**IN THE SUPREME COURT**

**FOR THE STATE OF NEVADA**

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| **DR. JOEL SLADE,**<br><br>**Plaintiff/Appellant,**<br><br>vs.<br><br>**CAESARS ENTERTAINMENT CORPORATION, PARIS LAS VEGAS OPERATING COMPANY, LLC, d/b/a PARIS LAS VEGAS, AND CAESARS ENTERTAINMENT OPERATING COMPANY, INC.,**<br>**Defendants/Appellees** | Electronically Filed<br>Nov 13 2013 12:16 p.m.<br>Tracie K. Lindeman<br>Clerk of Supreme Court<br><br>Supreme Court Case No.<br>62720 |

**On Appeal from the Eighth Judicial District Court**
**Clark County, Nevada**

# APPELLANT'S REPLY BRIEF ON APPEAL

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## III. INTRODUCTION

Defendants/Appellees' ("Defendants") Brief relies on a legally incompetent premise. It states a general rule that a property owner can eject anyone for any or no reason, yet refuses to recognize or address firmly established common law exceptions to this rule. In every common law jurisdiction, innkeepers, common carriers, and utilities[1] cannot refuse service or access to proper customers, and in some jurisdictions this extends to other commercial property owners as well. In failing to even acknowledge this truism despite it being squarely before the Court, the entirety of Defendants' arguments arise under a patently false premise.

## IV. REPLY TO DEFENDANTS' STATEMENT OF THE ISSUES ON APPEAL

Defendants challenge the Plaintiff/Appellant's ("Plaintiff") statement of issues claiming that it is argumentative, incorrect legally, and is rife with improper characterizations. Defendants' Brief, p. 1. To the contrary, Plaintiff relies upon universal common law mandating that innkeepers must entertain guests properly presenting themselves. Opening Brief, p. 1 at III.A. Plaintiff provides United States Supreme Court authority recognizing this as a universal

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[1] The universal duty of innkeepers is thoroughly addressed in the Opening Brief. Concerning utilities, see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), and concerning common carriers, see e.g. Forrester v. S. Pac. Co., 36 Nev. 247, 134 P. 753, 766 (1913).

attribute of the common law. No court, even with full perusal of Defendants' authorities, has ever held otherwise. Clearly, Defendants misplace their consternation with the warrantless attack on the Plaintiff.

As to the second issue, the Defendants attack Plaintiff's characterization of the special nature of the casino industry to Nevada society and community. See Opening Brief at p. 1, at III.B. Such status is recognized by statute in NRS 463.0129. It is recognized by case law. State v. Rosenthal, 107 Nev. 772, 777, (1991) (Industry is "vital" to the State.). Clearly, Plaintiff overstates nothing in such a reference. Defendants' contentions are hyperbolic and ill-placed.

Plaintiff next references the common law and statutory law addressing public amusements as places subject to a public calling status. All of this is supported in the Opening Brief. The call of the question presented is, "[A]re Nevada casinos on par with innkeepers and common carriers with respect to the status?" Opening Brief, p. 1, at III.B. That is, as is evident by the arguments of both parties, the exact question addressed on an issue in the briefs of the parties. There is no impropriety to this question.

Plaintiff's final appellate issue quotes a Nevada statute while asking this Court to address the legal effect of quoted language. Opening Brief, p. 1, at III.C. Is it Defendants' contention that the Plaintiff misquoted the language? Plaintiff did not. The issues presented by Plaintiff are the issues present in this

case, Plaintiff correctly stated them, and Defendants' dislike of being directly challenged on the law is not argument.

Defendants, however, are disingenuous in stating their purported "issues," maintaining that they are private property owners without any other character or burden. It is indisputable that Defendants are innkeepers and casinos, but Defendants speak as though they are neither. For certain "private property" owners there universally exists a separate status requiring access. This indisputably included innkeepers, common carriers, and public utilities (see Note 1, supra), and an additional question for this appeal is whether it includes casinos, as casinos, in Nevada. Defendants simply ignore these truisms, and pretend away hundreds of years of common law. It is the Defendants who have failed to properly present the questions at issue in this appeal.

## V. REPLY TO DEFENDANTS' STATEMENT OF THE CASE

Defendants' statement of the case suffers the same disability note above. Under the law presented by Defendants, there is no special status for any property owner. Common carriers could deny cartage and passenger conveyance because they own the bus, train, or freight car. Six hundred years of innkeeper law and public calling law would be inapplicable in Nevada, and render Nevada the only common law jurisdiction in the world to deny that innkeepers hold a special relationship with the public and their prospective guests. Utilities could cut someone off without cause. The law imposes upon

certain property owners whose services are important to the community a duty to provide access. The question properly before this Court is whether Nevada imbues either innkeepers or casinos with such obligations. Defendants ignoring the elephant in the room presents the antithesis of argument.

## VI. REPLY TO DEFENDANTS' STATEMENT OF FACTS

Defendants claim that Plaintiff's characteristics are irrelevant. Defendants' Brief, p. 2, n.2. Under every duty to provide access under the law, those that are already fully accepted and unimpeded (innkeeper), as well as those which are subject to a determination of the common law pertaining in Nevada (public amusement), and those arguably dictated by statute (gaming licensees), the character of the Plaintiff is a critical factor in imposition of the duty to grant access. Thus, Plaintiff's status as an upstanding, inoffensive citizen and even coveted gambler is relevant. And the fact that Plaintiff desires to attend national conferences, symposiums, etc., over which Defendants have a monopoly can even be viewed as critical. As to this last factor, it also affects Defendants' character meeting the nature of a public calling.

Defendants next challenge Plaintiff's statement of facts asserting that the character of Defendants as a "public amusement" and an "innkeeper" are unduly argumentative and improper legal conclusions. Defendants' Brief, p. 2, n.3. These are not legal conclusions. A casino is "a building or room used for . . . public amusements, for dancing, gaming, etc." Webster's International

Dictionary, (2d ed. 1953). Defendants have no argument that their casino business is not a public amusement, but merely challenge Plaintiff's obviously proper adoption of the term as ascribable to casinos. One need not state that something has the character of 'cloth sewn in into a cup shape for wearing on the head' when the word 'hat' will suffice. Defendants' distinction and challenge is meaningless.[2]

Concerning Defendants being innkeepers, this is expressly recognized under Nevada law. Opening Brief, p. 9, n.2. An innkeeper is also defined as "[T]he keeper of a common inn for the lodging and entertainment of travelers . . . for a reasonable compensation." A Law Dictionary, Adapted to the Constitution and Laws of the United States, John Bouvier (1856); Black's Law Dictionary, 5th ed. (West 1979). That the Defendants operate as innkeepers is a pure statement of fact, as well as a determined status under the law in Nevada.

As to the Defendants' alleged facts, Defendants' Brief, pp. 2-4, Defendants commit various omissions and exaggerations. While stating that one of the Defendants occupies and controls private property, Defendants intentionally omit the fact that it occupies the property as both an innkeeper and

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[2] This analysis also vitiates the Defendants' 'public amusement' argument at Defendants' Brief, p. 21. Defendants do not present any alternative character for the business. Further, ordinances across the country adopt the common definition of a public amusement which would include a casino. Accord Matthews Municipal Ordinances, § 42:38.10 ("[P]lace of public amusement

a casino. Again, Defendants are attempting to define away the very character of this Defendant critical under the law to be applied.

Defendants, without citation to any portion of the record, state that it is undisputed that the Plaintiff was not excluded due to race, creed, national origin or gender. This fact is neither contested nor uncontested, but rather, is unknown and appears nowhere within the record to be considered.

Defendants' contend that the Plaintiff's complaint should be limited to asserting the character of the Defendants as casinos to the exclusion of innkeeper status. Contrary to Defendants position, and omitted by the Defendants, Plaintiff alleged the innkeeper status, his status as a guest (as opposed to gambling patron), and most importantly, his unjust exclusion from professional events held by Defendants in their conduct as an innkeeper. Complaint, ¶ 6 (Plaintiff's visits are often in conjunction with hotel operations rather than casino operations), ¶ 14 (reference to status as "guest"), ¶ 23 (reference to status as "tourist"), ¶ 25(c) (expressly noting the Defendants' innkeeper status). There is no prevailing theme in Plaintiff's pleadings as the Defendants claim, but rather, three distinct and equal themes, to wit: 1) Innkeeper status; 2) Public amusement or public calling status, and 3) Statutory status as a gaming licensee. All are pled and argued equally, and if under any

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means a . . . facility . . . at which . . . activity takes place for the entertainment of the public and to which access is made available to the public . . . .").

one character Defendants cannot prohibit access to properly presenting guests or patrons, then Plaintiff states a viable claim.

It is also of note that Defendants illegitimately claim that Plaintiff's "facts" contain improper legal conclusions, but violate their own rule, and misstate the law in the process. Defendants proffer that NRS 463.0129 grants a casino authority to eject or bar any patron "for any reason." The actual language under the statute provides that, "**any** common law right . . . to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason" is not abrogated. (Emphasis added). It obviously does not say '**the** common law right to eject' which is how the Defendants define the statute in their analysis. In referencing "any" common law right, obviously, one must first find a common law right, and the exclusion can only be under the common law, and, by the very words of the statute, it does not create a right to eject.

Finally, within their statement of facts, the Defendants again speak of the Plaintiff changing theories. Defendants' Brief, p. 3, n.4. In this footnote, Defendants go so far as to claim Plaintiff's focus has changed two times converting to a focus on innkeeper status almost to the exclusion of a concern regarding casino status. This is demonstrably false, and all statuses are presented at the onset. Complaint, JA ¶¶ 25(a) and 25(c), see also ¶¶ 6, 14, 23 and 25. The fact that innkeeper status is an alternate status pled in no way

detracts from the fact that Plaintiff legitimately pled and relies upon innkeeper status. NRCP 8. Further, the first paper filed by Plaintiff after the Complaint devotes an entire co-equal portion of its brief to the Defendants' status as an innkeeper. JA 45-48. And in the Plaintiff's Opening Brief the same argument and premise is again forwarded. The issue has been presented from the onset of this litigation, and prosecuted at each stage. Defendants, in asserting that this case is not about innkeepers, present a subterfuge hoping this Court misses the consistent position of the Plaintiff.

## VII. REPLY TO DEFENDANTS' STANDARD OF REVIEW

Plaintiff does not take issue with the standard presented by the Defendants. Plaintiff does, nonetheless, take issue with the statement that Plaintiff's statement of facts, ¶¶ 9-10 are statements of law. See Discussion, supra.

## VIII. REPLY TO DEFENDANTS' SUMMARY OF ARGUMENT

Defendants' argument ignores large swaths of the common law, and only sets out the general rule concerning the rights that go with the ownership of property while ignoring applicable exceptions to the general rule, and even the indisputable fact that exceptions exist. Defendants also cannot escape the truism that Nevada recognizes and limits such classes under the restrictions of the common law. See e.g. Forrester v. S. Pac. Co., 36 Nev. 247, 275,282 (1913). (Recognizing the limit on the owner of a common carrier to eject, that it is a tort

warranting punitive damages when an unreasonable ejection is undertaken, and that it is a public duty which this ejection breaches while providing a private right of action). Per Forrester, Nevada recognizes the common law concerning certain classes of property owners with a corollary duty to provide access and not unreasonably eject.

Furthering their overstatement, Defendants claim that adopting the Plaintiff's analysis "would result in a change . . . whereby virtually every individual would have a right of access to Nevada gaming establishments." Clearly, as further explained below and emphasized in Plaintiff's Opening Brief at pp. 8-9, this is not what Plaintiff argues in any sense, and casinos and innkeepers would continue to hold the right to exclude, under the common law, all those who do not appropriately present themselves, the odious, the disruptive, the non-patron, and others in circumstances where 'good cause' exists to bar or eject the individual. California, Missouri, and Maine have always held such status, and New Jersey, has of late readopted this status. Opening Brief, pp. 18-19. Other states have legislated this very status. See e.g. 18 Pa. Cons. Stat. Ann. § 3503(c)(2). None of these states have been overrun with rampaging throngs of societal detritus demanding access.

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## IX. REPLY TO DEFENDANTS' ARGUMENT

### A. DEFENDANTS' ALLEGED PRECEDENT IS NOT PRECEDENTIAL

Defendants begin their analysis by stating that "courts in Nevada have long recognized a private property owner's right to exclude individuals from its premises." Def. Brf. p. 5. In addition to ignoring the patent applicable exceptions to this rule as noted above, Defendants follow their statement with citation to a non-Nevada court for the proposition forwarded relying upon Franceschi v. Harrah's Entm't, Inc., 2:10-CV-00205, 2011 WL 9305 (D. Nev. Jan. 3, 2011) aff'd sub nom Franceschi v. Harrah's Entm't, Inc., 472 F. App'x 615 (9th Cir. 2012).[3] Defendants' Brief at pp. 6, 12-13. Franceschi provides no authority for the Defendants' position because: 1) It is not precedential as decided by a non-Nevada court; and 2) Its analysis is demonstrably flawed such that it could be presented as a primer on improper legal analysis. Moreover, Franceschi had no issue of innkeeper's duties or status before it, and was solely decided from the perspective of a casino/public amusement (while not even recognizing the split of authority on the issue).

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[3] The appellate court's affirmance was on grounds independent from the issues raised here. These issues were before the Court of Appeals, but the opinion eschews "the right to exclude" argument upon which the Defendants rely, and affirms solely on an adequate independent ground. In ignoring the argument of the District Court, and constructing its own reason for affirming, it appears that the Ninth Circuit Court of Appeals found the "right to exclude" argument unpersuasive.

The decision of a Federal District Court on an issue of first impression under state law falls short of applicable precedent.[4] "[A] federal district court opinion . . . is not precedential or binding" on issues of state law." Bajalo v. Nw. Univ., 860 N.E.2d 556, 565 (Ill. App. 2006); Linsell v. Applied Handling, Inc., 697 N.W.2d 913, 921 (Mich. App. 2005) (Also implying that if the reasoning of the federal court is unpersuasive, it should particularly not be followed). Thus, Defendants' lead case on the issue is of no effect.

More important, the Franceschi opinion is of a court of co-ordinate authority to the District Court in this matter. Thus, the decision cannot have any greater authority or weight than the decision at issue, and is far subordinate to this Court's consideration of the status and scope of Nevada law. In short, the determination in Franceschi stands, at best, on the same underpinnings as the case on appeal, and presents no more authority. The issues presented as issues of law are thusly reviewed de novo, and the Franceschi trial court's legal conclusions are before this court de novo with no weight. In other words, as to casino status, this remains an issue of first impression in Nevada, and

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[4] Nevada even views the federal courts as not precedential over questions of federal law, let alone state law. See, Hiibel v. Sixth Judicial Dist. Court ex rel. Cnty. of Humboldt, 118 Nev. 868, 873 (2002) aff'd sub nom. Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty., 542 U.S. 177 (2004). In the appeal to the United States Supreme Court, the decision of the Nevada Supreme Court was validated, demonstrating that even the Ninth Circuit Court of Appeals can err, and the Nevada Supreme Court correctly jettisoned the reasoning of a federal appellate court on the law.

concerning innkeeper statue, NRS 1.030 (not cited in Franceschi) and 600 years of common law (also ignored in Franceschi) determine the responsibilities.

Addressing the second basis for which the Franceschi decision is not precedential, its decisional basis is patently flawed on the issue of access. The premise stated by Franceschi that, "At common law, a proprietor of a privately-owned entertainment establishment may exclude whomever he wishes for any reason, or for no reason whatsoever," is demonstrably false. To the contrary, as demonstrated in the Opening Brief at pp. 16-25, at the only time there was a unified common law rule, the rule mandated that a proprietor of an entertainment establishment must admit all who properly seek admission. Even as of the time the Franceschi court rendered its decision, there existed a delineated majority and minority rule as to what the common law provided, but the Franceschi court failed to acknowledge this evident truism. Thus, the introductory assumption of Franceschi inappropriately states as a universal rule of law a premise that is demonstrably subject to a split of authority, with the more recent authority departing from the historic common law.

The very next perspective asserted by Franceschi is that Nevada, and its neighbor, California have "established that the "right to exclude others" as a "fundamental element of private property ownership."" For this proposition, the cases of S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403 (2001), and Allred v. Harris, 14 Cal. App. 4th 1386 (1993) are cited. The Franceschi opinion omits

the fact, recognized in both states (and all states concerning innkeepers, common carriers, and utilities), that this rule is subject to common law exceptions.

For example, in Nevada there is obviously exception where this Court recognized the inability of a common carrier to eject otherwise proper patrons from their conveyances. Forrester v. S. Pac. Co., 36 Nev. 247, 275 (1913). With regard to the California rule, the Franceschi Court missed the gaping exception which mandates that **the common law in that State forbids** a privately–owned entertainment establishment open to the public from excluding or ejecting absent good cause. That is, California law is directly opposed to Franceschi. In re Cox, 3 Cal. 3d 205, 213, 474 P.2d 992 (1970).[5] In short, while Franceschi states the general rule, universally there are exceptions to the general rule in all states (innkeepers and common carriers), and some states

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[5] The Court in In re Cox, 474 P.2d 992, 996 (Cal. 1970), noted that the original California civil rights statutes codified the common law applicable in the State. The codification provided: "All citizens . . . are entitled to the full and equal . . . facilities and privileges of inns, restaurants . . . and all other places of public accommodation or amusement . . . ." Cal. Stat. 1905, c. 413, §§ 1, 2, p. 553, as cited in Ronald P. Klein, The California Equal Rights Statutes in Practice, 10 Stan. L. Rev. 253, 257 (1958). Franceschi ignored this applicable precedent and relied upon Allred v. Harris, 14 Cal. App. 4th 1386 (1993), involving neither an amusement nor citizen seeking to use the services offered by a proprietor. Yet, Franceschi ignores this on-point authority on the issue, and cites a factually inapplicable and inferior court of appeals opinion.

(entertainment businesses and public amusements) which encompass the current facts and foreclose an ability to exclude.

Franceschi next cites Uston v. Nev. Gaming Comm'n, 103 Nev. 824 (1987), which is not an opinion, and under SCR 123, "shall not be regarded as precedent and shall not be cited as legal authority." Further, there is nothing reported at the decision other than "dismissal." There is no indication of facts or law. It is authority for nothing.

Also cited by Franceschi for the proposition that Nevada law grants a casino the right to exclude people with or without cause is Uston v. Hilton Hotels Corp., 448 F. Supp. 116 (D. Nev. 1978). This case expressly holds, "[t]urning now to Uston's state law claims, it is the finding of this Court that it is without jurisdiction to entertain same." There is no opinion, but rather the express rejection of any opinion on state law in Nevada. Again, Franceschi's purported authority is the opposite of authority.

Another case which Franceschi cites, Donovan v. Grand Victoria Casino Resort, L.P., 934 N.E.2d 1111 (Ind. 2010), merely presents Indiana law, and is merely another in the majority blindly stating no duty to provide access to public amusements. It does not address innkeepers. It cannot support the Franceschi rendition of Nevada law. Also, as a split decision by three of five Supreme Court Justices reversing a unanimous three judge appellate decision finding a duty to provide access, Donovan effectively exemplifies an argument of serious

import demonstrating a close decision concerning casino access. Simply, the incredibly close decision shows that the issue is not clear-cut as Defendants or the court in Franceschi proffer. This Court should, like the Court in Donovan, address the issue in the circumstances appertaining in its jurisdiction, and when the policies of Nevada are considered, a duty to provide access should apply in this jurisdiction.

The misscitation by the court in Franceschi does not end with the Defendants' quoted portion of the decision. Def. Brf. p. 5. At note 2 of the decision, the court provides further alleged authority for its proposition that access can be denied by citing to Am.Jur.2d Gambling § 163 (2010); Lionel Sawyer & Collins, Nevada Gaming Law, 312, 315–16 (3d ed 2000); and I. Nelson Rose. & Robert A. Loeb, Blackjack and the Law 17–19 (1998). Reference to the citation to Blackjack and the Law shows that, in the actual text, the authors note that "the law in Nevada remains unclear," and further posits that the Nevada courts should and would conclude that there is a duty to allow access. In short, the authority is expressly contrary to the proposition for which the Franceschi cites to it.

The result is similar if one looks to the authority provided in Nevada Gaming Law and American Jurisprudence. The authority from Nevada Gaming Law actually points out that the decision the text addressed could not be made as it was outside the jurisdiction of the administrative body that ruled, and

therefore, the law in Nevada remained undecided. The American Jurisprudence cite notes that the rule could only exist in some jurisdictions if approved by the legislature (presumably, one would assume, those jurisdictions whose common law imposes a duty to allow access upon public amusements).

Franceschi also relies upon a single judge dissent in the case of Chen v. Nev. State Gaming Control Bd., 116 Nev. 282, 285 (2000), without noting that it is citing to a dissent. Clearly a dissent is not the law, and the court's failure to so indicate is inappropriate and misleading.[6]

In summary, Defendants' non-precedential lead case is based on some authority that is directly opposite of holding cited by in the opinion. It also relies upon authority for propositions where the cited authority expressly notes that it is not reaching the very issue upon which the Franceschi opinion claims it is authoritative. The rule proffered concerning private property ignores long recognized and universal exceptions, and despite exceptions existing in both jurisdictions which the opinion references, and which exceptions go to the issues before this court (and also which were before the Franceschi court), the Franceschi court appears to actively avoid and intentionally ignore the contrary

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[6] See THE BLUEBOOK, A UNIFORM SYSTEM OF CITATION, (2005) ("[A]lways indicate when you are citing a concurring or dissenting opinion.").

authority.[7] In sum, Franceschi shows something, but what it does not show is a decided ability for casinos to exclude anyone for any or no reason under Nevada law.[8] In a word, Defendants' lead authority on the question of access "isn't."

Defendants' additional authority suffers the same disabilities as Franceschi, and more. Uston v. Airport Casino, Inc., 564 F.2d 1216 (9th Cir. 1977), merely adopts the majority rule without any analysis or mention of the minority rule, and relies entirely on authorities from outside Nevada. More importantly, Uston relied exclusively upon the casino's engagement as a place of amusement, and alluded that if there was an innkeeper/guest relationship between the plaintiff and the casino (as alleged by Plaintiff here), the result would have likely compelled admission. In this sense, Uston v. Airport Casino, Inc., supports Plaintiff's claim under innkeeper status.

Defendants' citation to Doug Grant, Inc. v. Greate Bay Casino corp., 232 F.3d 173 (3d Cir. 2000), also supports the Plaintiff's contentions. The players were not suing for access, and the opinion repeatedly cites to Uston v. Resorts

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[7]Were a litigant to proffer such arguments to a court, the flawed analysis in Franceschi is of such a nature that the litigant would be subject to sanctions. See Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 194 (1985) ("What [an attorney] cannot do is to mislead the court by contending that his argument is supported by existing law in the sense that the issue has been decided when that is not true.").

[8] This may well explain why the appellate decision actively avoided, touching upon the analysis and searched out independent grounds divorced from Nevada common law as basis to affirm the District Court.

Int'l Hotel, Inc., 89 N.J. 163, 445 A.2d 370 (1982), recognizing both the casino's obligation to grant access, and the patron's right to access the games offered by the casino. The case does recognize that there is no **constitutional** right to access, while acknowledging the common law right of access. Doug Grant, Inc., thusly highlights the distinction between a common law right of access and the lack of a constitutional right of access, and provides the imprimatur establishing that Defendants' cited authority of Spilotro v. State, ex rel. Nevada Gaming Comm'n, 99 Nev. 187 (1983), and S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403 (2001), are inapplicable to any analysis to be undertaken on Plaintiff's contentions in this matter. This is so because Spilotro and S.O.C. are limited to a claim of a constitutional right, and never address or even touch upon the common law and statutory rights upon which Plaintiff relies.

The balance of Defendants' statements and authorities merely recite the general rule that a property owner has a right to exclude without noting the well founded exceptions to this general rule (likely because the facts did not give rise to the exceptions), or stating the majority rule as to public amusements without noting the contrary authority applying the minority rule that access. No case allows an innkeeper to deny access or eject without proper cause. Defendants' citation to authorities that contain no reason for addressing an exception supported by common law authority have no precedential value in this court,

persuasive or otherwise, because they are divorced from the matters at issue here.

Concerning the authorities that restate the majority rule applying to public amusements, all appear generally of the same ilk, stating blindly that it is the majority rule while generally ignoring the fact that there is a minority rule and eschewing any policy analysis for the stated rule. Ignored in all such authority is the fact that the current majority rule presents a departure from a contrary common law doctrine applied for centuries before a backlash to emancipation created the faux need for such a rule. In short, as the laws were being changed under the 'Black Codes' and 'Jim Crow' to disallow the formerly compelled right of access, the decisions were left without a policy analysis which could be stated out loud in polite company, and, thus, present no policy analysis. This tawdry rationale for the reversal of the formerly universal rule of access presents the reason there is no policy analysis discussed in Defendants' brief save for some imagined influx of undesirables which, even under Plaintiff's cited authority, could be excluded if the exclusion is objectively reasonable.

Plaintiff, however, provides broad policy analysis supporting the minority rule, and why it should be formally adopted in Nevada. This is the rule which best protects the tourism industry and reputation of the state. The casino industry and its attendant hotel industry has obviously taken up the responsibility of providing a public service as being the universal victualar,

entertainment facility, political forum, and educational forum locally and for much of the country. See JA 11-12, 61-72. And with impeccable logic, because the casino industry exists solely due to the public's dispensation from the criminality of the enterprise, the duty to not unreasonably restrict access is a quid pro quo owed in exchange for the public providing this dispensation through the license.

### B. THERE IS A PRIVATE RIGHT OF ACTION WHEN A PRIVATE BUSINESS VIOLATES A DUTY OWED TO THE PUBLIC

When an individual or entity, in contrast to a governmental entity, interferes with a right held by the general public, an individual member so affected by that interference has a claim compensable in tort. Virtually all tort actions are actions for violations of duties which the defendant holds with respect to the entire populace. The duty to not spew odious vapors across the neighborhood is a duty owed to the general public, but can be enforced by any person upon whom those vapors infringe through a nuisance action. The duty to provide access is a duty to the public owed by an innkeeper, and yet is universally recognized as providing the individual excluded with a private cause of action for its breach. See Opening Brief, pp. 10-12. Likewise, the common law duty applicable to common carriers creates a private right of action on ejectment. See Forrester v. S. Pac. Co., 36 Nev. 247, 274-82 (1913). The provision of NRS 463.0129.1(e), simply applies the identical standard to

casinos, and there is no discernible basis for why a private action could be maintained on the former, but not the latter.

The phrase 'open to the general public' means all persons who are not otherwise disabled from access by reasonable rules and regulations. Emory University v. Nash, 127 S.E.2d 798, 802 (Ga. 1962) (J. Head concurring). Truly, "open to the general public" means freely accessible to all members of the public using or intending to use the property in accord with its purpose. As stated in In re Lundgren, 189 Cal. App. 3d 381 (1987):[9]

> Persons using property to which the public is allowed access may . . . be guilty of trespassing if they use the property in a manner not reasonably related to the purpose for which the owner holds it open . . . . The operative concept here . . . is the purpose for which the property has been opened to the public.[10] **Property owners are not free to define their purposes in such a way as to arbitrarily discriminate against members of the public because those persons happen to be manifesting some disagreement with the property owner.**

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[9] Lundgren is reported in reports as indicated, and appears a valid and binding decision between the parties thereto. It does not, however, officially appear in the official reports of the State of California. See In re Lundgren, 1987 Cal. LEXIS 325 (Cal. 1987) and, In re Lundgren, 236 Cal. Rptr. 307, 308 (Ct. App. 1987)

[10] Note that this recognition also confirms the basis upon which Defendants' citation to S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403(2001), is wholly distinguishable. Pointedly, the plaintiffs in S.O.C. were not asserting a right of access consistent with the purpose of the public amusement, but rather, were asserting an alleged constitutional right to literally invade the property for private pecuniary reasons unrelated to the casino's business.

(Emphasis added, footnote added); see also Souders v. Lucero, 196 F.3d 1040, 1045 (9th Cir. 1999) (Access for the "general public" includes an individual's access subject to such "tranquility as the facilities' central purpose requires" subject to reasonable regulations on the conduct of the person.). In short, access to the general public also creates a private right of access for those whose reasons meet the character of the establishment and who's character falls within the character of the general public.

## C. THE TORT OF BREACH OF INNKEEPER'S DUTY EXISTS IN NEVADA

Defendants argue that there is no common law innkeeper's duty in Nevada. Their first argument is that Plaintiff has failed to cite "one Nevada statute or case supporting his purported innkeeper duty arguments." To the contrary, Plaintiff cites to NRS 1.030, and adds to this Forrester v. S. Pac. Co., 36 Nev. 247 (1913), recognizing the common law corollary duty of a common carrier to grant access. Since the common carrier and innkeeper duties are co-extensive in virtually all authority, the duty to provide access recognized as to a common carrier in Nevada also applies to an innkeeper. Additionally, there are an untold number of cases recognizing that the common law is the law in Nevada thusly validating the Plaintiff's "one page long string cite of cases regarding the "universal[]" innkeeper duties . . . ." Opening Brief, pp. 11-12. Plaintiff's position is functionally unassailable under the law in Nevada.

Indeed, it is the Defendants' Brief which is entirely bereft of authority decrying the duties of an innkeeper. Simply, as cited and supported, the duties of an innkeeper to provide lodging to those who request it, and not eject guests without proper cause, is universal and well seated within the common law.

Moreover, the passage of civil rights legislation or a criminal trespass statute do not overrule the common law of access. First, every state has analogous statutes, and none have claimed that such statutes overrule the common law innkeeper's obligations. More importantly, nonetheless, the reason for the statutes cited by the Defendants is obvious, and antithetical to Defendants' arguments. These statutes assure that a hotel that bars pets must keep their doors open to those in need of service animals, thereby restricting that which can be asserted as good cause for denying access. Likewise, the anti-discrimination statutes vitiate any claim by a place of public accommodation that the heritage, race, religion, gender, or sexual orientation is good cause to exclude. These statutes validate and extend the common law.

This is also the uniform rule as to how statutes and the common law are applied. Statutes only overrule common law if the intent is clearly stated to do so, and statutes touching upon the same subject matter are merely cumulative to the common law. "A legislative intent to abrogate the common law must be clearly and plainly expressed, and such an intent will not be presumed . . . ." Maksimovic v. Tsogalis, 687 N.E.2d 21, 24 (Ill. 1997); Pleak v. Entrada Prop.

Owners' Ass'n, 87 P.3d 831, 835 (Ariz. 2004); Tucson Gas & Elec. Co. v. Schantz, 428 P.2d 686, 690 (Ariz. App. 1967); Holien v. Sears, Roebuck & Co., 677 P.2d 704, 706-07 (Or. App. 1984) aff'd and remanded, 689 P.2d 1292 (Or. 1984) ("[I]f a statute which provides for a new remedy shows no intention to negate, either expressly or by necessary implication, a pre-existing common law remedy, the new remedy will be regarded as merely cumulative, rather than exclusive, with the result that a plaintiff may resort to either the pre-existing remedy or the new remedy."). Clearly, Defendants' citation to other statutory remedies does not affect or foreclose Plaintiffs' resort to the common law remedies available for the wrongful ejection of the Plaintiff.

Such an application is also the law in Nevada. Nevada law provides as follows:

> Although the common law may be impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject matter, repeal by implication is not favored, **and this result will be reached only where there is a fair repugnance between the common law and the statute, and both cannot be carried into effect.**'[11]

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[11] And see Edmonds v. Perry, 62 Nev. 41, 57 (1943) (""We point out, however, that the common law prevails in our state as to decisions unless modified or changed by legislation.").

W. Indies, Inc., v. First Nat. Bank of Nev., 67 Nev. 13, 32 (1950). That is, the common law will be deemed supplanted by a statute "only where . . . both cannot be carried into effect."

Nothing in any of the statutes cited by Defendants prevents or infringes upon the common law and its application in the current case. Nothing in NRS 207.200 touches upon when a property owner can and cannot validly give a trespass warning, only the effect if one is given. Moreover, determining that the common law continues forward will not, in any way, prevent or affect the application of the statutes. Clearly, both the statutes and the common law can be carried into effect, and a conclusion that the statutes have overruled the common law is foreclosed.

Also, the trespass statute, NRS 207.200 is raised by the Defendants for the first time in the Answering Brief. Defendants' Brief, pp. 19-20. Absent having raised this issue in the District Court, there is no basis for this Court to address the argument in any respect. The law is just this straightforward: "This court will not consider issues raised for the first time on appeal." Rivera v. Am. Nat. Prop. & Cas. Co., 105 Nev. 703, 707, (1989); Penrose v. O'Hara, 92 Nev. 685, 686 (1976); In re Estate of Hansen, 124 Nev. 1477, n.1 (2008). Thus, per this Court's prior directives, Defendants' argument premised upon NRS 207.200 is wholly incompetent and should not be considered.

NRS 207.200 also has no application to this appeal of a motion to dismiss. Under NRS 207.200, only an "owner or occupant" of property can give a warning under the statute. Defendants Caesars Entertainment and Caesars Entertainment Operating are neither the owner nor occupant of any of the casinos to which the alleged trespass warning applies. Complaint, JA p.3, ¶ 18. Had this been raised at the onset, rather than on appeal, Plaintiff could have provided the District Court with ample evidence and authority that these Respondents do not own or occupy any casinos in Nevada (or anywhere), although they are the entities transmitting the warning. As to respondent, Paris, it never gave a warning. With the allegations in the Complaint taken as true at this stage, NRS 207.200 cannot apply to this case by its express terms. Clearly, there exists an innkeeper's duty owed to Plaintiff to allow Plaintiff access, and the dismissal was improper.

## D. THE MAJORITY RULE IS TAINTED DESPITE DEFENDANTS' MACHINATIONS TO THE CONTRARY

Defendant refers to Plaintiff's citation to the trend to allow exclusion from public amusements as perpetuation of the badges of slavery through 'Jim Crow' as "brazen," and "ridiculous." They also refer to it as "creative." Defendant's Brief, pp. 11 and 4, respectively. As noted, the Supreme Court of New Jersey recognized the connection. Justices Warren, Douglas, and Goldberg of the United States Supreme Court recognized the connection between the downfall of

the duty to provide access with the intention to perpetuate the badges of slavery. Bell v. State of Md., 378 U.S. 226, 308 (1964) (After noting the historic common law duty of the purveyor of a public amusement to grant access, these Justices noted, "some States began to utilize and make available their common law to sanction similar discriminatory treatment."). Commentators have highlighted the relation between rejection of a duty to provide access under the common law with racial discrimination. See Joseph William Springer, No Right to Exclude: Public Accommodations and Private Property, Joseph William Singer, pp. 1357, 1390, respectively, 90 Nw. U. L. Rev. 1283 (1995-96) ("The case law that emerged after 1865 is absolutely consistent in affirming a common-law right of access to places of public accommodation without regard to race until the time of the Jim Crow laws of the 1890s.", and "The current [majority] rule clearly has its origins in a desire to avoid extending common-law rights of access to African Americans."). A unanimous state supreme court opinion, three late sitting United States Supreme Court Justices, and a well-supported and thorough scholarly article recognize the relationship. Simply, that the current majority rule that there is no duty allow access to public amusements is a product of 'Jim Crow,' finding this connection is mainstream (not "brazen"), is supported by authority (not "ridiculous"), and is adopted from thorough analysis by respected jurists (not "creative").

Defendants' final argument provides that market forces would prevent any casino from excluding individuals absent a proper basis. It is actually suggested by the Defendants that in 2013, it would be impossible to imagine a casino magnate seeking to sway a political outcome. From a different perspective, Defendants maintain that it is unimaginable that a casino magnate that contributed over $45,000,000.00 to electing a given party would avoid taking the free shot of legally excluding opposing delegates from a convention held at one of his casinos. Clearly, in Nevada, casinos have taken on a public persona, and they should be bound by this responsibility voluntarily assumed.

## X. CONCLUSION

For the reasons set forth above, Plaintiff requests that the dismissal of Plaintiff's claims for failure to state a claim upon which relief can be granted be reversed, and the case be remanded for proceedings consistent with such ruling.

Dated this 11th day of October, 2013.

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## XI. CERTIFICATE OF COMPLIANCE

1. I herby 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 requirement of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word 2010 in fourteen point Times New Roman.
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more and contains 6915 words.
3. 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, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of October, 2013

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## XII. PROOF OF SERVICE

On October 11, 2013, the undersigned did serve APPELLANT'S REPLY BRIEF ON APPEAL upon following counsel:

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through the electronic filing system maintained by this court.

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An employee of Nersesian & Sankiewicz