IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY WHITEHEAD; STACY WHITEHEAD; BRENDEN WHITEHEAD, A MINOR CHILD BY AND THROUGH HIS GUARDIAN AD LITEM TO BE APPOINTED; BLAINE DEVERE; HYDI DEVERE; AND VYCTORIA DEVERE, A MINOR CHILD BY AND THROUGH HER GUARDIAN AD LITEM TO BE APPOINTED;
Appellants,
vs.
COSTCO, A WASHINGTON CORPORATION, DOING BUSINESS IN THE STATE OF NEVADA,
Respondent.

No. 42801

FILED

MAY 17 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting summary judgment in favor of respondent Costco, and denying appellants' motion for sanctions for spoliation of evidence in an E-Coli food poisoning case. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

This case involves claims that ground beef purchased from Costco and partially used at two July 1999 outdoor family parties caused appellants' family members to contract E-Coli related illness. One of the parties was held at the residence of appellants Terry and Stacy Whitehead, the other at the home of appellants Blaine and Hydi Devere. Members of both families attended both parties. Appellants filed suit against Costco alleging negligence, strict tort liability, breach of implied and express warranties of good faith and fair dealing, and negligent infliction of emotional distress (NIED). Costco moved for summary

Order corrected by the Order Denying Rehearing. Mailed corrected dispositional order with the Order Denying Rehearing on July 19, 2005. jck

05-09642

judgment arguing, inter alia, that appellants could not show causation as a matter of law. The appellants countered with a motion for entry of default against Costco, claiming that Costco's failure to preserve batches of uncooked hamburger caused its inability to provide direct proof of causation through additional testing. Beyond seeking the default, which would have obviated the need to establish a nexus between the Costco hamburger and appellants' E-Coli related illnesses, appellants sought to proceed to trial with their circumstantial evidence.

The district court denied the spoliation motion based upon a finding that the release of the product was reasonable under the circumstances, and entered summary judgment in favor of Costco. On appeal, appellants contend that genuine issues of material fact remain as to the cause of their illnesses and that the district court erred in denying their spoliation motion. We reverse and remand this matter for trial with instructions.

DISCUSSION

Causation

We review summary judgment orders de novo.[1] "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] A genuine issue of material fact exists if, based on the evidence, a reasonable jury could return a verdict for the non-

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[1]Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002).

[2]Id.

moving party.[3] The pleadings and evidence are viewed in the light most favorable to the non-moving party.[4] However, to prevail, the party opposing summary judgment must point to facts demonstrating a genuine material issue.[5]

This court is reluctant to grant summary judgment in negligence cases because, generally, the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve.[6] "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 [i.e., duty, breach, causation, or damages] is clearly lacking as a matter of law."[7]

In Wilson v. Circus Circus, this court held that "mere correlation between ingestion and illness is typically insufficient as a matter of law to establish causation" in a food poisoning case.[8] However, the Wilson court recognized that direct proof in a food poisoning case is often difficult "because the food has been consumed and is often

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[3]Id.

[4]Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).

[5]Boland v. Nevada Rock and Sand Co., 111 Nev. 608, 610, 894 P.2d 988, 990 (1995).

[6]See, e.g., Lee v. GNLV, 117 Nev. 291, 296, 22 P.3d 209, 212 (2001).

[7]See, e.g., Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996) (quoting Sims v. General Telephone & Electric, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991)).

[8]Wilson v. Circus Circus, 101 Nev. 751, 754, 710 P.2d 77, 79 (1985).

unavailable for scientific analysis." Accordingly, "[i]n the absence of direct proof[,] . . . circumstantial evidence may be used to prove the unwholesomeness or unfitness of food."[9] Nevertheless, in order to use circumstantial evidence of causation, the injured party must sufficiently negate alternate theories of contamination.[10] In making this determination in the context of a summary judgment motion, we must draw all inferences in favor of the appellants.[11] If the evidence presented, viewed in this deferential light, conclusively establishes that the defendant's proffered alternate causes are at least as likely to have caused the plaintiff's illness than the plaintiff's circumstantial causation evidence, summary judgment in the defendant's favor may be appropriate.[12]

Appellants concede that they are unable to provide direct proof that the Costco hamburger caused the E.Coli infections. However, they assert this failure is a result of Costco's failure to preserve available samples of the product for testing. The appellants further argue that circumstantial evidence of causation, coupled with flaws in Costco's theories of alternate causation, require our reversal of the district court's summary judgment. We agree.

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[9]Id.

[10]See id. at 755, 710 P.2d at 80.

[11]See Wiltsie v. Baby Grand Corp., 105 Nev. 291, 292, 774 P.2d 432, 433 (1989) (stating, "[i]n determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true").

[12]See Wilson, 101 Nev. at 755, 710 P.2d at 80.

Two of Costco's witnesses, Dr. Katona and Dr. Phebus, submitted affidavits stating that, in all probability, Costco hamburgers were not the cause of the appellants' illnesses. However, the appellants' expert witness, Melvin Kramer Ph.D., MPH, testified that there is a "high likelihood" and a "very strong inference" that the Costco hamburger caused the illnesses. Costco argues that the testimony and affidavit of Dr. Kramer do not create triable issues of fact precluding summary judgment because no reasonable jury could have found in favor of the appellants due to overwhelming evidence demonstrating that the Costco patties did not cause the illnesses. In this, Costco posits that Dr. Kramer's affidavit ignored overlapping theories that eliminate Costco meat as the cause. While Costco did posit alternative theories of contamination, we conclude that these alternative theories do not sufficiently eliminate Costco hamburgers as a source of the appellants' illnesses.

First, issues of fact remain as to whether the method of food preparation at the Devere and Whitehead parties conclusively eliminated Costco product as the cause of appellants' illnesses. Second, triable issues of fact remain as to whether the testing of the remaining "Devere" patties and the negative test results during the manufacturing process conclusively eliminate Costco hamburger as the source of illnesses. More particularly, issues of fact exist as to whether the testing performed by Costco and the Orange County Health Department (OCHD) were conducted in such a manner as to eliminate the product as the source of the appellants' illnesses.[13] Third, Brendan and Stacy Whitehead's

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[13]One of Costco's experts, James Dickson, Ph.D., testified at a deposition that at least six product samples should be tested to properly determine the presence of E. Coli. Costco asserts that appellants'

continued on next page . . .

apparent reacquisition of E.Coli in late August 1999 does not eliminate Costco hamburger as the cause of the E.Coli infections. Fourth, the time of onset of the Whitehead party guests' symptoms does not irrefutably eliminate Costco hamburger as the source of the appellants' illnesses. Fifth, viewed in a light most favorable to the appellants, Costco's other offered sources of E.Coli transmission are not more likely to have caused the appellants' illnesses than the Costco hamburger.[14] In this we conclude that no evidence has been presented that any of these alternative sources actually harbored the E-Coli bacteria. Thus, in light of the correlation evidence presented by appellants, Costco's alleged alternate causes of contamination are not equally likely to have caused appellants' illnesses.[15]

. . . *continued*
argument that sixty samples of the product should have been tested is inaccurate and taken out of context, as Dr. Dickson was referencing sampling techniques established by the FDA in the 1960's for salmonella, not E.Coli. Costco further contends that Dr. Dickson testified that "as few as five hamburger patties would establish a sufficient basis for analysis." We conclude that Dr. Dickson's testimony does not sufficiently establish that an adequate sample size was garnered from five patties, only that samples from five patties should be combined to form one testing sample. Accordingly, we conclude that genuine issues of fact exist as to whether the OCHD tests conclusively prove the wholesomeness of the product.

[14]These theories include: (1) Stacy Whitehead could have come into contact with E.Coli at her place of employment; (2) the family homes of the parties were located in rural areas; (3) the Whitehead's neighbor operated a daycare out of the home; (4) the water in the area is "nasty"; (5) the source of the bacteria is the Whitehead's open trash trailer; (6) and the Devere plaintiffs became sick because the Whiteheads brought their sick child to the Devere party,

[15]See Wilson, 101 Nev. at 755, 710 P.2d at 80.

In sum, the appellants presented evidence below which, if believed by the jury, would negate Costco's alternative theories of contamination. Accordingly, we reverse the district court's order granting summary judgment and remand for trial.[16]

Spoliation of evidence

Appellants next argue that we should direct the district court to strike Costco's answer and enter default under NRCP 37. In this, they claim that Costco released every box of ground beef that had been withheld from distribution within three hours of receiving the OCHD test results. Thus, it failed to preserve any samples for independent inspection, either by the appellants' experts or the Nevada State Health Department (NSHD). More specifically, the appellants allege that Costco failed to cooperate with the NSHD pursuant to NAC 441A.530 and, under the factors set forth in Stubli v. Big D International Trucks,[17] a default is the only appropriate remedy.

Costco argues that sanctions are unwarranted because its management did not willfully destroy evidence or hinder a proper investigation. Costco further submits that its release of the product for sale was a reasonable decision after learning that the Devere samples tested negative for E.Coli and other pathogens. The district court agreed

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[16]Costco argues that, in the event we conclude triable issues of fact exist as to causation, summary judgment in Costco's favor remains appropriate as to the appellants' claims for negligent infliction of emotional distress. We note that, while Costco raised this argument in its summary judgment motion, the district court never explicitly reached this issue due to its causation finding on the underlying negligence claim. We will not rule on this issue in the first instance.

[17]107 Nev. 309, 810 P.2d 785 (1991).

with Costco, concluding there was no spoliation of evidence because Costco acted reasonably and in good faith.

As this court recently confirmed in Banks v. Sunrise Hospital,[18] "[w]hen a potential for litigation exists, the 'litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.'"[19] However, as this court explained in GNLV Corp. v. Service Control Corp., "sanctions [for spoliation of evidence] may only be imposed where there has been willful noncompliance with a court order or where the adversary process has been halted by the actions of the unresponsive party."[20] Sanctions such as dismissal "'should only be used in extreme situations; if less drastic sanctions are available, they should be utilized.'"[21] In Stubli, this court reiterated that a non-exhaustive list of seven factors is relevant in determining whether dismissal is the appropriate sanction.[22]

Weighing the Stubli factors, we conclude that the district court erred in its complete rejection of the spoliation motion. First, product from

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[18]120 Nev. ___, 102 P.3d 52 (2004).

[19]Id. at ___, 102 P.3d at 58 (quoting Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 914 (1987)); see also Stubli, 107 Nev. at 313-14, 810 P.2d at 788 (quoting Graves v. Daley, 526 N.E.2d 679, 681 (Ill. App. Ct. 1988) (stating that "'[t]he plaintiffs are not free to destroy crucial evidence simply because a court order was not issued to preserve the evidence'")).

[20]111 Nev. 866, 869, 900 P.2d 323, 325 (1995). I

[21]GNLV Corp., 111 Nev. at 870; 900 P.2d at 325 (quoting Nevada Power v. Fluor Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992)).

[22]Stubli, 107 Nev. at 313, 810 P.2d at 787.

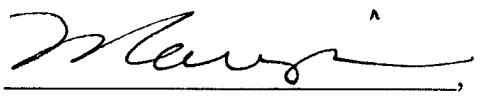
the Whitehead house was never tested. Second, any additional product appears irreparably lost. Third, a substantial question exists as to whether the sample size of the OCHD test was sufficient in size. Fourth, the parties presented conflicting evidence on whether Costco fully cooperated with the NSHD investigation. Fifth, assuming Costco acted improperly, the need to deter future litigants from similar abuses is great. Having said this, entry of default is premature and overly harsh. Accordingly, we conclude that the district court should allow the case to proceed on remand; and that the parties may litigate questions concerning the adequacy of the OCHD testing, the appropriateness of Costco's release of the product, whether/to what extent the appellants' actions may have caused spoliation of the evidence, and the resultant possibilities if further testing of the Devere/Whitehead and Costco's held product had been available. At trial, the district court may, in its discretion, instruct the jury on the permissible inferences that may be drawn from the evidence presented.[23]

[23]See Banks v. Sunrise Hospital, 120 Nev. ___, ___, 102 P.3d 52, 59 (2004).

CONCLUSION

Because we conclude that the district court erred in granting Costco's motion for summary judgment and in its complete rejection of the appellants spoliation motion, we

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



_____, J.
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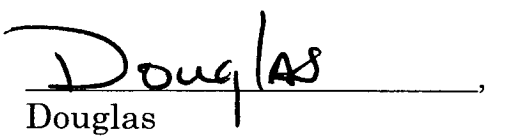

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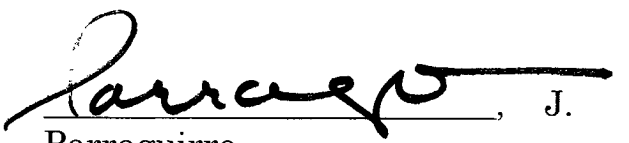
Douglas



_____, J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Stephen H. Osborne
Lee, Smart, Cook & Patterson
Robison Belaustegui Sharp & Low
Washoe District Court Clerk