IN THE SUPREME COURT OF THE STATE OF NEVADA

*** * * * ***

CAREY HUMPHRIES; AND LORENZO ROCHA, III, Appellants, vs. NEW YORK-NEW YORK HOTEL & CASINO, Respondent.	S.C. CASE NO. 65316

APPELLANTS' ANSWER TO RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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I. INTRODUCTION

Criminal activity has serious consequences for the victims, our community, and the overall reputation of Las Vegas and the State of Nevada. Although Respondent New York-New York Hotel & Casino ("NYNY") suggests we should simply be resigned to the fact that "crime happens," crime should nonetheless be deterred through every legal mechanism possible to keep our community safe. Based on the voluminous evidence provided to this Court, NYNY absolutely knew there were numerous prior incidents involving assaults and batteries close to or at the site of the subject incident, thus they had notice and foreseeability under the statute. NYNY also had a duty to the Appellants to keep them safe. Based on NYNY's inactions prior to breaking up the fight and Appellants' apparent injuries after the subject incident, they breached this duty. NYNY's argument that "crime happens" and their staunch defense that innkeepers should not be liable for the criminal acts of third-parties further negates their responsibilities under NRS 651.015 as an innkeeper to the general public.

NYNY states in its petition that "Broadly speaking, all crime can be characterized as "foreseeable" by virtue of the fact that crime occurs." Pet. at 1. However, under NRS 651.015 the opposite is actually true. The Legislature enacted NRS 651.015 to create a statutory framework governing hotel liability for injuries caused by unlawful acts of third parties. NRS 651.015 grants extremely broad

protection to hotel and resort operators by codifying a rule that such unlawful acts are presumed to be ***unforeseeable***, and an injured patron must establish otherwise. NYNY even concedes that NRS 651.015 does not provide absolute immunity to innkeepers. As such, the otherwise blanket protection given to innkeepers under the statute is limited by the two express exceptions set forth in NRS 651.015(3) which define acts that are foreseeable for purposes of the statute.

Under NRS 651.015(2), the Legislature expressly vested the courts with the authority to determine foreseeability and duty as a matter of law. Consistent with this statutory framework, the Panel analyzed the facts of this case, and the majority determined that the assault and battery against Appellants was foreseeable based on NYNY's notice of prior, similar wrongful acts on its premises, and found that NYNY had a duty to Appellants as a matter of law. *See Humphries v. New York-New York Hotel & Casino*, 403 P.3d 358, 363 (Nev. 2017). Because this Court correctly analyzed NRS 651.015 with the Legislature's original intent in mind, NYNY's petition for rehearing en banc should be swiftly denied.

The majority of the Panel reversed the district court's decision that NYNY had no duty to Appellants because the wrongdoing was unforeseeable. In doing so, the Panel found the district court's foreseeability analysis under NRS 651.015(3)(a) was overly restrictive because it focused on the spontaneity of the subject assault, and looked only at notice that a specific individual would engage in a specific act.

The Panel further found that the district court failed to even consider NRS 651.015(3)(b), and ignored an extensive record of similar, unlawful acts that had occurred on NYNY's premises. *Id.* at 361-362.

Although NYNY clearly disagrees with the majority's decision in this case, the Panel did not depart from any statutory language, and did not subject innkeepers to any "heightened duty" as NYNY suggests. To the contrary, NYNY now asks this Court en banc to ignore the plain language of NRS 651.015(3), and to impose an additional requirement on Appellants to establish the third-party wrongdoing was foreseeable as a matter of law – regardless of whether Appellants already satisfied the exceptions in NRS 651.015(3).

In its petition, NYNY argues, for the first time, that the Panel misinterpreted NRS 651.015(3). NYNY argues, with no legal support, that NRS 651.015(3) is not the test for determining foreseeability, and that satisfaction of one or both of the express exceptions in NRS 651.015(3) only results in a "threshold" showing of *possible* foreseeability. NYNY maintains that even though a majority of the Panel found that Appellants fully satisfied NRS 651.015(3), the statute requires some additional showing to establish foreseeability as a matter of law. Further, and despite this Court's de novo review and findings of duty and foreseeability, NYNY now argues that this Court should not have made any findings on duty and causation at all, but should leave that analysis to the district court.

In addition to being untimely raised, NYNY's arguments are simply incorrect. NYNY's proposed interpretation contradicts the plain meaning of NRS 651.015(3), and this Court's prior interpretation of the statute which carves out two express exceptions to the rule that third-party wrongdoing is unforeseeable. Should this Court entertain this new argument - or ultimately accept it – NYNY's argument lacks merit and should be rejected. Through its de novo review, the Panel followed the statutory framework, considered the totality of the facts, and considered the extensive (and largely undisputed) evidence of prior, similar incidents on NYNY's premises before concluding that the assault was foreseeable, and that NYNY had a duty to Appellants. Accordingly, even if this Court agrees that Appellants had to do something more than satisfy the express exceptions of NRS 651.015(3) to establish foreseeability, which it should not, the findings of foreseeability and duty in this case are fully supported by the record, and the petition should be denied.[1]

II. LEGAL ARGUMENT

A. NYNY's New Statutory Construction Argument Lacks Merit and is Not an Appropriate Basis to Grant a Petition for Rehearing.

NYNY's request for en banc reconsideration of the Panel's majority decision should be swiftly denied. First, this Court should not consider NYNY's new

[1] On October 5, 2017, this Court ruled 2-1, reversing and remanding the district court's final ruling. Respondent's filed their Petition for Rehearing on November 7, 2017, essentially requesting an appeal of the October 5, 2017 ruling in front of the en banc court. Appellants' filed their Answer to Respondent's Petition for Rehearing on December 19, 2017. This Court denied Respondent's Petition on January 4, 2018.

statutory construction argument as it lacks merit. This Court has repeatedly held that questions raised for the first time on petition for rehearing will not be considered. *Chadbourne v. Hanchett*, 35 Nev. 319, 323, 133 P. 936, 937 (1912). Notably, the appeal in the instant case focused entirely on the proper interpretation and application of NRS 651.015, specifically, subsection three (3). Indeed, Appellants specifically argued that NRS 651.015(3) provided the definition of "foreseeable" for purposes of the Court's determination of duty. *See* Opening Brief at 12:11-15. As discussed below, this Court previously adopted such a definition in *Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. 855 (2011).

Prior to Respondent's original petition for rehearing, NYNY never challenged Appellants' interpretation of the statute, and never argued that Appellants' satisfaction of either NRS 651.015(3)(a) or (b), or both, would not be sufficient to establish foreseeability as a matter of law. NYNY certainly never argued that NRS 651.015(3) was only intended to be a "threshold" indicator of "possible" foreseeability, and that Appellants would still be required to satisfy some additional, unspecified burden to establish foreseeability. NYNY provides no explanation as to why it did not previously advance this argument prior to the Panel's de novo review, and as such, NYNY should not be permitted to raise the argument now in a petition for rehearing.

/ / /

B. <u>Rehearing is Not Warranted Because NYNY's Proposed Interpretation Contradicts the Plain Language of NRS 651.015 and Should Not Be Adopted by This Court.</u>

Even if this Court elects to consider NYNY's new argument, which it should not, their argument should be rejected as it incorrectly interprets the statute in question. Words in a statute should be given their plain meaning unless this violates the spirit of the act. *Application of Filippini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949). Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

When enacting NRS 651.015, the Legislature specifically directed courts to determine foreseeability of a wrongful act and innkeeper duty as a matter of law:

> The court shall determine as a matter of law whether the wrongful act was foreseeable and whether the owner or keeper had a duty to take reasonable precautions against the foreseeable wrongful act of the person who caused the death or injury.

NRS 651.015(2)(b).

Because foreseeability of a third-party's wrongdoing is a critical component of the court's analysis, the Legislature provided a definition of foreseeability that effectively defined all third-party acts of wrongdoing as unforeseeable **<u>with two express exceptions</u>**,

> For the purposes of this section, a wrongful act is not foreseeable <u>unless:</u>
>
> (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)(a) and (b).

As such, the Panel looked to NRS 651.015(3), and specifically noted that satisfying either of the two exceptions is sufficient to demonstrate foreseeability, "[f]or purposes of determining duty under NRS 651.015(2)(a), **NRS 651.015(3) provides that an incident may be foreseeable in two distinct ways**…" *Humphries*, 403 P.3d at 361 (emphasis added). The entire Panel (including the dissent) also expressly relied upon *Smith*, wherein this Court previously examined the plain language of NRS 651.015(3), and correctly interpreted it as setting forth the definition of "foreseeable" for purposes of applying the statute:

> **We further conclude that NRS 651.015(3)'s definition of "foreseeable" provides the appropriate framework for conducting this inquiry** in the context of innkeeper liability by codifying the common-law approach that we set forth in *Doud*.

Id., 127 Nev. at 856 (emphasis added).

Based on the plain meaning of the statute, as adopted in *Smith*, a majority of the Panel ruled that the trial court improperly applied NRS 651.015 to the facts of this case because the district court improperly applied NRS 651.015(3)(a) by focusing on the "spontaneous" nature of the attack, and unduly limited its review to notice of specific wrongdoing by a specific individual. The majority held that

nothing in the statute so limited the court's review, but instead the standard set forth in NRS 651.015(3)(a) "is akin to a totality of the circumstances approach." *Id.* at 362. The majority also found that the district court erred by not considering NRS 651.015(3)(b) and numerous similar acts that occurred at NYNY, and noted that an evaluation of foreseeability under NRS 651.015(3), "requires a case-by-case analysis of similar wrongful acts, including, without limitation, the level of violence, location of attack, and security concerns implicated." *Id*. at 360.

NYNY now conveniently argues, for the first time, that NRS 651.015(3) is not the test for foreseeability. NYNY claims that the test in NRS 651.015(3) is only conclusive as to whether third-party wrongdoing is *unforeseeable*, but is not conclusive as to whether the same conduct was *foreseeabl*e. As such, NYNY asks this Court to rule that satisfaction of one of the two express exceptions in NRS 651.015(3) is not enough to establish foreseeability because the "Legislature couched the statutory language in terms of setting two threshold requirements for foreseeability to *possibly* exists." Pet. at p. 5 (emphasis added). NYNY asserts that "while the absence of either of the two threshold requirements [automatically] precludes a finding of foreseeability, it does not follow that the presence of either automatically establishes foreseeability." *Id*. at p. 3. NYNY essentially argues that rehearing en banc is required because the Panel only found Appellants satisfied NRS 651.015(3), but that Appellants must also still satisfy some additional

requirement not expressly described in NRS 651.015(3) to establish foreseeability as a matter of law.

"The construction of a statute is a question of law subject to review de novo." "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." However, when a statute "is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application." In construing an ambiguous statute, we must give the statute the interpretation that "reason and public policy would indicate the legislature intended." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).

Simply put, an act that is legally "not unforeseeable" is foreseeable. The Legislature clearly intended NRS 651.015(3) to carve out two, distinct exceptions to the general rule that third-party wrongdoing is considered unforeseeable under the statute. Thus, wrongdoing that meets one of the two exceptions is necessarily foreseeable for purposes of the statute. Although Justice Pickering did not believe the evidence presented was sufficient to establish foreseeability, her dissent also interpreted NRS 651.015(3) as providing the definition of foreseeability. *Humphries*, 403 P.3d at 364. As such, all three members of the Panel interpreted the statute the same way. The Panel's unanimous agreement on that point is not surprising because there is nothing in the language of the statute itself, or in the

legislative history, that suggests NRS 651.015(3) was intended to create a gray area with regard to foreseeability in which a court could conclude a third-party's wrongful act satisfies one of these two exceptions to unforeseeability, but then still finds the subject wrongdoing to be unforeseeable anyway.

Allowing a court to rule that wrongdoing that satisfies the exceptions in NRS 651.015(3) can still be unforeseeable would render the exceptions meaningless (or permit courts to ignore the exceptions entirely). Such an interpretation would also defeat the public policy concerns that led the Legislature to include these express exceptions in the statute in the first place. Moreover, nothing in the statute describes or even suggests what additional proof a plaintiff would need to show to establish foreseeability once an exception under the statute is met.

NYNY claims that, "The Panel's zero-sum "either/or" foreseeability test is contrary to the Legislature's explicit directive." Pet. at p.4. However, it is NYNY that is advocating for an interpretation that "eviscerates" two express provisions of the statute. NYNY concedes the statute was never intended to create absolute immunity for innkeepers (Pet. at p.7), yet it now requests this Court adopt an interpretation that effectively eliminates the only two exceptions to immunity. If the Legislature wanted plaintiffs to satisfy additional requirements to establish foreseeability, it could have done so when it drafted the two exceptions in NRS 651.015(3). The Legislature did not do so. Thus, NYNY's argument fails.

NYNY's proposed interpretation of NRS 651.015(3) would essentially re-write the statute to impose requirements not intended or required by the Legislature, would unduly burden plaintiffs suing under the statute, and as such, would be contrary to reason and public policy. As NYNY's new argument regarding statutory interpretation of NRS 651.015(3) contradicts the Legislature's original intent, NYNY's petition should be denied.

C. <u>Rehearing is Not Warranted Because This Court Conducted a Complete Analysis of All the Facts and Evidence Before Concluding NYNY Owed Appellants a Duty under NRS 651.015.</u>

Ultimately, NYNY's petition provides no basis for rehearing en banc because, regardless of whether Appellants were required to do *more* than satisfy the exceptions in NRS 651.015(3) to establish foreseeability, Appellants met that burden here. Consistent with the Legislative directive set forth in NRS 651.015(2), the Panel conducted a complete, de novo review of all the facts and evidence in this case, and a majority concluded that the third-party's wrongdoing was foreseeable, and that NYNY still owed Appellants a duty as a matter of law. As noted above, although Justice Pickering disagreed that the evidence established foreseeability, she otherwise agreed with the interpretation of NRS 651.015(3). NYNY therefore should not be permitted to use its petition for rehearing en banc to request this Court reweigh the evidence, or second guess the majority, in the hopes of a different result.

Nevertheless, the totality of the facts and evidence in this case fully supports

the majority's decision. Throughout their petition, NYNY continues to minimize and misrepresent the record to suggest that the majority based its entire decision on "a few attenuated prior incidents of fights between patrons." Pet. at p. 3. The record, however, establishes numerous prior, similar incidents at NYNY, and demonstrates that the Panel considered much more evidence than just prior incidents in reaching its conclusions.

The majority noted that the district court failed to consider "a year's worth of incident reports detailing on-premises assaults and batteries" at NYNY. *Humphries*, 403 P.3d at 362. The majority also referenced multiple reports of patron-on patron batteries in NYNY nightclubs, and at the Center Bar near where the assault occurred. *Id.* As part of its review, the Panel examined testimony given by NYNY's corporate NRCP 30(b)(6) designee on topics related to "knowledge of security, crime prevention and assaults and batteries" at NYNY. AA Vol. I at 0085. NYNY's corporate designee, who was the Security Manager for NYNY for four years prior to the incident, estimated there were **2-3 fights *per week*** on the NYNY casino floor (where this incident took place). *Humphries*, 403 P.3d at 362. The evidence of 2-3 fights per week on the casino floor came directly from the testimony of the Defendant's designee. The Panel also considered the location of the prior incidents, and the similarity of injuries resulting from the subject incidents. [2]

[2] A detailed discussion of prior incidents at NYNY can be found at pp. 18-20 of Appellants'

In addition to the extensive evidence of prior, similar violent incidents, the Panel also considered evidence regarding NYNY security practices. NYNY's corporate designee testified that he did not know how many patrons would be on the casino floor on a given night, or how much security was needed to keep patrons safe on the 85,000-square foot casino floor. Opening Br. at 6:6-27. As such, NYNY had only three security personnel assigned to the entire casino floor. *Id*. at 6:22-7:4. Such testimony is binding on NYNY, and supports the Panel's findings here. Finally, regarding the actual assault in this case, the majority found it significant that only one security guard initially responded to the assault on Appellants, and the responding guard stood by and watched the attack for 12-15 seconds before intervening. *Humphries*, 403 P.3d at 363.

As part of its review, the Panel also considered *Estate of Smith v. Mahoney's Silver Nugget*, and its prior ruling that "courts should consider…circumstances regarding the basis minimum precautions that are reasonable expected of an innkeeper." 127 Nev. 855 (2011), at 862 (Emphasis added). As is highly relevant here, the *Smith* Court examined the Legislative history for NRS 651.015(3)(b), and cited to the drafter's comment that use of the word "similar" in the statute was

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Opening Brief. Appellants' Reply also outlined specific incidents of "similar" wrongdoing on NYNY's premises. Reply Br. at pp. 2-3 (citing to AA Vol. II, Exhibit H at 0216, 0218, 0219, 0230, 0236, 0240, 0243, 0244 and 0245). The reports produced by NYNY include instances of threats, altercations, hitting, punching, assaulting, shoving and verbal harassment at NYNY. *Id.* at 3:15-19 (citing AA Vol. II at 0205-0251).

"chosen very specifically to allow the judge to have some leeway" when evaluating prior incidents. *Id.* at 861. In *Smith*, the Court found that a deadly shooting inside a casino was unforeseeable because in the five years prior to the incident, there were no prior incidents involving weapons, no serious injuries, and "casino security handled the disturbances by escorting the individuals off the premises while maintaining the safety of customers inside the casino." *Id.* Here, however, Appellants have provided extensive, detailed, and undisputed evidence of similar prior incidents, and established that "a proportional level of violence was involved in the prior wrongful acts on and around NYNY's casino floor." *Humphries*, 403 P.3d at 363.

Ultimately, the record reflects that the Panel meticulously discharged its duty under NRS 651.015(2) by examining all of the facts and evidence related to the subject assault, all the events leading up to it, and the resulting injuries. A majority of the Panel ultimately concluded that "documented prior wrongful acts [at] NYNY involved a similar level of violence," that there were "reports of casino security being punched, attacked, and assaulted on the casino floor," and that other wrongful acts occurred that "also appear to call into question NYNY's staffing and response times." *Id*. Given this in-depth analysis, it is ultimately irrelevant whether Appellants were only required to satisfy the exceptions in NRS 651.015(3), or some additional foreseeability requirement not addressed in the statute (which Appellants

dispute exists). The Panel conducted a complete and thorough NRS 651.015 analysis, and based on the totality of the circumstances, the majority correctly concluded that the assault against Appellants was foreseeable, and that NYNY owed a duty to Appellants.

D. This Court Need Not Defer the District Court to Conduct Another Review of Foreseeability and Duty under NRS 651.015.

Lastly, this Court has the authority to make the final determination of the legal issues presented in the appeal, not the district court. The district court had the initial opportunity to analyze foreseeability and duty under NRS 651.015, and incorrectly assessed the statute. Under *Wood v. Safeway*, this Court properly conducted a de novo review of the district court's ruling, "without deference to the findings of the lower court." 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Further, issues of statutory construction are also reviewed by this Court de novo. *See Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). Accordingly, this Court was free to conduct its own analysis under NRS 651.015(2), without deferring any part of their analysis to the district court.

Additionally, this case has already been before this Court twice for review. The Court previously reversed a different ruling of the district court via a petition for writ relief. *See Humphries vs. New York-New York Hotel and Casino,* 129 Nev. Advance Opinion 85 (2013) (issuing a Writ of Mandamus instructing the district court to vacate a previous order compelling joinder of the intentional tortfeasor by

the Plaintiffs). Given this Court's authority to conduct a de novo review, it would be an inefficient use of judicial resources, and could unduly protract and delay these proceedings, to remand any part of the NRS 651.015 analysis to the district court - especially given the potential prejudice to Appellants if required to obtain a ***third*** round of appellate review. This Court competently reviewed the record, and concluded that foreseeability and duty exist as a matter of law, given the facts of this case, thus, the case should proceed accordingly.

III. CONCLUSION

For the reasons previously stated, the Court should deny NYNY's request for rehearing en banc. This Court's majority decision is correct, and is consistent with the plain meaning of the statute as well as the drafter's original understanding of "similar" criminal activity under NRS 651.015(3). Therefore, this Court should remand this case back to the District Court with instructions to follow its ruling related to foreseeability and duty.

DATED this 5th of April, 2018

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

1. I hereby certify that this petition for rehearing/reconsideration or answer 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:

[X] It has been prepared in a proportionally spaced typeface using Microsoft Word 2017, in 14 point-Times New Roman; or

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionally spaced, has a typeface of 14 points or more and contains 3,878 words; or

[ ] Does not exceed _____ pages.

Finally, I hereby have read this 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 5 day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 9th April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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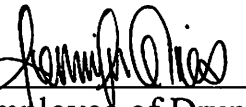

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