IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KNUTSON AND ESTATE OF SANDRA KNUTSON,
Appellants,
vs.
BATTLE MOUNTAIN GOLD COMPANY; AND NEWMONT GOLD COMPANY,
Respondents.

No. 46504

FILED

JUL 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment, certified as final under NRCP 54(b), in a personal injury action. Seventh Judicial District Court, Eureka County; Steve L. Dobrescu, Judge.

This matter arises from Sandra Knutson's exposure to asbestos while she worked for Westinghouse Electric Apparatus Repair Services repairing equipment owned by respondents Battle Mountain Gold Company and Newmont Gold Company (collectively, Newmont). Appellants Dennis Knutson and the estate of Sandra Knutson (collectively, Knutson) brought suit against Newmont alleging, among other things, negligence, intentional failure-to-warn, and loss of consortium.[1]

[1]Knutson's district court action, and this appeal, included multiple other defendants/respondents. This court elected to treat a response given by Knutson as a motion for a voluntary dismissal of this appeal with respect to all respondents except Newmont. We granted the motion and dismissed all respondents except for the Newmont companies. (See Order Partially Dismissing Appeal, December 1, 2006.)

In the district court, Knutson alleged that Sandra was continually exposed to asbestos while cleaning and repairing used Newmont pumps, turbines, compressors, and other machinery containing asbestos. Knutson contended that Newmont was negligent because it did not take precautions to protect Sandra from the asbestos while she repaired the equipment and that Newmont should have warned Sandra of the dangers the asbestos-containing equipment presented. Additionally, Knutson asserted that Newmont was responsible for Dennis's loss of consortium. The district court granted Newmont summary judgment, and Knutson appealed. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

We review an order granting summary judgment de novo.[2] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[3] The pleadings and other proof must be construed in a light most favorable to the non-moving party.[4] Additionally, this court has recognized that motions for summary judgment in negligence actions should be considered with caution.[5] In this case, Newmont does not raise

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[2]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[3]Id.

[4]Id.

[5]Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996); see also Sims v. General Telephone & Electric, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991), overruled on other grounds by Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 951 P.2d 1027 (1997).

should be considered with caution.[5] In this case, Newmont does not raise any issue of fact but asserts that it is entitled to judgment as a matter of law based on the allegations raised in the first amended complaint.

Negligence

To establish negligence, a plaintiff must prove the following five elements: (1) that the defendant owed the plaintiff a duty of care; (2) that defendant breached that duty; (3) that defendant's breach was the actual cause of plaintiff's injuries; (4) that defendant's breach was the proximate cause of plaintiff's injuries; and (5) that plaintiff suffered damages.[6] This court has recognized that "[i]f respondent can show that one of the elements is clearly lacking as a matter of law, . . . then summary judgment is proper."[7]

In this appeal, Knutson asserts that it was seeking relief for the direct negligence of Newmont and that it was not alleging that Newmont is vicariously liable for the negligence of Sandra's employer. Knutson claimed below that Newmont was negligent because it knowingly sent dangerous equipment for cleaning without taking precautions to protect Sandra. With the exception of a duty to warn, however, Knutson failed to demonstrate that, legally, Newmont owed Sandra any duty of

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[5]Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996); see also Sims v. General Telephone & Electric, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991), overruled on other grounds by Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 951 P.2d 1027 (1997).

[6]Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993); Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991).

[7]Sims, 107 Nev. at 521, 815 P.2d at 154.

care. As the district court recognized, Knutson argued only that Newmont had a duty to warn Sandra of the dangers involved in the cleaning and maintenance of its machinery. Accordingly, the district court correctly granted summary judgment on Knutson's negligence claim against Newmont based on the doctrine of peculiar risk.

The doctrine of peculiar risk Knutson argues that because it is alleging negligence against Newmont for Newmont's own actions and omissions, this court's holding in Sierra Pacific Power Co. v. Rinehart,[8] applying the doctrine of peculiar risk, is inapplicable to this case. We disagree.

> Section 416 of the Restatement (Second) of Torts states
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> > One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.[9]

In Rinehart, this court determined that the term "others," as used in Section 416, does not apply to the employees of independent contractors because an independent contractor, rather than an employer, "is in a better position to take special precautions to protect against any peculiar dangers."[10] In making this determination, this court also relied on

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[8]99 Nev. 557, 561, 665 P.2d 270, 273 (1983).

[9]Restatement (Second) of Torts § 416 (1965).

[10]99 Nev. at 562-63, 665 P.2d at 273-74.

Celender v. Allegheny County Sanitary Authority, in which the Pennsylvania Superior Court held that "the owner of [a] property is under no duty to protect the employees of an independent contractor from risks arising from or intimately connected with defects or hazards which the contractor has undertaken to repair or which are created by the job contracted."[11]

In this case, Newmont employed Westinghouse to rebuild, maintain, and repair its turbines and other machinery. Because the machinery contained asbestos, rebuilding, maintaining, and repairing it may have created a peculiar risk of physical harm to Westinghouse's employees unless special precautions were taken. However, Newmont is not subject to liability for physical harm caused to Sandra from her work on Newmont's machinery because Westinghouse, as an independent contractor specializing in this type of work, was "in a better position to take special precautions to protect against any peculiar dangers"[12] associated with working with Newmont's machinery. Accordingly, we determine that because Sandra was an employee of Westinghouse, a contractor hired by Newmont to service and repair machinery, Newmont is not liable for any physical harm caused to Sandra while servicing its machinery. As the district court noted, with the exception of failure-to-warn, Knutson has failed to identify any theory under which Newmont would owe Sandra a duty.

Failure to warn

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[11]222 A.2d 461, 463 (Pa. Super. Ct. 1966).

[12]Rinehart, 99 Nev. at 563, 665 P.2d at 274.

Knutson argues that the district court improperly relied upon Sims v. General Telephone & Electric[13] when it determined that Newmont did not have a duty to warn Sandra about the dangers of asbestos exposure. Knutson asserts that in failure-to-warn cases, a special relationship should not be required to impose a duty. We disagree.

It is well-established that in failure-to-warn actions, liability only arises where a special relationship exists between the parties and the danger is foreseeable.[14] Additionally, this court stated in Wiley v. Redd that "[i]t is . . . apparent . . . that the law does not impose a general affirmative duty to warn others of dangers."[15] Going further, this court affirmatively recognized that "'in failure-to-warn cases, [a] defendant's duty to warn exists only where there is a special relationship between the parties, and the danger is foreseeable.'"[16]

In this case, Sandra was an employee of Westinghouse, which Newmont hired to conduct repair and maintenance work on its machinery. Newmont was no more than a customer of Westinghouse and the record does not show that Newmont had a special relationship with any of Westinghouse's employees. Thus, Knutson did not show the existence of

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[13]107 Nev. 516, 815 P.2d 151 (1991).

[14]See Doe A. v. Green, 298 F. Supp. 2d 1025, 1039 (D. Nev. 2004); Wiley v. Redd, 110 Nev. 1310, 1316, 885 P.2d 592, 596 (1994); Sims, 107 Nev. at 521, 815 P.2d at 154; Ducey v. United States, 830 F.2d 1071, 1072 (9th Cir. 1987); see also Mangeris v. Gordon, 94 Nev. 400, 402-03, 580 P.2d 481, 483 (1978).

[15]110 Nev. at 1316, 885 P.2d at 596.

[16]Id. (quoting Sims, 107 Nev. at 521, 815 P.2d at 154).

any genuine dispute with respect to a type of relationship that would have given rise to a duty to warn. Having determined that no dispute was shown as to whether Sandra and Newmont had a special relationship that would give rise to a duty to warn, we need not address the issue of whether the danger was foreseeable.

Dennis's claim for loss of consortium

The district court determined that Dennis's loss-of-consortium claim is legally barred because Dennis and Sandra entered their marriage knowing that the relationship would be different from a normal marriage because of Sandra's pre-existing illness.[17] Knutson asserts that a jury could conclude that Dennis's and Sandra's long-term monogamous relationship was altered in such a way as to have been damaged by Newmont's conduct. Knutson also points out that Sandra's exposure occurred prior to their divorce and continued thereafter. Newmont responds by arguing that a loss-of-consortium claim is for damage to an existing marital relationship. We agree.

Because Dennis and Sandra were not married when they discovered Sandra's terminal condition, her condition did not damage their marital relationship when they re-married. Sandra and Dennis were aware of her condition when they re-married and therefore their newly formed legal relationship was not harmed by her condition. Instead, her condition was an integral part of their new marital relationship. The

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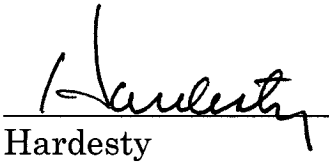
[17]See Friedman v. Klazmer, 718 A.2d 1238, 1239-40 (N.J. Super. Ct. App. Div. 1998) (determining that persons should not be able to assert a loss-of-consortium claim where the injury was "discovered or reasonably discoverable" prior to the marriage).

In sum, we conclude that summary judgment was appropriate with respect to Knutson's claims because no genuine issues of material fact existed and Newmont was entitled to judgment as a matter of law.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre



_____, J.
Hardesty

_____, J.
Douglas

cc: Hon. Steve L. Dobrescu, District Judge
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