IN THE SUPREME COURT OF THE STATE OF NEVADA

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FCH1, LLC, A NEVADA LIMITED LIABILITY COMPANY F/K/A FIESTA PALMS, LLC, D/B/A THE PALMS CASINO RESORT,

Appellant,

vs.

No. 59630

ENRIQUE RODRIGUEZ, AN INDIVIDUAL,

Respondent.

_____/

APPEAL FROM JUDGMENT AFTER BENCH TRIAL
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA
HONORABLE JESSIE WALSH, DISTRICT JUDGE

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

INTRODUCTION

The introduction to respondent's answering brief (RAB) starts with: "It is easy if one ignores eighty percent of the record to construct an argument that sounds good and justifies a predetermined result." RAB 2:4-5. If this statement is true, it is inapplicable to the opening brief here. The following truism, however, is applicable to the answering brief: If a respondent fabricates new issues that are not the real issues in the appeal, it is easy for the respondent to construct arguments that sound good and justify predetermined results on the newly-fabricated issues. That is what the answering brief does. It attributes contentions to the opening brief, then rebuts those contentions. But its phrasing of appellant's contentions frequently has no relationship to the actual contentions in the opening brief.

Additionally, a common theme is reflected in the following statement by the answering brief's author: ". . . I have personally read the transcript, and it is my impression the doctors were careful not to testify beyond their treatment and professional expertise." RAB 27:21-24. In essence, plaintiff's counsel is asking this court to "trust me" on critical issues in the appeal, and "trust me" to give personal impressions without citations to the record. Counsel's personal impressions of the record in this appeal permeate his answering brief, but they are irrelevant. Cf. *Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008)(in trial, attorney cannot express personal opinions).

Plaintiff's answering brief largely ignores critical issues raised in the opening brief, and plaintiff presents no persuasive arguments on issues that the Palms has actually raised in this appeal. Plaintiff's claim against the Palms should have failed as a matter of law. Or at the very least, this court should order a new trial with a different judge.

Response to RAB's Statement of Facts

A. Response to RAB's facts regarding the accident

Plaintiff's statement of facts depicts a wild free-for-all of dangerous activity in the Palms sports book. RAB 3-5. This exaggerated view of the evidence significantly downplays plaintiff's own involvement. Although plaintiff and his girlfriend were staying at another hotel, he went to the Palms sports book by himself. 8App.1461. He had seen advertising for "Monday Night Football Frenzy with Brandy Beavers." 7App.1319 (plaintiff's opening statement); 8App.1463(plaintiff's testimony). When he arrived he saw a "rowdy" environment, with cheerleaders throwing souvenirs to the audience. 8App.1463-65. He entered the sports book and stood near the entrance–a location from which he could have easily left the premises at any time. *Id.*

Plaintiff emphasizes that souvenirs were thrown to spectators to "motivate" or "entice" them. RAB 4. But plaintiff observed this, he knew exactly what was happening, yet he stayed in the sports book for more than an hour anyway. And he watched girls throw souvenirs to the audience six times. 8App.1465-66, 1534. He conceded that throwing souvenirs to the audience did not appear dangerous. 8App.1534. If he had any inkling it was dangerous, he would have left the premises.[1] *Id.*

Plaintiff criticizes the Palms for relying on his own testimony regarding the unexpected nature of the body-dive by the other patron. RAB 5. He argues that we took testimony out of context, and he accuses the Palms of falsely characterizing the record by contending that the other patron's behavior was aberrant, unexpected and

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[1] Although plaintiff's counsel now criticizes the Palms for creating a party atmosphere (RAB 20-21), plaintiff himself obviously did not believe this was a bad thing at the time.

unforeseeable. RAB 5:10-16; 22:24-28. To avoid the impact of plaintiff's testimony, the answering brief argues that "what Enrique clearly meant is that *he* did not expect that particular woman to jump at that particular time." RAB 22:28 to 23:1(italics in original). This might reflect what plaintiff's counsel wishes plaintiff said on the witness stand, but it was not.

The opening brief referred to plaintiff's testimony in its proper context, and our characterization of the record was accurate. Plaintiff himself testified that the other patron's conduct was a complete surprise to him, and, as best as he could tell, a complete surprise to everybody else. 8App.1535. Any artificial dispute created by the answering brief's interpretation of the transcript can be easily resolved by looking at plaintiff's testimony.

[Direct examination]

Q By the way, do you remember how the Monday Night Football was advertised? Was it -- I'm forgetting, "Monday Night Football Frenzy with Brandy Beavers"?

* * *

A Pretty much the way you said it.

* * *

Q When you arrived at the Sportsbook, would you describe to the Judge, please, the environment that was going on inside the Sportsbook?

* * *

A The environment was, I would say rowdy.

Q What was happening?

A Well, besides the -- watching the football game, the Palm employees were throwing -- actually were throwing several different items in the air. And some of them were t-shirts, some of them were the water bottles, and some of them were actually NFL footballs.

* * *

Q Where were you standing?

A I was standing at the entrance . . . .

* * *

Q How long were you watching the game before anything happened?

A I would say a little over an hour. Yeah.

* * *

Q During that period of time, did you have the opportunity to see other promotional items being thrown into the audience?

A Yes.

Q How many occasions were promotional items thrown into the audience by the girls who were throwing them into the audience?

A From what I saw and from what I recall, I would say about six occasions.

* * *

Q What -- would you please tell the Judge what happened?

A Well, what happened to me is a water bottle was thrown in my direction. And it happened so fast that there was this lady sitting down in front of me at a monitor where there was a TV. I'm standing there, watching the big screen TV. And when the ball's in flight hands move in the air [demonstrating] and this lady, for whatever reason, she decided to get up out of her chair, turn around, and run. I mean literally run towards where I'm standing and just take a total dive, body dive.

And while I'm standing, she lands right on my knee. . . . And there wasn't really much I can do about it. I mean, it happened so fast.

8App.1466-68 (emphasis added)

[Cross-exam]

Q * * * You testified that at least six things had been thrown into the audience before this incident had occurred, right? So, you were aware that people were throwing things into the audience, right?

A Correct.

Q So, my question is, did you think it was dangerous?

A No, I didn't.

Q No. If you had thought it was dangerous you would have left, right?

A Yes, I would have left.

Q Okay. But a patron did something that was pretty unusual?

A I believe so, absolutely.

Q Okay. You didn't know she was going to do that; did you?

A Not at all.

Q Okay. It didn't appear that anybody else knew she was going to do that; isn't that right?

A Correct.

Q Okay. And especially because she didn't get out of her chair until the water bottle was already on the ground; isn't that right?

A It -- that's the way it happened.

Q Right. So, someone tossed a water bottle. It landed on the floor. It was already on the floor. And after it landed on the floor, this woman that you hadn't noticed before, got out of her chair and ran over and jumped for the water bottle, right?

A Correct.

Q And a complete surprise to you?

A Absolutely.

Q And as best as you can tell, a complete surprise to everybody else who was there?

A Correct.

8App.1534-35 (emphasis added)

Other facts relating to liability issues will be discussed below.

B. Response to RAB's facts regarding medical treatment

Most of the medical information in the eight-page "Medical Treatment" section of the answering brief is irrelevant to the issues in this appeal. RAB 7-15. Plaintiff asserts that the Palms has an "unspoken but loudly implied theme that [plaintiff's] injuries are minor and the verdict excessive." RAB 7. The Palms has never suggested that plaintiff's injuries are minor. Even the defense medical witness testified that plaintiff had a significant knee injury, with a need for knee surgery.

E.g., 14App.2677. On the other hand, there was evidence of "symptom proliferation," with serious questions about whether plaintiff's constellation of problems–such as his sleep apnea, sexual dysfunction, an ingrown toe nail, and a fungus on his foot–were legitimately related to the Palms accident. *E.g.* 13App.2669-70 [and numerous App. citations at AOB 46-47]. The true extent of plaintiff's injuries needs to be determined in a fair trial, without erroneous rulings on evidence.

As part of plaintiff's factual discussion of "medical treatment," the RAB discusses Dr. Schifini's testimony extensively, stating, for example, that Dr. Schifini referred to medical records of Dr. Ferrante "on which Dr. Schifini relied in his own treatment of [plaintiff]." RAB 10:26-27. The brief's appendix citation (RAB 11:2, citing 10App.1821) does not support the brief's reliance contention. Although Dr. Schifini discussed Dr. Ferrante's records in detail, he never testified that he relied on the records as part of his own treatment of plaintiff.[2] 10App.1819-25.

The RAB asserts that Dr. Schifini only testified regarding medical records of other treating physicians "in the context of how he interpreted them in reaching his diagnosis and treating [plaintiff]." RAB 11:12-14. The brief asserts that Dr. Schifini related "all of [plaintiff's] conditions" to the Palms accident (apparently including his sleep apnea, his obesity, the fungus on his toes, etc.); and that Dr. Schifini relied upon the tests and opinions of the other physicians, in his treatment of plaintiff. RAB 11-12. As noted above, Dr. Schifini never testified that he actually relied upon the other physicians in forming his own opinions as part of his treatment. The only fair reading of Dr. Schifini's testimony is that he reviewed the other physicians' medical records

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[2] In fact, despite the RAB's repeated contention that Dr. Schifini relied upon records from other doctors as part of his treatment of plaintiff, the words "rely" and "relied" appear nowhere in Dr. Schifini's testimony in Volume 10 of the appendix.

provided by counsel, and he opined regarding those records solely for purposes of this litigation, not for purposes of his treatment rendered to plaintiff.

Other facts regarding medical testimony and Dr. Schifini will be discussed below.

ARGUMENT

A. No liability as a matter of law

1. Negligence and foreseeability

The opening brief observed that the district judge's finding of liability was contained in an order that did not even mention the words "negligent" or "negligence," focusing solely upon a generic concept of "liability." AOB 4, 14. In response, plaintiff concedes that the order did not discuss "negligence." RAB 18:17-18. Plaintiff fails to identify the standard of care used by the district court in imposing liability, other than a general reference to "premises liability law." RAB 18:23-24. There is no strict liability for landowners in Nevada. Liability is imposed only for negligence. *Foster v. Costco Wholesale Corp.,* 128 Nev. ___, 291 P.3d 150 (Adv. Opn. 71, December 27, 2012). Negligence is the landowner's failure to act reasonably under the circumstances (*id.*), or the failure to exercise the care a reasonable person would exercise in similar circumstances. *Driscoll v. Erreguible,* 87 Nev. 97, 101, 482 P.2d 291, 294 (1971). A defendant is not required to exercise extraordinary prudence. *Id.*

The opening brief relied, in part, on *Estate of Smith v. Mahoney's Silver Nugget,* 127 Nev.___, 265 P.3d 688 (2011) and NRS 651.015, supporting a lack of liability, as a matter of law. AOB 11. In *Smith*, the decedent was a patron at a casino bar. Another patron fatally shot him, and his heirs sued the casino for negligence. The district court granted summary judgment on the ground that the casino did not owe Smith a duty under NRS 651.015, which immunizes such a defendant for injury

to a patron caused by another person who is not an employee of the defendant, unless the other person's act which caused the injury was foreseeable.

This court affirmed, adopting a limited view of "foreseeability." This limit on foreseeability is necessary because a casino owner "cannot guarantee the safety of guests" on the premises. 127 Nev. at ___, 265 P.3d at 692. In *Smith* there was evidence of multiple prior criminal incidents, fistfights, robberies, shots fired, and people brandishing firearms. *Id.* at ___, 265 P.3d at 693. Nonetheless, *Smith* held that the fatal shooting was unforeseeable under the statute. *Id.* The court held that there was no evidence that the casino should have known the other patron was carrying a concealed weapon, and circumstances leading to the shooting did not establish foreseeability for imposing liability, as a matter of law. *Id.*

Here, there was no evidence of any prior injuries at the Palms resulting from tossing souvenirs to an audience. Yet plaintiff attempts to distinguish *Smith*, contending that if a particular injury is in any way foreseeable to a landowner, the landowner should always be liable. RAB 17:8-9. This broad view of premises liability would impose strict liability for all injuries, which is not the law. Even when an injury is foreseeable, in a situation created by the landowner, the landowner's duty and liability can be limited. E.g., *Turner v. Mandalay Sports Entertainment,* 124 Nev. 213, 180 P.3d 1172 (2008) (no liability of stadium owner for injury caused by ball).

Plaintiff repeatedly relies on testimony that his injury was "foreseeable." *E.g.,* RAB 6-7. As noted in the opening brief, however, the risk here was only "foreseeable" in the sense that an injury was theoretically possible. AOB 11. Because injuries are theoretically possible from virtually every activity, a remote possibility of an injury does not equate to a "reasonably foreseeable" injury, for purposes of premises liability. See *Ellsworth v. Sherne Lingerie, Inc.,* 495 A.2d 348,

355 (Md. 1985) (court applied "reasonably foreseeable" test, recognizing that without the word "reasonable" as a modifier, "virtually anything is possible, and thus, arguably foreseeable").

The mere possibility that an injury might occur does not equate to reasonable foreseeability. *Dyess v. Harris,* 321 S.W.3d 9, 14-15 (Tex. App. 2009) (foreseeability analysis based upon what "might occur" would give rise to universal duty to prevent harm, which the law does not impose). The test for negligence is reasonable foreseeability, not possibility or conceivability. *Blunt v. Klapproth,* 707 A.2d 1021, 1033 (N.J. Super., App. Div. 1998). More than a mere possibility of an injury must be shown; otherwise, a business owner would have absolute liability for all injuries to patrons. *Johnson v. Metropolitan Atlanta Rapid Transit Auth.,* 495 S.E.2d 583, 584 (Ga. App. 1998) (no liability to customer stabbed by other customer).

This court recently evaluated premises liability in *Foster, supra,* where a store patron tripped on an open and obvious object. *Foster* held that in a premises liability negligence analysis, the fundamental question is whether the owner employed "reasonable care," taking into account the surrounding circumstances.[3] *Id.* In the present case, the mere remote possibility of an injury–in an activity that even plaintiff himself did not believe was dangerous–failed to establish any violation of the Palms' duty of "reasonable care."

Plaintiff attempts to distinguish *Smith* on the ground that the person who negligently injured plaintiff in the present case was a "third-party hired by the Palms,"

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[3] The court also held that a consideration related to reasonable care by the landowner is whether the plaintiff failed to exercise reasonable self-protection in encountering the danger. *Id.*

i.e., a cheerleader. RAB 17:10. This argument ignores the fact that the cheerleader did not dive into plaintiff's knee; the third-party who injured him was the other patron, just like in *Smith.*

Plaintiff also argues that liability is justified because the Palms had knowledge of the activity and "failed to intervene." RAB 17:12-13. This overlooks the fact that plaintiff had knowledge of the activity, yet he failed to leave. He stayed at the sports book because there was no apparent danger in the souvenir-tossing activity that he observed at least six times for more than an hour. 8App.1466,1534.

2. Testimony of Palms employees

Plaintiff relies heavily on testimony of two Palms employees who expressed personal opinions regarding activities in the sports book. RAB 5-7, 17-18. Plaintiff cites no evidence that these employees had authority to establish official Palms policies, or that even if there was a Palms policy, its violation somehow constituted negligence. Plaintiff's heavy reliance on Sherri Long's testimony is misplaced. RAB 5-6. She used a standard that was not the equivalent of negligence. Plaintiff's trial counsel tried to prod Long into testifying that the conduct at the sports book was unreasonable, but she refused, merely expressing her personal opinion that the activity was "inappropriate." *Id.* ("Q. And it was unreasonable for people to be throwing items into the audience, is that right? A. I wouldn't say unreasonable. I just felt that it was inappropriate.") She recognized the theoretical "possibility" that somebody could get injured by one of the thrown promotional items. 8App.1412, 1414.

Plaintiff also relies on Vikki Kooinga. RAB 6-7. Plaintiff concedes that Kookinga merely testified "she thought it was inappropriate to throw items into a crowd." RAB 7. Kookinga never testified that she felt the conduct was unreasonably dangerous or negligent.

The district court also relied on testimony by these two witnesses, essentially determining that their opinions regarding whether the conduct was "appropriate" constituted a Palms' policy, which was violated. 2App.266-68. Their testimony did not establish any official or formal policy. Even if it did, the opening brief discussed cases holding that a company's violation of its own internal rule does not equate to negligence, because the internal rule might establish a standard of conduct higher than negligence; and imposing liability would punish a defendant for adopting a high internal safety standard. AOB 13-15. The answering brief provides no discussion of this contention.

3. Franklin's testimony

The RAB argues: "Other than the testimony of its own expert, Mr. Franklin, . . . the Palms presented no evidence that its conduct was safe and did not fall below the standard of care." RAB 19:4-8. This is like saying: "Other than the ten witnesses who saw the accident, there was no evidence of how the accident happened." In any event, the Palms did not have the burden to prove that its conduct was safe and was within the applicable standard of care. Plaintiff had the burden of proof.

Franklin's expert testimony was the only evidence concerning applicable reasonable standards at sporting and entertainment venues. Plaintiff's brief asserts that Franklin's testimony "can be summarized in a single sentence: He believes because he has been to many events where promotional items were thrown into a crowd that throwing items into a crowd is never dangerous anywhere or under any conditions." RAB 19:9-11. This is an inaccurate simplification of Franklin's testimony. He testified that throwing promotional items to an audience is not a violation of any standard in the industry, and is an accepted common activity. 12App.2352-54, 2359-60, 2370-73. His expert opinions were based upon a lifetime of professional experience in security and crowd control (law enforcement; industrial

protection; disaster recovery planning; catastrophe management; and riot, security and crowd control, including crowd control in entertainment venues). 12 App.2344-51.

Franklin's opinions were also based upon his personal experience as a security professional at venues where memorabilia is tossed to spectators, such as a conference of security professionals, where promotional items were tossed to the audience. 12App.2353. He is also familiar with other entertainment venues, including those at casino resorts. 12App.2359-60, 2371. The standard at these venues is to allow promotional items to be tossed to the audiences. *Id.* There is no basis for plaintiff's attack on Franklin's testimony.

4. Comparative negligence

Plaintiff briefly discusses comparative negligence regarding his failure to leave the sports book, and he asserts that "comparative fault was not pleaded as a defense." RAB 19:26. This is incorrect. The Eighth Affirmative Defense expressly alleged that plaintiff's damages were the direct result of his own negligent acts. 1App.16:22-24. The answering brief goes on to argue "nor did the Palms ever suggest during the trial that plaintiff was comparatively negligent." RAB 19-20. The answering brief's author states: "I cannot cite to the record for this negative, but a review of the transcript reveals that the issue of comparative negligence was never discussed." RAB 20:27-28. Defense counsel clearly discussed plaintiff's own responsibility. For example, defense counsel's closing argument discussed plaintiff's statement to a doctor that plaintiff thought the sports book activity was dangerous. 16App.3104:21-23. [Plaintiff's statement to the doctor directly contradicted his testimony at trial, where he said he did not think the activity was dangerous. 8App.1534:9-13.] Defense counsel argued that "if in fact that's what he really thought, I don't understand why he didn't, either, number one, try to get somebody to stop it or simply

leave." 16 App.3104:22-25. Defense counsel also argued that "presumably if the people don't like it, they leave." 16App.3105:22-3106:1.

Other places in the appendix show that comparative negligence was an issue at trial. For example, two district court orders dealt with the issue of comparative liability. 2App.268:8; 3App.724:10.

5. *Turner* and other case law

The opening brief relied, in part, on *Turner*, involving the baseball stadium. The answering brief says the issue in *Turner* "was whether the stadium owner had provided sufficient precautions against foreseeable injury." RAB 20:7-8. This was not the issue; the issue was whether baseball stadium owners have a duty to protect patrons against injuries from foul balls. 124 Nev. at 215, 180 P.3d at 1173. Plaintiff argues: "And the owner in *Turner* was protected from liability *because it had taken significant precautions to protect the spectators.*" RAB 20:12-13 (italics in original). Actually, the opposite is true. Of all the concession areas at the stadium, only two provided protection from foul balls. *Id.* at 216, 180 P.3d at 1174. The concession area where the plaintiff was injured had no protection whatsoever. *Id.* Nonetheless, this court found no liability, adopting a limited duty rule that protects sports venue owners from the need to take unreasonable precautions, considering dangers that are known to spectators. *Id.* at 218-19, 180 P.3d at 1175-76.

Turner also discusses general negligence concepts. For one thing, the court did not impose a duty on landowners to protect against every foreseeable (i.e., theoretically possible) injury, as the district court seems to have done here. *Turner* recognized that the risk of a foul ball is not an unduly high risk of injury, and therefore does not result in the stadium owner's need to protect against it. *Id.* at 219, 180 P.3d at 1176. Additionally, *Turner* recognized the social consequences of

imposing duties that might result in substantial alteration of spectator sports. *Id.* at 217-18, 180 P.3d at 1175-76.

Plaintiff argues that throwing promotional items to spectators is not part of any sport. RAB 20:14-15. Although this activity is not part of the game itself, the activity is widely accepted as part of the overall experience of attending a sports event. The opening brief discussed cases contained in the annotation on which this court relied in *Turner*. AOB 8-9(discussing *Loughran v. The Phillies,* 888 A.2d 872 (Pa. Super. 2005) and *Pira v. Sterling Equities, Inc.,* 790 N.Y.S.2d 551 (N.Y. App. Div. 2005)). Both cases involved spectators who were struck by souvenirs tossed to fans by baseball players. Both decisions rejected the idea that liability should be imposed because intentionally throwing a baseball to fans is not part of the actual game of baseball. The courts recognized that throwing a souvenir to the fans, as a memento from the event, is part of the sporting event experience. AOB 8-9. The answering brief ignores *Loughran* and *Pira*, failing to distinguish or even cite those cases. Tossing souvenirs to audiences at sporting events and other entertainment venues is a very common, well-accepted activity.[4] 12App. 2353-54; *Loughran,*

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[4] For example, at a University of Washington home basketball game against the University of Nevada, cheerleaders tossed bags containing free breakfasts to the sections of the stadium audience that contained the loudest Husky fans. www.gohuskies.com/marketing/mbballpromos.html. The University of Michigan website references a 2012-13 basketball promotion: "T-Shirt Toss -- During a select timeout, the cheer & dance teams will be throwing T-shirts to the loudest fans in the stands!" www.mgoblue.com/promotions/bkw-promotions.html. One college's website advertises sports promotions such as "tossing out freebies" to fans at sporting events, including such sports as football, soccer, volleyball, wrestling, basketball, baseball and softball. www.gopoly.com/fan_zone/upcoming_promotions/index. One university's website proudly displays a picture of the university president rearing back to throw a t-shirt to the audience at a football game, with a caption (continued)

supra; Pira, supra.

Plaintiff argues that the fact that the game was on television did not "transform this party into a sporting event" or a sporting venue. RAB 20:23-25. For purposes of premises liability, there is no meaningful difference between a live game and a televised game. Both involve premises owners who want their customers to have a fun, exciting time watching the game; and both involve customers who want a fun, exciting time watching the game. For tort liability, there is no logical difference between a cheerleader who throws a t-shirt to the audience at a live football or basketball game, and a cheerleader who throws a t-shirt to the audience when the game is televised at a sports bar or sports book. The tort analysis should be the same, and the limited duty and lack of liability should be the same.

The opening brief cited cases from other jurisdictions finding no liability. AOB 8-12. The answering brief ignores these cases and fails to cite any case, from any jurisdiction, in which a court imposed liability against a premises owner for an injury related to a souvenir tossed to spectators. Instead, the answering brief asserts that a "case more analogous" is *Stewart v. Gibson Products Co.*, 300 So.2d 870 (La.App. 1974), where a store owner dropped ping pong balls onto a parking lot, some of which were redeemable for merchandise. RAB 21.

Stewart is not analogous at all. As the answering brief observes, the *Stewart* court "found liability even though it found that the danger was not foreseeable, but appeared only in hindsight." RAB 21:22-23. This is not the law in Nevada, where

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(continued) indicating that he and his wife throw t-shirts to audiences at all home games. www.ttu.edu/administration/president/gettoknow/tshirts.php. See www.promotionalproductsblog.net/tag/promotional-mini-footballs ("the fans love to catch mini-footballs thrown by the cheerleaders;" and "everyone loves when they leave the games with a souvenir"). Because these web pages might change, we have attached addendum copies to this brief.

liability for negligence requires reasonably foreseeable risks at the time of the incident. *Butler v. Bayer,* 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007). The foreseeability of risks and the reasonableness of a defendant's conduct are not evaluated with the clarity of hindsight. See *Mainor v. Nault,* 120 Nev. 750, 775, 101 P.3d 308, 325 (2004) (reasonableness of defendant's conduct cannot be evaluated "with the benefit of 20/20 hindsight"); *Giordano v. Spencer,* 111 Nev. 39, 43, 888 P.2d 915, 917 (1995) (whether defendant's conduct was reasonable depends upon circumstances at time of incident, not "with benefit of 20/20 hindsight"); *Brown v. United Blood Services,* 109 Nev. 758, 766-67, 858 P.2d 391, 397 (1993) (no liability even though hindsight may suggest that more steps could have avoided injury).

Additionally, *Stewart* did not involve a sporting or entertainment event. The store owner's conduct in dropping the balls was exclusively a commercial advertising event. The court noted that alternative means of advertising were available, with less risk of harm, and the store owner's conduct in dropping the balls had "marginal social utility." RAB 22:16-18.

Tossing souvenirs to spectators at sports venues is a common practice, whether at a live sporting event or a venue where the event is televised. The district court's imposition of liability, if affirmed, would drastically change sports and entertainment, essentially prohibiting activities that spectators want and expect. For the reasons set forth in the opening brief and in this reply brief, the Palms is entitled to judgment as a matter of law.

B. Improper medical testimony

1. Initial arguments

The RAB starts its argument regarding medical testimony with the following: "The Palms sets forth the proposition that if a plaintiff has forty treating physicians, that plaintiff must call all forty to testify in order to recover for an injury and course

of medical treatment." RAB 23:11-13(no page citation to AOB). Similarly, the RAB asserts: "In the Palms view, Enrique was required by law to have every one of his treating physicians testify, . . ." RAB 31:19-20(no page citation to AOB). The Palms never made such broad, far-fetched propositions. Our actual contention is that a plaintiff is not required to call all treating doctors as witnesses, and one doctor can testify regarding care rendered by other doctors, but the testifying doctor must be adequately disclosed as a retained expert, and the doctor's new expert opinions must be fairly disclosed to defense counsel during discovery. AOB 21-25. Our contention, if adopted by the court, will not make personal injury cases "impossible to try," as plaintiff argues. RAB 31:21-22. It will make personal injury cases more fair.

Plaintiff cites *Prabhu v. Levine,* 112 Nev. 1538, 930 P.2d 103 (1996), for the rule that a treating physician need not be disclosed as a retained expert, and "is allowed to testify to the treatment of the patient and as a medical expert . . . ." RAB 23:27-24:2. Plaintiff cites no page in *Prabhu* where this proposition can be found, and *Prabhu* is not nearly this broad. In *Prabhu*, Dr. Levine was disclosed only as a treating physician, but at trial he gave standard-of-care testimony. *Id.* at 1541-42, 930 P.2d at 106. On appeal, the defendant contended that Levine was not adequately disclosed as an expert. This court disagreed, because defense counsel had taken Levine's pretrial deposition regarding the standard-of-care opinions. *Id.* at 1547, 930 P.2d at 109-10. The defense suffered no prejudice as a result of the plaintiff's failure to disclose Levine as an expert, because defense counsel fully deposed Levine regarding the very opinions he eventually rendered at trial. Thus, *Prabhu* does not hold that treating physicians can testify regarding matters beyond their treatment rendered to the plaintiff. Nor does *Prabhu* minimize the importance of discovery disclosures, which provide opposing counsel with fair notice of testimony that can be

expected at trial. Unlike *Prabhu,* in the present case defense counsel received no such fair notice.[5]

2. Scope of treating doctors' testimony

The answering brief has a section entitled: "Enrique's doctors did not testify to matters beyond their own treatment and expertise." RAB 25-27. The brief offers no appendix citations or legal authorities in this section. The brief merely interprets the transcript, without citing to testimony. Within this section, plaintiff contends that his testifying doctors testified only "in the context of their own treatment of Enrique," and the testifying doctors necessarily reviewed and relied upon records of other doctors, as part of their treatment. RAB 26:2-8 (no appendix citation). As demonstrated in the opening brief, however, plaintiff's testifying doctors went far beyond the context of their own treatment. AOB 18-21. The testifying physicians never testified that their review of other doctors' opinions and thousands of pages of records and bills (provided by plaintiff's counsel) was necessary for them to form their own opinions or to provide adequate treatment for plaintiff.

Plaintiff's counsel gives this court his personal assurance that testifying doctors were careful not to testify beyond their own treatment of plaintiff. RAB 27:22-23. Counsel apparently failed to read the 21 places in the transcript where the district court allowed doctors Schifini and Shannon to give opinions (over objection) that the amounts of money billed by other non-testifying doctors were reasonable. Schifini:

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[5] Plaintiff also relies upon *Fernandez v. Amirand,* 108 Nev. 963, 843 P.2d 354 (1992). RAB 24-25. Yet plaintiff concedes that *Fernandez* "had nothing to do with whether a treating physician is subject to expert witness disclosures." RAB 25:7-9.

10App. 1826, 1834, 1835-37, 1854-57, 1864-65, 1875, 1901-02, 1908-09; Shannon: 9App. 1597-98, 1606-07, 1609, 1611, 1617, 1659, 1661-65, 1667.

These opinions were obviously intended solely to support plaintiff's claim for medical expenses in this litigation. Even the most vivid appellate imagination cannot support an argument that doctors Schifini and Shannon (1) relied on the amounts of money billed by other doctors when rendering their own treatment to plaintiff, or (2) developed opinions on the reasonableness of the amounts of money in other doctors' billings, as part of, and at the time of, their own treatment rendered to plaintiff. Opinions of doctors Schifini and Shannon regarding reasonableness of the amounts of medical billings by other doctors conclusively establishes that Schifini and Shannon were retained, at least in part, to express undisclosed opinions for this lawsuit beyond the scope of their treatment of plaintiff.

3. Dr. Schifini

The opening brief established that Dr. Schifini was allowed to give other improper opinions. AOB 18-20. Plaintiff's counsel concedes that Dr. Schifini reviewed thousands of pages of medical records from other doctors, but counsel explains that this "is precisely what a treating physician does in treating a patient with complex symptomology." RAB 31:25-27. Although this might be counsel's view, the brief cites no testimony supporting this view. Dr. Schifini himself certainly did not testify that he needed thousands of pages of medical records (from plaintiff's counsel) in order to treat plaintiff.

The Palms subpoenaed Dr. Schifini's records, and he responded by providing only approximately 21 pages. 2App. 300, 327. When he got to trial, however, his file contained numerous additional records, and he had reviewed "thousands of pages" of records from "many, many providers." 2App. 300-01, 327; 10App. 2021. The district judge allowed plaintiff's counsel to use Dr. Schifini as a Trojan horse to admit

hundreds of pages of other doctors' records, over defense objections. 3App. 556-58; 10App. 1831, 1835, 1838, 1856, 1858, 1865, 1875, 1910. Plaintiff's brief cites no testimony that this is what Dr. Schifini–or any other doctor, for that matter–normally does in treating a patient.

Finally regarding Dr. Schifini, the opening brief established that the district court improperly allowed the doctor to express new opinions concerning the life-care plan plaintiff's counsel disclosed to defense counsel before trial. AOB 19-20. The judge allowed Dr. Schifini to criticize the life-care plan and to add nearly $1 million to the plan. *Id.* The judge accepted the new opinions, awarding $1.8 million in future medical expenses. 2App. 274:8.

Plaintiff admits that Dr. Schifini criticized the life care plan at trial. RAB 32:21-24. Plaintiff's primary argument is that the Palms did not depose Dr. Schifini, and had it done so, the doctor's opinions would have been discovered. RAB 32:25-27. There are two flaws with this argument. First, it encourages unnecessary medical depositions, which are time-consuming and expensive. Second, the argument presumes defense counsel will be clairvoyant while deposing doctors.

If a plaintiff's discovery disclosures and medical records never suggest that the doctor will express new opinions on an entirely new topic, defense counsel might never think to ask about that topic at a deposition. In the present case, for example, plaintiff disclosed 28 treating medical providers and a life-care plan expert/report, with no hint that any treating doctors would give trial testimony critical of plaintiff's plan. In the answering brief's view of the law–a view shared by the judge–defense counsel should have deposed all 28 providers, at which he should have conducted broad fishing expeditions, to find out whether any of the doctors intended to offer trial opinions critical of the life-care plan plaintiff's own counsel had disclosed; and if defense counsel had deposed all 28 providers, counsel would have somehow

stumbled across Dr. Schifini's new opinions criticizing plaintiff's life-care plan expert. This view of the law cannot be sustained.

Plaintiff contends: "There is no law that says a defendant has a right to rely on a disclosed life care plan and to assume that properly disclosed treating medical experts will not offer opinions different from the life care planner's." RAB 33:4-7. To the contrary, litigants are entitled to rely on the opposition's expert discovery disclosures. *Lee v. Ingalls Memorial Hosp.,* 606 N.E.2d 160, 164 (Ill. App. 1992)(undisclosed opinion excluded); see *Prism Technologies v. Adobe Systems,* 2011 WL 6210292 (D.Neb. 2011)(general reliance on opponent's discovery disclosures). There is no law that says a plaintiff has the right to disclose a life care plan expert, obtain a treating doctor's opinion that the plan is $1 million too low, fail to disclose the new opinion, then abandon the life-care plan expert and use the treating doctor's surprise testimony at trial. This is exactly what happened here.

4. Other doctors

The answering brief attempts to show that other treating physicians did not testify improperly. RAB 28-34. For example, plaintiff argues that Dr. Kidwell did not testify that if Dr. Thalgott (a non-testifying doctor) knew what had transpired since he saw plaintiff three years earlier, he would change his opinion regarding whether plaintiff was a surgical candidate. RAB 28. Although Dr. Kidwell did not use those exact words, this was the essence of his testimony. Dr. Kidwell testified regarding information Dr. Thalgott did not have, compared to information Dr. Kidwell had (three years later). 14App.2875-77. His speculation about what Dr. Thalgott would have opined with the additional information was certainly inferred in his testimony. This is why defense counsel objected on the ground that Dr. Kidwell was speculating as to "things that Dr. Thalgott might have done or would have done" with the additional information. 14App.2878:1-6. Plaintiff's trial counsel did not

dispute defense counsel's characterization of the testimony; plaintiff's counsel only argued that Dr. Kidwell should be allowed to give the opinion. 14App.2878:7-17. The judge agreed. 14App.2878:21-22. The district court's ruling was wrong, and Dr. Kidwell should not have been allowed to speculate.

Regarding Dr. Shannon, the opening brief established that she was allowed to testify regarding treatment from other doctors, including Dr. Nork. AOB 20-21. Plaintiff answers: "Dr. Shannon did not testify extensively regarding Dr. Nork, and she did not testify at all regarding Dr. Nork's treatment of Enrique." RAB 33:20-22. This statement is false. Dr. Shannon's testimony regarding Dr. Nork spans 13 pages of the trial transcript, with direct examination concerning plaintiff's visits with Dr. Nork; Dr. Nork's diagnosis; Dr. Nork's referral to physical therapy; and the reasonableness of Dr. Nork's bills. 9App.1598-1611.

5. Other arguments

The answering brief predicts a judicial catastrophe if this court accepts the Palms' contention, because courts would be swamped with cumulative medical testimony, and courts would be mired with an impossible task of determining whether pretrial disclosures need to be made. RAB 26:21-25. There is no basis for plaintiff's apocalyptic prediction. Courts would not be swamped with cumulative testimony by treating doctors. Instead, plaintiffs would merely be required to give fair pretrial disclosures of expert medical witnesses who will render trial opinions dealing with treatment rendered by non-testifying doctors.

Moreover, courts will not be faced with impossible tasks. Numerous federal and state courts have ruled that if a treating doctor will provide opinions not made in the normal course of rendering treatment, the doctor must submit a report and be disclosed as an expert before trial. See cases cited at AOB 22-26. These courts have

not collapsed under the weight of cumulative testimony or the task of determining the scope of such testimony.

After painting the apocalyptic picture, plaintiff asks: "And all for what? To save defendants the expense of deposing medical treating experts?" RAB 26:26-27. Plaintiff apparently wants this court to require defense attorneys to take depositions of every treating doctor in every personal injury case. This was the view expressed by Judge Walsh, when she told defense counsel: "Well, you know, frankly, I guess you take your chances if you don't depose a witness, and then you don't know what he's going to testify at trial." 13App.2466:17-19. With this statement, Judge Walsh might well be the only district judge in Nevada who has openly criticized the defense bar for not taking enough depositions in personal injury cases. Her view is contrary to the policy of the law, which is to discourage excessive and unnecessary discovery, and to make discovery less burdensome and less expensive. E.g., NRCP 26(b)(2) and (c).

In the present case, plaintiff's counsel was guilty of litigation sandbagging at its worst. He served discovery disclosures identifying at least 28 medical providers, but no retained medical experts. AOB 16. He never even whispered the idea that any of these doctors would express opinions beyond the limited scope of their own treatment of plaintiff. AOB 16-17. Then, at trial, he called only four doctors, to whom he had given thousands of pages of medical records from other doctors, and these four doctors expressed opinions far beyond the scope of their own treatment of plaintiff. *Id.* And when defense counsel objected to this grossly unfair scenario, Judge Walsh essentially ruled that defense counsel assumed the risk by not deposing all the treating doctors. 13App.2466:17-19. The judge then relied upon the testimony of the four doctors, rendering a $6 million award. 2App.273-74.

Plaintiff argues that case law does not support the Palms' arguments regarding treating physician testimony. RAB 35. Although plaintiff attempts to distinguish some of the numerous cases supporting the Palms' position, plaintiff does not provide a single case, from any jurisdiction, actually supporting what the district court did here.[6]

Plaintiff attempts to distinguish *Goodman v. Staples,* 644 F.3d 817 (9th Cir. 2011), where the court precluded undisclosed opinions by treating doctors. Plaintiff argues that "the Ninth Circuit approved of a treating doctor testifying to the contents of medical records of other treaters on which the doctor relied." RAB 36:18-20. Actually, the court held that a doctor is only exempt from expert report requirements if (1) the opinions were formed during the course of treatment; and (2) the doctor relied on records reviewed at that time. If the doctor formed opinions later, relying on records provided by counsel (i.e., records not reviewed during the normal course of treatment), an expert report is required. *Id.* at 825-26. This is precisely what occurred in the present case.

Plaintiff's attempt to distinguish other persuasive case law is equally ineffective. RAB 37-40. Every case cited in the opening brief on this point–including *Ghiorizi v. Whitewater Pools,* 2011 WL 5190804 (D. Nevada 2011), where the court limited Dr. Schifini's trial testimony–stands for the unassailable rule that expert witness disclosures are required when treating physicians will be

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6 Plaintiff quotes from *Eglas v. Colorado Belle Corp.*, 179 F.R.D. 296 (D.Nev. 1998), for the proposition that expert opinions concerning causation and future care can be given without expert reports. RAB 37:20-24. The *Eglas* language quoted by plaintiff is immediately followed by: "However, if a physician, even though he may be a treating physician, is specially retained or employed to render a medical opinion based on factors that were not learned in the course of the treatment of the patient, then such doctor would be required to present an expert written report." *Id.* at 298.

rendering opinions beyond the scope of their treatment. Fundamental fairness demands such a rule.

C. Error regarding plaintiff's economist

The opening brief established that plaintiff failed to present an evidentiary foundation for determining a reasonably accurate amount of wage-loss damages. AOB 35-37. Although plaintiff claimed to be a successful real estate investor for many years, he gave his expert only three random tax returns, two of which were prepared five years after the Palms incident. AOB 34-36. His expert requested him to provide government statements showing annual income histories, but he did not comply. 13App.2499-2504. Nor did plaintiff provide the expert with any other business records showing his income. AOB 36-37. Despite this paucity of evidence, the district court awarded more than $700,000 in past and future lost income. 2App.274. Plaintiff's brief states: "The Palms argues that because Enrique's income is derived from buying and selling real property, there should be some sort of presumption against Enrique." RAB 41:5-7(no page citation to AOB). The Palms never made such an argument. Plaintiff argues that "this Court will find ample evidence in the record to support his claim of lost ability to earn income in the future." RAB 41:21-22. Yet throughout this entire section of the answering brief (RAB 41-42), plaintiff fails to provide a single appendix citation.

Finally, plaintiff attempts to characterize this as "a discovery dispute," which should have been resolved pretrial. RAB 42:10-14. The issue on appeal, however, is not a discovery dispute. Plaintiff had the burden to prove his wage-loss damages, and the legal question is whether the minimal records given to his expert economist provided a sufficient evidentiary foundation for the $700,000 award. They did not.

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D. Improperly striking defense experts

The opening brief established that the district court erred by striking defense experts Franklin and Cargill. AOB 37-45. The judge did not strike these experts because they were unqualified. She granted a motion to strike which was made after both witnesses had already testified and were excused, because the experts had not used the words "to a reasonable degree of probability." 1App.146-49; 2App.269-70.

Our argument on appeal is simply that expert witnesses are not required to recite talismanic phrases such as "reasonable degree of probability," if the testimony otherwise satisfies Nevada evidentiary requirements. AOB 41-44. The answering brief does not address this issue in any meaningful way. The brief attacks the bases of testimony by Franklin and Cargill, essentially questioning the credibility of their testimony. RAB 42-44. Plaintiff cites no law rebutting our contention that expert witnesses are not required to use magic language or set phrases for their testimony.

Plaintiff argues that the error was harmless, because the district court would have reached the same result if she had not stricken the testimony. RAB 45. This speculative backup position is unfounded, particularly with regard to Franklin's testimony. Franklin was the only expert witness regarding liability in this entire case. His expert testimony, if not stricken, would have stood unrefuted regarding the standard of care and absence of any significant risk in the activities in question. Error in striking the two defense expert witnesses cannot be deemed harmless.

E. Remand to different judge

The opening brief contended that if this case is remanded for a new trial, the case should be assigned to a different judge. AOB 47-48. The answering brief fails to address this contention, thereby conceding it.

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CONCLUSION

For the reasons expressed in the opening brief and in this brief, the judgment on liability should be reversed, and a judgment should be entered in favor of the Palms. Or at the very least, the case should be remanded for a new trial with a different judge.

DATED: Feb. 6, 2013

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CERTIFICATE OF COMPLIANCE

1. 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 in a proportionally spaced typeface using WordPerfect version X5 in 14 point Times New Roman type style.

2. This reply brief is governed by the type-volume limitation in NRAP 32(a)(7)(A)(ii) [7,000 words]. Appellant is filing a motion seeking permission to file this brief in excess of the word limitation. If granted, this brief will comply with the rule because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it will contain the number of words allowed by the court, i.e., 7,889 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 appropriate rferences to 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: Feb. 6 2013

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellants' Reply Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served copies of this **Reply Brief and a disk of the Appendix** by U.S. mail to:

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