IN THE SUPREME COURT OF THE STATE OF NEVADA

INGER CASEY,
Appellant,
vs.
JAMES CONNELLEY, INDIVIDUALLY AND AS A NEVADA STATE BRAND INSPECTOR; HOLLY PECETTI, INDIVIDUALLY AND AS A NEVADA STATE BRAND RECORDER; AND STATE OF NEVADA IN RELATION TO ITS DEPARTMENT OF AGRICULTURE, DIVISION OF LIVESTOCK IDENTIFICATION,
Respondents.

No. 48360

FILED

MAY 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a negligence action. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Inger Casey filed an application for a Bill of Sale/Transfer of Title with the Nevada Department of Agriculture (the Department). Casey completed the application in order to transfer the Walking Lazy E brand from Barbara Enochson to "Casey, Pat or Linda Dempsey" (emphasis added). Holly Pecetti, of the Department's Livestock Division (the Division), altered the application to list the signatories as "Casey, Pat and Linda Dempsey" (emphasis added). The altered certificate issued to Casey expired on December 31, 2003.

The Department issued a second certificate to Casey following her re-recording of the brand. This second certificate also listed the signatories as "Casey, Pat and Linda Dempsey" (emphasis added). Casey deposited checks payable to the registered brand signatories to an account

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at Wells Fargo Bank in the names of the registered brand signatories. The Dempseys made claims to the funds. Consequently, Wells Fargo froze the account. Casey then filed a district court complaint against the State, the Department, the Division, and individual Brand Inspectors (respondents), for failure to issue a corrected brand certificate due to negligence in issuing the first brand certificate. Respondents filed a motion to dismiss Casey's complaint, which the district court granted. Casey now appeals the dismissal, and claims that respondents were negligent in their issuance of the brand certificate, precluding Casey from negotiating the checks without the Dempseys' signatures.

The district court granted respondent's motion to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. Specifically, the district court found that the addition of "and" on the application and certificate did not implicate the rights of Casey because NRS 104.3110(4) states that "[i]f an instrument payable to two or more person is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the person alternatively."[1] As such, the district court concluded that Casey was not harmed from the change on the application from "or" to "and" because the instrument was ambiguous and would pay alternatively to either Casey or the Dempseys under NRS 104.3110(4).

On appeal, Casey contends that the district court erred in dismissing her complaint because: (1) the Department's alteration of the brand transfer application harmed Casey; (2) Casey satisfied her initial

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[1]See also Uniform Commercial Code (UCC) § 3-110(1)(d).

burden to demonstrate triable issues of fact as to the proximate cause of damages because she pleaded negligence per se; and (3) the Department failed to correct the brand transfer application, precluding Casey from being able to negotiate her payments, such that Casey is entitled to punitive damages.

In reviewing dismissal of a complaint under NRCP 12(b)(5), this court considers whether the questioned pleading provides allegations sufficient enough to establish the elements of a right to relief.[2] The court is bound to accept all factual allegations as true.[3] A complaint will not be dismissed for failure to state a claim unless, beyond a doubt, the plaintiff cannot prove facts, which if accepted as true by the trier of fact would entitle the plaintiff to relief.[4]

NRS 104.3110(4) is Nevada's codification of Uniform Commercial Code § 3-110(1)(d). Rulings by other states on this provision of the UCC are particularly persuasive. The Department urges this court to consider two cases from other states that interpreted UCC § 3-110(1)(d).

First, the Court of Appeals of Maryland held that the purpose of UCC § 3-110(1)(d) is "to provide a bright-line rule for how checks with ambiguous payee designations should be treated."[5] Moreover, "if it were

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[2]Kaldi v. Farmers Insurance Exchange, 117 Nev. 273, 278, 21 P.3d 16, 19 (2001).

[3]Id.

[4]Simpson v. Mars, Inc., 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

[5]Pelican National Bank v. Provident Bank of Maryland, 849 A.2d 475, 486 (Md. 2002).

necessary to resort to extrinsic evidence of custom and practice in order to determine whether a check was payable jointly or affirmatively," the purpose of this provision would be frustrated.[6] Consequently, the court reasoned that UCC § 3-110(1)(d) sets forth a simple rule, "unless the check on its face is unambiguously payable jointly, it is deemed payable alternatively."[7]

Second, the Appellate Court of Illinois held that ambiguous checks, defined as checks that lack a grammatical connector between the listed payees, were payable in the alternative under UCC § 3-110(1)(d).[8]

We hold that the district court did not err in dismissing Casey's complaint, because the change of "and" from "or" between Casey and the Dempseys on the certificate did not affect Casey's rights. Specifically, NRS 104.3110(4) and UCC § 3-110(1)(d) mandate that an ambiguous payee connector means that parties will be paid alternatively. As altered, the certificate allowed payment to Casey, or alternatively the Dempseys, and only modified the relationship between the Dempseys. Consequently, the modification of the relationship between the Dempseys from the altered connector did not harm Casey, and the district court did not err in dismissing Casey's complaint because Casey failed to state a claim upon which relief could be granted.

Further, Casey contends that she pleaded negligence per se such that the district court erred in dismissing her complaint.

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[6]Id.

[7]Id.

[8]Harder v. First Capital Bank, 775 N.E.2d 610, 614 (Ill. 2002).

Specifically, Casey argues that respondents were negligent per se because they violated criminal forgery statutes, including NRS 205.090 and NRS 206.095. Respondents counter that they never formed the intent necessary to violate NRS 205.090 and NRS 206.095, and furthermore have never been charged with violating criminal statutes in the instant matter.

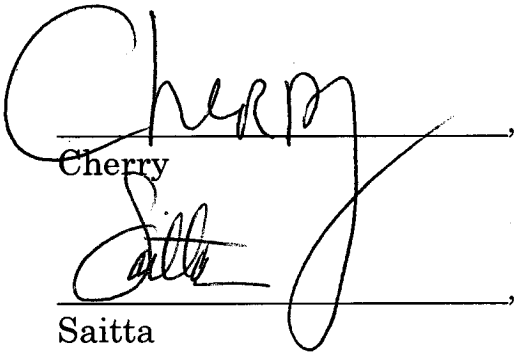
We hold that the district court did not err in dismissing Casey's complaint because fraud must be pleaded with specificity. That is, NRCP 9(b) mandates that "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Recitation of criminal forgery statutes, under which respondents were never charged, is not sufficient particularity for a pleading of fraud to proceed with a negligence per se claim. Because Casey failed to allege sufficient facts to find that respondents were negligent per se by violating forgery statutes, and failed to include any other facts to suggest a complaint for negligence per se, we conclude that the district court did not err in dismissing her complaint.

Finally, Casey argues that she is entitled to punitive damages. We hold that punitive damages are precluded as matter of law in the instant action because respondents, as actors of the state, are qualifiedly

immune under NRS 41.032(2). As we have previously held, punitive damages are unavailable in actions of this nature.[9]

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Andrew J. Puccinelli, District Judge
Carolyn Worrell, Settlement Judge
Smith & Harmer
Attorney General Catherine Cortez Masto/Carson City
Elko County Clerk

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[9]Rush v. Nevada Industrial Commission, 94 Nev. 403, 407, 580 P.2d 952, 954 (1978).

MAUPIN, J., concurring and dissenting:

In my view the district court correctly dismissed the intentional tort and punitive damage claims. However, I conclude that the learned trial judge erred in dismissing, at this early stage of the proceedings, the negligence claims against the respondents.

In dismissing the action below, the district court determined that the substitution of the word "and" for the word "or" in the issued brand certificate did no harm to appellant. In this the district court noted as follows:

> The Court finds that the addition of "and" on the application and certificate did not implicate the rights of the Plaintiff. NRS 104.3110(4) states in relevant part: If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively. Here, the brand certificate did not have an "or" or an "and" between the Plaintiff and the Dempseys. These facts alone make it ambiguous as to whether an instrument made out as written on the brand certificate should be paid alternatively to either the Plaintiff or the Dempseys. Under NRS 104.3110(4), the instrument would be paid to the persons alternatively.
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> The Court finds that the change from "or" to "and" on the application and certificate only modifies the relationship between Pat and Linda Dempsey. Therefore, the Plaintiff was not harmed from the change on the application from "or" to "and" and the Defendants' actions in modifying the application are not the cause of any alleged damages suffered by the Plaintiff.

In my view, the district court misapprehended the legal significance of the change in terms of NRS 104.3110(4), which provides as follows:

> If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

This provision deals with two unambiguous permutations when negotiable instruments are paid to multiple parties, both present here, and a third general permutation that deals with ambiguous descriptives of multiple payees. More particularly, under the first sentence of NRS 104.3110(4), an instrument that is clearly payable to two or more payees alternatively (in the disjunctive) may be negotiated by any of the payees. And, under the second sentence of the provision, an instrument that is payable in the conjunctive, i.e., not alternatively, is payable to all of the named payees and only may be negotiated by all. Only when the statement of payees is ambiguous does the third sentence of NRS 104.3110(4) come into play.

Here, because of the erroneous brand registration, the purchasers of the cattle were forced to make the draft payable to all three of the named payees in the conjunctive, to Casey, Pat and Linda Dempsey. The draft therefore contained unambiguous non-alternative payment language which, under the second sentence of the statute, requires that all payees endorse the draft. This is what appellant claims caused the damage. Had the respondents registered the brand in accordance with the brand registration application, the alleged intent of the purchasers, to buy cattle from the appellant only, could have been reflected in the draft by

clearly making it payable in the alternative to Casey, Pat or Linda Dempsey.

To explain through the use of abbreviations, the application described brand ownership as A (appellant), B (Pat Dempsey) or C (Linda Dempsey). Drafts to A, B or C can be negotiated by any of the payees under the first sentence of the statute. Drafts to A, B and C must be negotiated by all payees under the second sentence. In short, neither payee descriptive is ambiguous under the statute. Thus, in my view, the district court erred in finding the descriptives ambiguous and thus finding that there was no damage as a matter of law because the draft had to be read as allowing payment in the alternative. The drafts must be read as requiring non-alternative payment.

For this reason, the change may have, as alleged in the complaint in this case, caused a monetary loss, such as a loss of interest pending resolution of the bank's separate interpleader action over the check used to purchase the cattle. In my view, because appellant could arguably prove that respondents negligently caused the variance between the brand application and the brand certificate, the district court erred to the extent that it dismissed the negligence claim under NRCP 12(b)(5).[1]

Maupin

[1]Because estoppel is generally a question of fact under Nevada law, but may be established by undisputed competent evidence under NRCP 56, or via contested evidence at trial, estoppel was probably not a proper ground to dismiss under NRCP 12(b)(5). I would not, however, foreclose either option as an ultimate basis for resolving the matter.