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Anderson v. Mandalay Corp., Nev. Adv. Op. 82 (Oct. 10, 2015)

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TORTS: VICARIOUS LIABILITY

Summary

The Court determined (1) NRS § 41.745(1)(c) sets forth a factual inquiry; (2) a reasonable jury could find it “reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his . . . employment” that a hotel employee would rape a hotel guest; and (3) direct negligence claims against an employer are not futile when a reasonable jury could conclude under the facts that the employer could reasonably foresee the employee’s unlawful act.

Background

On September 8, 2008, Cristie Anderson came to Las Vegas to attend a trade show. After completing her work-related duties, Anderson went out for dinner and drinks with coworkers, and returned to her room at Mandalay, at 2 a.m., intoxicated. Surveillance footage shows Anderson shared an elevator with Alonzo Monroy Gonzalez, a Mandalay employee, when returning to her room. After Anderson entered her room and went to sleep, Gonzalez entered Anderson’s room without authorization and raped her.

Gonzalez worked as a House Person at Mandalay, and his late shift had little supervision. Mandalay provided Gonzalez with a keycard that opened the guest rooms on his assigned floors. Prior to hiring Gonzalez, Mandalay performed a criminal background check using the social security number Gonzalez provided, which indicated no criminal record. Mandalay solicited Gonzalez’s employment references and filled out I-9 documents, however, it is not clear whether Mandalay contacted those references or properly updated Gonzalez’s information in his I-9.

Gonzalez’s prior disciplinary history shows Mandalay suspended him for 31 days because of his misuse of employee radios, and lies about such misuse. Additionally, Gonzalez allegedly harassed and threatened a female co-worker. At trial, Anderson presented evidence that Mandalay employees have a history of sexual assaults on Mandalay premises, along with a history of unauthorized entry into occupied rooms. An expert report indicated Mandalay had insufficient security when Gonzalez attacked Anderson, as well as ongoing security defects.

The district court granted Mandalay’s motion for summary judgment on Anderson’s vicarious liability claim, concluding NRS § 41.745(1) and *Wood v. Safeway, Inc.*,² barred vicarious liability against Mandalay because Gonzalez’s acts were truly independent, not committed in the course of the task assigned, and not reasonably foreseeable. The district court also denied as futile Anderson’s request for leave to amend to add a direct negligence claim.

Discussion

¹ By Emily Haws.

² 121 Nev. 724, 121 P.3d 1026 (2005).

Mandalay was not entitled to summary judgment.

The Court reviews summary judgment de novo.³ Summary judgment is improper whenever “a reasonable jury could return a verdict for the non-moving party.”⁴ When reviewing the record, “the evidence and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.”⁵

NRS § 41.745(1)(c) sets forth a factual inquiry.

An employer is vicariously liable for employees’ intentional torts when an employee’s act is “reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment.”⁶ These factual and circumstantial inquiries are issues of fact, not legal determinations. The Legislature clarified this reasonable foreseeability standard, relying on the definition of reasonable foreseeability that emerged from premises liability cases, stating, “[C]onduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.”⁷ Simply put, the reasonable foreseeability standard requires a factual inquiry.

A reasonable jury could conclude Gonzalez’s act was reasonably foreseeable.

This Court has considered reasonable foreseeability under NRS § 41.745(1)(c) in only one published case.⁸ In *Wood*, as a matter of law, an employer could not reasonably foresee an employee’s sexual assault of another worker in the building because the employee had no criminal history, the employer required higher proof of identification and immigration status, and the employer had received no sexual harassment complaints over the last ten years.⁹ Distinguishably, here, “the prior on-premises attacks, employees’ regular keycard abuse, Gonzalez’s disciplinary history, and Mandalay’s decision to provide Gonzalez keyed access to guest rooms with minimal supervision” allow a reasonable jury to conclude that Gonzalez’s sexual assault on a Mandalay guest was foreseeable.

Whether other states would find that Gonzalez’s act to be outside the scope of his employment is irrelevant, because the proper inquiry is reasonable foreseeability. Further, other states have in fact concluded sexual assault can be reasonably foreseeable either through a vicarious liability inquiry or a direct negligence inquiry. Thus, under the facts and circumstances here, a reasonable jury could conclude Gonzalez’s act was reasonably foreseeable.

The district court erred in concluding it would be futile for Anderson to amend her complaint.

³ Wood, 121 Nev. at 729, 121 P.3d at 1029.

⁴ Sprague v. Lucky Stores, Inc., 109 Nev. 247, 249, 849 P.2d 320, 322 (1993).

⁵ Wood, 121 Nev. at 729, 121 P.3d at 1029.

⁶ NEV. REV. STAT. § 41.745(1)(c) (2014).

⁷ *Id.*

⁸ Wood, 121 Nev. 724, 121 P.3d 1026.

⁹ *Id.* at 729, 1029.

While a court's decision on a motion for leave to amend is generally reviewed for abuse of discretion, futility is a question of law reviewed de novo.¹⁰ Anderson's proposed amendments are not futile because a reasonable jury could conclude Gonzalez's attack was reasonably foreseeable. An unlawful act will not supersede causation if the act was foreseeable.¹¹ Further, the district court's reliance on NRS § 651.015 was erroneous because the statute only applies to injury caused by a "person who is not an employee under the control or supervision of the owner," and Gonzalez was a Mandalay employee.¹²

Conclusion

NRS 41.745(1)(c) sets forth a factual inquiry, and a reasonable jury could conclude Mandalay could reasonably foresee Gonzalez's sexual assault of Anderson because of his disciplinary history, unfettered keycard access with minimal supervision, and Mandalay's notice of its employees' history of sexual assault and unauthorized entry. Anderson's proposed amendment to add a direct negligence claim was not futile because Gonzalez's unlawful act was foreseeable, and thus does not supersede causation. The Court reversed the district court's grant of summary judgment and denial of Anderson's motion for leave to amend, and remanded the matter to the district court for further proceedings.

¹⁰ See *Whealon v. Sterling*, 121 Nev. 662, 665, 119 P.3d 1241, 1244 (2005); see *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); see also *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010).

¹¹ "While unlawful conduct can interrupt and supersede the causation between a negligent act and injury, an unlawful act will not supersede causation if it was foreseeable."

¹² NEV. REV. STAT. § 651.015 (2014).