IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BARBARA HEID, AN INDIVIDUAL,
Appellant,
vs.
TA OPERATING, LLC,
Respondent.

No. 68894

ORDER OF AFFIRMANCE

This is an appeal from an order granting summary judgment and an order denying a motion to amend. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

TA Operating ("TA") entered into a sublease agreement in which TA sublet its premises to Northpointe Sierra ("Northpointe") for a casino within TA's truck stop and restaurant. In 2011, appellant Barbara Heid, a Northpointe employee, tripped over a metal plate covering an electrical junction box built into the casino floor. Heid received workers' compensation benefits through her employer, Northpointe, and also sued TA to recover for her injuries. TA moved for summary judgment, which the district court granted after concluding TA was not responsible for maintaining the metal plate.[1] Heid moved for reconsideration and to amend her complaint to add Northpointe as a defendant.[2] The district court denied the motion.

[1]Though the order was signed by Senior Judge Joseph Bonaventure, Judge Allf orally granted the motion at the hearing.

[2]We do not recount the facts except as necessary to our disposition.

16-901338

On appeal, Heid contends the district court erred in granting summary judgment and denying Heid's motion to amend her complaint. Specifically, she argues, first, a genuine issue of material fact remains regarding TA's duty to maintain the casino premises and, second, she should have been allowed to bring suit against Northpointe under the dual capacity doctrine. We disagree.[3]

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Costello v. Casler*, 127 Nev. 436, 439, 254 P.3d 631, 634 (2011). Summary judgment is proper when the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. When deciding a summary judgment motion, we view all evidence in the light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

Interpreting an unambiguous contract is generally a question of law. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). Summary judgment is improper if the court must use extrinsic evidence to determine the meaning of an ambiguous term within the contract. *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

The sublease agreement's terms unambiguously reflect TA is not liable for injuries to third parties on the casino premises. The contract

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[3]We have carefully considered Heid's other arguments and find they are without merit.

clearly states Northpointe leased the premises "as is" and acknowledged TA would not be liable for any defects therein. Heid's own evidence shows the metal plate was never flush with the floor and Northpointe was aware of the defect when it began occupying the premises pursuant to the sublease agreement. In fact, deposition testimony established that Northpointe employees were aware of this tripping hazard and took affirmative steps to keep people from tripping over the plate, including putting a gaming table over it.

Further, the sublease unambiguously states that Northpointe will "protect, indemnify, and hold harmless [TA] for, from and against all liabilities . . . asserted against [TA] by reason of . . . any accident or injury to, or death of, persons or loss or damage to property occurring on or about the Premises."[4] As a result, pursuant to the unambiguous terms of the sublease agreement, TA is not liable to third parties, such as Heid, who are injured in a trip and fall on Northpointe's casino premises.[5] We

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[4]This indemnification clause found in paragraph 9 of the sublease agreement also provides that Northpointe is not required to indemnify TA for liabilities "caused by [TA's] negligence or misconduct[.]" However, this exception is immaterial to the instant case because, as discussed earlier in this order, paragraph 3 provides that TA does not have any duty of care relating to "any latent or patent defects therein."

[5]Our dissenting colleague asserts, in part, that TA's duty of care may arise merely as a matter of tort law, and not by virtue of the terms of the sublease. While it is true that the amended complaint below sounded in negligence and Heid asserted in her opposition to summary judgment that the agreement between TA and Northpointe had no bearing on her negligence claim, she has abandoned that argument on appeal. Rather, her opening brief focuses only on arguments intended to establish that TA contractually assumed a duty of care—*i.e.*, that TA had the contractual duty to maintain the area where she tripped; that the agreement was ambiguous such that it could not be decided on summary judgment who

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therefore conclude the district court did not err in granting summary judgment in favor of TA.[6]

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had the duty to maintain the area; and that TA and Northpointe's course of conduct of allowing TA to maintain the area modified the agreement, making maintenance of the area TA's responsibility, among other contract-based arguments. Accordingly, because Heid abandoned any purely torts-based duty of care arguments on appeal, she has waived them and any consideration of them is improper. *See Costello v. Casler*, 127 Nev. 436, 440 n.3, 254 P.3d 631, 634 n.3 (2011) (concluding, in resolving an appeal from an order granting summary judgment, that an argument raised below that was not reasserted on appeal had been abandoned and did not need to be addressed).

[6]Both parties on appeal, as below, erroneously frame the issue as whether the sublease agreement charged TA with maintaining the electrical box. The district court granted summary judgment in favor of TA on the basis that TA did not have a duty to maintain the electrical box over which Heid tripped. The district court and the parties improperly framed the issue as an interpretation of the portion of paragraph 10 regarding maintenance of the electrical system as opposed to paragraphs 3 and 9 on defects and injuries and responsibility therefor. However, we will affirm a district court's order if the district court reached the correct result, even if for the wrong reason. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (affirming declaratory judgment despite interpreting a contract's terms differently than the district court). Because granting summary judgment was proper under the terms of the sublease agreement, we therefore affirm the district court.

Furthermore, we conclude that there is no ambiguity in the sublease agreement's use of the terms "Property" and "Premises" to allocate TA's and Northpointe's respective rights and obligations. The sublease defines "Property" in relevant part as "a truck and travel stop, restaurant, and related facilities[,]" and it defines "Premises" in relevant part as "[t]he portion of the Property subleased by [TA] to [Northpointe] hereunder[.]" Any contention that they do not have distinct meanings is rebutted by the fact that the sublease refers to "the Property *and every part thereof*" when the two terms are intended to overlap. (Emphasis added.)

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We next consider whether the district court abused its discretion in denying Heid's motion to amend her complaint. We review the denial of leave to amend for an abuse of discretion. *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013). Under NRCP 15(a), leave to amend a complaint shall be "freely given when justice so requires." But, the court should not give leave to amend where the moving party wishes to plead an impermissible claim. *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013); *see also Nutton v. Sunset Station, Inc.*, 131 Nev. ___, 357 P.3d 966 (Ct. App. 2015) (providing that the district court need not allow facially futile amendments).

Heid argues that, despite receiving workers' compensation benefits, she should be allowed to bring suit against Northpointe. Under the Nevada Industrial Insurance Act, an employee who receives workers' compensation benefits may not thereafter recover additional damages from an employer who provides workers' compensation benefits. NRS 616A.020; *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1342, 905 P.2d 168, 171 (1995). Heid asserts she may nevertheless recover against Northpointe under the dual capacity doctrine, which allows an employee to sue an employer who occupies "a second capacity that confers on him obligations independent of those imposed on him as employer." *Noland v. Westinghouse Elec. Corp.*, 97 Nev. 268, 269 n.1, 628 P.2d 1123, 1124 n.1 (1981).

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Moreover, we hold that Heid has failed to show the existence of a genuine issue of material fact with respect to her theory that TA assumed—through its course of dealing—a duty to maintain the Premises.

The Nevada Supreme Court has not adopted the dual capacity doctrine. Because Heid does not advance any cogent argument explaining why this court should adopt this rule, we decline to do so here. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that we need not consider claims that are not cogently argued). In light of this decision, we conclude the district court did not abuse its discretion by denying Heid's motion to amend her complaint. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Silver

TAO, J., concurring in part and dissenting in part:

I agree with my colleagues that the district court did not abuse its discretion in denying Heid's motion to amend her complaint, because the Nevada Supreme Court has expressly rejected the "dual capacity" doctrine. *See Harris v. Rio Hotel & Casino, Inc.*, 117 Nev. 482, 491, 25 P.3d 206, 212 (2001); *Watson v. G.C. Associates Limited Partnership*, 100 Nev. 586, 588, 691 P.2d 417, 418 (1984).

But I respectfully dissent from the affirmance of summary judgment against Heid. The majority resolves that issue based upon the language of a contractual indemnity clause, but this isn't a contract case,

and Heid isn't even a party to the contract between TA and Northpointe. This is a slip-and-fall tort case, and in a tort case a defendant's duties arise as a matter of law, not by way of contract, and no private contract can change what every "reasonable person" is required to do at all times by operation of law.

I.

TA argues that Northpointe contractually agreed to indemnify TA for its negligence, and the majority disposes of this appeal based solely upon this argument. But TA's argument is both untrue and legally irrelevant.

The lease actually says, quite explicitly, that Northpointe does NOT indemnify TA for negligence (in a passage that the majority oddly replaces with ellipses):

> protect, indemnify, and hold harmless [TA] for, from and against all liabilities . . . asserted against [TA] by reason of the following, **except to the extent caused by LESSOR's negligence or misconduct**: (1) any accident or injury to, or death of, persons or loss or damage to property occurring on or about the Premises . . . .

(emphasis added).

In other words, the lease provides that Northpointe indemnifies TA for various kinds of liability *except* for liability from its negligence—which means that in a negligence case like this one, there is no duty to indemnify. So TA's argument is simply and utterly wrong.

Even if it weren't wrong, TA's argument is wholly beside the point. Contracts are enforceable only between the parties to the contract (except in cases involving third-party beneficiaries, which Heid expressly argues that she is not). Contractual clauses cannot be asserted as

defenses to tort claims brought by non-parties who never signed the contract, and Heid isn't a party to this lease.

Thus, even if the lease said the exact opposite of what it says—that Northpointe actually indemnifies TA for negligence to non-parties—that wouldn't mean that TA is immune from being sued by those non-parties for its own negligence. Rather, it only means that, if and when sued by one, TA can assert its right against Northpointe under the contract it signed with Northpointe to bring Northpointe into the action to help its defense and spread any liability around. *See Reid v. Royal Ins. Co.*, 80 Nev. 137, 140–41, 390 P.2d 45, 47 (1964) ("A defendant is permitted to defend the case and at the same time assert his right of indemnity against the party ultimately responsible for the damage. The application of indemnity (when proper) shifts the burden of the entire loss from the defendant tort-feasor to another who should bear it instead.").

With a mere indemnity provision (this isn't even that, but assuming that it is)—as opposed to, say, a subrogation provision with a "duty to defend" clause—Northpointe wouldn't even participate in the defense of the case but would only help pay any judgment; TA would have to pursue its contractual indemnity rights against Northpointe on its own either separately or by adding Northpointe as a third party. But either way, that relationship exists between TA and Northpointe; it's not a shield to use against Heid or any other plaintiff who never signed the lease and has no contractual relationship ("privity") with either Northpointe or TA.

Thus, TA's contractual indemnity argument is nothing but a red herring swallowed hook, line, and sinker. The only issue here is whether a rational jury could find that TA's negligence—tested under the "reasonable person" standard of tort law, not contract law—proximately

caused Heid's injuries. If any negligence occurred, all the lease tells us is whether TA has its own contract-based claim against Northpointe to make Northpointe pay TA back for whatever the jury might eventually award Heid in damages. But TA stays in the case until a final resolution on the merits and the lease doesn't entitle it to an early out.

II.

"A business owes its patrons a duty to keep the premises in a reasonably safe condition for use." *Sprague v. Lucky Stores Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). To prevail in a premises liability case, the plaintiff must demonstrate that (a) the defendant owed a duty of care to the plaintiff; (b) that the duty was breached; (c) the breach was the proximate cause of the plaintiff's injury; and (d) the plaintiff suffered injury. Although most of these inquiries are questions of fact, whether the defendant owed a legal duty toward the plaintiff, and what that duty was, are questions of law. *Foster v. Costco Wholesale Corp.*, 128 Nev. ___, ___, 291 P.3d 150, 153 (2012).

TA argues that summary judgment was properly granted in its favor because it owed no duty to Heid, having contractually transferred any duty to maintain the premises where the fall occurred to Northpointe via the lease.

Once upon a time TA's argument would have rung true; at common law, the lessor of the premises had *no* duty of care for physical harm caused by dangerous conditions on leased premises once a lessee took possession of the premises. *See Wright v. Schum*, 105 Nev. 611, 613, 781 P.2d 1142, 1143 (1989).

But Nevada has abolished the common-law rule and now "[i]mmunity from liability cannot be enjoyed simply due to one's legal

status," and "merely because a person ha[s] the legal status of being an owner or a landlord, such person [does] not enjoy immunity from tort liability." *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 410, 282 P.3d 727, 731 (2012) (citing *Wright v. Schum*, 105 Nev. 611, 613–14, 781 P.2d 1142, 1143 (1989)). Rather, under current law,

> landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk. . . . The questions of control, hidden defects and common or public use, which formerly had to be established as a prerequisite to even considering the negligence of a landlord, will now be relevant only inasmuch as they bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm.

Turpel v. Sayles, 101 Nev. 35, 38, 692 P.2d 1290, 1292 (1985) (quoting *Sargent v. Ross*, 113 N.H. 388, 397, 308 A.2d 528, 534 (1973)).

Accordingly, the relevant question is not whether TA should be called a landlord or lessor, but rather whether it owed some tort duty to Heid to exercise due care in preventing an unreasonable risk of harm where the fall happened.

There are at least two ways that Heid could establish a duty like that in this case: first, such a duty would exist if, regardless of whether TA is a landlord or not, as a practical matter it took affirmative steps to assume a duty on the leased premises. *See Harry v. Smith*, 111 Nev. 528, 533, 893 P.2d 372, 375 (1995); *see also* RESTATEMENT (SECOND)

OF TORTS: NEGLIGENCE § 324A (AM. LAW INST. 2016), which the Nevada Supreme Court has expressly adopted.[7]

The second way that Heid could establish that TA owed a duty to her would be if TA contracted to keep the premises in good repair, yet unreasonably failed to do so or did so in a negligent manner. As explained in the RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 357 (AM. LAW INST. 2016):

> A lessor of land is subject to liability for physical harm cause[d] to his lessee and others upon the

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[7]Section 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm or
>
> (b) he has undertaken to perform a duty owed by the other to the third person or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

(emphasis added). This rule was expressly adopted in Nevada in *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1492 970 P.2d 98, 113–114 (1998) (affirming judgment based on § 324A), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 270, 21 P.3d 11, 14 (2001). Many other states have adopted it as well. *See, e.g., Paz v. State*, 994 P.2d 975 (Cal. 2000); *CeCaire v. Pub. Serv. Co.*, 479 P.2d 964 (Co. 1971) (en banc); *Huggins v. Aetna Cas. & Sur. Co.*, S.E.2d 191 (Ga. 1980); *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1301–02 (Haw. 1997); *Espinal v. Melville Snow Contractors, Inc.*, 773 N.E.2d 485 (N.Y. 2002); *Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068 (Utah 2002).

> land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract.

(Emphasis added.) *See also* RESTATEMENT (THIRD) OF TORTS § 53 cmt. h (AM. LAW INST. 2016) ("[t]he lessor thereby remains responsible for risks that arise from failure to comply with the contractual undertaking, as well as for risks created in the course of performing the undertaking"). Such a contractual provision would operate to shift the tort duty of reasonable care between the lessee and the lessor (one could assume the duties of the other, or both could have concurrent duties), but could not change what every "reasonable person" is required to do at all times as a matter of law. *See Harry*, 111 Nev. at 533, 893 P.2d at 375.

Here, both of these theories apply. Paragraph 10B of the lease provides that TA, not Northpointe, was required to keep "all wiring" and "electrical" systems in good repair wherever located, whether within the leased Premises or otherwise, and a rational jury could find that the electrical junction box cover that Heid tripped over was a part of the building's electrical system.

Furthermore, paragraph 3 of the lease expressly describes the leased Premises (where Heid fell) as a "portion of the Property," and paragraph 10B requires TA to "keep and maintain in good order, condition and repair the Property *and every part thereof*" (emphasis added). "Every

part thereof" literally includes the "portion of the Property" called the "Premises" that was leased to Northpointe.[8] At the same time, Paragraph 10A of the lease states that Northpointe "shall keep the Premises in a clean and sanitary condition and in good repair during the Term of this Lease."

I would read these clauses as simultaneously imposing two duties: a concurrent duty upon both TA and Northpointe to generally keep the entirety of the Premises safe for third parties; and an additional and separate duty solely upon TA to keep the electrical system and wiring in a safe condition. Either one of these contractual duties is sufficient to support Heid's action against TA.

This is consistent with both the express language of the lease and the evidence outside of the lease; the evidence clearly suggests that Northpointe understood the lease to assign the duty to maintain the electrical junction box to TA, at least in part, and accordingly Northpointe gave actual notice to TA of the problem with the expectation that TA would do something about it:

> Q. . . . When North Point and you guys did the configuring of where to put the tables, was there any concern about covering over these metal plates that's depicted in H?

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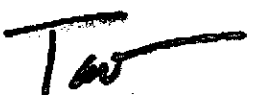
[8]Exhibit A to the lease depicts the Property as a building that includes a "casino area," which exhibit B clearly labels as the "Premises." Moreover, the lease specifies that TA's duties do not include "any portion of any of the foregoing consisting of the LESSEE's fixtures or personal property," which one would expect to be found only within the Premises portion of the Property. This provision makes no sense if TA possesses no duties within the leased Premises. Thus, TA's duties toward the whole Property necessarily apply to the Premises, which the lease defines simply as a lesser-included portion of the Property.

> A. I mean, we had commented that it was – yes, we did comment that we needed to look at talking to TA about helping out with that because it did stick up, they had a little lip.
>
> Q. Did you talk to anybody from TA?
>
> A. We did with the maintenance gentleman, yes.

Even if one were overly nitpicky and harbored doubts about whether the electrical junction box was truly part of the "electrical" system; whether "part of the Property" means the same thing as "portion of the Property"; or whether the lease actually requires Northpointe to indemnify TA notwithstanding its express language to the contrary, then at best the lease contains unresolved ambiguities and the district court should have entertained parol evidence to determine the intent of the parties. But even then summary judgment would be inappropriate because the district court did not hear any such evidence, and furthermore the competing parol evidence might have had to be resolved by the jury rather than the district court. *See Agric. Aviation Engineering Co. v. Board of Clark Cty. Com'rs*, 106 Nev. 396, 398-400, 794 P.2d 710, 712-13 (1990) ("the district court should have resolved the ambiguity of the lease by examining the intentions of the parties. To determine the parties' intentions, the credibility of their statements must be decided, which should be an issue for consideration by the trier of fact.").

Either way, whether the lease is labeled clear or ambiguous, and whether it contains an indemnity clause or not, it appears pretty thoroughly clear to me that there is no reasonable interpretation of the lease under which summary judgment should have been granted in favor of TA based upon the existing record.

Quite to the contrary, I would conclude that a rational jury could return a verdict in favor of Heid where, when viewed in the light most favorable to Heid, the evidence indicates that TA could have owed a duty of reasonable care toward Heid, could have breached it, and the breach could have caused Heid to fall and suffer injuries. I would therefore reverse the grant of summary judgment below.



_____, J.
Tao

cc: Chief Judge, Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Hon. Nancy L. Allf, Judge
Carolyn Worrell, Settlement Judge
Bailus Cook & Kelesis
Olson, Cannon, Gormley, Angulo & Stoberski
Eighth District Court Clerk