

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARD ROCK HOTEL, INC., A NEVADA
CORPORATION,
Appellant,
vs.
MICHELE SCHWARTZ, AS SPECIAL
ADMINISTRATRIX OF THE ESTATE
OF ROBERT GANN, DECEASED; AND
KAY GANN,
Respondents.

No. 40644

FILED

MAR 03 2005

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

ORDER OF REMAND

This is an appeal from a judgment after a bench trial. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

FACTS AND PROCEDURAL HISTORY

The litigation below arose from an altercation between Robert Gann and Marc Coddette at appellant Hard Rock Hotel's "Center Bar." Coddette allegedly punched and kicked Gann in the head, inflicting serious personal injuries.

The events leading up to the altercation started with Gann's¹ arrival at the home of his friend, Mark Berg, early in the afternoon of August 30, 1997. After an extended bout of heavy drinking, Gann and Berg departed for the Hard Rock Hotel's Center Bar at approximately 9:30 p.m.

¹Robert Gann died prior to trial for causes unrelated to the injuries that were the subject of the instant litigation. Michelle Schwartz, special administratrix, was substituted for Gann as a plaintiff in the action below.

Gann and Berg took seats at the bar and continued to imbibe over the next few hours. Shortly before 12:30 a.m., a man in a velour shirt reached between Berg and Gann to order a drink. Words were exchanged between Gann and the man, after which Gann asked for an apology. The man apologized and apparently left the area. Shortly thereafter, a man in a black tank top approached Gann and took umbrage at Gann's treatment of the man in the velour shirt. At 12:34 a.m., a brief squabble ensued between the two, during which the man in the black tank top pushed Gann from behind. A bartender, Rick Albright, promptly called security about a "possible fight" related to this incident. Unfortunately, Hard Rock's security dispatch officer sent security officers to the main doors of the hotel instead of the Center Bar. When the officers arrived at the main doors, they saw no one matching the relevant descriptions and notified dispatch that the possible fight was "GOA," gone on arrival.

Shortly thereafter, Berg observed the individual in the black tank top speaking with Marc Coddette, an African American male. At 12:36 a.m., Coddette approached Gann and commented that Gann was lucky that the individual in the black tank top did not "kill" him. Bartender Greg Holmes witnessed Gann and Coddette exchanging words, but did not call security. The parties do not dispute that, during a resulting conversation with Berg, Gann referred to Coddette using a highly offensive racial epithet. Coddette's deposition testimony, admitted at trial, also reflects that Gann was speaking directly to Coddette in a highly offensive and insulting manner. Coddette admitted that, after hearing these remarks, he struck Gann in the face and threw him to the ground, but denied kicking Gann in the head. Coddette's deposition testimony also revealed that, during the reported preliminary hearing on

Coddette's resulting battery charge, Gann admitted to calling Coddette a "nigger" after Coddette had thrown him to the ground. Further, during trial, Berg testified that he chased Coddette to the front doors, where Coddette apologized for what happened to Gann, but said that he "couldn't take the racial slurs anymore."

An emergency response team transported Gann to a local hospital. Gann's blood/alcohol level following admission was determined through laboratory testing to have been .291. The record also reflects that Gann was admitted to the intensive care unit, where it was ultimately determined that he suffered severe head trauma, including brain hemorrhaging.

Gann sued Hard Rock for negligent provision of security and Coddette for battery. Kay Gann, Gann's spouse, joined the suit claiming loss of consortium. The district court dismissed the claims against Coddette for failure to perfect service of process. Hard Rock denied liability, alleging that Gann's comparative fault exceeded any negligence on the part of Hard Rock and that Gann's and Coddette's actions were the proximate cause of Gann's injuries. Hard Rock also cross-claimed against Coddette for equitable indemnity and contribution. Coddette failed to timely answer the cross-claim and the district court entered judgment against him.

Hard Rock filed a demand for jury 13 days after the district court's initial order setting the case for trial. The district court granted respondents' motion to strike the jury demand as untimely under NRCP 38(d), and required the parties to try the matter to the bench.

The district court ultimately found Hard Rock liable on the negligent security claim and awarded Gann \$365,217.85. The district court also awarded Kay Gann \$158,365.00 for her loss of consortium. Including prejudgment interest, these awards total \$471,038.52 and \$172,504.67, respectively. The district court explicitly found that “[t]here was no negligent conduct on the part of Robert Gann which proximately caused or contributed to his injuries and damages resulting from the negligence of Hard Rock Hotel.” The district court further found that the combination of Hard Rock’s negligence and Coddette’s battery proximately caused Gann’s injuries. Hard Rock appeals.

DISCUSSION

Hard Rock argues that the district court erred because Gann failed to establish causation as a matter of law.

“Causation consists of two components: actual cause and proximate cause.”² In this case, actual cause requires proof that Hard Rock’s failure to provide adequate security was a substantial factor in bringing about Gann’s injury.³ Proximate cause, on the other hand, “is essentially a policy consideration that limits a proprietor’s liability to [foreseeable] consequences that have a reasonably close connection with both the proprietor’s conduct and the harm that the conduct originally created.”⁴ “Proximate cause has been widely defined as that cause which,

²Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998).

³See Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1105, 864 P.2d 796, 801 (1993).

⁴Id. (emphasis added); see also Dow Chemical, 114 Nev. at 1481, 970 P.2d at 107.

in natural and continuous sequence and unbroken by any efficient, intervening cause, produces the injury complained of and without which the result would not have occurred.”⁵ Thus, a proprietor’s negligence is not actionable if an unforeseeable superseding cause breaks the chain of causation.⁶ In this connection, the district court made the following findings of fact:

Hard Rock Hotel had reasonable cause to anticipate the battery of Marc Coddette upon Robert Gann, and the probability of injury resulting therefrom; and therefore, Hard Rock had a duty to take affirmative action to reasonably attempt to prevent this battery.

Hard Rock Hotel breached its duty of care, and was negligent, in that it failed to take reasonable actions to prevent the battery upon Robert Gann, including but not limited to the fact that the security dispatcher reported the “possible fight” at the “main doors” rather than the Center Bar, that security did not follow-up with bartender Albright after finding no disturbance at the “main doors, and that bartender Greg Holmes did not call security upon observing the heated exchange between Marc Anthony Coddette and Robert Gann.

Proximate causation is generally an issue for the trier of fact to resolve.⁷ We will not overturn a district court’s determination on factual issues

⁵Doud, 109 Nev. at 1105, 864 P.3d at 801.

⁶See id.

⁷E.g. Doud, 109 Nev. at 1106, 864 P.3d at 802.

unless it is clearly erroneous and not supported by substantial evidence.⁸ “Substantial evidence is ‘that which a reasonable mind might accept as adequate to support a conclusion.’”⁹

We conclude that Hard Rock could not have foreseen that the altercation between Gann and the individual in the black tank top could have resulted in the criminal actions of Coddette, a third-party individual not present at the time of the first attack, which was likely provoked by Gann’s racially offensive comments. We therefore conclude that, as a matter of law, Hard Rock’s negligence in initially responding to the wrong location did not proximately cause Gann’s injuries. This, however, does not compel outright reversal in light of evidence supporting the additional finding that bartender Holmes breached his duty of care in his failure to alert security to the impending altercation between Gann and Coddette. We therefore direct the district court on remand to consider anew whether this breach of duty caused Gann’s injuries, *i.e.*, whether Gann’s injuries were the actual and foreseeable consequence of Holmes’ failure to notify security of the impending altercation.

Hard Rock also argues that the district court erred in finding Gann 0% comparatively negligent. We agree.

⁸See Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994).

⁹Gilman v. State, Bd. of Vet. Med. Exam’rs, 120 Nev. ___, ___, 89 P.3d 1000, 1003 (2004) (quoting McClanahan v. Raley’s, Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001)).

NRS 41.141¹⁰ “permits a plaintiff to recover as long as his or her comparative negligence is not greater than that of the defendant or defendants.”¹¹ We conclude that, under NRS 41.141, intentional, grossly negligent, and reckless conduct can be compared as against a defendant’s negligence.¹² In this connection, the district court made the following finding of fact:

There was no negligent conduct on the part of Robert Gann, which proximately caused or contributed to his injuries and damages resulting from the negligence of Hard Rock Hotel.

This finding seemingly relies on an erroneous assumption by the district court that it could only compare negligent conduct against negligent conduct in apportioning damages under NRS 41.141. Given Berg’s and Coddette’s testimony of Gann’s repeated use of a highly insulting racial epithet, and the district court’s finding that Coddette overheard the comment Gann directed to Berg, substantial evidence in this record

¹⁰NRS 41.141 provides in pertinent part:

1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or his decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.

¹¹Woosley v. State Farm Ins. Co., 117 Nev. 182, 189-90, 18 P.3d 317, 322 (2001).

¹²See Restatement of Torts (Third), Apportionment of Liability § 3, cmt. a (2000) (stating a “[p]laintiff’s negligence can include conduct that is reckless, grossly negligent, or intentional”).

demonstrates that Gann's intentional and reckless conduct may have, provoked Coddette's attack. While there was evidence to suggest that Coddette's attack on Gann was self-generated, the district court did not explicitly discount the effect of Gann's reckless and intentional misconduct on the affray that led to his injuries, and did not apparently consider the totality of the evidence that Gann's misconduct, whether or not entirely addressed to Coddette, provoked the incident.

Therefore, in the event the district court on remand concludes that bartender Holmes' failure to call security after observing the heated exchange between Coddette and Gann was an actual and proximate cause of Gann's injuries, we direct the district court to further determine whether Coddette's attack was motivated by Gann's misconduct or was self-generated. If the later, the district court may find that Gann's negligence, recklessness or intentional misconduct did not cause his injuries. If the former, the district court must, under NRS 41.141, compare the extent to which Gann's intentional and reckless conduct may have proximately caused his injuries with Hard Rock's negligence.¹³

CONCLUSION

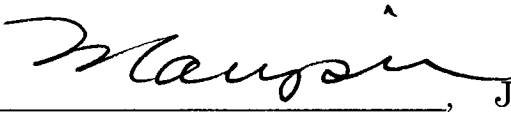
Hard Rock security's negligence in responding to the wrong location did not proximately cause Gann's injuries. We do, however, direct the district court to determine anew whether the bartender's failure to alert security to the impending altercation between Gann and Coddette caused Gann's injuries. If the district court so finds, it must then

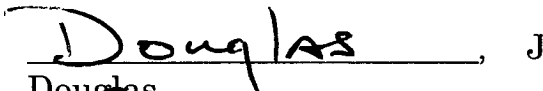
¹³Both the administratrix's "survival" claim and Ms. Gann's consortium claim may be subject to reduction or a finding entirely in favor of the defense, depending upon the court's findings under NRS 41.141.

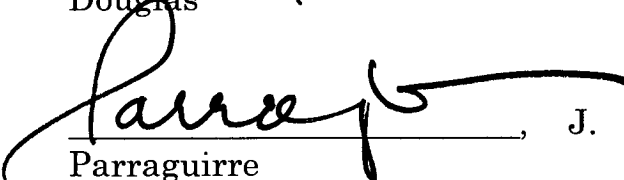
determine whether, and the extent to which, Gann's intentional and reckless conduct proximately caused the injuries claimed at trial below.¹⁴

Accordingly, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Valorie Vega, District Judge
Law Offices of Thomas D. Beatty
Law Offices of Michael A. Koning
Clark County Clerk

¹⁴We also conclude that the district court did not abuse its discretion in striking Hard Rock's untimely jury demand, which was filed 13 days after the date of the order setting the matter for trial. See NRCP 38(b).

The Hard Rock claims further error in connection with Gann's final argument to the court made through counsel. While counsel's comments during closing argument were improper, they do not compel a new trial. See Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 25, 16 P.3d 415, 418-19 (2001) (holding that counsel's "comments must permeate the trial to the degree that this court is convinced that passion and prejudice influenced the [result]"). It is highly unlikely that the trial judge was in any way affected by counsel's improper closing arguments.