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

RESPONDENT'S SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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INTRODUCTION

This Supplemental Reply Brief is a reply to Appellant's Supplemental Brief, filed on August 25, 2017 ("ASB"). Baiguen makes some new arguments in the ASB, which should not be considered, and repeats some prior ones. None of them change the fact that this Court should reverse the decision of the Court of Appeals and affirm the District Court's granting of summary judgment.

That A Duty May Exist To Aid Both Patrons And Employees Who Are In Peril Does Not Mean Their Remedies Are Identical

Baiguen seems to suggest that "because Harrah's owes the same duties to its customers and guests that it owes to its employees," they all should have the same ability to bring a negligence suit. *See* ASB at 3.

This Court has stated that "where a special relationship exists between the parties, such as with an innkeeper-guest . . . or employer-employee, an affirmative duty to aid others in peril is imposed by law." *Lee v. GNLV Corp.,* 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). However, this Court has never held that employees and guests have the same remedy if this duty is allegedly breached. A key distinction is that a guest of Harrah's, who is not an "employee" (as defined in NRS 616A.105 *et. seq.*), does not have the ability to file a worker's compensation claim.

Employees have a worker's compensation remedy for injuries arising out of and in the scope of their employment. This is their exclusive remedy,[1] and the Nevada Legislature has not exempted instances of an employer negligently failing to come to the aid of an employee in peril from the exclusivity provisions of the NIIA. *See also Conway v. Circus Circus Casinos, Inc.,* 116 Nev. 870, 875, 8 P.3d 837, 840 (2000) (citations omitted) ("[e]mployees may avoid the exclusive remedy provision of the NIIA in regard to their injuries only if [the employer] deliberately and specifically intended to injury them").

Any Employee Who Experiences A Situation Requiring Medical Assistance In The "Back Of The House" Faces A Different Risk Than Members Of The General Public

Baiguen argues 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 an employee or otherwise – bears the same risk that Harrah's will violate its duty to aid those in peril." *See* ASB at 3 (emphasis in original).

[1] *Wood v. Safeway, Inc.,* 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (citation omitted).

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Baiguen's argument lacks merit. If Baiguen was a customer playing blackjack when he began to exhibit symptoms of a stroke, even if the dealer, the Pit Boss, and other employees in the area were oblivious to these symptoms, or were aware of the symptoms and for some reason refused to seek medical help, other customers (including anyone patronizing the casino with Baiguen) would be there to notice the problem and summon medical assistance. Likewise, the same logic applies if the symptoms started to occur as Baiguen was dining in the buffet.

In contrast, the Housekeeping Department is in the "back of the house," where the general public is not allowed. In this area, Baiguen was completely dependent on his co-workers knowing that he was experiencing the symptoms of a stroke and that more needed to be done than simply driving him home. If Harrrah's, *hypothetically*, had a duty to train its employees to know the symptoms of a stroke and to summon medical assistance if these symptoms were observed, if there was any failure by the employees in this regard, non-employees were not in the vicinity to potentially overcome this failure. Baiguen's risk in "back of the house" areas differed from the risk faced by hotel and casino customers in public areas, and for the reasons set forth in prior briefing, the risk is employment-related. *See e.g.,* Respondent's Opening Supplemental Brief at 4-7.

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Harrah's Conduct Does Not Preclude It From Asserting A Worker's Compensation Exclusivity Defense

Baiguen claims that "the conduct of Harrah's itself at the time of Mr. Baiguen's injury . . . indicates that even Harrah's did not consider Mr. Baiguen's condition to constitute a workplace injury . . . 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." *See* ASB at 3-4. Without actually using the word "waiver," Baiguen seems to argue that by its conduct, Harrah's has waived the right to claim that worker's compensation is Baiguen's exclusive remedy.

First, this was not an issue previously raised by Baiguen, and he should not be permitted to raise it for the first time in the ASB. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that a point not urged in the district court, unless it pertains to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal).

In any event, Baiguen is erroneous. As far as timing, Harrah's did not wait until the summary judgment stage to assert that Baiguen's

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negligence claim was preempted by worker's compensation. This was the Second Defense in the Answer. (App. Vol. 1 00020).[2]

Substantively, Baiguen cites no case holding that a Nevada employer is precluded from asserting a worker's compensation exclusivity defense if the employer fails to take steps to treat a workplace event as a compensable injury as it is occurring or in its immediate aftermath. Baiguen's argument ignores that it is not the employer's responsibility to initiate a worker's compensation claim – that is the responsibility of the employee or someone on his or her behalf. *See e.g.,* NRS 616C.020(1).

Finally, Baiguen claims that "Harrah's seeks to deny [him] ANY remedy, either in worker[']s compensation or in tort." *See* ASB at 5 (emphasis in original). Harrah's has never denied Baiguen a worker's compensation remedy; in fact, Baiguen never filed for worker's compensation. This is not a situation where Baiguen filed a worker's compensation claim, Harrah's took the position that the injury was not compensable, and then later inconsistently claimed a worker's compensation exclusivity defense in a negligence suit.

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

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Baiguen's Injury Was An "Accident" Under The NIIA

Baiguen claims his negligence claim is not preempted because what occurred to him does not constitute an "accident." *See* ASB at 5. Again, this is an issue that was not previously raised by Baiguen, and it should not be considered now. *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

Once again, Baiguen is mistaken. NRS 616A.020(1) refers to an injury "by accident." "Accident" is defined by NRS 616A.030 as "an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury." The fact that Baiguen would experience a stroke on October 19, 2012 was unforeseen, sudden, and produced objective symptoms, such as the inability to speak.

Baiguen claims that "[t]he 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." *See* ASB at 7. The requirement of occurring "violently" is satisfied when there is "any cause efficient in producing a harmful result." *Conway,* 116 Nev. at 876, 8 P.3d at 841 (exposure to noxious fumes over a period of time satisfied the requirement). Baiguen alleges that the failure of Harrah's employees to

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properly respond to his medical situation produced a harmful result. Thus, all elements of the definition of "accident" are satisfied in this case.

CONCLUSION

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, based on its holding that the NIIA provides the exclusive remedy for Baiguen in this case because his injuries arose out of and in the course of his employment.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that Respondent's Supplemental Reply 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 2013 in 14-point Times New Roman font.

2. I further certify that Respondent's Supplemental Reply 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.

Finally, I hereby certify that I have read Respondent's Supplemental Reply 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 Respondent's Supplemental Reply Brief 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 brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21 day of September 2017.

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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Respondent's Supplemental Reply Brief 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:

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Dated: September 21, 2017

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