IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO BARRAGAN-MONTANO AND DOLORES PEREZ, MARRIED NEVADA RESIDENTS,
Appellants,
vs.
IMV NEVADA AND RAMON VILLALOBOS,
Respondents.

No. 54476

FILED

MAY 11 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a district court granting a motion to dismiss in a tort action. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

In April 2009, appellants filed a complaint in district court seeking damages from respondents for injuries sustained during the course of appellant Antonio Barragan-Montano's employment. More specifically, appellants alleged that Barragan-Montano was injured by a mechanized drill that his employers had improperly altered by substituting a four-inch bolt for the proper two and one half-inch manufacturer's pin. According to Barragan-Montano, his clothing got caught on the gerryrigged bolt when he was instructed to clean the drill with a three inch putty knife, resulting in the near amputation of his right arm. Appellants alleged that such purportedly willful or wanton misconduct should be construed as going beyond ordinary negligence and instead be treated as an intentional act.

Respondents thereafter filed a motion to dismiss, arguing that appellants' complaint seeks compensation for an injury caused by an accident within the course and scope of Barragan-Montano's employment, for which he had already filed a successful workers' compensation claim, and that therefore the complaint was barred under the workers' compensation exclusive remedy provision in NRS 616B.612. Appellants

opposed the motion and respondents filed a reply. The district court subsequently entered an order dismissing appellants' complaint and appellants have now appealed.

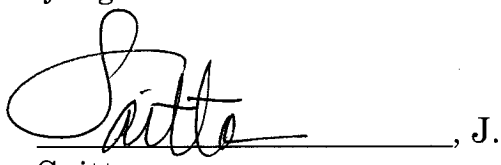
While workers' compensation exclusive remedy provisions will generally not apply when an employer commits an intentional tort upon an employee, Barjesteh v. Faye's Pub, 106 Nev. 120, 122, 787 P.2d 405, 406 (1990); see also Fanders v. Riverside Resort & Casino, 126 Nev. ___, 245 P.3d 1159 (2010), simply labeling alleged negligent conduct as intentional will not subject an employer to liability outside the workers' compensation statutory scheme. Conway v. Circus Circus Casinos, Inc., 116 Nev. 870, 874, 8 P.3d 837, 840 (2000). Indeed, this court has explained that intentional conduct for the purposes of avoiding the workers' compensation exclusive remedy provisions requires a deliberate and specific intent to injure the employee and that even knowingly allowing a hazardous work condition to exist "still falls short of the kind of actual intention to injure that robs the injury of accidental character." Id. at 875, 8 P.3d at 840 (internal quotations and citation omitted).

Here, even when the pleadings are viewed in the light most favorable to appellants, Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (setting forth this court's standard of review for a district court's grant of summary judgment),[1] the underlying incident simply cannot be construed as an intentional act by Barragan-Montano's

[1]Because the district court considered matters outside the pleadings, such as photographs and the federal Mine Safety and Health Administration's citation report, the summary judgment standard of review applies to our consideration of this appeal. See Lumbermen's Underwriting v. RCR Plumbing, 114 Nev. 1231, 1234, 969 P.2d 301, 303 (1998).

employer, as defined by this court's Conway decision. Appellants' complaint alleges that Barragan-Montano was injured on April 12, 2007, and that he had only begun working for respondents four days before this incident. The complaint further alleges that, at the time of the injury, the replacement pin had already been in use for approximately five years. Thus, appellants are essentially claiming that the bolt switch was made with the deliberate and specific intent to injure Barragan-Montano despite that action being taken approximately five years before he even began working for respondents. As noted above, this court has held that even knowingly allowing a hazardous condition to exist is not sufficient to render an employer's conduct intentional. See Conway, 116 Nev. at 874, 8 P.3d at 840.[2] As a result, the district court did not err in granting summary judgment to respondents. Id. We therefore

ORDER the judgment of the district court AFFIRMED.[3]



_____, J.
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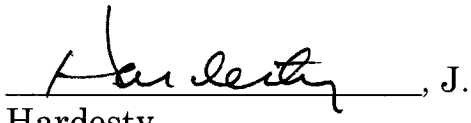

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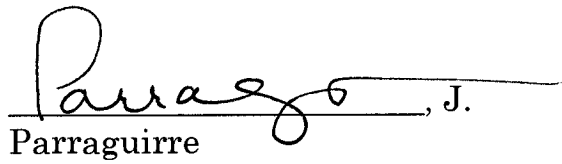

_____, J.
Parraguirre

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[2]We do not consider appellants' alternative argument regarding the creation of an exception for cases involving the violation of mandatory safety standards, as appellants have failed to cite any authority in support of this position. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider an issue not supported by pertinent authority).

[3]Because we affirm this appeal on the intentional tort issue, we need not reach appellants' arguments regarding the district court's alternative basis for summary judgment–election of remedies.

cc: Hon. Robert W. Lane, District Judge
Janet Trost, Settlement Judge
Benson Lee and Associates
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Nye County Clerk