IN THE SUPREME COURT OF THE STATE OF NEVADA

OLEN BRITTON, AN INDIVIDUAL,
Appellant,
vs.
FIRE INSURANCE EXCHANGE, A RECIPROCAL OR INTER-INSURANCE EXCHANGE AND FARMERS INSURANCE EXCHANGE A/K/A TRUCK INSURANCE EXCHANGE, A RECIPROCAL OR INTER-INSURANCE EXCHANGE,
Respondents.

No. 54271

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a declaratory relief action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Olen Britton is the plaintiff in a separate lawsuit against Guy Julien, who is not a party to this appeal. Britton and Julien got into a physical altercation when Britton, the bartender at the Inn at Mt. Charleston, tried to remove Julien from the bar. Julien had become intoxicated and Britton refused to serve Julien any more alcohol. As Britton was walking Julien out of the bar, Julien hit Britton. Several witnesses stated that Julien hit Britton without provocation. Julien claimed Britton struck him and he punched Britton back. In the separate lawsuit, Britton sued Julien for negligence, battery, and punitive damages.

Julien tendered the defense and indemnity for the separate lawsuit to his homeowner's insurance company, respondents Fire Insurance Exchange and Farmers Insurance Exchange (collectively, FIE). In the instant case, FIE filed a complaint for declaratory relief, naming both Julien and Britton as defendants, and arguing that FIE had no duty to defend or indemnify Julien under the homeowner's policy or the umbrella policy.

Next, FIE filed a motion for summary judgment, arguing that there was no dispute regarding whether Julien intended to hit Britton, and therefore, it was not covered by the insurance policy since intentional acts are specifically excluded from coverage. Julien filed an opposition to the motion for summary judgment but Britton did not.

The district court granted FIE's motion for summary judgment. The district court found there was no genuine issue of material fact and that there was no coverage under the homeowner's policy or the umbrella policy and therefore, FIE had no duty to defend or indemnify Julien in the separate lawsuit.

Here, Britton argues that the confrontation between himself and Julien presents a genuine issue of material fact as to whether it was an "occurrence" covered by Julien's insurance policies. Britton argues there was a genuine issue of material fact regarding whether FIE had a duty to defend and indemnify Julien. FIE argues there are no material facts in dispute; both Britton and Julien stated in their depositions that the contact was intentional. The only dispute involved who instigated the altercation. FIE

argues that the undisputed testimony was that it was an intentional act, which was not covered by Julien's insurance.

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood, 121 Nev. at 729, 121 P.3d at 1029.

Britton failed to oppose the motion for summary judgment.[1] "Generally, an issue which is not raised in the district court is waived on appeal." Nye County v. Washoe Medical Center, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992). Because Britton failed to raise the issue below, he is precluded from raising the argument for the first time on appeal. Additionally, pursuant to DCR 13(3) the failure to oppose a motion may be construed as an acknowledgment that the motion is meritorious and as consent to

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[1]Britton did not file any opposition to FIE's motion for summary judgment. The transcript of the hearing was not included in the record on appeal. This court has held that the appellant is responsible for making certain "that the record on appeal contains the material to which exception is taken." Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996). Missing portions of the record are presumed to support the district court's decision. Id.

grant the motion. Therefore, we affirm the district court's grant of FIE's motion for summary judgment. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Salvatore C. Gugino, Settlement Judge
Law Offices of Leslie Mark Stovall
Berger Kahn
Fine Law Group
Eighth District Court Clerk