

Third District Court of Appeal

State of Florida

Opinion filed July 29, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-453
Lower Tribunal No. 16-737-PK

Curtis Luckman, etc.,
Appellant,

vs.

Alfred Harris Wills, III, et al.,
Appellees.

An Appeal from the Circuit Court for Monroe County, Luis M. Garcia, Judge.

Bushell Law, P.A., and Daniel A. Bushell (Fort Lauderdale), for appellant.

Lydecker Diaz, and Forrest L. Andrews and Brandon L. Fernandez, for appellee Northwood Investors & Northwood Hospitality LLC d/b/a Cheeca Lodge & Spa.

Before FERNANDEZ, SCALES and GORDO, JJ.

SCALES, J.

Appellant Curtis Luckman, executor of the estate of Michael Ianniello (“Decedent”), brought a wrongful death action against appellee Northwood Investors & Northwood Hospitality, LLC (“Cheeca Lodge”).¹ The trial court granted summary judgment to Cheeca Lodge. We affirm because Cheeca Lodge did not owe the alleged duty of care to Decedent.

I. Relevant Facts and Procedural History

On December 20, 2015, Decedent was a guest at Cheeca Lodge in Islamorada, Florida. Cheeca Lodge is located on the east side of U.S. 1, a two-lane highway running north and south, and flanking Cheeca Lodge. A local, public road called Old Highway 1 also runs north and south between U.S. 1 and Cheeca Lodge. The Trading Post, a grocery store, is located on the west side of U.S. 1. Cheeca Lodge offered guests a complimentary shuttle service to take them to destinations within two miles of the resort, including across U.S. 1 to the Trading Post. Cheeca Lodge also offered a golf cart service to take guests around its property. The golf cart service, however, was prohibited from traveling on public roads beyond Cheeca Lodge’s property but could cross Old Highway 1 to pick up and drop off guests on the east side of U.S. 1.

On the night of the accident that cost Decedent his life, Decedent got into a golf cart and asked Cheeca Lodge bellman Alex Rifice for a ride. Rifice at first did

¹ The amended complaint also named Alfred Harris Wills (“Wills”) as a defendant, but he is not a party in this appeal.

not know Decedent's destination, but once they were underway Decedent explained that he wanted to go to The Trading Post. The record does not reflect whether Decedent had sought to use the shuttle service. Consistent with Cheeca Lodge's policy on golf cart use, Rifice drove Decedent through the Cheeca Lodge gate and across Old Highway 1, stopping about twenty feet from U.S. 1. Decedent exited the golf cart and, while waiting to cross U.S. 1 on foot, was struck by a vehicle driven by Wills. Before passing away, Decedent filed this negligence action against Wills and Cheeca Lodge. After Decedent's death on April 15, 2017, Luckman was substituted as plaintiff and amended the complaint to assert a wrongful death claim.

In counts III (negligence against Cheeca Lodge) and IV (wrongful death against Cheeca Lodge) of the amended complaint, Luckman maintains that Cheeca Lodge undertook a duty to transport Decedent to The Trading Post in a reasonably safe manner, and that it failed to warn Decedent of the dangers of U.S. 1 when its employee dropped Decedent off on the east side of U.S. 1 to cross the highway. Cheeca Lodge moved for summary judgment and argued that, as a matter of law: (i) its conduct did not create a foreseeable zone of risk; (ii) its policy of transporting guests did not include or establish a legal duty to transport guests to The Trading Post by golf cart; (iii) it did not breach any duty it owed to Decedent; and (iv) the danger of crossing a busy U.S. 1 at night was an open and obvious danger to Decedent.

In opposition to Cheeca Lodge’s motion, Luckman filed an affidavit of Dr. Rick A. Swope who was retained as an expert witness in the field of “accident reconstruction and forensic engineering as well as liability related issues.” Dr. Swope attested that he “visited the scene, reviewed documents, performed research concerning the roadway where the action occurred, researched other similar accidents . . . and consulted relevant literature.” Dr. Swope asserted that Cheeca Lodge “had a greater knowledge of the dangers involved with crossing [U.S. 1],” that it “had a duty to warn [Decedent] of the dangers of [U.S. 1],” that it “failed to use reasonable care” in transporting Decedent, and that Decedent would not have been struck if Cheeca Lodge had transported Decedent across U.S. 1. Cheeca Lodge filed a motion to strike Dr. Swope’s affidavit because his opinions were “speculative, not supported by facts, unsupported by record evidence, based on insufficient data, and littered with legal conclusions that implicate issues within the purview of the court.”

On January 14, 2019, the trial court conducted a hearing on Cheeca Lodge’s summary judgment motion. Cheeca Lodge argued that Decedent was not on Cheeca Lodge’s property when the accident occurred; it did not take Decedent onto U.S. 1; it does not own any property on the west side of U.S. 1; and it has no business relationship with The Trading Post. Luckman responded that Cheeca Lodge has a policy of complimentary transportation within two miles of the premises; it

undertook a duty to transport Decedent off Cheeca Lodge's premises when its employee crossed Old Highway 1, dropped Decedent on the edge of its property, and advised him to cross U.S. 1; and it failed to warn Decedent of any dangers of crossing U.S. 1.

At the summary judgment hearing, the trial court struck Dr. Swope's affidavit and subsequently granted Cheeca Lodge's motion for summary judgment and, on January 31, 2019, entered final judgment for Cheeca Lodge. Luckman timely appealed the judgment, challenging both rulings.

II. Analysis²

A. Duty of Care

Cheeca Lodge can be liable to Luckman for negligence only if Cheeca Lodge owed a duty of care to Decedent to ensure his safe crossing of U.S. 1. Jenkins v. W. L. Roberts, Inc., 851 So. 2d 781, 783 (Fla. 1st DCA 2003) (affirming summary judgment because defendant owed no legal duty to plaintiff in a wrongful death action). Generally, whether a defendant owes a duty of care to a plaintiff is a question of law for the court. See Sch. Bd. of Miami-Dade Cty. v. Martinez-Oller, 167 So. 3d 451, 453 (Fla. 3d DCA 2015). Hence, we focus our analysis on whether the conduct

² "The granting of summary judgment is subject to de novo review." Rocamonde v. Marshalls of Ma, Inc., 56 So. 3d 863, 864 (Fla. 3d DCA 2011). A trial court's evidentiary ruling that excludes an affidavit is reviewed for an abuse of discretion. Fuentes v. Sandel, Inc., 189 So. 3d 928, 935 (Fla. 3d DCA 2016).

of Cheeca Lodge created a foreseeable zone of risk such that it owed a duty of care to Decedent. “Where a defendant’s conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.” McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992) (quoting Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989) (emphasis in original)).

The record reflects that: (i) Cheeca Lodge operated different complimentary transportation services to local destinations, including destinations on the west side of U.S. 1; (ii) Cheeca Lodge did not own any property on the west side of U.S. 1; and (iii) the golf cart service, at issue in this case, was prohibited on public roads beyond Cheeca Lodge’s property but could cross Old Highway 1 to drop off its guests. The employee brought Decedent across Old Highway 1 to the edge of Cheeca Lodge’s premises and stopped before reaching U.S. 1. Decedent then voluntarily, and with tragic consequences, attempted to cross U.S.1 to visit The Trading Post.

Viewing the summary judgment evidence *de novo*, and in the light most favorable to Luckman, we agree with the trial court’s conclusion that Cheeca Lodge did not create a foreseeable zone of risk by dropping off Decedent on the east side of U.S. 1, and therefore, Cheeca Lodge owed Decedent no duty of care with respect to any potential danger of crossing U.S. 1. Cheeca Lodge safely transported Decedent to the edge of U.S. 1 in the golf cart. It did not undertake to transport

Decedent beyond the golf cart's allowable limits. Once Decedent voluntarily disembarked from the golf cart, Cheeca Lodge owed no further duty of care to him. See Angulo v. Szklaver, 746 So. 2d 562, 563 (Fla. 3d DCA 1999) (concluding that a bus driver owes no duty of care to a passenger who safely disembarks from the bus); Cecil v. D'Marlin, Inc., 680 So. 2d 1138, 1138 (Fla. 3d DCA 1996) (determining that a bus driver did not create a "foreseeable zone of risk" when the passenger disembarked the bus and attempted to cross U.S. 1); Sheir v. Metro. Dade Cty., 375 So. 2d 1114, 1117 (Fla. 3d DCA 1979) (holding that the deceased was no longer a passenger once he disembarked from the bus and that "there is no authority to support . . . that a busdriver [sic] has a duty to warn passengers who have safely alighted the bus of a possible danger beyond that point"); see also Paneque v. Metro. Dade Cty., 478 So. 2d 414, 415 (Fla. 3d DCA 1985) (holding that the county was not subject to liability for failing to warn pedestrians of a danger that was readily apparent).

In sum, Decedent's death was not caused by Cheeca Lodge's breach of any duty of care it owed to Decedent. Therefore, the trial court did not err in granting summary judgment for Cheeca Lodge.

B. Striking of Affidavit

Luckman argues that the trial court erred by striking Dr. Swope's affidavit filed in opposition to Cheeca Lodge's summary judgment motion. Given our

conclusion, above, we ordinarily would not reach this issue. We address it briefly, though, to provide guidance to the bench and bar regarding the permissible scope of an expert's affidavit. Dr. Swope's affidavit provided his opinions as to Cheeca Lodge's greater knowledge of dangers about crossing U.S. 1, and Cheeca Lodge's failure to act reasonably in transporting Decedent. Dr. Swope's affidavit, however, also contained Dr. Swope's own *legal opinion* regarding the duty of care Cheeca Lodge owed to Decedent. To the extent that Dr. Swope's affidavit opined on legal issues that were entirely within the province of the trial court, the trial court did not abuse its discretion in striking Dr. Swope's affidavit. The issue of the existence of legal duty is a question of law that is outside the scope of expert opinion. HSBC Bank USA, Nat'l Ass'n v. Buset, 241 So. 3d 882, 886-87 (Fla. 3d DCA 2018); Citibank, N.A. v. Olsak, 208 So. 3d 227, 229 (Fla. 3d DCA 2016). As this Court has explained, admitting "expert testimony on the legal issues central to the case" is an abuse of discretion. Buset, 241 So. 3d at 886.³

III. Conclusion

Because Cheeca Lodge did not owe a duty of care to Decedent after Decedent left Cheeca Lodge's golf cart and attempted to cross U.S. 1, Cheeca Lodge was

³ We recognize that the trial court struck the entirety of Dr. Swope's affidavit. Because we conclude Cheeca Lodge owed no legal duty to Decedent, we need not, and therefore do not, reach the issue of whether the trial court erred by striking those other portions of the expert's affidavit that might have been appropriate for expert testimony.

entitled to summary judgment as a matter of law. The trial court did not err in striking those portions of Luckman's expert's affidavit purporting to opine on purely legal issues that were within the exclusive province of the trial court.

Affirmed.