

IN THE SUPREME COURT OF THE STATE OF NEVADA

KALEENA PONCE; DARLENE PONCE,
AS GUARDIAN AD LITEM FOR
KELLIE PONCE, A MINOR,
INDIVIDUALLY AND AS THE
NATURAL AND LEGAL HEIRS OF
NICOLAS PONCE, DECEASED; AND
KALEENA PONCE AS THE SUMMARY
ADMINISTRATOR OF THE ESTATE
OF NICHOLAS PONCE,
Appellants,
vs.
THE STATE OF NEVADA EX REL.
NEVADA DEPARTMENT OF
TRANSPORTATION,
Respondent.

No. 44153

FILED

FEB 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in a negligence action. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

Appellants, Kaleena and Kellie Ponce, appeal a district court summary judgment order in favor of respondent, the State of Nevada Department of Transportation. The Ponces argue that the district court erred because (1) the State is not immune from suit under NRS 41.033 because it had actual knowledge of the dangerous condition giving rise to the accident, and (2) The State's affirmative defense of NRS 41.032 is inapplicable in this situation.

We conclude that the Ponces failed to submit evidence demonstrating that the State had actual knowledge of the dangerous condition and that the State's failure to remove snow and debris from a

ditch contributed to the accident.¹ Accordingly, we affirm the decision of the district court. The parties are familiar with the facts, and we do not recount them in this order except as is necessary for our disposition.

We review a district court order granting summary judgment de novo.² “Summary judgment is appropriate and ‘shall be rendered forthwith’ when the pleadings and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.’”³ While the record must be viewed in a light most favorable to the nonmoving party, the nonmoving party “‘must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.’”⁴

Liability for actual knowledge of a hazardous condition

The State is immune from suit for failure to discover a hazard on the public highway.⁵ However, when the State has actual or express

¹The Ponces also assert that the district court abused its discretion by considering Jeffrey Palmer’s, NDOT’s principal geotechnical engineer, affidavit when granting summary judgment. Our conclusion that the Ponces failed to demonstrate a genuine issue of material fact concerning actual knowledge necessarily renders the issue regarding Palmer’s affidavit moot.

²Harrington v. Syufy Enters., 113 Nev. 246, 248, 931 P.2d 1378, 1380-81 (1997); Joynt v. California Hotel & Casino, 108 Nev. 539, 541, 835 P.2d 799, 800 (1992).

³Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1029 (2005) (alteration in original) (quoting NRCP 56(c)).

⁴Id. at ___, 121 P.3d at 1031 (quoting Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

⁵NRS 41.033.

knowledge “of a hazard and fails to act reasonably to correct such hazard,”⁶ the State is no longer immune under NRS 41.033.⁷ Generally, “[w]hether a particular condition constitutes a hazard is a question of fact for the jury.”⁸ But, summary judgment is nevertheless appropriate if the State had no actual knowledge of the potential hazard of a particular condition.⁹

Here, the Ponces assert that the dangerous condition at issue is the slope from which the boulder fell, and argue that the State had actual knowledge that the slope was unsafe. Although we agree that the dangerous condition at issue was the slope from which the boulder fell, we disagree that the State had actual knowledge that the slope was currently unstable. At most, the evidence the Ponces rely on demonstrates that the State had actual knowledge that rocks fall from the slopes along Highway 50. That fact, however, does not demonstrate that the State had actual knowledge that the slope at issue currently presented a hazard. The Ponces have not shown that there is a genuine issue for trial regarding whether the State had actual knowledge of the hazardous nature of the

⁶Schroeder v. Ely City Mun. Water Dep’t, 112 Nev. 73, 76, 910 P.2d 260, 262 (1996); see also Nardoizzi v. Clark Co. School Dist., 108 Nev. 7, 9, 823 P.2d 285, 287 (1992).

⁷Davenport v. County of Clark, 111 Nev. 467, 469, 893 P.2d 1003, 1005 (1995); Lotter v. Clark Co. Bd. of Commissioners, 106 Nev. 366, 368, 793 P.2d 1320, 1322 (1990) (stating that actual knowledge of defects gives the State a duty to act reasonably after discovery).

⁸Chastain v. Clark County School District, 109 Nev. 1172, 1178, 866 P.2d 286, 289-90 (1993).

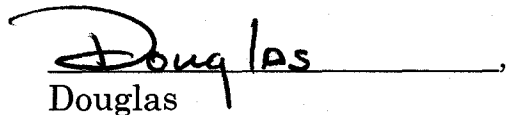
⁹See id. at 1176-78, 866 P.2d at 288-90.

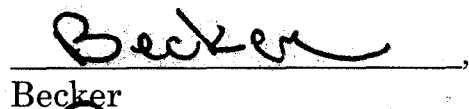
slope at issue, and therefore, the district court did not err by granting summary judgment in favor of the State.

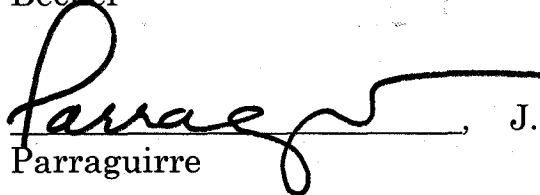
Liability for operational functions

The State is immune from suit for discretionary functions but not operational functions.¹⁰ The State concedes that highway maintenance is operational and it acknowledges its duty to maintain Highway 50.¹¹ The Ponces assert that the State negligently maintained the roadside ditches and that the debris and snow in the ditches contributed to the accident. However, the Ponces presented no evidence that, but for the State's failure to clean the ditches, the boulder would not have entered the roadway, killing Nicholas. Thus, there are no genuine issues of material fact regarding the negligent maintenance claim. Therefore, the district court did not err by dismissing as moot the Ponces' motion for summary judgment on this issue. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Douglas

 J.
Becker

 J.
Parraguirre

¹⁰NRS 41.032.

¹¹The State argues that the Ponces' negligent maintenance claims are actually negligent design or construction issues. We conclude that this assertion is without merit.

cc: Hon. Michael P. Gibbons, District Judge
Jack E. Kennedy & Associates
Attorney General George Chanos/Transportation Division
Douglas County Clerk