IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AFSHIN BAHRAMPOUR, AN INDIVIDUAL,
Appellant,
vs.
SIERRA NEVADA CORPORATION, A NEVADA CORPORATION; SIERRA NEVADA CORPORATION SHAREHOLDERS; SIERRA NEVADA CORPORATION BOARD OF DIRECTORS; SIERRA NEVADA CORPORATION OFFICERS AND EMPLOYEES; LEV SADOVNIK; AND VLADIMIR MANASSON,
Respondents.[1]

No. 82826-COA

FILED
JAN 13 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Afshin Bahrampour appeals from a district court order, certified as final under NRCP 54(b), partially dismissing a complaint in a tort action. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Bahrampour filed the underlying lawsuit against respondents (collectively SNC) and various government officials. In relevant part, Bahrampour alleges that government actors have been surreptitiously using him as a human test subject for a microwave-emitting, riot-control weapon manufactured by SNC, thereby causing him to suffer cognitive, neurological, and financial injury. In his complaint, Bahrampour purported to set forth eight different claims against all defendants: unreasonably

[1]We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

dangerous product, invasion of privacy, negligent failure to warn, design defect, implied warranty of merchantability, negligence per se, ultrahazardous activity, and infliction of emotional distress. SNC filed a motion to dismiss the claims against it, arguing that Bahrampour failed to state a claim under NRCP 12(b)(5) and that all of his claims were barred under the doctrine of claim preclusion and the relevant statute of limitations. Over Bahrampour's opposition, and without reaching the claim-preclusion or statute-of-limitations issues, the district court entered an order granting SNC's motion and dismissing all of the claims against it under NRCP 12(b)(5). This appeal followed, and the district court subsequently entered an order certifying the dismissal as a final judgment.[2]

We review a district court order granting an NRCP 12(b)(5) motion to dismiss de novo, accepting all factual allegations in the plaintiff's complaint as true and drawing all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. In evaluating an NRCP 12(b)(5) motion, the court must determine whether "the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (internal quotation marks omitted).

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[2]It is unclear from the record whether any of the governmental defendants were ever served with process. Moreover, none of them had appeared in the action, nor had the district court entered any judgment affecting them, at the time Bahrampour filed his notice of appeal. Accordingly, the governmental defendants are not parties to this appeal.

Considering his claims for "unreasonably dangerous product," "design defect," and "negligent failure to warn" together, Bahrampour essentially sets forth both a design-defect and failure-to-warn theory of strict product liability against SNC. *See Motor Coach Indus., Inc. v. Khiabani*, 137 Nev., Adv. Op. 42, 493 P.3d 1007, 1015 (2021) (recognizing both as distinct theories of strict product liability); *see also Nev. Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004) (providing that, when evaluating a complaint, "we must look at the substance of the claims, not just the labels used"). Both theories have the same elements; the plaintiff "must show that (1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury." *Motor Coach*, 137 Nev., Adv. Op. 42, 493 P.3d at 1011 (internal quotation marks omitted).

The difference is, under a design-defect theory, a product is defective when it "failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Ford Motor Co. v. Trejo*, 133 Nev. 520, 523, 402 P.3d 649, 652 (2017) (internal quotation marks omitted). Whereas under a failure-to-warn theory, the relevant defect simply *is* the lack of a warning, as "strict liability may be imposed even though the product is faultlessly made if it was unreasonably dangerous to place the product in the hands of the user without suitable and adequate warning concerning safe and proper use." *Motor Coach*, 137 Nev., Adv. Op. 42, 493 P.3d at 1011-12 (alteration and internal quotation marks omitted).

Bahrampour essentially contends that the microwave-emitting function of SNC's weapon poses inherent risks of damage to a target's brain such that the weapon is unreasonably dangerous as a result of both its design and SNC's failure to warn potential users of these risks. But Bahrampour fails to set forth any facts giving rise to an inference that the weapon actually suffers from a design defect, as he does not allege that the weapon in any way failed to perform as reasonably expected in light of its nature and intended function as a non-lethal tool for incapacitation and riot control, nor does he allege that the weapon is any more dangerous than would be expected by an ordinary user of such technology. *See Ford*, 133 Nev. at 523, 402 P.3d at 652. Instead, he largely focuses on the extent to which he has allegedly suffered injuries as a result of prolonged and repeated use of the weapon against him by various government actors, which, even assuming as we must that the allegations are true, does not itself imply that the weapon is unreasonably dangerous when used as intended by an ordinary user. Bahrampour therefore fails to set forth facts sufficient to establish the most fundamental element of his design-defect theory—i.e., that the product's design is defective—and the district court appropriately dismissed this claim. *See Motor Coach*, 137 Nev., Adv. Op. 42, 493 P.3d at 1011; *Breliant*, 109 Nev. at 846, 858 P.2d at 1260.

With respect to his failure-to-warn theory, although Bahrampour alleges that SNC furnished its weapon to users without any warnings concerning its proper use, he fails to set forth any facts giving rise to an inference that doing so renders the weapon unreasonably dangerous. *See Motor Coach*, 137 Nev., Adv. Op. 42, 493 P.3d at 1011-12. Under Nevada law, manufacturers are not required to warn against generally known dangers, *id.* at 1012, and Bahrampour does not allege that SNC

furnished the weapon to users who would not generally know that prolonged and repeated use of a weapon designed to incapacitate human targets by emitting microwaves directly into their brains may result in substantial harm to those targets. Accordingly, the district court appropriately dismissed both of Bahrampour's claims for strict product liability. *See Breliant*, 109 Nev. at 846, 858 P.2d at 1260.

Bahrampour also appears to assert a garden-variety negligence claim based on SNC's failure to warn of the weapon's dangers. Although "the law does not impose a general affirmative duty to warn others of dangers," a plaintiff may recover under a failure-to-warn theory of negligence if there was a special relationship between the parties and the danger was foreseeable. *Wiley v. Redd*, 110 Nev. 1310, 1316, 885 P.2d 592, 596 (1994). Because Bahrampour fails to allege any sort of special relationship between himself and SNC, the district court appropriately dismissed this claim. *See Breliant*, 109 Nev. at 846, 858 P.2d at 1260.

With respect to Bahrampour's remaining claims, he fails to challenge the district court's grounds for dismissing them, and he has therefore waived the issues. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived). Specifically, Bahrampour's complaint relies on a theory of negligence per se, *see Ashwood v. Clark Cty.*, 113 Nev. 80, 86, 930 P.2d 740, 743-44 (1997) (providing that a plaintiff may establish negligence per se if the defendant violated a statute intended to protect a class of persons to which the plaintiff belongs and the injury is of the kind the statute was intended to protect), but on appeal, he fails to challenge the district court's determination that none of the statutes identified in his complaint apply to SNC because it was not the entity allegedly using the

weapon against him. Similarly, with respect to his claim for invasion of privacy, Bahrampour fails to challenge the district court's determination that he failed to allege that SNC at any point used the weapon to intrude on his seclusion. *See PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630, 895 P.2d 1269, 1279 (1995) (providing that a plaintiff may recover for invasion of privacy by intrusion upon seclusion only where the defendant intentionally intruded upon the plaintiff's seclusion in a manner that would be highly offensive to a reasonable person), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997).

Bahrampour further fails to challenge the district court's determination that, because he fails to allege that SNC actually used the weapon against him, SNC cannot be held liable for infliction of emotional distress, *see Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993) (providing that, under theories of both intentional and negligent infliction of emotional distress, the defendant must have caused the plaintiff to suffer serious emotional distress), or strictly liable for ultrahazardous conduct. *See Valentine v. Pioneer Chlor Alkali Co.*, 109 Nev. 1107, 1110, 864 P.2d 295, 297 (1993) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." (internal quotation marks omitted)). And he likewise fails to challenge the district court's determination that he was not a buyer of SNC's goods and therefore has no claim for breach of the implied warranty of merchantability. *See* NRS 104.2314(1) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."). Accordingly,

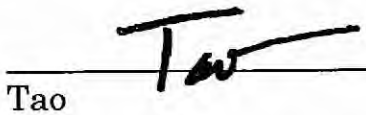
all of these issues are waived. *Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

Finally, Bahrampour contends that the district court should have granted leave to amend when it dismissed his claims. But a review of the record on appeal does not demonstrate that he requested this relief below, and he has therefore waived the issue. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."); *Woodstock v. Whitaker*, 62 Nev. 224, 230, 146 P.2d 779, 781 (1944) ("[N]ot having requested the [district] court for permission to amend, the appellant will be deemed to have elected to stand on his [pleading] as originally filed.").

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
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cc: Hon. Egan K. Walker, District Judge
Afshin Bahrampour
Holland & Hart LLP/Reno
Washoe District Court Clerk