

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZORAN SAVICIC,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,

and

BRODERICK TIMMS, A MINOR,
INDIVIDUALLY AND AS AN HEIR OF
KRISTY TIMMS, DECEASED, BY AND
THROUGH LEONARD TIMMS AND
JENETT TIMMS, HIS LEGAL
GUARDIANS; LEONARD TIMMS,
INDIVIDUALLY AND AS AN HEIR
AND PERSONAL REPRESENTATIVE
OF KRISTY TIMMS, DECEASED; AND
JENETT TIMMS, INDIVIDUALLY AND
AS AN HEIR AND PERSONAL
REPRESENTATIVE OF KRISTY
TIMMS, DECEASED,
Real Parties in Interest.

No. 52122

FILED

NOV 19 2008

TRACIE L. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS
AND DIRECTING COUNSEL TO SHOW CAUSE
WHY SANCTIONS SHOULD NOT BE IMPOSED

This original petition for a writ of mandamus challenges a district court order denying partial summary judgment in a tort action.

Real parties in interest Broderick Timms, Leonard Timms, and Jenett Timms filed the underlying wrongful death and personal injury

action against petitioner Zoran Savicic and others,¹ alleging that Savicic and others were liable for Kristy Timms' death and Broderick Timms' personal injuries purportedly sustained in a motor vehicle accident involving Radomir Banda, Savicic's employee, and Kristy Timms.

Savicic filed a motion for judgment on the pleadings, or in the alternative, a motion for summary judgment, arguing that the Timms had failed to adequately plead a claim for negligent entrustment. The Timms opposed the motion, asserting that they did not plead a negligent entrustment claim but rather a vicarious liability claim against Savicic, because Banda was acting within the course and scope of his employment at the time of the accident. Savicic filed a reply to address the Timms' vicarious liability allegation. Because the district court did not exclude from its consideration the additional documents attached to the parties' motions, the district court treated Savicic's motion as one for summary judgment.²

The district court granted Savicic's summary judgment motion to the extent that the Timms had failed to produce evidence showing that Savicic had negligently entrusted the vehicle to Banda. The district court, however, denied Savicic's summary judgment motion on the issue of respondeat superior liability on the basis that a material issue of fact

¹According to Savicic, the Timms settled with Banda and other defendants were granted summary judgment on various grounds and thus are not parties to this writ petition.

²See NRCP 12(c) (stating that when parties attach additional materials to a motion for judgment on the pleadings and those materials are not excluded by the district court, the motion is treated as one for summary judgment).

existed because the Timms asserted that Banda was acting within the course and scope of his employment at the time of the accident and Savicic denied this allegation. This writ petition followed. The Timms filed an answer.³ Savicic was permitted to file a reply.⁴

A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion.⁵ Mandamus is an extraordinary remedy and it is within this court's discretion to determine if such petitions will be considered.⁶ This court generally declines to exercise its discretion to consider writ petitions that challenge district court orders denying summary judgment motions, unless summary judgment is clearly mandated by a statute or rule, or an important issue of law requires clarification, and public policy and judicial economy principles weigh in favor of considering the petition.⁷ Savicic, as

³We grant real parties in interest's motion for leave to file their answer and deny petitioner's motion to strike the answer.

⁴We grant petitioner's motion for leave to file a reply to real parties in interest's answer and we direct the clerk of this court to detach and file petitioner's reply, which was attached as Exhibit 1 to the November 6, 2008, motion. We remind petitioner's counsel, however, that the proposed reply should be submitted with, but separately from, the motion for leave to file it.

⁵NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁶See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

⁷Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997); see also Conklin ex rel. v. Buckingham, 58 Nev. 450, 453, 83 P.2d 462, 463 (1938) (recognizing that a writ of mandamus will issue only when a clear legal right to the requested relief is shown).

petitioner, carries the burden of demonstrating that extraordinary relief is warranted.⁸

In his writ petition, Savicic asserts that the district court was obligated to grant his summary judgment motion because the Timms failed to produce any evidence to establish a material question of fact regarding whether Banda was acting within the scope of his employment at the time of the accident. The Timms baldly claim that Banda contends that he was within the scope of his employment when the accident occurred, which creates a material question of fact for the jury.

In the context of a writ petition, we review a summary judgment order to determine if the district court was mandated to enter summary judgment.⁹ Summary judgment is appropriate when the pleadings and affidavits that are properly before the court, when viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.¹⁰ To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting her

⁸Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

⁹Smith, 113 Nev. at 1345, 950 P.2d at 281.

¹⁰Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

claims.¹¹ “A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.”¹²

This court has stated that the issue of whether an employee is acting within the scope of employment when the employee committed a tortious act is generally a question of fact.¹³ When undisputed evidence exists, however, demonstrating the employee’s status at the time of the tortious conduct, the trial court may consider the issue as a matter of law.¹⁴ An employer is normally not exposed to liability when an employee’s tortious conduct occurs while traveling to or from work.¹⁵ Exceptions to this rule exist when the evidence shows that the employee was performing a special errand for or conferring a benefit on the employer at the time of the accident.¹⁶

Having considered the petition and its supporting documentation in light of these principles, we conclude that our

¹¹NRCP 56(e); see also Wood, 121 Nev. at 731, 121 P.3d at 1030-31.

¹²Wood, 121 Nev. at 731, 121 P.3d at 1031.

¹³Evans v. Southwest Gas, 108 Nev. 1002, 1005, 842 P.2d 719, 721 (1992), overruled on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001).

¹⁴Id.

¹⁵Connell v. Carl’s Air Conditioning, 97 Nev. 436, 438-39, 634 P.2d 673, 674 (1981).

¹⁶See Kornton v. Conrad, Inc., 119 Nev. 123, 125, 67 P.3d 316, 317 (2003); Evans, 108 Nev. at 1006, 842 P.2d at 721; Connell, 97 Nev. at 439, 634 P.2d at 674; Molino v. Asher, 96 Nev. 814, 817, 618 P.2d 878, 879-80 (1980).

intervention by way of extraordinary relief is warranted in this instance because NRCP 56(c) clearly mandates judgment in Savicic's favor. In particular, the Timms' sole evidence in opposition to the summary judgment was their assertion that Banda was acting within the course and scope of his employment when the accident occurred because he was driving coworkers home at the time of the accident. But Banda testified in his deposition that his passengers were not Savicic's employees, and the Timms presented no controverting evidence. Even if Banda was driving coworkers home before the accident occurred, the undisputed evidence before the district court shows that Banda and his "coworkers" were traveling home and were not on a special errand for, nor conferring a benefit on, Savicic. Moreover, although Banda testified that his work hours were from sunrise to sunset—meaning, as he explained in his deposition, that he would open the gate and work until he had finished work for the day and then go home—he was driving home when the accident occurred. Because the Timms failed to produce any material evidence to create an issue of fact regarding whether Banda was acting in the course and scope of his employment at the time of the accident, the district court was required to grant summary judgment.

Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying summary judgment to petitioner Zoran Savicic on the issue of vicarious liability and to enter an order granting summary judgment in favor of Zoran Savicic on this claim.

On August 12, 2008, we directed counsel for real parties in interest, Mary P. Groesbeck, to file an answer against issuance of the writ relief requested in this court within 30 days of that order. When

Groesbeck failed to file an answer, we entered an order on September 29, 2008, directing that an answer be filed within 15 days. Groesbeck failed to timely respond. This court received Groesbeck's untimely answer on October 30, 2008.

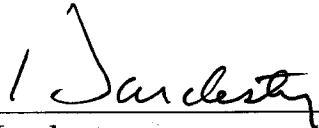
Additionally, Groesbeck's answer appears to violate NRAP 28's requirements. Under NRAP 28(e), every factual assertion contained in briefs is required to be supported by a reference to the page in the appendix or transcript where the fact relied on can be found. Groesbeck's answer appears to set forth several factual assertions that are unsupported by any citation to the record and which appear to misconstrue the evidence contained in petitioner's appendix. For instance, the answer asserts that Banda contended that he was acting within the scope of his employment at the time of the accident. Nothing in petitioner's appendix appears to support this assertion, however, and Groesbeck did not provide an appendix with the answer.

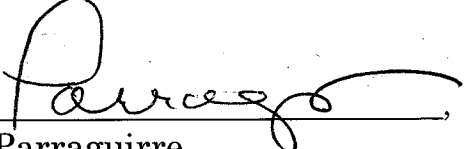
Finally, Groesbeck's answer appears to violate NRAP 28A's requirements. Under NRAP 28A, briefs submitted for filing in this court shall contain a certificate signed by an attorney of record and must represent that the attorney signing has read the brief, that to the best of the attorney's knowledge, information, and belief, the brief is not frivolous or interposed for any improper purpose, and that the submitted brief has complied with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e). Groesbeck's answer lacks such a certificate.¹⁷

¹⁷We note that petitioner's reply also lacks a certificate of compliance as required by NRAP 28A, and we therefore admonish petitioner's counsel. As the lack of an NRAP 28A certificate is the only
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Accordingly, Groesbeck shall have 15 days from this order's date within which to show cause why she should not be personally sanctioned for failure to comply with this court's directives and our appellate procedural rules.¹⁸

It is so ORDERED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. James M. Bixler, District Judge
Nersesian & Sankiewicz
Groesbeck Group, Ltd.
Eighth District Court Clerk

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procedural shortcoming in the reply, we decline to impose sanctions upon petitioner's counsel at this time. But we note that, in the future, similar disregard for the appellate rules of procedure may result in the imposition of sanctions. See NRAP 28A.

¹⁸Under NRAP 28A(b), we may impose sanctions when an attorney's certification is incomplete or inaccurate.