IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 65316

CAREY HUMPHRIES, AN INDIVIDUAL; AND LORENZA ROCHA III, AN INDIVIDUAL

Appellants,

v.

NEW YORK-NEW YORK HOTEL & CASINO, A NEVADA LIMITED LIABILITY COMPANY, D/B/A NEW YORK-NEW YORK HOTEL & CASINO,

Respondent,

RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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I. INTRODUCTION

Respondent New York – New York Hotel & Casino ("NYNY") petitions for rehearing en banc following the Panel's 2-1 refusal to rehear this matter. This case presents substantial precedential and public policy issues concerning the State's largest industry's potential liability for the criminal actions of others. The Panel's current opinion presents significant policy implications beyond just these litigants.

The Nevada Legislature has specified that Nevada innkeepers are not to be deemed insurers for the acts of third parties occurring on their premises. The Legislature recognized the simple fact that Nevada's hotels and casinos attract and cater to wide swaths of the public, and some of those members of the public may very well commit criminal acts. But, the Legislature does not want innkeepers facing liability unless those criminal acts were truly foreseeable as opposed to the ordinary acts of a free society. Broadly speaking, all crime can be characterized as "foreseeable" by virtue of the fact that crime occurs. There simply is no hotel and casino in this State that has not experienced fisticuffs or other disputes amongst patrons on their premises.

But when a person seeks to hold an innkeeper responsible for another's criminal conduct, Nevada law (at least until now) has required courts to determine whether the specific criminal acts were foreseeable given the particular facts of the case. Succinctly, Nevada courts have previously refused to view criminal acts at

hotels and casinos at a high level of generality. But, the Panel's opinion diverts from that goal, failing to account for the particular facts here in concluding the sudden patron-on-patron fight (instigated - if not provoked - by the plaintiff) was foreseeable, and thus establishing a duty for the innkeeper as a matter of law.

The Panel's decision faults the district court for what the majority says was its failure to conduct the proper analysis under NRS 651.015(3). They say the district court failed to consider NRS 651.015(3)(b), pertaining to prior incidents of similar wrongful acts. But rather than remand for further determination, the Panel majority concluded that NYNY owed a duty as a matter of law to Appellants Carey Humphries ("Humphries") and Lorenza Rocha III ("Rocha") because "the battery against Humphries and Rocha was foreseeable based on NYNY's notice or knowledge of prior incidents of similar wrongful acts that occurred on the premises" under NRS 651.015(3)(b). *See* Decision at 11. As the Panel dissent recognized, the majority departed from prior precedent as well as the Legislature's directives, because at such a general level, all future incidents are "foreseeable."

The Panel's decision departs from the statutory language, the Legislature's policy choices and the Court's precedents. If permitted to stand, it marks a material change that imposes a heightened duty upon hotel and casino operators in the State to predict and prevent patron-on-patron fights erupting without forewarning due to the occasional unrelated past disputes occurring on the premise.

According to the Panel's opinion, "prior incidents of similar wrongful acts" occurring on the premise *conclusively* establishes foreseeability, and thus a duty, as a matter of law. This approach eviscerates both the statute's terms and the Legislature's policy choices. Specifically, NRS 651.015(3) says that "a wrongful act is *not foreseeable unless*" the innkeeper failed to exercise due care or it has notice of knowledge of prior incidents of similar wrongful acts occurring on the premise. The statute thus requires at least one of two threshold requirements to be satisfied for a finding that a criminal act was foreseeable, but it expressly does not provide that satisfying either of these requirements conclusively establishes foreseeability as a matter of law. While the absence of either precludes a finding of foreseeability, it does not follow that the presence of either automatically establishes foreseeability, as the Panel majority now provides.

The Panel's decision focused solely on one predictor of foreseeability. To the extent the district court erred in failing to consider prior incidents of similar wrongful acts, the Panel should have remanded to the district court for determination whether the criminal misconduct of the third party in ***this*** case was foreseeable when considering these prior incidents of similar wrongful acts together with all other circumstances of the incident. Respectfully, the Panel's decision that NYNY owed a duty as a matter of law based solely on a few attenuated prior incidents between patrons warrants rehearing by the full Court, as it departs from prior precedent and

renders innkeepers as insurers against unrelated patron altercations – even those based on provocation – simply because other unrelated patron-on-patron disputes have occurred in the past.

II. REASONS EN BANC REHEARING SHOULD BE GRANTED

The Panel's zero-sum "either/or" foreseeability test is contrary to the Legislature's explicit directive. It effectively eviscerates the Legislature's explicit requirements for an innkeeper to be held responsible for a third parties' criminal acts. The predicate for the Panel's decision centers upon its determination that under the "plain language" of NRS 651.015(3) a duty can be imposed under either subsection (a) - pertaining to the failure to exercise due care - or subsection (b) – pertaining to prior similar wrongful acts. *See* Decision at 8. This approach conflicts with both the explicit terms of the Legislature's enactment as well as the public policy choices made by the Legislature.

As this Court has previously announced relative to NRS 651.015, the "Legislature set forth the applicable standard for assessing whether an innkeeper is liable for the acts of a third party." *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 859, 265 P.3d 688, 691 (2011). The initial inquiry is whether a duty exist. *Id*. This inquiry is made "by the district court as a matter of law." *Id*. Whether a duty of care is owed depends upon whether "the wrongful act which caused the death or injury was foreseeable." *Id*.

But the Legislature was not silent as to what "foreseeability" means in this context. As NRS 651.015(3) says, "a wrongful act is *not foreseeable unless*:"

> (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) (emphasis added). Yet, the Panel's holding – that a wrongful act is foreseeable if either subsection (a) or (b) of NRS 651.015(3) occurs – undermines that Legislature's directive. The Legislature did not state that all wrongful acts of third parties are foreseeable if either (a) or (b) of the statute is satisfied. Instead, it specified that such acts are "*not* foreseeable *unless"* either (a) or (b) occurs. The Legislature couched the statutory language in terms of setting two threshold requirements for foreseeability to possibly exist. It did not provide that foreseeability automatically follows if either of the prerequisites of NRS 651.015(3) are found to exist. The Legislature did not impose a duty if either occurred. It simply said that as a matter of law, no duty can exist ***unless*** (a) or (b) are present.

The Legislature's directive – that a duty cannot exist under the law unless certain prerequisites occur – is not the same as stating a duty automatically exists if they are present. After all, stating that a figure is not a square unless it has four sides does not mean every figure with four sides is therefore a square. If the Legislature sought to automatically impose a duty upon a finding of either (a) or (b) under NRS 651.015(3), then it would written the statute differently. Specifically, it would have

stricken "not" and replaced "unless" with "if." *See* NRS 651.015(3) ("a wrongful act is not foreseeable unless," as opposed to "a wrongful act is foreseeable if."). The Legislature imposed no such standard and the Panel's opinion conflicts with and rewrites the statute's actual terms.

That reality is underscored by not just the statutory language, but also the public policy articulated by the Legislature, including its explicit expression of legislative intent. *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003); *see also McKay v. Board of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986) ("The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute.").

Nothing within the legislative history indicates NRS 651.015(3) is intended to handcuff a district court's determination of a duty into an either/or straitjacket of foreseeability. Instead, as this Court's decision in *Estate of Smith* tells us "[a]lthough an innkeeper cannot guarantee the safety of guests, the Legislature recognized that certain minimum precautions are necessary and concluded that a judge should be given *broad leeway in evaluating foreseeability on a case-by-case basis*." *Estate of Smith*, 127 Nev. at 860, 265 P.3d at 692 (emphasis added).

For these reasons, the Court concluded in *Estate of Smith* that "NRS 651.015(3) allows a judge to evaluate evidence of prior incidents of similar wrongful acts or any other circumstances related to the exercise of due care when imposing [or not

imposing] a duty under NRS 651.015(2)." *Id*. (quotations omitted). But the Panel's decision now holds if either prior incidents of similar wrongful acts or if the owner fails to exercise due care is present, foreseeability, and thus a duty, is affirmatively proven as a matter of law; thereby eviscerating the *Estate of Smith* standard. Respectfully, such an interpretation is contrary to what the Legislature provided.

The legislative history of NRS 651.015 highlights the concern about creating legal uncertainty for innkeepers as to the wrongful acts of third parties. Hearing on S.B. 474 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 18, 1995). Enactment of the statute neither sought absolute immunity or liability for innkeepers. Rather, it is intended to preclude courts and juries from converting innkeepers into insurers for any injuries that occur on the premises, even though caused by the wrongful conduct of others. But the effect of the Panel's decision is to create such liability. Indeed, if the opinion stands it would result in a finding of a duty any time there is evidence of "prior incidents of similar wrongful acts," on the property, regardless of any other facts or circumstances. As Justice Pickering noted in the dissent, "it is hard to imagine a casino floor fight case in which foreseeability will not be deemed established as a matter of law." *See* Justice Pickering's Dissent, at 2.

The dissent's observation is presently what the Legislature opposed. It is doubtful there exists a hotel and casino operator in this State that has not experienced patron-on-patron conflicts or is entirely crime-free. Broadly speaking, disputes

between patrons at any hotel and casino are always somewhat "foreseeable" because they have occurred in the past. And they probably occur on a daily basis in hotels throughout the State. However, the actual test of foreseeability must be assessed in light of the particular facts of the case, not sweeping generalities. Yet, the Panel's analysis focusing only on "prior incidents of similar wrongful acts" fails to account for this reality.

It is not, nor should it be, the law in Nevada that the mere presence of "prior incidents of similar wrongful acts" occurring on the premise conclusively establishes foreseeability. That approach finds no support in the legislative history of NRS 651.015. Instead, the Legislature set forth two alternative minimum requirements needed for foreseeability to even be possible; not conclusively established. If either is present, then they become factors considered by the district court in determining foreseeability, and thus duty, as matter of law. *Estate of Smith*, 127 Nev. at 860, 265 P.3d at 692 (standard is akin to the totality of the circumstances approach).[1]

[1] Moreover, application of the Panel's interpretation leads to unreasonable results. *Harris*, 119 Nev. at 642, 81 P.3d at 534 (The statutory provision should also be interpreted such that its application produces no "absurd or unreasonable results."). For example, the record contains previous patron-on-patron domestic assaults occurring in guest rooms on the premise. Under the Panel's holding, an innkeeper would owe a "duty"—as a matter of law—to a patron involved in a future domestic assault in a hotel room merely because there was prior incidents of domestic assault. This result highlights the failures of the Panel's foreseeability approach.

Yet, the Panel's decision that "the battery against Humphries and Rocha was foreseeable based on NYNY's notice or knowledge of prior incidents of similar wrongful act [that] occurred on the premise" truncates the law's foreseeability analysis. *See* Decision at 11. The foreseeability analysis cannot end there. Instead, the test must take into account all factors of an incident when determining the existence of a legal duty. All these factors are weighed by the district court when determining whether a duty exists which is precisely what the district court did in recognizing that the facts did not support the existence of a duty here.[2]

That approach is consistent with *Estate of Smith*. There, this Court found that the test for foreseeability should also consider whether the circumstances leading up to the incident indicate that the innkeeper should have known of the specific danger and whether the innkeeper took basic minimum precautions reasonably expected to ensure the safety of its patrons. *Estate of Smith*, 127 Nev. at 862, 265 P.3d at 693.[3]

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[2] The question of whether and to what extent a duty is owed to protect from the criminal acts of third parties has been the subject of debate among the courts. However, four basic approaches have emerged to determine foreseeability in this context: (1) the specific harm test, (2) the prior similar incidents test, (3) the totality of the circumstances test, and (4) the balancing test. *See generally Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999). Notably, California has shifted from a totality of the circumstances test to the balancing test. *See Ann M. v. Pac. Plaza Shopping Ctr.*, 6 Cal. 4th 666, 679, 863 P.2d 207, 215 (1993).

[3] The basic minimum precautions reasonably expected to ensure the safety of patrons involves a court determining whether the protective measures needed to prevent the incident would have been economically feasible. *Seibert v. Vic Regnier*

Under NRS 651.015(3) "a wrongful act is not foreseeable unless," either an innkeeper fails to exercise due care or has notice of knowledge of prior incidents of similar wrongful acts. Yet, if either is present, then the district court should weigh all factors to determine whether as a matter of law the wrongful act was foreseeable in light of particular facts of the case. Under this approach, the district court may conclude that when the prior incidents of wrongful acts are nebulous at best, as in this case, the other relevant factors dictate that the wrongful act was unforeseeable.

For these reasons, as well as the dissent's points, the Panel's approach should be set aside. At best, the case should be remanded to the district court for further consideration of whether NYNY owed Humphries and Rocha a duty as a matter of law. The generic presence of "prior incidents of similar wrongful acts" should not, by itself, conclusively establish foreseeability. The Panel's approach suffers from the same criticism the majority asserts led to the district court's error. Accordingly, en banc rehearing of the Court's decision is warranted to resolve an uncertainty in Nevada law created by this decision.

Builders, Inc., 856 P.2d 1332, 1339 (Kan. 1993). For example, in *Rogers v. Jones*, 56 Cal. App. 3d 346, 128 Cal. Rptr. 404 (Ct. App. 1976) the court declined to impose a duty on a football stadium parking lot operator to prevent a sudden attack by one fan on another because the measures needed to prevent the incident would have necessitated one guard being provided for every fan. *Rogers*, 56 Cal. App. 2d at 352 ("Such precautionary measures would be totally unreasonable and beyond the requirements of ordinary care.").

III. CONCLUSION

The Court should grant rehearing en banc. This case presents substantial precedential and public policy issues with significant impact beyond just these litigants. The Panel's decision also runs contrary to the Court's precedent and now imposes a near strict liability for owners and operators of this State's largest industry for the criminal misconduct of others. Clarity should be provided to all on this important issue.

DATED this 19th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

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Finally, I hereby certify to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this 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.

DATED this 19th day of January, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 19th day of January, 2018, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION** properly addressed to the following:

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