

**IN THE APPELLATE COURT OF THE CHOCTAW NATION**

JORGE CUENCA, Plaintiff,

v.

CHOCTAW NATION OF OKLAHOMA,  
Defendant.

Appeal No. AC -2023- 8

District Court No. CV-2020-11

Judge Jones - Author

Appellant, Jorge Cuenca, appeals a judgment of the trial court sustaining the Appellee's, Choctaw Nation of Oklahoma, Motion for Summary Judgment and Subsequent Supplemental Motion for Summary Judgment. The issue before the Court is whether a Plaintiff can establish a viable claim of negligence against an Employer for the actions of security guards, working within the scope of their employment, without an expert witness to provide testimony as to the standard of care required by a security guard when required to confront a patron that may be armed and potentially dangerous.

We, the Choctaw Nation Court of Appeals, find that there is no genuine issue or substantial controversy as to any material fact in the case at bar. Furthermore, the undisputed facts support the trial Court's finding that the Defendant is entitled to a judgment as a matter of law. Therefore, the Order on Defendant's Supplemental Motion for Summary Judgment, as filed of record on September 5, 2023, by the Honorable Judge Amy J. Pierce, is AFFIRMED.

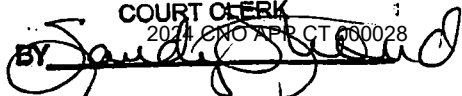
**I. BACKGROUND AND PROCEDURAL HISTORY**

Appellant filed a lawsuit against the Appellee in the District Court of the Choctaw Nation on September 14, 2020. In his Petition, Appellant alleged that on June 6, 2019, he was severely injured by an assault and battery committed upon him by an unknown security personnel, employed by the Appellee, at the Choctaw Casino in Durant Oklahoma. Plaintiff plead causes of action for assault, false imprisonment, and negligence, alleging Appellee failed to exercise ordinary care in the hiring, training, supervising, and maintaining its employees so as to prevent assault and false imprisonment; failing to exercise reasonable care in providing a safe environment for customers; and failing to properly supervise employees and the Appellee's premises. Appellant also sought damages for lost wages and punitive damages.

Appellee filed its first Motion for Summary Judgment on February 21, 2023. A hearing was conducted by the Trial Court on April 6, 2023. At the hearing, the Appellant confessed judgment as to his causes of action for assault, false imprisonment, lost wages and punitive damages.

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The sole remaining cause of action was for Negligence. The Appellee argued that the Court should grant its Motion for Summary Judgment on the grounds that Appellant could not meet his burden, under a claim of negligence, without expert testimony that the security guards failed to act in a reasonably prudent manner under the circumstances.

## II. STANDARD OF REVIEW

Section 686 (C) of the Choctaw Nation Code of Civil Procedure provides that summary judgment should be rendered if there “is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Choctaw Nation District Court Rule 13 provides that a party may move for summary judgment on the grounds that the evidentiary material shows that there is “no substantial controversy as to any material fact.” The Choctaw Nation Code of Civil Procedure is patterned upon the State of Oklahoma Code of Civil Procedure, 12 O.S. § 2056 (C), which is patterned upon Section 56(a) of the Federal Rules of Civil Procedure. Therefore, the Court will adopt both Oklahoma and Federal Common Law in reviewing the trial Court’s decision to grant a summary judgment.

The appellate standard of review on a trial court’s decision to grant summary judgment is *de novo*. The evidentiary materials will be examined to determine what facts are material and whether there is a substantial controversy as to any material fact. All inferences and conclusions to be drawn from the materials must be viewed in a light most favorable to the nonmoving party. Even when the facts are not controverted, if reasonable persons may draw different conclusions from the facts summary judgment must be denied. Summary judgment is proper only if the record reveals uncontroverted material facts failing to support any legitimate inference in favor of the nonmoving party. When genuine issues of material fact exist, summary judgment should be denied and the question becomes one for determination by the trier of fact. Because the trial court has the limited role of determining whether there are such issues of fact, it may not determine fact issues on a motion for summary judgment nor may it weigh the evidence. Tiber v. Verdigris Valley Electric Cooperative, 410 P.3d 1007, ¶ 13 (Okla. 2024).

## III. DISCUSSION

In the case at bar, the following facts were admitted and not controverted by the parties. On January 16, 2019, an individual named Osvaldo Alanis (hereafter “Alanis”) and his wife were traveling from Dallas, Texas, to The Choctaw Nation Resort and Casino in Durant, Oklahoma, in a Nissan Maxima. While driving North on Highway 75, still in Texas, Alanis was involved in an altercation with TJ Royalty (hereafter “Royalty”) and his passengers, who driving in a separate vehicle north bound on Highway 75.

Soon after the altercation occurred, Alanis arrived at the Choctaw Nation Casino and used the valet service to park his Nissan Maxima. Royalty and his passengers also arrived at the Choctaw Nation Casino behind Alanis. Upon seeing Alanis enter the Casino, Royalty reported the incident to Casino Personnel. Royalty advised that Alanis pointed a gun at him and his passengers, while driving north on Highway 75, and made verbal threats to kill the occupants of Royalty's vehicle. Alanis later admitted that he did in fact have a handgun visible to the Royalty vehicle.

Royalty also advised Casino personnel that he believed Alanis entered the Casino with the gun on his person. Royalty described Alanis as a Hispanic male, wearing blue jeans, a blue or dark colored shirt, and a blue or dark colored jacket. At the same time, Appellant was in the Casino as a patron. Appellant conceded that he met the description of Alanis, being a Hispanic male who was also wearing blue jeans, a blue shirt, and a black jacket. In his deposition, Appellant admitted that he did indeed fit the description that Royalty provided to Casino personnel of Alanis.

As Appellant was standing in the buffet cash register area of the Casino, he was approached by four security personnel and, by Appellant's admission, "violently taken to the ground without warning." Appellant was then taken to a room and held for approximately twenty-eight (28) minutes. While Appellee was being detained, security personnel also made contact with Alanis and determined that he was the actual suspect that potentially had a firearm. Appellant was then released.

Appellant concedes that at all times the security personnel were acting within the scope of their employment for Appellee. As a result of being taken to the ground, Defendant alleges that he was physically injured.

The security guards that involved in taking Appellant to the ground were Officers Jason Allen, Robert Bates, Lonnie Glover, Spencer Jaye and Jason Krob. All of these officers took courses in Defensive Tactics; Firearm Qualifications; Security Active Shooter; Threat Assessment; Concepts and Techniques of Weapon Awareness; Techniques of Ground Defense; and Active Shooter Testing and Response. Some of the officers also had additional training on Night Fire Orientation, Mental Health Training and Taser X26 P Certification.

The policies and procedures for security personnel at the Choctaw Casino states that "Lives Depend" upon the actions of security personnel and that "[a] swift and effective response will serve to minimize the damage and save the lives of potential victims." These policies and procedures further provide that "Security personnel should use a progression of force, if possible. Officers are required to identify themselves verbally as Security immediately upon making contact with guests and others, regardless of the purpose of contact." Officers should give a "verbal challenge or warning before use of any force, if time permits." These policies and procedures further define "progression of

force” as starting “with the lowest level in an established Use of Force Policy, then move upward through the levels until the incident or action is stopped or contained.”

To establish a prima facie case of negligence, a plaintiff must show: 1) the defendant owned a duty to protect the plaintiff from injury; 2) a failure to perform that duty; and 3) the plaintiff suffered an injury which was proximately caused by the defendant's failure to perform its duty of care. See Smith v. City of Stillwater, 2014 OK 42, ¶ 22, 382 P.3d 1192. In order to show a breach of duty by the Defendant, Plaintiff must prove that Defendant failed to do what a reasonably prudent or careful person should do under the circumstances. See Fargo v. Hays-Kuehn, 2015 OK 56, ¶ 13, 352 P.3d 1223. If the Defendant is acting in a capacity that requires some specialized training or skills, the “reasonable prudent or careful person” standard will be based on the industry standard or how a reasonably prudent or careful person that possesses the specialized skill or training should act under the circumstances. See Cook v. McGraww Davisson Stewart, LLC, 2021 OK CIV APP 32, ¶ 20, 496 P.3d 1006. If this standard of care, or industry standard, and whether the defendant breached this standard, is not within the common knowledge of a lay juror, it is ordinarily established by expert testimony. See Johnson v. Hillcrest Health Ctr., Inc., 2003 OK 16, ¶ 13, 70 P.3d 81.

Pursuant to 12 O.S. § 2701, a lay person can only give opinion testimony if the opinion is based on: 1) the perception of the witness; 2) helpful to the determination of a fact in issue; and 3) not based on scientific, technical or other specialized knowledge. Section 2701 is identical to Rule 701 of the Federal Rules of Civil Procedure. The question of whether a lay witness is qualified to testify as to any matter of opinion is a preliminary question to be answered by the trial court. The Court's decision will not be disturbed on appeal unless it is clearly erroneous or a clear result of judicial discretion. See Randolph v. Collectramatic, Inc., 590 F.2d 844 (10<sup>th</sup> Cir. 1979). Rule 701 does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness. *Id.* at 846.

As stated above, the security officers that responded to the report of a man in the casino that possessed a firearm and recently threatened to kill others. The average lay juror would not be familiar with the industry standards for security officers in a similar situation. It is not within the common knowledge of a lay juror to determine whether the actions taken by these security officers fell within the industry standard, based on the facts and circumstances in the case at bar.

Therefore, based on the undisputed facts and circumstances of this case, the Appellant must produce expert testimony to establish the standard or duty of care required by the Appellee, i.e. whether the Security Officers acted as a reasonably prudent or careful person based on the industry standards, as well as whether their failure to do so resulted in the Appellant's injuries. By failing to provide an expert witness for this

purpose, the Appellant cannot meet his burden of proof for a claim of negligence. Therefore, the Appellee is entitled to Summary Judgment as a matter of law.

It is undisputed that Appellant failed to name an expert witness to establish the standard of care owed by the Appellee to the Appellant and whether Appellee violated this standard of care in his Final Witness List. This Final Witness List was due, pursuant to the Trial Court's Scheduling Order, on January 3, 2023. It is within the Trial Court's discretion to allow the parties to amend their Final Witness Lists after the deadline, pursuant to the Rules of the Choctaw Nation District Court. The Court finds no abuse of discretion by the Trial Court in denying the Appellant's request to amend his Final Witness List after the scheduling deadline previously set by the Trial Court.

#### **IV. CONCLUSION**

The Court finds that the District Court correctly found that there is no genuine issue or substantial controversy as to the facts that Appellant failed to timely produce an expert witness to testify that the Appellee failed to act as a reasonably prudent or careful person, based on the industry standards for a security officer, under the circumstances of the case at bar, and that Appellant's injuries were proximately caused by the Appellee's failure to act as a reasonably prudent or careful person and that the Appellee is entitled to a judgment as a matter of law. Therefore, the Choctaw Nation District Court Order is hereby **AFFIRMED**.

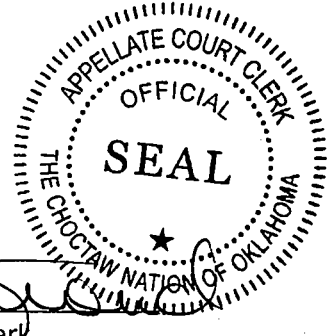
**PER CURIAM**


**CERTIFICATE OF DELIVERY**

I hereby certify that on the 1st day of August, 2024, a true and correct copy of the above pleading was emailed to:

Jose Escobar: [jose@escobarlawyers.com](mailto:jose@escobarlawyers.com)

Bart Robey: [bjrobey@chubbucklaw.com](mailto:bjrobey@chubbucklaw.com)



  
Sandy Stroud, Appellate Court Clerk