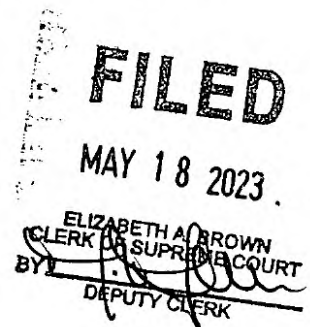


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TINA LEWIS ON BEHALF OF LAUREN
LEWIS, A MINOR,
Appellant,
vs.
CLARK COUNTY SCHOOL DISTRICT,
AN AGENCY AND/OR POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA,
Respondent.

No. 84145-COA



ORDER OF REVERSAL AND REMAND

Tina Lewis, on behalf of Lauren Lewis, a minor, appeals from a district court order granting a motion for summary judgment in a negligence action. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

In May 2017, Lauren was walking to class at Greenspun Junior High School when she cut her left leg on a broken drainpipe cover that left a severe laceration.¹ Lauren's father, Lawrence Lewis, arrived in the school nurse's office to take Lauren to the doctor. He alleged that while he was in the nurse's office with Lauren, he spoke with Greenspun's principal, Jacqueline Carducci. Lawrence testified at his deposition that, during this conversation, Carducci told him that she too had previously scratched her leg on the same broken drainpipe cover but did not specify when she was injured. Similarly, Lauren testified at her deposition that she overheard this conversation between Carducci and her father. Carducci herself did

¹We recount facts only as necessary for our disposition.

not recall speaking with either of Lauren's parents and, at her deposition, categorically denied ever being injured by the broken drainpipe or making a statement that she was injured at Greenspun.

Lawrence took Lauren to an urgent care facility where she received twelve stitches and two dissolvable sutures. Although Lauren's wound healed, she still has a visible scar.

At some time thereafter (it is unclear precisely when), Greenspun's vice-principal Nakia McKeever and Clark County School District (CCSD) construction analyst George Petaway inspected the broken drainpipe cover. Petaway prepared a Safety Inspection Report and another Greenspun employee submitted a work order to repair the broken cover. The broken drainpipe cover was subsequently removed and replaced, and the whereabouts of the broken piece that caused Lauren's injury remain unknown. CCSD employee Joshua Chesnik stated in a sworn affidavit that "[t]he normal course for an item like the drainpipe cover at issue in this case would for it to be placed in a scrap bin and have it recycled."

Tina initiated litigation against CCSD on behalf of her minor daughter alleging negligence (premises liability). The parties fully participated in discovery. In Tina's interrogatory responses on Lauren's behalf, Lauren averred that Carducci also told both her and Tina that Carducci had been previously injured by the broken drainpipe. Lauren did not know exactly when Carducci was injured, only that Carducci said it happened "recently."

At the close of discovery, Tina filed a motion for a rebuttable presumption, or, in the alternative, adverse inference based on CCSD's spoliation of evidence. Tina's motion asserted that CCSD had either purposefully or negligently disposed of the broken drainpipe cover, entitling

her to either a rebuttable presumption or an adverse inference that the missing evidence would have been unfavorable to CCSD. CCSD filed its opposition to Tina's spoliation motion and admitted the evidence had been destroyed but argued that an adverse inference was not warranted because it did not dispose of the evidence with the intent to harm Tina's case.

CCSD also filed a motion for summary judgment, arguing that NRS 41.033 granted it immunity because Tina could not show that CCSD had express knowledge of the broken drainpipe cover. Under NRS 41.033, political subdivisions are immune from liability for the failure to inspect or discover a hazardous condition unless they have express knowledge of the hazardous condition. *See Chastain v. Clark Cty. Sch. Dist.*, 109 Nev. 1172, 1175, 866 P.2d 286, 288 (1993).

Tina opposed CCSD's motion for summary judgment, arguing that a genuine dispute of material fact existed as to Carducci's prior injury on the broken drainpipe cover, which would establish CCSD's express knowledge of the hazardous condition. Tina relied on her interrogatory responses and her expert report that indicated the drainpipe cover had likely been broken for "months or years" before Lauren's injury. Tina also reiterated several arguments from her pending spoliation motion.

During the hearing on CCSD's motion for summary judgment, CCSD acknowledged that Lawrence's and Lauren's deposition testimony conflicted with Carducci's deposition testimony about Carducci's alleged prior injury. CCSD argued that Tina's counsel "tries to focus in on, Oh, well, my clients are saying, No, Ms. Carducci said that she hurt herself. Ms. Carducci is saying, No, she didn't hurt herself. . . . Taking that testimony away, those conflicting testimonies, there is no evidence that the school district had express knowledge before Lauren got injured." The district

court similarly acknowledged the conflicting deposition testimony and asked Tina, "What about the fact that Principal Carducci's deposition testimony directly contradicts plaintiff's? And obviously the deposition is under oath. Plaintiff's assertion that she ever said she was injured?"

Nevertheless, without addressing Tina's spoliation motion or the conflicting testimony, the district court granted CCSD's motion for summary judgment. The court found that "[t]here [was] no evidence that the Clark County School District gained express knowledge of the hazardous condition prior to Lauren Lewis' injury" because no CCSD employees had actual knowledge of the broken drainpipe cover, nor were there any reports of prior injuries.

Tina filed a motion for reconsideration and primarily argued that the Lewis' deposition testimony created a genuine dispute of material fact with regard to whether Carducci had been previously injured by the broken drainpipe cover. Tina attached Lauren's and Lawrence's deposition transcripts to her motion and argued that the district court improperly weighed the evidence and failed to construe the facts in a light most favorable to Tina. Additionally, Tina's motion for reconsideration renewed her request for the adverse inference from CCSD's destruction of the broken drainpipe cover and argued that the adverse inference, if heard before the summary judgment motion, would have likewise created a genuine dispute of material fact. The district court denied the motion to reconsider and found that Tina failed to set forth any new evidence or legal authority. Tina thereafter filed a timely notice of appeal.

On appeal, Tina argues that the district court improperly weighed Carducci's testimony as more credible than that of Lawrence's and Lauren's competing deposition testimony on the issue of CCSD's express

knowledge. CCSD responds that summary judgment was proper because the deposition testimony failed to establish that CCSD had actual knowledge of the hazardous condition and the record does not show that the district court improperly weighed the testimony. We agree that the district court improperly granted summary judgment when there was a genuine dispute of material fact about Carducci's prior injury.

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 dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; NRC 56(a). When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party and the court is not permitted to weigh the evidence or credibility of witnesses. *Borgerson v. Scanlon*, 117 Nev. 216, 219-20, 19 P.3d 236, 238 (2001).

NRS 41.033 grants immunity to political subdivisions for failure to inspect or discover a hazardous condition; however, that immunity is not absolute. "NRS 41.033 bars suit unless the public entity has express knowledge of the existence of a hazardous condition" and fails to rectify it. *Chastain*, 109 Nev. at 1176, 866 P.2d at 289 (emphasis omitted).

The district court improperly granted summary judgment because there was a genuine dispute of material fact about whether Carducci had previously injured herself on the broken drainpipe cover thereby creating express knowledge of the danger. Lawrence's and Lauren's deposition testimony as well as Tina's interrogatory responses conflicted with Carducci's deposition testimony. Lawrence testified that Carducci told him she had previously been injured by the same broken drainpipe cover.

Lauren testified that she was present and overheard Carducci make this statement to her father. Tina's interrogatory responses averred that Carducci told Lauren and Tina that she had previously been injured by the drainpipe. Although Carducci denied making this statement and claims she was never injured, the conflict created a genuine dispute of material fact as to whether Carducci (and therefore, CCSD) had express knowledge of the hazardous condition. *See Chastain*, 109 Nev. at 1175, 866 P.2d at 288.

During the summary judgment hearing, the district court acknowledged that the parties' testimony was conflicting. In response to the court's inquiry about the contradiction, Tina replied that the conflicting testimony cannot be weighed on a motion for summary judgment, and the district court did not further respond. Although CCSD argues on appeal that there is nothing in the record to show that the district court weighed the testimony, CCSD's assertion is belied by the above discussion. Further, CCSD's counsel also acknowledged during the hearing in district court that the Lewis depositions conflicted with Carducci's deposition. CCSD argued that "[t]aking that testimony away, those conflicting testimonies, there is no evidence that the school district had express knowledge before Lauren got injured." Lastly, CCSD's own motion for summary judgment seemed to recognize that competing evidence existed regarding its express knowledge of the hazard posed by the drainpipe. In its "Statement of Relevant Facts," CCSD advised the district court, "there is no evidence, *other than the self-serving statements from the Lewis family*, that anyone within the Clark County School District was injured by the dangerous condition." (Emphasis added.)

Because a genuine dispute of material fact existed as to whether CCSD had actual knowledge of a hazardous condition on its

property by virtue of Carducci's prior alleged injury, summary judgment was improper. *Wood*, 121 Nev. at 729, 121 P.3d at 1029; *Chastain*, 109 Nev. at 1175, 866 P.2d at 288. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Hon. Michael A. Cherry, Senior Justice
Hon. Monica Trujillo, District Judge
Adam S. Kutner
The702Firm
Clark County School District Office of The General Counsel
Eighth District Court Clerk

²Tina also argues on appeal that the district court misapplied *Davenport v. County of Clark*, 111 Nev. 467, 893 P.2d 1003 (1995), and erroneously granted CCSD's motion for summary judgment without first addressing her spoliation motion. We have considered these arguments and conclude that they need not be reached given the disposition of this appeal.