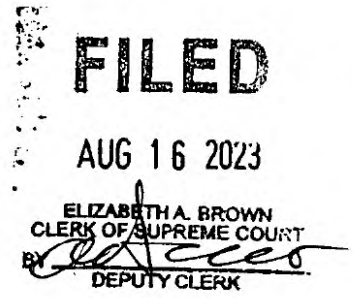
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BENJAMIN CRUMEDY, AN INDIVIDUAL,
Appellant,
vs.
FIDELIS HOLDINGS, LLC, D/B/A PISOS DISPENSARY, A DOMESTIC LIMITED-LIABILITY COMPANY,
Respondent.

No. 84733-COA



ORDER OF AFFIRMANCE

Benjamin Crumedy appeals from a district court order granting summary judgment in a tort case. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Chief Judge.

In March 2018, Crumedy, his girlfriend, and a man he met on a bus that afternoon visited the Pisos Dispensary. Respondent Fidelis Holdings, LLC, does business as Pisos Dispensary. Crumedy did not realize there was a line to enter the dispensary, so he attempted to walk through the front door. A Pisos security guard stopped him and directed him to go to the end of the line. Instead, Crumedy went to a nearby smoke shop where he purchased paper to roll marijuana cigarettes, as he already had some marijuana in his possession. After purchasing the paper, Crumedy walked past the dispensary on his way to a parking lot behind the dispensary. A fence separated the dispensary premises from the parking lot.

Three people, who Crumedy believed worked for the dispensary, exited the store and one of them approached Crumedy, who was now in the parking lot, and accused him of attempting to sell marijuana to the people

in line.[1] Crumedy denied the allegation, but the verbal altercation continued. According to Crumedy, the security guard, Eric Marshall, would not leave Crumedy and the others alone, so his girlfriend shouted at Marshall to leave them alone. Crumedy stated that his girlfriend also used expletives while shouting at Marshall. Crumedy called Marshall "an ignorant nigga." Next, Marshall jumped over a fence separating the dispensary from the parking lot, and confronted Crumedy in the parking lot. Marshall punched Crumedy in the face, knocking him down and causing him to hit his head on the ground. Crumedy lost consciousness for about ten seconds. While Crumedy was unconscious, his girlfriend called the police. Crumedy was punched at approximately 4:26 p.m., and Marshall clocked out from his work at the dispensary at 4:21 p.m. before the incident. The punch was captured by a surveillance camera, and the police took the recording into evidence.

The police and an ambulance arrived and Crumedy was taken to the hospital. Crumedy was diagnosed with a head contusion and told to follow up with his primary care physician.

In March 2020, Crumedy filed a complaint against Fidelis alleging the following causes of action: (1) failure to properly maintain the premises; (2) failure to warn plaintiff of the dangerous and hazardous conditions on the premises; (3) failure to provide proper and adequate security on the premises which allowed for dangerous and hazardous conditions to emerge and exist; (4) negligent hiring, training, and supervision; and (5) respondeat superior. Following the completion of discovery, Fidelis filed a motion for summary judgment after discovery was

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[1]Only the behavior of the off duty security guard, Eric Marshall, is at issue in this appeal.

completed.[2] The district court granted the motion in respect to all causes of action. The district court found that, even when viewing the evidence in the light most favorable to Crumedy, Crumedy presented no evidence to support any of his claims.

Crumedy now appeals and argues that the district court erred when it granted summary judgment as to his respondeat superior claim but does not argue that the district court erred in regard to his other causes of action. We disagree with Crumedy's assertion that the district court erred in granting summary judgment as to his respondeat superior claim.

Crumedy specifically argues that the question of whether Marshall was acting within the course and scope of his employment and whether his conduct was reasonably foreseeable involves a dispute of material fact. Fidelis argues that Crumedy waived his argument on appeal because he failed to make an argument regarding the respondeat superior claim in his opposition to the motion for summary judgment.[3] Fidelis also argues that there is no evidence to suggest that Marshall was acting within the course and scope of his employment when he punched Crumedy.

We review 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 should be granted "if the movant shows that

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[2]Only Fidelis actually engaged in discovery.

[3]A review of the record reveals that Fidelis is incorrect and Crumedy did respond to this argument in his opposition to summary judgment. While it is true that Crumedy did not develop the argument and merely made the conclusory statement that "scope" is a legal definition that needs analysis by a jury, this is still a response to Fidelis's argument that summary judgment should be granted. Accordingly, Crumedy did not waive this argument.

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "[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." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. And "[i]n evaluating the propriety of a summary judgment, we review the evidence in the light most favorable to the party against whom judgment was rendered." *Epperson v. Roloff*, 102 Nev. 206, 208, 719 P.2d 799, 801 (1986).

To prevail on a theory of respondeat superior, Crumedy must establish both that (1) the employee who caused the injury was under the employer's control, and (2) the act occurred within the scope of employment. *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Generally, this presents a question of fact for the jury. *See Kornton v. Conrad, Inc.*, 119 Nev. 123, 125, 67 P.3d 316, 317 (2003) (addressing the scope of employment); *Molino v. Asher*, 96 Nev. 814, 816-18, 618 P.2d 878, 879-80 (1980) (addressing factual questions regarding the control and the scope of employment).

Summary judgment may nevertheless be appropriate where undisputed evidence establishes the employee's status at the time of the incident. *See Molino*, 96 Nev. at 817-18, 618 P.2d at 879-80 (concluding that summary judgment was proper where the undisputed evidence established that, as to the scope and course of employment, the employer could not be liable under the respondeat superior doctrine). Additionally, an employer is not liable for injuries caused by the intentional conduct of its employee if the employee's conduct was "truly [an] independent venture[;] . . . not committed in the course of the very task assigned to the employee; and . . . [w]as not reasonably foreseeable under the facts and circumstances

of the case considering the nature and scope of his or her employment." NRS 41.745(1)(a)-(c).

It is undisputed that Marshall was an employee of Fidelis and had ended his shift as a security guard for Pisos and clocked out several minutes before he punched Crumedy. No evidence suggests that Marshall was acting within the scope of his employment at the time of the incident. Marshall had clocked out, and Crumedy has failed to provide any evidence that suggests that Marshall was expected to continue working as a security guard when off duty, or that Fidelis ratified or approved Marshall's off duty conduct. *Cf. Rockwell*, 112 Nev. at 1226, 925 P.2d at 1181 (explaining that summary judgment was not proper when one affidavit stated that off duty employees were still expected to respond to emergency situations and a contradicting affidavit stated that off duty employees had no obligations to respond to emergencies).

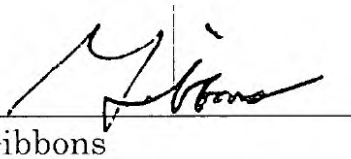
While Crumedy is correct that an employer may still be liable when an employee has been subject to verbal abuse or provocation and reacts and injures someone, the case Crumedy relies on is factually distinct from the matter before this court. *See Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970). In *Prell*, the employee, a blackjack dealer, never left the blackjack table and was on the clock when he punched a customer who insulted him. *Id.* at 392, 469 P.2d at 400. This is distinguishable from the facts in Crumedy's case because Marshall was off duty and no longer on the premises when he punched Crumedy. Marshall's actions, unlike the dealer's, occurred outside the scope of his employment. *See also J. C. Penney Co. v. Gravelle*, 62 Nev. 434, 155 P.2d 477 (1945) (holding that an *on duty* security guard acted outside the scope of his

employment when he punched a bystander for interfering with the pursuit of a shoplifter).

Finally, Crumedy failed to produce any evidence that Marshall's off duty conduct was foreseeable to Fidelis. The "conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury." NRS 41.745(1). While Crumedy is correct that it is foreseeable that a security guard might have to use force in the course of their job performance, Crumedy failed to produce any evidence to show that Marshall's conduct should have been foreseeable to Fidelis. Additionally, Marshall was off duty and off premise at the time of the incident. Therefore, we conclude that the district court did not err by granting Fidelis's motion for summary judgment.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Jerry A. Wiese, Chief Judge
Patrick N. Chapin, Settlement Judge
Eric Blank Injury Attorneys
Clark Hill PLLC
Eighth District Court Clerk