

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE STEVENS,
Appellant,
vs.
RIO PROPERTIES, INC., A NEVADA
CORPORATION D/B/A RIO SUITE
HOTEL & CASINO,
Respondent.

No. 42269

FILED

OCT 18 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a negligence action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Ronnie Stevens appeals the district court grant of summary judgment in favor of respondent Rio Properties. Stevens had alleged negligence against Rio when Stevens was injured upon stepping into a floor electrical box that was hidden from view by carpeting on the Rio's convention floor. Two other independent contractors that worked on the convention, originally co-defendants with Rio, were dismissed out of the action by stipulation. The district court granted summary judgment to Rio based on Stevens' being unable to establish which entity had exclusive control of the floor boxes.

This court's review of an order granting summary judgment is de novo, and without deference to the lower court's findings.¹ Summary judgment will be upheld on appeal only when, after reviewing the record

¹Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993).

in a light most favorable to the appellant, there remain no issues of material fact and respondent is entitled to judgment as a matter of law.²

Summary judgment should be considered with caution in a negligence action.³ “In order to establish entitlement to judgment as a matter of law, a moving defendant must show that one of the elements of the plaintiff’s prima facie case is ‘clearly lacking as a matter of law.’”⁴ The summary judgment standard requires this court on appeal “to determine whether a factual dispute exists with regard to each element of the cause of action.”⁵

The required elements of a negligence claim are (1) existence of a duty of care owed by defendant to plaintiff; (2) breach of that duty by defendant; (3) breach was the proximate cause of plaintiff’s injury; and (4) damages suffered by the plaintiff.⁶

This court has held that the existence of a duty “is a question of law solely to be determined by the court.”⁷ Where such a “legal duty exists, reasonable care under the circumstances must be exercised.

²Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985).

³Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993).

⁴Id. (quoting Sims v. General Telephone & Electric, 107 Nev. 516, 815 P.2d 151 (1991)).

⁵Sims at 521, 815 P.2d at 154.

⁶Doud, 109 Nev. at 1100, 864 P.2d at 798.

⁷Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) (citing Scialabba v. Brandise Const. Co., Inc., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996)).

Whether a defendant's conduct was 'reasonable' under a given set of facts is generally an issue for the jury to decide."⁸

Stevens' second amended complaint alleged that Rio had a nondelegable duty to maintain safe premises, and that Rio had negligently breached that duty.

In Karadanis v. Newcomb, this court held that a property lessee owed a legal duty to an injured worker of an independent contractor, since there was evidence that the unsafe condition that caused the injury was not open and obvious.⁹ This court further held that there was sufficient evidence for the jury to find that the lessee had not relinquished possession and control of the area where the injury occurred.¹⁰ This court cited the Restatement (Second) of Torts as "a clear articulation of the duties of a possessor of land."¹¹ The section cited reads as follows:

If the actor permits a third person to use land or chattels in his possession . . . he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

⁸Id. at 296, 22 P.3d at 212.

⁹101 Nev. 196, 199, 698 P.2d 872, 874 (1985) (citing Worth v. Reed, 79 Nev. 351, 384 P.2d 1017 (1963) for the proposition that an owner has a duty to warn independent contractor invitees of hidden dangers, but not obvious dangers).

¹⁰Id. at 200, 698 P.2d at 875.

¹¹Id.

- (a) knows or has reason to know that he has the ability to control the third person, and
- (b) knows or should know of the necessity and opportunity for exercising such control.¹²

In Moody v. Manny's Auto Repair, this court noted that

[w]hile a reasonable person would take greater precautions to protect from harm's way one invited onto his or her premises than he or she would to protect a trespasser, the status of the injured party may not be the dispositive factor. Rather, determinations of liability should primarily depend upon whether the owner or occupier of land acted reasonably under the circumstances.¹³

Stevens contends Rio, as possessor of the premises, owed him a nondelegable duty to keep its floor safe for the performance of his work, and a duty to inspect the premises for latent or concealed danger. We agree.

As to the breaching of that duty, Stevens relied on the doctrine of res ipsa loquitur to permit an inference of negligence on the part of Rio.

The doctrine of res ipsa loquitur "is a rule of evidence which permits an inference of negligence to be drawn based upon the surrounding facts and circumstances of the injury."¹⁴ A plaintiff is only permitted to infer negligence when certain elements are met:

- (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- (2) the event must be caused by an agency or instrumentality within the exclusive

¹²Restatement (Second) of Torts § 318 (1965).

¹³Id.

¹⁴Rector v. Oliver, 809 N.E.2d 887, 889 (Ind. Ct. App. 2004).

control of the defendant; and (3) the event must not have been due to any voluntary action or contribution on the part of the plaintiff.¹⁵

Further, this court held that

Nevada also requires the defendant to have superior knowledge of or be in a better position to explain the accident for *res ipsa loquitur* to apply. Once the elements of *res ipsa loquitur* are met, the burden shifts to the defendant to show that something other than its negligence caused the accident.¹⁶

“*Res ipsa loquitur* is a balancing doctrine, and while the plaintiff need not show the exact cause of an injury, he must at least show that it is more probable than not that the injury resulted from the defendant’s breach of duty.”¹⁷

The district court in this matter granted summary judgment to respondent Rio, ruling that *res ipsa loquitur* was not applicable since the plaintiff could not establish exclusive control of the instrumentality of injury by any of the original defendants, including Rio.

The Court of Appeals of Indiana explained the concept of exclusive control in Rector v. Oliver as follows:

To invoke *res ipsa loquitur*, the plaintiff must demonstrate that the defendant had exclusive control of the injuring instrumentality at the time

¹⁵Woosley v. State Farm Ins. Co., 117 Nev. 182, 188-89, 18 P.3d 317, 321 (2001) (quoting Bialer v. St. Mary’s Hospital, 83 Nev. 241, 243, 427 P.2d 957, 958 (1967)).

¹⁶Id. at 189, 18 P.3d at 321 (citations omitted).

¹⁷American Elevator Co. v. Briscoe, 93 Nev. 665, 669, 572 P.2d 534, 537 (1977).

of injury. Exclusive control is an expansive concept which focuses upon who has the right or power of control and the opportunity to exercise it. The existence of multiple defendants or the possibility of multiple causes does not automatically defeat the application of res ipsa loquitur.¹⁸

In American Elevator Co. v. Briscoe,¹⁹ this court affirmed a res ipsa award against a company employed by a hotel to maintain the elevators.²⁰ The maintenance company had appealed, claiming the plaintiff did not show the company had exclusive control over the instrumentality that caused the harm. The company suggested that absent any showing of negligent maintenance, the elevator manufacturer must assume liability based on a design defect. This court disagreed, finding that the evidence “adequately show[ed] that stoppage of the elevator may have been attributable to negligent maintenance.”²¹ The company also contended that the plaintiff had to “demonstrate that it is not equally probable that other causes might have affected the same result.”²² This court again disagreed, stating that

[t]o require a plaintiff to establish exclusive control in the defendant with respect to any possible cause of the accident before permitting the application of res ipsa loquitur would

¹⁸809 N.E.2d 887, 890 (Ind. Ct. App. 2004) (citations omitted).

¹⁹93 Nev. 665, 572 P.2d 534 (1977).

²⁰Id. (an elevator passenger was injured when the elevator ended its descent with several jarring stops).

²¹Id. at 668-69, 562 P.2d at 536.

²²Id. at 669, 562 P.2d at 537.

emasculate the doctrine. He was required, as was done, only to produce sufficient evidence from which it could be said that it was more likely than not that it was negligence on the part of his adversary.²³

In Fireman's Fund American Insurance Co. v. Knobbe, this court upheld a trial court's summary judgment as to the res ipsa doctrine, finding that "appellant failed to demonstrate that respondents had exclusive control or joint control of the instrumentality causing the damage."²⁴ This court acknowledged cases from other jurisdictions where res ipsa was applied even though the plaintiff could not establish which of several defendants had been negligent, distinguishing the cases by noting that in each of those cases "the instrumentality causing the damage was known[.]"²⁵ and the plaintiff "had established that each [defendant] was at some time or to some extent responsible for that instrumentality."²⁶ Such cases "shift[ed] the burden to each individual defendant to present exculpatory evidence."²⁷

We conclude that the district court incorrectly granted summary judgment on behalf of Rio as a matter of law. Proof of exclusive control is not required here, where Rio as the property owner has a nondelegable duty to keep its premises reasonably safe for others. Stevens presented evidence that the electrical boxes were ultimately controlled by

²³Id. at 670, 572 P.2d at 537.

²⁴93 Nev. 201, 202, 562 P.2d 825, 825-26 (1977).


²⁵Id. at 203, 562 P.2d at 826.

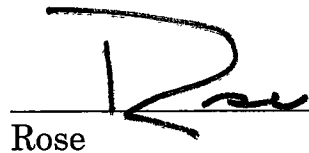
²⁶Id.

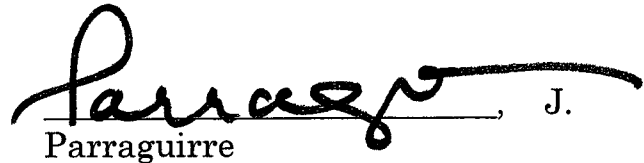
²⁷Id. at 202, 562 P.2d at 826.

Rio, that Rio workers accessed the boxes, and that Rio security personnel oversaw convention set-up activities. We conclude that there are material issues of fact as to whether Rio breached its nondelegable duty to Stevens, and that such issues preclude summary judgment. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, J.
Douglas

 _____, J.
Rose

 _____, J.
Parraguirre

cc: Hon. Kathy A. Hardcastle, District Judge
Murphy, Small & Associates
Ashby & Ranalli
Clark County Clerk