
IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.: 81034

United States District Court Case No.: 2:19-cv-01189-APC-LEP

Electronically Filed
Oct 26 2020 05:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

Appellants,

v.

COLT'S MANUFACTURING COMPANY LLC,
COLT'S DEFENSE LLC; DANIEL DEFENSE, INC.;
PATRIOT 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.;
and GUNS AND GUITARS, INC.,

Respondents

APPELLANTS' REPLY BRIEF

Richard H. Friedman (NV Bar #12743)
FRIEDMAN | RUBIN PLLC
1126 Highland Ave.
Bremerton, WA 98337
(360) 782-4300

Joshua D. Koskoff (*Pro Hac Vice*)
KOSKOFF, KOSKOFF & BIEDER, PC
350 Fairfield Ave.
Bridgeport, CT 06604
(203) 336-4421

Matthew L. Sharp, Esq. (NV Bar #4746)
MATTHEW L. SHARP, LTD.
432 Ridge Street
Reno, NV 89501
(775) 324-1500

Counsel for Appellants

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INTRODUCTION

The Gun Company defendants in this case ask the Court to rewrite NRS 41.131 to immunize them from civil liability for the illegal conduct alleged here, and any wrongful or illegal conduct that results in injuries or deaths to Nevadans going forward. The statute does not support such sweeping immunity. NRS 41.131 directs that firearms manufacturers and distributors be shielded from a specific and limited subset of civil claims, not all civil claims or those involving lawbreaking. The statute forecloses liability if a claim asserts “merely” that a firearm is “capable of causing serious injury, damage or death....” Firearms manufacturers and distributors who act negligently or who break the law, however, are liable for their actions. The statute’s meaning is plain; NRS 41.131 does not shield the Gun Companies from the claims alleged here; and the first two certified questions must be answered “No” and “Yes,” respectively.

Turning to the third certified question, Nevada law dictates that violations of statutes like 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) support negligence per se claims. These statutes ban the sale of machine guns in order 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). This Court’s precedents dictate that negligence per se applies. Indeed, the Court’s precedents are so strong that the Gun Companies largely ignore Nevada law and instead brief inapposite cases from

other states in their attempts to argue against negligence per se. Nevada law requires that the third certified question be answered “Yes.”

I. RESPONSE TO COUNTERSTATEMENT OF FACTS

All three certified questions here begin with the same premise: the Companies “knowingly violated federal and state machine gun prohibitions.” The Companies concede this premise reflects the federal court’s holding: “the district court held that the Parsons plausibly alleged that the Companies ‘knowingly’ manufactured and sold weapons ‘designed to shoot’ automatically....” Def. Br. at 8. The Companies simultaneously assert this is an “erroneous” position. *Id.* at 7. Their disagreement with the federal court’s construction of federal precedent, application of federal pleading standards and consequent holding has no place in this certified appeal – the Court is bound by the federal court’s findings. *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 955-56, 267 P.2d 786, 794-95 (2011).

II. NRS 41.131 DOES NOT PROTECT VIOLATIONS OF FIREARMS LAWS

The firearms distributor who carelessly shoots a customer at a tradeshow; the manufacturer who makes and sells armor-piercing ammunition that is later used in an assault on police officers; the distributor who sells firearms to felons – *of course* such wrongdoers are civilly liable for their actions. Firearms manufacturers and distributors should be deeply invested in *complying* with laws that regulate

their trade. Yet the Gun Companies here request that the Court protect noncompliance and rewrite NRS 41.131 to immunize firearms manufacturers and distributors for “claims alleging negligent or willful misconduct,” Def. Br. at 24 & n.10, “unlawful sales,” *Id.*, “regardless” of whether a firearm is manufactured or sold “in violation of the law,” *Id.* at 15-16, and regardless of whether the weapon in issue is a fully automatic machine gun, *Id.* If the Nevada legislature had intended to create such an extraordinarily expansive immunity, it would have said so. It did not.

A. NRS 41.131 Should Be Applied Per Its Plain Meaning

The plain meaning rule “is the best indicator of the Legislature’s intent.” *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018). Aware that the plain language of NRS 41.131 does not assist them, the Companies argue for a “liberal construction” because of the statute’s supposed “protective purpose.” Def. Br. at 16. NRS 41.131 does not protect the public, however, and no liberal construction is due.¹

¹ Statutes with a “protective purpose” typically protect the public, not an industry. The cases the Companies cite demonstrate this – they concern consumer protection statutes. *State Dep’t of Bus. & Indus. v. Dollar Loan Ctr., LLC*, 134 Nev. 112, 115, 412 P.3d 30, 33-34 (2018) (statutory purpose to protect borrowers); *Colello v. Adm’r of Real Estate Div.*, 100 Nev. 344, 347, 683 P.2d 15, 16 (1984) (statutory purpose to aid victims of real estate fraud). Other protective statutes protect children. *E.g. Edgington v. Edgington*, 119 Nev. 577, 583-84, 80 P.3d 1282, 1287 (2003). Ironically, the statutes at issue in this case with protective purposes are the statutes the Companies violated – 18 U.S.C. § 922(b)(4) and NRS 202.350.

The Companies also argue that NRS 41.131 should be “broadly” construed because subsection 1 is “declaratory and not in derogation of the common law.” Def. Br. at 16-17 & 20. That argument ignores what these words actually mean. They mean that the limitation on liability identified in subsection 1 *is the same as the limitation on liability existing under Nevada law*. Subsection 1 is “declaratory” of existing law, meaning it is the same as existing law. It is also is “not in derogation” of existing law, meaning it does not change existing law. In sum, the limitation on liability described by subsection 1 is no broader and no narrower than such limitation on liability as existed when the statute was enacted. The plain language of NRS 41.131 does not condone the “broad” and “liberal” construction the Companies seek.

B. NRS 41.131 Does Not Limit Gun Manufacturer/Distributor Liability for Wrongful Conduct

The declaratory/not in derogation formulation establishes that NRS 41.131(1) restates a limitation on liability already existing under Nevada law. Simply put, the limitation stated in subsection 1 is that liability requires fault; without fault, no liability. As subsection 1 provides, “[n]o 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.” (emphasis added). The most important word in that sentence is “merely” –

meaning “alone,” “simply,” “solely,” *Peardon v. Peardon*, 65 Nev. 717, 756, 201 P.2d 309, 328 (1948). That a firearm is “capable of causing serious injury, damage or death” does not, on its own, constitute fault or wrongdoing on the part of the manufacturer/distributor. Likewise, “merely” because a gun causes serious injury or death does not make the manufacturer or seller liable. A cause of action based “merely” on such allegations would fail under existing Nevada law, and it fails under NRS 41.131.²

The Companies argue that “the immunity applies regardless of the theory of liability alleged, including whether the firearms violated the law.” Def. Br. at 18. That argument ignores “merely” in subsection 1’s first sentence. And it ignores subsection 1’s entire second sentence, which says subsection 1 is declaratory and not in derogation of the common law. The right approach is to give effect to subsection 1 as written.

They also argue that the Parsons’ construction of subsection 1 makes it “superfluous,” because, according to the Companies, the Parsons’ construction reads both subsection 1 and subsection 2 as applying only to product liability claims. Def. Br. at 22. Not so. Subsection 1 restates a *general* limitation on liability already existing under Nevada law; subsection 2 specifically addresses product liability. It is *not* the Parsons’ position that the only immunity provided by the

² In the legislative history, discussed in Part II.C. below, legislators made this point repeatedly.

statute is for “strict, product liability claims premised on the novel theory that a firearm is defective because it is inherently dangerous,” Def. Br. at 22 (misstating the Parsons’ position); *see also Id.* at 23 (repeating similar claim). As we said in our opening brief, subsection 1 restates NRS 41.130, the generally applicable principle that liability depends on the commission of a wrongful act. Pl. Br. at 16.

The Companies argue that if the legislature had intended to preserve claims alleging “negligent or willful misconduct,” or claims arising from unlawful sales in violation of state and federal law, it would have done so expressly. Def. Br. at 24 & n.10. That argument ignores *the title of the statute* and *every word* of subsection 1. NRS 41.131 is titled a “[l]imitation” on “the basis” of liability, not “immunity from liability.” Subsection 1 then states the precise contours of that limitation: “No person has a cause of action ... *merely because* the firearm ... was capable of causing serious injury, damage or death....” NRS 41.131(1) (emphasis supplied). It does *not* say, “No person has a cause of action against a firearms manufacturer or distributor.” And subsection 1 then says that it is “declaratory and not in derogation of the common law” – an affirmative indication that *claims for negligent and willful misconduct, including violations of federal and state law, are actionable*.

To the point that the legislature chooses the wording of a statute advisedly, comparison to a truly sweeping immunity is helpful. Indiana Code 34-12-3-3(2) provides:

[A] person may not bring an action against a firearms or ammunition manufacturer, trade association or seller for:

(1) Recovery of damages resulting from ... the lawful:

- (A) design;
- (B) manufacture;
- (C) marketing; or
- (D) sale;

of a firearm or ammunition for a firearm; or

(2) *[R]ecover of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party.*

Indiana Code 34-12-3-3(2) (emphasis supplied). Looking to the italicized language, the Indiana Supreme Court held the statute “bars actions against firearms sellers for ‘recovery of damages resulting from the criminal or unlawful use of a firearm ... by a third party.’” *KS&E Sports v. Runnels*, 72 N.E.3d 892, 899 (Ind. 2017). The Gun Companies’ amicus asserts that Indiana Code 34-12-3-3 is “similar” to NRS 41.131 but makes that claim without examining the wording of either statute. NSSF Br. at 7. *This is statutory construction: the words matter.*

Although the two statutes limit liability of firearms manufacturers and distributors, they use completely different language to do so and consequently arrive at completely different meanings. Indiana Code 34-12-3-3(2) forecloses claims based on the presence of an intervening cause. *Nothing* in NRS 41.131 limits liability based on intervening cause. NRS 41.131(1) simply forecloses claims that are based solely on the intrinsic dangerousness of firearms.

In sum, the Court must give effect to the plain language of NRS 41.131. That plain language provides no immunity for firearms manufacturers and distributors who violate gun-safety laws.

C. The Legislative History Confirms that S.B. 211 Restates Existing Nevada Law Rather than Creating an Expansive New Immunity

The Court need not look further than the plain meaning of the statute to resolve the certified questions. Should it choose to do so, S.B. 211’s legislative history confirms that the legislature intended to restate existing Nevada law, not to create a “sweeping immunity,” Def. Br. at 19. Those considering the bill agreed that S.B. 211 was intended to prevent suits that would never be successful anyway. Senator Robinson said, for example, that the bill was intended to prevent suits that “have been filed, claiming that there is fault with the weapon, if it caused an injury or death....” Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. March 13, 1985) (p. 1).³ He continued, “*this type of suit is never successful....*” *Id.* (emphasis supplied). Mr. Neumann, representing the Nevada Trial Lawyers Association, agreed that the bill would defeat cases that allege that “if someone gets injured or killed by a gun, then the manufacturer or

³ Such cases argued “the societal risks inherent in the gun outweigh the societal benefits of the product” and “that the manufacture and sale of handguns ... is an ultrahazardous or abnormally dangerous activity.” *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533 (11th Cir. 1986); see *Handguns and Products Liability*, 97 Harv. L. Rev. 1912 (1984) (discussing why such theories fail).

vendor of that gun is somehow going to be automatically liable, just because they made the gun.” *Id.* at p. 3. Like Senator Robinson, he acknowledged such a suit would *already* fail, stating that “*the manufacturer is not liable under present Nevada law*” on such a theory. *Id.* at p. 3 (emphasis supplied).

Underscoring this point, the Senate Judiciary Committee added explicit language stating that S.B. 211’s limit on liability was the limit already present in Nevada law – the “declaratory and not in derogation of the common law” sentence. (California Civil Code 1714.4, the model for S.B. 211, has no such provision.) That sentence says precisely what Senator Robinson and Mr. Neumann had observed: the limitation on liability adopted in NRS 41.131(1) restates the limitation already present in Nevada law. That is, under Nevada law and NRS 41.131(1), the mere fact that a firearm causes serious injury and death does not give rise to a cause of action; an allegation of wrongdoing is required.

After the Senate Committee on Judiciary added the declaratory/not in derogation sentence, the Assembly Committee on Judiciary – and Senator Robinson – considered removing it. One member observed, “when you say something is declaratory it means it has no legal effect. It sounds nice but it doesn’t mean anything.” Hearing on S.B. 211 Before the A. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. April 17, 1985) (p. 5). Senator Robinson was also concerned that there was no point in passing the statute if “declaratory” was included. “If it doesn’t mean anything at all,” he said, “it’s not worth printing.” *Id.*

Senator Robinson then requested that the bill be “changed so that this section were not in derogation of the common law and that would strengthen the bill...” *Id.* at p. 6. The Assembly refused his request, and the entire sentence stayed in the bill.

The Companies assert that Senator Robinson intended that Nevada expand the reach of NRS 41.131 beyond that of California’s 1714.4. Def. Br. at 19. There is no indication in the legislative history that Senator Robinson intended to shield Companies *that violate firearms laws* from liability for the consequences of those violations. Even if that had been Senator Robinson’s intent, he did not carry the day. The final statute is *less* expansive than he intended, due to the inclusion of the declaratory/not in derogation sentence.

D. PLCAA, Like NRS 41.131, Ensures that Firearms Manufacturers and Distributors Will Remain Liable for Illegal Conduct

The Gun Companies and their amicus confuse protection of the firearms industry and the right to bear arms with protection of *illegal conduct* by firearms manufacturers and distributors. However expedient that position may be in this litigation, it is poorly conceived in broader perspective.

Congress and every state legislature in the country have passed laws to regulate the manufacture and sale of firearms. Industry compliance with these laws ensures that *legal* sales of firearms and ammunition continue to supply *legal* firearms to the *law-abiding* public. Protection of *illegal* conduct by firearms makers and sellers does not protect the Second Amendment; the rights embodied in

Article I, Section 11 of the Nevada Constitution; or the firearms industry generally, and such a protection would serve no purpose other than to expose the public to grave risk.

The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 *et seq.* (PLCAA), exemplifies that protection of the right to bear arms and the firearms industry means protection of legal manufacturing and sales – while imposing full penalties, including civil liability, for illegal and certain wrongful activity. When Congress passed PLCAA it did so with the stated purpose of protecting the right to bear arms, including “[t]o preserve a citizen’s access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.” 15 U.S.C. § 7901(b)(2). To serve these purposes, Congress protected legal firearms sales, while maintaining liability for conduct that violates “a State or Federal statute applicable to the sale or marketing of the product....” *Id.* § 7903(5)(A) (iii). Congress also preserved claims against firearms sellers for negligence per se. *Id.* § 7902(5)(A)(ii). Simply put, PLCAA does *not* protect firearms makers and sellers who engage in illegal conduct from civil liability. NRS 41.131 embodies the same choice.

III. UNDER NEVADA LAW, THE STATUTES AT ISSUE SUPPORT NEGLIGENCE PER SE LIABILITY

Nevada law holds that statutes create duties of care when the injured party belongs to the class of persons the statute was intended to protect, and the injury is

of the type the statute was intended to protect against. *Ashwood v. Clark Cty.*, 113 Nev. 80, 86, 930 P.2d 740, 744 (1997). When the class of persons/type of injury rule is satisfied, negligence per se applies. *Id.* The statutes at issue here were meant to protect the public from the extreme danger posed by weapons capable of fully automatic fire, a concern for which there has been a broad consensus among lawmakers since 1934. The victims of the Route 91 shooting are the class of persons these statutes were meant to protect; their injuries are the type of injuries these statutes were meant to protect against; negligence per se applies.

The Gun Companies rest their counterargument on two equally weak foundations. First, they turn to out-of-state case law and argue it in place of Nevada law. Based on this out-of-state law, they argue that statutes in Nevada do not create duties of care. But Nevada law controls here. For the last century, Nevada has held that when a statute is meant to protect a class of persons, the statute creates a duty to that class of persons. Second, the Companies argue that this Court's treatment of alcohol-vendor liability overrides all of its other negligence per se precedents. The alcohol-vendor line of cases is a specific exception and does not overrule other negligence per se precedents.

A. Under Nevada Law, Statutes May Create Duties of Care

It is black-letter Nevada law that statutes themselves may create duties of care. In Nevada, “[a] negligence per se claim arises when a *duty is created by statute....*” *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828, 221 P.3d 1276,

1283 (2009) (emphasis added). To reiterate, “A violation of statute establishes the duty and breach elements” of a negligence action. *Ashwood*, 113 Nev. at 86, 930 P.2d at 744 (citing *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983)); *see also* *Ryan v. Manhattan Big Four Mining Co.*, 38 Nev. 92, 145 P. 907, 910 (1914) (violation of penal statute intended to protect the public from harm is negligence per se; “as a general proposition ... whenever an act is ... prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action, and that the violation of the law is the basis of the right to recover and constitutes negligence per se”).⁴ Just this year, the Court reaffirmed that “negligence per se arises *when a duty is created by statute.*” *Estate of Curtis v. S. Las Vegas Med. Inv’rs*, 466 P.3d 1263, 1270 n.6, 136 Nev. Adv. Op. 39 (2020) (emphasis added).

The Gun Companies center their argument against negligence per se on a line of authority that ignores *Sanchez*, *Ashwood*, *Sagebrush Ltd.*, *Ryan* and *Curtis*.

⁴ *See also* *Lynam v. Health Plan of Nevada, Inc.*, 128 Nev. 915 n.2, 381 P.3d 636 (2012) (“Negligence per se ... serves as a method of establishing the duty and breach elements of a negligence claim.”); *Cervantes v. Health Plan of Nevada, Inc.*, 127 Nev. 789, 793 n.4, 263 P.3d 261, 264 (2011) (same); *Lee v. GNLV Corp.*, 117 Nev. 291, 296 n.2, 22 P.3d 209, 212 (2001) (same); *Helle v. Core Home Health Servs. of Nevada*, 124 Nev. 1474, 238 P.3d 818 (2008) (plaintiff “can show duty and breach” by showing violation of statute meeting negligence-per-se test).

Citing out-of-state cases, and failing to distinguish the Nevada cases listed above, the Companies contend that statutes create *only* a *standard* of care, but no *duty* of care. Def. Br. at 31-37.⁵ As a result, they claim, in order to establish negligence per se, a plaintiff must show a preexisting common-law duty running between the defendant and the plaintiff, or else specific evidence of intent to create civil liability. This is not Nevada law.⁶

In *Ross v. Carson Construction*, this Court held that statutory violations create a duty of care independent of the common law duty. It found that negligence per se “liability may be imposed under [a statute] regardless of the injured party’s common law status,” and that a public safety statute creates a separate and independent negligence per se duty regardless of any common law one. *Ross*, 106 Nev. 885, 888-89, 803 P.2d 657, 659 (1990). The plaintiff argued that a Nevada statute “create[d] a duty to safeguard excavations, and a corresponding right to

⁵ In Nevada, if the class of persons/type of harm rule is satisfied, the statute gives rise to *both* the duty of care, *Sanchez*, 125 Nev. at 828, 221 P.3d at 1283; *Ashwood*, 113 Nev. at 86, 930 P.2d at 744; *Sagebrush Ltd.*, 99 Nev. at 208, 660 P.2d at 1015; *Ryan*, 38 Nev. 92, 145 P. at 910; *and* the standard of care, *see, e.g., Sagebrush Ltd.*, 99 Nev. at 208, 660 P.2d at 1015; *Ryan.*, 38 Nev. 92, 145 P. at 910.

⁶ Nor is it the Restatement rule. The Second Restatement contains no indication of it, Restatement (Second) of Torts §§ 286–88B (1965), and the Third specifically rejects it, *see* Restatement (Third) of Torts: Phys. & Emot. Harm § 14 *id.* cmt. c, *i* (2010) (noting a statutory violation may create liability even where “an injured plaintiff’s claim for damages would, absent the statute, fail because ... the defendant ... owes no [common-law] duty to the plaintiff”).

recovery for breach of this duty, regardless of the injured party’s status as a trespasser, licensee or invitee under the common law.” *Id.* at 888. The Court agreed. Because “[t]he protection intended by the act was for the public generally,” the statute imposed an “absolute duty, nonperformance of which, resulting in injury, is negligence as a matter of law.” *Id.* (quoting *Perry v. Tonopah Mining Co. of Nevada*, 13 F.2d 865, 866 (D. Nev. 1915)). The common-law duty was irrelevant because the negligence per se duty, which flowed from the statute, was more expansive. *Id.* at 889 (declining to reach plaintiff’s “status under the common law landowner liability classifications”).⁷

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⁷ Ignoring *Ross* completely, the Gun Companies argue that *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 642, 98 P.3d 678, 680 (2004), a case relied by the Parsons in opening as an example of negligence per se, finds a duty of care only because landowners owed a common law duty to protect even trespassers from risky artificial conditions. *See* Def. Br. at 41. *Ross* teaches the contrary: the negligence per se duty arose *from the statute*.

Not only do the Companies ignore Nevada law in favor of out-of-state cases that take a different approach to negligence per se, the out-of-state cases they rely on are factually inapposite. None concern violation of firearms safety statutes.⁸

B. Under Nevada Law, Violation of Statutes Regulating the Manufacture and Sale of Firearms Is Negligence Per Se

To assess whether a statute creates a duty, Nevada looks to the statutory purpose. Violation of a statute “establishes the duty and breach elements of negligence only if the injured party belongs to the *class* of persons that the statute was intended to protect, and the injury is of the *type* against which the statute was intended to protect.” *Ashwood*, 113 Nev. at 86, 930 P.2d at 744 (emphasis in original); *see Atkinson*, 120 Nev. at 643, 98 P.3d at 680 (applying negligence per se because statute was “intended to protect members of the public”); *Brannan v. Nevada Rock & Sand Co.*, 108 Nev. 23, 26, 823 P.2d 291, 293 (1992) (same); *cf. Sanchez*, 125 Nev. at 828, 221 P.3d at 1283 (rejecting negligence per se because statute was *not* meant to protect general public); *Ryan*, 38 Nev. 92, 145 P. at 909

⁸ Their cases concern statutes controlling how regulatory compliance is monitored and the reporting of medical information. *See, e.g., Myers v. United States*, 17 F.3d 890, 901 (6th Cir. 1994) (whether federal government could be held liable for violation of mining regulations concerning how compliance is monitored, rather than actual noncompliance with safety standards); *Cuyler v. United States*, 362 F.3d 949, 952 (7th Cir. 2004) (child abuse reporting statute); *Marquay v. Eno*, 139 N.H. 708, 662 A.2d 272 (1995) (same); *Estate of Johnson ex. rel. Johnson v. Badger Acquisition of Tampa LLC*, 983 So. 2d 1175 (Fla. Dist. Ct. App. 2008), *reh’g denied* (June 30, 2008) (statute regulating pharmacist recordkeeping); *Faber v. Ciox Health, LLC*, 944 F.3d 593, 599 (6th Cir. 2019) (HIPAA); *Parker v. Carilion Clinic*, 296 Va. 319, 347, 819 S.E.2d 809, 825 (2018) (HIPAA).

(negligence per se applies when penal statute intended to “safeguard” miners’ “life and limb”). In short, Nevada has applied the class of persons/type of harm rule to determine whether a statute supports negligence for over a century.

Statutes prohibiting the manufacture, distribution and sale of certain firearms satisfy Nevada’s class of persons/type of harm rule because they aim to protect the public and law enforcement officers from serious injury and death due to criminal misuse of those firearms. “Recognizing the deadliness of firearms ... it seems incomprehensible that the primary concern of the legislature in enacting provisions regulating ‘deadly weapons dealers’ could have been anything other than the safety of citizens and the prevention of injuries caused by ‘deadly weapons.’” *Hetherton v. Sears, Roebuck & Co.*, 593 F.2d 526, 530 (3d Cir. 1979); *see also K-Mart Enterprises of Florida, v. Keller*, 439 So. 2d 283, 286-87 (Fla. App. 1983) (“risk of harm” Congress meant to prevent by enacting 18 U.S.C. § 922 was criminal use of firearms and consequent firearms-caused injury; that risk was a risk to “us all”); *Englund v. World Pawn Exchange, LLC*, 2017 WL 7518923, at *8 (Or. Cir. June 30, 2017) (18 U.S.C. § 922(d) and corresponding Oregon statute were “gun safety statutes ... designed to prevent innocent civilians ... from becoming victims of gun violence”); *Rubin v. Johnson*, 550 N.E.2d 324, 329 (Ind. App. 1990) (“The Indiana statutes regulating the transfer and possession of handguns were enacted by the legislature to protect the public from those who would use such weapons in a dangerous or irresponsible manner.”); *Montgomery Ward & Co., Inc. v. Cooper*,

177 Ga. App. 540, 541-42, 339 S.E.2d 755, 756 (1986) (gun sale ordinance meant to protect potential victims of criminal acts by convicted felons from injuries due to criminal shooting); *Menmuir, M.D. v. Safe Shot, LLC*, 2016 WL 3356995, at *5 (Nev. Dist. Ct. June 14, 2016) (statutes regulating to whom a firearm may legally be sold, such as 18 U.S.C. § 922 and NRS 202.362, are “designed to keep guns out the hands of dangerous and unstable individuals so as to keep society safer”).⁹

Because the public is the class of persons these statutes mean to protect, and serious injury or death due to gunfire is the type of injury these statutes mean to prevent, these statutes are widely considered appropriate bases for negligence per se. *See Hetherton*, 593 F.2d at 529-30 (violation of statute requiring seller of firearm to ensure two citizens identified buyer negligence per se); *Tamiami Gun Shop v. Klein*, 116 So. 2d 421, 423 (Fla. 1959) (violation of Florida statute prohibiting transfers of firearms to minors could create negligence per se); *Lundy v. Hazen*, 90 Idaho 323, 327, 411 P.2d 768, 770 (1966) (violation of state gun-sales statute could create negligence per se); *Raymond v. Wal-Mart Stores E., L.P.*, 99 So. 3d 112, 116 (Miss. 2012) (“A violation of 18 U.S.C. § 922(b)(1) constitutes

⁹ *See also Huddleston v. United States*, 415 U.S. 814, 824, 94 S.Ct. 1262, 1268-69 (1974) (“Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States.... The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping ‘firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency....’”).

negligence per se.”); *Taylor v. Webster*, 12 Ohio St. 2d 53, 55-56, 231 N.E.2d 870, 872 (1967) (statute prohibiting transfer of firearm or air gun to minor created negligence per se); *Franco v. Bunyard*, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (1977) (violation of Gun Control Act was negligence per se); *Spires v. Goldberg*, 26 Ga. App. 530, 106 S.E. 585 (1921) (violation of Georgia law prohibiting gun sales to minors negligence per se).¹⁰ Indeed, the acceptance of firearms statutes as a basis for negligence per se is so widespread that PLCAA, passed in 2005, contains a specific exception for negligence per se, 15 U.S.C. § 7903(5)(A)(ii).

Congress enacted the National Firearms Act in 1934 to combat an important national problem: the use of machine guns, like the Tommy Gun, in gang shootings. APP192. 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) implement that same purpose – protecting the public from machine gun attacks. The danger of such attacks is extraordinary: “Short of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machine guns.”

¹⁰ See also *West v. Mache of Cochran, Inc.*, 187 Ga. App. 365, 369, 370 S.E.2d 169, 172-173 (1988) (18 U.S.C. §§ 922, 933); *K-Mart Enters. of Fla.*, 439 So. 2d at 285, 287 (18 U.S.C. § 922(d)); *Englund*, 2017 WL 7518923, at *8 (18 U.S.C. § 922(d) and corresponding Oregon statute); *Menmuir, M.D.*, 2016 WL 3356995, at *5 (18 U.S.C. § 922 and NRS 202.362); *Crown v. Raymond*, 159 Ariz. 87, 90, 764 P.2d 1146, 1149 (Ct. App. 1988) (federal and state statutes regulating the sale of firearms); *Rubin*, 550 N.E.2d at 330 (Indiana gun transfer statute); *Montgomery Ward & Co.*, 177 Ga. App. at 541, 339 S.E.2d at 756 (ordinance regulating sale of firearms); *Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774, 778 & n.3 (Fla. App. 1994) (18 U.S.C. § 922); *Estate of Kim ex. rel. Alexander v. Coxe*, 295 P.3d 380, 393-394 (Alaska 2013) (18 U.S.C. § 922(t)); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 415 (E.D.N.Y. 2007) (18 U.S.C. § 923(g)).

United States v. Henry, 688 F.3d 637, 640 (9th Cir. 2012). The class of persons these statutes mean to protect is the class of persons injured in such attacks; the type of injury these statutes mean to prevent is wounding and death due to automatic fire. Under Nevada’s class of persons/type of harm rule, 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) create both duties and standards of care and are appropriate bases for negligence per se in the circumstances of this case. *See Ashwood*, 113 Nev. at 86, 930 P.2d at 744.

C. The *Hamm/Bell/Hinegardner* Approach to Negligence Per Se Applies Only in Alcohol Sale Cases

Nevada looks for specific evidence of legislative intent when determining whether violation of alcohol sales statutes will establish negligence per se, an exception to the generally applicable class of persons/type of harm rule.¹¹ The Gun Companies would like the alcohol sales exception to swallow the rule. They argue that this specific intent inquiry “is not limited to the alcohol context,” but rather

¹¹ The Companies claim “the *Hamm* and *Hinegardner* doctrines have been applied to a number of cases not involving alcohol.” Def. Br. at 39 n.16. Not so. *Sanchez* did not apply (or even mention) either. *Sanchez*, 125 Nev. 818, 221 P.3d 1276. The Companies’ other state cases are one administrative law and one employment law case regarding implied statutory rights of action, neither of which implicated negligence per se or cited the *Hamm* line of cases. *See Richardson Const., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 156 P.3d 21 (2007); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958, 194 P.3d 96, 100 (2008). Their remaining authorities are a line of Nevada federal district court cases, which mistakenly apply *Hamm* outside the alcohol sales context. *See Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182 (D. Nev. 2009); *Harlow v. LSI Title Agency, Inc.*, 2012 WL 5425722 (D. Nev. Nov. 6, 2012); *Conboy v. Wynn Las Vegas, LLC*, 2012 WL 5511616 (D. Nev. Nov. 14, 2012).

applies to every negligence per se case, regardless of the nature of the statute in issue. *See* Def. Br. at 37-41. Again, they ignore at least a century of Nevada negligence per se precedent.

As we explained in opening, *Hamm v. Carson City Nugget, Inc.* reasoned that a civil action for damages against a liquor vendor based on the conduct of the intoxicated person would be at odds with the language of Nevada statutes regulating sales of alcohol. 85 Nev. 99, 101-02, 450 P.2d 358, 359-60 (1969). *Hamm* therefore held that statutes regulating the sale of alcohol were not negligence per se predicates. Confronted with nearly the same question some years later, the Court understandably declined to apply negligence per se “absent evidence of legislative intent to impose civil liability.” *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 98 Nev. 109, 111, 642 P.2d 161, 162 (1982). It “infer[red] from the legislature’s inaction after *Hamm* that it did not intend to impose civil liability for violations of this penal statute....” *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 1096, 844 P.2d 800, 803 (1992). There is no indication *Bell* and *Hinegardner* meant to expand the alcohol sales rule to all penal statutes. *See Hinegardner*, 108 Nev. at 1095-96, 844 P.2d at 803-04; *Bell*, 98 Nev. at 111, 642 P.2d at 162. Courts, like legislatures, do not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468, 121 S.Ct. 903, 910 (2001). The Companies’ attempts to require specific, explicit evidence of

legislative intent in every negligence per se case are contrary to Nevada's longstanding class of persons/type of harm rule.

The Companies argue that this Court's rejection of negligence per se in the alcohol vendor context exemplifies a broader rule that "a common law duty must first exist between a plaintiff and defendant before the relevant criminal statute's standard can serve as a basis for negligence per se." Def. Br. at 41, *see also id.* at 39. As we have explained, the Companies have Nevada law wrong. Indeed, *Hamm*, a key case on which the Companies rely for this argument, ultimately resolves the question of whether negligence per se should lie by looking at the alcohol vendor statutes, not the common law. *Hamm*, 85 Nev. at 102, 450 P.2d at 360 (comparing NRS 202.100 with NRS 202.070 to finally determine whether negligence per se applied). Because the class of persons/type of harm rule is satisfied in this case, firearms manufacturers and distributors owe a *statutory duty of care* to the class of people machine gun prohibitions are meant to protect. The imposition of that statutory duty is clear on the face of the statutes and through the application of black-letter Nevada law; the Court need go no further to answer the certified question.

Further the Companies' "no common law duty" argument is waived and beyond the scope of the certified questions. The Gun Companies did not dispute the existence of a common law duty in the federal court. *See, e.g.*, APP75 (arguing only the need for specific legislative intent, not the need for existence of common

law duty; not contesting existence of common law duty). Further, common law duty turns on foreseeability, an issue the Gun Companies lost below. The Companies contested proximate cause in the federal court, including foreseeability, e.g. APP 140-41, and the court found against them. APP 202 (finding allegations establish reasonable foreseeability).

Although the point is beyond the scope of this certified appeal, we note as well that the duty of care created by the machine gun prohibition statutes is consistent with and reinforced by Nevada common law.¹² The duty to act reasonably runs to those within the scope of foreseeable risk: “A negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act.” *Dakis*, 111 Nev. at 820, 898 P.2d at 118. Those

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¹² Nevada law holds that it is the duty of all persons to “exercise reasonable care not to subject others to an unreasonable risk of harm...” *FGA, Inc. v. Giglio*, 128 Nev. 271, 288, 278 P.3d 490, 501 (2012); *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 1170, 925 P.2d 496, 501 (1996) (“all persons in this society have an obligation to act reasonably”); *Dakis v. Scheffer*, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) (defendant liable in negligence for leaving loaded flare gun easily accessible to children); see also NRS 41.130 (“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”).

consequences include foreseeable criminal acts within the scope of the risk created by the wrongful act.¹³

D. Plaintiffs Do Not Allege a Duty to Protect or Warn

The Gun Companies also argue that negligence per se liability will not lie, because they owe no “duty to control the dangerous conduct of another or to warn others of the dangerous conduct.” Def. Br. at 42 (quoting *Sanchez*, 125 Nev. at 824, 221 P.3d at 1280). This is another entirely new argument; the Companies did not raise it in the federal court. It would have made no sense there, just as it makes no sense here, for an obvious reason: the Parsons allege gun safety statute violations, *not* a duty to control or warn. Thus the certified question concerns whether negligence per se will lie based on the statutory violations alleged.

The Companies discuss *Sanchez v. Wal-mart Stores, Inc.*, 125 Nev. 818, 221 P.3d 1276 (2009), at length, as if it supports their argument. Def. Br. at 42-44. In fact, *Sanchez* systematically shows the flaws in the Companies’ position. *Sanchez* holds that statutes create duties, not merely standards of care. *See id.* at 828 (“A negligence per se claim arises when a duty is created by statute.”). To determine

¹³ *See, e.g., Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 517, 893 P.2d 367, 369 (1995) (causal chain remains unbroken when the third party's intervening intentional, criminal act is reasonably foreseeable); *El Dorado Hotel, Inc. v. Brown*, 100 Nev. 622, 628-29, 691 P.2d 436, 441 (1984) (“where a third party's intervening intentional act is reasonably foreseeable, a negligent defendant is not relieved of liability”), *overruled on other grounds, Vinci v. Las Vegas Sands*, 115 Nev. 243, 984 P.2d 750 (1999).

whether statutes regulating prescription drug sales create a duty, it applies the class of persons/type of harm rule, citing *Ashwood*, 113 Nev. at 86, 930 P.2d at 744, not the *Hamm/Hinegardner/Bell* approach the Companies say is now broadly applicable. Because the *Sanchez* court is following the class of persons/type of harm rule, it looks to the nature of the statutes at issue – not the common law – to determine whether the statutes create a duty. It finds no duty because the statutes at issue fail the “type of injury” prong of *Ashwood*: “Nevada's pharmacy statutes and regulations ... are not intended to protect the general public from the type of injury sustained in this case, and thus, do not support the appellants' negligence per se claim.” *Id.* at 821. And lastly, *Sanchez* does not conflate duty based on special relationship with negligence per se as the Companies do; those are separate, independent sections in the opinion. *Id.* at 824-28.

The Gun Companies then cite a series of firearms cases that concern manufacturers and distributors *who sold legal firearms in a legally permissible manner*. See Def. Br. at 44-45. In those cases, the plaintiffs claimed the manufacturers or sellers owed affirmative duties to warn, protect, or screen against dangerous use of their product by third parties. See *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (claimed duties to warn, protect or screen); *Bloxham v. Glock Inc.*, 203 Ariz. 271, 53 P.3d 196 (Ct. App. 2002) (claimed duties to control and protect based on Restatement (Second) §§ 314-15); *Riordan v. Int’l Armament Corp.*, 132 Ill. App. 3d 642, 648-49, 477 N.E.2d 1293, 1297 (1985) (claimed duty

to protect); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 750 N.E.2d 1055 (2001) (claimed duty to screen buyers at point of sale); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1227 (D. Colo. 2015) (claimed duty to protect). These cases are inapposite because the Parsons do not claim the Companies owed them common law duties to protect or control or warn or screen.

In sum, under Nevada law the Parsons may assert negligence per se claims predicated on the violation of criminal federal and state machine gun prohibitions.

The answer to the third certified question is “Yes.”

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CONCLUSION

For these reasons, the first two certified questions concerning NRS 41.131 must be answered “No” and “Yes,” respectively. The third certified question concerning negligence per se must be answered “Yes.”

Dated this 26th day of October 2020.

FRIEDMAN | RUBIN PLLP

/s/ Richard H. Friedman

Richard H. Friedman
Nevada State Bar No. 12743
1126 Highland Avenue
Bremerton, WA 98337
(360) 782-4300

Matthew L. Sharp
Nevada State Bar No. 4746
432 Ridge Street
Reno, NV 89501
(775) 324-1500

Joshua D. Koskoff (Admitted *PHV*)
Alinor C. Sterling (Admitted *PHV*)
KOSKOFF, KOSKOFF & BIEDER PC
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421

Attorneys for Plaintiffs

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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 26th day of October 2020.

FRIEDMAN | RUBIN PLLP

/s/ Richard H. Friedman

Richard H. Friedman

Nevada Bar No. 12743

1126 Highland Ave.

Bremerton, WA 98337

(360) 782-4300

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:

John H. Mowbray @ jmowbray@spencerfane.com

Mary E. Bacon @ mbacon@spencerfane.com

Loren Young @ lyoung@lgclawoffice.com

Jay Joseph Schuttert @ jschuttert@efstriallaw.com

Vance Bohman @ vbohman@swlaw.com

Michael Nunez @ mnunez@murchisonlaw.com

Ismail Amin @ iamin@talglaw.com

Patrick Byrne @ pbyrne@swlaw.com

DATED this 26th day of October 2020.

/s/ Cristin B. Sharp

An Employee of Matthew L. Sharp, Ltd.