

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CAROLYN STONE, AN INDIVIDUAL,
AND AS HEIR OF THE ESTATE OF
STEVEN FEINBERG; AND LORI
KENNEDY, AS SPECIAL
ADMINISTRATOR OF THE ESTATE
OF STEVEN FEINBERG,

Appellants,

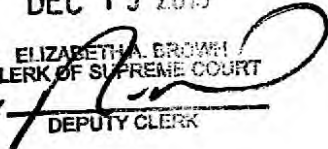
vs.

REPUBLIC SILVER STATE DISPOSAL,
INC., A NEVADA CORPORATION;
CITY OF NORTH LAS VEGAS, A
MUNICIPALITY; AGGREGATE
INDUSTRIES-SWR, INC., A NEVADA
CORPORATION; AND MC4
CONSTRUCTION, LLC, A NEVADA
LIMITED-LIABILITY COMPANY,
Respondents.

No. 76962-COA

FILED

DEC 19 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Carolyn Stone and Lori Kennedy appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), in a wrongful death, negligence action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

At approximately 8:35 p.m. on July 14, 2014, Lauren Simone Blackwell was driving east on Cheyenne Avenue toward Commerce Street when she struck Steven Feinberg with her vehicle as he was crossing the street, killing Feinberg instantly. Blackwell was subsequently arrested on several charges, and a blood test later revealed the presence of marijuana and cocaine in her system.

Carolyn Stone, as Feinberg's heir, and Lori Kennedy, as special administrator of Feinberg's estate (collectively, Stone), filed a complaint in

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district court alleging wrongful death and various theories of negligence against Blackwell as well as Jessica Goodrich (the owner of the vehicle). Because one of Stone's theories of negligence posited that the abnormally dark conditions were a proximate cause of Feinberg's death, the complaint also named as defendants Republic Silver State Disposal, Inc., NV Energy, Inc., and the City of North Las Vegas (CNLV), all of which were allegedly responsible for the lighting conditions.

The joint case conference report was filed on September 1, 2016, with discovery set to end on August 21, 2017. Stone filed an amended complaint on May 24, 2017 adding two new parties, Aggregate Industries-SWR, Inc., and MC4 Construction, LLC. Both companies were purportedly performing work at the construction site where the accident occurred. Then, NV Energy moved for summary judgment on July 27, arguing that it had no control over the breaker box on the premises and that Stone had presented no evidence that the lighting conditions were the proximate cause of Feinberg's death as opposed to Blackwell's intoxication. CNLV, Republic, Aggregate, and MC4 joined NV Energy's motion.¹

To support her opposition to summary judgment, Stone presented the police report, including the witness statements made to the police. The district court found that Stone's evidence was inadmissible hearsay and that because Stone presented no admissible evidence, there was no genuine issue of material fact as to causation. The district court

¹We note that Aggregate answered Stone's amended complaint on the same day it joined NV Energy's motion for summary judgment, meaning that no discovery had been conducted at least as to Aggregate. The record also suggests that no discovery was conducted as to MC4 before the district court heard the motion for summary judgment.

granted summary judgment as to CNLV, MC4, Republic, and Aggregate on October 17.² Two days later, the district court granted Stone's motion to extend discovery (filed on September 20) as to the two remaining defendants, Blackwell and Goodrich.

On October 30, Stone moved the court to reconsider its grant of summary judgment pursuant to NRCP 60, NRCP 59(e), or EDCR 2.24, or alternatively, to grant relief under NRCP 56(f).³ Stone presented allegedly newly discovered, previously unavailable evidence including Regional Transportation Commission of Southern Nevada (RTC) bus driver and witness to the incident, Melissa May Wendel's declaration; Blackwell's statements to Wendel describing the incident; Goodrich's sworn statement to her insurance company describing the incident; and police photographs of the incident scene.

As most pertinent here, in her declaration, Wendel clearly described the premises as "pitch black" and "dangerously dark." Wendel further stated that despite her illuminated headlights and elevated view, she did not see Feinberg because it was so dark. Moreover, Wendel had previously reported the area to her supervisor because she felt the dark conditions were a danger to her passengers and other pedestrians.

²NV Energy previously withdrew its motion.

³The Nevada Rules of Civil Procedure were amended in March 2019. *In Re: Creating a Committee to Update and Revise the Nevada Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). NRCP 56(f) (2005) was recodified as NRCP 56(d) (2019); the substance of the rule did not change. *Id.*; compare NRCP 56(f) (2005), with NRCP 56(d) (2019). For clarity, we refer to the version of the rule that governed the district court litigation: NRCP 56(f).

Additionally, Goodrich told her insurance company that the area “was pitch black,” that she couldn’t see, and that she “wasn’t confident to drive—you know, driving in that dark area.”

CNLV opposed Stone’s motion, arguing that the evidence was previously available and new only in its access as a result of Stone’s lack of diligence. MC4, Aggregate, and Republic joined CLNV’s opposition. On December 5, 2017, during the hearing on the motion for reconsideration, Stone explained that the new evidence was previously unavailable because first, Wendel had moved to Michigan and Stone only recently located her, and, second, Goodrich’s insurance company (despite producing other documents) failed to previously produce Goodrich’s statement for unknown reasons. The district court took the motion for reconsideration under advisement.

On July 23, 2018, the district court entered its order denying Stone’s motion, finding that while the evidence was newly acquired, Stone could not show that the discovery was obtained with due diligence pursuant to NRCP 60(b)(2). The district court certified its order granting summary judgment as a final judgment on August 28, and Stone filed the notice of appeal on September 10. On appeal, Stone argues that the district court erred by granting summary judgment and abused its discretion by denying her motion for reconsideration and not granting relief pursuant to NRCP 56(f). We agree.

A district court’s decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

All evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

“[I]f the reconsideration order and motion are properly part of the record on appeal from the final judgment, and if the district court elected to entertain the motion on its merits, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment.” *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007). A reconsideration motion and order are properly part of the record on appeal when the order denying reconsideration is entered before the notice of appeal from the final judgment is filed. *Id.* at 416-417, 168 P.3d at 1054.

Negligence requires a duty of care, breach of that duty, causation, and damages. *Klasch v. Walgreen Co.*, 127 Nev. 832, 837, 264 P.3d 1155, 1158 (2011). “Proximate causation is generally an issue of fact for the jury to resolve.” *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 665 (1998) (internal citation omitted). And, when it appears that a party cannot present “facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order” further discovery. NRCP 56(f).

Summary judgment can only be granted or denied based upon evidence that would be admissible at trial. *See* NRCP 56(e) (affidavits in support of or in opposition to summary judgment “shall set forth such facts as would be admissible in evidence”); *see also Collins v. Union Fed. Sav. & Loan Ass’n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (evidence in support of or in opposition to summary judgment must be evidence that would be admissible at trial); *Schneider v. Cont’l Assurance Co.*, 110 Nev. 1270, 1274, 885 P.2d 572, 575 (1994) (“The district court thus erred in relying solely on inadmissible evidence to grant summary judgment.”); *Adamson v. Bowker*,

85 Nev. 115, 119, 450 P.2d 796, 799 (1969) (“[E]vidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment.”).

Here, Stone did cite to Wendel’s affidavit describing her personal knowledge of the area’s dark conditions, and ultimately deposed her. Further, Stone also presented a sworn statement of the passenger and co-defendant Goodrich, in which she also describes the area as extremely dark at the time of the collision. Stone also submitted other statements and records to support her position, which may have included inadmissible hearsay insufficient to defeat summary judgment.


Regardless, Stone also opposed summary judgment under NRCP 56(f), requesting the opportunity to engage in discovery. Under Rule 56(f), Stone was not required to present evidence that by itself would have sufficed to defeat summary judgment, but rather was only required to make a showing that additional discovery would be likely to bear fruit on whether summary judgment should be granted.⁴


In the affidavit attached to her request for NRCP 56(f) relief, Stone detailed specific forthcoming evidence that would further support a


⁴The district court’s analyzed Stone’s motion for reconsideration under NRCP 60(b)(2), focusing on the due diligence standard as it applies to newly discovered evidence in requesting a new trial under NRCP 59(b). Without addressing the merits of applying the due diligence standard of NRCP 60(b)(2) to a motion for summary judgment brought under NRCP 56, we decline to apply this standard to deny relief under NRCP 56(f). We recognize that even if there was a lack of diligence in obtaining some or all of the information presented at the reconsideration hearing, appellant raised a genuine material fact as to the cause of the accident thereby precluding a grant of summary judgment and warranting NRCP 56(f) relief, especially whereas here the appellant did not have the opportunity to engage in discovery directly with the newly added parties.

genuine issue of material fact as to causation. See NRCP 56(f). Her affidavit is corroborated by the statements of Goodrich, Wendel and the investigating officer. Even though some of these statements may constitute hearsay, they also suggest that additional witnesses may exist who may have knowledge of the relevant conditions of the area at the time of collision. Moreover, a minimal amount of time had elapsed between the filing of the amended complaint adding two new parties and the granting of summary judgment. See *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118-19, 110 P.3d 59, 62-63 (2005) (holding 56(f) relief was appropriate where less than eight months had passed between the complaint and the granting of summary judgment). Therefore, we conclude that the district court abused its discretion by failing to grant NRCP 56(f) relief, and, we reverse the district court's order and remand for additional discovery.⁵ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁵In light of our decision, we do not address Stone's remaining arguments. *Edwards v. City of Reno*, 45 Nev. 135, 143, 198 P. 1090, 1092 (1921) ("Appellate courts do not give opinions on moot questions or abstract propositions.").

cc: Hon. Kathleen E. Delaney, District Judge
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