

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES WASMUND, INDIVIDUALLY AND AS SURVIVING SPOUSE AND AS ADMINISTRATOR AND HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED; JAMES WASMUND AS PARENT AND NATURAL GUARDIAN OF AUSTIN WASMUND, A MINOR, AS HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED; JAMES WASMUND AS PARENT AND NATURAL GUARDIAN OF SARAH WASMUND, A MINOR, AS HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED; AND JAMES WASMUND AS PARENT AND NATURAL GUARDIAN OF HUNTER WASMUND, A MINOR, AS HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED,

Appellants.

vs.

ARIA RESORT & CASINO HOLDINGS, LLC, D/B/A ARIA RESORT & CASINO,
Respondent.

JAMES WASMUND, INDIVIDUALLY AND AS SURVIVING SPOUSE AND AS ADMINISTRATOR AND HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED; JAMES WASMUND AS PARENT AND NATURAL GUARDIAN OF AUSTIN WASMUND, A MINOR, AS HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED; JAMES WASMUND AS PARENT AND NATURAL GUARDIAN OF SARAH WASMUND, A MINOR, AS HEIR OF THE ESTATE OF SANDRA MARIE SUTTON, DECEASED; AND JAMES

No. 68635

FILED

MAR 06 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

No. 69147 ✓

17-900420

WASMUND AS PARENT AND
NATURAL GUARDIAN OF HUNTER
WASMUND, A MINOR, AS HEIR OF
THE ESTATE OF SANDRA MARIE
SUTTON, DECEASED,

Appellants,

vs.

ARIA RESORT & CASINO HOLDINGS,
LLC, D/BA/ ARIA RESORT & CASINO,
LLC,

Respondent.

No. 70209

JAMES WASMUND, INDIVIDUALLY
AND AS SURVIVING SPOUSE AND AS
ADMINISTRATOR AND HEIR OF THE
ESTATE OF SANDRA MARIE SUTTON,
DECEASED; JAMES WASMUND AS
PARENT AND NATURAL GUARDIAN
OF AUSTIN WASMUND, A MINOR, AS
HEIR OF THE ESTATE OF SANDRA
MARIE SUTTON, DECEASED; JAMES
WASMUND AS PARENT AND
NATURAL GUARDIAN OF SARAH
WASMUND, A MINOR, AS HEIR OF
THE ESTATE OF SANDRA MARIE
SUTTON, DECEASED; AND JAMES
WASMUND AS PARENT AND
NATURAL GUARDIAN OF HUNTER
WASMUND, A MINOR, AS HEIR OF
THE ESTATE OF SANDRA MARIE
SUTTON, DECEASED,

Appellants,

vs.

ARIA RESORT & CASINO HOLDINGS,
LLC, D/B/A ARIA RESORT & CASINO,
Respondent.

ORDER OF AFFIRMANCE

These are consolidated appeals arising from a district court's orders granting a motion to dismiss under NRCP 12(b)(5), awarding costs,

and denying relief from the judgment under NRCP 60(b)(2). Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

As relevant to this appeal, appellant James Wasmund sued respondent Aria Resort & Casino ("Aria") for negligence following the death of his wife, Sandra Sutton. Ammar Harris set in motion a chain of events leading up to Sutton's death by shooting and mortally wounding Kenneth Cherry while both men were driving on Las Vegas Boulevard. Cherry then crashed into a taxicab in which Sutton was a passenger. As a result of Cherry's crashing into the taxicab, the taxicab exploded into flames, killing both the taxi driver and Sutton. Prior to the shooting, Harris and Cherry had attended a party at Aria's Haze Nightclub.¹

The district court dismissed Aria from the lawsuit upon Aria's NRCP 12(b)(5) motion, agreeing with Aria that it did not have a duty to control the dangerous conduct of others nor did it have a special relationship with Sutton that would give rise to a duty of care. The district court further concluded that Sutton's death was not foreseeable and that the shooting was a superseding cause. As a result, the district court awarded Aria reasonable costs. Wasmund moved for relief from the judgment pursuant to NRCP 60(b) after further facts came to light during Harris's criminal trial, arguing Aria was aware Harris was violent but did nothing to protect the public, despite various policies and regulations imposed on Aria by the Nevada Gaming Control Board. The district court denied the motion.

On appeal, we consider, first, whether the district court erred by granting Aria's NRCP 12(b)(5) motion to dismiss; second, whether the

¹We do not recount the facts except as necessary to our disposition.

district court abused its discretion by denying Wasmund's NRCP 60(b) motion; and third, whether the district court erred by awarding Aria its costs. Wasmund argues, in essence, that the district court erred because the facts could support a finding that Aria owed a duty of care to prevent the shooting. We disagree.

NRCP 12(b)(5) allows a defendant to move for dismissal where the plaintiff fails "to state a claim upon which relief can be granted." We rigorously review, *de novo*, a district court's grant of a 12(b)(5) motion to dismiss. *Slade v. Caesars Entm't Corp.*, 132 Nev. ___, ___, 373 P.3d 74, 78 (2016). In so doing, we also accept the plaintiff's allegations as true. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

To succeed on a negligence claim, the plaintiff must first establish the defendant owed a duty of care to the plaintiff. *Id.* at 824, 221 P.3d at 1280. Although generally the question of negligence is a question of fact for the jury, the question of whether the defendant owes a duty of care is a question of law for the court. *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009); *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011).

Under common law, there is no duty to control a party's dangerous conduct, warn others, or protect another from a criminal attack. *Sanchez*, 125 Nev. at 824, 221 P.3d at 1280. An exception arises where the parties have a special relationship. *Id.* A special relationship exists where a party's ability to protect him- or herself is limited in some way by submitting to the control of the other party. *Scialabba v. Brandise Const. Co., Inc.*, 112 Nev. 965, 969, 921 P.2d 928, 930 (1996). "In the absence of this degree of control, there is no special relationship giving rise to a duty

of reasonable care.” *Sparks*, 127 Nev. at 297, 255 P.3d at 245 (internal quotations and citation omitted).

Our supreme court has repeatedly held that where a patron or customer leaves the premises and commits a tort elsewhere, the innkeeper, landowner, or business is not liable for the tort. *See Rodriguez*, 125 Nev. at 584-85, 216 P.3d at 797-99 (holding a hotel was not liable for a drunk driving crash after hotel security evicted the driver from his hotel room for disorderly conduct); *Sparks*, 127 Nev. at 297-99, 255 P.3d at 245-46 (concluding a fraternity was not responsible for torts committed by members after they left a party). For example, in *Sanchez* a pharmacy filled a customer’s prescription despite having been warned that the customer was illegally obtaining multiple prescriptions. 125 Nev. at 822, 221 P.3d at 1279. The customer, driving under the influence of prescription drugs, struck two men, killing one and injuring another. *Id.* at 821-22, 221 P.3d at 1279. The supreme court concluded the pharmacy was not liable because no special relationship existed between the pharmacy and the plaintiffs. *Id.* at 824-25, 221 P.3d at 1280-81. The court further noted that assigning liability for a customer’s wrongful act harming an “anonymous member of the driving public” would “create a zone of risk [that] would be impossible to define.” *Id.* at 825, 221 P.3d at 1281 (internal quotations and citation omitted). *Compare with Anderson v. Mandalay Corp.*, 131 Nev. ___, 358 P.3d 242 (2015) (discussing vicarious liability for an employee’s rape of a hotel patron).

Similarly, here, the facts fail to establish either that a special relationship existed between the Aria and Sutton,² or that the relationship between the Aria and Harris establishes a duty of care in favor of Sutton. Rather, similar to *Sanchez*, Sutton was an anonymous member of the public whom Harris injured in a different location after he left the Aria. Assigning a duty of care under these facts creates an immeasurable zone of danger. Accordingly, the district court did not err by granting Aria's NRCP 12(b)(5) motion to dismiss.


Wasmund argues, however, that new evidence discovered during Harris's criminal trial refuted the district court's basis for dismissal. We review a district court's ruling regarding a 60(b) motion for an abuse of discretion. *Ford v. Branch Banking & Trust Co.*, 131 Nev. ___, ___, 353 P.3d 1200, 1202 (2015). Wasmund primarily points to evidence showing that Aria's security was aware patrons were arguing in the valet parking area, someone brandished a gun, and that Harris was argumentative as he left the casino.³ This evidence, however, does not


²We are not persuaded that Nevada's gaming regulations and a letter sent by the Gaming Control Board in 2012 established a duty of care. The regulations and the letter upon which Wasmund relies focus on licensees' duties to protect patrons on the premises, and do not address harm caused by patrons to the public, off the premises. *See, e.g., Sanchez*, 125 Nev. at 825-28, 221 P.3d at 1281-83 (concluding a warning letter and regulatory statutes did not create an obligation for the pharmacies to take affirmative action to protect the public).


³Wasmund makes additional allegations, which we do not recount as we conclude they do not establish a duty of care. We note, however, that several of these assertions are stated without citation to the record or are actually belied by the record. *See* NRAP 28(a)(10)(A) (factual assertions must be supported by citations to the appellate record). We further note the new evidence suggests the argument in the valet parking quickly
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establish that Aria owed a duty of care to Sutton.⁴ Therefore, the district court properly denied Wasmund's motion for NRCP 60(b) relief. Because the district court did not err by dismissing the Aria from the lawsuit, Aria is entitled to recover its costs. See NRS 18.020 (a prevailing party is entitled to recover reasonable costs). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
Ara H. Shirinian, Settlement Judge
Christiansen Law Offices
Bailey Kennedy
Hall Jaffe & Clayton, LLP
Harper Selim
Eighth District Court Clerk

...continued

dissipated and that party-goers were on friendly terms as they left the Aria.

⁴Wasmund argues Aria had a duty to detain Harris and call law enforcement once Harris became argumentative, but NRS 651.020 gives Aria the right to evict disorderly persons from the premises. See, e.g., *Rodriguez*, 125 Nev. at 584-85, 216 P.3d at 797-99.