THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0196

Clearview Realty Ventures, LLC v. City of Laconia
Chhavi Hospitality, LLC, et al. v. Town of Conway
JHM Hix Keene, LLC v. City of Keene
VIDHI Hospitality, LLC v. City of Keene
Naksh Hospitality, LLC v. City of Manchester
298 Queen City Hotel, LLC v. City of Manchester
ANSHI Hospitality, LLC v. City of Manchester
700 Elm, LLC v. City of Manchester
Bedford-Carnevale, LLC v. Town of Bedford
Carnevale Holdings, LLC v. Town of Bedford

REPLY BRIEF OF APPELLANTS

Appeal Pursuant to Supreme Court Rule 8 from
Hillsborough County Superior Court North, 211-2021-CV-00181;
212-2021-CV-00123; 213-2021-CV-00125; 213-2021-CV-00126;
216-2021-CV-00554; 216-2021-CV-00555; 216-2021-CV-00556;
216-2021-CV-00557; 216-2021-CV-00558; 216-2021-CV-00559

Attorneys for Appellants

Bernstein, Shur, Sawyer & Nelson, P.A.
Roy W. Tilsley, Jr., Esq., Bar No. 9400
Hilary H. Rheaume, Esq., Bar No. 265510
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
rtilsley@bernsteinshur.com
hrheaume@bernsteinshur.com

August 26, 2022

TABLE OF CONTENTS

ARGUMENT 4

I. THE TRIAL COURT'S DECISION IN *EASOM* IS STILL RELEVANT TO INTERLOCUTORY APPEAL QUESTION NO. 1 4

CONCLUSION 7

STATEMENT OF COMPLIANCE 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases

Easom v. US Well Services, Inc.,
527 F. Supp. 3d 898 (S.D. Tex. 2021) 4, 5, 6

Easom v. US Well Services, Inc.,
37 F.4th 238 (5th Cir. 2022) 4, 5, 6

Statutes

R.S.A. 76:21 ..... 4, 5, 6

ARGUMENT

I. THE TRIAL COURT'S DECISION IN *EASOM* IS STILL RELEVANT TO INTERLOCUTORY APPEAL QUESTION NO. 1.

In their Responding Brief, the Appellees take issue with the Appellants' citation to *Easom v. US Well Services, Inc.*, 527 F. Supp. 3d 898, 909 (S.D. Tex. 2021). (Appellee's Brief at p. 19.) Specifically, the Appellees state that *Easom* was "reversed and remanded by the U.S. Court of Appeals for the Fifth Circuit" and "[c]ontrary to Appellants' argument, in *Easom*, the 5th Circuit explicitly held that the COVID-19 pandemic is ***not*** a natural disaster." (*Id.* (emphasis in original.)) However, the Appellee's attempt to dismiss *Easom* lacks merit.

As a preliminary matter, the Appellants do not dispute that the Fifth Circuit reversed and remanded the trial court decision in *Easom v. U.S. Well Services, Inc.*, 37 F.4th 238 (2022). Notably, the Fifth Circuit's decision was released on June 15, 2022, which immediately preceded the filing of the Appellants' Opening Brief. *See id.* The Appellants' counsel was not aware of the Fifth Circuit decision prior to filing the Appellants' Opening Brief.

In their Opening Brief, the Appellants cited the trial court's decision in *Easom* in support of their argument that COVID-19 satisfied the general definitions of "natural" and "disaster." (*See* Op. Brief at pp. 25-28.) Notably, the Fifth Circuit did not analyze whether COVID-19 satisfies the general definitions of "natural" and "disaster." Rather, the Fifth Circuit analyzed whether the statutory language of the WARN Act contemplated a "natural

disaster," such as COVID-19. *Easom*, 37 F.4th at 243. For example, the Fifth Circuit explained that:

> Although the dictionary definitions of the words 'natural' and 'disaster' bear consideration, they are not dispositive of the meaning of 'natural disaster' in the WARN Act. To supplement our combined dictionary definition of 'natural disaster,' we consider the term's statutory context.... Congress's use of the term 'such as' 'indicat[es] that there are includable other matters of the same kind which are not specifically enumerated in the standard'....By providing three examples after 'such as,' Congress indicated that the phrase, 'natural disaster' includes events of the same kind as floods, earthquakes, and droughts.

Id. (citations omitted.) Accordingly, in contrast to the Appellees' implication, the Fifth Circuit did not conclude that COVID-19 does not satisfy the general definitions of "natural" and "disaster." Rather, the Fifth Circuit concluded that COVID-19 does not constitute a "natural disaster" under the WARN Act in light of the WARN Act's "statutory language, context, and purpose." *Id.* at 244. Therefore, the trial court's determination in *Easom* that COVID-19 satisfies the general definitions of "natural" and "disaster" is still relevant to this Court's analysis of whether COVID-19 constitutes a "natural disaster" under R.S.A. 76:21.

Further, the Fifth Circuit decision supports the Appellants' position that Interlocutory Appeal Question No. 1 should be answered in the affirmative. As set forth above, the Fifth Circuit decided that COVID-19 did not constitute a "natural disaster" under the WARN Act (only) because the WARN Act included examples of what constituted a "natural disaster." *Id.* at 243 ("By providing three examples after 'such as,' Congress indicated that

the phrase, 'natural disaster' includes events of the same kind as floods, earthquakes, and droughts.").

Notably, R.S.A. 76:21 *does not* provide examples of a "natural disaster." *See* R.S.A. 76:21. Rather, R.S.A. 76:21 provides that:

> Whenever a taxable building is damaged due to unintended fire or natural disaster to the extent that it renders the building not able to be used for its intended use, the assessing officials shall prorate the assessment for the building for the current tax year. For purposes of this paragraph, an unintended fire means a fire which does not arise out of any act committed by or at the direction of the property owner with the intent to cause a loss.

Id. In other words, R.S.A. 76:21 applies when a taxable building is damaged by a "natural disaster" that "renders the building not able to be used for its intended use." *See id.* In contrast to the Warn Act, the New Hampshire Legislature did not include examples of a natural disaster and, thus, did not limit the events that constitute a "natural disaster" for purposes of R.S.A. 76:21. Therefore, the New Hampshire Supreme Court should answer Interlocutory Appeal Question No. 1 in the affirmative because R.S.A. 76:21 does not limit the type of events that constitute a "natural disaster" for purposes of R.S.A. 76:21 and COVID-19 satisfies the general definition of a "natural disaster."

CONCLUSION

For the reasons set forth in the Appellants' Opening Brief and stated herein, the Court should answer the questions presented as follows:

1. Yes. For purposes of R.S.A. 76:21, the COVID-19 pandemic constitutes a natural disaster.

2. Yes. The buildings subject to this appeal were "damaged" by COVID-19 such that they were "not able to be used for [their] intended use" under the meaning of R.S.A. 76:21, I.

Respectfully Submitted,
Clearview Realty Ventures, LLC; Chhavi Hospitality, LLC and Kavya, LLC; JHX Hix Keene, LLC; VIDHI Hospitality, LLC; Naksh Hospitality, LLC; 298 Queen City Hotel, LLC; ANSHI Hospitality, LLC; 700 Elm, LLC; Bedford-Carnevale, LLC; and Carnevale Holdings, LLC

By and through their counsel,

/s/ Roy W. Tilsley, Jr.

Roy W. Tilsley, Jr., Esq., Bar No. 9400
Hilary H. Rheaume, Esq., Bar No. 265510
Bernstein, Shur, Sawyer & Nelson, P.A.
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
rtilsley@bernsteinshur.com
hrheaume@bernsteinshur.com

August 26, 2022

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, the Reply Brief contains approximately 807 words, which is fewer than the 3,000-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Roy W. Tilsley, Jr., Esq.
Roy W. Tilsley, Jr., Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 26th day of August, 2022 through the electronic-filing system on all counsel of record.

/s/ Roy W. Tilsley, Jr., Esq.
Roy W. Tilsley, Jr., Esq.