IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID J. WEST,
Appellant,
vs.
CAROL A. LITTLE,
Respondent.

No. 41795

FILED

APR 19 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a personal injury case. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

FACTS

This appeal arises out of an incident that occurred at the home of Carol Little in July 1999. At the time of the incident, Carol owned the home in which she lived with her 23-year old son, Jeff Little.

The night before the incident, Jeff had been out all night drinking with his friend, David West. The two men returned to Carol's home around 7:30 in the morning and agreed they would return downtown after a nap. Carol noticed West sleeping in a chair as she was leaving for work and woke up Jeff to tell him she wanted West to leave because she knew that both men had been using drugs and alcohol.

According to West, he fell asleep after his conversation with Jeff about going back downtown. His next recollection is waking up on the floor of Carol's house. When he tried to get up, he realized that everything was hazy, and he saw a big blurred red pool on the floor. Jeff started screaming that he could not believe West was alive and that West was so tough. Jeff then called for an ambulance, and West was taken to the hospital. At that time, West did not know what happened to him, but he

later learned from a detective that Jeff had hit him in the face with a baseball bat while he slept. Carol learned of the incident when she returned home after work.

West suffered from multiple facial and jaw fractures, spent several days in the hospital, underwent surgery, and suffered significant memory loss.

In July 2001, West filed an amended complaint against both Jeff and Carol Little. West alleged that Carol owed him a duty of care to provide for his safety and welfare while he was a guest in her home. West claimed that this duty included the duty to warn of foreseeable dangers within Carol's residence. According to West, Carol's duty arose from her knowledge of Jeff's violent, careless, reckless and negligent tendencies.

Carol testified at her deposition that she knew Jeff had been involved in the criminal justice system, with several visits to Wittenberg for curfew violations, several arrests that mostly had to do with drinking, and at least four or five bookings in jail. Despite this history, Carol did not consider Jeff to be a violent person. She testified that everyone knew that Jeff could get upset easily, especially when he was on drugs. Carol acknowledged that Jeff had been in several previous altercations, including two that resulted in domestic battery convictions. Carol also stated that on one occasion, Jeff had gotten a little bit physical with her.

Carol testified that when she woke Jeff, she did not think he was under the influence of alcohol, but Jeff told her that the two had been using drugs and alcohol.

After West filed his amended complaint, Carol filed a motion for summary judgment pursuant to NRCP 56. The district court stated that it was unable to conclude that Carol had a duty to warn West of the

unforeseeable harm by Jeff and granted Carol's motion. This appeal followed.[1]

DISCUSSION

West argues that the district court erred in granting Carol's motion for summary judgment because there was a genuine issue of fact as to whether Carol owed West a duty of care. West claims that Carol, as a landowner, owed him a duty to keep her property in a reasonably safe condition. According to West, this duty encompassed taking precautions to provide for his safety and welfare while he was a guest in her home, including protecting him from Jeff, whom Carol knew to be violent when using drugs and alcohol.

The district court's order granted summary judgment in favor of Carol stating, "a reasonable person would not conclude that [Jeff] would wake up from a night of partying, become enraged and attack [West], causing him to suffer major physical injury." The district court concluded that because the attack was not foreseeable, Carol had no duty to awaken West to warn him of any potential risk.

Summary judgment should be granted when a review of the record, viewed in a light most favorable to the nonmoving party, reveals no genuine issue of material fact, and judgment is warranted as a matter of law.[2] "A genuine issue of material fact is one where the evidence is such

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[1]The notice of appeal is specific to dismissal of Carol Little only, as Jeff Little confessed judgment for his negligent acts.

[2]Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985); NRCP 56.

that a reasonable jury could return a verdict for the non-moving party."[3] The standard of review for a district court's grant of summary judgment is de novo.[4]

West sued Carol on a theory of negligence. In order to prevail on a negligence theory, "a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages."[5] In a negligence action, summary judgment should be considered with caution.[6] A moving defendant is entitled to summary judgment in a negligence case only if he can "show that one of the elements of the plaintiff's prima facie case is 'clearly lacking as a matter of law.'"[7] Therefore, the primary issue in this appeal is whether Carol owed West a duty as a matter of law.

Whether a defendant owes a plaintiff a duty of care is a question of law.[8] West asserts that Carol's liability is premised on her position as a landowner and that Jeff's attack was reasonably foreseeable.

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[3]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

[4]Pressler v. City of Reno, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

[5]Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

[6]Id.

[7]Id. (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, 951 P.2d 1027 (1997)).

[8]Scialabba, 112 Nev. at 968, 921 P.2d at 930.

This court has held that a determination of landowner liability "should primarily depend upon whether the owner or occupier of land acted reasonably under the circumstances."[9] Therefore, a landowner owes "a duty to use reasonable care to keep the premises in a reasonably safe condition for use."[10] When addressing the issue of a landowner's duty to protect a person on his or her property from an injury caused by a third person, the landowner's duty is "circumscribed by the reasonable foreseeability of the third person's actions and the injuries resulting from the condition or circumstances which facilitated the harm."[11] As a result, "[t]here is a duty to take affirmative action to control the wrongful acts of third persons only where the occupant of realty has reasonable cause to anticipate such act and the probability of injury resulting therefrom."[12]

Whether Carol owed West a duty of care depends on whether it was foreseeable that Jeff would attack West that morning, and whether Carol acted reasonably under the circumstances. We conclude that the attack was not foreseeable, and therefore, that Carol did not owe a duty of care to Jeff. Although Carol stated that she knew Jeff had been involved in several altercations, there is no evidence that Jeff and West had ever fought during a seven-year friendship. There is also no evidence that Jeff

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[9]Moody v. Manny's Auto Repair, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994).

[10]Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1101, 864 P.2d 796, 799 (1993).

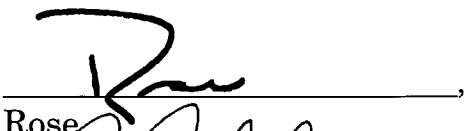
[11]Early v. N.L.V. Casino Corp., 100 Nev. 200, 203, 678 P.2d 683, 684 (1984).

[12]Thomas v. Bokelman, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970).

had ever attacked a guest in Carol's home. Finally, Carol had no knowledge that any prior altercations included the use of a bat.

Based on these facts, we conclude that Carol did not owe a duty of care to West. Therefore, the district court did not err in granting summary judgment.

Accordingly we, ORDER the judgment of the district court AFFIRMED.



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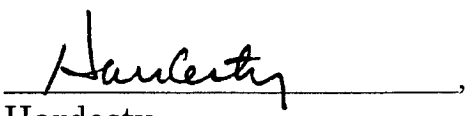

_____, J.
Hardesty

cc: Hon. Peter I. Breen, District Judge
Hardy & Woodman
Rands, South, Gardner & Hetey
Washoe District Court Clerk