IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

COLT'S MANUFACTURING COMPANY, LLC; COLD DEFENSE LLC; DANIEL DEFENSE, INC.; PATRIOR ORDINANCE FACTORY; FN AMERICA; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL, LLC; DISCOUNT FIREARMS & AMMO, LLC; DF&A HOLDINGS, LLC; MAVERICK INVESTMENTS, LP; SPORTSMAN'S WAREHOUSE; GUNS & GUITARS, INC.,

Respondents.

Supreme Court No.: 81034

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

(In Support of Appellants)

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association ("NJA"), an *amicus curiae,* is a non-profit organization of independent lawyers in the State of Nevada. The *amicus curiae* is represented by Therese M. Shanks, Esq., of Robison, Sharp, Sullivan & Brust, and Sean Claggett and Micah Echols of the Claggett & Sykes Law Firm in this matter.

NJA, and its counsel, did not appear in the district court in this matter. NJA submits this brief upon request by the Court of Appeals.

Dated this 29th day of July, 2020.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASE LAW

STATUTE

NEVADA RULE

SECONDARY SOURCES

AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and share the common goal of improving the civil justice system. NJA seeks to ensure that access to the courts by Nevadans is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NJA files this brief with an accompanying motion pursuant to NRAP 29(c). Through its brief, NJA seeks to provide this Court with the historical contexts behind the particular claims and statutes at issue in these certified questions. Amicus intervention is appropriate where "the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor & Indus.,* 694 F.2d 203, 204 (9th Cir. 1982) (indicating that the classic role of an amicus curiae is to assist in cases of general public interest and to supplement the efforts of counsel by drawing the court's attention to law that may have escaped consideration). Thus, amicus curiae are regularly allowed to appear when they seek to inform the deciding court on matters of historical contexts and legislative history. *See, e.g., Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.,* 547 U.S.

651, 661 (2006) (considering amicus curiae arguments regarding the legislative history of a federal statute); *see also Contreras Aybar v. Sec'y U.S. Dep't of Homeland Sec.,* 916 F.3d 270, 274 n.1 (3d Cir. 2019) ("Although we do not rest our interpretation of the statute on legislative history, we thank the *amicus curiae* . . . for its thorough and valuable submission on that subject."). Accordingly, NJA has respectfully requested leave to appear as amicus curiae in this matter.

ARGUMENT

The answer to the three certified questions pending before this Court is yes. First, since its evolution into Nevada common law, Nevada has recognized that negligence per se claims may be predicated on criminal statutes. Second, the legislative history of NRS 41.131 clearly demonstrates that it was never intended to create a blanket tort immunity for firearm manufacturers and distributors, but was instead intended to prevent product liability lawsuits premised on the theory that a firearm manufacturer is liable merely because a firearm is an unreasonably dangerous product. Finally, because NRS 41.131 is not in derogation of the common law, it should not be interpreted to preclude a claim to which the Legislature never intended that it apply.

I. NEGLIGENCE PER SE THEORIES MAY BE BASED ON CRIMINAL STATUTES.

A. NEGLIGENCE PER SE IN GENERAL.

This Court reviews *de novo* the question of whether a violation of a statute constitutes a breach of duty in a negligence action. *Sagebrush Ltd. v. Carson City,* 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983). In Nevada, "[a] negligence per se claim arises when a duty is created by statute," and the defendant violates the statute in a manner which results in harm to the plaintiff. *Sanchez v. Wal-Mart Stores, Inc.,* 125 Nev. 818, 828, 221 P.3d 1276, 1284 (2009).

Negligence per se evolved into the American common-law during the muck raking era of American history. While state legislatures faced pressure from citizens to enact statutes protecting the public from safety hazards created by a rapidly growing industrial capitalist system, courts were faced with the question of how to balance common law negligence standards with statutory safety standards. As Justice Cardozo explained in the seminal case of *Martin v. Herzog,* 126 N.E. 814 (N.Y. 1920), a statutory violation "*is* negligence itself," because these statutes "are intended for the guidance and protection" of the public at large, and a disregard of a statutory duty "fall[s] short of the standard of diligence to which those who live in organized society are under a duty to conform." *Id.* at 815.

Today, modern negligence per se claims serve three basic purposes: First, negligence per se protects "institutional comity" by disallowing "a court in a tort case to commend as reasonable that behavior which the legislature has already condemned as unlawful." *Restatement (Third) of Torts: Phys. & Emot. Harm,* § 14, cmt. c (2010). Second, negligence per se claims erase the gray area that can be created by inconsistent legislative mandates and jury verdicts, by recognizing that "when the legislature has addressed the issue of what conduct is appropriate, the judgement of the legislature . . . takes precedence over the view of any one jury." *Id.* Finally, negligence per se addresses the problem of recurring conduct and inconsistent jury verdicts. *Id.* Statutes generally address conspicuous recurring

conduct; otherwise, the issue would not have been brought to the attention of the legislature. *Id.* When the legislature has spoken on a repeat, recurring issue, the legislature's mandate is favored, as opposed to potentially inconsistent jury verdicts. *Id.*

B. EARLY NEGLIGENCE PER SE IN NEVADA.

One of the first Nevada cases recognizing the modern concept of negligence per se arose from a violation of a criminal statute. In *Ryan v. Manhattan Big Four Mining Co.,* the 1914 Nevada Supreme Court held that an employer's non-compliance with a penal statute which made it a misdemeanor to violate certain safety statutes governing mining operations could be relied upon in a negligence action to establish breach of the employer's duty of care to its employee. 38 Nev. 92, 145 P. 907, 909 (1914). The 1914 Court reasoned that although the statute "was not enacted with its primal object" to punish a true crime, the legislature nevertheless imposed a criminal penalty "as a reminder that the law is a police regulation, enacted for the purpose of minimizing casualties which entail suffering, privation and death on those who may be unfortunate victims." *Id.* Thus, the 1914 Court held that "whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by the violation . . . constitutes negligence per se." *Id.* at 910.

The 1915 Court was not alone in recognizing negligence per se claims based upon violations of criminal statutes. As the drafters of the Restatement (Second) of Torts explained, the typical early cases seeking to hold a defendant negligent for the violation of a statute generally involved a "criminal statute that proscribes certain conduct and imposes a criminal penalty but says nothing about civil responsibility." *Restatement (Second) of Torts,* § 874A (1979). Thus, the Second Restatement recognized that "[t]he fact that a statute, ordinance or administrative regulation provides for criminal punishment for its violation . . . does not itself prevent the imposition of tort liability through the adoption by the court of the standard of conduct required by the legislation or regulation." *Id.* at § 287, cmt. a.

Since *Ryan,* this Court has continued to recognize negligence per se claims predicated on criminal statutes. *See S. Pac. 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."). As this Court explained, "[t]he fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability . . . ." *Id.* at 492, 435 P.2d at 511.[1]

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[1] Although the District Court did not certify the question of whether a federal, as opposed to a state, criminal statute may form the basis of a negligence per se theory, the analysis is the same. The United States Supreme Court has recognized that federal statutes can form the basis of state law claims predicated on negligence per se theories. *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.,* 545 U.S.

C. MODERN NEGLIGENCE PER SE IN NEVADA.

This Court has never overruled its prior cases that hold criminal statutes can form the basis of a negligence per se claim. In fact, in the line of authority analyzed by the federal district court in this case, this Court ***affirmed*** its prior holdings that "violation of a penal statute is negligence per se." *Hamm v. Carson City Nugget, Inc.,* 85 Nev. 99, 102, 450 P.2d 358, 360 (1969). However, in *Hamm,* this Court declined to find that a violation of criminal statute governing the provision of alcohol to minors could be relied upon in a negligence per se context, because the Nevada Legislature had enacted anti-dram shop liability laws and signaled a clear legislative intent to not hold providers of alcohol civilly liable to those who were injured by drunk patrons. *Id.*

Throughout the years, this Court has affirmed *Hamm* solely in the context of dram shop and tavern keeper liability. *See Hinegarder v. Marcor Resorts, L.P.V.,* 108 Nev. 1091, 844 P.2d 800 (1992); *Yoscovitch v. Wasson,* 98 Nev. 250, 645 P.2d 975 (1982); *Bell v. Alpha Tau Omega Fraternity,* 98 Nev. 109, 642 P.2d 161

308, 318-19 (2005); *see also Restatement (Third) of Torts: Phys. & Emot. Harm,* § 14, cmt. a (2010) (stating that negligence per se theories "equally appl[y] to . . . federal statutes"). Furthermore, because federal courts analyzing negligence per se claims generally apply state law, this Court's precedents apply. *See Boles v. U.S.,* 3 F. Supp. 3d 491, 509 (M.D.N.C. 2014) (holding that a claim for negligence per se for violation of section 922 must be analyzed by "whether the statute meets the criteria of application of the State's negligence per se doctrine" and not whether it contains a private federal right of action).

(1982); *Van Cleave v. Kietz-Mill Minit Mart,* 97 Nev. 414, 633 P.2d 1220 (1981); *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979); *Mills v. Cont'l Parking Corp.*, 86 Nev. 724, 475 P.2d 673 (1970). As this Court explained, the ultimate cornerstone of this line of authority is ***not*** that the statutes involved are generally penal, but that a negligence per se claim attempts to impose common-law liability on tavern keepers, something Nevada has historically refused to do. *See Snyder v. Viani,* 110 Nev. 1339, 1343, 885 P.2d 610, 613 (1994).

Nothing in the above line of authority precludes a finding that a criminal statute unrelated to dram-shop or tavern-keeper liability cannot be relied upon in a negligence per se claim. Thus, a criminal statute may form the basis of a negligence per se claim as long the statute at issue was intended to protect (1) the class of persons to which the plaintiff belongs, and (2) against the harm incurred. *Restatement (Second) of Torts,* § 286 (1979); *see also Sagebrush Ltd.,* 99 Nev. at 207-08, 660 P.2d at 1014-15 (listing the factors).[2]

D. THE CERTIFIED QUESTIONS.

Unlike the issues in the *Hamm* line of authority, this Court has previously recognized that a plaintiff may assert a negligence claim premised upon the

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[2] The *Restatement (Third) of Torts: Phys. & Emot. Harm,* § 14 (2010), which updates § 286, provides the same factors. *See id.* ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

negligent handling of a firearm. For example, in *Dakis for Dakis v. Scheffer,* this Court held that the foreseeability of the plaintiff's injury caused by an unattended flare gun was a genuine issue of material fact precluding summary judgment. 111 Nev. 817, 820-21, 898 P.2d 116, 118-19 (1995). There is no common law or statutory prohibition against civil liability on this basis.

NRS 202.350(1)(b), which prohibits a person from manufacturing or distributing automatic weapons, was enacted to mirror 18 U.S.C. § 922(b)(4), the federal law governing machine guns. *See Hearing on S.B. 199 before Sen. Comm. on Jud.,*72d Reg. Sess. (March 10, 2003). The drafters of 18 U.S.C. § 922(b)(4) explained that its intent was to:

> [B]an conversion parts for machine guns, conversion kits for silencers . . . The Volkmer bill creates loopholes for underworld gunsmiths converting semiautomatic weapons into machineguns . . . We need to close that loophole.

132 Cong. Rec. H1649-03, 1986 WL 780592; *see also* 131 Cong. Rec. E5314-01, 1985 WL 721530, 2 ("To assist our law enforcement agencies and insure the safety of our citizens, Congress must consider ways to make our present gun control laws more effective.").

Importantly, multiple courts have recognized that 18 U.S.C. § 922, through 15 U.S.C. § 7903(5)(A)(iii), may form the basis for a negligence per se theory under state law. *See Ramos v. Wal-Mart Stores, Inc.,* 202 F. Supp. 3d 457, 464-66 (E.D. Pa. 2016); *Boles v. U.S.,* 3 F. Supp. 3d 491, 509 (M.D.N.C. 2014); *King v.*

Story's, Inc., 54 F.3d 696, 697 (11th Cir. 1995). Accordingly, this Court should answer the first certified question in the affirmative.

II. NRS 41.131 DOES NOT PRECLUDE A WRONGFUL DEATH CLAIM.

The legislative history behind NRS 41.131, and the California statute from which it was adopted, clearly demonstrate that NRS 41.131 cannot be interpreted to preclude a claim for wrongful death. Statutory interpretation is a question of law that this Court reviews de novo. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013). NRS 41.131(1) states:

> 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.

A. FORMER CALIFORNIA CIVIL CODE § 1714.4.

In the 1980's, a string of lawsuits were filed across the country against firearm manufacturers, seeking to hold them strictly liable under theories of product liability for the manufacture and distribution of "Saturday Night Special" handguns. *See, e.g., Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Patterson v. Rohm Gesellschaft,* 608 F. Supp. 1206 (N.D. Tex. 1985). Called "Turley" lawsuits after the attorney who filed them (Windle Turley, Esq.), these lawsuits argued "an unconventional and expanded theory of products liability" that would allow recovery against "the manufacturer and the seller of [a]

nondefective revolver because the risks of injury and death that accompany handguns greatly outweigh any utility they may have" and are "unreasonably dangerous." *Patterson,* 608 F. Supp. at 1208.

In response to the Turley lawsuits, the California Legislature passed Assembly Bill 75 in 1983, which would become the predecessor to NRS 41.131. *See Hearing on S.B. 211 before Comm. on Judiciary*, 63d Sess. (March 13, 1985) (stating that the bill "is a copy of the California law"). Codified as Civil Code § 1714.4, it stated:

> (a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
>
> (b) For purposes of this section:
>
> (1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
>
> (2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.
>
> (c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.

Cal. Civ. Code §1714.4(a)-(c) (West 1998). The statute further stated that it was merely "declaratory of existing law." *Id.* at § 1714(d).

According to its drafters, Section 1714.4 was never intended to create blanket tort immunity for gun manufacturers and distributors, but was instead intended to prevent the Turley lawsuits from disrupting established principles of product liability law. John Fowler, *Will A Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?*, 34 McGeorge L. Rev. 339, 343 (2003) (citing to Senate Committee on Judiciary, Committee Analysis of A.B. 75, at *2 (1983-84 Reg. Sess.) (May 25, 1983)). Concerned that courts would vary from traditional product liability principles, Section 1714.4 was intended to retroactively wipe out Turley lawsuits by codifying California common law. *See id.*

However, the California Legislature did not intend for Section 1714.4 to provide blanket tort immunity to gun manufacturers and distributors. Directly relevant to this certified question, the drafters stated that Section 1714.4 ***would not bar actions alleging the furnishing of a statutorily-banned weapon***. *See id.* at n. 35 (quoting Senate Committee on Judiciary, Committee Analysis of A.B. 75, at *2 (1983-84 Reg. Sess.) (May 25, 1983)).

B. NRS 41.131.

In 1985, the Nevada Legislature adopted Section 1714.4 in Senate Bill 211. *See Hearing on S.B. 211 before Comm. on Judiciary*, 63d Sess. (March 13, 1985) (stating that the bill "is a copy of the California law"). Similarly concerned with

the threat of Turley lawsuits, S.B. 211's drafters explained that the bill's primary focus was product liability litigation, "so that a gun in itself is not to be determined as at fault in the case of a death or injury, unless the weapon is faulty in design, materials or workmanship." *Id.* The drafters further explained that, like California, S.B. 411 was not intended to change Nevada common law, but simply intended to end Turley lawsuits. *Hearing on S.B. 211 before the Sen. Comm. on Judiciary*, 63d Sess. (April 17, 1985) ("The bill doesn't preempt common law").

C. THE REPEAL OF SECTION 1714.4.

In 2001, the California Supreme Court interpreted Section 1714.4 to preclude a negligence per se claim against the manufacturer of assault weapons used by one man in a 1993 mass-shooting incident that killed eight people and injured six others. *Merrill v. Navegar, Inc.,* 28 P.3d 116, 131-32 (Cal. 2001). In direct response, the California Legislature repealed Section 1714.4. *See* A.B. 496, Sen. Judiciary Comm. (5/14/2002) (2001-02 Reg. Sess.). In repealing, the California Legislature explained that it "did not intend to bar negligence claims against gun makers" when it enacted Section 1714.4. *Id.* By 2002, Turley lawsuits were no longer the threat they had been in 1983. Thus, the California Legislature repealed Section 1714.4 since it was nothing more than a codification of product liability law. *See id.*

D. NRS 41.131 AND THE CERTIFIED QUESTION.

NRS 41.131(1) does not generally preclude all wrongful death actions, and it does not preclude the wrongful death claim from which this certified question arises. NRS 41.131 was solely intended to protect against an expansion of product liability law. The plain language of NRS 41.131(1) clearly limits its scope to Turley lawsuits, i.e., lawsuits alleging theories of strict product liability against manufacturers and distributors of firearms "merely because the firearm . . . was capable of causing serious injury, damage or death." *Id.; see also Williams v. United Parcel Servs.,* 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013) (stating that this Court "give[s] effect to the plain and ordinary meaning of the words" in a statute (internal quotations omitted)).

To extend NRS 41.131 to claims which allege liability based upon a different theory would improperly "expand[] or modify[] the statutory language," something this Court cannot do without infringing upon legislative functions. *Williams,* 129 Nev. at 391-92, 302 P.3d at 1147. Nor can this Court interpret NRS 41.131(1)'s silence regarding the ***type*** of liability, i.e., strict or negligent, as an implicit grant of immunity. "This [C]ourt does not fill in alleged legislative omissions based on conjecture as to what the [L]egislature would or should have done." *In re Manhattan W. Mech.'s Lien Litig.,* 131 Nev. 702, 711-12, 359 P.3d 125, 131 (Nev. 2015) (internal quotations omitted).

III. NRS 41.131(1) DOES NOT PRECLUDE WRONGFUL DEATH CLAIMS BECAUSE IT IS NOT IN DEROGATION OF THE COMMON LAW.

The Legislature made it abundantly clear that NRS 41.131(1) has a limited scope through its insertion of the last sentence that "[t]his subsection is declaratory and not in derogation of the common law." By adding this section, the Legislature instructed this Court that NRS 41.131 is not to be construed strictly. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp.,* 132 Nev. 49, 59, 366 P.3d 1105, 1112 (Nev. 2016) (holding that "this [C]ourt strictly construes statutes in derogation of the common law"). Had the Legislature intended to create a blanket tort immunity with NRS 41.131(1), it could have done so. It did not. Accordingly, the certified question must be answered yes.

CONCLUSION

For the reasons set forth above, NJA requests that this Court answer the certified questions to hold that (1) negligence per se claims may be predicated upon criminal statutes in Nevada, (2) NRS 41.131 cannot be interpreted to preclude a wrongful death claim, and (3) NRS 41.131 is not in derogation of the

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common law, and therefore, cannot be interpreted to preclude the plaintiffs' claims in this matter.

Dated this 29th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Amicus Curiae 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 2006 in 14 font and Times New Roman type.

2. I further certify that this Amicus Curiae Brief complies with the page or type-volume limitations of NRAP 29 and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3530 words.

3. Finally, I hereby certify that I have read this Amicus Curiae 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

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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 29th 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 Robison, Sharp, Sullivan & Brust and that on this date I electronically filed the foregoing **AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION (In Support of Appellants)** 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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Dated this 29th day of July, 2020.

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