

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY SHELBY AWAND,
Appellant,
vs.
DOOR CONTROL SERVICES, INC.,
Respondent.

No. 49714

FILED

DEC 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order in a tort action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In this appeal, we must determine whether to affirm the district court's order granting a motion to dismiss an amended complaint that substituted respondent as a doe defendant in the underlying action. We affirm the district court's order.

Under NRCP 12(b)(5), if it appears beyond doubt that the plaintiff could prove no set of facts, which if true, would entitle her to relief, this court will affirm the grant of the motion to dismiss. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, ___, 181 P.3d 670, 672 (2008). The district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003). Questions of law, however, are reviewed de novo. Buzz Stew, 124 Nev. at ___, 181 P.3d at 672.

Here, the district court granted respondent Door Control Services, Inc.'s motion to dismiss after it determined that appellant Mary Shelby Awand's motion to amend had been improperly granted under NRCP 10(a) and Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873,

822 P.2d 1100 (1991). Awand's amended complaint asserted that (1) she was injured by a door on or about August 19, 2003; (2) named Door Control as one of the defendants who purportedly manufactured the door; and (3) alleged causes of action for negligence and negligence per se. Awand filed her motion to amend her complaint on July 28, 2006, nearly one year after NRS 11.190(4)(e)'s statute of limitations had expired.

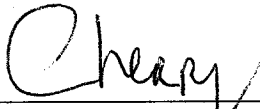
Nevertheless, even after the statute of limitations has expired, NRCP 10(a) allows a plaintiff to amend her complaint to substitute a doe defendant with a named party when the true name is discovered. To do so, the plaintiff must meet all elements of the following three-part test established in Nurenberger, 107 Nev. at 881, 823 P.2d at 1106: (1) fictitious or doe defendants must be plead in the original complaint's caption; (2) the basis for naming defendants by other than their true identity must be plead and must clearly specify the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based; and (3) reasonable diligence must be exercised in ascertaining the true identity of the intended defendants and the plaintiff must promptly move to amend the complaint in order to substitute the actual for the fictional. If all elements of this test are met and the NRCP 10(a) amendment is properly granted, then the amendment automatically relates back to the commencement of the action. Id., 107 Nev. at 882, 823 P.2d at 1106.


In this case, the district court found that Awand did not meet the third prong of the Nurenberger test and had not acted with reasonable promptness. As substantial evidence supports the district court's finding that Awand did not exercise reasonable diligence required by NRCP 10(a) and Nurenberger to ascertain Door Control's identity

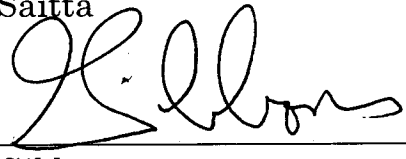
before the statute of limitations period expired, the district court properly concluded that it had erred in allowing Awand to amend her complaint.

Accordingly, we

ORDER the judgment of the district court AFFIRMED. ¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Eugene Osko, Settlement Judge
Bowen Law Offices
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Eighth District Court Clerk

¹We reject, as meritless, all other contentions raised by Awand. To the extent that Door Control seeks sanctions for alleged deficiencies in Awand's opening brief and appendix, we decline to award sanctions.