

IN THE SUPREME COURT OF THE STATE OF NEVADA

BREK LONG,
Appellant,
vs.
MGM GRAND HOTEL, LLC,
Respondent.

No. 55516

FILED

FEB 24 2012

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

After attending a New Year's Eve UFC fight, appellant Brek Long was in the restroom at respondent MGM Grand Hotel's Studio 54 nightclub when she had a verbal altercation with two unidentified women. Long alleges that a restroom porter witnessed the incident, but did not notify security; however, the porter denied seeing anything. Shortly thereafter, Long was attacked by these women, causing serious injury. Long filed a complaint against MGM, alleging negligence, negligent hiring, negligent supervision and retention, and negligent training. MGM moved for, and was granted, summary judgment. On appeal Long argues that the district court erred in granting summary judgment in favor of MGM because genuine issues of material fact remain regarding whether the attack was foreseeable. We agree, and we reverse and remand this matter to the district court for further proceedings in light of our recent opinion in Estate of Smith v. Mahoney's Silver Nugget, 127 Nev. ___, 265 P.3d 688 (2011).

The parties are familiar with the facts, so we do not recount them further except as pertinent to our disposition.

This court reviews de novo a district court summary judgment. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

*modified
per order
filed 6/7/12*

Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. An issue of material fact is genuine when the evidence is such that a rational jury could return a verdict in favor of the nonmoving party. Id. at 731, 121 P.3d at 1031.

“In a negligence action, summary judgment should be considered with caution.” Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993), superseded by statute on other grounds as stated in Estate of Smith v. Mahoney’s Silver Nugget, 127 Nev. ___, 265 P.3d 688 (2011). The initial burden of proving that there is no genuine issue of material fact lies with the movant. NRCP 56; Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993). “To establish entitlement to judgment as a matter of law, defendant need only negate one element of plaintiff’s case (i.e., duty, breach, causation, or damages).” Harrington v. Syufy Enters., 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997). However, once this initial responsibility has been satisfied, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Maine, 109 Nev. at 727, 857 P.2d at 759.

Here, the district court concluded that pursuant to Bower v. Harrah’s Laughlin, 125 Nev. 470, 215 P.3d 709 (2009), and the evidence in the record, the unknown assailants’ wrongful intervening acts were unforeseeable superseding causes of Long’s injuries.¹ Accordingly, the

¹In Bower, Robert Garcia and Noi Lewis were guests at Harrah’s who were detained by Las Vegas Metro policemen following a brawl between two biker gangs during Laughlin’s annual River Run event; they were not involved in the brawl. Bower, 125 Nev. at 492, 215 P.3d at 724.

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district court granted summary judgment in favor of MGM. We reverse the district court's grant of summary judgment. Viewing the evidence in a light most favorable to Long, we conclude that genuine issues of material fact remain regarding whether the attack on Long was foreseeable.²

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Lewis was handcuffed and pushed to the ground, causing her blouse and bra to slip, leaving her breast exposed; she was walked through the casino in this state. *Id.* Garcia was struck after commenting on the officers' rough treatment of Lewis. *Id.* Both Garcia and Lewis were detained; Garcia requested a return to his room so he could take his evening dose of seizure medication but was not allowed to and suffered two seizures before an ambulance took him to the hospital. *Id.* This court held that Metro's intervening acts were unforeseeable, amounting to a superseding intervening cause of Garcia's and Lewis's injuries and, therefore, extinguishing Harrah's liability. *Id.* at 491-93, 215 P.3d at 724-25.

²*Bower* determined that the acts of Metro were not foreseeable based on finding that these intentional torts were a superseding intervening cause. 125 Nev. at 492, 215 P.3d at 724-25. In determining

whether an intervening cause is foreseeable, we consider several factors. These include whether (1) the intervention causes the kind of harm expected to result from the actor's negligence, (2) the intervening event is normal or extraordinary in the circumstances, (3) the intervening source is independent or a normal result of the actor's negligence, (4) the intervening act or omission is that of a third party, (5) the intervening act is a wrongful act of a third party that would subject him to liability, and (6) the culpability of the third person's intervening act.

Id. at 492, 215 P.3d at 725 (citing Restatement (Second) of Torts § 442 (1965)). While we here determine that the district court failed to conduct a proper foreseeability determination pursuant to NRS 651.015, the result is the same pursuant to the superseding cause factors in *Bower* because

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After the district court entered its order in the instant matter, this court decided Estate of Smith. In Estate of Smith, we interpreted NRS 651.015, a statute enacted in 1995 to limit the civil liability of innkeepers for the death or injury of patrons caused by a person who is not an employee. See 1995 Nev. Stat., ch. 691, § 8, at 2670; NRS 651.015. In doing so, we drew a distinction between foreseeability as it relates to duty and foreseeability as it relates to causation. Foreseeability in relation to duty focuses on reasonable cause to anticipate a wrongful act, whereas foreseeability in relation to causation focuses on the foreseeability of the harmful consequences of the wrongful act. See Estate of Smith, 127 Nev. at ___ n.3, 265 P.3d at 691 n.3 (citing Doud, 109 Nev. at 1102, 1105, 864 P2d at 799, 801)).

We further stated that “[t]he preliminary inquiry in any case involving innkeeper liability is whether ‘[t]he wrongful act which caused the death or injury was foreseeable,’ and thus, whether a duty of care was owed to the plaintiff.” Estate of Smith, 127 Nev. at ___, 265 P.3d at 691 (second alteration in original) (quoting NRS 651.015). If the wrongful act is unforeseeable, then the innkeeper owes no duty and the district court need not consider the remaining elements of plaintiff’s negligence cause of action. Id. Additionally, this determination regarding foreseeability as it relates to duty “must be made by the district court as a matter of law.” Id. A wrongful act is not “foreseeable” unless:

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the district court failed to make a determination as to whether the attack was foreseeable viewing the evidence presented in the light most favorable to Long.

(a) The owner or keeper failed to exercise due care for the safety of the patron or other person on the premises; or

(b) Prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.

Id. (quoting NRS 651.015(3)).

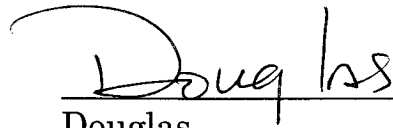
Here, the record supports that MGM knew that fights between its patrons were a regular occurrence and it had additional security on hand due to the New Year's holiday and the UFC fight. Additionally, Long presented evidence she felt threatened and that MGM's internal policies and procedures required its restroom porter to notify security that she had witnessed the incident in the restroom. Based on the record presented on appeal, it is evident that the district court granted MGM's motion for summary judgment based on Long's statement at one point in her deposition that she did not feel threatened by one of the unidentified women and felt the incident was over when she left the restroom. The district court seemed to discount Long's statement that she felt threatened by one of the woman, after the confrontation in the bathroom. By discounting or ignoring Long's testimony regarding feeling threatened, as well as the restroom porter's failure to notify security that she had witnessed the incident in the restroom, it appears that the district court did not view the evidence in the light most favorable to Long.³ This was error.

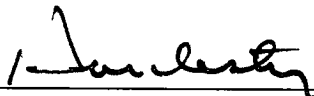
³Further, as set forth in Doud, MGM had a duty to use reasonable care to keep its premises in a reasonably safe condition, which includes keeping its patrons safe from injury caused by third persons if the actions or injuries are reasonably foreseeable. In Doud, the plaintiff presented extensive evidence of the dangerous nature of the parking lot where he

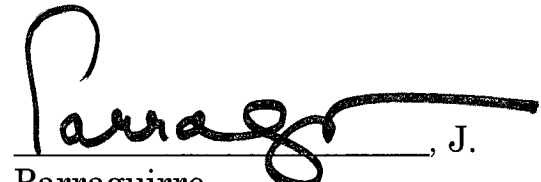
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Viewing the evidence in the light most favorable to Long, genuine issues of material fact remain as to whether her attack was foreseeable (as it relates to duty), and thus, whether MGM had a duty to prevent it. Thus, we remand this appeal for a proper determination of whether MGM owed Long a duty of care in light of our decision in Estate of Smith. 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.
Douglas


_____, J.
Hardesty


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Parraguirre

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was assaulted that showed 85 crimes and arrests reported on the Hilton premises in the two years before the attack, including nine that occurred specifically in the parking lot where Doud was attacked. 109 Nev. at 1103, 864 P.2d at 800. In addition, Doud's security expert stated that the parking lot was known to be dangerous by Hilton and the robbery and attempted murder of Doud was foreseeable given the substantial level of criminal activity occurring on the premises. Id. Although there is little evidence in the record regarding the statistics of crimes at MGM, Long did not have to prove the exact same type of incident had previously occurred at MGM, she simply had to show there was a genuine issue of material fact regarding her claims, which she did based on the depositions of various MGM employees in the record.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Persi J. Mishel, Settlement Judge
Porter & Terry, LLC
Kravitz, Schnitzer, Sloane & Johnson, Chtd.
Eighth District Court Clerk