IN THE SUPREME COURT OF THE STATE OF NEVADA

CAREY HUMPHRIES; AND LORENZO ROCHA, III, *Appellants,* vs. NEW YORK-NEW YORK HOTEL & CASINO, *Respondent.*	**Supreme Court Case No. 65316** District Court A-11-641181-C

APPELLANTS' OPENING BRIEF

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APPELLANTS' NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiffs: Carey Humphries [Yucaipa, California] and Lorenzo Rocha III [Yucaipa, California].

2. Attorneys of Record for Plaintiffs: Craig W. Drummond, Esq., from the Drummond Law Firm, and Joshua Tomsheck, Esq., from the Law Firm of Hofland and Tomsheck.

3. Defendant: New York-New York Hotel & Casino, Las Vegas, NV.; MGM Resorts International (Parent Company).

4. Attorneys of Record for Defendant: Martin J. Kravitz, Esq., from Kravitz, Schnitzer & Johnson, Chtd.

DATED this 26 day of January, 2015.

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By _____
Craig Drummond, Esq.
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Attorney for Appellants

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment. On March 4, 2014, a District Court for Clark County, Nevada entered Findings of Fact and Conclusions of Law granting summary judgment in favor of Defendant based on a hearing held on January 29, 2014. A Notice of Entry of Order was filed on March 7, 2014 and Plaintiffs filed their timely Notice of Appeal on March 25, 2014.

NRAP 4 provides, in pertinent part:

> **(a) Appeals in Civil Cases.**
>
> **(1) Time and Location for Filing a Notice of Appeal.** In a civil case in which an appeal is permitted by law from a District Court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the district court clerk. Except as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. If an applicable statute provides that a notice of appeal must be filed within a different time period, the notice of appeal required by these Rules must be filed within the time period established by the statute.

Thus, jurisdiction is proper in this Honorable Court.

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ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in finding that the attack on the Plaintiffs was not foreseeable when it only analyzed the knowledge by the Defendant of the actual attacker in this case and failed to consider or analyze the admissions by the Defendant, and the incident reports of other fights and previous altercations on the Defendant's premises;

II. Whether the district court erred in finding Defendant owed no duty to Plaintiffs where Defendant wholly failed to exercise due care for Plaintiffs' safety due to Defendant's inadequate security policies and procedures;

III. Whether the district court erred in finding Defendant owed no duty to Plaintiffs where Defendant failed to take reasonable precautions to protect Plaintiffs from a foreseeable vicious attack.

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STATEMENT OF THE CASE

This case is an appeal from the grant of summary judgment in favor of Defendant New York-New York Hotel & Casino. On May 12, 2011, Plaintiffs filed a Complaint against Defendant based on theories of negligent security for a vicious attack on Plaintiffs that occurred on Defendant's premises. [Vol I App. at 0001-0006] The Defendant filed an Answer denying all liability. [Vol I App. at 0007-0012] After significant litigation at the District Court level regarding the need for the Plaintiffs to sue an intentional tortfeasor and a negligent tortfeasor, the District Court ruling in favor of the Defendant, this Honorable Court thereafter held oral argument and granted a *Writ of Mandamus* in favor of Plaintiffs holding that the third party intentional tortfeasor was not a necessary and indispensable party to this action and issued its published decision in Humphries v. Eighth Judicial District Court, 129 Adv. Op. 85 (November 7, 2013).

Once the case was remanded back to the district court, Plaintiffs then moved for summary judgment on December 2, 2013 on a number of areas related to liability and damages. [Vol II App. At 0013-0110]. Specifically, summary judgment was requested on the following areas:

1.) That the attack on Plaintiffs on April 10, 2010 at New York-New York Hotel & Casino was foreseeable;

2.) That the Defendant failed to take reasonable precautions against the foreseeable wrongful act;
3.) That the Defendant had a duty to exercise due care for the safety of the Plaintiffs on their premises and failed to perform that duty;
4.) That there were prior incidents of similar wrongful acts occurred on the premises;
5.) That the Defendant had notice or knowledge of those incidents; and
6.) That the Plaintiffs were injured as a result of the attack.
[Vol I App. at 0013]

The request for summary judgment was largely based on unobjected to admissions by the Defendant's Corporate Designee at his deposition, the exhibits discussed by the Corporate Designee at his deposition outlining knowledge of previous fights, the evidence of a lack of adequate security, and no evidence to contradict the Plaintiffs' injuries. Id. Defendant filed an Opposition and Counter-motion for Summary Judgment on December 19, 2013. [Vol II App. at 0111-0258] The district court held a hearing on January 29, 2014. [Vol II App. at 0291-0309] The Court thereafter entered summary judgment in favor of Defendant on March 4, 2014, finding that Defendant owed no duty to Plaintiffs because they were not on notice that the specific intentional tortfeasor in this case would attack the Plaintiffs and because it exercised reasonable care for Plaintiffs' safety. [Vol II App. at 0276-0280] Plaintiffs filed a timely Notice of Appeal to this Court on April 1, 2014. [Vol II App. at 0288-0290]

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STATEMENT OF FACTS

On the weekend of April 10, 2010, Plaintiffs Carey Humphries, a teacher from California, and Lorenzo Rocha, a firefighter-paramedic from California, ("Plaintiffs," collectively) were patrons and hotel guests of Defendant New York-New York Hotel & Casino ("Defendant" or hereinafter). [Depo. Rocha, attached hereto at Vol I App. at 0036-0048; Depo. Humphries, attached hereto at Vol I App. at 0050-0081] On that date, at approximately three in the morning (3:00am), Ms. Humphries was walking through the casino floor, where she walked by a woman accompanying one Erik Ferrell ("Ferrell" hereinafter). [Depo. of Glenn Nulle, Defendant's Corporate Designee, attached hereto at Vol I App. at 0083-0101] Ms. Humphries stopped and spoke to the woman, an apparent companion of Ferrell's. [Vol I App. at 0070] Ms. Humphries complimented her outfit, and the two began to exchange pleasantries. Id.

Ferrell then introduced himself and began to flirt with and hit on Ms. Humphries. Id. Ms. Humphries declined his advances, and he thereafter made a lewd sexual comment to her. [Vol 1 App. at 0071] Ms. Humphries then asked "How dare you speak to me like that?" Id. at 0071 [Depo. Humphries, 87] Ms. Humphries then made a "spitting gesture" – "I just did the gesture and turned and walked away in utter disgust." Id. [Depo. Humphries, 87]

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Ferrell then punched Ms. Humphries multiple times, attacking her viciously. [Vol I App. at 0071-0072] Plaintiff Rocha intervened to protect Ms. Humphries and was also viciously attacked. [Vol I App. at 0043]. The entire attack went on for approximately 12 to 15 seconds in the middle of the casino floor before security, who for at least some time stood by and watched, actually intervened. [Vol I App. at 0089]

As a result of the vicious and prolonged attack, Ms. Humphries suffered from a skull fracture, loose fluid in her brain, two black eyes, scar tissue in her mouth, eyebrow ridge, and nose, and continues to suffer from severe headaches. [Vol I App. at 0071, 0078, 0080.] Mr. Rocha also suffered extensive injuries, including severe pain and headaches. [Vol I App. at 0043]. Based on this incident, Plaintiffs filed suit against Defendant on May 12, 2011.

On May 8, 2012, Plaintiffs' took the deposition of Mr. Glenn Nulle. [Vol I App. at 0083] Mr. Nulle was specifically designated and produced by Defendant in accordance with Nevada Rule of Civil Procedure "NRCP" 30(b)(6) as "**the officer, director or manager with the most knowledge of security, crime prevention and assaults and batteries of any employees, patrons or guests during the time period of April 10th, 2008 to April 10th, 2010 for the premises of the New York-New York Hotel &**

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Casino." [Bold emphasis added] [Vol I App. at 0085] Additionally, Mr. Nulle formally acknowledged that he was such person with the most knowledge about the subject incident and security for the Defendant. [Vol I App. at 0086] When questioned about the Defendant's knowledge of the subject incident, he responded as follows:

> Q. All right. What are you -- what is your knowledge of the event regarding my client, Carey Humphries, in April 10th, 2010?
>
> A. My knowledge of the event. Ms. Humphries was walking through the casino when she went over to address another patron, allegedly complementing her. Some words were exchanged. I don't know exactly what was exchanged. Allegedly she spit in this guy's face, and ***he gave her a beating.*** (Emphasis added)

[Vol I App. at 0087, Depo. Nulle 17: 14-22]

When Mr. Nulle, was questioned regarding the supposed swiftness of Defendant's security response and action while Plaintiffs were being attacked, Mr. Nulle testified that only one (1) security officer initially responded to the attack and then simply stood back and watched Petitioner Carey Humphries be attacked:

> Q. And when you witnessed him standing back, did you also witness Patron Humphries continue to get attacked?
>
> A. I did.

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Q. Okay. And do you know approximately how many seconds went by while he stood back and watched her get attacked?

A. I recall 12 to 15 seconds.

[Vol I App. at 0089, Depo. Nulle 24: 5-11]

Security responded, and then stood back and watched Petitioner Humphries continue to be attacked in the middle of the casino floor. Providing further evidence of Defendant's own negligence is the fact that Defendant had absolutely no idea how many people would be on their approximately 85,000 square foot casino floor during a similar Saturday night, such as the one in question. [Vol I App. at 0090, Depo. Nulle 28:17-20] Additionally, Defendant testified that they did not even know the number of security personnel that were necessary to ensure their premises were safe:

Q. Do you know how many security personnel are necessary for your casino floor to ensure the premises are safe for patrons?

A. I don't have a number, no.

[Vol I App. at 0090, Depo. Nulle 29:15-18]

Without having any idea how many security personnel were needed to keep an 85,000 square foot casino floor safe, and with an unknown number of patrons within that 85,000 square feet, Defendant chose to keep only three security personnel on the casino floor:

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Q. Okay. And the only personnel actually assigned to be within the vicinity would be these three security personnel?

A. Correct. They would be on the immediate casino floor.

[Vol I App. at 0093, Depo. Nulle 40:21-25]

Notably, in addition to occurring on the actual casino floor, the attack occurred within 200 feet of a nightclub. [Vol I App. at 0093, Depo. Nulle 40:4-8] In addition to occurring on the actual casino floor near a nightclub, there was a bar near the location where the Plaintiffs were attacked. [Vol I App. at 0096, Depo. Nulle 53:16-17] In admission of the clear foreseeability of the attack on Plaintiffs, Defendant's designee stated that as many as two to three fights per week occurred on Defendant's casino floor location alone:

Q. And you've testified previously, sir, that it's foreseeable that fights can occur on your casino floor, right, sir?

A. Uh-huh.

Q. And in fact I -- is that a yes?

A. Yes.

Q. In fact, I've been provided multiple other fights that have occurred on your casino floor during this litigation. Are you aware of that?

A. No.

Q. Could you to your understanding tell us how many fights have occurred on the casino floor at New York-New York in 2010?

A. I don't have that number.

Q. Can you give us your best estimate? One a month?

A. I wish.

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Q. Okay. Well then can you please elaborate for us sir?

A. I would say two to three a week.

[Vol I App. at 0096, Depo. Nulle 53:18-54:11]

Moreover, Defendant has admitted that the attack on Plaintiffs, or at least the extent of the attack, could have been limited with adequate security:

> Q. You would agree with me that if there was more security personnel on the floor, that the fight or at least the extent of the fight could have been limited?
>
> A. If there was more security officers in that area, yes.

[Vol I App. at 0097, Depo. Nulle 57:2-6]

In evidence before the district court at the time of the Plaintiff's Motion for Summary Judgement and the Defendant's Counter-motion were several incident reports attached as exhibits to Defendant's Counter-Motion for Summary Judgment for the period from May 1, 2009 to April 10, 2010. [Vol II App. 0205-0251 - Exhibit. H] As dicussed below, these incident reports further outline the multiple fights and incidents that regularly occurws on the Defendant's premises.

It is with the above admitted facts from Defendant's corporate designee that Plaintiffs moved the district court for summary judgment on the issue of negligence.

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In the Defendant's Counter-motion they admitted that in addition to the above admitted testimonial facts, that Plaintiffs had retained and disclosed an expert security witness [Vol II App. 0253-0258] This expert witness would offer opinions at trial as outlined in his disclosed report, to include that given all of the past activities that the event and attack was foreseeable by definition, and that the training programs, policies, and staffing levels at the time of the incident in question were not adequate to provide reasonable security. Id.

SUMMARY OF THE ARGUMENT

Given the admissions by the Defendant Corporate Designee at his deposition about prior security incidents, the lack of reasonable security personnel on hand, and the written prior incident reports, the district court erred in denying the Plaintiff's summary judgment. Further, the district court clearly erred in granting a Counter-motion for Summary Judgment on behalf of the Defendant.

For innkeepers such as Defendant, a duty is imposed for third party harms to a plaintiff if that conduct was foreseeable and the innkeeper failed to take reasonable precautions to prevent it. Moreover, Nevada law defines third party actions as "foreseeable" in this context if prior similar incidents of

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conduct gave the innkeeper notice of the risk or if the innkeeper failed to exercise due care for a plaintiff's safety overall.

Although gapingly left unaddressed by the district court in its decision, prior similar incidents of fistfights and batteries at Defendant's property provided sufficient notice of Ferrell's conduct and made that conduct foreseeable. This was admitted without objection by the Defendant's Corporate Designee when he stated "two to three" fights occur each week on the casino floor. Further, the incident reports Defendant produced show that fistfights and patron-patron altercations occurred *throughout* the Defendant's property, not merely the area in which Plaintiffs were attacked. The incidents are sufficiently similar to Plaintiffs' attack to make that attack foreseeable because the levels of violence involved are similar and the same security issues are implicated. The widespread nature of those prior similar incidents made the attack on Plaintiffs foreseeable and imposed a duty upon Defendant.

Moreover, even if prior incidents are insufficiently similar to make Plaintiffs' attack foreseeable, Defendant still owed a duty to Plaintiffs because it failed to exercise due care for Plaintiffs' safety. The totality of the circumstances surrounding Plaintiffs' attack show a lack of due care on Defendant's part. Only about twenty security officers were on duty at the time of Plaintiffs' attack, five of which were stationed on the casino floor and only

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three there to actually provide anything close to patron security. Additionally, the primary stated role of Defendant's security is stated to be customer service. Security officers are generally required to remain at particular posts unless given permission to move and several of the officers on duty at the time of Plaintiffs' attack were escorting money and not permitted to act outside that role except in dire circumstances.

Defendant has also failed to conduct any sort of audit or inquiry into how many security officers are needed to secure its approximately 85,000 square feet of space. Overall, Defendant wholly failed to exercise due care for the safety of its patrons in light of its enormous size and expanse. These same factors lead to the conclusion that Defendant also failed to take reasonable precautions for Plaintiffs' safety. Therefore, Defendant owed a duty to Plaintiffs and the court below erred in finding summary judgment in favor of Defendant.

ARGUMENT

STANDARD OF REVIEW AND INTRODUCTION

This appeal involves issues of the District Court's conclusions with regard to whether Defendant owed a duty to Plaintiffs under Nevada law, specifically Nev. Rev. Statutes ("NRS") § 651.015. This Court reviews such conclusions, including those of statutory construction, *de novo*. See e.g.

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Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007). Further, regarding any factual findings by a district court, this court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. Wood v. Safeway, Inc., 121 P.3d 1026, 121 Nev. 724 (2005).

Nevada law imposes a duty upon innkeepers to protect patrons from wrongful conduct that was: (1) foreseeable; and (2) against which an innkeeper fails to take reasonable precautions. NRS § 651.015. Nevada law further defines an act to be foreseeable if (1) the innkeeper has notice of prior similar incidents that have occurred on the premises; or (2) the innkeeper failed to exercise due care for the plaintiff's safety. NRS § 651.015(3). In its Order, the district court below found there was no duty because Defendant exercised due care for Plaintiffs' safety. [Vol II App. 278-280] The court did not, however, explicitly address whether prior similar instances of other third party conduct at New York-New York ("NYNY" or "Defendant" hereinafter) Casino made Ferrell's acts foreseeable and therefore created a duty. Id. As will be further explained below, there were a plethora of prior similar incidences that made Ferrell's acts foreseeable and imposed a duty upon Defendant to ensure Plaintiffs' safety. Moreover, even if there were no sufficient prior similar incidents, Defendant still failed to take reasonable

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precautions to protect Plaintiffs in the totality of the circumstances. Thus, this Court should reverse the court below and find summary judgment in favor of Plaintiffs.

I. THE DISTRICT COURT ERRED IN FINDING THAT THE ATTACK ON THE PLAINTIFFS WAS NOT FORESEEABLE WHEN IT ONLY ANALYZED HE KNOWLEDGE BY THE DEFENDANT OF THE ACTUAL ATTACKER IN THIS CASE AND FAILED TO CONSIDER OR ANALYZE THE ADMISSIONS BY THE DEFENDANT, AND THE INCIDENT REPORTS OF OTHER FIGHTS AND PREVIOUS ALTERCATIONS ON THE DEFENDANT'S PREMISES.

The case of Estate of Smith v. Mahoney's Silver Nugget, Inc. is the controlling authority for the instant matter and it shows that Defendant owed a duty to Plaintiffs because prior similar incidents of fistfights made Ferrell's conduct foreseeable. In Smith, this Court had the opportunity to interpret NRS § 651.015. 265 P.3d 690, 692-693 (Nev. 2011). One Daniel Ott had entered the Silver Nugget Casino and joined a raucous group at one of the bars. Id. at 690. The group was asked to leave and in doing so, one of Ott's friends began arguing with a friend of the decedent's. Id. The decedent then rose from his seat and punched Ott's friend in the face. Id. Ott took out a gun and shot the decedent, who died from his injuries. Id. Smith's estate sued the casino, claiming, *inter alia*, negligence. Id.

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This Court addressed many issues in deciding Estate of Smith, including the meaning of the phrase "prior similar incidents" as used in NRS § 651.015. In examining the legislative history of that statute, this Court noted that the legislature intended the word "similar" to be ambiguous and that judges were to have leeway in determining the similarity of incidents. Id. at 692. Although not providing a concrete definition of similarity, Estate of Smith did set forth at least three relevant factors for courts to examine: (1) the location of the incidents; (2) the level of violence involved in the incidents; and (3) whether the incidents implicate similar security issues. Id. at 692-693. Smith's Estate argued that any violent acts occurring inside and outside the casino should be considered, while the Silver Nugget argued that there were no prior incidences where deadly weapons were used. Id. at 692. In applying those factors to the facts before it, this Court first noted that none of the prior incidents involved weapons. Id. at 693. Second, this Court found the fact that no serious injuries resulted from those incidents significant. Id. Third, none of the incidents involved patrons of the casino. Id. Based on these considerations, this Court found there to be no prior similar incidents that would have made Smith's death foreseeable. Id. Here, as detailed below, prior incidents of fistfights were sufficiently similar to that involving Plaintiffs to make Ferrell's conduct foreseeable.

A. Physical altercations involving assaults and batteries occurred throughout Defendant's facilities in the year preceding Plaintiffs' attack, making it foreseeable that similar altercations could occur at the location where Plaintiffs were injured.

Applying the same Smith factors to the facts of this case shows that there were numerous prior similar incidents that made Plaintiffs' injuries foreseeable. First, it was foreseeable that a battery could occur at the location where Plaintiffs were attacked. The Defendant's Corporate Designee testified that there were previously two to three fights a week on the casino floor. [Vol I App. at 0096] This deponent was not just the Corporate Designee, but also the Security Manager for the Defendant for the four years preceding his deposition and clearly was in the best position to provide testimony about the actual numbers of prior similar incidents[Vol I App. at 0086] The testimony of the Corporate Designee/Security Manager is clearly the best person to provide the true facts about similar incident whether the Defendant chose to record them in writing or not. In fact, Plaintiffs position is that the testimony is the best evidence because otherwise the Defendants would be able to benefit from their not recording in writing every assault and fight on their premises.

Defense may attempt to simply argue in opposition that the Defendant - their own corporate designee - was wrong or lied and therefore his admissions

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should not be considered as fact. This position would essentially allow the Defendant to argue that it should get the benefit of lying at a deposition. Pursuant to NRCP 32(a)(2) "The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party **may be used by an adverse party for any purpose.**" [Emphasis added]

It should be noted that almost none of the questions or answers at the Corporate Designee's testimony were objected to by counsel for the Defendant. [Vol I App. at 0083-0101]. Pursuant to NRCP 32(d)(3)(B) "Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, **are <u>waived</u> unless seasonable objection thereto is made at the taking of the deposition."** [Emphasis added.] No objections were made by counsel to any of the above factual questions and answers incorporated in this filing. As such, any attempt by counsel now, or at trial, to object or argue against such testimonial

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questions, answers, and admissions, is untimely and improper as the objections have been waived.

The Defendant is bound by the testimony of their Corporate Designee. "It is well settled that a corporation is a creature of legal fiction which can act only through its officers, directors or other agents." MicroSignal Corp. v. MicroSignal Corp., 147 Fed Appx. 227, 231 (3d Cir. 2005). In interpreting FRCP 30(b)(6) depositions, the vast majority of courts have found that the FRCP 30(b)(6) designee binds the corporation. See e.g. Sabre v. First Dominion Capital, LLC 2001 WL 1590644 (S.D.N.Y. Dec 12, 2011) ("A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity.") A corporation has a duty under Rule 30(b)(6) to provide a witness who is knowledgeable in order to provide "binding answers on behalf of the corporation". Starlight International, Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan.1999). While the vast majority of decisions dealing with the binding admissions of a FRCP 30(b)(6) deponent are Federal cases, this Honorable Court has held that federal cases interpreting procedural rules are "strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal

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counterparts." See Executive Mgmt., Ltd. v. Ticor Title Ins., 118 Nev. 46, 54 (2002).

In addition to the Defendant's deposition testimony, there is documentary proof of prior similar incidents on the Defendants premises. Defendant attached several incident reports to its Counter-motion for Summary Judgment for the period from May 1, 2009 to April 10, 2010. [Vol II App. 0205-0251] Several of these reports reveal physical assaults and altercations occurred between patrons throughout Defendant's inside the Gonzales y Gonzales restaurant; inside the Coyote Ugly nightclub; in the Century Lobby; outside the Grand Central Bling Company; at the food court on the mezzanine level of the casino; on the North Walkover, which leads between the casino and parking lots; several assaults at the Center Bar, which is very close in proximity to where Plaintiffs were attacked; inside the ROK Vegas nightclub; in the Sports Book; and in front of the SoHo retail area. [These incident reports are attached hereto at Vol II App. at 0216, 0218, 0219, 0230, 0233, 0236, 0240, 0243, 0244, 0245 - Reports Bate Stampted Originally as #1379, 1383, 1385, 1407, 1413, 1419, 1427, 1433, 1435, 1437.] Each of these locations are main parts of the Defendant New York-New York Hotel & Casino and are likely highly trafficked.

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In addition to these altercations between patrons in public areas of Defendant's facilities, incident reports reveal a pattern of batteries upon security personnel. These incidents also occurred throughout the casino: several on the gaming floor; several in or around the Coyote Ugly nightclub; and in public restrooms. These incident reports are attached hereto at Vol II App. at0211, 0251, 0221, 0223, 0228, 0238, 0239- Reports Bate Stamped Originally as 1370, 1450, 1390, 1394, 1404, 1424, 1426]

Given the similarity of injuries that occur in patron-patron and patron-security altercations, the fact that these incidents did not involve a patron battering another guest should not defeat a finding that they are sufficiently similar to Plaintiffs' attack.

Moreover, there have been numerous assaults between patrons committed in guest rooms. [These incident reports are attached hereto at Vol II App. at 0208, 0209, 0212, 0224, 0226 - Reports Bate Stamped Originally as1363, 1365, 1371, 1395, 1399] Collectively, these incident reports show that physical altercations involving patrons of Defendant's hotel and casino occurred innumerable times *throughout* Defendant's facilities during the one year period preceding Plaintiffs' assault. Given the widespread and consistent occurrence of these altercations on Defendant's premises, it was entirely foreseeable that a physical battery could occur on the casino floor in the area

where Plaintiffs were assaulted. Additionally, Defendant's corporate representative admitted in his deposition that at least two fights, presumably between patrons, occur per week in the casino. [Vol I App. 0096] This is entirely different from the situation in Estate of Smith, where *no* similar incidents had occurred within the casino. Smith, 265 P.3d at 692.

Defendant argues at length that there is no proof whatsoever of prior similar incidents to Ferrell's conduct that would make that conduct foreseeable to Defendant. [Vol II App. 0122-0124] In so arguing, Defendant takes an unwarrantedly limited view of what constitutes a "similar" prior incident for purposes of innkeeper liability. In its Counter-motion for Summary Judgment, Defendant states that "[it] had not encountered an incident in the same location with the same circumstances as in this case" and that "[t]here is no record...of a physical brawl taking place on the casino floor stemming from one patron spitting on or toward another patron." [Vol II App. 0124] Essentially, Defendant's position is that the "prior similar incidents" must be factually identical to third party conduct to make that conduct foreseeable to an innkeeper. This black and white rule is contrary to the plain meaning of the word "similar" in NRS § 651.015(3). It is also directly adverse to this Court's interpretation of that statute in Estate of Smith - that judges are to have leeway in determining the similarity of incidents. 265 P.3d at 692.

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Indeed, were identical prior incidents required for foreseeability, there would have been no need for this Court to employ a multi-factor analysis to determine what incidents qualify as "similar."

Furthermore, the court below entirely failed to address whether there were any prior similar incidents making Plaintiffs' injuries foreseeable and found only that Defendant exercised due care to protect Plaintiffs. Therefore, this Honorable Court should reverse the decision of the district court and find that Defendant owed a duty to protect Plaintiffs because prior similar incidents made Ferrell's conduct foreseeable.

B. The level of violence involved in prior similar incidents is essentially the same as that involved in the attack on Plaintiffs.

The second factor this Court considered when considering "similarity" of prior incidents of conduct is the level of violence involved. Estate of Smith, 265 P.3d at 692-693. With regard to this factor, this Court focused on the fact that the prior incidents cited by Smith's estate did not involve weapons, whereas Smith was shot and killed. Id. at 693. It also noted that the prior incidents were primarily robberies and fistfights, which would entail surface abrasions, bruising, and broken bones, whereas the primary injury associated with the claim of Smith's estate was his death. Id. Based on these

considerations, this Court found that no prior similar incidents made Smith's death foreseeable.

The situation before the Court in the instant matter is entirely different than that in Estate of Smith. All of the incidents outlined in Part II.A above involved physical altercations. These include fistfights, assaults, batteries, and general unconsented to touchings. [Vol II App. at 0205-0251] At least the majority of these incidents undoubtedly resulted in broken bones, bruising, and other sorts of surface abrasions. These are the exact type of injuries sustained by Plaintiffs in this matter. Plaintiff Humphries suffered a skull fracture, loose fluid in her brain, two black eyes, scar tissue in her mouth, eyebrow ridge, and nose. [Vol I App. at 0071, 0078, 0080] Plaintiff Rocha was struck several times during the altercation and suffers from severe headaches and pain. Vol I App. at 0043] Each of the Plaintiffs here suffered very similar physical injuries to those resulting from prior similar violent acts that occurred throughout Defendant's hotel and casino. Thus, the level of violence for prior incidents is highly similar to that involved in Plaintiffs' attack, further supporting a finding that those prior incidents made Plaintiffs' injuries foreseeable to Defendant.

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C. The prior incidents are similar to the attack on Plaintiffs because analogous security issues are implicated.

The third factor examined by this Court in Estate of Smith with regard to the similarity of prior incidents is whether they implicate similar security issues as the subject incident. 265 P.3d at 693. The Court noted that the legislature, in enacting NRS § 651.015 thought it unfair to hold casinos in one part of the state to the same standard of security as those in others part because they will inherently employ different security measures to confront different security issues. Id. In finding the security issues implicated by prior incidents dissimilar to those implicated by Smith's death, this Court noted that none of the incidents Smith's estate cited involved actual patrons of the casino. Id. at 693.

In the instant matter, the prior incidents included in Defendant's Counter Counter-motion for Summary Judgment were all physical altercations that involved fistfights or other sorts of physical touching. Likewise, Plaintiffs were involved in a one-on-one altercation with Ferrell on a crowded casino floor, an altercation that did not implicate a casino-wide security threat. This is exactly what the Corporate Designee for the Defendant was discussing when he estimated two to three fights per week on the casino floor. [Vol I App. at 0096] Therefore, the prior incidents are sufficiently

similar to Plaintiffs' attack to make Plaintiffs' injuries entirely foreseeable to Defendant.

II. THE DISTRICT COURT ERRED IN FINDING DEFENDANT OWED NO DUTY TO PLAINTIFFS WHERE DEFENDANT WHOLLY FAILED TO EXERCISE DUE CARE FOR PLAINTIFFS' SAFETY DUE TO DEFENDANT'S INADEQUATE SECURITY POLICIES AND PROCEDURES;

Even if there are no similar prior incidents to the circumstances surrounding a patron's injuries, a duty is imposed upon an innkeeper if "[t]here is a preponderance of evidence that the owner or keeper did not exercise due care for the safety of the patron." NRS § 651.015(1)(b). This Court also addressed the meaning of this statutory definition of foreseeability in Estate of Smith, finding that "the circumstances surrounding the commission of a wrongful act may provide the requisite foreseeability for imposing a duty even where no prior incidents of similar wrongful conduct have occurred on the premises." Id. at 693. This standard is akin to a "totality of the circumstances" approach, allowing a judge to look beyond the existence of "similar wrongful acts" in determining the existence of a duty." Id. at 692. If this Court finds that there were no prior similar incidents that made Ferrell's conduct foreseeable, Defendant nevertheless owed a duty to protect Plaintiffs from harm because the totality of the circumstances

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surrounding Plaintiffs' attack show Defendant failed to exercise due care for Plaintiffs' safety.

Several factual circumstances lead to the conclusion that Defendant failed to exercise due care in the instant matter. As outlined previsouly, the primary role of the Defendant's security is not, in fact, security, but rather customer service. [Vol I App. at Depo. 0089, Depo. lines 24:14] Perhaps because patron safety is a secondary priority for Defendant's security personnel, Defendant also did not conduct any security audits in the five years preceding Plaintiffs' attack to determine the number of officers that should be on duty at any one time or to determine officer response times to security issues. [Vol I App. at 0087 –lines 15: 22-24 and at 0096 – lines 51: 2-5]

Additionally, Defendant's policies regarding the assignment of officers to posts, their ability to move about the casino, and regarding the process for breaking up fights prolonged the period within which Plaintiffs were attacked. At least two of the five officers on floor duty on the date of the subject incident were assigned to "drop" duty, which entails escorting money between the cashier/safe and the casino pits. [Vol I App. at 0090 - lines 27:5-6] Defendant's security policy with regard to these officers was that they are not to leave their posts unless there is a *major* emergency, which does not include patron fistfights. [Vol I App. at 0090 – lines 27:9-10 and at 0093 –

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lines 38:8-12] Because no officers were assigned to the immediate area where Plaintiffs were attacked, this further extended the period of the attack. Defendant security officers also do not generally carry batons, pepper spray, or any other types of weapons with which to quickly stop fights. [Vol I App. at 0092 – lines 35:22-25 and 36:1-12] Lastly, Defendant has a policy that officers not run through the casino, even to break up fistfights. [Vol I App. at 0097 – lines 57:20-24]

All of these policies resulted in too few officers on duty at the time of Plaintiffs' attack available to step in and prevent, or at least shorten, that attack. Indeed, the first officer to respond to the scene waited at least 12 to 15 seconds before intervening, standing idly by while Ferrell ruthlessly beat a woman and her fiancé. [Vol I App. at 0089 – lines 24:11] As reflected in the incident reports at described *supra*, physical altercations took place throughout the property. In light of this, surely more than twenty security officers should be on duty at any one time, with more than three of those officers assigned to a casino floor near areas with a high risk of fistfights occurring ans

Defendant argues first that it had no prior notice of any violent proclivity of Ferrell that imposed a duty upon it to prevent Plaintiffs' attack. [Vol II App. 124-126] Defendant intimates that an innkeeper need only

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protect patrons if it has knowledge of a specific third party's potential for committing a wrongful act. The District Court below also placed emphasis on Ferrell's violent propensities rather than Defendant's knowledge of the risk of a particular type of danger. [Vol II App. 0304 see also Vol II App. 278-280] However, this entirely misreads Estate of Smith. There, this Court found no duty could be imposed because "[t]here [was] no evidence to suggest that the Silver Nugget should have known that Ott *was carrying a concealed weapon.*" 265 P.3d at 693 (emphasis added). Rather than focusing on the conduct of a particular *tortfeasor*, this Court focused on the innkeeper's knowledge of a particular *type of danger* in analyzing whether a duty existed. Id.

In the instant matter, it is of no consequence that Defendant had no knowledge of Ferrell's specific propensity to commit a battery. It is entirely sufficient that Defendant had knowledge of the widespread occurrence of fights on its premises at least two to three times per week, including in and around the area where Plaintiffs were attacked, because it had knowledge that the specific *type of danger* posed to Plaintiffs could occur at the location of Plaintiffs' attack. If Defendant's argument - that innkeepers must have knowledge of a tortfeasor's individualized propensity to commit a wrongful act - were correct, innkeepers could essentially be rendered immune from

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almost all liability by (willfully) claiming ignorance of a third party tortfeasor's violent proclivities.

A. Defendant's ostrich behavior as to the evaluation of relevant factors for determining the number of security personnel needed on the casino floor should not absolve it of liability.

Defendant next argues that it took "basic minimum precautions," citing Estate of Smith for the proposition that provision of such precautions relieves it of liability in this case. [Vol II App. at 0126-0127] Defendant argues that it "staffed between 17-20 officers, and two supervisors" on the date of Plaintiffs' attack, and that two Las Vegas police officers were also on duty. [Vol II App. at 0126] Defendant also cites the fact that security immediately radioed dispatch to report the attack. Id. Defendant concludes that it "fully staffed the casino with security officers," constituting "basic minimum precautions." Id. Defendant provides no support for its conclusion that 17-20 officers staffed to a six acre facility is "fully staffed," relying only on the fact that there is no industry standard. [Vol II App. at 0298] Further, the Defendant's Corporate Designee was asked "Do you know how many security personnel are necessary for your casino floor the ensure the premises are safe for patrons?" The answer was "I don't have a number, no." [Vol I App. at 0090 – lines 29:15-18] As extensively outlined above, Defendant's security policies and procedures were entirely insufficient and prolonged the

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time it took for security to respond to and stop the brutal attack on Plaintiffs. Defendant therefore failed to exercise due care for Plaintiffs' safety.

The district court below erred in finding that Defendant exercised due care for Plaintiffs' safety. In so finding, it focused on the fact that no expert opinion had been presented as to the customary number of security officers required for a casino of Defendant's size. [Vol II App. 0303] This was factually incorrect as the Defendant's Counter-motion they admitted that in addition to the above admitted testimonial facts, that Plaintiffs had retained and disclosed an expert security witness [Vol II App. 0253-0258] This expert witness would offer opinions at trial as outlined in his disclosed report, to include that given all of the past activities that the event and attack was foreseeable by definition, and that the training programs, policies, and staffing levels at the time of the incident in question were not adequate to provide reasonable security. Id. Further, compliance with custom is not determinative of whether precautions met the applicable standard of care but is merely evidence as to compliance. See K-Mart Corp. v. Washington, 109 Nev. 1180, 1189 (1993) (finding evidence of the custom of removing shoplifters properly before a jury when determining duty and the standard of care).

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Moreover, contrary to Defendant's intimation in its briefing that it had no metric with which to determine the number of security officers needed on the date of Plaintiffs' injuries, the Defendant admitted at the Counter-motion for Summary Judgment hearing below that relevant factors to consider when determining what security precautions to take are the time of week and the time of day, the level of foot traffic, and whether any events are happening. [Vol II App. at 0298, Lines 9-14] As applied to the facts of this case, those factors show that Defendant failed to exercise due care for Plaintiffs' safety. April 10, 2010 was a Saturday and Plaintiffs were attacked at approximately 4 A.M. [Vol I App. at 0039 – lines 15:17]. At that time, most, if not all, patrons still on the casino floor were highly likely to be intoxicated, increasing the risk of physical altercations. Additionally, Defendant did not undertake to determine the number of patrons that should be on the casino floor on a Saturday night in April. [Vol I App. at 0090 – lines 28:17-20] Defendant's ostrich behavior as to the evaluation of relevant factors for determining the number of security personnel needed on the casino floor should not absolve it of liability. Cf. Nevada Power Co. v. Clark Cnty., 813 P.2d 477, 479, 107 Nev. 428, 432 (Nev. 1991) (Springer, J., dissenting) (stating that "ostrich-like" behavior should abrogate negligence immunity of governmental entities for known dangers). It is clear in the instant matter the Defendant owed

Plaintiffs a duty because it failed to exercise due care for Plaintiffs safety in the totality of the circumstances. Thus, this Court should reverse the decision of the District Court below.

III. THE DISTRICT COURT ERRED IN FINDING DEFENDANT OWED NO DUTY TO PLAINTIFFS WHERE DEFENDANT FAILED TO TAKE REASONABLE PRECAUTIONS TO PROTECT PLAINTIFFS FROM A FORESEEABLE VICIOUS ATTACK.

In addition to showing that a given act of a third party was foreseeable, it must also be shown that an innkeeper failed to take reasonable precautions to protect a plaintiff against that act in order for a duty to exist. NRS § 651.015(1)(b). Here, Defendant entirely failed to take any reasonable precautions to protect Plaintiffs against Ferrell's foreseeable act in the totality of the circumstances. The reasons for this mirror those outlined previously regading the Defendant's failure to exercise due care for Plaintiffs' safety. Further, the following exchange best

These policies and procedures (or lack thereof) resulted in too few officers on duty at the time of Plaintiffs' attack available to **deter, prevent, step in and stop, or at least shorten**, the attack. This fact was admitted by the Defendant at the deposition:

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> Q. You would agree with me that if there was more security personnel on the floor, that the fight or at least the extent of the fight could have been limited?
>
> A. If there was more security officers in that area, yes.

[Vol I App. at 0097, Depo. Nulle 57:2-6]

Consideration of the above circumstances surrounding Plaintiffs' attack shows that Defendant wholly failed to take any reasonable precautions to protect Plaintiffs from a foreseeable fistfight. Indeed, it is clear that Defendant failed to even undertake any basic inquiry into the number of security officers that need to be on duty at any given time. Thus, Defendant owed a duty to Plaintiffs and this Court should reverse the decision of the District Court below.

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CONCLUSION

WHEREFORE, the District Court erred in granting summary judgment for Defendant. Fights and attacks on the Defendant's premises were foreseeable, the Defendant owed the Plaintiffs a duty of care to act reasonably and the Defendant breached this duty of of care. Further, given the unobjected testimony of the Defendant's Corporate Designee and the documents of prior incident reports, Plaintiffs were entitled to summary judgment. Thus, Plaintiffs respectfully request this Honorbale Court reverse the decision of the District Court granting summary judgment for the Defendant and enter summary judgment in favor of the Plaintiffs'

RESPECTFULLY SUBMITTED this 26 day of January, 2015.

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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.

The brief complies with the formatting requirements of NRAP 32(a)(4)-(6).

The brief is formatted in Word, 14 point Times New Roman font, double-spaced, has 7332 words in compliance with NRAP 32(a)(7)(a)(ii).

DATED this 26 day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 26 January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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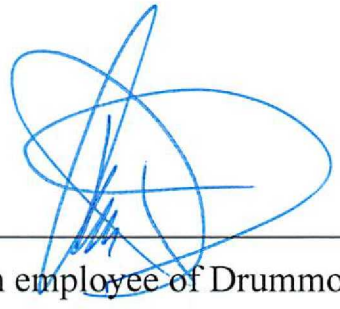

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