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### Summary of Rodriguez v. Primadonna Co. LLC, 125 Nev. Adv. Op. No. 45

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**TORT LAW – DRAM-SHOP LIABILITY, ATTORNEY FEES, INDEMNIFICATION**

**Summary**

Appeal and cross-appeal from an Eighth Judicial District Court’s grant of summary judgment in a tort action.

**Disposition/Outcome**

On appeal, the Nevada Supreme Court affirmed the district court’s rulings. The Court based its ruling on Nevada’s rejection of dram-shop liability and extended the protections to intoxicated minors injured after a reasonable eviction. The Court also denied respondent’s motion for attorney fees and costs, which was based upon an assertion that appellant’s claim was frivolous because it was barred based on relevant legal authority. The Court further affirmed the dismissal of the cross-claim for indemnity, finding that no right to implied indemnity exists for defense fees and costs when the underlying claim is dismissed but the fault of the third party is not determined.

**Factual and Procedural History**

Martin Rodriguez, grandfather and guardian ad litem of Fabian Santiago brought suit against Defendant, Primadonna Company, LLC, for spinal cord injuries sustained by Fabian in an automobile accident after he was evicted from Primadonna’s property for disorderly behavior. Fabian, who was 17 at the time of the incident, and his two adult step-uncles, were drinking and engaging in disorderly conduct at the defendant’s hotel property, including multiple physical altercations with hotel guests. At the hotel security officers’ request, the three agreed to leave the hotel property.

Prior to leaving, hotel security guards escorted the three to their hotel room to retrieve their belongings. While in the room, the three men spoke to Fabian’s mother and informed her that they had been asked to leave the hotel and intended to sleep in the car. However, once in the car, the hotel security guard’s informed the three that they needed to leave the parking lot.

After exiting the hotel parking lot, Fabian’s uncle, who did not have a valid driver’s license, mistook a frontage road for the freeway and rolled his vehicle, which was traveling at approximately 80 mph. Fabian sustained severe spinal cord injuries.

Fabian’s guardian brought suit alleging that Primadonna acted negligently when it evicted Fabian and his step-uncles from its property, thereby allowing or directing Fabian, a minor, to be a passenger in a motor vehicle driven by an intoxicated driver. Primadonna filed a third-party complaint against Fabian’s mother for indemnity, seeking indemnification and contribution for fees and costs incurred to defend the action. After the close of discovery, Primadonna filed two summary judgment motions, arguing that it had a duty and right to evict disruptive patrons and it did not owe a duty to keep Fabian, a minor, on its premises and, therefore, was not liable for his injuries. The district court granted the motions and dismissed the counterclaim for indemnity. Primadonna, as the prevailing party, then filed a motion for

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<sup>1</sup> By Keith Pickard

attorney's fees and costs against Fabian's guardian, arguing that the underlying action was frivolous. The district court denied the motion, finding that the action was based on a negligent eviction rather than the dram-shop liability bar.

Primadonna subsequently filed a second motion for summary judgment on its third-party claim for indemnity against Fabian's mother. Primadonna argued that Fabian's mother had an affirmative duty to protect her child from harm and that she breached that duty when she knowingly allowed him to leave the hotel with a drunk, non-licensed driver. The district court, again, dismissed the motion. The dismissal was based on the ruling that any indemnity claim against Fabian's mother was moot in light of the summary judgment entered in favor of Primadonna.

## **Discussion**

### *A. Standard of Review*

The Nevada Supreme Court reviews orders granted summary judgment *de novo*.<sup>2</sup> The Court is reluctant to affirm summary judgment in negligence cases because negligence is generally a question of fact for the jury;<sup>3</sup> however, if the defendant is able to show that one of the elements of plaintiff's *prima facie* case is "clearly lacking as a matter of law," the Court will affirm the summary judgment.<sup>4</sup>

### *B. Hotel Proprietors have a statutory right to evict disorderly patrons*

The Court reaffirmed that Nevada hotel proprietors have a statutory right, based on N.R.S. 651.020, to evict disorderly patrons, including minors, from its premises.<sup>5</sup> Accordingly, the Court concluded that when a hotel proprietor rightly evicts a disorderly, intoxicated patron, the hotel proprietor is not liable for any torts that an evicted patron commits after he or she is evicted, subscribing to the rationale that individuals, drunk or sober, are responsible for their torts.<sup>6</sup> In reaffirming Nevada's rejection of dram-shop liability, the Court further held that, while a proprietor has a duty to act reasonably under the circumstances,<sup>7</sup> the proprietor is not required to consider a patron's level of intoxication in order to prevent speculative injuries that could occur off the proprietor's premises.<sup>8</sup> Therefore, the Court concluded as a matter of law that, while Primadonna may have known that Fabian and his step-uncles were intoxicated and could

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<sup>2</sup> Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

<sup>3</sup> Butler v. Bayer, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007).

<sup>4</sup> *Id.* (quoting Scialabba v. Brandise Constr. Co, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996)).

<sup>5</sup> The Court cited NEV. REV. STAT. § 651.005 (2007) in noting that "premises" includes parking lots. The court also cited Hinegardner v. Marcor Resorts, 108 Nev. 1091, 1096, 844 P.2d 800, 803 (1992) indicating that the rule applies to intoxicated minors.

<sup>6</sup> See Hinegardner, 108 Nev. at 1093, 844 P.2d at 802.

<sup>7</sup> Billingsley v. Stockmen's Hotel, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995).

<sup>8</sup> See Mills v. Continental Parking Corp., 86 Nev. 724, 725-26, 475 P.2d 673, 674 (1970).

not safely drive, Primadonna did not have a duty to arrange safer transportation, prevent an intoxicated driver from driving, or prevent Fabian, a passenger, from riding with a drunk driver.<sup>9</sup>

*C. Attorney's fees are not appropriate*

The Court affirmed the district court's denial of attorney's fees to Primadonna. Primadonna argued that as the prevailing party, it was entitled to recover attorney fees because the claim for injuries was frivolous and only one potential tortfeasor was sued. The Court found no authority supporting Primadonna's proposition that the Plaintiff's decision to sue one alleged tortfeasor and not others renders the claim frivolous. The district court may award attorney fees to a prevailing party when it concludes that the claims pursued against the prevailing party are not based upon reasonable grounds.<sup>10</sup> In rejecting Primadonna's argument, the Court recognized that the Plaintiff's claim was based on reasonable grounds in that it presented a novel issue in Nevada, specifically, the potential expansion of common law liability to hotel proprietors for injuries sustained by an intoxicated minor guest after he is evicted from the premises. Therefore, the Court concluded that the district court did not abuse its discretion when it denied Primadonna's motion for attorney fees.

*D. Indemnification for attorney's fees and costs not appropriate*

The Court rejected Primadonna's claim for indemnification for attorney fees and costs. The Court recognized that the question of whether a party for whom summary judgment has been entered may be entitled to indemnification for attorney fees and costs for defending the action is an issue of first impression in Nevada. While the Court has considered the issue of indemnification after a trial on the merits, it has not considered the issue when summary judgment has been granted. In the prior opinions after trial, the Court determined that at least some of the attorney fees and court costs incurred in defending the action may be recovered, however such recovery was limited to amounts attributed to defenses not "primarily directed toward rebutting charges of active negligence."<sup>11</sup> Following persuasive authority from West Virginia regarding implied indemnity, the Court adopted the rule that when a district court has disposed of the underlying liability claim, but has not established that the potential indemnitor was at fault, no right to equitable indemnity exists.<sup>12</sup> Therefore, the Court determined that the motion for summary judgment was properly denied in the present case because implied indemnification may not be asserted without determined liability of the third party to the injured party and the showing of a nexus or special relationship between the indemnitee and proposed indemnitor.

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<sup>9</sup> In setting forth its holding, the Court cited cases from several other jurisdictions that have reached a similar conclusion, including *DeBolt v. Kragen Auto Supply, Inc.*, 227 Cal. Rptr. 258 (Cal. Ct. App. 1986); *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

<sup>10</sup> NEV. REV. STAT. § 18.010(2)(b) (2007).

<sup>11</sup> *Piedmont Equip. Co. v. Eberhand Mfg.*, 99 Nev. 523, 529, 665 P.2d 256, 260 (1983).

<sup>12</sup> *Harvest Capital v. WV Dept. of Energy*, 560 S.E.2d 509, 514 (W. Va. 2002).

## **Conclusion**

In accordance with N.R.S. 651.020, proprietors have a statutory right, to evict disorderly patrons, including minors, from their premises. A hotel proprietor who rightly evicts a disorderly, intoxicated patron, is not liable for any torts that an evicted patron commits after he or she is evicted. In accordance with this holding, the Court affirmed the district court's summary judgment in favor of Primadonna on Rodriguez's negligence claim. Further, the Court concluded that Rodriguez's claim was not frivolous because it introduced an issue of first impression. Accordingly, the Court affirmed the district court's decision denying Primadonna's motion to recover attorney fees and costs. . Finally, the Court concluded that, while Primadonna's motion for summary judgment for indemnification against Fabian's mother was not moot, the claim could not be sustained because there was no determination of liability of a third party to the injured patron and no showing of a nexus or special relationship.