IN THE SUPREME COURT OF THE STATE OF NEVADA

WELDON HELLE,
Appellant,
vs.
CORE HOME HEALTH SERVICES OF NEVADA, INC.; AND GARY A. VERGILIO,
Respondents.

No. 48427

FILED

NOV 20 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment directing a verdict in a negligence action. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them in this order except as necessary for our disposition.

Standard of review

When reviewing an involuntary dismissal, this court accepts the appellant's evidence as true and interprets all reasonable inferences in the appellant's favor to determine whether the appellant presented sufficient evidence to establish a prima facie case.[1] If the parties present conflicting testimony on material issues, the district court should not grant a motion for a directed verdict.[2] The party moving for judgment as a matter of law has the burden to produce "clear, uncontradicted, self-

[1]Fernandez v. Admirand, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992) (explaining the standard of review for dismissal pursuant to NRCP 41(b), which is now NRCP 50(a)).

[2]Bliss v. DePrang, 81 Nev. 599, 602, 407 P.2d 726, 727 (1965).

consistent, and unimpeached" evidence as to the material facts.[3] Therefore, absent overwhelming evidence in favor of one party, if the facts are disputed or if jurors could draw opposing inferences, the issue must go to the jury.[4]

Directed verdict regarding vicarious liability

Appellant Weldon Helle argues that the district court erred when it concluded that George Cedeno did not act within the scope of his employment with Core Home Health Services of Nevada, Inc. (Core), when he provided bowel care to Helle. We agree.

If an employee commits negligence when acting "under the control of the employer and acting within the scope of employment," the court may hold the employer vicariously liable for the employee's negligence.[5] Thus, we first consider whether Helle presented sufficient evidence that Cedeno committed negligence. If so, we then determine whether Helle presented sufficient evidence that Cedeno was acting under Core's control and within the scope of his employment.

Cedeno's negligence

The elements of a prima facie negligence case are duty, breach, causation, and damages.[6]

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[3]Id. at 603, 407 P.2d at 728.

[4]Id. at 602, 407 P.2d at 728.

[5]Evans v. Southwest Gas, 108 Nev. 1002, 1005-06, 842 P.2d 719, 721 (1992), overruled on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 268 n.6, 21 P.3d 11, 13 n.6 (2001).

[6]Butler v. Bayer, 123 Nev. ___, ___, 168 P.3d 1055, 1063 (2007).

Duty and breach

Under the doctrine of negligence per se, the plaintiff can show duty and breach if (1) the defendant violated a statute, (2) "the injured party belongs to the class of persons that the statute was intended to protect, and [(3)] the injury is of the type that the statute was intended to prevent."[7] NRS 629.091 outlines the duties of a personal care attendant to persons with a disability.

In this case, the parties do not dispute that Cedeno was legally unqualified to perform bowel care and that NRS 629.091 was designed to protect Helle from an injury such as complications related to improper bowel care. Thus, Helle presented sufficient evidence that Cedeno breached his duty to Helle by performing bowel care when he was legally unqualified to do so.

Causation

"[I]n cases in which an injury may have had two causes, either of which, operating alone, would have been sufficient to cause the injury," this court applies the substantial factor test for causation.[8] To survive a motion for a directed verdict, the plaintiff must present evidence that would negate the alternative causes if the jury were to believe the evidence.[9]

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[7]Sagebrush Ltd. v. Carson City, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983).

[8]Johnson v. Egtedar, 112 Nev. 428, 435, 915 P.2d 271, 276 (1996).

[9]Wilson v. Circus Circus, 101 Nev. 751, 754-55, 710 P.2d 77, 79 (1985).

In Wilson v. Circus Circus, this court concluded that the plaintiff had presented sufficient evidence on causation to send the case to the jury because the plaintiff's expert witness estimated that there was an 80 percent to 90 percent chance that the defendant's actions caused injury to the plaintiff.[10] Furthermore, an expert witness "may rely on evidence that is otherwise inadmissible at a trial even when testifying before a jury as to an ultimate issue such as negligence."[11]

In this case, Helle presented sufficient evidence that Cedeno's improper bowel care caused injury to Helle. Dr. Viviane Ugalde testified that Cedeno's improper bowel care was a substantial factor in causing Helle's autonomic dysreflexia because the records indicated that Helle experienced severe rectal bleeding in February of 2003 and he did not have a history of autonomic dysreflexia until August of 2003. Dr. Ugalde also testified that she had eliminated other sources of the autonomic dysreflexia. Robert Ferry, Helle's expert witness on the industry standard of care, testified that according to the records, Home Care Plus did not provide Helle with bowel care.

While Helle did not negate irritable bowel syndrome as a cause of his autonomic dysreflexia, he did present evidence that Dr. Ugalde had eliminated other causes of the autonomic dysreflexia. Further, under Wilson, Helle need not negate 100 percent of the possible alternative causes. Under Barrett v. Baird, Dr. Ugalde could properly rely

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[10]Id. at 753, 710 P.2d at 78.

[11]Barrett v. Baird, 111 Nev. 1496, 1503, 908 P.2d 689, 694 (1995), overruled on other grounds by Lioce v. Cohen, 122 Nev. 1377, 1392, 149 P.3d 916, 926 (2006).

on the inadmissible letter from Helle's physician.[12] Thus, Helle presented sufficient evidence that Cedeno's negligent performance of bowel care was a substantial factor of his autonomic dysreflexia.

Injury

Helle suffered from severe rectal bleeding, the hospital documented injury to the lower colon and anus, and he suffered from autonomic dysreflexia which required a colostomy. Therefore, we conclude that Helle presented sufficient evidence that Cedeno's negligence caused him injury.

Scope of employment

If an employee is under the employer's control and is furthering the business interests of the employer, then the employee is acting within the scope of employment.[13] "Generally, whether an employee was acting within the scope of his or her employment for the purposes of respondeat superior liability is a question to be determined by the trier of fact."[14] However, if, as a matter of law, the employee was not acting within the scope of employment, the district court may properly direct a verdict.[15]

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[12]See id. at 1503, 908 P.2d at 694.

[13]Evans v. Southwest Gas, 108 Nev. 1002, 1005-06, 842 P.2d 719, 721 (1992), overruled on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 268 n.6, 21 P.3d 11, 13 n.6 (2001).

[14]Id. at 1005, 842 P.2d at 721.

[15]Connell v. Carl's Air Conditioning, 97 Nev. 436, 439, 634 P.2d 673, 675 (1981).

In this case, if given the opportunity, the jury reasonably could have concluded that performance of bowel care was within Cedeno's scope of employment, and Cedeno acted under Core's control. Core agreed in 1998 to provide bowel care for Helle. In 1999, Core increased Helle's morning care so that he could have daily bowel care. On March 30, 2003, Core assigned Cedeno to care for Helle. Cedeno's duties included helping Helle with toileting, and Core evaluated him for his skills in elimination, which require digital stimulation.

Ferry testified that he was concerned that Core might be "keeping two sets of books, one that's official and one that's unofficial." Viewed in a light most favorable to Helle, the reference to the "official word" could create a reasonable inference that Core's unofficial policy was for aides to perform digital stimulation. Further, Core instructed Rebecca Kornman, an aide, to perform bowel care on Helle and another quadriplegic patient. On the other hand, Core presented evidence that it did not know that Cedeno had performed bowel care until Helle called to complain. As there was conflicting evidence regarding material facts, we conclude that the directed verdict was improper.[16]

In summary, we conclude that the district court erred when it concluded that Cedeno was acting outside the scope of employment and that Cedeno's improper bowel care did not cause injury to Helle. Therefore, we reverse the district court's directed verdict on the issue of vicarious liability.

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[16]See Bliss v. DePrang, 81 Nev. 599, 602, 407 P.2d 726, 727 (1965).

Directed verdict regarding negligent training and supervision

Helle argues that the district court erred because questions of material fact remained for the jury to decide as to whether Core was liable for negligent training and supervision. We agree.

This court has held that an "employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions."[17] The tort of negligent training and supervision imposes direct liability on the employer if (1) the employer knew that the employee acted in a negligent manner, (2) the employer failed to train or supervise the employee adequately, and (3) the employer's negligence proximately caused the plaintiff's injuries.[18] When liability is based on negligent supervision instead of respondeat superior, whether the employee acted within the course and scope of employment is immaterial.[19]

As previously discussed, sufficient evidence supported a reasonable inference that Core's policy was for aides like Cedeno to

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[17]Hall v. SSF, Inc., 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996).

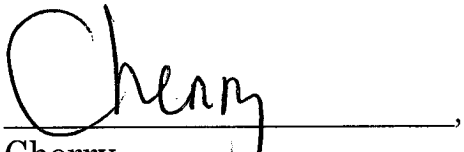
[18]See id. at 1384, 930 P.2d at 99 (concluding that excluded evidence was admissible to prove whether the employer was aware of the employee's actions and whether the employer negligently trained, supervised, and retained the employee); Oehler v. Humana, Inc., 105 Nev. 348, 351, 775 P.2d 1271, 1272 (1989) (concluding that the cause of action for negligent supervision by a hospital of a nonemployee physician with staff privileges included whether the hospital knew of the physician's action, the hospital aided and assisted such action, and the hospital's negligence proximately caused the plaintiff's injuries).

[19]Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1226 n.5, 925 P.2d 1175, 1181 n.5 (1996).

perform bowel care. Further, Core knew that Helle required bowel care, assigned Cedeno to Helle, and evaluated Cedeno for his skills in elimination. Cedeno documented on Core forms that he helped Helle with toileting. Ferry testified that this evidence led him to believe that Core knew that Cedeno performed bowel care for Helle, but failed to train Cedeno in bowel care. However, Core presented evidence that it did not know that Cedeno had performed bowel care until Helle called to complain.

Viewing the evidence in the light most favorable to Helle and drawing reasonable inferences in his favor, we conclude that Helle presented sufficient evidence that Core knew Cedeno performed bowel care, even though he was legally unqualified to do so, and yet failed to train and supervise him. As previously discussed, we further conclude that Helle presented sufficient evidence that Cedeno's improper bowel care caused injury to Helle. Therefore, we conclude that the district court improperly directed a verdict on Helle's claims of negligent training and supervision. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
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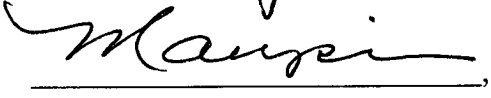

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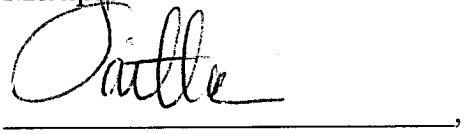

_____, J.
Saitta

cc: Hon. Steven R. Kosach, District Judge
Patrick O. King, Settlement Judge
Law Offices of Terry A. Friedman, Ltd.
Matthew L. Sharp
Laxalt & Nomura, Ltd./Reno
Attorney General Catherine Cortez Masto/Reno
Washoe District Court Clerk