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Summary of FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46

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FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46 (June 05, 2014)[1]

TORTS

Summary

The Court determined two issues: 1) whether to extend the limited-duty rule established in *Turner v. Mandalay Sports Entertainment*, 124 Nev. 213, 220–21, 180 P.3d 1172, 1177 (2008), to the facts of this case;[2] and 2) whether Palms breached the duty of reasonable care it owed to Rodriguez.

Disposition

Assuming, but not deciding, that the rule established in *Turner* could be extended, "extending it to the circumstances before us here would be a bridge too far." Also, where the testimony the district court excluded may have resulted in a different verdict on the issue of a breach of the duty of reasonable care, a new trial is warranted.

Factual and Procedural History

I.

Respondent Rodriguez sued the Palms Resort for damages resulting from a knee injury sustained while sitting at a sportsbook bar watching football on television. The injury resulted from another patron diving for a sports souvenir thrown into the crowd by an actress hired by the Palms for the event. Rodriguez sued the Palms for negligence.

During the bench trial, several of Rodriguez's treating physicians testified to the severity of his condition, the appropriateness of treatment, the nature of his condition, and the cause of his condition. The district court struck the testimony of Palms' experts on economics, crowd control, and security because they did not state that their opinions were given to a reasonable degree of professional probability. The district court found Palms liable as a matter of law and awarded respondent $6,051,589 in damages.

Discussion

II.

The Court analyzed the claim as one based on premises liability, because that is how both parties and the district court analyzed the claim. A premises owner or operator generally owes guests a duty to exercise reasonable care[3], but the duty may be limited by courts[4]. Courts typically make such limitations with sports venues, as this Court did in *Turner*.[5] Palms analogizes the facts in this case to those in *Turner*.

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[1] By Michael Bowman

[2] In Turner, the Court held that a duty owed an attendee of a baseball game was limited to protecting her from an "unduly high risk of injury." In that case, the Court held that a "known, obvious, and unavoidable part of all baseball games" does not present such a risk.

[3] Foster v. Costco Wholesale Corp., 128 Nev. Adv. Op. 71, 291 P.3d 150, 152 (2012).

[4] *See* Restatement (Second) of Torts § 496C cmt. d (1965); Restatement (Third) of Torts: Phys. & Emot. Harm § 7(b) (2010); *see also* Turner v. Mandalay Sports Ent., L.L.C., 124 Nev. 213, 220–21, 180 P.3d 1172, 1177 (2008).

[5] *See* Nalwa v. Cedar Fair, L.P., 290 P.3d 1158, 1162 (Cal. 2012).

In *Turner*, a baseball game attendee was struck by a foul ball while seated in an unfenced "Beer Garden.[6] The Court held that the foul ball did not pose an unduly high risk of injury because it was an avoidable, obvious, and known part of all baseball games.[7] In adopting that rule, the Court followed longstanding precedent that limited the duty owed by baseball stadium owners to attendees.[8] In this case, Rodriguez's injury while he was watching television at a bar, not while attending a live game, and he was hit by another patron and not a piece of equipment involved in the game.

Palms argued that tossing items to fans at sporting events is a well-accepted activity and therefore the risk involved cannot be extinguished without changing the fundamental nature of the event. However, even if the Court was willing to extend *Turner*, it could not agree that any risk of injury inheres in watching a televised sporting event at a casino bar.

The Court noted that the point of watching a live baseball game is to watch players hit baseballs and the hope of spectators of catching the ball, so hitting cannot be eliminated from the activities. In contrast, the Court stated that the point of watching a game at a sports bar is to watch a game at a sports bar. Additionally, the Court noted that having items tossed in a sports bar may enhance the experience but so long as the televised event is viewable in that venue the activity retains its character. If the owner of the bar declines to have actors toss items at attendees, patrons can still watch the game. The key is that once the injury-causing conduct has strayed too far from the core activity the limited-duty doctrine is inapplicable.

The Court held that even if *Turner* could be extended, "extending it to the circumstances before us here would be a bridge too far."

III.

Palms' expert on crowd control and security opined that throwing souvenirs into crowds is generally safe and not uncommon. He narrated his experience working crowd control at events where promoters threw items into crowds and indicated that he knew of no injuries. His testimony suggested that the Palms' conduct was safe and routine. Furthermore, the testimony suggested that the respondent's injury was not foreseeable and that the Palms acted reasonably. Respondent did not present any expert testimony in opposition. Therefore, such testimony could have altered the outcome of the case.

However, the district court struck the testimony because the expert did not state that he testified to a reasonable degree of probability. The Court held that "rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context."[9] In this case, the expert testified that his opinion was based on years of experience and that he never read anything that mandates that it shouldn't be done. The Court found that he offered a definitive opinion based on experience and research. Therefore, it was an abuse of discretion to exclude his testimony. Because it is probable that the testimony the district court excluded may have resulted in a different verdict on the issue of Palms' breach, a new trial is warranted.[10]

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[6] 124 Nev. at 216, 180 P.3d at 1174.
[7] *Id.* at 216–19, 180 P.3d at 1174–76.
[8] *See* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 485 (5th ed. 1984).
[9] *See* Williams v. Eighth Judicial Dist. Court, 127 Nev. Adv. Op. 45, 262 P.3d 360, 368 (2011).
[10] Cook v. Sunrise Hosp. & Med. Ctr., L.L.C., 124 Nev. 997, 1009, 194 P.3d 1214, 1221 (2008).

Conclusion

IV.

Here, declining to extend the limited-duty rule to the facts of this case, the Court held that "there was no error in the district court's refusal to find, as a matter of law, that Palms owed no duty of care." Furthermore, because it is probable that the testimony the district court excluded may have resulted in a different verdict on the issue of Palms' breach, a new trial is warranted.