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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Pamela Neppel, individually and as the parent and legal guardian of Z.N., an incapacitated individual,

Plaintiff, Appellant, And Cross-Appellee

vs.

Development Homes, Inc.,

Defendant, Appellee, and Cross-Appellant

and

Sandra J. Marshall, individually; Mark Indvik, individually, and Mark and Amelia Indvik as Co-Guardians of S.K.O.; Konah Zunugo, individually,

Defendants and Appellees

Supreme Court No. 20200036

Grand Forks Co. Court No. 18-2017-CV-03249

APPEAL FROM ORDERS DENYING IN PART DEFENDANTS' MOTIONS FOR JUDGMENT AS A MATTER OF LAW ON JULY 18, 2019, THE COURT'S AMENDED JUDGMENT IN THE DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA THE HONORABLE LOLITA HARTL-ROMANICK

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT DEVELOPMENT HOMES, INC.

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ARGUMENT

[1] For Development Homes, Inc.'s ("DHI") cross-appeal, the issue before the Court is whether the district court erred in denying Defendants' Motions for Judgment as a Matter of Law on the claims of intentional infliction of emotional distress ("IIED") asserted against DHI by Pamela Neppel and Z.N. (collectively "Plaintiffs"). In their brief, Plaintiffs failed to respond to any of the issues and arguments raised by DHI, and the Plaintiffs have erroneously asserted the issue to be decided is whether there is sufficient evidence to reverse the jury's decision. See Reply Brief of Appellant and Cross-Appellee at ¶ 25. Contrary to Plaintiffs' assertions, the decision on a motion for a judgment as a matter of law is fully reviewable by the Court. Forsman v. Blues, Brews, and Bar-B-Ques, Inc., 2012 ND 184, ¶ 8, 820 N.W.2d 748 Further, for an IIED claim, whether the alleged conduct meets the threshold of extreme and outrageous conduct is a question of law to be decided by the Court, which is fully reviewable on appeal. Dahlberg v. Lutheran Soc. Servs., 2001 ND 73, ¶ 21, 625 N.W.2d 241.

[2] As a matter of law, reviewing the evidence presented at trial, in the light most favorable to the Plaintiffs, DHI's actions do not meet the strenuously high "beyond all possible bounds of decency" threshold standard for extreme and outrageous conduct. G.K.T. v. T.L.T., 2011 ND 115, ¶ 11, 798 N.W.2d 872 (quoting Muchow v. Lindblad, 435 N.W.2d 918, 924 (N.D. 1989)). Further, viewing the evidence in the light most favorable to the Plaintiffs, reasonable persons could not disagree regarding DHI's conduct. Accordingly, the district court erred in refusing to dismiss the Plaintiffs' IIED claims against DHI.

I. The Plaintiffs' claim for IIED should have been dismissed as a matter of law because DHI's conduct was not so extreme in degree as to be beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society.

A. The decision to move S.K.O. into the duplex with Z.N. does not meet the strenuously high threshold of extreme and outrageous conduct.

[3] The decision to move S.K.O. into the duplex with Z.N. was not a decision that was made exclusively by DHI. Tr. Vol. VII at 1785:19-1790:7. The State of North Dakota ("the State") was involved in all aspects of the decision, and the decision was ultimately approved by the State. Id. For the move, S.K.O. and Z.N.'s social worker testified that she would never put Z.N. in a position that would cause him harm. Tr. Vol. III at 503:23-503:25. Even with her knowledge of S.K.O.'s behaviors, she did not believe he was a risk to Z.N. because of the mitigations put in place by DHI's staffing. Id. at 523:13-526:3.

[4] The social worker's testimony is consistent with the state employee from Northeast Human Services Center who did not object to the move because she believed Z.N.'s health and safety needs could be met and that the risks would be mitigated through staffing. Tr. Vol. VII at 1787:15-1787:20. The move was also not a rash decision that was made overnight by DHI and then subsequently forced upon Plaintiffs without any additional consideration. It took seven months for the move to occur. Tr. Vol. II at 252:25-253:5 and 283:16-283:18. Over those seven months, there were multiple meetings to discuss the change in housing. Tr. Vol. II at 257:12-257:22 and Vol. VII at 1764:3-1766:17. Despite the Plaintiffs' contentions, the evidence at trial showed reasonable efforts were exerted by DHI and the State prior to making this move and that DHI and the State reasonably believed the needs of S.K.O. and Z.N. could be met with this move. That belief and the

corresponding decision is not conduct that is atrocious and utterly intolerable in a civilized community.

[5] As a result of the incident, which occurred fourteen months after the change in housing, Plaintiffs assert DHI made the wrong decision and elicited testimony from their expert that DHI made the wrong decision. Tr. Vol. IV at 947:13-947:15. However, a wrong decision, such as an error of judgment in housing and placement, is at best negligence. Such an error is not itself conduct that is so extreme in degree to go beyond all possible bounds of decency.

[6] Considering the decision to move S.K.O. into the duplex with Z.N., it is also important to note that Plaintiffs' own expert conceded that there was not any evidence of a prior incident caused by S.K.O. that was similar to the incident on May 22, 2016. Tr. Vol. IV at 774:11-775:11. Moreover, DHI did not move a "sexual predator," into the residence with Z.N. At trial, there was not any evidence identifying S.K.O. as a "sexual predator," and even the Plaintiffs' experts did not identify S.K.O. as a "sexual predator." This was a term used exclusively by Plaintiffs' Counsel, throughout trial, to describe an individual with developmentally disabilities, who was not a party to the lawsuit. Thus, despite Plaintiffs' representations to this Court, DHI did not place a known sexual predator into the duplex with Z.N. The decision to move and placement of S.K.O. into the duplex with Z.N. is not conduct that meets the strenuously high threshold of extreme and outrageous conduct.

B. The failure to seek immediate medical care for Z.N. and the failure to immediately notify law enforcement does not meet the strenuously high threshold of extreme and outrageous conduct.

[7] It is undisputed that two DHI employees failed to follow through with appropriate risk management policies and procedures following the incident at 3:30 a.m. on May 22, 2016. However, their failures, are not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. Those policies and procedures should have been followed, but Z.N. was not abandoned.

[8] The overnight awake staff assisted Z.N. that evening after the incident. Index # 500 at 48:13-48:22. Later that morning, the direct support professional assigned to Z.N. testified he did not see anything during his shift that made him believe Z.N. was in need of immediate medical attention. Tr. Vol. V. at 1057:4-1057:17. If he had, he would have reported the issues, and then taken further action. Id. That afternoon, Z.N. then went for walk with staff and the staff's dog. Index # 431. When that report was made, Z.N. was off relaxing in his room, and he was described as being "pretty active" earlier in the day. Id. That evening, he went on another long walk around the neighborhood and when he returned home, he watched TV with his roommate, S.K.O. Id. Despite Plaintiff's characterization, there was not any evidence or testimony that Z.N. was forced to watch TV with S.K.O.

[9] The evidence does not reflect an immediate ongoing emergency situation that was being actively ignored by the subsequent on-duty DHI staff that were providing care and services to Z.N. When Z.N. was taken to the hospital for his medical examination on May 23, 2016, the doctor was unable to identify any sign of acute trauma and there was not trauma or tenderness to the anus. Tr. Vol. IV at 797:24-798:24 and Index #408. Z.N. was

then released that day without any plan for additional treatment or follow-up. Id. In presenting this information, DHI is not attempting to downplay or minimize the incident on May 22, 2016. It is simply attempting to provide a complete picture of the evidence submitted at trial for what occurred during the first 32 hours after the incident.

[10] The failure to follow through with appropriate risk management procedures immediately after the incident was contrary to DHI's accepted practice. But, as a whole, the actions taken following the incident are not conduct that exceeds all possible bounds of decency. Reviewing the entire record, there is also not any evidence that DHI ever acted with any intent to cause Z.N. and Pamela Neppel emotional distress. Finally, the incident itself, and DHI's actions prior to and immediately following the incident do not meet the strenuously high threshold of extreme and outrageous conduct. For these reasons, the Plaintiffs' claims for IIED against DHI should have been dismissed.

CONCLUSION

[11] As a matter of law, DHI's conduct was not so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. Accordingly, the district court erred in finding multiple questions of fact that a reasonable juror could disagree upon regarding whether DHI's conduct was extreme and outrageous. For these reasons, DHI respectfully requests this Court reverse the district court's orders denying Defendants' Motions for Judgment as a Matter of Law for Plaintiffs' IIED claims against DHI and to remand this matter to the district court for the entry of an Order for Second Amended Judgment consistent with such reversal.

Dated this 16th day of October 2020

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CERTIFICATE OF COMPLIANCE

The undersigned as Attorneys for Defendants, Appellees, and Cross-Appellant in the above matter, and as author of the above brief, hereby certify in compliance with Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the above brief complies with the page limitations set forth in Rule 32(a)(8).

Dated this 16th day of October 2020

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AFFIDAVIT OF SERVICE VIA ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

The undersigned, being duly sworn, deposes and says that: I am a United States citizen,

over 18 years of age, and on August 5, 2020, I served a copy of the attached:

Reply Brief of Appellee and Cross-Appellant Development Homes, Inc.

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