IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAYTON LEE,
Appellant,
vs.
LAMAR CENTRAL OUTDOOR, LLC,
Respondent.

No. 63048

FILED

MAR 3 1 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a personal injury action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Clayton Lee was riding a motor scooter around Las Vegas late in the evening. After visiting an abandoned campground to see a BMX or motocross race track, he intended to ride to an abandoned church. Lee planned to cross respondent Lamar Central Outdoor's property in order to proceed to the church.

Lamar's property is mostly vacant. It features only a fence and two billboards visible from the nearby freeway. The property is bounded by two bike paths. According to Lee, Lamar's property appeared to be a "public attraction" with a gravel park that looked to be "well-traveled" by BMX riders.

Lee intended to enter Lamar's property through what looked to be a break in the fence. In fact, there was no break in the fence. The area that appeared open was sealed off by barbed wire. Lee crashed his motor scooter directly into the barbed wire portion of the fence and sustained multiple injuries. He sought medical attention immediately after the accident.

Lee then filed suit against Lamar, alleging negligence on the grounds of premises liability. After Lee's deposition, Lamar moved for summary judgment. Lamar argued that it was immune from liability under Nevada's recreational use statute, NRS 41.510. The district court granted summary judgment in favor of Lamar. Lee appeals that decision.

"Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). "This court reviews orders granting summary judgment de novo." *DTJ Design, Inc. v. First Republic Bank*, 130 Nev. ___, ___, 318 P.3d 709, 710 (2014) (citing *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996)).

Under Nevada's recreational use statute, NRS 41.510, property owners or occupants do not owe any duty to keep their property safe for others using it for recreational purposes unless the owners or occupants granted permission to the users in exchange for consideration. This court has held that NRS 41.510 applies where (1) the defendant is the owner, lessee, or occupant of the premises where the plaintiff was injured; (2) the land where the plaintiff was injured is the type of land the Legislature intended NRS 41.510 to cover; and (3) the plaintiff was engaged in the type of activity the Legislature intended NRS 41.510 to cover. *Boland v. Nev. Rock & Sand Co.*, 111 Nev. 608, 611, 894 P.2d 988, 990 (1995). The statute, however, does not limit an owner or occupant's liability where the owner or occupant engaged in a "[w]illful or malicious

failure to guard, or to warn against, a dangerous condition, use, structure or activity." NRS 41.510(3)(a)(1).

Lee does not question that Lamar was the owner of the property or that he was engaged in the type of activity covered by the statute. Instead, he argues that the district court erred because Lamar's property, as urban or suburban property, is not the type of land covered by the statute and because an issue of material fact exists as to whether Lamar acted willfully or maliciously.

Whether NRS 41.510 covers Lamar's property

By its own terms, NRS 41.510 applies to "any estate" or "any premises." We have specified that, because the statute regards property used for recreation, "the type of property should be rural, semi-rural, or nonresidential so that it can be used for recreation." *Boland*, 111 Nev. at 612, 894 P.2d at 991. Accordingly, we have held that "a commercial gravel pit," *id.* at 610, 894 P.2d at 990, and "an uninhabited area of desert," *Brannan v. Nevada Rock & Sand Co.*, 108 Nev. 23, 24, 823 P.2d 291, 291-92 (1992), were types of land covered by NRS 41.510.

Because NRS 41.510 uses the broad language of "any estate" and "any premises," the statute requires us to apply a broad construction. The nonresidential, urban property at issue here is covered by the statute. We note that Nevada's recreational use statute can be distinguished from those in other states, which specify the type of property covered. *See, e.g.*, Alaska Stat. § 09.65.200 (2012) (specifying that "unimproved" property is covered by statute). Without any specification in the statute, there is no reason to construct NRS 41.510 narrowly so as to exclude urban land. *See Palmer v. United States*, 945 F.2d 1134, 1136 (9th Cir. 1991) ("We see nothing in the language of Hawaii's statute that makes a distinction between urban and rural properties. If the legislature wished to deprive

urban property holders of qualified immunity, it could have easily done so.").

Furthermore, the existence of improvements on Lamar's property, such as the fence or the billboards, does not disqualify Lamar from the immunity granted by the statute. NRS 41.510 expressly contemplates the "use of any structure on the premises" as a covered activity. One court has held that property "does not lose its immunity" where a softball field, complete with dugouts and fences, was constructed on the property. *Miller v. City of Dayton*, 537 N.E.2d 1294, 1297 (Ohio 1989). Courts have also held that property is covered under a recreational use statute even where the landowner has taken actions to prevent others from using the property. *White v. City of Troy*, 735 N.Y.S.2d 648, 650 (App. Div. 2002) ("It is now well settled that [New York's recreational use statute] applies . . . to those who attempt to prevent members of the public from using their lands." (citing *Bragg v Genesee Cnty. Agric. Soc'y*, 644 N.E.2d 1013, 1017-18 (N.Y. 1994))). Hence, the fence and other improvements on Lamar's property do not disqualify Lamar from protection under NRS 41.510.

Whether there exists an issue of material fact as to whether Lamar acted maliciously or willfully

An owner or occupant of property is immune from liability only if he did not act willfully or maliciously. NRS 41.510(3)(a)(1). "Although the issue of willfulness is generally a question of fact," this court has held that summary judgment is appropriate where the plaintiff has presented no evidence of willful or malicious conduct. *Boland*, 111 Nev. at 613, 894 P.2d at 991-92; *see also Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1049 (Ind. Ct. App. 1993) (holding that summary

judgment under a recreational use statute is appropriate where the plaintiff failed to allege malice or willfulness).

Here, not only did Lee not provide any evidence of malice, but he also did not allege malice. Lee's complaint is focused solely on negligence and does not "set forth sufficient facts to demonstrate the necessary elements," *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992), of any other claim for relief that might involve malicious or willful acts. "Willfulness and negligence are contradictory terms. If conduct is negligent, it is not willful; if it is willful, it is not negligent." *Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 44, 51, 369 P.2d 198, 201 (1962) (citations omitted). Therefore, because Lee only alleged negligence and failed to otherwise set forth evidence of willfulness, we conclude that the district court did not err in finding no issue of material fact on the issue of willfulness or malice.[1]

Accordingly we,

ORDER the judgment AFFIRMED.

/Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

[1]We have considered Lee's other arguments and found them to be without merit.

cc: Hon. Michelle Leavitt, District Judge
John Walter Boyer, Settlement Judge
Day & Nance
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk