

**Wood v. Safeway, Inc., 121 Nev. Adv. Op. 73,
121 P.3d 1026 (Oct. 20, 2005)¹**

CIVIL LAW – SUMMARY JUDGMENT & EMPLOYER LIABILITY

Summary

A mentally handicapped female working for Safeway Stores, Inc. was sexually assaulted at work by an employee of a company that provided janitorial services for Safeway. The assaults occurred in a storage room and in the parking lot while she was gathering shopping carts. She filed a complaint against Safeway and the janitorial company, Action Cleaning, alleging five causes of action as a result of the sexual assault. The district court granted summary judgment in favor of Safeway, determining that Safeway was immune from suit because of coverage provided by the Nevada Industrial Insurance Act (the “NIIA”). The district court also granted summary judgment in favor of Action Cleaning pursuant to NRS 41.745 because it was not liable for intentional torts committed by its employee and because the employee’s intervening criminal acts were a superseding cause that relieved Action Cleaning of responsibility.

The Nevada Supreme Court concluded that the district court properly granted summary judgment in favor of Safeway and Action Cleaning. The Court also took the opportunity to clarify that the “slightest doubt” standard in Nevada’s summary judgment jurisprudence was an incorrect statement of the law and should no longer be used when analyzing motions for summary judgment. The Court formally adopted the federal standard for summary judgment.

Issue and Disposition

Issues

1. Should Nevada courts follow the slightest doubt standard when considering a motion for summary judgment?
2. Does a sexual assault on an employee fall under the provisions of the NIIA, thus making the employer immune from a private suit?
3. Does NRS 41.745 relieve an employer of liability for injuries caused by an employee’s intentional conduct?
4. Does an employee’s intervening criminal act relieve the employer of liability for injuries caused by that act?

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Dispositions

1. No. Nevada formally adopts the federal standard of summary judgment. Summary judgment is available when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.
2. Yes. When the sexual assault arises out of and in the course of employment, the employee's injuries fall within the coverage of the NIIA.
3. Yes. Under NRS 41.745, if an employee's intentional actions were independent and not within the scope of employment, the employer is not liable for injuries caused by those actions.
4. Yes. A negligence action will not stand if there is an unforeseeable intervening cause that in and of itself is the cause of the harm.

Commentary

State of Nevada Law Before *Wood*

Summary Judgment

Since 1954, the "slightest doubt" standard has been part of Nevada's summary judgment analysis.² Although the Court has continued to use that standard, other courts and commentators have criticized it as unduly limiting the use of summary judgment.

Employer Liability for a Sexual Assault on its Employee

The exclusive remedy for employees injured on the job in Nevada is the NIIA. An employer is immune from suit by an employee for injuries that arise out of and in the course of employment. An injury arises out of employment when there is a causal connection between the employee's injury and the nature of the work or workplace. An injury occurs within the course of the employment if the "injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties."³

Nevada has previously used a test that is analogous to the incidental or increased risk test when holding that a sexual assault upon an employee arises out of the employment.⁴ This test "looks to whether the risk of harm is related to the conditions of employment or whether the employment increased the risk to the employee."⁵ However, the NIIA does not apply when the dispute culminating in the assault is brought into the workplace from the injured employee's private life, as long as the dispute is not worsened by the employment.

² Parman v. Petricciani, 272 P.2d 492, 496 (Nev. 1954).

³ Wood v. Safeway, Inc., 121 P.3d 1026, 1032 (2005).

⁴ See Cummings v. United Resort Hotels, Inc., 449 P.2d 245, 248 (Nev. 1969); McColl v. Scherer, 315 P.2d 807 (Nev. 1957).

⁵ Wood, 121 P.3d at 1032-33.

Employer Liability for Intentional Actions of Employees

NRS 41.745 specifically addresses situations where an employer is not liable for harm caused by an employee's intentional conduct. NRS 41.745(1) provides:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
 - (a) Was a truly independent venture of the employee;
 - (b) Was not committed in the course of the very task assigned to the employee; and
 - (c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, 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.

Before NRS 41.745, the Nevada Supreme Court had stated that the intentional conduct of an employee relieves an employer of liability if “the employee's tort is truly an independent venture of his own and not committed in the course of the very task assigned to him.”⁶ The Court had also recognized if “the willful tort is committed in the course of the very task assigned to the employee,” then it would be appropriate for the employer to be liable.⁷ These two holdings are codified in NRS 41.745(1)(a) and (b).

NRS 41.745 also has a foreseeability requirement. This requirement raises the standard and makes employers liable only if an employee's intentional conduct is reasonably foreseeable under the circumstances. The victim here asserted that the attacker's actions were foreseeable because “Action Cleaning's workforce [was] highly transient and not adequately trained or supervised, and because much of Action Cleaning's workforce . . . [were] illegal aliens.”⁸

The Court noted, however, that under NRS 41.745(1), an employee's conduct “is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.”⁹ The Court further noted that whether an intentional act is reasonably foreseeable depends on whether one has reason to anticipate such an act and the resulting injury.

Here, it was not reasonably foreseeable that an employee would sexually assault a Safeway employee. The employer conducted background checks, and no complaint of sexual assault had been lodged against any employees. Moreover, the assault was caused by the attacker's independent acts and was not within the course and scope of his employment. Therefore, under NRS 41.745, the employer was not liable for the intentional conduct of its employee.

⁶ *Id.* at 1035.

⁷ *Id.*

⁸ *Id.* at 1036.

⁹ *Id.*

Intervening Criminal Act of Employee

An employee's "criminal act is a superseding cause unless it involves a foreseeable hazard to a member of a foreseeable class of victims."¹⁰ The issue here was whether the specific crime of sexual assault by an employee was reasonably foreseeable to the employer under the circumstances. Because the Court had already concluded that the attacker's criminal actions were not reasonably foreseeable, it also concluded that his criminal actions were an intervening act relieving the employer of liability.

Effect of *Wood* on Current Nevada Law

Summary Judgment

In *Wood*, the Nevada Supreme Court took the opportunity to abrogate the viability of the "slightest doubt" standard. The Court adopted the federal standard for summary judgment, stating:

Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.¹¹

The Court went on to clarify that while the pleadings and other proof must be construed in a light most favorable to the nonmoving party, to avoid summary judgment in favor of the moving party, the nonmoving party bears the burden to do more than just show that there is some doubt as to the facts. The nonmoving party must set forth specific facts demonstrating the existence of a genuine issue for trial.

Employer Liability for a Sexual Assault on its Employee

The Nevada Supreme Court reinforced its prior case law, affirming the incidental or increased risk test. In *Wood*, it was undisputed that the employee's employment brought her into contact with her assailant. Her job duties included cleaning different areas of the store and collecting shopping carts from the parking lot. Two of the sexual assaults occurred while she was collecting carts from a lot, and the other occurred in a cleaning supply room. Because of these locations, the Court concluded "that Doe's employment contributed to and increased the risk of assault beyond that of the general public. Her only contact with [her attacker] was through her employment."¹² These sexual assaults were not brought into the workplace or the result of motivations unrelated

¹⁰ *Id.* at 1037.

¹¹ *Id.* at 1031.

¹² *Id.* at 1034.

to the employment. Consequently, the Court held that the incidental or increased risk test brought the employee's injury within the coverage of the NIIA.

Employer Liability for Intentional and Criminal Actions of Employees

Wood does not alter Nevada law in these areas. Nevertheless, it clarifies that an employer is not liable for the unforeseeable intentional actions of an employee and that an employee's criminal act constitutes a superseding cause further relieving an employer of liability.

Other Jurisdictions

The employee argued that sexual gratification was a personal and private motive and that her rape occurred either because of her assailant's individual attraction to her or because he preyed upon her because of her mental disability. She urged the Court to adopt the rule from *Villanueva v. Astroworld, Inc.*¹³

In *Villanueva*, the Texas Court of Appeals held that the rape of an employee by a co-employee raised genuine issues of fact as to whether the victim's injuries arose out of her employment. The Texas court noted that "[s]urely it would be going too far to say that every assault arises out of the employment if it can be proved that the acquaintance of the parties came about through the employment."¹⁴ The court then stated the general rule that "an injury does not arise out of one's employment if the assault is not connected with the employment, or is for reasons personal to the victim as well as the assailant."¹⁵

The Nevada Supreme Court declined to follow this rule, as under this formulation the exception would swallow the rule. The Court noted:

It would be irrelevant whether there [was] a causal link between the employment and the assault because every sexual assault could be said to arise from privately held motivations. Thus, every sexual assault would fall outside the purview of the NIIA, leaving workplace-related sexual assaults uncovered under the NIIA. This court is reluctant to accept such a broad formulation of the rule. Instead, we adopt the rule that the sexual assault of an employee falls within the NIIA if the nature of the employment contributed to or otherwise increased the risk of assault beyond that of the general public.¹⁶

The Court further held that a sexual assault would not be within the NIIA, if "the animosity or dispute which culminates in the assault is imported into the place of employment from the injured employee's private or domestic life . . . at least where the animosity is not exacerbated by the employment."¹⁷

¹³ 866 S.W.2d 690 (Tx. Ct. App. 1993).

¹⁴ *Id.* at 695.

¹⁵ *Id.*

¹⁶ *Wood*, 121 P.3d at 1034.

¹⁷ *Id.* quoting *Commercial Standard Ins. Co. v. Marin*, 488 S.W.2d 861, 863 (Tx. Civ. App. 1972).

Conclusion

Nevada courts will follow the federal standard for summary judgment and not the “slightest doubt” standard previously used in Nevada’s summary judgment consideration. Also, the NIIA provides the exclusive remedy when an employee’s injuries from sexual assault arise out of and in the course of employment. In addition, an employer is not responsible for an employee’s actions if those actions are independent and not committed within the course and scope of employment, and not reasonably foreseeable under the circumstances. An employee’s intervening criminal actions are a superseding cause further relieving the employer of liability.