

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH FORTE, BY AND THROUGH  
CLARK COUNTY PUBLIC  
ADMINISTRATOR, KATHLEEN  
BUCHANAN,  
Appellant,  
vs.  
WILLIAM WRIGHT, INDIVIDUALLY  
AND IN HIS CAPACITY AS AN  
OFFICER AND DIRECTOR OF EQUITY  
ENTERPRISES D/B/A THE OAKLEAF  
GROUP HOME; AND KAY FOSTER,  
INDIVIDUALLY AND IN HER  
CAPACITY AS AN OFFICER AND  
DIRECTOR OF EQUITY  
ENTERPRISES D/B/A THE OAKLEAF  
GROUP HOME,  
Respondents.

No. 38975

FILED

JUN 03 2003

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a district court order granting summary judgment against appellant Joseph Forte in breach of contract and negligence actions involving embezzlement of funds.

Respondents William Wright and Kay Foster incorporated respondent Equity Enterprises, Inc. ("EEI") for the purpose of operating a group home for Alzheimer's victims pursuant to NRS 449.001 et seq. EEI contracted with Senior Connections, L.L.C. to manage the facility known as The Oakleaf. Senior Connections was owned and managed by Richard A. Smith. EEI also listed Smith as the home administrator on The Oakleaf's operating license pursuant to NRS 449.0365.

Wright's mother suffered from Alzheimer's disease. Wright and Foster determined that it would be economically advantageous to establish their own group home to care for Wright's mother and other Alzheimer's patients. In order to initiate this endeavor, Wright and Foster incorporated EEI. Wright and Foster are the sole officers, directors, and shareholders of EEI. EEI made the appropriate filings to conduct business as "The Oakleaf."

Because neither Wright nor Foster was qualified to act as the administrator of a group home, they entered into a management agreement with Senior Connections, providing that Smith would be the administrator and Senior Connections would manage The Oakleaf. Under the management agreement, Senior Connections supervised and directed, at EEI's expense, the renovations required for The Oakleaf to qualify as a Category II Residential Group Home. Senior Connections applied for all licenses on behalf of EEI, solicited all residents except Wright's mother, collected all rents and fees, and controlled the day-to-day operations of the home for a period of time.

Because Smith and Senior Connections failed to manage the home's fiscal affairs properly, EEI assumed responsibility for the financial affairs of the home in August 1999. Senior Connections continued to manage the day-to-day care of the residents. However, after Wright's mother passed away, EEI attempted to divest itself from any responsibility for The Oakleaf by entering into a "lease" with Senior Connections. According to the lease, Senior Connections would sublet The Oakleaf premises from EEI and pay a monthly fee of \$5,000.00. Senior Connections would then be the owner/operator of the home as of October 1,

2000, and EEI would simply be a landlord. No attempt was made to license The Oakleaf under this new relationship.

Forte was an eighty-five-year-old man suffering from Alzheimer's disease. In early 2000, Forte's illness worsened to the point that he was no longer able to live alone. Forte's insurance company, Senior Dimensions of HPN, referred him to Senior Connections for placement in a managed care facility. After stays at other homes managed by Senior Connections, Forte was transferred to The Oakleaf on March 9, 2000.<sup>1</sup>

Prior to Forte's transfer, Smith had already befriended Forte and systematically gained his trust. In February 2000, prior to Forte's admission to The Oakleaf, Smith forged the signatures of both Forte and a notary public on a document purportedly authorizing Smith to be a signatory on Forte's bank accounts at Nevada State Bank. Smith provided similar authorizations regarding Forte's funds to CalFed Bank. These authorizations were issued prior to Forte's admission to The Oakleaf and prior to any contact between Forte and either EEI, Wright, or Foster.

While Forte resided at The Oakleaf, Smith depleted Forte's accounts and converted approximately \$453,000.00. Once the funds had been depleted, Smith resigned as administrator and manager of all homes managed by Senior Connections.

EEI immediately assumed full control of The Oakleaf and began an investigation of Smith's malfeasance based on information provided by other Senior Connections employees. They reported their

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<sup>1</sup>The record reflects Forte may have also resided at The Oakleaf, on a temporary basis, prior to March 10th.

findings to the Las Vegas Metropolitan Police Department. Shortly thereafter, Smith executed a written confession admitting that he had misappropriated the funds owned by Forte. The Clark County Public Administrator was appointed as Forte's guardian and subsequently filed suit against EEI, Wright, and Foster (collectively, "Respondents") alleging breach of contract, negligent supervision and retention, and negligence.

Foster, Wright, and EEI filed a motion to dismiss the complaint, which the district court granted as a motion for summary judgment. The district court concluded that Foster, Wright, or EEI owed no duty to Forte. Therefore, the claims for negligent supervision and/or retention and simple negligence failed as a matter of law. The district court also concluded that if a contract existed between Forte and Foster, Wright, or EEI, liability for personal property was limited by the contract, thereby negating the breach of contract claim. Further, the district court concluded that Foster, Wright, and EEI could not be held responsible for the intentional torts of fraud and conversion committed by Smith because Smith was an employee of Senior Connections, not EEI. Finally, the district court concluded that there were no facts known to the parties or which might have become known to the parties that would have allowed the corporate veil to be pierced and Wright and Foster to be held individually liable under the law established in Frank McCleary Cattle Company v. Sewell.<sup>2</sup> The district court granted summary judgment on all claims in favor of Foster, Wright, and EEI.

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<sup>2</sup>73 Nev. 279, 317 P.2d 957 (1957).

Forte filed a motion for reconsideration focusing primarily on his request for additional time to conduct discovery pursuant to NRCP 56(f). The district court denied the motion. Forte then timely filed this appeal.

## DISCUSSION

### I. Standard of review

“The standard of review on an appeal from a summary judgment is de novo.”<sup>3</sup> Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>4</sup> “A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party.”<sup>5</sup>

The burden of establishing the non-existence of any genuine issue of fact is on the movant.<sup>6</sup> The burden is discharged by

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<sup>3</sup>Nicholas v. State, 116 Nev. 40, 43, 992 P.2d 262, 264 (2000).

<sup>4</sup>NRCP Rule 56(c).

<sup>5</sup>Coury v. Robinson, 115 Nev. 84, 87, 976 P.2d 518, 520 (2000) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993)).

<sup>6</sup>Pacific Pools Construction Co. v. McClain's Concrete Inc., 101 Nev. 557, 559, 706 P.2d 849, 851 (1985) (citing Hoffmeister Cabinets of Nev. v. Bivins, 87 Nev. 282, 486 P.2d 57 (1971)).

demonstrating that there is an absence of evidence supporting one or more of the prima facie elements of the non-moving party's case.<sup>7</sup>

“[I]n deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought and the factual allegations of that party must be presumed correct.”<sup>8</sup> A litigant has a right to a trial when there remains the slightest doubt as to remaining issues of fact.<sup>9</sup> “However, the non-moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.”<sup>10</sup>

## II. EEI

The district court concluded EEI did not have a contract with Forte. The contract was with Senior Connections and EEI was simply Senior Connections' landlord or, in the alternative, any contractual liability was limited by the personal property provision in the admission contract. The district court apparently based this conclusion on the fact that the contract was in the name of The Oakleaf, and Senior Connections and Smith were responsible for managing patient care at The Oakleaf.

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<sup>7</sup>Joynt v. California Hotel & Casino, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992) (citing Sims v. General Telephone and Electric, 107 Nev. 516, 521, 81 P.2d 151, 154 (1991)).

<sup>8</sup>Ferreira v. P.C.H. Inc., 105 Nev. 305, 306, 774 P.2d 1041, 1042 (1989).

<sup>9</sup>Clauson v. Lloyd, 103 Nev. 432, 435, 743 P. 2d 631, 632 (1987); see also Mullis v. Nevada National Bank, 98 Nev. 510, 654 P.2d 533 (1982).

<sup>10</sup>Posadas, 109 Nev. at 452, 851 P.2d at 442 (citing Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 294, 662 P.2d 610, 618-19 (1983)).

This ignores the fact that EEI is the actual licensee of The Oakleaf and The Oakleaf is not a separate corporate entity, but merely a fictitious name. Assuming Forte had the capacity to contract, his contract was with EEI. EEI was the licensed owner/operator of the home, not Senior Connections or Smith. The contract itself states it is between Forte and The Oakleaf, not Smith or Senior Connections. Any "lease" agreement or other attempt to construe EEI as a landlord is irrelevant as such arrangements between EEI, Smith, and Senior Connections would not change the legal status of The Oakleaf. EEI was licensed to run the group home under the The Oakleaf name and the license is non-transferable.<sup>11</sup> Moreover, EEI could not transfer the contract to Senior Connections and relieve itself of liability without Forte's consent. Thus, the district court erred as a matter of law in concluding no contract existed or EEI was simply a landlord.

With respect to the clause that allegedly limits EEI's liability, that clause simply indicates that EEI cannot guarantee the safety of a resident's personal property and suggests not keeping cash, but opening a client account. It is clear and unambiguous.<sup>12</sup> On its face, it does not purport to limit liability, nor does it apply to property located off The Oakleaf's premises. Finally, although the contract does not contain an express provision indicating EEI will protect a resident from exploitation by its personnel, a reasonable jury, based on Wright and Foster's affidavits

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<sup>11</sup>NRS 449.080(2); NAC 449.190.

<sup>12</sup>Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

and the nature of the home's license, could conclude that such a duty is implied in the contract.

Turning to the issue of duty under tort law, EEI contends again that it owed no duty to protect The Oakleaf residents against exploitation. EEI asserts that it could not reasonably foresee that Smith would exploit Forte, and therefore no duty arose. We disagree. First, the statutes and regulations governing the operation of group homes specifically contemplate employee exploitation as a harm that could befall residents.<sup>13</sup> Thus, it was foreseeable that an administrator or employee might exploit a resident. Moreover, by virtue of the statutes, an owner, operator or administrator of a group home has a duty to protect against exploitation.<sup>14</sup> As a matter of law, EEI had a duty to protect residents against exploitation.

Once a duty is established, a party must also prove a breach of that duty to maintain a tort claim.<sup>15</sup> EEI claims as a matter of law it could not have breached any duty because it acted reasonably in designating Smith as the administrator and contracting with Senior Connections to manage The Oakleaf. EEI also contends that any duty was delegated to Smith and Senior Connections and that it cannot be held vicariously liable for Smith's conduct because Smith was not an employee

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<sup>13</sup>NAC 449.267 (duty to prevent exploitation); see also NRS 200.5091 et. seq., Elder Abuse and Neglect Statutes.

<sup>14</sup>Id.

<sup>15</sup>Scialabba v. Brandise Constr. Co., 112 Nev. 965, 969, 921 P.2d 928, 930 (1996).



of EEI. Finally, EEI asserts that even if Smith could have been considered an employee of EEI, EEI is not responsible for Smith's criminal acts.

As noted above, EEI's duty is designated by statute, and we conclude that this duty is non-delegable. Public policy dictates that the licensee of a group care home cannot delegate away its statutory duties to protect the residents of that home. Protection is the keystone of the legislation and regulations. To permit a licensee to delegate these duties would undermine the entire statutory scheme.<sup>16</sup>

With regard to the issue of Smith as an employee, it is irrelevant. Smith was EEI's agent and he, not Senior Connections, was the designated administrator of the facility. EEI can therefore be held liable for Smith's conduct if it knew of facts or circumstances that would lead a reasonable person to believe Smith might exploit the residents, or had knowledge of facts that would lead a reasonable person to pursue additional investigation of Smith.<sup>17</sup>

EEI asserts that summary judgment was still proper because EEI had no knowledge that Smith might exploit residents. This is based upon Wright and Fosters' affidavits that they had no reason to suspect Smith and EEI's decision to take control of financial management of the home away from Smith and Senior Connections was simply a business decision to save money. Forte claims EEI had notice of improper financial

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<sup>16</sup>NRS 200.5091 and 200.5093(4)(i) (indicating persons who maintain facilities for elder persons have a duty to report exploitation); see also Vallery v. State, 118 Nev. \_\_\_, \_\_\_, 46 P.3d 66, 77 (2002) (finding an administrator may not contractually limit statutory duties).

<sup>17</sup>Scialabba, 112 Nev. at 969, 921 P.2d at 930; NRS 200.50925 and 200.5093(1).

transactions by Smith and problems with stolen or forged payroll checks with Senior Connections. Forte asserts EEI actually mistrusted Smith, and this was the basis for EEI assuming financial control. Forte also argues that even if EEI did not actually mistrust Smith, the circumstances would have caused a reasonable person to investigate Smith and Senior Connections more closely, resulting in the discovery that Smith was exploiting patients at The Oakleaf or other facilities. We agree that the opposition to the motion for summary judgment contains sufficient information to raise a genuine issue of material fact on this question.

Foster's statement to the police was included in the opposition. In it, she indicates she did not believe Smith's explanations for delays and defaults on HPN payments due to EEI. She confronted him with her doubts and he confessed to her that he had been using the money to pay other accounts. This statement alone is sufficient to warrant a denial of summary judgment at the early stage of the proceedings, and demonstrates the need for additional discovery. Moreover, given these facts, the reasonableness of EEI's response to Smith and Senior Connection's financial issues is for the jury to decide.<sup>18</sup>

### III. Wright and Foster

Forte contends that he should have been given additional time under NRCP 56(f) to conduct discovery on the manner in which Wright and Foster operated EEI. Forte alleges that discovery may provide a basis for piercing the corporate veil or demonstrating Wright and Forte personally benefited from their conduct as officers and directors of EEI.

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<sup>18</sup>Lee v. GNLV Corp., 117 Nev. 291, 293, 22 P.3d 209, 210 (2001).

Forte asserts the district court erred in granting summary judgment on this issue within thirty days of the filing of the complaint. We disagree. The complaint does not contain proper allegations of ultra vires conduct or any other factual basis for holding Wright and Foster personally liable. Nor did Forte attach an affidavit outlining what additional discovery he intended to pursue and what he anticipated such discovery to produce in support of this Rule 56(f) request.<sup>19</sup> While the failure to attach an appropriate affidavit is not necessarily fatal, we conclude the opposition provides no basis for including Wright and Foster as individual defendants or any information that would indicate additional discovery would provide such a basis. We conclude the district court properly granted summary judgment as to Wright and Foster. However, we note that the order provides that the dismissal is with prejudice. Because Wright and Foster will be part of the litigation in their capacity as officers and directors of EEI, we conclude dismissing the complaint against them with prejudice at such an early stage of the proceeding was an abuse of discretion. We therefore remand this issue to the district court with instructions to correct the dismissal to one without prejudice.

#### CONCLUSION


We conclude that a genuine issue of material fact exists regarding contractual duties owed to Forte by EEI as well as whether EEI breached those and its duties under tort law. Therefore, the district court erred in granting summary judgment as to EEI. We further conclude that

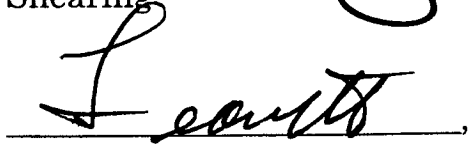
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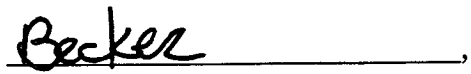
<sup>19</sup>Bakerink v. Orthopedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978).

dismissal without prejudice was proper as to Wright and Foster individually. Accordingly 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.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Valorie Vega, District Judge  
Marquis & Aurbach  
Kossack Law Offices  
Clark County Clerk