IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN PROTECTIVE SERVICES, INC.,
Appellant,
vs.
MARVIN HENRY,
Respondent.

No. 40266

FILED

JAN 0 8 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a final judgment on a jury verdict in a personal injury action and an order denying a motion for a new trial.[1] Respondent Marvin Henry received a gunshot wound while attempting to stop an altercation in the Reno Hilton parking lot. Appellant American Protective Services (APS) provided security for the Hilton on the night in question. Henry sued APS, claiming that his injuries resulted from APS' failure to provide adequate security. The jury found for Henry and awarded damages.

On appeal, APS argues the following: (1) the trial court improperly denied APS' motion to dismiss at the close of Henry's case because the assault on Henry was unforeseeable, (2) there was insufficient evidence to establish that the APS officers' actions proximately caused Henry's injuries, (3) there is no substantial evidence to support the jury's award of future damages, and (4) the district court improperly excluded Henry's prior misdemeanor conviction for possession of drug paraphernalia.

[1]We lack jurisdiction over the district court's orders denying American Protective Services' motions for a judgment notwithstanding the verdict and a remittitur.

FACTS

Henry received a gunshot wound while trying to stop a fight in the Reno Hilton parking lot. APS was responsible for security on the Hilton premises. Henry brought a personal injury action against APS, claiming negligent failure to provide adequate security.

Henry is a custodian in the Washoe County School District. APS contracted with the Reno Hilton "to provide the Reno Hilton's guests . . . a safe and secure place to work and play." APS officers are not armed; their duties include observation and reporting.

On December 6-7, 1997, Henry attended a party at the Hilton.[2] At approximately 3:45 a.m., Edwood Neal and Brian Kirtdoll engaged in an altercation. APS security officer Gerald Williams attempted to intervene and escort Neal out of the party. During the intervention, Neal pulled a razor blade and threatened to kill Williams. Williams called for backup, and Officers Michael Grimm and Pat Pendergest, Williams' supervisors, arrived shortly thereafter. Williams did not notify dispatch about the razor blade threat, but he did report it to Grimm. Grimm later reported the incident to dispatch.

While the officers were escorting Neal outside, the party broke off, and two separate groups formed. The groups descended to the parking level, yelling gang references at each other. A female walking behind Grimm referred to Neal and said: "He is crazy. I hope he don't pull a gun." After hearing her comment, Grimm and Williams notified dispatch that a gun was potentially present. As the two groups and the officers approached the hallway leading to the parking lot, Grimm asked another

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[2]Henry arrived at the party between 11 p.m. and 1 a.m.

APS security officer to stop one of the groups, and Grimm accompanied Neal to the parking lot.

During these events, the party crowd, including Henry, continued to exit through the same doors. On the way to his car, Henry noticed that Neal and Kirtdoll had renewed their prior altercation. Neal and a friend of his pinned Kirtdoll to the ground and began cutting Kirtdoll's neck. Henry spontaneously ran over and pushed Neal away from Kirtdoll. Neal then shot Henry in the arm. Two people took Henry to Washoe Medical Center.

The APS officers did not intervene in the altercation. When Grimm learned that Neal possessed a gun, he ordered his officers back into the hotel for safety reasons. The officers properly withdrew because they were unarmed. Once inside, the officers notified the Hilton's patrons of the fight in the parking lot and attempted to prevent them from walking outside. Grimm then contacted dispatch to report the incident. Although Grimm knew of the potential gun presence at 3:50 a.m., he did not inform dispatch until he saw the gun. At 3:58 a.m., dispatch called the Reno Police Department and requested assistance. The police arrived in five minutes, but found neither Neal nor Henry, because Neal had run away and Henry was in Washoe Medical Center.

As a result of the incident, Henry underwent two forearm surgeries and missed thirteen weeks of work. He has a limited range of motion with his wrist and a diminished sensation on his palm. Henry has a problem with dexterity and manipulating small objects. He requires no future medical care, but he will not be able to engage in some recreational activities, including bowling, basketball, golf, and racquetball. While Dr. Joseph Kiener, the plastic surgeon who treated Henry at Washoe Medical

Center, expected him to have "a near normal recovery," Dr. Harry Hill, Henry's medical expert, testified that Henry had a permanent partial disability.[3]

At trial, Ken Braunstein, a forensic science consultant specializing in adequacy of security, testified for Henry. He stated that APS did not adequately train its officers and that the officers violated APS' policies and procedures on the night in question. The APS policy manual required the officers to escort belligerent patrons out at separate times and through separate exits. The manual also instructed the officers to immediately report hazards to life or property. Braunstein conceded that the officers correctly withdrew inside the building because they were unarmed. However, he maintained that they acted improperly by failing to immediately report the incident to the Reno Police.

At the close of Henry's case, APS moved to dismiss on the grounds that Henry failed to establish foreseeability and proximate causation. The court denied the motions. Following a four-day jury trial, the jury awarded Henry $29,786.65 in past damages and $236,221.00 in future damages. APS filed a motion for a judgment notwithstanding the verdict, a motion for a new trial and/or alternatively a motion for remittitur, and a motion for oral argument. The district court denied the motions. This appeal followed.

DISCUSSION

Foreseeability

Pursuant to NRCP 41(b), a defendant "may move for a dismissal on the ground that upon the facts and the law the plaintiff has

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[3]Twelve to fifteen percent impairment of the whole person.

failed to prove a sufficient case for the court or jury." A motion for involuntary dismissal admits the truth of the plaintiff's evidence and all inferences that can reasonably be drawn from it.[4] In reviewing an NRCP 41(b) ruling, the court must interpret the evidence in the light most favorable to the plaintiff.[5]

APS argues that the trial court erred in denying its NRCP 41(b) motion to dismiss at the close of Henry's case because there was insufficient evidence to show the incident was foreseeable. To prevail on a negligence theory, one of the elements the plaintiff must show is that "the defendant owed a duty of care to the plaintiff."[6] Because foreseeability is a prerequisite to establishing duty of care,[7] APS alleges that the lack of prior criminal activity on the Hilton premises made the incident unforeseeable and thus it did not owe a duty to Henry. We disagree.

We have previously held that a "proprietor has a duty to exercise 'reasonable and ordinary care' in keeping its premises safe for its patrons."[8] However, the duty to protect a patron against the acts of a

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[4]Fernandez v. Admirand, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992).

[5]Id. (citing Vancheri v. GNLV Corp., 105 Nev. 417, 420, 777 P.2d 366, 368 (1989)).

[6]Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993) (citing Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991)).

[7]Id. at 1101, 864 P.2d at 799 (citing Early v. N.L.V. Casino Corp., 100 Nev. 200, 203, 678 P.2d 683, 684 (1984)).

[8]Basile v. Union Plaza Hotel & Casino, 110 Nev. 1382, 1384, 887 P.2d 273, 275 (1994) (quoting Early, 100 Nev. at 203, 678 P.2d at 684).

third party arises only when the proprietor has reasonable cause to anticipate the third party's acts and the probability of injury.[9] Foreseeability is a question of fact for the jury.[10]

In Doud v. Las Vegas Hilton Corp.,[11] we concluded, using the Restatement (Second) of Torts standard, that a proprietor's ability to anticipate a third party's acts depends not only on past experience with such conduct, but on other circumstances, such as the place or character of the business. Whenever the circumstances are such that a proprietor should "reasonably anticipate careless or criminal conduct on the part of third persons, generally or at some particular time, the proprietor may be under a duty to take precautions against it."[12] Past criminal activity is only one method of proving that a proprietor has reason to anticipate a third party's actions.

Applying the "totality of circumstances" approach and Doud's reasoning, we conclude that Henry presented sufficient evidence from which the jury could have granted relief. Similar to Doud, the Reno Hilton was aware that the presence of alcohol and cash transactions might provide an environment for criminal conduct. Realizing the potential for altercations, the Hilton employed APS to provide security services. The

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[9]Early, 100 Nev. at 203, 678 P.2d at 684 (citing Thomas v. Bokelman, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970)).

[10]Basile, 110 Nev. at 1384, 887 P.2d at 275 (citing Elko Enterprises, Inc. v. Broyles, 105 Nev. 562, 566, 779 P.2d 961, 964 (1989)).

[11]109 Nev. 1096, 1102, 864 P.2d 796, 799-800 (1993).

[12]Id. at 1101, 864 P.2d at 799 (quoting Restatement (Second) of Torts § 344 cmt. F (1977)).

APS policy manual required APS officers to immediately report hazards to life or property. Yet, the officers did not promptly report the razor blade or the gun to dispatch. Henry's expert witness testified that given the totality of the circumstances, the officers should have taken additional steps to control the crowd prior to escorting Neal from the premises. The jury could have reasonably concluded that these factors gave APS reasonable cause to anticipate additional altercations as the crowd exited into the parking lot.

Despite the lack of prior crimes on the Hilton premises, the jury could have reasonably concluded that the APS officers should have foreseen the incident and acted accordingly.

APS cites Scialabba Brandise Construction Co.[13] and Kusmirek v. MGM Grand Hotel, Inc.[14] for the proposition that evidence of prior criminal activity is a necessary element of foreseeability. We find APS' arguments unpersuasive. While in Scialabba the exorbitant evidence of past criminal activity was a deciding factor, we followed the totality of circumstances approach.[15] APS' reliance on Kusmirek is also inapposite because Kusmirek is distinguishable. Unlike Kusmirek, where sudden acceleration or a mechanical malfunction was completely unforeseeable, the APS officers had a reason to anticipate Henry's injury.

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[13]112 Nev. 965, 921 P.2d 928 (1996).

[14]73 F. Supp. 2d 1222 (D. Nev. 1999).

[15]112 Nev. at 970, 921 P.2d at 931 (citing Doud, 109 Nev. at 1102, 864 P.2d at 799-800).

Proximate causation

APS argues there is no evidence the jury could reasonably conclude that the APS officers' delay in calling the Reno Police Department proximately caused Henry's injuries. APS also contends that Henry voluntarily encountered the risk, thus his actions necessarily supercede APS' liability. We find APS' arguments inapposite.

"[T]o establish proximate causation 'it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'"[16] Proximate cause consists of two components: cause in fact and foreseeability.[17] To establish a cause in fact, the plaintiff must show that the defendant's negligence was a substantial factor in bringing about the plaintiff's injury.[18] Foreseeability is a policy limitation on the defendant's liability to exclude consequences that lack close connection with the defendant's conduct and the harm the conduct created.[19] Proximate cause must be "unbroken by any efficient, intervening cause."[20] An intervening act is a superseding cause which

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[16]Yamaha Motor Co. v Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (citing Crosman v. Southern Pacific Co., 42 Nev. 92, 108-09, 173 P. 223, 228 (1918)).

[17]Doud, 109 Nev. at 1105, 864 P.2d at 801 (citing Sims v. General Telephone & Electrics, 107 Nev. 516, 815 P.2d 151 (1991)).

[18]Id.

[19]Id.

[20]Id. (citing Frances v. Plaza Pacific Equities, 109 Nev. 91, 847 P.2d 722 (1993)).

breaks the chain of causation to the extent that it is unforeseeable.[21] Proximate causation is generally an issue of fact for the jury.[22]

We conclude the jury could have reasonably found that APS' failure to notify the police sooner was a substantial factor in bringing about Henry's injuries. Evidence showed that at 3:50 a.m., Officer Williams had knowledge that Neal possessed a razor blade, and he also suspected that Neal had a firearm. Yet, the Reno Police did not receive a request for assistance until 3:58 a.m. The police arrived in five minutes, but it was too late to prevent the incident. The jury could have reasonably concluded that had APS reported to the Reno Police earlier, the police would have detained Neal before he shot Henry.

APS' contention that Henry voluntarily encountered the risk and his conduct severed APS' liability is also unavailing because Henry's intervention was foreseeable. Trial testimony showed that after the fight in the parking lot broke out, the APS officers started telling people to stay out of the fight and informed them that the police were on the way. APS' claim that it could not foresee the very act it tried to prevent is inapposite. Because an intervening cause breaks the chain of causation only to the extent that it is unforeseeable,[23] APS' argument that Henry's conduct severed its liability lacks merit.

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[21]Id. (citing Drummond v. Mid-West Growers, 91 Nev. 698, 705, 542 P.2d 198, 203 (1975).

[22]Yamaha, 114 Nev. at 238, 955 P.2d at 665 (citing Nehls v. Leonard, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981)).

[23]Doud, 109 Nev. at 1105, 864 P.2d at 801 (citing Drummond, 91 Nev. at 705, 542 P.2d at 203).

Future damages

APS asserts that we should reverse the jury's future damages award because no substantial evidence supported the jury award. APS also urges that the trial court erred in denying its motions for a judgment notwithstanding the verdict, a new trial, and/or remittitur. We disagree.

A. Jury verdict

The district court instructed that the jury could award reasonable compensation for "physical and mental pain, suffering, anguish and disability" that Henry was "reasonably certain to experience in the future as a result of the incident." After the jury heard all the evidence, it awarded Henry $236,221.00 in future damages.

We have held that damages for pain and suffering are peculiarly within the province of the jury.[24] The standard of review for a jury verdict is whether substantial evidence supports the verdict.[25] "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"[26] "We will not overturn the jury's verdict if it is supported by substantial evidence, unless . . . the verdict was clearly wrong."[27]

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[24]Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001).

[25]Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

[26]Yamaha, 114 Nev. at 238, 955 P.2d at 664 (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (internal quotation marks and citation omitted)).

[27]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989).

APS contends that no adequate evidence supports the jury's award because the trial testimony failed to establish that Henry's future pain and suffering was more than a mere possibility. The gravamen of APS' argument is the evidence that Henry would require no future medical treatment, Henry "only occasionally missed work," and Henry's testimony about the scope of his injuries was relatively vague.[28]

However, other evidence established that Henry had a limited range of motion in his wrist and a diminished sensation on his palm. After the accident, he was unable to complete some maintenance tasks, could not adequately dust and sweep, and had difficulty manipulating bolts and screws and using a screwdriver. As a result of this impairment, Henry had to perform tasks with his left hand, which made him less efficient. Henry testified that he believed the drop in efficiency was the reason why he lost his permanent position at Veterans Elementary School and had to travel to different schools each day. Two medical experts who assessed Henry's injuries stated he would not be able to engage in some recreational activities, including bowling, basketball, golf, and racquetball. Henry also suffered a "drop finger" syndrome[29] and Dr. Hill testified that Henry had a permanent partial disability.

Although there is conflicting testimony regarding Henry's injuries, we are not free to weigh the evidence and must draw all

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[28]Henry testified that his wrist gets "kind of stiff," he experiences occasional pain in cold weather, which makes him stay home for a day or two, and the pain makes him feel "cranky or something."

[29]Because the bullet severed the finger muscle, Henry has to concentrate continuously on keeping his finger straight. Otherwise, the finger assumes an unnatural position.

inferences in favor of the prevailing party.[30] Therefore, we affirm the jury's award.

B. Motion for a new trial

APS' argument that the district court should have granted its motion for a new trial because the jury manifestly disregarded the court's instructions also lacks merit. "This court presumes that a jury follows the district court's instructions."[31] "[T]he decision to grant or deny a motion for a new trial rests within the [trial court's] discretion . . . and will not be disturbed on appeal absent palpable abuse."[32] Granting a new trial is appropriate only if the court determines that had the jurors properly applied the district court's instructions, "it would have been impossible for them to reach the verdict, which they reached."[33] We will not disturb the jury's verdict, unless the verdict "is so flagrantly improper as to indicate passion, prejudice or corruption in the jury."[34]

In light of our prior analysis, we conclude that the jury correctly applied the trial court's instructions. The record contains ample evidence from which the jury could reasonably award future damages to

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[30]Smith v. Timm, 96 Nev. 197, 202, 606 P.2d 530, 532 (1980).

[31]Krause Inc. v. Little, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001) (citing Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997)).

[32]Smith's Food & Drug Cntrs. v. Bellegarde, 114 Nev. 602, 605-06, 958 P.2d 1208, 1211 (1998) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

[33]Jaramillo v. Blackstone, 101 Nev. 316, 317-18, 704 P.2d 1084, 1085 (1985) (quoting Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982)).

[34]Canterino, 117 Nev. at 24, 16 P.3d at 418 (quoting Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 454, 686 P.2d 925, 932 (1984)).

Henry. There is no indication of passion, prejudice, or corruption. Therefore, the jury verdict was proper.

Misdemeanor

APS contends that the trial court erred in precluding APS from impeaching Henry with a misdemeanor conviction for possession of drug paraphernalia. On September 19, 2001, Henry pleaded guilty to drug paraphernalia possession and spent two days in the Washoe County jail. However, in his September 24, 2001 deposition, Henry denied having any prior criminal charges. APS' counsel attempted to proffer the testimony to attack Henry's credibility. The court precluded counsel from introducing the misdemeanor conviction, and APS maintains that the court erred in doing so. We disagree.

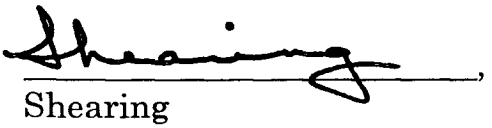
Pursuant to NRS 50.095(1), "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which he was convicted." (Emphasis added.) The parties do not dispute the fact that Henry's conviction constituted a misdemeanor. A misdemeanor is a "crime punishable by a fine of not more than $1,000, or by imprisonment in a county jail for not more than 6 months."[35] By definition, Henry's

[35]NRS 193.120(3).

conviction falls outside the category of crimes NRS 50.095 permits for impeachment purposes.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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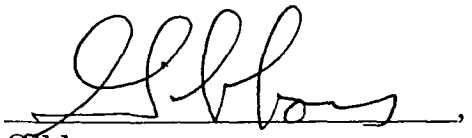

_____, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
Perry & Spann/Reno
Marc P. Picker
Washoe District Court Clerk