Smith v. Mahoney & NRS 651.015
How to Turn Lemons into Lemonade

by Steven M. Baker

It was a tough case, and sad. A seventy-four year old woman was assaulted and robbed by three young heroin–heads in the parking garage of a local casino. She suffered a constellation of orthopedic and other injuries, putting her in the hospital for seven weeks. My firm was associated as co-counsel about a month before trial. It was a busy month.

Shortly before trial, defense counsel brought a "Renewed Motion for Summary Judgment in Light of *Smith v. Mahoney's Silver Nugget". The Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. Ad.Op 76 (November 23, 2011), in conjunction with NRS 651.015, now represents a substantial portion of the controlling authority for negligent security (third party intentional acts on a premises) cases in Nevada. These authorities, and their potential favorable use for the plaintiff, will be discussed below.

NRS 651.015 states as follows:

Civil liability of innkeepers for death or injury of person on premises caused by person who is not employee.

1. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house is not civilly liable for the death or 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.

2. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house is civilly liable for the death or 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 if:

(a) The wrongful act which caused the death or injury was foreseeable; and

(b) The owner or keeper failed to take reasonable precautions against the foreseeable wrongful act.

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.

3. For the purposes of this section, 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.

(Added to NRS by 1995, 2670)

Two aspects of the above statute are immediately notable: 1) section 3(a) of the statute is peculiar as its "due care" component" seemingly merges a breach concept into a duty (foreseeability) analysis; and 2) section 2(b) creates a "gatekeeper" role in the trial judge with respect to this foreseeability/due care chimera, when

continued on page 9

Continued from page 7

breach is an element typically reserved for the determination of the jury.

In *The Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 265 P.3d 688, 127 Nev. Adv. Op. 76 (2011), the Nevada Supreme Court recognized the aforesaid counterintuitive and ambiguous nature of said statute (one created as a result of the legislature's apparent misinterpretation of *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796 (1993) coupled with an attempt to codify the traditional rule requiring prior similar circumstances to establish a duty). In order to resolve said ambiguity, the Nevada Supreme Court turned to legislative history for guidance regarding NRS 651.015(3)(a)'s proper interpretation. The Court held:

> However, as discussed in *Doud*, proof of prior incidents of similar wrongful acts are sufficient, but not always necessary, for establishing the existence of a duty. The legislative history of NRS 651.015(3)(a) likewise indicates that the circumstances surrounding the commission of a wrongful act may provide the requisite foreseeability for imposing a duty even where no prior incidents of similar wrongful conduct have occurred on the premises. *Smith v. Mahoney* at 6.

The Court, however, then went on to note: "After carefully reviewing the record, it is apparent the Silver Nugget took basic minimum precautions to ensure the safety of its patrons." *Id.*

In our case (which I assume is not unique), defense counsel speciously used the *Smith* decision to propose a standard as a basis for Summary Judgment in these matters as follows: in the absence of any prior similar circumstances, if any minimum safety precautions were taken by the premises, a crime is not foreseeable and, therefore, no duty is owed as a matter of law. Misusing such a standard, future defendants will likely also argue that without prior instances and when there is any security, Summary Judgment against the plaintiff must be granted by the judge.

While initially frightening, defendant's argument misconstrues *Smith* and ignores the court's adoption of a "totality of circumstances" standard as set forth in *Doud, supra.*

If you are lucky, it seems, and allow the defendant to fall on their own sword, you can use *Smith* and NRS 651.015 to turn lemons into lemonade.

Further, defendant's Motion for Summary Judgment is a true double-edged sword because, it should be argued, such motions are considered under the long established standard that all facts must be considered in the light most favorable to the non-moving party. *Citations omitted.* As such, in our case, we did not bring a counter-motion for Summary Judgment (fearing a wash) but, rather, argued that the facts in our case, under a totality of circumstances test, in the most favorable light to us, required the judge to find foreseeability as a matter of law in plaintiff's favor. The judge agreed. We then moved to strike all of defendant's expert opinions regarding foreseeability as not relevant in light of the court's ruling, which was also granted. The next challenge was jury instructions, but we'll save that for another day.

Despite all the ambiguities, uncertainties, and industry-slanted legislation, the jury actually awarded one-third more than we boarded. If you are lucky, it seems, and allow the defendant to fall on their own sword, you can use *Smith* and NRS 651.015 to turn lemons into lemonade.

Steven Baker is a highly experienced civil attorney who has spent his entire career representing injury victims. He is a partner at Benson, Bertoldo, Baker & Carter and lives in Las Vegas with his wife and daughter.