

IN THE SUPREME COURT OF THE STATE OF NEVADA

WAUSAU UNDERWRITERS
INSURANCE COMPANY,
Appellant,
vs.
GES EXPOSITION SERVICES, INC.,
Respondent.

No. 50658

FILED

NOV 23 2010

TRACIE A. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a workers' compensation statutory subrogation action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In August 2004, an AMF Automation Systems employee was setting up a display booth at a convention center. A forklift driver employed by respondent GES Exposition Services, Inc., dropped a heavy conveyer on the AMF employee's leg, whose femur consequently was fractured. As a result, the AMF employee received workers' compensation benefits from AMF's workers' compensation insurance provider, appellant Wausau Underwriters Insurance Company. Wausau then brought a statutory subrogation action against GES in district court, seeking to recover the money it had paid out as a result of the August 2004 accident.

GES moved for summary judgment, asserting that AMF had contractually agreed to "hold harmless" and indemnify GES for any injury to persons in the exhibit space, and that as a result, it could not be held

liable to AMF's insurer, Wausau, for the AMF employee's damages. Wausau opposed the summary judgment motion. The district court granted GES summary judgment, finding that the express indemnity provision barred Wausau's subrogation claim. Wausau has appealed.

This court reviews de novo a district court's summary judgment. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A district court's construction of Nevada's workers' compensation subrogation statute, NRS 616C.215, is also reviewed de novo. St. Paul Fire v. Employers Ins. Co. of Nev., 122 Nev. 991, 995, 146 P.3d 258, 261 (2006).

On appeal, Wausau contends, among other things, that the contractual release between AMF and GES—to which Wausau was not a party—could not modify its statutory right to seek subrogation from GES. GES disagrees.¹ NRS 616B.609(1)(a) provides that “[a] contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by chapters 616A to

¹We are not persuaded by GES's argument that the indemnification agreement caused AMF to “step into the shoes” of GES, thereby rendering GES a statutory employer immune from suit under Nevada law, because AMF and GES were not “in the same trade, business, or occupation.” NRS 616B.603(1)(b); see also GES, Inc. v. Corbitt, 117 Nev. 265, 269, 21 P.3d 11, 14 (2001) (rejecting an argument that this same company, GES, is immune from suit as a workers' compensation statutory employer when GES's employees allegedly negligently injured an employee of a company that had hired GES to prepare an exhibit booth). We also note that, given our resolution of this appeal, we have considered but need not address Wausau's remaining appellate arguments and GES's responses thereto.


616D, inclusive, of NRS.” Here, NRS 616C.215(2)(b), which provides that a workers’ compensation insurer “has a right of action against the person so liable to pay damages [for the employee’s injury] and is subrogated to the rights of the injured employee . . . to recover therefor,” fits within NRS 616B.609(1)(a)’s “liability created by chapters 616A to 616D” provision. Under NRS 616B.609(1)(a), this statutory right to subrogation cannot be changed or modified by an indemnity agreement, such as the one between AMF and GES. To hold otherwise here would permit GES to avoid, by contract, potential liability expressly provided for by the workers’ compensation statutory scheme, in direct contravention of NRS 616B.609(1)(a)’s intent.²

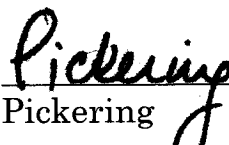
²While GES argues that AMF contractually released GES from liability, as permitted by this court in American Federal Savings v. Washoe County, 106 Nev. 869, 802 P.2d 1270 (1990), our American Federal decision does not control resolution of this appeal. In American Federal, which concerned the effect of an express indemnity contract between an employer and a third-party tortfeasor, this court upheld the third-party tortfeasor’s express contractual right to indemnification from the employer for damages based on its employee’s injury. 106 Nev. at 877, 802 P.2d at 1276. We did so because the parties’ express contractual provision imposed on the employer a duty to pay independent from the duties and rights imposed by the workers’ compensation statutes, and thus, permissibly allocated risk in a manner not inconsistent with the policies behind Nevada’s workers’ compensation statutes. Id. at 875-76, 802 P.2d at 1275. American Federal does not, however, stand for the proposition that an employer’s express agreement to indemnify a third party operates to extinguish that third party’s liability to an employee or an insurer under NRS 616C.215. We note, however, that under American Federal, 106 Nev. at 872, 802 P.2d 1273, GES may have a cause of action against AMF subject to any defenses AMF might raise.

Accordingly, as NRS 616B.609(1)(a) prohibited AMF and GES from waiving Wausau's NRS 616C.215(2)(b)'s subrogation rights, the district court erred when it granted summary judgment to GES based on this indemnity agreement. Wood, 121 Nev. at 729, 121 P.3d at 1029. Thus, we

ORDER the district court's summary judgment REVERSED AND REMAND this matter to the district court for further proceedings.

 _____, C.J.
Parraguirre

 _____, J.
Douglas

 _____, J.
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Persi J. Mishel, Settlement Judge
Elizabeth J. Foley
Watson Rounds
Eighth District Court Clerk