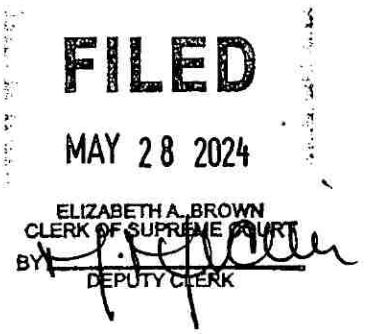
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIC G. BENDER,
Appellant,
vs.
WENEVADA, LLC, A DOMESTIC LIMITED LIABILITY COMPANY, D/B/A WENDY'S,
Respondent.

No. 86160-COA



ORDER OF AFFIRMANCE

Eric G. Bender appeals from a district court order, certified as final under NRCP 54(b), granting a motion to dismiss for failure to state a claim. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

According to his complaint, Bender was fueling his car at a gas station next door to a Wendy's fast-food restaurant when two Wendy's employees, Owen Hunnel and Xavier Summers, exited the restaurant and approached Bender and his two friends.[1] Hunnel and Summers were both still wearing their Wendy's work uniforms, and as Hunnel came closer, Bender noticed the imprint of a handgun in Hunnel's waistband. Hunnel and Summers initiated a verbal confrontation with Bender. Then, while Bender was engaged in a physical altercation with Summers, Hunnel shot one of Bender's friends, and shortly thereafter, Hunnel shot Bender.

Bender filed a civil complaint against respondent Wenevada, LLC (d/b/a Wendy's) as well as Hunnel and Summers individually. He asserted claims for assault, battery, intentional infliction of emotional distress, and negligent infliction of emotional distress against Hunnel and

[1]We recount the facts only as necessary for our disposition.

Summers. He also alleged causes of action against Wendy's for respondeat superior and negligent supervision based on the above factual allegations.

Prior to discovery, Wendy's moved to dismiss Bender's claims against it under NRCP 12(b)(5). Bender opposed and attached multiple exhibits to his opposition, including a police report about the shooting, public records related to prior felony charges against Hunnel and Summers, and a news report identifying Hunnel as a gang member who had previously shot someone.[2]

The district court granted Wendy's motion. The court found that Bender failed to state claims for respondeat superior and negligent supervision where the central factual allegations—that two uniformed fast-food restaurant employees left their place of employment and committed an intentional tort with a firearm against patrons of another business on the other business's property—permitted no reasonable inference of liability. The district court certified its order as final under NRCP 54(b), and Bender timely appealed.

An order granting a defendant's motion to dismiss under NRCP 12(b)(5) for failure to state a claim is "subject to a rigorous standard of review on appeal." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008) (internal quotation marks omitted). In reviewing dismissal under NRCP 12(b)(5), we recognize all factual allegations in Bender's complaint as true and draw all inferences in his favor. *See id.* at 228, 181 P.3d at 672. However, this court is not required "to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Cholla Ready Mix, Inc. v.*

---

[2]In its reply brief, Wendy's objected to the consideration of these exhibits, and the district court did not address them in its order.

Civish, 382 F.3d 969, 973 (9th Cir. 2004). We review the district court's legal conclusions de novo. *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

An employer's liability for the intentional conduct of employees is governed by NRS 41.745(1). This statute sets forth "three distinct circumstances" when an employer will be liable for an employee's intentional tort:

> (1) [when] the employee's act was not "a truly independent venture," (2) [when] the employee acted "in the course of the very task assigned," or (3) [when] the employee's act was "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment."

Anderson v. Mandalay Corp., 131 Nev. 825, 831-32, 358 P.3d 242, 247 (2015) (quoting NRS 41.745(1)). Not only does NRS 41.745(1) govern respondeat superior liability for an employee's intentional tort, *see id.*, it also establishes the scope of an employer's duty of care for negligent supervision claims that are *premised on* an employee's intentional tort, *see Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993) (recognizing that "negligent supervision derives from the respondeat superior doctrine" with a coextensive duty of care), *cited with approval in Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996). Therefore, the resolution of this appeal turns on whether Bender's complaint stated a claim for relief under one of the three grounds for liability set forth in NRS 41.745(1). *See Anderson*, 131 Nev. at 831-32, 358 P.3d at 247.

On appeal, Bender does not challenge the district court's findings that, as pled, the shooting was an "independent" tortious act that was not

committed in the course of any task assigned by Wendy's.[3] *See* NRS 41.745(1)(a), (b). Therefore, he has waived any claim of error as to these findings. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

Instead, Bender focuses solely on "reasonable foreseeability" under NRS 41.745(1)(c), arguing that the district court erred by dismissing his complaint at the pleading stage because his complaint satisfied the notice pleading standard of NRCP 8(a) and because foreseeability is a question of fact for the jury. *See Anderson*, 131 Nev. at 830, 358 P.3d at 246 (stating that "NRS 41.745(1)(c)'s reasonable foreseeability standard sets forth a factual inquiry"). At the outset, we note that Bender did not allege anywhere in his complaint that the employees' actions were "foreseeable," let alone that their actions were "reasonably foreseeable *under the facts and circumstances of the case considering the nature and scope of [their] employment.*" NRS 41.745(1)(c) (emphasis added).[4] And although foreseeability is generally a

---

[3]It would be manifestly unreasonable to infer from the facts pleaded in the complaint that Wendy's "assigned" two of its restaurant workers to leave the Wendy's, go to another place of business, and use a firearm to shoot lawful patrons of that other business.

[4]In connection with his respondeat superior claim, Bender alleged that "[a]t all times relevant hereto, Defendants HUNNEL and SUMMERS . . . were acting within the course and scope of said employment and agency, and were acting with the knowledge, permission and consent of Defendant WENDY'S" and were liable "under the doctrine of respondeat superior." The legal conclusion that Hunnel and Summers were acting as Wendy's "agents . . . within the course and scope of said employment and agency" during an off-premises shooting cannot reasonably be drawn from the facts alleged and need not be credited. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

question of fact for the jury, the factual allegations in Bender's complaint do not permit any reasonable inference that Wendy's could be liable for its employees' tortious conduct under NRS 41.745(1)(c).

Drawing every reasonable inference in Bender's favor, one can infer from the complaint that, immediately prior to the shooting, Hunnel was inside Wendy's with a handgun under his work uniform with the imprint of his gun readily visible. If the handgun was as discernable as alleged, one could also infer that other Wendy's employees—including possibly supervisors—either noticed or should have noticed the handgun. Therefore, it is *possible* that Wendy's had actual or constructive knowledge that Hunnel had a gun in his possession that day.

However, even drawing such reasonable inferences in Bender's favor, it does not follow that a shooting off-premises, where the victim was neither a Wendy's patron nor another Wendy's employee, was reasonably foreseeable considering the nature and scope of Hunnel's and Summers' employment.[5] NRS 41.745(1)(c). As alleged in the complaint, Hunnel and Summers were fast-food restaurant workers, not security guards;[6] thus, we can infer no employment-related reason for either of them to carry or use a

---

[5]Bender is correct that an employer may be held liable for intentional torts occurring outside the scope of employment; however, such intentional torts must still be "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment." *Anderson v. Mandalay Corp.*, 131 Nev. 825, 832, 358 P.3d 242, 247 (2015). This means the court must still consider the nature and scope of employment when evaluating foreseeability.

[6]Given the allegation that Hunnel and Summers were wearing Wendy's uniforms, we cannot reasonably infer that they were security guards. Rather, the only reasonable inference that may be drawn from the facts alleged is that Hunnel and Summers were employed in connection with fast food preparation and/or customer service.

firearm. While Bender alleged that he was a "lawful patron" of a *neighboring business*, he did not allege that he was a patron of Wendy's or otherwise had a "special relationship" with Wendy's that would give rise to a duty of care to protect Bender in this case. *See Turner v. Mandalay Sports Ent., LLC*, 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008) (recognizing that the existence of a duty of care is a question of law to be determined solely by the courts); *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968-69, 921 P.2d 928, 930 (1996) ("As a general rule, a private person does not have a duty to protect another from a criminal attack by a third person. However, courts have imposed liability where a 'special relationship' exists between the parties, including landowner-invitee, businessman-patron, employer-employee, school district-pupil, hospital-patient, and carrier-passenger." (internal citation omitted)).

As the Nevada Supreme Court has explained, "the element of control is the pivotal factor in the determination of liability arising from certain relationships." *Scialabba*, 112 Nev. at 969, 921 P.2d at 930; *see id.* at 969, 921 P.3d at 931 (holding that a construction company owed a duty of care to residents of an apartment because the company "exercised sufficient control over the premises" where an assault occurred). When we draw every reasonable inference in favor of Bender, the complaint alleged no facts that would permit us to find that Wendy's could have exercised control over Hunnel and Summers after they left Wendy's, to establish a duty of care. The nature of Hunnel's and Summers' employment as fast-food restaurant workers precludes any reasonable inference that their actions off-premises, involving non-patrons, could have been foreseeable to Wendy's. *Cf. Anderson*, 131 Nev. at 830, 358 P.3d at 246 (finding that genuine issues of material fact related to foreseeability existed when an employee sexually assaulted a hotel guest after discovery revealed that five other hotel

employees had sexually assaulted guests, the employee in question had been disciplined for harassing and threatening a female supervisor, and the employee was permitted access to occupied rooms on a shift with minimal supervision).[7]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

---

[7]Bender contends that his complaint should not have been dismissed because discovery would have revealed that Hunnel was a gang member, that both Hunnel and Summers were "convicted felons" with "extensive criminal histories" who were both "prohibited from owning or possessing firearms," and that Hunnel had a prior conviction involving the use of a firearm, which was similar to his crime against Bender. Yet, even if Bender had raised such allegations in his complaint, his respondeat superior and negligent supervision claims still would not have survived the motion to dismiss. Unlike in *Anderson*, where the hotel employer owed a duty of care to protect hotel guests on its premises, the facts as alleged in this case preclude any finding that Wendy's owed a duty of care to protect non-patrons from crimes occurring off premises.

Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Jessica K. Peterson, District Judge
Law Offices of Kevin R. Hansen
Jonathan A. Rich
Hall Jaffe & Clayton, LLP
Eighth District Court Clerk