IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.: 81034

United States District Court Case No.: 2:19-CV-01189-APG-EJY

JAMES PARSONS, Individually and as Special Administrator of the Estate of CAROLYN LEE PARSON; ANN-MARIE PARSONS,

Appellants,

v.

COLT'S MANUFACTURING COMPANY LLC, COLT'S DEFENSE LLC; DANIEL DEFENSE, INC.; PATRIOT ORDNANCE FACTORY, INC.; FN AMERICA, LLC; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE, INC.; GUNS AND GUITARS, INC.

Respondents.

Certified Questions from the United States District Court for the District of Nevada

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APPELLANTS' OPENING BRIEF

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Jurisdictional Statement

The Court has jurisdiction pursuant to Nevada Rule of Appellate Procedure 5, as the Court accepted certified questions from the United States District Court for the District of Nevada. The federal court certified its questions by Orders dated April 10 and May 8, 2020, APP206-212, APP241-247, and this Court accepted them by Order dated May 22.

Routing Statement

This matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(6), "Questions of law certified by a federal court."

Statement of the Issues Presented for Review

The federal court certified the following three questions[1] to this Court:

- Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have "a cause of action against the manufacturer or distributor of any firearm . . . merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]" under Nevada Revised Statutes § 41.131?
- Does Nevada Revised Statutes § 41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law"?
- Under Nevada law, can a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?

[1] The federal court listed the questions in a different order. Appellants have re-ordered them to match the presentation of their arguments in this brief.

STATEMENT OF THE CASE

This case arises from the tragic events of October 1, 2017, when an individual opened fire from a hotel window in Las Vegas into a crowd gathered for a musical festival. He fired over 1,000 rounds in less than ten minutes. Carrie Parsons was shot and died that evening. She was one of 58 fatalities. Hundreds more were injured.

Appellants James Parsons and Anne-Marie Parsons are Carrie Parsons's parents.[2] They filed their complaint in the Eighth Judicial District on July 2, 2019 against gun manufacturers Colt's Manufacturing Co., LLC, Colt Defense, LLC, Daniel Defense, Inc., Patriot Ordnance Factory, FN America, FN Herstal, Herstal Group, Noveske Rifleworks, LLC, Christensen Arms, Lewis Machine & Tool Co., and LWRC International LLC, and gun sellers Discount Firearms and Ammo LLC, DF&A Holdings LLC, Maverick Investments LP, Sportsman Warehouse, and Guns & Guitars Inc.[3] APP1-27. The named defendants, respondents here, are the manufacturers and sellers of the AR-15s used by the Las Vegas shooter. APP4-5, APP14-17.[4]

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[2] Carrie's parents and her estate are all plaintiffs in this case, collectively referred to as "Parsons" in this brief.

[3] Parsons subsequently voluntarily dismissed FN Herstal, S.A. (identified as "FN Herstal" in the Complaint) and, Herstal, S.A. (identified as "Herstal Group" in the Complaint). ECF No. 51.

[4] Due to the number of respondents, they will collectively be referred to as "Gun Companies" in this brief.

Parsons alleged the Route 91 shooting could not have occurred but for the Gun Companies' decision to knowingly violate federal and Nevada Statutes that make it illegal to manufacture and sell machine guns. Had the Gun Companies followed federal and Nevada Statutes, the shooter would not have obtained 12 machine guns and the Route 91 shooting would not have occurred.

Respondent FN America removed the case to federal court. ECF No. 1. The Gun Companies then moved to dismiss Parsons's claims. APP65-92. Rejecting the Gun Companies' motion to dismiss in part, the federal court held that: 1) Parsons stated a wrongful death claim under Nevada law; 2) that claim is premised on sufficient allegations that the Gun Companies knowingly violated the National Firearms Act, 18 U.S.C. § 922(b)(4) and Nevada Revised Statutes § 202.350(1)(b), which prohibit gun manufacturers and distributors from manufacturing, selling or delivering machine guns; 3) Parsons sufficiently alleged that those statutory violations proximately caused Carrie Parsons's death; and 4) the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03 ("the PLCAA"), does not bar this claim. APP191-205. These issues are not before this Court.

In their motion to dismiss, the Gun Companies argued that NRS 41.131 prohibits Parsons's claims. In its initial decision, the federal court noted that the Nevada courts have not yet construed NRS 41.131, and certified two questions concerning the construction of NRS 41.131 to this Court. APP203-APP204; APP206-APP208.

The Gun Companies also argued in their motion to dismiss that violation of 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) did not support a negligence per se charge under Nevada law. APP74-75. The federal court initially held that under Nevada law, a negligence per se claim could not be based on violation of a penal statute absent evidence of legislative intent to allow such claims. APP197; APP242. Finding no express evidence of intent, the court dismissed this theory of liability. APP197-198. On Parsons's motion for reconsideration, however, the court determined that this Court's cases concerning negligence per se and express intent "do not address the issue outside the context of alcohol laws," APP243, and amended its certification order to add a question regarding the application of negligence per se. APP241.

This Court accepted the certified questions and set a briefing schedule on May 22, 2020.

STATEMENT OF FACTS

This matter comes before the Court on certified questions from the United States District Court. As such, "this court is bound by the facts as stated in the certification order and its attachment." *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011).

The Court requires no significant factual record in order to answer the certified questions because the federal court has already addressed the relevant factual issues. Specifically, the district court has already resolved that Parsons

sufficiently alleged that the Gun Companies knowingly violated federal and state machine gun statutes. Thus, the certified questions regarding NRS 41.131 reflect the federal court's determination that Parsons "assert[s] a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions." APP241. The third certified question again recognizes that Parsons's claims are "predicated on violations of criminal federal and state machine gun prohibitions." *Id.*

In arriving at its holdings, the federal court laid out the following summary of the facts: Congress enacted the National Firearms Act in 1934 to combat an important national problem: the use of machine guns, like the so-called Tommy Gun, in gang shootings. APP192. The Act imposed a 100% tax on machine guns, which were defined as firearms with the ability to fire "more than one shot, without manual reloading, by a single function of the trigger." *Id.* Congress later banned machine guns outright and expanded their definition to include, among other things, conversion kits enabling semi-automatic rifles to fire automatically. *Id.*

The AR-15 rifle was designed as a military weapon called the M-16 and first saw use in the Vietnam War. APP192. The M-16's "selective fire" feature enabled soldiers to choose between fully automatic, semi-automatic, and three-round burst firing. *Id*. As the Vietnam War wound down, AR-15 manufacturers turned to the civilian market. *Id*. Rather than design a new weapon, the

manufacturers removed the selector switch from the AR-15. *Id.* Redesign was cost-prohibitive, while removal of the selector switch was cost-effective and allowed marketing of the weapon's military bona fides. *Id.* AR-15 exterior components like the stock, barrel, and rail system were preserved as removeable and interchangeable with M-16 parts (a feature the firearm industry calls "modularity"). *Id*. The manufacturers named in this case emphasized the AR-15's military bona fides or modularity in their marketing. *Id.*

Over the past decade, new devices called bump stocks have been developed to enable reliable and continuous automatic fire by capitalizing on the AR-15's recoil and removable stock. APP193. An AR-15 equipped with a bump stock will continually fire rounds with a single trigger pull, replicating automatic fire. *Id.* Videos available on the internet show the ease of installing a bump stock, and the Slide Fire bump stock can be installed with "nothing more than a screwdriver." *Id*. Despite their knowledge of the availability of bump stocks, the manufacturer Gun Companies continued to manufacture AR-15s with a stock that can be easily removed and replaced. *Id.* Using the Colt trademark, Slide Fire advertised its bump stock's compatibility with Colt's AR-15. *Id.* As the result of an agreement between Colt and Slide Fire, a Colt Competition AR-15 was sold with a Slide Fire bump stock already "integrated." *Id*. Christensen Arms' AR-15 manual warned users that "any damage or malfunction due to fully automatic operation and any other modification to this

firearm" voids its warranties. *Id.*

Between November 23, 2016 and July 5, 2017, the October 1 shooter purchased from the dealer Gun Companies twelve AR-15 rifles made by the manufacturer Gun Companies. APP193. The shooter removed the stocks from the weapons and replaced them with bump stocks. *Id*. On October 1, the shooter used the AR-15s equipped with bump stocks to fire 1,049 rounds in less than ten minutes, killing 58 people and injuring hundreds. *Id*. One of the rounds hit Carrie Parsons in the shoulder. *Id.* Carrie was transported to the hospital before succumbing to her wound. *Id.*

SUMMARY OF ARGUMENT

Federal law has sought to prevent the sale of machine guns since 1934, casting them in the same category as "bombs, grenades, mines, rockets, and large caliber weapons including mortars, anti-tank guns, and bazookas." *United States v. Freed*, 401 U.S. 601, 616, 91 S. Ct. 1112, 1121 (1971) (Brennan, J., concurring). 18 U.S.C. § 922(b)(4) prohibits the sale or delivery of machine guns. NRS 202.350(1)(b) adopts parallel prohibitions. The memory of the Tommy Gun and the havoc it wreaked is embodied in these statutes; they exist to protect the public and law enforcement from what the United States Supreme Court has called "[t]he immense danger posed by machineguns." *United States v. O'Brien*, 560 U.S. 218, 230, 130 S. Ct. 2169, 2178 (2010).

The first two certified questions concern whether NRS 41.131 immunizes manufacturers and sellers of illegal machine guns from civil liability when their illegal actions lead to a fatal shooting. The statute provides no such exculpation. NRS 41.131 applies when a claim pleads "merely" or solely that the firearm was capable of being discharged and proximately caused death or harm. It does not shield wrongful conduct, and it certainly does not shield knowing, illegal conduct.

That NRS 41.131 "is declaratory and not in derogation of the common law" confirms this point. This wording means that the statute declares the law, rather than changes it. NRS 41.131 simply declares the principle that civil liability does not arise merely because a firearm works as a firearm.

As a matter of statutory interpretation, NRS 41.131 must be read consistent with other Nevada statutes regulating the conduct of manufacturers and distributors of firearms. The most relevant statute in this regard is NRS 202.350(1)(b), which prohibits the manufacture, sale, and distribution of machine guns. The purpose of this statute is to protect Nevadans from the very wanton destruction the Las Vegas shooter achieved. Given this clearly expressed protective intent – an intent which parallels Congress' intent in enacting 18 U.S.C. § 922 – it is inconceivable that the Nevada legislature intended NRS 41.131 to shield from civil liability actors who illegally sell machine guns.

The third certified question concerns when violations of the state and federal machine gun prohibitions will establish a negligence per se claim. When a firearms

maker or distributor violates 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b), they violate a standard laid down for the firearms industry by both Congress and the Nevada legislature to protect the public and law enforcement from death and serious injury caused by automatic fire. It is hard to imagine statutory violations more suited to negligence per se. To foreclose the application of negligence per se would frustrate these statutes' protective purpose.

Moreover, longstanding Nevada law provides that violation of a penal statute intended to protect the public from harm is negligence per se. See, e.*g.*, *Ryan v. Manhattan Big Four Mining Co.*, 38 Nev. 92, 145 P. 907, 910 (1914). The line of cases from this Court rejecting negligence per se when it is based on the violation of a statute regulating the sale of alcohol – *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969), *Bell v. Alpha Tau Omega Fraternity*, 98 Nev. 109, 642 P.2d 161 (1982), and *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 844 P.2d 800 (1992) – does not even disagree with, let alone overrule this authority. Their rule is limited to negligence per se claims based on violation of statutes regulating the sale of alcohol and has no application to this case.

ARGUMENT

I. NRS 41.131 Does Not Prohibit A Wrongful Death Claim Premised on Allegations that Firearms Manufacturers and Dealers Knowingly Violated Federal and State Laws against Machine Gun Sales

A. Standard of Review and Statutory Construction

Two of the questions certified by the federal court concern the meaning of NRS 41.131. This Court addresses questions of statutory interpretation de novo. *See, e.g.*, *A.J. v. Eighth Jud. Dist. Ct.*, 133 Nev. 202, 206, 394 P.3d 1209, 1213 (2017); *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008).

The plain meaning rule is the first rule of construction. "Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction." *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019) (citing *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010)). As set forth below, application of the plain meaning rule resolves both of the federal court's interpretive questions in favor of Parsons.

B. The Statute

NRS 41.131, titled "Limitation on basis of liability of manufacturers and distributors of firearms and ammunition," provides:

> 1. No person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage

or death. This subsection is declaratory and not in derogation of the common law.

2. This section does not affect a cause of action based upon a defect in design or production. The capability of a firearm or ammunition to cause serious injury, damage or death when discharged does not make the product defective in design.

NRS 41.131.

C. On Its Face, NRS 41.131 Does Not Apply to This Action

The federal court first asks,

> Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have 'a cause of action against the manufacturer or distributor of any firearm… merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]' under Nevada Revised Statutes § 41.131?

APP241. The answer is "no."

Parsons does not claim the Gun Companies are liable merely because their weapons could and did cause harm. He alleges that the Gun Companies knowingly manufactured and sold illegal machine guns. If NRS 41.131 immunizes the Gun Companies from the claims made in this case, then it immunizes firearms companies that decide to sell any illegal firearm. As the district court stated in its order certifying these questions, "I am particularly concerned by the defendants' concession in oral argument that under their interpretation 41.131 would immunize even a defendant that manufactured and sold Tommy guns or M-16 rifles to

civilians."[5] APP244. If Parsons fail to prove the alleged statutory violations, their claim will fail. In short, the claim does not arise "merely because" the firearms used by the Las Vegas shooter were capable of causing serious injury and were discharged; it arises from the Gun Companies' violation of anti-machine gun laws designed to protect the public from exactly the kind of harm that occurred on October 1, 2017.

The statutory language is clear. NRS 41.131 is also in a section of Chapter 41 titled "Actions for Personal Injuries by Wrongful Act, Neglect or Default." The first and most elementary provision of this section, NRS 41.130, *predicates liability on the commission of wrongful conduct*: "whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury is liable to the person injured for damages…." NRS 41.130; *see also* NRS 41.085 (liability for wrongful death also predicated on a "wrongful act or neglect of another").

In NRS 41.131, the prohibited claim is *not* a claim premised on the "wrongful act, neglect or default of another" – that key language is nowhere in the statute. Rather, the statute describes the prohibited claim as one that alleges no fault, i.e. one that asserts that a firearm "is capable of causing serious injury,

[5] It would also immunize the illegal manufacture and sale of bazookas, grenade launchers. See, e.g. NRS 202.253.

damage or death, was discharged and proximately caused serious injury, damage or death." *Id.*

The legislature's intent is already plain from this language. Underscoring that intent, the legislature added the word "merely," so that it is crystal clear that the prohibited claim is a no-fault claim. "Merely" is a synonym of the words "alone," "simply," and "solely." *Peardon v. Peardon*, 65 Nev. 717, 756, 201 P.2d 309, 328 (1948). NRS 41.131 does not bar actions that allege more than the fact that the firearm could cause serious harm, let alone claims that assert wrongful and illegal conduct.[6]

If the legislature had wanted to enact a more expansive immunity, it knew how to do so. The Nevada statutes are replete with examples of more expansive immunities, for example, applying to injury or illness from consumption of donated food, NRS 41.491(1) (no liability "unless the injury or illness directly resulted from the gross negligence or willful misconduct of the donor, donee, organization or employee"); transmission of infectious disease due to blood transfusions and organ transplants, NRS 460.010 ("[n]o implied warranty of merchantability or fitness, nor any doctrine of liability other than negligence or

[6] Indeed, immunity from liability for harm proximately caused by violating a firearms statute would be greater than the federal immunity conferred by the PLCAA. The PLCAA expressly preserves both claims for knowing violation of a federal or state statute applicable to the sale or marketing of firearms and claims for negligence per se. 15 U.S.C. § 7903(5)(A)(ii)-(iii).

willful misconduct, applies to the service"); injury resulting from the use of a sidewalk in a public right-of-way, NRS 41.1315 (no property owner is liable unless such owner failed to comply with certain ordinances or created a dangerous condition); and injuries caused by the adult purchaser of alcohol, NRS 41.1305 (a person who sells an alcoholic beverage to another person who is 21 years of age or older "is not liable in a civil action for any damages caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage").

There is no conceivable policy or rationale that would support ignoring NRS 41.131's plain meaning, let alone construing it to shield gun manufacturers and distributors who violate federal and state firearms statutes. It would be inconsistent to impose criminal liability on manufacturers and distributors for firearms violations but immunize them from civil liability for the injuries and deaths proximately caused by such violations. To do so would undermine the safety of law enforcement officers and the public. Doing so would also be inconsistent with the legislative policy expressed in NRS 41.130 that all actors are responsible for harms caused by their own wrongful acts. Neither the plain meaning of the statute, nor the legislative history set forth below support such a construction.

D. NRS 41.131 Does Not Alter Nevada Law

The federal court asks a follow up question:

> Does Nevada Revised Statutes § 41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law"?

APP241.

Declaratory statutes declare the law to be what it already is. Norman J. Singer & J.D. Shambie Singer, 1A Sutherland Statutes & Statutory Construction § 26:1 (7th ed. Supp. 2019)); *see also In re Taylor's Estate*, 61 Nev. 68, 114 P.2d 1086, 1089 (1941) (recognizing a statute may be declaratory of the common law); *Cassinelli v. Humphrey Supply Co.*, 43 Nev. 208, 183 P. 523, 525-26 (1919) (same).[7] "A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute and declares what it is and ever has been." *Pers. Fin. Co. of Braddock v. United States*, 86 F. Supp. 779, 784 (D. Del. 1949). Declaratory statutes are sometimes called "tautologies" – they declare to be so what we already knew was so. *See, e.g.*, *Conservatorship of Bones*, 234 Cal. Rptr. 724, 727, 189 Cal. App. 3d 1010, 1017 (1987).

Not only did the legislature state that NRS 41.131(1) is declaratory, it also stated that this provision is "not in derogation of the common law." *Id.* In other

[7] Such statutes come in two kinds: (1) statutes declaratory of the common law; and (2) statutes declaratory of prior statutes and prior legislative intent. 1A Sutherland Statutory Construction § 26:1.

words, the provision declares the law *and* it does not alter the common law. And again, NRS 41.131(1) does precisely that. Nevada's common law concerning liability for wrongful acts, codified in NRS 41.130—a bare two provisions before NRS 41.131—states that those who commit wrongful acts are responsible for the harms caused. The plain language of NRS 41.131 then provides that if a claim against a manufacturer or distributor does not include an allegation of wrongful or neglectful conduct, the claim must fail.

E. The Legislative History Confirms NRS 41.131 Was Intended to Immunize Firearms Manufacturers and Distributors Only from Suits Alleging No Fault

Because NRS 41.131 is plain on its face, the Court need not consult its legislative history. If consulted, however, the legislative history confirms that the statute does not immunize firearms makers and sellers from claims that allege wrongful or neglectful conduct.[8] Statements by legislators indicate that the statute was passed in response to a concern that someone might harass gun dealers and gun manufacturers by bringing a frivolous suit against them for selling a gun,

[8] NRS 41.131 was adopted in 1985, introduced as Senate Bill 211. Its legislative history can be found at: https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1985/SB211,1985.pdf (last accessed July 19, 2020). All references to specific hearings on S.B. 211 are to records available at this website. For the Court's convenience, Parsons includes a parenthetical identifying the specific page number in the collected legislative history in subsequent citations to portions of this record.

based solely on the fact that the weapon caused harm.[9] Although the bill was amended several times after it was introduced, it never lost this focus: clarifying that the ability of a firearm to cause harm solely by functioning as intended should not be considered a defect. Nothing in the legislative history indicates an intent to provide broad immunity from other types of actions, let alone to protect manufacturers and sellers of illegal weapons.

As originally introduced, the bill explicitly applied only "[i]n an action for liability based on a defective product."[10] It provided that "a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its capability to cause serious injury, damage or death when discharged."[11] The legislative counsel copied the language from a California statute, but, at the first hearing, he and the bill's sponsor agreed that it should be rewritten to clarify its intent.[12] The bill was then substantially rewritten using language similar to what is now NRS 41.131(1).[13]

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[9] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. March 13, 1985) (p. 4).

[10] Senate Bill No. 211, as introduced 1985 Leg., 63rd Leg. Sess. (Nev. March 4, 1985) (p. 3).

[11] *Id.*

[12] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. March 13, 1985) (pp. 4-6).

[13] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. March 139, 1985) (pp. 8-9); Senate Bill No. 211, Second Reading and

The revised bill was passed to the Assembly. The prime sponsor explained to the Assembly Judiciary Committee that the bill:

> came about because of frivolous lawsuits being filed in different states. It says that you cannot bring action against a person for damages in the use of a firearm just because it is a firearm.… *The bill wouldn't relieve the seller or the manufacturer of the gun from liability* if the gun is defective or *causes injury due to some fault of the manufacturer or the seller*.[14]

The committee members then discussed the "declaratory and not in derogation of the common law" language. The chair explained, "The bill doesn't preempt common law."[15] Another member noted, "Normally when you say something is declaratory it means it has no legal effect."[16] A member suggested, "What the Committee wants to convey is that if someone shoots a firearm and hurts somebody, you can't sue the firearms manufacturer because it shoots."[17] The committee eventually voted to amend the bill by rewriting the first sentence somewhat and adding a second section.[18] The "declaratory and not in derogation of

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Amendment before Senate, 1985 Leg., 63rd Leg. Sess. (Nev. March 20, 1985) (pp. 10-11).

[14] Hearing on S.B. 211 Before the A. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. April 17, 1985) (p. 15) (emphasis added).

[15] *Id.*

[16] *Id.*

[17] *Id.* at p. 18.

[18] Senate Bill No. 211, Second Reading and Amendment before Assembly, 1985 Leg., 63rd Leg. Sess. (Nev. May 7, 1985) (pp. 19-20).

the common law" language was not changed.[19] The conference committee made only one small additional change before the bill was enacted as NRS 41.131.[20]

It may be helpful in parsing this legislative history to recall that NRS 41.131 was enacted at a time when some firearms product liability claims were being brought on the theory that the firearm was defective solely because of its inherent dangerousness. Subsection 2 of the statute, which distinguishes between inherent dangerousness claims on the one hand, and design or production defects on the other, supports the understanding that the statute intends to foreclose such inherent dangerousness firearms claims. The Restatement (Third) of Torts: Product Liability also supports this understanding, categorizing NRS 41.131 as "legislation that prohibits actions against firearm manufacturers for injuries resulting from the weapon's inherent danger." Restatement (Third) of Torts: Prod. Liab. § 2 (1998).[21]

In sum, there is no discussion anywhere in the legislative history of any intent to provide broad immunity to firearm manufacturers or sellers for illegal

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[19] *Id.*

[20] Senate Bill No. 211, Reports of Conference Committees,1985 Leg., 63rd Leg. Sess. (Nev. May 23, 1985) (pp. 29-30).

[21] It appears that legislators believed that such inherent dangerousness product defects theories were already foreclosed by existing law. *See* Hearing on S.B. 211 Before the A. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. April 17, 1985) (pp. 15-16). This explains why legislators, who understood that "when you say something is declaratory it means it has no legal effect," *id.* at 15, nonetheless chose to use that wording. It also explains why wording that the statute is not in derogation of the common law was viewed as "strengthen[ing]" the bill, *see id.* at 15-16.

conduct. In fact, the legislative history supports the opposite conclusion. Like the statute's plain language, the legislative history confirms the statute is intended to bar a narrow class of claims that the legislators suspected would already fail under existing legal standards.

F. NRS 41.131 Cannot Be Construed to Undercut Nevada Criminal Statutes that Regulate the Conduct of Firearms Manufacturers and Sellers in Order to Protect Public Health and Safety

The plain meaning of NRS 41.131 is determined not only from its wording, but from its relationship to other Nevada statutes concerning the manufacture and sale of firearms. "The meaning of a statute may be determined by referring to laws which are "in pari materia." *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 541, 958 P.2d 733, 737 (1998) (citation omitted). "Statutes may be said to be in pari materia when they relate to the same person or things, to the same class of persons or things…." *Id.* A related canon of construction provides that "statutes should be interpreted in a manner to avoid conflict with other related statutes." *Csomos v. Venetian Casino Resort, LLC*, 127 Nev. 1128, *2, 373 P.3d 907, *2 (2011) (citation omitted).

Nevada criminal law contains a number of provisions that set standards for the conduct of anyone who manufactures or sells weapons. NRS 202.273 prohibits the "manufacture or sale" of certain metal-penetrating bullets. NRS 202.274, passed in response to the Harvest festival shooting, prohibits the manufacture and sale of bump stocks. NRS 202.275 prohibits manufacture and disposition of short-

barreled rifles or shotguns. And NRS 202.350(1)(b) prohibits the manufacture and sale of machine guns.

The legislative purpose in enacting these statutes is plain: they protect the public from exactly the kind of ultra-powerful attack that occurred in Las Vegas. Construing NRS 41.131 to provide civil immunity to manufacturers and distributors who violate these statutes would undercut the public health and safety purposes of these statutes.

II. Violation of Federal and State Machine Gun Prohibitions Is Negligence Per Se under Nevada Law

A. Standard of Review

Whether violation of a statute provides a basis for negligence per se is a question of law. *See Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983).

B. The Federal Court Is Concerned that This Court Has Different Rules for Applying Negligence Per Se for Civil vs. Penal Statutes

The federal court asks, "[u]nder Nevada law, can a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?" APP241. The answer is "yes."

This question derives from the federal court's concern that this Court requires a specific showing of legislative intent before negligence per se could be applied based on a penal statute. In its initial decision granting in part the Gun

Companies' motion to dismiss, the court recognized that in rejecting negligence per se premised on violations of alcohol laws, this Court reasoned that "[i]n the absence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se." APP197, citing *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 802 (Nev. 1992), and *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162 (Nev. 1982).

> Given these cases, one could argue either way: that there is a presumption that a violation of a penal statute is not negligent per se absent legislative intent, or that there is a presumption that a violation of a penal statute is negligent per se absent legislative intent to the contrary.

APP197.

Because other federal courts applying Nevada law had adopted the former interpretation, the district court initially did the same. *Id.* On Parsons's motion for reconsideration, the federal district court recognized that this Court had applied negligence per se to penal statutes in the absence of any expression of legislative intent, and that the leading case regarding alcohol statutes, *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969), supports that approach. APP238. The court determined that the use of penal statutes as the basis for negligence per se should be answered by this Court. APP238-239, APP241-247.

Nevada has always looked to a statute's provisions and its fit with the facts of the case to determine if a negligence per se charge is appropriate. Statutes that protect people from physical injury are particularly apt predicates for negligence

per se, whether or not they are "penal." Thus, violation of a statute regulating safety requirements in mines, violation of traffic statutes regulating the conduct of drivers on the roadways, and violation of a statute controlling the safe approach of a train to a road crossing all constitute negligence per se under Nevada law.[22] Federal and state statutes prohibiting the manufacture, distribution and sale of machine guns likewise protect law enforcement officers and the public from injury and death. Under Nevada law, violation of these statutes is negligence per se.

With the exception of statutes regulating the sale of alcohol, moreover, Nevada law has never required explicit evidence of legislative intent in the statutory language or legislative history before applying the negligence per se doctrine.

C. Nevada Law Recognizes that Penal Statutes Enacted to Protect People from Harm Are Particularly Appropriate Bases for Negligence Per Se

Negligence per se is a mechanism to "establish[] the duty and breach elements of a negligence claim." *Cervantes v. Health Plan of Nevada, Inc.*, 127 Nev. 789, 793, 263 P.3d 261, 264 (Nev. 2011). In other words, when negligence per se is applied, the court is, in essence, saying that as a matter of law, a

[22] *See Ryan v. Manhattan Big Four Mining Co*., 38 Nev. 92, 145 P. 907 (1914) (violation of mining statute); *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690, 669 P.2d 709, 710-11 (1983) (violation of traffic statutes); *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 491-93, 435 P.2d 498, 511-12 (1967) (violation of statute requiring sounding the whistle 1320 feet from train crossing).

reasonably careful person would not violate the statute at issue. One who violates that statute is negligent.[23]

This Court has stated the test for whether a statute can be the basis for a negligence per se instruction:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Sagebrush Ltd. v. Carson City, 99 Nev. 204, 207, 660 P.2d 1013, 1015 (1983) (quoting Restatement (Second) of Torts § 286). It is no coincidence that the test repeats the word "protect" four times. Statutes that protect people from harm set

[23] *See* NEV. J.I. 4.12 ("A violation of the law[s] just read to you constitutes negligence as a matter of law. If you find that a party violated a law just read to you, it is your duty to find such violation to be negligence; and you should then consider the issue of whether that negligence was a [proximate] [legal] cause of injury or damage to the plaintiff."); NEV. J.I. 4.13 ("An unexcused violation of the law[s] just read to you constitutes negligence as a matter of law. If you find that a party, without excuse or justification, violated a law just read to you, it is your duty to find such violation to be negligence; and you should then consider the issue of whether that negligence was a [proximate] [legal] cause of injury or damage to the plaintiff.…").

standards of conduct that must be followed. It would undermine their purpose if negligence per se did not apply. [24]

In accordance with these principles, this Court has repeatedly held that violations of statutes designed to protect public safety constitute negligence per se. *See, e.g. Vega v. E. Courtyard Assocs.*, 117 Nev. 436, 440-41, 24 P.3d 219, 221-22 (2001) (violation of building code); *Del Piero v. Phillips*, 105 Nev. 48, 49, 51-53 769 P.2d 53, 55-56 (1989) (violation of right of way ordinance); *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690, 669 P.2d 709, 710-11 (1983) (violation of traffic statutes); *Watkins*, 83 Nev. at 491-93, 435 P.2d at 511-12 (violation of statute requiring sounding the whistle 1320 feet from train crossing). If the Court were to adopt the rule argued by the Gun Companies, *none* of these statutes could serve as the basis for a negligence per se charge.

Nevada's recognition that penal statutes enacted to protect public safety are appropriate bases for negligence per se dates back to at least 1914. In *Ryan v. Manhattan Big Four Mining Co.*, 38 Nev. 92, 145 P. 907 (1914), the Court confronted a mining injury that occurred due to the absence of a statutorily required iron-bonneted safety cage. The *Ryan* court held that negligence per se was appropriate both because the statute was "penal … in its nature" and because the

[24] Restatement (Third) of Torts § 14 explains that when a statute is designed to protect public safety, imposing negligence per se generally supports the legislative purpose. Restatement (Third) of Torts: Phys. & Emot. Harm § 14 (2010).

statute was "intended not primarily to subject the violator to fine or imprisonment, but rather intended to safeguard life and limb…. for the purpose of minimizing casualties which entail suffering, privation, and death on those who may be the unfortunate victims." *Id*., 145 P. at 909.

Ryan recognized that violating a penal statute is generally negligence per se. *Id.* at 910 ("It has been held, as a general proposition, that whenever an act is … prohibited by law" and violation of that law causes injury to another, the violation of the law "constitutes negligence per se."). The Court reaffirmed this principle in *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 491-92, 435 P.2d 498, 511 (1967): "The use of a violation of a criminal statute as the basis for common-law negligence has been upheld in this state, as well as in many others." This is because criminal statutes set standards of conduct: "When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate…." 83 Nev. at 492, 435 P.2d at 511 (quoting Prosser on Torts, § 35 (3d Ed. 1964)). The exception is "the comparatively rare case where the penalty is made payable to the person injured, and clearly is intended to be in lieu of all other compensation," *id.* – that is, where the statutory language makes plain that negligence per se should *not* apply.

Again, if the Court were to adopt the rule urged by the Gun Companies, it would have to hold that *Ryan* and *Southern Pacific* were wrongly decided.

D. The Court's Holdings that Negligence Per Se Does Not Apply in Cases Involving the Sale of Alcohol Do Not Apply to this Case

In the proceedings before the federal court, the Gun Companies based their argument that penal statutes could not be the basis for negligence per se claims "absent evidence of legislative intent to impose civil liability" on a series of decisions from this Court regarding liability for damages caused by intoxication. The quoted language comes from *Bell v. Alpha Tau Omega Fraternity*, 98 Nev. 109, 111, 642 P.2d 161, 162 (1982), and was repeated in *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 1095, 844 P.2d 800, 803 (1992), cases rejecting negligence per se for violation of statutes regulating the sale of alcohol. The Court's reasoning in those cases, however, has no application here.

Nevada's leading case addressing whether violation of a statute regulating the sale of alcohol is negligence per se is *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 102, 450 P.2d 358, 360 (1969). At the time *Hamm* was decided, Nevada common law did not recognize a duty running from liquor vendors to third persons injured or killed due to an inebriated person's conduct. 85 Nev. at 100, 450 P.2d at 359. The Court determined that given this history, it should not alter the common law. Rather, imposition of negligence liability for alcohol sales "should be accomplished by legislative act after appropriate surveys, hearings, and investigations to ascertain the need for it and the expected consequences to follow." *Id.* Thus when *Hamm* reached the question of whether to impose

negligence per se, the unusual question before the Court was whether to impose negligence per se even though the common law *foreclosed* a negligence claim.

Hamm first acknowledged the general rule of negligence per se: "In other contexts we have recognized that a violation of a penal statute is negligence per se." *Id.* (citing *Watkins*, 83 Nev. 471, 435 P.2d 498, and *Ryan*, 38 Nev. 92, 145 P. 907). *Hamm* then announced that because the statutory scheme regulating alcohol sales explicitly addressed civil liability in one section, it must deviate from the usual negligence per se rule:

> We decline to so rule in this case since to do so would subvert the apparent legislative intention. The statute before us is but one of many in the statutory scheme regulating the sale of tobacco and intoxicating liquor to minors and drunkards. *The section immediately preceding NRS 202.100 (NRS 202.070) does impose a limited civil liability upon the proprietor of a saloon who sells liquor to a minor. By providing for civil liability in one section and failing to do so in the section immediately following, the legislature has made its intention clear.* Accordingly, we must conclude that a violation of NRS 202.100 does not impose civil liability upon one in charge of a saloon or bar, nor is such a violation negligence per se.

85 Nev. at 102, 450 P.2d at 360 (emphasis supplied).

In short, *Hamm* found express evidence that the legislature intended that negligence per se *not* apply to violations of alcohol sale statutes.

Bell and *Hinegardner* follow *Hamm* in holding that Nevada's legislature did not intend statutes regulating the sale of alcohol to be a basis for negligence per se. *Hamm* had explicitly stated that the imposition of negligence liability in this context was a legislative decision. The legislature, however, did not act; it did not

reverse the common law and enact negligence liability. Its silence spoke volumes. Refusing to impose negligence per se liability, the *Bell* court noted that the statute at issue before it was "part of the statutory scheme [considered in *Hamm*] regulating the sale of tobacco and intoxicating liquor to minors and drunkards." *Bell*, 98 Nev. at 111, 642 P.2d at 162. Given the Court's explicit referral of the negligence question to the legislature in *Hamm*, evidence of legislative intent to impose civil liability was necessary – and there was none. The *Bell* Court declined to impose negligence per se, stating: "We adhere to our view that absent evidence of legislative intent to impose civil liability we shall not conclude that a violation of a statute is negligence per se." *Id.*

Hinegardner, again considering whether violation of a statute regulating alcohol sales was a basis for negligence per se, makes it even clearer that the Court perceived the legislature's silence after *Hamm* as legislative acquiescence to *Hamm*'s holding of no negligence and no negligence per se for violations of statutes controlling sales of alcohol. Again refusing to impose negligence per se, *Hinegardner* states:

> [W]e note that in the absence of evidence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se. *Bell v. Alpha Tau Omega*, 98 Nev. 109, 642 P.2d 161 (1982). In 1987, the legislature amended the penal statute which Vendors allegedly violated, NRS 202.055. As Vendors properly assert, in 1987 the legislature could have added a civil liability component to NRS 202.055. We infer from the legislature's inaction that it did not intend to impose civil liability for violations of this penal statute.

108 Nev. at 1095-96, 844 P.2d at 803 (emphasis added).

Hamm, *Bell* and *Hinegardner* apply only to cases involving alcohol sales. This Court has never applied a rule requiring express legislative intent to impose negligence per se liability outside the area of alcohol regulation, nor has it criticized *Ryan*, let alone overruled it. Indeed, as already stated above, *Hamm* confirms that "[i]n other contexts … violation of a penal statute is negligence per se." 85 Nev. at 102, 450 P.2d at 360.

If there were any lingering question concerning what *Bell* and *Hinegarder* mean, and there should be none, this Court's subsequent negligence per se cases lay it completely to rest. The Gun Companies read *Bell* and *Hinegardner* to mean that negligence per se will *never* be appropriate unless a statute expressly authorizes it. If that were the law of Nevada, then this Court would not have approved negligence per se claims in post-*Hinegardner* cases such as *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 643-44, 98 P.3d 678, 680-81 (2004) and *Brannan v. Nevada Rock & Sand Co.*, 108 Nev. 23, 26-27, 823 P.2d 291, 293 (1991). Instead, *Atkinson* and *Brannan* approve negligence per se claims although the statutes violated contained no express authorization to do so.[25]

[25] *Atkinson* remanded for a new trial because the trial court failed to provide a requested jury instruction regarding negligence per se for a violation of NRS 455.010, which requires the erection of a fence or other safeguard around an excavation, hole or shaft. Nothing in the relevant statutory provisions specifically addressed civil liability. 120 Nev. at 644, 98 P.3d 681. Likewise, *Brannan* reversed

D. The Restatement and Other States Apply the General Rule that Violation of a Penal Statute is Negligence Per Se

Nevada law's existing rule that violation of a penal statute can constitute negligence per se is consistent with the Restatement (Second) of Torts and the view of other states.

As discussed above, in *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 207, 660 P.2d 1013, 1015 (1983), this Court followed Restatement (Second) of Torts § 286 in establishing the test for when a statute supported negligence per se. The next section, Restatement (Second) of Torts § 287, directly addresses the question of whether a penal statute can be the basis for negligence per se: "A provision for a penalty in a legislative enactment or an administrative regulation has no effect upon liability for negligence unless the penalty is found to be intended to exclude it." Comment a to § 287 further explains:

> The fact that a statute, ordinance, or administrative regulation provides for criminal punishment for its violation, or for the payment of a sum of money to the injured person as a penalty, does not in itself prevent the imposition of tort liability through the adoption by the court of the standard of conduct required by the legislation or regulation. It is only where the intent of the provision is construed to be that it shall be in lieu of all other remedies that the tort action is necessarily defeated.

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and remanded for failure to give a negligence per se instruction based on the violation of NRS 282.597, a statute requiring brakes to be maintained in good working order, which contains no provisions concerning civil liability. 108 Nev. at 26-27, 823 P.2d at 293.

In other words, penal statutes are generally an appropriate basis for the application of negligence per se.[26]

[26] *See also Steinberger v. McVey*, 234 Ariz. 125, 139-40, 318 P.3d 419, 433-34 (Ct. App. 2014) (penal statute enacted for protection of the public an appropriate basis for negligence per se); *McIntyre v. Balentine*, 833 S.W.2d 52, 59 (Tenn. 1992) ("violation of a penal statute is negligence per se"); *Sammons v. Ridgeway*, 293 A.2d 547, 550 (Del. 1972) ("all reported opinions of the courts of this State on the doctrine [of negligence per se] … involved criminal statutes or ordinances"); *Newsome v. Haffner*, 710 So. 2d 184, 186 (Fla. Dist. Ct. App. 1998) ("[A] cause of action in negligence per se is created when a penal statute is designed to protect a class of persons, of which the plaintiff is a member, against a particular type of harm."); *West v. Mache of Cochran, Inc.*, 187 Ga. App. 365, 367, 370 S.E.2d 169, 171 (Ct. App. 1988) ("[violation of a penal statute, resulting in injury, is negligence per se and authorizes a recovery by the party injured" (citation omitted)); *Roddel v. Town of Flora*, 580 N.E.2d 255, 259 (Ind. Ct. App. 1991) ("The violation of a penal statute constitutes negligence per se."); *Hickey v. Gen. Elec. Co.*, 539 S.W.3d 19, 23-24 (Ky. 2018) (a requirement for negligence per se is is that "the statute in question must be penal in nature or provide no inclusive civil remedy." (citation omitted)); *Moore v. K & J Enters.*, 856 So. 2d 621, 624 (Miss. Ct. App. 2003) ("Negligence per se is founded on the violation of a statutory standard, usually a penal one."); *King v. Morgan*, 873 S.W.2d 272, 275-78 (Mo. Ct. App. 1994) (trial court erred in not submitting negligence per se claim based on violation of penal statute to the jury); *Skinner v. Penn. R. Co.*, 127 Ohio St. 69, 71, 186 N.E. 722, 723 (1933) ("In a majority of jurisdictions it is stated as a general rule of law that the violation of a penal or criminal statute is actionable negligence, or as frequently stated is 'negligence per se' or 'negligence as a matter of law.'" (citation omitted)); *Congini v. Portersville Valve Co.*, 470 A.2d 515, 518 (1983) (finding negligence per se based on violation of a criminal statute); *Smith v. Merritt*, 940 S.W.2d 602, 607 (Tex. 1997) ("Negligence per se is a common-law doctrine in which a duty is imposed based on a standard of conduct created by a penal statute rather than on the reasonably prudent person test used in pure negligence claims."); *Paskiet v. Quality State Oil Co., Inc.*, 164 Wis. 2d 800, 809, 476 N.W.2d 871, 874-75 (1991) (violation of criminal statute constituted negligence per se).

Conclusion

The Court should answer "no" to the District Court's first question regarding NRS 41.131, and "yes" to its second question. The statute does not immunize the Gun Companies from liability for knowingly violating federal and state machine gun prohibitions.

The Court should answer "yes" to the District Court's question regarding negligence per se. Violation of criminal federal and state machine gun prohibitions is absolutely negligence per se in Nevada.

Dated this 21st day of July, 2020.

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3. Finally, I hereby certify that I have read this appellate 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 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 conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of July, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of Friedman | Rubin PLLP, and that on this date, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to:

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