IN THE SUPREME COURT OF THE STATE OF NEVADA

CAREY HUMPHRIES; AND LOREZO ROCHA, III,

Appellants,

vs.

NEW YORK-NEW YORK HOTEL & CASINO,

Respondent.

Supreme Court Case No. 65316

Appeal from the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, The Honorable Michael Villani, District Judge District Court Case No. A-11-641181-C

RESPONDENT NEW YORK-NEW YORK HOTEL & CASINO'S ANSWERING BRIEF

KRAVITZ, SCHNITZER, & JOHNSON, CHTD.
MARTIN J. KRAVITZ, ESQ.
Nevada Bar No. 83
KRISTOPHER T. ZEPPENFELD, ESQ.
Nevada Bar No. 12144
8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123
(702) 362-6666

Attorneys for Respondent
New York-New York Hotel & Casino.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases/Rules/Statutes.....Page Number(s)

Cases

Statutes

Rules

Other Authorities

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the 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:

MGM Resorts International is the parent corporation of Respondent New York-New York Hotel & Casino. Respondent New York-New York Hotel & Casino has been represented throughout this litigation by the law firm of Kravitz, Schnitzer & Johnson, Chtd.

DATED this 27th day of March, 2015.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

MARTIN J. KRAVITZ, ESQ.
Nevada Bar No. 83
KRISTOPHER T. ZEPPENFELD, ESQ.
Nevada Bar No. 12144
8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123
(702) 362-6666
Attorneys for Respondent
New York-New York Hotel & Casino.

ISSUES PRESENTED FOR REVIEW

1. Should Summary Judgment in New York-New York Hotel & Casino's favor be affirmed where the attack upon Plaintiffs was not foreseeable, under the analysis of *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 265 P.3d 688 (Nev. 2011), because the undisputed facts establish no prior incidents of similar violent acts occurred on the casino floor?

2. Should Summary Judgment in New York-New York Hotel & Casino's favor be affirmed where the undisputed facts demonstrate it exercised due care to ensure the safety of its guests under the totality of the circumstances?

3. Should Summary Judgment in New York-New York Hotel & Casino's favor be affirmed where the undisputed facts prove it employed basic minimum precautions to ensure the safety of its patrons?

4. Whether the District Court abused its discretion in granting summary judgment based upon the undisputed facts in the record and the authority granted pursuant to N.R.S. § 651.015.

STATEMENT OF THE CASE

Appellants bring the instant matter as a result of the District Court granting summary judgment in favor of New York-New York Hotel Casino (hereinafter "NYNY"). Appellants filed their Complaint with the Eighth Judicial District Court of Clark County on May 12, 2011. Appellants alleged causes of action against NYNY for (1) negligent and inadequate security; (2) negligent hiring, supervision and retention of employees; and (3) intentional misrepresentation. All claims against NYNY arose from a physical altercation on NYNY's casino floor involving a third-party casino patron, Eric Ferrell (hereinafter "Ferrell"), Carey Humphries (hereinafter "Appellant Humphries") and Lorenzo Rocha, III (hereinafter "Appellant Rocha"). In response to the Complaint, NYNY filed its Answer on 8/1/2011 denying liability. Subsequent litigation ensued concerning the issue of whether Ferrell was a necessary and indispensable party to the lawsuit. Cite – Humphries. The matter was ultimately brought before this Court as published in *Humphries v. Eighth Judicial Dist. Court of State*, 312 P.3d 484, 129 Adv. Op. 85 (Nev. 2011).

Thereafter, this Court remanded the case back to the District Court, and on December 2, 2013, Appellants moved for summary judgment on issues of foreseeability and liability. [Vol. 1. Appellant's Appendix ("AA"). at 0013-0110]. On December 19, 2013, NYNY filed its Opposition to Plaintiffs' Motion for

Summary Judgment and Countermotion for Summary Judgment arguing it had no duty, under Nevada law, to prevent the violent acts committed by Ferrell upon Plaintiffs because the acts were unforeseeable. [Vol. II. AA. at 0111 – 0258] Additionally, NYNY contended Ferrell's criminal acts were intervening and superseding causes, severing any causation on the part of NYNY. *Id.*

On January 29, 2014, the District Court conducted a hearing. [Vol. II AA. at 0291-0309] On March 5, 2014, the District Court entered an order granting Summary Judgment in favor of NYNY, holding the altercation between Appellants and Ferrell was not foreseeable and NYNY exercised due care. [Vol. II AA. at 0276-0280] Thereafter, Appellants filed a Notice of Appeal to this Court on April 1, 2014. [Vol. II AA. at 0288-0290]

STATEMENT OF THE FACTS

On or about April 10, 2010, Appellants were patrons of NYNY located at 3790 South Las Vegas Boulevard, Las Vegas, Nevada 89109. At approximately 3:50 am, Appellants were walking through the casino floor. Ferrell, along with friends, was walking through the same area, near pit #3, toward Appellants. According to deposition testimony of Appellants, as well as surveillance video of the incident, Appellant Humphries initiated conversation with a female patron associated with Ferrell. Shortly thereafter, Ferrell allegedly made lewd comments toward Appellant Humphries. **Appellant Humphries did not inform NYNY**

security of Ferrell's vulgar remarks, nor did she walk away from Ferrell after he made his comments. Instead, Humphries criminally assaulted Ferrell by making a "spitting type gesture" toward him, prompting Ferrell to retaliate and a physical altercation to ensue.

NYNY security officers and Las Vegas Metropolitan Police Department ("LVMPD") officers (present in the hotel) responded to the altercation in less than seventeen (17) seconds and were able to separate Ferrell from Appellants. Security called for medical assistance, and Appellants were transported to Spring Valley Hospital. Subsequently, security and LVMPD officers detained Ferrell and, after questioning him, arrested him for attempted battery with substantial bodily harm. He was subsequently adjudged guilty of one count attempted battery with substantial bodily harm (felony) and was ordered to serve five (5) years of probation as well as pay $24,040.12 in restitution. Ferrell was not at the time, nor had never been, an employee or agent of NYNY.

SUMMARY OF THE ARGUMENT

NYNY is entitled to an Order from this Court affirming the District Court's Order granting NYNY's Motion for Summary Judgment. Specifically, NYNY is entitled to judgment as a matter of law because the evidence conclusively establishes: (1) there are no genuine issues of material fact for trial; (2) under Nevada law, NYNY cannot be held liable, pursuant to N.R.S. §651.015 and *Estate*

of Smith, for Ferrell's independent, unforeseeable, retaliatory physical acts of violence committed upon Appellants; and (3) as a matter of law, NYNY was not the proximate cause of Appellants' injuries.

ARGUMENT

I. THE ENTRY OF SUMMARY JUDGMENT WAS PROPER

A. Standard Of Review

This Court reviews a district court's order granting summary judgment de novo. *See Wood v. Safeway,* 121 Nev. 724; 121 P.3d 1026 (2005). Thus, this Court determines anew, without deference to the district court, whether genuine issues of material fact exist and whether the movant is entitled to judgment as a matter of law. *Id.* Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate no "genuine issue as to any material fact remains and the moving party is entitled to a judgment as a matter of law." *Id.*

Here, it is undisputed NYNY is entitled to judgment as a matter of law because the evidence establishes there are no genuine issues of material fact for trial. Under Nevada law, as well as this Court's ruling in *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 265 P.3d 688 (Nev. 2011), NYNY cannot be held liable for Ferrell's independent, unforeseeable retaliatory assault committed upon Appellants, and NYNY was not the proximate cause of Appellants' alleged

injuries.

B. NYNY Cannot Be Liable To Appellants As A Matter Of Law Because It Had No Duty To Prevent the Unforeseeable Criminal Acts of Ferrell

Civil liability of hotel owners for death or injury of a person on the hotel premises caused by a third person who is not an employee of the owner is governed by Nevada's innkeeper statute. N.R.S. §651.015(1) provides:

> *1. An owner or keeper of any hotel, inn, motel, motor court, boarding house or lodging house is not civilly liable for the death of injury of a patron or other person on the premises caused by another person who Is not an employee under the control or supervision of the owner or keeper unless:*
>
> *(a) the wrongful act which caused the death or injury was foreseeable; and*
>
> *(b) there is a preponderance of evidence that the owner or keeper did not exercise due care for the safety of the patron or other person on the premises.*

N.R.S. § 651.015(1).

In *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, this Court addressed the issue of foreseeability under the statute and provided the proper legal framework to determine whether the criminal act of a third party should be considered foreseeable. 265 P.3d 688 (Nev. 2011). To determine foreseeability for the purposes of establishing duty, a court must consider two distinct approaches: (1) evidence of prior similar acts in a similar location; and (2) a totality of the circumstances. *Id.* at 692. Additionally, this Court further held "[i]f any injury is unforeseeable, then the innkeeper owes no duty, and the district court has no

occasion to consider the remaining elements of plaintiff's cause of action." *Id.* at 690-691. Thus, unless a plaintiff can establish either prong of the aforementioned test, an innkeeper is shielded from liability because the innkeeper has no duty.

1. Ferrell's Criminal Acts Were Not Foreseeable

Appellants cannot establish NYNY had a duty to protect them from the unanticipated, unforeseeable criminal acts of Ferrell. First, Appellant's Opening Brief relies upon deposition testimony of NYNY security employee Glen Nulle ("Mr. Nulle") as a qualified admission of foreseeability and liability. *See* Appellants' Opening Brief at 15:8-25. Specifically, Appellants claim Mr. Nulle's opinion testimony binds NYNY and is dispositive of the notion the subject incident was foreseeable and thus, NYNY owed Appellants a duty of care. *Id.* While convenient to Appellants' predicament, their position is contravened by the aforementioned legal landscape governing an innkeeper's duty. Specifically, as set forth in N.R.S. § 615.015, foreseeability is a legal term of art requiring a judicial determination as to whether it exists in a given set of circumstances. In a liability analysis, "foreseeability" carries more weight than that of simply the word on its face as used in common parlance, and certainly more than a lay person's interpretation of the word. Mr. Nulle provided deposition testimony as to his opinions of foreseeability and incident prevention. Mr. Nulle was not testifying as to a determination of foreseeability that falls in line with the statutory scheme or

with that of *Estate of Smith*, because he is not the proper person to do so.

Additionally, Appellants' assertion that Mr. Nulle's testimony satisfies the foreseeability prong flies in the face of the rationale upon which the Innkeeper Statute is founded. The Legislative History of the statute illustrates Nevada's underlying public policy that an innkeeper is not the insurer of a patron's safety. Specifically, the Legislature sought to shift liability away from the innkeeper when the third party act was unforeseeable or unanticipated. This is the same policy this Court has been developing over recent years as "foreseeability is a policy concern that limits...liability to only those harms with a reasonably close connection to its breach." *Bower v. Harrah's Laughlin, Inc.*, 215 P.2d 709, 724 (Nev. 2009). Further, this Court has clarified:

> **"[w]hen a third party commits an intentional tort or crime, the act is a superseding cause**, even when the negligent party created a situation affording the third party an opportunity to commit the tort or crime. [Restatement (Second) of torts § 448 (1965).] In such a scenario, the negligent party will only be liable if he knew or should have known at the time of the negligent conduct that he was creating **a situation and that a third party 'might have availed himself of the opportunity to commit such a tort or crime.'"**

Id. at 725 (emphasis added). Notably, the above standard is more broad than N.R.S. §651.015(3)(b) which is limited to notice or knowledge.

This language rejects Appellants' argument of finding liability based upon "constructive notice" that a third party may carry the potential for unspecified violence. Otherwise, and contrary to *Estate of Smith, Wood, and*

Bower, innkeepers would have a heightened duty to predict sudden, unpredictable violent behavior that lacked any indicator violence was about to occur, the exact duty abrogated by the Innkeeper Statute in 1995.

Moreover, the Legislature was fully aware crime occurs every day in a casino. In fact, the Legislative History revealed the Legislature considered "**random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violence crime seems improbable....No one really knows why people commit crime, hence no one really knows what is 'adequate' deterrence in any given situation." *Id.* (emphasis added). Thus, the Legislature sought to immunize casinos from liability for the unforeseeable acts of third parties**." [Vol. I Respondent's Appendix ("RA") at 1-6] Therefore, Appellants' exact legal argument was considered and rejected by the Legislature in the manifestation of N.R.S. §651.015. Accordingly, the testimony of Mr. Nulle is insufficient to establish foreseeability.

2. No prior "similar" criminal acts of a third party exist in this case

N.R.S. §.651.015(1)(a) and § 651.015(3)(b) increased a plaintiff's burden to establish the notice element of duty through foreseeability. The Legislature clearly intended that N.R.S. § 651.015 reflect Nevada's policy that an innkeeper is not the insurer of a patron's safety. Thus, **the statute imposes a duty on an innkeeper**

only when there are prior "similar" incidents and/or a failure to exercise reasonable due care for the safety of a patron.

Here, Appellants are unable to produce **any** evidence demonstrating NYNY has encountered an incident similar to the subject assault. In fact, in the twelve (12) months prior, there are no documented incidents of violent acts involving similar facts or circumstances as the underlying incident.[1] [See Exhibit H to Vol. II AA. at 0111-0258].

In *Estate of Smith*, security officers at the Silver Nugget asked a boisterous group of individuals seated at a bar to leave the premises. *Estate of Smith*, 265 P.3d at 689. As the group left, a verbal altercation arose between the group and another individual – the plaintiff. *Id.* The plaintiff punched a member of the group in the face. *Id.* In response, another member of the group "immediately revealed a concealed weapon and fatally shot [plaintiff]." *Id.* at 690. This event lasted approximately 10 seconds. *Id.* at 689. Plaintiff's estate sued Silver Nugget alleging negligence. *Id.* In an attempt to impose a duty on Silver Nugget, Plaintiff's estate argued that "all violent acts occurring anywhere on an innkeeper's premises—whether inside or outside the casino – should be considered similar."

[1] The majority of incidents cited by Appellants involved domestic disputes in guests' rooms, or physical altercations between security and patrons as security attempted to evict the patrons). *See* Appellants' Opening Brief at 18:4-27; 19; 20:1-7. None involved a female spitting on or at a customer and provoking a counterattack. Moreover, none involved a fight between a male and female patron. *Id.*

Estate of Smith, 265 P.3d at 692. Specifically, Plaintiff's estate referenced several "fights and robberies that occurred inside the casino within five years prior to the murder," but this Court noted the level of violence, injury and weapons used were not similar. *Id.*

Additionally, the estate also identified several incidents that occurred in the "parking lot outside of the casino" which included reports of gun fire. *Id.* This Court noted these incidents did not take place within the casino and the levels of violence were not similar. *Id.* Accordingly, this Court held no prior "similar" event has ever occurred. *Id.*

In the instant matter, Appellants allege prior incidents of "similar" wrongful acts had occurred on the premises, but offer no evidence demonstrating a single previous case of patron-on-patron violence occurring on the NYNY casino floor. In fact, **all of the evidence upon which they rely to satisfy this prong involve incidents that either: (1) transpired in areas of the hotel other than where the subject incident occurred; or (2) were assaults upon security officers committed by patrons during the effectuation of a trespass**. *See* Appellants' Opening Brief at 18:4-26; 19:1-9. Appellants' argument is essentially the same as that submitted by the estate in *Estate of Smith;* all acts of violence occurring on an innkeeper's property no matter the location should be considered "similar." As previously mentioned, this Court explicitly rejected this argument and concluded

the location of previous assaults is a factor rendering physical altercations dissimilar. *Estate of Smith,* 265 P.3d at 692-693.

Moreover, Appellants failed to produce any evidence demonstrating previous patron-on-patron altercations involving similar levels of violence as the subject incident. Appellants allege 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." *See* Appellants' Opening Brief at 4:10-14. Appellants contend this level of violence is similar to other prior incidences of violence occurring on NYNY premises. However, the prior incident reports of patron-on-patron violence set forth in Appellants' Opening Brief involved the following: three (3) reports indicated injuries of "small lacerations" or "small cuts;" two (2) reports indicated injuries of "bruising;" and five (5) reports indicated no injuries at all. [Exhibit H in Vol. II AA. at 0111-0258] None of these incidents are remotely similar to the underlying incident involving Appellants. Accordingly, these incident reports are insufficient to establish foreseeability based upon a theory of "prior similar acts."

Appellants also rely upon Mr. Nulle's "estimates" that fights may occur on the "property" two to three times a week in an effort to establish "similar" previous acts of violence. Appellants' Opening Brief at 23:24-27. As set forth above, this

testimony alone does not satisfy the "prior similar acts" analysis. Specifically, Appellants' counsel failed to elicit any specifics related to the alleged "two to three fights per week," including the circumstances surrounding the fights, the locations of the fights, or the severity of the injuries resulting from the purported fights. Appellants rely only upon "facts" which lack any foundational findings establishing the subject incident was foreseeable based upon prior similar acts in a similar location.

Simply, Appellants fail to identify any prior "similar" incident in a "similar location" within the NYNY involving circumstances similar to the subject incident (i.e. female patron provoking fight by spitting on another patron). As such, Appellants cannot demonstrate Ferrell's assault was foreseeable based upon prior similar acts, and therefore, NYNY owed no duty. *Estate of Smith,* 265 P.3d at 692.

3. Mr. Ferrell's conduct prior to the subject incident did not make his subsequent wrongful conduct foreseeable

This Court has held an innkeeper may owe a duty when the circumstances surrounding the subject incident provide "requisite foreseeability" of the resultant crime. *Estate of Smith*, 265 P.3d at 692. To make this determination, the court must conclude whether the innkeeper "should have known" of a specific danger, such as a patron "carrying a concealed weapon." *Id.* at 693. In *Estate of Smith*, this Court held the circumstances of the specific incident did not establish a duty. *Id.* This is because no evidence suggested the assailant was carrying a concealed

weapon and because security was already escorting the boisterous group off the premises. *Id.* Further, the Court held no duty exists when the innkeeper takes "**basic minimum precautions** to ensure safety of its patrons." *Id.* (emphasis added).

i. No information existed to put NYNY on notice that Mr. Ferrell posed a threat to NYNY's patrons.

Here, NYNY had no notice or knowledge Ferrell would physically attack Appellants in retaliation to being assaulted by Appellant Humphries' spitting action. First, Appellants argue NYNY's security policies are inadequate and demonstrate it failed to exercise due care. Appellants' Opening Brief at 25:5-28. However, this "evidence" is wholly irrelevant in the "totality of the circumstances" analysis set forth in *Estate of Smith.* Specifically, Appellants do not show how such policies are applicable to the determination of whether NYNY **should have known Ferrell would commit a retaliatory attack upon Appellants after being spit on or at by Humphries.** As such, this argument is speculative and does not demonstrate how NYNY failed to exercise due care.

Second, Appellants argue the District Court erred because it placed emphasis on Ferrell's violent propensities rather than NYNY's knowledge of the risk of particular type of danger. Appellants' Opening Brief at 27:4-5. Specifically, Appellants argue in *Estate of Smith*, this Court focused on the innkeeper's knowledge of a particular type of danger, rather than conduct of a particular

tortfeasor, in analyzing whether a duty existed. *Id.* at 27:9-15. This argument is unsupported by any legal authority. In *Estate of Smith*, **this Court held the circumstances leading up to the shooting did not provide requisite foreseeability to impose a duty because "there [was] no evidence to suggest that Silver Nugget should have known that [tortfeasor] Ott was carrying a concealed weapon when he entered the premises" and because "the Silver Nugget promptly deployed security to request that the boisterous group leave the Touchdown Lounge."** *Estate of Smith*, 265 P.3d at 693 (emphasis added).

This Court never expressly or implicitly identifies the type of danger committed by a tortfeasor as the dispositive factor in the totality of the circumstances analysis. On the contrary, this Court suggested the conduct of the tortfeasor is in fact the controlling factor in its determination to impose a duty. Moreover, as demonstrated above, the Legislative history of NRS §651.015 indicates liability is imposed only where it is foreseeable a certain patron would commit a wrongful act (i.e. behaving in a manner which would input notice or knowledge to NYNY security).

With the proper legal framework established, NYNY did not have any notice nor opportunity to respond to or prevent Ferrell from committing his independent retaliatory criminal act. Appellants offer no legitimate argument any NYNY employee **knew or should have known Ferrell would attack**

Appellant Humphries, or Appellant Humphries would assault Ferrell. This is because prior to the incident, NYNY security had no notice Ferrell would become involved in a physical altercation. He had done nothing to raise any suspicion or attention from NYNY security. In fact, NYNY did not have any basis to exclude Ferrell from the property prior to the commission of his criminal act, nor was there any legitimate information which would have provided NYNY security with notice a crime was about to occur.[2] Accordingly, NYNY owed no duty based upon the specific circumstances leading up to Ferrell's attack on Appellants.

ii. NYNY employed "basic minimum precautions to ensure patron safety"

In *Estate of Smith*, this Court makes clear innkeepers must take only "basic minimum precautions" to ensure the safety of their patrons, not "optimum precautions." *Estate of Smith*, 265 P.3d at 692 (emphasis added). In that case, security was aware the parties were boisterous and security had already asked the entire group to leave the premises. *Id.* at 690. After being asked to leave, an argument ensued and one individual punched another in the face. *Id.* After this altercation, a third individual from the group pulled a concealed weapon and fatally shot the individual who threw the punch. *Id.* at 690-691. Thus, prior to the shooting, security (1) knew the parties needed to be removed from the property; (2)

[2] Patrons must first engage in disorderly or disruptive conduct before a trespass can be effectuated. Nev. Rev. Stat. § 651.020

witnessed a physical altercation; and (3) failed to separate the parties prior to the shooting. *See, generally Id.* As such, this Court noted "it was apparent that [defendant] took basic minimum precautions to ensure the safety of its patrons." *Id.* at 692.

Here, NYNY's security precautions are far superior to those taken by Silver Nugget in *Estate of Smith.* Perhaps the most obvious point on topic is Silver Nugget security witnessed a physical altercation, thus putting them on notice of the individual's violent propensities; however, in this case, NYNY security officers had no notice whatsoever that Appellant Humphries would spit at Ferrell, or that Ferrell posed a threat to any NYNY patron prior to the incident. Moreover, on the night of the subject incident, NYNY security department staffed between 17-20 officers, and two supervisors. [Exhibit F, in Vol II AA at 0111-0258 at 15:3-5; 26:12-21] Additionally, two LVMPD officers were present and on duty. *Id.* 28:5-12. When the fight erupted, NYNY security immediately and contemporaneously radioed the incident to dispatch and to LVMPD. Thereafter, security was able to end the altercation in approximately seventeen (17) seconds.

It is without question these actions constitute "basic **minimum** precautions" far exceeding the minimum precautions exercised by Silver Nugget in *Estate of Smith (*where this Court found no duty existed on the part of the innkeeper defendant). Given NYNY's lack of notice or knowledge of Ferrell's criminal

attack, the number of security officers staffed on the night of the attack, and the speed in which NYNY security terminated the altercation, Appellants cannot legitimately dispute NYNY provided the requisite minimum precautions. Again, the standard is "basic minimum precautions," not "perfect" or "optimum" precautions. Therefore, this Court should find NYNY owed no duty to Appellants in this matter[3].

iii. A suggested approach to define "basic minimum precautions"

Given the above, NYNY respectfully requests this Honorable Court articulate the test for "basic minimum precautions" as follows: **(a) whether the innkeeper provided security at the time of the third-party criminal act; (b) whether the innkeeper's security officers complied with the law when responding to the criminal acts of a third-party; and (c) whether the innkeeper's security officers complied with its own policies and procedures when responding to the third-party criminal act.** If answer to these three questions is in the affirmative, "basic minimum precautions" have been satisfied.

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[3] Interestingly, Appellant's Brief fails to cite their security "expert's" report in support of their claims. Perhaps this is because their expert admits "to my knowledge, there is no established written guidelines, or industry standard to refer to in reference to required security staffing levels for a casino floor." [*See* Exhibit I in Vol. II AA 0111-0258] Moreover, in his deposition, the expert admitted his opinion as to an industry standard was not generally accepted, and in fact, merely his own "rule of thumb." [Vol. I RA at 7-25] In cases such as these, security "experts" frequently offer nothing more than speculative and unfounded industry standards. This is precisely why NYNY seeks that this Court adopt the suggested approach and clearly articulate a standard.

The rationale is as follows:

a. *Whether the Innkeeper Provided Security at the Time of the Third-Party Criminal Act*

What is obvious from this Honorable Court's analysis in *Estate of Smith*, is there are circumstances where an innkeeper may be liable for the criminal act of a third-party even if the criminal act was not foreseeable simply by virtue of the fact the innkeeper had abrogated its duty to undertake "basic minimum precautions" to protect the patrons' safety. As such, liability under the "basic minimum precautions" standard should be narrow and limited as evidenced by its name, which implies liability should only exist in circumstances where the innkeeper did less than the bare minimum. Therefore, the "basic minimum precautions" test is not "optimal precautions," nor should it be a "hindsight analysis" of what addition precautions may have prevented the criminal act of a third-party. To the contrary, sole inquiry should be whether the bare minimum precautions occurred.

If the inquiry is limited to the minimum precautions that should be taken, the first inquiry should be whether security was provided at all. **In the absence of any security measures, it would be clear the innkeeper did not employ "basic minimum precautions" to ensure the safety of its patrons**. Conversely, in

circumstances where innkeepers have established a security presence along with security protocols for the property, the innkeeper has satisfied the "basic minimum precaution" of providing a security detail on the premises.

In this case, there is no dispute as to whether NYNY provided security at the time of the subject incident. As previously indicated, NYNY staffed between 17-20 security officers, two security supervisors and the LVMPD officers on the night of the subject incident. Consequently, NYNY satisfies this prong of the suggested "basic minimum precautions" approach.

b. Whether the innkeeper's security officers complied with the law when responding to the criminal acts of a third party

Unfortunately, in the day and age of gangs, drug dealers, prostitutes, and other predators who prey upon customers, Nevada law does not allow casinos to remove those persons simply because they look "suspicious." N.R.S. 651.050 et. seq.; § 651.070 ("All persons that are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin, disabilities, or sexual orientation."). To the contrary, **individuals must first engage in disorderly or**

disruptive conduct to be trespassed from the premises. Id. at §651.020. Similarly, **hotel security officers can only arrest an individual when a crime occurs in the officer's presence or in the assistance of another making a citizen's arrest.** Id. at §171.267, 171.136(2)(b).

Security officers are not police officers. Having limited powers of trespass and arrest, they have no authority to search individuals merely because they look suspicious. *See State v. McKellips*, 118 Nev. 465, 472, 49 P.3d 665, 660 (2002) (citation omitted) (probable cause limited to police discretion); N.R.S. § 171.126 (committed an actual felony or misdemeanor). Consequently, any determination of "basic minimum precautions," must be narrowly tailored as to prevent imposing an impossible burden upon an innkeeper. Specifically, the standard must be tailored to fit inside the framework of the legal options afforded to hotel security officers.

Thus, when "due care" is defined to include a determination of whether hotel security officers satisfied "basic minimum precautions," it is important to tailor such a standard to circumstances where the officers had actual notice and a reasonable opportunity to respond to prevent the tortious conduct. From a public policy standpoint, this would be consistent with other notice requirements as

expressed by this Honorable Court in *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005); *Butler v. Bayer*, 123 Nev. 450, 463, 168 P.3d 1055, 1064 (2007); and *Bower v. Harrah's Laughlin*, Inc., 125 Nev. 470, 215 P.3d 709, 724 (2009).

Again, as previously discussed, NYNY security officers did not have actual notice Appellant Humphries would provoke a physical altercation by spitting at Ferrell, or that Ferrell would immediately retaliate. Moreover, NYNY security was not afforded a reasonable opportunity to prevent the criminal acts of Appellant Humphries and Ferrell, as the altercation was spontaneous and unprecedented. Therefore, NYNY security complied with the laws governing an innkeeper's ability to address disorderly conduct and prevent criminal acts of patrons and third-parties. Thus, NYNY satisfies the second prong of the suggested "basic minimum precautions" approach.

c. *Whether the Innkeeper's Security Officers Complied With Its Own Policies and Procedures When Responding To the Third-Party Criminal Act.*

The third prong of the suggested "basic minimum precautions" approach involves the Court determining whether the security officers complied with the innkeeper's own policies and procedures in response to the third-party criminal act.

NY-NY security policies require the officers observe a violent act from a point of safety and respond to ensure that additional patrons do not become involved. The goal of the policy is that officers take prudent action to ensure the safety of additional guests, visitors, and employees.

This policy is an established protocol in the security and hotel gaming industry known as "Observe and Report Methodology." [Exhibit C in Vol. II AA at 0111-0258] NYNY security are trained to wait for proper backup to arrive before getting involved in a physical altercation. [Exhibit F in Vol. II AA 0111-0258] In this case, the first security officer on the scene was outnumbered by the individuals involved in the physical altercation. The officer immediately calls dispatch from his radio, and awaits for adequate backup to promptly arrive. Appellants cannot establish NYNY failed to follow its policies and procedures in dealing with the subject incident. Consequently, NYNY satisfies the third prong of the suggested "basic minimum precautions" approach.

C. As A Matter Of Law, Any Negligence Of NYNY Was Not The Proximate Cause Of Plaintiffs' Alleged Injuries Because Ferrell's Wrongful/Criminal Act Was The Superseding, Intervening Cause

As demonstrated above, Appellants' claims must fail because as a matter of law NYNY had no duty to prevent the unforeseeable, unanticipated criminal act of

Ferrell. It is therefore not necessary for this Court to examine the sufficiency of any other elements of Appellants' negligence action. Nevertheless, the record reveals the Complaint fails, as a matter of law, to assert the requisite legal cause between the alleged deficiencies and the injuries wrought by the assailant.

To prevail in a negligence claim, a party must prove the alleged tortfeasor was the legal cause – i.e. cause in fact and the foreseeable cause—of the harm. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491, 215 P.3d 709, 724 (2009)(*citing Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096 (1993)(overruled on other grounds)). A tortfeasor is the actual cause of a person's harm only if the tortfeasor's actions were a substantial factor in bringing about the injury. *Id.* Moreover, to establish an act as the proximate cause of any injury, "it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981) *citing Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970). The cause must have been natural (foreseeable) and in a continuous sequence, *unbroken by any efficient intervening cause*, that produces the injury complaint of and without which the result would not have occurred. *Goodrich & Pennington Mortg. Frund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 784, 101 P.3d 792, 796 (2004) (emphasis added).

An intervening act severs liability if it is unforeseeable, thus becoming a superseding act. *Bower*, 125 Nev. at 492, 215 P.3d at 724. When a third party commits an intentional tort or a crime, the act is a superseding cause, **even when** the negligent party created a situation affording the third party an opportunity to commit the tort or crime. *Id.* at 492, 725 (*citing Restatement (Second) of Torts § 448*) (emphasis added). In such a scenario, the alleged negligent tortfeasor will only be liable if he knew or should have known at the time of the alleged negligent conduct that he was creating such a situation and that a third party "might avail himself of the opportunity to commit such a tort or crime." *Id.*

Here, as previously stated, Appellants must establish the acts or omissions of NYNY were the legal cause of the alleged injuries inflicted by Ferrell to prevail on their claim for negligence. *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991). First, there is no dispute the actual cause of Appellants alleged injuries came from the third party, Ferrell. Next, Appellants cannot establish NYNY's alleged negligence was the proximate cause of their harm. Appellants contend NYNY negligently permitted them to be attacked and injured by Ferrell. If this allegation is accepted as true, for the sole purposes of this analysis, it does not state a claim for relief because the intervening criminal assault of Ferrell (not to mention Appellant Humphries' initial act of spitting) severs any causal connection between the alleged conditions and the injuries resulted therefrom.

Appellants' inability to demonstrate the foreseeability of the specific attack by Ferrell on them is fatal to the claim against NYNY.

As previously discussed, Ferrell's intentional tortious conduct amounts to an unforeseeable superseding act absolving NYNY from liability. NYNY security had no way of contemplating Appellant Humphries would provoke Ferrell by spitting at him, nor that Ferrell would immediately retaliate with violence. Appellants cannot cite to any evidence demonstrating NYNY knew or should have known or anticipated the behaviors of Appellant Humphries or Ferrell prior to the eruption of the physical altercation. Consequently, NYNY respectfully requests that this Honorable Court affirm the District Court's granting NYNY's motion for summary judgment.

III. CONCLUSION

NYNY is entitled to judgment as a matter of law because the evidence conclusively establishes there are no genuine issues of material fact for trial. Additionally, under Nevada law, NYNY had no duty to prevent the unanticipated, unforeseeable, retaliatory assault involving Ferrell and Appellants.

Moreover, no duty exists because no prior similar acts had ever occurred, and NYNY had implemented the basic minimum requirements by properly staffing security and responding to the incident in a timely fashion. Additionally, Appellants' claims also fail because they cannot establish NYNY's acts or

omissions were the proximate cause of their injuries.

Therefore, NYNY respectfully requests this Court affirm the District Court's Order granting NYNY's Motion for Summary Judgment.

Respectfully submitted this 27th day of March, 2015.

KRAVITZ, SCHNITZER & JOHNSON, CHTD.

MARTIN J. KRAVITZ, ESQ.
Nevada Bar No. 83
KRISTOPHER T. ZEPPENFELD, ESQ.
Nevada Bar No. 12144
8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123
(702) 362-6666
Attorneys for Respondent New York-New York Hotel & Casino.

CERTIFICATE OF COMPLIANCE

STATE OF NEVADA }
} ss.
COUNTY OF CLARK }

I, Kris Zeppenfeld, Esq., declare the following under penalty of perjury:

1. I hereby certify that this Answering 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 Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify this Answering Brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it contains less than 14,000 words and 1,300 lines.

3. Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this Answering Brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying Answering Brief is not

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

DATED this 27th day of March, 2015.

Kristopher T. Zeppenfeld, Esq.
Nevada Bar No. 12144
KRAVITZ, SCHNITZER & JOHNSON, CHTD.
8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123

CERTIFICATE OF SERVICE

I CERTIFY that on the 27 day of March, 2015, I filed electronically with the Nevada Supreme Court and served by electronic service the foregoing **ANSWERING BRIEF** upon all parties listed on the Master Service List, to:

DRUMMOND FIRM, P.C.
Craig W. Drummond, Esq.
228 South Fourth St., First Floor
Las Vegas, NV 89101
Attorneys for Appellants

HOFLAND & TOMSCHECK
Joshua Tomscheck, Esq.
228 South 4th St., First Floor
Las Vegas, Nevada 89101
Attorneys for Appellants

An Employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD