

Third District Court of Appeal

State of Florida

Opinion filed February 19, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-300
Lower Tribunal No. 16-9731

The Waves of Hialeah, Inc.,
Appellant,

vs.

Julia Machado, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz,
Judge.

Luks, Santaniello, Petrillo & Cohen, and Daniel J. Santaniello, and Daniel S.
Weinger (Fort Lauderdale), for appellant.

The Haggard Law Firm, P.A., and James C. Blecke, for appellees.

Before SALTER, FERNANDEZ and LOGUE, JJ.¹

¹ Judge Salter and Judge Logue did not participate in oral argument.

PER CURIAM.

The Waves of Hialeah, Inc. (“The Waves”) appeals the final judgment and three trial court’s orders denying its renewed motion for directed verdict, motion for remittitur, and motion for new trial. The Waves claims error on eight separate issues, but only two merit discussion, the trial court’s directed verdict on The Waves’ Fabre² defense based on the undertaker’s doctrine, and the trial court’s exclusion of evidence of drug use on the part of the deceased victim. Finding no reversible error, we affirm.

Julia Machado and Rafael Guevara (collectively, “Guevara Machado”), the plaintiffs below, are the parents and co-representatives of the estate of Yaimi Guevara Machado (“Yaimi”). The Waves owns and operates the Chesapeake Motel in Hialeah, Florida.

On April 9, 2016, Yaimi and a friend, Jorge Luis Napoles (“Napoles”), had spent the day drinking, and, at some point, Yaimi lost her phone. Around 11:00 p.m., the two arrived at the motel. Yaimi was intoxicated. Napoles paid for a room and purchased two condoms and a bottle of vodka in the motel’s lobby. After the two had relations, Napoles received a message that Yaimi’s phone was found at a restaurant. Napoles left the motel to retrieve Yaimi’s phone. Yaimi and Napoles had an argument as Napoles was leaving. The argument spilled outside of their room,

² Fabre v. Marin, 623 So. 2d 1182, 1183 (Fla. 1993).

room 106, and the key remained inside, thereby locking them out. Before leaving the motel, Napoles asked the front desk attendant to open the door to room 106. Motel security went to unlock the door but no one was there. Napoles never actually returned to the motel, he went to a strip club instead.

Meanwhile, as Yaimi waited for Napoles to return, an intoxicated Ronald Andrade (“Andrade”) arrived at the motel around 4:30 a.m. and asked the motel’s receptionist if the motel had “any women.” Shortly thereafter, at 4:50 a.m., Yaimi appeared at the front desk requesting that room 106 be opened, but the receptionist refused per the motel’s security policy. At this same time, Andrade approached and harassed a housekeeper in room 104. The motel’s security was warned by the housekeeper about Andrade, but security did not remove him from the premises.

As Andrade exited room 104, Yaimi was knocking on the door to room 106. Andrade requested that the motel’s receptionist give him a key to room 106, but she again refused because Yaimi was not a registered guest. Thereafter, Yaimi and Andrade were seen walking around the motel together and they appeared to be friendly.

In a final effort to gain access to room 106, Yaimi, this time accompanied by Andrade, again asked the receptionist to unlock the door. The receptionist rejected this request as well. Yaimi and Andrade then began walking towards an area of the motel consistent with the direction of Andrade’s home. That was the last time Yaimi

was seen alive. By his own admission, Andrade murdered Yaimi but only had a vague recollection of what occurred on the night in question.

Guevara Machado filed the instant wrongful death action against The Waves alleging premises liability, more specifically, negligent security. The Waves asserted the affirmative defenses of comparative fault and the drug and alcohol defense as per section 768.36, Florida Statutes (2019). The jury ultimately returned a verdict for the plaintiffs in the amount of \$12,000,000.00, finding The Waves wholly at fault.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. Int'l Sec. Mgmt. Grp., Inc. v. Rolland, 271 So. 3d 33, 44 (Fla. 3d DCA 2018).

Prior to trial, the plaintiffs sought to preclude The Waves from referencing the fact that trace amounts of cocaine and benzodiazepine were found in Yaimi's system. Relying on State v. McClain, 525 So. 2d 420 (Fla. 1988), the plaintiffs argued that the probative value of the drug evidence was substantially outweighed by its prejudicial effect because The Waves' experts could not testify as to Yaimi's level of intoxication. The Waves' expert toxicologist testified that the amount of drugs in her system, other than alcohol³, was unquantifiable. The Waves, on the

³ The plaintiffs stipulated that Yaimi's blood alcohol level was above the legal limit and the jury was informed of this fact, so the fact of Yaimi's impairment was squarely before the jury on the question of comparative negligence. Nevertheless, the jury answered "no" to the question on the verdict form asking if Yaimi was comparatively negligent.

other hand, contended that the evidence of Yaimi's drug usage was relevant to its comparative fault and drug and alcohol defenses. In this connection, The Waves proffered that its toxicologist would testify that the combination of drugs and alcohol negatively impacted Yaimi's judgment. During plaintiff's voir dire examination of the toxicologist, however, he conceded that he did not know the concentration of the trace amounts and that the quantification of trace amounts was unreliable from the assay performed. Ultimately, the trial court granted the plaintiff's motion, without prejudice, reasoning that the evidence appeared to be a "character assassination" and only slightly relevant.

At trial, The Waves again proffered the toxicologist's testimony that Yaimi's judgment would have been affected by the combination of the drugs and alcohol and moved for reconsideration on the issue. Again, the trial court excluded the evidence.

In order for evidence to be admissible, it must be relevant; i.e., "tending to prove or disprove a material fact." §§ 90.401, 90.402, Fla. Stat. (2019). Relevant evidence may be excluded when its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2019). Indeed, "evidence of illegal drug use is inherently prejudicial," R-L Sales, LLC v. Hoce, 276 So. 3d 434, 435 (Fla. 1st DCA 2019) (citations omitted). As such, evidence of an unquantifiable trace amount of drugs can be excluded under section 90.403. See,

e.g., McClain, 525 So. 2d at 423. Concluding that the trial court did not abuse its discretion under the circumstances, we find no error.

At the conclusion of the presentation of evidence, the plaintiffs made an *ore tenus* motion for a directed verdict seeking to exclude Napoles as a Fabre defendant, contending that Napoles owed no duty to Yaimi. The plaintiffs specifically argued that Napoles was under no duty to control the actions of a third party. The Waves, on the other hand, contended that Napoles undertook a duty when he agreed to retrieve Yaimi's phone because he knew that Yaimi was impaired. The trial court granted the plaintiff's motion, and Napoles was not included as a Fabre defendant on the verdict form.

A trial court's ruling on a motion for a directed verdict is reviewed *de novo*, with the evidence evaluated in the light most favorable to the nonmoving party. Competitive Softball Promotions, Inc. v. Ayub, 245 So. 3d 893, 895 (Fla. 3d DCA 2018). Similarly, whether a legal duty existed is a question of law that is reviewed *de novo*. Id.

Fabre established that a defendant may reduce its responsibility by the degree of negligence of a nonparty to the action. Fabre, 623 So. 2d at 1187. In order to place the nonparty on the verdict form, the defendant bears the burden of presenting evidence at trial that the nonparty's negligence contributed to the accident. Nash v. Wells Fargo Guard Servs., Inc., 678 So. 2d 1262, 1264 (Fla. 1996).

The Waves argues that the undertaker's doctrine applies because Napoles undertook the duty to aid and protect Yaimi by ensuring that the door to room 106 would be opened. See Restatement (Second) of Torts § 324 (1965); Estate of Massad ex rel. Wilson v. Granzow, 886 So. 2d 1050, 1053 (Fla. 4th DCA 2004). However, Napoles' request that the room be opened and his subsequent departure, do not, without more, constitute taking charge of Yaimi to the extent that the undertaker's doctrine is implicated.

“The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader ‘zone of risk’ that poses a general threat of harm to others.” McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992). When a person creates a “generalized and foreseeable risk of harming others,” a legal duty will arise. Id. at 503; Dorsey v. Reider, 139 So. 3d 860, 865-66 (Fla. 2014).

Generally, a person's duty does not extend to preventing a third party from causing physical harm to another. Dorsey, 139 So. at 864. There are two exceptions to this general rule. Knight v. Merhige, 133 So. 3d 1140, 1145 (Fla. 4th DCA 2014). The first is the “special relationship” exception, which is inapplicable here. Id.; Boynton v. Burglass, 590 So. 2d 446, 448 (Fla. 3d DCA 1991), as amended on denial of reh'g (Dec. 24, 1991). In the absence of a special relationship between the plaintiff and defendant, a duty to protect the plaintiff from third-party conduct will arise if the defendant is in actual or constructive control of: (1) the instrumentality of the

harm; (2) the premises upon which the tort is committed; or (3) the person who committed the tort. Dorsey, 139 So. 3d at 864.

Here, Napoles had no actual or constructive control over the instrumentality, premises on which the tort was committed, or the tortfeasor. Importantly, Napoles was not present when the murder occurred and was unable to prevent the injury. Indeed, The Waves controlled the premises. Napoles only rented a room that was located within the premises. Accordingly, he cannot be liable for Andrade's criminal acts and the trial court correctly granted the motion for a directed verdict.

Affirmed.