IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDY LEE ANDERSON,
Appellant,
vs.
WELLS CARGO, INC., A NEVADA CORPORATION AND SUPERIOR TRAFFIC SERVICES CORP., A NEVADA CORPORATION,
Respondents.

No. 54962

FILED

NOV 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order in a tort and contract action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Andy Anderson crashed his motorcycle into the median on Rainbow Boulevard in Las Vegas in April 2005 and sustained a brain injury. The median was designed by Clark County and was completed almost three years before Anderson's accident, in early May 2002. Respondent Wells Cargo, Inc., was the general contractor for the median's construction, and respondent Superior Traffic Services Corp. was a subcontractor responsible for temporary traffic control and permanent signs and striping. According to the plans provided by the county, Superior was to install reflectors and an R4-7 sign,[1] in addition to painting the median with retro-reflective paint.

[1]An R4-7 sign is a "Keep Right" sign that "may be used at locations where it is necessary for traffic to pass only to the right of a roadway feature or obstruction." U.S. Dept. of Transportation, Manual on Uniform

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Anderson commenced an action against Clark County, Wells Cargo, and Wells Cargo's subcontractors alleging negligence, negligence per se, and breach of contract. Anderson claimed that respondents were negligent in five respects: (1) defective design; (2) failure to maintain; (3) failure to perform the construction in a workmanlike manner; (4) negligent construction; and (5) using defective materials. Prior to the close of discovery, respondents filed motions for summary judgment, which Anderson opposed; Anderson also sought an NRCP 56(f) continuance for further discovery.[2] The district court denied Anderson's NRCP 56(f)

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Traffic Control Devices § 2B.33 (2003 ed.), available at http://mutcd.fhwa.dot.gov/pdfs/2003/Ch2B.pdf.

[2]We note that Anderson's deposition reflects that he has no recollection of the events relating to the accident and his only other proof of respondents' alleged negligence was an expert report. However, the expert relied in part on the observation of the accident location almost two years after the accident and photos taken by the Las Vegas Metropolitan Police Department (LVMPD) on the night of the accident. Although an expert need not learn of the material facts contemporaneously, the expert must have reviewed relevant materials to inform his or her opinion. This is not the case here. The condition of the median in 2007 during the first site inspection by the expert can provide no basis for an opinion regarding the conditions of the median at the time of the accident or at the time that construction was completed. Additionally, the photos taken by LVMPD cannot establish the condition of the median at the time that construction was completed.

Although respondents had a duty to repair under the contract with the county, that duty was only triggered when the county made a demand for repair. No demand was made by the county because it was not on notice that the median was defective.

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request and entered summary judgment for respondents. This appeal followed.

Discussion

On appeal, Anderson argues that the district court abused its discretion in denying his NRCP 56(f) request, and that the district court erred in granting summary judgment in respondents' favor. As explained below, we conclude that these contentions lack merit, and we therefore affirm the district court's order.

The district court did not abuse its discretion in denying Anderson's NRCP 56(f) request

We review a district court's decision denying a motion for an NRCP 56(f) continuance for an abuse of discretion. Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005). A party seeking an NRCP 56(f) continuance for further discovery must demonstrate how further discovery will lead to the creation of a genuine issue of material fact. Id.

Anderson argues that summary judgment was premature because he had been diligent in pursuing discovery, less than two years had passed, and the discovery commissioner had recently extended the discovery deadline. A party's diligence in pursuing discovery and the length of time since the complaint was filed are relevant to whether an

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Furthermore, the expert report at most establishes that the lack of retro-reflective paint, reflectors, and sign caused the accident. It, however, cannot establish that the retro-reflective paint, reflectors, and sign were missing due to respondents' negligence.

NRCP 56(f) continuance should be granted. Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294, 948 P.2d 704, 705-06 (1997); Ameritrade, Inc. v. First Interstate Bank, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989); Halimi v. Blacketor, 105 Nev. 105, 106, 770 P.2d 531, 531-32 (1989); Harrison v. Falcon Products, 103 Nev. 558, 560, 746 P.2d 642, 642-43 (1987). However, Anderson's argument that the district court abused its discretion in denying his request because he was diligent in pursuing discovery is without merit.

Whether a party seeking an NRCP 56(f) continuance was diligent in seeking discovery is relevant only after the party has demonstrated that additional discovery was necessary to oppose the motion for summary judgment. Aviation Ventures, 121 Nev. at 118, 110 P.3d at 62 ("[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact."). It is insufficient for a party seeking such a continuance to merely allege that additional discovery is necessary; instead, the party must identify what additional facts might be obtained that are necessary to oppose the motion for summary judgment. Bakerink v. Orthopaedic Assocsiates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978).

In this case, Anderson's request for a continuance was not supported by an affidavit as required by NRCP 56(f). Anderson's opposition did not identify what additional discovery would enable him to oppose respondents' motion for summary judgment.[3] The mere fact that

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[3]In Bakerink, we noted that:

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additional discovery could be conducted does not preclude the granting of summary judgment.[4] Rather, the district court has no authority to grant

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> "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified."

Bakerink, 94 Nev. at 431, 581 P.2d at 11 (quoting Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir. 1975)).

[4]Although the dissent suggests that Anderson should have been allowed further discovery, NRCP 56(f) requires a party to identify those additional facts that it might discover. Anderson did not identify any of the potential evidence that the dissent postulates to be available. In fact, Anderson's opposition did nothing more than state he has not completed discovery.

Moreover, it is not for this court or the district court to speculate about what evidence a party may or may not discovery with additional NRCP 56(f) discovery. It is the responsibility of the parties to identify what additional facts might be obtained that are essential to justify opposition. Aviation Ventures, 121 Nev. at 118, 110 P.3d at 62. Had he presented an affidavit identifying those additional facts as required by NRCP 56(f), it may very well have been an abuse of discretion for the district court to deny the discovery request and grant summary judgment; however, those are not the facts before us. Anderson's failure to comply

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an NRCP 56(f) request if the party seeking such a continuance fails to identify what additional discovery is necessary to oppose the motion for summary judgment. Therefore, the district court's denial of NRCP 56(f) relief was not an abuse of discretion.

The district court properly granted summary judgment for respondents

Standard of review

We review orders granting summary judgment de novo. Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995). Summary judgment is only proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

In order to establish a claim for negligence, a plaintiff must prove four elements: "(1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages." Turner v. Mandalay Sports Entm't, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). Furthermore, under the foreseeability doctrine, a construction contractor is liable for the injuries or damages to a third person caused by its negligence.[5] Cosgriff Neon Co.

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with NRCP 56(f)'s requirement of identifying additional facts he hopes to discover and will create a genuine issue of material fact is fatal to his request for further discovery.

Contrary to the dissent's assertion, this order has no effect on the balance of procedural safeguards. It merely requires that parties comply with the rules of civil procedure.

[5]Although the parties and the district court discussed the application of the "completed and accepted" doctrine, which allows a

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v. Mattheus, 78 Nev. 281, 286-87, 371 P.2d 819, 822 (1962). Liability is predicated on the contractor acting negligently, subject to two exceptions: (1) if the contractor establishes that the plans, specifications, and directions given to the contractor have been carefully carried out and that those plans, specifications, and directions are not so obviously defective that a reasonable contractor would not follow them; or (2) the owner discovers the danger, or it is so obvious, that the owner's conduct is an intervening cause of the injury. Terry v. New Mexico State Highway Com'n, 645 P.2d 1375, 1379 (N.M. 1982), abrogated on other grounds by Coleman v. United Engineers & Construct., 878 P.2d 996 (N.M. 1994); see also Peters v. Forster, 804 N.E.2d 736, 742 (Ind. 2004). Moreover, an owner's acceptance of the work is accompanied by the presumption that the owner made a reasonably careful inspection of the work and accepts any defects that were discoverable. Coleman v. City of Kansas City, Mo., 859 S.W.2d 141, 146 (Mo. Ct. App. 1993).

We have recognized that "courts are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness usually are questions of fact for the

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contractor to avoid liability for injuries to a third person that result from the work after the work is complete and accepted by its owner, see Emmanuel S. Tipon, Annotation, Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring After Completion and Acceptance of Work; "Completed and Accepted" Rule, 75 A.L.R.5th (1999), we long ago joined the majority of jurisdictions and adopted the foreseeability doctrine. See Cosgriff Neon Co. v. Mattheus, 78 Nev. 281, 371 P.2d 819 (1962).

jury." Lee v. GNLV Corp., 117 Nev. 291, 296, 22 P.3d 209, 212 (2001) (internal quotation omitted). However, summary judgment is nevertheless proper if the plaintiff could not recover as a matter of law. Id.

A person only incurs a duty of reasonable care when he or she acts or fails to act when he or she has a duty to act. Restatement (Second) of Torts § 284 (1965). In this case, it is uncontroverted that respondents did not design the median and were not responsible for doing so. Additionally, as other courts have explained:

> An independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them.

Hunt v. Blasius, 384 N.E.2d 368, 371 (Ill. 1978). Furthermore, it is undisputed that respondents had no duty to maintain the median after the work had been completed and accepted by the county. Rather, that responsibility resided solely with the county. Therefore, respondents did not owe Anderson a duty of care concerning the median's design or maintenance. Consequently, the district court properly granted summary judgment with respect to Anderson's design and maintenance claims.

The district court was also correct in granting summary judgment on the workmanship and materials claims, but for a different reason. In Cuzze v. University & Community College System of Nevada, 123 Nev. 598, 172 P.3d 131 (2007), we explained that we follow the federal approach with regard to burdens of proof and persuasion when considering a motion for summary judgment. Id. at 602, 172 P.3d at 134. The party

moving for summary judgment has the burden of production to demonstrate the absence of a genuine issue of material fact. Id. If the moving party makes such a demonstration, the opposing party takes on a burden of production to demonstrate the existence of a genuine issue of material fact. Id. If the nonmoving party, such as Anderson, bears the burden of persuasion at trial, then the moving party may satisfy its burden by either (1) presenting evidence negating an essential element of the nonmoving party's claim or (2) pointing out the absence of evidence to support an element of the nonmoving party's claim. Id. at 602-03, 172 P.3d at 134. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case on which it bears the burden of proof, entry of summary judgment is mandatory. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

In this instance, Anderson bears the burden of persuasion at trial, and thus, must present specific facts that show a genuine issue of material fact to defeat summary judgment. Cuzze, 123 Nev. at 602-03, 172 P.3d at 134. However, he proffered no relevant evidence to show that respondents' performance was defective or that the materials were defective. Instead, Anderson merely pointed to the fact that respondents could not prove that the construction and materials used were not defective.[6] This bare allegation, however, is insufficient to withstand a

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[6]Anderson points to several pieces of evidence as creating an issue of material fact in dispute as to whether respondents' workmanship was defective and whether the materials used were defective: (1) his expert's report; (2) testimony that the construction was under warranty; (3) the fact that the reflectors, sign, and paint were missing; and (4) Superior's admission that the sign should last five years and that it did not refer to

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motion for summary judgment. Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) ("The non-moving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" (quoting Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992))). Because Anderson did not offer any evidence that respondents breached their duty of care, summary judgment on the workmanship and materials claims was proper.[7] Accordingly, we affirm the district court's order.

It is so ORDERED.

_____, C.J.
Saitta

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Douglas

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Pickering

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Hardesty

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the MUTCD guidelines when submitting its bid. We conclude that, as a matter of law, the evidence presented were irrelevant and did not create an issue of material fact as to whether respondents breached their duty of care.

[7]We also conclude that the summary judgment was proper regarding Anderson's breach of contract claim because he presented no evidence to establish that respondents breached their contract with the county.

cc: Hon. Michelle Leavitt, District Judge
Kathleen J. England, Settlement Judge
Eric Dobberstein & Associates
J. D. Evans
Marquis Aurbach Coffing
Selman Breitman, LLP
Parker & Edwards
Eighth District Court Clerk

CHERRY, J., with whom, GIBBONS, J., agrees, dissenting:

I differ with my colleagues as to their resolution of this appeal. In particular, I conclude that the district court erred when it granted the motion for summary judgment and therefore I dissent. Summary judgment was granted in this case when discovery was still ongoing and when Anderson's claims that issues of material fact existed were stronger than the """"gossamer threads of whimsy, speculation and conjecture""""" that Wood v. Safeway, Inc. and many other Nevada cases reject as being too weak to withstand such a motion. 121 Nev. 724, 731, 121 P.3d 1026, 1030 (2005) (quoting Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993) (quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)))). The alteration in this court's standard for granting summary judgment created by this order of affirmance for Superior will result in the denial of important procedural safeguards that should be afforded to all litigants. Therefore, I cannot agree with the majority.

Here, Anderson was not dilatory in conducting discovery. The discovery commissioner in the case concluded that Anderson was diligent in the discovery process, given the complexity of the case and his brain damage. Anderson clearly meant to continue pursuing litigation against the defendants as he filed a motion for a continuance. Nevada caselaw is clear that a request for additional time is reflective of diligent discovery. Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294, 948 P.2d 704, 706 (1997); Ameritrade, Inc. v. First Interstate Bank, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989); Halimi v. Blacketor, 105 Nev. 105, 106, 770

P.2d 531, 531 (1989); Harrison v. Falcon Products, 103 Nev. 558, 560, 746 P.2d 642, 642 (1987).

Moreover, Anderson's request for a continuance was not done simply to keep his case alive and harass Superior. Less than two years had elapsed since he had begun discovery. This court has previously held that declaring summary judgment before a reasonable period of time has elapsed is an abuse of discretion. Halimi, 105 Nev. at 106, 770 P.2d at 531-32 (holding that summary judgment was improper when less than a year had passed since the filing of the complaint); Harrison, 103 Nev. at 560, 746 P.2d at 642-43 (holding that summary judgment was improper when less than two years had passed since the filing of the complaint). Because Anderson was not dilatory in conducting discovery during this limited timeframe, granting summary judgment at this early stage of the proceedings when the discovery window was still open was an abuse of discretion.

Moreover, the discovery deadline had not passed and the discovery up to this point only established that the County had records indicating that a sign and reflectors were installed on the median during the initial construction of the barrier and that the sign and reflectors were not present at the time the accident occurred. At the time the motion for summary judgment was granted for Superior, Anderson planned to conduct additional discovery such as expert depositions, percipient witness depositions, and follow-up discovery. The discovery that Anderson has yet to complete could very well show that adequate signage and reflective markings were never installed by Superior in the proper locations or that the adhesives used were insufficient. Anderson could uncover information showing that the County's records were in error or that the signs and

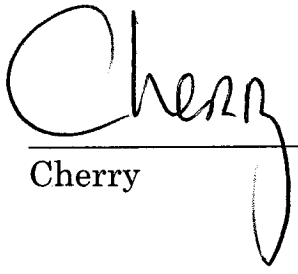
reflectors were placed on the opposite end of the median dividing the roadway. "A party is allowed to discover any information that is 'reasonably calculated to lead to the discovery of admissible evidence.'" Harrison, 103 Nev. at 560, 746 P.2d at 642 (quoting NRCP 26(b)(1)). Anderson's planned discovery falls well within this category and it could easily "infuse the issues with facts sufficient to defeat a motion for summary judgment." Auerbach's, Inc. v. Kimball, 572 P.2d 376, 377 (Utah 1977). Anderson should not be prematurely denied his opportunity to seek redress for his injuries.

In addition, this court should not diverge from its precedent that summary judgment should only reluctantly be affirmed in negligence cases as "negligence is ordinarily a question of fact for the jury" unless no duty exists from the defendant to the plaintiff. Rodriguez v. Primadonna Company, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009) (citing Butler v. Bayer, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007)). Here, Anderson was not given the opportunity to conduct the relevant discovery to prove that there was a defect in the subject median. Anderson asserts that material questions of fact remain regarding his claims against respondents for defective or negligent maintenance, design and workmanship defects, and the use of defective materials. Anderson was also deprived of an opportunity to demonstrate that the contractor still owed him a duty. In this regard, the district court, in failing to allow further discovery, failed to meaningfully apply Cosgriff Neon Co. v. Mattheus, 78 Nev. 281, 371 P.2d 819 (1962), to this case to determine if the contractor could have been liable.

Summary judgment might well be proper after Anderson has completed his requested discovery, but prematurely ending Anderson's

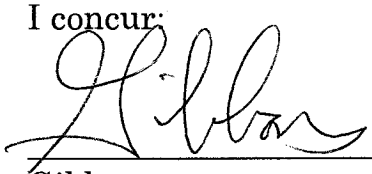
case when the discovery commissioner had just granted Anderson's request for an extension of discovery and when the time for discovery was still open, improperly moves the delicate balance of procedural safeguards too far away from the plaintiff's side to be just. Therefore, in my view the district court erred in granting summary judgment.

In light of the above, I would reverse the district court's order and remand this matter to the district court to allow Anderson to complete discovery. For these reasons, I dissent.



_____, J.
Cherry

I concur:



_____, J.
Gibbons