

**IN THE SUPREME COURT
OF THE STATE OF NEVADA**

Damaso S. Puente, individually and on
behalf of the Estate of Damaso I. Puente;
Maria Puente;
Daniel Malone; and Diane Malone,
individually and on behalf of the Estate of
Christa Puente,

Appellants/Cross-Respondents,
vs.

Dave & Buster's of Nevada, Inc., d/b/a Dave
& Buster's,

Respondent/Cross Appellant.

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Supreme Court No. 82554
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Appeal of
District Court No. A813787

APPELLANTS' OPENING BRIEF

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**DISCLOSURE STATEMENT
PURSUANT TO NRAP 26.1**

The undersigned counsel of record 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.

Appellants Damaso S. Puente, Maria Puente, Daniel Malone and Diana Malone are individuals using their true names. They are represented by Christensen Law Offices (Thomas F. Christensen).

Dated this 9th day of August 2021.

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OTHER AUTHORITIES

Nevada Constitution	<i>passim</i>
Prosser and Keeton on the Law of Torts § 37, at 236 (5th ed. 1984)	22
United States Constitution	16,17

JURISDICTIONAL STATEMENT

The Nevada Supreme Court has jurisdiction over this matter because it is an appeal from an order certified as final in a case granting a motion to dismiss certain claims then granting summary judgment on the remaining claim. The Order granting Dave and Buster's motion for summary judgment was filed on January 26, 2021. Notice of Entry of that Order was filed on January 26, 2021, and the Notice of Entry was served that same day by electronic service through the Eighth Judicial District Court electronic filing system. No tolling motions were filed following the Notice of Entry of Order in this matter.

At the time the order appealed from was entered, there were other claims in the suit pending against other parties, but the order with regard to Dave and Buster's was certified pursuant to NRCP 54(b).

ROUTING STATEMENT

Pursuant to NRAP 17(a)(11) and (12), Appellant believes the Nevada Supreme Court should retain this appeal because it raises as a principal issue a question of first impression involving the Nevada Constitution or common law and raises as a principal issue a question of statewide public importance.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Does serving “an alcoholic beverage” under NRS 41.1305 abrogate the common law and NRS 41.130, which provide for damages resulting from wrongful act, neglect or default?

Does NRCP 56(d) require the Court to allow discovery on factual issues that Plaintiff has alleged to support valid causes of action, when Plaintiff has presented a declaration that it can present further facts to justify its opposition with discovery of facts that are exclusively in the control, possession and custody of the moving defendant?

STATEMENT OF THE CASE

On May 15, 2018, two Nevada citizens were stopped at a light when their vehicle was rear-ended at high speed by a drunk driver, killing them both. The Appellants are the family of the deceased: Damaso S. Puente, individually and on behalf of the Estate of Damaso I. Puente, Maria Puente, Daniel Malone and Diane Malone, individually and on behalf of the Estate of Christa Puente. The Respondent is the local tavern that illegally furnished alcohol to the drunk driver: Dave & Buster's of Nevada, Inc., dba Dave & Buster's.

The date the proceedings commenced in District Court was April 17, 2020, when the original complaint was filed. Allegations of the complaint alleged facts which supported multiple causes of action against Respondent Dave & Buster's of Nevada, Inc., (hereinafter "Dave & Buster's"). The complaint alleged facts supporting a cause of action for Dave and Buster's wrongful act, neglect or default under NRS 41.130, as a matter of law, for violation of codes that make it illegal to serve alcohol to an intoxicated person. The complaint also alleged facts supporting causes of action against Dave & Buster's for negligence, gross negligence, willful and wanton misconduct, strict products liability, breach of express and implied warranties, acting in concert in an abnormally dangerous activity, negligent supervision and hiring. The allegations in the complaint against Dave & Buster's alleged actions and inactions, some of which were wanton and willful misconduct,

1 which each result in liability under the common law. See *Davies v. Butler*, 95 Nev.
2 763, 773 (Nev. 1980).

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4 Dave & Buster's filed a Motion to Dismiss on May 20, 2020. In response to
5 Dave & Buster's Motion to Dismiss, Plaintiff argued NRS 41.1305(1), which has
6 yet to be interpreted by any appellate court in Nevada, by its language, does not
7 eliminate any of the Plaintiffs' causes of action, nor give liquor vendors a license to
8 kill in Nevada. The Court denied the Motion, but ordered the Plaintiffs to file an
9 amended Complaint. The Amended Complaint was filed on August 7, 2020 and
10 even more clearly alleged facts supporting multiple different causes of action
11 against Dave & Buster's. The Amended Complaint also continued to allege that
12 NRS 41.1305, if applied as Dave & Buster's suggested in its first Motion to
13 Dismiss, is unconstitutional.
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18 Dave & Buster's then filed a Renewed Motion to Dismiss on August 14, 2020.
19 The Court determined NRS 41.1305 did not bar all actions of negligence. The court
20 found that only one specific set of facts— that Dave & Buster's initiated the tort by
21 helping Aparicio to his car — could support a claim for relief. The Court therefore
22 granted in part and denied in part the renewed motion. The Court's order concluded
23 NRS 41.1305 did not bar a negligence cause of action, but that the only actionable
24 negligence possible would be in assisting the drunk driver to the vehicle he drove.
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26 Negligence as a matter of law for violation of Clark County code 8.20.300 was
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1 disregarded by the court. The violation of internal standards designed by Dave &
2 Buster's to prevent the very harm of drunk driving was also disregarded by the
3 Court.
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5 Following initial productions, Dave & Buster's then filed a Motion for
6 Summary Judgment on December 3, 2020, claiming no issues of fact remained with
7 regard to anyone from Dave & Buster's assisting the drunk driver to the vehicle he
8 drove. The summary judgment was opposed by Plaintiff's with evidence of
9 violations by Dave and Buster's of its internal protocols and Clark County codes
10 with regard to the responsible service of alcohol. Plaintiff alleged that such action
11 was at least as negligent as helping the driver to his vehicle and that such
12 negligence was not barred. Plaintiffs further requested NRCP 56(d) relief since
13 discovery had only recently commenced and the Plaintiffs were in an inferior
14 position to have access to evidence. Plaintiffs were merely the grieving survivors,
15 were not present when the alcohol was served, and therefore had limited ability to
16 contest the motion without any discovery. The Court agreed with Dave & Buster's,
17 granted its Motion for Summary Judgment and certified the order per Rule 54(b).
18 This appeal follows.
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STATEMENT OF FACTS

On May 15, 2018, two Nevada citizens were killed by a drunk driver when stopped at a light and rear-ended at high speed. (AA459). Allegations of the complaint alleged facts which supported multiple different causes of action against Appellant Dave & Buster's of Nevada, Inc., (hereinafter "Dave & Buster's"). *Id.* The allegations included that Dave and Buster's committed a wrongful act, neglect or default under NRS 41.130, as a matter of law, for violation of codes making it illegal to serve alcohol to an intoxicated person. (AA002) Plaintiff's Complaint also alleged facts supporting causes of action against Dave & Buster's for negligence, gross negligence, willful and wanton misconduct, strict products liability, breach of express and implied warranties, acting in concert in an abnormally dangerous activity, negligent supervision and hiring. *Id.*

Specific facts that were alleged include, but were not limited to, that Dave & Buster's served alcohol to obviously intoxicated people, which was contrary to law and in violation of internal policies and procedures of Dave & Buster's which were designed for protection of guests. (AA014, 017-018) Further allegations were that that Dave & Buster's had a special relationship with the patrons that were over-served because they were frequent guests and that they were incentivized to drink at Dave & Buster's because there was no restriction on service and financial benefit was given. (AA005) Also, it was alleged that Dave & Buster's promotion

1 and service of alcohol in this instance was contrary to the level of responsible
2 service required of a liquor license holders in Clark County and that the patrons in
3 this instance were over served to the point where they could not make informed
4 decisions. (AA015) It was alleged that it was foreseeable that the over-served
5 patron would drive in an inebriated state. Further, the amended complaint
6 specifically alleged that Dave and Buster's failed in its duty to provide a safe
7 situation for its guests by failing to train and supervise employees, failing to
8 monitor and enforce responsible service of alcoholic beverages. (AA133) Further,
9 the complaint alleged that Defendants' actions were not protected by NRS 41.1305
10 as they were outside of simply the limited "serves, sells or otherwise furnishes"
11 alcoholic beverages and were violations of the county code and internal procedures
12 developed to protect third party guests. All of these allegations, and more, are
13 found in the Complaint and Amended Complaint in Appellants Appendix
14 Documents 1 and 7, both of which are in Volume I.

15
16 The initial Motion to Dismiss was denied on July 13, 2020. (AA074) On
17 renewed motion, the lower Court granted Dave & Buster's Motion to Dismiss on
18 all but one specific set of facts. (AA473) Thereafter, the Court granted Summary
19 Judgment to Dave & Buster's on that remaining set of facts without allowing
20 Plaintiffs to do adequate discovery. (AA507-509)

SUMMARY OF THE ARGUMENT

It is improper for a Court to dismiss a Complaint containing adequately pled causes of action against a liquor provider for wrongful act, neglect or default under NRS 41.130 for violation of codes making it illegal to serve alcohol to intoxicated persons. NRS 41.1305(1) cannot be interpreted as a complete bar to liability. This approach is contrary to the United States Constitution, the Nevada Constitution, and the legislative intent and essentially results in servers of alcohol having no regulation or requirement for responsible behavior. Such an interpretation incentivizes irresponsible service and promotion of alcohol which is detrimental to the Nevada public. There is no legitimate state purpose to be promoted by this broad grant of immunity to a particular industry to participate with the state in depriving certain of its citizens life, liberty, and the pursuit of happiness without due process of law.

The complaint alleged facts supporting causes of action against Dave & Buster's for wrongful act, neglect or default under NRS 41.130, negligence, gross negligence, willful and wanton misconduct, strict products liability, breach of express and implied warranties, acting in concert in an abnormally dangerous activity, negligent supervision and hiring. These multiple allegations in the complaint against Dave & Buster's alleged actions and inactions, some of which were wanton and willful misconduct, have resulted in liability under the common

1 law. See *Davies v. Butler*, 95 Nev. 763, 773 (Nev. 1980). The Motions to Dismiss
2
3 should not have been granted.

4 The lower court also should not have denied a request for discovery to
5 develop the record when the Plaintiffs (survivors of the victims) had no ability to
6 obtain the information other than through discovery. See NRCP 54(d). At the
7 outset of discovery, Dave & Buster's filed a Motion for Summary Judgment,
8 claiming no issues of fact existed with regard to anyone from Dave & Buster's
9 assisting the drunk driver to the vehicle he drove.¹ The summary judgment was
10 opposed by plaintiffs with evidence of violations of Dave & Buster's internal
11 protocols and statutes and a request for NRCP 56(d) relief since discovery had only
12 recently commenced. Plaintiffs alleged the conduct of disregarding internal
13 protocols pertaining to excessive service were at least as negligent as helping the
14 drunk driver to his vehicle. The Court should have allowed Plaintiffs the
15 opportunity to do discovery and develop the record with regard to the negligence of
16 Dave & Buster's. Plaintiff also requested discovery regarding legislative intent and
17 other information to develop an appropriate record for the constitutional challenge.
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¹ This is the one claim the Court allowed to proceed after the Motions to Dismiss were decided.

ARGUMENT

I. Standard of Review: *de novo*

There are three basic categories of decisions reviewable on appeal, each with its own standard of review: decisions on “questions of law” are “reviewable *de novo*,” decisions on “questions of fact” are “reviewable for clear error,” and decisions on “matters of discretion” are “reviewable for ‘abuse of discretion.’” *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

In this instance, the Court, in granting the alcohol server’s Motion to Dismiss and later granting the Motion for Summary Judgment without adequate discovery, has made errors of law, which are reviewable *de novo*. As the Court has previously recognized in a case with similar procedural posture:

The City's motion to dismiss Buzz Stew's complaint under NRCP 12(b)(5) "is subject to a rigorous standard of review on appeal." Accordingly, this court will recognize all factual allegations in Buzz Stew's complaint as true and draw all inferences in its favor. Buzz Stew's complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. We review the district court's legal conclusions *de novo*.” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (Nev. 2008).

In reviewing orders granting motions to dismiss, this court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. *Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993). In making its determination, this court is to accept

1 all factual allegations in the complaint as true. *Id.* at 792, 858 P.2d at 381 (citing
2 *Marcoz v. Summa Corporation*, 106 Nev. 737, 739, 801 P.2d 1346, 1347 (1990)).”
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4 *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 358 (Nev. 1999).

5 This Court also reviews a district court’s grant of summary judgment de
6 novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc.*,
7 121 P. 3d 1026 (2005). When reviewing a Motion for Summary Judgment, the
8 evidence and any reasonable inferences drawn from it must be viewed in light
9 most favorable to the nonmoving party. *Id.*, citing *Lipps v. Southern Nevada*
10 *Paving*, 116 Nev. 497, 498, 998 P.2d 1183, 1184 (2000) (citing *Butler v.*
11 *Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985)).

12 Finally, and perhaps most importantly, this case raises the issue of
13 constitutionality of an amended statute, as interpreted by the lower Court, which
14 is a pure question of law and the reviewing court must evaluate de novo and strive
15 to interpret harmoniously with the legislative intent.

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20 Statutory interpretation is a question of law that this court
21 reviews de novo. We interpret statutes in accordance with
22 their plain meaning and generally do not look beyond the
23 plain language of the statute absent ambiguity. Furthermore, "it is the duty of this court, when possible,
24 to interpret provisions within a common statutory scheme
25 'harmoniously with one another in accordance with the
26 general purpose of those statutes' and to avoid
27 unreasonable or absurd results, thereby giving effect to
28 the Legislature's intent." *Torrealba v. Kesmetis*, 124
Nev. 95, 101 (Nev. 2008).

It is clear that this court reviews questions of constitutional interpretation de

1 novo. *Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 392 P. 3d 614 (2017.)

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3 **II. Taking the allegations of the complaint as true, Plaintiffs alleged valid**
4 **causes of action against Dave & Buster's**

5 The allegations in the complaint against the alcohol server herein, Dave &
6 Buster's, alleged actions and inactions, some of which were wanton and willful
7 misconduct, which resulted in liability under the common law. See *Davies v.*
8 *Butler*, 95 Nev. 763, 773 (Nev. 1980). These allegations must be taken as true in
9 the evaluation of the Motions to Dismiss. We rigorously review NRCP 12(b)(5)
10 dismissals on appeal, presuming all factual allegations in the complaint as true and
11 drawing all inferences in the complainant's favor. *Patush v. Las Vegas Bistro, LLC*,
12 135 Nev. Adv. Op. 46 (2019), quoting, *Buzz Stew, LLC v. City of N. Las Vegas*, 124
13 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is appropriate "only if it
14 appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if
15 true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

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17 The complaint herein further alleges claims for negligence, gross negligence,
18 willful and wanton misconduct, strict products liability, breach of express and
19 implied warranties, acting in concert in an abnormally dangerous activity,
20 negligent supervision and hiring, and negligence per se. (AA080) NRS
21 41.1305(1), by its language, does not eliminate any of these causes of action
22 alleged in the complaint, nor give alcohol servers a carte blanche license to
23 over-serve and act irresponsibly in Nevada. Irresponsible service and access to
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1 alcohol often results in tragedy, which is why it is regulated. The statute **does not**
2 authorize serving alcohol to an already drunk individual, whether that person is a
3 minor or an adult. The plain language makes that clear. A statute must clearly
4 remove rights established under common law or the common law is still operative.
5 In the absence of statutory restrictions of the common law right . . . , then the
6 common law rule must prevail, and the question be determined by such rule only.
7 *Mandlebaum v. Gregovich*, 24 Nev. 154, 160 (Nev. 1897).
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11 The complaint and the amended complaint herein allege that Dave and
12 Buster's participated in willful and wanton misconduct, violated laws enacted to
13 protect the public, knew, facilitated and participated with a driver in driving drunk,
14 introduced a defective product into commerce, provided alcohol to an already
15 intoxicated person, failed to follow company policy established to protect the
16 public from the very harm that occurred, and that, acting in concert with a drunk
17 driver, deprived the Puentes of their lives. (AA Documents 1 and 7). As is apparent
18 from a review of the legislative history, NRS 41.1305(1) was not intended by the
19 legislature to eliminate or limit any common law causes of action, nor to restrict the
20 continuing development of the common law as it relates to these causes of action.
21 (AA 144-414). The Court **must construe** the pleadings liberally and accept all
22 factual allegations in the Complaint as true. *Blackjack Bonding v. City of Las Vegas*
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1 *Municipal Court*, 116 Nev. 1217 (2000). If the allegations within the complaints in
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3 this case are true, valid causes of action survive dismissal.

4 **III. NRS 41.1305 extends the common law and should be interpreted to**
5 **protect the citizens of Nevada.**

6 NRS 41.1305(1) has never been interpreted by a Nevada appellate court; but,
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8 if it is interpreted as a complete bar to all causes of action, it is unconstitutional.

9 In its entirety, the amended statute is as follows:

10 **NRS 41.1305 Liability of person who serves, sells**
11 **or furnishes alcoholic beverages for damages caused**
12 **as a result of consumption of alcoholic beverage: No**
13 **liability if person served is 21 years of age or older;**
14 **liability in certain circumstances if person served is**
under 21 years of age; exception to liability; damages,
attorney's fees and costs.

15 1. A person who serves, sells or otherwise
16 furnishes an alcoholic beverage to another person who is
17 21 years of age or older is not liable in a civil action for
18 any damages caused by the person to whom the alcoholic
19 beverage was served, sold or furnished as a result of the
20 consumption of the alcoholic beverage.

21 2. Except as otherwise provided in this section, a
22 person who:

23 (a) Knowingly serves, sells or otherwise furnishes
24 an alcoholic beverage to an underage person; or

25 (b) Knowingly allows an underage person to
26 consume an alcoholic beverage on premises or in a
27 conveyance belonging to the person or over which the
28 person has control,

È is liable in a civil action for any damages caused by the
underage person as a result of the consumption of the
alcoholic beverage.

3. The liability created pursuant to subsection 2
does not apply to a person who is licensed to serve, sell
or furnish alcoholic beverages or to a person who is an
employee or agent of such a person for any act or failure
to act that occurs during the course of business or
employment and any such act or failure to act may not be
used to establish proximate cause in a civil action and
does not constitute negligence per se.

1 4. A person who prevails in an action brought
2 pursuant to subsection 2 may recover the person's actual
3 damages, attorney's fees and costs and any punitive
4 damages that the facts may warrant.

5 5. As used in this section, "underage person"
6 means a person who is less than 21 years of age.

7 (Added to NRS by 1995, 2667; A 2007, 589)

8 The common law in Nevada did not provide for liability for merely serving or
9 even consuming alcohol appropriately. So, NRS 41.1305 was first passed in 1995
10 and the legislative history demonstrates that the act began as a typical dram shop
11 piece of legislation designed *to extend* the common law and hold retail liquor stores
12 liable for foreseeable damages caused by the sale or service of liquor. (AA
13 144-414)

14 The Nevada Resort Association² ("NRA" hereinafter) lobbied and obtained an
15 amendment that only purported to reflect the current law, as expressed by the
16 Nevada Supreme Court at that time, but it also specifically removed negligence per
17 se for serving an intoxicated person. Specifically, it stated that "The violation of
18 any penal statute, regulation or ordinance regulating the sale of service of alcoholic
19 beverages to an underage or intoxicated person ... shall not constitute negligence
20 per se...." The legislature went on to specifically say that the statute was NOT
21 meant to change the common law, but was "intended to affirm and codify the
22 common law of the State of Nevada." (AA262). In 1995, the NRA stated that an
23 innkeeper is not liable unless there is an absence of care for the safety of patrons
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² The NRA holds itself out to be "the primary advocacy voice for Nevada's gaming and resort industry." See www.nevadaresorts.org/about/

1 and others on the premises by employees acting within the scope of their
2 employment. (AA268).

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4 In 2007, when NRS 41.1305 was amended, the purpose of the amendment
5 was to *enlarge* liability for the service of alcohol. At its introduction as a bill, it was
6 explained “They were trying to determine the decree of culpability of each
7 individual involved--the server and the guest. Bars were held to a higher standard
8 than individuals. Bars are licensed, must obey certain laws and require training.”
9 (AA393) The main target was the social host because the alcohol retailer was
10 subject to the regulatory structure and prohibition by code and internal regulations.
11 (AA248). In addition to extending strict liability to social hosts, the amendment
12 also reinstated (the previously removed) negligence per se under the common
13 law---for **all persons** violating statutes, regulation or ordinances restricting the
14 providing of alcohol to any one who is already intoxicated. (AA413-414) This is
15 the very set of facts that killed the Puentes and it is not protected under the current
16 version of NRS 41.1305. The complaint contains allegations of these violations.
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22 The NRA specifically represented that the method that works to prevent
23 alcohol related deaths “is mandated server training which seeks to educate servers
24 of alcohol.” (AA196) The legislature relied on the NRA’s commitment to put
25 together a program “to serve as a model to the country for education and
26 awareness...” (AA183) The NRA also provided policies and procedures to the
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1 legislature that it promised would be followed to reduce the carnage on Nevada
2 highways. Some of the most interesting for our purposes here is Boyd Gaming's
3 instructions when encountering an intoxicated guest to "2.2 Attempt departure
4 delay or alternative transportation. 2.2.1 Comp in Coffee Shop (notify Beverage
5 Department of no further alcohol service) 2.2.2 Locate family/friends to transport
6 2.2.3 Taxi -- resort pays if necessary."(AA210)
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9 NRS 41.1305 has no language removing any common law causes of action
10 regarding alcohol. The statute did remove negligence per se resulting from failure
11 to comply with licensing statutes. Since its original enactment, there have been
12 several situations where the court found liability for servers of alcohol, over and
13 above the mere consumption of alcohol. In one case, the Defendant alcohol
14 provider argued that the only duty it owed to an intoxicated patron was to refrain
15 from willfully and wantonly injuring him. *Billingsley v. Stockmen's Hotel Inc.*, 111
16 Nev. 1033, 1037, 901 P.2d 141, 144 (1995). The Nevada Supreme Court disagreed,
17 and held that, while the court can consider intoxication and other factors in
18 determining reasonableness, proprietors have a duty to act reasonably toward
19 patrons. *Id. at 143.*
20
21

22 Likewise, it is axiomatic that whether or not Defendants were negligent in the
23 present case is a question of fact for a jury to decide. "...[F]oreseeability, duty,
24 **proximate cause** and reasonableness usually are questions of fact for the jury."
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1 *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970). A statute may be
2
3 used to define the duty owed by a provider of alcohol to others. Also, even in the
4
5 absence of dram shop legislation, the common law imposes liability on
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7 establishments that serve liquor based on ordinary negligence. *Alegria v. Payonk*,
8
9 619 P.2d 135, 137 (Idaho 1980). An establishment that serves liquor is not
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11 abrogated from claims of ordinary negligence. *Manuel v. Weitzman*, 191 N.W.2d
12
13 474 (1971). In a situation like the present, a jury should evaluate the totality of the
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15 circumstances and determine the culpability of the alcohol provider based upon the
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17 conduct that is alleged and proven at trial.

18
19 **IV. If interpreted as an absolute bar to all claims, NRS 41.1305 is unconstitutional.**

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21 The amended complaint herein further alleges that NRS 41.1305, if applied
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23 as the lower court has ruled, is unconstitutional as it allows the taking of a
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25 citizen's life, liberty or property without due process of law including the right to
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27 a trial by jury. The Fifth Amendment says to the federal government that no one
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shall be "deprived of life, liberty or property **without due process of law.**" The
Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the
Due Process Clause, to describe a **legal** obligation of all states. The Nevada
constitution Sec: 3. **Trial by jury; waiver in civil cases.** The right of trial by
Jury shall be secured to all and remain inviolate forever; but a Jury trial may be
waived by the parties in all civil cases in the manner to be prescribed by law; and

1 in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and
2 have the same force and effect as a verdict by the whole Jury. The Nevada
3 constitution Section 8. 2. **No person shall be deprived of life, liberty, or**
4 **property, without due process of law.**
5

6
7 This situation with NRS 41.1305 is in contrast to the medical malpractice
8 statutory scheme, which was recently determined to be constitutional because it
9 was determined to only *limit* damages, as opposed to being a complete bar. See
10 *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015). NRS
11 41.1305, as interpreted by the lower court here, is a **complete bar** to *any action*
12 against a commercial liquor provider for any and all damages, as long as at least
13 one drink was served to a patron. This is simply not the intent of the statute.
14
15

16 NRS 41.1305 differs from NRS 41A.035 (the challenged medical malpractice
17 statute in *Tam, Id.*) in two constitutionally fatal ways. First, the injured victims
18 subject to NRS 41.1305 have their right to damages completely removed, not just
19 their damages limited as was the case in NRS 41A.035. This violates the language
20 in *Tam* that to be unconstitutional “a statute must make the right practically
21 unavailable.” *Barrett v. Baird*, 111 Nev. 1496, 1502, 908 P.2d 689, 694 (1995)” *Tam*
22 *v. Eighth Judicial Dist. Court of State*, 358 P.3d 234, 238 (Nev. 2015). Here, by
23 dismissal of the various causes of actions pled (without even the benefit of
24 discovery), the Plaintiffs’ rights have been made wholly unavailable.
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1 Secondly, there is no legitimate governmental interest in protecting the
2 financial benefits of serving inebriated persons under NRS 41.1305. “To survive an
3 equal protection challenge, NRS 41A.035 need only be rationally related to a
4 legitimate governmental purpose.” *Tam v. Eighth Judicial Dist. Court of State*, 358
5 P.3d 234, 239 (Nev. 2015). Protecting the profits of bars is not a legitimate
6 governmental interest like that protected in *Tam*: “Based on this express goal, NRS
7 41A.035's aggregate cap on noneconomic damages is rationally related to the
8 legitimate governmental interest of ensuring that adequate and affordable health
9 care is available to Nevada's citizens.” *Tam, Id. at 239*.

10
11 Plaintiffs argued the statute does not authorize serving more than one
12 alcoholic beverage to an already drunk individual minor or adult. Dave & Buster's
13 alleged that NRS 41.1305 is a ***complete bar*** to all causes of action for licensees
14 legally providing alcohol in Nevada. (“[T]he correct standard for evaluating
15 whether a statute unconstitutionally restricts the right to a jury trial is that the right
16 must not be burdened by the imposition of onerous conditions, restrictions or
17 regulations which would make the right practically unavailable.” (internal
18 quotations omitted)), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17,
19 174 P.3d 970, 980 (2008), *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234,
20 238 (Nev. 2015).

1 As reflected by the positive response of an overwhelming majority of the
2
3 common law courts of this nation, there is a compelling need for the judiciary of
4 Nevada to provide its citizens and the users of its highways with relief from the
5 growing menace of intoxicated drivers.
6

7 Once again, the majority places greater emphasis on
8 economic concerns than on human life....This court will
9 have only so many opportunities to address the issues
10 raised in the instant case. **Each time we fail to act, we**
11 **assure the proliferation of needless human death and**
12 **suffering.** Since, in my humble opinion, we have far too
13 long perpetuated a condition that cries out for principled
14 remedies, partial though they may be, I am again forced
15 to dissent from the majority's most unfortunate act of
16 judicial forfeiture. *Dissent, Snyder v. Viani*, 110 Nev.
17 1339, 1348 (Nev. 1994)(emphasis added.)
18

19 We can realistically look to no other source than the Court for justice to be
20 served and the public to be protected. This court must recognize the fact that
21 irresponsible and negligent vendors of alcoholic beverages are priming people for
22 roles as drunken drivers who kill and maim innocent travelers on Nevada's
23 highways. Entire families are wiped out and destroyed by this menace and if the
24 current statute is interpreted as the lower court has done in this case, there is
25 absolutely no incentive for alcohol vendors to improve their awareness, training
26 and distribution of alcohol. In fact, the opposite is true, if the statute provides them
27 a limitless protective sheath, vendors are financially incentivized to over-serve as
28 much and as often as possible.

1 **V. NRS 41.130 provides for recovery and was sufficiently pled.**

2
3 The Nevada personal injury statute provides for recovery and was sufficiently
4 pled, so the Court should have allowed the case to proceed to discovery and trial.

5 The statute is as follows:

6
7 **NRS 41.130 Liability for personal injury.** Except
8 as otherwise provided in NRS 41.745, whenever any
9 person shall suffer personal injury by wrongful act,
10 neglect or default of another, the person causing the
11 injury is liable to the person injured for damages; and
12 where the person causing the injury is employed by
13 another person or corporation responsible for the conduct
14 of the person causing the injury, that other person or
15 corporation so responsible is liable to the person injured
16 for damages.[1911 CPA § 707; RL § 5649; NCL § 9196]
17 — (NRS A 1997, 1357)

18 In this case, assuming the facts most favorable to the Plaintiff, the employees
19 of Dave & Buster's knew exactly what was being done with the alcohol and what
20 the results of the ingestion of the alcohol were. (AA083-85) They violated Dave &
21 Buster's own policies and the statutorily required education they received, because
22 they knew, or at least should have known, that serving an intoxicated driver and his
23 passengers would "very probably" result in drunk driving and death. (AA100-101)
24 In fact, the allegations of the complaint are that Dave & Buster's were complicit
25 and enabled the drunk driving. (AA096) The employees should have foreseen a
26 drunk driving accident, and resulting injuries, based upon their actions. In fact, their
27 actions did result in two deaths that very evening. '"As long as the injuries
28

1 incurred were the reasonably foreseeable consequences of the tortfeasor's conduct .
2
3 . . the question of foreseeability. . . is for the trier of fact." *Crislip v. Holland*, 401
4 So.2d 1115, 1117 (Fla. 1981).

5 A negligence per se claim arises when a duty is created by statute. *Torrealba*
6 *v. Kesmetis*, 124 Nev. 95, 178 P.3d 716 (2008). A civil statute's violation establishes
7 the duty and breach elements of negligence when the injured party is in the class of
8 persons whom the statute is intended to protect and the injury is of the type against
9 which the statute is intended to protect. *Ashwood v. Clark County*, 113 Nev. 80, 86,
10 930 P.2d 740, 744 (1997); *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660
11 P.2d 1013, 1015 (1983)." *Sanchez v. Wal-Mart Stores*, 125 Nev. Adv. Op. No. 60,
12 47851 (2009), 221 P.3d 1276, 14 (Nev. 2009).

13
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16 Additionally, NRS 369 requires that restaurant and bar businesses in Nevada,
17 such as Dave & Buster's, have their employees certified in alcohol awareness
18 training that it is alleged instructs them to decline service to intoxicated persons.
19 Dave & Buster's breached its own company policy and the NRS 369 educational
20 directives against directing intoxicated patrons (and intended occupants) into their
21 vehicles, endangered the exact group of persons the policy and law were intended
22 to protect, and this constitutes further support for the claim of negligence against
23 Dave & Buster's here.
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1 **VI. Summary Judgment was improper because discovery was necessary and**
2 **provided for under the rules.**

3 Plaintiffs were the survivors of the decedents, who were innocent third parties
4 and therefore had no ability to provide sworn testimony, other than through
5 discovery, to contest the motion. When reviewing a district court's order granting
6 summary judgment, this court will determine "whether the law has been correctly
7 perceived and applied by the district court." *Mullis v. Nevada National Bank*, 98
8 Nev. 510, 512, 654 P.2d 533, 535 (1982). Additionally, summary judgment should
9 only be granted by a district court when, after reviewing the pleadings and
10 discovery on file, and viewing them in a light most favorable to the nonmoving
11 party, no genuine issue of material fact exists and the moving party is entitled to
12 judgment as a matter of law. *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d
13 662, 663 (1985); NRCP 56(c). "A genuine issue of material fact is one where the
14 evidence is such that a reasonable jury could return a verdict for the non-moving
15 party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).
16 Accordingly, we review the district court's decision de novo. *See Bulbman, Inc. v.*
17 *Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). Furthermore, in a
18 negligence action, the question of whether a "duty" to act exists is a question of law
19 solely to be determined by the court. *Scialabba v. Brandise Const. Co., Inc.*, 112
20 Nev. 965, 968, 921 P.2d 928, 930 (1996); *see also* W. Page Keeton et al., *Prosser*
21 *and Keeton on the Law of Torts* § 37, at 236 (5th ed. 1984). Therefore, under our de

1 novo standard of review, we must first determine whether "such a relation exists
2 between the parties that the community will impose a legal obligation upon one for
3 the benefit of the other." *Keeton et al.*, § 37, at 236.

4
5 In Nevada, as under the common law, strangers are generally under no duty
6 to aid those in peril. *Sims v. General Telephone Electric*, 107 Nev. 516, 525, 815
7 P.2d 151, 157 (1991). This court, however, has stated that, where a special
8 relationship exists between the parties, such as with an innkeeper-guest,
9 teacher-student or employer-employee, an affirmative duty to aid others in peril is
10 imposed by law. *See id.* at 526, 815 P.2d at 157-58 (citing *Keeton et al.*, § 56, at
11 376). Likewise, we have held that a party who is in "'control of the premises' is
12 required to take reasonable affirmative steps to aid the party in peril." *Id.* at 526,
13 815 P.2d at 158 (*quoting Keeton et al.*, § 56, at 376). Finally, while this court has
14 not so held, other jurisdictions have expressly stated that restaurant owners and
15 their employees owe an affirmative duty to come to the aid of patrons who become
16 ill or are otherwise in need of medical attention. *See Breaux v. Gino's, Inc.*, 200
17 Cal. Rptr. 260, 261 (Ct.App. 1984) ("It is well established that restaurants have a
18 legal duty to come to the assistance of their customers who become ill or need
19 medical attention. . . ."); *Drew v. LeJay's Sportsmen's Cafe, Inc.*, 806 P.2d 301, 306
20 (Wyo. 1991) ("A restaurant whose employees are reasonably on notice that a
21 customer is in distress and in need of emergency medical attention has a legal duty
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1 to come to the assistance of that customer.".)” *Lee v. GNLV Corp.*, 117 Nev. 291,
2 295-96 (Nev. 2001). It follows that a restaurant, which is serving alcohol, has a
3 legal duty to assist their customers who are inebriated and incapable of making
4 decisions and to take steps to prevent over-service of alcoholic beverages.
5

6
7 It is unjust and improper to deny a request for discovery to develop the record
8 when the plaintiffs had no ability to obtain the information except through
9 comprehensive discovery. Following very little exchange of evidence and
10 information, and within the same month of answering the complaint, Dave &
11 Buster’s filed a Motion for Summary Judgment. (AA447 and AA454) Dave &
12 Buster’s claimed no issues of fact with regard to anyone from Dave & Buster’s
13 assisting Mr. Aparicio to the vehicle he drove. The summary judgment was
14 opposed by plaintiffs with evidence of violations by Dave & Buster’s of internal
15 protocols and statutes. (AA480-495) Plaintiffs argued that such action was at least
16 as negligent as helping the driver to his vehicle. Plaintiffs also requested NRC
17 56(d) relief and presented a declaration of counsel since discovery had just begun
18 and the Plaintiffs were the survivors of the decedents---innocent third parties.
19 (AA491) Plaintiffs had no knowledge, other than through discovery, to contest the
20 motion with affidavits but only through compelled sworn testimony. *Id.* The Court
21 denied the requested discovery, agreed with Dave & Buster’s, granted its Motion
22 for Summary Judgment and certified the order per Rule 54(b). (AA507)
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1 NRCP 56(d), formerly NRCP 56(f), allows a party more time to gather
2 evidence to oppose a summary judgment motion if the party needs additional time
3 to gather evidence to challenge the motion for summary judgment. The Nevada
4 Supreme Court has interpreted Rule 56(f) as follows:
5

6
7 NRCP 56(f) permits a district court to grant a
8 continuance when a party opposing a motion for
9 summary judgment is unable to marshal *118 facts in
10 support of its opposition.² A district court's decision to
11 refuse such a continuance is reviewed for abuse of
12 discretion.³ Furthermore, a motion for a continuance
13 under NRCP 56(f) is appropriate only when the movant
14 expresses how further discovery will lead to the creation
15 of a genuine issue of material fact.⁴ In *Halimi v.*
16 *Blacketor*, this court concluded that a district court had
17 abused its discretion when it denied an NRCP 56(f)
18 motion for a continuance and granted summary judgment
19 in a case where the complaint had been filed only a year
20 before summary judgment was granted.⁵ This court
21 noted that summary judgment is improper when a party
22 seeks additional time to conduct discovery to compile
23 facts to oppose the motion.⁶ Furthermore, this court held
24 that when no dilatory motive was shown, it was an abuse
25 of discretion to refuse a request for further discovery at
26 such an early stage in the proceedings. *Aviation Ventures,*
27 *Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117–18, 110 P.3d
28 59, 62 (2005).

29 In the instant case, Plaintiffs initially defended two Motions to Dismiss before
30 Dave & Buster's answered the amended complaint on December 2, 2020. (AA447)
31 The very next day, December 3, 2020, the Motion for Summary Judgment was
32 filed. (AA453). No written discovery was propounded nor depositions taken.
33 (AA491)

1 Appellants herein did not have the benefit of discovery to determine the names
2
3 of the bartenders, their employment history, their training, their reprimands, the
4 rules and regulations they operate under, their knowledge, what they observed,
5 what drinks were served, what promotions were being offered, what warnings were
6 provided, what the condition of the product was, what the internal video
7 surveillance shows. etc. Allegations of improper and illegal activities were made in
8 the complaint.
9
10

11 CONCLUSION

12 This Court should remand the case and instruct the District Court to allow the
13 case to proceed through discovery and trial against Dave & Buster's.
14

15 Dated this 9th day of August 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared proportionally spaced using 14 point double spaced Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts exempted, it does not exceed 30 pages.

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, including NRAP 28(e)(1) which requires each assertion regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied upon may 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

1 NRAP.
2

3 Dated this 9th day of August 2021.

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14 **CERTIFICATE OF SERVICE**

15 I hereby certify that service of the foregoing Opening Brief was made this 9th
16 day of August, 2021, by electronic service through the Nevada Supreme Court's
17 electronic filing system to all registered users.
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