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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants

vs.

Dave & Buster's of Nevada, Inc.,

Respondent

Supreme Ct. No.: 82554

Respondent's Answering Brief

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Mary Kay Holthus, District Judge

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Attorney's Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,347 words.

3. Finally, I certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

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1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 8th day of September, 2021.



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11 Inc.

1 **NRAP 26.1(a) Disclosure**

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

- 6 1. Parent Corporation: Dave & Buster's Entertainment, Inc.
7 2. Publicly held company that owns 10% or more of the party's stock: Dave &
8 Buster's Entertainment, Inc.
9 3. Law firms who have appeared or are expected to appear for Dave & Buster's
10 of Nevada, Inc.: Wilson Elser Moskowitz Edelman & Dicker, LLP

11 DATED this 8th day of September, 2021.



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1 **Certificate of Service**

2 Per NRAP 25(c), I certify that I am an employee of Wilson Elser
3 Moskowitz Edelman & Dicker LLP, and that on September 8, 2021,
4 **Respondent's Answering Brief** was served via electronic means by operation of
5 the Court's electronic filing system to:

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Statement of Issues Presented for Review

1. Dave & Buster's served alcoholic beverages to Aparicio, who was over 21 years old. He later drove drunk and damaged the Puentes, who sued Dave & Buster's for serving Aparicio. NRS 41.1305(1) states "[a] person who serves ... an alcoholic beverage to another person who is 21 years of age or older is not liable in a civil action for any damages caused by the person to whom the alcoholic beverage was served ... as a result of the consumption of the alcoholic beverage." If NRS 41.1305(1) applies and states Dave & Buster's "is not liable in a civil action for any damages," was the district court correct to dismiss per NRCP 12(b)(5)?
2. The Puentes argue NRS 41.1305(1) is unconstitutional. The district court analyzed NRS 41.1305(1) using a rational basis review. Two other states reviewing similar statutes concluded there are multiple ways such statutes can rationally relate to a governmental interest. If so, is NRS 41.1305(1) also constitutional?
3. Dave & Buster's moved for summary judgment. The Puentes requested NRCP 56(d) relief but did not identify how the discovery they sought would alter the district court's ruling. In that circumstance, did the district court abuse its discretion by denying NRCP 56(d) relief?

Statement of the Case & Facts

On May 15, 2018, Henry Aparicio drove drunk and killed Damaso & Christa Puentes. Aparicio was criminally charged and convicted for his actions.¹ The Puentes' estates and heirs (collectively "the Puentes") sued, seeking to hold others liable for Aparicio's actions. This appeal concerns whether Nevada law holds Dave & Buster's vicariously liable for Aparicio's decision to drive drunk.

Chronologically, on May 15, 2018 Aparicio and Morgan Hurley came to Dave & Buster's and legally consumed alcohol there.² The couple then left Dave & Buster's and went to Casa del Matador, where they consumed more alcohol. They later left Casa del Matador and got in their car. Minutes later Aparicio was driving and struck the Puentes' car, killing them. Aparicio & Hurley survived.

The Puentes timely filed a civil complaint against Aparicio, Hurley, Dave & Busters, and Casa del Matador.³ Dave & Busters moved to dismiss.⁴ The district court denied that motion without prejudice, but stated "it is unclear to the Court what Plaintiffs allege Dave & Buster's did," so Plaintiffs were directed to file an amended complaint.⁵

¹ Aparicio's sentencing for his criminal conviction was at issue in case 80072.

² The Puentes assert Aparicio was served illegally, but present no support for this assertion. Opening Brief at 1:9.

³ Appendix Vol. 1 at AA002-022.

⁴ *Id.* at AA023-032.

⁵ *Id.* at AA073-074.

1 The amended complaint alleged that on May 15, 2018 Aparicio drank at
2 least 13 tequila based drinks in the 3 hours and 15 minutes.⁶ He consumed these
3 drinks at “Dave and Buster’s and Matador which are located in close proximity in
4 the same mall building complex and share common parking.”⁷ At least five of
5 those drinks were consumed at Casa del Matador.⁸ Aparicio consumed no food
6 while he was drinking.⁹

7 As to Dave & Buster’s, the amended complaint alleged it continued to serve
8 alcohol to Aparicio although he “was obviously intoxicated and even though Dave
9 & Buster’s knew Aparicio would thereafter be operating a motor vehicle.”¹⁰ The
10 Puentes also alleged Aparicio had a “friendly relationship with Dave & Buster’s,”
11 who provided Aparicio “with alcoholic beverages for free.”¹¹ The Puentes finally
12 alleged Dave & Buster’s employees helped “Defendant Aparicio to the vehicle and
13 providing him with the keys.”¹²

14 The amended complaint contained a variety of factual allegations as to Casa
15 del Matador. Relevant to this appeal, the Puentes alleged Aparicio was obviously
16

17
18 ⁶ *Id.* at AA084, ¶ 21.

19 ⁷ *Id.*

20 ⁸ *Id.* at AA085, ¶ 30.

⁹ *Id.* at ¶ 29.

¹⁰ *Id.* at AA084 at ¶ 24.

¹¹ *Id.* at ¶ 25.

¹² *Id.* at AA085 at ¶ 26.

1 intoxicated at Casa del Matador but was still served drinks.¹³ The Puentes
2 alternatively alleged Casa del Matador's employees assisted Aparicio to the car.¹⁴

3 The amended complaint then alleged Aparicio then drove his car eastbound
4 on Sahara.¹⁵ At the same time, the Puentes were stopped at a red signal on
5 eastbound Sahara, at its intersection with Hualapai.¹⁶ Aparicio struck the Puentes'
6 vehicle and killed them.¹⁷ A blood draw taken hours after the collision indicated
7 Aparicio's blood-alcohol content was 0.204%.¹⁸

8 Dave & Buster's moved to dismiss the amended complaint.¹⁹ The district
9 court's order noted "Dave & Buster's argued that the facts alleged in the amended
10 complaint are all subject to NRS 41.1305(1). If so, then Dave & Buster's argues
11 Plaintiffs' causes of action against is are barred."²⁰ The district court concluded 1)
12 NRS 41.1305(1) applied to almost all the facts alleged; 2) was clear and
13 unambiguous; and 3) was constitutional as "rationally related to a legitimate state
14 purpose."²¹ The district court granted Dave & Buster's motion, except on one,
15 narrow point.

16 ¹³ *Id.* at ¶ 31.

17 ¹⁴ *Id.* at AA086 at ¶ 33.

18 ¹⁵ *Id.* at AA083 at ¶ 15.

18 ¹⁶ *Id.* at ¶¶ 14, 16.

19 ¹⁷ *Id.* at AA083 and AA103, at ¶¶ 17, 123.

19 ¹⁸ *Id.* at AA083 at ¶ 18.

20 ¹⁹ *Id.* at AA106-AA119.

20 ²⁰ Appendix Vol. 2 at AA473.

21 ²¹ *Id.* at AA473-AA474.

1 As to the negligence cause of action, the court concludes that NRS
2 41.1305(1) does not bar a cause of action against Dave & Buster's to
3 the extent that Dave & Buster's agents or employees may have
4 assisted Mr. Aparicio to the vehicle he drove that was then involved in
5 the collision that killed Damaso & Christa Puente. The motion is
6 denied on that point only.²²

7 Dave & Buster's later moved for summary judgment on that point, relying
8 upon a police investigation that identified the person who may have assisted
9 Aparicio to his car was an El Matador employee.²³ The district court granted
10 summary judgment and certified the judgment as final as to Dave & Buster's
11 only.²⁴ The Puentes then timely appealed all adverse rulings.

12 **Summary of the Argument**

13 The Puentes argue Dave & Buster's is vicariously responsible for Aparicio's
14 actions because he consumed alcohol at Dave & Buster's that night and later drove
15 drunk, damaging them. However, NRS 41.1305(1) makes the person who drove
16 drunk responsible for his actions, not the person or business that served him. This
17 statute applies to the facts alleged, is not ambiguous, is not subject to any
18 exception, and is constitutional. But even if unconstitutional, the Puentes could not
19 have sued Dave & Buster's under Nevada's common law that existed before NRS
20 41.1305(1) was enacted.

²² *Id.* at AA473.

²³ *Id.* at AA454-AA467.

²⁴ Appendix Vol. 3 at AA507-509.

Argument

1. The motion to dismiss should have been granted in full.

a. Standard of Review

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo.²⁵ The facts alleged presumed true and all inferences drawn in favor of the plaintiff.²⁶ Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.”²⁷ “Statutory interpretation is a question of law, which this court reviews de novo.”²⁸

b. NRS 41.1305(1) applies to the facts alleged.

Read as a whole, the amended complaint alleged that 1) Dave & Buster’s sold alcoholic beverages; 2) sold them to Aparicio; 3) Aparicio then drove drunk; and 4) damaged the Puentes. The Puentes assert this makes Dave & Buster’s vicariously liable for Aparicio’s actions, but NRS 41.1305(1) expressly prohibits this exact type of liability.

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

²⁵ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

²⁶ *Id.*

²⁷ *Id.* at 228, 181 P.3d at 672.

²⁸ *Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015).

1 the alcoholic beverage was served, sold or furnished as a result of the
2 consumption of the alcoholic beverage.²⁹

3 NRS 41.1305(1) is broken out into its constituent parts below.

4 • *A person who serves, sells or otherwise furnishes an alcoholic*
5 *beverage to another person:* The Puentes alleged Dave & Buster's
sold at least one alcoholic beverage to Aparicio.

6 • *who is 21 years of age or older:* The Puentes did not allege Aparicio
7 was less than 21.

8 • *is not liable in a civil action for any damages:* The Puentes filed a
civil action for damages against Dave & Buster's.

9 • *caused by the person to whom the alcoholic beverage was served,*
10 *sold or furnished:* The Puentes alleged Aparicio damaged them.

11 • *as a result of the consumption of the alcoholic beverage:* The
Puentes alleged Aparicio damaged because he drove drunk.

12 NRS 41.1305(1) squarely applies to the facts alleged in the amended complaint.

13 **c. NRS 41.1305(1) is not ambiguous.**

14 The Puentes argued below that NRS 41.1305(1) was ambiguous. The
15 district court disagreed, concluded NRS 41.1305(1) is unambiguous, and refused to
16 consider legislative history. The Puentes' opening brief does not argue that ruling
17 was error, waiving the point.³⁰

18
19 ²⁹ NRS 41.1305(1). NRS 41.1305(2) creates the only exception, but the Puentes
did not allege it applies.

20 ³⁰ *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672
(2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

1 **d. NRS 41.1305(1) applies to the Puentes’ causes of action.**

2 The Puentes assert NRS 41.1305(1)’s language “does not eliminate any of
3 [the] causes of action alleged in the complaint...” because the causes are not
4 expressly listed.³¹ This reads NRS 41.1305(1) too narrowly. As drafted, the
5 statute bars liability for damages arising from a certain fact pattern. The
6 Legislature was not required to list every conceivable cause of action that might
7 arise from that fact pattern. Instead, the Legislature clearly defined a fact pattern
8 from which liability for damages is not permitted.

9 The Puentes alternatively argue that NRS 41.1305(1) modified Nevada’s
10 common law and must be narrowly construed. Courts “presume that a statute does
11 not modify common law unless such intent is explicitly stated.”³² Statutes that
12 derogate “the common law should be strictly construed, and, if there is any doubt
13 as to the statute’s meaning, the court should interpret the statute in the way that
14 least changes the common law.”³³

15 This argument is misplaced because the Puentes had no common law causes
16 of action against Dave & Buster’s before NRS 41.1305(1) was created in 1995.
17 Before then, the Supreme Court had repeatedly refused to allow a tort claims
18 arising out of the distribution of alcohol. It instead concluded the proximate cause

19 _____
20 ³¹ Opening Brief at 25.

³² *Branch Banking*, 131 Nev. at 158-59, 347 P.3d at 1040.

³³ *Id.*

1 of any damage caused by a person who has consumed alcohol is the *consumption*
2 of alcohol itself, not its *distribution*.³⁴ NRS 41.1305(1) is consistent with that
3 common law.

4 The motivation for NRS 41.1305 may have been *Hinegardner v. Marcor*
5 *Resorts*, which refused in 1992 to allow such a claim even against vendors who
6 served alcohol to minors.³⁵ NRS 41.1305 was then enacted in 1995 and expressly
7 allowed liability for damages only when minors are served.

8 **e. Other statutes and case law do not change the result.**

9 The Puentes also seem to argue that NRS 41.1305(1) does not bar potential
10 vicarious liability against Dave & Buster's because Dave & Buster's would still be
11 liable for its employees' potential negligence through NRS 41.130. However these
12 two statutes do not conflict here. NRS 41.130 creates vicarious liability for the
13 actions of employees, then NRS 41.1305(1) limits that liability in certain factual
14 scenarios.

15 The Puentes also argue Dave & Buster's could be liable for Aparicio's
16 actions via Clark County Code 8.20.300. But the Puentes do not explain how a
17
18

19 _____
20 ³⁴ *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969); *Snyder v.*
Viani, 110 Nev. 1339, 885 P.2d 610 (1994).

³⁵ 108 Nev. 1091, 844 P.2d 800 (1992).

1 county code could create liability that a statute bars.³⁶ “[C]ounties are legislative
2 subdivisions of the state. Because counties obtain their authority from the
3 legislature, county ordinances are subordinate to statutes if the two conflict.”³⁷

4 The Puentes also speculate Dave & Buster’s may not have complied with the
5 alcoholic beverage education requirements in NRS 369.600-635.³⁸ NRS 369.630
6 outlines the potential liability if the educational requirements are not met. The
7 only liability is an administrative fine. NRS 369.630 creates administrative
8 liability if employees do not complete certain training requirements. It does not
9 create civil liability, which is consistent with NRS 41.1305(1).

10 The Puentes also cite *Billingsley v. Stockmen’s Hotel*, but the case did not
11 concern liquor liability like the Puentes wish to impose here.³⁹ *Billingsley* was
12 about an altercation between hotel security and a guest who was being escorted off
13 property. No argument was presented about whether the hotel could be liable for
14 damages for serving him alcohol.

15 Finally, the Puentes’ citations to decisions from Idaho and Michigan are
16 irrelevant given that Nevada law has already considered this topic.

17
18 ³⁶ *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280,
1288 (2006) (stating that courts need not consider claims that are not cogently
argued or supported by relevant authority).

19 ³⁷ *Falcke & Herbig Props. v. Cty. of Douglas*, 116 Nev. 583, 588, 3 P.3d 661, 664
(2000).

20 ³⁸ Opening Brief at 21:16-16.

³⁹ *Billingsley v. Stockmen’s Hotel*, 111 Nev. 1033, 901 P.2d 141 (1995).

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

2 If NRS 41.1305(1) otherwise applies, the Puentes argue it is
3 unconstitutional. No Nevada appellate court has yet ruled on this argument.
4 “Statutes are presumed to be valid, and the challenger bears the burden of showing
5 that a statute is unconstitutional. In order to meet that burden, the challenger must
6 make a clear showing of invalidity.”⁴⁰ “When the law ... does not implicate a
7 suspect class or fundamental right, it will be upheld as long as it is rationally
8 related to a legitimate government interest.”⁴¹

9 The Supreme Court of Nevada has repeatedly ruled that the right to sue for
10 damages “does not involve a fundamental constitutional right.”⁴² When a
11 fundamental constitutional right is not implicated, the Legislature may restrict
12 court access “if there exists a rational basis for doing so.”⁴³ The rational basis test
13 does not allow a court to “superimpose its own preferences on the work product of
14 a coordinate branch of government.”⁴⁴ The Puentes do not dispute that NRS
15 41.1305(1) is subject to a rational basis review.

16 At least two other jurisdictions have considered rational basis challenges to
17 statutes substantively similar to NRS 41.1305(1). Wisconsin’s Supreme Court

18 ⁴⁰ *Tam v. Dist. Ct.*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015).

19 ⁴¹ *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

⁴² *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995); *Tam*, 131 Nev.
20 at 796, 358 P.3d at 237-38.

⁴³ *Id.*

⁴⁴ *Allen v. State*, 100 Nev. 130, 136, 676 P.2d 792, 796 (1984).

1 concluded its statute satisfied the rational basis test, noting that distinguishing
2 between two groups of persons who furnish alcoholic beverages to others was
3 rationally related to the legitimate governmental purpose of protecting persons
4 under the legal drinking age.⁴⁵ NRS 41.1305(1) does the same thing.

5 Wyoming's Supreme Court considered a similar statute in *Greenwalt v. Ram*
6 *Rest. Corp.*⁴⁶ The statute at issue read "[n]o person who has legally provided
7 alcoholic liquor or malt beverage to any other person is liable for damages caused
8 by the intoxication of the other person."⁴⁷ *Greenwalt* noted many potential reasons
9 a legislature might have that could satisfy a rational basis test.

10 [T]he legislature could reasonably have concluded that the full nature
11 and scope of the liability and immunity of all alcohol providers,
12 licensed vendors and non-licensed persons alike, was uncertain. ...
13 The legislature could have rationally thought that it must create a
14 comprehensive, yet simple to administer tort claim to cover all liquor
15 providers and intoxicated persons. It could have rationally thought
16 that the establishment of an unquestioned and predictable yet limited
17 basis for legal liability would provide a more effective incentive for
18 the responsible furnishing of alcohol and the realization of the primary
19 purpose.⁴⁸

20 Ultimately, a legislature is not required to "draw its lines with mathematical
certainty or even that it exercise its policy-making judgment in the best or wisest

⁴⁵ *Doering v. WEA Ins. Group*, 532 N.W.2d 432 (Wis. 1995).

⁴⁶ 71 P.3d 717 (Wyo. 2003).

⁴⁷ W.S. § 12-8-301(a).

⁴⁸ *Greenwalt*, 71 P.3d at 738.

1 way. We hold that the legislative classifications at issue are rationally related to the
2 legitimate legislative objectives of” the statute.⁴⁹

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

7 **g. The district erred by creating an exception to NRS 41.1305(1).**

8 The district court denied Dave & Buster’s motion to dismiss as to one,
9 narrow point. It concluded “NRS 41.1305(1) does not bar a cause of action against
10 Dave & Buster’s to the extent that Dave & Buster’s agents or employees may have
11 assisted Mr. Aparicio to the vehicle he drove that was then involved in the
12 collision....⁵⁰ This ruling was erroneous for two reasons.

13 First, in the factual context of this case if such a duty existed it would
14 conflict with NRS 41.1305(1). The Puentes allege Aparicio was drunk because
15 Dave & Buster’s served alcohol to him. The district court’s ruling created both a
16 duty and potential liability for damages precisely because Dave & Buster’s served
17 alcohol to him. But NRS 41.1305(1) expressly prohibits liability for damages
18 arising from that conduct.

20 ⁴⁹ *Id.*

⁵⁰ Appendix Vol. 2 at AA473.

1 Second, the Supreme Court of Nevada rejected the idea that Dave &
2 Buster's owed a duty once Aparicio left the premises. In *Rodriguez v. Primadonna*
3 *Co., LLC* three men were ejected from a casino for being drunk and disorderly.
4 After being ejected, they were subsequently involved in a motor vehicle accident.
5 One of the injured parties sued the casino. *Rodriguez* first noted "it is well settled
6 in Nevada that commercial liquor vendors, including hotel proprietors, cannot be
7 held liable for damages related to any injuries caused by the intoxicated patron,
8 which are sustained by either the intoxicated patron or a third party."⁵¹
9 Consequently, "when a hotel proprietor rightly evicts a disorderly, intoxicated
10 patron, the hotel proprietor is not liable for any torts that an evicted patron commits
11 after he or she is evicted that result in injury."⁵² This meant "because Nevada
12 commercial alcohol vendors are not liable for injuries sustained by intoxicated
13 patrons, [the hotel] did not have a duty to ensure safe transportation for the young
14 men, keep Fabian on the premises, or otherwise prevent injuries subsequent to their
15 eviction."⁵³

16 Therefore, although the Primadonna may have known that Fabian's
17 step-uncle was intoxicated and could not safely drive, we conclude, as
18 a matter of law, that Primadonna did not have the duty to arrange safer
19 transportation, prevent an intoxicated driver from driving, or prevent
20 Fabian, a passenger, from riding with a drunk driver. In so
concluding, we note that it would be contrary to existing authority for

⁵¹ 125 Nev. 578, 585, 216 P.3d 793, 798 (2009).

⁵² *Id.*, 216 P.3d at 798-99.

⁵³ *Id.* at 587, 216 P.3d at 800.

1 this court to hold otherwise and require a proprietor to monitor the
2 intoxication level or other factors related to patrons who elect to drive
3 while intoxicated or who engage in other dangerous activity after they
4 are evicted.⁵⁴

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

8 The district court should have granted Dave & Buster's motion to dismiss in
9 whole. If so, then it is unnecessary to reach the part of this appeal concerning the
10 motion for summary judgment.

11 **2. The Puentes did not meet their burden to obtain NRCP 56(d) relief.**

12 After ruling on Dave & Buster's motion to dismiss, the Puentes' only viable
13 theory against Dave & Buster's was "to the extent that Dave & Buster's agents or
14 employees may have assisted Mr. Aparicio to the vehicle he drove that was then
15 involved in the collision....⁵⁵ Dave & Buster's obtained admissible evidence
16 identifying that person and that he was an employee of Casa del Matador, not Dave
17 & Buster's. Dave & Buster's moved for summary judgment relying upon that
18 evidence and the district court then granted it.

19 The Puentes' appeal of that order is narrow. They do not contest the district
20 court's ruling as to the admissibility of the evidence Dave & Buster's presented

⁵⁴ *Id.*

⁵⁵ Appendix Vol. 2 at AA473.

1 identifying Eubanks or the conclusion that there was no genuine issue of material
2 fact. Instead, the Puentes argue only that the district court erred by denying their
3 request for relief per NRCP 56(d). “[U]nlike the summary judgment decision
4 itself, the decision to grant or deny a continuance of a motion for summary
5 judgment to allow further discovery is reviewed for an abuse of discretion.”⁵⁶

6 The party requesting NRCP 56(d) relief “has the burden to affirmatively
7 demonstrate why he cannot respond to a movant’s affidavits as otherwise required
8 ... and how postponement of a ruling on the motion will enable him, by discovery
9 or other means, to rebut the movant’s showing of the absence of a genuine issue of
10 fact.”⁵⁷ The “party must show that the requested discovery, if obtained, would
11 alter the court’s determination.”⁵⁸

12 Applied here, the district court denied the Puentes’ request because
13 the discovery Plaintiffs describe does not pertain to the sole remaining
14 theory of liability against Dave & Buster’s. Even if Plaintiffs were
15 given time to pursue this discovery, it would not generate a genuine
16 issue of material fact relevant to who assisted Mr. Aparicio to the
17 vehicle he drove that was then involved in the collision that killed
18 Damaso & Christa Puente.⁵⁹

19 ⁵⁶ *Sciarratta v. Foremost Ins. Co. Grand Rapids Mich.*, No. 79604, 137 Nev. Adv.
Rep. 32 (2021).

20 ⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Appendix Vol. 3 at AA508.

1 On appeal the Puentes still do not explain how pursuing the discovery they
2 describe⁶⁰ could have generated a genuine issue of material fact on the remaining
3 theory of liability. They do not explain how pursuing this discovery could have
4 altered the district court's decision. In short, they have not demonstrated this
5 ruling was an abuse of the district court's discretion.

6 Conclusion

7 The facts alleged in the amended complaint are tragic. But NRS 41.1305(1)
8 squarely applies and prevents the Puentes from holding Dave & Buster's liable for
9 damages Aparicio may have caused. The district court correctly concluded the
10 Puentes have not pled a set of facts upon which relief could be granted, but that
11 conclusion should have applied to the entire amended complaint. Secondly, the
12 district court was well within its discretion to deny the Puentes' request for NRCP
13 56(d) relief. The judgment should be affirmed.

14 DATED this 8th day of September, 2021.



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⁶⁰ Opening Brief at 26.