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

5 Damaso S. Puente, individually and on
6 behalf of the Estate of Damaso I. Puente;
7 Maria Puente;
8 Daniel Malone; and Diane Malone,
9 individually and on behalf of the Estate of
Christa Puente,

10 Appellants/Cross-Respondents,

11 vs.

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

14 Respondent/Cross Appellant.

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Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court No. 82554
Appeal of
District Court No. A813787

15
16 **APPENDIX TO APPELLANTS' OPENING BRIEF**

17
18 **VOLUME 2**

19 **Part 2 of 2**

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Cases I will value A Difference I. The Key to Hotel Safety

ADVOCATE
3/87
Edward Cronin

This is the first in a series of regular Advocate features about personal injury cases that made a difference in product safety and injury prevention. In the case of King v. Trans-Sterling, in which the lawyer for the plaintiff was ATLA Member Joseph I. Cronin of Minden, Nevada, the effects of the verdict were greater than the monetary award. Not only did the defendants take significant action to prevent future harm, but the verdict sent a message that was heeded by other potential defendants—in this instance the hotel industry of Las Vegas. Cases like these illustrate the deeply-held belief of ATLA and its membership that tort law can be a powerful instrument for the protection of the common safety.

On August 21, 1982, a Chicago woman, Julia Marie King, and her mother-in-law, Dorothy Williams, were vacationing at the Stardust Hotel and Casino in Las Vegas. That night they had been in the casino, and at about 10:30 Julia King went up to her room to pick up the tickets for a show that the two women were going to see at another hotel. Mrs. King used her room key to open the door. As she moved to turn on the light, she was grabbed by a man waiting in the room who held a knife to her throat and threatened to kill her if she screamed. She begged him not to hurt her. He used the knife to cut her dress and pantyhose from her body, and tied her hands behind her back with a curtain cord. He then took a washcloth, stuffed it in her mouth, and used her pantyhose to wrap the gag in place. He proceeded to rape her vaginally and rectally, tied her feet with more cord, rummaged through her purse (taking about \$60 in cash), and finally left the room.

At 11 o'clock Mrs. King's mother-in-law, who had become very concerned, asked a security guard to come with her to check the room, where they found Mrs. King naked, bound and gagged.

At the Las Vegas hospital where Mrs. King was treated, she required more sedation, according to the emergency room nurse, than had been administered to any of the more than 100 rape victims she had treated. When Julia King returned home to Chicago, she began treatment with a psychologist and continued in treatment for several years. An expert witness testified at the trial that Mrs. King suffered permanent and chronic post-traumatic stress disorder brought on as a result of the rape at the Stardust Hotel. She also developed a skin disorder diagnosed as a combination of lupus erythematosus and vitiligo, both diseases of the immune system, the onset of which was determined to have been precipitated by the trauma suffered as a result of the rape.

During the trial, a great deal of evidence was introduced about the security provided to guests at the Stardust Hotel. The system was a farce. Patrols of the building containing Mrs. King's room were sporadic at best, despite the fact that key-clock stations supposedly insured a regular foot patrol. The stations were unused on the day of the assault, had not been in use for months, and perhaps had never been used. Although more than 125 closed circuit video cameras were in operation at the hotel, the wing containing Mrs. King's room was totally unprotected. Guests were given a false sense of security by the strategic placement of "dummy" video cameras on the roof.

It also appeared that the Stardust lost an average of 500 keys per week to its guest rooms, and it could not be established that the rooms in Mrs. King's building had been rekeyed since its construction in 1957. Management was also aware of at least 101 master keys in circulation. No records were kept of lost master keys. To make matters worse, these master keys were of a type known as emergency keys, which can override the night latch, even if a guest is in the room. Expert witnesses testified that no operation should have more than one or two emergency master keys, and that these should be kept locked in a safe, logged in and out, and kept under strict management control. There was no question that the lack of a key control system and the lax security policies at the Stardust amounted to gross criminal negligence.

The lawsuit resulted on July 17, 1985, in a plaintiff's verdict in the amount of \$750,000 compensatory and \$2,500,000 punitive damages. Mrs. King was finally awarded \$821,000 (including interest), although the punitive damage award is still at issue. The question was argued before the Nevada Supreme Court on January 16, 1987 (Nevada has no intermediate Court of Appeals), and the opinion is expected in March.

Between the time of Mrs. King's rape in 1982 and the verdict, a period of almost three years, there was virtually no change in key-control policy at the Stardust. But as soon as the verdict was handed down, the Las Vegas hotel managers got the message. Joe Cronin learned that the Schlage Lock Company was deluged with requests for bids. By the spring of 1986, between 15,000 and 20,000

Las Vegas hotel rooms had been rekeyed with systems meeting national industry standards. At the Stardust, the entire 1,000-room Mercury building, where Mrs. King's room was located, had brand-new hardware of the latest design installed on the doors. Joe Cronin reports that "the immediate and salutary effect on consumer safety in Las Vegas remains a source of considerable pride to me as a professional." This is the kind of story, he believes, that "will assist our organization to combat the tidal wave of lies being disseminated nationwide by the insurance industry."

The Stardust Hotel story spread far beyond Nevada. Four months ago, Joe Cronin was in Chicago, checking a friend into the Palmer House. He noticed a state-of-the-art lock set prominently displayed at the registration desk in order to show guests how their locks worked. Cronin asked the desk clerk why the hotel used such a technologically advanced mechanism. "The word around here," the clerk said, "is that there was some case in Las Vegas where a huge award was made." Joe Cronin knew just what he meant. "It made me feel really good," he says.

Joe Cronin frequently visits Las Vegas, a vacation city where he believes hotel security is now excellent. And the Stardust Hotel, which has come under new ownership and management since the rape, is "with respect to security and locks and keys, perhaps the safest hotel in Las Vegas."

Have you tried a case in which the verdict had far-reaching effects beyond the individuals involved? Perhaps you reached an agreement with a defendant that involved not only a monetary award, but the taking of remedial action to prevent future harm. Let us know if you have been connected with a case that made a difference.

6-25-95

Assemblymen Batten, Manendo and Evans requested a roll call on Assemblyman Batten's motion.

Roll call on Assemblyman Batten's motion:

YEAS—8.

NAYS—Allard, Anderson, Arberry, Braunlin, Brower, Buckley, Carpenter, Chowning, Close, de Braga, Ernaut, Fetic, Freeman, Goldwater, Harrington, Humke, Krenzer, Lambert, Marvel, Monaghan, Neighbors, Perkins, Price, Sandoval, Schneider, Segerblom, Steel, Stroth, Tripple, Mr. Speaker Hettrick—30.

Absent—Nolan.

Not voting—Tiffany, Williams, Mr. Speaker Dini—3.

The motion having failed to receive a majority, Mr. Speaker declared the amendment lost.

Bill ordered reprinted, re-engrossed and to third reading.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Arberry moved that Assembly Bill No. 401 be re-referred to the Committee on Ways and Means.

Motion carried.

SECOND READING AND AMENDMENT

Senate Bill No. 424.

Bill read second time and ordered to third reading.

Senate Bill No. 433.

Bill read second time and ordered to third reading.

Senate Bill No. 462.

Bill read second time and ordered to third reading.

Senate Bill No. 474.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:
Amendment No. 1278.

Amend sec. 3, page 2, lines 13 and 14, by deleting "dangerous" and inserting "harmful".

Amend sec. 4, page 2, line 25, by deleting "In" and inserting: "1. Except as otherwise provided in subsection 2, in".

Amend sec. 4, page 2, line 29, by deleting "1." and inserting "(a)".

Amend sec. 4, page 2, line 32, by deleting "2." and inserting "(b)".

Amend sec. 4, page 2, line 34, by deleting "3." and inserting "(c)".

Amend sec. 4, page 2, line 37, by deleting: "subsection 1, 2 or 3" and inserting: "paragraph (a), (b) or (c)".

Amend sec. 4, page 2, between lines 40 and 41, by inserting:

"2. The limitations on liability set forth in subsection 1 do not apply to an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage."

Amend sec. 8, pages 3 and 4, by deleting lines 42 through 48 on page 3 and lines 1 through 5 on page 4 and inserting: "an employee under the control or supervision of the owner or keeper unless:

(a) *The wrongful act which caused the death or injury was foreseeable; and*

(b) *There is a preponderance of evidence that the owner or keeper did not exercise due care for the safety of the patron or other person on the premises.*

2. *An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse is civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee under the control or supervision of the owner or keeper if:*

(a) *The wrongful act which caused the death or injury was foreseeable; and*

(b) *The owner or keeper failed to take reasonable precautions against the foreseeable wrongful act.*

The court shall determine as a matter of law whether the wrongful act was foreseeable and whether the owner or keeper had a duty to take reasonable precautions against the foreseeable wrongful act of the person who caused the death or injury.

3. *For the purposes of this section, a wrongful act is not foreseeable unless:*

(a) *The owner or keeper failed to exercise due care for the safety of the patron or other person on the premises; or*

(b) *Prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.”*

Amend sec. 9, page 4, by deleting lines 13 through 32 and inserting: “in the absence of gross neglect by the owner or keeper.

2. [If an] *An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse in this state is not civilly liable for the theft, loss, damage or destruction of any property of a guest left in a guest room if:*

(a) *The owner or keeper provides a fireproof safe or vault in which guests may deposit property for safekeeping [, and notice] ;*

(b) *Notice of this service is personally given to a guest or posted in the office and the guest’s room [, the owner or keeper is not liable for the theft, loss, damage or destruction of any property which] ; and*

(c) *The property is not offered for deposit in the safe or vault by a guest , unless the owner or keeper is grossly negligent.*

3. *An owner or keeper is not obligated to receive property to deposit for safekeeping which exceeds \$750 in value or is of a size which cannot easily fit within the safe or vault.*

[3.] 4. *The liability of the owner or keeper [under this section] does not exceed the sum of \$750 for any property , including, but not limited to, property which is not deposited in a safe or vault because it cannot easily fit within the safe or vault, of an individual patron or guest, unless the owner or keeper receives the property for deposit for safekeeping and consents to assume a liability greater than \$750 for its theft, loss, damage [,] or destruction in a written agreement in which the patron or guest specifies the value of the property.”*

Amend sec. 11, page 4, by deleting lines 38 through 42 and inserting:
"Sec. 11. 1. The amendatory provisions of sections 1 to 9, inclusive, of this act are applicable to any action filed on or after the effective date of this act. Any action filed before the effective date of this act must be controlled by the applicable statutes in their prior form, any applicable common law and any applicable case law that construed the common law or the statutes in their prior form."

Assemblyman Anderson moved the adoption of the amendment.

Remarks by Assemblyman Anderson.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 475.

Bill read second time and ordered to third reading.

Senate Bill No. 477.

Bill read second time.

The following amendment was proposed by the Committee on Health and Human Services:

Amendment No. 1139.

Amend section 1, page 2, after line 8, by inserting:

"5. As used in this section, unless the context otherwise requires, "convention hall" means a facility which incorporates both space for exhibitions and a substantial number of smaller spaces for meetings, and which is primarily for use by trade shows, public shows, conventions or related activities."

Assemblyman Monaghan moved the adoption of the amendment.

Remarks by Assemblyman Monaghan.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 536.

Bill read second time.

The following amendment was proposed by the Committee on Commerce:

Amendment No. 1288.

Amend the bill as a whole by deleting sec. 48 and inserting:

"Sec. 48. (Deleted by amendment.)"

Assemblyman Tiffany moved the adoption of the amendment.

Remarks by Assemblyman Tiffany.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Perkins moved that Assembly Bills Nos. 467, 565, 621, 710, 732; Senate Bills Nos. 231, 283, 333, 349, 378 be placed on the Second Reading File.

Motion carried.

SENATE BILL NO. 474—COMMITTEE ON JUDICIARY

MAY 12, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages. (BDR 3-1965)

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; revising provisions governing civil liability of employers; revising provisions governing civil liability of keepers of specified accommodations for the public; revising provisions relating to punitive damages; 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.** NRS 41.085 is hereby amended to read as follows:
2 41.085 1. As used in this section, "heir" means a person who, under
3 the laws of this state, would be entitled to succeed to the separate property of
4 the decedent if he had died intestate.
5 2. When the death of any person, whether or not a minor, is caused by the
6 wrongful act or neglect of another, the heirs of the decedent and the personal
7 representatives of the decedent may each maintain an action for damages
8 against the person who caused the death, or if the wrongdoer is dead, against
9 his personal representatives, whether the wrongdoer died before or after the
10 death of the person he injured. If any other person is responsible for the
11 wrongful act or neglect, or if the wrongdoer is employed by another person
12 who is responsible for his conduct, the action may be maintained against that
13 other person, or if he is dead against his personal representatives.
14 3. An action brought by the heirs of a decedent pursuant to subsection 2
15 and the cause of action of that decedent brought or maintained by his personal
16 representatives which arose out of the same wrongful act or neglect may be
17 joined.
18 4. The heirs may prove their respective damages in the action brought
19 pursuant to subsection 2 and the court or jury may award each person
20 pecuniary damages for his grief or sorrow, loss of probable support, compan-
21 ionship, society, comfort and consortium, and damages for pain, suffering or
22 disfigurement of the decedent. The proceeds of any judgment for damages
23 awarded under this subsection are not liable for any debt of the decedent.

1 5. The damages recoverable by the personal representatives of a decedent
2 on behalf of his estate include:

3 (a) Any special damages, such as medical expenses, which the decedent
4 incurred or sustained before his death, and funeral expenses; and

5 (b) Any penalties, including, but not limited to, exemplary or punitive
6 damages, that the decedent would have recovered if he had lived,
7 but do not include damages for pain, suffering or disfigurement of the de-
8 cent. The proceeds of any judgment for damages awarded under this subsec-
9 tion are liable for the debts of the decedent unless exempted by law.

10 Sec. 2. Chapter 42 of NRS is hereby amended by adding thereto the
11 provisions set forth as sections 3 and 4 of this act.

12 Sec. 3. As used in this chapter, unless the context otherwise requires:

13 1. "Conscious disregard" means the knowledge of the probable harmful
14 consequences of a wrongful act and a willful and deliberate failure to act to
15 avoid those consequences.

16 2. "Fraud" means an intentional misrepresentation, deception or con-
17 cealment of a material fact known to the person with the intent to deprive
18 another person of his rights or property or to otherwise injure another
19 person.

20 3. "Malice, express or implied" means conduct which is intended to
21 injure a person or despicable conduct which is engaged in with a conscious
22 disregard of the rights or safety of others.

23 4. "Oppression" means despicable conduct that subjects a person to cruel
24 and unjust hardship with conscious disregard of the rights of the person.

25 Sec. 4. 1. Except as otherwise provided in subsection 2, in an action for
26 the breach of an obligation in which exemplary or punitive damages are
27 sought pursuant to subsection 1 of NRS 42.005 from an employer for the
28 wrongful act of his employee, the employer is not liable for the exemplary or
29 punitive damages unless:

30 (a) The employer had advance knowledge that the employee was unfit for
31 the purposes of the employment and employed him with a conscious disregard
32 of the rights or safety of others;

33 (b) The employer expressly authorized or ratified the wrongful act of the
34 employee for which the damages are awarded; or

35 (c) The employer is personally guilty of oppression, fraud or malice,
36 express or implied.

37 If the employer is a corporation, the employer is not liable for exemplary or
38 punitive damages unless the elements of paragraph (a), (b) or (c) are met by
39 an officer, director or managing agent of the corporation who was expressly
40 authorized to direct or ratify the employee's conduct on behalf of the
41 corporation.

42 2. The limitations on liability set forth in subsection 1 do not apply to an
43 action brought against an insurer who acts in bad faith regarding its obliga-
44 tions to provide insurance coverage.

45 Sec. 5. NRS 42.005 is hereby amended to read as follows:

46 42.005 1. [In] Except as otherwise provided in section 4 of this act, in an
47 action for the breach of an obligation not arising from contract, where it is
48 proven by clear and convincing evidence that the defendant has been guilty of

1 oppression, fraud or malice, express or implied, the plaintiff, in addition to
2 the compensatory damages, may recover damages for the sake of example
3 and by way of punishing the defendant. Except as otherwise provided in this
4 section or by specific statute, an award of exemplary or punitive damages
5 made pursuant to this section may not exceed:

6 (a) Three times the amount of compensatory damages awarded to the
7 plaintiff if the amount of compensatory damages is \$100,000 or more; or

8 (b) Three hundred thousand dollars if the amount of compensatory dam-
9 ages awarded to the plaintiff is less than \$100,000.

10 2. The limitations on the amount of an award of exemplary or punitive
11 damages prescribed in subsection 1 do not apply to an action brought against:

12 (a) A manufacturer, distributor or seller of a defective product;

13 (b) An insurer who acts in bad faith regarding its obligations to provide
14 insurance coverage;

15 (c) A person for violating a state or federal law prohibiting discriminatory
16 housing practices, if the law provides for a remedy of exemplary or punitive
17 damages in excess of the limitations prescribed in subsection 1;

18 (d) A person for damages or an injury caused by the emission, disposal or
19 spilling of a toxic, radioactive or hazardous material or waste; or

20 (e) A person for defamation.

21 3. If punitive damages are claimed pursuant to this section, the trier of fact
22 shall make a finding of whether such damages will be assessed. If such
23 damages are to be assessed, a subsequent proceeding must be conducted
24 before the same trier of fact to determine the amount of such damages to be
25 assessed. The trier of fact shall make a finding of the amount to be assessed
26 according to the provisions of this section. The findings required by this
27 section, if made by a jury, must be made by special verdict along with any
28 other required findings. The jury must not be instructed, or otherwise
29 advised, of the limitations on the amount of an award of punitive damages
30 prescribed in subsection 1.

31 4. Evidence of the financial condition of the defendant is not admissible
32 for the purpose of determining the amount of punitive damages to be assessed
33 until the commencement of the subsequent proceeding to determine the
34 amount of exemplary or punitive damages to be assessed.

35 **Sec. 6.** Chapter 651 of NRS is hereby amended by adding thereto the
36 provisions set forth as sections 7 and 8 of this act.

37 **Sec. 7.** *As used in NRS 651.010 to 651.040, inclusive, this section and*
38 *section 8 of this act, "premises" includes, but is not limited to, all buildings,*
39 *improvements, equipment and facilities, including any parking lot, recrea-*
40 *tional facility or other land, used or maintained in connection with a hotel,*
41 *inn, motel, motor court, boardinghouse or lodginghouse.*

42 **Sec. 8. 1.** *An owner or keeper of any hotel, inn, motel, motor court,*
43 *boardinghouse or lodginghouse is not civilly liable for the death or injury of a*
44 *patron or other person on the premises caused by another person who is not*
45 *an employee under the control or supervision of the owner or keeper unless:*

46 (a) *The wrongful act which caused the death or injury was foreseeable;*
47 *and*

1 (b) There is a preponderance of evidence that the owner or keeper did not
2 exercise due care for the safety of the patron or other person on the premises.

3 2. An owner or keeper of any hotel, inn, motel, motor court, boarding-
4 house or lodginghouse is civilly liable for the death or injury of a patron or
5 other person on the premises caused by another person who is not an
6 employee under the control or supervision of the owner or keeper if:

7 (a) The wrongful act which caused the death or injury was foreseeable;
8 and

9 (b) The owner or keeper failed to take reasonable precautions against the
10 foreseeable wrongful act.

11 The court shall determine as a matter of law whether the wrongful act was
12 foreseeable and whether the owner or keeper had a duty to take reasonable
13 precautions against the foreseeable wrongful act of the person who caused the
14 death or injury.

15 3. For the purposes of this section, a wrongful act is not foreseeable
16 unless:

17 (a) The owner or keeper failed to exercise due care for the safety of the
18 patron or other person on the premises; or

19 (b) Prior incidents of similar wrongful acts occurred on the premises and
20 the owner or keeper had notice or knowledge of those incidents.

21 Sec. 9. NRS 651.010 is hereby amended to read as follows:

22 651.010 1. An owner or keeper of any hotel, inn, motel, motor court,
23 boardinghouse or lodginghouse in this state is not civilly liable for the theft,
24 loss, damage or destruction of any property [left in the room of any guest or
25 left in a motor vehicle on the premises, including the parking facilities, of
26 such an establishment] brought by a patron upon the premises or left in a
27 motor vehicle upon the premises because of theft, burglary, fire or otherwise,
28 in the absence of gross neglect by the owner or keeper.

29 2. [If an] An owner or keeper of any hotel, inn, motel, motor court,
30 boardinghouse or lodginghouse in this state is not civilly liable for the theft,
31 loss, damage or destruction of any property of a guest left in a guest room if:

32 (a) The owner or keeper provides a fireproof safe or vault in which guests
33 may deposit property for safekeeping [, and notice] ;

34 (b) Notice of this service is personally given to a guest or posted in the
35 office and the guest's room [, the owner or keeper is not liable for the theft,
36 loss, damage or destruction of any property which] ; and

37 (c) The property is not offered for deposit in the safe or vault by a guest ,
38 unless the owner or keeper is grossly negligent.

39 3. An owner or keeper is not obligated to receive property to deposit for
40 safekeeping which exceeds \$750 in value or is of a size which cannot easily fit
41 within the safe or vault.

42 [3.] 4. The liability of the owner or keeper [under this section] does not
43 exceed the sum of \$750 for any property , including, but not limited to,
44 property which is not deposited in a safe or vault because it cannot easily fit
45 within the safe or vault, of an individual patron or guest, unless the owner or
46 keeper receives the property for deposit for safekeeping and consents to

1 assume a liability greater than \$750 for its theft, loss, damage [,] or destruc-
2 tion in a written agreement in which the *patron or* guest specifies the value of
3 the property.

4 **Sec. 10.** Chapter 681A of NRS is hereby amended by adding thereto a
5 new section to read as follows:

6 *An insurer may insure against legal liability for exemplary or punitive*
7 *damages that do not arise from a wrongful act of the insured committed with*
8 *the intent to cause injury to another.*

9 **Sec. 11.** 1. The amendatory provisions of sections 1 to 9, inclusive, of
10 this act are applicable to any action filed on or after the effective date of this
11 act. Any action filed before the effective date of this act must be controlled by
12 the applicable statutes in their prior form, any applicable common law and
13 any applicable case law that construed the common law or the statutes in their
14 prior form.

15 2. If any provision of this section, or the application thereof to any person,
16 thing or circumstance is held invalid, the invalidity of that provision does not
17 affect the provisions or applicability of this section or sections 1 to 10,
18 inclusive, of this act which can be given effect without the invalid provision
19 or application, and to this end the provisions of this section are severable.
20 The provisions of this subsection do not affect the operation or applicability of
21 NRS 0.020 to the provisions of sections 1 to 10, inclusive, of this act.

22 **Sec. 12.** This act becomes effective upon passage and approval.

6-27-95

Senate Bill No. 474.

Bill read third time.

The following amendment was proposed by the Committee on Judiciary:
Amendment No. 1340.

Amend sec. 3, page 2, line 12, by deleting "requires:" and inserting:
"requires and except as otherwise provided in subsection 5 of NRS
42.005:".

Amend sec. 5, page 3, between lines 34 and 35, by inserting:

"5. For the purposes of an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage, the definitions set forth in section 3 of this act are not applicable and the corresponding provisions of the common law apply."

Assemblyman Anderson moved the adoption of the amendment.

Remarks by Assemblyman Anderson.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Perkins moved that Assembly Bills Nos. 475, 696, 728; Senate Bills Nos. 72, 344, 374, 443, 505 be placed on the General File immediately following Assembly Bill No. 715.

Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 181.

Bill read third time.

Remarks by Assemblymen Marvel and Carpenter.

Potential conflict of interest declared by Assemblymen Evans and Price.

Roll call on Assembly Bill No. 181:

YEAS—40.

NAYS—None.

Not voting—Evans, Harrington—2.

Assembly Bill No. 181 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Perkins moved that Assembly Bill No. 695 be taken from its position on the General File and placed at the bottom of the General File.
Motion carried.

Assemblyman Anderson moved that Senate Bill No. 531 be taken from the General File and placed on the Chief Clerk's desk.

Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 622.

Bill read third time.

SENATE BILL NO. 474—COMMITTEE ON JUDICIARY

MAY 12, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages. (BDR 3-1965)

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; revising provisions governing civil liability of employers; revising provisions governing civil liability of keepers of specified accommodations for the public; revising provisions relating to punitive damages; 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. NRS 41.085 is hereby amended to read as follows:
2 41.085 1. As used in this section, "heir" means a person who, under
3 the laws of this state, would be entitled to succeed to the separate property of
4 the decedent if he had died intestate.
5 2. When the death of any person, whether or not a minor, is caused by the
6 wrongful act or neglect of another, the heirs of the decedent and the personal
7 representatives of the decedent may each maintain an action for damages
8 against the person who caused the death, or if the wrongdoer is dead, against
9 his personal representatives, whether the wrongdoer died before or after the
10 death of the person he injured. If any other person is responsible for the
11 wrongful act or neglect, or if the wrongdoer is employed by another person
12 who is responsible for his conduct, the action may be maintained against that
13 other person, or if he is dead against his personal representatives.
14 3. An action brought by the heirs of a decedent pursuant to subsection 2
15 and the cause of action of that decedent brought or maintained by his personal
16 representatives which arose out of the same wrongful act or neglect may be
17 joined.
18 4. The heirs may prove their respective damages in the action brought
19 pursuant to subsection 2 and the court or jury may award each person
20 pecuniary damages for his grief or sorrow, loss of probable support, compan-
21 ionship, society, comfort and consortium, and damages for pain, suffering or
22 disfigurement of the decedent. The proceeds of any judgment for damages
23 awarded under this subsection are not liable for any debt of the decedent.

1 5. The damages recoverable by the personal representatives of a decedent
2 on behalf of his estate include:

3 (a) Any special damages, such as medical expenses, which the decedent
4 incurred or sustained before his death, and funeral expenses; and

5 (b) Any penalties, including, but not limited to, exemplary or punitive
6 damages, that the decedent would have recovered if he had lived,
7 but do not include damages for pain, suffering or disfigurement of the de-
8 cent. The proceeds of any judgment for damages awarded under this subsec-
9 tion are liable for the debts of the decedent unless exempted by law.

10 Sec. 2. Chapter 42 of NRS is hereby amended by adding thereto the
11 provisions set forth as sections 3 and 4 of this act.

12 Sec. 3. As used in this chapter, unless the context otherwise requires and
13 except as otherwise provided in subsection 5 of NRS 42.005:

14 1. "Conscious disregard" means the knowledge of the probable harmful
15 consequences of a wrongful act and a willful and deliberate failure to act to
16 avoid those consequences.

17 2. "Fraud" means an intentional misrepresentation, deception or con-
18 cealment of a material fact known to the person with the intent to deprive
19 another person of his rights or property or to otherwise injure another
20 person.

21 3. "Malice, express or implied" means conduct which is intended to
22 injure a person or despicable conduct which is engaged in with a conscious
23 disregard of the rights or safety of others.

24 4. "Oppression" means despicable conduct that subjects a person to cruel
25 and unjust hardship with conscious disregard of the rights of the person.

26 Sec. 4. 1. Except as otherwise provided in subsection 2, in an action for
27 the breach of an obligation in which exemplary or punitive damages are
28 sought pursuant to subsection 1 of NRS 42.005 from an employer for the
29 wrongful act of his employee, the employer is not liable for the exemplary or
30 punitive damages unless:

31 (a) The employer had advance knowledge that the employee was unfit for
32 the purposes of the employment and employed him with a conscious disregard
33 of the rights or safety of others;

34 (b) The employer expressly authorized or ratified the wrongful act of the
35 employee for which the damages are awarded; or

36 (c) The employer is personally guilty of oppression, fraud or malice,
37 express or implied.

38 If the employer is a corporation, the employer is not liable for exemplary or
39 punitive damages unless the elements of paragraph (a), (b) or (c) are met by
40 an officer, director or managing agent of the corporation who was expressly
41 authorized to direct or ratify the employee's conduct on behalf of the
42 corporation.

43 2. The limitations on liability set forth in subsection 1 do not apply to an
44 action brought against an insurer who acts in bad faith regarding its obliga-
45 tions to provide insurance coverage.

46 Sec. 5. NRS 42.005 is hereby amended to read as follows:

47 42.005 1. [In] Except as otherwise provided in section 4 of this act, in an
48 action for the breach of an obligation not arising from contract, where it is

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1 proven by clear and convincing evidence that the defendant has been guilty of
2 oppression, fraud or malice, express or implied, the plaintiff, in addition to
3 the compensatory damages, may recover damages for the sake of example
4 and by way of punishing the defendant. Except as otherwise provided in this
5 section or by specific statute, an award of exemplary or punitive damages
6 made pursuant to this section may not exceed:

7 (a) Three times the amount of compensatory damages awarded to the
8 plaintiff if the amount of compensatory damages is \$100,000 or more; or

9 (b) Three hundred thousand dollars if the amount of compensatory dam-
10 ages awarded to the plaintiff is less than \$100,000.

11 2. The limitations on the amount of an award of exemplary or punitive
12 damages prescribed in subsection 1 do not apply to an action brought against:

13 (a) A manufacturer, distributor or seller of a defective product;

14 (b) An insurer who acts in bad faith regarding its obligations to provide
15 insurance coverage;

16 (c) A person for violating a state or federal law prohibiting discriminatory
17 housing practices, if the law provides for a remedy of exemplary or punitive
18 damages in excess of the limitations prescribed in subsection 1;

19 (d) A person for damages or an injury caused by the emission, disposal or
20 spilling of a toxic, radioactive or hazardous material or waste; or

21 (e) A person for defamation.

22 3. If punitive damages are claimed pursuant to this section, the trier of fact
23 shall make a finding of whether such damages will be assessed. If such
24 damages are to be assessed, a subsequent proceeding must be conducted
25 before the same trier of fact to determine the amount of such damages to be
26 assessed. The trier of fact shall make a finding of the amount to be assessed
27 according to the provisions of this section. The findings required by this
28 section, if made by a jury, must be made by special verdict along with any
29 other required findings. The jury must not be instructed, or otherwise
30 advised, of the limitations on the amount of an award of punitive damages
31 prescribed in subsection 1.

32 4. Evidence of the financial condition of the defendant is not admissible
33 for the purpose of determining the amount of punitive damages to be assessed
34 until the commencement of the subsequent proceeding to determine the
35 amount of exemplary or punitive damages to be assessed.

36 5. *For the purposes of an action brought against an insurer who acts in*
37 *bad faith regarding its obligations to provide insurance coverage, the defini-*
38 *tions set forth in section 3 of this act are not applicable and the corresponding*
39 *provisions of the common law apply.*

40 Sec. 6. Chapter 651 of NRS is hereby amended by adding thereto the
41 provisions set forth as sections 7 and 8 of this act.

42 Sec. 7. *As used in NRS 651.010 to 651.040, inclusive, this section and*
43 *section 8 of this act, "premises" includes, but is not limited to, all buildings,*
44 *improvements, equipment and facilities, including any parking lot, recrea-*
45 *tional facility or other land, used or maintained in connection with a hotel,*
46 *inn, motel, motor court, boardinghouse or lodginghouse.*

47 Sec. 8. 1. *An owner or keeper of any hotel, inn, motel, motor court,*
48 *boardinghouse or lodginghouse is not civilly liable for the death or injury of a*

1 patron or other person on the premises caused by another person who is not
2 an employee under the control or supervision of the owner or keeper unless:

3 (a) The wrongful act which caused the death or injury was foreseeable;
4 and

5 (b) There is a preponderance of evidence that the owner or keeper did not
6 exercise due care for the safety of the patron or other person on the premises.

7 2. An owner or keeper of any hotel, inn, motel, motor court, boarding-
8 house or lodginghouse is civilly liable for the death or injury of a patron or
9 other person on the premises caused by another person who is not an
10 employee under the control or supervision of the owner or keeper if:

11 (a) The wrongful act which caused the death or injury was foreseeable;
12 and

13 (b) The owner or keeper failed to take reasonable precautions against the
14 foreseeable wrongful act.

15 The court shall determine as a matter of law whether the wrongful act was
16 foreseeable and whether the owner or keeper had a duty to take reasonable
17 precautions against the foreseeable wrongful act of the person who caused the
18 death or injury.

19 3. For the purposes of this section, a wrongful act is not foreseeable
20 unless:

21 (a) The owner or keeper failed to exercise due care for the safety of the
22 patron or other person on the premises; or

23 (b) Prior incidents of similar wrongful acts occurred on the premises and
24 the owner or keeper had notice or knowledge of those incidents.

25 Sec. 9. NRS 651.010 is hereby amended to read as follows:

26 651.010 1. An owner or keeper of any hotel, inn, motel, motor court,
27 boardinghouse or lodginghouse in this state is not civilly liable for the theft,
28 loss, damage or destruction of any property [left in the room of any guest or
29 left in a motor vehicle on the premises, including the parking facilities, of
30 such an establishment] brought by a patron upon the premises or left in a
31 motor vehicle upon the premises because of theft, burglary, fire or otherwise,
32 in the absence of gross neglect by the owner or keeper.

33 2. [If an] An owner or keeper of any hotel, inn, motel, motor court,
34 boardinghouse or lodginghouse in this state is not civilly liable for the theft,
35 loss, damage or destruction of any property of a guest left in a guest room if:

36 (a) The owner or keeper provides a fireproof safe or vault in which guests
37 may deposit property for safekeeping [, and notice] ;

38 (b) Notice of this service is personally given to a guest or posted in the
39 office and the guest's room [, the owner or keeper is not liable for the theft,
40 loss, damage or destruction of any property which] ; and

41 (c) The property is not offered for deposit in the safe or vault by a guest ,
42 unless the owner or keeper is grossly negligent.

43 3. An owner or keeper is not obligated to receive property to deposit for
44 safekeeping which exceeds \$750 in value or is of a size which cannot easily fit
45 within the safe or vault.

46 [3.] 4. The liability of the owner or keeper [under this section] does not
47 exceed the sum of \$750 for any property , including, but not limited to,
48 property which is not deposited in a safe or vault because it cannot easily fit

1 *within the safe or vault, of an individual patron or guest, unless the owner or*
2 *keeper receives the property for deposit for safekeeping and consents to*
3 *assume a liability greater than \$750 for its theft, loss, damage [,] or destruc-*
4 *tion in a written agreement in which the patron or guest specifies the value of*
5 *the property.*

6 **Sec. 10.** Chapter 681A of NRS is hereby amended by adding thereto a
7 new section to read as follows:

8 *An insurer may insure against legal liability for exemplary or punitive*
9 *damages that do not arise from a wrongful act of the insured committed with*
10 *the intent to cause injury to another.*

11 **Sec. 11.** 1. The amendatory provisions of sections 1 to 9, inclusive, of
12 this act are applicable to any action filed on or after the effective date of this
13 act. Any action filed before the effective date of this act must be controlled by
14 the applicable statutes in their prior form, any applicable common law and
15 any applicable case law that construed the common law or the statutes in their
16 prior form.

17 2. If any provision of this section, or the application thereof to any person,
18 thing or circumstance is held invalid, the invalidity of that provision does not
19 affect the provisions or applicability of this section or sections 1 to 10,
20 inclusive, of this act which can be given effect without the invalid provision
21 or application, and to this end the provisions of this section are severable.
22 The provisions of this subsection do not affect the operation or applicability of
23 NRS 0.020 to the provisions of sections 1 to 10, inclusive, of this act.

24 **Sec. 12.** This act becomes effective upon passage and approval.

6-28-95

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 474.

Bill read third time.

Remarks by Assemblyman Buckley.

Roll call on Senate Bill No. 474:

YEAS—41.

NAYS—None.

Absent—Carpenter.

Senate Bill No. 474 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 519.

Bill read third time.

Remarks by Assemblyman Stroth.

Roll call on Senate Bill No. 519:

YEAS—41.

NAYS—None.

Absent—Carpenter.

Senate Bill No. 519 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 526.

Bill read third time.

Remarks by Assemblyman Evans.

Roll call on Senate Bill No. 526:

YEAS—32.

NAYS—Close, Giunchigliani, Humke, Monaghan, Ohrenschall, Price, Sandoval, Spittler, Tiffany—9.

Absent—Carpenter.

Senate Bill No. 526 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 234.

Bill read third time.

Remarks by Assemblymen Goldwater and Harrington.

Roll call on Senate Bill No. 234:

YEAS—29.

NAYS—Bache, Batten, de Braga, Ernaut, Evans, Giunchigliani, Lambert, Marvel, Monaghan, Segerblom, Tripple—11.

Absent—Carpenter.

Not voting—Freeman.

Senate Bill No. 234 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Sixty-eighth Session
June 29, 1995**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 1:45 p.m., on Thursday, June 29, 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:

Senator Randolph J. Townsend, Washoe County Senatorial District No. 4

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Lori Story, Committee Secretary

OTHERS PRESENT:

William A. Prezant, Lobbyist, The Doctors' Company
Rick Dunn, Executive Director, Nevada Coalition Allied for Patient Protection
Bill Bradley, Lobbyist, Nevada Trial Lawyers Association
Victoria D. Riley, Lobbyist, Nevada Trial Lawyers Association
Sheila A. Smith, Deputy Attorney General, Human Resources Division, Office of the
Attorney General

Senate Committee on Judiciary
June 29, 1995
Page 26

At the top of page 6, Senator James indicated the insertion in line 4 after the word "organization" the words "who shall, pursuant to the authority of the insurance commissioner, as set forth in [NRS] 679B, conduct a study."

Mr. Bradley said:

I think if we don't say that normally when there's a dismissal it's without prejudice, the insurance commissioner is going to have to decide that, and we're trying to keep decisions away from the insurance commissioner. If the panel dismisses it, I think we don't need to put it in the statute ... but the intent behind it should be without prejudice so that the insurance commissioner doesn't have to repeatedly decide motions whether to dismiss or not."

Senator James responded he believes it is without prejudice unless it is beyond the statute of limitations.

Senator James announced his intention to call a floor meeting to take action along the lines just discussed. He requested committee members to speak up if they have any questions or comments. With no more comment, Senator James closed the hearing on A.B. 520. He turned to the first reprint of a bill for which the Assembly proposed two amendments, Amendments No. 1340 and 1278 to S.B. 474.

SENATE BILL 474: Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages.

Asked to explain the changes, Allison Combs, Senior Research Analyst, called attention to the second page, lines 13 and 14, where she indicated the word "dangerous" was changed to "harmful," under the definition of "conscious disregard." On the same page a new subsection 2 in section 4 is being added just before section 5, she said, which will state:

The limitations on liability set forth in subsection 1 do not apply to an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage.

Ms. Combs stated on page 3 lines 43 through 48 will be deleted, which will replace subsections 1 and 2 of section 8. Senator James interjected "The employer's not

Senate Committee on Judiciary
June 29, 1995
Page 27

liable for the action of an employee under the control or supervision of the owner or keeper unless ... there's a wrongful act which caused the death or injury which was foreseeable, and a preponderance of the evidence the owner did not exercise care for the safety of the patron," which he called a due-care standard.

According to Senator James, the Assembly added the owner or keeper of a hotel will be civilly liable for death or injury of a patron or other person on the premises caused by another person who is not an employee, under certain circumstances. He explained that is language regarding a person who may come onto the premises and commit a rape or other crime. He noted the liability applies if the act was foreseeable and the owner failed to exercise reasonable precautions, another due-care standard.

Senator James read the following language:

The court will determine as a matter of law whether the wrongful conduct was foreseeable and whether the owner or keeper had duty to take reasonable precautions.

He stated that is language similar to what the Senate originally used, which will allow a summary judgment motion. Continuing, he read:

For purposes of this section, an act is not foreseeable unless the owner failed to exercise due care, or where prior incidents of similar acts occurred on the premises and the owner had knowledge of those incidents and didn't do something to prevent those.

Senator James deemed the amendments to be largely technical. He asked if the committee understood the amendments and had further questions or comments.

SENATOR TITUS MOVED TO CONCUR IN AMENDMENTS NO. 1340
AND 1278 TO S.B. 474.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR ADLER ABSTAINED. SENATOR
WASHINGTON WAS ABSENT FOR THE VOTE.)

* * * * *

Senate Bill No. 498—Committee on Judiciary

CHAPTER 690

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.

[Approved July 6, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT 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.

Senate Bill No. 474—Committee on Judiciary

CHAPTER 691

AN ACT relating to civil actions; revising provisions governing civil liability of employers; revising provisions governing civil liability of keepers of specified accommodations for the public; revising provisions relating to punitive damages; and providing other matters properly relating thereto.

[Approved July 6, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.085 is hereby amended to read as follows:

41.085 1. As used in this section, "heir" means a person who, under the laws of this state, would be entitled to succeed to the separate property of the decedent if he had died intestate.

2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is dead against his personal representatives.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by his personal representatives which arose out of the same wrongful act or neglect may be joined.

4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

5. The damages recoverable by the personal representatives of a decedent on behalf of his estate include:

(a) Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses; and

(b) Any penalties, *including, but not limited to, exemplary or punitive damages*, that the decedent would have recovered if he had lived, but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

Sec. 2. Chapter 42 of NRS is hereby amended by adding thereto the provisions set forth as sections 3 and 4 of this act.

Sec. 3. As used in this chapter, unless the context otherwise requires and except as otherwise provided in subsection 5 of NRS 42.005:

1. *“Conscious disregard” means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.*

2. *“Fraud” means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.*

3. *“Malice, express or implied” means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.*

4. *“Oppression” means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.*

Sec. 4. 1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:

(a) *The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;*

(b) *The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or*

(c) *The employer is personally guilty of oppression, fraud or malice, express or implied.*

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by

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an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

2. The limitations on liability set forth in subsection 1 do not apply to an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage.

Sec. 5. NRS 42.005 is hereby amended to read as follows:

42.005 1. [In] *Except as otherwise provided in section 4 of this act, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:*

(a) *Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is \$100,000 or more; or*

(b) *Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than \$100,000.*

2. *The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:*

(a) *A manufacturer, distributor or seller of a defective product;*

(b) *An insurer who acts in bad faith regarding its obligations to provide insurance coverage;*

(c) *A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;*

(d) *A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or*

(e) *A person for defamation.*

3. *If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.*

4. *Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.*

5. *For the purposes of an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage, the definitions set forth in section 3 of this act are not applicable and the corresponding provisions of the common law apply.*

Sec. 6. Chapter 651 of NRS is hereby amended by adding thereto the provisions set forth as sections 7 and 8 of this act.

Sec. 7. *As used in NRS 651.010 to 651.040, inclusive, this section and section 8 of this act, "premises" includes, but is not limited to, all buildings, improvements, equipment and facilities, including any parking lot, recreational facility or other land, used or maintained in connection with a hotel, inn, motel, motor court, boardinghouse or lodginghouse.*

Sec. 8. 1. *An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse is not civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee under the control or supervision of the owner or keeper unless:*

(a) *The wrongful act which caused the death or injury was foreseeable; and*

(b) *There is a preponderance of evidence that the owner or keeper did not exercise due care for the safety of the patron or other person on the premises.*

2. *An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse is civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee under the control or supervision of the owner or keeper if:*

(a) *The wrongful act which caused the death or injury was foreseeable; and*

(b) *The owner or keeper failed to take reasonable precautions against the foreseeable wrongful act.*

The court shall determine as a matter of law whether the wrongful act was foreseeable and whether the owner or keeper had a duty to take reasonable precautions against the foreseeable wrongful act of the person who caused the death or injury.

3. *For the purposes of this section, a wrongful act is not foreseeable unless:*

(a) *The owner or keeper failed to exercise due care for the safety of the patron or other person on the premises; or*

(b) *Prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.*

Sec. 9. NRS 651.010 is hereby amended to read as follows:

651.010 1. *An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse in this state is not civilly liable for the theft, loss, damage or destruction of any property [left in the room of any guest or left in a motor vehicle on the premises, including the parking facilities, of such an establishment] brought by a patron upon the premises or left in a motor vehicle upon the premises because of theft, burglary, fire or otherwise, in the absence of gross neglect by the owner or keeper.*

2. *[If an] An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse in this state is not civilly liable for the theft, loss, damage or destruction of any property of a guest left in a guest room if:*

(a) *The owner or keeper provides a fireproof safe or vault in which guests may deposit property for safekeeping [, and notice] ;*

(b) *Notice of this service is personally given to a guest or posted in the office and the guest's room [, the owner or keeper is not liable for the theft, loss, damage or destruction of any property which] ; and*

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(c) *The property* is not offered for deposit in the safe or vault by a guest , unless the owner or keeper is grossly negligent.

3. An owner or keeper is not obligated to receive property to deposit for safekeeping which exceeds \$750 in value or is of a size which cannot easily fit within the safe or vault.

[3.] 4. The liability of the owner or keeper [under this section] does not exceed the sum of \$750 for any property , *including, but not limited to, property which is not deposited in a safe or vault because it cannot easily fit within the safe or vault,* of an individual *patron or* guest, unless the owner or keeper receives the property for deposit for safekeeping and consents to assume a liability greater than \$750 for its theft, loss, damage [,] or destruction in a written agreement in which the *patron or* guest specifies the value of the property.

Sec. 10. Chapter 681A of NRS is hereby amended by adding thereto a new section to read as follows:

An insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with the intent to cause injury to another.

Sec. 11. 1. The amendatory provisions of sections 1 to 9, inclusive, of this act are applicable to any action filed on or after the effective date of this act. Any action filed before the effective date of this act must be controlled by the applicable statutes in their prior form, any applicable common law and any applicable case law that construed the common law or the statutes in their prior form.

2. If any provision of this section, or the application thereof to any person, thing or circumstance is held invalid, the invalidity of that provision does not affect the provisions or applicability of this section or sections 1 to 10, inclusive, of this act which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable. The provisions of this subsection do not affect the operation or applicability of NRS 0.020 to the provisions of sections 1 to 10, inclusive, of this act.

Sec. 12. This act becomes effective upon passage and approval.



Senate Committee on Judiciary
February 8, 2007
Page 16

CHAIR AMODEI:

The hearing is closed on S.B. 14 and opened on S.B. 7.

SENATE BILL 7: Establishes civil liability for certain acts involving the use of controlled substances and the consumption of alcoholic beverages. (BDR 3-53)

SENATOR VALERIE WIENER (Clark County, Senatorial District No. 3):

I submitted my written testimony ([Exhibit E](#)). I sent a memorandum dated February 8, 2007 ([Exhibit F](#)) to Senator Amodei and the Senate Committee on Judiciary on legislation that would impose certain liabilities related to social hosting with the following attachments: a chart which shows risky youth behavior related to alcohol consumption; a survey which shows adult attitudes toward underage drinking; a chart which indicates states that have social-hosting laws and a letter in support of S.B. 7. In addition, I submitted Proposed Amendment 3125 to Senate Bill No. 7 ([Exhibit G](#)).

JOHN R. JOHANSEN (Highway Safety Representative, Office of Traffic Safety, Department of Public Safety):

I submitted a packet of information relative to social hosting ([Exhibit H](#)). As a federally funded state employee involved in traffic safety, I am neutral and take neither a pro or con position on S.B. 7.

I will explain the information contained in [Exhibit H](#). The "National Survey of Accountability, Norms and Judgments" was done by the School of Public Health at the University of Minnesota. The "National Survey of American Attitudes on Substance Abuse IX: Teen Dating Practices and Sexual Activity" is the eleventh survey of teens and parents done by the National Center on Addiction and Substance Abuse at Columbia University. The study for "Reducing Harmful Alcohol-Related Behaviors: Effective Regulatory Methods" was done by the Center for Health Policy, Law and Management from Duke University. Liability laws of other states were obtained from the Mothers Against Drunk Driving (MADD) Website. Age groups in the Department of Education 2005 Nevada Youth Risk Behavior survey were typically middle and high school students. Information contained herein is relative to the high school age group. Finally, data on teens involved in traffic fatalities is from the Office of Traffic Safety.

The "National Survey of Accountability, Norms and Judgments" was a national survey of approximately 7,000 civilian adults. Vignettes were described in

which the server could be a bartender or parent who served an adult or juvenile resulting in an automobile accident or property damage. They were trying to determine the degree of culpability of each individual involved—the server and the guest. Bars were held to a higher standard than individuals. Bars are licensed, must obey certain laws and require training. Both parents and bars that condone drinking by minors were held to a higher standard when a teen was involved. The degree of damage caused by an automobile accident did not change with the degree of culpability by either party; they were able to distinguish between a horrific crash and knocking down a fence.

The survey by Columbia University of American Attitudes on Substance Abuse included 1,297 teens and 562 parents. We were looking at what teens were telling us and what their parents thought was happening. Eighty percent of parents believed marijuana or alcohol was available at parties attended by their teens. Half the teens said they attended parties where alcohol and drugs were available. Ninety-eight percent of parents said they were normally present at parties allowed in their home. Thirty-one percent of teens reported parents were rarely or never present at parties they attended. Ninety-nine percent of parents said they would not serve alcohol at their teen's party, and 28 percent of teen partygoers went to parties where alcohol was consumed and parents were present.

Regarding reducing harmful behaviors, a great number of different laws were reviewed with respect to traffic fatalities and crashes. The report concludes, although several criminal and administrative regulations are also effective in reducing episodic drinking and drunk driving, the imposition of tort liability represents a useful addition to the arsenal of alcohol-control policies.

MR. JOHANSEN:

The other states category in [Exhibit H](#) includes 50 states and Washington, District of Columbia. Of these, 42 have dramshop laws specifically targeting the licensed providers; 32 have social host laws similar to [S.B. 7](#); 31 have both; and 8 states, including Nevada, have neither.

Senator Wiener's data on the youth risk behavior survey agreed with data in [Exhibit H](#) that 41 percent of the youth surveyed used alcohol within 30 days; 24.8 percent did binge drinking—5 drinks in a short period of time on one occasion; 36 percent obtained alcohol from home and 10.4 percent drove after drinking.

The final two charts encompass teen involvement in traffic crashes with fatalities; teens are not always the ones that die. In the Teen Traffic Crashes chart, the total for 2003 requires explanation. Of 53 teen drivers involved in fatal crashes in 2003, 25 tested negative for alcohol, 21 were unknown, 7 tested positive for alcohol and 5 of these tested above 0.08 blood alcohol content (BAC). Of the 144 teens involved in fatal crashes between 2003 and 2005, 20 tested positive for alcohol, and 14—70 percent—were above the 0.08 BAC limit.

The chart BAC by Age: 2003-2005 showed no fatalities due to alcohol for age 15. There was 1 fatality for age 16 with a BAC above 0.08. Ages 17 and 19 were responsible for 12 percent of alcohol-related crashes. Age 18 showed 1 out of 4 fatal crashes. The danger area is clearly 17, 18 and 19 years of age, which is the age teens attend parties.

MICHAEL D. GEESER (American Automobile Association Nevada):

I worked with Senator Wiener on S.B. 7 and will support it as long as the word "knowingly" is added. Senator Wiener asked me to address the issue of punitive damages and its effect on insurance companies. Punitive damages punish an individual who cannot be covered under an insurance policy. The problem is the policy and the law require a carrier to defend an insurer and the duty to defend is broader than the duty to provide coverage. Even though there is no coverage for punitive damages, there is still a duty to defend and protect the insured against a punitive damage claim. While supporting S.B. 7, we are asked to defend a person, which puts the insurance company in an awkward position. As long as the word "knowingly" is present, punitive damages punish the offender. The question is whether punitive damages are part of this bill.

ROBERT L. COMPAN (Farmers Insurance):

I echo Mr. Geeser's sentiments. We also spoke with Senator Wiener on this issue. As long as the word "knowingly" is added to section 1, subsections 1 and 2 of S.B. 7, we support the bill.

Punitive damages are an issue with our insurance contract. We have a duty to defend when a lawsuit is filed on behalf of our insured for a claim made against civil tort liability in the same case.

CHAIR AMODEI:

Should S.B. 7 pass, what impact would punitive damages have on insurance rates?

MR. COMPAN:

Punitive damages may impact insurance rates in the future. If it becomes an issue, it would be a rated item and the factor would be whether a minor is in the home. I have no idea how the rates would be affected.

CHAIR AMODEI:

For purposes of homeowner or automobile insurance, if there is minor involvement and a statute with a punitive damage provision, would insurance companies take that into account when crunching numbers for Nevada?

MR. GEESER:

It would be a rating factor on homeowner policies on a case-by-case basis.

SENATOR CARE:

Can insurance companies issue a policy that covers certain conducts and not others?

MR. COMPAN:

There are exclusions in policies, such as intentional acts. If an adult intentionally provides alcoholic beverages, the insurance company has the right to deny the claim based on that premise. The inclusion of the term "knowingly" provides the opportunity to deny claims on intentional acts; however, cases will exist in which minors enter the house unintentionally, even though it is spelled out in the statute under "knowingly." Ambiguous language may trigger the mechanism of the policy-to-defend cases should there be punitive damages involved.

ROBERT R. JENSEN (President, Nevada Trial Lawyers Association):

I speak in favor of S.B. 7, which is a well-tailored, carefully considered bill. Dramshop liability is imposed on people for furnishing alcohol or controlled substances. The concept of not imposing liability on someone who furnishes alcohol to a minor, particularly in a situation where people are driving, is abhorrent. Minors should not drink and parents and/or other adults should not furnish alcohol to minors. Adults should be made responsible if they are allowing minors to drink. With Senator Wiener's amendment, [Exhibit G](#), and the addition

of the word "knowingly," I see no reason for not imposing liability on an adult in this event.

I am concerned by comments that the term "knowingly" could trigger insurance companies to deny coverage in this case and victims of this unnecessary conduct receive compensation for severe or significant injury. The purpose of tort law is to deter wrong conduct and provide an avenue of justice for people to receive compensation for medical expenses, lost wages, injuries, and pain and suffering endured as a result of that conduct.

I will speak about increasing expenses for insurers in this situation. I am involved in a suit for a client where a drunk individual, driving 80 miles per hour, rear-ended my client who was driving 40 miles per hour within the speed limit. The insurance company had a duty to defend under their policy and provided a defense counsel. Additional work by the defense counsel defending the punitive damage claim is fairly minor; it would not cause a dramatic increase in expenses for insurers just because they defend a punitive damage claim.

KATHLYN BARTOSZ (Juvenile Justice Specialist, Division of Child and Family Services, Department of Health and Human Services):

I will read my prepared testimony ([Exhibit I](#)). A brochure entitled, "Nevada's Enforcing Underage Drinking Laws (EUDL) Project" ([Exhibit J](#)) demonstrates examples of environmental strategies. One of the more highlighted strategies is limiting access through business sources. Peter Krueger and the Nevada Petroleum Marketers & Convenience Store Association were one of the first to work with law enforcement.

The survey entitled "The Nevada State Department of Education's Office of Child Nutrition and School Health, Nevada Youth Risk Behavior Survey Results" ([Exhibit K](#)) shows the number of youths reporting having a drink in the past 30 days was 53 percent in 1999 and is presently 41 percent. Although still high, a decrease of 11 percent is significant in a short period of time. Two trends that worsened are parents and social access to alcohol.

Unfortunately, the chart entitled "The Nevada State Department of Education's Office of Child Nutrition and School Health, Nevada Youth Risk Behavior Survey Results—Alcohol Related, 2001 to 2005 MIDDLE SCHOOL SURVEYS" ([Exhibit L](#)) demonstrates no changes in this age group.

KEVIN QUINT (Executive Director, Join Together Northern Nevada):

I will read my prepared testimony ([Exhibit M](#)), which addresses prevention of underage drinking and access to alcohol.

SENATOR CARE:

Does the language in the amendment to [S.B. 7](#), [Exhibit G](#), change the standard of care? As originally written, the bill addresses parents who leave the house for three days and tell their child it is permissible to throw a party. The amendment states a parent is present in the house and knows consumption of alcohol is taking place. Would passage of [S.B. 7](#) with the proposed amendment and the word "knowingly" preclude an action where the parent is not present?

MR. JENSEN:

Nevada case law on negligent entrustment indicates liability may be imposed on somebody who negligently entrusts a vehicle to a person they know is incompetent or reckless. The bar is set high under case law for imposing liability for negligent entrustment. In the original bill without the word "knowingly," if the parents were gone, alcohol was available and somebody drove a vehicle—or was shoved—into the swimming pool, there probably would be no liability imposed. If the parents left, the children had a party, something happened and the parents told the children not to do it again, it still would not impose liability. If the situation happened a second or third time, the court would attempt to reasonably apply the law handed down by the Legislature. A jury would view the case in a reasonable setting and, under those circumstances, there would be potential for liability. Including the word "knowingly" in [S.B. 7](#) increases immunity from liability.

I was comfortable with the bill as originally written without the word "knowingly." The object of tort law is to provide compensation under just circumstances. It is a just circumstance to hold parents or other adults accountable for giving minors alcohol and allowing them to injure people while driving or under other circumstances. I originally thought there would be insurance coverage because the parent's conduct in serving alcoholic beverages to underage people is an intentional act; however, I am not sure it is an act in which they intend a person to sustain injury. Another concern about adding the word "knowingly" was from the standpoint of the families of people killed or seriously injured, such as in the event of a paraplegic, loss of an arm or leg, or chronic pain for the remainder of their life.

As an attorney, I have observed seriously injured people with no source of recovery or compensation. I hoped this bill would be tailored to provide insurance coverage and not impose a high standard for recovery. It must be viewed with common sense. Parents should not necessarily be held responsible if they leave the house for an hour or two and their teenage son drinks alcohol and inadvertently injures someone. That is not the intent of S.B. 7; on the contrary, this bill targets parents or adults who know they are providing alcohol to teens and aware there is potential to harm.

SENATOR CARE:

If adding the word "knowingly" is the sponsor's wish, I am comfortable with it.

SANDY HEVERLY (Executive Director, Stop Driving Under the Influence):

I have been involved in the anti-drunk driving movement for 23 years and worked with thousands of innocent DUI victims throughout Nevada and across the country. Stop DUI believes S.B. 7 will encourage civil liability, accountability and a conscience for those with no compunction about providing or allowing alcohol or other drugs to be consumed by minors. Senate Bill 7 would also help diffuse the myth that consumption of alcohol by minors is an acceptable rite of passage. Social drinking norms in today's society do not view underage alcohol consumption as a rite of passage or socially acceptable behavior. A national survey showed 83 percent of adults are in favor of laws that impose fines on adults who provide alcohol to minors. Stop DUI concurs with that survey and supports passage of S.B. 7.

LAUREL A. STADLER (President, Mothers Against Drunk Driving-Lyon County Chapter):

The mission of MADD is to stop drunken driving, support victims of this violent crime and prevent underage drinking. We would rather see the crimes of DUI and underage drinking not happen than sanction offenders and console victims. We see the social host law as a deterrent to parents and other adults from providing alcohol to minors. Many times, adults are not inspired to do things because they are right or wrong; they are often inspired to do the right thing when dollars are associated with their behavior.

We have worked with many victims over the years. At present, a case is pending in which juveniles were at an underage drinking party, two of them left the party, the driver caused a crash and the passenger was killed. It is sad to see parents of an 18-year-old high school student killed in a car crash after

drinking at a party. Parents who receive money due to the social-hosting law know it never replaces their lost child, but it may act as a deterrent to future party hosts allowing alcohol.

ROBERT ROSHAK (Sergeant, Las Vegas Metropolitan Police Department; Nevada Sheriffs' and Chiefs' Association):
Law enforcement considers S.B. 7 another tool of great benefit to help reduce juvenile drinking and driving.

TIMOTHY KUZANEK (Lieutenant, Washoe County Sheriff's Office; Nevada Sheriffs' and Chiefs' Association):
We support S.B. 7 as a means to deter things happening in our area on an ongoing basis to which we must respond.

SENATOR WIENER MOVED TO AMEND AND DO PASS AS
AMENDED S.B. 7.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

Let me open the hearing on Senate Bill 7 (1st Reprint).

Senate Bill 7 (1st Reprint): Establishes civil liability for certain acts involving the use of controlled substances and the consumption of alcoholic beverages. (BDR 3-53)

[Chairman Anderson returned to room.]

Senator Valerie Wiener, Clark County Senatorial District No. 3:

[Read from prepared testimony ([Exhibit C](#)) and submitted memorandum ([Exhibit D](#)).]

Chairman Anderson:

I come from a background where my parents would have thought it unsociable for children not to have alcohol when it is served as part of a family dinner. My mother would have thought it offensive to not offer alcohol to someone who came to the house because she came from Europe and had a different tradition. There are some religions that have alcohol as part of their communion services, but it is a very small consumption of alcohol. If you are at a dinner party or wedding and alcohol is being served and the child takes some and then leaves the party and is involved in an accident, would that put the host at risk?

Senator Wiener:

This bill is used if an inebriated behavior causes damage to person or property. There is a provision about the person who owns or is responsible for the premises providing alcohol. Based on the facts of the case and evidentiary findings, attorneys would present the facts. If the person knowingly had control

of the premises and knowingly provided alcohol, there would probably be a civil cause of action.

Assemblyman Carpenter:

What about the situation of punitive damages? Is that necessary to be included?

Senator Wiener:

It would be part of the case that is developed. It may be appropriate if this is a recurring behavior. We have situations in southern Nevada where law enforcement is repeatedly called to households where parties are hosted by adults and children are constantly provided with alcoholic beverages. Law enforcement is involved and yet those scenarios continue to occur. That may be where they would bring it for punitive damages because it is a recurring behavior.

Assemblyman Horne:

I am in support of this bill. I appreciate Senator Wiener's hard work and the changes she has made to the bill. I have heard parents saying "at least I know they are doing it at home where they are safe." But if they leave and cause damage or hurt somebody else, it is not unreasonable that the parent should be held liable. If they allow that practice and allow their children's friends to come over and drink as well, then they should be liable for any actions resulting from that.

Assemblyman Mabey:

I have concerns about vendors. From your handout, it looks like most states have a law against vendors that would knowingly sell alcohol to a minor. This bill would exclude that.

Senator Wiener:

The major distinction with this bill was to address the social hosting component where someone is engaged with an underage drinker. The vendors are selling to people who are of legal age. I am not addressing that part of it because it is already illegal to provide alcohol to them. This addressed when damage occurs because somebody should be held accountable for that. They were already doing something illegal. This only addresses when damage is caused by an underage drinker who was provided the alcohol by someone who knew better.

Assemblyman Mabey:

Let us say that there is a club who knowingly serves alcohol to someone who is underage. Would they be held liable under this bill?

Senator Wiener:

No, not under this bill, but they would certainly be liable under other laws in the State of Nevada.

Chairman Anderson:

I understand that a vendor could be charged for serving an underage drinker, but would he be held liable for the damages that were caused by that underage drinker if he were involved in an accident?

Senator Wiener:

My attempt was to address the social setting where we see an epidemic of this happening. I wanted to address this piece of it because we have had established Dram Shop law for quite a long time.

Assemblyman Ohrenschall:

Do most of the states that have the social hosting law provide any kind of religious exemption for the Friday night service where wine is part of the religious observation?

Senator Wiener:

This law does not create liability for that situation unless there is damage that results because of an inebriated state. This does not capture anything about what happens until there is damage. It is not aimed toward the participation in the religious experience or the celebration; it is the inebriated underage drinker causing harm to person or property.

Assemblyman Ohrenschall:

You do not foresee this proposed statute keeping an observant Jewish family from letting their children have wine on Sabbath or during mass?

Senator Wiener:

Coming from that background, no, I do not.

Assemblyman Goedhart:

I realize the intent of the bill is to go for the social hosting, and I applaud that attempt. But the last sentence in Section 2, subsection 3 seems to set out an exclusion from any negligence in a civil action if you are a vendor. Why did we have to go to that degree to exclude them from negligence?

Senator Wiener:

That is current law. The attempt is towards the social hosting component because it is gaping, and we are having more and more occurrences.

Assemblyman Segerblom:

I support this bill. Have you looked to see whether the injured party could go after the homeowner's policy for the social host and would this bill help or hurt that aspect?

Senator Wiener:

There are insurance representatives who will address that. The "knowingly" standard was something that also addressed their concerns because it does raise the bar much higher. That was a response to what your concerns were last session in this Committee and concerns from the insurance industry.

Assemblyman Segerblom:

Personally, I would prefer to have the homeowner's policy available, which would be a less-than-knowingly standard.

Senator Wiener:

There are those who do not like the "knowingly" standard, so it was a compromise.

Assemblyman Mabey:

If a person bought some liquor and next night some of his friends came over and got drunk and went out driving, would that be qualified as "knowingly"?

Senator Wiener:

I was hoping that using "knowingly" would raise the bar higher, but I would defer to counsel about that.

Risa Lang, Committee Counsel:

Adding "knowingly" was to have it be more of an intentional act, so that it would have to be proven in court that there was some intent by leaving the drink there, expecting the person would take it and drink it.

Assemblyman Carpenter:

It says that you would be liable for the damage resulting from the consumption of alcohol. Would there be a test to confirm that they were inebriated? Somebody could have a drink and not be impaired and get into an accident.

Senator Wiener:

I would agree with that. There is a reference to inebriated, so evidence would have to be shown to determine that piece of the case. A civil case is different than a criminal case, but they still have to make their case to prove inebriation. Then it would go back to who caused the inebriated state or provided the

alcohol which caused the inebriated state. That would be a piece of evidence that would have to be presented.

Assemblyman Manendo:

I have concerns about the furnishing of alcohol in the scenario that Assemblyman Mabey raised. The parents know they have alcohol in the house. Even if they do not serve it, they knowingly furnish it because it is there. I am wondering if we may need to tighten that up.

Senator Wiener:

With the intent language of "knowingly," it raises the standard much higher. "Furnish" was used in the bill last session, but based off of your past concerns, "knowingly" was used to raise the bar much higher.

John R. Johansen, Representative, Office of Traffic Safety, Department of Public Safety:

I will take you through the handout I submitted ([Exhibit E](#)). It is very difficult for us to capture fatalities and injuries in the official database as a direct result of a social hosting situation. There is a national survey of accountability and judgments which is a national survey of over 7,000 people that used vignettes, such as if a person who knowingly served teens is good or bad compared to a bar knowingly serving teens, et cetera.

The next is a national survey of attitudes on substance abuse. The disconnection between the adults and the teenagers is large. What adults believe and what teens are telling us is very interesting. In all cases, bars are considered more liable than social hosts. We expect more of a bar because they are licensed and trained to do the right thing in the service of alcohol. However, both social hosts and bars are more accountable when teens are involved. Interestingly, parents who knowingly serve teens are held equally accountable, except for a bar who has repeated violations of service to teens. As a parent, I believe certain things that my children do or do not do or experience. As a teen, they tell us something differently. Eighty percent of parents say alcohol and marijuana are not available at teen parties. The teens say it is easily available in at least half of the parties they attend. Ninety-eight percent of parents say they are present during teen parties at their house. The teens say that one out of three times parents are not present. Ninety-nine percent of parents say they are not willing to serve alcohol to teens, but 28 percent of the time the teens say they are.

Several criminal and administrative regulations were also effective in reducing heavy episodic drinking and drunk driving. The imposition of tort liability

represents a useful addition to the arsenal of tools to reduce both teenage drinking and teenage drinking and driving and other harmful behaviors.

There is a specific distinction between Dram Shop laws and the social host laws. There are only eight states that do not have any type of liability laws such as Dram Shop or social hosting. Nevada is one of those states. There were a total of 144 teen car accidents from 2003 to 2005. Of those, 20, or 13.9 percent, involved alcohol. Of those 20, 14 times, or 70 percent of the time, the teen was above the legal limit for an adult, which is .08 blood alcohol content (BAC). When teens drink, they have a tendency to drink a lot. At age 16, there is not much of a problem with alcohol because it is the first year of driving. However, at age 17, 18, and 19 alcohol becomes a serious problem for our teen drivers. That is also the age where we are beginning to host parties for teens. There are not a lot of parties who serve alcohol to 16-year-olds, but there are many who will serve to 17-, 18-, or 19-year-olds.

Chairman Anderson:

Ms. Bartosz, I see you have handed out information ([Exhibit F](#)) and the "Stand Tall Don't Fall" brochure ([Exhibit G](#)).

Kathy Bartosz, Statewide Coordinator, Enforcing Underage Drinking Laws Project for the State of Nevada:

In response to a congressional request, the Institute of Medicine and the National Research Council of the National Academy of Science formed a committee to develop a strategy to reduce and prevent underage drinking. In the final report to Congress by the committee, they identified three broad things that are now driving activities in many of the states across the country: reduction of the availability of alcohol, reducing the occasion and the opportunity, and reducing the demand for alcohol among young people.

Demand reduction usually focuses on the youth themselves with knowledge- and skill-based instruction with minimal emphasis on the environment. However, holding youth solely responsible for preventing underage drinking is somewhat like holding a canary responsible for dying in a poisoned mine shaft. His death is simply an indication that there is a problem within the environment. Based on the National Academy's report, environmental strategies are critical in addition to continuing our ongoing knowledge- and skill-based education for children.

An example of an environmental strategy includes limiting business and social access to alcohol. In the blue brochure ([Exhibit G](#)), you will see some examples and environmental strategies that are currently being funded with the Enforcing Underage Drinking Laws grant to the State. As you will see, many of them emphasize law enforcement operations, compliance checks in stores to ensure

that they are not selling to underage patrons, insuring that people are not going into the stores attempting to purchase for the young person waiting for them in the parking lot and other activities, as well as looking at the number of fake identification cards we have circulating within the State that are easily accessible off of 31,000 websites.

We are encouraged by what we see in the environmental strategies with the compliance checks which we started in 1999. Fifty-two percent of businesses were selling to underage decoys. At the beginning of this year, we saw the statewide compliance rates were in the 77 to 78 percentage range, which includes new liquor licensees coming in and new clerks coming on board. In most instances when clerks sell to a minor, the fine is from \$300 to \$600 for that clerk. That is quite an incentive to be checking identification and not selling to anyone who looks younger than their grandmother. It has been quite effective.

Please look at the high school table I handed out. Although we are still very concerned with the number of youth engaging these types of high-risk behaviors, we are really encouraged by the downward trend in some of the engagement in those activities. One that is particularly encouraging is the amount of youth that believe they are causing themselves harm by having five or more drinks. We are seeing a downward trend of 16 percent from 2001. As you will notice, the two circumstances that have actually gone up are those that deal with the home environment. The numbers have gone up 4 percent for those teens who drink alcohol getting their alcoholic beverage from home. There was a minimal increase of 1.6 percent who think that parents or guardians would approve or not care. It is interesting that those trends are actually going up when all of the other ones seem to be going down. We believe it has to do with the restriction of access through businesses and outside sources.

The statistic that is particularly disturbing to me is the middle school chart. We are seeing little if any significant change among our middle school youth in terms of response to the education they have been receiving or any significant changes in the home or community environment around underage drinking. Teen parties constitute one of the highest settings for youth alcohol problems. Young people report their heaviest drinking at large parties with peers. Almost all of them are underage and usually in someone else's residence. The teen parties frequently lack adequate adult supervision and can lead to serious health and safety problems beyond drunk driving. There have been incidences of violence, rape, sexual violence, alcohol poisoning, and other drug abuse. The parties also provide a venue for introducing young teens to a heavier drinking culture. In one study, we had older teens, age 17, 18, and 19, report breaking

in younger teens, age 14, 15, and 16, at teen parties by encouraging them to become very intoxicated with drinking games. The most popular one we are now seeing is called "beer pong."

Communities report that many parents have a high tolerance for teen parties and allow them to occur on their property with their knowledge, but often without any supervision. This tolerance apparently stems from their misconceptions or beliefs that alcohol is a relatively harmless drug compared to illegal drugs, and that alcohol consumption is part of the passage into adulthood. I never care for the term "gateway drug" when we talk about alcohol, but that is how it is perceived. Common misconceptions are that permitting consumption in a residential setting is safer than having it appear in open areas where there is a higher risk for problems, and that teenage drinking is inevitable. Unfortunately, these misconceptions do not take into consideration the difference in teen drinking between when the parents were teens and what the young people are doing now.

One major difference is the size of the alcohol container. When many of the parents were teenagers, the average drink was 12 ounces; now there are 40-ounce big mouths. The types of alcohol have also changed. We are now seeing alcohol pops like Smirnoff lemonade. Also, energy drinks are packaged the same as regular energy drinks that athletes like to use, but they now have an alcohol content of 8 percent or better. We have "spikes" that just came out right before prom and high school graduation parties, which is a very small container designed to put into another drink to enhance the alcohol content. In New York, they are now seeing ice cream with 5 percent alcohol content.

Kids have more money, cars, and technology communication systems now. If I were to throw a party in my youth, I would have had to get on the phone and call everybody, which would have taken quite a while. Now, youth can text message 100 people at one time.

In closing, I would like to call your attention to the copy of the adult survey that was also included in the packet. We see tolerance by some of the parents of youth, but the community tolerance is certainly opposite. Question 6 inquired if the alcohol policy should be more concerned with people who give or sell alcohol to teenagers, and less with teenagers who drink, and two out of three parents agreed. The Academy's report, in closing, stated:

State and local regulations, laws, ordinances, and policies form the framework of any effort to reduce underage drinking. The right regulations well crafted can minimize the opportunity for

young people to use alcohol and maximize opportunities for effective and efficient enforcement.

Assemblyman Carpenter:

Bud Light and Coors spend millions of dollars on advertising. I do not think this problem will be solved as long as they are advertising. They make it seem that you cannot do anything unless you have a Bud Light in your hand. How are you going to be able to contradict that?

Kathy Bartosz:

Within the National Academy of Sciences report, they had a significant number of pages that addressed how alcohol is portrayed in advertisements by the industry and the media. There are already standards for the alcohol beverage industry that they are not to use any advertising that blatantly targets young people. If you talk to the advertisers, they say they are strictly adhering to that and that those incredibly young-looking people that they use in their advertisements are over the age of 21.

Chairman Anderson:

When I was a teacher, I taught my students about the subliminal messages in cigarette and alcohol ads in magazines as indicators of subliminal messaging and how that seemed to create a socially acceptable atmosphere. That is clearly one of the problems we are trying to address. We will obviously change the attitude people have towards drinking and driving significantly.

Graham Galloway, Attorney, Nevada Trial Lawyers Association:

We believe this bill is good social policy, and we support it. While it may not eliminate the issues or problems that have plagued our society and it may not be the perfect piece of legislation, it is good legislation and it should be passed.

Assemblyman Segerblom:

Do you not believe that under current law, a victim of a drunken driving accident involving a teenager could fall back on the homeowners insurance?

Graham Galloway:

In my mind, I believe that you can hold a social host liable. I am not the final say in this matter, but an argument could be made to hold people who furnish alcohol as a social host liable. I would be much more comfortable having this legislation so that it would be clearly in the law. I

am not aware of any Supreme Court decisions that say you cannot hold a social host liable, but that is an ambiguity that this provision would take care of.

Assemblyman Segerblom:

This bill requires willful behavior. Would that negate going after the homeowner's policy?

Graham Galloway:

In my mind, "knowingly" almost equates to intentional. With semantics involved, there is a slight difference. If it is determined that "knowingly" equates to intentional—insurance policies exclude intentional behavior—you would then have problems and difficulties pursuing the homeowner's insurance. Instead you would then be pursuing people individually, which is always a tough road.

Sandy Heverly, Executive Director and Victim Advocate, Stop Driving Under the Influence:

I have been involved in the anti-driving under the influence (DUI) movement for the last 24 years. During that time, I have worked with thousands of innocent victims in Nevada and across the nation. A number of those victims, including my family of seven, became victims because of the very issue described in S.B. 7 (R1). Stop DUI believes that because this bill provides for civil liability and accountability, it will help create a conscience for those who have no compunction about providing or allowing alcohol or other drugs to be available and consumed by minors. Senate Bill 7 (1st Reprint) will also help diffuse the myth that the consumption of alcohol by minors is an acceptable right of passage. The social drinking norms in society today do not view underage alcohol consumption as a right of passage or a socially acceptable behavior. In fact, a national survey showed 83 percent of adults are in favor of laws that impose fines on adults who provide alcohol to minors. Stop DUI concurs with that survey and supports passage of S.B. 7 (R1).

Chairman Anderson:

Is there anyone else wishing to get on record in support of S.B. 7 (R1)? [There were none.] Is there anyone wishing to be on record in opposition? [There were none.]

Let me close the hearing on S.B. 7 (R1).

Let us turn our attention to Senate Bill 132.

Let us open the hearing on Senate Bill 7
(1st Reprint).

Senate Bill 7 (1st Reprint): Establishes civil liability for certain acts involving the use of controlled substances and the consumption of alcoholic beverages. (BDR 3-53)

Jennifer Chisel, Committee Policy Analyst:

The Committee heard this bill on May 3, as presented by Senator Wiener. This is the social host bill which imposes civil liability for damages that result if the host knowingly provides alcohol or drugs or allows the consumption of alcohol or drugs by a minor on his premises. There are no amendments for the Committee to consider, and there was no opposition testimony on this measure.

Assemblyman Carpenter:

On page 3, on lines 2 and 3, it says "any damage caused by the under-aged person as a result of the alcoholic beverage." We do not have any kind of standard as to whether the blood alcohol level is 0.08 or something else. I was wondering if that could be a problem.

[Chairman Anderson leaves.]

Vice Chairman Horne:

This is a civil liability clause. Persons under the age of 21 are not supposed to be consuming alcohol in the first place. Under this, it is like a strict liability type of burden. If an individual caused an accident and it is determined there is alcohol in his blood, he is held liable under this standard. If you put in a 0.08 standard, you are saying that it is okay for underage drinkers to be at 0.07. I do not think that is a message we want to send.

Assemblyman Carpenter:

I know they are not supposed to be drinking. On the other hand, they may be at a home where there is alcohol being served. Even though consumption of

alcohol would not have been the cause of the accident because they were fully in control of their faculties, it still could get them in a lot of trouble.

Assemblyman Conklin:

I support the bill, but I am concerned about the same area as Mr. Carpenter. It is my understanding of this per se law that if a minor under a 0.08 blood alcohol level, he is still guilty, but 0.08 is the threshold at which one is impaired. It is impossible to measure impairment by just having some measure at that time. This is saying "civil action for any damages caused by the underage person as a result of the consumption." That means someone would have to consume enough to have an impact on whatever action they take. We are saying that there is no per se. You have to prove that there is a link between the consumption and the behavior that resulted in the damage. Is that correct?

Risa Lang, Committee Counsel:

You are correct. It says that they are liable for damages caused by the underage person as a result of the consumption of the alcoholic beverage. There would have to be some level of proof that it was the consumption and then the impairment that caused the damage.

Assemblyman Conklin:

That will not fall under the per se law standard for driving and so on.

Assemblyman Mabey:

I will support the bill. I feel there is a double standard in our community. We let certain people serve alcohol and others cannot.

Assemblyman Segerblom:

I have a concern about the requirement that this be a knowing violation. Normally an insurance policy will not cover anything when it is a knowing violation. In these kinds of situations, the person who was the victim would probably want to be compensated by the homeowner's policy of the person who served the alcohol to the minor who caused the damage. This bill would exclude that. I would like to see it changed to "recklessly or knowingly" so that the person could get some recourse. When you sue an individual it is very difficult to get any recovery from that person. If there was an insurance policy, the insurance company would step in and defend the host if he was wrongfully charged. If it was a legitimate claim, the insurance company would pay the claim.

Assemblyman Horne:

I understand your concerns. That may be the case with some insurance policies. Let us say the Smith family serves alcohol to minors. One of the

minors leaves the premises and gets in a car accident and John Doe is injured. John Doe wants to sue the Smith family for serving alcohol to that minor. Their automobile policy says "knowing violations."

In this situation the homeowner's policy may not be accessible, but the auto insurance may be. Historically, this type of legislation without this "knowing" standard has failed to survive.

Assemblyman Segerblom:

I am willing to go with the bill as it is, but I wanted to raise that concern.

Assemblyman Ohrenschall:

During the hearing, the sponsor of the bill said that she had no intention for people to be prosecuted who are participating in religious ceremonies where wine is used. I want to make sure that was on the record. I support the bill, but I would not want any prosecutions to arise from religious and ceremonial uses of alcohol.

Assemblyman Goedhart:

Could you explain subsection 3? It seems to carve out a liability exception. I am not exactly sure why it is in the legislation. It says that if a bartender knowingly and willfully serves alcohol to a minor, he would still be exempt from any of these liabilities. Is that correct?

Vice Chairman Horne:

Yes. We have "dram shop" laws in Nevada. Those establishments would not be affected by this.

ASSEMBLYMAN CONKLIN MOVED TO DO PASS SENATE BILL 7 (R1).

ASSEMBLYMAN MANENDO SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN ANDERSON AND OCEGUERA WERE ABSENT FOR THE VOTE.)

CHAPTER 172

AN ACT relating to civil actions; establishing civil liability under certain circumstances for knowingly serving, selling or otherwise furnishing a controlled substance to another person and for knowingly serving, selling or otherwise furnishing an alcoholic beverage to a minor; establishing civil liability under certain circumstances for knowingly allowing the unlawful use of a controlled substance by another person or the consumption of an alcoholic beverage by a minor on certain premises or in certain conveyances; and providing other matters properly relating thereto.

[Approved: May 29, 2007]

Legislative Counsel's Digest:

Existing law provides immunity from civil liability to a person who serves or sells an alcoholic beverage to another person for damages caused by an intoxicated person as a result of that service or sale. (NRS 41.1305) **Section 2** of this bill limits that immunity to a person who serves, sells or furnishes an alcoholic beverage to another person who is at least 21 years of age. In contrast, **section 2** makes a person liable in a civil action for damages caused as a result of the consumption of alcohol by an underage person if he knowingly served, sold or furnished alcohol to the underage person or allowed the underage person to consume alcohol on premises or in a conveyance belonging to him or over which he had control. The liability created does not apply to a person who is licensed to serve, sell or furnish alcoholic beverages or to an employee or agent of such a person.

Section 1 of this bill further makes a person liable in a civil action for damages caused as a result of the use of a controlled substance by another person if the person knowingly served, sold or furnished the controlled substance or allowed the other person to use a controlled substance in an unlawful manner on premises or in a conveyance belonging to the person allowing the use or over which he has control.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A person who:

(a) Knowingly and unlawfully serves, sells or otherwise furnishes a controlled substance to another person; or

(b) Knowingly allows another person to use a controlled substance in an unlawful manner on premises or in a conveyance belonging to the person allowing the use or over which he has control, È is liable in a civil action for any damages caused as a result of the person using the controlled substance.

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

.....
ê2007 Statutes of Nevada, Page 589 (CHAPTER 172, SB 7)ê

Sec. 2. NRS 41.1305 is hereby amended to read as follows:

41.1305 1. ~~[No]~~ A person who serves, ~~[or]~~ sells *or otherwise furnishes an* alcoholic ~~[beverages is]~~ *beverage to another person who is 21 years of age or older is not* 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.]~~ *for any damages caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage.*

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

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

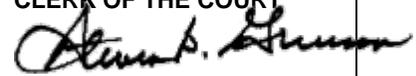
(b) Knowingly allows an underage person to consume an alcoholic beverage on premises or in a conveyance belonging to the person or over which he has control, È is liable in a civil action for any damages caused by the underage person as a result of the consumption of the alcoholic beverage.

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

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

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

#10: Reply



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

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

Deciding this motion requires answering two questions. 1) Does NRS 41.1305(1) apply to the facts alleged in the amended complaint and bar Plaintiffs from recovering against Dave & Buster's? 2) If so, is NRS 41.1305(1) constitutional? Plaintiffs' position is largely a political one: they do not believe NRS 41.1305(1) should be the law of Nevada. They may lobby the legislature to seek change, but the judiciary's role is to apply the law as it exists.

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

1 DATED this 9th day of September, 2020.



3
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9 **Memorandum of Points & Authorities**

10 **I. Plaintiffs do not dispute several points.**

11 Plaintiffs do not dispute that:

- 12 • the amended complaint can be fairly summarized to allege that 1) Dave & Buster's sells
13 alcoholic beverages; 2) sold them to Aparicio; 3) as a result of Dave & Buster's selling
14 alcoholic drinks to Aparicio, Aparicio drove drunk; and 4) Aparicio injured plaintiffs.
- 15 • Clark County Code 8.20.300 is subordinate to NRS 41.1305(1), meaning the ordinance
16 cannot create civil liability that the statute bars.¹
- 17 • under *Rodriguez v. Primadonna Co.* Dave & Buster's owed no duties once Aparicio left the
18 restaurant.²
- 19 • if a bailment relationship existed between Dave & Buster's and Aparicio, meaning Dave &
20 Buster's somehow had the keys to his car, that relationship is insufficient to create liability
21 to Dave & Buster's for the reasons noted in *Mills v. Cont'l Parking Corp.*³

22 Stated simply, the primary dispute at issue in this motion is whether NRS 41.1305(1)
23 applies to the facts alleged in the amended complaint to bar Plaintiffs' claims against Dave &
24 Buster's. If NRS 41.1305(1) applies, Plaintiffs have no claims against Dave & Buster's so the
25 motion to dismiss should be granted.

26
27

¹ Motion at § III(d).

28 ² Motion at § III(e).

³ Motion at § III(f).

1 **II. NRS 41.1305 bars liability against Dave & Buster’s under the facts alleged.**

2 NRS 41.1305(1) expressly prohibits the exact type of liability Plaintiffs allege.

3 A person who serves, sells or otherwise furnishes an alcoholic beverage to another
4 person who is 21 years of age or older is not liable in a civil action for any damages
5 caused by the person to whom the alcoholic beverage was served, sold or furnished as
6 a result of the consumption of the alcoholic beverage.⁴

7 Plaintiffs present various arguments as to why NRS 41.1305(1) does not apply to the facts
8 alleged in their complaint. These arguments generally attempt to reframe their factual allegations
9 into something, anything that would escape NRS 41.1305(1). “Clever pleading, of course, is
10 neither unethical nor illegal - it is, in fact, good lawyering. But good lawyering should not
11 defeat good judging, which requires a court to call things as it sees them.”⁵ No matter how spun,
12 the basic facts alleged all arise from conduct subject to NRS 41.1305(1)’s protections.

13 **a. Plaintiffs could not sue Dave & Buster’s under Nevada common law.**

14 Plaintiffs first argue NRS 41.1305(1) did not eliminate common law causes of action they
15 may have possessed against Dave & Buster’s. This argument is misplaced because Plaintiffs had
16 no common law causes of action against Dave & Buster’s even before NRS 41.1305(1) was
17 created in 1995. Before 1995 the Supreme Court had repeatedly ruled refused to allow a tort
18 claim for negligence arising out of the distribution of alcohol. Instead it had concluded the
19 proximate cause of any damage caused by a person who has consumed alcohol is the *consumption*
20 of alcohol itself, not its *distribution*.⁶ To summarize, Nevada common law would have barred
21 Plaintiffs’ causes of action against Dave & Buster’s even if NRS 41.1305(1) had not been enacted.

22 Plaintiffs next seem to argue NRS 41.1305(1) somehow does not apply to their common
23 law causes of action like negligence. Plaintiffs do not explain how this is possible as it would
24 contradict NRS 41.1305(1)’s plain language. NRS 41.1305(1) states Dave & Buster’s “is not
25 liable in a civil action for any damages caused by the person to whom the alcoholic beverage was
26 served, sold or furnished as a result of the consumption of the alcoholic beverage.” This language
27 does not limit the immunity to certain causes of action. Instead the server (Dave & Buster’s) is

28 ⁴ NRS 41.1305(1).

⁵ *Linnin v. Michielsens*, 372 F. Supp. 2d 811, 825 (E.D. Va. 2005).

⁶ *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).

1 immune to all civil actions seeking damages, no matter the specific cause of action pled. NRS
2 41.1305(1) applies regardless of whether Plaintiffs framed the causes of action as negligence,
3 product liability, or something else.

4 Plaintiffs also cite no authority that supports their distinction. They cite an Idaho case that
5 overruled Idaho's common law prohibition against suing those who served the alcohol.⁷ Plaintiffs
6 do not explain how Idaho common law is relevant or trumps NRS 41.1305(1).

7 Plaintiffs' arguments then rely upon first-party cases.⁸ "First-party" cases are those where
8 the drinker who consumed the alcohol sues the bar for injuries the drinker sustained. These cases
9 are distinguishable because Plaintiffs here are presenting a third-party claim. They are not the
10 drinker (a first-party claim), they people who were injured by the drinker (a third-party claim).
11 For example *Billingsley v. Stockmen's Hotel* is a first party case, but it did not concern liquor
12 liability like Plaintiffs wish to impose here.⁹ *Billingsley* was about an altercation between hotel
13 security and a guest who was being escorted off property. No argument was presented about
14 whether the hotel could be liable for damages for serving him alcohol.

15 Plaintiffs also cite *Brockett v. Kitchen Boyd Motor Co.* from California where an employer
16 served alcohol to a minor employee who became intoxicated.¹⁰ The employer then guided the
17 intoxicated minor to his car, placed him in it, and directed him to drive home. This gave rise to
18 third-party liability but is inapplicable here because Aparicio was not a minor.

19 NRS 41.1305(1) applies to all causes of action Plaintiffs allege and bars them.

20 **b. NRS 41.1305(1)'s plain language applies to Dave & Buster's.**

21 Plaintiffs' second argument invites the court to ignore NRS 41.1305(1)'s plain language
22 and consider legislative history. But to do this Plaintiffs must first demonstrate NRS 41.1305(1) is
23 ambiguous. "Statutory interpretation concerns determining legislative intent, and the starting
24 point is the statute's plain language. When the meaning of the language is clear, the analysis
25

26 ⁷ *Alegria v. Pavonk*, 619 P.2d 135 (Idaho 1980).

27 ⁸ *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).

28 ⁹ 111 Nev. 1033, 901 P.2d 141 (1995).

¹⁰ 264 Cal. App. 2d 69 (1968).

1 ends....”¹¹ Considering legislative history becomes necessary only when the statute’s language
2 could support two or more reasonable interpretations.¹²

3 Plaintiffs do not identify what part of NRS 41.1305(1) could be reasonably interpreted in
4 two different ways. The statute’s plain language is broken out into its constituent parts below and
5 directly applies to the facts alleged in Plaintiffs’ amended complaint.

- 6 • *A person who serves, sells or otherwise furnishes an alcoholic beverage to another person:*
7 Plaintiffs allege Dave & Buster’s sold at least one alcoholic beverage to Aparicio.
- 8 • *who is 21 years of age or older:* Plaintiffs do not allege Aparicio was less than 21.
- 9 • *is not liable in a civil action for any damages:* Plaintiffs have filed a civil action for
10 damages against Dave & Buster’s
- 11 • *caused by the person to whom the alcoholic beverage was served, sold or furnished:*
12 Plaintiffs allege Aparicio injured them.
- 13 • *as a result of the consumption of the alcoholic beverage:* Plaintiffs allege the reason
14 Aparicio injured them is because he drove drunk.

15 NRS 41.1305(1) is unambiguous and applies directly to the facts alleged in Plaintiffs’
16 amended complaint. Consequently Plaintiffs’ suit against Dave & Buster’s is barred.

17 **c. If ambiguous, the legislative intent was clear.**

18 If some part of NRS 41.1305(1) could support two or more reasonable interpretations,
19 Plaintiffs’ themselves note the legislative history was clear. “The legislature went on to
20 specifically say that the statute was NOT meant to change the common law but was ‘intended to
21 affirm and codify the common law of the State of Nevada.’ (See Exhibit 1, at bold bates number
22 118.)”¹³ The common law would not have allowed Plaintiffs to sue Dave & Buster’s, so neither
23 does NRS 41.1305(1).

24 **d. There is no exception applicable to the facts alleged in the amended complaint.**

25 Plaintiffs seem to argue NRS 41.1305(1) should not apply because Aparicio was no longer
26 able to consent to consume alcohol and continuing to serve him amounted to “wanton and reckless

27 ¹¹ *Guzman v. Dist. Ct.*, 136 Nev. Adv. Op. 12, 460 P.3d 443, 447 (2020).

28 ¹² *Id.*

¹³ Opposition at 14:24-26.

1 disregard for the consequences” of Aparicio’s continued consumption.¹⁴ However, NRS
2 41.1305(1) contains no consent or scienter requirement. The statute also does not contain any
3 exception for “wanton and reckless disregard.”

4 Plaintiffs seem to base this argument upon two Nevada cases that are inapplicable. *Hart v.*
5 *Kline* was decided in 1941 and interpreted Nevada’s vehicle guest statute as it then existed.¹⁵ In
6 the second case, *Davies v. Butler*, the deceased was an initiate into a social group that forced him
7 to drink alcohol for two days before he died of alcohol poisoning.¹⁶ He sued the social group and
8 its members. This made it a first-party case, not a third-party case like Plaintiffs plead here.

9 *Davies* is also distinguishable because it was decided in 1979, long before NRS 41.1305(1)
10 was first enacted in 1995. There is no indication in the decision that the defendants presented a
11 third-party non-liability defense such as existed under Nevada common law at the time. Finally
12 the case is factually distinguishable as Plaintiffs here do not allege Dave & Buster’s forced
13 Aparacio to consume alcohol.

14 **e. Selling alcohol is not an ultra-hazardous activity.**

15 Plaintiffs fleetingly argue that selling alcohol for retail consumption is an ultra-hazardous
16 activity that creates strict liability. NRS 41.1305(1) does not 1) conclude that alcohol can be sold
17 in an ultra-hazardous manner; or 2) contain an exception for ultra-hazardous sales.

18 Regardless, selling alcohol does not meet the legal definition of an ultra-hazardous
19 activity. In Nevada “[o]ne who carries on an abnormally dangerous activity is subject to liability
20 for harm to the person, land or chattels of another resulting from the activity, although he has
21 exercised the utmost care to prevent the harm.”¹⁷ There are six factors to determine if an activity
22 is abnormally dangerous:

- 23 1) existence of a high degree of risk of some harm to the person, land or chattels of
24 others;
25 2) likelihood that the harm that results from it will be great;
26 3) inability to eliminate the risk by the exercise of reasonable care;
27 4) extent to which the activity is not a matter of common usage;

28 ¹⁴ Opposition at 5:20-24.

¹⁵ 61 Nev. 96, 116 P.2d 672 (1941).

¹⁶ 95 Nev. 763, 602 P.2d 605 (1979).

¹⁷ *Valentine v. Pioneer Chlor Alkali Co.*, 109 Nev. 1107, 1110, 864 P.2d 295, 297 (1993) (*quoting*
RESTATEMENT (SECOND) OF TORTS § 519 (1977)).

- 1 5) inappropriateness of the activity to the place where it is carried on; and
2 6) extent to which its value to the community is outweighed by its dangerous attributes.

3 “The harm threatened must be major in degree, and sufficiently serious in its possible
4 consequences to justify holding the defendant strictly responsible for subjecting others to an
5 unusual risk.”¹⁸ The drafter’s note to RESTATEMENT (SECOND) OF TORTS § 520 gave guidance as
6 to when these factors might be satisfied.

7 Some activities, such as the use of atomic energy, necessarily and inevitably involve
8 major risks of harm to others, no matter how or where they are carried on. Others,
9 such as the storage of explosives, necessarily involve major risks unless they are
10 conducted in a remote place or to a very limited extent. Still others, such as the
11 operation of a ten-ton traction engine on the public highway, which crushes conduits
12 beneath it, involve such a risk only because of the place where they are carried on.¹⁹

13 Plaintiffs cite no case concluding that selling alcohol is an ultra-hazardous or abnormally
14 dangerous activity, nor has Dave & Buster’s located Nevada authority on that point.²⁰ Outside
15 Nevada, Rhode Island concluded that even selling alcohol to minors “does not rise to the level
16 addressed by § 520 of the restatement.”²¹ “We are satisfied that, although selling grain alcohol or
17 alcoholic beverages to a minor is a crime and may pose serious risks to the purchaser and others, it
18 is not an ultra-hazardous or abnormally dangerous activity as those terms are recognized.”²²
19 Massachusetts agreed.²³ California concluded that even drunk driving, “although unquestionably
20 dangerous and hazardous-in-fact, does not come within the rubric of an ultrahazardous or
21 abnormally dangerous activity for purposes of tort liability....”²⁴

22 Applied here, Plaintiffs allege Dave & Buster’s sold alcohol to Aparicio, Aparicio
23 consumed the drinks, he later drove drunk and injured them. These factual allegations do not
24 indicate an ultra-hazardous or abnormally dangerous activity.

25 ¹⁸ RESTATEMENT (SECOND) OF TORTS § 520, cmt. g

26 ¹⁹ *Id.*

27 ²⁰ The case Plaintiffs cite concerned the alleged release of “liquified chlorine or chlorine gas into
28 the environment....”

²¹ *Selwyn v. Ward*, 879 A.2d 882, 889 (R.I. 2005).

²² *Id.* at 890. *See also Concklin v. Holland*, 138 S.W.3d 215, 223 (Tenn. App. 2003) (“[T]his
Court is not prepared to infer that the use of drugs and alcohol is to be included as an ultra
hazardous activity.”).

²³ *Tobin v. Norwood Country Club*, 661 N.E.2d 627, 633 (Mass. 1996) (“A business that makes
money by serving liquor where teenagers are known to be present is not engaging in an
ultrahazardous activity....”).

²⁴ *Goodwin v. Reilley*, 176 Cal. App. 3d 86, 92 (1985).

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

2 If NRS 41.1305(1) applies to the facts alleged and bars a recovery against Dave &
3 Buster's, then Plaintiffs argue NRS 41.1305(1) is unconstitutional. Plaintiffs "must make a clear
4 showing of invalidity."²⁵ Preliminarily, while Plaintiffs cite extensively from the 1994 dissent in
5 *Snyder v. Viani*, NRS 41.1305(1) was not created until 1995. *Snyder* could not have considered
6 the constitutionality of a statute that did not exist.

7 **a. NRS 41.1305(1) is subject to a rational basis test.**

8 Plaintiffs argue NRS 41.1305(1) violates their right to a jury trial because it bars them
9 from recovering damages from Dave & Buster's. They seem to argue the statute should be subject
10 to some higher standard of review than a rational basis. They are incorrect.

11 The Supreme Court of Nevada has repeatedly ruled that the right to sue for damages "does
12 not involve a fundamental constitutional right."²⁶ When a fundamental constitutional right is not
13 implicated, the Legislature may restrict court access "if there exists a rational basis for doing so.
14 In other words, constitutional 'right of access' challenges that do not implicate a fundamental right
15 are subjected to the lowest level of judicial scrutiny--the 'rational basis' test."²⁷ The rational basis
16 test is satisfied if the statute is rationally related to a legitimate government purpose.

17 NRS 41.1305(1) limits the types of defendants Plaintiffs may sue. But the right to sue for
18 damages is not a fundamental right, so NRS 41.1305(1) is subject to a rational basis test.

19 **b. NRS 41.1305(1) passes a rational basis test.**

20 Dave & Buster's opening brief described decisions from two other jurisdictions
21 considering constitutional challenges to substantively similar statutes. Both concluded the statutes
22 were subject to a rational basis test and met that test. Plaintiffs present no case considering a
23 similar statute that has concluded otherwise.

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27 ²⁵ *Tam v. Dist. Ct.*, 131 Nev. Adv. Rep. 80, 358 P.3d 234, 237-38 (2015).

28 ²⁶ *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).

²⁷ *Id.*

1 Plaintiffs instead present political arguments as to why NRS 41.1305(1) disadvantages
2 them. *Hamm v. Carson City Nugget* noted these arguments in 1969 and concluded resolving them
3 is a political question for a legislature.

4 [I]f civil liability is to be imposed, it should be accomplished by legislative act after
5 appropriate surveys, hearings, and investigations to ascertain the need for it and the
6 expected consequences to follow. . . . Judicial restraint is a worthwhile practice when
the proposed new doctrine may have implications far beyond the perception of the
court asked to declare it.²⁸

7 The legislature eventually accepted that invitation, drafted NRS 41.1305(1), and
8 subsequently amended it. Plaintiffs do not like the result and present the same arguments against
9 NRS 41.1305(1) that *Hamm* noted in 1969. A legislature is not required to “draw its lines with
10 mathematical certainty or even that it exercise its policy-making judgment in the best or wisest
11 way.”²⁹ When assessing if a statute meets a rational basis test a court may not “superimpose its
12 own preferences on the work product of a coordinate branch of government.”³⁰ The legislature
13 answered a political question by drafting NRS 41.1305(1). The answer it gave had a rational basis
14 for all the reasons both Wisconsin and Wyoming noted when considering their own statute. If
15 Plaintiffs are dissatisfied with NRS 41.1305(1), their recourse is to lobby the legislature.

16 **c. NRS 41.1305(1) is consistent with equal protection.**

17 Plaintiffs argue in passing that NRS 14.1305(1) somehow violates equal protection.
18 “When the law . . . does not implicate a suspect class or fundamental right, it will be upheld as
19 long as it is rationally related to a legitimate government interest.”³¹ NRS 41.1305(1)’s text does
20 not implicate any suspect class. It is a statute of general application. While Plaintiffs present
21 political arguments that assert NRS 41.1305(1) systemically discriminates against those who are
22 minorities or economically disadvantaged, they present no meaningful support for these
23 arguments.

24
25 ///

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27 ²⁸ 85 Nev. 99, 101, 450 P.2d 358, 359 (1969).

²⁹ *Greenwalt v. Ram Rest. Corp.*, 71 P.3d 717, 738 (Wyo. 2003).

³⁰ *Allen v. State*, 100 Nev. 130, 136, 676 P.2d 792, 796 (1984).

³¹ *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

1 **IV. Plaintiffs' remaining arguments do not change the result.**

2 **a. Plaintiffs' have not distinguished between the defendants.**

3 At the hearing on the first motion to dismiss, the court itself noted it was difficult to
4 determine who was alleged to have done what in what sequence. Except as to the negligence
5 cause of action, the amended complaint did not clarify who Plaintiffs allege did what and when. If
6 anything the amended complaint appears calculated to further obfuscate that problem.

7 “[U]ndifferentiated pleading against multiple defendants is improper.”³²

8 Plaintiffs confuse their obligation to plead sufficient facts to support a cause of action with
9 the burdens of notice pleading. The complaint must allege sufficient facts against each individual
10 defendant to support a cause of action. That is what then gives the defendant potential notice.
11 Merely naming multiple defendants and alleging generic facts without differentiating between
12 them does not meet either obligation.

13 **b. Dave & Buster's internal standards do not override NRS 41.1305(1).**

14 Plaintiffs speculate that Dave & Buster's may have internal standards for its employees
15 when serving alcoholic beverages and that those standards may have been breached. They
16 provide no authority stating that statutory immunity can be waived by having internal standards.

17 They also speculate Dave & Buster's may not have complied with the alcoholic beverage
18 education requirements in NRS 369.600-635. NRS 369.630 outlines the potential liability if the
19 educational requirements are not met. The only liability is an administrative fine. NRS 369.630
20 creates administrative liability if employees do not complete certain training requirements. It does
21 not create any liability beyond that, which is consistent with NRS 41.1305(1).

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

23 Even after amending the complaint, the operative facts are still that Aparicio consumed
24 alcohol, drove drunk, and killed two people. These facts put Dave & Buster's squarely within
25 NRS 41.1305(1)'s protections and the statute is constitutional. As NRS 41.1305(1) bars Plaintiffs
26 from recovering against Dave & Buster's for Aparicio's conduct, they have not pled, nor can they
27

28 ³² *Aaron v. Aguirre*, No. 06-cv-1451, 2006 U.S. Dist. LEXIS 90384, 2006 WL 8455871 n.12 (S.D. Cal. Dec. 13, 2006).

1 plead, a set of facts against Dave & Buster's that could entitle them to relief. Dismissal per NRCP
2 12(b)(5) is proper.

3 DATED this 9th day of September, 2020.



6 BY: /s/ Michael P. Lowry
7 MICHAEL P. LOWRY, ESQ.
8 Nevada Bar No. 10666
9 VIRGINIA T. TOMOVA, ESQ.
10 Nevada Bar No. 12504
11 6689 Las Vegas Blvd. South, Suite 200
12 Las Vegas, Nevada 89119
13 Attorneys for Dave & Buster's of Nevada, Inc.

14 **Certificate of Service**

15 Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman
16 & Dicker LLP, and that on September 9, 2020, I served **Dave & Buster's of Nevada, Inc.'s**

17 **Reply re Renewed Motion to Dismiss** as follows:

- 18
- 19 by placing same to be deposited for mailing in the United States Mail, in a sealed
20 envelope upon which first class postage was prepaid in Las Vegas, Nevada;
 - 21 via electronic means by operation of the Court's electronic filing system, upon each
22 party in this case who is registered as an electronic case filing user with the Clerk;

23

24 Thomas F. Christensen Christensen Law 1000 S Valley View Blvd Las Vegas, Nevada 89107 Attorneys for Plaintiffs	25 Shea Backus Backus, Carranza & Burden 3050 S. Durango Dr. Las Vegas, NV 89117 Attorneys for Morgan Hurley; Henry Aparicio
26 Michael S. Rawlings Wolfe & Wyman 6757 Spencer St. Las Vegas, NV 89119 Attorneys for Mocre, LLC; MAT-Summerlin, LLC	

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



#11: 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

AA428

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

09/16/2020 **Motion to Dismiss** (10:00 AM) (Judicial Officer Holthus, Mary Kay)
Dave & Buster's of Nevada, Inc.'s Renewed Motion to Dismiss

Minutes

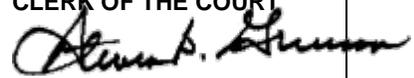
09/16/2020 10:00 AM

- Thomas Christensen, Esq., Michael Rawlings, Esq., Michael Lowry, Esq. and Jacqueline Franco, Esq. present via Bluejeans video conference. Upon Court's inquiry, Mr. Lowry indicated the instant Motion was a renewed Motion to Dismiss which was previously denied without prejudice; additionally, Mr. Lowry indicated they reassessed the Complaint and re-filed. Arguments by Mr. Christensen. Statements by Mr. Lowry. Court noted it did believe statute was clear and would leave the first cause of action that would appear to take it out the door. Additionally, Court noted there may had been liability that Deft. couldn't find his car which Dave & Buster's facilitated getting Deft. to his car; however, it wasn't comfortable dismissing that cause of action at the instant time. Further Court indicated with respect to the remainder the statute stated Dave & Buster's just wasn't liable as to damages as to the service of alcohol. Statements by Mr. Lowry. COURT ORDERED, Dave & Buster's of Nevada, Inc.'s Renewed Motion to Dismiss was hereby GRANTED IN PART, DENIED IN PART. Mr. Lowry to prepare Order and submit to opposing counsel for approval as to form and content.

[Parties Present](#)

[Return to Register of Actions](#)

#12: Transcript of Hearing



1 RTRAN

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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DAMASO PUENTE,)

9

Plaintiff,)

CASE NO. A-20-813787-C

10

vs.)

DEPT. NO. XVIII

11

HENRY APARICIO,)

12

Defendant.)

13

14

BEFORE THE HONORABLE MARY KAY HOLTHUS, DISTRICT COURT JUDGE

15

WEDNESDAY, SEPTEMBER 16, 2020

16

TRANSCRIPT OF PROCEEDINGS RE:

17

DAVE & BUSTER'S OF NEVADA, INC.'S RENEWED MOTION TO DISMISS

18

19

APPEARANCES:

20

For the Plaintiff:

THOMAS CHRISTENSEN, ESQ.,

21

For the Defendants:

22

Mocore LLC

MICHAEL S. RAWLINGS, ESQ.,

23

Dave & Busters of NV, Inc.

MICHAEL P. LOWRY, ESQ.,

24

Morgan Hurley & Henry Aparicio

JACQUELINE FRANCO, ESQ.,

25

RECORDED BY: YVETTE SISON, COURT RECORDER

1 LAS VEGAS, CLARK COUNTY, NEVADA; WEDNESDAY, SEPTEMBER 16, 2020

2 [Proceeding commenced at 11:01 a.m.]

3
4 THE CLERK: Damaso Puente versus Henry Aparicio, A813787.

5 MR. LOWRY: Good morning, Your Honor, Michael Lowry on
6 behalf Dave and Busters.

7 THE COURT: Okay.

8 MR. CHRISTENSEN: Good morning, Your Honor. Tom
9 Christensen on behalf of the plaintiffs.

10 MS. FRANCO: Good morning, Your Honor. Jacqueline Franco
11 on behalf of Henry Aparicio and Morgan Hurley.

12 MR. RAWLINGS: Good morning, Your Honor. Mike Rawlings
13 on behalf of the Matador.

14 THE COURT: Good morning. Ready when you are.

15 MR. LOWRY: All right. Judge, this is Matt Lowry. We
16 are back. This is the renewed motion to dismiss.

17 THE COURT: I recognize you.

18 MR. LOWRY: The first time this motion was heard, you
19 granted -- you denied it without prejudice and granted plaintiffs'
20 move to amend, so they did. We then assessed the complaint and
21 elected to refile the motion to dismiss.

22 At this point to summarize where we are, the allegations
23 that gave rise to this lawsuit against these various parties
24 they're still relatively simple. Mr. Aparicio went to two
25 restaurants in -- in Downtown Summerlin, consumed a number of

1 alcoholic beverages, got into a vehicle and drove and killed two
2 people.

3 So with that in mind, we're going to have to evaluate
4 whether those facts are ones that would give rise to causes of
5 action specifically against Dave and Buster's. Dave and Buster's
6 is the only party moving to dismiss.

7 And that's where we get to the statute, NRS 41.1305 sub
8 1. If you look at the -- the plain language of the statute and
9 apply it to these facts, plaintiffs are arguing that Dave and
10 Buster's is -- is responsible for the damages Mr. Aparicio caused
11 because it served him alcoholic beverages.

12 Well that's a fact pattern though that the Legislature
13 and the Supreme Court before it said does not support a cause of
14 action in Nevada. So however you construe the arguments that
15 plaintiffs are making, it all comes back to that basic fact. Mr.
16 Aparicio consumed alcohol, he chose to drive, he chose to consume
17 and sadly it ended up with two people dead. But that's not -- that
18 responsibility for his actions lie solely with him. It does not
19 apply with Dave and Buster's.

20 And so when you apply the statute as it's drafted as the
21 language reads and unfortunately plaintiffs did not have a cause of
22 action against the Dave and Buster's. They have causes of action
23 against Mr. Aparicio and causes of action against Ms. Hurley who
24 allegedly entrusted the vehicle to him. We have causes of action
25 against the Matador, the other restaurant where he consumed

1 alcohol. But they don't have any against Dave and Buster's under
2 this particular fact pattern.

3 So again, if we get all the way through those facts and
4 we apply them to the statutes, there are no causes of action
5 applied against Dave and Buster's and that's why the dismissal is
6 appropriate.

7 THE COURT: Okay. Thank you. Counsel.

8 MR. CHRISTENSEN: First of all, I'll go to their reply
9 because it's exactly response to what they've continued to say.
10 They haven't objected or put in any evidence that the numerous
11 causes of action that are not covered by, even arguably covered by
12 NRS 41.1305 that we haven't alleged facts that are -- that are
13 pertinent to that which is strict liability and products liability.
14 That certainly is a different cause of action and a different
15 subject than the legal providing of alcohol and the responsible
16 consumption of alcohol which is the only thing that NRS 41.1305
17 actually addresses in its current condition.

18 And they -- they seem to disregard all the facts that are
19 alleged about a ultra-hazardous activity which is not the providing
20 -- responsible providing the alcohol to a patron. That's not an
21 ultra-hazardous actually. But having a contest where people it's -
22 - are encouraged to drink a large amount of alcohol is an ultra-
23 hazardous activity. No one [indiscernible] perhaps flying a plane
24 is not an ultra-hazardous activity. But a speeding contest with
25 airplanes, that would probably be an ultra-hazardous activity.

1 Driving a vehicle is probably not an ultra-hazardous
2 activity. But having a contest where you spin donuts in
3 intersections, probably would be an ultra-hazardous activity. And
4 if somebody promoted that for business purposes and to receive a
5 profit, that would be an ultra-hazardous activity.

6 Those are the allegations in the complaint. And the
7 Court has to take the allegations of the complaint as true. And
8 that there's no possibility that we could present a set of facts
9 that would have Dave and Buster's participating in an ultra-
10 hazardous activity.

11 And that's the standard that the Court has to look at in
12 dismissing all of those claims that are outside of the negligence
13 causes of action.

14 But further, the NRS 41.1305 has not -- Dave and Buster's
15 did not cite any Nevada law interpreting NRS 41.1305. And I would
16 submit to you that -- and Dave and Buster's didn't discuss the
17 history of NRS 41.1305 and the true enactments of NRS 41.1305
18 because when it was first enacted, it -- it's thought to codify the
19 common law as it stood at that point.

20 And the common law as it stood at that point as we put in
21 our brief was that liquor providers could be held responsible for
22 providing liquor in egregious circumstances like over --
23 overserving a guest to the point that they are intoxicated and then
24 continuing to serve them. They -- they try to distinguish that one
25 case that was before the enactment of NRS the first time -- NRS

1 41.1305 the first time. They try to distinguish that case by
2 saying, well that that was a first party case, you know, the person
3 who was suing was the actual patron of the establishment serving
4 the liquor.

5 And -- but the case law is that the patron has a more
6 difficult, a higher standard to get liability on the provider of
7 the outcall. The third party totally innocent victim has a lower
8 bar. And so egregious conduct -- conduct that the Nevada Courts
9 found prior to -- as a matter of the common law, finds the
10 enactment of NRS 41 which only sought to codify; that's very clear
11 in the legislative history, the original 41.1305 only got to codify
12 where the common law was at that point.

13 And so that case that still had liability for a egregious
14 act it be on the part of the provided alcohol is still common law.
15 And as we cited in order to change the common law or limit the
16 common law statutorily, they have to specifically do that. And NRS
17 41.1305 certainly does not specifically do that in the statute.
18 And the legislative history confirms that that wasn't the intent
19 that they were just trying to codify where this -- where the common
20 law was at that point.

21 And -- and then when NRS 41.1305 was amended, they -- the
22 Legislature removed the limitation on providers of alcohol in both
23 situations of two minors and also two adults of no negligence per
24 se as a result of violating the statute. So they specifically put
25 that back in. So that was taken out in the original -- the first

1 time NRS 41.1305 was enacted. It didn't -- it said that there's no
2 liability for violation of the statute -- of any statutes.

3 They took that out within NRS 41.1305 and the reason for
4 that again if you read the legislative history on the second
5 enactment of or the amendment of 41.1305, they specifically say
6 what we were extending towards host serving alcohol to minors is a
7 strict liability standard. It doesn't matter how much is served to
8 the minor. It doesn't matter if the minor is over the alcohol
9 limit that the host is strictly liable. And that's the intention
10 of the statute.

11 And they did not extend that strict liability to persons
12 over the age of 21 for anybody, to the host, a -- and a liquor
13 license. They are not strictly liable for the reasonable service
14 of alcohol and the reasonable consumption of that alcohol. But
15 they are -- can be strictly liable for violation of the statute now
16 or the County code.

17 And the Legislature knew that the County code was there
18 when they took that provision out of the statute, when they amended
19 out of the statute. Because also if you look at the legislative
20 history, that's what the Legislature was relying on is policies and
21 procedures for education and -- and self-regulation by servers of
22 alcohol.

23 And so when the defendant says that plaintiffs' position
24 is largely a political one, they do not believe NRS 41.1305(1)
25 should be the law of Nevada. They may lobby the Legislature to

1 seek change, but the judiciary role is to apply the law as it
2 exists. No. No. No. Plaintiff believes that Dave and Buster's
3 overly broad application is not consistent with the Nevada law.
4 But that is indeed the correct interpretation and the Court adopts
5 that interpretation which by the way NRS 41.1305 has never been
6 interpreted or ruled upon by any Nevada court. And, you know, you
7 can see that because the defendant hasn't cited any Nevada
8 decisions interpreting NRS 41.1305.

9 But if it was -- if this Court interprets that way, that
10 would -- then the statute is rendered unconstitutional because
11 there is no rational basis for removing completely of the ability
12 to have due process. And this is totally opposite of the medical
13 malpractice restrictions which we cited in our brief.

14 And the medical malpractice restrictions are not even as
15 broad as the one here because the medical malpractice restrictions
16 just limited some of the damages. It didn't eliminate the whole
17 case, the whole cause of action.

18 And even if you deal with the medical malpractice
19 restrictions which were not as broad, they are required that there
20 be a legislative purpose and the legislative purpose there was to
21 provide affordable healthcare to Nevadans. There is no such
22 legislative purpose that has been identified by the defendant that
23 would grant immunity, complete immunity for even illegal act
24 conspiracy and complicit act seeing the person get in their car,
25 seeing the person drive, ignoring their own internal rules and

1 regulations and ignoring the statutes that bar that activity.

2 Thank you, Your Honor.

3 THE COURT: Thank you. Anything further?

4 MR. LOWRY: Yes, Your Honor. I just for the response.
5 As far as the contest that plaintiffs mentioned, plaintiffs were
6 going to allege there were contests by Matador or El Casa del
7 Matador --

8 THE COURT: Mr. Lowry --

9 MR. LOWRY: [indiscernible - simultaneous speech]

10 THE COURT: -- Mr. Lowry, I need you to identify
11 yourself. Well I've just identified you.

12 MR. LOWRY: Sorry.

13 THE COURT: Sounds good. You're identified.

14 MR. LOWRY: You would think -- you would think that six
15 months into this I'd be accustomed by now. So again, this is Mike
16 Lowry.

17 Paragraphs 35, 36 and 37 in the amended complaints,
18 that's pages 8 or 7 and 8, they're the ones that alleged the
19 various drinking contests. Those are -- out of those allegations
20 are as to Casa Del Matador only. Really what plaintiff here is
21 doing here as we alluded in the brief, they're [indiscernible] very
22 hard certainly within the rules to create a construct of 41.1305
23 sub 1 under which their claims can continue.

24 But this legislative history that plaintiffs want to
25 discuss only becomes relevant if you believe that statute is

1 somehow ambiguous which means it is subject to two reasonable
2 interpretations, two or more reasonable interpretations.

3 Plaintiff has not suggested either in their brief and
4 their [indiscernible] argument any of the language within a statute
5 is subject to two or more reasonable interpretations. We went
6 through that on page 5 in our reply. Your Honor, each element is -
7 - is met here and is made clear. Plaintiffs have argued that there
8 is somehow an exception for product liability. However, NRS
9 41.1305 sub 1 contains no -- no exceptions.

10 It's not as though a party can escape the statute by
11 renaming their causes of action. They still all arise from the
12 same underlying facts that are protected within the statute. That
13 still a person who serves, sells or otherwise furnishes an
14 alcoholic beverage to another person, the first part of the
15 statute, well that's what plaintiffs alleged occurred here. To
16 somebody who was 21 years of age or older that's Mr. Aparicio,
17 there's no dispute that, is not liable in a civil action for any
18 damages. What we have is civil action and plaintiff certainly are
19 seeking damages.

20 The next phrase is caused by the person to whom alcoholic
21 beverage was served, sold or furnished. Well Dave and Buster's
22 served, sold or furnished alcoholic beverages to Mr. Aparicio,
23 that's the allegation in the complaint. So we're still squared
24 within the statute.

25 And then the damages are as a result of the consumption

1 of that beverage. Well, again, that's what plaintiffs alleged that
2 Mr. Aparicio were served these beverages, he consumed them and then
3 he drove drunk and killed her, their -- their loved ones; were
4 squarely within the statute.

5 It is unambiguous and clear. We only get to rest of it
6 when -- excuse me -- we only get to the legislative history if you
7 [indiscernible] conclude that that languages is ambiguous or
8 subject to two or more reasonable interpretations. And there is no
9 marking to that effect at this time.

10 As far as the ultra-hazardous activity argument, we
11 addressed that in the reply. Nevada thought it was the
12 restatement. And actually it's such as nuclear energy probably
13 anything that happens out of the test site, those are probably
14 ultra-hazardous activities within the restatement factors.

15 At least two Courts outside of Nevada because Mr.
16 Christensen was right, nobody in Nevada has interpreted this
17 statute. I wish they had. Would make -- would make the arguments
18 today easier. But at least two other Courts have concluded that
19 even serving alcohol to minors who should not be drinking, even
20 that activity does not qualify as ultra-hazardous.

21 And for reasons I don't pretend to understand was
22 California Courts have concluded that drunk driving is not ultra-
23 hazardous activity. Certainly dangerous, but not within the
24 definition of the -- the restatement.

25 So the last thing we get to is whether the statute was

1 constitutional. Before I launch into a discussion of that, I had
2 the firsthand indicated that those arguments aren't particular
3 persuasive to you. If that's still the case, I don't need to talk
4 to hear my own voice.

5 THE COURT: Yeah.

6 MR. LOWRY: And we can move on.

7 THE COURT: It's still the case. I mean I understand the
8 argument and I don't blame you for making it, but I don't think
9 there's enough here for that --

10 MR. LOWRY: Understood.

11 THE COURT: -- so.

12 MR. LOWRY: And, Your Honor, I have nothing further.
13 Thank you for your time.

14 THE COURT: Okay. I do believe that the statute is
15 pretty clear. I understand the frustration because these are hard,
16 but I could argue both sides of this, so I'm going back to the law.
17 I think it's pretty clear that it's a -- it's -- I don't know, a
18 bar. Oh God, I think that's a terrible plan, I guess. I don't
19 think that you can -- I don't think any causes of action except --
20 like I said the first time around, I'm going to leave the first
21 causes of action that appears to take it out the door as I said
22 before.

23 I think the law where it activates the tort to the extent
24 that that individual may not have been able to get to his car on
25 his own or not found his car on his own that there may have been

1 liability at that point ultimately if the fact show that Dave and
2 Buster's employees literally facilitated him getting behind the
3 wheel. Whether or not the keys were provided or -- I don't know
4 those facts, but they certainly allege enough as to that cause of
5 action I'm not comfortable dismissing it right now. I mean that
6 might be subject to summary judgment down the road.

7 But with respect to the rest, I do -- I do think that the
8 statute says you're just -- you're just not liable for any action
9 or any damages as a result of the service of alcohol. I think
10 there is a difference that it seems to be covering third parties'
11 actions which is I think why the first party actions can be
12 somewhat distinguished arguably. But for these purposes that's
13 what I find.

14 And I've already said that take it up because we could
15 use some law on the area if I'm wrong. It just seems to me to be
16 real straightforward.

17 MR. LOWRY: [indiscernible - simultaneous speech]

18 MR. CHRISTENSEN: Your Honor, are you willing to make a
19 finding that there's no just reason for delay so that we could take
20 that up with you?

21 MR. LOWRY: Judge, this is Michael Lowry. I agree with
22 you and Mr. Christensen it maybe good to have law in this. My
23 concern is that because the motion is going to be granted in part
24 subject to the limitations that you --

25 THE COURT: It's not --

1 MR. LOWRY: -- discussed --

2 THE COURT: -- it's not filed.

3 MR. LOWRY: -- whoever it was that helped Mr. Aparicio to
4 the car may have some liability with -- I think I know who that is,
5 but that's outside the scope of this -- this argument. I don't
6 know that 54b certification at this time would be appropriate
7 although I would -- simply because there's still a cause of action
8 that survives against my client. So I don't know that the -- that
9 taking it up would really resolve anything quite yet.

10 THE COURT: And I -- I -- that's not one of those things
11 I can do like on the spot, guys. So if we wanted to do it --

12 MR. CHRISTENSEN: Okay.

13 THE COURT: -- we could. I would need to read it, brief
14 it, something. I'm not adverse to it, but --

15 MR. CHRISTENSEN: All right.

16 MR. LOWRY: Okay.

17 MR. CHRISTENSEN: Okay.

18 MR. LOWRY: Then, Your Honor, I -- this is Michael Lowry.
19 I would procure the orders, circulate to Mr. Christensen and we'll
20 get it on file and we'll go from there.

21 THE COURT: All right. And then if you want to do that
22 down the road and you agree, just let me know.

23 MR. CHRISTENSEN: Thank you, Your Honor.

24 MR. LOWRY: Thank you for your time.

25 MR. CHRISTENSEN: All right.

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THE COURT: Thank you.

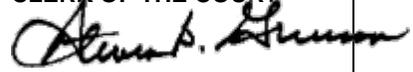
[Proceeding concluded at 11:26 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Michelle Ramsey
Transcriber

#13: Answer to Amended Complaint



1
2
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Tel: 702.727.1400/Fax: 702.727.1401
7 Attorneys for Dave & Buster's of Nevada, Inc.

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

13 Plaintiffs,

14 vs.

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

18 Defendants.

Case No.: A-20-813787-C

Dept. No.: 18

**Dave & Buster's of Nevada, Inc's
Answer to Amended Complaint**

- 19 1. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
20 this paragraph, so it denies them.
- 21 2. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
22 this paragraph, so it denies them.
- 23 3. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
24 this paragraph, so it denies them.
- 25 4. Admit.
- 26 5. Admit.
- 27 6. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
28 this paragraph, so it denies them.

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- 7. Admit.
- 8. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 9. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 10. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 11. Admit.
- 12. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 13. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 14. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 15. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 16. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 17. Dave & Buster's denies it employed Mr. Aparicio. Dave & Buster's lacks information sufficient to determine the accuracy of the remaining allegations in this paragraph, so it denies them.
- 18. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in this paragraph, so it denies them.
- 19. Dave & Buster's admits that on the night at issue Mr. Aparicio and Ms. Hurley were present at its store and legally consumed alcoholic beverages while there. Dave & Buster's denies the remaining allegations in this paragraph.

- 1 20. Dave & Buster's admits that on the night at issue Mr. Aparicio and Ms. Hurley were present
2 at its store and legally consumed alcoholic beverages while there. Dave & Buster's denies
3 the remaining allegations in this paragraph.
- 4 21. Dave & Buster's admits that on the night at issue Mr. Aparicio was present at its store and
5 legally consumed alcoholic beverages while there. Dave & Buster's denies the remaining
6 allegations in this paragraph.
- 7 22. Deny.
- 8 23. Deny.
- 9 24. Dave & Buster's admits that on the night at issue Mr. Aparicio was present at its store and
10 legally consumed alcoholic beverages while there. Dave & Buster's denies the remaining
11 allegations in this paragraph.
- 12 25. Deny.
- 13 26. Deny.
- 14 27. Deny.
- 15 28. Deny.
- 16 29. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
17 this paragraph, so it denies them.
- 18 30. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
19 this paragraph, so it denies them.
- 20 31. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
21 this paragraph, so it denies them.
- 22 32. Deny.
- 23 33. This paragraph is unclear as to whether it is meant to apply to Dave & Buster's. To the
24 extent it does, Dave & Buster's denies the allegations it contains.
- 25 34. Deny.
- 26 35. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
27 this paragraph, so it denies them.
- 28

- 1 36. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
2 this paragraph, so it denies them.
- 3 37. Dave & Buster's lacks information sufficient to determine the accuracy of the allegations in
4 this paragraph, so it denies them.
- 5 38. Dave & Buster's admits it possessed a liquor license, but lacks information sufficient to
6 determine the accuracy of the remaining allegations in this paragraph, so it denies them.
- 7 39. Deny.
- 8 40. Deny.
- 9 41. Deny.
- 10 42. Deny.
- 11 43. Deny.
- 12 44. Deny.
- 13 45. Dave & Buster's repeats its responses to the prior paragraphs.
- 14 46. Deny.
- 15 47. Deny.
- 16 48. Deny.
- 17 49. Deny.
- 18 50. Deny.
- 19 51. Deny.
- 20 52. This allegation is accurate as to Mr. Aparicio only. Dave & Buster's denies any remaining
21 allegations in this paragraph.
- 22 53. Page 10, paragraph 53 through page 23, paragraph 122 were dismissed as to Dave &
23 Buster's only per the pending order on its renewed motion to dismiss.
- 24 123. Deny.
- 25 124. Dave & Buster's lacks information sufficient to determine the accuracy of the
26 allegations in this paragraph, so it denies them.
- 27 125. Dave & Buster's lacks information sufficient to determine the accuracy of the
28 allegations in this paragraph, so it denies them.

- 1 126. Deny.
- 2 127. Deny.
- 3 128. Deny.

Affirmative Defenses

- 5 1. To the extent not previously dismissed, the remaining claims against Dave & Buster’s are
- 6 barred by NRS 41.1305(1).
- 7 2. Plaintiffs were comparatively negligent.
- 8 3. The accident at issue was the result of an intervening, superseding cause.
- 9 4. The accident was the sole fault of Mr. Aparicio and Ms. Hurley.
- 10 5. Plaintiffs have not mitigated damages.

DATED this 2nd day of December, 2020.



BY: /s/ Michael P. Lowry
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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 December 2, 2020, I served **Dave & Buster’s of Nevada, Inc’s**

Answer to Amended Complaint as follows:

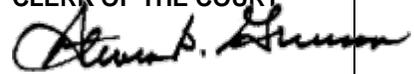
- by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- via electronic means by operation of the Court’s electronic filing system, upon each party in this case who is registered as an electronic case 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 A. Koning Wolfe & Wyman 6757 Spencer St. Las Vegas, NV 89119 Attorneys for Mocore, LLC; MAT-Summerlin, LLC	

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



#14: Motion for Summary Judgment



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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.: A-20-813787-C

Dept. No.: 18

**Dave & Buster's of Nevada, Inc.'s
Motion for Summary Judgment**

Hearing Requested

The court previously dismissed all causes of action against Dave & Buster's, except for negligence. As to negligence, it survived only to the extent that Dave & Buster's agents or employees may have assisted Mr. Aparicio to the vehicle he drove that was then involved in the collision that killed Damaso & Christa Puente. Discovery has determined that person was Asa Eubanks, an employee of Casa del Matador. As Eubanks is not an employee or agent of Dave & Buster's, summary judgment is appropriate.

///

///

AA454

1 DATED this 3rd day of December, 2020.



3
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
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Attorneys for Dave & Buster's of Nevada, Inc.

9 **Memorandum of Points & Authorities**

10 **I. Dave & Buster's did not assist Aparicio or Hurley to their car.**

11 As discussed in prior motions, on May 15, 2018 Aparicio and Hurley came to Dave &
12 Buster's and legally consumed alcohol there. They then left Dave & Buster's and went to Casa
13 del Matador. They consumed more alcohol there. When they left Casa del Matador, Aparicio and
14 Hurley got into their Mercedes and drove away. Minutes later Aparicio drove the Mercedes into
15 the Puentes' Prius, killing them. He was criminally charged and is presently incarcerated for his
16 role in these deaths.

17 Plaintiffs filed this civil lawsuit alleging Dave & Buster's was responsible for Aparicio's
18 actions. Dave & Buster's moved to dismiss per NRS 41.1305. That motion was eventually
19 granted and all causes of action against Dave & Buster's were dismissed, except for negligence.
20 As to negligence, it survived only to the extent that Dave & Buster's agents or employees may
21 have assisted Mr. Aparicio to the vehicle he drove that was then involved in the collision that
22 killed Damaso & Christa Puente. When discovery opened, Dave & Buster's subpoenaed Metro
23 for its investigative files concerning this accident. Metro's investigation conclusively identified
24 who assisted Mr. Aparicio to the vehicle after leaving Casa del Matador. As noted below from
25 Metro's report, it was Casa del Matador employee Asa Eubanks.¹

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¹ Exhibit 1 at DB000447.

1 At 20:53:55 in video 5 from Casa Del Matador, Henry Aparicio and Morgan Hurley walk out of
2 the front door of Casa Del Matador accompanied by the bartender who was identified by Chef Collins
3 as Asa Eubanks. Eubanks reenters the bar at 20:55:28.

4 In the dining room video from Casa Del Matador, the left side mirror signal of the red Mercedes
5 can be seen flashing at 20:55:31, consistent with someone locking or unlocking the vehicle. This is
6 consistent with the time frame Hurley and Aparicio exit the bar and after Eubanks reenters the bar. At
7 20:56:03 a person wearing clothing identical to the clothing worn by Henry Aparicio, staggers in between
8 the parking spot occupied by the red Mercedes and the vehicle parked to the south of the Mercedes.
9 That same person opens the driver's door of the Mercedes and gets into the vehicle at 20:56:09. The
10 headlamps become illuminated 18 seconds later at 20:56:27. At 20:56:34 Asa Eubanks can be seen in
11 both the bar video and the dining room video running out of the business for a second time and standing
12 at the door of the red Mercedes. Eubanks appears to know the driver and appears to be making hand
13 gestures and talking to the driver of the red Mercedes. At 20:57:22 Eubanks walks away from the vehicle
14 toward the dining room camera, then reenters the business at 20:57:28, as the red Mercedes begins to
15 back out of the parking space.

16 The red Mercedes can be seen backing out of the parking space in the dining room video as
17 well as the Downtown Summerlin surveillance video from camera D2-01-180. The Downtown
18 Summerlin surveillance camera had a more accurate time of 21:03:05 as the time of departure from
19 the parking spot at Casa Del Matador and a time of 21:03:29 as the last time the red Mercedes was
20 seen driving east on Oval Park Drive. This time is 3 minutes and 55 seconds prior to the time of the
21 collision which was captured by the Canes drive through surveillance camera at Sahara and Hualapai.
22 The distance between this parking space and the area of initial contact at Sahara and Hualapai,
23 assuming the most direct route was taken, was approximately 1.6 miles.

24 **II. Summary judgment is warranted for Dave & Buster's.**

25 This case involves a tragic set of facts. However Plaintiffs' only remaining cause of action
26 against Dave & Buster's was if its agents or employees may have assisted Mr. Aparicio to the
27 vehicle he drove. Factually, it is now established that person was an employee of Casa del
28 Matador, not Dave & Buster's. Consequently, Plaintiffs cannot prevail on their only cause of
action against Dave & Buster's and summary judgment is appropriate.

DATED this 3rd day of December, 2020.



BY: /s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

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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 December 3, 2020, I served **Dave & Buster's of Nevada, Inc.'s**

Motion for Summary Judgment 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 A. Koning Wolfe & Wyman 6757 Spencer St. Las Vegas, NV 89119 Attorneys for Mocore, LLC; MAT-Summerlin, LLC	

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



EXHIBIT 1

EXHIBIT 1

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

On-Scene Investigation

On 05/15/2018 at approximately 9:59 p.m. I arrived at the intersection of West Sahara Avenue and North Hualapai Way. I observed a significant amount of vehicle debris, vehicle fluids, and broken glass within the intersection. The debris extended from the west side of the intersection in the eastbound travel lanes, to the east side of the intersection, in the east and westbound travel lanes. Las Vegas Fire, Heavy Rescue 44, was still on scene in the westbound travel lanes of west Sahara Avenue, attempting to remove the roof of the white 2010 Toyota Prius to check for occupants in the crushed rear seat. The below photograph was taken by Sergeant Jeff Richter at the time that Las Vegas Fire Heavy Rescue 44 was attempting to remove the roof of the Prius. More photographs of the Prius during the time of the on-scene investigation can be located in the Prius "Appendix B" portion of this report.



The 2010 Toyota Prius had major damage originating from the rear of the vehicle. The apparent contact damage originated adjacent to the midline of the vehicle, on the driver's side, and extended to the deepest point of crush damage on the passenger side of the vehicle. The above photograph is of the rear of the Prius as rescue personnel was attempting to remove the roof.

I made contact with Traffic Officer E. Contreras, who was the primary collision investigator before I assumed responsibility for this collision scene. Contreras relayed the circumstances of the collision to Fatal Detectives Salisbury, Grimesey, Figueroa, Sergeant McCullough, and I during a briefing. Contreras advised me both occupants of the white Toyota Prius were removed from the Prius by the first arriving CCFD unit, but both occupants were pronounced deceased shortly after their extrication. Contreras stated the occupants of the red Mercedes-Benz C250 were transported to UMC Trauma after the female occupant of the Mercedes was extricated from the front right passenger seat. Contreras also advised me that a male subject, who had been transported to UMC Trauma, was believed to be

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

the driver at the time of the collision, but was denying driving the Mercedes, despite having injuries consistent with the driver's airbag deployment. That same subject was identified through valid Nevada driver's license as Henry Aparicio.

During the on-scene investigation, Crime Scene Analyst G. Guerreo took digital photographs of the scene of the collision prior to the marking of roadway evidence. A second set of photographs were taken after the marking of roadway evidence consistent with the dynamics of the collision. I conducted an inspection of each vehicle, making notes of interior and exterior damage, as well as other factors such as seat positions, glass damage, and the position and state of each tire. Sergeant P. McCullough collected multiple data points using a Sokia GRXZ GNSS RTK Receiver for use in the scale diagram of the collision scene. Detective E. Grimmesey authored two related telephonic search warrants, which were approved by the Honorable Judge Amy Chelini, for further investigation into the interior of both vehicles and to obtain the evidentiary blood samples from Henry Aparicio. Detective D. Figueroa marked all visible roadway evidence after the preliminary set of photographs were taken.

I read through the written voluntary statements of citizens who remained at the scene of the collision and conducted a digitally recorded interview of witness Brandon McCauley. The details of that interview appear in the interview section of this report. I spoke with the other subjects who completed voluntary statements and found that most of them did not have firsthand knowledge of the collision or stopped after the collision to attempt to render aid. No recorded interviews were conducted with witnesses who were not able to describe the dynamics of the collision correctly.

I took measurements of the travel lanes at the area of initial contact and in the eastbound and westbound directions using a steel tape measure. I confirmed the grade and super elevation of the roadway at the area of initial contact using a digital level. Detectives Figueroa and Grimmesey conducted friction testing of the roadway, in the direction of the collision, using a VC 4000 accelerometer which was installed in a 2013 Ford Explorer, LVMPD vehicle #10465. The results of the measurements and accelerometer testing are detailed in the "Primary Roadway" section of this report.

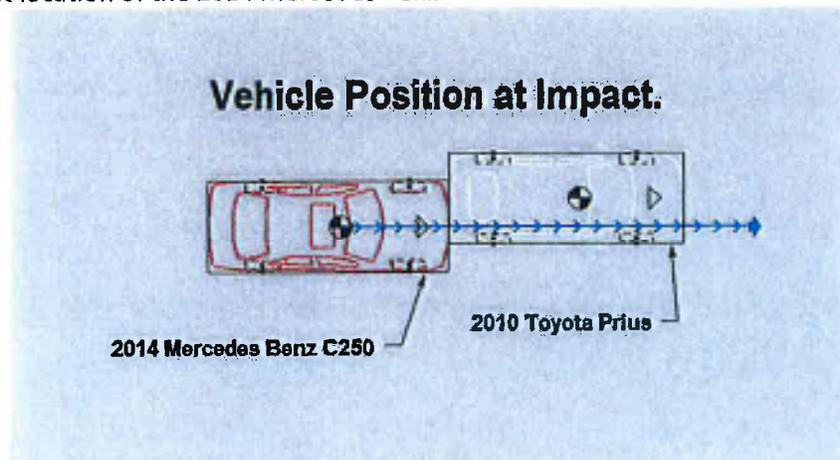
Detective Salisbury took a series of aerial photographs of the collision scene with the LVMPD Collision Investigation drone. The drone photographs were taken after roadway evidence was marked and while vehicle inspections were being conducted. These photographs were taken from varying altitudes and angles to the roadway. One of these drone photographs is visible on the following page with a brief description of the perspective of the collision scene.

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422



The above photograph was taken by the LVMPD Collision Investigation drone which was operated by Detective Salisbury on the night of this collision. The photograph shows the scene of the collision after the evidence of the vehicles paths of travel were marked with paint from the area of initial contact to the location of final rest of each vehicle. The Yellow arrow points to the area of initial contact which is labeled "AIC." The white arrow points to the final rest location of the 2010 Prius. The red arrow points to the final rest location of the 2014 Mercedes Benz.

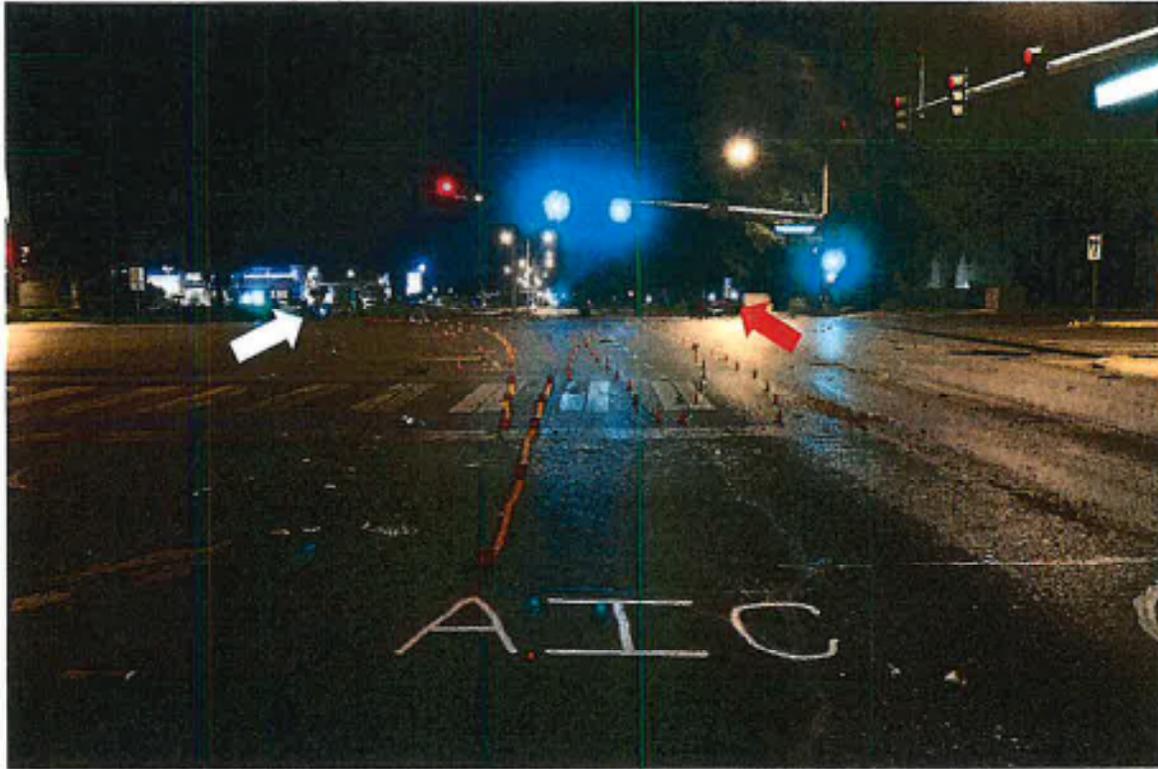


The above image is consistent with the approximate position of each vehicle at first contact. This probable position is consistent with the damage profile to each vehicle and the minimal rotation each vehicle experienced after maximum engagement was achieved. The blue arrow in the image shows the path of the center of gravity of the Mercedes Benz, initiated at the area of initial contact which

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

was shown in the drone photograph on the previous page. The blue arrow is not the same as the departure angle of the Mercedes after impact. This image is also consistent with the damage profile shown in the aerial drone photos in each vehicle’s respective appendix portion of this report. The below picture is from the perspective of the first travel lane in the eastbound direction on West Sahara Avenue, west of the intersection of South Hualapai Way. This photograph is consistent with the location of both vehicles at the time of first contact and was taken after roadway evidence was marked. The red arrow points to the final rest location of the Mercedes and the white arrow points to the final rest location of the Prius. Both vehicles were more than 200 feet east of the paint marking the area of initial contact (AIC).



The red Mercedes-Benz came to rest on the south sidewalk of West Sahara Avenue, east of the intersection of South Hualapai Way. Henry Aparicio deposited a significant amount of blood on the steering wheel airbag which deployed at the time of the collision. Apparent blood was also located on the center console, driver’s door armrest, and steering wheel. These blood samples were collected during the service of a search warrant which was authored by Detective Grimesey and approved by the Honorable Judge Amy Chelini on the night of the collision. The blood samples were collected by Crime Scene Analyst Guerrero using approved techniques. These samples would later be tested by the LVMPD Forensic Laboratory for comparative analysis against a sample which was provided voluntarily by Henry Aparicio on the morning of May 16th, 2018. The results of that testing are detailed in the follow-up investigation portion of this report.

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

Follow-Up Investigation

On the morning of May 17th, 2018 Certified CDR Analyst Detective Kenneth Salisbury and I reviewed the Bosch CDR report which was obtained from the 2010 Toyota Prius on the morning of May 16th, 2018. Detective Salisbury obtained the report pursuant to the search warrant authored by Detective Grimmesey and approved by the Honorable Judge Amy Chelini. The report indicated the 2010 Toyota Prius was stopped at the time of the first triggered event. This first triggered event was the time the Prius was first impacted by the Mercedes while stopped for the red signal at the intersection of West Sahara Avenue and South Hualapai Way. The Prius was accelerated to a speed of 54.2 mph in approximately 140 milliseconds. Additional details of the CDR report are expanded upon in the speed analysis of the Mercedes Benz "Appendix A" portion of this report. Please refer to the CDR report directly for more specific information obtained from the 2010 Toyota Prius.

On May 17th, 2018 Forensic Scientist II, Dana Russell conducted an analysis of the blood samples obtained from Henry Aparicio in the early morning hours of May 16th, 2018.

The two blood samples were obtained pursuant to a search warrant which was authored by Detective Grimmesey and approved by the Honorable Judge Amy Chelini.

On June 11th, 2018 Kimberly Dannenberger, Forensic Scientist II, of the LVMPD Forensic Laboratory began the comparative analysis of the apparent blood samples which were obtained from the interior of the 2014 Mercedes-Benz C250. Dannenberger's Comparative analysis report was completed and released on July 10th, 2018. The most notable results from the report reflect a positive result for presumptive blood from the steering wheel airbag, steering wheel, interior driver door armrest, and the area immediately below the driver side window. The report would also state about these same samples, "The probability of observing this same DNA profile is approximately 489 septillion (489×10^{24}) times more likely if it originated from Henry Aparicio than if it originated from an unknown random contributor." This report was consistent with the evidence that Morgan Hurley was seated in the front right passenger seat of the Mercedes and that the rear bench seat was unoccupied at the time of the collision. The DNA analysis is also consistent with Henry Aparicio being the driver of the red 2014 Mercedes C250 at the time of the airbag deployment during this fatal collision. Please refer to the complete DNA analysis for more specific information.

According to the National Highway Traffic Safety Administration (NHTSA), the average time of deployment for an automobile airbag is 1/20th of a second. The NHTSA website states, "Generally, when there is a moderate to severe crash, a signal is sent from the air bag system's electronic control unit to an inflator within the air bag module. An igniter in the inflator starts a chemical reaction that produces a harmless gas, which inflates the air bag within the blink of an eye – or less than 1/20th of a second. Because air bags deploy very rapidly, serious or sometimes fatal injuries can occur if the driver or passenger is too close to – or comes in direct contact with – the air bag when it first begins to deploy." The airbag deployment in the 2014 Mercedes Benz was consistent with the injuries to Henry Aparicio's face which caused him to bleed on the airbag, steering wheel, interior driver door, and various other locations in and on the Mercedes. The speed at which the airbag deploys at the time of impact also

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

excludes any person, other than Henry Aparicio, from occupying the driver’s seat at the time of the airbag deployment.

On 06/21/2018 at 0730 hours I conducted a review of the video footage which I obtained under Grand Jury Subpoena from Dave and Buster’s Director of Security, James Brussow. I also reviewed the video footage which was obtained under Grand Jury Subpoena from the Wolfe & Wyman LLP law office who are representing the interest of Casa Del Matador. Both Restaurants produced video surveillance from the night of May 15th, 2018 which directly related to LVMPD case number 180515-4422. Both sets of videos showed two subjects who I identified as Henry Aparicio dob-07/30/94 and Morgan Hurley dob-07/28/94. Hurley and Aparicio are the two subjects within the yellow square in the below image from the Dave and Buster’s security video which will be further described below.



On May 18th, 2018 at approximately 1300 hours, I made contact with Chef Andrew Collins at Casa Del Matador located at 1770 Festival Plaza Drive suite 190, Las Vegas NV 89135. Chef Collins showed me the video surveillance from the night of May 15th, 2018 between the hours of 1900 and 2105 which would correspond with the surveillance footage I had previously viewed from Downtown Summerlin Security. Chef Collins identified Henry Aparicio as a Hispanic male adult with black hair wearing a light blue, short sleeve, button up shirt and black pants, seated on the south end of the main bar in the video. Chef Collins also identified the white female adult, seated to Aparicio’s left at the bar, as “Morgan”, but was unsure of her last name. In the video Morgan Hurley appears to be a white female adult wearing a white and black, horizontal striped dress, carrying a large black handbag, who has multiple tattoos on her left and right shoulders and arms. The image on the following page shows Aparicio and Hurley at the bar at Casa Del Matador wearing the same clothes they were wearing in the Dave and Buster’s image.

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422



The Casa Del Matador Surveillance system time was approximately five minutes slower than the current LVMPD dispatch time in comparison to the current view at the time of my initial review of the video on the 18th of May, 2018. The Dave and Buster’s video Surveillance footage was approximately 20 minutes faster than the current LVMPD dispatch time in comparison to the current view at the time of my initial review of the video on the 17th of May, 2018. I identified the same two subjects in the Dave and Buster’s videos and made official requests for surveillance from both businesses as well as Downtown Summerlin.

During my review of the Dave and Buster’s surveillance video, I reviewed the entry way video and the prize zone video prior to watching the “game bar 1” video. The “game bar 1” label is visible on the lower right side of the screen in the videos. The running date and time stamp appears on the video in the upper left corner and this camera view of the bar will be referred to as the “game bar 1” video in the rest of this document.

In the first of the two “game bar 1” videos Henry Aparicio and Morgan Hurley can be seen seated in the center of the bar area, near the blue and brown booths on the right of the screen. During this video Aparicio consumes three separate Patron Silver and Sodas at 17:53:21, 18:23:43, and 18:27:47. These alcoholic beverages are consistent with the Patron Silver bottle which is visible as the bartender is preparing the drink and the drink which is charged on the receipts which were provided by Dave and Buster’s. In the second of the two “Game Bar 1” videos Aparicio consumes one more Patron Silver and soda at 19:04:10 and two separate shots of Patron Silver. At 19:30:02 Aparicio consumes one more shot of Patron Silver and has his final Patron Silver and soda prior to leaving Dave and Buster’s.

Between the time on the Dave and Buster’s “Game Bar 1” camera of 17:53 (5:53 pm) and 19:32 (7:32 pm) Henry Aparicio consumed a total of eight alcoholic beverages containing at least a one ounce shot of Patron Silver. Hurley consumed five separate alcoholic beverages, consistent with the video and the receipts in that same time frame. Patron Silver is an intoxicating liquor which has an alcohol concentration described as 80 proof according to Patron’s published information. This total number of drinks is also consistent with the receipts provided by Dave and Buster’s.

The time discrepancy in the Dave and Buster’s video surveillance is supported by the video surveillance footage from the exterior Downtown Summerlin security cameras. Aparicio and Hurley can be seen leaving Dave and Buster’s entry way at approximately 19:37 (7:37 pm), but due to the 20 minute

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

time discrepancy the actual time of their departure was approximately 19:17 (7:17 pm). This time was consistent with parking lot camera K1-01-180 from lot 10 at Downtown Summerlin. The parking lot camera shows Aparicio and Hurley walking to a red Mercedes at 19:14:29. This camera view was 3 minutes slower than the current time when compared to LVMPD dispatch time, suggesting the actual time in the video was 19:17 (7:17 pm).

Downtown Summerlin security camera D2-01-180 also captured the red Mercedes Benz driving toward Casa Del Matador at 19:21:19 (7:21 pm). The current view from this camera matched with current LVMPD dispatch time at the time the video was reviewed. This time was consistent with the time of arrival at Casa Del Matador. This camera view was also used to establish the departure time of the red Mercedes Benz as it left Downtown Summerlin, eastbound on Oval Park Drive, approximately 4 minutes prior to the fatal collision at West Sahara Avenue and South Hualapai Way. The red Mercedes can be seen turning left into a parking space in front of Casa Del Matador at 19:21:44 in the Downtown Summerlin video. This video corresponded with the Interior surveillance camera footage from the dining room side of Casa Del Matador.

The Casa Del Matador surveillance footage shows a time of 19:16:02 when the red Mercedes pulls into the parking space on the left side of the dining area, visible through the restaurant's southeast window. The driver's door of the Mercedes opens and Henry Aparicio can be seen exiting the vehicle and walking toward the front of the business prior to walking through the front door with Hurley. The 5 minute discrepancy in the Matador video is consistent with the actual time being 19:21 (7:21 p.m.) at the time of Henry Aparicio and Morgan Hurley arriving at Casa Del Matador.

The bar camera video from Casa Del Matador has a view of the south end of the bar and the front door from the interior of the business. This video was synchronized with the dining area video which showed the arrival of the Mercedes. In this video Aparicio and Hurley can be seen walking through the front door at 19:16:42 (7:16 p.m.), the time displayed on the video, or 19:21 (7:21 p.m.), when adjusted for the time discrepancy. According to the time stamp on the bar camera video, at 19:22:04 (7:22p.m.) Aparicio is served an apparent shot of Tequila. The shot of tequila appears to come from a Dos Artes Extra Anejo bottle which has a distinct ceramic bottle and is consistent with the sales receipt. Dos Artes Extra Anejo is an oak barrel aged tequila which is described as "40% alcohol by volume," on the label printed by the manufacturer. Aparicio consumes that shot a short time later.

In the second of five bar camera videos, Aparicio is served a larger drink, poured from a tall clear bottle, which appears to be consistent with the "Casamigos Reposado" that appears on the sales receipt from Casa Del Matador. The "Casamigos Reposado" is also an oak barrel aged tequila which is also "40% alcohol by volume (80 proof)" per the manufacturers printed label.

In the third of five bar camera videos, Aparicio is served a drink at 20:00:53 (8:00 p.m.), from a tall brown bottle which appears to be consistent with the "Don Julio 1942," that appears on the sales receipt from Casa Del Matador. Don Julio 1942 is a tequila which is "40% alcohol by volume" according to the manufacturer's bottle label.

In video number 4, Aparicio is served a shot from a bottle similar to the bottle containing the Casamigos Reposado. Aparicio drinks that shot at 20:35:40 (8:35 p.m.). At 20:37:12 (8:37 p.m.) on video 4, Aparicio removes a drink from a server's tray which is on the bar to the right of Aparicio. That server sees Aparicio take the drink and appears to talk to him about it prior to setting the drink in front of Aparicio, and prior to the bar tender charging Aparicio for that drink on a separate receipt. That drink was charged on a separate receipt as a Jalapeno Margarita. Aparicio begins to drink that Margarita at 20:45:30 (8:45 p.m.).

In the time between Aparicio taking the margarita from the server's tray and drinking the margarita, bar staff appears to deny Aparicio the ability to purchase more alcoholic beverages. At

COLLISION INVESTIGATION NARRATIVE

Event Number: 180515-4422

20:44:12 Morgan Hurley falls out of her bar stool onto the ground and appears to have difficulty standing back up. Hurley appears wobbly as she attempts to stand back up and Aparicio is extremely slow to react to her falling. Immediately after Hurley falls, Aparicio attempts to give the bar tender, what appears to be a red credit card. The bar tender appears to wave his hand at Aparicio signaling a “no” response to his request.

In the time between 7:21 p.m. and 8:45 p.m. (1 hour and 24 minutes) Henry Aparicio consumed a total of four full alcoholic beverages containing at least a one ounce shot of Tequila. Aparicio’s total drink count between 5:30 p.m. and 8:45 p.m. (3 hours and 15 minutes) consisted of at least twelve tequila based alcoholic beverages while on surveillance video. Aparicio also consumed a portion of a Jalapeno Margarita.

Hurley also appears to consume five separate alcoholic beverages during the time at Casa Del Matador and a total of ten alcoholic beverages in the same time period as Aparicio, between Dave and Buster’s and Casa Del Matador.

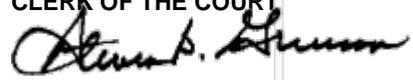
At 20:53:55 in video 5 from Casa Del Matador, Henry Aparicio and Morgan Hurley walk out of the front door of Casa Del Matador accompanied by the bartender who was identified by Chef Collins as Asa Eubanks. Eubanks reenters the bar at 20:55:28.

In the dining room video from Casa Del Matador, the left side mirror signal of the red Mercedes can be seen flashing at 20:55:31, consistent with someone locking or unlocking the vehicle. This is consistent with the time frame Hurley and Aparicio exit the bar and after Eubanks reenters the bar. At 20:56:03 a person wearing clothing identical to the clothing worn by Henry Aparicio, staggers in between the parking spot occupied by the red Mercedes and the vehicle parked to the south of the Mercedes. That same person opens the driver’s door of the Mercedes and gets into the vehicle at 20:56:09. The headlamps become illuminated 18 seconds later at 20:56:27. At 20:56:34 Asa Eubanks can be seen in both the bar video and the dining room video running out of the business for a second time and standing at the door of the red Mercedes. Eubanks appears to know the driver and appears to be making hand gestures and talking to the driver of the red Mercedes. At 20:57:22 Eubanks walks away from the vehicle toward the dining room camera, then reenters the business at 20:57:28, as the red Mercedes begins to back out of the parking space.

The red Mercedes can be seen backing out of the parking space in the dining room video as well as the Downtown Summerlin surveillance video from camera D2-01-180. The Downtown Summerlin surveillance camera had a more accurate time of 21:03:05 as the time of departure from the parking spot at Casa Del Matador and a time of 21:03:29 as the last time the red Mercedes was seen driving east on Oval Park Drive. This time is 3 minutes and 55 seconds prior to the time of the collision which was captured by the Canes drive through surveillance camera at Sahara and Hualapai. The distance between this parking space and the area of initial contact at Sahara and Hualapai, assuming the most direct route was taken, was approximately 1.6 miles.

#15: Order

AA468



1 **NOE**
2 THOMAS F. CHRISTENSEN, ESQ.
3 Nevada Bar No. 2326
4 CHRISTENSEN LAW OFFICES, LLC
5 1000 S. Valley View Blvd.
6 Las Vegas, Nevada 89107
7 T: 702-870-1000
8 courtnotices@injuryhelpnow.com

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 Damaso S. Puente, individually and on behalf of
12 the Estate of Damaso I. Puente, Maria Puente,
13 Daniel Malone, and Diane Malone, individually
14 and on behalf of the Estate of Christa Puente,

15 Plaintiffs,

16 vs.

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

27 Defendants.

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

28 **NOTICE OF ENTRY OF ORDER**

TO: ALL PARTIES AND THEIR COUNSEL

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order was entered
in the above-entitled matter on the 14th day of December, 2020, a copy of which is attached

///

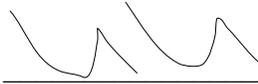
///

AA469

1 hereto.

2 Dated this 15th day of December, 2020.

3 CHRISTENSEN LAW OFFICES

4 

5

THOMAS F. CHRISTENSEN, ESQ.

6 Nevada Bar 2326

7 1000 S. Valley View Blvd.

8 Las Vegas, NV 89107

9 courtnotices@injuryhelpnow.com

10 **CERTIFICATE OF SERVICE**

11 Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTENSEN LAW
12 OFFICES, LLC and that on this 15th day of December, 2020, I served a copy of the foregoing
13 **NOTICE OF ENTRY OF ORDER** via the Court's e-service system to all registered users for
14 this case number.
15

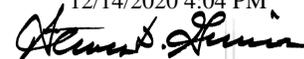
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An employee of CHRISTENSEN LAW OFFICES, LLC
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28

EXHIBIT 1

AA471



CLERK OF THE COURT

1 **ORDR**

2 THOMAS F. CHRISTENSEN, ESQ.
3 Nevada Bar No. 2326
4 CHRISTENSEN LAW OFFICES, LLC
5 1000 S. Valley View Blvd.
6 Las Vegas, Nevada 89107
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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 Damaso S. Puente, individually and on behalf of
12 the Estate of Damaso I. Puente, Maria Puente,
13 Daniel Malone, and Diane Malone, individually
14 and on behalf of the Estate of Christa Puente,

15 Plaintiffs,

16 vs.

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

27 Defendants.

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

28 **ORDER RE: DAVE & BUSTER'S RENEWED MOTION TO DISMISS**

Dave & Buster's of Nevada, Inc. moved to dismiss the amended complaint per NRC
12(b)(5). Dave & Buster's argued that NRS 41.1305(1) bars and eliminates all causes of action
against Dave and Buster's. Plaintiffs opposed and the motion was heard on September 16, 2020.
Michael Lowry appeared for Dave & Buster's, Thomas Christensen appeared for Plaintiffs.

AA472

1 When evaluating a motion to dismiss per NRCPC 12(b)(5), the district court accepts all
2 factual allegations in the complaint as true and draws all inferences in the plaintiffs' favor.
3 Dismissal is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set
4 of facts, which, if true, would entitle [her] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124
5 Nev. 224, 228, 181 P.3d 670, 672 (2008).
6

7 Dave & Buster's argued that the facts alleged in the amended complaint are all subject to
8 NRS 41.1305(1). If so, then Dave & Buster's argues Plaintiffs' causes of action against it are
9 barred. Plaintiffs opposed, arguing NRS 41.1305(1) did not abrogate the common law causes of
10 action against liquor providers pled in their complaint, including negligence, gross negligence,
11 willful and wanton misconduct, strict products liability, breach of express and implied warranties,
12 acting in concert in an abnormally dangerous activity, negligent supervision and hiring, and
13 negligence per se. The Plaintiff argued that NRS 41.1305(1) did not abrogate any common law
14 causes of action against liquor providers, but only served to protect licensees from strict liability
15 for reasonable service of alcohol, while making social hosts strictly liable for any amount of
16 alcohol served to minors. Plaintiff argued that if NRS 41.1305(1) is interpreted more broadly,
17 then it is unconstitutional. Dave & Buster's replied and disputed Plaintiffs' opposition.
18
19

20 The Court concludes Plaintiffs could prove one set of facts that could support a claim for
21 relief, so the motion is GRANTED IN PART and DENIED IN PART.

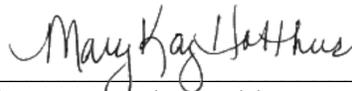
22 As to the negligence cause of action, the court concludes that NRS 41.1305(1) does not bar
23 a cause of action against Dave & Buster's to the extent that Dave & Buster's agents or employees
24 may have assisted Mr. Aparicio to the vehicle he drove that was then involved in the collision
25 that killed Damaso & Christa Puente. The motion to dismiss is denied on that point only. The
26 motion is granted as to all other remaining causes of action including negligence, gross
27 negligence, willful and wanton misconduct, strict products liability, breach of express and
28

1 implied warranties, acting in concert in an abnormally dangerous activity, negligent supervision
2 and hiring, and negligence per se.
3

4 Plaintiffs further argued NRS 41.1305(1) is ambiguous, so it is necessary to consider its
5 legislative history. “Statutory interpretation concerns determining legislative intent, and the
6 starting point is the statute’s plain language. When the meaning of the language is clear, the
7 analysis ends....” Considering legislative history becomes necessary only when the statute’s
8 language could support two or more reasonable interpretations. The Court finds NRS
9 41.1305(1)’s language is clear and unambiguous. Consequently, the Court did not consider NRS
10 41.1305(1)’s legislative history.
11

12 Plaintiffs alternatively argued NRS 41.1305(1) is unconstitutional because it results in a
13 denial of their right to a jury trial on the issues of negligence, gross negligence, willful and
14 wanton misconduct, strict products liability, breach of express and implied warranties, acting in
15 concert in an abnormally dangerous activity, negligent supervision and hiring, and negligence per
16 se. The Court finds the statute is constitutional because the restrictions are rationally related to a
17 legitimate state purpose.
18

19 DATED THIS ____ day of October, 2020. Dated this 14th day of December, 2020



District Court Judge Holthus

21 Submitted by:
22
23 CHRISTENSEN LAW OFFICES, LLC

F39 8C4 E8FC A3AB
Mary Kay Holthus
District Court Judge

24 BY: /s/Thomas Christensen
25 THOMAS CHRISTENSEN, ESQ.
26 Nevada Bar No. 2326
27 1000 S. Valley View Blvd.
28 Las Vegas, Nevada 89107
Attorney for Damaso Puente, Maria Puente,
Daniel Malone and Diane Malone

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Approved as to form and content by:
Wilson, Elser Moskowitz Edelman & Dicker LLP

BY: /s/Michael Lowry
MICHAEL LOWRY, ESQ.
Nevada Bar No. 10666
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
Attorney for Dave & Buster's



Stephanie Martinez <stephaniem@injuryhelpnow.com>

[courtnotices] RE: Puente: Proposed Order

1 message

Lowry, Michael <Michael.Lowry@wilsonelser.com>
To: Dawn Hooker <dawnh@injuryhelpnow.com>
Cc: "CourtNotices@InjuryHelpNow.com" <courtnotices@injuryhelpnow.com>

Wed, Oct 14, 2020 at 10:46 AM

Thank you. I can accept that if you can insert the signature block and submit it to the court.

From: Dawn Hooker [mailto:dawnh@injuryhelpnow.com]
Sent: Friday, October 9, 2020 13:04
To: Lowry, Michael <Michael.Lowry@wilsonelser.com>
Cc: CourtNotices@InjuryHelpNow.com
Subject: Re: Puente: Proposed Order

[EXTERNAL EMAIL]

Hello Michael:

Please see the attached proposed order (in word format). I have attempted to combine your language with ours a little bit more comprehensively.

I have not added your signature line yet, but obviously if you are agreeable to this version, that would be an easy fix.

Please let me know if this proposed Order is acceptable or if you have proposed modifications that would make it acceptable. 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
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www.injuryhelpnow.com

***** PLEASE NOTE ***** This E-Mail/telefax message and any documents accompanying this transmission may contain privileged and/or confidential information and is intended solely for the addressee(s) named above. If you are not the intended addressee/recipient, you are hereby notified that any use of, disclosure, copying, distribution, or reliance on the contents of this E-Mail/telefax information is strictly prohibited and may result in legal action against you. Please reply to the sender advising of the error in transmission and immediately delete/destroy the message and any accompanying documents. Thank you.*****

On Thu, Oct 8, 2020 at 11:25 PM Lowry, Michael <Michael.Lowry@wilsonelser.com> wrote:

Dawn, your response?

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4		
5		
6	Damaso Puente, Plaintiff(s)	CASE NO: A-20-813787-C
7	vs.	DEPT. NO. Department 18
8	Henry Aparicio, Defendant(s)	
9		

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/14/2020

15	Eservice Irvine	wiznet@wolfewyman.com
16	Jeremy Robins	jrobins@backuslaw.com
17	Michael Lowry	michael.lowry@wilsonelser.com
18	Shea Backus	sbackus@backuslaw.com
19	Anne Raymundo	anneraymundo@backuslaw.com
20	Efile LasVegas	efilelasvegas@wilsonelser.com
21	Evelyn Pastor	empastor@ww.law
22	BCB Clerk	rec@backuslaw.com
23	Kait Chavez	kait.chavez@wilsonelser.com
24	Agnes Wong	agnes.wong@wilsonelser.com
25	Thomas Christensen	courtnotices@injuryhelpnow.com
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Virginia Tomova

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