IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA NAJGRODSKI,
Appellant,
vs.
JOSEPH A. VOLPE, INDIVIDUALLY, AND PARDEE CONSTRUCTION COMPANY OF NEVADA,
Respondents.

No. 39732

FILED

NOV 04 2003

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

ORDER OF AFFIRMANCE

Paola Najgrodski, a motorist passenger, appeals a district court order granting summary judgment to Joseph Volpe and Pardee Construction Company of Nevada (Pardee) on theories of negligence and negligence per se. Najgrodski claims Volpe was (1) negligent in building a flowerbed behind a wall located in his backyard; (2) negligent for failing to warn her of the flowerbed; and (3) negligent per se for violating a building code in constructing the flowerbed. She claims Pardee was negligent for failing to warn Volpe about the hazard of building a solid structure adjacent to the wall.

We affirm the district court's order granting summary judgment because neither Volpe nor Pardee owed Najgrodski a duty of care. We also affirm the district court order granting summary judgment on the negligence per se claim. Najgrodski does not fit within the class of persons the building code was designed to protect.

FACTUAL BACKGROUND

Ross Duran was driving in a Las Vegas residential neighborhood. Najgrodski was his front seat passenger. Both were sixteen years old. Duran's vehicle traveled westbound on Endora Drive toward a "T" intersection. Endora ends when it intersects with

Sandalwood Drive. A stop sign is located at the corner of Endora and Sandalwood. Vehicles are required to stop and then turn right or left onto Sandalwood. A residential cinder block wall runs parallel to Sandalwood. Residential houses are located on the opposite side of the block wall. Duran was traveling at approximately seventy-five miles per hour on Endora. The posted speed limit was twenty-five miles per hour. Duran's vehicle failed to stop at the stop sign located at Endora and Sandalwood. He drove through the "T" intersection and into the block wall bordering Sandalwood. The vehicle struck the wall at fifty-five miles per hour.

Volpe's home is located near the intersection of Endora and Sandalwood. His backyard runs parallel to Sandalwood. The block wall separates Volpe's property from the road. Volpe had built a flowerbed in his backyard along the block wall. The flowerbed, approximately four feet high and three feet wide, was constructed of cinder block and filled with dirt. Duran's vehicle collided into the portion of block wall bordering the flowerbed. Najgrodski sustained severe injuries. She was not wearing a seatbelt when the accident occurred.

Najgrodski filed an amended complaint against Volpe and Pardee four years after the accident.[1] She filed a second amended complaint one week later. She alleged premises negligence, construction defect, and negligence per se. Volpe and Pardee filed a motion for summary judgment. After a hearing, the district court granted summary judgment because Volpe and Pardee did not owe Najgrodski a duty of care. Najgrodski sought reconsideration. The parties filed numerous motions

---

[1]The original complaint was filed in January 1999 and included Daimler Chrysler as a defendant. Chrysler settled out of court.

and accused each other and the district judge of alleged procedural errors. The district court vacated its prior order to resolve these issues and create a clean record. During a new hearing, the parties re-argued the motion for summary judgment. The district court granted summary judgment. Najgrodski appeals the district court order.

DISCUSSION

We review a summary judgment order de novo.[2] Summary judgment is proper where no genuine issue of material fact exists "and the moving party is entitled to judgment as a matter of law."[3] A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party."[4] We review the pleadings and proof in a light most favorable to the nonmovant.[5]

Volpe - Negligence

To succeed on a negligence claim, a plaintiff must show that (1) the defendant owed her a duty of care; (2) the defendant breached his duty of care; (3) the breach was the legal cause of her injury; and (4) she suffered damages.[6] Summary judgment may be granted where the defendant demonstrates that the plaintiff's prima facie case lacks a necessary element as a matter of law.[7]

---

[2]Dermody v. City of Reno, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997).

[3]Id.

[4]Id.

[5]Id.

[6]Wiley v. Redd, 110 Nev. 1310, 1315, 885 P.2d 592, 595 (1994).

[7]Id.

"[W]hether a 'duty' to act exists is a question of law solely to be determined by the court."[8] The court needs to "first determine whether 'such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other.'"[9] Although the issue of legal duty reflects social policy considerations,[10] the main consideration is foreseeability.[11] A defendant bears responsibility for all foreseeable consequences resulting from his or her negligent conduct.[12] This means a "defendant must be able to foresee that his negligent actions may result in harm of a particular variety to a certain type of plaintiff."[13] If a legal duty exists, the defendant is required to exercise reasonable care under the circumstances.[14] The finder of fact decides whether a defendant's conduct was 'reasonable' under the circumstances.[15] A breach of the standard of care occurs when a person fails to exercise "'that degree

---

[8]Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) (quoting Scialabba v. Brandise Const. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996)).

[9]Lee, 117 Nev. at 295, 22 P. 3d at 212 (quoting W. Page Keeton et al., Prosser and Keeton on Torts § 37).

[10]Wiley, 110 Nev. at 1316, 885 P.2d at 596.

[11]Sims v. General Telephone & Electric, 107 Nev. 516, 525, 815 P.2d 151, 156 (1991) (overruled on other grounds by Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997)).

[12]Id.

[13]Id.

[14]Lee, 117 Nev. at 296, 22 P.3d at 212.

[15]Id.

of care in a given situation which a reasonable man under similar circumstances would exercise.'"[16]

Najgrodski claims Volpe owed her a duty of care since it was foreseeable that a vehicle could leave the roadway and crash into the block wall adjacent to Volpe's backyard. She also argues Volpe turned the wall into a hidden deathtrap by adding the flowerbed. She analogizes this case to Arnesano v. State, Dep't Transp.[17] In Arnesano, a driver was traveling on Interstate 95 and was hit from behind by another vehicle.[18] He spun out of control, slid into the center median, and crashed into an unprotected concrete post located sixteen feet off the paved portion of the freeway. The post supported an antiquated overpass used for seismic testing.[19] The Nevada Department of Transportation was liable because it owed the traveling public a duty of due care and was "obligated to ensure that all aspects of the overpass met the standard of reasonable safety."[20] We stated that "changes in conditions may have mandated new safety precautions."[21] The instant case is easily distinguishable.

Unlike the overpass built by the state for public transportation, Volpe is a private citizen who built a flowerbed in his

---

[16]Sims, 107 Nev. at 522, 815 P.2d at 155 (overruled on other grounds by Tucker, 113 Nev. at 1356 n.4, 951 P.2d at 1031 n.4) (quoting Driscoll v. Erreguible, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971)) (emphasis omitted).

[17]113 Nev. 815, 942 P.2d 139 (1997).

[18]Id. at 817, 942 P.2d at 141.

[19]Id. at 817-18, 942 P.2d at 141.

[20]Id. at 824, 942 P.2d at 145.

[21]Id.

backyard for personal use. Volpe did not have a special relationship with Najgrodski or the other passengers in the vehicle. He merely happened to live in a house with a backyard that abutted Sandalwood. It is foreseeable that a vehicle traveling at a high rate of speed on an interstate highway could crash into a highway structure resulting in serious injuries or death. It is not, however, foreseeable that a motorist would travel at seventy-five miles per hour in a residential neighborhood, fail to obey a stop sign at a "T" intersection, fail to negotiate a turn, and crash into a landowner's backyard at fifty-five miles per hour.

Najgrodski also analogizes this case to Tieder v. Little,[22] a Florida District Court of Appeal case. In Tieder, an out-of-control vehicle struck a student as she was walking out of a college dormitory building.[23] The vehicle pinned the student against a brick wall supporting a concrete canopy at the dormitory entrance.[24] Since the wall was built without adequate supports as required by Florida's building code, the entire wall fell and crushed the student to death.[25] The architect and university were sued for negligence and stipulated they breached their duty of due care to the student.[26] The sole contested issue was whether the design and construction of the wall was a proximate cause of the student's death.[27] In

---

[22]502 So. 2d 923 (Fla. Dist. Ct. App. 1987).

[23]Id. at 924.

[24]Id.

[25]Id.

[26]Id. at 928.

[27]Id.

Tieder, a special relationship existed between the university and decedent. In determining the issue of proximate cause, the Tieder court addressed foreseeability.[28] It said the collapse of the dormitory wall was "within the scope of the danger created by the defendants' negligence in designing and constructing the wall without adequate supports, and was a reasonably foreseeable consequence of such negligence."[29]

Here, no special relationship existed between the parties and whether a duty of care was owed is a matter of contention. It was not foreseeable that a properly built block wall fortified by a flowerbed would cause severe injury to a passenger riding in a vehicle that veers off the roadway and collides into the block wall at an excessive speed.

Alternatively, Volpe analogizes this case to Comfort v. Rocky Mountain Consultants,[30] a case decided by the Colorado Court of Appeals. In Comfort, a vehicle was traveling at a high rate of speed, failed to negotiate a turn, left the road, and crashed into a ditch built on private property about twenty feet from the highway.[31] A passenger in the vehicle sued the landowner on theories of negligence and negligence per se.[32] The court followed the rule adopted in a majority of cases in other jurisdictions considering similar issues.[33] It held that the landowner did not owe a duty

---

[28]Id. at 927.

[29]Id.

[30]773 P.2d 615 (Colo. Ct. App. 1989).

[31]Id. at 616.

[32]Id.

[33]Id.

to ensure the safety of motorists who leave the traveled portion of the roadway.[34] The court also found that a special relationship did not exist to justify imposing a duty on the landowner.[35] Numerous other foreign jurisdictions have also held that private landowners are not liable in negligence actions brought by motorists who stray from the roadway and crash into the landowner's property.[36]

We agree that the instant case is analogous to Comfort. No special relationship existed between Najgrodski and Volpe. Najgrodski was a vehicle passenger traveling at a high speed when the vehicle failed to maneuver a turn and crashed into the wall enclosing Volpe's backyard. Like the landowner in Comfort, Volpe does not have a duty to protect

---

[34]Comfort, 773 P.2d at 616; but see Jacque v. Public Service Co. of Colorado, 890 P.2d 138, 140 (Colo. App. 1994) (holding that "[s]imply because an accident occurs off the paved portion of a roadway, it does not follow that no duty of care exists").

[35]Id.

[36]See Hutchings v. Bauer, 599 N.E.2d 934, 935 (Ill. 1992) (landowner not liable when motorcyclist hit posts built to protect property because no duty owed); Battisfore v. Moraites, 541 N.E.2d 1376, 1378, 1382 (Ill. App. Ct. 1989) (duty of care not owed to a motorist who exceeded the speed limit, failed to negotiate a turn, and crashed into cement blocks located on the landowner's property); Fortenberry v. Sanders, 323 S.E.2d 697, 698 (Ga. Ct. App. 1984) (no duty of care to protect against a possibility that vehicles might stray from the highway and onto landowner's property); Scattareggia v. Niagara Mohawk Power, 510 N.Y.S.2d 455, 458 (N.Y. Sup. Ct. 1986) (automobiles traveling beyond the roadway generally not foreseeable); Braxton v. Com., Dept. of Transp., 634 A.2d 1150, 1152, 1158-59 (Pa. Commw. Ct. 1993) (no duty owed to motorist who failed to negotiate a curve, veered off the highway, and struck landowner's stone pillar located nearly eleven feet from the highway).

motorists like Najgrodski who leave the roadway and crash onto private property.

It was unforeseeable that Najgrodski would be traveling seventy-five miles per hour in a residential neighborhood where the speed limit was twenty-five miles per hour, zoom past a stop sign, fail to negotiate a turn at a "T" intersection, and crash into the wall of Volpe's backyard at a speed of fifty-five miles per hour without wearing a seat belt. Public policy does not support the imposition of liability on Volpe. Without the flowerbed, Duran's vehicle might have crashed into Volpe's house, seriously injured or killed Volpe or his family members, or at the very least caused additional damage to Volpe's backyard.

The flowerbed did not cause Volpe's wall to become a deathtrap. "[W]hen a moving vehicle strikes any immovable or fixed object with sufficient force, some damage or injury from the collision would be expected, the extent of damage depending on a variety of factors including speed."[37] The flowerbed was not inherently dangerous or intended to cause harm to out-of-control motorists. Rather, it was a structure built by Volpe to enhance the aesthetics of his backyard. Imposing liability on residential landowners for injuries or fatalities suffered by motorists who leave the roadway would place an undue burden on landowners, especially those living near busy roadways.

---

[37]Hutchings, 599 N.E.2d at 936.

Volpe - Negligence per se

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."[38]

Although Najgrodski did not assert a negligence per se claim in her original pleadings, the district court addressed the issue in Volpe's motion for summary judgment. The parties also addressed the merits of the negligence per se claim during a hearing on the motion for summary judgment. The district court granted summary judgment on all Najgrodski's claims. Therefore, we address the merits of the negligence per se claim.

In Vega v. Eastern Courtyard Assocs.,[39] we created a three-part test for negligence per se claims arising from alleged statute violations. An alleged statutory violation results in negligence per se if

> (1) a violation of a building code provision adopted by local ordinance is established, (2) an injured party fits within the class of persons that a particular provision of a building code was intended to protect, and (3) the injury suffered is of the type the provision was intended to prevent.[40]

We also held that "whether an injured party belongs to the class of persons that the provision at issue was meant to protect, and whether the injury

---

[38]NRCP 15(b).

[39]117 Nev. 436, 441, 24 P.3d 219, 222 (2001).

[40]Id.

suffered is the type the provision was intended to prevent, are questions of law to be determined by the court."[41]

Najgrodski claims Volpe violated a building code in constructing the flowerbed. Najgrodski argues the district court erred by granting summary judgment before determining whether she was in a class of persons the code sought to protect and whether the injuries she sustained were the type the provision was intended to prevent.

We conclude the district court did not abuse its discretion in granting summary judgment on this issue. Najgrodski was not in the class of plaintiffs the building code was meant to protect. Nevada's building code is meant to ensure the structural integrity and support of the structure to prevent collapse and deterioration.[42] It was not meant to protect a motorist who veers off the roadway and crashes into a block wall at an excessive speed.

Pardee

"[T]he law does not impose a general affirmative duty to warn others of dangers. Specifically, 'in failure to warn cases, defendant's duty to warn exists only where there is a special relationship between the parties, and the danger is foreseeable.'"[43]

---

[41]Id.

[42]NRS 278.011.

[43]Wiley v. Redd, 110 Nev. 1310, 1316, 885 P.2d 592, 596 (1994) (quoting Sims v. General Telephone & Electric, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991) (overruled on other grounds by Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997)).

Najgrodski claims Pardee should be held liable because it failed to warn Volpe that a flowerbed constructed adjacent to the block wall could harm motorists who leave the roadway. This reasoning is flawed because no special relationship existed between Pardee and Najgrodski.

CONCLUSION

We conclude the district court did not abuse its discretion by granting summary judgment. Najgrodski is precluded from recovery because neither Volpe nor Pardee owed her a duty of care. It was also unforeseeable that Duran's vehicle would leave the roadway and crash into Volpe's backyard. We further conclude that Volpe is not liable for negligence per se even if he breached a building code in constructing his flowerbed. Najgrodski was not in a class of persons the building code was meant to protect. Accordingly, we affirm the decision of the district court.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Michael A. Cherry, District Judge
G. Dallas Horton & Associates
Hafen, Porter & Storm, Ltd.
Koeller Nebeker Carlson & Haluck, LLP
Clark County Clerk