IN THE SUPREME COURT OF THE STATE OF NEVADA

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FCHI, LLC, a Nevada Limited Liability Company, fka Fiesta Palms LLC, a Nevada Limited Liability Company dba The Palms Casino Resort;

Appellent,

vs.

ENRIQUE RODRIGUEZ, an Individual,

Respondent.

/

No. 59630

ANSWER TO PETITION FOR REHEARING

Appellant (the Palms) hereby answers respondent's petition for rehearing.

I

Standard of Review

Pursuant to NRAP 40, rehearings are extremely limited. A rehearing is only available if the court overlooked or misapprehended a material fact or question of law, or if the court overlooked, misapplied or failed to consider controlling authority. NRAP 40(a)(2). Rehearings are not granted to review matters that are of no practical consequence. *Bahena v. Goodyear Tire & Rubber Co.,* 126 Nev.___, 245 P.3d 1182, 1184 (2010).

II

Liability

The petition first contends that the court misapprehended or overlooked material questions of law and fact when it "overturned the trial court's finding of negligence." (Pet. 1:16-17) Actually, Judge Walsh never did make a finding of negligence. She granted plaintiff's motion for judgment as a matter of law, finding that "liability" had been conclusively established. 2App.265-268. The order did not even contain the words "negligent" or "negligence." *Id.* at 265-68. The order was also completely silent

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as to the standard of care for negligence, or as to whether the judge applied any negligence standard of care at all (other than applying a generic concept of "liability"). *Id.*

The gist of the petition's argument is that the court overlooked material facts and overlooked the district court's specific findings. (Pet.2:8-9) The petition first emphasizes testimony to the effect that throwing souvenirs into a crowd is dangerous because such behavior "creates chaos." (Pet.2:10-14) The petition ignores the fact that plaintiff's sole purpose in leaving his own hotel and going to the Palms was to watch "Monday Night Football Frenzy with Brandy Beavers." 7App.1319; 8App.1463 (emphasis added). When he arrived he saw a "rowdy" environment, with cheerleaders tossing souvenirs to the audience. 8App.1463-65. Upon observing the "rowdy" environment, plaintiff then did exactly what he wanted to do – he freely and voluntarily entered the sports book, stayed for more than an hour, and watched the cheerleaders toss souvenirs to the audience at least six times. 8App.1465-66, 1534. He did not think the cheerleaders' activity of throwing souvenirs to the audience was dangerous. 8App.1534. If he thought the activity was dangerous, he would have simply left the premises; but he did not do so. *Id.*

The rehearing petition now criticizes the Palms, because if a cheerleader tosses a harmless souvenir to people attending a televised football game in a sports book, this "creates chaos." But plaintiff did not go to the Palms to watch a sleepy rerun of "Leave it to Beaver." He went there to watch a ". . . Frenzy with Brandy Beavers."

In any event, the rehearing petition's liability argument focuses on the exclusion of expert Franklin's testimony. This court's opinion concluded that the district judge erred by striking Franklin's testimony, and "rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context." (Op. 10) The rehearing petition does not contend that the opinion was wrong in finding this error. Instead, the petition's sole argument is that the error was harmless because Judge Walsh would have rendered the same liability

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decision against the Palms even if she had not stricken Franklin's expert testimony and opinions. (Pet.2-3) The argument is based upon a single sentence in the 17-volume appendix, in an order denying the Palms' motion for a new trial. (*Id.*) There are several reasons why the court should reject the argument.

A. Reargument in Petition

Pursuant to NRAP 40(c)(1), matters presented in the briefs may not be reargued in a petition for rehearing. Here, the answering brief already argued that the district court's error in striking the testimony of expert witnesses was harmless. RAB 45. The rehearing petition simply argues the same point again, in violation of Rule 40(c)(1).

Moreover, this court appears to have considered and rejected plaintiff's argument. In fact, the opinion twice recognizes the prejudicial impact of the judge's order striking the defense expert's testimony. The opinion first held: "Given that Rodriguez did not present any expert testimony to the contrary, such evidence [Franklin's testimony] could have reasonably shifted the district court's verdict in the Palms' favor." Op. 9. Additionally, the court held: "Inasmuch as it is probable that but for this erroneous ruling a different result might have been reached on the matter of Palms' breach, a new trial is warranted." Op. 10.

The rehearing petition adds nothing to the argument that respondent's answering brief already argued. Pursuant to NRAP 40(c)(1), the petition should be denied.

B. Factual/Procedural Background

To understand the district court's finding that her liability determination would have been the same, regardless of striking Franklin's testimony (4App.853, quoted in rehearing petition at Pet.2-3), this court must consider the factual/procedural context of the finding.

The opinion correctly summarizes expert Franklin's testimony at Op. 9. As the opinion observes, Franklin is an expert in security and crown control. He offered his opinion that throwing promotional items to an audience is not uncommon and is generally safe, based upon his extensive experience. *Id.* He expressed his opinions

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without objection. E.g., 12 App.2371.

After Franklin was excused, plaintiff's counsel filed a motion to strike Franklin's testimony and opinions, on the ground that Nevada law requires all expert opinions to be based upon a reasonable degree of professional probability. 1App.149. The motion to strike was filed on November 10, 2010, the last day of trial. 1App.146. In opposition, the Palms argued that an expert is not required to use "magic words" as a foundational requirement for expert testimony. 1App.151-52. At the hearing on the motion, plaintiff's counsel argued that magic words are required: "The reason they're called, that we call them magic words, is because they're magic." 16App.3178. Plaintiff's counsel then argued that in order to have a "magical transformation" from inadmissibility to admissibility of expert testimony, "you need to use the [magic] words." *Id.* This hearing occurred on January 27, 2011. 16App.3164.

On the same day that plaintiff moved to strike Franklin's testimony, plaintiff's counsel also filed "Plaintiff's Rule 50 Motion for Judgment on Liability." 17App.3218. This was essentially a motion for judgment as a matter of law. The motion relied upon testimony of two Palms employees, as well as Franklin's testimony. 17App.3218-23. The motion argued that the issue of liability had been definitively established, as a matter of law, through the testimony of the two employees "and Mr. Franklin, Defendant's expert."[1] 17App.3224: 9-10.

On March 10, 2011, the district court entered two orders. First, the district court granted plaintiff's motion for judgment as a matter of law on the issue of liability. 2App.265. Second, the district court granted plaintiff's motion to strike Franklin's expert testimony. 2App.269-71. By this time the trial had finished four months earlier. 16App.3074. Neither of the district court's orders entered on March 10, 2011, indicated

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[1]In other words, plaintiff's counsel filed two motions on the same day. One motion sought an order striking Franklin's testimony, for failing to comply with Nevada expert requirements, but the other motion sought a judgment on liability, relying on Franklin's testimony. 1App.146; 17App.3218. The trial judge granted both motions.

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that the judge's ruling on liability would have been the same even if Franklin's testimony had not been stricken.[2]

Four days later, on March 14, 2011, the district court entered a "verdict," awarding approximately $6 million in damages. 2App.273-74.

The Palms moved for a new trial, and on July 5, 2011, the district court held a hearing on the motion. 16App.3187. The district court ruled from the bench, never saying a word about whether other testimony would have outweighed Franklin's testimony, if Franklin's opinions had not been stricken. 16App.3210-11. The district court entered an order nearly three months later, denying the motion for new trial. 4App.841. This 14-page order was written entirely by plaintiff's counsel; and nothing in the order or elsewhere in the record indicates that Judge Walsh changed even a single word in the order before she signed it. *Id.* at 841-54. The order included a new sentence – on which the rehearing petition now relies – indicating that the judge determined liability independent of striking the defense experts. 4App.853:9-13. The judge had not made such a finding in her bench ruling on the motion for new trial; the parties had not briefed it; and so far as we can tell, the proposed order from plaintiff's counsel was the first time the finding was ever mentioned. Judge Walsh signed the proposed order, including the new finding that had been inserted by plaintiff's counsel.

It is painfully obvious that this new finding was an afterthought by plaintiff's counsel, who was apparently (and justifiably) concerned about whether this court would eventually uphold Judge Walsh's decision striking expert testimony based upon the absence of "magic words." Despite the fact that the judge had never mentioned this finding at any of the hearings on the various motions, she signed the order in which plaintiff's counsel added the new finding.

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[2]At the hearing on the motion to strike, the district court granted the motion from the bench, with no explanation, no reasons given, and no indication that other evidence trumped Franklin's expert opinions if Franklin's testimony had not been stricken. 16App.3183:8 (judge's entire ruling was: "I agree. The motion's granted.")

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The judge clearly believed that Franklin's expert testimony should be disregarded and stricken, because the judge was convinced by plaintiff's counsel that magic words are required, that Franklin did not use the required magic words, and that Franklin's testimony therefore did not satisfy foundational requirements for expert opinions. Having made this erroneous decision, Judge Walsh obviously would not have given Franklin's testimony the full weight and credibility to which it was entitled. As this court's opinion correctly held, "rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context." Op.10.

In these circumstances, it is impossible to believe that the judge could have evaluated Franklin's testimony objectively and fairly, after having erroneously determined that the testimony did not satisfy legal requirements.[3] It is equally impossible to believe, based upon this record, that the judge's liability determination would have been the same even if she had not erroneously stricken Franklin's undisputed testimony.

C. Insufficient other evidence

As this court's opinion correctly observed, Franklin's expert opinions were uncontested, and plaintiff did not present any expert testimony to the contrary. Op. 9. Nonetheless, the rehearing petition argues that the exclusion of Franklin's testimony could not have influenced the outcome of the liability issue (which was hotly contested and disputed), because there were other witnesses supporting liability. (Pet.3). The other two witnesses were Sheri Long and Vikki Cooinga. Based upon the testimony of these two Palms employees, the district court found that the Palms had a "policy" prohibiting promotional items from being thrown to spectators, and the district court found a breach of the so-called policy. 2App.268. But neither employee testified that

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[3]Plaintiff's answering brief conceded that the district court's record on this point was "not clearly stated." RAB 45:18.

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there was a Palms policy on this point, and there was no evidence that the Palms itself had ever adopted such a policy. 8App.1415, 1422. The two employees merely expressed their own personal subjective opinions that it was "inappropriate" to throw promotional items to an audience.

Long was the director of marketing. There was no evidence that she had any prior experience in risk management, safety, security, accident prevention or accident investigation. She had never received any training that dealt with safety during promotional events. 8App.1410. She gave no foundational testimony showing whether she had knowledge of the standard of care for casino sports books. Nothing in her testimony indicated that she had ever seen or heard about an injury as a result of souvenirs being tossed to an audience. Nor did she testify regarding the foundation for her personal view that such behavior is "inappropriate." Although she thought such behavior is "inappropriate," she did not testify that such behavior was "unreasonable."[4]

Cooinga's testimony was also without any foundation for a negligence/liability finding. Cooinga's title was "risk manager" at the Palms, but her testimony indicated that her job duties were very limited – she described her job as merely overseeing the database for security incidents that are reported, and acting as a liaison between lawyers and insurance companies. 8App.1434. Her prior job experience with the Palms was mainly in food and beverage, and she had only worked in the security or risk management department for approximately three years before the incident in question. 8App.1435. There was no foundational testimony regarding her experience with safety,

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[4]Plaintiff's counsel attempted to elicit a concession from Long that throwing items to an audience is "unreasonable." Long refused, testifying: "I wouldn't say unreasonable. I just felt that it was inappropriate." 8App.1412:16-17. Negligence is the failure to use reasonable care. *Driscoll v. Erreguible,* 87 Nev. 97, 101, 482 P.2d 291, 294 (1971). Therefore, Long's testimony clearly did not establish negligence. Whether something is "inappropriate" is an entirely personal, subjective matter. Long offered no explanation as to what she meant by that word or what standard she personally uses to evaluate whether something is "inappropriate."

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security, accident prevention, or standards of care for casino sports books. She did not testify that she had ever seen or heard about an injury resulting from a souvenir being tossed to an audience at a casino sports book (or anywhere else).

Cooinga did not testify that tossing souvenirs to an audience is unreasonably dangerous. Instead, like Long, she merely expressed her own personal subjective viewpoint that such behavior is "inappropriate." 8App.1439. She did not define what "inappropriate" means to her, and she gave no foundational testimony explaining the basis for her personal opinion. Significantly, after the incident involving Rodriguez, Cooinga checked records at the Palms, and she found no other incident where an injury occurred as a result of items being thrown to a crowd. 8App.1442.

Even with the testimony of Long and Cooinga, there was not a shred of evidence that any other person attending a televised sporting event had ever been injured, at the Palms or anywhere else, as the result of harmless souvenirs being tossed to patrons watching televisions. Here, plaintiff was injured when another patron unexpectedly and surprisingly leaped from her chair, ran toward plaintiff, then took a "total body dive" and bumped into plaintiff's knee, apparently attempting to obtain the empty water bottle souvenir. 8App.1468, 1534-35. A premises owner is not liable for injury to a patron caused by another patron, unless the wrongful act which caused the injury was reasonably foreseeable. NRS 651.015; see *Estate of Smith v. Mahoney's Silver Nugget,* 127 Nev.___, 265 P.3d 688 (2011). In *Smith*, a casino patron was fatally shot by another patron. This court rejected liability as a matter of law, holding that "foreseeability" requires consideration of "evidence of prior similar acts." *Id.* at ___, 265 P.3d at 690. The shooting in *Smith* was not foreseeable, primarily because there were no prior similar acts, despite the fact that such a shooting was theoretically possible. *Id.* at ___, 265 P.3d at 691-93.

In the present case, plaintiff watched the cheerleaders toss souvenirs to the audience for an hour, and he stayed at the sports book because he did not perceive any danger. Moreover, the testimony of Long and Coolinga established the absence of any

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prior similar acts. The personal opinions of these two employees – merely indicating their subjective personal beliefs that such conduct is "inappropriate," whatever that means – cannot rationally trump the undisputed testimony of a highly qualified expert such as Franklin.

Furthermore, the district court's liability determination was based upon a finding that testimony by Long and Cooinga somehow established a Palms safety procedure or policy against tossing items to patrons, and that this testimony "conclusively established" liability. 2App.267-68. For the reasons discussed in the opening brief (AOB 14-15) and not fully repeated here, there was no such policy, and this possible basis for liability is equally infirm. Even if the Palms did establish a policy with a standard of care higher than negligence, the internal policy cannot substitute for the usual negligence standard. To do so would deter companies from adopting higher safety standards. AOB 14-15. See also *Entex v. Gonzalez,* 94 S.W.3d 1, 10 (Tex. App. 2002) (internal procedures do not create a negligence duty where none would otherwise exist); *Wal-Mart v. Wright,* 774 N.E.2d 891, 894-96 (Indiana 2002) (business owner's violation of its own internal standards that transcend the reasonable care standard cannot be considered a basis for negligence).

In conclusion on this issue, the evidence (if any) of actual "negligence" by the Palms was incredibly weak, at best. Accordingly, this court's opinion was absolutely correct in determining that Franklin's testimony could reasonably have shifted the result in the Palms' favor, and that a different result might have been reached but for the erroneous exclusion of Franklin's testimony (particularly given the fact that plaintiff did not present any expert testimony to the contrary). Op. 9-10.

III

Medical Testimony

After remanding for a new trial on the issue of liability, the court's opinion dealt with damages testimony. First, the opinion concluded that the district court improperly excluded testimony of Dr. Thomas Cargill. Op. 10-11. Second, the opinion determined

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that the district judge erred by admitting and considering inadmissible testimony by treating physicians. Op. 11-14. The rehearing petition does not challenge this court's decision regarding Dr. Cargill. The rehearing petition does address the court's opinion regarding testimony of treating physicians. (Pet. 3-9)

The rehearing petition is entirely unclear as to the material facts or questions of law that the court allegedly overlooked or misapprehended. The petition is also unclear as to the relief being sought. So far as we can discern, the petition does not seem to attack the court's ultimate determination that the trial judge erred by admitting and considering inadmissible testimony by the treating physicians. The petition only seems to request clarification regarding the extent to which the treating physicians will be allowed to testify at the retrial, or the extent to which additional discovery regarding the treating physicians might be allowed or required. The petition's primary concern seems to be whether plaintiff will be afforded an opportunity to "cure the error" in the remanded proceedings. (Pet. 3-4)

The incident at the Palms occurred nearly ten years ago on November 22, 2004. The trial occurred nearly four years ago, in October and November of 2010. Because of this lengthy passage of time – particularly the four years since the first trial – both sides might want additional supplemental discovery before the second trial. For example, if plaintiff has had medical care since the first trial, plaintiff's counsel might want to update disclosures of medical records, provide recent records to physicians, provide expert reports, supplement NRCP 16.1 disclosures, and otherwise update medical information necessary for the second trial. Similarly, the Palms might want to take supplemental depositions of plaintiff, his physicians, and his other medical witnesses, in order to obtain updated current information regarding plaintiff's alleged injuries and damages. Defense counsel might also want to make other supplemental discovery disclosures necessary for the new trial.

After the remand, and after the case has been assigned to a new judge, the parties will presumably attempt to stipulate to the extent that supplemental discovery will take

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place before the second trial. If the parties are unable to reach agreement, the new judge assigned to the case will be able to exercise discretion in determining discovery that will be allowed or required before the second trial. See *Diversified Capital v. City N. Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979) (after remand, district court has discretion to determine extent of discovery); *Wright v. Moore*, 953 A.2d 223 (Del. Supr. 2008) (trial court has discretion to reopen discovery following remand for new trial); *Douglas v. Burley*, 134 So.3d 692, 697-98 (Miss. 2012) (after remand, trial court has discretion to reopen discovery and to modify previous scheduling orders).

The rehearing petition seems to express concern regarding whether the 2012 version of NRCP 16.1 will apply when the case gets back to the district court for the new trial. (Pet. 4-5) This court's opinion found, in part, that the district judge erred by considering certain inadmissible testimony by treating physicians, because plaintiff did not "provide a written NRCP 26 expert witness report for any of these physicians." Op. 11. Expert reporting requirements are now contained in NRCP 16.1, as amended in 2012.

The first trial occurred in 2010, under the pre-2012 version of the rule. The new trial, however, will occur at a time when the 2012 amended version of the rule is in place. The rehearing petition seems to contend that the 2012 version of the rule should apply upon remand. The Palms generally does not disagree. But on remand, if either side believes application of the 2012 version of the rule would result in substantial unfairness or injustice on a specific aspect of discovery or at trial, the party will be able to bring the issue to the attention of the new judge in an appropriate motion. At that point the judge can exercise discretion in determining whether relief is required.[5]

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[5]For example, the 2012 version of NRCP 16.1(a)(2)(B) deals with written reports by experts. The rule provides that the district court may relieve a party from the duty to prepare a written report, in an appropriate case, and upon good cause shown. If plaintiff seeks relief under this rule, and if the Palms opposes it, the district judge can determine whether relief should be granted.

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Regarding Dr. Schifini, the opinion correctly observed that this doctor was allowed to testify about a variety of subjects. Op. 11-12. Dr. Schifini's variety of opinions had never been disclosed to defense counsel, and he had not previously disclosed the thousands of pages he reviewed to form the opinions he expressed at trial. Op. 12-13. The opinion also noted that Dr. Schifini's testimony was broad, and there was "vagueness as to the purpose of his review of Rodriguez's medical records." Op. 13.

Under these circumstances, the Palms believes that many of Dr. Schifini's opinions expressed for the first time at trial were beyond the scope of his expertise and qualifications. Thus, the opinions should be excluded at the second trial. As explained fully in the opening brief, plaintiff's counsel engaged in litigation sandbagging at its worst, blind-siding defense counsel and giving virtually no advance notice that treating physicians such as Dr. Schifini would be asked to express opinions far beyond the limited scope of their treatment to plaintiff. This strategy by plaintiff's counsel, which Judge Walsh allowed, prohibited defense counsel from conducting effective cross-examination. AOB 28. This court's opinion clearly seeks to prevent such strategy and unfairness on remand. The new district judge will be in the best position to determine what additional disclosures and discovery will be needed, and what medical opinions will be allowed or disallowed, in order to assure fairness to both sides and to guarantee a level playing field at the second trial.[6]

In conclusion on this issue, we again must admit to confusion regarding the precise relief being sought by the rehearing petition regarding testimony of physicians. This case is unique. The case was tried by one judge, who erred by considering inadmissible testimony under rules that existed at that time. The new trial on remand

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[6]This will also apply to testimony of other physicians, such as Dr. Kidwell and Dr. Shannon. See Op. 14.

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will be conducted by a new judge, who will need to consider the extent to which newly-adopted rules are applicable. Despite these somewhat unique circumstances, there is nothing wrong with the court's opinion regarding its analysis of the medical discovery and medical testimony. Accordingly, rehearing should be denied.

IV

Conclusion

For the foregoing reasons, the petition for rehearing should be denied.

DATED: July 24, 2014

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CERTIFICATE OF COMPLIANCE FOR

ANSWER TO PETITION FOR REHEARING

1. I hereby certify that this answer to the petition for rehearing 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 answer has been prepared in a proportionally spaced typeface using WordPerfect in 14 point Times New Roman type style.

2. I further certify that this answer complies with the page or type-volume limitations of NRAP 40(b)(3) because it is proportionately spaced, has a typeface of 14 points, and contains 4,158 words.

DATED: July 24, 2014.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellants' Answer to Petition for Rehearing 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:

Steven Baker
J. Randall Jones
Jennifer C. Dorsey
Marsha Stephenson
Michael Wall
Matthew Sharp

I further certify that on this date I served copies of this document by U.S. mail to:

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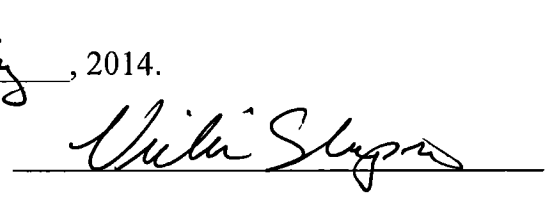
DATED this 24 day of July, 2014.



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