IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BEATRICE DENISE TURNER, AN INDIVIDUAL,
Appellant,
vs.
SOUTHERN NEVADA REGIONAL HOUSING AUTHORITY, A POLITICAL SUBDIVISION FORMED PURSUANT TO NRS 315.7805,
Respondent.

No. 75258-COA

ORDER OF REVERSAL AND REMAND

Beatrice Denise Turner appeals from a district court order granting Southern Nevada Regional Housing Authority's (SNRHA) motion for summary judgment in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

On Sunday, June 22, 2014, between 7:30 p.m. and 8:00 p.m., Turner went to visit her friend, Shirley Ratliff, who lived in an apartment complex owned and operated by SNRHA.[1] Turner walked up a common walkway to Ratliff's apartment, knocked on her door, and when Ratliff did not answer, proceeded back down the same walkway. Turner claims that she slipped on gravel that was on the walkway and fell to the ground. She also alleges that the light near Ratliff's door was out and that the other lighting in the area was dim. After the fall, Turner sued SNRHA for negligence for not inspecting and cleaning the walkway. SNRHA filed a motion for summary judgment, which the district court granted. In its order, the district court concluded that Turner failed to provide admissible

[1]We do not recount the facts except as necessary to our disposition.

evidence showing that SNRHA had actual or constructive notice of gravel on the walkway. Additionally, noting that Turner saw gravel on the walkway, the district court further concluded that a guest or invitee is barred from recovery when a hazardous condition is open and obvious.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence is viewed in the light most favorable to the nonmovant. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31. However, where genuine factual disputes exist, summary judgment is improper. *Id.* at 731, 121 P. 3d at 1031 ("A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."). Further, we are reluctant to affirm a district court's grant of summary judgment in a negligence case because "the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve." *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007).

On appeal, Turner argues that whether SNRHA had constructive notice of the gravel on the walkway was a question of fact for a jury to determine, and therefore, summary judgment should not have been granted. She also argues that expert testimony was not required to prove her slip and fall case. Finally, Turner argues that whether a hazard is open and obvious is a question of fact for a jury, and that the district court erred

as a matter of law when it concluded that a hazard being open and obvious precludes recovery. We agree.

In a premises liability case, when a foreign substance on a floor causes an individual to slip and fall, liability will lie when the owner or one of its agents caused the substance to be on the floor. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). But if the foreign substance on the floor results from actions of persons aside from the owner or its employees, liability will only lie if the business had actual or constructive notice of the condition and failed to remedy it. *Id.* at 250, 849 P.2d at 322-23; *see also* 62A Am. Jur. 2d *Premises Liability* § 572 ("An owner or occupier is on constructive notice of hazards that would be revealed by a reasonable inspection."). And whether a property owner is under constructive notice of a hazardous condition is a question of fact for the jury to resolve. *Sprague*, 109 Nev. at 251, 849 P.2d at 323; *see also Rios v. Wal-Mart, Inc.*, 740 Fed. App'x 582, 583 (9th Cir. 2018) (citing *Sprague* and affirming that constructive notice is a question of fact for the jury); *Paul v. Imperial Palace, Inc.*, 111 Nev. 1544, 1549, 908 P.2d 226, 230 (1995) (same); *Brascia v. Johnson*, 105 Nev. 592, 595, 781 P.2d 765, 768 (1989) ("The state's policy is to send issues of negligence like the one presented by this case to the jury.").

Here, Turner points out that there are sufficient facts in the record for a jury to consider, such as deposition testimony from two witnesses; a former maintenance supervisor, Jeremiah Nash; and a former asset manager for the property, Patricia Rossol. Rossol confirmed that SNRHA maintained no one on site for two days (over the weekend) so that by Monday morning pea gravel had regularly accumulated on walkways. Nash testified that the pea gravel on the walkways posed a slipping hazard

and a reasonably competent employee would know to keep the walkways free of gravel. SNRHA, however, also designated two experts, John Smith and Alan Snyder, who opined that pea gravel was not a hazardous condition and was regularly used in residential developments. Snyder further opined that SNRHA's maintenance schedule of five days complied with industry standards. In response to SNRHA's experts, Turner produced a rebuttal expert report from Thomas Jennings stating that SNRHA should have cleaned the walkways seven days a week, rather than five, according to industry standards. Based on these facts, whether SNRHA had constructive notice of the pea gravel was a question of fact that should have been left for the jury. Thus, summary judgment was improper.

We also agree that Turner was not required to designate an expert in her case-in-chief as SNRHA argues. To establish the standard of care in a negligence case, expert testimony is unnecessary when the conduct involved is within the common knowledge of a layperson. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982); *see also Iazzetta v. Smith's Food & Drug Ctrs., Inc.*, 99 Fed. R. Evid. Serv. 820, at *4 (D. Nev. 2016) ("It is well settled [in Nevada] that the standard of care must be determined by expert testimony *unless* the conduct involved is within the common knowledge of laypersons. When the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of performance.") (alteration in original) (emphasis added) (citation omitted); *McConnell v. Wal-Mart Stores, Inc.*, 995 F. Supp. 2d 1164, 1169 (D. Nev. 2014) ("A layman may evaluate reasonable behavior in the context of everyday events, such as mopping a floor in a retail store, without resort to expert assistance.").

Here, where the conduct at issue is the duty to maintain the walkways free from pea gravel, a layperson can determine whether SNRHA breached its duty to guests such as Turner by systemically not inspecting or cleaning the walkways on weekends. Accordingly, Turner was not required to designate an expert in her case-in-chief. Turner, however, chose to designate a rebuttal expert to refute SNRHA's initial experts' opinions that SNRHA complied with industry standards in support of its fifth affirmative defense for which SNRHA had the burden of proof. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014) (stating that the party asserting an affirmative defense bears the burden of proof). The competing expert reports further underscore the factual nature of the liability dispute, which is more appropriately resolved by a jury.

Finally, we conclude that the district court erred when it overlooked the modern development of the open and obvious doctrine. The district court relied on *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962), *abrogated by Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 291 P.3d 150 (2012), to conclude that an injured guest is precluded from recovering when a dangerous or hazardous condition is open and obvious. *Foster*, however, overruled *Gunlock* to the extent that it automatically precludes liability when a hazard is open and obvious. 128 Nev. at 781-82, 291 P.3d at 156. Instead, the court treated the "open and obvious" nature of the condition as a factor "to be considered in the apportioning of comparative negligence when awarding damages." *See id.* (internal quotation marks omitted). Therefore, the district court erred when it summarily concluded that a hazard being open and obvious barred recovery.

Based on the foregoing, we

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

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., dissenting:

Here is Turner's claim: while walking outdoors on a path through thousands of desert landscaping rocks, she allegedly slipped and fell on some rocks that had rolled into her way and asserts that SNRHA is liable for her injury because it failed to properly clear the path. Have we so lost touch with any sense of personal responsibility that, when someone slips on a rock while walking outdoors through a sea of rocks, the outcome is a lawsuit? I would conclude that this isn't a valid claim under Nevada law and that summary judgment was properly granted.

Desert landscaping has been the dominant form of landscaping in southern Nevada for well over twenty years, becoming even more so since the local government mandated its installation in most newly-constructed homes and commercial properties as a water-conservation measure. *See* Henry Brean, *Southern Nevada Water Agency Ups Incentive to Get Rid of Lawns*, Las Vegas Review-Journal (May 31, 2018, 3:00 PM) https://www.reviewjournal.com/news/politics-and-government/clark-county/southern-nevada-water-agency-ups-incentive-to-get-rid-of-lawns/.

Since the early 2000's, the Clark County government "and its member utilities [have] restricted landscape watering to certain assigned days, banned front lawns at new homes, limited grass in backyards and at commercial properties, and clamped down on water use for fountains, misters, golf courses and car washes." *Id.* So it's not just coincidence that most landowners in Clark County installed it; many were required to install it by force of law.

SNRHA did what it was supposed to and installed the very desert landscaping that local law required it to and that environmentalists urge everyone living here to. It placed thousands of loose rocks on its property in a carpet thick enough and wide enough to prevent sand from blowing and weeds from sprouting, which is how desert landscaping is supposed to work. It then built walkways to help pedestrians navigate through the ocean of rocks on the property.

Turner doesn't challenge the origin of SNRHA's desert landscaping, and wisely so. Instead, she challenges whether SNRHA safely maintained the landscaping after installation. But she doesn't allege that SNRHA utterly failed to maintain its landscaping or walkways and allowed them to fall completely into shambles and disrepair; her own evidence shows that the property was generally well-kept and in good order and that SNRHA diligently hired landscapers to maintain the walkways five days a week, every week. Rather, Turner alleges that SNRHA didn't do quite enough to prevent some of the rocks in the surrounding carpet of rocks from rolling onto the walkways before she fell.

Was it conceptually foreseeable, at least at a very high level of generality, that when a walkway is surrounded by a sprawling carpet of thousands of rocks, some of those rocks might roll onto the walkway? Of

course. Rocks are rocks, and everyone can foresee that small rocks can sometimes be kicked about by pedestrians, moved by children at play, scuffled by pets, disturbed by wild animals, shifted by erosion, or blown about by inclement weather. Anyone who has ever walked near desert landscaping knows this to be true. Indeed, SNRHA readily conceded as much; that's exactly why it hired landscapers to clear the walkways five days a week.

But that's not the level of generality at which courts operate. Precisely because anyone can so readily envision that, when a landowner lays out a sprawl of thousands of loose landscaping rocks across many acres of land surrounding apartments where dozens of people live and walk around, some of those rocks will inevitably get kicked or blown about, it follows that no reasonable landowner can ever guarantee that every inch of every neighboring sidewalk will always be clear of rocks at all times, day and night, in any kind of weather, and no matter how many pedestrians and pets wander by. Just because a landlord is familiar with the concept that rocks can move doesn't mean that it's automatically always liable for every pebble that ever moves even an inch. If that's how Nevada law worked, I don't know who would ever own property in Nevada and we'd likely see the end of desert landscaping along with all of its attendant environmental benefits because such landscaping would become too expensive to have around.

Fortunately, that's not how Nevada law works. Quite to the contrary, landlords aren't the "insurers" of the safety of all who visit their premises and aren't strictly liable for every injury that happens no matter how it happened, who caused it to happen, or whether or not it was preventable. *See Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d

320, 322 (1993). They're only liable for hazards for which they had notice and a reasonable opportunity to cure, but nonetheless failed to cure. *Id.*

Turner's claim doesn't meet this test because it's missing a critical piece. In the (in)famous words of a former U.S. Secretary of Defense, there exist "known unknowns" and "unknown unknowns": the former refers to questions that one knows to be at stake but whose answers are not available (i.e., you know what information you don't know), while the latter refers to situations where one is not even aware of what question to ask, much less the answer to it (i.e., you don't know what information you don't know). This appeal isn't about "unknown unknowns." In this case, we know exactly what information is missing: Turner has no idea how long the particular rocks that she slipped on had been on the walkway before she stepped on them.

In opposing summary judgment, Turner says that she encountered the rocks on a walkway on SNRHA's property, but presented no evidence of how the rocks got there or how long they had been there before she stepped on them. She avers that she first saw the rocks while walking to visit a friend's apartment and then, after discovering that her friend was not home and walking back the way she came, stumbled and fell on her return trip. From this, we know that the rocks lay unattended for a very short window of time, lasting moments, as Turner walked down the path and then back shortly thereafter. But we do not know whether the rocks first migrated onto the walkway hours, minutes, or seconds before Turner's first trip down the path. This is a fatal omission because if we don't know how the rocks got there or how long they had been there, we don't know whether a reasonable landlord could have had reasonable notice of the problem with enough time to take reasonable steps to prevent

Turner's injury. Notably, Turner doesn't contend that she warned SNRHA about the rocks after noticing them on her first trip down the walkway; indeed, she doesn't claim that anyone had time to give such a warning if they wanted to.

Without this, Turner cannot prove two of the four elements essential to a negligence claim, namely: breach (which in this case supposedly arises from "constructive notice") or causation. *See Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993) (noting that a negligence claim requires plaintiff to establish that "(1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages."), *superseded by statute on other grounds as stated in Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 858-59, 265 P.3d 688, 691 (2011).

I.

This appeal comes to us from a district court's grant of summary judgment in favor of SNRHA. A grant of summary judgment is one of the few things that appellate courts review "de novo," with no deference to the district court's view of things. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). This makes sense because under NRCP 56 courts cannot consider such things as witness demeanor or credibility; Rule 56 asks only whether the documents presented confirm that any material facts are so genuinely in dispute such that a jury is required to sort out the truth. Because Rule 56 depends entirely on a review of documents and we are as well-positioned to review those documents as the district court was, we give no deference and can reach our own conclusions regardless of what the district court thought.

The lack of deference matters here because SNRHA's motion requested summary judgment on a number of grounds, but the district court granted summary judgment on some of those grounds and said nothing about the others. In other contexts we might be required to limit ourselves to only the specific grounds that the district court actually cited, but not on de novo review. If unchallenged documentary evidence clearly shows that a case is obviously not worth the time and expense of going to jury trial, things do not suddenly become trial-worthy just because the district court focused on the wrong argument when the rest of the documents say otherwise. Here, we review the question of summary judgment as if we ourselves were sitting as the district court, and in doing so I would conclude that the district court reached the correct conclusion, albeit for slightly different reasons than it articulated.

II.

To defeat a well-supported summary judgment motion, the non-moving party must show that at least one material fact is genuinely disputed and, further, that if the jury accepts the version of facts most favorable to the non-moving party, it would be entitled to prevail as a matter of law. NRCP 56. Thus, when the non-moving party is the plaintiff, it must show that when all of the contested facts are viewed in the light most favorable to it, those facts would meet its ultimate burden of proof at trial and entitle it to relief.

Avoiding summary judgment requires more than merely asserting that some question is classified as one of "fact" as opposed to one of law. Every lawsuit necessarily contains some mixture of both questions of law and questions of fact, but not every lawsuit merits a jury trial. To warrant a trial, NRCP 56 requires that there must be not merely some

question of fact but some "dispute" regarding the truth of a fact that is both "genuine" and "material" to the outcome of the suit or else there is no decision for a jury to make and only one verdict it could return. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. A factual "dispute" cannot be created through "the gossamer threads of whimsy, speculation and conjecture" or "general allegations or conclusions." *Id.* Rather, a factual dispute is only "genuine" enough to defeat summary judgment if a reasonable jury could return a verdict in favor of the non-moving party on that issue. Evidence that is merely colorable or trivially probative is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986).

III.

The fundamental problem with Turner's claim is that even if we accept everything she alleges to be true, she cannot prevail at trial as a matter of law because she can't prove either breach or causation.

As to the element of breach, a business owes a duty to keep its premises in a reasonably safe condition for use. *FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012). The key here lies in the word "reasonable." The duty is breached when a landlord acts "unreasonably" which means that it actually knew, or constructively should have known, that a hazard existed yet failed to remedy it in the way that we expect a reasonable landowner to. *Id.* at 280, 278 P.3d at 496. The starting point is notice: liability cannot exist without either actual or constructive notice. "Actual notice" exists if the landlord either caused the hazard itself or otherwise knew it was there; "constructive notice" can be found when, even if the landlord did not cause the problem itself and was not actually aware of it, it nonetheless should have discovered the hazard through the exercise of reasonable diligence. *See Sprague*, 109 Nev. at 250, 849 P.2d at 322-23.

But the next, and more important, point is that courts impose liability not due to the existence of notice alone, but rather due to *the failure to reasonably implement a remedy* in response to the notice. Thus, to demonstrate liability, Turner must prove the existence of both notice plus a reasonable opportunity to cure that the landlord failed to seize: the "fail[ure] to remedy" is a critical component of liability. *Id.* "[L]iability will lie only if the business had actual or constructive notice of the condition *and failed to remedy it*." *FGA*, 128 Nev. at 280, 278 P.3d at 496 (emphasis added). Functionally, this means that there must exist not only some notice (either actual or constructive), but a specific kind of notice: notice that was received far enough in advance for a reasonable person in that situation to have had an opportunity to rectify the problem. This is a question of time: you have to know when the hazard arose before you can calculate whether there was enough time for a reasonable person to have done something about it.

Let's apply that to the facts of this case. Turner doesn't know whether SNRHA itself moved the rocks, whether another pedestrian did, or whether the rocks were moved by an act of nature. Thus, Turner cannot prove that SNRHA was itself responsible for putting the rocks there. She also can't prove that anybody ever notified SNRHA that those particular rocks were there before she stepped on them; Turner didn't notify them herself and couldn't identify anyone else who did. Consequently, SNRHA never had "actual notice" of any hazard in that particular walkway.

The only way left for Turner to establish liability is to prove "constructive notice," meaning proof that the rocks had been there long enough that SNRHA should have known about them and been able to do something about them had it exercised reasonable diligence. *Sprague*, 109 Nev. at 250, 849 P.2d at 322-23. But she never did. The best she can do is

to offer evidence that SNRHA knew that, in a general sense, rocks on walkways occasionally constituted a potential hazard to pedestrians when too many rocks had moved onto walkways. She also offered evidence that rocks generally tended to accumulate on walkways over weekends when the walkways were not swept on Saturday and Sunday. But just because SNRHA had prior notice that other rocks (not these particular ones) had intruded onto other walkways (not this particular walkway) on various occasions in the past (not this particular day) does not make SNRHA strictly liable for every future rock-related injury whether the particular injury in question was reasonably preventable or not. Proving that SNRHA had theoretical notice of other rocks in other locations on other days says little about whether SNRHA had timely legal notice of anything amiss with the rocks that actually caused Turner's fall. Worse, Turner offered no evidence that any pedestrian had ever slipped on any rocks anywhere on the property before Turner did.

"Constructive notice" is a doctrine of imputed knowledge, referring to what the landlord could and should have learned had it exercised the kind of diligence we as a society expect from reasonable landlords under like circumstances. It says that, even in the absence of any proof of the landlord's actual knowledge, under some circumstances courts can nonetheless infer from certain kinds of evidence that "if the [landlord] had made a reasonable inspection of the [area] they would have discovered the latent defect which caused [the plaintiff's] injuries." *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 788, 476 P.2d 946, 948 (1970); *see Chasson-Forrest v. Cox Commc'ns Las Vegas, Inc.*, Docket No. 70264, 2017 WL 1328370, at *1 (Order of Reversal, Ct. App., March 31, 2017) ("A defendant may have constructive notice of a hazardous condition if a

reasonable jury could determine that based on the circumstances of the hazard the defendant should have known the condition existed."). Here, if Turner does not know how long the rocks had laid there, she necessarily cannot prove that they had been there long enough for SNRHA to have discovered them through the exercise of reasonable diligence; if they moved onto the walkway only seconds before she happened on the scene, no reasonable landlord could have discovered them no matter how diligently they searched. More, she cannot prove that they had been there long enough not only to be discovered, but to be discovered with enough time remaining for SNRHA to attempt a reasonable remedy before her arrival. Thus, without knowing how long the rocks had been there, Turner has no claim. Under NRCP 56 Turner bears the affirmative burden to present evidence proving every element of her case, or else lose. Without some affirmative evidence of notice accompanied by affirmative proof of a failure to reasonably cure, Turner is doing nothing more than inviting the jury to engage in "whimsy, speculation and conjecture" that SNRHA was responsible for a cure anyway, which ought to be legally insufficient to defeat summary judgment. *Wood*, 121 Nev. at 731, 121 P.3d at 1030.

None of this is revolutionary. Most courts require some affirmative evidence proving how long a foreign substance was on the ground before notice can be legally inferred, and mere proof of the existence of a foreign substance does not itself create such notice. *See, e.g., Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008) ("Absent any evidence demonstrating the length of time that the substance was on the floor, a plaintiff cannot establish constructive notice."); *Clemente v. Carnicon-Puerto Rico Mgmt. Assocs., L.C.*, 52 F.3d 383, 389 (1st Cir. 1995) (holding that although appellant offered some evidence of the existence of a

foreign substance on the staircase, "it does not in any way demonstrate how long the substance may have been there" and thus a reasonable jury could not have found the hotel had constructive notice), *abrogated on other grounds by United States v. Gray*, 199 F.3d 547 (1st Cir. 1999); *Tidd v. Walmart Stores, Inc.*, 757 F. Supp. 1322, 1323-24 (N.D. Ala. 1991) (holding there was no evidence of constructive notice where the record was silent on the length of time the spill had been on the floor and that the plaintiff's argument that the size of the spill is sufficient to raise a question of fact regarding the length of time the spill had been present lacks merit); *House v. Wal-Mart Stores, Inc.*, 872 S.W.2d 52, 53 (Ark. 1994) (holding that appellant failed to show the substance was on the floor for such a period of time that the store should have reasonably known of its presence, as "[n]o one knew when the spill occurred and at most, the evidence reflect[ed] the liquid had been on the floor for five or six minutes"); *Ortega v. Kmart Corp.*, 36 P.3d 11, 15-16 (Cal. 2001) ("The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence."); *Kelly v. Stop & Shop, Inc.*, 918 A.2d 249, 256 (Conn. 2007) ("Evidence which goes no farther than to show the presence of a slippery foreign substance does not warrant an inference of constructive notice to the defendant."); *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567 (Tex. 2006) (noting that constructive notice requires proof that an owner had a reasonable opportunity to discover the defect, which requires "analyzing the combination of proximity, conspicuity, and longevity"); *Great Atl. & Pac. Tea Co. v. Berry*, 128 S.E.2d 311, 314 (Va. 1962) ("There are many cases from other jurisdictions holding that the condition of the foreign substance is not sufficient to show that it had been on the floor long enough for the

personnel of the store in the exercise of reasonable care to have discovered it." (citing cases)). *See generally* 107 Am. Jur. Proof of Facts 3d 407 (2009); 3 Premises Liability 3d § 49:1 ("Spill notice requirement") (2018); 2 Premises Liability 3d § 36:6 ("Notice requirement") (2018).

In this case we know that the rocks were there and that Turner slipped on them. We know little else. I would conclude that there isn't enough here to defeat summary judgment.

IV.

Alternatively, when a business maintains a self-service operation in which the danger of slippery substances falling to the floor is a repeated and inherent part of the operation (as with a casino buffet), the "mode of operation" approach, also referred to as the "recurrent risk" approach, allows courts to infer legal notice from the nature of the business itself. *See FGA*, 128 Nev. at 281, 278 P.3d at 496; *see Fisher v. Big Y Foods, Inc.*, 3 A.3d 919, 928 n.21 (Conn. 2010) (stating that 22 jurisdictions have adopted some variation of the mode of operation rule, and that the majority of the jurisdictions adopting it have applied it narrowly). With such types of businesses, "even in the absence of constructive notice, 'a jury could conclude that [the business] should have recognized the impossibility of keeping the [self-service] section clean by sweeping' alone [and] sufficient evidence was presented 'to justify a reasonable jury in concluding that [the business] was negligent in not taking further precautions, besides sweeping, to diminish the chronic hazard posed by the [self-service] department floor.'" *FGA*, 128 Nev. at 282, 278 P.3d at 497 (quoting *Sprague*, 109 Nev. at 251, 849 P.2d at 323). Essentially, to determine whether owners are liable to injured patrons under these approaches, the inquiry is "whether there was a 'recurrent' or 'continuous' risk on the premises

associated with a chosen mode of operation." *Id.* at 281 n.5, 278 P.3d at 497 n.5. *See generally Sheehan v. Roche Bros. Supermarkets*, 863 N.E.2d 1276, 1280-85, 1280 n.3 (Mass. 2007).

But the mode of operation approach doesn't apply to every business. It doesn't apply, for example, to sit-down restaurants where the plaintiff "failed to show that the handling of food in a particular area by employees of [the restaurant] gave rise to a foreseeable risk of a regularly occurring hazardous condition for its customers similar to the condition that caused the injury." *FGA*, 128 Nev. at 282, 278 P.3d at 497 (finding "no reason to extend mode of operation liability to such establishments absent such a showing as their owners have not created the increased risk of a potentially hazardous condition by having their customers perform tasks that are traditionally carried out by employees").

Here, the fall occurred outdoors where rocks can move for a variety of reasons entirely outside of the control of any landlord or visitor, which is nothing like an enclosed self-service restaurant in which the business owner chooses how to run the restaurant and which patrons to admit. Moreover, there's no evidence that anyone visiting the apartment complex had ever fallen on a rock before Turner did. So the mode of operation approach doesn't apply and can't be used to create constructive notice where it otherwise does not exist. *Cf. Ford v. S. Hills Med. Ctr., LLC*, 127 Nev. 1134, 373 P.3d 914 (2011) (unpublished disposition) (holding that appellant "has not presented any evidence that spills of liquid on the floor of respondent's emergency department were a virtually continuous condition that created an ongoing, continuous hazard, thus providing constructive notice of the condition to respondent").

V.

As to the element of causation: it's black-letter law that, even in cases when a duty has clearly been breached, a landlord is nevertheless not legally liable unless the breach was also the proximate cause of the injury. *See Doud*, 109 Nev. at 1100, 864 P.2d at 798.

Below, the parties engaged in battle over whether SNRHA should have inspected the walkways once daily on all seven days of the week or only five, with Turner alleging that SNRHA breached its duty by inspecting only five. But this supposed breach only matters if she can prove that the rocks that she stepped on had lain in place since before the last inspection that she argues should have taken place, i.e., longer than it would have taken SNRHA to normally clean it had SNRHA followed the once-a-day standard of care that Turner says it should have. She must show that if SNRHA had cleaned as frequently as she wants the rocks would have been removed and she would not have stepped on them; otherwise, if the rocks had moved only after the last daily cleaning would already have been complete (and based on what little there is in the record, your guess is as good as mine), then even if SNRHA had swept exactly as often as she wants, her injury would still have happened just as it did. Turner cannot show that her injury would not have happened "but for" the alleged breach, and that's a fatal flaw.

VI.

These gaps suggest a third problem. Had Turner been able to prove either actual or constructive knowledge on the part of SNRHA with enough time to implement a remedy, I agree that she would not have needed the assistance of an expert witness to testify regarding the appropriate standard of care that owners of large apartment complexes like SNRHA should follow. If SNRHA actually knew the rocks were there, any untrained

layperson could easily imagine the solution: get someone with a broom out there to sweep the walkway clean.

But in the absence of direct evidence—indeed, any evidence at all—regarding how long the rocks had been there, the only plausible (not necessarily successful, but plausible) way that Turner could establish liability would be to prove that Turner's injury was the proximate result of a systemic failure by SNRHA to remedy a problem that was already widely known in the industry. More specifically, if she could have shown that her injury arose in the exact same way, perhaps on similar days and at similar times, as many other identical injuries that were known to arise in similar apartment complexes with similar landscaping, then she could perhaps have based her claim on a failure by SNRHA to design a better overall inspection methodology that took that risk into account. By way of example, if she hypothetically could prove that rock-related pedestrian injuries commonly occur in statistical clusters on the same day of the week and at about the same time as Turner's did in apartment complexes with similar landscaping, then she could have argued that SNRHA should have inspected the walkways not merely more frequently than it did, but precisely at the exact time that Turner arrived.

This theory of liability might solve the notice and causation gaps that now loom over the case. But it would also require the assistance of an expert witness to lay the foundation for her argument, one who could identify the existence of such a statistical cluster, prove it to be so common that reasonable landlords are expected to know about it, and describe the remedy that similar apartment complexes can or should reasonably implement (perhaps by comparison to an industry standard). But such evidence is so intrinsically complex that "the standard of care *must* be

determined by expert testimony *unless* the conduct involved is within the common knowledge of laypersons." *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (emphasis added); *see also Webster v. Claremont Yoga*, 236 Cal. Rptr. 3d 802, 805 (Ct. App. 2018) (holding that when a negligence case arises from the rendering of professional services, expert testimony is generally required to establish the standard of care, unless it within the common knowledge of a layperson); *Sanchez v. Brooke*, 138 Cal. Rptr. 3d 507, 515 (Ct. App. 2012) ("Generally, expert testimony is required to establish the standard of care that applies to a professional.").

Can laypeople sort out what an apartment owner needs to do to prevent some kind of systemic hazard in a large, open, professionally-maintained desert-landscaped area? Both duty and breach are measured according to what a "reasonable person in like circumstances" would do in the face of the problem, which in this case refers to a reasonable landowner operating an apartment complex of similar size, density, and occupancy, with similar landscaping. I imagine few laypeople have any idea how to design an inspection methodology to safely maintain dense apartment complexes with extensive desert landscaping. Quite to the contrary, the field of landscape architecture is one so complex that it comprises its own college major, including graduate-level courses. *See, e.g., Department of Landscape Architecture*, Cornell University College of Agriculture and Life Sciences, https://landscape.cals.cornell.edu/.

At a minimum, I would think that we'd need to know the following: the number and length of the walkways involved; the number of tenants who live around the walkways and how they travel around the complex; the ratio of landscaped areas in proportion to the walkway areas;

the types and weights of rocks involved; the cost, effort, and time required to clean on seven versus five days a week (or any other schedule); the effect of nature (including weather conditions and the activity of wild animals) upon the rocks; the volume of pedestrian traffic on the walkways on any particular day and the relative proportion of high-traffic areas to low-traffic areas; the number and density of rocks needed to accumulate on a walkway before they become hazardous; the types of landscaping surrounding the rocks; the distances between the rocks in the landscaped areas and the walkways; whether and how the surrounding foliage affects how rocks can be moved; the prevailing industry standard for such inspections; whether the movement of rocks changes seasonally throughout the year as the weather changes or with seasonal changes in pedestrian traffic; and how long it takes to adequately inspect an area as large and complex as the landscaped premises in this case. Just articulating these shows that we're far beyond the scope of a claim that Turner could have proven without expert assistance.

VII.

What's telling is that Turner eventually did hire an expert, Thomas Jennings, to confirm her version of the standard of care (clean seven days a week instead of five). But unfortunately for her, she only retained and designated Jennings as a rebuttal witness, rendering the report inadmissible for purposes of NRCP 56.

A party can only support or defeat summary judgment based upon evidence that would be admissible at trial. *See* NRCP 56(e) (affidavits in support of or in opposition to summary judgment "shall set forth such facts as would be admissible in evidence"); *see also Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 301, 662 P.2d 610, 621 (1983) (evidence in

support of or in opposition to summary judgment must be evidence that would be admissible at trial); *Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1273-74, 885 P.2d 572, 575 (1994) ("The district court thus erred in relying solely on inadmissible evidence to grant summary judgment"); *Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969) ("evidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment").

Rebuttal evidence cannot be used to fill in weaknesses in a plaintiff's case-in-chief for the simple reason that if the defendant chooses not to mount a defense then the plaintiff's rebuttal evidence will not be admissible and would never be considered by the factfinder. *See Linder v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Haw. 2008); *see also Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006) (stating that "rebuttal evidence may be used to challenge the evidence or theory of an opponent—and not to establish a case-in-chief" and that to rule "otherwise would eviscerate the distinction between primary and rebuttal witnesses"). If a defendant simply moves for judgment as a matter of law pursuant to NRCP 50 at the close of the plaintiff's case (which most defendants routinely do), the plaintiff could not rely upon not-yet-offered-or-admitted rebuttal evidence to defeat such a motion. The purpose of rebuttal evidence "is to explain, repel, counteract or disprove evidence of the adverse party," not to supplement a flawed case-in-chief. *Marmo*, 457 F.3d at 759 (internal quotation marks omitted); *see Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004). Thus, Turner cannot rely on Jennings' rebuttal expert report to fill in the missing pieces of her case and defeat an otherwise meritorious motion for summary judgment.

VIII.

In the end, for all we know and don't know about the rocks in this case, they might have fallen (or been carried, pushed, blown, thrown, washed, slid, eroded, or any of a number of other alternatives that Turner cannot identify) onto the walkway mere moments before Turner stepped on them. If so, then there would not have been time for even an extraordinarily diligent landowner, much less a simply reasonable one, to either learn of the hazard or to do anything to remedy it that would have causally prevented Turner's injury from happening just as it did. She nonetheless argues that we must give deference to the possibility that a jury could conclude that the rocks might have been there much longer than that. But she presented no evidence at all providing the jury with any foundation to reach that conclusion, so she's doing nothing more than inviting the jury to take a guess. That shouldn't be enough to defeat summary judgment under NRCP 56 and warrant a jury trial. I respectfully dissent.

Tao, J.

Tao

cc: Hon. Linda Marie Bell, Chief District Judge
Carolyn Worrell, Settlement Judge
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