IN THE SUPREME COURT OF THE STATE OF NEVADA

REPUBLIC SERVICES, INC.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JACKIE GLASS, DISTRICT JUDGE,
Respondents,
and
TEJAS UNDERGROUND, LLC,
Real Party in Interest.

No. 46897

FILED

JUN 30 2006

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying petitioner Republic Services, Inc.'s motion to dismiss real party in interest Tejas Underground, LLC's third-party complaint against it, based on the Nevada Industrial Insurance Act's (NIIA's) exclusive remedy provision.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station,[1] or to control an arbitrary or capricious exercise of discretion.[2] Although this court generally declines to consider writ petitions that challenge district court orders denying motions to dismiss,[3] we will

[1]NRS 34.160; see also Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

[2]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[3]Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 578-79, 97 P.3d 1132, 1134 (2004).

exercise our discretion to consider such writ petitions when the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule.[4] As explained below, our consideration of this petition is warranted because the district court was obligated to dismiss the third-party complaint against Republic Services pursuant to clear statutory authority: the NIIA's exclusive remedy provision.[5]

The exclusive remedy provision extends to contribution and indemnity claims

The NIIA's exclusive remedy provision, NRS 616A.020, recognizes that an industrially injured employee's rights and remedies under the NIIA are the "exclusive" means of obtaining recovery from a statutory employer "on account of such injury."[6] Thus, while the employee may sue a third-party to recover tort damages, an employer who has complied with the NIIA's requirements, as well as any co-employees, are "relieved from other liability for recovery of damages or other compensation for [industrial] injuries."[7] As this court pointed out in American Federal Savings v. Washoe County,[8] the NIIA's provisions immunizing an employer from suits for recovery "on account of" an

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[4]Id.; see Dayside Inc. v. Dist. Ct., 119 Nev. 404, 407, 75 P.3d 384, 386 (2003).

[5]See generally Kellen v. District Court, 98 Nev. 133, 642 P.2d 600 (1982) (granting a petition for a writ of mandamus that challenged the district court's refusal to dismiss an action against an employer who was entitled to NIIA immunity from suit by a third-party defendant).

[6]NRS 616A.020(1).

[7]NRS 616B.612(4); see NRS 616C.215(2); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353-54, 951 P.2d 1027, 1030 (1997).

[8]106 Nev. 869, 873, 802 P.2d 1270, 1273 (1990).

industrial injury generally extend to third-party suits seeking indemnity for damages relating to that injury.[9]

This general bar to third-party contribution/indemnification suits stems from the fact that contribution and implied indemnity claims allow parties "to seek recovery from other potential tortfeasors under equitable principles."[10] Under the Nevada statutes, contribution allows one tortfeasor to recover a proportionate share of a judgment rendered against it from any joint tortfeasors who contributed to the common liability.[11] Similarly, implied indemnity also refers to the indemnity obligor's "fault," allowing for total responsibility to be shifted to a party who is more "actively" at fault than the defendant.[12] Consequently, the defendant in a suit brought by an injured employee generally may not seek contribution or indemnity from an employer who is subject to the NIIA's exclusive remedy provision under these theories, because doing so would indirectly subject the employer to additional liability "on account of" the industrial injury in conflict with NIIA immunity purposes.[13]

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[9]See also Nevada Power Co. v. Haggerty, 115 Nev. 353, 360, 989 P.2d 870, 875 (1999).

[10]Doctors Co. v. Vincent, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004); see also Medallion Dev. v. Converse Consultants, 113 Nev. 27, 31-34, 930 P.2d 115, 118-20 (1997).

[11]Doctors Co., 120 Nev. at 650-51, 98 P.3d at 686 (citing NRS 17.225 to 17.305).

[12]Id. at 651, 98 P.3d at 686.

[13]See 7 A. Larson, Workers' Compensation Law § 121.08D[1] (2003) (citing Nevada cases for the majority view that indemnification based on active or primary employer negligence is not allowed under the NIIA); NRS 616A.020(1); American Federal Savings, 106 Nev. at 873, 802 P.2d at 1273.

Although employers are generally immune from third-party suits, this court has recognized two narrow exceptions to the general rule: an employer may be held liable to a defendant for indemnification arising out of an employee's injuries when either (1) an express indemnification agreement exists, or (2) an independent duty between the employer and the defendant exists.[14] These "exceptions" are allowed because, under an express contract or independent duty, indemnification is "on account of" something other than the industrial injury.[15]

No exceptions to the general rule apply here

Here, the defendant below, Tejas Underground, concedes that no express contractual indemnification right exists. Instead, Tejas Underground argues that it is entitled to indemnification from the employer, Republic Services, because Republic Services is a garbage removal company servicing residential neighborhoods with "very large and noisy" garbage trucks, and consequently, it owes Tejas Underground an independent duty to properly hire, train, and supervise its employees.[16] Republic Services conceded, before the district court, that it has a duty to properly hire, train, and supervise its employees, but argued that such a duty is a general duty between Republic Services and the public, and thus does not constitute the type of independent duty between Republic Services and Tejas Underground that can negate NIIA immunity. We

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[14]Haggerty, 115 Nev. at 360, 989 P.2d at 874-75 (citing American Federal Savings, 106 Nev. at 877-78, 802 P.2d at 1275).

[15]American Federal Savings, 106 Nev. at 873, 802 P.2d at 1273 (citing 2B A. Larson, Workmen's Compensation Law § 76.41 (1989), at pages 14-733 to 14-734).

[16]Tejas Underground does not argue, in its answer, that it is entitled to contribution from Republic Services.

agree that the general duty to properly hire, train, and supervise employees does not remove Republic Services from the NIIA's immunity protections in this instance.

In his workers' compensation treatise, Arthur Larson notes that, to allow recovery against an employer based on an independent duty, two things generally must be shown: (1) that the alleged independent duty is sufficient to give rise to a state law indemnity claim, and (2) that any such claim is based on a duty sufficiently independent of the injury, so as not to offend an exclusive remedy provision's bar against recovery "on account" of the industrial injury.[17] Here, regardless of whether Nevada law recognizes an indemnity claim based on an employer's negligence in hiring, training, and supervising an employee, that theory is of the sort that does not sufficiently overcome the NIIA's immunity provision under the second prong of the analysis, because any recovery under this theory would remain "on account of" the injury.

In Kellen v. District Court,[18] this court noted that any liability resulting, "in reality, from a duty and resultant liability of the employer to the employee, . . . is exactly the type which the [NIIA] extinguishes." Thus, we stated, an abstract tort-based duty, such as "'the duty to the public to exercise ordinary care to avoid injury to other drivers,'" is not the type of independent duty to which the exception to the general rule refers.[19] Accordingly, we have rejected the argument that an employer's

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[17]See 7 A. Larson, Workers' Compensation Law §§ 121.01[3] and 121.08[1] (2003), at pages 121-10 – 121-12 and 121-106.

[18]98 Nev. at 134-35, 642 P.2d at 601 (1982).

[19]Id. at 134, 642 P.2d at 601.

fault in causing the accident resulting in the injury can alone negate NIIA immunity.[20]

In both Kellen and American Federal Savings, we discussed with approval a Ninth Circuit Court of Appeals decision, Santisteven v. Dow Chemical Company,[21] which addressed NIIA employer immunity from indemnity actions. In Santisteven, the Ninth Circuit noted that indemnity, when not based on a specific legal relationship or a contract-type obligation, is available only "when the indemnitor is somehow more at fault."[22] But in those types of cases, in which the employer's fault arises, in reality, from an underlying "liability of employer to employee," NIIA immunity is not negated.[23] Instead, NIIA immunity may be negated only in the former type of cases, when the employer owes the defendant an independent duty, such as that arising from a "specific legal relationship (e.g., master-servant)," or a contractual-like obligation, between the defendant and the employer.[24]

For example, even if an accident was caused by an employer's "failure to properly instruct" an employee as to the use of a particular product, the employer is immune from "common law" indemnification liability asserted by the product's manufacturer.[25] On the other hand, this

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[20]Outboard Marine Corp. v. Schupbach, 93 Nev. 158, 165, 561 P.2d 450, 454 (1977).

[21]506 F.2d 1216 (9th Cir. 1974), also cited with approval in Outboard Marine Corp., 93 Nev. at 164-65, 561 P.2d at 454.

[22]Santisteven, 506 F.2d at 1219.

[23]Id.

[24]Id.

[25]Id. at 1217, 1220.

court has concluded that an independent duty to indemnify arises under Nevada's overhead power line statutes, which specifically provide that, legally, an employer may be held liable to a power company for injuries resulting from the failure to comply with its notice and consent provisions.[26]

Here, Tejas Underground has not asserted that it has any "specific legal relationship" with Republic Services. Instead, Tejas Underground seems to be arguing that Republic Services should indemnify it for a duty that it owes to the public (or more specifically, to an employee allegedly injured by another employee's negligence) to hire, train, and supervise its employees so as not to injure others with its "particularly dangerous" garbage truck services. Tejas Underground's argument thus is akin to saying that Republic Services should pay for any damages judgment imposed on it because Republic Services was more negligent in causing the accident to one employee (either by failing to properly hire, train or supervise another employee, or vicariously, through the other employee's negligence) than it was. But an "independent duty" cannot be based on a duty owed to the injured employee.[27] Consequently, the duty to properly hire, train, and supervise employees is the sort of

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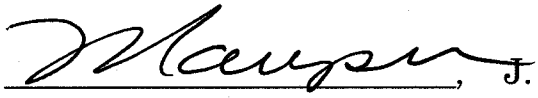
[26]See Haggerty, 115 Nev. 353, 989 P.2d 870.

[27]Kellen, 98 Nev. at 134-35, 642 P.2d at 601; see also Cochran v. Gehrke Constr., 235 F. Supp. 2d 991, 1008-09 (N.D. Iowa 2002) (concluding that, in the exclusive remedy context, an "alleged duty to supervise and maintain the safety of the job site" is merely a general duty owing from every member of society to another not to harm him through tortious acts) (citing Merryman v. Iowa Beef Processors, Inc., 978 F.2d 443 (8th Cir. 1992)).

general duty, arising out of the injuries, that we have previously found insufficient to negate NIIA immunity.[28]

Accordingly, the district court was obligated, as a matter of NIIA law, to dismiss Tejas Underground's contribution and indemnification claims against Republic Services. Therefore, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its February 16, 2006 order denying the motion to dismiss the third-party complaint against Republic Services, and to enter an order granting that motion.

It is so ORDERED.[29]



_____, J.
Maupin

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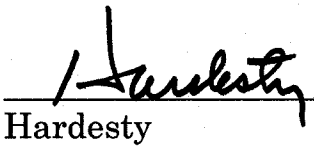
Gibbons



_____, J.
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cc: Honorable Jackie Glass, District Judge
McNeil, Tropp & Braun, LLP
Emerson & Manke, LLP
Clark County Clerk

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[28]See Kellen, 98 Nev. 133, 642 P.2d 600; see also Santisteven, 506 F.2d 1216.

[29]In light of this order, we vacate our stay entered on April 10, 2006.