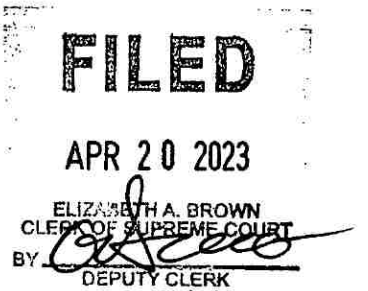
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ISAAC ZIMMERMAN,
Appellant,
vs.
CROSSROADS COMMONS, LTD., LLC; CROSSROADS COMMONS MANAGEMENT, L.L.C.; PECCOLE-NEVADA CORPORATION;
Respondents.

No. 84079-COA



ISAAC ZIMMERMAN,
Appellant,
vs.
CROSSROADS COMMONS, LTD., LLC; CROSSROADS COMMONS MANAGEMENT, L.L.C.; PECCOLE NEVADA CORPORATION; PECCOLE-NEVADA CORPORATION; SPORT CHALET; SPORT CHALET, LLC; SPORTS CHALET; SPORTS CHALET, L.L.C.,
Respondents.

No. 84080-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Isaac Zimmerman appeals from district court orders granting a motion for summary judgment and for attorney fees in a negligence action. These appeals have been consolidated. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.[1]

In September 2013, Isaac Zimmerman was riding his bicycle to Sports Chalet through a parking lot owned by Crossroads Commons and

[1]We note the NRCP 54(b) certification was granted by District Judge Crystal Eller.

23-12315

Peccole Nevada Corporation (collectively, Crossroads Commons).[2] When turning around the building, Zimmerman fell head-first off of his bicycle on or near a speed bump, injuring his head and resulting in his face being covered in blood. A security guard approached him and asked if he needed medical attention, which Zimmerman refused. Zimmerman used his cell phone to call his half-sister, Donna O'Bryon-Coates, for a ride home and subsequently decided to go to the hospital.

O'Bryon-Coates drove Zimmerman to the emergency room, where he underwent numerous head scans and diagnostic tests. He was ultimately diagnosed with skin abrasions, lacerations, and contusions to his face, but no further head or other bodily injury was found. Only one laceration required stitches and Zimmerman was discharged after a few hours with instructions to follow up with his primary care physician. With the exception of a follow-up at the hospital to have the sutures removed, no further medical or psychiatric treatment was sought. Zimmerman's total medical bills from the emergency room and follow up amount to $13,400.

Zimmerman's descriptions and recollection of the accident changed over time. His first description of the accident was to the emergency room doctor on the day of the accident. At that time, Zimmerman stated that he fell off his bike while going over a speed bump. Zimmerman's second description was during a recorded interview in January 2015. In this interview, Zimmerman stated that, after turning towards Sports Chalet, he saw a speed bump in the parking lot 20-30 feet after the turn. He did not recall what happened after seeing the speed bump, and his next memory was waking up after the fall. Zimmerman

[2]We recount the facts only as necessary to our disposition.

further stated that he did not see anything on the ground near the speed bump when he got up after the accident, however, he returned to the scene of the accident two days later to inspect the area, and at this time he saw a banana peel in the gutter.

Zimmerman filed a civil complaint in September 2015 alleging causes of action for negligence, negligence per se, and negligence under the doctrine of res ipsa loquitur. In his complaint, Zimmerman alleged that "the speed bump and/or a banana on the ground caused Plaintiff to fall."[3] He further alleged that Crossroads Commons breached its duty to maintain a reasonably safe premises by failing to inspect or maintain its property, failing to post speed limit signs, and by allowing a dangerous condition to exist that it knew, or should have known, was likely to cause injury.

Zimmerman's next full description of the accident occurred during a sworn deposition in October 2016, more than three years after the accident. In his deposition, Zimmerman testified that he was distracted by something rustling in a bush after turning left on his bicycle towards Sports Chalet. He did not remember either a speed bump or a banana and had no memory of falling, but he had "ideas" and "theories" about what caused him to fall. Zimmerman stated that when he returned to the scene two days later, he saw the speed bump and banana for the first time. While revisiting the scene, he "was trying to reconstruct the accident in [his] mind." He further testified that he could not be sure the banana was there the day of the accident or, if it was, how long it had been there. Lastly, Zimmerman

---

[3]Zimmerman asserts at various points that it was either a banana or a banana peel. The distinction is insignificant for purposes of summary judgment, and we will refer to it generally herein as a banana.

testified that he had no proof that Crossroads Commons had any prior incidents involving a speed bump or a banana on its property.

From this point forward, Zimmerman asserted in his pleadings that he fell over the speed bump while swerving to avoid the banana. The matter proceeded to court-annexed arbitration, and the arbitrator found in favor of Crossroads Commons on all claims. Zimmerman thereafter filed a timely request for trial de novo and demand for removal from the short trial program in March 2017. In April 2017, Zimmerman served supplemental discovery responses that stated there was a banana present the day of the accident and that he fell over the speed bump while swerving to avoid the banana.

Crossroads Commons moved for summary judgment in May 2017. It asserted that Zimmerman could not establish as a matter of law that Crossroads Commons breached a duty or that a breach caused Zimmerman's fall. In support of the motion, Crossroads Commons attached, among other exhibits, Zimmerman's recorded statement transcript, his sworn deposition transcript, and an e-mail from Las Vegas Fire and Rescue.[4] The e-mail stated that "[s]taff has indicated that the humps appear to be installed in compliance with the adopted code. We cannot be 100% as there was no permit issued for these humps. There are no records of fire code violations at this location that pertain to speed bumps/humps." Further attachments to the e-mail included an inspection report by the City of Las Vegas showing Crossroads Commons passed inspections in August 2012, October 2015, and October 2016 with no code

[4]Zimmerman had filed a request for inspection records with Las Vegas Fire and Rescue. The e-mail contained the results of Zimmerman's "records request for Crossroads Commons/APN #163-05-101-002."

violations or noted conditions. Crossroads Commons argued that this email established that no hazards or code violations existed on the property, including the speed bump, at the time of the accident.

Zimmerman opposed summary judgment, arguing that "the necessity to avoid the banana, as well as the encounter with the unsafe, illegal speed bump were the causes of his fall and resulted in injuries." Zimmerman also attached documents to his opposition, including two declarations from himself, a declaration from O'Bryon-Coates, his supplemental discovery responses dated April 26, 2017, his medical bills, and several internet article printouts discussing the hazards of speed bumps to bicyclists. Zimmerman also attached a document entitled, "Las Vegas Fire and Rescue Fire Prevention Division Information Sheet." This information sheet discussed Las Vegas Ordinance 6325, which went into effect July 1, 2014. Ordinance 6325 required design approval and permitting for new speed bumps/humps, including approved signage, placement, and visibility requirements.

After a hearing in June 2017, the district court entered an order granting Crossroads Commons' motion for summary judgment. Zimmerman appealed that order, and we remanded in January 2019 for the district court to clarify the undisputed facts and legal determinations as then required by NRCP 56(c). On remand, the district court held a second hearing on Crossroads Commons' motion for summary judgment. During the 33-minute hearing, Zimmerman stated that he now remembered the accident, but had been suffering from amnesia during his deposition. In February 2019, the district court entered a second order granting Crossroads Commons' motion for summary judgment.

Following summary judgment, in March 2019, Crossroads Commons filed a motion for fees and costs, which Zimmerman opposed. Crossroads Commons requested costs pursuant to NRS 18.020 but requested attorney fees pursuant to Nevada Arbitration Rule (NAR) 20(B)(2)(a) only. The next month, Crossroads Commons filed a supplement to the motion that included an itemization of the requested fees and costs, including attorney fees that were incurred prior to Zimmerman's request for trial de novo.

In May 2019, the district court entered a minute order stating that it had "considered the applicable law" and granted Crossroads Commons' motion for fees and costs "as consistent with the Affidavit of Marissa Temple at the time from Plaintiff's Request for Trial through the date of this minute order. Defendants shall recalculate the appropriate amount and include in the proposed order." Crossroads Commons drafted the proposed order granting fees and costs but failed to serve Zimmerman with a copy before submitting it to the district court. Despite the district court's instruction to recalculate attorney fees, the proposed order awarded Crossroads Commons attorney fees dating back to the inception of litigation which were incurred prior to Zimmerman's request for trial de novo. Although Crossroads Commons had originally sought attorney fees under NAR 20(B)(2)(a) only, the proposed order included both NAR 20(B)(2)(a) and NRS 18.010, without specifying a subsection under NRS 18.010 as a basis for the award of attorney fees. The district court ultimately signed and adopted Crossroads Commons' proposed order as written. The final order granted attorney fees to Crossroads Commons in the amount of $21,790.50 and costs totaling $2,433.12.

Following NRCP 54(b) certification, Zimmerman concurrently filed two separate notices of appeal, one appealing the order granting summary judgment and another appealing the order granting attorney fees and costs. The supreme court consolidated the two appeals. On appeal, Zimmerman raises four issues: (1) Zimmerman presented sufficient evidence of causation, and the district court improperly weighed the evidence and credibility of witnesses when it granted summary judgment; (2) causation should have been presumed because Zimmerman can establish the elements of res ipsa loquitur; (3) the district court did not properly review the case or give Zimmerman an opportunity to present his argument at the second hearing on summary judgment; and (4) Crossroads Commons erroneously included all fees and costs incurred during the litigation under NAR 20(B)(2)(a), rather than just those following the request for trial de novo.

This court reviews a district court's order granting summary judgment do 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[5] of material fact exists

---

[5]The pre-2019 language of NRCP 56(a) is "no genuine issue of material fact," while the current NRCP 56(a) language is "no genuine dispute as to any material fact." See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedures, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018) (amending the Nevada Rules of Civil Procedure to be effective prospectively on March 1, 2019, as to all pending and future cases). However, the standard of review remains the same, and therefore, this revision to the language has no legal effect on the jurisprudence of the cited cases. *See* Advisory Committee Note (2019). We note that this case was decided under the pre-2019 version of NRCP 56 and we apply that version.

and that 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, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of material fact, nor can the non-moving party "build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id.* at 731, 121 P.3d at 1030-31 (quoting *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

Although the district court erroneously construed some of Zimmerman's contradictions against him, summary judgment is nonetheless appropriate on the element of breach

On appeal, Zimmerman argues that he presented enough circumstantial evidence of causation to defeat summary judgment. Specifically, he argues that the only impediments around him at the time of his accident were the banana and speed bump, both of which presented a hazard to bicyclists, and that the speed bump was dangerous because it was poorly lit and lacked adequate warning. Zimmerman contends that summary judgment was inappropriate because "a reasonable juror could find that a fall which occurred at a manmade travel obstacle was caused by that obstacle." In response, Crossroads Commons argues that Zimmerman had no evidence to support his claim that the speed bump or banana actually caused his fall, and a property owner is not subject to liability merely because an accident occurred on its land without demonstrating a breach of duty.

In Nevada, "a claim for negligence requires that the plaintiff satisfy four elements: (1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages." *Turner v. Mandalay Sports Entm't*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). A business owes its patrons a duty to

keep the premises in a reasonably safe condition for use. *Asmussen v. New Golden Hotel Co.*, 80 Nev. 260, 262, 392 P.2d 49, 49 (1964). However, "[a]n accident occurring on the premises does not of itself establish negligence." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). If only one of the four elements of negligence is negated as a matter of law, summary judgment is appropriate. *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997).

Crossroads Commons' motion for summary judgment argued that no genuine issue of material fact existed on the elements of duty, breach, and causation; however, the district court granted summary judgment "solely" on the element of causation. The district court relied on Zimmerman's deposition testimony to conclude that Zimmerman did not know why he fell, and therefore he could not establish factual causation. Although Zimmerman had alleged in his complaint and his interrogatory responses that a "speed bump and/or banana" caused the fall, the district court found that Zimmerman's subsequent deposition testimony "had the effect of superseding his prior affirmative statements of the causes" of his accident. The district court found that Zimmerman changed his position again when faced with Crossroads Commons' motion for summary judgment, and that when confronted with the discrepancies in his testimony, he claimed to have lost his memory due to a concussion, without supporting evidence. Relying on *Luciano v. Saint Mary's Preferred Health Ins. Co.*, No. 67501, 2016 WL 2740860, *3 (Nev. May 6, 2016) (Order of Affirmance), the district court found that "a party opposing a Motion for Summary Judgment ordinarily cannot avoid Summary Judgment by contradicting prior sworn testimony. This rule applies when no reasonable justification exists to explain the contradiction." (Internal citation omitted).

The court found that Zimmerman failed to provide any reasonable justification for changing his sworn testimony about the cause of the accident, and so construed Zimmerman's causation contradictions against him, granting summary judgment in favor of Crossroads Commons.

In *Luciano*, the Nevada Supreme Court observed that "contradictory statements may be used against a party on a summary judgment motion when no reasonable justification exists to explain the contradiction." *Id.* However, this comment relied on our more limited holding in *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 294, 357 P.3d 966, 976 (Ct. App. 2015), where we explained that "the general rule is that a party cannot defeat summary judgment by contradicting itself *in response to an already-pending NRCP 56 motion*." (emphasis added); *see also Aldabe v. Adams*, 81 Nev. 280, 284-85, 402 P.2d 34, 36-37 (1965) (refusing to credit sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998).

In *Nutton*, the appellant created a contradiction prior to summary judgment by moving to amend his pleadings. *Nutton*, 131 Nev. at 282, 357 P. 3d at 968-69. We noted that when a contradictory statement is made in response to a summary judgment motion, the "only obvious motive" for the change is to "avoid summary judgment that otherwise might have been granted." *Id.* at 293, 357 P.3d at 975-76. However, "[w]hen a contradiction is not necessarily driven by a desperate attempt to avoid a pending summary judgment motion that appears meritorious on its face, a party's inconsistent testimony actually creates a question of credibility for the jury to resolve." *Id.* at 294, 357 P.3d at 977.

Nevertheless, in *Nutton* we recognized that contradictions which predate summary judgment may still be construed against the non-moving party if "the district court affirmatively concludes that the conflicting testimony either creates judicial estoppel or represents a legal 'sham' designed solely to avoid summary judgment, and was not the result of an honest discrepancy, a mistake, or newly discovered evidence." *Id.* We held the district court erred in construing the contradictions against Nutton without making the necessary affirmative findings that allowed it to discount the change in the testimony. *Id.* at 294. 357 P.3d 977.

As in *Nutton*, Zimmerman made contradictory statements about what caused his accident prior to summary judgment. Although the district court found that Zimmerman contradicted himself *in response* to summary judgment, the court overlooked Zimmerman's supplemental discovery responses which were served two weeks before Crossroads Commons filed its motion for summary judgment. These supplemental discovery responses contained Zimmerman's arguably contradictory theory of causation. Instead of *not knowing* why he fell as he stated in his deposition, Zimmerman now claimed that his fall was caused by going over the speed bump while swerving to avoid the banana.

Because Zimmerman changed his theory of causation prior to the filing of Crossroads Commons' motion for summary judgment, the contradiction was not "driven by a desperate attempt to avoid a pending summary judgment motion." *Id.* Additionally, like in *Nutton*, the district court failed to make any factual determinations that Zimmerman's contradictory statements "either creates judicial estoppel or represents a legal 'sham' designed solely to avoid summary judgment." *Id.* Without such

findings, it was error to construe Zimmerman's contradictions about causation against him for purposes of summary judgment.

However, our analysis does not end there. Although the district court granted summary judgment on causation based on the court's misapplication of *Luciano*, "[t]his court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010). Here, the district court could have properly granted summary judgment in favor of Crossroads Commons, as argued by respondents, because Zimmerman did not establish that Crossroads Commons breached an existing duty of care. *Harrington*, 113 Nev. at 248, 931 P.2d at 1380.

In its motion for summary judgment, Crossroads Commons argued that Zimmerman could not establish breach of a duty with respect to the banana because Zimmerman was not sure that a banana was present the day he fell,[6] nor did he have proof of any incidents involving debris on Crossroads Commons' property before or after his accident. In his opposition, Zimmerman asserted that Crossroads Commons breached its duty to maintain a reasonably safe premises when it allowed debris to accumulate on its property. He further argued the banana must have originated from Whole Foods Market because it was the only store in the area that sold bananas. On appeal, Crossroads Commons argues that

---

[6]Donna O'Bryon-Coates, Zimmerman's sister, submitted a declaration to Zimmerman's opposition to the summary judgment motion, which indicated she "saw a banana on the ground after the speed bump near [Zimmerman]" on the day of the accident. *Cf., Luciano* at *4. But there is no testimony to support that Crossroads Commons was aware of the existence of the banana, or any other debris, on its property prior to Zimmerman's fall.

Zimmerman could not establish breach of a duty because there was no evidence that Crossroads Commons failed to maintain its premises, had knowledge or control over the banana, or had actual or constructive knowledge of any hazardous conditions on the property and had the opportunity to address them to prevent Zimmerman's accident. Zimmerman declined to address Crossroads Commons' breach of duty argument in his reply brief and conceded at oral argument that he had declined to address breach of duty because the district court granted summary judgment on causation.

Where the presence of a "foreign substance" like a banana "is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it." *Sprague*, 109 Nev. at 250, 849 P.2d at 322-23 (citing to *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 510-11, 377 P.2d 174, 175-76 (1962) (requiring the defendant to have actual or constructive notice of a foreign substance that was not due to the acts of the business, its agents or its employees because "[i]t would be grossly unfair to demand immediate awareness of new peril")).

Because Zimmerman argues that the banana came from Whole Foods Market, not from Crossroads Commons or its agents or employees, he must establish that Crossroads Commons had actual or constructive notice of its presence on the property. Zimmerman testified that he had no proof that Crossroads Commons had prior incidents involving the banana or actually knew it was present the day of the accident,[7] assuming it was

[7]Zimmerman also conceded at oral argument that he did not present evidence to the district court that Crossroads Commons had knowledge the banana was present.

present and in his path of travel, not in the gutter. And further, Zimmerman testified during his deposition that he had no idea how long the banana was there. Therefore, Zimmerman had no admissible evidence to show the banana was not a "new peril" or that Crossroads Commons had actual or constructive notice of the banana's existence on the property and thus his negligence claims as they pertain to the banana fail as a matter of law, and summary judgment is appropriate. *Id.*; *Asmussen*, 80 Nev. at 262, 392 P.2d at 49.

Crossroads Commons also contends on appeal that Zimmerman could not establish a breach with regard to the speed bump because he could not identify any hazardous conditions that were known or should have been known to Crossroads Commons; thus, it argues that his accident was not foreseeable or preventable.

Although Zimmerman does not address Crossroads Commons' breach of duty argument on appeal, Zimmerman argued in the district court that the speed bump was illegal and inherently dangerous because it violated Ordinance 6325. However, the speed bump at issue was installed around 2002 and Ordinance 6325 went into effect July 1, 2014—more than ten months after the accident and approximately 12 years after the speed bump was installed. The ordinance facially applies to the installation of new speed bumps, and there is no clear legislative intent for the ordinance to apply retroactively. *See Pub. Emps. Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) (holding that statutes are prospective unless the Legislature clearly manifests an intent to apply the statute retroactively). Zimmerman did not present any evidence of deficiencies or violations based on the laws in effect either at the

time of the speed bump's installation or at the time of the accident.[8] And, to the contrary, the email from Las Vegas Fire and Rescue found no hazards or code violations relating to the speed bump at issue during the inspections before and after Zimmerman's accident. Further, Zimmerman had no expert opinion and failed to produce any evidence regarding Crossroads Commons' knowledge of any prior accidents involving a bicyclist and the speed bump that would have potentially provided notice to respondents of a hazardous condition associated with the speed bump requiring corrective action, separate and apart from any alleged code violations.

Therefore, Zimmerman failed to create a genuine issue of material fact that the speed bump was inherently hazardous or legally deficient, even viewing the facts in a light most favorable to him.[9] Thus,

---

[8]In the district court, Zimmerman also relied on several inadmissible documents, such as internet article printouts, in support of his argument that speed bumps are inherently dangerous to bicyclists. However, a party must rely on admissible evidence to establish a genuine issue of material fact in response to summary judgment. NRCP 56(c). Lastly, Zimmerman provided excerpts from an undated "Manual on Uniform Traffic Control Devices" published by the U.S. Department of Transportation. However, Zimmerman's excerpt of this manual stated that "[t]he responsibility for the design, placement . . . and uniformity of traffic control devices shall rest with the public agency or the official having jurisdiction, or, in the case of private roads open to public travel, with the private owner or the private official having jurisdiction." Therefore, notwithstanding its questionable admissibility or applicability, the "guidance" provided in the Manual is insufficient to create a genuine issue of material fact.

[9]On appeal, Zimmerman asks us to find strict liability against a property owner for having a speed bump on its property because speed bumps are an inherently dangerous manmade obstacle and an "unreasonable hazard." Zimmerman provides no authority in support of his strict liability claim, and we decline to consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38

Zimmerman cannot establish that Crossroads Commons breached its duty to maintain a reasonably safe premises with respect to the speed bump, cannot demonstrate negligence, and summary judgment is appropriate. *Asmussen*, 80 Nev. at 262, 392 P.2d at 49.

The district court properly granted summary judgment on negligence based on the doctrine of res ipsa loquitur

On appeal, Zimmerman argues that "[i]t is axiomatic that once you learn how to ride a bike, you never forget how to do it, and you do not just fall off the bike for no reason." He further contends that it was improper for the district court to grant summary judgment on the element of causation when the doctrine of res ipsa loquitur allowed the court to presume causation. In response, Crossroads Commons argues that bicycle falls, like slip and falls, will frequently occur in the absence of another party's negligence, and therefore Zimmerman's bicycle accident was outside the scope of res ipsa loquitur.

For negligence under the doctrine of res ipsa loquitur, the plaintiff must show: (1) the event is of a kind which ordinarily does not occur in the absence of someone else's negligence, (2) the event is caused by an agent or instrumentality under the defendant's exclusive control, (3) the plaintiff's negligence is not greater than the defendant's negligence, and (4) the defendant has superior knowledge or is in a better position to explain the accident. *Woolsey v. State Farm Ins. Co.*, 117 Nev. 182, 188-89, 18 P.3d 317, 321 (2001).

In addition, "[t]he general rule is that, where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say,

---

(2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply." *Austin v. Dilday*, 55 Nev. 357, 362, 36 P.2d 359, 359 (1934) (quoting *Connor v. Atchison, T. & S.F. Ry. Co*, 207 P. 378, 379 (Cal. 1922)).

Although Zimmerman argues that a bicycle accident is not something that would occur "for no reason," he misapplies the standard of res ipsa loquitur; the doctrine does not require an accident that ordinarily would not occur for no reason at all, but rather requires an accident that ordinarily would not occur absent *someone else's negligence*. *Woolsey*, 117 Nev. at 188, 18 P.3d at 321. Bicycle accidents can occur frequently in the absence of another party's negligence, for reasons such as inclement weather, inattentiveness, inexperience, and natural terrain.

Additionally, res ipsa loquitur does not apply to the accident in this case because Zimmerman asserted that Crossroads Commons engaged in specific negligent acts or omissions involving the speed bump. *See Austin*, 55 Nev. at 362, 36 P.2d at 359. Here, Zimmerman claimed that Crossroads Commons violated Ordinance 6325, which was not yet in effect, when it failed to maintain the speed bump, failed to have adequate warnings around the speed bump, and installed the speed bump in shadow.

Finally, to the extent Zimmerman alleges that a banana was the instrumentality that caused his accident, res ipsa loquitur does not apply because Zimmerman conceded that the banana must have originated from Whole Foods Market or a patron, and therefore the instrumentality was not within the exclusive custody and control of Crossroads Commons. *See Woolsey*, 117 Nev. at 188, 18 P.3d at 321. Because the doctrine of res ipsa loquitur did not apply in this case, summary judgment on

Zimmerman's claim of negligence based on the doctrine of res ipsa loquitur was appropriate.

The district court gave Zimmerman an opportunity to present his argument at the summary judgment rehearing

Zimmerman contends that the district court did not properly review the case or give him an opportunity to present his argument in the second summary judgment hearing. Specifically, he claims the district court gave Crossroads Commons 30 seconds to answer a question, and Zimmerman only 3 seconds. However, Zimmerman did not object to the district court's limitation below.

"Judicial misconduct must be preserved for appellate review." *Oade v. State*, 114 Nev. 619, 621, 960 P.2d 336, 338 (1998). In the absence of an objection, this court reviews unpreserved allegations of judicial misconduct for plain error. *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 369, 892 P.2d 588, 590 (1995). Under plain error review, it is the appellant's burden to demonstrate "irreparable and fundamental error." *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008).

The district court gave each party, including Zimmerman, significant time to present their arguments over the course of the 33-minute hearing. Zimmerman does not assert what he would have said had the district court given him 27 seconds extra, nor does Zimmerman argue that limiting his response to a single question impacted the district court's decision. Because the district court permitted Zimmerman to present substantial argument over the length of the hearing, in conjunction with his failure to assert prejudice, Zimmerman has not met his burden of demonstrating plain error. Therefore, he is not entitled to relief on this claim.

The district court erroneously granted Crossroads Commons all attorney fees incurred during the litigation

Zimmerman argues the district court erred when it granted Crossroads Commons all attorney fees incurred during litigation. An award of attorney fees is reviewed for an abuse of discretion. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).

In its motion for fees and costs, Crossroads Commons requested costs under NRS 18.020 as the prevailing party, but only requested attorney fees pursuant to NAR 20(B)(2)(a). NAR 20(B)(2)(a) states, in pertinent part,

> [w]here the arbitration award is $20,000 or less, and the party requesting the trial de novo fails to obtain a judgment that exceeds the arbitration award by at least 20 percent of the award, the non-requesting party is entitled to its attorney's fees and costs associated with the proceedings following the request for trial de novo.

NAR 20(B)(2)(a) clearly only permits attorney fees "following the request for trial de novo." In this case, Zimmerman filed a request for trial de novo in March 2017. However, the district court awarded Crossroads Commons attorney fees that predated Zimmerman's request for trial de novo, including fees incurred from the onset of litigation dating back to January 22, 2016. At oral argument, counsel for Crossroads Commons conceded that it had only sought attorney fees pursuant to NAR 20(B)(2)(a), and therefore, was only entitled to fees incurred after the filing of the trial de novo. Thus, the district court abused its discretion when it awarded Crossroads Commons attorney fees predating the request for trial de novo.

Therefore, we reverse and remand for the district court to recalculate the attorney fees appropriate under NAR 20(B)(2)(a) following Zimmerman's request for a trial de novo.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[10]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Crystal Eller, District Judge
Legal Aid Center of Southern Nevada, Inc.
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Eighth District Court Clerk

---

[10]Zimmerman also argues on appeal the term "proximate cause" confuses legal practitioners and should be replaced with "scope of liability." However, this argument is raised for the first time on appeal, a point which Zimmerman concedes, and, accordingly, we decline to address it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).