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**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.

Electronically Filed  
Aug 09 2021 08:54 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
**Supreme Court No. 82554**  
Appeal of  
District Court No. A813787

**APPENDIX TO APPELLANTS' OPENING BRIEF**

**VOLUME 1**

CHRISTENSEN LAW OFFICES, LLC.  
THOMAS F. CHRISTENSEN, ESQ.  
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**ALPHABETICAL INDEX TO APPELLANTS' APPENDIX**

<b>Document</b>	<b>Date</b>	<b>Bates No.</b>	<b>Vol.</b>
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Answer to Amended Complaint	12/2/2020	AA446-452	<b>2</b>
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Renewed Motion to Dismiss	8/14/2020	AA105-119	<b>1</b>
Reply in Support of Motion for Summary Judgment	12/28/2020	AA496-501	<b>3</b>
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**VOLUME I**

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1	Complaint	4/17/2020	AA001-022
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3	Opposition to Motion to Dismiss	6/9/2020	AA033-058
4	Reply in Support of Motion to Dismiss	6/24/2020	AA059-068
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7	Amended Complaint	8/7/2020	AA079-104
8	Renewed Motion to Dismiss	8/14/2020	AA105-119
9	Opposition to Renewed Motion to Dismiss	9/2/2020	AA120-242

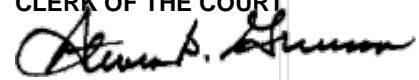
**VOLUME II**

#	Document	Date	Bates No.
9	(continued from Volume I) Opposition to Renewed Motion to Dismiss	9/2/2020	AA243-414
10	Reply re Renewed Motion to Dismiss	9/9/2020	AA415-426
11	Minutes of Hearing	9/16/2020	AA427-429
12	Transcript of Hearing 9/16/2020	10/21/2020	AA430-445
13	Answer to Amended Complaint	12/2/2020	AA446-452
14	Motion for Summary Judgment	12/3/2020	AA453-467
15	Order	12/15/2020	AA468-478

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#	Document	Date	Bates No.
16	Opposition to Motion for Summary Judgment	12/17/2020	AA479-495
17	Reply re: Motion for Summary Jdmt	12/28/2020	AA496-501
18	Minutes of Hearing	1/13/2020	AA502-503
19	Order	1/26/2021	AA504-509
20	Notice of Appeal	2/24/2021	AA510-512
21	Transcript of Hearing 7/1/2020	8/9/2021	AA513-524
22	Transcript of Hearing 1/13/2021	8/9/2021	AA525-536

## **#1: Complaint**



CASE NO: A-20-813787-C  
Department 18

**COMP**

THOMAS F. CHRISTENSEN, ESQ.  
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CHRISTENSEN LAW OFFICES, LLC  
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**DISTRICT COURT  
CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio, Morgan Hurley, Dave  
& Buster's of Nevada, Inc dba Dave & Buster's;  
Dave & Buster's Inc; MAT-SUMMERLIN LLC,  
dba Casa del Matador Summerlin; MATADOR  
INVESTMENTS, LLC; OPPEL MELANG 5410,  
LLC; MEL-OPP & GRIFF, LLC; OPP MEL &  
GRIFF, INC.; MOCORE, LLC; DOES I - V, and  
ROE CORPORATIONS I - V, ROE  
MANUFACTURER I - V; ROE WHOLESALER,  
I - V; ROE RETAILER, I - V;

Defendants.

CASE NO:  
DEPT. NO:

**COMPLAINT**

(Exempt from Arbitration;  
amount in controversy  
Exceeds \$50,000.00 and claim  
for declaratory relief)

COME NOW the Plaintiffs, Damaso S. Puente, individually and on behalf of the Estate of  
Damaso I. Puente, Maria Puente, Diane Malone, individually and on behalf of the Estate of  
Christa Puente, and Daniel Malone, by and through Plaintiffs' attorney, THOMAS  
CHRISTENSEN, of the law firm of CHRISTENSEN LAW OFFICES, and complain against the  
Defendants, and each of them, as follows:

AA002

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**I. PARTIES/JURISDICTION**

1. Upon information and belief, that at all times relevant to this action, the Defendant, Henry Biderman Aparicio, was a resident of Clark County, Nevada.

2. Upon information and belief, that at all times relevant to this action, the Defendant, Morgan Hurley, was a resident of Clark County, Nevada.

3. Upon information and belief, that at all times relevant to this action, the Defendant, MAT-SUMMERLIN LLC dba Casa del Matador Summerlin, was a business located in Clark County, Nevada.

4. Upon information and belief, that at all times relevant to this action, the Defendant, Dave & Buster's of Nevada, Inc. dba Dave & Buster's, was a business located in Clark County, Nevada.

5. That Plaintiff Damaso S. Puente is the Special Administrator of the Estate of Damaso I. Puente, who died in Clark County, Nevada.

6. That Damaso S. Puente and Maria Puente, at all times relevant to this action were the parents of and are the heirs of Decedent Damaso I. Puente.

7. That Plaintiff Diane Malone is the Special Administrator of the Estate of Christa Puente, who died in Clark County, Nevada.

8. That Daniel Malone and Diane Malone, at all times relevant to this action were the parents of and are the heirs of Decedent Christa Puente.

9. Upon information and belief, MAT-SUMMERLIN, LLC is and was a business entity registered in the State of Nevada and in the State of Washington, doing business as Casa del Matador in Clark County, Nevada.

10. That Defendants MATADOR INVESTMENTS, LLC; OPPEL MELANG 5410, LLC; MEL-OPP & GRIFF, LLC; OPP MEL & GRIFF, INC.; MOCORE, LLC; MATADOR



1 INVESTMENTS, LLC; OPPEL MELANG 5410, LLC; MEL-OPP & GRIFF, LLC; OPP MEL  
2 & GRIFF, INC.; MOCORE, LLC; are Washington State and/or Nevada entities doing business  
3 as Casa del Matador and/or El Matador (hereinafter collectively referred to as “Matador”) in and  
4 subject to the laws of the State of Washington and doing business in and subject to the laws of  
5 the State of Nevada.

7 11. That Defendant Dave & Buster’s of Nevada, Inc. is a Delaware Corporation, registered  
8 as a foreign Corporation and doing business in and subject to the laws of the State of Nevada;  
9 Dave & Buster’s, Inc is a Texas State entity doing business in and subject to the laws of the  
10 State of Texas and doing business in and subject to the laws of the State of Nevada.

12 12. That the true names and capacities, whether individual, corporate, partnership, associate  
13 or otherwise, of Defendants DOES I through V, and ROES I through V, ROE  
14 MANUFACTURER I - V; ROE WHOLESALER, I - V; ROE RETAILER, I - V; are unknown  
15 to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiffs are  
16 informed and believe and thereon allege that each of the Defendants designated herein as DOE,  
17 ROE, ROE MANUFACTURER I - V; ROE WHOLESALER, I - V; ROE RETAILER, I - V is  
18 responsible in some manner for the events and happenings referred to and caused damages  
19 proximately to Plaintiffs as herein alleged, and that Plaintiffs will ask leave of this Court to  
20 amend this Complaint to insert the true names and capacities of DOES I through V and ROES I  
21 through V, ROE MANUFACTURER I - V; ROE WHOLESALER, I - V; ROE RETAILER, I -  
22 V when the same have been ascertained, and to join such Defendants in this action.

## 24 II. GENERAL ALLEGATIONS

25 13. Upon information and belief, at all times relevant hereto, Defendant Henry Biderman  
26 Aparicio was the operator and Defendant Morgan Hurley was the owner of a certain 2014  
27 Mercedes-Benz, Nevada license plate number UNLV16935 (hereinafter referred to as  
28

1 "Defendant's Vehicle"). He was operating the vehicle with the knowledge and consent of  
2 Defendant Morgan Hurley and in carrying out a joint venture common purpose.

3  
4 14. At all times relevant hereto, Decedent Damaso I. Puente was the operator of, and  
5 Christa Puente was a passenger in, a certain 2010 Toyota Prius, Nevada license plate number  
6 240ATX (hereinafter referred to as "Plaintiff's Vehicle").

7 15. On May 15, 2018 at approximately 9:08 pm, Defendant Henry Biderman Aparicio was  
8 operating the Defendant's Vehicle with the consent of Morgan Hurley for a common purpose in  
9 an eastbound direction on W. Sahara Ave approaching the intersection of S. Hualapai Way,  
10 located in Clark County, Nevada.

11  
12 16. Plaintiffs are informed and thereon allege, that on the date and time as set forth in the  
13 preceding paragraph, Plaintiff's vehicle was stopped for a red light in the first eastbound travel  
14 lane of West Sahara Ave., at its intersection with Hualapai Way.

15 17. On or about May 15, 2018, Defendant Henry Biderman Aparicio, acting in the course  
16 and scope of his employment with Defendants and each of them, did carelessly and negligently  
17 operate Defendant's vehicle so as to cause the same to collide with the rear of Plaintiff's vehicle  
18 while far exceeding the posted speed of 45 mph (hereinafter "the crash.")

19  
20 18. At the time of the crash, Defendant Henry Biderman Aparicio was driving under the  
21 influence of alcohol .204 Blood Alcohol Content per blood test performed by LVMPD, which  
22 was obtained at 1:47am and was 4 hours and 40 minutes after the crash. with such an elevated  
23 B.AC. the Defendant showed signs of sedation, loss of memory and lack of comprehension,  
24 delayed motor reactions, balance problems, blurred vision and sensation impairment, at the time  
25 of the crash

26  
27 19. Immediately prior to the crash, Defendant Henry Biderman Aparicio and Morgan  
28 Hurley, acting in concert and as part of a joint venture, consumed alcohol on the premises of the

1 business of other named Defendants as a result of the Defendants illegal dangerous activities and  
2 without being warned of the dangerous product.  
3

4 20. On May 15th, 2018, Defendant Henry Biderman Aparicio consumed at least 13 tequila  
5 based alcoholic beverages in 3 hours and 15 minutes, before colliding with the Plaintiffs'  
6 vehicle.

7 21. Defendant Aparicio with the knowledge and consent of Morgan Hurley willfully  
8 consumed alcohol while knowing that he would later operate a motor vehicle.

9 22. Defendants, and each of them, promoted and encouraged the acts of the other  
10 Defendants.  
11

12 23. Defendant did not eat food during the time he consumed alcoholic drinks.

13 24. Plaintiffs are informed and thereon allege that Henry Biderman Aparicio was employed  
14 by Casa Del Matador and that five of the beverages were consumed at Casa Del Matador just  
15 prior to the crash.

16 25. At the time Defendant was served at Casa Del Matador, he was obviously intoxicated  
17 within the meaning of Clark County Ordinance 8.20.300 and Washington Code RCW 66.44.200  
18 (1). Morgan Hurley and Aparicio's co-employees knew he was intoxicated and knowingly  
19 conspired to violate company policy and the law by providing alcohol to an intoxicated person.  
20

21 26. Defendant Aparicio was served alcoholic drinks despite his obvious intoxication  
22 because he was an employee and was given preferential treatment; he and his joint venturer,  
23 Defendant Morgan Hurley, were served drinks until Defendant Hurley fell off her barstool due to  
24 her drunken state and Defendant Aparicio staggered to the vehicle in the parking lot with the aid  
25 of fellow employees. Defendants continued alcohol service because Aparicio and Hurley were  
26 known by Aparicio's co-workers and given preferential treatment in violation of company policy  
27 due to Aparicio's employment status at Casa Del Matador.  
28

1 27. On or about January 11, 2018, and at other times and in similar ways, Casa del Matador  
2 Summerlin used a photograph of Aparicio, holding a bottle of Tequila, advertising happy hour  
3 on social media.  
4

5 28. On or about January 15, 2018 and at other times and in similar ways Casa del Matador  
6 Summerlin posted on Instagram: "Start your week right with our bottomless MONDAYS!!! All  
7 you can eat tacos and Margaritas for \$25. #tequila #tgifridays #mondays #tacos #mlkweekend  
8 #downtownsummerlin".  
9

10 29. On or about July 13, 2018 and at other times and in similar ways, Casa del Matador  
11 Summerlin posted on Instagram a picture with the caption "You have 10 minutes to drink 30  
12 tequila shots...who's your team?"

13 30. The Plaintiffs have been required to retain the law firm of Christensen Law Offices, LLC  
14 to prosecute this action, and are entitled to a reasonable attorney's fee.  
15

### 16 **III. CAUSES OF ACTION**

#### 17 **FIRST CAUSE OF ACTION**

18 31. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
19 paragraphs and incorporate the same herein by reference.

20 32. Defendants, and each of them, owed a duty of care to Plaintiffs.

21 33. Defendants, and each of them, breached the duty of care owed to Plaintiffs.

22 34. Defendants, and each of them, were negligent so as to proximately cause the crash  
23 described herein which resulted in the deaths of Damaso I. Puente and Christa Puente.

24 35. That, at all times mentioned herein, Defendants acted recklessly, maliciously and  
25 willfully, as set forth herein, whereupon Defendants breached their duty of care.  
26

27 36. That as a direct and proximate result of the aforesaid negligence and/ or reckless,  
28 malicious and willful acts of Defendants, and each of them, Decedents Damaso I. Puente and

1 Christa Puente sustained grievous and serious personal injuries and damages, which caused their  
2 deaths.

3  
4 37. At the time of the crash herein complained of, and immediately prior thereto, Defendant,  
5 Henry Biderman Aparicio, and/or Defendant Morgan Hurley and each of the defendants in  
6 breaching a duty owed to Plaintiffs, and each of them, were negligent and careless, inter alia, in  
7 the following particulars:

- 8 a. In failing to keep Defendant's vehicle under proper control;  
9  
10 b. In operating Defendant's vehicle without due caution for the rights of Decedents;  
11  
12 c. In failing to keep a proper lookout for Decedents;  
13  
14 d. In driving recklessly and with reckless disregard for the safety of Damaso I and Christa  
15 Puente;  
16  
17 e. In operating the Defendant's vehicle under the influence of alcohol and/or other controlled  
18 or prescribed substances;  
19  
20 f. In entrusting the vehicle to the driver of the vehicle; and  
21  
22 g. In violating certain Nevada revised statutes and Clark County Ordinances, including but  
23 not limited to NRS 484.377, 484.379 and 484.3795; the Plaintiffs will pray leave of  
24 Court to insert additional statutes or ordinances at the time of trial.

25 38. Defendant was convicted of the crime of driving under the influence and reckless driving  
26 and is therefore civilly liable under NRS 41.133 for all damages caused pursuant to Nevada law.

## 27 **SECOND CAUSE OF ACTION**

28 39. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
paragraphs and incorporate the same herein by reference.

////

1 40. That at the time of the crash herein complained of, and immediately prior thereto,  
2 Defendant Morgan Hurley, in breaching a duty owed to the Plaintiffs, was negligent and  
3 careless, inter alia, in the following particulars:  
4

- 5 a. In failing to properly maintain the Defendant's Vehicle;  
6 b. In negligently entrusting the Defendant's Vehicle to Defendant Aparicio;  
7 c. Vicarious liability through operation of NRS 41.440; and  
8 d. The Defendant violated certain state and local statutes, rules, regulations, codes and  
9 ordinances, and the Plaintiff will pray leave of Court to insert the exact citations at the time  
10 of trial.  
11

12 41. Alternatively, Plaintiffs allege Defendant Hurley was the driver in the crash.

13 **THIRD CAUSE OF ACTION**

14 42. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
15 paragraphs and incorporate the same herein by reference.

16 43. Defendants, in concert with each other, carried on an abnormally dangerous activity that  
17 risked harm to the person of Decedent, which was foreseeable even if reasonable care had been  
18 used.  
19

20 44. The carrying on of this activity resulted in harm to the person of the Decedents.

21 **FOURTH CAUSE OF ACTION**

22 45. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
23 paragraphs and incorporate the same herein by reference.

24 ////

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26 ////

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1 46. Defendant ROE RETAILER is an unknown entity engaged in the business of selling  
2 tequila and other alcoholic beverages at retail and was and is the distributor, retailer and/or seller  
3 of the tequila and other alcoholic beverages and as such did transport, ship, introduce and/or  
4 cause said product to be introduced into the State of Nevada, the State of Washington, and other  
5 states, for the purpose of its sale, distribution and/or use within the State of Nevada, the State of  
6 Washington and other states.

7  
8 47. Defendants, and each of them, expected the tequila and other alcoholic beverages so sold  
9 to reach consumers or users in the condition in which it was sold.

10  
11 48. Defendant Aparicio either purchased or was provided with tequila and other alcoholic  
12 beverages from ROE RETAILER for a drink and actually used the tequila and other alcoholic  
13 beverages as a drink, and Aparicio's use and manner of use of the tequila and other alcoholic  
14 beverages was reasonably foreseeable by the Defendants, and each of them.

15 49. Plaintiff is informed and believes, and in reliance thereon alleges, that the tequila and  
16 other alcoholic beverages were then and there in the condition existing when Defendant ROE  
17 MANUFACTURER sold and/or delivered it to Defendant ROE WHOLESALER, and in the same  
18 condition existing when Defendant ROE WHOLESALER sold and/or delivered it to ROE  
19 RETAILER.  
20

21 50. Plaintiff is informed and believes, and in reliance thereon alleges, that the same condition  
22 of the product existed when Defendant ROE RETAILER sold and/or delivered the tequila and  
23 other alcoholic beverages to Aparicio, and the condition of the product remained unchanged  
24 when Aparicio used the product which resulted in injuries and damages because of the  
25 unreasonably dangerous condition of the product.  
26

27 ///

28 ///

1 51. When Plaintiffs sustained the injuries hereinafter alleged, the tequila and other alcoholic  
2 beverages were in a defective condition and were unreasonably dangerous to a user or consumer  
3 in that the tequila was defective and unreasonably dangerous.  
4

5 52. Defendants, and each of them, knew or through the exercise of reasonable care and  
6 diligence, should have known of such defective and unreasonably dangerous conditions.  
7

8 53. Plaintiffs relied on the duty of Defendants, and each of them, to deliver the tequila and  
9 other alcoholic beverages at the time of sale and/or delivery by each in a condition fit for use for  
10 the purpose intended. The tequila and other alcoholic beverages were defective, unreasonably  
11 dangerous, and were in fact not fit for the purposes and uses for which they were intended.  
12

13 54. The breach of such duty by Defendants, and each of them, and such defective condition of  
14 the tequila and other alcoholic beverages, were a proximate cause of the injuries sustained by  
15 Plaintiff.  
16

17 55. By reason of the premises and as a direct and proximate result of all of the foregoing,  
18 Defendants, and each of them, are strictly liable to Plaintiff for the injuries and damages  
19 hereinabove set forth.  
20

21 56. Defendants, and each of them, owed a duty to all persons who could reasonably be  
22 foreseen to use the tequila and other alcoholic beverages or be injured as a result of the use of the  
23 tequila and other alcoholic beverages, and such a duty was specifically owed to Plaintiff.  
24

25 57. Defendants, and each of them, breached a duty owed to the Plaintiff consisting of, among  
26 other things, the following:  
27

- 28 a. Failure to warn by statement on the product, in the instruction booklet, or otherwise, of the  
unreasonably dangerous conditions of the tequila and other alcoholic beverages;

////

////



- 1 b. Failure to properly design the tequila and other alcoholic beverages in such a manner as to  
2 avoid or minimize the unreasonable danger to users of the tequila and other alcoholic  
3 beverages;  
4  
5 c. Failure to properly and adequately test and inspect the tequila and other alcoholic  
6 beverages to ascertain its unreasonably dangerous condition; Failure to give adequate  
7 instructions regarding the safe use of the tequila and other alcoholic beverages; i.e. Tequila  
8 and other alcoholic beverages should not be consumed on an empty stomach, should not  
9 be consumed quickly, designed to be sipped and not taken in shot form. Failure to use due  
10 care to avoid misrepresentations, cannot operate machinery.  
11

12 58. As a direct and proximate result of the actions and inactions of Defendants, and each  
13 of them, Plaintiffs were caused to suffer the injuries and damages hereinabove set forth.

14 59. The Alcoholic Beverage Labeling Act (ABLA) of The Anti-Drug Abuse Act of  
15 1988, enacted November 18, 1988, is United States federal law requiring that (among other  
16 provisions) the labels of alcoholic beverages carry a government warning. The warning reads: (1)  
17 According to the Surgeon General,... (2) Consumption of alcoholic beverages impairs your ability  
18 to drive a car or to operate machinery ....; The ABLA also contains a declaration of policy and  
19 purpose, which states the United States Congress finds that: The American public should be  
20 informed about the health hazards that may result from the consumption or abuse of alcoholic  
21 beverages, and has determined that it would be beneficial to provide a clear, non-confusing  
22 reminder of such hazards, and that there is a need for national uniformity in such reminders in  
23 order to avoid the promulgation of incorrect or misleading information and to minimize burdens  
24 on interstate commerce.  
25

26 60. Defendants, and each of them, placed on the market a defective product.  
27

28 61. Decedents' deaths were caused by the defect in the product.

1           62.     Such defects existed when the product left the hands of the Defendants and each of  
2 them.

3  
4           63.     It is unreasonably dangerous to place the product in the hands of a consumer without  
5 adequate warning concerning its safe and proper use.

6           64.     As a direct and proximate result of the defective product, Plaintiffs have been  
7 deprived of the services, assistance, comfort, society, support maintenance, and companionship of  
8 Damaso I. Puente and Christa Puente, and were caused great emotional damage and injury in an  
9 amount to be more specifically determined at the time of trial, but which is an amount in excess  
10 of \$15,000.00.

11  
12           65.     As a direct and proximate result of the defective product, Damaso I. Puente and  
13 Christa Puente were caused great pain and suffering in an amount to be more specifically  
14 determined at trial, but which is an amount in excess of \$15,000.00.

15  
16                               **FIFTH CAUSE OF ACTION**

17           66.     Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
18 paragraphs and incorporate the same herein by reference.

19           67.     Prior to the purchase or use of the tequila and other alcoholic beverages, Defendants,  
20 and each of them, in order to induce the purchase or use of the tequila and other alcoholic  
21 beverages, provided express warranties and representations, including, but not limited to, the  
22 warranty that the products were fit for use for the purpose intended.

23           68.     The tequila and other alcoholic beverages were purchased and/or used in reliance on  
24 said express warranties and representations.

25           69.     Said tequila and other alcoholic beverages were defective and unreasonably  
26 dangerous, were not fit for the purposes and uses for which they were intended, and were not of  
27 merchantable quality.  
28

70. As a direct and proximate result of the breach of express warranties and representations by the Defendants, and each of them, Plaintiff was caused to suffer the injuries and damages as herein set forth.

## SIXTH CAUSE OF ACTION

71. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

72. Defendants, and each of them, impliedly warranted that the tequila and other alcoholic beverages were fit for use for the purpose for which they were designed, and that the tequila and other alcoholic beverages were fit and suitable for the use in fact made by Aparicio.

73. In purchasing and using the tequila and other alcoholic beverages, Aparicio relied on the skill and judgment of Defendants, and each of them, and the implied warranty of fitness for the purpose for which Aparicio purchased and/or used the tequila and other alcoholic beverages.

74. The tequila and other alcoholic beverages were not fit for use for its intended purpose and Defendants, and each of them, breached the implied warranty of fitness.

75. As a direct and proximate result of the breach of implied warranty of fitness by Defendants, and each of them, Plaintiffs were caused to suffer said injuries and damages herein set forth.

## SEVENTH CAUSE OF ACTION

76. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

77. The Defendants, and each of them, promoted a dangerous activity with a complete lack of disregard for the safety of the community in which they live and do business.

78. The Defendants, and each of them, were promoting and encouraging drinking and driving.

1           79.     There is a special relationship between the Defendants and Defendant Aparicio;  
2 the harm created by Aparicio's conduct is foreseeable.

3  
4           80.     Defendants condone bartenders to do shots with customers.

5           81.     Defendants, and each of them, failed to warn or take steps to provide transportation  
6 for competitors in any of these drinking challenges.

7  
8                               **EIGHTH CAUSE OF ACTION**

9           82.     Defendants, and each of them, were negligent and careless in failing to adequately  
10 investigate the background, personality traits and work history of their employees, and each of  
11 them, subsequent to hiring.

12           83.     Defendants, in the exercise of ordinary care, should have known of the individual  
13 employees' unfitness to act as responsible employees and should not have hired/retained the  
14 employees.

15           84.     Defendants, and each of them, failed to adopt and administer adequate procedures to  
16 protect third parties.

17           85.     Defendants, and each of them, failed to evaluate, supervise and/or investigate factual  
18 indications which suggested that overserving and/or serving to employees would create risks to  
19 third parties.

20  
21           86.     Defendants, and each of them, failed to reasonably supervisor or monitor service of  
22 alcoholic beverages to ensure adequate safety precautions were taken and to recognize and  
23 evaluate potential risks to third parties.

24           87.     Defendants, and each of them was negligent and careless in failing to adequately  
25 train and educate its employees on the dangers of serving intoxicated co-workers, patrons and  
26 friends.  
27  
28

1 88. Defendants, and each of them, failed to adequately evaluate, supervise and/or  
2 investigate activities on its premises that indicated danger to society.

3  
4 89. Defendants, and each of them, failed to use reasonable care to protect third parties  
5 from risk.

6 90. At all times material to this complaint, Defendant Henry Biderman Aparicio was  
7 employed at Casa Del Matador working behind the bar. Defendant Casa Del Matador, and DOE  
8 1-2 knew or should have known that this Defendant exhibited known vicious, dangerous, and  
9 lawless propensities that posed a substantial risk of harm to the public. These known propensities  
10 included:

- 11  
12 a. Arrest for drug use;  
13 b. Reckless driving on the wrong side of the road;  
14 c. Arrest for carrying a concealed weapon around schools;  
15 d. Social media posts indicating a contempt for the law and law enforcement

16 91. At all times complained of, Morgan Hurley, Casa Del Matador and its employees  
17 acted in concert with Defendant Aparicio. Due to Aparicio's employment relationship with Casa  
18 Del Matador, Defendants escorted him out of the establishment and looked in on him while in  
19 his vehicle in the parking lot, knowing that Aparicio was going to operate a motor vehicle on a  
20 public roadway while intoxicated in violation of State Law.

21  
22 92. Defendants Casa Del Matador and their employees violated their duty of care by:

- 23 a. Affirmatively aiding a severely intoxicated person to operate a motor vehicle;  
24 b. Affirmatively participating in the commission of a crime;  
25 c. Failing to render aid to a severely intoxicated person unable to safely operate a  
26 motor vehicle;  
27 d. Failing to obtain transportation for Defendant Aparicio and Hurley;  
28

1 e. Failing to call the police to prevent a crime.

2 93. As a direct and proximate result of the conduct of Defendants and Henry Biderman  
3 Aparicio's employment at Casa Del Matador, Damaso I. Puente and Christa Puente were killed,  
4 all to Plaintiffs' damages as are hereinafter alleged.  
5

6 94. The Defendants, and each of them, under the doctrine of respondeat superior, are  
7 liable to the Plaintiffs for their damages caused by the Defendant Aparicio.

8 95. The actions of Defendants, and each of them, in this matter have been intentional,  
9 fraudulent, malicious, oppressive, reckless, and in conscious disregard of Plaintiffs' rights and  
10 therefore Plaintiffs are entitled to punitive damages in an amount in excess of Fifteen Thousand  
11 Dollars (\$15,000.00).  
12

13 96. Casa Del Matador knew or should have known that Defendant was not fit for the  
14 employment and was a danger to others and still employed Aparicio. Defendant breached a duty  
15 in hiring an employee knowing or should have known of dangerous propensities. Matador and  
16 Casa Del Matador ratified the acts of Defendant Aparicio and his co-actor. Matador and Casa  
17 del Matador promoted illegal behavior. Employees received preferential treatment which  
18 directly caused injuries and damages to Plaintiffs.  
19

20 97. The actions of Defendants were reckless and in violation of NRS 42.010 and give  
21 rise to punitive damages pursuant to that section and other state laws.

22 98. Defendants knew that driving under the influence was breaching a duty owed to  
23 Plaintiffs.

24 99. Defendants substantially assisted and encouraged Aparicio's conduct and Plaintiffs  
25 thereby sustained damages.  
26

27 100. As a result of the foregoing wrongful conduct, Plaintiffs have suffered great physical  
28 and mental harm, mental anxiety, grief and sorrow.

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**NINTH CAUSE OF ACTION**

101. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

102. Clark County code section 8.20.300 provides that it is unlawful for any licensee under the provisions of this chapter, or any of his servants or employees, to sell, serve or give away alcoholic liquor to any intoxicated person. Matador is subject to the Statutes of Washington including RCW 66.44.200 (1) which provides that no person shall sell any liquor to any person apparently under the influence of liquor.

103. Violation of these statutory and code provisions establish negligence per se on the part of Defendants.

104. That Defendants' actions are not protected by NRS 41.1305 as they were outside of the limited merely "serves, sells or otherwise furnishes" alcoholic beverages.

105. As a result of the foregoing wrongful conduct, Plaintiffs have suffered great physical and mental harm, mental anxiety, grief and sorrow.

**TENTH CAUSE OF ACTION**

106. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

107. To the extent NRS 41.1305 is ambiguous or protects the Defendants under the facts of this case, it is an unconstitutional taking and violation of the equal protection of the law and a taking of life liberty and the pursuit of happiness of the Plaintiffs without due process of law.

NRS 41.1305 is unconstitutional.

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1           108. Plaintiffs further allege that application of NRS 41.1305 immunity against  
2 “dramshop” type civil claims under the facts of this case is a violation of Plaintiff’s Civil rights  
3 under the Due Process and Equal Protection provisions of the Constitution of the State of Nevada,  
4 and the Constitution of the United States of America.  
5

6           109. An actual controversy has arisen and now exists between Plaintiffs and Defendants  
7 concerning the respective rights and duties under the law and related to the law.  
8

9           110. Plaintiffs desire a judicial determination of their rights and duties and a declaration  
10 as to their rights and remedies under the law and that the law is unconstitutional.  
11

#### 12                           **ELEVENTH CAUSE OF ACTION**

13           111. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
14 paragraphs and incorporate the same herein by reference.  
15

16           112. Upon information and belief, at all times herein mentioned each of the Defendants  
17 was the agent and employee of the other Defendants and was acting within the course, scope and  
18 authority of said agency; each Defendant approved, ratified and authorized the acts of each of the  
19 other Defendants as herein alleged; each Defendant was subject to a right of control by the other  
20 Defendants; each Defendant was authorized to act for each and all of the other Defendants; and  
21 each Defendant is a successor in interest to each of the other Defendants.  
22

23           113. Upon information and belief, Defendant Aparicio, was employed by Defendants,  
24 and each of them, and was acting within the course and scope of his employment when the  
25 incident herein complained of occurred.  
26

27           114. Under the doctrine of respondeat superior, Defendants are jointly and severally  
28 liable for the torts and conduct of its employees herein referenced directly and proximately  
damaging the Plaintiffs in an amount to be more specifically determined at the time of trial.

#### **IV. DAMAGES**



1           115. By reason of the premises, and as a direct and proximate result of the aforesaid  
2 negligence, carelessness, criminal and other wrongful acts of Defendants, and each of them,  
3 delineated herein, Decedents Damaso I. Puente and Christa Puente, sustained multiple blunt force  
4 trauma injuries, and conscious pain and suffering, which were the proximate cause of their death,  
5 amounting to damage in an amount in excess of \$15,000.00.  
6

7           116. Prior to the injuries, complained of herein, Decedents Damaso I. Puente and Christa  
8 Puente were able-bodied persons, capable of being gainfully employed and capable of engaging  
9 in all other activities for which they were otherwise suited and have thereby suffered a loss of  
10 future earnings and household services.  
11

12           117. That Damaso S. Puente, Maria Puente, Daniel Malone and Diane Malone, were each  
13 caused to suffer grief and sorrow, loss of probable support, companionship, society, comfort and  
14 consortium as a result of the death and disfigurement of Damaso I. Puente and Christa Puente,  
15 amounting to damage in an amount in excess of \$15,000.00.  
16

17           118. By reason of the premises, and as a direct and proximate result of the aforesaid  
18 negligence and carelessness, criminal and other wrongful acts of Defendants, and each of them,  
19 Plaintiffs have been caused to expend monies, for funeral and miscellaneous expenses incidental  
20 thereto as of this time in the approximate amount of \$15,000.00 and may in the future be caused  
21 to expend additional monies for funeral expenses and miscellaneous expenses incidental thereto,  
22 in a sum not yet presently ascertainable, and leave of Court will be requested to include said  
23 additional damages when the same have been fully determined.  
24

25           119. The Defendants, and each of them, are guilty of oppression, fraud and malice,  
26 express or implied, and Plaintiffs in addition to compensatory damages, should recover punitive  
27 damages, pursuant to NRS 42.010 and other legal basis, for the sake of example and by way of  
28 punishing the Defendants, and each of them.

120. The Plaintiffs have been required to retain the law firm of Christensen Law Offices, LLC to prosecute this action, and are entitled to a reasonable attorney's fee.

**WHEREFORE,** Plaintiffs, expressly reserving the right herein to include all items of damage, demand judgment against the Defendants, and each of them, as follows:

1. General damages in an amount in excess of \$15,000.00;
2. General damages in an amount in excess of \$15,000.00;
3. Special damages in an amount in excess of \$15,000.00;
4. Pecuniary damages for Plaintiffs' grief and sorrow in excess of \$15,000.00
5. For damages for conscious pain, suffering, disfigurement, mental anguish and loss of enjoyment of life of the Decedents in an amount in excess of \$15,000.00;
6. For loss of earning capacity and future loss of earning capacity of Decedents in amounts to be proven at trial;
7. Special damages for medical, funeral and other expenses according to proof;
8. For damages for wrongful death in an amount in excess of \$15,000.00;
9. Punitive damages in excess of \$15,000.00;
10. For declaratory judgment;
11. Costs of this suit;
12. Attorney's fees;
13. For such other and further relief as to the Court may seem just and proper in the premises.

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1  
2 DATED THIS 16<sup>th</sup> day of April, 2020.

3 CHRISTENSEN LAW OFFICES, LLC

4 BY:  #7019

5 THOMAS CHRISTENSEN, ESQ.

6 Nevada Bar No. 2326

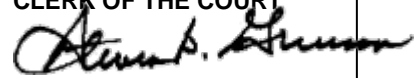
7 1000 S. Valley View Blvd.

8 Las Vegas, Nevada 89107

9 Attorney for Damaso Puente, Maria Puente,

10 Daniel Malone and Diane Malone  
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## **#2: Motion to Dismiss**



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Attorneys for Dave & Buster's of Nevada, Inc.

**DISTRICT COURT**

**CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio; Morgan Hurley; Dave &  
Buster's of Nevada, Inc. dba Dave & Buster's; Dave  
& Buster's, Inc.; MAT-Summerlin, LLC dba Casa  
del Matador Summerlin; Matador Investments, LLC;  
Oppel Melang 5410, LLC; Mel-Opp & Griff, LLC;  
Opp Mel & Griff, Inc.; Mocore, LLC; Does I-V, and  
Roe Corporations I-V, Roe Manufacturer I-V; Roe  
Wholesaler I-V; Roe Retailer I-V,

Defendants.

Case No.: A-20-813787-C  
Dept. No.: 18

**Dave & Buster's of Nevada, Inc.'s  
Motion to Dismiss**

Hearing Requested

Mr. Aparicio drove drunk and killed Damaso & Christa Puente. He was convicted for his actions and is serving a 15 year sentence. In Nevada, the person who drove drunk is responsible for his actions, not the restaurants where he drank. The facts pled in the complaint do not state a claim upon which Plaintiffs could recover because NRS 41.1305 bars any recovery from Dave & Buster's in this scenario. Consequently the complaint should be dismissed as to Dave & Buster's per NRCP 12(b)(5).

1 DATED this 20<sup>th</sup> day of May, 2020.



3 /s/ Michael P. Lowry

4 BY:

5 MICHAEL P. LOWRY, ESQ.

6 Nevada Bar No. 10666

7 VIRGINIA T. TOMOVA, ESQ.

8 Nevada Bar No. 12504

9 6689 Las Vegas Blvd. South, Suite 200

10 Las Vegas, Nevada 89119

11 Attorneys for Dave & Buster's of Nevada, Inc.

12 **Memorandum of Points & Authorities**

13 **I. Plaintiffs are suing for Aparicio's decision to drive drunk.**

14 The facts alleged that are relevant to this motion are taken from the complaint. Plaintiffs  
15 allege that on May 15, 2018 Aparicio drank at least 13 tequila based drinks in the 3 hours and 15  
16 minutes.<sup>1</sup> At least five of those drinks were consumed at Casa del Matador.<sup>2</sup> Aparicio consumed  
17 no food while he was drinking.<sup>3</sup> While at Casa del Matador Aparicio was obviously intoxicated  
18 but was still served drinks.<sup>4</sup> When he left, Casa del Matador's employees assisted Aparicio to the  
19 Hurley's vehicle.<sup>5</sup>

20 Aparicio then drove Hurley's car, with her permission, eastbound on Sahara.<sup>6</sup> At the same  
21 time, the Puentes were stopped at a red signal on eastbound Sahara, at its intersection with  
22 Hualapai.<sup>7</sup> Aparicio struck the Puentes' vehicle and killed them.<sup>8</sup> A blood draw taken hours after  
23 the collision indicated Aparicio's blood-alcohol content was 0.204%.<sup>9</sup>

24 Plaintiffs have alleged numerous causes of action, but either they contain no additional  
25 facts as to Dave & Buster's, or the causes of action themselves do not apply to Dave & Buster's.

26 <sup>1</sup> Complaint at ¶ 20.

27 <sup>2</sup> *Id.* at ¶ 24.

28 <sup>3</sup> *Id.* at ¶ 23.

<sup>4</sup> *Id.* at ¶ 25.

<sup>5</sup> *Id.* at ¶ 26.

<sup>6</sup> *Id.* at ¶ 15.

<sup>7</sup> *Id.* at ¶¶ 14, 16.

<sup>8</sup> *Id.* at ¶¶ 17, 115.

<sup>9</sup> *Id.* at ¶ 18.

1                   **a. First Cause of Action**

2                   This cause of action appears to allege negligence. The specific negligent acts alleged all  
3                   pertain to Aparicio’s operation of Hurley’s vehicle and Hurley’s negligent entrustment of that  
4                   vehicle to Aparicio.<sup>10</sup> This cause of action contains no allegations as to Dave & Buster’s.

5                   **b. Second Cause of Action**

6                   This cause of action appears to expressly allege negligent entrustment against Hurley.<sup>11</sup> It  
7                   alternatively alleges Hurley was driving when the collision occurred.<sup>12</sup> This cause of action  
8                   contains no allegations as to Dave & Buster’s.

9                   **c. Third Cause of Action**

10                  It is unclear specifically what legal theory this cause of action attempts to invoke. It  
11                  simply alleges “defendants, in concert with each other, carried on an abnormally dangerous  
12                  activity that risked harm to the person of Decedent, which was foreseeable even if reasonable care  
13                  had been used.”<sup>13</sup> It appears Plaintiffs are alleging that Aparicio and Hurley acted in concert to  
14                  engage in drunk driving, which is an abnormally dangerous activity. Regardless, this cause of  
15                  action contains no allegations as to Dave & Buster’s.

16                  **d. Fourth Cause of Action**

17                  The fourth cause of action appears to allege products liability against fictional defendants  
18                  who manufactured, distributed, and sold the tequila Aparicio consumed. Specifically, that “the  
19                  tequila and other alcoholic beverages were in a defective condition and were unreasonably  
20                  dangerous to a user or consumer in that the tequila was defective and unreasonably dangerous.”<sup>14</sup>  
21                  However, the cause of action contains no specific allegations against Dave & Buster’s.

22                  **e. Fifth Cause of Action**

23                  This cause of action seems to allege a breach of an express warranty. It alleges  
24                  unidentified defendants “provided express warranties and representations, including, but not  
25

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26                  <sup>10</sup> *Id.* at ¶ 37

27                  <sup>11</sup> *Id.* at ¶ 40.

28                  <sup>12</sup> *Id.* at ¶ 41.

<sup>13</sup> *Id.* at ¶ 43.

<sup>14</sup> *Id.* at ¶ 51.

1 limited to, the warranty that the products were fit for use for the purpose intended.”<sup>15</sup> This would  
2 again relate to a product claim. Again, the cause of action contains no specific allegations against  
3 Dave & Buster’s.

4 **f. Sixth Cause of Action**

5 This cause of action alleges the tequila Aparicio consumed was “not fit for use for its  
6 intended purpose and Defendants, and each of them, breached the implied warranty of fitness.”<sup>16</sup>  
7 But it contains no specific allegations against Dave & Buster’s.

8 **g. Seventh Cause of Action**

9 The theory of liability this cause of action alleges is unclear. Plaintiffs allege defendants  
10 “promoted a dangerous activity with a complete lack of disregard [sic] for the safety of the  
11 community in which they live and do business.”<sup>17</sup> Plaintiffs further allege that defendants “were  
12 promoting and encouraging drinking and driving” and had a “special relationship” with  
13 Aparicio.<sup>18</sup> Plaintiffs also alleged defendants “failed to warn or take steps to provide  
14 transportation for competitors in any of these drinking challenges.”<sup>19</sup> The cause of action contains  
15 no specific factual allegations against Dave & Buster’s.

16 It appears instead this cause action relates to Casa del Matador’s advertising. Plaintiffs  
17 allege on January 11, 2018 Casa del Matador advertised its happy hour using a picture of Aparicio  
18 holding a bottle of tequila.<sup>20</sup> They allege on January 15, 2018 Casa del Matador advertised “all  
19 you can eat tacos and margaritas for \$25.”<sup>21</sup> Plaintiffs also allege that, approximately two months  
20 after Aparicio drove drunk, Casa del Matador advertised a team tequila drinking contest.<sup>22</sup>

21 **h. Eighth Cause of Action**

22 This cause alleges negligent hiring as to Aparicio. However, the facts pled with this cause  
23 of action assert only that Aparicio was an employee of Casa del Matador.<sup>23</sup> It contains no

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24 <sup>15</sup> *Id.* at ¶ 67.

25 <sup>16</sup> *Id.* at ¶ 74.

26 <sup>17</sup> *Id.* at ¶ 77.

27 <sup>18</sup> *Id.* at ¶¶ 78-79.

28 <sup>19</sup> *Id.* at ¶ 81.

<sup>20</sup> *Id.* at ¶ 27.

<sup>21</sup> *Id.* at ¶ 28.

<sup>22</sup> *Id.* at ¶ 29.

<sup>23</sup> *Id.* at ¶¶ 90-91.



1 allegations that Aparicio was an employee of Dave & Buster's, or any other allegations against  
2 Dave & Buster's.

3 **i. Ninth Cause of Action**

4 This cause of action alleges negligence per se for a violation of Clark County Code §  
5 8.20.300. As with other causes of action, it contains no specific allegations against Dave &  
6 Buster's.

7 **j. Tenth Cause of Action**

8 This section alleges that NRS 41.1305 is unconstitutional. Regardless of whether that is an  
9 independent cause of action or a theory of liability, there are no specific allegations against Dave  
10 & Buster's.

11 **k. Eleventh Cause of Action**

12 This cause asserts only that respondeat superior applies to all defendants. However it does  
13 not distinguish between any of them or identify specific factual allegations against Dave &  
14 Buster's.

15 **II. Plaintiffs must plead a set of facts that could entitle them to relief.**

16 When evaluating a motion to dismiss per NRCP 12(b)(5), the district court accepts all  
17 factual allegations in the complaint as true and draw all inferences in the plaintiffs favor.  
18 Dismissal is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set  
19 of facts, which, if true, would entitle [her] to relief."<sup>24</sup>

20 **III. Plaintiffs have not pled facts against Dave & Buster's that could entitle them to relief.**

21 To summarize, Plaintiffs' complaint alleges they were injured because Aparicio was  
22 served alcoholic drinks, consumed them, and drove drunk. But NRS 41.1305 bars any recovery  
23 from Dave & Buster's under this fact pattern.

24 **a. The complaint contains no specific factual allegations against Dave & Buster's.**

25 Assuming the allegations that Aparicio drove drunk, Hurley negligently entrusted him with  
26 her car, and Casa del Matador employees helped Aparicio get to that car are all true, the complaint

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27 <sup>24</sup> *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Dave &  
28 Buster's urges an appellate court to discard this standard in favor of the federal *Iqbal* standard, but acknowledges *Buzz Stew* controls the district court's evaluation at this time.

1 still contains no specific factual allegations as to Dave & Buster's. The complaint does not even  
2 expressly allege that Aparicio was at Dave & Buster's or consumed alcohol there.

3 In short, although Nevada may be a notice pleading state, a plaintiff must still provide fair  
4 notice of the allegations against a defendant. Here there are numerous defendants but the factual  
5 allegations asserted relate to only three: 1) Aparicio; 2) Hurley; and 3) Casa del Matador.

6 **b. NRS 41.1305 bars liability against Dave & Buster's under the facts alleged.**

7 For purposes of this motion Dave & Buster's assumes that if Plaintiffs filed an amended  
8 complaint, it would allege that 1) Dave & Buster's sells alcoholic beverages; 2) sold them to  
9 Aparicio; 3) a result of Dave & Buster's selling alcoholic drinks to Aparicio, Aparicio drove  
10 drunk; and 4) injured plaintiffs. NRS 41.1305(1) expressly prohibits this exact type of liability.

11 A person who serves, sells or otherwise furnishes an alcoholic beverage to another  
12 person who is 21 years of age or older is not liable in a civil action for any damages  
13 caused by the person to whom the alcoholic beverage was served, sold or furnished as  
a result of the consumption of the alcoholic beverage.<sup>25</sup>

14 NRS 41.1305(2) creates the only exception to NRS 41.1305(1)'s prohibition. That  
15 exception allows liability if the person served was underage, but Plaintiffs do not allege Aparicio  
16 was less than 21 years old so the exception does not apply. In short, even if Plaintiffs proved all  
17 the facts alleged, NRS 41.1305(1) prohibits liability against Dave & Buster's.

18 NRS 41.1305 was enacted in 1995 and represented the Legislature's codification of a  
19 common law doctrine, but with a twist. The Supreme Court had twice ruled refused to allow a tort  
20 claim for negligence arising out of the distribution of alcohol. Instead it had concluded the  
21 proximate cause of any damage resulting from a person who has consumed alcohol is the  
22 *consumption* of alcohol itself, not its *distribution*.<sup>26</sup> The motivation for NRS 41.1305 seems to  
23 have been *Hinegardner v. Marcor Resorts*, which refused in 1992 to even allow such a claim  
24 against vendors who serve alcohol to minors.<sup>27</sup> NRS 41.1305 was then enacted in 1995 and  
25 expressly allowed a claim only when minors are served.

26 <sup>25</sup> NRS 41.1305(1).

27 <sup>26</sup> *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358, 359 (1969); *Snyder v. Viani*, 110  
28 Nev. 1339, 885 P.2d 610, 612 (1994).

<sup>27</sup> 108 Nev. 1091, 844 P.2d 800, 803 (1992).

1                   **c. NRS 41.1305 is constitutional.**

2                   Plaintiffs' complaint argues NRS 41.1305 is unconstitutional. "Statutes are presumed to  
3 be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order  
4 to meet that burden, the challenger must make a clear showing of invalidity."<sup>28</sup> "When the law . . .  
5 does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally  
6 related to a legitimate government interest."<sup>29</sup>

7                   NRS 41.1305 does not involve a suspect class such as one based upon race, religion,  
8 gender, etc. The statute also does not impede a fundamental right. In ruling on challenges to  
9 Nevada's medical malpractice statutes the Supreme Court stated the "right of malpractice  
10 plaintiffs to sue for damages caused by medical professionals does not involve a fundamental  
11 constitutional right."<sup>30</sup> Consequently, NRS 41.1305 is valid if it is rationally related to a  
12 legitimate government interest.

13                  A similar challenge was brought to Wisconsin's equivalent to NRS 41.1305. The  
14 Wisconsin Supreme Court upheld the statute, concluding distinguishing between two groups of  
15 persons who furnish alcohol beverages to others was rationally related to the legitimate  
16 governmental purpose of protecting persons under the legal drinking age.<sup>31</sup> This logic is equally  
17 applicable to NRS 41.1305, so the rational review standard is met.

18                   **d. NRS 41.1305 overrides Clark County Code § 8.20.300.**

19                  The ninth cause of action seems to allege negligence per se, relying upon Clark County  
20 Code ("CCC") 8.20.300, enacted in 1965. "It is unlawful for any licensee under the provisions of  
21 this chapter, or any of his servants or employees, to sell, serve or give away alcoholic liquor to any  
22 intoxicated person." Plaintiffs then allege that CCC 8.20.300 creates liability to Dave & Buster's  
23 that NRS 41.1305 does not.

24                  Plaintiffs are incorrect. CCC chapter 8.20 creates regulations for liquor licenses. CCC  
25 8.20.300 states only that it is unlawful for a licensee to act in a certain manner. Its text does not

26  
27 <sup>28</sup> *Tam v. Dist. Ct.*, 131 Nev. Adv. Rep. 80, 358 P.3d 234, 237-38 (2015).

28 <sup>29</sup> *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

<sup>30</sup> *Tam*, 131 Nev. at 798, 358 P.3d at 239.

<sup>31</sup> *Doering v. WEA Ins. Group*, 532 N.W.2d 432 (Wis. 1995).

1 purport to create liability civil liability against the licensee for a violation of the regulation. To  
2 this extent, CCC 8.20.300 is consistent with NRS 41.1305.

3 But CCC 8.20.300 cannot be read to create civil liability to Dave & Buster's because it  
4 would then conflict with NRS 41.1305. "[C]ounties are legislative subdivisions of the state.  
5 Because counties obtain their authority from the legislature, county ordinances are subordinate to  
6 statutes if the two conflict."<sup>32</sup>

7 **IV. Plaintiffs have not pled a claim for relief against Dave & Buster's.**

8 This case involves a tragic set of facts, but these facts do not create liability against Dave  
9 & Buster's. NRS 41.1305 and Nevada common law that preceded it clearly state that when  
10 Aparicio decided to consume alcohol and drive drunk, he was responsible for the consequences of  
11 his choices, not the place where he was served. Plaintiffs have not pled a set of facts against Dave  
12 & Buster's that could entitle them to relief, so Dave & Buster's should be dismissed per NRC  
13 12(b)(5).

14 DATED this 20<sup>th</sup> day of May, 2020.



16 /s/ Michael P. Lowry

17 BY:

18 MICHAEL P. LOWRY, ESQ.

19 Nevada Bar No. 10666

20 VIRGINIA T. TOMOVA, ESQ.

21 Nevada Bar No. 12504

22 6689 Las Vegas Blvd. South, Suite 200

23 Las Vegas, Nevada 89119

24 Attorneys for Dave & Buster's of Nevada, Inc.

25  
26  
27  
28 <sup>32</sup> *Falcke & Herbig Props. v. Cty. of Douglas*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000).

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**Certificate of Service**

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on May 20, 2020, I served **Dave & Buster's of Nevada, Inc.'s Motion to Dismiss** as follows:

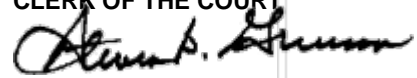
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Thomas F. Christensen Christensen Law 1000 S Valley View Blvd Las Vegas, Nevada 89107 Attorneys for Plaintiffs	
--	--

BY: /s/ Cynthia Kelley  
An Employee of



### **#3: Opposition to Motion to Dismiss**



**OMD(CIV)**  
THOMAS F. CHRISTENSEN, ESQ.  
Nevada Bar No. 2326  
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**DISTRICT COURT  
CLARK COUNTY, 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,

CASE NO:A-20-813787-C  
DEPT. NO:

Plaintiffs,

vs.

Henry Biderman Aparicio, Morgan Hurley, Dave  
& Buster's of Nevada, Inc dba Dave & Buster's;  
Dave & Buster's Inc; MAT-SUMMERLIN LLC,  
dba Casa del Matador Summerlin; MATADOR  
INVESTMENTS, LLC; OPPEL MELANG 5410,  
LLC; MEL-OPP & GRIFF, LLC; OPP MEL &  
GRIFF, INC.; MOCORE, LLC; DOES I - V, and  
ROE CORPORATIONS I - V, ROE  
MANUFACTURER I - V; ROE WHOLESALER,  
I - V; ROE RETAILER, I - V;

Defendants.

**PLAINTIFFS' OPPOSITION TO DAVE & BUSTER'S MOTION TO DISMISS**

COME NOW the Plaintiffs, Damaso S. Puente, individually and on behalf of the Estate of  
Damaso I. Puente, Maria Puente, Diane Malone, individually and on behalf of the Estate of  
Christa Puente, and Daniel Malone, by and through Plaintiffs' attorney, THOMAS  
CHRISTENSEN, of the law firm of CHRISTENSEN LAW OFFICES, and hereby submit this

AA034

1 Opposition to Dave & Buster's of Nevada, Inc.'s Motion to Dismiss. This Opposition is made and  
2 based upon the pleadings on file herein, the following Points and Authorities, and any arguments  
3 elicited at the hearing of this matter.  
4

5 DATED THIS 9<sup>th</sup> day of June, 2020.

6 CHRISTENSEN LAW OFFICES, LLC

7 BY:  #7019

8 THOMAS CHRISTENSEN, ESQ.

9 Nevada Bar No. 2326

10 1000 S. Valley View Blvd.

11 Las Vegas, Nevada 89107

12 Attorney for Damaso Puente, Maria Puente,

13 Daniel Malone and Diane Malone

## 14 MEMORANDUM OF POINTS AND AUTHORITIES

### 15 Introduction

16 Dave & Buster's of Nevada, Inc., (hereinafter "Dave & Buster's") has filed a Motion to  
17 Dismiss, alleging that the facts pled in the Plaintiffs' Complaint do not state a claim upon which  
18 Plaintiffs could recover. However, Dave & Busters simply ignores many factual allegations in  
19 the Complaint. These facts must be taken as true in evaluation of the Motion. *Simpson v. Mars,*  
20 *Inc.*, 113 Nev. 188, 929 P.2d 966 (1997). A district court order granting an NRCP 12(b)(5) motion  
21 to dismiss is subject to rigorous appellate review. *Lubin v. Kunin*, 117 Nev. 107, 110-11, 17 P.3d  
22 422, 425 (2001). Notably, the following paragraphs (numbered as they are in the Complaint) give  
23 rise to the Plaintiffs' causes of action against Dave & Buster's, but have been ignored by the  
24 Defendant:

25 19. Immediately prior to the crash, Defendant Henry Biderman Aparicio and Morgan Hurley,  
26 acting in concert and as part of a joint venture, consumed alcohol on the premises of the business  
27 of other named Defendants as a result of the Defendants illegal dangerous activities and without  
28 being warned of the dangerous product.



1 20. On May 15th, 2018, Defendant Henry Biderman Aparicio consumed at least 13 tequila  
2 based alcoholic beverages in 3 hours and 15 minutes, before colliding with the Plaintiffs'  
3 vehicle.  
4

5 21. Defendant Aparacio with the knowledge and consent of Morgan Hurley willfully  
6 consumed alcohol while knowing that he would later operate a motor vehicle.

7 22. Defendants, and each of them, promoted and encouraged the acts of the other Defendants.

8 43. Defendants, in concert with each other, carried on an abnormally dangerous activity that  
9 risked harm to the person of Decedent, which was foreseeable even if reasonable care had been  
10 used.  
11

12 52. Defendants, and each of them, knew or through the exercise of reasonable care and  
13 diligence, should have known of such defective and unreasonably dangerous conditions.

14 53. Plaintiffs relied on the duty of Defendants, and each of them, to deliver the tequila and  
15 other alcoholic beverages at the time of sale and/or delivery by each in a condition fit for use for  
16 the purpose intended. The tequila and other alcoholic beverages were defective, unreasonably  
17 dangerous, and were in fact not fit for the purposes and uses for which they were intended.  
18

19 54. The breach of such duty by Defendants, and each of them, and such defective condition of  
20 the tequila and other alcoholic beverages, were a proximate cause of the injuries sustained by  
21 Plaintiff.

22 55. By reason of the premises and as a direct and proximate result of all of the foregoing,  
23 Defendants, and each of them, are strictly liable to Plaintiff for the injuries and damages  
24 hereinabove set forth.

25 56. Defendants, and each of them, owed a duty to all persons who could reasonably be  
26 foreseen to use the tequila and other alcoholic beverages or be injured as a result of the use of the  
27 tequila and other alcoholic beverages, and such a duty was specifically owed to Plaintiff.  
28

1 57. Defendants, and each of them, breached a duty owed to the Plaintiff consisting of, among  
2 other things, the following:  
3

- 4 a. Failure to warn by statement on the product, in the instruction booklet, or otherwise, of the  
5 unreasonably dangerous conditions of the tequila and other alcoholic beverages;
- 6 b. Failure to properly design the tequila and other alcoholic beverages in such a manner as to  
7 avoid or minimize the unreasonable danger to users of the tequila and other alcoholic  
8 beverages;
- 9 c. Failure to properly and adequately test and inspect the tequila and other alcoholic  
10 beverages to ascertain its unreasonably dangerous condition; Failure to give adequate  
11 instructions regarding the safe use of the tequila and other alcoholic beverages; i.e. Tequila  
12 and other alcoholic beverages should not be consumed on an empty stomach, should not  
13 be consumed quickly, designed to be sipped and not taken in shot form. Failure to use due  
14 care to avoid misrepresentations, cannot operate machinery.  
15

16 67. Prior to the purchase or use of the tequila and other alcoholic beverages, Defendants, and  
17 each of them, in order to induce the purchase or use of the tequila and other alcoholic beverages,  
18 provided express warranties and representations, including, but not limited to, the warranty that  
19 the products were fit for use for the purpose intended.  
20

21 72. Defendants, and each of them, impliedly warranted that the tequila and other alcoholic  
22 beverages were fit for use for the purpose for which they were designed, and that the tequila and  
23 other alcoholic beverages were fit and suitable for the use in fact made by Aparicio.

24 77. The Defendants, and each of them, promoted a dangerous activity with a complete lack of  
25 disregard for the safety of the community in which they live and do business.  
26

27 78. The Defendants, and each of them, were promoting and encouraging drinking and driving.

28 79. There is a special relationship between the Defendants and Defendant Aparicio;

1 the harm created by Aparicio's conduct is foreseeable.

2 80. Defendants condone bartenders to do shots with customers.

3 81. Defendants, and each of them, failed to warn or take steps to provide transportation for  
4 competitors in any of these drinking challenges.  
5

6 86. Defendants, and each of them, failed to reasonably supervisor or monitor service of  
7 alcoholic beverages to ensure adequate safety precautions were taken and to recognize and  
8 evaluate potential risks to third parties.  
9

10 87. Defendants, and each of them was negligent and careless in failing to adequately train and  
11 educate its employees on the dangers of serving intoxicated co-workers, patrons and friends.

12 88. Defendants, and each of them, failed to adequately evaluate, supervise and/or investigate  
13 activities on its premises that indicated danger to society.

14 89. Defendants, and each of them, failed to use reasonable care to protect third parties from  
15 risk.

16 95. The actions of Defendants, and each of them, in this matter have been intentional,  
17 fraudulent, malicious, oppressive, reckless, and in conscious disregard of Plaintiffs' rights...  
18

19 102. Clark County code section 8.20.300 provides that it is unlawful for any licensee under the  
20 provisions of this chapter, or any of his servants or employees, to sell, serve or give away  
21 alcoholic liquor to any intoxicated person.

22 103. Violation of these statutory and code provisions establish negligence per se on the part of  
23 Defendants.

24 104. That Defendants' actions are not protected by NRS 41.1305 as they were outside of the  
25 limited merely "serves, sells or otherwise furnishes" alcoholic beverages.  
26  
27  
28

1 The above allegations, taken directly from the Complaint, support causes of action against  
2 Dave & Buster's for negligence, gross negligence, willful and wanton misconduct, strict products  
3 liability, breach of express and implied warranties, acting in concert in an abnormally dangerous  
4 activity, negligent supervision and hiring, and negligence per se. The complaint further alleges  
5 that NRS 41.1305, if applied as Dave & Buster's has alleged in its Motion to Dismiss, is  
6 unconstitutional. Dave & Buster's sole defense is that NRS 41.1305 is a complete bar to all  
7 causes of action involving alcohol in Nevada, except providing alcohol to a minor. Since that is  
8 not the law in Nevada, and Dave & Buster's failed to even address the various valid causes of  
9 action that were pled, its motion must be denied. Further, since Dave & Buster's did not present  
10 any affirmative reasons in their motion to dismiss, it cannot, in any reply, now address those  
11 issues.  
12

#### 14 **A NEVADA LIQUOR LICENSE IS NOT A LICENSE TO KILL**

15 The tragic collision giving rise to this litigation took the lives of the Puentes, two  
16 successful and appreciated members of this community, on May 15, 2018. That evening, Henry  
17 Aparicio and Morgan Hurley were served alcoholic drinks by Dave & Busters of Nevada, Inc.,  
18 after they were clearly intoxicated.<sup>1</sup> The Court must construe the pleadings liberally and accept  
19 all factual allegations in the Complaint as true. *Blackjack Bonding v. City of Las Vegas Municipal*  
20 *Court*, 116 Nev. 1217 (2000). The appropriate standard requires a showing beyond a doubt. *Buzz*  
21 *Stew, LLC v. City of N. Las Vegas*, 181 P. 3d 670, (2008). Plaintiffs herein assert that their  
22 complaint alleges facts upon which to support their claims.  
23  
24

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25 <sup>1</sup> "19. Immediately prior to the crash, Defendant Henry Biderman Aparicio and Morgan Hurley, acting in  
26 concert and as part of a joint venture, consumed alcohol on the premises of the business of other named  
27 Defendants as a result of the Defendants illegal dangerous activities and without being warned of the  
28 dangerous product." --This is one of the 30 preliminary or general allegations that apply to the eleven  
causes of action that follow, even without the "repeat and reallege" paragraph. There are a number of  
entity defendants and rather than list the name of every defendant each time, a reference is made. Plaintiffs  
used the term "defendants" to refer to all defendants including Dave & Buster's of Nevada, Inc., dba Dave  
and Buster's.

**The history of Alcohol related problems: The common law is continually developing and has continued to move towards general negligence principles applicable to all situations.**

By the mid-1700s, England had gone to great lengths to encourage the production of gin after the more expensive and less potent ale and port fell out of favor. Not long afterward, England regretted its gin policy and began imposing taxes and ever-stiffer regulations governing the production and sale of “hard liquor.” Meanwhile in the fledgling United States, alcohol was fast becoming a serious problem as well. Connecticut was typical. By 1779, the state had passed 80 major laws concerning alcoholic beverages based mostly on the teachings of the church. Despite the teachings and the laws, drinking excesses mounted throughout the colonies as communities distilled their own spirits. Attempts to impose taxes and controls on the financially lucrative enterprise gave rise in 1794 to the Whiskey Rebellion in western Pennsylvania. The uprising was brought under control only when then-President Washington amassed 13,000 troops to restore law and order. Initially, the common law did not afford a claim against a provider of alcohol because of proximate cause and because the person most likely to be injured was the drinker himself. *Cruse v. Aden*, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).

### **Prohibition: States license and control sales of alcohol**

Temperance movements have since come and gone with the likes of hatchet-swinging Carry Nation in Kansas to the creation of the Prohibition Party to the Prohibition Era in the early 20th Century under the 18th Amendment. Just before Christmas in 1933, Congress adopted the 21st Amendment which repealed the 18th, thereby bringing an end to Prohibition and federal control of alcohol. Since then, states have been largely responsible for control of alcoholic beverages through the operation of the common law and enactment of dram shop liability laws. “Dram shops” refers to establishments that served alcohol by the dram, a unit of liquid measure used in the United States during the colonial period. These laws stipulate that people who serve

alcoholic beverages may be liable under state laws for damages resulting from the consumption of those beverages. Liability may be imposed either under specific state laws (“dram shop acts”) or under the general law of negligence or both.

### **Early Dram Shop Decisions: Proximate cause limited liability under the common law.**

This view limiting liability for the sale of alcohol to intoxicated people because of proximate cause concerns, even if the service or sale of the alcohol resulted in the intoxicated person injuring himself or others continued into the 20th century. *Manuel v. Weitzman*, 191 N.W.2d 474, 476 (Mich. 1971). In the beginning the common law considered “the act of selling the intoxicating beverage as too remote to serve as the proximate cause of an injury resulting from the negligent conduct of the purchaser of the drink. Nevada subscribes to the common law rule.” *Snyder v. Viani*, 110 Nev. 1339, 1342-43 (Nev. 1994).

Once the automobile was invented, things changed. “The court concluded that the danger was “particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.” *Id.*” *Snyder v. Viani*, 110 Nev. 1339, 1345 (Nev. 1994) Dram Shop statutes were interpreted “to fill a void in the law, not to remove the well-recognized duty of a tavern keeper to exercise due care for the welfare and safety of invited patrons.” *Id.*

The modern era of dram shop liability began in 1959, when two courts— the Seventh Circuit in *Waynick v. Chicago's Last Department Store*, [269 F.2d 322](#) (7th Cir. 1959), *cert. denied*, [362 U.S. 903](#), [80 S.Ct. 611](#), [4 L.Ed.2d 554](#) (1960), and the New Jersey Supreme Court in *Rappaport v. Nichols*, [31 N.J. 188](#), [156 A.2d 1](#) (1959) — held that a third party injured by an intoxicated person may bring a negligence action against the commercial vendor who sold liquor to the intoxicated person. Both decisions rejected the defendants' contention that the sale or service of an alcoholic beverage could not, as a matter of law, be the proximate cause of injury to

1 a third party. The *Rappaport* court said: "Where a tavern keeper sells alcoholic beverages to a  
2 person who is visibly intoxicated or to a person he knows or should know from the circumstances  
3 to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through  
4 action of the intoxicated person or the minor." *Id.* 156 A.2d at 8.

5  
6 The *Largo* court recognized the clear foreseeability of injury resulting from drivers  
7 whose abilities and judgment are impaired by intoxicants. Moreover, the court  
8 described as "outdated and ill-reasoned," the old common law rule that "the person  
9 who consumed alcohol became a superseding cause of the injury and broke the  
causal relation between the vendor's conduct and the plaintiff's injuries." *Id.* at 1103.  
*Snyder v. Viani*, 110 Nev. 1339, 1345 (Nev. 1994).

10 As I observed in dissent in *Hinegardner*,

11 [t]he role of alcohol in the death and maiming of countless numbers of men, women  
12 and children each year is well and indisputably attested. The shattered concourses of  
13 victims of alcohol-related accidents have combined with a restive and angry society  
14 to create a responsive, solid majority of courts that have recognized a cause of action  
against negligent vendors of alcohol. 108 Nev. at 1097, 844 P.2d at 805.  
*Snyder v. Viani*, 110 Nev. 1339, 1346 (Nev. 1994).

15 In our modern society, where drunk-driving crashes claim more than 10,000 lives per year  
16 in the United States, to allege there is no foreseeable unreasonable risk of harm to others through  
17 the action of an intoxicated person, of any age, is simply disregarding reality.

18 **Nevada's lack of a dram shop law imposing greater liability is not a shield for all wrongful**  
19 **conduct.**

20 **As with all statutes modifying the common law, a statute must clearly remove rights**  
21 **established under common law or the common law is still operative.**

22 In the absence of statutory restrictions of the common law right [of action upon  
23 judgments], then the common law rule must prevail, and the question be determined  
by such rule only. *Mandlebaum v. Gregovich*, 24 Nev. 154, 160 (Nev. 1897).

24 Even in jurisdictions that recognize dram shop liability, the dram shop statute is not the  
25 exclusive remedy when an independent cause of action recognized at common law, like  
26 negligence, exists. *Id.*, at 477. For example, in *Harris v. Gower, Inc.*, the plaintiff's husband  
27 drank himself into an unconscious state in the defendant's establishment. *Harris*, 506 N.E.2d 624,  
28

625 (Ill. App. 1987). While unconscious, the plaintiff's husband was dragged outside and placed in his car, where he subsequently froze to death. *Id.* The Illinois court, which recognizes dram shop liability, held that the plaintiff was entitled to maintain her cause of action in common law negligence because her complaint was based on defendant's negligent conduct toward her husband after he became intoxicated, rather than defendant's negligence in serving him liquor. *Id.* Therefore, the defendant could be found negligent for placing the plaintiff's husband in obvious peril. *Id.*

Also, even in the absence of dram shop legislation, the common law imposes liability on establishments that serve liquor based on ordinary negligence. *Alegria v. Payonk*, 619 P.2d 135, 137 (Idaho 1980). An establishment that serves liquor is not abrogated from claims of ordinary negligence. *Manuel*, at 477. Here, it is irrelevant where the operator of the subject vehicle consumed the alcohol, be it on Defendants' premises or that of another establishment. Like the Plaintiff in *Harris*, Plaintiffs' claims herein also arise out of the negligent conduct of Dave & Buster's personnel when they placed Plaintiffs in peril by allowing Aparicio and Hurley into society in their obviously intoxicated state.

In a negligence action, the plaintiff must show: "(1) that the defendant had a duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the plaintiff was damaged." *Joynt v. California Hotel and Casino*, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992).

All of these elements have been alleged against Defendant Dave & Buster's in the Plaintiffs' complaint herein. It is axiomatic that whether or not Defendants were negligent in the present case is a question of fact for a jury to decide. "...[F]oreseeability, duty, **proximate cause** and reasonableness usually are questions of fact for the jury." *Thomas v. Bokelman*, 86 Nev. 10,



1 13, 462 P.2d 1020, 1022 (1970). The Nevada Supreme Court has held that businesses have a duty  
2 to act reasonably toward patrons like Aparicio, even if the patron is intoxicated or considered a  
3 trespasser. *Billingsley v. Stockmen's Hotel Inc.*, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995).  
4

5 In *Billingsley*, an intoxicated patron at the defendant's hotel fell asleep in the empty  
6 showroom. *Id.*, 111 Nev. at 1034, 901 P.2d at 142. Hotel Security officers woke him up, and  
7 evicted him from the hotel. *Id.*, 111 Nev. at 1035, 901 P.2d at 143. The plaintiff was  
8 uncooperative, and an altercation ensued, resulting in injury to the plaintiff. *Id.* The defendant in  
9 *Billingsley* argued that the only duty it owed to an intoxicated patron was to refrain from willfully  
10 and wantonly injuring him.<sup>2</sup> *Id.*, 111 Nev. at 1037, 901 P.2d at 144. The Nevada Supreme Court  
11 disagreed, and held that, while the court can consider intoxication and other factors in  
12 determining reasonableness, **proprietors have a duty to act reasonably toward patrons.** *Id.*  
13 "[T]he overriding factor is whether the land owner or occupier has acted reasonably toward the  
14 plaintiff under the circumstances." *Id.*  
15

16 Here, Dave and Buster's had a duty to act reasonably toward Aparicio and Hurley.  
17 Whether continuing to serve patrons after they reached an obvious state of intoxication, when the  
18 server know or should have known the patrons would be driving from the premises, was "act[ing]  
19 reasonably toward [Aparicio and Hurley] under the circumstances," is a genuine issue of material  
20 fact for a jury to decide. The general duty of Dave and Buster's to act reasonably toward the  
21 guests aside, Dave and Buster's created an additional affirmative duty when it encouraged the  
22 guests to drink more, in order to obtain a greater profit from the compromised guest. This profit  
23 approach to this industry disregarding the foreseeable consequences to the public is no different  
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25  
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28 <sup>2</sup> Plaintiffs allege wilful and wanton misconduct by Dave & Buster's, as set forth below and in the complaint.

1 from the conduct condemned in auto manufacturers. *Grimshaw v. Ford Motor Co.*, 119 Cal. App.  
2 3d 757, 174 Cal. Rptr. 348 (1981).

3  
4 When a defendant enters into an affirmative course of conduct that affects the interests of  
5 another person, he assumes a duty to exercise reasonable care toward that person's safety, and the  
6 defendant will be liable thereafter for negligent acts or omissions. *Brockett v. Kitchen Boyd Motor*  
7 *Co.*, 264 Cal. App. 2d 69, 71 (1968). The facts of the *Brockett* case are relevant and analogous to  
8 the facts of the present case. In *Brockett*, the defendant's employee, Jimmie Huff, became  
9 intoxicated at the company's holiday party. *Id.* at 70. A representative of the company placed Huff  
10 in his car and directed him to drive home. *Id.* Huff subsequently had a car accident. *Id.* While the  
11 *Brockett* Court recognized that providing alcohol does not ordinarily make a defendant liable for  
12 the acts of the consumer, the affirmative act of placing Huff in his car and directing him to drive  
13 home established a duty on the defendant to exercise reasonable care. Specifically, the *Brockett*,  
14 court held that the defendant "activated the tort, and anyone hurt as a consequence should be  
15 entitled to recover from it." *Id.* at 73. In the present case, Dave & Buster's "activated the tort" to a  
16 far greater extent than the defendant in *Brockett* by continuing to provide further debilitating  
17 substances to an already compromised guest to obtain greater profit. As a consequence, Plaintiffs  
18 have suffered overwhelmingly debilitating injuries, and they are entitled to have the question of  
19 Dave & Buster's negligence submitted to the jury.

20  
21  
22 **Dave & Buster's violated its own internal policies and industry standards.**

23 Further, while a defendant may ordinarily have no duty to anticipate the conduct of another  
24 person, the law will impose an affirmative duty to abide by an established standard of care. An  
25 established company policy is evidence of a standard of care which the company finds  
26 appropriate to serve the purpose of the policy. *O'Toole v. Carlsbad Shell Service Station*, 202 Cal.  
27 App. 3d 151 (1988). "A violation of a rule of care established by a party to the litigation is  
28

evidence of negligence." *Id.* The undersigned counsel believes that discovery in this case - which has not yet commenced - will reveal that Dave & Buster's has violated its own company policy. Specifically, Dave & Buster's likely has a formal policy to cease service to intoxicated persons, encourage them to obtain a taxi, and even report disorderly conduct to police. This fairly standard policy serves to protect patrons like Hurley and Aparicio, and when reasonably followed, also avoids an establishment's "activating the tort" as occurred in *Brockett*.

Additionally, NRS 369 requires that restaurant and bar businesses in Nevada, such as Dave & Buster's, have their employees certified in alcohol awareness training that presumably instructs them to decline service to intoxicated persons. Dave & Buster's likely breached its own company policy and the NRS 369 educational directives against directing intoxicated patrons (and intended occupants) into their vehicles, endangered the exact group of persons the policy and law were intended to protect, and this constitutes further support for the claim of negligence against Dave & Buster's here.

Foreseeability and proximate cause are also genuine issues of material fact for the jury to decide, both of which are important factors in this case. Negligence is actionable when the injury resulting from the wrongful act should have been foreseen in light of the circumstances. *Van Cleve v. Kietz-Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981), citing *Crosman v. Southern Pacific Co.*, 42 Nev. 92, 108-109, 173 P. 112, 228 (1918). Unquestionably, on the facts of this case, the jury may decide that it was reasonably foreseeable that plying the customers with alcohol well beyond their limits could result in substantial harm. Further, the jury will be entitled to conclude that facilitating driving while intoxicated was a substantial factor in the resulting accident, and the catastrophic injuries suffered by Plaintiffs. A civil statute's violation establishes the duty and breach elements of negligence when the injured party is in the class of persons whom the statute is intended to protect and the injury is of the type against which the statute is

intended to protect. *Ashwood v. Clark County*, 113 Nev. 80, 86, 930 P.2d 740, 744 (1997); *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983).

**Liability is not based on merely furnishing alcohol that is then consumed in moderation.**

The present case is very different from the dram shop cases, like *Van Cleve*, which hold that the consumption, not the sale, of alcohol is the proximate cause of the resulting injuries because the seller cannot foresee what the purchaser will do with the alcohol. *Id.* 97 Nev. at 417, 633 P.2d at 1222. In this case, assuming the facts most favorable to the Plaintiff, the employees of Dave & Buster's knew exactly what was being done with the alcohol and what the results of the ingestion of the alcohol were and violated Dave & Buster's own policies and the statutorily required education they received, because they knew, or at least should have known, that serving an intoxicated driver and his passengers would "very probably" result in drunk driving. In fact, the allegations of the complaint are that Dave & Buster's were complicit and enabled the drunk driving. The employees should have foreseen a drunk driving accident, and resulting injuries, based upon their actions. In fact, their actions did result in two deaths that very evening. "As long as the injuries incurred were the reasonably foreseeable consequences of the tortfeasor's conduct . . . the question of foreseeability. . . is for the trier of fact." *Crislip v. Holland*, 401 So.2d 1115, 1117 (Fla. 1981).

It seems to us that the aim of the guest statute is to allow recovery if the host's consumption of alcohol proximately caused injury to (or the death of) his guest. The term "intoxication" is to be construed with this purpose in mind. The precise degree of inebriation is relatively unimportant if, in fact, the host's consumption of alcohol was the proximate cause of injury. Reasonable jurors can make this determination. *Frame v. Grisewood*, 399 P. 2d 450, (1965).

1 The Nevada Supreme Court has clearly stated that the District Court errs in finding that a  
2 defendant acted reasonably when the defendant does not address reasonableness in its motion for  
3 Summary Judgment. *Billingsley*, 111 Nev. at 1038, 901 P.2d at 144 (1995). No less a standard  
4 should apply here. Dave & Buster's did not address reasonableness or any other factor pertinent  
5 to Plaintiff's negligence cause of action or any other causes of action, it cannot belatedly do it in  
6 its reply, therefore, the Court should deny its Motion.  
7

8 **NRS 41.1305 did not usurp the common law in Nevada---it extended it and applied it to**  
9 **hosts who serve even a moderate amount of alcohol to minors.**

10 As set forth above and below, the Nevada Supreme Court has been slow to recognize and  
11 adopt fully the modern trend regarding dram shop liability, which would bring Nevada in  
12 harmony with other jurisdictions and in harmony with the Nevada negligence law in every other  
13 type of negligence claim.  
14

15 We considered whether we should modify existing Nevada law to  
16 recognize third parties' claims for relief against tavern keepers who furnish  
17 alcoholic beverages to an underage drinker, but concluded that any "modern  
18 trend" was not significant enough to justify the abrogation of our long line of  
19 decisions denying negligence claims against tavern keepers. ...Our continued  
20 adherence to the bright-line common law rule necessitates our conclusion that,  
21 as with injuries to third parties, consumption is the proximate cause of  
22 alcohol-related injuries to the drinker. *Snyder v. Viani*, 110 Nev. 1339, 1343  
(Nev. 1994).  
23

24 The common law in Nevada never provided for liability for merely serving or even  
25 consuming alcohol appropriately. After this *Snyder* decision in 1994, the original NRS 41.1303,  
26 which Defendant relies upon, was passed. The legislature has attempted to move the Court  
27 forward. This was a signal to the court that the Nevada legislature felt the modern trend was the  
28 correct one. The statute continued the non-liability of liquor licensees who provide alcohol in  
compliance with their license.<sup>3</sup> NRS 41.1303 has **no language removing any common law**

---

<sup>3</sup> Section two imposes liability on non-licensed hosts for providing liquor to minors because they are not regulated and trained to spot situations that pose a risk to the greater community.

1 **causes of action regarding alcohol**, but the statute did remove negligence per se resulting from  
2 failure to comply with licensing statutes. There were several situations where the court found  
3 liability, over and above the mere consumption of alcohol, discussed below. These were never  
4 removed and still are causes of action.

5  
6 Nevada legislature chose not to enact legislation that would impose civil  
7 liability on tavern keepers for the sale of alcoholic beverages to underage  
8 drinkers. This choice not to extend liability supports our decision in  
9 *Hinegardner* and our decision here. *Snyder v. Viani*, 110 Nev. 1339, 1343 (Nev.  
10 1994).

### 11 **Negligence per se for serving intoxicated person**

12 In 2007, NRS 41.1305 was amended. The amendment reinstated negligence per se for serving  
13 already intoxicated persons. Thus returning the common law principle and statutory principle of  
14 negligence per se when violating a statute. This concept is reinforced in Nevada by NRS 41.133  
15 which provides that conviction of crime is conclusive evidence of facts necessary to impose civil  
16 liability for related injury. Thus, Clark County Code (8.20.300) is applicable to the finding of  
17 negligence per se of Dave & Buster's. This does not create liability; it is a statute that established  
18 the standard of care that is reasonable under the common law negligence liability.

### 19 **Willful and Wanton misconduct of Dave & Buster's**

20 Once Aparicio passed the threshold of intoxication, he was no longer able to consent to  
21 further sales and consumption of alcohol. Dave & Buster's had stepped into control; and  
22 instead of acting reasonably, acted with wanton and reckless disregard for the consequences of  
23 its actions. This illegal activity was taken for the sole purpose of greater profits and amounts to  
24 egregious disregard for the safety of the patron and the public. *Ordinary and gross negligence*  
25 *differ in degree of inattention, while both differ in kind from wilful and intentional conduct*  
26 *which is or ought to be known to have a tendency to injury.* (Emphasis added.) *Hart v. Kline*, 61  
27 Nev. 96, 101, 116 P.2d 672, 674 (1941), *Davies v. Butler*, 95 Nev. 763, 771 (Nev. 1980).  
28

The evidence in the instant case supports an instruction regarding the willful or wanton misconduct of the respondents. The jury could conclude that the intent of respondents was to administer dangerous quantities of alcohol to Davies within a short period of time. 190 proof alcohol was deliberately chosen to be administered, as it had been on previous occasions, and respondents were fully aware of its nature. Further, they were aware that retention of large amounts of alcohol in the system can be highly dangerous, as an initiate had had to be hospitalized the year before. Despite respondents' protestation that they assumed decedent would not swallow most of the alcohol administered to him, they admitted having no way to determine whether that was so, while continuing to put bottles of liquor to his lips and screaming at him to drink it. Other courts have had no difficulty finding willful, wanton, or reckless misconduct in the furnishing of alcohol in sufficient quantities to cause death, even under less aggravated circumstances. *E.g.*, *Ewing v. Cloverleaf Bowl*, 572 P.2d 1155 (Cal. 1978); *McCue v. Klein*, 60 Tex. 168 (1883). *Davies v. Butler*, 95 Nev. 763, 773 (Nev. 1980)

Dave & Buster's is in a superior position to measure the dangers and the potency of the at least eight hard liquor drinks it provided to Aparicio. This callous approach to the obviously dangerous situation is actionable. Dave & Buster's cannot hide behind consent either because it knowingly took away Aparicio's ability to consent and cannot now hide behind it.

Furthermore, capacity to consent requires the mental ability to appreciate the "nature, extent and probable consequences of the conduct consented to." Restatement, Torts, *supra*, comment b, at 365. As noted by Prosser, *Law of Torts*, § 18, at 102 (4th ed. 1971), "[i]f the plaintiff is known to be incapable of giving consent because of . . . intoxication . . . his failure to object, or even his active manifestation of consent will not protect the defendant." *Davies v. Butler*, 95 Nev. 763, 774 (Nev. 1980).

### **Intentional criminal act in concert with another**

Dave & Buster's, by participating and taking control of the dangerous instrumentality of an intoxicated driver, participated in the tort. Its actions in creating consequences dangerous to the community amount to participation in a criminal conspiracy.

In *McCue v. Klein*, *supra*, the widow of a man who had died as a result of drinking a toxic quantity of alcohol sued those who had furnished him the alcohol and induced him to drink it, on a wager. The court held, 60 Tex. at 169,

[T]he maxim of *volenti non fit injuria* presupposes that the party is capable of giving consent to his own injury. If he is divested of the power of refusal by mental faculties, the damage cannot be excused on the ground of consent given. A consent given by a person in such condition is no consent at all, — more

1 especially when his state of mind is well known to the party doing the injury. . . .  
2 And so if one whose mental faculties are suspended by intoxication is induced to  
3 swallow spiritous liquors to such excess as to endanger his life, the persons  
4 taking advantage of his condition of helplessness and mental darkness and  
5 imposing the draught upon him must answer to him if such injury should fall  
6 short of the destruction of life, and to his family if death should be the result.  
7 *Davies v. Butler*, 95 Nev. 763, 774 (Nev. 1980).

8 When Dave & Buster's chose to place greater profit above reasonable behavior, as alleged  
9 in the complaint on file herein, it divested power from its patrons. Instead, without warnings, it  
10 plied excessive amounts of high octane alcohol on a youthful already disabled patron in wanton  
11 and reckless disregard for the safety of its patron and the general public. A situation like this was  
12 no different than handing Aparicio an AR 15 with a full clip and sending him out the door.

### 13 **Product Liability**

14 The dissent authored by justices Steffen and Mowbray in *Hinegardner v. Marcor Resorts* ,  
15 considered the vision and pervasive impact of the venerable Judge Cardozo who, writing for the  
16 *MacPherson* court, said:

17 "Precedents drawn from the days of travel by stagecoach do not fit the  
18 conditions of travel to-day. The principle that the danger must be imminent  
19 does not change, but the things subject to the principle do change. They are  
20 whatever the needs of life in a developing civilization require them to be.

21 . . . .

22 If the nature of a thing is such that it is reasonably certain to place life and  
23 limb in peril when negligently made [such as an intoxicated human ready  
24 to operate a high-speed vehicle], it is then a thing of danger. If to the  
25 element of danger there is added knowledge that the thing will be used by  
26 persons other than the purchaser, and used without new tests, then,  
27 irrespective of contract, the manufacturer of this thing of danger is under a  
28 duty to make it carefully." *Hinegardner*, 108 Nev. at 1097, 844 P.2d 804-05  
(quoting *MacPherson*, 111 N.E. at 1053).

29 In 1994, in *Snyder v. Viani*, 110 Nev. 1339, 1347 (Nev. 1994), Justice Steffan again  
30 authored a dissenting opinion, this time joined by Justice Springer:

31 As I previously observed in *Hinegardner*, the majority's position would  
32 place them in solid dissent with the landmark ruling of *MacPherson v. Buick*  
33 *Motor Co.*, 111 N.E. 1050 (N Y 1916), on grounds that liability in the  
34 manufacture and sale of products, including automobiles, would be limited to



those comparatively few instances where there was contractual privity between the manufacturer and the purchaser of the product. *See id.* at 1097, 844 P.2d at 804 (STEFFEN, J., dissenting). Thus, the interpositioning of the retailer between the manufacturer and the consumer who would ultimately use and be injured by the defective product, would generally leave the consumer without a remedy for his or her injuries. *See MacPherson*, 111 N.E. at 1053-54. Likewise, in negligent entrustment cases, the majority's reasoning would eliminate the cause of action on grounds that it is the action of the party to whom the instrumentality of harm is negligently entrusted who causes the harm rather than the one who negligently entrusts the instrumentality to someone unsuited to the trust.

As I observed in dissent in *Hinegardner*, "the role of alcohol in the death and maiming of countless numbers of men, women and children each year is well and indisputably attested. The shattered concourses of victims of alcohol-related accidents have combined with a restive and angry society to create a responsive, solid majority of courts that have recognized a cause of action against negligent vendors of alcohol." *Snyder v. Viani*, 110 Nev. 1339, 1346 (Nev. 1994)

"Indeed, it is not consistent with the rationale applied by this court in other consecutive negligence situations. *See, e.g., Drummond v. Mid-West Growers*, 91 Nev. 698, 704-5, 542 P.2d 198, 203 (1975) (subsequent negligence of a third party toward rescuer of negligent defendant foreseeable; defendant's negligence remains proximate cause)." *Davies v. Butler*, 95 Nev. 763, 776 (Nev. 1980).

**NRS 41.1305 is unconstitutional and must be stricken. The statute violates the equal protection clause and has a disproportionate effect on minorities and the poor.**

Dave & Buster's only basis for dismissal is a misreading and unconstitutional application of NRS 41.1305.

The "overwhelming majority of courts" have advanced the common law to meet the conditions of our present society because it should be clear to all that if vendors of alcoholic beverages are factored into the liability equation, there will be fewer intoxicated drivers, like *Lovett*, to continue the highway carnage that truly has become such a national disgrace and tragedy. Fewer intoxicated drivers translates into fewer victims. Depreciating inebriated drivers results in the veneration of human life. **Placing greater value on human life than economic advantage, lifts society to a higher plane.** Conversely, emphasizing commercial advantage over human life and suffering degrades society and lowers the quality of its civilization.

The majority would have us believe that there are so many problems and nuances of problems involved in placing negligent vendors of alcohol in the liability equation, that these problems and the difficulties inherent in their resolution outweigh the substantial attenuation of human misery and death that would result

1 from the implementation of solutions. I suggest that the majority's fears are as  
2 unjustified as its priorities. *Dissent, Snyder v. Viani*, 110 Nev. 1339, 1347 (Nev.  
3 1994), (emphasis added.)

4 The Equal Protection Clause of the Fourteenth Amendment to the United States  
5 Constitution guarantees equal protection under the law. The first step in the equal protection  
6 analysis is to determine the appropriate standard of scrutiny to apply according to the rights  
7 infringed and the classification created. *Hamm v. Arrowcreek HOA*, 183 P.3d 895 (2008).

8 In 2015, the Nevada Court upheld a challenge to the tort reform statutes imposing a cap on  
9 damages in malpractice actions. “To survive an equal protection challenge, [NRS 41A.035](#) need  
10 only be rationally related to a legitimate governmental purpose. ” *Tam v. Eighth Judicial Dist.*  
11 *Court of State*, 358 P.3d 234, 239 (Nev. 2015) “Thus, we conclude that [NRS 41A.035](#) does not  
12 violate equal protection because the imposition of an aggregate cap on noneconomic damages in  
13 medical malpractice actions is rationally related to the legitimate governmental interests of  
14 ensuring that adequate and affordable health care is available to Nevada's citizens. ” *Tam v.*  
15 *Eighth Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015).

16  
17 NRS 41.1305 differs from NRS 41A.035 in two constitutionally fatal ways. First, the  
18 injured victims subject to NRS 41.1305 have their right to damages completely removed, not  
19 limited as was the case in NRS 41A.035. This violates the language in *Tam* that to be  
20 unconstitutional “a statute must make the right practically unavailable.” *Barrett v. Baird*, [111 Nev.](#)  
21 [1496, 1502, 908 P.2d 689, 694](#) (1995)” *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234,  
22 238 (Nev. 2015).

23  
24 Secondly, there is no legitimate governmental interest in protecting the financial benefits of  
25 serving inebriated persons under NRS 41.1305. “To survive an equal protection challenge, [NRS](#)  
26 [41A.035](#) need only be rationally related to a legitimate governmental purpose.” *Tam v. Eighth*  
27 *Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015). Protecting the profits of bars is not a  
28

1 legitimate governmental interest like that protected in *Tam*: “Based on this express goal, [NRS](#)  
2 [41A.035](#)’s aggregate cap on noneconomic damages is rationally related to the legitimate  
3 governmental interest of ensuring that adequate and affordable health care is available to  
4 Nevada’s citizens.” *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015).

5  
6 The decedents herein did not have underinsured motorists coverage. They were killed by a  
7 drunk driver. Their lives are ravaged and the root cause hides behind the legislative and judicial  
8 branches of government.

9  
10 Given the fact that Nevada has a singularly strong financial  
11 dependence upon segments of the state economy that dispense  
12 alcohol as a significant inducement to other forms of business  
13 activity, it is both unrealistic and irresponsible to espouse the  
14 fantasy that the Legislative branch of government will effectively  
15 consider and adopt dram shop legislation. Although we can hardly  
16 fault our legislators for shunning such an act of self-immolation,  
17 there is no excuse for the "non-political" judicial branch of  
18 government doing the same. I realize the unfortunate fact that  
19 judges, including the members of this court, are elected in this state,  
20 but that constitutes no valid excuse for this court's failing to respond  
21 to the clear and increasing demands of our society to give relief to  
22 the growing number of victims who fall prey to inebriated drivers  
23 on our highways. Despite the apparent need to substantially finance  
24 judicial elections with contributions from segments of our state  
25 economy that are purveyors of alcoholic beverages, "biting the hand  
26 that feeds you" should never be a consideration in the judicial  
27 process. *Dissent, Snyder v. Viani*, 110 Nev. 1339, 1346 (Nev. 1994).

28  
As reflected by the positive response of an overwhelming majority of the common law  
courts of this nation, there is a compelling need for the judiciary of Nevada to provide its citizens  
and the users of its highways with relief from the growing menace of intoxicated drivers. We can  
realistically look to no other source. This court must recognize the fact that irresponsible and  
negligent vendors of alcoholic beverages are priming people for roles as drunken drivers who kill  
and maim the innocent travelers on Nevada's highways. Entire families are wiped out and  
destroyed by this menace.

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

7 **Minorities and the poor are disadvantaged in electing officials and obtaining insurance**  
8 **coverage. This is Systemic racism where the power elite oppress minorities and the poor.**

9 A 2014 article authored by Jeffery Stempel, a UNLV law professor, discusses Nevada's  
10 approach to this situation:

11 Notwithstanding the flexibility that legislatures and courts have in  
12 defining legal obligations and status, Nevada's current protection of businesses  
13 already favored with liquor licenses comes uncomfortably close to being an  
14 equal protection problem, even if it is not clearly constitutionally disfavored  
15 favoritism such as that based on race, religion, gender, ethnicity, or age. Further,  
16 there is no strong public policy reason for being so protective of commercial  
17 hosts. 14 Nev. L.J. 866, at 894 (2014).<sup>4</sup>

16 Stempel goes on to conclude:

17 At some point, Nevada's legal system must ask itself whether such extensive  
18 immunity for commercial hosts can be justified. Nevada's resistance to the modern  
19 world of dram shop liability is embarrassing enough. Expanding it to other aspects  
20 of the hospitality industry only adds to the embarrassment. *Id.* at 896.

## 20 Denial of trial by jury

21 In Nevada, "[t]he right of trial by Jury shall be secured to all and remain inviolate forever."  
22 Nev. Const. art. 1, § 3. This provision guarantees "the right to have factual issues determined by a  
23 jury." *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 711, 542 P.2d 198, 207 (1975).

24 In order for a statute to violate the right to trial by jury, a statute must make the right practically  
25 unavailable. *Barrett v. Baird*, 111 Nev. 1496, 1502, 908 P.2d 689, 694 (1995) ("[T]he correct  
26

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27  
28 <sup>4</sup> Stempel, Jeffrey W. (2014) "Making Liquor Immunity Worse: Nevada's Undue Protection of  
Commercial Hosts Evicting Vulnerable and Dangerous Patrons," *Nevada Law Journal*: Vol. 14 :  
Iss. 3 , Article 13. Available at: <https://scholars.law.unlv.edu/nlj/vol14/iss3/13>.

standard for evaluating whether a statute unconstitutionally restricts the right to a jury trial is that the right must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.” (internal quotations omitted)), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008), *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234, 238 (Nev. 2015).

Life liberty and the pursuit of happiness are fundamental rights. These rights may not be taken away except with due process of law, which, in this case, includes trial by jury. It is not a legitimate state interest to protect the profits of the rich and powerful. Most decisions regarding the jury trial right arise in the criminal context and have focused on the magnitude of the possible punishment to determine whether the right is invoked. Here Plaintiffs’ descendants received the ultimate punishment of death. Their right to have all negligent parties liability determined by a jury cannot be questioned.

The evolution continued in *Duncan v. Louisiana*, 391 U.S. 145 (1968), where the Supreme Court more clearly emphasized the maximum authorized penalty over other criteria in determining whether the crime is so serious as to require a jury trial. *Id.* at 159. In *Duncan*, the Supreme Court stated that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." *Blanton v. North Las Vegas Mun. Ct.*, 103 Nev. 623, 629 (Nev. 1987).

No one would argue that a death penalty case would need to be tried to a jury under the criminal law. It stands to reason that a civil case seeking to establish liability, where the harm suffered or “penalty” was death, would require the issues establishing liability to be submitted to a jury under the constitution.

Moreover, concerning the problems that are of such paramount concern to the majority, I refer again to my dissent in *Hinegardner* where, quoting from the Colorado Supreme Court in *Largo*, that court instructed:

"[A]s to the consequences of imposing such a burden upon tavern owners, we reject Largo's claim that civil liability for the negligent sale

1 of alcohol would impose insurmountable proof problems on tavern  
2 owners. Whatever problems of proof exist, the plaintiff will be  
3 confronted with the same obstacles in reconstructing the facts, and the  
4 plaintiff, not the defendant, will bear the burden of proving a breach of  
duty." *Snyder v. Viani*, 110 Nev. 1339, 1347-48 (Nev. 1994).

5 Again, Professor Stempel's law review article, under the heading of "Needlessly Barring  
6 Jury Consideration" wrote:

7 Perhaps I'm hopelessly naïve about the extent to which a hotel or other  
8 host establishment should go to avoid placing patrons (and those who  
9 they may encounter) in danger. But what better way to settle the issue  
10 than to have trial and jury consideration? Judges too often strain to grant  
summary judgment out of what I suspect is inordinate fear of what a jury  
11 may do if the matter is tried. But such fears are probably misplaced.  
Jurors are not Marxist agents of income redistribution. *Id.* at 883.

12 **In the Alternative, Plaintiffs must be allowed to Amend the Complaint herein.**

13 While Plaintiffs do not believe the complaint is deficient to warrant Dave & Buster's  
14 Motion to Dismiss, in the alternative, Plaintiffs request leave to amend should the court believe  
15 that some element of the above causes of action has not been sufficiently pled. Nevada Rule of  
16 Civil Procedure 15, similar to Federal Rule of Civil Procedure 15, provides that leave to amend  
17 should be "freely" granted "when justice so requires." As a result, Courts have consistently held  
18 that a district court abuses its discretion in denying leave to amend "unless the district court  
19 'determines that the pleading could not possibly be cured by the allegation of other facts,'" *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Lopez v. Smith*, 203 F.3d  
20 1122, 1127 (9th Cir. 2000) (en banc)).

23 ///

24 ///

25 ///

26 ///

1 **Conclusion: Dave & Buster's motion must be denied.**

2 Dave & Buster's has ignored the allegations in the pleadings, failed to refute each of the  
3 causes of action alleged and claimed without support that NRS 41.1305 is fatally flawed. Its  
4 motion should be denied.  
5

6 Dated this 9<sup>th</sup> day of June, 2020.

7  
8 CHRISTENSEN LAW OFFICES, LLC

9 BY: 

10 THOMAS CHRISTENSEN, ESQ.

11 Nevada Bar No. 2326

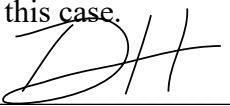
12 1000 S. Valley View Blvd.

13 Las Vegas, Nevada 89107

14 Attorney for Plaintiff

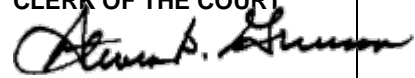
15 **CERTIFICATE OF SERVICE**

16 I HEREBY CERTIFY that on the 9<sup>th</sup> day of June, 2020, this document was filed  
17 electronically with the Eighth Judicial District Court's efile system, Odyssey Efile & Serve,  
18 and was thereby served upon all registered users for this case.  
19

20   
21 An Employee of Christensen Law Offices  
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**#4: Reply in Support of Motion to Dismiss**





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**DISTRICT COURT**

**CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio; Morgan Hurley; Dave &  
Buster's of Nevada, Inc. dba Dave & Buster's; Dave  
& Buster's, Inc.; MAT-Summerlin, LLC dba Casa  
del Matador Summerlin; Matador Investments, LLC;  
Opper Melang 5410, LLC; Mel-Opp & Griff, LLC;  
Opp Mel & Griff, Inc.; Mocore, LLC; Does I-V, and  
Roe Corporations I-V, Roe Manufacturer I-V; Roe  
Wholesaler I-V; Roe Retailer I-V,

Defendants.

Case No.: A-20-813787-C  
Dept. No.: 18

**Dave & Buster's of Nevada, Inc's  
Reply re Motion to Dismiss**

There are three arguments that apply to this motion: 1) Plaintiffs have not pled specific facts against Dave & Buster's. Generic allegations against multiple defendants are insufficient. 2) Assuming Plaintiffs intend to allege certain facts, NRS 41.1305(1) applies and prevents Plaintiffs from recovering against Dave & Buster's. 3) If so, NRS 41.1305(1) is constitutional. Plaintiffs' position is largely a political one: they do not believe NRS 41.1305(1) should be the law of Nevada. They are free to present these arguments to their elected officials to seek change, but the judiciary's role is to apply the law as it exists.

AA060

1 Applied here, the Nevada Legislature and the Supreme Court of Nevada before it decided  
2 the person who drove drunk is responsible for his actions, not the establishments where he drank.  
3 It means Plaintiffs plead no claim against Dave & Buster's upon which relief could be granted and  
4 their complaint should be dismissed per NRCP 12(b)(5).

5 DATED this 24<sup>th</sup> day of June, 2020.



7 /s/ Michael P. Lowry

8 BY:

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13 **Memorandum of Points & Authorities**

14 **I. Generic allegations are insufficient when multiple defendants are involved.**

15 A complaint must contain “a short and plain statement of the claim showing that the  
16 pleader is entitled to relief.”<sup>1</sup> Dave & Buster's opening brief detailed how the complaint did not  
17 contain any specific factual allegations against it. The complaint instead pleads only generic facts  
18 and causes of action as to all defendants.<sup>2</sup> The specific factual allegations the complaint contains  
19 apply only to acts by Aparicio, Hurley, and Casa del Matador.

20 Merely lumping all the defendants together does not comply with NRCP 8(a)(2). “A  
21 complaint that lumps together thirteen ‘individual defendants,’ where only three of the individuals  
22 was alleged to have been present for the entire period of the events alleged in the complaint, fails  
23  
24  
25  
26

27 <sup>1</sup> NRCP 8(a)(2).

28 <sup>2</sup> Opposition at n.1 “Plaintiffs used the term ‘defendants’ to refer to all defendants including Dave & Buster's of Nevada, Inc.....”).

1 to give ‘fair notice’ of the claim to those defendants.”<sup>3</sup> “Additionally, the Court notes that  
2 undifferentiated pleading against multiple defendants is improper.”<sup>4</sup>

3 At a bare minimum, Plaintiffs current complaint does not plead specific facts as to Dave &  
4 Buster’s that would support a claim for relief.

5 **II. NRS 41.1305(1) precludes liability against Dave & Buster’s.**

6 Dave & Buster’s assumed if Plaintiffs filed an amended complaint, it would allege that 1)  
7 Dave & Buster’s sells alcoholic beverages; 2) sold them to Aparicio; 3) resulting in Aparicio  
8 driving drunk; and 4) that injured the plaintiffs. Plaintiffs have confirmed this is what they plan.  
9 No matter how phrased, Plaintiffs’ theory of liability against Dave & Buster’s arises from these  
10 alleged facts.

11 Plaintiffs’ problem is NRS 41.1305(1) bars any recovery from Dave & Buster’s under this  
12 fact pattern.

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

16 **a. Plaintiffs’ first-party liability arguments are inapplicable.**

17 Plaintiffs offer various arguments about why NRS 41.1305(1) should not apply. Within  
18 their arguments are citations to first-party cases.<sup>5</sup> “First-party” cases are those where the drinker  
19 who consumed the alcohol sues the bar for injuries the drinker sustained. These cases are  
20 distinguishable because Plaintiffs here are presenting a third-party claim. They are not the drinker  
21 (a first-party claim), they people who were injured by the drinker (a third-party claim).

22 *Billingsley v. Stockmen’s Hotel* is a first party case, but it did not concern liquor liability  
23 like Plaintiffs wish to impose here.<sup>6</sup> *Billingsley* was about an altercation between hotel security

---

24 <sup>3</sup> *In re Sagent Tech., Derivative Litig.*, 278 F. Supp. 2d 1079, 1094-95 (N.D. Cal. 2003) (decided  
25 pre-*Iqbal*, applying the same *Conley* standard as presently applies in Nevada); *Gauvin v.*  
26 *Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (lumping together multiple defendants in  
one broad allegation fails to satisfy notice requirement of Rule 8(a)(2).

27 <sup>4</sup> *Aaron v. Aguirre*, No. 06-cv-1451, 2006 U.S. Dist. LEXIS 90384, 2006 WL 8455871 n.12 (S.D.  
Cal. Dec. 13, 2006).

28 <sup>5</sup> *E.g. Harris v. Gower, Inc.*, 506 N.E.2d 624 (Ill. App. 1987) (bar removed intoxicated guest and  
put him in his car where he froze to death).

<sup>6</sup> 111 Nev. 1033, 901 P.2d 141 (1995).

1 and a guest who was being escorted off property. No argument was presented about whether the  
2 hotel could be liable for damages for serving him alcohol.

3 Plaintiffs also cite *Brockett v. Kitchen Boyd Motor Co.* where an employer served alcohol  
4 to a minor employee who became intoxicated.<sup>7</sup> The employer then guided the intoxicated minor  
5 to his car, placed him in it, and directed him to drive home. This gave rise to third-party liability  
6 but is inapplicable here because Aparicio was not a minor and because Plaintiffs allege Casa del  
7 Matador engaged in that conduct, not Dave & Buster's.

8 **b. Dave & Buster's owed no duties once Aparicio left the restaurant.**

9 Plaintiffs alternatively argue their claims do not arise from conduct that NRS 41.1305(1)  
10 protects. They argue their "claims herein also arise out of the negligent conduct of Dave &  
11 Buster's personnel when they placed Plaintiffs in peril by allowing Aparicio and Hurley into  
12 society in their obviously intoxicated state."<sup>8</sup> They argue Dave & Buster's could be liable because  
13 it knew "or should have known the patrons would be driving from the premises."<sup>9</sup> They assert  
14 Dave & Buster's instead owed a duty to provide alternative transportation home such as a taxi.  
15 First, this is a distinction without meaning. The facts alleged in the complaint assert Aparicio was  
16 drunk because Dave & Buster's served, sold or furnished alcohol to him. Thus the duty Plaintiffs  
17 allege still arose from conduct that NRS 41.1305(1) protects.

18 Second, the Supreme Court of Nevada has rejected the idea that Dave & Buster's owed a  
19 duty once Aparicio left the premises. In *Rodriguez v. Primadonna Co., LLC* three men were  
20 ejected from a casino for being drunk and disorderly. After being ejected, they were subsequently  
21 involved in a motor vehicle accident. One of the injured parties sued the casino. The Supreme  
22 Court first noted "it is well settled in Nevada that commercial liquor vendors, including hotel  
23 proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated  
24 patron, which are sustained by either the intoxicated patron or a third party."<sup>10</sup> Consequently,  
25 "when a hotel proprietor rightly evicts a disorderly, intoxicated patron, the hotel proprietor is not  
26

27 <sup>7</sup> 264 Cal. App. 2d 69 (1968).

<sup>8</sup> Opposition at 10:15-17.

<sup>9</sup> Opposition at 11:19.

<sup>10</sup> 125 Nev. 578, 585, 216 P.3d 793, 798 (2009).

1 liable for any torts that an evicted patron commits after he or she is evicted that result in injury.”<sup>11</sup>  
2 This meant “because Nevada commercial alcohol vendors are not liable for injuries sustained by  
3 intoxicated patrons, [the hotel] did not have a duty to ensure safe transportation for the young  
4 men, keep Fabian on the premises, or otherwise prevent injuries subsequent to their eviction.”<sup>12</sup>

5 Therefore, although the Primadonna may have known that Fabian’s step-uncle was  
6 intoxicated and could not safely drive, we conclude, as a matter of law, that  
7 Primadonna did not have the duty to arrange safer transportation, prevent an  
8 intoxicated driver from driving, or prevent Fabian, a passenger, from riding with a  
9 drunk driver. In so concluding, we note that it would be contrary to existing authority  
for this court to hold otherwise and require a proprietor to monitor the intoxication  
level or other factors related to patrons who elect to drive while intoxicated or who  
engage in other dangerous activity after they are evicted.<sup>13</sup>

10 Applied here, Aparicio left Dave & Buster’s of his own accord; he was not evicted or  
11 asked to leave. Regardless, once he left the premises, whatever duties Dave & Buster’s might  
12 have owed ended for the same reasons that *Rodriguez v. Primadonna Co.* described.

13 **c. Clark County Code § 8.20.300 cannot create civil liability for Dave & Buster’s.**

14 Plaintiffs continue to argue CCC 8.20.300 can be used to impose civil liability against  
15 Dave & Buster’s via negligence per se. Plaintiffs do not dispute that if read as they propose, CCC  
16 8.20.300 would conflict with NRS 41.1305(1). If so, NRS 41.1305(1) controls.

17 Plaintiffs instead argue a 2007 amendment to NRS 41.1305 allows them to pursue only a  
18 negligence per se theory against Dave & Buster’s. Before the 2007 legislature, NRS 41.1305 read  
19 as follows:

- 20 1) No person who serves or sells alcoholic beverages is liable in a civil action based  
21 on the grounds that the service or sale was the proximate cause of injuries  
22 inflicted by an intoxicated person upon himself or another person.  
23 2) The violation of any statute, regulation or ordinance which regulates the sale or  
24 service of alcoholic beverages to a minor or an intoxicated person does not  
constitute negligence per se in any action brought against the server or seller for  
injuries inflicted by an intoxicated person upon himself or another person.

24 The 2007 Legislature combined these two statutes into NRS 41.1305(1).

25 A person who serves, sells or otherwise furnishes an alcoholic beverage to another  
26 person who is 21 years of age or older is not liable in a civil action for any damages

27 <sup>11</sup> *Id.*, 216 P.3d at 798-99.

28 <sup>12</sup> *Id.* at 587, 216 P.3d at 800.

<sup>13</sup> *Id.*

1 caused by the person to whom the alcoholic beverage was served, sold or furnished as  
2 a result of the consumption of the alcoholic beverage.

3 Plaintiffs argue by deleting the specific reference to negligence per se, the 2007 legislature  
4 intended to allow third-party claims such as are at issue here. This is inaccurate as the revised  
5 NRS 41.1305(1) provides even broader protection than its predecessor. This interpretation also  
6 leads to the absurd result of there being no general negligence duty, but only a regulatory duty that  
7 varies by locality and creates liability NRS 41.1305(1) otherwise eliminated.

### 8 **III. NRS 41.1305(1) is constitutional.**

9 Plaintiffs' final argument is that if NRS 41.1305(1) applies to the facts alleged and bars a  
10 recovery against Dave & Buster's, then NRS 41.1305(1) is unconstitutional. Plaintiffs "must  
11 make a clear showing of invalidity."<sup>14</sup> Preliminarily, while Plaintiffs' cite extensively from the  
12 1994 dissent in *Snyder v. Viani*, NRS 41.1305(1) was not created until 1995. *Snyder* could not  
13 have considered the constitutionality of a statute that did not exist.

#### 14 **a. The Legislature may reasonably restrict access to the courts.**

15 Plaintiffs argue NRS 41.1305(1) violates their right to a jury trial because it bars them  
16 from recovering against Dave & Buster's. The Supreme Court of Nevada has repeatedly ruled  
17 that the right to sue for damages "does not involve a fundamental constitutional right."<sup>15</sup> When a  
18 fundamental constitutional right is not implicated, the Legislature may restrict court access "if  
19 there exists a rational basis for doing so. In other words, constitutional 'right of access' challenges  
20 that do not implicate a fundamental right are subjected to the lowest level of judicial scrutiny--the  
21 'rational basis' test."<sup>16</sup> The rational basis test is satisfied if the statute is rationally related to a  
22 legitimate government purpose. "This Court may not, under such a standard, superimpose its own  
23 preferences on the work product of a coordinate branch of government."<sup>17</sup>

24 At least two other jurisdictions have considered rational basis challenges to statutes  
25 substantively similar to NRS 41.1305(1). Wisconsin's Supreme Court concluded such a statute  
26 satisfied the rational basis test, noting distinguishing between two groups of persons who furnish

27 <sup>14</sup> *Tam v. Dist. Ct.*, 131 Nev. Adv. Rep. 80, 358 P.3d 234, 237-38 (2015).

28 <sup>15</sup> *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995); *Tam v. Dist. Ct.*, 131 Nev.  
Adv. Rep. 80, 358 P.3d 234, 237-38 (2015).

<sup>16</sup> *Id.*

<sup>17</sup> *Allen v. State*, 100 Nev. 130, 136, 676 P.2d 792, 796 (1984).

1 alcohol beverages to others was rationally related to the legitimate governmental purpose of  
2 protecting persons under the legal drinking age.<sup>18</sup>

3 Wyoming's Supreme Court considered a similar statute in *Greenwalt v. Ram Rest. Corp.*<sup>19</sup>  
4 The statute at issue read "[n]o person who has legally provided alcoholic liquor or malt beverage  
5 to any other person is liable for damages caused by the intoxication of the other person."<sup>20</sup>  
6 *Greenwalt* noted many potential reasons the Wyoming Legislature may have had for passing the  
7 statute that could satisfy a rational basis test.

8 [T]he legislature could reasonably have concluded that the full nature and scope of  
9 the liability and immunity of all alcohol providers, licensed vendors and non-licensed  
10 persons alike, was uncertain. ... The legislature could have rationally thought that it  
11 must create a comprehensive, yet simple to administer tort claim to cover all liquor  
12 providers and intoxicated persons. It could have rationally thought that the  
establishment of an unquestioned and predictable yet limited basis for legal liability  
would provide a more effective incentive for the responsible furnishing of alcohol and  
the realization of the primary purpose.<sup>21</sup>

13 Ultimately, a legislature is not required to "draw its lines with mathematical certainty or  
14 even that it exercise its policy-making judgment in the best or wisest way. We hold that the  
15 legislative classifications at issue are rationally related to the legitimate legislative objectives of"  
16 the statute.<sup>22</sup>

17 The rational bases that Wisconsin and Wyoming found for their statutes are equally  
18 applicable in Nevada. NRS 41.1305(1) is rationally related to any of these legitimate government  
19 purposes, so its restrictions upon access to the courts are constitutionally sound.

20 **b. NRS 41.1305(1) is consistent with equal protection.**

21 "When the law . . . does not implicate a suspect class or fundamental right, it will be  
22 upheld as long as it is rationally related to a legitimate government interest."<sup>23</sup> NRS 41.1305(1)'s  
23 text does not implicate any suspect class. It is a statute of general application. While Plaintiffs  
24 present political arguments that assert NRS 41.1305(1) systemically discriminates against those

25  
26 <sup>18</sup> *Doering v. WEA Ins. Group*, 532 N.W.2d 432 (Wis. 1995).

27 <sup>19</sup> 71 P.3d 717 (Wyo. 2003).

<sup>20</sup> W.S. § 12-8-301(a).

28 <sup>21</sup> *Greenwalt*, 71 P.3d at 738.

<sup>22</sup> *Id.*

<sup>23</sup> *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

1 who are minorities or economically disadvantaged, they present no meaningful support for these  
2 arguments. Fatally, Plaintiffs do not allege they are even members of these classes.<sup>24</sup>

3 **IV. Plaintiffs have not pled a claim for relief against Dave & Buster's.**

4 Even if Plaintiffs amended their complaint, the operative facts are still that Aparicio  
5 consumed alcohol, drove drunk, and killed two people. Amending the complaint will not change  
6 those facts, nor will it change the end result: NRS 41.1305(1) is constitutional and bars Plaintiffs  
7 from recovering against Dave & Buster's for Aparicio's conduct. Plaintiffs have not pled, nor can  
8 they plead, a set of facts against Dave & Buster's that could entitle them to relief, so dismissal per  
9 NRCP 12(b)(5) is proper.

10 DATED this 24<sup>th</sup> day of June, 2020.



12  
13 */s/ Michael P. Lowry*

14 BY:

15 MICHAEL P. LOWRY, ESQ.

16 Nevada Bar No. 10666

17 VIRGINIA T. TOMOVA, ESQ.

18 Nevada Bar No. 12504

19 6689 Las Vegas Blvd. South, Suite 200

20 Las Vegas, Nevada 89119

21 Attorneys for Dave & Buster's of Nevada, Inc.

22  
23  
24  
25  
26  
27  
28 <sup>24</sup> *Allen v. State*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984) ("Equal protection of the law has long been recognized to mean that no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances.").



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**Certificate of Service**

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on June 24, 2020, I served **Dave & Buster's of Nevada, Inc's Reply re Motion to Dismiss** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Thomas F. Christensen Christensen Law 1000 S Valley View Blvd Las Vegas, Nevada 89107 Attorneys for Plaintiffs	
--	--

BY: /s/ Michael Lowry  
An Employee of



## **#5: Minutes of Hearing**

## REGISTER OF ACTIONS

CASE No. A-20-813787-C

Damaso Puente, Plaintiff(s) vs. Henry Aparicio, Defendant(s)

§  
§  
§  
§  
§  
§  
§

Case Type: **Negligence - Auto**

Date Filed: **04/17/2020**

Location: **Department 18**

Cross-Reference Case **A813787**

Number:

Supreme Court No.: **82554**

---

### PARTY INFORMATION

---

Defendant Aparicio, Henry Biderman

**Lead Attorneys**  
**Shea A. Backus**  
*Retained*  
702-872-5555(W)

Defendant Dave & Busters of Nevada Inc Dave  
& Busters

**Michael P. Lowry**  
*Retained*  
702-727-1400(W)

Defendant Hurley, Morgan

**Shea A. Backus**  
*Retained*  
702-872-5555(W)

Defendant MAT Summerlin LLC *Doing Business*  
As Casa del Matador Summerlin

**Michael A. Koning**  
*Retained*  
702-258-6238(W)

Defendant Mocore LLC

**Michael A. Koning**  
*Retained*  
702-258-6238(W)

Plaintiff Estate of Christa Puente

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

Plaintiff Estate of Damaso I Puente

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

Plaintiff Malone, Daniel

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

Plaintiff Malone, Diane

**Thomas F. Christensen**

AA070

*Retained*  
7028701000(W)

**Plaintiff**      **Puente, Damaso S**

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

**Plaintiff**      **Puente, Maria**

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

**Special**      **Malone, Diane**  
**Administrato**

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

**Special**      **Puente, Damaso S**  
**Administrato**

**Thomas F. Christensen**  
*Retained*  
7028701000(W)

---

**EVENTS & ORDERS OF THE COURT**

---

07/01/2020 | **Motion to Dismiss** (10:00 AM) (Judicial Officer Holthus, Mary Kay)  
*Dave & Buster's of Nevada, Inc.'s Motion to Dismiss*

**Minutes**

07/01/2020 10:00 AM

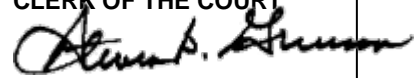
- Thomas Christensen, Esq., Michael Rawlings, Esq., Michael Lowry, Esq. present via Bluejeans video conference. Statements by Mr. Lowry. Colloquy between parties. Arguments by Mr. Christensen. Following colloquy, COURT ORDERED, Dave & Buster's of Nevada, Inc.'s Motion to Dismiss was hereby DENIED; however, Court noted it would deny for now and allow amendment. Mr. Christensen to prepare Order and submit to opposing counsel for approval as to form and content. Mr. Christensen indicated in Order he would grant Deft. leave to amend and deny without prejudice. COURT DIRECTED Mr. Christensen to clear up which Deft. did what. Mr. Christensen concurred.

[Parties Present](#)

[Return to Register of Actions](#)

**#6: Order**

AA072



MICHAEL P. LOWRY, ESQ.  
Nevada Bar No. 10666  
E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)  
VIRGINIA T. TOMOVA, ESQ.  
Nevada Bar No. 12504  
E-mail: [Virginia.Tomova@wilsonelser.com](mailto:Virginia.Tomova@wilsonelser.com)  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, Nevada 89119  
Tel: 702.727.1400/Fax: 702.727.1401  
Attorneys for Dave & Buster's of Nevada, Inc.

**DISTRICT COURT**

**CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio; Morgan Hurley; Dave &  
Buster's of Nevada, Inc. dba Dave & Buster's; MAT-  
Summerlin, LLC dba Casa del Matador Summerlin;  
Mocore, LLC; Does I-V, and Roe Corporations I-V,  
Roe Manufacturer I-V; Roe Wholesaler I-V; Roe  
Retailer I-V,

Defendants.

Case No.: A-20-813787-C

Dept. No.: 18


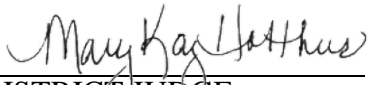
**Order on Dave & Buster's of Nevada,  
Inc's Motion to Dismiss**

///

///

///

Dave & Buster's of Nevada, Inc. moved to dismiss per NRCP 12(b)(5). Plaintiffs opposed and the motion was heard on July 1, 2020. Michael Lowry appeared for Dave & Buster's, Thomas Christensen appeared for Plaintiffs. The Court denies Dave & Buster's motion without prejudice. As pled, it is unclear to the Court what Plaintiffs allege Dave and Buster's did. Plaintiffs are granted leave to file an amended complaint.

  <u>/s/ Michael Lowry</u> MICHAEL P. LOWRY, ESQ. Nevada Bar No. 10666 6689 Las Vegas Blvd. South, Suite 200 Las Vegas, Nevada 89119 Attorneys for Dave & Buster's of Nevada, Inc.	CHRISTENSEN LAW  <u>/s/ Tom Christensen</u> THOMAS F. CHRISTENSEN, ESQ. Nevada Bar No. 2326 1000 S Valley View Blvd Las Vegas, Nevada 89107 Attorney for Plaintiffs
	It is so ordered.  DISTRICT JUDGE  Date: <u>July 13th, 2020</u>

**Kelley, Cynthia H.**

---

**From:** Dawn Hooker <dawnh@injuryhelpnow.com>  
**Sent:** Wednesday, July 8, 2020 4:05 PM  
**To:** Lowry, Michael  
**Subject:** Re: Puente: Proposed Order

**[EXTERNAL EMAIL]**

Yes, that looks fine.  
You may use my esignature. Thank you very much.

Dawn Allysa Hooker, Esq.  
Nevada Bar 7019  
Christensen Law Offices, LLC  
1000 S Valley View Blvd.  
Las Vegas, NV 89107  
Office: (702) 870-1000  
Direct Line: (702) 204-8490  
Fax: (702) 870-6152  
[www.injuryhelpnow.com](http://www.injuryhelpnow.com)

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On Wed, Jul 8, 2020 at 4:00 PM Lowry, Michael <[Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)> wrote:

I could live with that. Attached is a revised order. Will it work for you too?

**From:** Dawn Hooker [mailto:[dawnh@injuryhelpnow.com](mailto:dawnh@injuryhelpnow.com)]  
**Sent:** Wednesday, July 8, 2020 15:43  
**To:** Lowry, Michael <[Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)>  
**Cc:** [courtnotices@injuryhelpnow.com](mailto:courtnotices@injuryhelpnow.com)  
**Subject:** Re: Puente: Proposed Order

**[EXTERNAL EMAIL]**

Okay, keeping that sentence would be okay to keep. So, it would say :

"The Court denies Dave & Buster's motion without prejudice. As pled, it is unclear to the Court what Plaintiffs allege Dave and Buster's did. Plaintiffs are granted leave to file an amended complaint."



Dawn Allysa Hooker, Esq.  
Christensen Law Offices, LLC  
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On Tue, Jul 7, 2020 at 5:40 PM Lowry, Michael <[Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)> wrote:

Thank you, but the order needs to state some reason why the court ruled as it did. I kept it as simple as I could based upon what the judge said during the hearing. If you have alternative language to "As pled it is unclear to the court what Plaintiffs' allege Dave & Buster's did" I'm willing to consider it.

**From:** Dawn Hooker [mailto:[dawnh@injuryhelpnow.com](mailto:dawnh@injuryhelpnow.com)]  
**Sent:** Tuesday, July 7, 2020 15:55  
**To:** Lowry, Michael <[Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)>  
**Cc:** [courtnotices@injuryhelpnow.com](mailto:courtnotices@injuryhelpnow.com)  
**Subject:** Re: Puente: Proposed Order

**[EXTERNAL EMAIL]**

Hello Michael:

I spoke to Mr. Christensen, who appeared at the hearing on this and he would prefer to have more simple language in the order.

After the introductory sentences regarding the motion, date and appearances, etc. could you change it to read as follows:

"The Court denies Dave and Buster's Motion without prejudice. Plaintiffs are granted leave to file an amended complaint."

If you are okay with that language, you may affix my electronic signature. (Bar number 7019). Thank you.

Dawn Allysa Hooker, Esq.

Christensen Law Offices, LLC  
1000 S Valley View Blvd.  
Las Vegas, NV 89107  
Office: (702) 870-1000  
Direct Line: (702) 204-8490  
Fax: (702) 870-6152  
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On Fri, Jul 3, 2020 at 8:43 AM Lowry, Michael <[Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)> wrote:

Hello,

A draft of the proposed order from the July 1 hearing is attached. If acceptable, please just reply and confirm that. I will then submit it to the court electronically.

Michael Lowry  
Attorney at Law  
Wilson Elser Moskowitz Edelman & Dicker LLP  
6689 Las Vegas Blvd. South, Suite 200  
Las Vegas, NV 89119  
702.727.1267 (Direct)  
702.727.1400 (Main)  
702.727.1401 (Fax)  
[michael.lowry@wilsonelser.com](mailto:michael.lowry@wilsonelser.com)

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For further information about Wilson, Elser, Moskowitz, Edelman & Dicker LLP, please see our website at [www.wilsonelser.com](http://www.wilsonelser.com) or refer to any of our offices.

Thank you.

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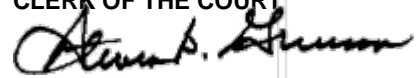
Thank you.

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For further information about Wilson, Elser, Moskowitz, Edelman & Dicker LLP, please see our website at [www.wilsonelser.com](http://www.wilsonelser.com) or refer to any of our offices.

Thank you.

## **#7: Amended Complaint**



**ACOM**  
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**DISTRICT COURT  
CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio, Morgan Hurley, Dave  
& Buster's of Nevada, Inc.,; MAT-SUMMERLIN  
LLC, dba Casa del Matador Summerlin;  
MOCORE, LLC; DOES I - V, and ROE  
CORPORATIONS I - V, ROE  
MANUFACTURER I - V; ROE WHOLESALER,  
I - V; ROE RETAILER, I - V;

Defendants.

CASE NO:  
DEPT. NO:

**FIRST AMENDED  
COMPLAINT**

COME NOW the Plaintiffs, Damaso S. Puente, individually and on behalf of the Estate of  
Damaso I. Puente, Maria Puente, Diane Malone, individually and on behalf of the Estate of  
Christa Puente, and Daniel Malone, by and through Plaintiffs' attorney, THOMAS  
CHRISTENSEN, of the law firm of CHRISTENSEN LAW OFFICES, and complain against the  
Defendants, and each of them, as follows:

**I. PARTIES/JURISDICTION**

AA080

1           1. Upon information and belief, that at all times relevant to this action, the Defendant,  
2 Henry Biderman Aparicio, was a resident of Clark County, Nevada.

3  
4           2. Upon information and belief, that at all times relevant to this action, the Defendant,  
5 Morgan Hurley, was a resident of Clark County, Nevada.

6           3. Upon information and belief, that at all times relevant to this action, the Defendant,  
7 MAT-SUMMERLIN LLC dba Casa del Matador Summerlin, was a business located in Clark  
8 County, Nevada.

9           4. Upon information and belief, that at all times relevant to this action, the Defendant, Dave  
10 & Buster's of Nevada, Inc. dba Dave & Buster's, was a business located in Clark County,  
11 Nevada.

12  
13           5. That Plaintiff Damaso S. Puente is the Special Administrator of the Estate of Damaso I.  
14 Puente, who died in Clark County, Nevada.

15           6. That Damaso S. Puente and Maria Puente, at all times relevant to this action were the  
16 parents of and are the heirs of Decedent Damaso I. Puente.

17           7. That Plaintiff Diane Malone is the Special Administrator of the Estate of Christa Puente,  
18 who died in Clark County, Nevada.

19  
20           8. That Daniel Malone and Diane Malone, at all times relevant to this action were the  
21 parents of and are the heirs of Decedent Christa Puente.

22           9. Upon information and belief, MAT-SUMMERLIN, LLC is and was a business entity  
23 registered in the State of Nevada and in the State of Washington, doing business as Casa del  
24 Matador in Clark County, Nevada.

25           10. That Defendant MOCORE, LLC; is a Washington State and/or Nevada entity doing  
26 business as Casa del Matador and/or El Matador (hereinafter collectively referred to as  
27  
28

1 “Matador”) in and subject to the laws of the State of Washington and doing business in and  
2 subject to the laws of the State of Nevada.

3  
4 11. That Defendant Dave & Buster’s of Nevada, Inc. (hereinafter “Dave & Buster’s”) is a  
5 Delaware Corporation, registered as a foreign Corporation and doing business in and subject to  
6 the laws of the State of Nevada.

7 12. That the true names and capacities, whether individual, corporate, partnership, associate  
8 or otherwise, of Defendants DOES I through V, and ROES I through V, ROE  
9 MANUFACTURER I - V; ROE WHOLESALER, I - V; ROE RETAILER, I - V; are unknown  
10 to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiffs are  
11 informed and believe and thereon allege that each of the Defendants designated herein as DOE,  
12 ROE, ROE MANUFACTURER I - V; ROE WHOLESALER, I - V; ROE RETAILER, I - V is  
13 responsible in some manner for the events and happenings referred to and caused damages  
14 proximately to Plaintiffs as herein alleged, and that Plaintiffs will ask leave of this Court to  
15 amend this Complaint to insert the true names and capacities of DOES I through V and ROES I  
16 through V, ROE MANUFACTURER I - V; ROE WHOLESALER, I - V; ROE RETAILER, I -  
17 V when the same have been ascertained, and to join such Defendants in this action.  
18  
19

## 20 **II. GENERAL ALLEGATIONS**

21 13. Upon information and belief, at all times relevant hereto, Defendant Henry Biderman  
22 Aparicio was the operator and Defendant Morgan Hurley was the owner of a certain 2014  
23 Mercedes-Benz, Nevada license plate number UNLV16935 (hereinafter referred to as  
24 "Defendant's Vehicle"). He was operating the vehicle with the knowledge and consent of  
25 Defendant Morgan Hurley and in carrying out a joint venture common purpose.  
26  
27  
28

1           14. At all times relevant hereto, Decedent Damaso I. Puente was the operator of, and  
2 Christa Puente was a passenger in, a certain 2010 Toyota Prius, Nevada license plate number  
3 240ATX (hereinafter referred to as "Plaintiff's Vehicle").  
4

5           15. On May 15, 2018 at approximately 9:08 pm, Defendant Henry Biderman Aparicio was  
6 operating the Defendant's Vehicle with the consent of Morgan Hurley for a common purpose in  
7 an eastbound direction on W. Sahara Ave approaching the intersection of S. Hualapai Way,  
8 located in Clark County, Nevada.  
9

10           16. Plaintiffs are informed and thereon allege, that on the date and time as set forth in the  
11 preceding paragraph, Plaintiff's vehicle was stopped for a red light in the first eastbound travel  
12 lane of West Sahara Ave., at its intersection with Hualapai Way.

13           17. On or about May 15, 2018, Defendant Henry Biderman Aparicio, acting in the course  
14 and scope of his employment with Defendants and each of them, did carelessly and negligently  
15 operate Defendant's vehicle so as to cause the same to collide with the rear of Plaintiff's vehicle  
16 while far exceeding the posted speed of 45 mph (hereinafter "the crash.")  
17

18           18. At the time of the crash, Defendant Henry Biderman Aparicio was driving under the  
19 influence of alcohol .204 Blood Alcohol Content per blood test performed by LVMPD, which  
20 was obtained at 1:47am and was 4 hours and 40 minutes after the crash. with such an elevated  
21 B.AC. the Defendant showed signs of sedation, loss of memory and lack of comprehension,  
22 delayed motor reactions, balance problems, blurred vision and sensation impairment, at the time  
23 of the crash  
24

25           19. Immediately prior to the crash, Defendant Henry Biderman Aparicio and Morgan  
26 Hurley, acting in concert and as part of a joint venture, consumed alcohol on the premises of the  
27 business of other named Defendants as a result of the Defendants illegal dangerous activities and  
28 without being warned of the dangerous product.



1           20. On information and belief, immediately prior to the crash, Defendant Henry Biderman  
2 Aparicio and Morgan Hurley, acting in concert and as part of a joint venture, consumed alcohol  
3 on the premises of Dave & Buster's in excess of 8 hard liquor drinks served to Aparicio after he  
4 was intoxicated in violation of law and as result of Dave & Buster's illegal and dangerous  
5 activities and without being warned of the danger.  
6

7           21. On May 15th, 2018, Defendant Henry Biderman Aparicio consumed at least 13 tequila  
8 based alcoholic beverages in 3 hours and 15 minutes, before colliding with the Plaintiffs'  
9 vehicle. These drinks were consumed on the premises of Defendants including Dave and  
10 Buster's and Matador which are located in close proximity in the same mall building complex  
11 and share common parking.  
12

13           22. Defendant Aparacio, with the knowledge and consent of Morgan Hurley, Dave and  
14 Buster's and The Matador, consumed alcohol each knowing that he would later operate a motor  
15 vehicle.  
16

17           23. Defendants, and each of them, promoted and encouraged the acts of the other  
18 Defendants.  
19

20           24. On information and belief, on May 15th, 2018 Defendant Henry Biderman Aparicio  
21 consumed at least 13 alcoholic beverages, which were served at the location of and by Dave &  
22 Buster's after Defendant Aparicio was obviously intoxicated and even though Dave & Buster's  
23 knew Aparicio would thereafter be operating a motor vehicle.  
24

25           25. On information and belief, on May 15th, 2018, and for some period of time leading up to  
26 that date, Defendants Aparicio and Hurley enjoyed a friendly relationship with Dave & Buster's  
27 whereby Defendant Dave & Buster's provided Aparicio and Hurley with alcoholic beverages for  
28 free.

1 26. On information and belief, Defendant Dave & Buster's conspired with Aparicio and  
2 Hurley in providing alcohol beyond the point of intoxication, knowing that the Defendant  
3 Aparicio would drive and in helping Defendant Aparicio to the vehicle and providing him with  
4 keys.  
5

6 27. On information and belief, Defendant Dave & Buster's solicited Defendant Aparicio and  
7 enticed him to drink at its establishment by offering free and/or discounted drinks based upon his  
8 status as a bartender and/or frequent patron.  
9

10 28. On information and belief, Dave & Buster's provided an excess amount of alcohol to  
11 Defendant Aparicio and continued to provide alcohol despite actual or implied knowledge that  
12 he was intoxicated and planning to drive.

13 29. Defendant Aparicio did not eat food during the time he consumed alcoholic drinks.

14 30. Plaintiffs are informed and thereon allege that Henry Biderman Aparicio was employed  
15 by Casa Del Matador and that five of the beverages were consumed at Casa Del Matador just  
16 prior to the crash.  
17

18 31. At the time Defendant was served at Casa Del Matador, he was obviously intoxicated  
19 within the meaning of Clark County Ordinance 8.20.300 and Washington Code RCW 66.44.200  
20 (1). Morgan Hurley and Aparicio's co-employees knew he was intoxicated and knowingly  
21 conspired to violate company policy and the law by providing alcohol to an intoxicated person.  
22

23 32. At the time Defendant was served at Dave & Buster's, he was obviously intoxicated  
24 within the meaning of Clark County Ordinance 8.20.300. Morgan Hurley and Aparicio's friends  
25 and acquaintances, agents for Dave & Buster's, knew Defendant Aparicio was intoxicated and  
26 knowingly conspired to violate company policy and the law by providing alcohol to an  
27 intoxicated person.  
28

1 33. Defendant Aparicio was served alcoholic drinks despite his obvious intoxication  
2 because he was an employee and was given preferential treatment; he and his joint venturer,  
3 Defendant Morgan Hurley, were served drinks until Defendant Hurley fell off her barstool due to  
4 her drunken state and Defendant Aparicio staggered to the vehicle in the parking lot with the aid  
5 of fellow employees. Defendants continued alcohol service because Aparicio and Hurley were  
6 known by Aparicio's co-workers and given preferential treatment in violation of company policy  
7 due to Aparicio's employment status at Casa Del Matador.  
8

9 34. Defendant Aparicio was served alcoholic drinks despite his obvious intoxication because  
10 he was a friend/acquaintance and regular patron of Defendant Dave & Buster's and he was given  
11 preferential treatment; he and his joint venturer, Defendant Morgan Hurley, were served drinks  
12 in reckless disregard for the safety of the public while in an obvious drunken state and  
13 Defendant Aparicio staggered to the vehicle in the parking lot with the aid of Dave & Buster's  
14 employees. Defendant Dave & Buster's continued to serve alcohol to Defendants Aparicio and  
15 Hurley because these Defendants were well known and given preferential treatment in violation  
16 of company policy due to their friendly relationship and in order to make greater profit.  
17  
18

19 35. On or about January 11, 2018, and at other times and in similar ways, Casa del Matador  
20 Summerlin used a photograph of Aparicio, holding a bottle of Tequila, advertising happy hour  
21 on social media.

22 36. On or about January 15, 2018 and at other times and in similar ways Casa del Matador  
23 Summerlin posted on Instagram: "Start your week right with our bottomless MONDAYS!!! All  
24 you can eat tacos and Margaritas for \$25. #tequila #tgifridays #mondays #tacos #mlkweekend  
25 #downtownsummerlin".  
26  
27  
28

1           37. On or about July 13, 2018 and at other times and in similar ways, Casa del Matador  
2 Summerlin posted on Instagram a picture with the caption “You have 10 minutes to drink 30  
3 tequila shots...who’s your team?”  
4

5           38. Defendants Matador and Dave & Buster’s, at all relevant times, each was the possessor  
6 of a Liquor License, issued by Clark County, State of Nevada and each offered intoxicating  
7 liquors of various kinds for sale to the public.  
8

9           39. At all relevant times, Defendants Matador and Dave & Buster’s owed a duty to comply  
10 with all applicable statutes, regulations and rules related to responsible behavior expected of  
11 liquor licensees for serving obviously intoxicated patrons.  
12

13           40. Defendants Matador and Dave & Buster’s sold alcoholic beverages to Defendant  
14 Aparicio and Defendant Hurley at a time when Matador and Dave & Buster’s, knew, or in the  
15 exercise of reasonable care should have known, that Defendant Aparicio and Defendant Hurley  
16 were intoxicated.  
17

18           41. At all materials times, each of the Defendants were either joint tortfeasors with other  
19 Defendants, were concurrently or jointly and severally liable and/or otherwise derivatively or  
20 vicariously liable for the events described herein, which caused Plaintiff’s injuries and damages  
21 described in this Complaint.  
22

23           42. At all material times, each of the Defendants were the agent and employee of every other  
24 Defendant in doing the events described and was at all times acting within the purpose and scope  
25 of such agency and employment and are vicariously liable under the theory of *respondeat*  
26 *superior* for the actions and inactions of their employees and contractors.  
27

28           43. At all material times, Defendants Dave and Busters and Matador includes and included  
any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures, and

1 organization units of any kind, predecessors, successors and assigns and their officers, directors,  
2 employees, agents, representatives and any and all other persons acting on their behalf.

3  
4 44. The Plaintiffs have been required to retain the law firm of Christensen Law Offices, LLC  
5 to prosecute this action, and are entitled to a reasonable attorney's fee.

### 6 **III. CAUSES OF ACTION**

#### 7 **FIRST CAUSE OF ACTION**

8 45. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
9 paragraphs and incorporate the same herein by reference.

10  
11 46. Defendants, and each of them, specifically including Dave and Buster's and Matador  
12 owed a duty of care to Plaintiffs.

13 47. Defendants, and each of them, breached the duty of care owed to Plaintiffs.

14 48. Defendants, and each of them, were negligent so as to proximately cause the crash  
15 described herein which resulted in the deaths of Damaso I. Puente and Christa Puente.

16 49. That, at all times mentioned herein, Defendants acted recklessly, maliciously and  
17 willfully, as set forth herein, whereupon Defendants breached their duty of care.

18  
19 50. That as a direct and proximate result of the aforesaid negligence and/ or reckless,  
20 malicious and willful acts of Defendants, and each of them, specifically including Dave and  
21 Buster's and Matador, Decedents Damaso I. Puente and Christa Puente sustained grievous and  
22 serious personal injuries and damages, which caused their deaths.

23 51. At the time of the crash herein complained of, and immediately prior thereto, Defendant,  
24 Henry Biderman Aparicio, and/or Defendant Morgan Hurley and each of the defendants in  
25 breaching a duty owed to Plaintiffs, and each of them, were negligent and careless, inter alia, in  
26 the following particulars:  
27  
28

- a. Dave and Buster's and Matador in providing alcohol in violation of law, internal rules and in a conspiracy and inherently dangerous activity to Aparicio and Hurley thus initiating and enabling the tort.
- b. Dave and Buster's and Matador in supporting, encouraging and enabling the activity of Aparicio and Hurley in operating a vehicle.
- c. In failing to keep Defendant's vehicle under proper control;
- d. In operating Defendant's vehicle without due caution for the rights of Decedents;
- e. In failing to keep a proper lookout for Decedents;
- f. In driving recklessly and with reckless disregard for the safety of Damaso I and Christa Puente;
- g. In operating the Defendant's vehicle under the influence of alcohol and/or other controlled or prescribed substances;
- h. In entrusting the vehicle to the driver of the vehicle; and
- i. In violating certain Nevada revised statutes and Clark County Ordinances, including but not limited to Clark County Ordinance 8.20.300, NRS 484.377, 484.379 and 484.3795; the Plaintiffs will pray leave of Court to insert additional statutes or ordinances at the time of trial.

52. Defendant was convicted of the crime of driving under the influence and reckless driving and is therefore civilly liable under NRS 41.133 for all damages caused pursuant to Nevada law.

## **SECOND CAUSE OF ACTION**

53. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

54. That at the time of the crash herein complained of, and immediately prior thereto, Defendant Morgan Hurley, in breaching a duty owed to the Plaintiffs, was negligent and careless, inter alia, in the following particulars:

- a. In failing to properly maintain the Defendant's Vehicle;
- b. In negligently entrusting the Defendant's Vehicle to Defendant Aparicio;
- c. Vicarious liability through operation of NRS 41.440; and
- d. The Defendant violated certain state and local statutes, rules, regulations, codes and ordinances, and the Plaintiff will pray leave of Court to insert the exact citations at the time of trial.

41. Alternatively, Plaintiffs allege Defendant Hurley was the driver in the crash.

### THIRD CAUSE OF ACTION

42. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

43. Defendants, including Dave and Buster's and Matador, in concert with each other, carried on an abnormally dangerous activity that risked harm to the person of Decedent, which was foreseeable even if reasonable care had been used.

44. The carrying on of this activity resulted in harm to the person of the Decedents.

#### FOURTH CAUSE OF ACTION

45. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

1 46. Defendant ROE RETAILER is an unknown entity engaged in the business of selling  
2 tequila and other alcoholic beverages at retail and was and is the distributor, retailer and/or seller  
3 of the tequila and other alcoholic beverages and as such did transport, ship, introduce and/or  
4 cause said product to be introduced into the State of Nevada, the State of Washington, and other  
5 states, for the purpose of its sale, distribution and/or use within the State of Nevada, the State of  
6 Washington and other states.

7  
8 47. Defendants, including Dave and Buster's and Matador, and each of them, expected the  
9 tequila and other alcoholic beverages so sold to reach consumers or users in the condition in  
10 which it was sold.  
11

12 48. Defendant Aparicio either purchased or was provided with tequila and other alcoholic  
13 beverages from each defendant including Dave and Buster's, Matador and ROE RETAILER for  
14 a drink and actually used the tequila and other alcoholic beverages as a drink, and Aparicio's use  
15 and manner of use of the tequila and other alcoholic beverages was reasonably foreseeable by the  
16 Defendants, and each of them.

17 49. Plaintiff is informed and believes, and in reliance thereon alleges, that the tequila and  
18 other alcoholic beverages were then and there in the condition existing when Defendant ROE  
19 MANUFACTURER sold and/or delivered it to Defendant ROE WHOLESALER, and in the same  
20 condition existing when Defendant ROE WHOLESALER sold and/or delivered it to ROE  
21 RETAILER, Dave and Buster's and Matador.

22  
23 50. Plaintiff is informed and believes, and in reliance thereon alleges, that the same condition  
24 of the product existed when Defendants, Dave and Buster's, Matador and ROE RETAILER sold  
25 and/or delivered the tequila and other alcoholic beverages to Aparicio, and the condition of the  
26 product remained unchanged when Aparicio used the product which resulted in injuries and  
27 damages because of the unreasonably dangerous condition of the product.  
28



1           51. When Plaintiffs sustained the injuries hereinafter alleged, the tequila and other alcoholic  
2 beverages were in a defective condition and were unreasonably dangerous to a user or consumer  
3 in that the tequila was defective and unreasonably dangerous.  
4

5           52. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each of  
6 them, knew or through the exercise of reasonable care and diligence, should have known of such  
7 defective and unreasonably dangerous conditions.  
8

9           53. Plaintiffs relied on the duty of Defendants, including Dave and Buster's, Matador and  
10 ROE RETAILER, and each of them, to deliver the tequila and other alcoholic beverages at the  
11 time of sale and/or delivery by each in a condition fit for use for the purpose intended. The  
12 tequila and other alcoholic beverages were defective, unreasonably dangerous, and were in fact  
13 not fit for the purposes and uses for which they were intended.

14           54. The breach of such duty by Defendants, including Dave and Buster's, Matador and ROE  
15 RETAILER, and each of them, and such defective condition of the tequila and other alcoholic  
16 beverages, were a proximate cause of the injuries sustained by Plaintiff.  
17

18           55. By reason of the premises and as a direct and proximate result of all of the foregoing,  
19 Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each of them, are  
20 strictly liable to Plaintiff for the injuries and damages hereinabove set forth.

21           56. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each of  
22 them, owed a duty to all persons who could reasonably be foreseen to use the tequila and other  
23 alcoholic beverages or be injured as a result of the use of the tequila and other alcoholic  
24 beverages, and such a duty was specifically owed to Plaintiff.  
25

26           57. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each of  
27 them, breached a duty owed to the Plaintiff consisting of, among other things, the following:  
28

- a. Failure to warn by statement on the product, in the instruction booklet, or otherwise, of the unreasonably dangerous conditions of the tequila and other alcoholic beverages;
- b. Failure to properly design the tequila and other alcoholic beverages in such a manner as to avoid or minimize the unreasonable danger to users of the tequila and other alcoholic beverages;
- c. Failure to properly and adequately test and inspect the tequila and other alcoholic beverages to ascertain its unreasonably dangerous condition; Failure to give adequate instructions regarding the safe use of the tequila and other alcoholic beverages; i.e. Tequila and other alcoholic beverages should not be consumed on an empty stomach, should not be consumed quickly, designed to be sipped and not taken in shot form. Failure to use due care to avoid misrepresentations, cannot operate machinery.

58. As a direct and proximate result of the actions and inactions of Defendants, and each of them, Plaintiffs were caused to suffer the injuries and damages hereinabove set forth.

59. The Alcoholic Beverage Labeling Act (ABLA) of The Anti-Drug Abuse Act of 1988, enacted November 18, 1988, is United States federal law requiring that (among other provisions) the labels of alcoholic beverages carry a government warning. The warning reads: (1) According to the Surgeon General,... (2) Consumption of alcoholic beverages impairs your ability to drive a car or to operate machinery ....; The ABLA also contains a declaration of policy and purpose, which states the United States Congress finds that: The American public should be informed about the health hazards that may result from the consumption or abuse of alcoholic beverages, and has determined that it would be beneficial to provide a clear, non-confusing reminder of such hazards, and that there is a need for national uniformity in such reminders in order to avoid the promulgation of incorrect or misleading information and to minimize burdens on interstate commerce.

1           60. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
2 of them, placed on the market a defective product.

3  
4           61. Decedents' deaths were caused by the defect in the product.

5           62. Such defects existed when the product left the hands of the Defendants including  
6 Dave and Buster's, Matador and ROE RETAILER, and each of them.

7           63. It is unreasonably dangerous to place the product in the hands of a consumer without  
8 adequate warning concerning its safe and proper use.

9           64. As a direct and proximate result of the defective product, Plaintiffs have been  
10 deprived of the services, assistance, comfort, society, support maintenance, and companionship of  
11 Damaso I. Puente and Christa Puente, and were caused great emotional damage and injury in an  
12 amount to be more specifically determined at the time of trial, but which is an amount in excess  
13 of \$15,000.00.  
14

15           65. As a direct and proximate result of the defective product, Damaso I. Puente and  
16 Christa Puente were caused great pain and suffering in an amount to be more specifically  
17 determined at trial, but which is an amount in excess of \$15,000.00.  
18

19                           **FIFTH CAUSE OF ACTION**

20           66. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
21 paragraphs and incorporate the same herein by reference.

22           67. Prior to the purchase or use of the tequila and other alcoholic beverages, Defendants,  
23 including Dave and Buster's, Matador and ROE RETAILER, and each of them, in order to induce  
24 the purchase or use of the tequila and other alcoholic beverages, provided express warranties and  
25 representations, including, but not limited to, the warranty that the products were fit for use for  
26 the purpose intended.  
27  
28

1           68.     The tequila and other alcoholic beverages were purchased and/or used in reliance on  
2 said express warranties and representations.

3  
4           69.     Said tequila and other alcoholic beverages were defective and unreasonably  
5 dangerous, were not fit for the purposes and uses for which they were intended, and were not of  
6 merchantable quality.

7           70.     As a direct and proximate result of the breach of express warranties and  
8 representations by the Defendants, including Dave and Buster's, Matador and ROE RETAILER,  
9 and each of them, Plaintiff was caused to suffer the injuries and damages as herein set forth.

10  
11                   **SIXTH CAUSE OF ACTION**

12           71.     Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
13 paragraphs and incorporate the same herein by reference.

14           72.     Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
15 of them, impliedly warranted that the tequila and other alcoholic beverages were fit for use for  
16 the purpose for which they were designed, and that the tequila and other alcoholic beverages  
17 were fit and suitable for the use in fact made by Aparicio.

18  
19           73.     In purchasing and using the tequila and other alcoholic beverages, Aparicio relied on  
20 the skill and judgment of Defendants, including Dave and Buster's, Matador and ROE  
21 RETAILER, and each of them, and the implied warranty of fitness for the purpose for which  
22 Aparicio purchased and/or used the tequila and other alcoholic beverages.

23           74.     The tequila and other alcoholic beverages were not fit for use for its intended  
24 purpose and Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
25 of them, breached the implied warranty of fitness.  
26  
27  
28

1           75.     As a direct and proximate result of the breach of implied warranty of fitness by  
2 Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each of them,  
3 Plaintiffs were caused to suffer said injuries and damages herein set forth.  
4

5                               **SEVENTH CAUSE OF ACTION**

6           76.     Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
7 paragraphs and incorporate the same herein by reference.

8           77.     The Defendants, including Dave and Buster's, Matador and ROE RETAILER, and  
9 each of them, promoted a dangerous activity with a complete lack of disregard for the safety of  
10 the community in which they live and do business.  
11

12           78.     The Defendants, including Dave and Buster's, Matador and ROE RETAILER, and  
13 each of them, were promoting and encouraging drinking and driving.

14           79.     There is a special relationship between the Defendants including Dave and Buster's,  
15 Matador and ROE RETAILER, and Defendant Aparicio;  
16 the harm created by Aparicio's conduct is foreseeable.  
17

18           80.     Defendants including Dave and Buster's, Matador and ROE RETAILER, condone  
19 bartenders to do shots with customers.

20           81.     Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
21 of them, failed to warn or take steps to provide transportation for competitors in any of these  
22 drinking challenges.  
23

24                               **EIGHTH CAUSE OF ACTION**

25           82.     Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
26 of them, were negligent and careless in failing to adequately investigate the background,  
27 personality traits and work history of their employees, and each of them, subsequent to hiring.  
28

1           83. Defendants, including Dave and Buster's, Matador and ROE RETAILER, in the  
2 exercise of ordinary care, should have known of the individual employees' unfitness to act as  
3 responsible employees and should not have hired/retained the employees.  
4

5           84. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
6 of them, failed to adopt and administer adequate procedures to protect third parties.  
7

8           85. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
9 of them, failed to evaluate, supervise and/or investigate factual indications which suggested that  
10 overserving and/or serving to employees would create risks to third parties.  
11

12           86. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
13 of them, failed to reasonably supervisor or monitor service of alcoholic beverages to ensure  
14 adequate safety precautions were taken and to recognize and evaluate potential risks to third  
15 parties.  
16

17           87. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
18 of them was negligent and careless in failing to adequately train and educate its employees on the  
19 dangers of serving intoxicated co-workers, patrons and friends.  
20

21           88. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
22 of them, failed to adequately evaluate, supervise and/or investigate activities on its premises that  
23 indicated danger to society.  
24

25           89. Defendants, including Dave and Buster's, Matador and ROE RETAILER, and each  
26 of them, failed to use reasonable care to protect third parties from risk.  
27

28           90. Defendant Matador breached its duty by failing to exercise due care in the hiring,  
training, retention and supervision of its managers, bartenders and servers.

          91. Defendant Dave & Buster's breached its duty by failing to exercise due care in the  
hiring, training, retention and supervision of its managers, bartenders and servers.

1           92. Defendant Matador breached its duty by intentionally encouraging its managers,  
2 bartenders and servers to violate the law through its hiring, training, retention and supervision of its  
3 managers, bartenders and servers in order to maximise profits for the company.  
4

5           93. Defendant Dave & Buster's breached its duty by intentionally encouraging its  
6 managers, bartenders and servers to violate the law through its hiring, training, retention and  
7 supervision of its managers, bartenders and servers in order to maximise profits for the company.  
8

9           94. At all times material to this complaint, Defendant Henry Biderman Aparicio was  
10 employed at Casa Del Matador working behind the bar. Defendant Casa Del Matador, and DOE  
11 1-2 knew or should have known that this Defendant exhibited known vicious, dangerous, and  
12 lawless propensities that posed a substantial risk of harm to the public. These known propensities  
13 included:

- 14           a. Arrest for drug use;
- 15           b. Reckless driving on the wrong side of the road;
- 16           c. Arrest for carrying a concealed weapon around schools;
- 17           d. Social media posts indicating a contempt for the law and law enforcement

18           95. At all times complained of, Morgan Hurley, Casa Del Matador and its employees  
19 acted in concert with Defendant Aparicio. Due to Aparicio's employment relationship with Casa  
20 Del Matador, Defendants escorted him out of the establishment and looked in on him while in  
21 his vehicle in the parking lot, knowing that Aparicio was going to operate a motor vehicle on a  
22 public roadway while intoxicated in violation of State Law.  
23

- 24           96. Defendants Casa Del Matador and their employees violated their duty of care by:
- 25           a. Affirmatively aiding a severely intoxicated person to operate a motor vehicle;
  - 26           b. Affirmatively participating in the commission of a crime;
  - 27
  - 28

- c. Failing to render aid to a severely intoxicated person unable to safely operate a motor vehicle;
- d. Failing to obtain transportation for Defendant Aparicio and Hurley;
- e. Failing to call the police to prevent a crime.

97. As a direct and proximate result of the conduct of Defendants and Henry Biderman Aparicio's employment at Casa Del Matador, Damaso I. Puente and Christa Puente were killed, all to Plaintiffs' damages as are hereinafter alleged.

98. The Defendants, and each of them, under the doctrine of respondeat superior, are liable to the Plaintiffs for their damages caused by the Defendant Aparicio.

99. The actions of Defendants, and each of them, in this matter have been intentional, fraudulent, malicious, oppressive, reckless, and in conscious disregard of Plaintiffs' rights and therefore Plaintiffs are entitled to punitive damages in an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

100. Casa Del Matador knew or should have known that Defendant was not fit for the employment and was a danger to others and still employed Aparicio. Defendant breached a duty in hiring an employee knowing or should have known of dangerous propensities. Matador and Casa Del Matador ratified the acts of Defendant Aparicio and his co-actor. Matador and Casa del Matador promoted illegal behavior. Employees received preferential treatment which directly caused injuries and damages to Plaintiffs.

101. The actions of Defendants were reckless and in violation of NRS 42.010 and give rise to punitive damages pursuant to that section and other state laws.

102. Defendants knew that driving under the influence was breaching a duty owed to Plaintiffs.



1           103. Defendants substantially assisted and encouraged Aparicio's conduct and Plaintiffs  
2 thereby sustained damages.

3  
4           104. As a result of the foregoing wrongful conduct, Plaintiffs have suffered great physical  
5 and mental harm, mental anxiety, grief and sorrow.

6                                   **NINTH CAUSE OF ACTION**

7           105. Plaintiffs repeat and reallege each and every allegation contained in the foregoing  
8 paragraphs and incorporate the same herein by reference.

9           106. Clark County code section 8.20.300 provides that it is unlawful for any licensee  
10 under the provisions of this chapter, or any of his servants or employees, to sell, serve or give  
11 away alcoholic liquor to any intoxicated person. Matador is subject to the Statutes of  
12 Washington including RCW 66.44.200 (1) which provides that no person shall sell any liquor to  
13 any person apparently under the influence of liquor.

14  
15           107. That Defendant Matador and Defendant Dave & Buster's violated these laws by  
16 overserving Defendants Aparicio and Hurley when each was obviously intoxicated.

17           108. That Plaintiffs were, at the time of the incident complained of, within the class of  
18 persons whom the above referenced laws were designed to protect and that the violation of the  
19 laws by Defendants was the direct and proximate cause of the Decedents' injuries and deaths and  
20 the Plaintiff's grief and sorrow.

21  
22           109. Violation of these statutory and code provisions establish negligence per se on the  
23 part of Defendant Matador and Defendant Dave & Buster's.

24           110. That Defendants' actions are not protected by NRS 41.1305 as they were outside of  
25 the limited merely "serves, sells or otherwise furnishes" alcoholic beverages specifically were  
26 violations of the county code section cited.  
27  
28

111. As a result of the foregoing wrongful conduct, Plaintiffs have suffered great physical and mental harm, mental anxiety, grief and sorrow.

#### **TENTH CAUSE OF ACTION**

112. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

113. To the extent NRS 41.1305 is ambiguous or protects the Defendants under the facts of this case, it is an unconstitutional taking and violation of the equal protection of the law and a taking of life liberty and the pursuit of happiness of the Plaintiffs without due process of law. NRS 41.1305 is unconstitutional.

114. Plaintiffs further allege that application of NRS 41.1305 immunity against “dramshop” type civil claims under the facts of this case is a violation of Plaintiff’s Civil rights under the Due Process and Equal Protection provisions of the Constitution of the State of Nevada, and the Constitution of the United States of America.

115. That Defendants’ actions are not protected by NRS 41.1305 as they were outside of the limited merely “serves, sells or otherwise furnishes” alcoholic beverages.

116. That decedent Damaso Puente was a person of latin descent and was the victim of the violation of the laws stated herein.

117. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning the respective rights and duties under the law and related to the law.

118. Plaintiffs desire a judicial determination of their rights and duties and a declaration as to their rights and remedies under the law and that the law is unconstitutional.

#### **ELEVENTH CAUSE OF ACTION**

119. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs and incorporate the same herein by reference.

1           120. Upon information and belief, at all times herein mentioned each of the Defendants  
2 was the agent and employee of the other Defendants and was acting within the course, scope and  
3 authority of said agency; each Defendant approved, ratified and authorized the acts of each of the  
4 other Defendants as herein alleged; each Defendant was subject to a right of control by the other  
5 Defendants; each Defendant was authorized to act for each and all of the other Defendants; and  
6 each Defendant is a successor in interest to each of the other Defendants.  
7

8           121. Upon information and belief, Defendant Aparicio, was employed by Defendants,  
9 and each of them, and was acting within the course and scope of his employment when the  
10 incident herein complained of occurred.  
11

12           122. Under the doctrine of respondeat superior, Defendants are jointly and severally  
13 liable for the torts and conduct of its employees herein referenced directly and proximately  
14 damaging the Plaintiffs in an amount to be more specifically determined at the time of trial.  
15

#### 16                           IV. DAMAGES

17           123. By reason of the premises, and as a direct and proximate result of the aforesaid  
18 negligence, carelessness, criminal and other wrongful acts of Defendants, and each of them,  
19 delineated herein, Decedents Damaso I. Puente and Christa Puente, sustained multiple blunt force  
20 trauma injuries, and conscious pain and suffering, which were the proximate cause of their death,  
21 amounting to damage in an amount in excess of \$15,000.00.

22           124. Prior to the injuries, complained of herein, Decedents Damaso I. Puente and Christa  
23 Puente were able-bodied persons, capable of being gainfully employed and capable of engaging  
24 in all other activities for which they were otherwise suited and have thereby suffered a loss of  
25 future earnings and household services.  
26  
27  
28

1 125. That Damaso S. Puente, Maria Puente, Daniel Malone and Diane Malone, were each  
2 caused to suffer grief and sorrow, loss of probable support, companionship, society, comfort and  
3 consortium as a result of the death and disfigurement of Damaso I. Puente and Christa Puente,  
4 amounting to damage in an amount in excess of \$15,000.00.  
5

6 126. By reason of the premises, and as a direct and proximate result of the aforesaid  
7 negligence and carelessness, criminal and other wrongful acts of Defendants, and each of them,  
8 Plaintiffs have been caused to expend monies, for funeral and miscellaneous expenses incidental  
9 thereto as of this time in the approximate amount of \$15,000.00 and may in the future be caused  
10 to expend additional monies for funeral expenses and miscellaneous expenses incidental thereto,  
11 in a sum not yet presently ascertainable, and leave of Court will be requested to include said  
12 additional damages when the same have been fully determined.  
13

14 127. The Defendants, and each of them, are guilty of oppression, fraud and malice,  
15 express or implied, and Plaintiffs in addition to compensatory damages, should recover punitive  
16 damages, pursuant to NRS 42.010 and other legal basis, for the sake of example and by way of  
17 punishing the Defendants, and each of them.  
18

19 128. The Plaintiffs have been required to retain the law firm of Christensen Law Offices,  
20 LLC to prosecute this action, and are entitled to a reasonable attorney's fee.  
21

22 **WHEREFORE,** Plaintiffs, expressly reserving the right herein to include all items of  
23 damage, demand judgment against the Defendants, and each of them, as follows:  
24

- 25 1. General damages in an amount in excess of \$15,000.00;
- 26 2. General damages in an amount in excess of \$15,000.00;
- 27 3. Special damages in an amount in excess of \$15,000.00;
- 28 4. Pecuniary damages for Plaintiffs' grief and sorrow in excess of \$15,000.00

1 5. For damages for conscious pain, suffering, disfigurement, mental anguish and loss of  
2 enjoyment of life of the Decedents in an amount in excess of \$15,000.00;

3  
4 6. For loss of earning capacity and future loss of earning capacity of Decedents in amounts  
5 to be proven at trial;

6 7. Special damages for medical, funeral and other expenses according to proof;

7 8. For damages for wrongful death in an amount in excess of \$15,000.00;

8 9. Punitive damages in excess of \$15,000.00;

9 10. For declaratory judgment;

10 11. Costs of this suit;

11 12. Attorney's fees;

12  
13 13. For such other and further relief as to the Court may seem just and proper in the  
14 premises.

15  
16 DATED THIS 7<sup>th</sup> day of August, 2020.

17 CHRISTENSEN LAW OFFICES, LLC

18  
19 BY: 

20 THOMAS CHRISTENSEN, ESQ.

21 Nevada Bar No. 2326

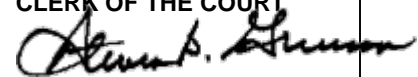
22 1000 S. Valley View Blvd.

23 Las Vegas, Nevada 89107

24 Attorney for Damaso Puente, Maria Puente,

25 Daniel Malone and Diane Malone  
26  
27  
28

## **#8: Renewed Motion to Dismiss**



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Attorneys for Dave & Buster's of Nevada, Inc.

DISTRICT COURT

CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio; Morgan Hurley; Dave &  
Buster's of Nevada, Inc.; MAT-Summerlin, LLC dba  
Casa del Matador Summerlin; Mocore, LLC; Does I-  
V, and Roe Corporations I-V, Roe Manufacturer I-V;  
Roe Wholesaler I-V; Roe Retailer I-V,

Defendants.

Case No.: A-20-813787-C  
Dept. No.: 18

**Dave & Buster's of Nevada, Inc.'s  
Renewed Motion to Dismiss**

Hearing Requested

Mr. Aparicio drove drunk and killed Damaso & Christa Puente. He was convicted for his actions and is serving a 15 year sentence. In Nevada, the person who drove drunk is responsible for his actions, not the restaurants where he drank. The facts pled in the original complaint did not state a claim upon which Plaintiffs could recover because NRS 41.1305(1) bars any recovery from Dave & Buster's in this scenario. The court granted Plaintiffs leave to file an amended complaint, but the facts alleged are still subject to NRS 41.1305(1). Consequently the amended complaint should be dismissed as to Dave & Buster's per NRCP 12(b)(5).

1 DATED this 14<sup>th</sup> day of August, 2020.



4 BY: /s/ Michael P. Lowry

5 MICHAEL P. LOWRY, ESQ.

6 Nevada Bar No. 10666

7 VIRGINIA T. TOMOVA, ESQ.

8 Nevada Bar No. 12504

9 6689 Las Vegas Blvd. South, Suite 200

10 Las Vegas, Nevada 89119

11 Attorneys for Dave & Buster's of Nevada, Inc.

12 **Memorandum of Points & Authorities**

13 **I. Plaintiffs are still suing for Aparicio's decision to drive drunk.**

14 Plaintiffs' amended complaint alleges that on May 15, 2018 Aparicio drank at least 13  
15 tequila based drinks in the 3 hours and 15 minutes.<sup>1</sup> He consumed these drinks at "Dave and  
16 Buster's and Matador which are located in close proximity in the same mall building complex and  
17 share common parking."<sup>2</sup> At least five of those drinks were consumed at Casa del Matador.<sup>3</sup>  
18 Aparicio consumed no food while he was drinking.<sup>4</sup>

19 Plaintiffs specifically allege Dave & Buster's continued to serve alcohol to Aparicio  
20 although he "was obviously intoxicated and even though Dave & Buster's knew Aparicio would  
21 thereafter be operating a motor vehicle."<sup>5</sup> Plaintiffs also allege Aparicio had a "friendly  
22 relationship with Dave & Buster's," who provided Aparicio "with alcoholic beverages for free."<sup>6</sup>  
23 Plaintiffs finally accuse Dave & Buster's employees of "helping Defendant Aparicio to the vehicle  
24 and providing him with the keys."<sup>7</sup>

25 <sup>1</sup> Amended Complaint at ¶ 21.

26 <sup>2</sup> *Id.*

27 <sup>3</sup> *Id.* at ¶ 30.

28 <sup>4</sup> *Id.* at ¶ 29.

<sup>5</sup> *Id.* at ¶ 24.

<sup>6</sup> *Id.* at ¶ 25.

<sup>7</sup> *Id.* at ¶ 26.



1 Plaintiffs allege that, while at Casa del Matador, Aparicio was obviously intoxicated but  
2 was still served drinks.<sup>8</sup> When he left, Casa del Matador's employees assisted Aparicio to the  
3 Hurley's vehicle.<sup>9</sup>

4 Aparicio then drove Hurley's car, with her permission, eastbound on Sahara.<sup>10</sup> At the  
5 same time, the Puentes were stopped at a red signal on eastbound Sahara, at its intersection with  
6 Hualapai.<sup>11</sup> Aparicio struck the Puentes' vehicle and killed them.<sup>12</sup> A blood draw taken hours  
7 after the collision indicated Aparicio's blood-alcohol content was 0.204%.<sup>13</sup>

8 Plaintiffs' amended complaint pleads 11 causes of action.

9 **a. First Cause of Action**

10 This cause of action still appears to allege negligence but Plaintiffs inserted more specific  
11 allegations as to Dave & Buster's. Specifically that Dave & Buster's was negligent

- 12 • "in providing alcohol in violation of law, internal rules and in a conspiracy and inherently  
13 dangerous activity to Aparicio and Hurley thus initiating and enabling the tort."<sup>14</sup>
- 14 • by "supporting, encouraging and enabling the activity of Aparicio and Hurley in operating a  
15 vehicle."<sup>15</sup>
- 16 • and by breaching Clark County Code 8.20.300.<sup>16</sup>

17 **b. Second Cause of Action**

18 This cause of action is identical to the original complaint. It appears to expressly allege  
19 negligent entrustment against Hurley.<sup>17</sup> It alternatively alleges Hurley was driving when the  
20 collision occurred.<sup>18</sup> This cause of action still contains no allegations as to Dave & Buster's.

---

23 <sup>8</sup> *Id.* at ¶ 31.

24 <sup>9</sup> *Id.* at ¶ 33.

25 <sup>10</sup> *Id.* at ¶ 15.

26 <sup>11</sup> *Id.* at ¶¶ 14, 16.

27 <sup>12</sup> *Id.* at ¶¶ 17, 123.

28 <sup>13</sup> *Id.* at ¶ 18.

<sup>14</sup> *Id.* at ¶ 51(a).

<sup>15</sup> *Id.* at ¶ 51(b).

<sup>16</sup> *Id.* at ¶ 51(i).

<sup>17</sup> *Id.* at ¶ 54.

<sup>18</sup> *Id.* at ¶ 41 (it appears the amended complaint is misnumbered. After paragraph 54 the numbering restarts at 41).

1                   **c. Third Cause of Action**

2                   It is still unclear specifically what legal theory this cause of action attempts to invoke. The  
3                   only change between the original and amended complaints is italicized here: “defendants,  
4                   *including Dave & Buster’s and Matador*, in concert with each other, carried on an abnormally  
5                   dangerous activity that risked harm to the person of Decedent, which was foreseeable even if  
6                   reasonable care had been used.”<sup>19</sup> This is not a substantive change because even as originally  
7                   drafted the cause of action encompassed all defendants. This change still does not distinguish  
8                   between the numerous defendants.

9                   **d. Fourth Cause of Action**

10                  The fourth cause of action appears to allege products liability against fictional defendants  
11                  who manufactured, distributed, and sold the tequila Aparicio consumed. Specifically, that “the  
12                  tequila and other alcoholic beverages were in a defective condition and were unreasonably  
13                  dangerous to a user or consumer in that the tequila was defective and unreasonably dangerous.”<sup>20</sup>  
14                  The amended complaint is identical to the original except that at various points it adds the  
15                  language “including Dave and Buster’s, Matador, and ROE RETAILER...”<sup>21</sup> This does not  
16                  substantively change the allegation as Dave and Buster’s was already included in this cause of  
17                  action. The amendment still contains no specific factual allegations against Dave & Buster’s.

18                  **e. Fifth Cause of Action**

19                  This cause of action seems to allege a breach of an express warranty. The only change to  
20                  the amended complaint is to add the language “including Dave and Buster’s, Matador and ROE  
21                  RETAILER...”<sup>22</sup> This would again relate to a product claim. Again, amended cause of action  
22                  still contains no specific allegations against Dave & Buster’s.

23                  **f. Sixth Cause of Action**

24                  This cause of action alleges the tequila Aparicio consumed was “not fit for use for its  
25                  intended purpose and Defendants, *including Dave and Buster’s, Matador and ROE RETAILER*,

26  
27                  <sup>19</sup> *Id.* at ¶ 43.

28                  <sup>20</sup> *Id.* at ¶ 51.

<sup>21</sup> *E.g. id.* at ¶¶ 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, et. al.

<sup>22</sup> *Id.* at ¶ 67.

1 and each of them, breached the implied warranty of fitness.”<sup>23</sup> The italicized text is the only  
2 change, but it is not a substantive change for the reasons previously discussed.

3 **g. Seventh Cause of Action**

4 The theory of liability this cause of action alleges is unclear. Plaintiffs allege defendants  
5 “including Dave and Buster’s, Matador and ROE RETAILER, and each of them, promoted a  
6 dangerous activity with a complete lack of disregard [sic] for the safety of the community in  
7 which they live and do business.”<sup>24</sup> Plaintiffs further allege that defendants “were promoting and  
8 encouraging drinking and driving” and had a “special relationship” with Aparicio.<sup>25</sup> Plaintiffs also  
9 alleged “Dave and Buster’s, Matador and ROE RETAILER, and each of them, failed to warn or  
10 take steps to provide transportation for competitors in any of these drinking challenges.”<sup>26</sup> Again,  
11 the italicized language is all that was added to the cause of action. The cause of action still  
12 contains no specific factual allegations against Dave & Buster’s.

13 It appears instead this cause action relates to Casa del Matador’s advertising. Plaintiffs  
14 allege on January 11, 2018 Casa del Matador advertised its happy hour using a picture of Aparicio  
15 holding a bottle of tequila.<sup>27</sup> They allege on January 15, 2018 Casa del Matador advertised “all  
16 you can eat tacos and margaritas for \$25.”<sup>28</sup> Plaintiffs also allege that, approximately two months  
17 after Aparicio drove drunk, Casa del Matador advertised a team tequila drinking contest.<sup>29</sup>

18 **h. Eighth Cause of Action**

19 As originally pled, this cause alleged negligent hiring as to Aparicio but the facts pled  
20 asserted only that Aparicio was an employee of Casa del Matador.<sup>30</sup> The amended complaint still  
21 contains those allegations.<sup>31</sup> It also adds generalized allegations that “Dave and Buster’s, Matador  
22 and ROE RETAILER, and each of them, failed to evaluate, supervise and/or investigate factual  
23 indications which suggested that overserving and/or serving to employees would create risks to

---

24 <sup>23</sup> *Id.* at ¶ 74.

25 <sup>24</sup> *Id.* at ¶ 77.

26 <sup>25</sup> *Id.* at ¶¶ 78-79.

27 <sup>26</sup> *Id.* at ¶ 81.

28 <sup>27</sup> *Id.* at ¶ 35.

29 <sup>28</sup> *Id.* at ¶ 36.

30 <sup>29</sup> *Id.* at ¶ 37.

31 <sup>30</sup> Complaint at ¶¶ 90-91.

<sup>31</sup> Amended Complaint at ¶¶ 94, 95, & 97.

1 third parties.”<sup>32</sup> Another allegation asserts each were “negligent and careless in failing to  
2 adequately train and educate its employees on the dangers of serving intoxicated co-workers,  
3 patrons and friends.”<sup>33</sup> “Dave & Buster’s breached its duty by intentionally encouraging its  
4 managers, bartenders and servers to violate the law through its hiring, training, retention and  
5 supervision of its managers, bartenders and servers in order to maximise [sic] profits for the  
6 company.”<sup>34</sup>

7 **i. Ninth Cause of Action**

8 This cause of action alleges negligence per se for a violation of Clark County Code §  
9 8.20.300. The only change to it is to allege “Defendant Matador and Defendant Dave & Buster’s  
10 violated these laws by overserving Defendants Aparicio and Hurley when each was obviously  
11 intoxicated.”<sup>35</sup> This is not a substantive change from the original complaint.

12 **j. Tenth Cause of Action**

13 This section still alleges that NRS 41.1305 is unconstitutional. The only new factual  
14 allegation is that “Damaso Puente was a person of latin [sic] descent....”<sup>36</sup>

15 **k. Eleventh Cause of Action**

16 This cause asserts only that respondeat superior applies to all defendants. It is unchanged  
17 from the original complaint. It still does not distinguish between any of the defendants or identify  
18 specific factual allegations against Dave & Buster’s.

19 **II. Plaintiffs must plead a set of facts that could entitle them to relief.**

20 When evaluating a motion to dismiss per NRCP 12(b)(5), the district court accepts all  
21 factual allegations in the complaint as true and draw all inferences in the plaintiffs’ favor.  
22 Dismissal is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set  
23 of facts, which, if true, would entitle [her] to relief.”<sup>37</sup>

---

24  
25 <sup>32</sup> *Id.* at ¶ 86.

26 <sup>33</sup> *Id.* at ¶ 87.

27 <sup>34</sup> *Id.* at ¶ 93.

28 <sup>35</sup> *Id.* at ¶ 107.

<sup>36</sup> *Id.* at ¶ 116.

<sup>37</sup> *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Dave & Buster’s urges an appellate court to discard this standard in favor of the federal *Iqbal* standard, but acknowledges *Buzz Stew* controls the district court’s evaluation at this time.

1 **III. Plaintiffs have not pled facts against Dave & Buster's that could entitle them to relief.**

2 Read as a whole, Plaintiffs' original complaint alleged they were injured because Aparicio  
3 was served alcoholic drinks, consumed them, and drove drunk. The same operative facts are pled  
4 in the amended complaint. Plaintiffs' problem is NRS 41.1305(1) bars any recovery from Dave &  
5 Buster's under this fact pattern.

6 **a. Certain causes of action still plead no facts against Dave & Buster's.**

7 A complaint must contain "a short and plain statement of the claim showing that the  
8 pleader is entitled to relief."<sup>38</sup> Merely lumping all the defendants together does not comply with  
9 NRCP 8(a)(2). "A complaint that lumps together thirteen 'individual defendants,' where only  
10 three of the individuals was alleged to have been present for the entire period of the events alleged  
11 in the complaint, fails to give 'fair notice' of the claim to those defendants."<sup>39</sup> "Additionally, the  
12 Court notes that undifferentiated pleading against multiple defendants is improper."<sup>40</sup>

13 This same problem still applies to all causes of action except the first (negligence). The  
14 original complaint merely lumped all defendants together. The changes to the amended complaint  
15 specifying all defendants includes Dave & Buster's still does not distinguish between the  
16 defendants. They are still impermissibly lumped together. As this is Plaintiffs' second  
17 opportunity to provide the required distinctions, it appears Plaintiffs are unable to do so.

18 **b. NRS 41.1305 bars liability against Dave & Buster's under the facts alleged.**

19 Read as a whole, the amended complaint alleges that 1) Dave & Buster's sells alcoholic  
20 beverages; 2) sold them to Aparicio; 3) as a result of Dave & Buster's selling alcoholic drinks to  
21 Aparicio, Aparicio drove drunk; and 4) injured plaintiffs. NRS 41.1305(1) expressly prohibits this  
22 exact type of liability.

23 A person who serves, sells or otherwise furnishes an alcoholic beverage to another  
24 person who is 21 years of age or older is not liable in a civil action for any damages

25 <sup>38</sup> NRCP 8(a)(2).

26 <sup>39</sup> *In re Sagent Tech., Derivative Litig.*, 278 F. Supp. 2d 1079, 1094-95 (N.D. Cal. 2003) (decided  
27 pre-*Iqbal*, applying the same *Conley* standard as presently applies in Nevada); *Gauvin v.*  
28 *Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (lumping together multiple defendants in  
one broad allegation fails to satisfy notice requirement of Rule 8(a)(2)).

<sup>40</sup> *Aaron v. Aguirre*, No. 06-cv-1451, 2006 U.S. Dist. LEXIS 90384, 2006 WL 8455871 n.12 (S.D.  
Cal. Dec. 13, 2006).

caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage.<sup>41</sup>

NRS 41.1305(2) creates the only exception to NRS 41.1305(1)'s prohibition. That exception allows liability if the person served was underage, but Plaintiffs still do not allege Aparicio was less than 21 years old so the exception does not apply. In short, even if Plaintiffs proved all the facts alleged, NRS 41.1305(1) prohibits liability against Dave & Buster's.

NRS 41.1305 was enacted in 1995 and represented the Legislature's codification of a common law doctrine, but with a twist. The Supreme Court had repeatedly ruled refused to allow a tort claim for negligence arising out of the distribution of alcohol. Instead it had concluded the proximate cause of any damage caused by a person who has consumed alcohol is the *consumption* of alcohol itself, not its *distribution*.<sup>42</sup> The motivation for NRS 41.1305 may have been *Hinegardner v. Marcor Resorts*, which refused in 1992 to allow such a claim even against vendors who serve alcohol to minors.<sup>43</sup> NRS 41.1305 was then enacted in 1995 and expressly allowed a claim only when minors are served.

**c. NRS 41.1305(1) is constitutional.**

Plaintiffs' recognize NRS 41.1305(1) as a barrier to any recovery, so the amended complaint alleges NRS 41.1305(1) is unconstitutional. "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity."<sup>44</sup> "When the law . . . does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest."<sup>45</sup>

NRS 41.1305(1) does not involve a suspect class such as one based upon race, religion, gender, etc. Its text creates a statute of general application.

NRS 41.1305(1) also does not impede a fundamental right. Plaintiffs argue NRS 41.1305(1) violates their right to a jury trial because it bars them from recovering damages from

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<sup>41</sup> NRS 41.1305(1).

<sup>42</sup> *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358, 359 (1969); *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610, 612 (1994).

<sup>43</sup> 108 Nev. 1091, 844 P.2d 800, 803 (1992).

<sup>44</sup> *Tam v. Dist. Ct.*, 131 Nev. Adv. Rep. 80, 358 P.3d 234, 237-38 (2015).

<sup>45</sup> *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

1 Dave & Buster's. The Supreme Court of Nevada has repeatedly ruled that the right to sue for  
2 damages "does not involve a fundamental constitutional right."<sup>46</sup> When a fundamental  
3 constitutional right is not implicated, the Legislature may restrict court access "if there exists a  
4 rational basis for doing so. In other words, constitutional 'right of access' challenges that do not  
5 implicate a fundamental right are subjected to the lowest level of judicial scrutiny--the 'rational  
6 basis' test."<sup>47</sup> The rational basis test is satisfied if the statute is rationally related to a legitimate  
7 government purpose. "This Court may not, under such a standard, superimpose its own  
8 preferences on the work product of a coordinate branch of government."<sup>48</sup>

9 NRS 41.1305(1) does not impede a fundamental right, so it is subject to a rational basis  
10 test. At least two other jurisdictions have considered rational basis challenges to statutes  
11 substantively similar to NRS 41.1305(1). Wisconsin's Supreme Court concluded such a statute  
12 satisfied the rational basis test, noting distinguishing between two groups of persons who furnish  
13 alcoholic beverages to others was rationally related to the legitimate governmental purpose of  
14 protecting persons under the legal drinking age.<sup>49</sup>

15 Wyoming's Supreme Court considered a similar statute in *Greenwalt v. Ram Rest. Corp.*<sup>50</sup>  
16 The statute at issue read "[n]o person who has legally provided alcoholic liquor or malt beverage  
17 to any other person is liable for damages caused by the intoxication of the other person."<sup>51</sup>  
18 *Greenwalt* noted many potential reasons the Wyoming Legislature may have had for passing the  
19 statute that could satisfy a rational basis test.

20 [T]he legislature could reasonably have concluded that the full nature and scope of  
21 the liability and immunity of all alcohol providers, licensed vendors and non-licensed  
22 persons alike, was uncertain. ... The legislature could have rationally thought that it  
23 must create a comprehensive, yet simple to administer tort claim to cover all liquor  
24 providers and intoxicated persons. It could have rationally thought that the  
establishment of an unquestioned and predictable yet limited basis for legal liability  
would provide a more effective incentive for the responsible furnishing of alcohol and  
the realization of the primary purpose.<sup>52</sup>

25 <sup>46</sup> *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995); *Tam v. Dist. Ct.*, 131 Nev.  
Adv. Rep. 80, 358 P.3d 234, 237-38 (2015).

26 <sup>47</sup> *Id.*

27 <sup>48</sup> *Allen v. State*, 100 Nev. 130, 136, 676 P.2d 792, 796 (1984).

28 <sup>49</sup> *Doering v. WEA Ins. Group*, 532 N.W.2d 432 (Wis. 1995).

<sup>50</sup> 71 P.3d 717 (Wyo. 2003).

<sup>51</sup> W.S. § 12-8-301(a).

<sup>52</sup> *Greenwalt*, 71 P.3d at 738.

1 Ultimately, a legislature is not required to “draw its lines with mathematical certainty or  
2 even that it exercise its policy-making judgment in the best or wisest way. We hold that the  
3 legislative classifications at issue are rationally related to the legitimate legislative objectives of”  
4 the statute.<sup>53</sup>

5 The rational bases that Wisconsin and Wyoming found for their statutes are equally  
6 applicable in Nevada. NRS 41.1305(1) is rationally related to any of these legitimate government  
7 purposes, so its restrictions upon access to the courts are constitutionally sound.

8 **d. NRS 41.1305 overrides Clark County Code § 8.20.300.**

9 Plaintiffs then argue that even if NRS 41.1305(1) applies, they could still recover against  
10 Dave & Buster’s via negligence per se because Clark County Code (“CCC”) 8.20.300 creates  
11 liability to Dave & Buster’s that NRS 41.1305(1) does not eliminate. CCC 8.20.300 was enacted  
12 in 1965. “It is unlawful for any licensee under the provisions of this chapter, or any of his  
13 servants or employees, to sell, serve or give away alcoholic liquor to any intoxicated person.”

14 Plaintiffs’ position is incorrect. CCC chapter 8.20 creates regulations for liquor licenses.  
15 CCC 8.20.300 states only that it is unlawful for a licensee to act in a certain manner. Its text does  
16 not purport to create liability civil liability against the licensee for a violation of the regulation. To  
17 this extent, CCC 8.20.300 is consistent with NRS 41.1305.

18 But CCC 8.20.300 cannot be read to create civil liability to Dave & Buster’s because it  
19 would then conflict with NRS 41.1305. “[C]ounties are legislative subdivisions of the state.  
20 Because counties obtain their authority from the legislature, county ordinances are subordinate to  
21 statutes if the two conflict.”<sup>54</sup>

22 **e. Dave & Buster’s owed no duties once Aparicio left the restaurant.**

23 Plaintiffs also attempt to avoid NRS 41.1305(1) by alleging “Dave and Buster’s, Matador  
24 and ROE RETAILER, and each of them, failed to warn or take steps to provide transportation for  
25 competitors in any of these drinking challenges.”<sup>55</sup> This allegation assumes Dave and Buster’s  
26 owed a duty to Aparicio when he left the restaurant.

27 <sup>53</sup> *Id.*

28 <sup>54</sup> *Falcke & Herbig Props. v. Cty. of Douglas*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000).

<sup>55</sup> Amended Complaint at ¶ 81.



1 First, in the factual context of this case if such a duty existed it would conflict with NRS  
2 41.1305(1). The facts alleged in the complaint assert Aparicio was drunk because Dave &  
3 Buster's served, sold or furnished alcohol to him. The duty Plaintiffs allege still arose from  
4 conduct that NRS 41.1305(1) protects.

5 Second, the Supreme Court of Nevada has rejected the idea that Dave & Buster's owed a  
6 duty once Aparicio left the premises. In *Rodriguez v. Primadonna Co., LLC* three men were  
7 ejected from a casino for being drunk and disorderly. After being ejected, they were subsequently  
8 involved in a motor vehicle accident. One of the injured parties sued the casino. The Supreme  
9 Court first noted "it is well settled in Nevada that commercial liquor vendors, including hotel  
10 proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated  
11 patron, which are sustained by either the intoxicated patron or a third party."<sup>56</sup> Consequently,  
12 "when a hotel proprietor rightly evicts a disorderly, intoxicated patron, the hotel proprietor is not  
13 liable for any torts that an evicted patron commits after he or she is evicted that result in injury."<sup>57</sup>  
14 This meant "because Nevada commercial alcohol vendors are not liable for injuries sustained by  
15 intoxicated patrons, [the hotel] did not have a duty to ensure safe transportation for the young  
16 men, keep Fabian on the premises, or otherwise prevent injuries subsequent to their eviction."<sup>58</sup>

17 Therefore, although the Primadonna may have known that Fabian's step-uncle was  
18 intoxicated and could not safely drive, we conclude, as a matter of law, that  
19 Primadonna did not have the duty to arrange safer transportation, prevent an  
20 intoxicated driver from driving, or prevent Fabian, a passenger, from riding with a  
21 drunk driver. In so concluding, we note that it would be contrary to existing authority  
for this court to hold otherwise and require a proprietor to monitor the intoxication  
level or other factors related to patrons who elect to drive while intoxicated or who  
engage in other dangerous activity after they are evicted.<sup>59</sup>

22 Applied here, Aparicio left Dave & Buster's of his own accord; he was not evicted or  
23 asked to leave. Regardless, once he left the premises, whatever duties Dave & Buster's might  
24 have owed ended for the same reasons that *Rodriguez v. Primadonna Co.* described.

25  
26  
27 <sup>56</sup> 125 Nev. 578, 585, 216 P.3d 793, 798 (2009).

28 <sup>57</sup> *Id.*, 216 P.3d at 798-99.

<sup>58</sup> *Id.* at 587, 216 P.3d at 800.

<sup>59</sup> *Id.*

1                   **f. A bailment relationship would also not state a claim.**

2                   Plaintiffs' final attempt to avoid NRS 41.1305(1) relies upon a bailment relationship.  
3                   Plaintiffs' original complaint alleged only that Casa del Matador's employees assisted Aparicio to  
4                   the Hurley's vehicle.<sup>60</sup> The amended complaint presents this factual allegation alternatively. It  
5                   alleges either Dave & Buster's employees helped "Aparicio to the vehicle and providing him with  
6                   the keys"<sup>61</sup> or that Casa del Matador's employees assisted Aparicio to the Hurley's vehicle.<sup>62</sup>

7                   If the factual allegation that Dave & Buster's possessed the keys to the vehicle and gave  
8                   them to Aparicio is accurate, it would not create liability to Dave & Buster's. In *Mills v. Cont'l*  
9                   *Parking Corp.* the question was "whether the heirs of a pedestrian who was killed by a car driven  
10                  by a drunken driver have a claim for relief for wrongful death against the operator of a parking lot  
11                  who surrendered the car to the inebriate with knowledge of his drunken condition."<sup>63</sup> In that  
12                  situation a bailor-bailee relationship was created where "the bailee is duty bound to surrender  
13                  control of the car to the bailor upon demand or suffer a possible penalty for conversion. Indeed, if  
14                  the bailee refuses to return the car at the end of the bailment it is presumed that the car was  
15                  converted by him."<sup>64</sup> As applied, the relationship ended when the driver "appeared at the parking  
16                  lot to reclaim possession of his car and paid for the parking services. At that moment the bailee  
17                  lost his right to control the car." As the bailor had no right to keep or control the car, there was no  
18                  liability for returning it to the driver's control.

19                  If Dave & Buster's did have the keys to the car Aparicio drove, a bailment relationship  
20                  existed that obligated Dave & Buster's to return the keys upon demand. Those facts do not state a  
21                  claim for relief, just as *Mills* concluded.

22                  **IV. Plaintiffs have not pled a claim for relief against Dave & Buster's.**

23                  This case involves a tragic set of facts. While tragic, in Nevada these facts do not create  
24                  liability to someone in Dave & Buster's position. NRS 41.1305(1) and Nevada common law that  
25                  preceded it all state that when Aparicio decided to consume alcohol and drive drunk, he was

26                  <sup>60</sup> Complaint at ¶ 26.

27                  <sup>61</sup> Amended Complaint at ¶ 26.

28                  <sup>62</sup> *Id.* at ¶ 33.

<sup>63</sup> 86 Nev. 724, 725, 475 P.2d 673, 674 (1970).

<sup>64</sup> *Id.* at 725-26, 475 P.2d at 674.

1 responsible for the consequences of his choices, not the place where he was served. Plaintiffs  
2 have had two opportunities to plead a set of facts against Dave & Buster's that could entitle them  
3 to relief. They have been able to do so, meaning Dave & Buster's should be dismissed per NRC  
4 12(b)(5).

5 DATED this 14<sup>th</sup> day of August, 2020.



7

8 BY: /s/ Michael P. Lowry  
9 MICHAEL P. LOWRY, ESQ.  
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11 VIRGINIA T. TOMOVA, ESQ.  
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15 Attorneys for Dave & Buster's of Nevada, Inc.  
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**Certificate of Service**

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on August 14, 2020, I served **Dave & Buster's of Nevada, Inc.'s**

**Renewed Motion to Dismiss** as follows:

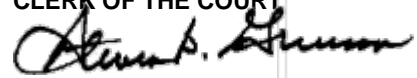
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

Thomas F. Christensen Christensen Law 1000 S Valley View Blvd Las Vegas, Nevada 89107 Attorneys for Plaintiffs	Shea Backus Backus, Carranza & Burden 3050 S. Durango Dr. Las Vegas, NV 89117 Attorneys for Morgan Hurley; Henry Aparicio
Michael S. Rawlings Wolfe & Wyman 6757 Spencer St. Las Vegas, NV 89119 Attorneys for Mocore, LLC; MAT-Summerlin, LLC	

BY: /s/ Agnes R. Wong  
An Employee of



**#9: Opposition to Renewed Motion to Dismiss**



**OMD(CIV)**

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**DISTRICT COURT  
CLARK COUNTY, 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,

Plaintiffs,

vs.

Henry Biderman Aparicio, Morgan Hurley, Dave  
& Buster's of Nevada, Inc dba Dave & Buster's;  
Dave & Buster's Inc; MAT-SUMMERLIN LLC,  
dba Casa del Matador Summerlin; MATADOR  
INVESTMENTS, LLC; OPPER MELANG 5410,  
LLC; MEL-OPP & GRIFF, LLC; OPP MEL &  
GRIFF, INC.; MOCORE, LLC; DOES I - V, and  
ROE CORPORATIONS I - V, ROE  
MANUFACTURER I - V; ROE WHOLESALER,  
I - V; ROE RETAILER, I - V;

Defendants.

CASE NO:A-20-813787-C

DEPT. NO: 18

Hearing:

September 16, 2020

10am

**PLAINTIFFS' OPPOSITION TO DAVE & BUSTER'S  
RENEWED MOTION TO DISMISS**

COME NOW the Plaintiffs, Damaso S. Puente, individually and on behalf of the Estate of  
Damaso I. Puente, Maria Puente, Diane Malone, individually and on behalf of the Estate of  
Christa Puente, and Daniel Malone, by and through Plaintiffs' attorney, THOMAS  
CHRISTENSEN, of the law firm of CHRISTENSEN LAW OFFICES, and hereby submit this

AA121

1 Opposition to Dave & Buster's of Nevada, Inc.'s Motion to Dismiss. This Opposition is made and  
2 based upon the pleadings on file herein, the following Points and Authorities, and any arguments  
3 elicited at the hearing of this matter. Plaintiff respectfully requests the Court consider plaintiffs'  
4 opposition to the original motion to dismiss in addition to these further points and authorities as if  
5 fully set forth herein.  
6

7 DATED THIS 2nd day of September, 2020.

8 CHRISTENSEN LAW OFFICES, LLC

9  
10 BY: 

11 THOMAS CHRISTENSEN, ESQ.

12 Nevada Bar No. 2326

13 1000 S. Valley View Blvd.

14 Las Vegas, Nevada 89107

15 Attorney for Damaso Puente, Maria Puente,

16 Daniel Malone and Diane Malone

## 17 MEMORANDUM OF POINTS AND AUTHORITIES

### 18 Introduction

19 Dave & Buster's of Nevada, Inc., (hereinafter "Dave & Buster's") has filed a renewed  
20 Motion to Dismiss, admitting that the facts pled do support the eight<sup>1</sup> independent recognized  
21 causes of action against Dave and Buster's, but claiming that all of those causes of action are  
22 eliminated by NRS 41.1305(1). NRS 41.1305(1) by its language does not eliminate any of the  
23 above causes of action nor give liquor vendors a license to kill in Nevada. It does not authorize  
24 serving alcohol to an already drunk individual minor or adult. In fact the legislative history of  
25 NRS 41.1305(1) suggests the opposite to be true.<sup>2</sup> Dave & Busters cites no Nevada law holding  
26 that NRS 41.1305(1) removes all liability from a liquor licensee.

---

27 <sup>1</sup> The eight include: negligence, gross negligence, willful and wanton misconduct, strict products  
28 liability, breach of express and implied warranties, acting in concert in an abnormally dangerous  
activity, negligent supervision and hiring, and negligence per se

<sup>2</sup> See Exhibit 1 hereto: legislative history of 1995 and amendment in 2007.

Dave & Buster's sole defense to the instant motion is that NRS 41.1305 is a complete bar to all causes of action for licensees providing alcohol in Nevada. Since that is not the law in Nevada, and Dave & Buster's failed to even address the various valid causes of action that were pled, its motion must be denied. Further, since Dave & Buster's did not present any affirmative reasons in their motion to dismiss, it cannot, in any reply, now address those issues. *See Moon v. McDonald Carano & Wilson*, 129 Nev. 547, 553 n.3, 306 P.3d 406, 410 n.3 (2013); *Francis v. Wynn Las Vegas*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011).

**Dave and Buster's misstates Nevada's notice pleading rules, requesting specificity that is not required or possible at the pleading stage**

Dave and Buster's continued criticism of the general allegations of the complaint are, at best, disingenuous. At worst, it is an intentional attempt to lead the court into error, delaying the litigation and increasing the cost. "Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party" *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). It is obvious to the court and Dave and Buster's that plaintiffs do not have the benefit of discovery to determine the names of the bartenders, their employment history, their training, their reprimands, the rules and regulations they operate under, their knowledge, what they observed, what drinks were served, what promotions were being offered, what warnings were provided, what the condition of the product was, what the internal video surveillance shows. etc. That is what discovery would reveal. Additionally, summary judgment motions can be made. Both Dave and Buster's and The Matador engaged in the improper and illegal activities alleged in the complaint. Both are on fair notice as to the basis of liability in the eight causes of action against each Defendant.

The facts alleged by the Plaintiffs herein *must* be taken as true in evaluation of the Motion. *Simpson v. Mars, Inc.*, 113 Nev. 188, 929 P.2d 966 (1997). A district court order granting an



1 NRCP 12(b)(5) motion to dismiss is subject to rigorous appellate review. *Lubin v. Kunin*, 117  
2 Nev. 107, 110-11, 17 P.3d 422, 425 (2001). A motion to dismiss a “complaint under NRCP  
3 12(b)(5) is subject to a rigorous standard of review on appeal. Accordingly, this court will  
4 recognize all factual allegations in [the] complaint as true and draw all inferences in its favor.  
5 [The] complaint should be dismissed only if it appears **beyond a doubt** that it could prove no set  
6 of facts, which, if true, would entitle it to relief. We review the district court's legal conclusions  
7 de novo.’ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (Nev. 2008).  
8

9 **Dave and Buster’s admits that but for NRS 41.1305, Plaintiffs have alleged facts supporting**  
10 **the eight valid Nevada causes of action.**

11 The facts alleged against Dave and Buster’s and the Matador are sufficient to give notice  
12 to Dave and Buster’s and to establish claims for negligence, gross negligence, willful and wanton  
13 misconduct, strict products liability, breach of express and implied warranties, acting in concert in  
14 an abnormally dangerous activity, negligent supervision and hiring, and negligence per se. Read  
15 as a whole, the complaint alleges that Dave and Buster’s participated in willful and wanton  
16 misconduct, violated laws enacted to protect the public, knew, facilitated and participated with  
17 Aparicio in driving drunk, introduced a defective product into commerce, provided alcohol to an  
18 already intoxicated person, failed to follow company policy established to protect the public from  
19 the very harm that occurred, and that acting in concert with Aparicio deprived the Puentes of their  
20 lives, etc.  
21

22 The tragic collision giving rise to this litigation took the lives of the Puentes, two successful  
23 and appreciated members of this community, on May 15, 2018. That evening, Henry Aparicio  
24 and Morgan Hurley were served alcoholic drinks by Dave & Busters of Nevada, Inc., after they  
25 were clearly intoxicated. The Court **must construe** the pleadings liberally and accept all factual  
26 allegations in the Complaint as true. *Blackjack Bonding v. City of Las Vegas Municipal Court*,  
27  
28

1 116 Nev. 1217 (2000). The appropriate standard requires a showing beyond a doubt. *Buzz Stew,*  
2 *LLC v. City of N. Las Vegas*, 181 P. 3d 670, (2008). Plaintiffs herein assert that their complaint  
3 alleges facts upon which to support their claims.  
4

5 **The facts pled support a claim under Nevada's strict product liability jurisprudence against**  
6 **retailer Dave and Buster's causing injury to the Puentes**

7 Nevada recognizes strict liability in tort for products including products to be ingested or  
8 inhaled like drugs and alcohol.

9 To successfully prove a failure-to-warn case, a plaintiff must  
10 produce evidence demonstrating the same elements as in other  
11 strict product liability cases: " (1) the product had a defect which  
12 rendered it unreasonably dangerous, (2) the defect existed at the  
13 time the product left the manufacturer, and (3) the defect caused  
14 the plaintiff's injury." *See* *Fyssakis v. Knight Equipment Corp.*, 108  
15 Nev. 212, 214, 826 P.2d 570, 571 (1992). A product may be found  
unreasonably dangerous and defective if the manufacturer failed to  
provide an adequate warning. *See* *Yamaha Motor Co. v. Arnoult*, 114  
Nev. 233, 238-39, 955 P.2d 661, 665 (1998). *Rivera v. Philip*  
*Morris, Inc.*, 209 P.3d 271, 275 (Nev. 2009).

16 Under strict liability rules, a retailer is liable to the injured party for a defective product  
17 though the retailer may be able to be indemnified by the manufacturer. *Piedmont Equipment*  
18 *Co. v. Eberhard Manufacturing Co.*, 99 Nev. 523, 528 (Nev. 1983).

19 **Willful and Wanton misconduct of Dave & Buster's causing injury to the Puentes**

20 Once Aparicio passed the threshold of intoxication, he was no longer able to consent to  
21 further sales and consumption of alcohol. Dave & Buster's had stepped into control; and  
22 instead of acting reasonably, acted with wanton and reckless disregard for the consequences of  
23 its actions. This illegal activity was taken for the sole purpose of greater profits and amounts to  
24 egregious disregard for the safety of the patron and the public. *Ordinary and gross negligence*  
25 *differ in degree of inattention, while both differ in kind from wilful and intentional conduct*  
26  
27  
28

1 which is or ought to be known to have a tendency to injury. (Emphasis added.) *Hart v. Kline*, 61  
2 Nev. 96, 101, 116 P.2d 672, 674 (1941), *Davies v. Butler*, 95 Nev. 763, 771 (Nev. 1980).  
3

4 The evidence in the instant case supports an instruction regarding  
5 the willful or wanton misconduct of the respondents. The jury  
6 could conclude that the intent of respondents was to administer  
7 dangerous quantities of alcohol to Davies within a short period of  
8 time. 190 proof alcohol was deliberately chosen to be  
9 administered, as it had been on previous occasions, and  
10 respondents were fully aware of its nature. Further, they were  
11 aware that retention of large amounts of alcohol in the system can  
12 be highly dangerous, as an initiate had had to be hospitalized the  
13 year before. Despite respondents' protestation that they assumed  
14 decedent would not swallow most of the alcohol administered to  
15 him, they admitted having no way to determine whether that was  
16 so, while continuing to put bottles of liquor to his lips and  
17 screaming at him to drink it. Other courts have had no difficulty  
18 finding willful, wanton, or reckless misconduct in the furnishing of  
19 alcohol in sufficient quantities to cause death, even under less  
20 aggravated circumstances. *E.g.*, *Ewing v. Cloverleaf Bowl*, 572  
21 P.2d 1155 (Cal. 1978); *McCue v. Klein*, 60 Tex. 168 (1883).  
22 *Davies v. Butler*, 95 Nev. 763, 773 (Nev. 1980).  
23

24 Dave & Buster's is in a superior position to measure the dangers and the potency of the at  
25 least eight hard liquor drinks it provided to Aparicio. This callous approach to the obviously  
26 dangerous situation is actionable. Dave & Buster's cannot hide behind consent either because it  
27 knowingly took away Aparicio's ability to consent and cannot now hide behind it.  
28

Furthermore, capacity to consent requires the mental ability to  
appreciate the "nature, extent and probable consequences of the  
conduct consented to." Restatement, Torts, *supra*, comment b, at  
365. As noted by Prosser, *Law of Torts*, § 18, at 102 (4th ed. 1971),  
"[i]f the plaintiff is known to be incapable of giving consent  
because of . . . intoxication . . . his failure to object, or even his  
active manifestation of consent will not protect the defendant."  
*Davies v. Butler*, 95 Nev. 763, 774 (Nev. 1980).

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1 **Intentional criminal act in concert with Aparicio caused injury to the Puentes**

2 Dave & Buster's, by participating and taking control of the dangerous instrumentality of an  
3 intoxicated driver, participated in the tort. Its actions in creating consequences dangerous to the  
4 community amount to participation in a criminal conspiracy.  
5

6 In *McCue v. Klein, supra*, the widow of a man who had died as a  
7 result of drinking a toxic quantity of alcohol sued those who had  
8 furnished him the alcohol and induced him to drink it, on a wager.  
The court held, 60 Tex. at 169,

9 [T]he maxim of *volenti non fit injuria* presupposes that the party is  
10 capable of giving consent to his own injury. If he is divested of the  
11 power of refusal by mental faculties, the damage cannot be  
12 excused on the ground of consent given. A consent given by a  
13 person in such condition is no consent at all, — more especially  
14 when his state of mind is well known to the party doing the injury.  
15 . . . And so if one whose mental faculties are suspended by  
16 intoxication is induced to swallow spiritous liquors to such excess  
as to endanger his life, the persons taking advantage of his  
condition of helplessness and mental darkness and imposing the  
draught upon him must answer to him if such injury should fall  
short of the destruction of life, and to his family if death should be  
the result. *Davies v. Butler*, 95 Nev. 763, 774 (Nev. 1980).

17 When Dave & Buster's chose to place greater profit above reasonable behavior, as alleged  
18 in the complaint on file herein, it divested power from its patrons. Instead, without warnings, it  
19 plied excessive amounts of high octane alcohol on a youthful already disabled patron in wanton  
20 and reckless disregard for the safety of its patron and the general public.

21 **Plaintiffs have alleged facts to support a cause of action against Dave and Buster's for**  
22 **engaging in an abnormally dangerous activity**

23 "One who carries on an abnormally dangerous activity is subject to liability for harm to the  
24 person, land or chattels of another resulting from the activity, although he has exercised the  
25 utmost care to prevent the harm.'" *Valentine v. Pioneer Chlor Alkali Co.*, 109 Nev. 1107, 1110  
26 (Nev. 1993). Nevada has adopted strict liability for engaging in an abnormally dangerous  
27 activity. Plying already compromised customers with excessive alcohol is an abnormally  
28

1 dangerous activity. The sponsoring of a contest or merely providing excessive amounts of  
2 alcohol establishes the factual basis for this claim.

3  
4 **Plaintiffs alleged facts supporting negligence, gross negligence and negligence per se for**  
5 **serving an intoxicated person on the part of Dave and Buster's causing the death of the**  
6 **Puentes**

7 Nevada has adopted the common law principle and statutory principle of negligence per se  
8 when violating a statute or code. This concept is reinforced in Nevada by NRS 41.133 which  
9 provides that conviction of crime is conclusive evidence of facts necessary to impose civil  
10 liability for related injury. Thus, Clark County Code (8.20.300) is applicable to the finding of  
11 negligence per se of Dave & Buster's. This does not create liability; it is a statute that established  
12 the standard of care that is reasonable under the common law negligence, gross negligence or  
13 willful and wanton liability.

14 In *Barnes v. Delta Lines, Inc.*, we held that where a plaintiff  
15 adduced evidence at trial showing that the defendant violated a  
16 statute designed to protect a class of persons to which the plaintiff  
17 belonged, the district court erred by failing to instruct the jury  
18 regarding the negligence per se doctrine. And later, in *Del Piero v.*  
19 *Phillips*, we applied the same analysis to a municipal ordinance. In  
20 that case we determined that a violation of the Reno Municipal  
Code, along with the defendant's failure to yield to pedestrians as  
required by the "rules of the road," required that the jury be  
instructed regarding negligence per se. *Vega v. Eastern Courtyard*  
*Assocs*, 117 Nev. 436, 440 (Nev. 2001).

21 Even in jurisdictions that recognize dram shop liability, the dram shop statute is not the  
22 exclusive remedy when an independent cause of action recognized at common law, like  
23 negligence, exists. For example, in *Harris v. Gower, Inc.*, the plaintiff's husband drank himself  
24 into an unconscious state in the defendant's establishment. *Harris*, 506 N.E.2d 624, 625 (Ill. App.  
25 1987). While unconscious, the plaintiff's husband was dragged outside and placed in his car,  
26 where he subsequently froze to death. *Id.* The Illinois court, which recognizes dram shop liability,  
27 held that the plaintiff was entitled to maintain her cause of action in common law negligence  
28

1 because her complaint was based on defendant's negligent conduct toward her husband after he  
2 became intoxicated, rather than defendant's negligence in serving him liquor. *Id.* Therefore, the  
3 defendant could be found negligent for placing the plaintiff's husband in obvious peril. *Id.*

4  
5 Also, even in the absence of dram shop legislation, the common law imposes liability on  
6 establishments that serve liquor based on ordinary negligence. *Alegria v. Payonk*, 619 P.2d 135,  
7 137 (Idaho 1980). An establishment that serves liquor is not abrogated from claims of ordinary  
8 negligence. *Manuel*, at 477. Here, it is irrelevant where the operator of the subject vehicle  
9 consumed the alcohol, be it on Defendants' premises or that of another establishment. Like the  
10 Plaintiff in *Harris*, Plaintiffs' claims herein also arise out of the negligent conduct of Dave &  
11 Buster's personnel when they placed Plaintiffs in peril by conspiring with and supporting  
12 Aparicio and Hurley in driving in their obviously intoxicated state.

13  
14 In a negligence action, the plaintiff must show: "(1) that the defendant had a duty to  
15 exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that  
16 the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the  
17 plaintiff was damaged." *Joynt v. California Hotel and Casino*, 108 Nev. 539, 542, 835 P.2d 799,  
18 801 (1992).

19  
20 All of these elements have been alleged against Defendant Dave & Buster's in the  
21 Plaintiffs' complaint herein. It is axiomatic that whether or not Defendants were negligent in the  
22 present case is a question of fact for a jury to decide. "...[F]oreseeability, duty, **proximate cause**  
23 and reasonableness usually are questions of fact for the jury." *Thomas v. Bokelman*, 86 Nev. 10,  
24 13, 462 P.2d 1020, 1022 (1970). The Nevada Supreme Court has held that businesses have a duty  
25 to act reasonably toward patrons like Aparicio, even if the patron is intoxicated or considered a  
26 trespasser. *Billingsley v. Stockmen's Hotel Inc.*, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995).

1 In *Billingsley*, an intoxicated patron at the defendant's hotel fell asleep in the empty  
2 showroom. *Id.*, 111 Nev. at 1034, 901 P.2d at 142. Hotel Security officers woke him up, and  
3 evicted him from the hotel. *Id.*, 111 Nev. at 1035, 901 P.2d at 143. The plaintiff was  
4 uncooperative, and an altercation ensued, resulting in injury to the plaintiff. *Id.* The defendant in  
5 *Billingsley* argued that the only duty it owed to an intoxicated patron was to refrain from willfully  
6 and wantonly injuring him.<sup>3</sup> *Id.*, 111 Nev. at 1037, 901 P.2d at 144. The Nevada Supreme Court  
7 disagreed, and held that, while the court can consider intoxication and other factors in  
8 determining reasonableness, **proprietors have a duty to act reasonably toward patrons.** *Id.*  
9 "[T]he overriding factor is whether the land owner or occupier has acted reasonably toward the  
10 plaintiff under the circumstances." *Id.*

13 Here, Dave and Buster's had a duty to act reasonably toward Aparicio and Hurley.  
14 Whether continuing to serve patrons after they reached an obvious state of intoxication, when the  
15 server knew or should have known the patrons would be driving from the premises, was "act[ing]  
16 reasonably toward [Aparicio and Hurley] under the circumstances," is a genuine issue of material  
17 fact for a jury to decide. The general duty of Dave and Buster's to act reasonably toward the  
18 guests aside, Dave and Buster's created an additional affirmative duty when it encouraged the  
19 guests to drink more, in order to obtain a greater profit from the compromised guest. This profit  
20 approach to this industry disregarding the foreseeable consequences to the public is no different  
21 from the conduct condemned in auto manufacturers. *Grimshaw v. Ford Motor Co.*, 119 Cal. App.  
22 3d 757, 174 Cal. Rptr. 348 (1981).

24 When a defendant enters into an affirmative course of conduct that affects the interests of  
25 another person, he assumes a duty to exercise reasonable care toward that person's safety, and the  
26

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28 <sup>3</sup> Plaintiffs allege wilful and wanton misconduct by Dave & Buster's, as set forth below and in the complaint.

1 defendant will be liable thereafter for negligent acts or omissions. *Brockett v. Kitchen Boyd Motor*  
2 *Co.*, 264 Cal. App. 2d 69, 71 (1968). The facts of the *Brockett* case are relevant and analogous to  
3 the facts of the present case. In *Brockett*, the defendant's employee, Jimmie Huff, became  
4 intoxicated at the company's holiday party. *Id.* at 70. A representative of the company placed Huff  
5 in his car and directed him to drive home. *Id.* Huff subsequently had a car accident. *Id.* While the  
6 *Brockett* Court recognized that providing alcohol does not ordinarily make a defendant liable for  
7 the acts of the consumer, the affirmative act of placing Huff in his car and directing him to drive  
8 home established a duty on the defendant to exercise reasonable care. Specifically, the *Brockett*  
9 court held that the defendant "activated the tort, and anyone hurt as a consequence should be  
10 entitled to recover from it." *Id.* at 73.

13 In the present case, Dave & Buster's "activated the tort" to a far greater extent than the  
14 defendant in *Brockett* by continuing to provide further debilitating substances to an already  
15 compromised guest to obtain greater profit. As a consequence, Plaintiffs have suffered  
16 overwhelmingly debilitating injuries, and they are entitled to have the question of Dave &  
17 Buster's negligence submitted to the jury.

18 **Dave & Buster's violated its own internal policies and industry standards.**

19  
20 Further, while a defendant may ordinarily have no duty to anticipate the conduct of another  
21 person, the law will impose an affirmative duty to abide by an established standard of care. An  
22 established company policy is evidence of a standard of care which the company finds  
23 appropriate to serve the purpose of the policy. *O'Toole v. Carlsbad Shell Service Station*, 202 Cal.  
24 App. 3d 151 (1988). "A violation of a rule of care established by a party to the litigation is  
25 evidence of negligence." *Id.* The undersigned counsel believes that discovery in this case - which  
26 has not yet commenced - will reveal that Dave & Buster's has violated its own company policy.  
27 Specifically, Dave & Buster's likely has a formal policy to cease service to intoxicated persons,  
28



1 encourage them to obtain a taxi, and even report disorderly conduct to police. This fairly standard  
2 policy serves to protect patrons like Hurley and Aparicio, and when reasonably followed, also  
3 avoids an establishment's "activating the tort" as occurred in *Brockett*.  
4

5 Additionally, NRS 369 requires that restaurant and bar businesses in Nevada, such as Dave  
6 & Buster's, have their employees certified in alcohol awareness training that presumably instructs  
7 them to decline service to intoxicated persons. Dave & Buster's likely breached its own company  
8 policy and the NRS 369 educational directives against directing intoxicated patrons (and intended  
9 occupants) into their vehicles, endangered the exact group of persons the policy and law were  
10 intended to protect, and this constitutes further support for the claim of negligence against Dave  
11 & Buster's here.  
12

13 Foreseeability and proximate cause are also genuine issues of material fact for the jury to  
14 decide, both of which are important factors in this case. Negligence is actionable when the injury  
15 resulting from the wrongful act should have been foreseen in light of the circumstances. *Van*  
16 *Cleve v. Kietz-Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981), citing *Crosman v.*  
17 *Southern Pacific Co.*, 42 Nev. 92, 108-109, 173 P. 112, 228 (1918). Unquestionably, on the facts  
18 of this case, the jury may decide that it was reasonably foreseeable that plying the customers with  
19 alcohol well beyond their limits could result in substantial harm. Further, the jury will be entitled  
20 to conclude that facilitating driving while intoxicated was a substantial factor in the resulting  
21 accident, and the catastrophic injuries suffered by Plaintiffs. A civil statute's violation establishes  
22 the duty and breach elements of negligence when the injured party is in the class of persons  
23 whom the statute is intended to protect and the injury is of the type against which the statute is  
24 intended to protect. *Ashwood v. Clark County*, 113 Nev. 80, 86, 930 P.2d 740, 744 (1997);  
25 *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983).  
26  
27

28 ///

**Liability is not based on merely furnishing alcohol that is then consumed outside the presence of the seller.**

The present case is very different from the dram shop cases, like *Van Cleve*, which hold that the consumption, not the sale, of alcohol is the proximate cause of the resulting injuries because the seller cannot foresee what the purchaser will do with the alcohol. *Id.* 97 Nev. at 417, 633 P.2d at 1222. In this case, assuming the facts most favorable to the Plaintiff, the employees of Dave & Buster's knew exactly what was being done with the alcohol and what the results of the ingestion of the alcohol were. They violated Dave & Buster's own policies and the statutorily required education they received, because they knew, or at least should have known, that serving an intoxicated driver and his passengers would "very probably" result in drunk driving and death. In fact, the allegations of the complaint are that Dave & Buster's were complicit and enabled the drunk driving. The employees should have foreseen a drunk driving accident, and resulting injuries, based upon their actions. In fact, their actions did result in two deaths that very evening. "As long as the injuries incurred were the reasonably foreseeable consequences of the tortfeasor's conduct . . . the question of foreseeability. . . is for the trier of fact." *Crislip v. Holland*, 401 So.2d 1115, 1117 (Fla. 1981).

It seems to us that the aim of the guest statute is to allow recovery if the host's consumption of alcohol proximately caused injury to (or the death of) his guest. The term "intoxication" is to be construed with this purpose in mind. The precise degree of inebriation is relatively unimportant if, in fact, the host's consumption of alcohol was the proximate cause of injury. Reasonable jurors can make this determination. *Frame v. Grisewood*, 399 P. 2d 450, (1965).

The Nevada Supreme Court has clearly stated that the District Court errs in finding that a defendant acted reasonably when the defendant does not address reasonableness in its motion for

Summary Judgment. *Billingsley*, 111 Nev. at 1038, 901 P.2d at 144 (1995). No less a standard should apply here. Dave & Buster's did not address reasonableness or any other factor pertinent to Plaintiff's negligence cause of action or any other causes of action, it cannot belatedly do it in its reply, therefore, the Court should deny its Motion.

**Nevada's lack of a dram shop law imposing greater liability is not a shield for wrongful conduct.**

As with all statutes modifying the common law, a statute must clearly remove rights established under common law or the common law is still operative.

In the absence of statutory restrictions of the common law right [of action upon judgments], then the common law rule must prevail, and the question be determined by such rule only. *Mandlebaum v. Gregovich*, 24 Nev. 154, 160 (Nev. 1897).

**NRS 41.1305, passed in 1995, did not usurp the common law in Nevada**

The common law in Nevada never provided for liability for merely serving or even consuming alcohol appropriately. NRS 41.1303, which Defendant relies upon, was first passed in 1995. The legislative history demonstrates that the act began as a typical dram shop piece of legislation to extend the common law and hold retail liquor stores liable for foreseeable damages caused by the sale or service of liquor. (See Exhibit 1 hereto.) The Nevada Resort Association lobbied and obtained an amendment that only purported to reflect the current law as expressed by the Nevada Supreme Court, but also specifically removed negligence per se for serving an intoxicated person. Specifically it stated that "The violation of any penal statute, regulation or ordinance regulating the sale of service of alcoholic beverages to an underage or intoxicated person ... shall not constitute negligence per se...." The legislature went on to specifically say that the statute was NOT meant to change the common law but was "intended to affirm and codify the common law of the State of Nevada." (See Exhibit 1, at bold bates number 118.)

1           The Nevada Resort Association specifically stated that the method that works to prevent  
2 alcohol related deaths “is mandated server training which seeks to educate servers of alcohol.”  
3  
4       The legislature relied on the NRA commitment to put together a program “to serve as a model to  
5 the country for education and awareness...” (See Exhibit 1, at bold bates number 040). The NRA  
6 also provided policies and procedures to the legislature that they promised would be followed to  
7 reduce the carnage on Nevada highways. Some of the most interesting for our purposes here is  
8 Boyd Gaming’s instructions when encountering an intoxicated guest to “2.2 Attempt departure  
9 delay or alternative transportation. 2.2.1 Comp in Coffee Shop (notify Beverage Department of  
10 no further alcohol service) 2.2.2 Locate family/friends to transport 2.2.3 Taxi -- resort pays if  
11 necessary.” (See Exhibit 1, at bold bates number 067).  
12

13           NRS 41.1303 has **no language removing any common law causes of action regarding**  
14 **alcohol**, but the statute did remove negligence per se resulting from failure to comply with  
15 licensing statutes. There were several situations where the court found liability, over and above  
16 the mere consumption of alcohol, discussed above. These were never removed and still are  
17 causes of action.  
18

19 **NRS 41.1305 was amended in 2007, which removed provisions in the 1995 version that**  
20 **serving intoxicated persons was not negligence per se.**

21           In 2007, NRS 41.1305 was amended. The purpose of the amendment was to enlarge  
22 liability for the service of alcohol. The main target was the social host because the alcohol retailer  
23 was subject to the regulatory structure and prohibition by code and internal regulations as stated  
24 above. (See Exhibit 1, at bold bates number 248.) In addition to extending strict liability to social  
25 hosts, the amendment also reinstated negligence per se under the common law for **all persons**  
26 violating statutes, regulation or ordinances restricting the providing of alcohol to any one who is  
27  
28

1 already intoxicated. This is the very set of facts that killed the Puentes and is not protected under  
2 NRS 41.1305.

3 **If NRS 41.1305 is read as Dave and Buster's suggests, it is unconstitutional and must be**  
4 **stricken. The statute violates the equal protection clause and has a disproportionate effect**  
5 **on minorities and the poor.**

6 The complaint further alleges that NRS 41.1305, if applied as Dave & Buster's has alleged  
7 in its Motion to Dismiss, is unconstitutional as it allows the taking of a citizen's life, liberty or  
8 property without due process of law including the right to a trial by jury.

9 The Fifth Amendment says to the federal government that no one shall be "deprived of life,  
10 liberty or property **without due process of law.**" The Fourteenth Amendment, ratified in 1868,  
11 uses the same eleven words, called the **Due Process** Clause, to describe a **legal** obligation of all  
12 states. The Nevada constitution Sec: 3. **Trial by jury; waiver in civil cases.** The right of trial  
13 by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the  
14 parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths  
15 of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by  
16 the whole Jury. The Nevada constitution Section 8. 2. No person shall be deprived of life,  
17 liberty, or property, without due process of law.

18 Dave & Buster's only basis for dismissal is a misreading and unconstitutional application  
19 of NRS 41.1305.

20  
21  
22 The "overwhelming majority of courts" have advanced the  
23 common law to meet the conditions of our present society because  
24 it should be clear to all that if vendors of alcoholic beverages are  
25 factored into the liability equation, there will be fewer intoxicated  
26 drivers, like *Lovett*, to continue the highway carnage that truly has  
27 become such a national disgrace and tragedy. Fewer intoxicated  
28 drivers translates into fewer victims. Depreciating inebriated  
drivers results in the veneration of human life. **Placing greater  
value on human life than economic advantage, lifts society to a  
higher plane.** Conversely, emphasizing commercial advantage  
over human life and suffering degrades society and lowers the  
quality of its civilization.

1           The majority would have us believe that there are so many  
2           problems and nuances of problems involved in placing negligent  
3           vendors of alcohol in the liability equation, that these problems and  
4           the difficulties inherent in their resolution outweigh the substantial  
5           attenuation of human misery and death that would result from the  
6           implementation of solutions. I suggest that the majority's fears are  
7           as unjustified as its priorities. *Dissent, Snyder v. Viani*, 110 Nev.  
8           1339, 1347 (Nev. 1994), (emphasis added.)

9           The Equal Protection Clause of the Fourteenth Amendment to the United States  
10          Constitution guarantees equal protection under the law. The first step in the equal protection  
11          analysis is to determine the appropriate standard of scrutiny to apply according to the rights  
12          infringed and the classification created. *Hamm v. Arrowcreek HOA*, 183 P.3d 895 (2008).

13          In 2015, the Nevada Court upheld a challenge to the tort reform statutes imposing a cap on  
14          damages in malpractice actions. “To survive an equal protection challenge, NRS 41A.035 need  
15          only be rationally related to a legitimate governmental purpose. ” *Tam v. Eighth Judicial Dist.*  
16          *Court of State*, 358 P.3d 234, 239 (Nev. 2015) “Thus, we conclude that NRS 41A.035 does not  
17          violate equal protection because the imposition of an aggregate cap on noneconomic damages in  
18          medical malpractice actions is rationally related to the legitimate governmental interests of  
19          ensuring that adequate and affordable health care is available to Nevada's citizens. ” *Tam v.*  
20          *Eighth Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015).

21          If interpreted as Dave and Buster’s suggests NRS 41.1305 differs from NRS 41A.035 in  
22          two constitutionally fatal ways. First, the injured victims subject to NRS 41.1305 have their right  
23          to damages, and therefore right to due process and a trial by jury, completely removed, not  
24          limited as was the case in NRS 41A.035. Following the holding in *Tam* NRS 41.1305 is  
25          unconstitutional because it completely obliterates the right which is worse than a statute that is  
26          unconstitutional because it makes “the right practically unavailable.” *Barrett v. Baird*, 111 Nev.  
27  
28

1 1496, 1502, 908 P.2d 689, 694 (1995)” *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234,  
2 238 (Nev. 2015).

3  
4 Secondly, there is no legitimate governmental interest in protecting the financial benefits of  
5 serving inebriated persons under NRS 41.1305. “To survive an equal protection challenge, NRS  
6 41A.035 need only be rationally related to a legitimate governmental purpose.” *Tam v. Eighth*  
7 *Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015). Protecting the profits of bars is not a  
8 legitimate governmental interest like that protected in *Tam*: “Based on this express goal, NRS  
9 41A.035’s aggregate cap on noneconomic damages is rationally related to the legitimate  
10 governmental interest of ensuring that adequate and affordable health care is available to  
11 Nevada’s citizens.” *Tam v. Eighth Judicial Dist. Court of State*, 358 P.3d 234, 239 (Nev. 2015).

12  
13 The decedents herein members of a protected minority class did not have underinsured  
14 motorists coverage. They were killed by a recklessly dangerous business establishment. Their  
15 lives are ravaged and the root cause hides behind the legislative and judicial branches of  
16 government.

17  
18 Given the fact that Nevada has a singularly strong financial  
19 dependence upon segments of the state economy that dispense  
20 alcohol as a significant inducement to other forms of business  
21 activity, it is both unrealistic and irresponsible to espouse the  
22 fantasy that the Legislative branch of government will effectively  
23 consider and adopt dram shop legislation. Although we can hardly  
24 fault our legislators for shunning such an act of self-immolation,  
25 there is no excuse for the “non-political” judicial branch of  
26 government doing the same. I realize the unfortunate fact that  
27 judges, including the members of this court, are elected in this state,  
28 but that constitutes no valid excuse for this court’s failing to respond  
to the clear and increasing demands of our society to give relief to  
the growing number of victims who fall prey to inebriated drivers  
on our highways. Despite the apparent need to substantially finance  
judicial elections with contributions from segments of our state  
economy that are purveyors of alcoholic beverages, “biting the hand  
that feeds you” should never be a consideration in the judicial  
process. *Dissent, Snyder v. Viani*, 110 Nev. 1339, 1346 (Nev. 1994).

1 As reflected by the positive response of an overwhelming majority of the common law  
2 courts of this nation, there is a compelling need for the judiciary of Nevada to provide its citizens  
3 and the users of its highways with relief from the growing menace of intoxicated drivers. We can  
4 realistically look to no other source. This court must recognize the fact that irresponsible and  
5 negligent vendors of alcoholic beverages are priming people for roles as drunken drivers who kill  
6 and maim the innocent travelers on Nevada's highways. Entire families are wiped out and  
7 destroyed by this menace.  
8

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

19 **Minorities and the poor are disadvantaged in electing officials and obtaining insurance**  
20 **coverage. This is systemic racism where the power elite oppress minorities and the poor.**

21 A 2014 article authored by Jeffery Stempel, a UNLV law professor, discusses Nevada's  
22 approach to this situation:

23 Notwithstanding the flexibility that legislatures and courts have in  
24 defining legal obligations and status, Nevada's current protection  
25 of businesses already favored with liquor licenses comes  
26 uncomfortably close to being an equal protection problem, even if  
27 it is not clearly constitutionally disfavored favoritism such as that  
28 based on race, religion, gender, ethnicity, or age. Further, there is  
no strong public policy reason for being so protective of  
commercial hosts. 14 Nev. L.J. 866, at 894 (2014).<sup>4</sup>

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<sup>4</sup> Stempel, Jeffrey W. (2014) "Making Liquor Immunity Worse: Nevada's Undue Protection of Commercial Hosts Evicting Vulnerable and Dangerous Patrons," *Nevada Law Journal*: Vol. 14 : Iss. 3 , Article 13. Available at: <https://scholars.law.unlv.edu/nlj/vol14/iss3/13>.



1 Stempel goes on to conclude:

2 At some point, Nevada's legal system must ask itself whether such  
3 extensive immunity for commercial hosts can be justified.  
4 Nevada's resistance to the modern world of dram shop liability is  
5 embarrassing enough. Expanding it to other aspects of the  
6 hospitality industry only adds to the embarrassment. *Id.* at 896.

## 7 **Denial of trial by jury**

8 In Nevada, "[t]he right of trial by Jury shall be secured to all and remain inviolate forever."  
9 Nev. Const. art. 1, § 3. This provision guarantees "the right to have factual issues determined by a  
10 jury." *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 711, 542 P.2d 198, 207 (1975).  
11 In order for a statute to violate the right to trial by jury, a statute must make the right practically  
12 unavailable. *Barrett v. Baird*, 111 Nev. 1496, 1502, 908 P.2d 689, 694 (1995) ("[T]he correct  
13 standard for evaluating whether a statute unconstitutionally restricts the right to a jury trial is that  
14 the right must not be burdened by the imposition of onerous conditions, restrictions or regulations  
15 which would make the right practically unavailable." (internal quotations omitted)), *overruled on*  
16 *other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008), *Tam v. Eighth Judicial*  
17 *Dist. Court of State*, 358 P.3d 234, 238 (Nev. 2015).

18 Life liberty and the pursuit of happiness are fundamental rights. These rights may not be  
19 taken away except with due process of law, which, in this case, includes trial by jury. It is not a  
20 legitimate state interest to protect the profits of the rich and powerful. Most decisions regarding  
21 the jury trial right arise in the criminal context and have focused on the magnitude of the possible  
22 punishment to determine whether the right is invoked. Here Plaintiffs' descendants received the  
23 ultimate punishment of death. Their right to have all negligent parties liability determined by a  
24 jury cannot be questioned.  
25

26 The evolution continued in *Duncan v. Louisiana*, 391 U.S. 145  
27 (1968), where the Supreme Court more clearly emphasized the  
28 maximum authorized penalty over other criteria in determining  
whether the crime is so serious as to require a jury trial. *Id.* at 159.

1 In *Duncan*, the Supreme Court stated that "the penalty authorized  
2 for a particular crime is of major relevance in determining whether  
3 it is serious or not and may in itself, if severe enough, subject the  
4 trial to the mandates of the Sixth Amendment." *Blanton v. North  
Las Vegas Mun. Ct.*, 103 Nev. 623, 629 (Nev. 1987).

5 No one would argue that a death penalty case would need to be tried to a jury under the  
6 criminal law. It stands to reason that a civil case seeking to establish liability, where the harm  
7 suffered or "penalty" was death, would require the issues establishing liability to be submitted to  
8 a jury under the constitution.

9 Moreover, concerning the problems that are of such paramount  
10 concern to the majority, I refer again to my dissent in *Hinegardner*  
11 where, quoting from the Colorado Supreme Court in *Largo*, that  
court instructed:

12 "[A]s to the consequences of imposing such a burden upon tavern  
13 owners, we reject Largo's claim that civil liability for the negligent  
14 sale of alcohol would impose insurmountable proof problems on  
15 tavern owners. Whatever problems of proof exist, the plaintiff will  
16 be confronted with the same obstacles in reconstructing the facts,  
and the plaintiff, not the defendant, will bear the burden of proving  
a breach of duty." *Snyder v. Viani*, 110 Nev. 1339, 1347-48 (Nev.  
1994).

17 Again, Professor Stempel's law review article, under the heading of "Needlessly Barring  
18 Jury Consideration" wrote:

19 Perhaps I'm hopelessly naïve about the extent to which a hotel or  
20 other host establishment should go to avoid placing patrons (and  
21 those who they may encounter) in danger. But what better way to  
22 settle the issue than to have trial and jury consideration? Judges too  
23 often strain to grant summary judgment out of what I suspect is  
inordinate fear of what a jury may do if the matter is tried. But  
such fears are probably misplaced. Jurors are not Marxist agents  
of income redistribution. *Id.* at 883.

24 **Conclusion: Dave & Buster's motion must be denied.**

25 Dave & Buster's has ignored the allegations in the pleadings, failed to refute each of the  
26 causes of action alleged and claimed without support that NRS 41.1305 is a complete bar to all  
27  
28

1 liability of a provider of alcohol. Its motion should be denied.

2 Dated this 2nd day of September, 2020.

3 CHRISTENSEN LAW OFFICES, LLC

4  
5 BY: 

6 THOMAS CHRISTENSEN, ESQ.

7 Nevada Bar No. 2326

8 1000 S. Valley View Blvd.

9 Las Vegas, Nevada 89107

10 Attorney for Plaintiff

11 **CERTIFICATE OF SERVICE**

12 I HEREBY CERTIFY that on the 2nd day of September, 2020, this document was filed  
13 electronically with the Eighth Judicial District Court's efile system, Odyssey Efile & Serve,  
14 and was thereby served upon all registered users for this case.

15 

16 An Employee of Christensen Law Offices  
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# EXHIBIT 1

AA143

DETAIL LISTING  
FROM FIRST TO LAST STEP

TODAY'S DATE: Aug. 17, 1995  
TIME : 11:30 am  
LEG. DAY IS: 116  
PAGE : 1 OF 1

N E L I S

1995

SB 498

By Judiciary

DRAM SHOP LAW

Limits by statute civil liability of sellers and servers of  
alcohol. (BDR 3-1922)

Fiscal Note: Effect on Local Government: No. Effect on the  
State or on Industrial Insurance: No.

05/23 81 Read first time. Referred to Committee on  
Judiciary. To printer.  
05/24 82 From printer. To committee.  
05/24 82 Dates discussed in Committee: 6/5, 6/15 (A&DP)  
06/22 105 From committee: Amend, and do pass as amended.  
06/22 105 (Amendment number 1062.)  
06/23✓106 Read second time. Amended. To printer.  
06/24 107 From printer. To engrossment.  
06/24 107 Engrossed. First reprint✓ Placed on General File.  
06/24✓107 Read third time. Passed, as amended. Title approved, as  
amended. (19 Yeas, 1 Nays, 0 Absent, 0 Excused,  
1 Not Voting.) To Assembly.  
06/24 107 In Assembly.  
06/24 107 Read first time. Referred to Committee on  
Judiciary. To committee.  
06/24 107 Dates discussed in committee: 6/27 (DP)  
06/27 110 From committee: Do pass.  
06/27 110 Placed on Second Reading File.  
06/27 110 Read second time.  
06/28✓111 Read third time. Passed. Title approved. (33 Yeas, 7 Nays,  
1 Absent, 0 Excused, 1 Not Voting.) Action of passage  
rescinded.✓  
06/28✓111 Read third time. Passed. Title approved. (34 Yeas,  
8 Nays, 0 Absent, 0 Excused, 0 Not Voting.) To Senate.  
06/29 112 In Senate.  
06/29 112 To enrollment.  
07/01 114 Enrolled and delivered to Governor.  
07/06 0 Approved by the Governor.  
07/07 0 Chapter 690.  
Effective July 6, 1995.

(\* = instrument from prior session)

NEVADA LEGISLATURE

SIXTY-EIGHTH SESSION

1995

SUMMARY OF LEGISLATION

PREPARED BY

RESEARCH DIVISION

LEGISLATIVE COUNSEL BUREAU

### **S.B. 498 (Chapter 690)**

Senate Bill 498 provides that a person who serves or sells alcoholic beverages is not liable in a civil action based on the grounds that the service or sale was the proximate cause of injuries caused by an intoxicated person. In addition, the violation of a law regulating the sale or service to a minor or intoxicated person does not constitute negligence *per se* in an action brought against the seller or server for certain injuries.

This bill is effective on passage and approval.

## SENATE BILL NO. 498—COMMITTEE ON JUDICIARY

MAY 23, 1995

## Referred to Committee on Judiciary

SUMMARY—Creates cause of action for sale of liquor to intoxicated person or minor.  
(BDR 3-1922)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil actions; providing specifically, and limiting, a cause of action for certain sales of liquor; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1     **Section 1.** Chapter 41 of NRS is hereby amended by adding thereto the
- 2     provisions set forth as sections 2 and 3 of this act.
- 3     **Sec. 2.** *As used in this section and section 3 of this act, unless the context*
- 4     *otherwise requires:*
  - 5         1. *"Liquor" has the meaning ascribed to it in NRS 369.040.*
  - 6         2. *"Minor" means a person who has not attained the age of 21 years.*
  - 7         3. *"Retail liquor store" has the meaning ascribed to it in NRS 369.090.*
  - 8         4. *"Visibly intoxicated" describes a state of intoxication accompanied by*
  - 9         *a perceptible act or series of acts which present clear signs of intoxication.*
- 10    **Sec. 3.** *A person who suffers death or sustains personal injury or damage*
- 11    *to property may recover damages from an owner or employee of a retail*
- 12    *liquor store, or the agent of either, but only if:*
  - 13         1. *The owner, employee or agent served or sold liquor to:*
    - 14             (a) *A person visibly intoxicated; or*
    - 15             (b) *A minor under circumstances in which the person selling or serving*
    - 16             *knew or reasonably should have known that the customer was a minor; and*
    - 17         2. *The injury or damage was:*
      - 18             (a) *Proximately caused by the sale or service of the liquor; and*
      - 19             (b) *A foreseeable consequence of the sale or service.*



**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Sixty-eighth Session  
June 5, 1995**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 9:10 a.m., on Monday, June 5, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman  
Senator Jon C. Porter, Vice Chairman  
Senator Maurice Washington  
Senator Mike McGinness  
Senator Ernest E. Adler  
Senator Dina Titus  
Senator O. C. Lee

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst  
Marilyn Hofmann, Committee Secretary

OTHERS PRESENT:

Judy Jacoboni, Lobbyist, President, Lyon County Chapter, Mothers Against Drunk Driving  
Laurel Stadler, Lobbyist, Legislative Liaison, Mothers Against Drunk Driving  
Roger S. Trounday, Executive Vice President, John Ascuaga's Nugget, Lobbyist, Nevada Resort Association  
Burton M. Cohen, Consultant, Nevada Resort Association  
Robert D. Faiss, Attorney at Law, Lobbyist, Nevada Resort Association  
Paul E. Larsen, Attorney at Law, Lobbyist, Nevada Resort Association  
Kay Scherer, Vice President, Public Relations/Research Division, R&R Advertising

Senate Committee on Judiciary  
June 5, 1995  
Page 2

Senator James asked for committee introduction of Bill Draft Request (BDR) 14-1455.

BILL DRAFT REQUEST 14-1455:       Revises provisions governing plea bargains and appeals in certain criminal actions.

SENATOR PORTER MOVED FOR COMMITTEE INTRODUCTION OF BDR 14-1455.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS TITUS, WASHINGTON AND ADLER WERE ABSENT FOR THE VOTE.)

\* \* \* \* \*

Senator James opened the hearing on Senate Bill (S.B.) 498. He indicated this bill is termed "dram shop legislation."

SENATE BILL 498:       Creates cause of action for sale of liquor to intoxicated person or minor.

The first to testify on the bill was Judy Jacoboni, Lobbyist, Chapter President, Lyon County Chapter, Mothers Against Drunk Driving (MADD). Ms. Jacoboni presented written testimony set forth herein as Exhibit C. She also referenced a letter from Mr. and Mrs. Leo Reginato of Petaluma, California, regarding a visit to Reno. That letter is attached as Exhibit D.

The next to appear was Laurel Stadler, Lobbyist, Legislative Liaison for MADD. Ms. Stadler first read into the record a letter from Sharon Zadra, set forth herein as Exhibit E.

Ms. Stadler then proceeded to present her prepared statement, attached hereto as Exhibit F. She added MADD suggests an amendment to the bill to "preclude any offenders or non-innocent victims having opportunity under this law."

Senator James indicated he wished to asked questions regarding policies concerning "dram shops." First, he noted an establishment will be liable if it

serves liquor to a visibly intoxicated person, and that person then causes an accident with injuries. The chairman said a sign of being "visibly intoxicated" is slurred speech, stumbling when walking, or similar actions. He then asked, "Where is the causation? If somebody is already drunk...there is no exception here that says you had to be the one to get him drunk in the first place."

Senator James continued, "The last drink server has the liability." Ms. Jacoboni answered, "Only liability to the degree of his contributory negligence...if witnesses would state that the previous server also served a visibly intoxicated person."

Senator James asked, "But how about the person who got him [the visibly intoxicated person] there..how about the people who served all the drinks that got him to the one drink before he was visibly intoxicated? Is that OK?" Ms. Jacoboni responded, "That is not OK...but only the one served after would be the irresponsible server...the one that would be liable civilly, but only to the degree of their responsibility."

Ms. Stadler stated the burden of proof will be on the plaintiff and added, "If they can't backtrack and prove in a court of law...then they will not have a case."

Senator James continued, "There seems to be a problem with the last drink being what caused an accident...that really isn't what caused it...."

Ms. Jacoboni stated the intent of the legislation is to impose strict liability on an establishment which serves liquor to a minor who causes an accident. She said MADD believes this is a "very promising concept," which will aid in upholding the minimum-age drinking laws.

Senator James asked Ms. Jacoboni to state the reason "for singling out those who serve for profit." Ms. Jacoboni answered the original bill which was requested included social hosts. Senator James said he does not believe there is any reason to make a distinction between an establishment and a social host.

Ms. Jacoboni indicated the bill should be amended to say anyone who is a party to the intoxication and has an accident can take an action against the establishment which served the drinks.

Senator Lee stated, "[Let us say] I had five drinks from five establishments...and a jury awards \$100,000 to the victim [of an accident I caused]...would that

\$100,000 be divided by five?" He asked if the legislation will allow that the first establishment is equally as guilty as the establishment which served the fifth drink, "...if I was not visibly intoxicated...?" Ms. Stadler answered she does not believe that is the intent of the bill. However, she said a plaintiff could bring an action against as many persons or establishments as he or she feels were responsible. She said the matter will be for a court to determine.

Senator Lee stated, "If this legislation authorizes a victim to recover damages from multi-establishments...I have a problem with allowing someone to arbitrarily decide which one of those five establishments is more guilty." He added, "If I wasn't ever at establishment number one, then number five would not be a problem...because I haven't reached that intoxication yet...."

Senator Lee continued, "If I was at all five, it seems to me all five should be equally guilty under this hypothetical proposal." Ms. Stadler repeated that is a decision for a judge and jury. She added, "This bill simply gives the innocent victim the opportunity to present the facts before a court of law."

Senator James stated the committee must "figure how it works hypothetically." He referenced persons who drink in hotels and casinos and asked, "How do you even know somebody is driving...they are just walking around...." Senator James said a hotel/casino would have to assume everybody is driving. He cited an example of a small bar where a patron drives up, "staggers in," and asks for a drink. The chairman asked if in that scenario the bartender refuses to serve the intoxicated person a drink, and that person indicates he will go to another bar, will there be a responsibility on the part of the bartender to keep the patron from leaving.

Ms. Jacoboni stated the legislation does not require an establishment to intervene in any way. She added, "Their moral duty is very clear, but their civil culpability in that instance would not be any greater than it is now."

Senator Adler asked if the intention of MADD is that S.B. 498 only apply to minors. Ms. Stadler reiterated the original bill draft request was to relate to minors, but minors and "intoxicated persons" are included in the final draft. She said they will support the bill as written and will support it if it only pertains to minors.

Senator Adler pointed out if a minor goes from bar to bar, and eventually has an accident, all bars will be liable because they served drinks to that minor. Ms.

Stadler agreed. Senator Adler asked if, in the case of an adult, the first bar where a witness could say a person was visibly intoxicated, but was served liquor, will be culpable. Ms. Stadler agreed with the senator's interpretation. Senator Adler then asked if the phrase set forth in section 3(2) of the bill will apply to both situations, and Ms. Jacoboni and Ms. Stadler answered it will.

Senator James thanked Ms. Jacoboni and Ms. Stadler for their presentation to the committee. There were no other proponents who wished to speak.

Appearing before the committee in opposition to S.B. 498 were Robert D. Faiss, Attorney at Law, Lobbyist, Nevada Resort Association (NRA); Roger S. Trounday, Executive Vice President, John Ascuaga's Nugget, Lobbyist, NRA; Burton M. Cohen, Consultant, NRA; and Paul E. Larsen, Attorney at Law, Lobbyist, NRA. The first person to speak was Mr. Faiss, who opened with the following statement, "The Nevada Resort Association believes in strong enforcement of state and local liquor laws and punishment for those who violate them." He then spoke from prepared remarks, which are set forth herein as Exhibit G.

Mr. Faiss presented an amendment to the bill, which is attached as Exhibit H. Mr. Larsen explained the amendment to the committee. He said the bill as a whole is "merely a codification of existing common law in the State of Nevada." Mr. Larsen said that common law is primarily articulated through three key cases, which are set forth on pages 1 and 2 of Exhibit G. He said the bill codifies the judicial finding that the proximate cause of alcohol-related injuries is the consumption of alcohol, and not the furnishing of that alcohol.

Senator James asked, "Why does dram shop liability...have a statute or some landmark case in each state to adopt it...why doesn't it come within the regular realm of negligence cases...where if it's foreseeable, there is liability..." He queried why it must be recognized as a separate tort. Mr. Larsen answered there generally is a proximate causation, which is "just a policy statement that at some point a chain of events becomes too remote from the actual injury to impose any liability." He said that decision has been made by the Nevada Supreme Court "after careful consideration in the cases articulated [in Exhibit G]."

Mr. Larsen stated the Nevada Supreme Court has concluded the furnishing of alcohol is too remote to be linked to the ultimate injury. He said the injury is "more directly caused by an intervening act, that is, the voluntary consumption of alcohol by an intoxicated person." Mr. Larsen stated the NRA is asking the Legislature to

recognize and codify that policy in paragraph 1 of the proposed amendment (Exhibit H). He added paragraph 2 of the amendment is a "natural outgrowth of that policy" when it states, "No cause of action may be brought against the server or seller of alcohol...[for] proximately caused injuries inflicted by an intoxicated person upon himself or third parties."

Mr. Larsen said the third paragraph of the proposed amendment (Exhibit H) addresses negligence. He said the common law was adopted in Hamm v. Carson City Nugget (1969), and has remained unchanged in the last 26 years. Mr. Larsen set forth the decision, "Violation of any penal statute...does not give rise to negligence per se...", against the server or seller of alcohol. He said the rationale behind the decision is, "If the Legislature intended to create a civil cause of action, they would have done so...and the penal remedy...is the sole and exclusive remedy intended by the Legislature."

Senator Titus asked if there are regulations "on the books" which deal with serving liquor to an intoxicated person, other than a minor. Mr. Faiss stated there is a regulation directly applicable to gaming licensees which prohibits such action. Mr. Larsen added there are also county ordinances prohibiting that conduct. He said those regulations are taken very seriously by the gaming and resort industry.

Mr. Faiss emphasized the bill does not release the seller or server from criminal penalties, fines and license revocation for violation of laws regulating the sale or service of alcohol.

Senator Lee asked if an establishment which serves a minor who later causes an accident can be sued under present law for civil damages. Mr. Larsen answered, "Today, no... under the series of decisions we discussed earlier." However, he added, the establishment will face criminal liability under the local and state regulations. Mr. Faiss said the ultimate penalty will be loss of a gaming license.

Mr. Cohen addressed the committee. He said he asked to appear because of his strong feelings regarding the proposed legislation. Mr. Cohen stated, "The bill presented to you is a bad bill...it is unenforceable within its very intent. All it will do will be to clog up our court system." He said this type of legislation will "open Pandora's box" for legal attack.

Mr. Cohen said in today's industry, which includes 5,000-room hotels with bars and mini-bars, hospitality suites, and convention centers, the old days of "isolated

mini-facilities" no longer exist. He said it is impossible to "police a guest" who sits in his room, empties the mini-bar, goes down and has one drink at the bar in the hotel, then goes out to his car. Mr. Cohen stated he is against drunk driving but added, "That is not what is before us." He said the issue before the committee is to try to "transfer responsibility from the individual to somebody else." Mr. Cohen asked, "If a juvenile goes into a stationary store, buys a can of glue, sniffs it and goes out and kills somebody...are you going to hold the stationary salesman responsible for that action? Of course not."

Mr. Cohen asked, "Are we to paint a white line down the casino...or do we have breathylators at every bar...at every hospitality suite?" Mr. Cohen reiterated the responsibility is with the individual. He said the amendment on Exhibit H, tells visitors they are responsible for their own actions, and if they get into an accident, they are responsible for the damages which occur.

Mr. Cohen said in closing, there is no way to determine "which drink caused the intoxication." He said it is an "impossibility" for a court of law to make such a judgment.

Mr. Trounday stated John Ascuaga's Nugget maintains training programs in order to monitor minors who go to the property, as well as "taking care of anyone who may be intoxicated." He said all casino employees are trained in this manner. However, Mr. Trounday said, some of the customers stay in their hotel rooms and have drinks in those rooms. He said in that case the hotel has not served them one drink, but the customer may drive his car and cause an accident. Mr. Trounday asked if the Nugget should be held responsible, because the person was staying at the hotel. He closed by saying it is "virtually impossible" for the hotel/casino to monitor such a situation.

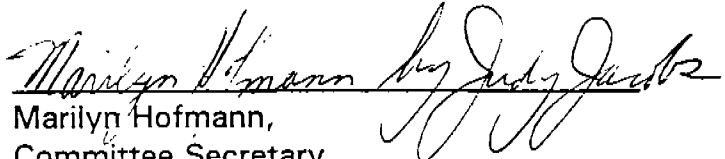
Mr. Cohen and Mr. Faiss both referred to the Clark County Liquor Servers' Training Program, which certifies a person to serve liquor in an establishment. He said employees who serve liquor must attend that 4-hour training program.

Kay Scherer, Vice President, Public Relations/Research Division, R&R Advertising, presented a display and played an audio tape, which demonstrates the "affirmative and dramatic steps the Nevada resort industry has taken to help prevent incidents of injury caused by intoxication."

Senate Committee on Judiciary  
June 5, 1995  
Page 8

There was no further testimony to come before the committee, and the hearing was adjourned at 10:30 a.m.

RESPECTFULLY SUBMITTED:

  
Marilyn Hofmann,  
Committee Secretary

APPROVED BY:

\_\_\_\_\_  
Senator Mark A. James, Chairman

DATE: \_\_\_\_\_





## Mothers Against Drunk Driving

P.O. Box 1354 • Dayton, Nevada 89403 • (702) 246-7522 • FAX (702) 246-3687 • TAX ID #: EIN-94-270-7273

### Lyon County Chapter

To members of the Senate Judiciary Committee:

Please consider the following in your decision regarding action on S.B. 498:

Nevada case law provides no redress against sellers or furnishers of alcoholic beverages for the resulting injuries or damages caused by the acts of intoxicated persons. The lack of a civil penalty to date has given special protection to the hospitality industry. The lack of a civil penalty has made it possible for servers and sellers of alcoholic beverages to irresponsibly and illegally serve intoxicating liquor without liability for the consequences of their illegal acts. Mothers Against Drunk Driving strongly supports the right of innocent victims of alcohol-related traffic crashes to seek financial recovery from establishments and servers who have irresponsibly and illegally provided alcohol to minors or intoxicated persons who then cause fatal or injurious traffic crashes. A civil penalty puts liability squarely where it belongs -- with those who are directly responsible for the intoxication which caused the damages -- each party's liability equal to the degree of their responsibility.

S.B. 498 is a very simple bill, only 19 lines long. It will set right an egregious inequity that has long existed in our state. The state of Nevada used to be the place where people could come to drink, to gamble, to buy sex, to get a quickie marriage or a quickie divorce. It has taken many years to polish Nevada's tarnished image and to attempt to promote our state as a wholesome, family-oriented resort destination. Over 40 other states have some form of civil liability similar to S.B. 498. If we wish to continue to endeavor to attract tourists and industry to visit or relocate in our state, it will be necessary to cast off the old-style, special protection afforded to Nevada's sacred cows, the hospitality and alcohol beverage industries.

I am sure you have concerns about the issue of personal responsibility -- that an individual should be held responsible for his own acts, and I agree that all persons responsible for acts causing injury or damages to others should share in responsibility. At the present time, all parties to an act of illegal intoxication are not held accountable -- namely the server or seller who has breached his duty of responsible beverage service and illegally sold liquor to a minor or intoxicated person. There are many examples I can give you of legal, but irresponsible practices that the hospitality and alcohol industry in Nevada presently engage in. Some of these practices are as follows:

1. Irresponsible around-the-clock service of alcohol.
2. The irresponsible providing of alcohol to patrons of casinos at no cost -- presumably so that patrons' judgment will become impaired so they will gamble more and lose more money.
3. Happy hours, 2-for-one or reduced price drink specials, which irresponsibly encourage frequent consumption and heavy consumption of alcohol.

I think you will agree that these practices are examples of irresponsible marketing of alcohol.

Nevada's public policy, as evidenced by ever increasing criminal sanctions against persons who drive under the influence of alcohol, is clearly moving toward intolerance of the crime of DUI, and the onerous burden this crime imposes on its' victims. Currently this burden is borne by the victims, their families, the offenders and the taxpayers of Nevada. Isn't it time for ALL parties responsible to share in the costs for their illegal, irresponsible actions?

The need for victims to recover just compensation for losses resulting from a crime is clear. Likewise, those who aid offenders by illegally providing alcoholic beverages to minors or intoxicated persons who then drive should be held accountable for their actions by the imposition of civil liability. The result could hopefully be that sellers or servers would in the future become more careful in the dispensing of alcoholic beverages for profit, as they would finally have a financial stake in the potential outcomes of irresponsible, careless, and illegal service.

Now to address another concern -- that the courts will be unfairly burdened by civil lawsuits. This bill does not impose strict liability. The burden of proof for the victim is very ambitious. Not only must the victim discover who was the illegal server, but must also prove that the serving of alcohol was the proximate cause of the injury or damage, and also that the injury or damage was a foreseeable consequence of the illegal service. These conditions precedent to civil liability will certainly prevent many causes of action from being filed.

The Supreme Court of the State of Nevada has been called upon only a few times in the last 25 years to decide this issue, and has repeatedly stated that such civil liability should be accomplished by legislative act. As to the consequences of imposing civil liability upon tavern owners, restaurants, casinos and retail liquor vendors, we point out that the imposition of civil liability would simply offer an avenue of relief to innocent victims whose lives have been forever altered by the foreseeable consequence of serving an alcoholic beverage to a minor or intoxicated person who then attempts to operate a motor vehicle. Although the probability of a resulting motor-vehicle crash is predictable, the burden of proof still would remain with the plaintiff.

Imposing civil liability upon those who assist minors to break the law and consume alcoholic beverages is justifiable because it is a breach of duty. Imposing civil liability is in keeping with the minimum age 21 drinking laws that were passed in every state in the 1980's, which laws have save tens of thousands of young lives in the ensuing years. Imposing civil liability will offer servers and sellers a powerful incentive to uphold the minimum age 21 drinking laws. I have enclosed a copy of a letter from a Mr. & Mrs. Leo Reginato of Petaluma, California, who were visiting Reno in January of 1993. The Reginatos were appalled by the practices they observed at a Reno casino that served alcoholic beverages to minors and allowed them to gamble. I would like to call your attention to this letter, and read from it to illustrate my point that the under-21 drinking-age laws are not currently being upheld by the hospitality industry, who might state that they are engaging in responsible practices, but as this letter illustrates, what they say they are doing, and what they ARE doing may be vastly different.

Finally, my last point is that S.B. 498 is in keeping with the evolving public policy in Nevada that driving under the influence is a serious crime, and that innocent victims deserve compensation from those whose acts are criminally negligent or careless.

January 24, 1993

Mayor Peter Sferrazza  
Reno City Hall  
P.O. Box 1900  
Reno, Nevada 89505

Dear Honorable Sferrazza:

My husband and I went to Reno last weekend for a brief vacation. We stayed at Circus Circus. Upon entering the hotel, we observed many underage kids drinking and gambling, throughout the casino. It was obvious these kids were either in high school or just in college by their demeanor, dress and attitude.

We saw one young man fall off a stool he was sitting on, he had beer spilled down his shirt. My husband went to order a drink at the bar and waded through kids four-deep. When he finally got to the bar he saw many packages of 12 packs of beer in cans, sitting on the bar; it appeared the kids had brought them in.

Many intoxicated kids were talking and gambling; every gambling table was filled and had kids waiting. It was clear they were enjoying themselves because they got to "party" and be "adults" and knew no one would challenge them.

We went to another casino to see if the same situation existed and we did see underage kids there, but far less.

We have a young daughter and I couldn't help but wonder how many parents thought their children were going to Reno to ski with a safe group, having no idea the gambling establishments would not enforce the laws regarding drinking and gambling.

I discussed my concerns with a Pit Boss on Saturday evening. He told me 4500 kids were in town with fraternities. He said casinos had recently received notices from the Gaming Commission telling them to be sure not to serve underage people. He assured me IDs had been checked, "as best they could." He and I both were aware that "as best they could" was certainly not good enough. In order to be in a fraternity in college, one can be 17 or 18, the first year. Many kids wore fraternity "pledge" shirts which read 1992 or 1993, indicating they were 18 or 19, and they looked it!

The Honorable Peter Sferrazza  
January 24, 1993  
Page 2

He said Circus Circus got the bulk of the kids because their rooms were the cheapest.

All weekend I thought about how this could occur. How could the law be so blatantly ignored? Why was it being ignored? The citizens of Nevada have a law that one must be 21 or older to drink or gamble yet, apparently, that law is not enforced when many rich "kids" come to the casino.

What kind of message does this send to the kids? It's okay not to listen to your parents, your teachers, and, you don't even have to obey state law! No wonder the United States is in such terrible shape, with little hope of climbing out from under, when this type of behavior exists!

My husband and I concluded that the authorities are willing to look the other way on this crime, for some reason we don't want to think about! We are not willing to let children be at risk for drunk driving, unwanted sexual advances by drunken peers, etc.

My husband and I were OUTRAGED by what we saw and doubt we'll return to Reno. We will definintely tell our friends that they should think twice before allowing their children to go to Reno, in light of what we witnessed!

Please call in the appropriate, honest authorities to investigate this flagrant disregard of the law. Thank you for addressing these concerns.

Sincerely,

*Sgt. S. S. S.*  
*Kira Reginato*  
Kira and Leo Reginato  
440 Amber Way  
Petaluma, CA 94952-2005

cc: President Bill Clinton  
Kurt Sullivan, General Manager/Vice President, Circus Circus  
The Reno Gazette-Journal  
Nevada State Gaming Commission  
Reno Chamber of Commerce  
Nevada Mothers Against Drunk Driving  
San Francisco Chronicle and Examiner

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**SHARON ZADRA**  
**22815 Carriage Drive**  
**Reno, NV 89511**

**June 2, 1995**

**TO:** Senator James  
Chairman, Judiciary Committee  
**SUBJECT:** Dram Shop, SB498

I am encouraged to learn that the Nevada Senate will hear discussion on "Dram Shop" legislation on Monday, June 5. I especially appreciate that you facilitated getting this topic introduced by the committee. I completely understand the ramifications that you and the entire Legislature must wrestle with when that term is even voiced. My understanding comes from having spent the first 15 years of my professional career in the gaming industry. That career was dramatically cut short when I was hit by a drunk driver. Having experienced both ends of this spectrum, I unequivocally support this bill and request that the Judiciary Committee support it as well.

Having been in casino management in both Reno and Lake Tahoe, I had the opportunity to participate in the development of programs designed to equip casino personnel in identifying drunken patrons and restricting their alcohol intake, with the goal of prohibiting drunk driving. Ironically, I became the victim of precisely the situation such programs are designed to resolve.

Failure was/is inevitable because: not all casino properties and drinking establishments have awareness/restriction programs, and more importantly, alcohol providers (both public and private) have no legal responsibility to restrict intake nor to enforce that restriction consistently. Nevada is one of less than 10 states who do not have dram shop legislation. Our priorities are misdirected.

In my specific case, on August 13, 1987, I was heading down Highway 50 from Stateline, where I lived and was employed as Director of Marketing Services for Caesars Tahoe (we had just that year initiated Caesars Against Drunk Driving). The drunk who hit me after crossing over all four lanes of travel (in the straight-away section only four or five miles up from the junction of Highway 50 and U.S. 395) had just left the Ormsby House where he had spent a good portion of the afternoon drinking. Approximately 10 minutes after leaving the bar, he struck me.

June 2, 1995  
Senate Judiciary Committee  
SB498, page two

After 13 surgeries, weeks in intensive care followed by more weeks in the orthopaedic ward of the hospital, I was released in the wheel chair that I would live in for several more months. All totaled, I had at least 135 bone breaks. My internal and head injuries were severe. After two years of intense therapy, seven-days-a-week at least five hours a day, I learned to walk again. But not without constant pain. Seven years later, that pain is still constant. And while by outside observation, I recovered from the head and internal injuries, there are painful lingering symptoms from those injuries as well. I am now treated with life-long drugs. I am now an unwanted insurance risk, so my Cobra Conversion policy costs me nearly \$9,000 a year, plus all the prescription expenses, another \$2,000.

You have before you a bill that can eliminate this type of preventable carnage and maim. I encourage you to support SB498. Look at the 41 states that enforce dram shop; there is not a reliable example of a single one that lost tourism business because it introduced this legislation. Please take a positive, responsible stand. Thank you!

Sincerely,

  
Sharon Zadra

Testimony in support of SB498 - Senate Judiciary - 6-5-95

For the record my name is Laurel Stadler, Legislative Liaison for MADD. I would first like to thank Senator James for the opportunity to testify today on this most important piece of legislation.

My testimony will try to address the potential statements that will be made in opposition to this bill. I would like to preface my comments by saying that dram shop or third party liability legislation seems to be a topic that no one in Nevada wants to address. Because we have no dram shop statute currently in Nevada, I felt it was necessary to direct my research toward entities that would have national experience. To that end I contacted three prominent lobbyists that had clients in applicable businesses.

In March, after we had a commitment that this bill would be drafted, introduced and set for a hearing, I contacted the lobbyist for the 7-11 Franchise Owners Assoc because I thought 7-11 would have valuable experience and be a good example in the service of liquor in the retail area. I was hoping to verify whether or not dram shop liability would be included in standard liquor liability coverage that establishments would already have, or if it was separate, is the premium more or less for states that don't have dram shop laws. She agreed to get as much information as possible regarding insurance rates, coverages and experiences with dram shop suits. She also recommended that I talk with the Southland lobbyist for national information. I asked the same type of questions to him and he said he'd get back to me with any pertinent information. I also contacted a prominent lobbyist for the insurance industry. I got the same assurance that information would be made available in a timely manner. To date, I have received no reply and/or information from any of the three lobbyists.

I can only speculate that these lobbyists did not want this committee to get the valid information; that the information would not have supported the perceived ideas that dram shop is sooooo bad for businesses in this state and others; that these lobbyists had other clients whose stand would not be in sync with the ones I requested; or possibly just didn't respond because they felt that this bill would NEVER come up for a committee hearing. I don't know if this is the first hearing ever on dram shop in Nevada or just the first in recent history.

To address the concerns:

1. That higher insurance costs would put everyone out of business. My contact at Southland Corp's legal department verified that ALL 7-11 company stores already have this insurance in place. Because insurance is handled out of Texas for all company stores and because most of the 30+ states that Southland does business in do have dram shop statutes in place, corporate insurance does not differentiate coverages. She went on to say that she believes any major, reputable retailer would already have the coverage in place and probably has responsible server training programs also. I have also heard that other national companies require dram shop coverage in all states in which they operate. Terry Holt from the 7-11 Franchise Owners Assoc stated that he thinks that the 115 franchises in Las Vegas area would probably be covered by their umbrella liability for any suit and also stated that in his limited knowledge he knows of no suits like this among his membership.

2. That lawsuits will clog the court system. The lack of a dram shop statute identifies alcohol retailers, taverns and casinos as a protected class, because any lawsuits brought are routinely thrown out of court. Implementation of dram shop does not immediately necessitate that all innocent victims of drunk driving crashes will file suit, because the criteria as written is very stringent and the burden of proof remains with the plaintiff. If the circumstances to support negligent service of alcohol to an intoxicated person or to a minor are so blatant that an injured victim or a grieving family believes another possible victimization by the legal system is worth the risk, they should be able to bring suit under the terms of this law. As the business owner of a family-owned manufacturing company in its 33rd year in business and carrier of liability insurance for all of those years, I know of no special circumstance regarding my business where suit cannot be brought.

3. That Nevada has no dram shop liability now. In reality, Nevada retailers and casinos currently can be sued for third party liability. Just be sure that if you are crashed into by a Nevada drunk, be sure you're across the state line to one of our border states that does have dram shop liability. Since every major road out of Nevada has a "last stop" casino, these bordertowns have undoubtedly been charged with liability for a crash that happened across the stateline (and all bordering states have dram shop at some level). I haven't heard of any casinos being closed down because they lost a dram shop suit. Shouldn't our locals have that



same right of civil action?

4. The issue of personal responsibility. Isn't it the individual's responsibility for what he does and the consequences of his actions? Yes it is. Is it statutorily wrong to serve alcohol to a minor? Yes it is. If not statutorily wrong, isn't it morally wrong to serve alcohol to a visibly intoxicated person? Yes it is. As the individual offender must take responsibility for his actions, to the extent of his resources, so should the individual who broke the law take responsibility for his actions. An innocent victim should have recourse against the negligence of a server or retailer of alcohol. By default, you allow the victim to have recourse against all of us by utilizing state-funded services for his recovery. We recently heard from a victim in Senate Transportation who was hit by a visitor to one of the brothels in Mound House and now Douglas County School District has spent over \$1 million of their education budget on his special needs. Wouldn't that \$1 million be more appropriately provided by the negligent establishment - or better yet, if the dram shop recovery threat had been in place at that time, the brothel may have not served irresponsibly and that young man may not now be serving his life sentence in a wheelchair and be in need of public assistance for the rest of his life. The best result of dram shop legislation would be to have NO suits because all establishments would become responsible in their service and those that are currently following responsible service guidelines would not have to change or enhance their practices. The deterrent effect is invaluable. This concept of third party liability has been accepted and implemented in at least 41 of the 50 states and I believe Senator James has been provided the complete provision listing for all states. It is interesting to see this legislature point to other states when it wants endorsement of its actions, but rejects mention of other states if that majority does not support what this legislature wants to believe.

In closing I ask for your support for SB498. Please understand that responsible vendors will not be found in violation under this law and that irresponsible, negligent vendors need to be found in violation under this law. I will be glad to answer any questions for the committee.

Thank you.

TESTIMONY OF ROBERT D. FAISS

ON S.B. 498

before the

Senate Judiciary Committee

June 3, 1995

I AM ROBERT FAISS OF LIONEL SAWYER & COLLINS, APPEARING WITH PAUL LARSEN AS CO-COUNSEL FOR THE NEVADA RESORT ASSOCIATION, TOGETHER WITH BURTON COHEN, ROGER TROUNDAY, AND KAY SCHERER [BACKGROUND OF WITNESSES].

WITH THE INTRODUCTION OF S.B. 498, THIS COMMITTEE HAS PUT BEFORE THE LEGISLATURE THE QUESTION OF WHETHER THE SEVER OF LIQUOR SHOULD BE HELD RESPONSIBLE FOR THE ACTIONS OF AN INTOXICATED PERSON OR WHETHER THE INTOXICATED PERSON SHOULD ANSWER FOR HIS ACTIONS.

AS WRITTEN, S.B. 498 WOULD HAVE YOU REVOKE THE HISTORIC COMMON LAW OF NEVADA, AS AFFIRMED BY THE NEVADA SUPREME COURT OVER THE LAST QUARTER CENTURY, AND HAVE SOMEONE OTHER THAN THE INTOXICATED PERSON STAND ACCOUNTABLE. THE NRA ASKS THAT YOU AFFIRM OUR COMMON LAW AND ACCEPT OUR PROPOSED AMENDMENT.

IN A 1969 DECISION ENTITLED HAMM V. CARSON CITY NUGGET, INC., THE NEVADA SUPREME COURT ADOPTED THE COMMON LAW

RULE THAT CONSUMING ALCOHOLIC BEVERAGES, AND NOT FURNISHING THEM, IS THE PROXIMATE CAUSE OF ALCOHOL-RELATED INJURIES INFLICTED BY INTOXICATED PERSONS UPON THEMSELVES AND OTHERS. IN HAMM, THE COURT ALSO DETERMINED THAT A TAVERN KEEPER'S SERVICE OF AN INTOXICATED PERSON, EVEN ALTHOUGH UNLAWFUL, WAS NOT NEGLIGENCE PER SE. THE COURT CONCLUDED THAT, IF CIVIL LIABILITY WERE TO BE IMPOSED UPON PERSONS FURNISHING ALCOHOLIC BEVERAGES, SUCH LIABILITY WOULD HAVE TO BE ESTABLISHED BY "LEGISLATIVE ACT." THIS BODY DID NOT FIND IT NECESSARY TO IMPOSE SUCH LIABILITY AFTER THAT 1969 DECISION, NOR HAS IT IN THE 25 YEARS SINCE. THIS IMPLICIT AFFIRMATION OF HAMM CONTINUED IN THE FACE OF FURTHER NEVADA SUPREME COURT DECISIONS IN 1970, 1979, 1981, 1982 AND 1992, WHICH CONTINUED TO REAFFIRM THE POLICY FIRST ARTICULATED IN HAMM. THE RECENT DECISIONS OF HINEGARDNER V. MARCOR RESORTS, 108 NEV. 1091, 844 P.2D 800 (1992), AND SMITH V. VIANI, 885 P.2D 610 (NEV. 1994), CLEARLY TRACE THE HISTORY OF THE STATE POLICY.

ACCORDINGLY, THE POLICY OF THE STATE OF NEVADA IS ESTABLISHED AND CLEAR AND HAS REMAINED UNCHANGED OVER

THE LAST 25 YEARS SINCE HAMM. TODAY, WE ASK THIS COMMITTEE TO REAFFIRM NEVADA'S LONG-HELD POLICY THAT IT IS THE CONSUMPTION OF ALCOHOL BY INTOXICATED PERSONS THAT PROXIMATELY CAUSES INJURIES INFLICTED BY THAT INTOXICATED PERSON UPON HIMSELF AND OTHERS.

ACCORDINGLY, WE URGE THIS COMMITTEE TO AMEND THE BILL AS A WHOLE BY DELETING THE CURRENT PROVISIONS AND INSERTING THE AMENDMENTS PROPOSED BY THE NRA.

THESE PROPOSED AMENDMENTS AFFIRM THE LONG-HELD POLICY OF THIS STATE: IT IS THE DRINKER'S CONSUMPTION OF ALCOHOLIC BEVERAGES, AND NOT THE SERVICE OR SALE OF ALCOHOL, THAT CAUSES INJURIES. THESE AMENDMENTS ALSO RECOGNIZE THAT, BECAUSE IT IS THE CONSUMPTION, NOT SALE OR SERVICE, OF ALCOHOLIC BEVERAGES THAT IS THE PROXIMATE CAUSE OF INJURIES INFLICTED BY INTOXICATED PERSONS, NO NEGLIGENCE PER SE SHOULD ARISE FROM A SELLER'S OR SERVER'S VIOLATION OF REGULATIONS REGARDING THE PROVISION OF ALCOHOL.

THESE AMENDMENTS DO NOT RELEASE THE SELLER OR SERVER FROM CRIMINAL PENALTIES, FINES AND LICENSE REVOCATION FOR VIOLATION OF LAWS REGULATING THE SALE OR

## SERVICE OF ALCOHOL.

FOR EXAMPLE, SALE OR SERVICE OF ALCOHOL TO MINORS IS A CRIME, FOR WHICH THE PERSON SERVING A MINOR IS PUNISHABLE AND SHOULD BE PUNISHED. OUR PROPOSED AMENDMENTS TO THIS BILL DO NOT CHANGE THIS FACT. SIMILARLY, SALE OR SERVICE OF ALCOHOL TO MINORS OR INTOXICATED PERSONS MAY BE AN UNSUITABLE METHOD OF OPERATION FOR A GAMING LICENSEE THAT COULD CAUSE THE GAMING CONTROL BOARD OR OTHER AUTHORITIES TO REVOKE THE LICENSE. THE PROPOSED AMENDMENTS TO THIS BILL DO NOT CHANGE THIS FACT. A SERVER OR SELLER OF ALCOHOLIC BEVERAGES MUST ALWAYS OBEY THE LAW AND ANSWER FOR VIOLATIONS OF THE LAW.

THE MEMBERS OF THE NRA CONSIDER COMPLIANCE WITH LAWS REGULATING THE SERVICE AND SALE OF ALCOHOL TO BE A MATTER OF EXTREME IMPORTANCE, AND HAVE ADOPTED POLICIES AND PROGRAMS DESIGNED TO ADDRESS THE INAPPROPRIATE OR UNLAWFUL SALE OR SERVICE OF ALCOHOLIC BEVERAGES. THE OTHER PANEL MEMBERS WILL NOW ADDRESS THESE MATTERS.

Proposed Amendments to S.B. 498

Amend the bill as a whole by deleting sections 1 through 3 and inserting:

Section 1: Chapter 41 of NRS is hereby amended by adding thereto a new section, to read as follows:

1. *The legislature hereby finds and declares that the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, is the proximate cause of injuries inflicted by an intoxicated person upon himself or third persons.*
2. *No cause of action may be brought against any person serving or selling alcoholic beverages on the grounds that the service or sale of alcohol proximately caused injuries inflicted by an intoxicated person upon himself or third persons.*
3. *The violation of any penal statute, regulation or ordinance regulating the sale or service of alcoholic beverages to an underage or intoxicated person by a server or seller of alcoholic beverages shall not constitute negligence per se in any action, against any person serving or selling alcoholic beverages, for injuries inflicted by an intoxicated person upon himself or third persons.*

Sec. 2: The provisions of Section 1 are intended to affirm and codify the common law of the State of Nevada as set forth in *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 226, 699 P.2d 110 (1969), *Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 844 P.2d 800 (1992) and *Snyder v. Viani*, 110 Nev. \_\_\_, 885 P.2d 610 (1994).

Sec. 3: This act becomes effective upon passage and approval.

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Sixty-eighth Session  
June 15, 1995**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:30 a.m., on Thursday, June 15, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman  
Senator Jon C. Porter, Vice Chairman  
Senator Maurice Washington  
Senator Mike McGinness  
Senator Ernest E. Adler  
Senator Dina Titus  
Senator O. C. Lee

GUEST LEGISLATORS PRESENT:

Assemblyman Michael A. Schneider, Clark County Assembly District No. 42  
Assemblywoman Genie Ohrenschall, Clark County Assembly District No. 12  
Assemblyman Brian E. Sandoval, Washoe County Assembly District No. 25

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst  
Judy Jacobs, Committee Secretary

OTHERS PRESENT:

Ron Coury, Concerned Citizen  
C. Edwin Fend, State Legislative Committee, American Association of Retired  
Persons  
Ben Graham, Lobbyist, Nevada District Attorneys Association

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\* \* \* \* \*

Senator James announced he will take up the other bill after more information is received. He asked Mr. Graham to come forward regarding A.B. 109.

ASSEMBLY BILL 109: Authorizes issuance of protective order for victim of person charged with crime of harassment or stalking who is acquitted by reason of insanity.

Mr. Graham explained the purpose is to clear up a situation in which stalking protective orders did not apply to persons found not guilty by reason of insanity. He stated, A.B. 109 will bring the matter into compliance with the law. If the bill is not processed, he said, "It would simply say 'as found guilty at trial.'" He suggested the committee may want to change the wording to "guilty, but mentally ill."

Senator James described the change is as follows:

If a defendant charged with a crime involved in harassment or stalking  
... is released from custody before trial, or is found guilty at the trial  
... and [then is ordered] acquitted by reason of insanity at the trial...

Mr. Graham concurred. Senator James wondered if acquittal by reason of insanity will be removed by virtue of the bill. Mr. Graham proposed the wording could be "guilty, but mentally ill," which will have a different meaning than "is found guilty at trial."

Senator James indicated he will hold the bill for a later hearing. He passed around copies of a proposed amendment to S.B. 498 (Exhibit E).

SENATE BILL 498: Creates cause of action for sale of liquor to intoxicated person or minor.

The committee agreed to retain paragraphs 2 and 3 of the proposed amendment and strike the remainder.



SENATOR TITUS MOVED TO AMEND AND DO PASS S.B. 498 WITH THE PROPOSED AMENDMENT TO INCLUDE ONLY SUBSECTIONS 2 AND 3 OF SECTION 1, AND TO LEAVE OUT SECTION 1, SUBSECTION 1, AND TO LEAVE OUT SECTION 2, AND WITH THE DELETION OF THE WORDS IN SUBSECTION 2, "CAUSE OF ACTION MAY BE BROUGHT AGAINST ANY PERSON," AND WITH THE INSERTION AFTER "PERSON" OF "SHALL BE LIABLE IN A CIVIL ACTION."

SENATOR WASHINGTON SECONDED THE MOTION.

Senator Adler announced he would abstain from the vote because he represents a bar that was recently cited for serving minors.

Senator McGinness requested an explanation of the changes proposed by Senator Titus. She responded:

It just seems like point 1 is a statement of purpose that you don't need to put in statute when you're enacting this legislation. Obviously that's our purpose ... or we wouldn't have enacted sections 2 and 3. And then the big section 2, where I just don't think you usually put in statute that this is intended to codify certain court decisions. I just don't ever see that in statute. I think that's just something that's unnecessary to put in there. So I think the key that we need are subsections 2 and 3 and then passage and approval.

Senator Washington concurred.

Senator Titus pointed out the provision refers to both minors and adults.

Senator James disclosed he does not know whether his firm represents anyone who owns what could be considered a dram shop, but admitted his firm represents one or two restaurants. He opined that is probably not a conflict which would prevent him from voting on the measure.

Senator Porter interjected he, too, is unaware if his firm is involved in any such type of business. Senator James pointed out the bill states, "no person," which could place liability on any person, even a social host. However, he said, most people should be able to vote on the bill.

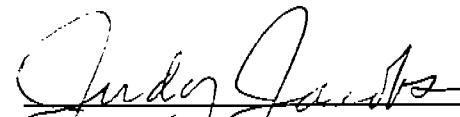
Senate Committee on Judiciary  
June 15, 1995  
Page 25

THE MOTION CARRIED. (SENATOR ADLER ABSTAINED FROM THE  
VOTE.)

\* \* \* \* \*

Senator James noted the committee is awaiting amendments for 16 bills. In the  
absence of further business, he adjourned the meeting at 10:22 a.m.

RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
Judy Jacobs,  
Committee Secretary

APPROVED BY:

\_\_\_\_\_  
Senator Mark A. James, Chairman

DATE: \_\_\_\_\_

Proposed Amendments to S.B. 498

Amend the bill as a whole by deleting sections 1 through 3 and inserting:

Section 1: Chapter 41 of NRS is hereby amended by adding thereto a new section, to read as follows:

1. ~~The legislature hereby finds and declares that the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, is the proximate cause of injuries inflicted by an intoxicated person upon himself or third persons.~~
2. ~~No cause of action may be brought against any person~~<sup>shall be liable in a civil action</sup>~~serving or selling alcoholic beverages on the grounds that the service or sale of alcohol proximately caused injuries inflicted by an intoxicated person upon himself or third persons.~~
3. ~~The violation of any penal statute, regulation or ordinance regulating the sale or service of alcoholic beverages to an underage or intoxicated person by a server or seller of alcoholic beverages shall not constitute negligence per se in any action, against any person serving or selling alcoholic beverages, for injuries inflicted by an intoxicated person upon himself or third persons.~~

~~Sec. 2: The provisions of Section 1 are intended to affirm and codify the common law of the State of Nevada as set forth in *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 226, 699 P.2d 110 (1969), *Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 844 P.2d 800 (1992) and *Snyder v. Viani*, 110 Nev. \_\_\_, 885 P.2d 610 (1994).~~

Sec. 3: This act becomes effective upon passage and approval.

6-23-95

— 13 —

Amend the title of the bill to read as follows:

“An Act relating to insurance; clarifying certain provisions regarding the unfair practice in the business of insurance; expanding the definition of “medical or surgical services” for the purposes of policies of insurance; and providing other matters properly relating thereto.”.

Amend the summary of the bill to read as follows:

“Summary—Makes various changes related to health insurance. (BDR 57-1424)”.

Senator Townsend moved the adoption of the amendment.

Remarks by Senator Townsend.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 498.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:  
Amendment No. 1062.

Amend the bill as a whole by deleting sections 1 through 3 and adding new sections designated sections 1 and 2, following the enacting clause, to read as follows:

“Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. *No person who serves or sells alcoholic beverages is liable in a civil action based on the grounds that the service or sale was the proximate cause of injuries inflicted by an intoxicated person upon himself or another person.*

2. *The violation of any statute, regulation or ordinance which regulates the sale or service of alcoholic beverages to a minor or an intoxicated person does not constitute negligence per se in any action brought against the server or seller for injuries inflicted by an intoxicated person upon himself or another person.*

Sec. 2. This act becomes effective upon passage and approval.”.

Amend the title of the bill to read as follows:

“An Act relating to civil actions; limiting by statute the civil liability of a person who sells or serves alcoholic beverages; and providing other matters properly relating thereto.”.

Amend the summary of the bill to read as follows:

“Summary—Limits by statute civil liability of sellers and servers of alcohol. (BDR 3-1922)”.

Senator Titus moved the adoption of the amendment.

Remarks by Senator Titus.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 506.

Bill read second time.

The following amendment was proposed by the Committee on Commerce and Labor:

(REPRINTED WITH ADOPTED AMENDMENTS)  
FIRST REPRINT

S.B. 498

SENATE BILL NO. 498—COMMITTEE ON JUDICIARY

MAY 23, 1995

Referred to Committee on Judiciary

SUMMARY—Limits by statute civil liability of sellers and servers of alcohol. (BDR 3-1922)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil actions; limiting by statute the civil liability of a person who sells or serves alcoholic beverages; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1     **Section 1.** Chapter 41 of NRS is hereby amended by adding thereto a new  
2     section to read as follows:  
3     1. *No person who serves or sells alcoholic beverages is liable in a civil*  
4     *action based on the grounds that the service or sale was the proximate cause*  
5     *of injuries inflicted by an intoxicated person upon himself or another person.*  
6     2. *The violation of any statute, regulation or ordinance which regulates*  
7     *the sale or service of alcoholic beverages to a minor or an intoxicated person*  
8     *does not constitute negligence per se in any action brought against the server*  
9     *or seller for injuries inflicted by an intoxicated person upon himself or*  
10    *another person.*  
11    **Sec. 2.** This act becomes effective upon passage and approval.

6-24-95

— 6 —

SENATOR JAMES:

Thank you, Mr. President. It would not have any kind of a deleterious effect. It would only have the effect that they, like all other local officials, would now participate in statewide water planning efforts. It would not have any substantial financial impact. It also would not affect our future water planning. We in southern Nevada are looking largely to the Colorado River and beyond to satisfy our future water supply needs. This will be interstate water planning and will assist so that we do not have things like the cooperative water project which took our rural areas by surprise. It resulted in us coming into a kind of in-state war which should have been anticipated and avoided. Hopefully, with this kind of legislation on the books, in the future it will be.

Roll call on Senate Bill No. 101:

YEAS—21.

NAYS—None.

Assembly Bill No. 101 having received a constitutional majority, Mr. President pro Tempore declared it passed.

Bill ordered transmitted to the Assembly.

Senate Bill No. 196.

Bill read third time.

Roll call on Senate Bill No. 196:

YEAS—8.

NAYS—Adler, Augustine, Lee, Lowden, Mathews, McGinness, O'Donnell, Rawson, Titus, Washington—10.

Not voting—Coffin, Porter, Raggio—3.

Senate Bill No. 196 having failed to receive a constitutional majority, Mr. President declared it lost.

Senate Bill No. 300.

Bill read third time.

Roll call on Senate Bill No. 300:

YEAS—19.

NAYS—None.

Not voting—Coffin, Porter—2.

Senate Bill No. 300 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 467.

Bill read third time.

Remarks by Senators Adler and O'Donnell.

Roll call on Senate Bill No. 467:

YEAS—18.

NAYS—Adler, Coffin, Neal—3.

Senate Bill No. 467 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 498.

Bill read third time.

Remarks by Senators Neal and Titus.

Roll c  
YEAS—  
NAYS—  
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Roll call on Senate Bill No. 498:

YEAS—19.

NAYS—Neal.

Not voting—O'Connell.

Senate Bill No. 498 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 506.

Bill read third time.

The following amendment was proposed by Senators Augustine and Lowden:

Amendment No. 1260.

Amend section 1, page 1, line 2, by deleting "8," and inserting "9,".

Amend the bill as a whole by deleting sec. 2 and renumbering sections 3 and 4 as sections 2 and 3.

Amend the bill as a whole by renumbering sections 5 through 37 as sections 6 through 38 and adding new sections designated sections 4 and 5, following sec. 4, to read as follows:

"Sec. 4. *"Registered interior designer" means any person who engages in the practice of interior design and holds a certificate of registration issued by the board.*

Sec. 5. *A registered interior designer may collaborate in the completion of a project for the alteration or construction of an interior area of a structure designed for human habitation or occupancy with members of not more than two of the following professions:*

1. *Architecture, as that profession is regulated pursuant to the provisions of chapter 623 of NRS;*

2. *Contracting, as that profession is regulated pursuant to the provisions of chapter 624 of NRS; and*

3. *Professional engineering, as that profession is regulated pursuant to the provisions of chapter 625 of NRS."*

Amend sec. 11, page 3, line 31, by deleting "An" and inserting "A registered".

Amend sec. 14, page 4, line 26, after "are" by inserting "registered".

Amend sec. 20, page 5, line 47, after "of" by inserting "registered".

Amend sec. 20, page 6, line 6, by deleting "interior" and inserting "registered interior".

Amend sec. 22, page 6, line 48, by deleting "interior" and inserting "registered interior".

Amend sec. 22, page 7, line 1, by deleting "interior" and inserting "registered interior".

Amend sec. 22, page 7, line 6, by deleting "interior" and inserting "registered interior".

Amend sec. 22, page 7, line 10, by deleting "interior" and inserting "registered interior".

Amend sec. 22, page 7, line 15, by deleting "an" and inserting "a registered".

**MINUTES OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Sixty-eighth Session  
June 27, 1995**

The Committee on Judiciary was called to order at 8:23 a.m., on Tuesday, June 27, 1995, Chairman Anderson presiding in Room 332 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

**COMMITTEE MEMBERS PRESENT:**

Mr. Bernie Anderson, Chairman  
Mr. David E. Humke, Chairman  
Ms. Barbara E. Buckley, Vice Chairman  
Mr. Brian Sandoval, Vice Chairman  
Mr. John C. Carpenter  
Mr. David Goldwater  
Mr. Mark Manendo  
Mrs. Jan Monaghan  
Ms. Genie Ohrenschall  
Mr. Richard Perkins  
Mr. Michael A. (Mike) Schneider  
Ms. Dianne Steel  
Ms. Jeannine Stroth

**COMMITTEE MEMBERS EXCUSED:**

Mr. Thomas Batten

**GUEST LEGISLATORS PRESENT:**

None

**STAFF MEMBERS PRESENT:**

Dennis Neilander, Research Analyst  
Christine Shaw, Committee Secretary

**OTHERS PRESENT:**

David Sarnowski, Chief Criminal Deputy Attorney General  
Judy Jacoboni, President, MADD, Lyon County Chapter



Bob Faiss, Lionel Sawyer and Collins, counsel for NRA  
Jack Godfrey, Nevada Resort Association  
Bill Bible, Chairman, State Gaming Control Board  
Brain Harris, Gaming Control Board  
Paul Larsen, Nevada Resort Association  
Carolyn Ellsworth, Mirage Resorts  
Burton Cohen, NRA  
Roger Trounday, Executive Vice President, John Ascuaga's Nugget  
Kay Scherer, NRA  
Peter Chase Neumann, attorney  
Major Dan Hammack, Nevada Highway Patrol  
Dora Mae Jacobsen, citizen  
Laurel Stadler, MADD  
Judy Jacoboni, MADD  
Pat Cashill, NTLA  
Brother Matthew Cunningham, Diocese of Reno-Las Vegas  
Kris Jensen, NCC  
Janine Hansen, President, Nevada Eagle Forum

**SENATE BILL 358 - Revises provisions regarding establishment of authenticity of records of regularly conducted activity by affidavit.**

David Sarnowski, Chief Criminal Deputy Attorney General, appeared as the proponent of S.B. 358. He stated the bill proposes amendments to a small part of Nevada's Evidence Code. As it presently exists, the Evidence Code carves out exceptions to a general rule requiring the custodian of records of a business to appear personally to authenticate records as being business records. He noted the amendatory language added by the Senate is shown on Page 3, lines 5 through 14. This would help streamline court proceedings if a party has a good faith reason to challenge whether or not documents are authentic.

ASSEMBLYMAN HUMKE MOVED DO PASS S.B. 358.

ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.

THE MOTION CARRIED.

**SENATE BILL 498 - Limits by statute civil liability of sellers and servers of alcohol.**

Judy Jacoboni, President, Mothers Against Drunk Driving: Lyon County Chapter, requested the committee withdraw S.B. 498 as in its present form it has no resemblance to the bill draft which they asked the Senate Judiciary Committee to have drafted. Their bill draft, early in the session, specified if a person illegally served a minor an intoxicating beverage resulting in a third person being injured, the innocent victim would have an avenue of relief for recovery of civil damages against the negligent server. She noted this bill goes hand in glove with a bill processed earlier in the session. S.B. 498 in its original form would have deterred the server of the minor from serving the minor.

Mr. Neilander explained once a bill is introduced in the legislature it then becomes within the jurisdiction of whatever committee takes receipt of that bill. The requester can ask that the bill be withdrawn but the committee has jurisdiction over the bill.

Mr. Anderson asked if there was a motion to withdraw the bill from the committee. Since there was no response he indicated the bill is as presented in its first reprint.

**SENATE BILL 497 - Clarifies provisions governing nature and circumstances of entertainment subject to casino entertainment tax.**

Mr. Robert Faiss, Lionel Sawyer and Collins, and counsel for the Nevada Resort Association (NRA), spoke in support of S.B. 497. He stated the NRA joined with the Gaming Control Board asking for S.B. 497 approval to provide clear direction for enforcement of the casino entertainment tax. His prepared testimony is submitted as Exhibit C. A collection of Nevada legislative amendments, opinions of the Attorneys General and decisions of the Nevada Supreme Court illustrating the history of the Casino Entertainment Tax (Exhibit D) can be viewed in the Research Library. This collection is labeled "Exhibits in Support of Senate Bill 497." A news release describing plans for the "Star Trek Experience" at the Las Vegas Hilton (Exhibit E) is an example of the interactive entertainment that the Control Board and the NRA agree is not subject to the casino entertainment tax. He further emphasized that S.B. 497 does not reduce tax obligations of the gaming industry.

Jack Godfrey, Nevada Resort Association, explained S.B. 497 as amended is a joint recommendation of the State Gaming Control Board and the gaming industry to finally resolve differences in interpretation of the casino entertainment tax. He

noted the bill clarifies the tax applies only to cabarets which in Nevada equates to night clubs, cocktail lounges, and casino showrooms. The bill specifies those facilities and types of entertainment that are subject to the tax. The most significant specification consists of definitions of auditoriums and casino showrooms. The bill extends the tax to some facilities that are not now taxable. He subsequently touched on highlights of the proposed amendments.

Mr. Carpenter wondered how small auditoriums such as in Elko, are affected. Mr. Godfrey said the definition applied statewide. The idea was to try to set forth a test so that the board and industry would have no disputes over facilities that are not traditional casino showrooms. The thought was to take the largest showroom in Nevada, which currently is Effects at the MGM Grand which holds approximately 750 persons and add 1000 person capacity to that, to come up with a reasonable line of demarcation for what would be considered an auditorium.

Mr. Carpenter said he fully supported what Mr. Godfrey was doing but questioned whether the definition would exempt the Elko auditorium which seats a little under 1000 and wondered whether "cowboy poetry" would be considered cabaret entertainment. Mr. Faiss commented Bill Bible would be in position to answer that concern.

Bill Bible, Chairman, State Gaming Control Board, spoke in support of S.B. 497 as written. Responding to Mr. Carpenter's inquiry, Mr. Bible said in order for the applicability to tax, it would have to be in a licensed gaming premises and in Elko, for example, there would not be an auditorium of that size.

Brian Harris, Gaming Control Board, discussed various enforcement problems they have had with the tax. Because of perplexities in the continually evolving entertainment industry, the problem as years have gone by is knowing when the tax should be assessed. He said hopefully this bill will take care of that.

ASSEMBLYMAN HUMKE MOVED DO PASS S.B. 497.

ASSEMBLYMAN MANENDO SECONDED THE MOTION.

THE MOTION CARRIED.

Mr. Humke was delegated floor assignment.

**SENATE BILL 498** - Limits by statute civil liability of sellers and servers of

**alcohol.**

Bob Faiss, counsel for the Nevada Resort Association, testified in support of S.B. 498. His written testimony is submitted as (Exhibit F).

Paul Larsen, Lionel, Sawyer & Collins, in support of S.B. 498 first reprint, gave an overview of the bill and explained its technical points. It was he who had prepared the research and analysis upon which the bill was based. He cited a discussion on the radio talk show, "PERFECTLY FRANK" where host Frank LaSpina posed the question, "Should victims of drunk drivers be allowed to sue the place where the drinks were served?" 85% of callers were opposed to the idea. See (Exhibit G). Mr. Larson emphasized S.B. 498 recognizes it is the consumption, not sale or service of alcoholic beverages, that can cause injuries inflicted by intoxicated persons.

Carolyn Ellsworth, Mirage Resorts, Inc., speaking in support of S.B. 498 said the bill is a mere codification of what the Nevada Supreme Court has set for the last 26 years. The law is necessary because the Supreme Court can change the law at any time. Currently they are leaning toward an erosion of requiring personal responsibility because they are under the mistaken impression that dram shop acts save lives. Dram shop laws require servers of alcohol to be responsible for injuries caused by drinkers of alcohol. They, however, do not save lives. What does work, according to Ms. Ellsworth, is mandated server training which seeks to educate servers of alcohol. The only state in which it is required is Oregon. In essence, the responsibility lies with the consumer of alcohol.

Burton Cohen, private citizen and formerly of NRA, stated S.B. 498 is a shifting of responsibility and is unenforceable in its original intent. He said the real source of solving drunk driving is education....to create awareness of the fact that if they cause an accident while intoxicated, they will pay the price.

Roger Trounday, Executive Vice President of John Ascuaga's Nugget, concurred with Mr. Cohen. He stressed the individual, somewhere along the line, has to assume the responsibility for his own conduct...and passing that burden on to someone else is unacceptable.

Ms. Kay Scherer, communications professional, explained she has been working with the NRA to evaluate and put together a program to serve as a model to the country for education and awareness as it relates to problem drinking and

intoxication as well as under age drinking and gambling. The booklet entitled "Nevada Resort Association Presentation to The Assembly Judiciary Committee" is submitted as Exhibit H and is on file in the Research Library.

Speaking in opposition to S.B. 498 was Peter Neumann. His testimony is taken verbatim.

"Mr. Chairman, members of the committee, my name is Peter Chase Neumann. I'm an attorney in Nevada. I've been practicing law for 32 years. I generally represent people that are injured or families of people killed in various kinds of mishaps such as product liability cases, drunk driving cases, some malpractice cases and so forth. I come today to speak on behalf of myself and my clients, both past clients, present clients, and future clients. I speak in opposition to this bill knowing that I am doing so in opposition to our major industry in Nevada. I understand the industry's concern and the reasons that they would like the bill as amended...and if I were in the industry myself I'm sure that I would support them. But I don't think the bill is good legislation and I think what you people have to decide ultimately here is by passing this legislation, am I as a legislator doing the right thing? Am I as a legislator going to make Nevada a better place to live and a safer place to live...or is this legislation going to have the opposite effect? And I would respectfully argue to you that this legislation is not needed by the industry because there is not a problem that they have demonstrated where they have actually ever been the subject of a verdict against them for dram shop liability, number one. And number two, by the Legislature telling the world (and that's what you are doing with this legislation) that we don't care as a policy making group...we don't care if people serve minors or drunk people intoxicating beverages knowing that they very well may hurt someone else or kill someone else...we don't care enough to have them legally accountable. It seems to me that you are actually, by implication, inviting this kind of conduct.

Now the gentlemen and the ladies that have testified so far represent that segment of industry that I think is quite responsible...and I read the presentation that they passed out and I agree with Mr. Humke...it is very impressive...and I think probably, certainly the Nugget for example, which I am a customer of many times, I am sure they have a policy like this that is very effective. And I'm not really concerned that the Nevada Resort Association is a problem here...but as a lawyer representing people...and I have represented many people that have been killed or very, very badly injured by drunk driving, I'm concerned more about the ABC Bar, or Joe's Bar, or some organization that doesn't have the resources to put out a program like the ones we've heard here today which would be very commendable. And, by

telling those bars, or those venders, or those 7-11 stores, or those grocery stores that they have no liability, no legal accountability at all for knowingly or intentionally violating the law in serving a minor or serving an obviously intoxicated person, then I think we're just laughing at the problem. And the problem is very real. I have passed out to you a study...and the representative from the gaming...or the Nevada Resort Association, talked about studies that have been done. Well, I'm giving you an actual study here..done by a very responsible group, The Insurance Institute for Highway Safety. I get their publication and have for many years and their June, 1995 issue happens to be on this very subject. They tell you in the studies they've done, and they've done several studies..one of which involved 4000 people..a very large study...and they cite other studies in this article...showing that the problem of fake IDs and selling and buying of alcohol to and from minors is a very real problem. This article also shows that of the fatal accidents that occur in this country, and as we all know there are about forty to fifty thousand people killed each year on our highways, and in Nevada we have about 250 people killed each year on our highways in motor vehicle accidents, that alcohol is a very large percent of the reason for those crashes. Nationally the rate is about 37 percent over all. In other words, if you take all the people killed in this country, which per year is as many as we lost in Viet Nam...for the whole Viet Nam war...we lose that many people killed in this country each year on our highways. 37 percent of those people killed...and you talk about a cost to society ...you talk about a cost to the taxpayers of all these deaths...not to mention the millions of very serious injuries which are in many respects even more serious and more costly than deaths...almost 40 percent of those are caused by alcohol and as you'll see on the 6th page of this study, in those fatal injury cases that occur between nine at night and six o'clock in the morning, 60 percent of those are caused, or related to alcohol.

Now, I'm stating the obvious. You know as well as I do that alcohol is a very dangerous thing when it comes to motor vehicles and that it causes a lot of problems, a lot of injuries and deaths and a lot of cost to society. But I don't think any of you probably realized that it was as high as 60 percent between the hours of 9 p.m. and 6 a.m. I surely didn't. That's a very, very large number. So the question is, does the legislature of Nevada want to encourage legislation, adopt legislation, which will basically do nothing to help the problem but will actually encourage a lack of accountability. When the gaming industry, or the Nevada Resort Association acts responsibly, which I believe it is trying to do, in telling people "Look, you've had too much to drink, I'm going to call a cab for you...take you home," and encourage their employees to watch for these people, I think that's wonderful. But, if we as a legislature say there's absolutely no accountability

legally, then I think the incentive to continue with those kind of programs will be absent. And there will be a lot of companies that will not follow through with those kind of programs.

I represent a lady by the name of Shawna Schneider, which the Schneider case was alluded to. And in that case, as well as the Heingardner case, the Supreme Court of Nevada in a three to two decision...a very, very divided court, held that the proximate cause was the person drinking. But the Shawna Schneider case, there's a petition for re-hearing on that case, pending before the court. That case is not over yet. In Ham vs. Carson City Nugget case which I worked on when I worked for Peter Echeverria in 1969 as a young lawyer, I was the one that helped write the brief on that case. And in Ham vs. Carson City Nugget Mrs. Ham lost her husband...she and her children lost her husband to a drunk driver that had been here in Carson City drinking at the Carson City Nugget...and very visibly intoxicated and they kept serving him. That was many, many years ago but basically in that case and the other cases cited by the ladies and gentlemen from Lionel Sawyer, our court did not invite this legislature, in my opinion, if you read those cases, our court was not asking this legislature to come out with this kind of legislation. Rather, what our court was saying was the legislature has never adopted a policy one way or the other...and so the majority of the justices in the three to two cases said "we're not going to do that here because the legislature hasn't done it." So now obviously, if the legislature says "well there is no accountability", then our court will probably, in the next case, will probably say "well now the legislature has passed this statute and we find that the policy of the state of Nevada is that there is no accountability."

I just am urging you as responsible legislators to say, "Look, it's not good legislation to say there is no legal responsibility". There can never be any legal responsibility in any kind of case no matter what the scenario. There has never been a jury verdict against a casino or a vender of alcohol in Nevada, or an individual person as Ms. Monaghan mentioned, for selling alcohol or furnishing alcohol. We've never had a case in which a verdict has come down. But I would like to at least keep the door open so that if one of you loses a husband or a child to a drunk driver and it turns out that drunk driver went to the 7-11 store and was visibly intoxicated so that he was staggering in drunk, he was sixteen years old, obviously not twenty one years old, obviously intoxicated, and the 7-11 store went ahead and sold him a six-pack of beer...and then he goes out and kills your kid, I think we should leave the door open to at least you would have a chance of making a claim against the vendor of that alcohol. I can't see a jury holding someone like the Nugget responsible or someone who has an in-room service and

furnishes liquor to an in-room patron and then that patron goes out....I can't see a jury ever finding someone guilty and accountable for that. But I can see the problem where they intentionally serve a minor or intentionally serve a visibly intoxicated person...I think the policy of the state should not be to say that victim has no right. Now, for that reason I have done a research this morning on Westlaw of all the states that have dram shop law..and the closest that I can come..."

Mr. Carpenter asked what would happen if the establishment or whoever sold the alcohol was held responsible ("then there wouldn't be any responsibility on that party for his own actions.")

Mr. Neumann continued: "The law as I understand it is that there can be more than one proximate cause of an injury...by not adopting this statute you wouldn't be changing the present law which is the primary responsibility is already on the drunk driver...there's no question about that...but what I'm saying is that it's not good policy for the state of Nevada to say there can never be a case where there couldn't be responsibility on an additional person as well in some instances. I gave an extreme example...if it were your store, as you say, it wouldn't be a problem because you would never serve someone like that...but suppose there were? I had a case that I tried to a jury 15 or 16 years ago...a little boy was killed on his bicycle...he was 6 years old...he was killed by a drunk driver who had been drinking all day long at a place called the "Dew Drop Inn". And the Dew Drop Inn knew that he was drunk and they loaned him their car...he wanted to go get some more money and wanted to cash a check...they wouldn't cash a check and they said well, we'll loan you our car. They loaned him their car and he went out and killed this perfectly innocent little six year old boy...and so there are cases where that happens. I don't think it's a problem for a responsible organization..and that's my point is that I don't think we need this legislation. "

Mr. Carpenter wondered if there were other additional protections in the law for a seller or provider of alcohol.

Mr. Neumann: "Yes there are, and it's called a jury system. I can't see that a jury would ever convict or make someone like yourself or a responsible person accountable if they acted reasonably. And as I say, we've never had a verdict, Mr. Carpenter, in the state of Nevada against a major hotel or casino. The case I said about the Dew Drop Inn is the only one I know of and that was a very strong set of facts. In my package that I've given you I have suggested some language to the bill in S.B. 498 which would say "no person who serves or sells alcoholic



beverages to an adult (add the words "to an adult") is liable in a civil action based on the grounds that the service or sale was the proximate cause of injuries inflicted by an intoxicated person on himself"...and strike the words "or another person". By adding those words to the bill, you would be ameliorating it to some extent. I agree that the intoxicated person, himself or herself, should not have a cause of action. If that person is drunk or gets hurt, I don't think the person should be allowed to sue the vendor of the alcohol. But if the person gets drunk in the scenario that I said, like at the Dew Drop Inn, and injures another innocent person, I just feel that you shouldn't close the door on the right of that person...or the mother of that person that I represented, to make a claim. Idaho has done that and the language of the Idaho statute is that there is no liability expect in cases where the intoxicated person was younger than the legal age for the consumption of alcoholic beverages or that the intoxicated person was obviously intoxicated at the time the beverages were sold or furnished ...and the person who sold or furnished the alcoholic beverages knew that the intoxicated person was obviously intoxicated. In those instances the Idaho Legislature has said they would preserve the right of legal action."

The amended language change by Mr. Neumann is submitted as Exhibit I.

Mr. Anderson questioned Mr. Neumann's intent as to whether a person would have a higher standard of accountability in selling to a minor than to an adult. Mr. Newman said yes, because it is against the law to sell to a minor.

Major Dan Hammack, Nevada Highway Patrol, stated the division is opposed to S.B. 498 on the basis of a traffic safety issue. Both the business industry and law enforcement must mutually cooperate to reduce the DUI offender problem. To limit civil liability on this issue will reduce the deterrent effect on these violations. The solution to DUI offenders involves education, treatment and enforcement. The division would encourage the committee to consider this issue a matter for the courts to decide based upon individual negligence of each case.

Dora Mae Jacobsen, citizen, testified in opposition to S.B. 498. Her 30 year old daughter was killed by a drunk driver who had consumed 18 beers in July of 1993. She stated anyone who gives alcohol to an intoxicated person or minor resulting in the death or injury of someone, should be held jointly responsible.

Laurel Stadler, MADD, expressed opposition to S.B. 498 "as it has currently been gutted by the Senate Judiciary Committee". She noted the concept presented in their bill draft was totally reversed by the Nevada Resort Association amendment

which was then adopted by that committee. She said in the five years she has been working with MADD she has yet to see a victim looking for "deep pockets"...a slap in a victim's face to suggest that! She noted proponents mentioned there are current statutes and ordinances making servers responsible; however, she has not seen statistics showing how many times fines are actually levied against those establishments or servers. Also there were no statistics to show how this legislation is going to harm the tourist industry; no figures to support that insurance liability premiums may increase because of any dram shop liability; and no numbers of cases experienced in other states to show there actually would be the plethora of civil cases that would clog the courts.

Ms. Stadler, in addressing the original version of the bill, stated the lack of the dram shop statute identifies alcohol retailers, taverns and casinos as a protected class because any lawsuits brought are routinely thrown out of court. If the circumstances to support the negligent service of alcohol to an intoxicated person or minor are so blatant that the injured victim or grieving family believes another possible victimization by the legal system is worth that risk to them, they should be able to bring suit.

Ms. Stadler stressed responsible vendors will not be found in violation under the law...and irresponsible, negligent vendors need to be found in violation under the original version of S.B. 498.

Judy Jacobini, MADD, explained on the issue of personal responsibility their bill draft request does not attempt to shift the personal responsibility off of the drinker. They only ask that personal responsibility be extended to everyone who, in violation of a law, sets in motion a dangerous, uncontrollable force and that they too be held responsible.

ASSEMBLYMAN SCHNEIDER MOVED TO DO PASS S.B. 498.

ASSEMBLYMAN MONAGHAN SECONDED THE MOTION.

THE MOTION CARRIED WITH ASSEMBLYMAN CARPENTER ABSTAINING FROM THE VOTE.

**SENATE BILL 482 -**

**Authorizes court to require attorney to pay additional costs, expenses and fees reasonably incurred as result of certain actions taken by attorney in civil action or proceeding.**

Testimony of Robert D. Faiss of Lionel Sawyer & Collins  
Counsel for the Nevada Resort Association  
On Senate Bill 498  
Before the Assembly Judiciary Committee  
Carson City, Nevada - June 27, 1995

I am Bob Faiss of Lionel Sawyer & Collins, counsel for the Nevada Resort Association.

Senate Bill 498 responds to the request of the Nevada Supreme Court for a legislative declaration as to whether the server of liquor should be held responsible for the actions of an intoxicated person or whether the intoxicated person should be held responsible.

S.B. 498 codifies the common law of Nevada, and affirms decisions of the Supreme Court over the past quarter of a century that declare consuming alcoholic beverages, not serving them, is the proximate cause of alcohol-related injuries inflicted by intoxicated persons.

NRA President Richard Bunker has selected a distinguished panel from the gaming industry to urge that you adopt S.B. 498 and continue Nevada's historic policy of personal responsibility.

S.B. 498 will be presented and its technical points explained by Paul Larsen of Lionel Sawyer & Collins, who prepared the research and analysis upon which the bill is based, and by Carolyn Ellsworth, Assistant General Counsel of Mirage Resorts. Carolyn Ellsworth, now one of the most respected corporate counsel in the gaming industry worldwide, formerly served for 11 years as a Clark County prosecutor, during which she became the first woman to serve as Chief Deputy District Attorney of a major trial unit.

Next, two respected industry executive will explain the ramifications of any course for Nevada other than holding intoxicated persons personally responsible for their actions.

They are Roger Trounday, Executive Vice President of John Ascuaga's Nugget, who has been a major force in statewide industry matters for 15 years, and Burton Cohen, who earlier this month retired as President of the Sheraton Desert Inn after 30 years of service to the gaming industry and the state. Among other things, Burton was a two-term President of the Nevada Resort Association.

**MASTERPLAN PRODUCTIONS**

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June 26, 1995

Lionel, Sawyer & Collins  
FAX: 383-8845

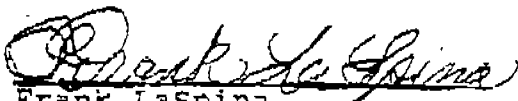
Attn: Paul Larsen

To-Whom-It-May-Concern:

When the question, "Should victims of drunk drivers be allowed to sue the place where the drinks were served?", was asked of listeners to the June 16, 1995, edition of my radio talk show, "PERFECTLY FRANK" (heard Monday thru Friday, between 5:30 and 7:00 PM, on K-NEWS AM970), 85% of callers were opposed to the idea, arguing, for the most part, drivers must take responsibility for their own actions.

These results can be confirmed by audio tapes made of each day's program.

Sincerely,

  
Frank LaSpina  
producer/host  
"PERFECTLY FRANK"

---

**RECEIVED**

JUN 26 1995

LIONEL, SAWYER & COLLINS

TIME 1:56 AM MEM

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2290 East Flamingo Road, Suite "F", Las Vegas, Nevada 89119  
(702) 731-9441 Fax (702) 369-0702

EXHIBIT G

TOTAL P.02

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049

REMARKS OF PAUL E. LARSEN  
ON S.B. 498  
Before the Assembly Judiciary Committee  
June 27, 1995

I AM PAUL LARSEN OF LIONEL SAWYER AND COLLINS, APPEARING AS CO-COUNSEL FOR THE NEVADA RESORT ASSOCIATION, IN SUPPORT OF S.B. 498.

S.B. 498 CODIFIES THE EXISTING COMMON LAW OF THIS STATE. BEGINNING WITH A 1969 DECISION ENTITLED HAMM V. CARSON CITY NUGGET, 85 NEV. 99, 450 P.2D 358 (1969). THE NEVADA SUPREME COURT ADOPTED THE COMMON LAW RULE THAT CONSUMING ALCOHOLIC BEVERAGES, AND NOT FURNISHING THEM, IS THE PROXIMATE CAUSE OF ALCOHOL RELATED INJURIES INFLICTED BY INTOXICATED PERSONS UPON HIMSELF AND OTHERS. THE EFFECT OF HAMM (AND ITS PROGENY) IS THAT NO SERVER OR SELLER OF ALCOHOL IS LIABLE IN A CIVIL ACTION BASED ON THE GROUNDS THAT THE SERVICE OR SALE OF ALCOHOL PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES. SECTION 1 OF S.B. 498 CODIFIES THIS INTO STATUTE.

IN HAMM, THE NEVADA SUPREME COURT ALSO DETERMINED THAT THE SERVICE OF AN INTOXICATED PERSON, ALTHOUGH UNLAWFUL AT THAT TIME, WAS NOT NEGLIGENCE PER SE. SECTION 2 OF S.B. 498 CODIFIES THIS INTO STATUTE.

THE COURT IN HAMM AND LATER CASES CONCLUDED THAT, IF CIVIL LIABILITY WERE TO BE IMPOSED UPON PERSONS FURNISHING ALCOHOLIC BEVERAGES, SUCH LIABILITY WOULD HAVE TO BE ESTABLISHED BY "LEGISLATIVE ACT." HOWEVER, THIS BODY DID NOT FIND IT NECESSARY TO IMPOSE SUCH LIABILITY AFTER THE 1969 HAMM DECISION, NOR HAS THIS BODY DONE SO IN THE 26 YEARS SINCE. THIS IMPLICIT AFFIRMATION OF HAMM CONTINUES IN THE FACE OF FURTHER NEVADA SUPREME COURT DECISIONS IN 1970, 1979, 1981, 1982, 1992, AND 1994, WHICH CONTINUED TO REAFFIRM THE POLICY FIRST ANNOUNCED IN HAMM. THE RECENT DECISIONS OF HINEGARDNER V. MARCOR RESORTS, 108 NEV. 1091, 844 P.2D 800 (1992), AND SNYDER V. VIANNI, 110 NEV. \_\_\_\_\_, 885 P.2D 800 (1994), CLEARLY TRACE THE HISTORY OF THIS STATE POLICY.

THUS, THE POLICY OF NEVADA IS ESTABLISHED AND CLEAR AND HAS REMAINED UNCHANGED OVER THE LAST 26 YEARS SINCE HAMM. INDEED, THERE ARE INDICATIONS THAT THIS POLICY IS STRONGER NOW THAN IT WAS 26 YEARS AGO. IN A DISCUSSION OVER THIS VERY BILL ON FRIDAY JUNE 16, 1995, LAS VEGAS RADIO TALK SHOW HOST FRANK LA SPINA (KNUU-970 AM) POSED THE QUESTION:

SHOULD VICTIMS OF DRUNK DRIVERS BE ALLOWED  
TO SUE THE PLACE WHERE THE DRINKS WERE SERVED?

THE RADIO LISTENERS RESPONDED WITH A RESOUNDING "NO!" APPROXIMATELY 85% OF THE CALLERS SAID THE DRINKER, NOT THE SERVER MUST TAKE PERSONAL RESPONSIBILITY FOR HIS ACTIONS. THIS POLL, ALTHOUGH UNSCIENTIFIC, WE NEVERTHELESS FEEL IS A GOOD INDICATION OF THE MOOD OF THE CITIZENS OF NEVADA. S.B. 498 CRYSTALLIZES THIS MOOD, AND

THE NEVADA COMMON LAW, INTO STATUTE.

SECTION 1 OF S.B. 498 CODIFIES THE PRIMARY HOLDING OF HAMM, AND THE CASES THAT HAVE FOLLOWED, INTO A CLEAR STATUTE. IN HAMM, THE NEVADA SUPREME COURT ALSO DETERMINED THAT THE SERVICE OF AN INTOXICATED PERSON, ALTHOUGH UNLAWFUL AT THAT TIME, WAS NOT NEGLIGENCE PER SE. SECTION 2 OF S.B. 498 CODIFIES THIS INTO STATUTE AS WELL.



*NEVADA RESORT ASSOCIATION  
PRESENTATION TO  
THE ASSEMBLY JUDICIARY COMMITTEE*

*June 27, 1995*

EXHIBIT H





RESOLUTION

WHEREAS, members of the Nevada Resort Association are leaders in the hospitality industry and serve as a model for other states in providing safe and legal recreational activities; and

WHEREAS, members of the Nevada Resort Association recognize the community benefits that result from acting responsibly in providing adult entertainment activities; and

WHEREAS, members of the Nevada Resort Association support community programs designed to combat alcohol and drug abuse; and

WHEREAS, many members of the Nevada Resort Association have established in-house employee training programs to increase awareness of problem drinking and gambling activities, and provide guidance on how to effectively respond to such occurrences; and

WHEREAS, the Nevada Resort Association desires to encourage its members to participate in maintaining and perpetuating Nevada's success in providing safe and legal entertainment activities; now, therefore, be it

RESOLVED, by its Board of Directors this 17th day of May, 1995, that the Nevada Resort Association establish a standardized problem drinking and gambling employee training program for its members; and be it further

RESOLVED, that each Nevada Resort Association member is encouraged to establish or continue its own training program curricula to ensure that their specific needs are met, and that the Nevada Resort Association recommends that each program contain components such as the following: (A) House Policy & Procedures; (B) Customer, Player, Guest and Employee Awareness Section; (C) Identification Training Section; and be it further

RESOLVED, that training collateral and public service materials be prepared and underwritten by the Nevada Resort Association and provided to members for use in their problem drinking and gambling awareness employee training programs; and be it further

RESOLVED, that these programs shall commence prior to January 1, 1996.

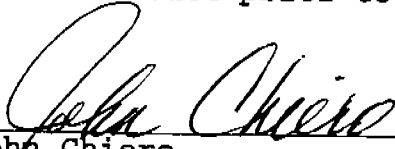
  
\_\_\_\_\_  
John Chiero  
Chairman of the Board  
Nevada Resort Association

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## **EXECUTIVE SUMMARY**

Dram shop laws arose out of public safety concerns for intoxicated individuals who became a danger to themselves and others. They were first instituted in the United States in 1849, and increased in popularity during the early 1980s when campaigns against drunk driving reached full-strength. Subsequently, a trend began to extend dram shop legislation to "social host liability", in which someone hosting a party or serving complimentary alcoholic beverages could be held liable for the actions of someone who became intoxicated and was involved in an accident.

However, after these laws were passed, many states encountered problems with the threshold question: "How does an alcohol server know when a guest has had too much to drink and is a threat to public safety? Indeed this is often a difficult question to determine.

For this reason, and others, the American Bar Association Journal noted in June 1987, that "The trend in legislation is toward limiting liquor liability. Because of the problems associated with enforcing liability, legislatures in many states amended their dram shop laws or enacted new laws limiting commercial server or social host liability in some form.

While other states chose to respond to this public safety issue through legislative action, the State of Nevada did not. Using foresight, the Legislature envisioned a scenario where a typical tourist wanders up and down the Las Vegas Strip or Reno's Virginia Street area visiting several different hotel-casinos and drinking an alcoholic beverage at each stop. The tourist then gets into his or her rental car and begins driving while intoxicated. If an accident occurs, who is liable? How much did the actions of each casino contribute to the accident? Clearly recognizing the difficulty of distributing and enforcing this type of liability among the

casinos and resorts, the Nevada Legislature left the responsibility of preventing intoxication to the individual.

However, members of Nevada's resort industry recognize their leadership role in the hospitality industry and many have been engaged in providing training programs that go beyond compliance with county regulations and are designed to help employees detect and effectively respond to intoxicated patrons and underage drinkers and gamblers. To further these efforts, on May 17, 1995, the Nevada Resort Association unanimously approved a resolution to establish a comprehensive problem alcohol and gambling program for its members.

The Association appreciates the Committee's interest in this important matter and is proud of the proactive stance the Nevada resort community has taken toward eliminating these activities. We will continue to work diligently to serve as a model for other states in providing safe and legal recreational gaming activities in the interest of both our guests and our communities.

## SELECTED CURRENT TRAINING PROGRAMS

Existing in-house training programs are focused primarily on increasing employee awareness and establishing effective response procedures when incidents of intoxication, underage drinking and gambling occur. Some properties are participating in umbrella marketing strategies to educate employees and remind patrons that these types of activities will not be tolerated on the premises, and if they occur will be taken with the utmost seriousness. Following are highlights of some of the employee-training programs that are being conducted by members of Nevada's resort industry. (See Appendices for full content of program examples). Again, they are designed to ensure that all employees are well versed and effectively trained in detecting and responding to intoxicated patrons and underage drinking and gambling.

### **Boyd Gaming Corporation**

A specific written policy and procedures manual is provided to new employees. The manual provides tips on how to detect and respond to intoxicated guests and underage drinking and gambling. Boyd has initiated an employee awareness campaign that includes distribution of pay-check stuffers, and speaker forums to instruct personnel on what to look for and how to best react when witnessing these types of activities. Messages reach employees through brochures, trade publications, and back-of-the-house posters and will highlight the social and economic costs of these activities, as well as the benefits each employee can bring by being alert and reporting them.

### **Mirage Resorts**

These properties have taken a very aggressive approach towards combating problem drinking and underage gambling. Treasure Island recently implemented a training program that focuses specifically on educating employees on house

policies and procedures, and how to effectively identify intoxicated patrons and underage gamblers and drinkers. The employee directive is to "do whatever it takes" to stay alert to these types of activities, thereby helping to ensure that the laws are implemented in full. Employees are required to revisit this program annually.

In March 1995, The Mirage hired a consultant to conduct training sessions with employees on the specifics of the laws against underage drinking and gambling. Ten sessions were held with 400 employees attending each session.

### **Tropicana**

Nearly two years ago, the Tropicana pulled together its operating properties, which at that time had their own policies relating to problem drinking and underage gambling, and developed a streamlined corporate policy. A company-wide alcohol awareness training program for front-line supervisors to top management is now being finalized. Like Boyd, the Tropicana has initiated an employee assistance program, and has hosted speakers on the subject.

## NEVADA RESORT ASSOCIATION TRAINING PROGRAM

While many members of the Nevada resort industry are conducting extensive in-house training programs specifically devoted to the awareness of intoxication, underage drinking and gambling, others are not. To encourage all Nevada Resort Association members to take the same steps, on May 17, 1995, the Association passed a resolution establishing a standardized alcohol awareness and underage gambling employee training program for its members.

Following is a suggested example of the Nevada Resort Association's new employee training program and an outline of the program's recommended elements.

The Nevada Resort Association will provide all members with the collateral materials needed to offer the program to all properties.

## SUGGESTED UNDERAGE GAMBLING AND ALCOHOL AWARENESS EMPLOYEE TRAINING PROGRAM

- A) House Policy and Procedures
  - Clear definition of house policies and procedures
  - Lines of authority: (management notification, etc.)
- B) Employee Awareness
  - Signs of intoxication
  - Techniques to inhibit intoxication
  - The law
  - Identifying underage patrons
  - Ramifications for the establishment and employees if violations occur.
- C) Customer, Player, and Guest Awareness
  - Literature and signage in gaming areas
  - Information in marketing newsletters
  - Public service announcements/radio advertising
  - Participation in casino properties speaker's bureau
- D) Identification Training
  - Acceptable identification
  - Verification of identification
  - Common falsification
  - Customer service techniques
- E) Training Collateral Elements
  - Training manual
  - Front-house signage
  - Paycheck stuffers
  - Back-of-house posters
  - Certificate of completion



*NEVADA RESORT ASSOCIATION PRESENTATION TO THE ASSEMBLY JUDICIARY COMMITTEE*

# APPENDICES



**BOYD GAMING**  
CORPORATION

**THE BOYD APPROACH:  
ACCEPTING OUR RESPONSIBILITY**

# THE BOYD APPROACH: ACCEPTING OUR RESPONSIBILITY

## I. Boyd Position Statement

## II. Alcohol Awareness

- A. Policy and Procedure
- B. Training Program

## III. Underage Gambling

- A. Policy and Procedure
- B. Training Program (21 to Play)
  - 1. Employee Awareness
  - 2. Customer Awareness
  - 3. Community Awareness



## BOYD POSITION STATEMENT


Gaming is a recreation industry specifically for adult entertainment. The vast majority of gaming customers access the services of the industry for the intended purpose—entertainment. For some individuals, however, the gaming experience is problematic.

We understand and accept that while casino activities do not cause compulsive gambling, underage gambling, or alcohol abuse, they do provide an opportunity to pursue these destructive behaviors.

Boyd Gaming Corporation accepts that we have a responsibility to the community to help mitigate these problems by providing diligent compliance with all laws and regulations, proactive education/information, and reactive treatment resource identification and information.

## ALCOHOL AWARENESS

## POLICY AND PROCEDURE

 <b>BOYD GAMING</b> <b>CENTRAL REGION</b>	<b>SUBJECT: Alcohol Awareness</b>
<b>EMPLOYMENT PRACTICES</b>	<b>POLICY NO. 1</b>
<b>POLICIES AND PROCEDURES</b>	<b>PAGE 1 OF 7</b>
<b>APPROVED BY:</b>	<b>EFFECTIVE DATE: 09/01/94</b>
	<b>REVISION DATE: 02/01/95</b>

**PURPOSE:**

To formalize and standardize the Company's approach to dealing with intoxicated patrons. The policy and procedures are necessary and must be complied with to minimize the liability of the company for any alcohol-related accidents, injuries or deaths; to maintain our position as a responsible corporate citizen and be in compliance with applicable laws and regulations.

**POLICY:**

It is the Company policy to be in compliance with all laws, regulations and/or ordinances pertaining to alcohol awareness.

Beyond this strict compliance, we will make a reasonable and prudent effort to assure that a person identified as being under the influence of alcohol is discouraged from operating a motor vehicle.

This "discouragement" will be within the scope of any expressed or implied legal authority and without illegal abridgement of individual rights.

We will make certain that all employees in job classifications (required either by city and/or county ordinance or by this policy) are trained and certified in Alcohol Awareness.

**PROCEDURES:**

The following procedures have been established for internal (inside resort) and external (outside resort) use, and for training and certification:

**SECTION I. INSIDE RESORT**

The highest ranking management member on property at the time of the incident in accordance with the following list will assume ultimate responsibility for actions taken:

1. Assistant General Manager
2. Night Manager
3. Casino Manager
4. Casino Shift Manager

Therefore, before any adversary action is taken against a patron, i.e., cutting off service, warning of Metro notification, etc., the management member will be notified and intercede or direct at his discretion.

1. Servers of Alcoholic Beverages (Bartenders, Bar Backs, Cocktail Servers, and Food Servers)
  - 1.1 Apply techniques learned in Alcohol Awareness training to inhibit intoxication.
  - 1.2 Avoid confrontations with patron.
  - 1.3 Contact Beverage Shift Supervisor.
2. Beverage Shift Supervisor
  - 2.1 Contact Security and have officer accompany, if possible.
  - 2.2 Assess the individual situation and take appropriate action.
    - 2.2.1 Discontinue serving alcohol
    - 2.2.2 If Hotel or RV Park guest, determine if destination is to room or RV Park. If patron will not be driving, further action not required in most cases.

<b>SUBJECT: Alcohol Awareness</b>	<b>POLICY NO. 1</b>
	<b>PAGE 3 of 7</b>

- 2.3 If determined that intoxicated patron is intending to drive, attempt departure delay or alternative transportation.
  - 2.3.1 Comp coffee (possibly meal) in Coffee Shop
  - 2.3.2 Taxi (patron pays)
  - 2.3.3 Locate family/friends to transport home
- 2.4 If patron becomes belligerent or obnoxious, notify Security Shift Supervisor on duty.
- 2.5 Document all incidents on the Department Incident Log - include at minimum:
  - 2.5.1 date & time
  - 2.5.2 casino location
  - 2.5.3 server who notified
  - 2.5.4 patron description
  - 2.5.5 description of incident
  - 2.5.6 statement of resolution
- 3. Security Shift Supervisor
  - 3.1 Appraised of circumstances by Beverage Shift Supervisor.
  - 3.2 Further attempts at departure delay or alternative transportation.
    - 3.2.1 Can authorize and arrange taxi transportation including payment by resort.
  - 3.3 If deemed appropriate, may caution patron that Metro will be notified of incident.
- 4. Prepare Incident report using standard report form and format. Additionally, include:
  - 4.1 observation of the patron's behavior
  - 4.2 positive identification of the patron
  - 4.3 list of property personnel who can substantiate and testify to the incident

SUBJECT: Alcohol Awareness	POLICY NO. 1
	PAGE 4 of 7

## SECTION II. OUTSIDE RESORT

### 1. Parking Attendant

- 1.1 If patron arrives at resort and appears to be intoxicated, take key and park car.
  - 1.1.1 Contact Security with information regarding patron.
- 1.2 If intoxicated patron requests vehicle, notify Security Shift Supervisor immediately.
  - 1.2.1 Attempt delaying delivery of vehicle
  - 1.2.2 Do not confront patron
- 1.3 Parking attendants will maintain a log of all incidents. The log will include:
  - 1.3.1 vehicle license number
  - 1.3.2 time and description of incident
  - 1.3.3 statement of resolution

### 2. Security Shift Supervisor

- 2.1 Assess individual circumstance.
- 2.2 Attempt departure delay or alternative transportation.
  - 2.2.1 Comp in Coffee Shop (notify Beverage Department of no further alcohol service)
  - 2.2.2 Locate family/friends to transport
  - 2.2.3 Taxi – resort pays if necessary
- 2.3 If patron insists on delivery of vehicle and is obviously under the influence:
  - 2.3.1 Notify Metro
  - 2.3.2 Hold keys until Metro arrives - give keys to Metro

<b>SUBJECT: Alcohol Awareness</b>	<b>POLICY NO. 1</b>
	<b>PAGE 5 of 7</b>

2.4 Complete Incident Report using standard report form and format. Additionally, include:

- 2.4.1 observation of the patron's behavior
- 2.4.2 positive identification of the patron
- 2.4.3 list of property personnel who can substantiate and testify to the incident.

### **SECTION III. - TRAINING/CERTIFICATION**

The Company provides an in-house training program called Controlling Alcohol Risks Effectively. The program utilizes a videotape and handouts in a classroom-style setting. All participants who successfully complete the course receive a certificate of training.

List of positions which require certification as a condition of employment is on the following page.



<b>SUBJECT: Alcohol Awareness</b>	<b>POLICY NO. 1</b>
	<b>PAGE 6 of 7</b>

**Positions which require certification as a condition of employment to comply with both the city and county ordinances and/or company policy.**

<u>JOB CODE</u>	<u>JOB TITLE</u>	<u>JOB CODE</u>	<u>JOB TITLE</u>
151	Assistant General Manager	461	Food Server
154	Asst. Casino Manager	352	Food Shift Supervisor
261	Asst. Chief of Security	191	Hotel Manager
201	Asst. Dir. of Food Services	186	Keno Manager
200	Asst. Dir. of Food and Beverage	320	Keno Shift Manager
265	Asst. Beverage Manager	407	Lead Security Officer
281	Asst. Slot Manager	502	Parking Attendant
366	Asst. Slot Shift Manager	193	R.V. Park Manager
342	Banquet Manager	523	R.V. Park Clerk
558	Banquet Server	158	Race and Sports Book Manager
416	Bar Back	188	Race Book Manager
415	Bartender	516	Race/Sports Cashier
165	Beverage Manager	517	Race/Sports Writer (Teller)
355	Beverage Shift Supervisor	269	Restaurant Operations Manager
190	Bingo Manager	351	Restaurant Manager
199	Bowling Center Manager	622	Room Service Server
356	Captain	526	Sales Cashier
189	Card Room Manager	527	Sales Clerk
157	Casino/Cage Credit Manager	331	Security Shift Supervisor
310	Casino Floorperson	532	Security Dispatcher
309	Casino Host	533	Security Officer - In
153	Casino Manager	552	Security Officer - Out
156	Casino Pit Boss	625	Showroom Server
155	Casino Shift Manager	626	Showroom Bus Person
273	Catering Manager	371	Slot Club Manager
159	Chief of Security	317	Slot Floorperson
439	Cocktail Server	316	Slot Host
173	Director of Administration	169	Slot Manager
163	Director of Food Services	315	Slot Shift Manager
198	Director of Hotel Operations	539	Snack Bar Attendant
172	Director of Human Resources	361	Specialty Room Head Person
152	Director of Night Operations	542	Specialty Food Server
171	Director of Operations	187	Sports Book Manager
370	Director of Slot Marketing	161	Store Manager
175	Director of Slot Operation	567	Store Lead Cashier
184	Employee Relations Manager	182	Vice President Casino Manager
104	Executive Vice President and General Manager	202	Western Dance Hall Manager

SUBJECT: Alcohol Awareness	POLICY NO. 1
	PAGE 7 of 7


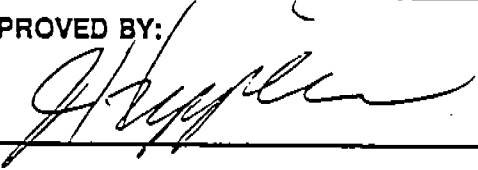
1. It is the responsibility of the Human Resources Department to maintain a master list of all employees who are certified, along with the date of certification.
2. It is the responsibility of the Human Resources Department to maintain a copy of the alcohol awareness certificate of training in the employee's personnel file.
3. Current employees who are promoted to or who transfer into any position in the above mentioned list will be trained.
4. The Department Manager/Supervisor will be responsible for making certain the employee attends the class, by rearranging the work schedule, if necessary.
5. Employees who fail to attend a class will not be allowed to work until they are trained.

## **TRAINING PROGRAM**

- \* Management, supervisory, and line employees will receive training and certification, if applicable, when their position involves serving and consumption of alcoholic beverages**
- \* Condition of employment to be educated in this area.**

## UNDERAGE GAMBLING

## POLICY AND PROCEDURE

 <b>BOYD GAMING</b> <small>CORPORATION</small>	<b>SUBJECT: Underage Gambling</b>
<b>EMPLOYMENT PRACTICES</b>	<b>POLICY NO. 91</b>
<b>POLICIES AND PROCEDURES</b>	<b>PAGE 1 OF 5</b>
<b>APPROVED BY:</b> 	<b>EFFECTIVE DATE: 01/01/95</b>
	<b>REVISION DATE:</b>

#### PURPOSE:

The Company has a strict policy against underage gambling in its gaming establishments. It is the intent of the Company to adhere to applicable laws and regulations related to underage gambling, and to maintain an exemplary record with all regulatory agencies where this concerns our exposure to underage violations.

#### POLICY:

It is the policy of Boyd Gaming Corporation to be in compliance with all laws, regulations, and/or ordinances pertaining to underage gambling.

Beyond this strict compliance, we will make a reasonable and prudent effort to assure a person identified as being under age will not be allowed to gamble, attempt to gamble, nor will he be allowed to loiter within the gaming areas of our establishments.

1. Employees in the gaming areas will receive training in:
  - identification of possible underage patrons;
  - age verification in a courteous, non-threatening manner;
  - how to politely request that underage individuals remove themselves from the gaming areas.

Gaming areas include all table games, slots, keno, race and sports, bingo, and the casino cage.

2. Employee training/education will be part of a broader company campaign entitled "21 to Play". This program includes public notification/education as well as

<b>SUBJECT: Underage Gambling</b>	<b>POLICY NO. 91</b>
	<b>PAGE 2 of 5</b>

employee training. It will include posters, notices, and public service announcements. All employees are expected to be familiar with this program and to actively support it.

3. The identification of underage gamblers and the removal process will be within the scope of any expressed or implied legal authority and without illegal abridgement of individual rights.

#### **PROCEDURES:**

1. Gaming Employees Non-Supervisory, Table Games
  - 1.1 Be on the alert for underage persons attempting to play, playing or loitering in the gaming areas.
  - 1.2 If the legal age of an individual is questionable, immediately notify a supervisor/manager or Security.
  - 1.3 Do not allow the individual to participate in gaming activity (place a wager or buy chips) until age is verified by supervisor/manager or security.
  - 1.4 The supervisor/manager or security will follow the procedures outlined in section 3 of this policy.
2. Gaming Employees Non-Supervisory, Slots, Keno, Race and Sports, Bingo, and Casino Cage

#### **Underage Patron Loitering In A Gaming Area**

- 2.1 Be on the alert for underage persons loitering in the gaming areas.
- 2.2 If the legal age on an individual is questionable, immediately ask for picture identification that includes date of birth. Approved identification includes a driver's license with photograph, a photo identification issued by a governmental agency or a passport.
- 2.3 Do not allow the individual to participate in gaming activity (place a wager, buy change, or cash chips) until age is verified.
- 2.4 If the patron is under age, has no identification, or the identification presented appears to be fake, ask the patron to leave.

<b>SUBJECT: Underage Gambling</b>	<b>POLICY NO. 91</b>
	<b>PAGE 3 of 5</b>

2.5 If the patron refuses to leave, call a supervisor/manager or security.

Underage Patrons Attempting To Play

2.6 Follow steps outlined in 2.1, 2.2, 2.3.

2.7 If the patron is under age, has no identification, or the identification appears to be fake, call a supervisor/manager or security.

2.8 The supervisor/manager or security officer, will log the incident or file an incident report.

2.9 The patron will be asked to leave.

Underage Patron Playing

2.91 Be on the alert for underage persons playing in the gaming area.

2.92 If the legal age on an individual is questionable, immediately ask for picture identification that includes date of birth. Approved identification includes a driver's license with photograph, a photo identification issued by a governmental agency or a passport.

2.93 Do not allow the individual to continue to participate in gaming activity (place a wager, buy chips or change, or cash chips or change) until age is verified.

2.94 If the patron is under age, has no identification, or the identification appears to be fake, call a supervisor/manager or security.

2.95 The supervisor/manager or security will complete an incident report.

2.96 The patron will be asked to leave.

2.97 If the patron becomes unruly, he will be 86ed by security from the property.



<b>SUBJECT: Underage Gambling</b>	<b>POLICY NO. 91</b>
	<b>PAGE 4 of 5</b>

### 3. Gaming Supervisors/Managers

- 3.1 Gaming supervisors/managers must be alert to persons in the gaming area who are loitering, attempting to gamble or gamble and appear to be underage.
- 3.2 Do not allow the individual to participate in gaming activity (place a wager, buy or sell change, buy or cash chips) until age is verified.
- 3.3 Gaming area supervisors/managers will politely ask for picture identification that includes date of birth. Approved identification includes a driver's license with photograph, a photo identification issued by a governmental agency or a passport.

If not of legal age, if the identification appears to be fake, or if acceptable identification is not available, explain that the law requires individuals must be at least 21 years of age to be in the gaming areas of a casino. Ask the individual to immediately leave the gaming area.

- 3.4 For incidents involving attempting to play, the incident must be logged or an incident report must be filed. For incidents involving play, Security must be called so an incident report can be completed.
- 3.5 The supervisor/manager will attempt to resolve any disputes in a non-adversarial manner.
- 3.6 If the individual refuses to leave or creates a disturbance, Security will be summoned.

### 4. Security

- 4.1 Security personnel have the same responsibility as supervisors/managers (outlined in Section 3) for the detection and removal of underage individuals from gaming areas.
- 4.2 Additionally, if summoned by a supervisor/manager, Security personnel will assess the situation and work with the supervisor/manager to affect removal. Except for extreme, documentable circumstances, physical force will not be used.
- 4.3 Formal "86" policy should be implemented for individuals known to be repeat offenders or determined to be unreasonable and/or offensive.

<b>SUBJECT: Underage Gambling</b>	<b>POLICY NO. 91</b>
	<b>PAGE 5 of 5</b>

5. Ultimate Authority/Responsibility

5.1 The Casino Shift Manager retains the ultimate authority/responsibility. The Shift Manager will be notified and make the final determination in all situations involving:

- 1) Disposition of funds (chips, credits, markers, or change)
- 2) Implementation of "86" procedures
- 3) Notification to local police
- 4) Notification to Gaming Control Board

6. Allowing underage gaming

6.1 Any employee that knowingly allows an individual under the age of 21 to gamble, subjects himself to disciplinary action up to and including discharge.

# **TRAINING PROGRAM**

**21 to Play**

## **EMPLOYEE AWARENESS**

1. Back of House Posters and Literature  
(Under Development)
2. On-Going Communication
  - a. Newsletters
  - b. Boyd Gaming Magazine
  - c. Payroll Stuffers for Current Employees
  - d. Covered in New Employee Orientation
3. All employees employed in a gaming area will be trained.

## **CUSTOMER AWARENESS**

1. Front of the House Notification  
(Under Development)

## **COMMUNITY AWARENESS**

1. Public Service Announcements
2. Speakers Bureau



**DEPARTMENT PROCEDURES  
COCKTAILS**

<b>SITUATION</b>	<b>ACTION</b>	<b>FOLLOW-UP</b>
Walking through a gaming	No action required	Observe
Loitering alone or with an adult in a gaming area or near a lounge	Verify proof of age	<b>Valid ID</b> - Politely thank for his/her cooperation  <b>Valid ID, but a minor</b> - Request minor to leave the gaming or lounge area and not return  <b>No ID</b> - Request individual to leave the gaming or lounge area and not return without proper ID  <b>Invalid or expired ID</b> - Request additional ID  <b>Fake ID</b> - Alert Cocktail Supervisor and Security
Gambling at a table game	Notify Floor Person	Follow directions of Floor Person
Gambling at a slot machine	Verify proof of age	Same as follow up for "Loitering alone or with an adult"
Refusing to leave a gaming or lounge area	Notify Security and record in Service Bar log	Same as follow up for "Loitering alone or with an adult"
Claiming ID previously checked	Verify proof of age	Same as follow up for "Loitering alone or with an adult"

Employees are responsible for enforcing this policy at all times, including when traveling to and from their work areas.



## MANAGEMENT POLICY 40

SUBJECT: MINORS IN THE CASINO

DATE ISSUED: 4/10/95

### POLICY

All employees are responsible for the prevention of underage gambling or loitering in the casino area by minors.

### PROCEDURE

1. The legal age for gambling in Nevada is 21 years. Minors are not permitted to gamble or patronize any gaming area of a casino. In addition, minors are not permitted to loiter or be employed in the casino area.
2. The casino area is defined as "any room or premises where gambling is operated or conducted." At the Mirage this includes anywhere within 10 feet of a licensed game (includes slots, poker, keno, and all table games) or inside the Race & Sports Book.
3. Minors are allowed to access the following areas:
  - Front Desk
  - Atrium
  - Any Retail Area
  - Arcade
  - Pool
  - Tiger Habitat
  - Dolphin Habitat
  - Elevator Lobby
  - Restaurants
  - Volcano
  - Any Outside Areas
4. Minors are permitted to pass through the casino area on the clearly marked carpet walkway only.
5. Employees are required to check the identification and verify the age of any person who appears to be under the age of 21 gambling or loitering in the casino area.



**MANAGEMENT POLICY 40**  
**MINORS IN THE CASINO**  
**PAGE 2**

6. Employees are required to instruct any person who does not have identification or who is under the age of 21 to leave the casino area in accordance with Nevada Revised Statute 463.350 prohibiting minors in the casino.
7. Employees are required to notify adults who are accompanying children and gambling or loitering to leave the casino area.
8. Employees should immediately notify their supervisors or Security if any minor or adult accompanying children refuses to leave the casino area.
9. Departments are required to establish specific procedures and training programs to ensure employee compliance with this policy.
10. Departments are required to communicate this policy and ensure all employees understand their responsibilities.
11. Employees who violate this policy are subject to disciplinary action.
12. Employees who violate the law may be guilty of a misdemeanor offense and prosecuted in accordance with Nevada Revised Statute 463.350. Violations may result in arrest, civil fines, and/or the revocation of their gaming/non-gaming card.
13. Employees may be criminally prosecuted for violation of the law even if they plead that they believed the person was 21 years old or older.

# MINORS IN THE CASINO - TRAINING OUTLINE

## **PHASE I - AWARENESS 3/95**

*Responsibility: Mirage Training Department*

Large Group Training

12 sessions

Outside Instructor

Awareness:

- Problem of Minors in the Casino
- The Law
- Mirage Policy

## **PHASE II - PROCEDURES 4/95**

*Responsibility: Division/Departments*

Departmental Training

Procedures Written

- Consistency in Verbiage and Format
- Hierarchy Established Within Divisions
- Department Specific Problems Addressed

DTM's Monitor Training

## **PHASE III - SPECIFICS 5/95**

*Responsibility: Training Department Initiated  
Conducted Through Team Leaders*

ID Identification Training

Training Department Developed and Presented

- Team Leaders Identified from Designated Departments
- Small Group Training Format
- One Hour Training Sessions
- Acceptable Identification
- Verification of Identification
- Common Falsification
- "Good Faith" Procedures
- Customer Service Techniques

Monitored by DTM's

## **PHASE IV - CONTINUANCE 5/95**

*Responsibility: Departments*

New Hire Training for Minors in the Casino

Team Leader Guide Addition

- Training Department Developed
- Leader's Guide Format
- Append Task Lists to Include
- Train Team Leaders in Phase III

Monitored by DTM's

# A Z T A R   C O R P O R A T I O N

## AN APPROACH TO INDUSTRY RESPONSIBILITY

draft 4-13-95

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# ALCOHOL AWARENESS

## A. POLICY AND PROCEDURE

AZTAR CORPORATION

POLICIES & PROCEDURES

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-----  
ADMINISTRATION

APPROVED BY:

TPMXXX

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SUBJECT:ALCOHOL AWARENESS

APPROVED BY:

EFFECTIVE DATE 1/1/95

REVISED DATE  
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PURPOSE:

To outline Aztar's approach to dealing with intoxicated patrons. The policy and procedures are implemented to minimize the liability of the company for any alcohol-related accidents, injuries or deaths; to reflect our position as a responsible corporate citizen; and to comply with applicable laws and regulations.

POLICY:

It is Aztar's policy to be in compliance with all laws, regulations and/or ordinances pertaining to alcohol use and awareness.

In addition to strict compliance with such laws, we will make concerted efforts to ensure that an individual suspected of being under the influence of alcohol at the legal limit is discouraged from operating a motor vehicle.

We will discourage such an individual within the scope of any expressed or implied legal authority and without illegal abridgement of individual rights.

Employees in pertinent job classifications (required either by city and/or county ordinances or by this policy) are trained and certified in Alcohol Awareness.

PROCEDURES:

The following procedures have been established for the property's use, and for training and certification:

INSIDE THE FACILITY

A. The highest ranking management member on property at the time of the incident will assume ultimate responsibility and authority for action taken. Therefore, before any adversarial action is taken against a patron, i.e., cutting off service, police notification, etc., the management member will be notified and intercede or direct at his/her discretion.

AZTAR CORPORATION

POLICIES & PROCEDURES

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ADMINISTRATION

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B. Servers of Alcoholic Beverages (Bartenders, Apprentice Bartenders, Cocktail Servers, and Food Servers)

1. Apply techniques learned in Alcohol Awareness training to discourage intoxication.
2. Avoid confrontations with patron.
3. Contact Beverage or Casino Management personnel if a problem arises.

C. Food and Beverage Management

1. Contact Security and have officer accompany, if possible.
2. Assess the individual situation and take appropriate action.
  - a. Discontinue serving alcohol
  - b. If Hotel guest, determine if destination is room. If patron will not be driving, further action may not be required.
3. If determined that intoxicated patron is intending to drive, attempt to delay departure or offer alternative transportation.
  - a. Comp coffe or food in restaurant
  - b. Taxi (patron pays)
  - c. Locate family/friends to transport home
4. If patron becomes belligerent or obnoxious, notify Security Shift Supervisor on duty.
5. Document all such incidents - include:
  - a. Date and time
  - b. Location
  - c. Server who notified
  - d. Patron description
  - e. Description of incident
  - f. Statement of resolution

AZTAR CORPORATION

POLICIES & PROCEDURES

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D. Security Shift Supervisor

1. Further attempts at delayed departure or alternative transportation.
2. Offer comp coffee or food in restaurant.
3. Authorize and arrange taxi transportation including payment by resort.
4. Attempt to locate family/friends to transport home.
5. Prepare incident report - include:
  - a. Observation of patron's behavior
  - b. Positive identification of the patron
  - c. List of property personnel who can substantiate and testify to the incident

OUTSIDE THE FACILITY

A. Parking Attendant

1. If patron arrives at resort and appears to be intoxicated:
  - a. Take key and park car
  - b. Contact Security with information regarding patron
2. If intoxicated patron requests vehicle, notify Security Shift Supervisor immediately.
  - a. Attempt delaying delivery of vehicle
  - b. Do not confront patron
3. Parking attendants will maintain a log of all incidents. The log should include:
  - a. Vehicle license number
  - b. Time and description of incident
  - c. Statement of resolution of incident



AZTAR CORPORATION

POLICIES & PROCEDURES

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ADMINISTRATION

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B. Security Shift Supervisor

1. Assess individual circumstances after being appraised by Parking Attendant.
2. Attempt departure delay or alternative transportation.
  - a. Comp in coffee shop (notify Beverage Department of no further alcohol service)
  - b. Attempt to locate family/friends to transport
  - c. Taxi - resort pays if necessary
3. If patron insists on delivery of vehicle and is obviously under the influence:
  - a. Notify police
  - b. Hold keys until police arrives - give keys to police
4. Prepare incident report - include:
  - a. Observation of the patron's behavior
  - b. Positive identification of the patron
  - c. List of property personnel who can substantiate and testify to the incident.

C. TRAINING/CERTIFICATION

Aztar provides in-house training programs such as Serving Alcohol with Care. These programs utilize videotape and handouts in a classroom-style setting. Participants who successfully complete the course receive a certificate of training. Other community entities also provide similar training and certification. A list of positions which require certification as a condition of employment is on the following page.

# UNDERAGE GAMBLING

## A. POLICY AND PROCEDURE

AZTAR CORPORATION

POLICIES & PROCEDURES

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-----  
ADMINISTRATION

APPROVED BY:

TPMXXX

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SUBJECT: UNDERAGE GAMBLING

APPROVED BY:

EFFECTIVE DATE: 1/1/95

REVISED DATE  
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PURPOSE:

Aztar strictly forbids underage gambling in its gaming properties. It is our intent to adhere to applicable laws and regulations related to underage gambling and to limit our exposure to underage gambling violations.

POLICY:

It is the policy of Aztar Corporation to be in compliance with relevant laws, regulations and/or ordinances pertaining to underage gambling. In our jurisdictions, individuals must be 21 years of age to gamble.

In addition to strict compliance with such laws, we will make concerted efforts to ensure individuals identified as being under age will not be allowed to gamble, attempt to gamble, nor will they be allowed to loiter within the gaming areas of our properties.

1. Employees working in our gaming areas will receive training in:

The identification of possible underage patrons;

Courteous inquiry about verification of age and requesting that underage individuals remove themselves immediately from the gaming areas.

Gaming areas include table games, slots, keno, race and sports and the casino cage of our casinos.

2. Employee training/education will be part of a broader corporate campaign entitled " ". This program includes public notification/education in addition to employee training. The campaign includes posters, notices and public service announcements. All employees are expected to be familiar with this program and to support it.

3. The identification of underage gamblers and the removal process will be within the scope of any expressed or implied legal authority and without illegal abridgement of individual rights.

PROCEDURES:

1. Gaming Employees (non-supervisory)- Table Games

a. Will be watchful for underage individuals attempting to play, playing or loitering in the gaming areas.

b. If the age of an individual is questionable, they will immediately notify a supervisor/manager or Security.

c. Do not allow the individual to participate or continue participating in gaming activities (place a wager or buy chips) until their age is verified by supervisor/manager or Security.

d. The supervisor/manager or Security will follow the procedures outlined in section 3 of this policy.

2. Gaming Employees (non-supervisory) - Slots, Keno, Race & Sports and Casino Cage areas

A. Underage individual loitering in gaming areas.

1. Will be watchful for underage persons loitering in the gaming areas.

2. If the age of an individual is questionable, immediately request an identification that includes date of birth. (Acceptable identification includes a driver's license with photograph, other photo identification issued by a governmental agency, or a passport.)

3. Will not allow the individual to participate in gaming activity (place a wager, buy change, or cash chips) until their age is verified.

4. If the individual is under age, has no identification, or the identification presented appears to be fraudulent, ask the person to leave.

5. If the individual refuses to leave, call a supervisor /manager or Security.

B. Underage Individuals Attempting to Play

1. Will be watchful for underage persons loitering in the gaming areas.

2. If the age of an individual is questionable, immediately request an identification that includes date of birth. (Acceptable identification includes a driver's license with photograph, other photo identification issued by a governmental agency, or a passport.)

3. Will not allow the individual to participate in gaming activity (place a wager, buy change, or cash chips) until their age is verified.

4. If the individual is under age, has no identification, or the identification presented appears to be fraudulent, ask the person to leave.

5. If the individual refuses to leave, call a supervisor /manager or Security.

#### C. Underage Patron Playing

1. Will be watchful for underage persons playing in the gaming areas.

2. If the age of an individual is questionable, immediately ask for picture identification that includes date of birth. Acceptable identification includes a driver's license with photograph, other photo identification issued by a governmental agency, or a passport.

3. Will not allow the individual to continue to participate in gaming activity (place a wager, buy chips or change, or cash chips or change) until their age is verified.

4. If the individual is under age, has no identification, or the identification appears to be fraudulent, call a supervisor/manager or Security.

5. The supervisor/manager or Security will ask the person to leave and will complete an incident report.

6. If the individual becomes unruly, he will be "trespassed" from the property by Security.

#### D. Gaming Supervisors/Managers

1. Gaming supervisors/managers must be alert to persons in the gaming area who are loitering, attempting to gamble or appear to be underage.

2. Will not allow the individual to participate in gaming activity (place a wager, buy or sell change, buy or cash chips) under their age is verified.

3. Gaming area supervisors/managers will politely request picture identification that includes date of birth. Acceptable identification includes a driver's license with photograph, photo identification issued by a governmental agency, or a passport.

If not of legal age, if the identification appears to be fraudulent, or if acceptable identification is not available, explain that the law requires individuals must be at least 21 years of age to be in the gaming areas of a casino. Ask the individual to immediately leave the gaming area.

4. For incidents involving play, the incident must be logged or an incident report must be filed. For incidents, Security must be called so an incident report can be compiled.

5. The supervisor/manager will attempt to resolve any disputes in a low-key, professional manner.

6. If the individual refuses to leave or creates a disturbance, Security will be summoned and the individual will be asked to leave or if necessary "trespassed" from the property.

#### E. Security Personnel

1. Security personnel have the same responsibility as supervisors/managers (outlined in Section 3) for the detection and removal of underage individuals from gaming areas.

2. Additionally, if summoned by an employee or by a supervisor/manager, Security personnel will assess the situation and work with the supervisor/manager to remove the underage individual from the gaming area.

3. Formal "trespass" policy should be implemented for individuals known to be repeat offenders or determined to be unreasonable and/or offensive.

#### F. Casino Shift Manager

1. The Casino Shift Manager retains the ultimate authority/responsibility in the identification and removal of underage individuals. The Casino Shift Manager will be notified by Security and/or Gaming supervisors/managers, and make the final determination in all situations involving:

- a. Disposition of funds (chips, credits, markers or change)
- b. Implementation of trespass procedures
- c. Notification to gaming authorities

#### G. OTHER

Any employee that knowingly allows an individual under the age of 21 to gamble, is subject to disciplinary action up to and including termination.