IN THE SUPREME COURT OF THE STATE OF NEVADA

FREEMAN DECORATING SERVICES, INC.,
Appellant,
vs.
JAMES I. MYDLACH,
Respondent.

No. 50965

FILED

JUN 24 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a tort action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

FACTS

Appellant Freeman Decorating Services, Inc. was the exclusive convention services provider at the Shot Show held at the Las Vegas Convention Center in February 2002. Respondent James I. Mydlach attended the show on its last day and spent some time at the trade booth for Innovative Weaponry, Inc. (IWI), a subsidiary of 21st Century Technologies on whose board Mydlach was a director. After the show closed, Mydlach helped dismantle IWI's exhibit and began packing things into crates that had been delivered to the site by Freeman Decorating.

The crate involved in this case was approximately 6 to 12 feet in length, 6 to 8 feet in width, and 3 feet in height and its empty weight was estimated to be 150 to 300 pounds. A lid constructed of lumber and plywood was attached to the crate with hinges and it weighed an estimated 75 to 85 pounds. Rather than laying flat along the back side of the crate, the hinged lid was propped open to rest against other crates

behind it. The crate sat atop two dollies, one on each end. Each dolly consisted of a carpet-covered wooden board measuring two and a half by three feet, under which there were four wheels. Because the dollies were smaller than the crate, about four inches of the crate protruded beyond the edges of the dollies.

Soon after starting to pack, and in the course of loading a four-foot-long column into the crate, Mydlach leaned against the front of the crate. The crate then moved and its lid fell forward and hit Mydlach's head, resulting in severe neck injuries. Mydlach subsequently filed a negligence action against Freeman Decorating, alleging that the company had placed the crate on the dollies in an unstable and dangerous condition that allowed the lid to fall on Mydlach's head and cause his injuries. Following a bench trial, the district court entered judgment for Mydlach and awarded him damages. This appeal followed.

On appeal, Freeman Decorating contends that Mydlach and Freeman Decorating were IWI's statutory employees for purposes of the Nevada Industrial Insurance Act (NIIA), so as to bar Mydlach from bringing his tort action against Freeman Decorating. Freeman Decorating further contends that Mydlach failed to establish all elements of his negligence cause of action because there was no evidence as to whom opened the crate and failed to properly secure its lid.

DISCUSSION

Unless clearly erroneous, this court will not disturb on appeal a trial court's factual findings that are made without a jury and supported by substantial evidence. Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996). Substantial evidence is "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." Installation & Dismantle v. SIIS,

110 Nev. 930, 932, 879 P.2d 58, 59 (1994) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986)). Purely legal questions, including conclusions of law and statutory construction issues, are subject to de novo review by this court. Matter of Halverson, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007); Bedore v. Familian, 122 Nev. 5, 10, 125 P.3d 1168, 1171 (2006).

IWI was not Freeman Decorating's statutory employer

Freeman Decorating argues that IWI was its statutory employer because IWI was the principal contractor who contracted with Freeman Decorating, as a subcontractor or independent contractor, to provide labor for the installation and dismantling of IWI's exhibit booth. If found to be a statutory employee of IWI, Freeman Decorating claims that it would be immune from liability under NRS 616A.020's exclusive remedy provisions, as it would have been IWI's responsibility to provide NIIA benefits to Mydlach.[1] Mydlach argues that Freeman Decorating and

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[1]Freeman Decorating cites to Antonini v. Hanna Industries, 94 Nev. 12, 573 P.2d 1184 (1978), to support its contention. But Freeman Decorating's reliance on Antonini is misplaced. In Antonini, we held that an employer who was injured while dismantling a convention exhibit was a joint employee of both the labor broker and the exhibitor, and that full coverage for his injuries was adequately provided under the workers' compensation insurance procured by the labor broker such that the exhibitor was not also required to provide double coverage to their joint employee. Id. at 20, 573 P.2d at 1189-90. The control test used in Antonini to determine whether the labor broker and exhibitor were the employers of the injured employee was expressly overruled in Harris v. Rio Hotel & Casino, 117 Nev. 482, 489, 25 P.3d 206, 211 (2001). Harris was subsequently examined in Richards v. Republic Silver State Disposal, 122 Nev. 1213, 148 P.3d 684 (2006), which provides the analytical framework for our determination in this case as to whether IWI was a statutory employer of either Freeman Decorating or Mydlach.

IWI were independent enterprises, not in the same trade, business, profession, or occupation, such that Freeman Decorating was not IWI's statutory employee.

The NIIA requires certain employers to provide compensation to employees who sustain injuries in the course of and arising out of the employment. NRS 616B.612(1); Richards v. Republic Silver State Disposal, 122 Nev. 1213, 1218, 148 P.3d 684, 687 (2006). In return for providing such coverage, NRS 616A.020's exclusive remedy provisions "immunizes those employers and their employees from lawsuits connected with another employee's industrial injury." Richards, 122 Nev. at 1218, 148 P.3d at 687. An employer is defined under the NIIA as a person, firm, voluntary association, or corporation that "has in service any person under a contract of hire." NRS 616A.230(2). If an employer is a principal contractor licensed under NRS Chapter 624 to engage in construction, repair, demolition, and moving of buildings and other structures, then "it is always deemed a statutory employer responsible for providing workers' compensation coverage for its subcontractors' and independent contractors' employees." NRS 616A.210(1); Richards, 122 Nev. at 1219, 148 P.3d at 687-88.

A nonlicensed principal contractor, however, is not a statutory employer if (1) he enters into a contract with another person or business that is an independent enterprise; and (2) he is not in the same trade, business, profession or occupation as the independent enterprise. NRS 616B.603(1); see Richards, 122 Nev. at 1219, 148 P.3d at 688. An "independent enterprise" is defined as "a person who holds himself out as being engaged in a separate business" and either (1) "holds a business or occupational license in his own name" or (2) "owns, rents, or leases property used in furtherance of his business." NRS 616B.603(2). The

independent enterprise test in NRS 616B.603 is a codification of the normal work test established in Meers v. Haughton Elevator, 101 Nev. 283, 286, 701 P.2d 1006, 1007-08 (1985), which looks to whether employees normally perform the type of work provided by the subcontractor or independent contractor. Richards, 122 Nev. at 1220, 148 P.3d at 688-89; Oliver v. Barrick Goldstrike Mines, 111 Nev. 1338, 1348-49, 905 P.2d 168, 174-75 (1995). The Meers normal work test and independent enterprise test of NRS 616B.603 "have been conjunctively used in determining when a nonlicensed contractor is deemed the statutory employer or co-employee of an industrially injured employee in nonlicensed defendant and nonconstruction cases." Richards, 122 Nev. at 1220, 1224-25, 148 P.3d at 688-89, 691 (eliminating the distinction between construction and nonconstruction cases and applying the Meers/NRS 616B.603 test to determine if the injured employee was carrying out work under a principal contractor's NRS Chapter 624 license).

As Freeman Decorating did not allege that IWI was licensed under NRS Chapter 624, the district court properly looked to the independent enterprise/Meers normal work test when it determined whether IWI was Freeman Decorating's statutory employer. Richards, 122 Nev. 1213, 148 P.3d 684. The district court concluded that there was no employment relationship between Freeman Decorating and IWI or any of IWI's parent companies and that Freeman Decorating and IWI are not statutory co-employers.

The district court's conclusion that IWI was not Freeman Decorating's statutory employer is supported by the record, which shows that IWI is a weapons manufacturer and distributor and that Freeman Decorating provides services to exhibitors at conventions and trade shows.

Specifically, the record establishes that (1) Freeman Decorating had its own business license and property used in furtherance of its business of providing exhibitor services; (2) Freeman Decorating's business included the delivery, removal, and storage of crates containing exhibit materials and the assembly and dismantling of exhibits for show exhibitors; (3) Freeman Decorating transported crates; and (4) only Freeman Decorating was allowed by the show's sponsors to transport the crates to and from the convention floor space for all exhibitors. The record further reveals that no one from IWI supervised Freeman Decorating's placement of the crates. Other than transporting IWI's crates, the only additional work that Freeman Decorating performed for IWI was to bring two ladders and wrenches to IWI's booth. Accordingly, substantial evidence supports the district court's conclusion that IWI and Freeman Decorating were independent enterprises not in the same trade, business, profession, or occupation and that IWI was not Freeman Decorating's statutory employer.[2] See GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001) (concluding that an electrical contractor was not in the same trade, business, profession, or occupation as a company providing live stage entertainment and custom lighting for exhibitors).

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[2]We further conclude that there is no merit to Freeman Decorating's arguments that IWI was Mydlach's statutory employer and should have maintained workers' compensation insurance to cover Mydlach. Even if Mydlach was IWI's statutory employee and could have filed a workers' compensation claim against IWI, Mydlach could still bring his negligence claim against Freeman Decorating, because the NIIA does not immunize Freeman Decorating, as a nonemployer, from a lawsuit brought by an industrially injured employee. Richards v. Republic Silver State Disposal, 122 Nev. 1213, 1218, 148 P.3d 684, 687 (2006); GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001); see also NRS 616C.215(2).

Mydlach established a negligence claim against Freeman Decorating

To establish a negligence claim, the plaintiff has the burden of proving "(1) that the defendant had a duty to exercise due care with respect to the plaintiff, (2) that the defendant breached this duty, (3) that the breach was both the actual and proximate cause of the plaintiff's injury, and (4) that the plaintiff was damaged." Joynt v. California Hotel & Casino, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992). Proximate cause, or legal cause, is defined "as that cause which, in natural and continuous sequence and unbroken by any efficient, intervening cause, produces the injury complained of and without which the result would not have occurred." Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1105, 864 P.2d 796, 801 (1993). In addition to being the cause in fact, proximate cause also considers foreseeability, so as to limit a defendant's liability to consequences that have a reasonably close connection with its conduct and the harm created by its conduct. Id. Questions of negligence and proximate cause are generally questions of fact that are left for the finder of fact to decide. Id. at 1106, 864 P.2d at 802.

Freeman Decorating argues that Mydlach did not prove that it was negligent and that the district court erred in concluding that if the crate had been placed flat on the level floor, then the lid would not have fallen down when Mydlach leaned on the crate to place something in it. Freeman Decorating contends that its only obligation was to deliver the crate to the proper location and not to open and secure the lid. Freeman Decorating further argues that Mydlach failed to establish that the crate's placement on the dollies was the cause of his injuries, when the actual cause was the lid falling on his head and there was no evidence of who left the lid open in a precarious position. Lastly, Freeman Decorating argues that the proximate cause of Mydlach's injuries was the failure to secure

the lid or remove the dollies from under the crate upon learning that it was unstable.

Mydlach argues that Freeman Decorating delivered the crate to the booth and that no one in his group had opened the crate's lid, which was already opened when they returned to the booth to begin dismantling the exhibit. As Freeman Decorating admitted being entirely responsible for delivering the crates to the floor, there was no evidence that anyone else would have opened the lid, and Freeman Decorating knew from previous accidents that the placement of the crate on dollies made it inherently unstable, Mydlach argues that Freeman Decorating's negligence caused his injuries.[3] The district court agreed that Mydlach established his negligence claims.

Freeman Decorating had a duty to position the crate in a secure manner

Substantial evidence supports the district court's conclusion that Mydlach had carried his burden of proving all elements of negligence. The district court found that Freeman Decorating was the exclusive provider of crating services for the Shot Show and contracted with IWI to transport crates to and from the convention floor. Two of Freeman Decorating's employees testified that the company brought crates to IWI's booth after the show ended so that the exhibit items could be packed into it. Phillip Freeman, who was Freeman Decorating's installation and

[3]We will not discuss the damages issue, as it was not raised on appeal. Additionally, in light of this decision and because it was not a basis for the district court's decision, we conclude that it is unnecessary to discuss the res ipsa loquitur doctrine. See Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 884, 822 P.2d 1100, 1108 (1991) (concluding that issues were raised without merit or need not be decided).

dismantle manager at the time of the accident, testified that "If we return a crate to a booth, we would not leave the dollies under it. We would take them out and put [the crate] back on the floor for two reasons: One, because it is not stable sitting on the dolly; two, we need the dollies back in order to continue moving freight into the building." He further testified that it was inherently unstable to place a crate of the size involved in the accident on a dolly's "very small footprint . . . that moves in all directions" and he had seen and heard of various injuries, mostly to the company's employees, caused by crates on dollies being tipped or pushed. The testimony from Freeman Decorating's own employees, therefore, supports the district court's findings and conclusions that Freeman Decorating brought the crate in question to IWI's booth and that Freeman Decorating had a duty to place it in a safe manner so as to not harm anyone who would be packing and loading the crate.

Freeman Decorating breached its duty of care

As the district court further concluded, Freeman Decorating breached its duty by leaving the crate on the dollies in an unsafe manner. Although the district court concluded that there was no evidence as to who opened the lid of the crate involved in the accident, Mydlach and Richard Grob[4] claimed that the lid was already opened when they returned to the booth between 10 and 11 p.m. According to Grob, some of the other crates around the IWI booth also had hinged lids that were open and that other crates built in a "shoebox" style had their lids completely removed and placed on the floor or leaning against crates. Grob also claimed that the

[4]Grob, a former law enforcement officer, worked with Mydlach at Trident Technologies and helped him load the crate shortly before the accident occurred.

security guard informed the group that the crates had been delivered about 15 minutes before they returned to the booth after having dinner. Mydlach testified that he did not see anyone other than his group in the convention hall upon their return. Both men asserted that no one in their group had opened the lid that was attached to the crate involved in the accident.

Both men also claimed that other crates were closely placed everywhere around the IWI booth and Grob noted that the crates could not be moved because of their size and weight. Mydlach and Grob also testified that there was not enough room to completely open the hinged lid to have it hang against the back of the subject crate; thus, the lid was propped at a little more than 90-degree angle against other crates behind it. Although Grob testified that the crate "teetered a little bit" when he and Mydlach had placed one or two other items into the crate by approaching it from its sides, Grob did not anticipate that the crate would shift so much as to cause the lid to fall. Mydlach, who had been a safety manager for a hotel-casino, testified that he did not observe any instability and did not see that the crate was still on dollies. Because about four inches of the crate protruded beyond the ends of the dollies, the district court found that the dollies could not be seen by someone approaching the crate and there were no readily observable signs that the crate was unstable. Substantial evidence thus supports the district court's conclusion that Freeman Decorating breached its duty by leaving the crate on dollies in an unsafe manner and that Mydlach was unaware of the crate's instability.

The crate's placement was the proximate cause of Mydlach's injuries

Freeman Decorating argues that Mydlach's failure to secure the lid or remove the crate from the dollies was the proximate cause of his

injuries. The district court, however, concluded that the crate's lid would not have fallen if the crate had been placed directly on the floor or had not been placed too close to other crates to be properly opened, regardless of who opened it. The district court concluded that Freeman Decorating's unsafe placement of the crate on dollies in a confined area, where the lid could only be propped open, was the proximate cause of Mydlach's injuries, because "the lid would not have come crashing down when Mr. Mydlach leaned over and placed something in the crate." The district court further found that such injury was reasonably foreseeable by Freeman Decorating, which knew that the empty crate would be packed with exhibit materials, that crates on dollies are inherently unstable, that its own employees had been injured by crates on dollies, and that the crates should be placed flat on the floor. We conclude that the district court did not err in determining that Freeman Decorating proximately caused Mydlach's injuries by leaving the crate in an unstable position on dollies in a confined area where the lid could not be completely opened and could only be propped open, as it led to the natural and continuous sequence of having the attached lid fall onto Mydlach's head when the crate moved as he leaned against its front to pack an item inside. See Doud, 109 Nev. at 1105, 864 P.2d at 801 (defining proximate cause).

CONCLUSION

We conclude that, as neither Mydlach nor Freeman Decorating were statutory employees of IWI and as Mydlach was not an employee of Freeman Decorating, Mydlach's negligence claim against Freeman Decorating is not barred by NRS 616A.020's exclusive remedy provisions. We further conclude that the district court properly determined that Freeman Decorating was negligent, because it had a duty of care to place the crate in a safe manner, breached that duty by leaving

the crate on dollies in an inherently unstable manner in a confined area where the lid could not be completely opened, and proximately caused Mydlach's injuries when the crate moved as he leaned into it to pack an item. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
William F. Buchanan, Settlement Judge
Clark Tatom, LLC
Dziminski & Associates
Eighth District Court Clerk