IN THE SUPREME COURT OF THE STATE OF NEVADA

DEAN JOHNSON,
Appellant,
vs.
FOSTER JANITORIAL, INC., A NEVADA CORPORATION,
Respondent.

No. 44273

FILED

JUL 06 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a grant of summary judgment in a personal injury action. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our discussion. We review an order granting summary judgment de novo.[1] Summary judgment is appropriate when a case presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[2]

Under the Nevada Industrial Insurance Act (NIIA), a worker who is injured on the job is permitted to "pursue a common law tort action against any tortfeasor who is not his statutory employer or co-employee."[3] Here, appellant Dean Johnson seeks to hold respondent Foster Janitorial, Inc. liable for his injuries. Because Johnson was employed by Safeway, the issue is whether Foster Janitorial, as a subcontractor hired by

[1]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

[2]NRCP 56(c).

[3]GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001).

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Safeway to provide janitorial services, is Johnson's statutory co-employee. We conclude that Foster Janitorial is Johnson's statutory co-employee and thus affirm.

In Meers v. Haughton Elevator, we held that the type of work performed by an independent contractor determines whether a statutory employment relationship exists.[4] The test is whether the activity performed by the subcontractor is "'normally carried on through employees rather than independent contractors.'"[5] This test was later codified in NRS 616B.603(1)(b), which provides that an employment relationship may exist if contracting parties are "in the same trade, business, profession or occupation."[6]

Johnson argues that Safeway, a grocery store, and Foster Janitorial, a cleaning service, are clearly not in the same trade or business.

However, in Hays Home Delivery, Inc. v. EICON, this court adopted a broad definition of what constitutes the same trade, business, profession, or occupation.[7] Hays was a national company that coordinated the delivery of appliances and furniture by contracting with local operators who actually delivered the products and thus were statutory co-

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[4]101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985).

[5]Id. (quoting Bassett Furniture Industries, Inc. v. McReynolds, 224 S.E.2d 323, 326 (Va. 1976)).

[6]NRS 616B.603(1)(6); see also Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1356, 951 P.2d 1027, 1031 (1997).

[7]117 Nev. 678, 684, 31 P.3d 367, 371 (2001) (quoting NRS 616B.603(1)(b)).

employees notwithstanding any distinction between their specific functions in the delivery process.[8]

The present case is analogous. Safeway has a continuing goal of keeping its stores clean, attractive, and safe. It uses both employees and independent contractors to achieve this goal. Foster Janitorial supplied graveyard shift floor-scrubbing, buffing, and waxing services. Safeway employees were responsible for cleaning and maintenance functions during the day. As in Hays, this responsibility was shared by both Safeway and Foster Janitorial employees. We conclude, therefore, that Foster was a statutory co-employee and thus entitled to NIIA immunity from tort liability.

The Supreme Court of Virginia recently decided a factually similar case.[9] In Fowler v. International Cleaning Service, the court held that a janitorial subcontractor hired by Sears was entitled to co-employee immunity.[10] The plaintiff, a Sears employee, was injured when he slipped on a wet floor that had been mopped by International Cleaning, a subcontractor hired by Sears to provide janitorial services. The court concluded that the "combined efforts of International and Sears were designed to accomplish Sears' goal of making its store clean, attractive, and safe—a goal necessary to the successful operation of Sears' furniture

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[8]Id.

[9]Our version of the "normal work test" adopted in Meers is based upon the Supreme Court of Virginia's decision in Bassett Furniture Industries, 224 S.E.2d at 326; therefore, Virginia precedent on this issue is highly persuasive.

[10]537 S.E.2d 312, 316 (2000).

business."[11] The court noted that Sears employees were expected to sweep and clean up trash and were even given access to International's cleaning equipment.[12] Likewise, the Foster Janitorial workers here were working in tandem with Safeway employees to make the store clean and safe. Therefore, the district court's grant of summary judgment was appropriate given Foster's status as a statutory co-employee.

Johnson's remaining argument is that a footnote in Oliver v. Barrick Goldstrike Mines wherein we discussed the legislative history of what is now NRS 616B.603 compels us to conclude that Foster and Safeway were not statutory co-employees.[13] In Oliver, we noted that counsel for the Department of Industrial Relations had stated that "a department store that hires an independent contractor to perform janitorial services could not be considered to be in the same trade, business, profession, or occupation as the janitor."[14] Johnson argues this footnote refers to a legal relationship identical to that in the present case and thus requires us to conclude that Foster Janitorial was not his statutory co-employee.

Johnson's reliance upon this footnote, however, is misplaced. First, counsel was not a member of the legislature and his comments do

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[11]Id. The court in Fowler applied the "stranger to the work" test rather than the "normal work" test adopted in Meers. We wish to emphasize that the Meers test does not require the activity to be "necessary" to the operation of the co-employee's business.

[12]Id. at 315-16.

[13]111 Nev. 1338, 1347 n.6, 905 P.2d 168, 174 n.6 (1995).

[14]Id.

not necessarily reflect legislative intent. Second, counsel's statement does not accurately describe the "normal work" test. The question is not whether the department store engaged in the janitorial business, as counsel stated, but whether the janitorial service engaged in some part of the department store's business. Moreover, counsel was not discussing the statutory language that became NRS 616B.603, but rather, another section of Senate Bill 7 describing the contractual relationships between principal contractors and the employees of independent subcontractors.

We conclude that Foster Janitorial and Safeway were in the same trade pursuant to NRS 616B.603 and are thus statutory co-employees. As a result, Foster is entitled to NIIA immunity from tort liability, and the district court properly granted summary judgment on Johnson's negligence claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.

Becker, J.

Parraguirre, J.

cc: Hon. Michael R. Griffin, District Judge
Kilpatrick Johnston & Adler
Rands, South, Gardner & Hetey
Carson City Clerk