IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAWAN GAUTAM,
Appellant,
vs.
BANK OF AMERICA, N.A.,
Respondent.

No. 79431-COA

FILED

MAY 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER REVERSING AND REMANDING

Pawan Gautam appeals from a final judgment in a tort action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Gautam was robbed and shot after using a Bank of America (BOA) ATM in Las Vegas.[1] Gautam later sued BOA, alleging negligent security. Prior to trial, BOA moved to exclude Gautam's retained expert, Jonathan Simon, arguing that he was unqualified to testify as an expert. The district court granted the motion and the matter proceeded to trial.

Before the jury was empaneled, the district court allowed Gautam a second opportunity to establish Simon's qualifications as a security expert via an offer of proof through Simon's testimony. After the offer of proof was made, the district court affirmed its original ruling and again concluded that Simon was unqualified to testify as an expert in the case. Subsequently, Gautam filed a motion seeking permission to call BOA's retained expert witness, Elizabeth Dumbaugh, during his case-in-chief. The district court heard argument on the matter and denied Gautam's request, but indicated Gautam would have the opportunity to cross-examine the expert if Dumbaugh was called to testify. During trial, Gautam elicited

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

testimony from various witnesses, including BOA Protective Services Manager David Robinson, whose responsibilities involved safety of the subject premises. Although Robinson was aware of the crime statistics in the area where the ATM is located, he did not appear to know how the information was used for safety purposes or if any remedial measures had been implemented.

After Gautam rested his case, BOA moved for judgment as a matter of law pursuant to NRCP 50(a). The district court entertained argument on the motion for judgment as a matter of law and ultimately granted the motion, concluding that Gautam failed to present sufficient evidence that BOA breached its duty of care. In its written order, the district court noted specifically that the evidence "presented in Gautam's case-in-chief . . . did not establish that [BOA] breached any duty it owed to [him]." This appeal followed.

Gautam contends that the district court erred in granting BOA's motion for judgment as a matter of law because he presented sufficient evidence of breach. BOA argues that the district court correctly determined that Gautam failed to present such evidence because, among other things, Robinson's testimony was insufficient to establish breach and because, as the district court noted, Gautam's expert was not "qualified to offer opinions as an expert witness on security." We agree with Gautam.

This court reviews de novo a district court's order granting an NRCP 50(a) motion for judgment as a matter of law. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007). "Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law." *Bielar v. Washoe Health Sys., Inc.*,

129 Nev. 459, 470, 306 P.3d 360, 368 (2013). When ruling on a motion for judgment as a matter of law, "the district court must view the evidence and all inferences in favor of the nonmoving party." *Id.* at 471, 306 P.3d at 368. To defeat an NRCP 50(a) motion, "the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Id.* (internal quotation omitted). Thus, a district court's entry of a directed verdict or judgment as a matter of law is proper only if there is no question of fact remaining to be decided. *Gordon v. Hurtado*, 91 Nev. 641, 646, 541 P.2d 533, 536 (1975).

"To prevail on a negligence theory, a plaintiff must generally show 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." *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). "Whether a defendant owes a plaintiff a duty of care is a question of law," *id.*, but whether the defendant breached that duty is a question of fact for the jury, *Klasch v. Walgreen Co.*, 127 Nev. 832, 841, 264 P.3d 1155, 1161 (2011). Moreover, it is well-established in Nevada that expert testimony is not necessarily required to establish for the jury the issue of breach of duty in a negligent-security case. *See Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 863, 265 P.3d 688, 693 (2011); *Scialabba*, 112 Nev. at 970, 921 P.2d at 931; *Basile v. Union Plaza Hotel & Casino*, 110 Nev. 1382, 1384-85, 887 P.2d 273, 275 (1994); *Early v. N.L.V. Casino Corp.*, 100 Nev. 200, 204, 678 P.2d 683, 685 (1984).

At trial, Robinson testified that he was BOA's Protective Services Manager for Nevada, Northern Arizona, Utah, and Colorado and that his duties included investigating on-property crime and taking remedial action

to mitigate criminal conduct on BOA properties within his jurisdiction when appropriate. Robinson also confirmed that there were two robberies at the subject BOA ATM location in 2011 and 2015, and that the 2015 incident was an armed robbery. Additionally, when asked what "the acceptable number of robberies at a Bank of America ATM location [would have to be] before security is increased," Robinson answered, "[w]ell, we would have to be consistently having robberies, like every night, every other night, every week of the month at the same location," indicating there was no standard or only an imprecise standard for when security measures were to be increased. And when asked what steps were taken after the 2011 robbery or the 2015 robbery at this particular ATM location to reduce crime, Robinson answered, "I do not know."

In short, Robinson testified that he was responsible for remediating on-property criminal activity;[2] that BOA was aware of prior similar incidents on the premises; that it had no articulable standard for determining when additional security might be necessary; and that he was not aware of any changes to security at the location in question after the 2011 and 2015 incidents. Moreover, when asked whether BOA looks at crime "in the immediate area to determine whether an ATM location is safe," Robinson stated that "we don't review the crime that's happening in the area when we have an ATM in place. It would only come up if there were additional crimes happening on our property."

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[2]Although we agree that BOA did not designate Robinson as an NRCP 36(b)(6) witness, we nevertheless conclude that Robinson's testimony was highly relevant as to whether BOA breached its duty to Gautam and should have been considered by the district court as evidence of breach.

Viewing all the evidence in the light most favorable to Gautam, we conclude that he presented sufficient evidence for a reasonable juror to conclude that BOA was aware of increased criminal activity in the area and that it breached its duty owed to him by failing to undertake additional security measures. Moreover, that Gautam failed to present expert testimony is unavailing, as expert testimony is not required for the trier of fact to determine that the element of breach was sufficiently proved. *See, e.g.*, *Smith*, 127 Nev. at 863, 265 P.3d at 693. Therefore, we conclude that the district court erred in granting BOA's motion for judgment as a matter of law.

Gautam also argues that his expert, Jonathan Simon, was qualified to proffer expert testimony, and therefore, the district court abused its discretion when it excluded Simon from testifying. Although an expert is not required in a negligent security case, on appeal and at oral argument, Gautam explained, among other things, that Simon's knowledge of the crime statistics in the area as well as his personal experience in inspecting the property supported his *qualifications* to testify as an expert. In turn, BOA averred that the district court considered many factors in disallowing Simon's testimony because he lacked minimum threshold requirements, including that he had never provided forensic expert testimony and consulting in the security field, held any professional security certification, nor did he have any experience relevant to banking security (i.e., he had never been hired by a financial institution).

A district court's decision to permit or exclude expert testimony is reviewed for abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). In order for a witness to testify as an expert under NRS 50.275, three requirements must be satisfied: "(1) he or she must be

qualified in an area of 'scientific, technical or other specialized knowledge' (the qualification requirement); (2) his or her specialized knowledge must 'assist the trier of fact to understand the evidence or to determine a fact in issue' (the assistance requirement); and (3) his or her testimony must be limited 'to matters within the scope of [his or her specialized] knowledge' (the limited scope requirement)." *Hallmark*, 124 Nev. at 498, 189 P.3d at 650 (alterations in original).

"In determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." *Id.* at 499, 189 P.3d at 650-51 (footnotes omitted). Further, "these factors are not exhaustive, may be accorded varying weights, and may not be equally applicable in every case." *Id.* at 499, 189 P.3d at 651.

Here, the district court excluded Simon as an expert under the qualification prong of *Hallmark*, and accordingly, did not address the remaining requirements. Although the record reveals that Simon did not have formal education in the field of forensic security and did not possess any professional certifications or licenses related to the same, it also reveals that he had a substantial military and law enforcement background, private investigator and private patrol operator licenses, detailed knowledge of the relevant crime statistics, familiarity with the area at issue (as he had conducted on-site surveillance and was assigned to patrol the area on a number of occasions during his career), and was knowledgeable about crime prevention measures, including increasing patrols. In other words, Simon possessed significant "practical experience and specialized training" in the field of crime prevention and security. Nevertheless, the district court

excluded Simon based primarily on his lack of certification and formal education in the field of forensic security. And the court did not adequately consider Simon's testimony regarding his credentials in light of his overall experience and expertise. *Cf. FCH1, LLC v. Rodriquez*, 130 Nev. 425, 432, 335 P. 3d 183, 188 (2014).

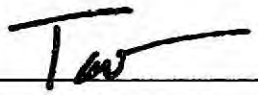
Based on this record, we conclude that the district court abused its discretion because it misapplied the qualification factors of *Hallmark*. Specifically, the court failed to properly consider Simon's "practical experience and specialized training," which was relevant to a negligent security case, and instead, placed undue emphasis on his lack of formal education and licensure. In essence, the district court made conclusory findings regarding Simon's academic credentials without considering his other relevant credentials. Thus, the district court abused its discretion by failing to apply the *Hallmark* factors for the "qualification requirement" before disqualifying Simon as an expert witness. *See Mathews v. State*, 134 Nev. 512, 514, 424 P.3d 634, 638 (2018) (concluding the district court abused its discretion when it failed to correctly apply *Hallmark's* qualifications factors); *see also FCH1*, 130 Nev. at 432, 335 P.3d at 188 (providing that the "district court should have considered the purpose of the expert testimony and its certainty in light of its context").[3]

[3]We note, however, that we do not reach the ultimate issue of whether Simon is fully qualified under *Hallmark* to testify as an expert in this case. On remand, the district court must still consider the remaining *Hallmark* requirements—i.e., the "assistance requirement" and "the limited scope requirement." 124 Nev. at 498, 189 P.3d at 650.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial.[4]

_____, C.J.
Gibbons



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[4]Additionally, Gautam argues that the district court abused its discretion when it precluded him from calling BOA's retained expert, Elizabeth Dumbaugh, during his case-in-chief, specifically contending that he was entitled to do so under NRS 50.115(4)(b) (providing that "a party is entitled to call . . . [a] witness *identified with an adverse party*, and interrogate by leading questions" (emphasis added)). In light of our disposition, we need not reach the merits of this issue. Nevertheless, we note that ordinarily such preclusion does not amount to an abuse of discretion because district courts have broad discretion to administer the rules of evidence, *Baltazar-Monterrosa v. State*, 122 Nev. 606, 613-14, 137 P.3d 1137, 1142 (2006), and because expert witnesses are not customarily considered witnesses "identified with an adverse party," *see, e.g.*, *Sec. & Exch. Comm'n v. Goldstone*, 317 F.R.D. 147, 164 (D.N.M. 2016) (defining the categories of witnesses who meet this standard under Federal Rule of Evidence 611—the analogue to NRS 50.115). However, when exercising such discretion, courts should evaluate the context of the particular circumstances and consider potential prejudice to the parties, especially where, as here, the requesting party (Gautam) was never afforded *any* examination of the witness, who was present at trial and under subpoena. *Cf. Sanchez v. Dupnik*, 362 F. App'x 679, 681 (9th Cir. 2010) (concluding that the "district court acted within its discretion by denying [plaintiff's] request to call the opposing party's expert as his own expert during his case-in-chief," where the plaintiff was "permitted to *fully cross-examine* his opponent's expert during trial" (emphasis added)).

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