IN THE SUPREME COURT

OF THE STATE OF NEVADA

ISRAEL BAIGUEN, an individual, Appellant, v. 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, and ROE CORPORATIONS I through X, inclusive, Respondents.	Supreme Court Case No. 70204 Appeal from Clark County District Court Case No. A-14-708544 -C

APPELLANT'S SUPPLEMENTAL BRIEF

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evidence that the alleged injuries arose out of one's employment. *113 Nev.* at 605.

As noted by the Court of Appeals, it is undisputed that "as both an employer and a landowner, Harrah's possesses an affirmative duty to aid those on its premises who are in peril." *See, Order of Reversal and Remand*, page 5, footnote 2, citing *Lee v. GNLV Corp.* 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). This is the very duty which Mr. Baiguen alleges was breached in this case. It is axiomatic that, because Harrah's owes the same duties to its customers and guests that it owes to its employees, then the risk of that duty being breached - as it was in this case - is a risk which is NOT unique to employees. Simply put, any person on the premises of Harrah's – whether employee or otherwise – bears the same risk that Harrah's will violate its duty to aid those in peril. Therefore, there is no "increase" in the risk which may be reasonably attributed to Mr. Baiguen's status as an employee compared to that which is borne by hotel guests or other customers.

HARRAH'S CONDUCT IS NOT CONSISTENT WITH A FINDING OF A WORKPLACE RELATED INJURY

Further, the conduct of Harrah's itself at the time of Mr. Baiguen's injury further indicates that even Harrah's did not consider Mr. Baiguen's condition to constitute a workplace injury. Specifically, upon Harrah's supervising employee becoming aware of Mr. Baiguen's plight, she elected to merely send him home. That supervising employee, Housekeeping Manager Karla Young, testified that she considered the situation one where Mr. Baiguen essentially called in sick. (Vol. 2,

QUESTION PRESENTED FOR SUPPLEMENTAL BRIEFING

Whether, when an employee suffers a medical emergency during work, an employer's failure to timely seek medical assistance for the employee is an act arising out of employment, such that the Nevada Industrial Insurance Act's exclusive remedy provision will preclude finding the employer liable for negligence?

SUMMARY OF ARGUMENT

Before statutory immunity pursuant to the NIIA may apply, an injury compensable under the NIIA must occur. The defense of exclusive remedy is a statutory construct born of the NIIA. If an injury is not one which is compensable under the NIIA, there can be no defense of statutory immunity.

When an injury does not arise out of the plaintiff's employment, even if the injury occurs at the workplace while plaintiff is at work, such injury is not compensable under the NIIA.

Such is the case here. Israel Baiguen was never provided with the remedy, exclusive or otherwise, of workers compensation because the injury which befell Mr. Baiguen did not arise out of his employment and therefor is one which is not compensable under workers compensation. The injury complained of in this case, the unnecessary exacerbation of the effects of an ongoing stroke caused by the failure to provide medical assistance to an obviously distressed individual, is one

which could have been inflicted upon anyone person present on the property at any given time, whether that person was an employee or a guest or other visitor. There is no unique correlation between Mr. Baiguen's employment as a houseperson at Harrah's and the failure of Harrah's and its employees to render assistance. Therefore, the order of the Court of Appeals must be upheld.

ARGUMENT

THE RISK TO ISRAEL BAIGUEN WAS NOT INCREASED DUE TO HIS EMPLOYMENT

The seminal case in Nevada with respect to a determination of whether an injury suffered by an individual while present in the workplace may be compensable as a work-related injury is *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 939 P.2d. 1043 (1997).

In *Gorsky*, this court confirmed that worker's compensation is not a "'no-fault' remedy for workers injured at work." *113 Nev.* at 605. Rather, in order to establish that an injury arose out of and in the course of employment something more than "merely being at work and suffering an injury" must be demonstrated. *Id.* There must be a link between the workplace conditions and how those conditions caused the injury, and that the origin of the injury is related to some risk involved within the scope of employment. *NRS 616.5015* and *113 Nev.* at 604. Here, there has been no such demonstration. To establish a compensable injury Nevada law requires a finding, supported by a preponderance of the evidence, of substantial

evidence that the alleged injuries arose out of one's employment. *113 Nev.* at 605.

As noted by the Court of Appeals, it is undisputed that "as both an employer and a landowner, Harrah's possesses an affirmative duty to aid those on its premises who are in peril." *See, Order of Reversal and Remand*, page 5, footnote 2, citing *Lee v. GNLV Corp.* 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). This is the very duty which Mr. Baiguen alleges was breached in this case. It is axiomatic that, because Harrah's owes the same duties to its customers and guests that it owes to its employees, then the risk of that duty being breached - as it was in this case - is a risk which is NOT unique to employees. Simply put, any person on the premises of Harrah's – whether employee or otherwise – bears the same risk that Harrah's will violate its duty to aid those in peril. Therefore, there is no "increase" in the risk which may be reasonably attributed to Mr. Baiguen's status as an employee compared to that which is borne by hotel guests or other customers.

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Further, the conduct of Harrah's itself at the time of Mr. Baiguen's injury further indicates that even Harrah's did not consider Mr. Baiguen's condition to constitute a workplace injury. Specifically, upon Harrah's supervising employee becoming aware of Mr. Baiguen's plight, she elected to merely send him home. That supervising employee, Housekeeping Manager Karla Young, testified that she considered the situation one where Mr. Baiguen essentially called in sick. (Vol. 2,

APP 151, Page 29, line21 – APP 152 Page 30, line 4). However, we know from Ms. Young's own experience how Harrah's responds to a perceived workplace injury. Ms. Young testified that after she suffered a workplace injury herself, Harrah's reaction was much different: security was summoned and Ms. Young was escorted to a medical facility where she was examined, treated and released for her injury and then returned to Harrah's. (Vol. 2, APP 156 page 47, line 15 – page 49, line 23). In contrast, Harrah's handling of the incident involving Israel Baiguen clearly indicates that Harrah's did not consider Mr. Baiguen's affliction to constitute a workplace injury.

Harrah's conflates the *Gorsky* requirement that an injury must be "fairly traceable to the nature of the employment or workplace environment" with merely occurring in the workplace. Surely it is not Harrah's position that any injury occurring at the workplace, especially one resulting from a non-work related personal illness, is compensable under the NIIA. That point is made clear from Harrah's own conduct in this case. Harrah's never treated this as a compensable injury until such time as Harrah's sought to avoid responsibility through summary judgment in the negligence lawsuit. In fact, it was Harrah's total failure to reasonably react in this situation which is the basis for the suit. Had Harrah's treated this as a compensable injury – by reporting Mr. Baiguen's illness to security and providing him with the requisite medical care like Harrah's did in Ms.

Young's case discussed *infra* - there would be no lawsuit. But Harrah's seeks to deny Mr. Baiguen ANY remedy, either in workers compensation or in tort.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT NO COMPENSABLE INJURY OCCURRED

In considering the question of whether a compensable injury occurred in the case at bar the Court of Appeals correctly concluded 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 Baiguen's stroke. *See, Order of Reversal and Remand*, page 4. Harrah's argues that "Baiguen's injury is unquestionably traceable and linked to Harrah's workplace because it is claimed to arise out of the alleged acts or omissions of Harrah's employees." However, there is no authority in Nevada workers compensation jurisprudence which suggests that it is the actions of the employer which render an injury compensable or not compensable.

Harrah's analysis of the Court of Appeals finding that Harrah's duties to Mr. Baiguen were rooted both in its status as an employer and as the landowner fails to acknowledge that the very fact that Harrah's owed a duty to Mr. Baiguen irrespective of his employment status renders such argument invalid. This situation embodies the very definition of an "increased risk." The Court of Appeals acknowledged that the duty owed by Harrah's was the same duty Harrah's owes to every person on its property under Nevada law. *Lee v. GNLV*, 117 Nev.

291 (2001).

The type of risk which should be ascribed to Mr. Baiguen's injury is a "neutral risk" – one which is "of neither distinctly employment nor distinctly personal character.' *Rio All Suite Hotel and Casino v. Phillips*, 126 Nev. 346, 351, 240 P.3d 2, 5 (2010). In order to determine whether an injury caused by a neutral risk arose out of the employment the Nevada Supreme Court has adopted the "increased risk test." *Id.* at 353. As fully argued in Appellant's Opening Brief, a proper application of the *Phillips* analysis to the facts of this case must conclude that the risk confronted by Israel Baiguen was the same risk that each and every visitor to Harrah's is potentially subjected to on any given day and at any given time.

THIS CASE IS DISTINGUISHABLE FROM THE AUTHORITY CITED IN HARRAH'S SUPPLEMENTAL BRIEF

This case is easily distinguishable from the *King*[1] case cited in Harrah's supplemental brief because the *King* court's ruling was predicated on the fact – undisputed in that case- that Mr. King had suffered a compensable injury. *652 F. Supp.* 1331, 1333. The underlying injury in that case – where the claimant slipped while egressing a piece of equipment - was indisputably a compensable workplace injury. In this case there has been no such determination. In fact, as discussed *infra* Mr. Baiguen's stroke is most definitely not a compensable injury under

[1] King v. Penrod Drilling Company, 652 F. Supp. 1331 (1987)

Gorsky. Accordingly, Mr. King was provided with workers compensation benefits for his injury, a benefit not afforded to Mr. Baiguen. The *King* decision merely affirms the presumption that the degree of negligence of an employer will not expose the employer to tort liability for an injury otherwise compensable under the NIIA.

In deciding *King*, Judge Reed also noted that the NIIA only applies to "accidents." "Accidents" are defined under Nevada law as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of injury" *Id.* citing *NRS 616.020.* The conduct by Harrah's complained of in this case does not meet that definition. The failure to recognize and properly respond to Mr. Baiguen's condition did not occur "suddenly and violently" but instead unfolded over a period of 30-45 minutes.

Harrah's rather cheekily quotes the holding in *Poremba*[2] that "[i]t is unquestionably the purpose of worker's compensation laws to provide economic assistance to persons who suffer disability or death as a result of their employment."[3] to bolster its position in this case. But no support for Harrah's can reasonably be found in *Poremba.* That case involved the reopening of a worker's compensation case by a claimant who had also recovered damages in tort from a

[2] Poremba v. S. Nev. Paving, 132 Nev. Adv. Op. 24, 369 P.3d 357 (2016)
[3] Supplemental brief

third party. The issue in that case was whether the claimant must spend all of the proceeds of the third-party settlement on medical bills before the workers compensation claim may be reopened (they need not). Once again, *Poremba* is a case where the claimant actually received benefits. Mr. Baiguen received no worker's compensation benefits. The reason why is because his injury was not a compensable one.

CONCLUSION

Harrah's conduct in this case has been beyond hypocritical: First, its response to an obviously unwell employee was to simply send him home. That is not the response that a reasonable employer would have if that employer believed the employee's illness or injury to be related to his employment. Rather, we know from its handling of Ms. Young's workplace injury that the worker should be referred for medical care by Harrah's contracted provider. Next, despite the involvement of Harrah's supervising employee in the events of October 19, 2012 Harrah's never followed up on Mr. Baiguen's condition. Again, if Harrah's considered Mr. Baiguen's injury to be "work related" logically it would have sought additional information about its injured employee. In fact, it was only after being sued in negligence – and even then only after 15 months of litigation – that Harrah's for the first time suggested that Mr. Baiguen's injury was compensable.

It would be an enormous miscarriage of justice if Harrah's is allowed to

escape ALL liability in this case. Harrah's conduct during the events at issue was never consistent with its current position that Mr. Baiguen was suffering a compensable injury on October 19, 2012. The duty breached by Harrah's on that day was one which it owed to any and all persons on its property and not just to its employees. Accordingly, Mr. Baiguen's injury is not one which is compensable under the Nevada Industrial Insurance Act. Because the injury is not compensable, the exclusive remedy provision does not preclude Mr. Baiguen's suit for negligence.

Dated this ___ day of August, 2017.

Ganz & Hauf

By:_____

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 in Times New Roman, font size 14.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. Finally, I hereby certify that I have read this opening brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the records to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relief on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24 day of August, 2017.

Ganz & Hauf

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Ganz & Hauf and that on the 24th day of August 2017, pursuant to N.E.F.C.R 8, I electronically filed and served a true and correct copy of the above and foregoing APPELLANT'S SUPPLEMENTAL BRIEF as follows:

[X] by the Court's CM/ECF system which will send notification to the following; and

[X] by US mail at Las Vegas, Nevada, postage prepaid thereon, addressed to the following:

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