

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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

Appellants/Cross-Respondents,
vs.

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

Respondent/Cross Appellant.

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

APPELLANTS' REPLY BRIEF

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NRS 41.1305.	<i>passim</i>
NRS 41.130	6,9

1 NRS 41.141 5

2

3 NRS 41.745 6

4 NRS 369.630 6

5

6 **RULES**

7 NRCP 56(f).8,9

8

9 **OTHER AUTHORITIES**

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11 Clark County Ordinance 8.20.300 5

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I. INTRODUCTION

Appellants 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, (collectively “Survivors”) did not claim Respondent Dave & Buster’s is vicariously liable for Defendant Aparicio’s actions. In fact, quite the opposite is true --- the Survivors claimed that Dave & Buster’s is liable for its own actions and inactions. Dave & Buster’s breached common law duties and statutory obligations including, but not limited to, those contained in *Davies v. Butler*, 95 Nev. 763, (Nev. 1980) (liability for willful and wanton service of liquor not limited by comparative fault statute)¹, Clark County Ordinance 8.20.300 (illegal to serve alcohol to an intoxicated person)², NRS

¹ “Respondents contend that with the passage of the comparative negligence statute, NRS 41.141, the legislature intended that henceforth the willful or wanton misconduct of a defendant should simply be compared with the contributory negligence of a plaintiff. Appellants, on the other hand, contend that, since the statute does not mention willful or wanton misconduct, there is no basis for concluding that the legislature intended to change the previous rule. We agree with the appellants that, read in light of our previous decisions carefully delineating the concepts of willful and wanton misconduct, the legislature intended to leave such behavior outside the purview of the comparative negligence statute.” *Davies v. Butler*, 95 Nev. 763, 769-70 (Nev. 1980). See also “I also question whether “individual responsibility” was the legislative objective behind the dram-shop statute because it is directly contrary to the policy underlying Wyoming’s comparative negligence statute in which the legislature chose to allocate the consequences to all those with fault.” *Greenwalt v. Ram Restaurant Corp.*, 71 P.3d 717, 749-50 (Wyo. 2003).

² “It is unlawful for any licensee under the provisions of this chapter, or any of his servants or employees, to sell, serve or give away alcoholic liquor to any intoxicated person.” Clark County Ordinance 8.20.300

1 369.630 (requiring alcohol awareness training) and NRS 41.130 (Liability for
2 personal injury caused by wrongful act, neglect or default of another).³

3
4 The court below correctly determined that NRS 41.1305 did not abrogate any
5 causes of action, as noted and identified in the Opening Brief. The court below also
6 correctly determined that NRS 41.1305 does not give providers of alcohol an
7 unlimited license to kill. The court below erred in too narrowly restricting the acts
8 that give rise to the causes of action which are unaffected by NRS 41.1305; and, in
9 failing to give the Survivors the opportunity to develop the factual basis of those
10 claims prior to ruling on summary judgment.

11
12 Since NRS 41.1305 was enacted in 1995 and amended in 2007, it has never
13 been interpreted by the appellate courts of Nevada. On its face, the amendment in
14 2007, obviously removed most of the protections for liquor providers. The end
15 result is a statute which, when taken at its plain english meaning, gives immunity to
16 liquor providers *only* for the first drink. This is a sensible reading of that statute that
17 maintains the applicability of NRS 41.130, the prior common law decisions in
18 Nevada (like *Davies, Id.*) and the right to a jury trial on issues of fact regarding
19 causation. This interpretation also avoids the absurd result of immunity provided
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25 ³ “**Liability for personal injury.** Except as otherwise provided in NRS 41.745,
26 whenever any person shall suffer personal injury by wrongful act, neglect or default
27 of another, the person causing the injury is liable to the person injured for damages;
28 and where the person causing the injury is employed by another person or
corporation responsible for the conduct of the person causing the injury, that other
person or corporation so responsible is liable to the person injured for damages.”
NRS 41.130.

1 for a long list of negligent, willful and wanton and even intentional acts so long as
2
3 at least one drink is served to a patron.

4 II. ARGUMENT

5 A. NRS 41.1305 only provides limited immunity for service of “an alcoholic 6 beverage” (singular) and “the alcoholic beverage” (again singular).

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8 The statutory scheme must be interpreted by the court consistent with the
9 legislative intent expressed in the statutory scheme. Respondents admit that the
10 statutory scheme in Nevada is similar to the Wyoming and Wisconsin statutory
11 schemes. All three of the states only restrict liability in narrow circumstances.
12
13 That is for “legal” service of alcohol. In Nevada, the legislature goes a step further
14 and only restricts liability to the service of one drink. More than one drink and
15 certainly service of drinks in violation of statutory conditions or industry standards
16 makes the service unreasonably dangerous, resulting in direct liability for the
17 improper service of liquor and or negligence *per se* from breaching a codified legal
18 duty.
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21 To interpret the statute as Respondent desires and different than the trial court
22 would be an improper twist of the legislative intent as expressed in the language of
23 the legislation and it would also render the statute unconstitutional pursuant to *Tam*
24 *v. Eighth Judicial Dist. Court of State*, 358 P.3d 234 (Nev. 2015). A complete bar
25 also fails a rational basis test. The legitimate state purposes reflected in the cases
26 cited by the defense are to protect the public by providing deterrence, provide
27
28

1 compensation and regulatory allow for insurance.⁴ A complete bar is not rationally
2 related to any of those purposes. In fact, a complete bar is contrary to each.
3 Neither does it promote responsible behavior by the drinker. Once the drinker
4 passes the point of intoxication, and is no longer rational, the server holds the
5 power of rational thought and, therefore, the responsibility. This is why the
6 legislature provided for one drink liability free. Subsequent drinks require
7 responsibility to shift to the drink provider, who stands to profit from over-service
8 and endangering the public, and whose behavior can be influenced to provide
9 deterrence, provide a source for compensation and a risk that can be insured
10 against.
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15 **B. The court must allow discovery; failing to do so is an abuse of discretion.**

16 NRCP 56(f) provides a mechanism for the trial court to grant a continuance
17 when a party opposing a Motion for Summary Judgment is unable to marshal facts
18 in support of its opposition. *Ameritrade Inc. v. First Interstate Bank*, 105 Nev.
19 696,699, 782 P.2d 1318, 1320 (1989). In this case, the Survivors explained to the
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23 ⁴ “Unquestionably, § 301 has at least three basic secondary purposes, as is common
24 with respect to tort claims generally, namely:
25 (1) penal or deterrence (intended to punish liquor providers for the wrongful
26 provision thereof);
27 (2) compensatory (intended to provide compensation for injured third-party
28 victims); and
(3) regulatory (intended to impose some of the costs of alcohol-related injuries on
the industry and citizenry and to ensure adequate financial responsibility/insurance
from industry and citizen participants.” *Greenawalt v. Ram Restaurant Corp.*, 71
P.3d 717, 735 (Wyo. 2003).

1 court how discovery would have led to the creation and development of additional
2 issues of fact regarding the negligent, willful, wanton, and illegal acts of Dave and
3 Buster's. Discovery would have allowed the development of Dave and Buster's
4 internal rules for the protection of the public. Discovery would have allowed the
5 development of the legislative history and the carnage resulting from a protectionist
6 interpretation of NRS 41.1305. The trial court erred in not granting the motion
7 pursuant to Rule 56(f). *Bakerink v. Orthopaedic Assoc. Ltd*, 94 Nev. 428, 431, 581
8 P.2d 9, 11 (1978). The Survivors have no access to information about Dave &
9 Buster's policies and procedures or even the actions and inactions of employees at
10 Dave & Buster's that preceded the severe intoxication of Aparicio and the almost
11 immediate tragic death of the Survivor's loved ones. A motion granting a
12 continuance under rule 56(f) would be reviewed only for an abuse of discretion.
13 *Harrison v. Falcon Products*, 103 Nev. 558, 560, 746 P.2d 642, 642 (1987).

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19 **C. Numerous direct causes of action were pled against Dave & Buster's and**
20 **are not abrogated by NRS 41.1305; NRS 41.1305 neither abrogated nor**
21 **restricted the common law; NRS 41.1305 is not an exception to NRS 41.130.**

22 The lower court correctly concluded that NRS 41.1305, when first enacted in
23 1995, was intended only to codify the then current development of the common law
24 regarding the service of alcohol and not abrogate⁵ prior decisions imposing liability
25

26
27 ⁵ "Civil Code section 1714, subdivision (b), states: "It is the intent of the Legislature
28 to abrogate the holdings in cases such as *Vesely v. Sager* (5 Cal.3d 153), *Bernhard v.*
Harrah's Club (16 Cal.3d 313), and *Coulter v. Superior Court* (21 Cal.3d 144) and
to reinstate the prior judicial interpretation of this section as it relates to proximate
cause for injuries incurred as a result of furnishing alcoholic beverages to an

1 for the service of liquor nor prevent the further development of that body of law. In
2
3 1995, Chapter 41 of NRS was amended by adding thereto a new section which read
4 as follows:

5
6 *1. No person who serves or sells alcoholic*
7 *beverages is liable in a civil action based on the grounds*
8 *that the service or sale was the proximate cause of*
9 *injuries inflicted by an intoxicated person upon himself*
10 *or another person.*

11 *2. The violation of any statute, regulation or*
12 *ordinance which regulates the sale or service of*
13 *alcoholic beverages to a minor or an intoxicated person*
14 *does not constitute negligence per se in any action*
15 *brought against the server or seller for injuries inflicted*
16 *by an intoxicated person upon himself or another person.*

17 The operative language of NRS 41.1305, which concerns us, was then amended in
18 2007 removing the limitation on negligence *per se* found in section 2 of the 1995
19 version, and further restricting the limitation section 1 from “alcoholic beverages”
20 to an alcoholic beverage:
21

22 *1. A person who serves, sells or otherwise furnishes **an***
23 ***alcoholic beverage** to another person who is 21 years of*
24 *age or older is not liable in a civil action for any damages*
25 *caused by the person to whom the alcoholic beverage*
26 *was served, sold or furnished as a result of the*
27 *consumption of **the alcoholic beverage**.*

28 This appeal is an opportunity for this court to confirm the law regarding
negligence in the State of Nevada. Appellants pled numerous causes of action

intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.” *DeBolt v. Kragen Auto Supply, Inc.*, 182 Cal.App.3d 269, 274 (Cal. Ct. App. 1986).

1 directly authorized by the Nevada Supreme Court decisions, both prior to and after
2 enactment of NRS 41.1305, and its subsequent amendment, that further expanded
3 liability against servers of alcohol. Even with the lower courts more restrictive
4 interpretation of NRS 41.1305, it was error to dismiss the causes of action in
5 addition to negligence pled against Dave & Buster's.

8 **D. Wrongful act neglect or default under NRS 41.130 is established against**
9 **Dave & Buster's by violating code or company policy.**

10 Repondent Dave & Buster's makes the unsupported claim that "this makes
11 Dave & Buster's vicariously liable for Aparicio's actions." (See Respondent's Brief
12 at p. 6). This is a straw man which is the opposite of the direct liability that is
13 actually alleged against Dave & Buster's in the lawsuit. The surviving negligence
14 claim was improperly dismissed on summary judgment because the "helping the
15 patron to his car" allegation was not the only basis for direct negligence against
16 Dave & Buster's. Violation of law was pled, which gives rise to negligence *per se*.
17 This is specifically authorized by the legislature's amendment of NRS 41.1305 in
18 2007, removing the negligence *per se* limitation.

22 The allegations of the complaint must be taken as true. *San Diego*
23 *Prestressed v. Chicago Title Ins.*, 92 Nev. 569, 555 P.2d 484 (1976). The only
24 response Appellant Dave & Buster's has to the causes of action pled were that
25 Plaintiffs asserted that Defendant Aparicio was served illegally but "present no
26 support for this assertion." However, it is an undisputed fact that
27
28

1 “Aparicio...consumed alcohol on the premises of Dave & Buster’s in excess of 8
2 hard liquor drinks served to Aparicio after he was intoxicated in violation of law.”
3 (See AA084: Amended complaint at paragraph 20.) The lower court granted a
4 motion to dismiss herein when the allegations of the complaint included that
5 “Aparicio... consumed alcohol...as a result of the Defendants Illegal activities”
6 (See Complaint at AA0005 and AA0006; See also Amended Complaint AA083.)
7 Further allegations, taken as true included: “Clark County code section 8.20.300
8 provides that it is unlawful for any licensee ... to sell...alcoholic liquor to any
9 intoxicated person,” and “Defendant Dave & Buster’s violated these laws by
10 overserving Defendants Aparicio and Hurley when each was obviously
11 intoxicated.” (See AA0100 , Amended complaint paragraph 106 & 107.)

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16 **E. The Lower Court’s interpretation of NRS 41.1305, allowing only certain**
17 **types of negligence claims to survive, and dismissing claims against liquor**
18 **providers such as willful and wanton activities, engaging in an unreasonably**
19 **dangerous activity, and products liability, is too restrictive.**

20 The sole citation in all Nevada Supreme Court cases to NRS 41.1305 is a
21 panel decision footnote “Our reliance on DeBolt here does not constitute an
22 interpretation of NRS 41.1305 and should not be relied upon as such.” *Rodriguez v.*
23 *the Primadonna*, 125 Nev. Adv. Op. No. 45, 49409 (2009), 216 P.3d 793, 12 n.2
24 (Nev. 2009) Presumably, this was because *DeBolt v. Kragen Auto Supply, Inc.*, 227
25 Cal. Rptr. 258, (Ct. App. 1986) was a California case which relied on the
26 California statutory dram shop scheme. Unlike Nevada’s NRS 41.1305, California’s
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1 statute, in the body of the law, (see footnote five above) clearly abrogated the
2
3 judicially developed common law dram shop liability in favor of granting immunity
4 to taverns. NRS 41.1305 merely codified the existing state of the law, which
5 imposed liability in certain circumstances and not in others. Then, NRS 41.1305
6 was amended to expand liability for serving alcohol by removing the negligence
7 *per se* restriction.
8

9
10 **F. Appellants did not waive the lower court’s ruling on the constitutionality
and interpretation of NRS 41.1305**
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12 It seems obvious that “Finally, and perhaps most importantly, this case raises
13 the issue of constitutionality of an amended statute, as interpreted by the lower
14 Court, which is a pure question of law and the reviewing court must evaluate de
15 novo and strive to interpret harmoniously with the legislative intent.” (See
16 Appellants’ Opening brief at page 9) is enough to raise the issue, contrary to
17 Respondent’s allegations. Of course that is not the only reference to this alternate
18 argument, that if NRS 41.1305 is applied as a complete bar, it is unconstitutional.
19 Appellants argued in the opening brief that there is “no legitimate governmental
20 interest in protecting the financial benefits of serving inebriated persons.” (See
21 Appellants’ Opening brief at page 18.) The trial court articulated no legitimate
22 governmental interest being protected by NRS 41.1305, because there is none.
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27 Statutory interpretation is a question of law that this court
28 reviews de novo. We interpret statutes in accordance with
their plain meaning and generally do not look beyond the
plain language of the statute absent ambiguity.

1 Furthermore, "it is the duty of this court, when possible,
2 to interpret provisions within a common statutory scheme
3 'harmoniously with one another in accordance with the
4 general purpose of those statutes' and to avoid
5 unreasonable or absurd results, thereby giving effect to
6 the Legislature's intent.'" *Torrealba v. Kesmetis*, 124
7 Nev. 95, 101 (Nev. 2008).

8 It is clear that this court reviews questions of constitutional interpretation de
9 novo. *Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 392 P. 3d 614 (2017.) It is also
10 clear that NRS 41.1305 must be interpreted in harmony with NRS 41.130, which
11 precedes it in the very same chapter. The only exception to the liability imposed
12 by NRS 41.130 is the one contained in NRS 41.745, not NRS 41.1305.

13 If NRS 41.1305 is interpreted as a complete bar to **all causes of action** with
14 the service of *one alcoholic beverage*, then it is unconstitutional for three reasons.
15 1. It is a complete bar; 2. It is not "rationally related to a legitimate state
16 purpose"; and, 3. It invades the province of the judiciary.

17 Respondents fail to describe a legitimate, or any, state purpose. The court
18 also failed to articulate a legitimate, or any, state purpose that the statute is
19 rationally related to. "Public safety cannot be enhanced by excusing alcohol
20 providers from the same duty owed by all other persons-acting reasonably under
21 the circumstances. " *Greenwalt v. Ram Restaurant Corp.*, 71 P.3d 717, 748 (Wyo.
22 2003). The rational-basis test is "not a toothless one." It allows the court to probe
23 to determine if the constitutional requirement of some rationality in the nature of
24 the class singled out has been met. *Schweiker v. Wilson*, 450 U.S. 221, 234, 101

1 S.Ct. 1074, 1082, 67 L.Ed.2d 186 (1981); *James v. Strange*, 407 U.S. 128, 140, 92
2
3 S.Ct. 2027, 2034, 32 L.Ed.2d 600 (1972).

4 III. CONCLUSION

5 In conclusion, Appellants ask this Court to evaluate a very important question
6
7 regarding public policy and statutory interpretation.

8 As we begin our review, we accept, as do all members of the
9 judicial department, that decision-making in response to a
10 constitutional challenge to a product of the legislative and
11 executive departments of our state government is a burden
12 profoundly felt by the judicial department which is invested
13 under our constitution with the responsibility to resolve the
14 challenge. This Court cannot refuse to bear that burden. Such
15 is the special nature of the judicial enterprise. Of that, Justice
16 Stephen Breyer has written:

17 [t]hat enterprise, Chief Justice Marshall explained, may call
18 upon a judge to decide "between the Government and the
19 man whom that Government is prosecuting; between the
20 most powerful individual in the community and the poorest
21 and most unpopular." Independence of conscience, freedom
22 from subservience to other Government authorities, is
23 necessary to the enterprise. *Greenwalt v. Ram Restaurant*
24 *Corp.*, 71 P.3d 717, 722 (Wyo. 2003).

25 This Court should remand the case and instruct the District Court to allow the
26
27 case to proceed through discovery and trial against Dave & Buster's.

28 Dated this 3rd day of December, 2021.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts exempted, it does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1) which requires each assertion regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied upon may be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the NRAP. Dated this 3rd day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Opening Brief was made this 10th day of December, 2021, by electronic service through the Nevada Supreme Court's electronic filing system to all registered users.

_____/s/Thomas Christensen_____
Employee of Christensen Law Offices