IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES KOCH,
Appellant,
vs.
BENNETT ELLIOTT,
Respondent.

No. 70882

ORDER OF AFFIRMANCE

James Koch appeals from a district court order granting Bennett Elliott's motion for summary judgment. Eighth Judicial District Court, Clark County; Valorie J. Vega, Senior Judge.

Koch sued Elliott after Koch fell from a ladder he provided while installing solar screens on the second story of Elliott's home. Koch injured his foot.[1] The district court granted Elliott's motion for summary judgment, in part, because it concluded that Koch failed to allege facts to show there was a dangerous condition on Elliott's land. The district court also concluded that whether a defendant owes a duty is a question of law for the court and apparently concluded that no duty was owed here.

Koch appeals from the district court's order granting summary judgment arguing that the district court erred by concluding he failed to allege facts that a dangerous condition existed on Elliott's property. Elliott counters that Koch did not allege a dangerous condition, Elliott did not know of or should have known of a dangerous condition on his property, and he did not have a duty in this case.

Elliott's alleged failure to adequately secure the ladder was not a dangerous condition on the land

[1] The facts are not recounted except as necessary to the disposition.

Koch alleged in his amended complaint that Elliott "failed to adequately secure" the ladder while Koch was installing the solar screens on the second-story of Elliott's house, Elliott "had a duty to provide a safe environment for" Koch and, because of Elliott's "actions," Koch was injured. In his deposition, Koch first testified that Elliott was holding the ladder at various points when he was securing solar screens over the windows of Elliott's house and testified Elliott was holding the ladder right before Koch fell. When further questioned, however, Koch admits he *assumed* Elliott was still holding the ladder at the time he fell, but he did not know because he was not looking down at the time. On appeal, Koch appears to concede that Elliott was not holding the ladder when he fell.

Now, Koch challenges the district court's order granting summary judgment because, according to the minutes of the hearing on that motion, the district court stated that "environment" generally means land or property and the district court did not believe that whether Elliott secured the ladder was considered part of the "environment."[2] The district court concluded that Koch did not allege any facts to support finding a dangerous condition on the land.

This court reviews an order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact

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[2]Koch argues on appeal that the term "environment" in his amended complaint included Elliott's actions, including his "unreliable assistance," and the district court erroneously limited "environment" to the land itself. Koch does not cite to any authority to support the proposition that the "environment" includes a landowner's actions. As the claim is not supported by relevant authority, it need not be addressed. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

[remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (alteration in original) (quoting NRCP 56(c)). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* "If the moving party satisfies its burden," then the burden shifts to the nonmoving party. *Maine v. Stewart*, 109 Nev. 721, 727, 857 P.2d 755, 759 (1993). "[T]he non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Wood*, 121 Nev. at 731, 121 P.3d at 1030-31 (internal quotation marks omitted); *see also* NRCP 56(e).

A dangerous condition is, generally, "[a] property defect creating a substantial risk of injury when the property is used in a reasonably foreseeable manner." *Condition*, Black's Law Dictionary (10th ed. 2014). The Nevada Supreme Court has employed this definition. *See generally Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 775, 291 P.3d 150, 152 (2012) (reviewing order granting motion for summary judgment regarding dangerous condition when a man's "toe caught the corner of a wooden pallet, which was covered by a slightly turned box" while walking down the paper goods aisle of a Costco); *Harrington v. Syufy Enters.*, 113 Nev. 246, 247, 931 P.2d 1378, 1379 (1997) (reviewing order granting motion for summary judgment regarding dangerous condition when attendee injured wrist after she tripped over tire spikes at theater where flea market held); *Coblentz v. Hotel Emps. & Rest. Emps. Union Welfare Fund*, 112 Nev. 1161, 1164, 1166, 1173, 925 P.2d 496, 498, 502 (1996) (reviewing order granting motion for summary judgment regarding dangerous condition on stairway when employee's shoe heel "got stuck in a crack in a concrete step, causing her to fall and sustain injuries"). To survive summary judgment, Koch must show

that the landowner "either caused, knew of, or should have known of the alleged dangerous condition." *Coblentz*, 112 Nev. at 1171, 925 P.2d at 502.

Koch did not offer any fact in his opposition to the motion for summary judgment to show there was a property defect on Elliott's land or home that caused him to fall off the ladder, thus he failed to show a dangerous condition. As there is no alleged dangerous condition, Koch also failed to show Elliott knew or should have known of any alleged dangerous condition. Accordingly, Koch's argument fails.

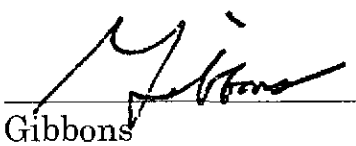
Elliott did not have a duty to secure the ladder

This court reviews an order granting "summary judgment and questions of legal duty" de novo. *San Juan v. PSC Indus. Outsourcing, Inc.*, 126 Nev. 355, 359, 240 P.3d 1026, 1028 (2010) (citation omitted). "[L]andowners bear a general duty of reasonable care to all entrants, regardless of the open and obvious nature of dangerous conditions." *Foster*, 128 Nev. at 781, 291 P.3d at 156. "An employee of a contractor is an invitee of the owner to whom the owner owes a duty to exercise reasonable care" and "there is a common law duty to provide a safe place to work." *Sierra Pac. Power Co. v. Rinehart*, 99 Nev. 557, 560, 665 P.2d 270, 272 (1983) (citation omitted) (quoting *Celender v. Allegheny Cty. Sanitary Auth.*, 222 A.2d 461, 463 (1966), *abrogated on other grounds by Foster*, 128 Nev. at 781, 291 P.3d at 156). However, "the owner of the property is under no duty to protect the employees of an independent contractor from risks arising from or intimately connected with defects or hazards which the contractor has undertaken to repair or which are created by the job contracted." *Id.* at 560-61, 665 P.2d at 272.

Elliott did not have a duty to protect Koch, an independent contractor, from risks undertaken as part of the job Koch was hired to do. *See id.* at 560-61, 665 P.2d at 272. Koch was hired to install solar screens on the

windows of Elliott's two-story house. Koch testified that he brought his own ladder, and it was part of Koch's job to safely use that ladder to install the screens. Accordingly, Elliott did not have a duty to protect Koch from the risks associated with using the ladder to install the solar screens. The district court correctly concluded that "[t]he question of whether the defendant owes the plaintiff a duty of care is a question of law to be determined by the court." Elliott had no duty to hold the ladder for Koch, and even if he did, Koch does not offer evidence that Elliott was negligently holding the ladder when he fell. In fact, Elliott could not be negligently holding the ladder if he was not holding it all, as Koch now appears to concede. As a result, he was entitled to judgment as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

TAO, J., concurring:

Appellant/plaintiff Koch argued this case below, and again frames it on appeal, as if it were a "premises liability" case. But it's not.

Koch contends that he asked Elliott to hold a ladder while he climbed it, and Elliott agreed to do so but somehow didn't, causing Koch to fall and injure himself. Koch characterizes this as a "premises liability" case involving a "dangerous condition" intrinsic to the land. But generally speaking, a "premises liability" case imposes vicarious lability on a property owner who fails to either warn of, or fix, a hazardous condition that he himself did not create through his own actions. Thus, a shopkeeper can be vicariously liable for injuries caused by food dropped on the floor by other customers, *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993),

or obstacles left in the aisles by employees, *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 775, 291 P.3d 150, 152 (2012). Innkeepers can become vicariously liable for criminal acts committed by third parties that were foreseeable. *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 862, 265 P.3d 688, 693 (2011); *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993). Homeowners can become vicariously liable for dangerous hazards on their property that they know, or should know, of, even if they didn't cause the hazard themselves. But if the landowner created the hazardous condition himself through his own affirmative actions, then no theory of premises liability is needed; he's just negligent because of what he did, plain and simple, and not constructively liable because he owns the land.

Here, Koch doesn't contend that he was injured by some hazard that existed on the property that Elliott, as the landowner, should have either fixed or warned him to avoid. Rather, he contends that Elliott neglected to act as a "reasonable person" when he affirmatively agreed to hold the ladder steady but then failed to do so. This isn't a premises liability case, it's just a garden-variety negligence case alleging that Elliott failed to act in the way that a reasonable person would have under the circumstances. Elliott himself was the person who performed the acts in question, and he either acted negligently or he didn't; there's no "vicarious" third-party liability to be imposed based on something someone else did. Furthermore, if the allegations are true, the result they lead to would have been the same had Elliott owned the land or had no connection to the land at all and merely been a passerby.

Had this case been argued this way, summary judgment might have been inappropriate and reversal in order, and I'd be joining my colleague in dissent. But my concern is that, had it been argued that way from the

beginning both below and on appeal, Elliott might have presented entirely different evidence than he did and a very different factual record might have been before both the district court and us. Perhaps that's unlikely in this case, as the evidence seems pretty straightforward and this doesn't seem to be the kind of case where more eyewitnesses might be lurking who have yet to be questioned or where highly trained experts might know something we don't. But so long as it's possible that something might have been different, Elliott deserved a reasonable opportunity to respond and present evidence to rebut any new legal contentions that could and should have been made but weren't even though they might have fit the facts much better.

As Judge Kozinski of the Ninth Circuit once sarcastically noted, "if I had ham, I could have some very nice ham and eggs, if I had eggs." *Berger v. City of Seattle*, 569 F.3d 1029, 1062 (9th Cir. 2009) (Kozinski, J., dissenting). If we'd been given a different factual record, we might reverse, had different arguments also been made. It's possible that even if Koch had argued the case differently, Elliott would have done nothing different and we'd have exactly the same evidence before us. We'll never know. But if we limit ourselves strictly to the arguments actually made and responded to and those arguments only, as well as the evidence presented in connection with those arguments and those arguments only, I agree with affirmance

Tao, J.

Tao

SILVER, C.J., dissenting:

I agree with appellant that the district court erred in granting summary judgment when it conflated a cause of action for premise liability due to a dangerous condition with the negligent acts of the respondent landowner. Based on my review of the record, appellant alleged that

respondent landowner undertook the "duty" to assist the appellant with his handyman work of installing solar screens, and thereafter negligently held or failed to hold the ladder on which appellant stood, thereby causing the appellant to lose his balance and fall from the ladder. Thus, looking at the facts in the light most favorable to the appellant, there existed a genuine issue of fact precluding summary judgment. *See* NRCP 56 (e); *see also Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d. 1026, 1030-31 (2005). Therefore, I would reverse the district court's grant of summary judgment in this case and allow a jury to determine whether respondent negligently undertook the duty of holding the ladder for appellant and caused his injuries.

Silver, C.J.

Silver

cc: Hon. Valorie J. Vega, Senior Judge
Chief Judge, Eighth Judicial District Court
Eva Garcia-Mendoza, Settlement Judge
Richard Harris Law Firm
Tanika M. Capers
Eighth District Court Clerk