

State of New Hampshire
Supreme Court

NO. 2011-0859

2012 TERM

DECEMBER SESSION

State of New Hampshire

v.

Priscilla Protasowicki

RULE 7 APPEAL OF FINAL DECISION OF
CONWAY DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT PRISCILLA PROTASOWICKI

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QUESTION PRESENTED

Was Priscilla Protasowicki unlawfully found guilty of simple assault when she properly invoked the innkeeper-ejection defense pursuant to RSA 353:3-c, I and RSA 353:3-c, II, and the state failed to disprove the elements of the defense beyond a reasonable doubt?

Preserved: MOTION TO DISMISS AND/OR MOVE TO MISTRIAL (May 12, 2011), *Appx.* at 28 & 29-30 (handwritten and typed copy); *Trn* at 3-4.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Priscilla Protasowicki works with her parents at the Covered Bridge Inn, which they own, in Jackson, New Hampshire. *Trn.* at 35.¹ At around 8:00AM while staffing the hotel desk, she got a call from Jean Stewart who, with her husband Christopher, was driving from their home on Cape Cod to Jackson for a weekend of skiing at Cranmore Mountain. *Trn* at 5-7, 9, 17.

The Stewarts had reviewed the hotel's website and booked their room through Expedia.com, and knew the earliest check-in time at the Covered Bridge Inn was 2:00PM. *Trn.* at 6, 18, 35. On March 19, 2011, Ms. Stewart was calling to see if they could have their room early, hoping to change into their ski gear at the inn rather than at the mountain. She estimated they would arrive around 1:00PM, which Ms. Protasowicki told Ms. Stewart the hotel would try to accommodate. *Trn.* at 7, 9, 18, 23, 29.

The Stewarts showed up at 12:30 or 12:40, even earlier than expected. *Trn.* at 7, 18, 23, 29, 35. They filled out the statutory registration card, RSA 353:3, and consummated the transaction they had begun with the on-line booking. *Trn.* at 7; REGISTRATION CARD (Mar. 19, 2011) (showing balance of bill paid), *Appx.* at 23.

At the check-in desk, the Stewarts made two queries the hotel had difficulty accommodating. *Trn.* at 9, 19. First, the Stewarts asked about the hot tub, and were disappointed it was out of service and would not be available *après-ski*. *Trn.* at 7, 20. Second, the Stewarts wanted to peek around to ensure their room had a satisfactory balcony view of the brook and bridge of the hotel's namesake. *Trn.* at 9, 19-20, 24, 35, 37. Unfortunately housekeeping had not finished cleaning so early before standard 2:00PM check-in time, and there was no other way to glimpse the views. *Trn.* at 9, 19, 24-25, 35, 37. Ms. Protasowicki father explained they were:

¹There are two transcripts associated with this case. The trial transcript is cited herein as *Trn.* The sentencing transcript is cited as *Sent. Trn.* Documents associated with the case are added to this brief and are cited as *appx.*

snowed in and the river is snowed in and it's mid-winter and it's the ski season and it's a busy time. And we were occupied at that time. For us to go touring people and showing them a room which was not even ready yet for them ... prior to the 2:00.

Trn. at 37.

The Stewarts understood their deposit was not refundable. *Trn.* at 12, 14, 24; *see also* REGISTRATION CARD (Mar. 19, 2011), *Appx.* at 23 (“deposit is non-refundable,” “early check-outs, for any reason, cannot be refunded”). They nonetheless demanded their money back, which the hotel refused as a violation of its policy as detailed on the registration card. Ms. Stewart called Expedia seeking a way out of the contract. *Trn.* at 11, 20, 29.

The discussion deteriorated. Although the Stewarts perceived Ms. Protasowicki as unpleasant and aggressive, *Trn.* at 8, 10-11, 19-20, Ms. Protasowicki thought the Stewarts were unreasonable and threatening. *Trn.* at 11, 28, 36. Ms. Protasowicki, then 6½ months pregnant, called the police. *Trn.* at 20, 29, 36.

All present agree that at some point, Jean Stewart was outside in her car calling Expedia, *Trn.* at 12, 20-21, Christopher Stewart was in front of the registration desk, *Trn.* at 11, 36, Priscilla Protasowicki was at her post behind it, and Ms. Protasowicki's parents emerged into the lobby. *Trn.* at 29, 36. Ms. Protasowicki was on the phone with Expedia as a result of Ms. Stewart's call, and with the Jackson police at her own initiation. *Trn.* at 21, 29. Ms. Protasowicki's father tried to calm his daughter. *Trn.* at 18.

Mr. Stewart acknowledges that Ms. Protasowicki, her father, or both, told him or shouted to him “get out,” and that Expedia advised him to leave and he was leaving anyway. *Trn.* at 12-13, 15-16, 21-22, 24-25, 28-29, 35-36.

The next episode is disputed. Mr. Stewart says Ms. Protasowicki “came up behind me and actually grabbed on to my back aggressively and started to push me out.” *Trn.* at 12; *Trn.* at 13. Ms. Stewart, who was sitting in her car outside, although it is not clear whether she saw physical contact, corroborated that Mr. Stewart appears to have been “pushed and shoved through the door.” *Trn.*

at 21-22, 24, 26. Ms. Protasowicki maintains she did not make any physical contact, but that she merely “opened the door and urged him out.” *Trn.* at 29, 43. Her father testified he physically interceded, thereby preventing any actual contact. *Trn.* at 36. In any event, Mr. Stewart said the touching was not violent:

I was not bruised or anything or did not make any impact with the structure. I wasn't pushed down, but I ... did not ask to be pushed out like that.

Trn. at 12-13.

The Stewarts then got in their car and drove off. *Trn.* at 22. They went to the Jackson Police station but found it closed. With the assistance of a local business they located the police, *Trn.* at 22, who later went to the Covered Bridge Inn, where Ms. Protasowicki gave them a statement. *Trn.* at 28; POLICE REPORT (Mar. 19, 2011), *Appx.* at 24. The police got an arrest warrant, and Ms. Protasowicki turned herself in. *Trn.* at 30.

Ms. Protasowicki was charged with class-B misdemeanor simple assault. COMPLAINT (Mar. 30, 2011), *Appx.* at 26. Long before trial by written pleading Ms. Protasowicki raised the innkeeper-ejection defense pursuant to RSA 353:3-c, I and RSA 353:3-c, II. *See* MOTION TO DISMISS AND/OR MOVE TO MISTRIAL (May 12, 2011), *Appx.* at 28 & 29-30 (handwritten and typed copy). On August 31, 2011, the Conway District Court (*Pamela D. Albee, J.*), conducted a bench trial. It held the innkeeper-ejection statute did not apply, *Trn.* at 41, and found Ms. Protasowicki guilty. *Trn.* at 43. On November 23, 2011 the court sentenced her to a fine of \$500, to be suspended upon completion of a mental health and anger-management evaluation, compliance with recommendations of the evaluation, good behavior, no contact with the Stewarts, and payment of \$350 restitution. *Sent. Trn.* at 6; COMPLAINT (Mar. 30, 2011), *Appx.* at 26, 27. Ms. Protasowicki appealed.

SUMMARY OF ARGUMENT

Priscilla Protasowicki first discusses the common law of hoteliers, and how New Hampshire's statute, including the innkeeper-ejection defense, fits within the legal scheme. She then shows that the innkeeper-ejection statute authorizes the reasonable use of force to eject unruly or unpaying hotel guests, and that the defense applies in criminal cases. Ms. Protasowicki enumerates the elements of the innkeeper-ejection defense, discusses the State's burden to disprove those elements beyond a reasonable doubt, and points out the State did not attempt to disprove them. While she acknowledges the court may have been entitled to find the bare elements of assault, she concludes that because of the State's failure to address the statutory defense and the court's failure to find them beyond a reasonable doubt, she is guilty of no crime.

ARGUMENT

I. Innkeeper may use Reasonable Force to Remove Unruly or Unpaying Guest

A. Innkeeper Liability at Common Law and Statutory Refinements

“By the common law innkeepers, like common carriers, are insurers of the property of their guests committed to their care, and are liable for its loss, or for injury to it, except when caused by the act of God, the public enemy, or the neglect or fault of the owner or his servants.” *Wagner v. Congress Square Hotel Co.* 98 A. 660, 661 (Me. 1916). This doctrine of *infra hospitium* was the law in New Hampshire. See e.g., *Campbell v. Portsmouth Hotel Co.*, 91 N.H. 390 (1941) (hotel held liable for theft of car and contents); *Sibley v. Aldrich*, 33 N.H. 553, 558 (1856) (“Inn-keepers, like common carriers, are liable by the custom of the realm. The principle on which the liability of an inn-keeper for the loss of the goods of his guest is founded, is, both by the civil and common law, to compel the inn-keeper to take care that no improper person be admitted into his house, and to prevent collusion between him and other persons.”).

This edict is of the greatest usefulness, because it is often necessary to trust seamen, innkeepers, and stable-keepers and to place property in their custody . . . and were it not for this law, the means would be given to them of cooperating with thieves against those whom they have accepted as guests, since even now they do not refrain from fraudulent activities of this kind.

Frederick B. Jonassen, J.D., Ph.D., *The Law and the Host of the Canterbury Tales*, 43 J. MARSHALL L. REV. 51, 68 (2009) (citing the Digest of Justinian, sixth-century compilation of late classical Roman law); David S. Bogen, *The Innkeeper's Tale: The Legal Development of A Public Calling*, 1996 UTAH L. REV. 51 (1996). In the twentieth century, when lodgers get to hotels by cars and planes and no longer travel for days between inns along stage roads, and when there are licencing and regulatory agencies to ensure health and safety, common law duties have become quaint and most (or all) states have adopted statutes altering strict liability.

Thus New Hampshire's hotelier statute details their duties. Its first three sections refine the common law, and limit liability for travelers' baggage from theft and fire damage so long as the hotel

is not negligent, keeps a “suitable safe ... for the safekeeping” of valuables, and posts notices. RSA 353:1; RSA 353:2. A recent amendment added liability limitations for some hotel-referred childcare facilities. RSA 353:2-a.

The statute requires inns to keep a card-register of guests, available to the police, which must contain agreed departure dates and times. RSA 353:3; RSA 353:3-b. It requires posting and signage of rental rates, and penalties for violation. RSA 353:3-a; RSA 353:5. The statute regulates how innkeepers must handle guests’ credit card information, and has penalties for improper use. RSA 353:8; RSA 353:9; RSA 353:10. While the common law today still protects innkeepers against absconding customers via a lien on both “the goods of his guest,” *Cross v. Wilkins*, 43 N.H. 332, 336 (1861), and “his guest’s horse and carriage,” *id.*, the statute adds hotel fraud and criminal penalties.

Both by common law (for the protection of travelers) and the statute (for protection of civil rights), innkeepers must accept all comers without discrimination if the hotel has vacancy – provided they are not underage, RSA 353:3-bb, I(b), I(c), & II (citing RSA 354-A), and they are not “unwilling or unable to pay for accommodations and services of the hotel.” RSA 353:3-bb, I(a). *See also, Morningstar v. Lafayette Hotel Co.*, 105 N.E. 656, 657 (N.Y. 1914) (“An innkeeper is not required to entertain a guest who has refused to pay a lawful charge.”).

B. Innkeeper-Ejection Statute Authorizes Physical Force

The portion of New Hampshire's hotel statute relevant here, roughly a codification of common law, *see e.g., Morningstar*, 105 N.E. at 656, is entitled "ejection of guests."² It provides that innkeepers "may remove or cause to be removed," RSA 353:3-c, I, anyone who is "unwilling or unable to pay." RSA 353:3-c, I (referencing RSA 353:3-bb). The statute also provides the innkeeper may "immediately remove or cause to be immediately removed" any guest who affects quiet enjoyment by actions "including *but not limited to*" disturbing other guests, illegally possessing alcohol or drugs, or violating a posted rule. RSA 353:3-c, II (emphasis added).

Before the innkeeper removes, she must notify the guest they are no longer welcome, request them to leave, RSA 353:3-c, I, and "make[] a reasonable attempt to verbally warn said guest to cease and desist said breach." RSA 353:3-c, II-a. If there is an immediate eviction, the guest gets

²RSA 353:3-c Ejection of Guests. - (included in addendum, *Appx.* at 36)

I. All hotel keepers and all persons keeping public lodging houses or cabins may remove or cause to be removed from such establishment any guest remaining in a rental unit in violation of RSA 353:3-b or RSA 353:3-bb by notifying such guest that the establishment no longer desires to entertain him or her and requesting that the guest immediately leave. Any guest who remains or attempts to remain in a rental unit after being so requested to leave shall be guilty of a violation. For the purpose of this section, the term "rental unit" shall include residential property rented for one month or less.

II. All hotel keepers and persons keeping public lodging houses, cabins, or any rental unit may immediately remove or cause to be immediately removed by any law enforcement officer of this state, any guest who willfully denies other guests their right to quiet enjoyment of their tenancies, including but not limited to any guest who:

- (a) Disturbs, threatens, or endangers other guests;
- (b) Is less than 21 years of age and possesses alcohol;
- (c) Possesses illegal drugs;

(d) Violates any rule of the hotel, lodging house, or campground that is posted in a conspicuous place and manner at the guest registration desk and in each guest room; or

- (e) Violates any local or state law.

II-a. The right to remove, or cause to be removed, shall arise after the hotel keeper or person keeping a public lodging house, or cabin, or their agents makes a reasonable attempt to verbally warn said guest to cease and desist said breach of quiet enjoyment or violation of local or state law. Upon such immediate eviction, the guest shall be refunded the unused portion of his or her pre-paid rental fee less damage charges for his or her actions. For the purpose of this section, the term "rental unit" shall include residential property rented for one month or less.

III. Any law enforcement officer of this state, upon request of a hotel keeper, or person keeping a public lodging house, or cabin, shall place under arrest and take into custody any guest who violates this section in the presence of the officer. Upon arrest, the guest shall be deemed to have abandoned his right of occupancy of the rental unit and the operator of the establishment may then make such unit available to other guests. The operator of said establishment shall employ all reasonable means to protect any personal property left on the premises by such guest.

refunded, but if police get involved in the removal, the guest is deemed to have abandoned. RSA 353:3-c, III.

The statute does not say what actions the innkeeper may take to “remove” a guest, but does clarify that warnings are to be “verbal,” implying that a subsequent removal can be non-verbal. Moreover, the statute gives the innkeeper the right to “remove,” in addition to and as distinguished from “cause to be removed” by the police, and also specifies that an innkeeper may have to “immediately remove” some guests. This suggests physical removal by the innkeeper.

There is no conceptual middle-ground between a verbal warning and a physical removal. *United States v. O'Brien*, 391 U.S. 367 (1968) (discussing distinction between speech and action in context of burning draft card). The statute therefore intends the innkeeper may use physical means if necessary. Moreover, the authority to eject without the possibility of force is no ejection at all. Construing the statute that way would leave it purposeless. *Soraghan v. Mt. Cranmore Ski Resort, Inc.*, 152 N.H. 399, 405 (2005) (court construes statutes to “effectuate the legislative purpose”).

That an innkeeper has the authority to physically eject has been long and widely established.

In *Markham v. Brown*, 8 N.H. 523 (1837), the keeper of a Hanover inn, where coach-drivers normally connected with travelers, tried to keep out an upstart driver competing for the Hanover-Claremont run. This Court noted the common law rule that hoteliers have a duty to accept all travelers without discrimination providing there is room at the inn, although they can exclude some – including those unwilling to pay, known thieves and fighters, vagrants, and anyone with an unlawful purpose. This Court held that the “connection between travelers and those engaged in their conveyance” is so close that the innkeeper’s duty ran to the coach driver as well, provided he contained his solicitation to common areas of the inn and “demeaned himself peaceably.” Important here, the Court noted that a driver “might forfeit this right by his own misconduct, so that the [innkeeper] might require him to depart, and expel him.” *Markham v. Brown*, 8 N.H. at 531 (emphasis added).

Many jurisdictions recognize the authority of innkeepers to physically remove unwanted guests, provided the hotel does not use unreasonable or excessive force. In *Billingsley v. Stockmen's Hotel, Inc.*, 901 P.2d 141, 145 (Nev. 1995), for example, the statute provided that “[e]very owner or keeper of any hotel . . . shall have the right to evict” anyone who violates the terms of the statute. The court held that “evict” means the “proprietor is permitted to use reasonable force to eject” the guest. *Billingsley* particularly informs Ms. Protasowicki’s situation because Nevada’s statutory language is similar to New Hampshire’s, and its Supreme Court equated the terms “eject” and “evict,” saying they both mean the use of reasonable force. All known jurisdictions that have reached the issue concur. *Harkins v. Win Corp.*, 771 A.2d 1025, 1029 (D.C. 2001) (subsequent history omitted) (“[A] transient-accommodation provider may utilize self-help as an alternative means of evicting a nonpaying roomer or lodger.”); *Neely v. Lott Hotels Co.*, 78 N.E.2d 659 (Ill. App. 1948) (“Having failed to pay the daily charge, [the hotel] had the right to eject [the guest] from the premises, using whatever reasonable force was necessary.”); *Holden v. Carraher*, 81 N.E. 261, 262 (Mass. 1907) (innkeeper had authority to “proceed to expel [the guests] by a forcible laying on of hands.”); *Jones v. Shannon*, 175 P. 882 (Mont. 1918) (“[I]f it becomes necessary to perform this duty, the proprietor may enter the room occupied by such a guest and eject him therefrom and from the house, provided, however, he uses no more force than is necessary.”); *Hopp v. Thompson*, 38 N.W.2d 133 (S.D. 1949); *McBride v. Hosey*, 197 S.W.2d 372, 375 (Tex. Civ. App. 1946) (“It is consistently held that when the right to evict, e. g. when a guest is obnoxious for some reason he may be forcibly removed and without resort to legal process, provided no more force is used than is necessary.”).

Because the law is not in dispute, both standard legal encyclopedias recognize innkeepers’ authority to apply reasonable force.

An innkeeper, in exercising the right to remove a guest, must do so in a reasonable and prudent manner and at a proper time. An innkeeper may not resort to force in ejecting a guest or invitee until it becomes necessary by the guest’s refusal to depart on request. Even when force is required, the innkeeper may use no more force than is reasonably necessary to effect the ejection.

40A AM.JUR.2d *Hotels, Motels* § 60. See also, 40A AM.JUR.2d *Hotels, Motels* § 57 (“A provider of transient accommodations may utilize self-help to evict a boarder, and is not required to pursue a judicial possessory action.”); 43A C.J.S. *Inns, Hotels, and Eating Places* § 24 (“An innkeeper may remove a guest for a valid reason without incurring liability therefor if the innkeeper does not employ excessive force or other unlawful means.”); 43A C.J.S. *Inns, Hotels, and Eating Places* § 24 (“Where one or more of the grounds of exclusion exist, an innkeeper may remove a guest from the inn without liability therefor, provided the innkeeper does not employ excessive force or other unlawful means in accomplishing the removal.”).

The amount of force to remove a guest can be substantial. In *Hopp v. Thompson*, the purported guest sued for damages for assault and battery. The South Dakota Supreme Court upheld a jury-verdict for the innkeeper who:

testified that respondent was a stranger to him and was not a guest at the hotel. That when respondent entered the hotel it was about 11 o'clock in the evening which was closing time; that respondent started to go upstairs and as he did so [innkeeper] repeatedly asked him who he was and what he wanted to which respondent made no reply; that [innkeeper] then told respondent to come down and go home; that respondent still refused to go and thereupon [innkeeper] tapped him lightly on the shoulder and told him to get out; that respondent did not leave as ordered and that [innkeeper] told him that [innkeeper] would call an officer; that when [innkeeper] picked up the telephone receiver respondent assaulted him and took the receiver from him. At this time [innkeeper] says he picked up a short piece of pipe, tapped respondent on the shoulder with it and again ordered him to leave and that respondent still refused to go; that a scuffle ensued in which [innkeeper] hit respondent on the shoulder and respondent grabbed [innkeeper] by the neck with both hands; that during this time [innkeeper] struck respondent on the back of the head with the pipe; that the parties were on the floor part of the time; that [innkeeper] called for help, which came, and then the struggle ended. [Innkeeper] contends that he struck respondent only to subdue him and that he used no more force than he thought was necessary for that purpose.

Hopp v. Thompson, 38 N.W.2d 133, 134 (S.D. 1949). In upholding, the court wrote:

The respondent did not enter the hotel as a guest nor with the intention of becoming one and it was his duty to leave peaceably when ordered by the [innkeeper] to do so, and in case of his refusal to leave on request [innkeeper] was entitled to use such force as was reasonably necessary to remove him.

Hopp v. Thompson, 38 N.W.2d at 135. Cf. *Lehnen v. E.J. Hines & Co.*, 127 P. 612, 615 (Kan. 1912)

(where hotel uses unjustifiable force, guest awarded civil damages); *McHugh v. Schlosser*, 28 A. 291, 292 (Pa. 1894) (same).

C. Innkeeper-Ejection Statute Applies in Criminal Context

As shown, the law allows an innkeeper to use reasonable force to eject an unruly or unpaying guest. The citations collected, *supra*, are suits for damages, and there are none known where the hotelier was, as here, criminally charged. But there is no language in New Hampshire's innkeeper-ejection statute limiting it to civil causes, and it would make no sense to remove civil liability from conduct that can still serve as a basis for a criminal conviction – as demonstrated by the dearth of criminal innkeeper-ejection cases.

Accordingly, Ms. Protasowicki cannot be liable when the force she used was no greater than reasonably necessary to urge Mr. Stewart out the door.

II. Elements of Innkeeper-Ejection Defense

The innkeeper-ejection statute indicates the conditions under which innkeepers are authorized to use force. It is presented in four parts.

Section I provides for removal of guests for reasons concerning mostly financial failures, and Section II for reasons concerning mostly misbehavior. Section II-a requires pre-removal warnings and post-removal process. Section III addresses arrest of unruly guests, not relevant here.

Sections I, II, and II-a appear to partially overlap, probably because the statute has been thrice amended since its original enactment in 1981. Ms. Protasowicki invoked the provisions of Sections I *and* II. MOTION TO DISMISS AND/OR MOVE TO MISTRIAL (May 12, 2011), *Appx.* at 28 & 29-30 (handwritten and typed copy).

A. Section I – Ejection for Reasons Concerning Mostly Financial Failures

Section I of the innkeeper-ejection statute applies when a guest has overstayed their departure date, will cause the hotel to be over capacity, or “is unwilling or unable to pay for accommodations and services of the hotel.” RSA 353:3-b; RSA 353:3-bb.³ Ms. Protasowicki invoked the section because, after the Stewarts learned they would be unable to peek at the view, they demanded a refund. Having already consummated their registration by completing the card, they were “guests.” They nonetheless wanted their money back, demonstrating an unwillingness to pay. Ms. Protasowicki complied with Section I by “notifying [the Stewarts] that the establishment no longer desire[d] to entertain [them] and requesting that [they] immediately leave.”

The State suggested below and the court erroneously found that Section I does not apply because the altercation did not occur in a “rental unit.” *Trn.* at 40-41.

Section I authorizes an innkeeper to “remove ... any guest remaining in a rental unit.”

³Both are referenced in Section I of the innkeeper-ejection statute (included in addendum, *Appx.* at 34, 35). RSA 353:3-b Registered Departure Date. -

All hotel keepers and all persons keeping public lodging houses, tourist camps, or cabins shall, upon the registration of each guest, cause an entry to be made in the book or card system required by RSA 353:3 which shall record the guest's agreed upon departure time and date. No guest shall, without the consent of the hotel keeper or such person keeping a public lodging house, tourist camp, or cabin remain in a rental unit beyond the departure time and date so recorded at registration.

RSA 353:3-bb Refusal or Denial of Accommodations. -

I. A hotel keeper, including any person keeping public lodging houses, tourist camps, or cabins, may refuse or deny any accommodations, facilities, or privileges of a hotel, lodging house, or campground to:

(a) Any person who is unwilling or unable to pay for accommodations and services of the hotel, lodging house, or campground. The hotel keeper may require the prospective guest to demonstrate the ability to pay by cash, valid credit card, or a validated check.

(b) Any person under the age of 18 who does not present a signed notification from a parent or legal guardian that the parent or legal guardian accepts liability of the guest room or campground site costs, taxes, all charges by the guest, and any damages to the hotel, lodging house, campground, guest room, or its furnishings or to the campground site caused by the minor guest while at the hotel, lodging house, or campground to the extent that such costs, taxes, damages, or charges exceed the amount of cash or credit card deposit already provided by the guest.

(c) Any person or persons, if admitting that person or those persons would cause the limit on the number of persons who may occupy any particular guest room in the hotel or lodging house or a site in the campground to be exceeded. For purposes of this subparagraph, the limit represents the number permitted by local ordinances or reasonable standards of the hotel, lodging house, or campground relating to health, safety, or sanitation.

II. Nothing in this section authorizes any hotel keeper to violate the state law against discrimination, RSA 354-A.

“Rental unit” is defined in the statute as “residential property rented for one month or less,” which distinguishes guests-and-innkeepers from tenants-and-landlords. *See* RSA 540-A:5, IV (defining “rental unit” in landlord-tenant law). “Residential property” includes the common areas of the hotel for several reasons.

First, New Hampshire’s hotel statute defines “inn or hotel” as “all types of establishments offering accommodations for rent either by the day, week or month, or any portion thereof, including but not limited to hotels, motels, apartment houses, rooming house, inns, boardinghouses, trailer parks, restaurants or camping areas.” RSA 353:7, III. A hotel is an “establishment offering accommodations for rent.” Part of the accommodations hotels rent for enjoyment by their guests are common areas.

Second, common areas are essential to the establishment. Depending upon the hotel, it might have, in addition to a lobby and restrooms, a dining room, gym, horse stables, or a game room. If those amenities are included in the “accommodations for rent,” they are expected by the guests, are among the privileges of the accommodation, and thus essential to the establishment. *See e.g., Locke Lake Colony Ass'n, Inc. v. Town of Barnstead*, 126 N.H. 136 (1985) (common areas, including beach, akin to easements and are for common use and enjoyment of all members).

Third, there is nothing in the law suggesting that the relationship between innkeeper and guest applies only in the guest’s private suite. This Court has explicitly held that the relationship applies to common areas, including stairs, *Pickford v. Abramson*, 84 N.H. 446 (1930); *see also* Annotation, *Liability of Innkeeper for Injury to Guest Using Hall or Similar Passageway*, 27 A.L.R.2d 822, and even to a public highway separating two portions of the inn. *Kellner v. Lowney*, 145 N.H. 195 (2000).

Fourth, limiting the authority to remove only when a guest is in private quarters would mean an innkeeper would be powerless to effect a removal from other parts of the hotel. But an unruly guest may be likely to cause *greater* harm if a disturbance occurs in a common area where others are

likely to be present. *Markham v. Brown*, 8 N.H. 523, 530-31 (1837) (innkeeper’s duty to keep out unwanted persons includes those “common public rooms of the inn, where guests were usually placed to await the departure of the stages”).

Thus the lobby was part of the “rental unit” and thus Ms. Protasowicki was authorized to “remove” them.

B. Section II – Ejection for Reasons Concerning Mostly Misbehavior

Section II of the ejection statute applies when a guest misbehaves by disturbing other guests, illegally possesses alcohol or drugs, or violates any conspicuously posted rule of the hotel. Ms. Protasowicki invoked the section because the rules of the hotel, plainly posted on the registration card said:

“WE PROVIDE LODGING & AMENITIES TO REGISTERED GUESTS ONLY”

and

“EARLY CHECK-OUTS, FOR ANY REASON, CANNOT BE REFUNDED.”

The record may not be conclusive as to the chronology of when the Stewarts made their demands compared with when they signed the registration card – thereby finalizing the transaction and becoming guests. The timing is not material, however. If they demanded to see the room *before* they became guests, they violated the first rule. Since they could only have wanted a refund *after* they paid, they violated the second rule. Rule-breaking in the lobby disturbs the quiet enjoyment of other guests.

Although Ms. Protasowicki neglected to apprise the court of the sign on the registration desk listing the rules of the establishment, the Stewarts acknowledged they were aware of the rules from both the Covered Bridge Inn’s website and from Expedia. Courts are divided over whether actual knowledge of the rule is sufficient to invoke innkeepers’ rights. 40A AM. JUR. 2d *Hotels, Motels* § 153. *See, Shultz v. Wall*, 19 A. 742 (Pa. 1890) (actual knowledge sufficient); *Nesben v. Jackson*, 109 S.E. 489 (W.Va. 1921) (actual knowledge sufficient). *But see, Paraskevaides v. Four Seasons*

Washington, 292 F.3d 886 (D.C.Cir. 2002) (actual knowledge insufficient); *Johnston v. Mobile Hotel Co.*, 167 So. 595 (Ala.App. 1936) (same); *North River Ins. Co. v. Tisch Management, Inc.*, 166 A.2d 169 (N.J. App. Div. 1960) (same).

Even if the Stewarts were not directly breaking the rules or they were insufficiently posted, the statute is not limited to the misbehaviors enumerated. Rather, the statute has an “including but not limited to” clause, meaning that the authorization for removal includes reasons beyond those listed. *In re Carr*, 156 N.H. 498, 504 (2007) (“When the legislature uses the phrase ‘including, but not limited to’ in a statute, the application of that statute is limited to the types of items therein particularized.”). Breaking a contract, demanding an immediate refund, and causing a disturbance thus invokes the statutory removal authority.

Section II-a authorizes an innkeeper to “immediately remove” a guest in these circumstances, provided she “makes a reasonable attempt to verbally warn” the guest. Not only did Ms. Protasowicki provide a warning to leave, but so did Expedia, and thus the innkeeper could properly remove Mr. Stewart from the hotel.

Finally, the Legislature recognized that “immediate” removal is critical because the ability of an innkeeper to stem a situation on the scene is worth more than letting it develop while awaiting the police. Moreover, in rural areas where many New Hampshire tourist hotels are located, official help can be a long way off, as demonstrated here when the Stewarts found the Jackson police station closed.

III. Priscilla Protasowicki is Not Guilty of Any Crime Because the State Did Not Disprove the Elements of the Innkeeper-Ejection Defense Beyond a Reasonable Doubt

A. State's Burden to Negate Elements of Statutory Innkeeper-Ejection Defense

The State must disprove each element of the innkeeper-ejection beyond a reasonable doubt. This is because it is a statutory defense under RSA chapter 627.

It is a justification defense, RSA 627:1, and a public duty defense. RSA 627:2. It is a "true defense" because it "serve[s] to discharge a defendant's liability for conduct that otherwise constitutes a crime." *State v. Soto*, 162 N.H. 708, 714 (2011). It is a statutory use-of-physical-force defense in the criminal code because it is in defense of premises. RSA 627:7.

It is also a statutory use-of-physical-force defense because innkeepers are "persons with special responsibilities," which are defined as:

A person authorized by law to maintain decorum or safety in a vessel, aircraft, vehicle, train or other carrier, or in a place where others are assembled.

RSA 627:6, V. Innkeepers are "authorized by law to maintain decorum ... in a place where others are assembled." See *Kellner v. Lowney*, 145 N.H. 195, 198 (2000) (because "special relationship exists between an innkeeper and a guest," innkeeper liable for injury to guest struck crossing road to hotel event); *Barnes v. New Hampshire Karting Ass'n, Inc.*, 128 N.H. 102, 106 (1986) ("Where the defendant is a common carrier, innkeeper or public utility, or is otherwise charged with a duty of public service, the defendant cannot by contract rid itself of its obligation of reasonable care."). In addition, innkeepers' duties have been repeatedly likened to those of common carriers because certain relationships, including "common carrier/passenger, innkeeper/guest, [and] landowner/invitee" involve "one who is required by law to take or who voluntarily takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection." *Dupont v. Aavid Thermal Technologies, Inc.*, 147 N.H. 706, 710 (2002); *Marquay v. Eno*, 139 N.H. 708 (1995) (quoting Restatement (Second) of Torts § 314A at 118 (1965)); *Berry v. Watchtower Bible & Tract Soc. of New York, Inc.*, 152 N.H. 407, 412-13 (2005) ("Under the Restatement (Second) of Torts §

314A (1965), ‘special relationships’ giving rise to a duty to aid or protect individuals from the criminal acts of others ‘are those of common carrier/passenger, innkeeper/guest, landowner/invitee and one who is required by law to take or who voluntarily takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection.”); *Barnes v. New Hampshire Karting Ass’n, Inc.*, 128 N.H. 102, 106 (1986) (“Where the defendant is a common carrier, innkeeper or public utility, or is otherwise charged with a duty of public service, the defendant cannot by contract rid itself of its obligation of reasonable care.”); *Sibley v. Aldrich*, 33 N.H. 553, 558 (1856) (“Inn-keepers, like common carriers, are liable by the custom of the realm.”); *Bennett v. Dutton*, 10 N.H. 481, 486-87 (1839) (“Like innkeepers, carriers of passengers are not bound to receive all comers. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion.”).

Because the innkeeper-eviction defense is a statutory defense, the State must disprove each of its elements beyond a reasonable doubt.

Our Criminal Code provides that ... any conduct which is justifiable under RSA chapter 627 constitutes a defense to any offense, and when evidence is admitted on a matter declared by this code to be a defense, the state must disprove such defense beyond a reasonable doubt. The legislature has thus determined that ... negating such a defense becomes an element of the offense that the State must prove beyond a reasonable doubt.

State v. Etienne, 163 N.H. 57, 81 (2011) (quoting and citing RSA 627:1) (quotations, citations, and brackets omitted); *State v. McMinn*, 141 N.H. 636, 645 (1997) (“[W]hen evidence of self-defense is admitted, conduct negating the defense becomes an element of the charged offense, which the State must prove beyond a reasonable doubt.”) (citations omitted).

Accordingly, RSA 627:1 and *State v. Etienne* apply here, and negating the innkeeper-ejection defense is an element of the offense the State must prove beyond a reasonable doubt.

B. State May Have Proved Bare Elements of Assault

New Hampshire's criminal code provides that "[a] person is guilty of simple assault if [s]he ... [p]urposely or knowingly causes ... unprivileged physical contact to another." RSA 631:2-a, I(a). "Unprivileged physical contact" means "all physical contact not justified by law or consent." *State v. Burke*, 153 N.H. 361, 364 (2006). The contact can be slight. *United States v. Bayes*, 210 F.3d 64 (1st Cir. 2000) (airline passenger deliberately touched stewardess's buttocks); *Lynch v. Commonwealth*, 109 S.E. 427 (Va. 1921) (defendant told woman he'd like to kiss her and when she refused he touched her shoulder). The touching can be indirect. *State v. Ortega*, 827 P.2d 152 (N.M. Ct.App. 1992) (defendant knocked flashlight from hand of police officer).

For the purposes of this appeal, and given the standard of review, *State v. Spinale*, 156 N.H. 456 (2007), the facts here are sufficient for the court to have found the State satisfied the bare elements of simple assault.

C. State Did not Address Elements of Statutory Defense

No comprehensive list of the elements of the innkeeper-ejection defense is attempted here, because that would have been the State's job at trial. It does appear, at a minimum however, that the State would have had to prove – beyond a reasonable doubt – matters such as: the Stewarts were not in a qualified residential property, were not unwilling to pay, created no risk of affecting the quiet enjoyment of others, and did not violate a posted rule; that Ms. Protasowicki did not provide the Stewarts notification of her desire they leave, did not request them to leave, did not have a valid statutory reason for such desire and request, *and* that she used force beyond reasonably necessary.

The State made no attempt to disprove these matters. The court did not find them disproved beyond a reasonable doubt. *State v. Wentworth*, 118 N.H. 832 (1978). Ms. Protasowicki is not guilty of any crime.

CONCLUSION

Because the innkeeper-ejection defense authorizes the reasonable use of force, Ms. Protasowicki cannot be guilty of assault for minor physical contact while removing a guest. Accordingly, this Court must set aside her conviction.

Respectfully submitted,

Priscilla Protasowicki
By her Attorney,

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Dated: December 12, 2012

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Priscilla Protasowicki requests oral argument because this case poses a novel issue of law, and she requests her Attorney Joshua L. Gordon, be allowed 15 minutes.

I hereby certify that on December 12, 2012, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: December 12, 2012

Joshua L. Gordon, Esq.

ADDENDUM

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