IN THE SUPREME COURT OF THE STATE OF NEVADA

ISRAEL BAIGUEN, an individual, Appellant, vs. HARRAH'S LAS VEGAS, LLC, a Nevada Domestic Limited-Liability Company, dba HARRAH'S CASINO HOTEL, LAS VEGAS; HARRAH'S LAS VEGAS, INC. dba HARRAH'S CASINO HOTEL, LAS VEGAS; CAESARS ENTERTAINMENT CORPORATION, a Nevada Foreign Corporation, dba HARRAH'S CASINO HOTEL, LAS VEGAS; DOES I through X, inclusive; and, ROE CORPORATIONS I though X, inclusive, Respondents.	Supreme Court No. 70204 Appeal from Clark County District Court Case No. A708544

PETITION FOR REVIEW

Respondent, Harrah's Las Vegas, LLC, pursuant to NRAP 40B(a), hereby petitions the Nevada Supreme Court for the review of the attached Order of Reversal and Remand (the "Order") filed by the Court of Appeals of Nevada on February 28, 2017.

QUESTION PRESENTED FOR REVIEW

Whether Nevada's worker's compensation statutes preempt a negligence claim asserting that an employer is liable to an employee for an alleged failure to timely summon medical assistance.

REASONS REVIEW IS WARRANTED

The Supreme Court is urged to review this matter because it is believed it is "one of first impression of general statewide significance" or "statewide public importance." *See,* NRAP 40B(a)(1) and (3). Also, NRAP 40(B)(a)(2) is applicable because the Court of Appeals' decision conflicts with prior holdings that worker's compensation applies when, as here, there is a nexus between workplace conditions and an injury. *See, e.g., Rio Suite Hotel & Casino v. Gorsky,* 113 Nev. 600, 939 P.2d 1043, 1046 (1997).

ARGUMENT

Introduction

A detailed rendition of the facts is set forth in Respondent's Answering Brief. Appellant, Israel Baiguen, was an employee of Respondent, Harrah's. On October 19, 2012, while in employee parking garage and then in the Housekeeping Department of Harrah's as he was beginning to start his work duties, Baiguen exhibited physical symptoms

that were potentially consistent with the beginning of a stroke. (App. Vol. 1 00066:5-25; 00069:2 – 00070:20; 00071:16 – 00073:14).[1] Baiguen's co-workers, not recognizing the severity of what was occurring, arranged to take him home instead of seeking medical assistance. (App. Vol. 1 00096:1-17). Two days later, he was seen by his significant other, taken to the hospital and diagnosed as having suffered a stroke. (App. Vol. 1 0004 ¶ V; 00054:13-17; 00055:21 – 00056:7).

It is not alleged that Harrah's negligence caused the stroke. Baiguen seeks to recover for various alleged negligent acts or omissions of Harrah's employees, as itemized in Paragraph VIII of the Complaint, such as alleged inadequate training, a lack of effective procedures and a failure to call for medical assistance. (App. Vol. 1 0005 ¶ VIII).[2]

The Legal Standard and the Court of Appeals' Decision

Nevada's worker's compensation statutes provide "the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries arising out of and in the course of the

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[1] "App. Vol. 1" refers to Appellant's Appendix, Vol. 1.

[2] See, also, Appellant's Opening Brief, pp. 8-9 ("[t]he injury for which Mr. Baiguen seeks compensation in this case is the loss of chance from recovery of the underlying stroke resulting from the Defendants' negligence in *responding* to the obvious signs of stroke exhibited by Israel Baiguen on the afternoon of October 19, 2012") (emphasis added).

employment." *Wood v. Safeway, Inc.,* 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (citation and internal quotation marks omitted). The Court of Appeals found that the "in the course of the employment" prong was met.

As for the second prong, "determining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of her employment," with risks being categorized as "those that are solely employment related, those that are purely personal, and those that are neutral." *Rio All Suite Hotel & Casino v. Phillips,* 126 Nev. 346, 350-51, 240 P.3d 2, 5. Employment-related risks arise out of one's employment, while personal ones generally do not. *Phillips,* 240 P.3d at 5 (citations and internal quotation marks omitted).

In *Phillips,* this Court "adopt[ed] the increased-risk test to determine whether an injury resulting from a *neutral risk* is compensable." *Id.,* at 6 (emphasis added). "[N]eutral risks are those that are 'of neither distinctly employment nor distinctly personal character.'" *Id.,* at 6 (citations omitted). Under the test, worker's compensation applies if the employee "is subjected 'to a risk greater than that to which the general public [is] exposed.'" *Id.,* at 7 (citation omitted).

With these principles in mind, the Court of Appeals held:

> The unique facts of this case raise a valid question regarding whether the risk of Baiguen's injuries should properly have been classified as "personal" or "neutral." However, under either categorization of risk, we conclude that Baiguen's injuries (whether characterized as the stroke itself of the lack of immediate care in the aftermath) did not "arise" from employment – if the risk was "personal" (meaning that he would have suffered the stroke with 100% certainty regardless of his employment) then no causal link exists; if the risk was "neutral," the existing record does not demonstrate that either Baiguen's duties as a houseperson or the particular working conditions at Harrah's "increased the risk" of Baiguen's stroke. (See, Order, p. 4).

Respectfully, there is no contention in this case that the injury allegedly caused by Harrah's negligence was the stroke itself. Further, the Court of Appeals erred in concluding that Baiguen's injuries did not arise from employment – they did, making the increased risk test irrelevant. Even if, *hypothetically*, the risk involved in this case was "neutral" such that the increased risk test applied, Baiguen faced a greater risk than members of the general public in the "back of the house" areas such as the employee parking garage and the Housekeeping Office where Baiguen

supposedly exhibited his stroke symptoms, preempting the negligence claim.[3]

Baiguen's Injuries Are Employment-Related

For an injury to "arise out of employment," there must be a "link between the workplace conditions and how those conditions caused the injury;" the injury must be "fairly traceable to the nature of employment or the workplace environment." *Gorsky,* 939 P.2d at 1046.

Baiguen does not contend that Harrah's negligence or something inherent to the workplace *caused* him to suffer his stroke. Rather, the alleged negligence arose *after* the stroke supposedly started from the claimed failure of Harrah's employees to properly respond to Baiguen's stroke symptoms by calling 911 or otherwise getting him to the hospital in time for treatment. This alleged negligence is clearly linked or traceable to the Harrah's workplace. It is tied to Harrah's alleged failure to properly train its employees on how to respond to stroke symptoms and/or the employees' alleged failure to execute on any training by calling 911 or

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[3] Regarding the risk possibly being personal, this would be true if the stroke itself were the alleged injury, in which case, worker's compensation preemption would not apply. However, if this were the contention, then Baiguen has made no showing that something in the Harrah's workplace caused him to have the stroke, and his negligence claim would fail for lack of causation.

otherwise obtaining medical assistance for Baiguen. Taking Baiguen's allegations on their face, if he had suffered the same stroke while working for a different employer, with different employees in a different work environment, the outcome might have been different. Under Baiguen's own theory of the case, his alleged injuries are inextricably connected with the Harrah's workplace.

That the alleged negligence for which Baiguen seeks to recover is linked to the Harrah's workplace is demonstrated by *Dugan v. American Express Travel Related Services Company, Inc.,* 912 P.2d 1322 (Ariz. App. 1995). Dugan had a "heart event" at work. Her co-workers tried to call 911, but could not do so because the company "had blocked that number in favor of an in-house emergency number." *Id.,* 912 P.2d at 1325. "Due to the inability to reach [911] . . ., emergency medical assistance was delayed, and Mrs. Dugan suffered prolonged oxygen deprivation . . . resulting in severe, irreversible brain damage." *Id.,* at 1325. Dugan filed a negligence lawsuit.

Similarly, here, Baiguen perhaps exhibited stroke symptoms while in the workplace, he claims there was a delay in receiving medical treatment due to decisions made by Harrah's employees, resulting in severe, irreversible injuries, and he has brought a negligence action.

In *Dugan*, the lower court granted summary judgment to the employer, regarding "Mrs. Dugan's brain injury as an aggravation of a pre-existing physical condition, the damages from which are covered by worker's compensation." *Id.,* at 1326. The appellate court affirmed, holding:

> [T]he parties agree that Mrs. Dugan's heart event is non-compensable because there was no employment-related injury, stress or exertion which substantially contributed to this episode. Nonetheless, even under the plaintiffs' theory, Mrs. Dugan's brain injury was not an uninterrupted consequence of her heart event, [but] . . . caused in whole or in part by an intervening incident – the delay in emergency medical attention caused by [the employer's] action in blocking [911] access . . .
>
> [T]he delay in emergency medical attention caused by [the employer's] bar to [911] telephone access combined with Mrs. Dugan's non-compensable, pre-existing heart condition to cause, at least in part, her severe brain injury. This inability to reach emergency assistance through [911] constitutes an 'accident' for purposes of [Arizona's worker's compensation statute]." *Id.,* at 1328-29.

Here, similarly, the parties agree that Baiguen's stroke itself is not covered by the NIIA. However, Baiguen's theory of the case is that the long-term effects of the stroke were exacerbated by a delay in receiving medical treatment (or at least the delay denied him the opportunity to

receive t-PA, which might have allowed him to avoid or mitigate the long-term consequences of the stroke). Thus, as in *Dugan*, his claim is exclusively covered by NIIA because Baiguen's present condition (according to him) resulted from a combination of his non-compensable, pre-existing condition and the alleged negligent acts or omissions of Harrah's employees.[4]

Even If Baiguen's Injury Resulted From A "Neutral Risk," Baiguen Was Subjected To A Risk Greater Than That Faced By Members Of The General Public

Even if, *hypothetically*, the Court of Appeals was correct that the risk faced by Baiguen in the workplace was "neutral," its conclusion that "the existing record does not demonstrate that either Baiguen's duties as a houseperson or the particular working conditions at Harrah's 'increased the risk' of [his] stroke" is erroneous. While Baiguen's houseperson duties are not germane to anything, where he supposedly suffered the stroke is relevant. The record established that when Harrah's employees observed

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[4] *Dugan* was recently followed in *Martinez v. Scottsdale Healthcare Corporation,* 2017 WL 344260 (Ariz. App.), in which summary judgment for the employer on an employee's negligence claim was affirmed based on worker's compensation exclusivity. In *Martinez,* the alleged negligence was that the employer's failure to "notify [the employee] of the results of [his] chest x-ray . . . deprive[d] him of the opportunity to discover and treat his cancer earlier." *Id.* at *3. Similarly, Baiguen contends Harrah's failure to get him treatment deprived him of the opportunity to have his stroke treated in a timely manner.

Baiguen's alleged symptoms and behavior, he was first in the employee parking portion of the parking garage, and then in the area of the Housekeeping Department where employees clocked-in and received their radios and keys. (App. Vol. 1 00066:5-25; 00069:2 – 00070:20; 00071:16 – 00073:14). To the extent there was a risk that his co-workers would not recognize the symptoms of a stroke and/or not know to promptly summon medical attention in response thereto, Baiguen faced a greater risk in these "back of the house" areas than members of the general public.

Based on the foregoing, Harrah's respectfully requests that this Court reverse the Order of the Court of Appeals and affirm the granting of summary judgment by the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Review complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

2. I further certify that this Petition for Review complies with the page or type volume limitations of NRAP 40B(d) because it does not exceed 10 pages.

Finally, I hereby certify that I have read this Petition for Review, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition for Review complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Petition for Review is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of March 2017.

FISHER & PHILLIPS LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Petition for Review was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada and by mailing a true and correct copy, addressed as follows:

Jeff Galliher, Esq.
Law Offices of Steven M. Burris
2810 W. Charleston Blvd., Suite F-58
Las Vegas, NV 89102

Dated: March 16, 2017

By: /s/ Lorraine James-Newman
An employee of Fisher & Phillips LLP

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ISRAEL BAIGUEN, AN INDIVIDUAL,
Appellant,
vs.
HARRAH'S LAS VEGAS, LLC, A NEVADA DOMESTIC LIMITED-LIABILITY CORPORATION, D/B/A HARRAH'S CASINO HOTEL, LAS VEGAS; AND CAESARS ENTERTAINMENT CORPORATION, A NEVADA FOREIGN CORPORATION, D/B/A HARRAH'S CASINO HOTEL, LAS VEGAS,
Respondents.

No. 70204

ORDER OF REVERSAL AND REMAND

This is an appeal from a grant of summary judgment to a defendant in a negligence claim. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Israel Baiguen, appellant, was an employee of Harrah's, respondent. Baiguen suffered a stroke sometime between driving to work and prior to the start of his shift. Baiguen's co-workers saw him exhibiting signs of distress in the parking lot and the clocking-in area before work, but nobody seemed to realize that Baiguen's condition was as serious as a stroke. A co-worker volunteered to drive Baiguen home, and Baiguen's supervisor agreed. A group of co-workers dropped Baiguen off at home, where he remained unattended for two days and eventually suffered various permanent injuries.

Baiguen sued Harrah's for negligence, claiming that its failure to render him timely medical aid reduced his chances of avoiding permanent harm from the stroke. Baiguen offered expert deposition

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testimony to the effect that, had he been treated at a hospital within three hours of first exhibiting symptoms, his chance of being permanently disabled may have been lessened by as much as 30%. Harrah's moved for summary judgment, arguing that Baiguen's sole remedy was workers compensation, not a negligence suit, and furthermore that Baiguen failed to establish the elements of duty and causation as a matter of law. The district court declined to reach the merits of Baiguen's negligence claim, instead holding that Baiguen's tort claim was precluded by the workers compensation statute, which provided his only remedy.[1] This appeal followed.

This court reviews grants of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

For an injury to be compensable under Nevada's workers compensation laws, the injury must have occurred "in the course" of employment and it must have "arisen out of" the employment. NRS 616C.150. If the injury is compensable under workers compensation, then the workers compensation statute provides the sole remedy for that injury. NRS 616A.020(1). Whether an injury is solely compensable via workers compensation is a question of law. *See D&D Tire v. Ouelette*, 131 Nev. ___, ___, 352 P.3d 32, 34 (2015).

Whether an injury is deemed to occur during the course of employment "refers merely to the time and place of employment, *i.e.*,

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[1]We do not recount the facts except as necessary to our disposition.

whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood,* 121 Nev. at 733, 121 P.3d at 1032. Because Baiguen was on the premises of his place of employment and was proceeding to work when he experienced the stroke, the injury occurred in the course of employment. *See MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) ("An injury sustained on an employer's premises while an employee is proceeding to or from work is considered to have occurred 'in the course of employment.'") (adopting the so-called "parking lot rule"). Accordingly, the district court did not err by holding that Baiguen's injury occurred during the course of employment.

Whether Baiguen's injury "arose" from his employment presents a more nuanced question. "An injury is said to arise out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace." *Wood*, 121 Nev. at 733, 121 P.3d at 1032.

When deciding if that causal link exists, "determining the type of risk faced by the employee is an important first step in analyzing whether the employee's injury arose out of her employment." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d 2, 5 (2010). Nevada divides such risks into three categories: personal, neutral, and employment-related. *Id.* Generally speaking, an "employment-related risk" represents a risk created entirely by the workplace and that the worker would not have faced had he not been employed at the particular job where the injury occurred. A "personal risk" is one that the worker would inevitably have faced regardless of whether he had been employed at the particular workplace or not. A "neutral risk" falls between the two

and courts employ an "increased risk" test to determine causation: if the court finds that the risk was neutral but that the workplace or its conditions "increased the risk" of an injury that might have happened anyway had the worker not been employed but whose danger or severity was elevated by workplace conditions, then a causal link is established and the injury is deemed to have "arisen" from the workplace. *Id.* at 353, 240 P.3d 2, 7.

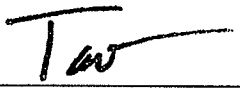
The unique facts of this case raise a valid question regarding whether the risk of Baiguen's injuries should properly have been classified as "personal" or "neutral." However, under either categorization of risk, we conclude that Baiguen's injuries (whether characterized as the stroke itself or the lack of immediate care in its aftermath) did not "arise" from employment—if the risk was "personal" (meaning that he would have suffered the stroke with 100% certainty regardless of his employment), then no causal link exists; if the risk was "neutral," the existing record does not demonstrate that either Baiguen's duties as a houseperson or the particular working conditions at Harrah's "increased the risk" of Baiguen's stroke. *See Rio*, 126 Nev. at 354, 240 P.3d at 7 (explaining that neutral risks are those that are "'of neither distinctly employment nor distinctly personal character,'" and that a causal link exists only if the employee faces an "increased risk" of injury by the employment) (quoting 1 Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* § 4.03, at 4–2). Thus, Harrah's failed to establish it was entitled to summary

judgment as a matter of law on this issue and the district court erred by holding that Baiguen's injuries "arose" from employment.[2]

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

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[2]Before the district court, Harrah's also moved for summary judgment on the ground that, even if Baiguen could pursue a negligence claim, Baiguen failed to establish the causation element of his negligence claim. Baiguen established that he was owed a duty as a matter of law, because as both an employer and a landowner, Harrah's possesses an affirmative duty to aid those on its premises who are "in peril." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). Further, based on our review of the record, there exist genuine issues of material fact regarding breach and causation, such that summary judgment was improper. *Id.* ("'[c]ourts are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness usually are questions of fact for the jury") (*quoting Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970)).

cc: Hon. Douglas W. Herndon, District Judge
Janet Trost, Settlement Judge
Law Offices of Steven M. Burris, LLC
Fisher & Phillips LLP
Eighth District Court Clerk