

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY FERGUSON AND MISTI
HALE, INDIVIDUALLY AND AS
HUSBAND AND WIFE,
Appellants,

vs.

DAVID TOCKEY AND KAY TOCKEY,
INDIVIDUALLY AND AS HUSBAND
AND WIFE; RUSSELL MASSET; AND
WASHOE COUNTY,
Respondents.

No. 45566

FILED

SEP 25 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from district court orders granting partial summary judgment, certified as final under NRCP 54(b), in a tort action and post-judgment orders awarding costs. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellants Jeffery Ferguson and Misti Hale argue that the district court erred in granting summary judgment as to all of their claims. We disagree.

The parties are familiar with the facts; therefore, we do not recount them in this order except as necessary for our disposition.

Standard of review

We review questions of law¹ and the grant of summary judgment do novo.² Additionally, summary judgment is available where

¹Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

²Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).



“no ‘genuine issue as to any material fact [remains] and . . . the moving party is entitled to a judgment as a matter of law.’”³ The substantive law on which a claim is based controls which facts are material.⁴ Even though we view “evidence, and any reasonable inferences drawn from it, . . . in a light most favorable to the nonmoving party,”⁵ the absence of evidence to support an essential element of a claim for relief renders all other elements of that claim immaterial and summary judgment is proper.⁶

Additionally, “[t]he non-moving party ‘is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.’”⁷ Instead, “the non-moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.”⁸

Claims against Massett

“[L]iability attaches for civil aiding and abetting if the defendant substantially assists or encourages another’s conduct in breaching a duty to a third person.”⁹ A defendant is liable for aiding and

³Wood, 121 Nev. at 729, 121 P.3d at 1029 (quoting NRCP 56(c)).

⁴Id. at 731, 121 P.3d at 1031.

⁵Id. at 729, 121 P.3d at 1029.

⁶Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

⁷Id. at 110, 825 P.2d at 591 (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

⁸Id.

⁹Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1490, 970 P.2d 98, 112 (1998).

abetting in a tortious act if, among other things, the defendant “knowingly and substantially assisted [the principal actor] in committing” the tort.¹⁰

We conclude that Ferguson has failed to establish genuine issues of material fact to support the “knowingly and substantially assisted” element of his claim. Nevada does not recognize the tort of preventing another from intervening in a fight as an act that constitutes assisting in that tort. Therefore, the district court correctly determined that Massett was entitled to summary judgment as a matter of law.

Claims against the Tockeys

To establish liability based on a negligence theory, a plaintiff must prove, among other things, that “the defendant had a duty to exercise due care towards the plaintiff.”¹¹ We have held that a private person has no “duty to protect another from a criminal attack by a third person” unless a special relationship giving rise to a duty exists between the parties.¹² We recognize the landowner-invitee relationship as a special relationship that can give rise to a duty to protect.¹³ Where a landowner has leased his property—thereby passing the right to control the property

¹⁰Id.

¹¹Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991).

¹²Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968-69, 921 P.2d 928, 930 (1996).

¹³Id. at 969, 921 P.2d at 930.

to a tenant—the tenant steps into the landowner’s shoes and becomes the duty-bound party to that special relationship.¹⁴

We have held that control is the “pivotal factor” in determining whether a party who occupies land owes a duty to an invitee and that a duty of due care can extend to parking areas controlled by a party.¹⁵ This court has recognized the right to regulate access to property as a key indicator of control.¹⁶

Ferguson did not establish genuine issues of material fact to support his theory that the Tockeys had actual control over the park’s common public parking area where he was injured, *i.e.*, that the Tockeys had the right to control access to the parking area or that they attempted to exercise such control. His assertions that it is “reasonable to assume” and “infer” that the Tockeys felt they controlled the common parking area are nothing more than speculation and conjecture. They do not create genuine issues of material fact. Therefore, we conclude that the district

¹⁴See Wright v. Schum, 105 Nev. 611, 613, 781 P.2d 1142, 1143 (1989) (recognizing that when a tenant takes possession of property, the landlord is no longer subject to liability for injuries to others caused by dangerous conditions on the property).

¹⁵Scialabba, 112 Nev. at 969, 921 P.2d at 930; see Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1104-05, 864 P.2d 796, 801 (1993) (where the court concluded that given additional facts, a casino-resort could be found to owe its patrons a duty to protect them from attack within its controlled parking lot).

¹⁶See Scialabba, 112 Nev. at 969-70, 921 P.2d at 931 (concluding that a party with access to property and the right to allow access was deemed to be the party in control of the property).

court properly granted summary judgment as to Ferguson's claims against the Tockeys.

Claims against Washoe County

Generally the "government is not liable for failing to prevent the unlawful acts of others."¹⁷ Additionally, under NRS 41.032(2), "action[s] based upon the performance or failure to perform a discretionary function" are prohibited.¹⁸ This court has held that "[t]he decision not to provide security [is] discretionary."¹⁹ However, in NRS 41.0336, the Legislature carved out two exceptions to the public duty doctrine with regard to fire departments and law enforcement agencies.

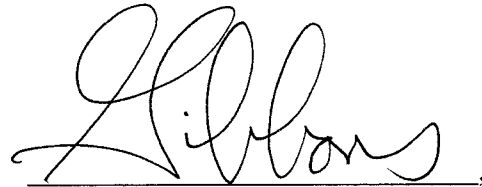
We conclude that the district court properly resolved through summary judgment all of Ferguson's claims against the County for three reasons. First, the attack on Ferguson was unlawful and the County had no duty to protect him against unlawful acts. Second, the County is immune to Ferguson's claims because those claims are based on the County's alleged failure to perform a function that this court has held to be discretionary. Third, we conclude that neither of the NRS 41.0336 exceptions apply here because there is no indication that the Legislature intended to extend the scope of that statute to include a county parks department.

¹⁷Bruttomesso v. Las Vegas Met. Police, 95 Nev. 151, 153, 591 P.2d 254, 255 (1979).

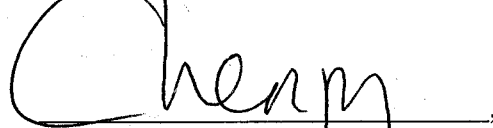
¹⁸Id.

¹⁹Id.

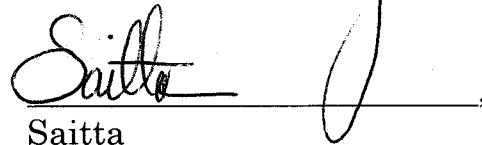
We have carefully considered all of the parties' other arguments and conclude that they lack merit. Accordingly, we ORDER the judgments of the district court AFFIRMED.

 J.

Gibbons

 J.

Cherry

 J.

Saitta

cc: Hon. Brent T. Adams, District Judge
Carolyn Worrell, Settlement Judge
Bowen Monson, LLC
Law Offices of Robert F. Enzenberger
Lemons Grundy & Eisenberg
Washoe County District Attorney Richard A. Gammick /Civil
Division
Washoe District Court Clerk