

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY CLARK,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, THE HONORABLE KATHY A.
HARDCASTLE, DISTRICT JUDGE,
AND THE HONORABLE JENNIFER
TOGLIATTI, DISTRICT JUDGE,

Respondents,

and

JOEL BETANCOURT, INDIVIDUALLY;
CARL A. MARSHALL, INDIVIDUALLY;
ATC/VANCOM, INC., AN ILLINOIS
CORPORATION; AND ATC/VANCOM
OF NEVADA LIMITED PARTNERSHIP,
Real Parties in Interest.

No. 46891

FILED

MAY 25 2006

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

ORDER GRANTING PETITION FOR A WRIT OF MANDAMUS

This original petition for a writ of mandamus or prohibition challenges a district court partial summary judgment in favor of real parties in interest Carl A. Marshall and ATC/Vancom, Inc. (ATC).

Petitioner Henry Clark was a passenger on a bus owned by ATC and driven by Carl A. Marshall. The bus collided with real party in interest Joel Betancourt's truck.¹ Clark filed a personal injury action against Betancourt, Marshall, and ATC. Marshall and ATC filed cross-claims against Betancourt. Both Betancourt and Clark testified that Marshall was at least partially at fault. ATC and Marshall moved for

¹Betancourt has filed a joinder to Clark's petition.

summary judgment, arguing that, because Betancourt's truck crossed over into the bus's lane, Betancourt was at fault.

Clark opposed the motion, arguing that negligence and probable cause issues present factual questions for the jury to resolve. He asserted that there was testimony supporting that Betancourt's truck was at a stop and that Marshall had failed to brake. Clark also pointed to the police report, indicating that no skid marks were present at the scene.

At the hearing on the summary judgment motion, the district court noted that an earlier summary judgment motion had been denied based on the "slightest doubt" standard. Clark argued that summary judgment was still not appropriate because witness credibility was at issue. The district court granted the motion, and denied Clark's request for NRCP 54(b) certification. Clark moved for reconsideration, which the court denied, again refusing Clark's request for NRCP 54(b) certification.

In his petition, Clark requests that we direct the district court to vacate its partial summary judgment. A writ of mandamus is available to compel the performance of an act that the law requires, or to control an arbitrary or capricious exercise of discretion.² Mandamus is an extraordinary remedy, generally unavailable if the petitioner has a plain, speedy and adequate legal remedy, such as an appeal from a final judgment.³ Summary judgment was appropriate only if the pleadings and other evidence, viewed in a light most favorable to Clark, demonstrated that no genuine issue of material fact remained in dispute and that

²See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

³NRS 34.170.

Marshall and ATC were entitled to judgment as a matter of law.⁴ Generally, questions regarding negligence present factual questions for the jury to resolve.⁵ Accordingly, courts should be reluctant to grant summary judgment in negligence cases.⁶

In this case, Clark and Betancourt both testified that Marshall was at least partially at fault for the accident. Marshall's and ATC's contention that Betancourt's testimony was "self-serving" and Clark's testimony was inconsistent with his earlier statement, raise credibility issues that are within the jury's province. Our rejection of the "slightest doubt" standard in Wood v. Safeway, Inc.,⁷ did not abrogate the general standard mandating that summary judgment is only appropriate when there remain no genuine issues of material fact. As we explained in Wood, the substantive law identifies material factual issues as those disputed facts that might affect the outcome of the case under the governing law.⁸ In this case, the genuine factual issue which remains disputed is material to the outcome of this case under our negligence jurisprudence, *i.e.*, whether Marshall's negligence caused the collision. We thus conclude that summary judgment was erroneously granted and, because the court refused to certify its order as final and a trial concerning these same negligence issues is scheduled to resolve Clark's claims against

⁴Wood v. Safeway, Inc., 121 Nev. __, __, 121 P.3d 1026, 1029 (2005).

⁵Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981).

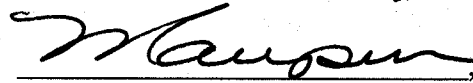
⁶Id.

⁷121 Nev. at __, 121 P.3d at 1029-31.

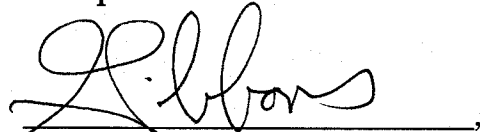
⁸Id.

Betancourt, mandamus relief is warranted. Accordingly, we grant this petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its partial summary judgment.

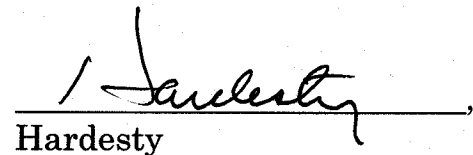
It is so ORDERED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Jennifer Togliatti, District Judge
Hon. Kathy A. Hardcastle, District Judge
Williams & Wiese
Alverson Taylor Mortensen & Sanders
Gentile & Howard
Clark County Clerk