**IN THE SUPREME COURT OF THE STATE OF NEVADA**



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

# APPELLANTS' REPLY BRIEF

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## STATEMENT OF DISPUTED FACTS FROM DEFENDANT'S ANSWERING BRIEF

Before being able to address the Defendant's arguments in the Defendant's Answering Brief , it is important to point out that the Defendant makes a number of inaccurate factual statements about the case. As outlined below there are two main representations by the Defendant that the Plaintiffs completely disagree with as they are contrary to the evidence in the case and the evidence presented to the District Court at the time of summary judgment.

Defendant represents that there were essentially no similar incidents to the subject attack on the Plaintiffs prior to them being attacked. "Appellants are unable to produce any evidence demonstrating NYNY has encountered an incident similar to the subject assault." *See* Defendant's Answering Brief at 11:4-5. Further, even though the Defendant has admitted to "two to three fights per week" "on the casino floor" that the Plaintiff has somehow still failed to show the "locations of the fights." Id. at 14:2-6. As outlined below, these representations are inconsistent with the evidence in the case.

Defendant represents that their Corporate Designee only provided "his opinions" and not evidence when testifying on behalf of and for the Defendant. "Mr. Nulle provided deposition testimony as to his opinions of foreseeability and incident prevention." *See* Defendant's Answering Brief at

8:24-26. As outlined below, a Corporate Designee's testimony is binding on behalf of the corporate defendant and unobjected to testimony at a deposition is actual admissible evidence.

## ARGUMENT

### I. THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE WIDESPREAD NATURE OF PRIOR SIMILAR INCIDENTS MADE THE ATTACK ON PLAINTIFFS FORESEEABLE AND IMPOSED A DUTY UPON DEFENDANT.

As previously stated in Appellant's Opening Brief there is clear and convincing evidence that the Defendant had notice and knowledge of prior incidents of similar wrongful acts as well as knew they owed a duty to their patrons. The Defendant's own Incident Reports prior to the subject event reflect the following:

| BATES # CITED TO | STATEMENTS DETAILING SIMILAR WRONGFUL ACTS |
|---|---|
| 0216 | "patron swinging a bottle around making threats toward patrons . . . security made contact with the subject later identified as Christoval Navarrette and two males and one female were all asked to depart the restaurant and casino" |
| 0218 | "Security was dispatched to Coyote Ugly for report of a 416 that had occurred inside of the club. Security made contact with the two parties involved and separated them." |
| 0219 | "report of an altercation between patrons" |
| 0230 | "...intoxicated male bothering females. Officer ... made contact with the male that was bothering the female guests" |

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|---|---|
| 0236 | "Patron Hernandez struck him with a closed fist. Patron Smith stated that when he attempted to defend himself from this assault, two of the three unknown males also struck him." |
| 0240 | "Security made contact with Carissa Nichols, and she stated that she was struck by Dominque Montenegro and Yesnia Osuna and wanted to press charges on them. Ms. Nichols had a bloody nose and lip." |
| 0243 | "Security was called to ROK Vegas for a report a Patron was assaulting another Patron" |
| 0244 | "when the female sitting to his right (later identified as Debra Ann Fogelbach), alleged that the male sitting across from her, (identified as Cappy Lynn Digirolamo), grabbed her by her crotch, Guest Jason Belhumeur then got up and walked over to the Mr. Digirolamo and shoved him with his left hand, which caused Mr. Digirolamo to fall over an ottoman and land on his neck. After investigation, it was determined that Mr. Digirolamo and Ms. Fogelbach are boyfriend and girlfriend." |
| 0245 | "Patron Wood stated that Patron Cook was sitting between Subject Dennis, and himself, however Subject Dennis proceeded to verbally harass him. After nearly two hours of verbal abuse, Subject Dennis physically struck him." |

*See* AA Vol II Exhibit H at 0216, 0218, 0219, 0230, 0236, 0240, 0243, 0244, and 0245.

The level of violence indicated in the incident reports is similar to the level of violence in this case. The cited violent acts between *patrons* listed in the reports include threats, altercations, men "bothering" women, unconsented to touchings, hitting, punching, assaulting, shoving and verbal harassment. *See* AA Vol II at 0205-0251. These reports also detail this level of violence occurring between patrons on the Defendant's casino floor.

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Each report above *reveals* similar wrongful acts of patron-on-patron violence occurring in main parts of the Defendant's property, exactly mirroring the subject incident. The above statement is true even if the original reason for the written reports were assaults upon security officers committed by patrons during the effectuation of a trespass.

## II. THE TESTIMONY OF DEFENDANT'S CORPORATE DESIGNEE, MR. NULLE IF AN "OPINION" MUST BE TAKEN AS THE OPINION OF THE DEFENDANT CORPORATION.

Defendant states, "Mr. Nulle provided deposition testimony as to his opinions of foreseeability and incident prevention." *See* Defendant's Answering Brief at 8:24-26. As outlined in the Opening Brief, 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 NRCP 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."

It goes without saying that Defendant is bound by the testimony of their own Corporate Designee and this issue was briefed at length in the Opening Brief. In fact the Defendant does not even dispute this position in their Reply Brief. This general rule is appropriate because the NRCP 30(b)(6) deposition

is one of the few facets in which the questioning party may obtain the position of the corporate party. Mr. Nulle was not offering his "opinions" about anything while he was testifying and rather was testifying as to the "knowledge of the corporation, not of the individual deponents." *See e.g.* Hyde v. Stanley Tools, 107 F.Supp.2d 992 (E.D. La., 2000); United States v. Massachusetts Indus. Finance Agency, 162 F.R.D. 410, 412 (D. Mass.1995); and Buycks-Roberson v. Citibank Federal Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill.1995).

Further, while testifying as the Corporate Designee, Mr. Nulle was offering binding answers to the facts and the evidence of the case. *See e.g.* Starlight International, Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan.1999).

**The fact that the Defendant apparently chose not to document and write down the detailed facts about the 2-3 fights a week that occurred on the casino floor does not mean that they did not occur.** The Defendant has provided a binding answer that they did in fact occur. Such inaction by the Defendant in not detailing all of the fights on their casino floor should not benefit them. The District Court unfortunately and improperly failed to consider the following evidence directly from the Corporate Designee concerning prior similar assaults and fights on the Defendant's premises:

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> "Q. Now, you would agree with me that prior to April 10th, 2010, New York-New York was aware that other individuals had been attacked inside of the New York-New York casino, correct?
> A. Has there been other fights or attacks? Yes.
> Q. Okay. And some of those occurred on the casino floor, correct?
> A. Correct.
> Q. Okay. And because of having security you would agree with me that it was foreseeable to New York-New York that fights may occur on the casino floor?
> A. That is foreseeable.
> *See* AA Vol I at 0092. Depo Nulle 34:3-14

Further, Defendant inaccurately states that Mr. Nulle did not provide testimony as to the "locations of the fights." *See* Defendant's Answering Brief at 14:4-5. Defendant's Corporate Designee testified at his deposition that fights were common place "on the casino floor," occurring at least "two to three a week."

> "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.
> Q. Okay. Well, then can you please elaborate for us,
> A. I would say two to three a week."
> *See* AA Vol I at 0097. Depo Nulle 54:3-11.

Given the above, in addition to the written, documented, incident reports, the actual evidence in the case from the Corporate Designee is that prior to the subject incident, at least 2-3 fights or attacks per week occurred

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on the casino floor. These clearly support a finding that there were "similar prior incidents" before the Plaintiffs were attacked on the casino floor.

## III. DEFENDANT IMPROPERLY DEFINES FORESEEABLE 'DANGER' TO ITS PATRONS AS A FORESEEABLE 'SPECIFIC PERSON' POSING A DANGER TO ITS PATRONS.

Defendant does correctly point out that "an innkeeper may owe a duty when the circumstances surrounding the subject incident provide "requisite foreseeability" of the resultant crime, and that in order 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." *See* Defendant's Answering Brief at 14:19-25.

However, Defendant then goes on to claim that NYNY was never on notice that *Mr. Ferrell* posed a threat to NYNY's patrons. *See* Defendant's Answering Brief at 15:7-21. Defendant muddles the language from Estate of Smith by mixing up "a specific danger" with a specific *person*. Defendant apparently hopes to misdirect any query into its possible negligence by focusing on the specific actions of the attacker in this case, and whether the attacker's actions would indicate to the Defendant's security that he would become involved in a physical altercation. Foreseeability, however has been defined as the totality of circumstances, surrounding the wrongful act.

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As outlined in the below section, the totality of circumstances in this case suggests that the Defendant should have known a specific danger, patron-on-patron fistfights, would occur on its premises as there were prior incidents of similar wrongful acts, involving fistfights, between patrons, on the premises, occurring multiple times throughout each week.

NRS 651.015(3) provides that a wrongful act is not foreseeable unless: (a) the owner failed to exercise due care; **or** (b) similar prior incidents occurred on the premises and the owner had notice or knowledge of those incidents. Thus, in order to survive summary judgment, the Plaintiff was required to establish that the wrongful act was foreseeable under either NRS 651.015(3)(a) or NRS 651.015(3)(b). In its Findings of Facts, Conclusions of Law and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Countermotion for Summary Judgment filed in the underlying matter on March 5, 2014, the Court improperly concluded:

> "7. Prior to the subject incident, the **third party assailant had not engaged in any disorderly or disruptive conduct** that would have raised the New York-New York's suspicion or attention.
> 8. New York-New York security had no notice or knowledge **the third party assailant would commit** his act of attacking Plaintiff Humphries in retaliation to being assaulted."
>
> *See* AA Vol II, Part III at 0279 Findings of Facts, Conclusions of Law and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Countermotion for

Summary Judgment, Page 4, Appendix Page No. 278 [Emphasis Added]

Nowhere in the Courts' Findings, Conclusions, or Order does it address the totality of the circumstances of this case. Further, the Court improperly failed to look at or even address the issue of "similar wrongful acts" at the New York-New York. Erroneously, the District Court chose instead to look solely at Defendant's obligations regarding one, solitary third-party's actions, which is an inappropriate standard to test foreseeability and/or due care. This was never the legislative intent of NRS 651.015 or this Honorable Court's Decision in Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc., 265 P.3d 688 (2011).

## IV. THE DISTRICT COURT IMPROPERLY DETERMINED NEW YORK-NEW YORK HAD MET ITS REQUISITE DUE CARE

The Court was clear in Smith that the proper standard in determining "due care" is akin to Nevada's "totality of the circumstances" approach established in Doud v. Las Vegas Hilton, Corp., 109 Nev. 1096, 864 P.2d 796 (1993) (imposing a duty where there is reasonable cause to anticipate a wrongful act, regardless of past experience). Other jurisdictions have similarly articulated that "duty encompasses a responsibility to take reasonable steps to secure the premises against foreseeable criminal acts of

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third parties that are likely to occur in the absence of such precautionary measures." Lopez v. Baca, 98 Cal.App.4th 1008, 120 Cal.Rptr.2d 281, 286 (2002) (quotations and citations omitted).

> "10. Plaintiffs have not met the burden of establishing a lack of due care on the part of the New York-New York security, as they did not provide any **evidence demonstrating the third party assailant's conduct** prior to the subject incident provided New York-New York security the requisite foreseeability of the resultant altercation."
>
> *See* AA Vol II, Part III at 0279 Findings of Facts, Conclusions of Law and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Countermotion for Summary Judgment, Page 4, Appendix Page No. 279 [Emphasis Added]

Here again the Court improperly solely and only looks at and addresses the actions of a specific third-party, not those of the Defendant.

## V. DEFENDANT'S DUE CARE TEST IS AN ISSUE OF MATERIAL FACT

> (a) The owner or keeper *failed to exercise due care* for the safety of the patron or other person on the premises; or
> (b) *Prior incidents of similar wrongful acts* occurred on the premises and the owner or keeper had notice or knowledge of those incidents.
>
> NRS 651.015(3) (emphases added).

Contrary to Defendant's assertions, in Estate of Smith, this Honorable Court made clear that innkeepers must take basic minimum precautions to ensure the safety of their patrons. Estate of Smith 265 P.3d at 692.

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Defendant's three prong test of whether an innkeeper provides security, if security follows the law, and if it follows its own protocols, flies in the face of the Smith ruling. *See* Defendant's Answering Brief at 20:2-21:12. The mere fact that security guards are employed, without looking at the appropriate number of security personnel, where they are located, or their training, for example, is not adequate to suggest "basic minimum precautions." Defendant further suggests "where innkeepers have provided 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. *See* Defendant's Answering Brief at 21:1-4.

In the instant case, "security presence" involved security observing Ms. Humphries get beaten for a period of twelve to fifteen seconds, while the sole responder stood there and watched. There is a difference between security being present and security actually being provided.

Defendant's suggestion would be giving disincentive to providing adequate security and/or having security respond as quickly and efficiently as possible. If Defendant's test were to pass, security could take as much time as desired before responding to an altercation. Security could stand back and watch attacks happen for any amount of time before actually intervening to break up an altercation. This suggestion is absurd.

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Defendant's test must also be denied due to the proposed last element of its suggested test: "whether the innkeeper's security officer's complied with its own policies and procedures when responding to the third-party criminal act." *See* Defendant's Answering Brief at 23:21-26. This is an irresponsible proposition, as there is absolutely no way of knowing that every innkeeper's policies and procedures are legal and safe for patrons. If Defendant's test were accepted by this Court, innkeepers would escape liability so long as *any* policy or procedure was in place, and its security follows those policy and procedures. Innkeepers with risky policies in place will undoubtedly have a dangerous effect on patrons. Again, as a matter of public policy, Defendant's proposed suggestion for defining "basic minimum precautions" must be denied.

Moreover, Defendant proposes this test and bases its arguments on its own proposition. Defendant should not be able to rewrite law solely to its own benefit. Defendant is acting as legislature and judiciary without having been elected or appointed in either capacity. Defendant's proposed test for defining "basic minimum precautions" must be denied, and basic minimum precautions must continue to be evaluated on a case-by-case basis.

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## VI. DEFENDANT ADDRESSES A SUPERSEDING CAUSE THEORY IN ITS REPLY BRIEF THAT IS NOT EVEN ADDRESSED IN THE COURT'S UNDERLYING ORDER

Despite the District Court never ruling on the issue in the underlying order, Defendant states, "[a]s 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." *See* Defendant's Answering Brief at 24:22-24. Defendant then states that "the intervening criminal assault of Ferrell severs any causal connection between the alleged conditions and the injuries resulted therefrom." Id. at 26:24-27.

Amazingly, the Defendant makes the above arguments without even addressing the fact that this Honorable Court very clearly **previously adjudicated and denied** Defendant's arguments for redress because of an alleged superseding cause and the Defendant should again be immediately denied their proverbial second bite at the apple. In Humphries v. Eighth Jud. Dist. Ct.,129 Nev. Adv. Op. 85, 312 P.3d 484, 489 (2013) this Court held:

> If New York-New York impleads Ferrell as a third-party defendant, the district court should apply those provisions of NRS 41.141 that are applicable to the action. NRS 41.141(1) and (2)(a) require that the plaintiffs fault not be greater than the defendant's. Humphries and Rocha cannot recover against New York-New York if their percentage of fault is greater than New York-New York's, even if their percentage of fault is less than New York-New York's and Ferrell's combined percentages of fault. NRS 41.141(2)(a).

As outlined and ruled upon above, the issues of the whether the subsequent negligence of a third party should be determined on the basis of traditional proximate cause analysis and comparative negligence under NRS 41.141 should be allowed to go forward are more suited to a jury. Id.

There were prior attacks to patrons on the Defendant's premises and 2-3 per week on the casino floor alone. Similarly, it was foreseeable that employing only three security guards to patrol 85,000 square feet of often crowded, public area had created and continued to create opportunities for patron-on-patron violence due to a lack of patrol presence and adequate security. The Plaintiffs were patrons at the casino and when attacked security responded and stood back and watched the Plaintiffs be beaten. 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. Given all of the above, the granting of summary judgment in favor of the Defendant and denying the Plaintiffs their ability to present their case to a jury was improper, unjust and wrong.

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## CONCLUSION

WHEREFORE, the District Court improperly disregarded evidence of prior fights and attacks on the Defendant's premises and misapplied the standards and tests from this Honorable Court's ruling in Estate of Smith v. Mahoney's Silver Nugget, Inc., 265 P.3d 690 (Nev. 2011). Thus, Plaintiffs' respectfully request this Honorable 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 4 day of May, 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 3,502 words in compliance with NRAP 32(a)(7)(a)(ii).

DATED this 4 day of May, 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 4 May, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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