IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS A. OROZCO,
Appellant,
vs.
THORNTON CONCRETE PUMPING, AN ENTITY OF UNKNOWN ORIGIN D/B/A LAS VEGAS PUMPING SERVICES,
Respondent.

No. 57364

ORDER AFFIRMING IN PART, VACATING IN PART AND REMANDING

This is an appeal from a district court summary judgment and a post-judgment order awarding attorney fees in a workers' compensation action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Jesus Orozco is a laborer who was employed by Marnell Corrao, a general contractor licensed pursuant to NRS Chapter 624, to work a construction job at the Wynn Hotel. Orozco suffered an industrial injury due to a defective concrete boom pump and brought suit against the concrete pump's operator, respondent Thornton Concrete Pumping. Thornton is an entity that had been contracted by Marnell to likewise work on the Wynn Hotel project. Orozco filed suit against Thornton alleging Thornton was liable in tort for his injury. Thornton filed a motion for summary judgment wherein the company argued it was protected from liability per the exclusive remedy provisions of the Nevada

Industrial Insurance Act (NIIA). The district court agreed with Thornton's position and granted summary judgment. The district court also granted Thornton's motion for attorney fees.[1]

On appeal, Orozco argues that: (1) the district court erred in granting summary judgment because genuine issues of material fact remain as to whether his claims are precluded by the exclusivity provision of the NIIA; (2) the district court erred by finding that NIIA immunity extends to product liability claims; and (3) the district court's grant of attorney fees was improper.

The parties are familiar with the facts, so we do not recount them further except as pertinent to our disposition.

Orozco's claims are precluded by the NIIA

Orozco argues that the district court erred in granting summary judgment based on its conclusion that Orozco's claims are precluded by the exclusive remedy provision of the NIIA. Specifically, Orozco contends that the district court failed to properly apply the test for determining statutory employer status, articulated by this court in Meers v. Haughton Elevator, 101 Nev. 283, 701 P.2d 1006 (1985). See also NRS 616B.603. Additionally, Orozco argues that the district court incorrectly concluded that, as a matter of law, Thornton was Marnell's subcontractor under NRS 616A.320.

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[1]Thornton applied for attorney fees pursuant to NRS 17.115 and NRCP 68 (because it had obtained a more favorable judgment than its offer of judgment) and alternatively under NRS 18.010 (because Orozco brought and maintained claims on unreasonable grounds); however, the district court did not specify under which grounds it granted the fees.

This court reviews a district court's grant of summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when, after examining the record in a light most favorable to the nonmoving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. Id.

The Nevada Industrial Insurance Act is codified in NRS Chapters 616A to 616D, inclusive. It was enacted "to ensure the quick and efficient payment of compensation to employees who are injured or disabled [in the course of their employment] at a reasonable cost to the employers who are subject to the provisions of [chapters 616A to 617]." NRS 616A.010(1). The NIIA requires that certain employers must provide compensation for death or injury that arises out of and in the course of employment. NRS 616A.020(2), 616B.612(1). These employers are referred to as "statutory employers" in the NIIA. Richards v. Republic Silver State Disposal, 122 Nev. 1213, 1218, 148 P.3d 684, 687 (2006). In return for providing this compensation, the NIIA's exclusive remedy provision, NRS 616A.020, immunizes those statutory employers and their employees from lawsuits connected with an employee's industrial injury. Id. at 1218, 148 P.3d at 687.

"A company that 'has in service any person under a contract of hire,' is that person's statutory employer under the NIIA." Id. at 1218, 148 P.3d at 687 (quoting NRS 616A.230(2)). Principal contractors are also generally considered to be the statutory employers of their subcontractors and independent contractors, and any employees of either. NRS

616A.210(1)[2]; Richards, 122 Nev. at 1218, 148 P.3d at 687. A principal contractor's immunity may extend to its statutory employees through a Chapter 624 license or by withstanding the independent enterprise test under NRS 616B.603 and Meers.

When principal contractors are licensed pursuant to NRS Chapter 624, their immunity from suit extends to any other party contracted by a principal. NRS 616B.603(3)(a). In accord is Richards, wherein this court interpreted NRS 616B.603(3) and held: "Under that statute, extended immunity generally automatically applies to matters involving a project executed within the scope of an NRS Chapter 624–licensed contractor's license. All other matters must be further analyzed under NRS 616B.603 and Meers."[3] Richards, 122 Nev. at 1222, 148 P.3d

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[2]NRS 616A.210(1) states that "[e]xcept as otherwise provided in NRS 616B.603, subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS."

[3]In 1991, the Legislature enacted NRS 616.262 (later substituted in revision as NRS 616B.603), codifying the Meers test. See 1991 Nev. Stat., ch. 723, § 16, at 2392. Lipps v. Southern Nevada Paving, 116 Nev. 497, 500, 998 P.2d 1183, 1185 (2000).

In pertinent part, NRS 616B.603 provides that:

> A person is not an employer for the purposes of chapters 616A to 616D, inclusive, of NRS if:
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> (a) The person enters into a contract with another person or business which is an independent enterprise; and
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> (b) The person is not in the same trade, business, profession or occupation as the independent enterprise.

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at 689. The court further held: "Contractors working, ultimately, under an NRS Chapter 624 license are entitled to NIIA immunity for claims arising from employee injuries incurred in the scope of work" Id. at 1225, 148 P.3d at 691. In other words, immunity for a subcontracting or independent contracting entity is generally automatic if the principal contractor who hired that entity possesses a NRS Chapter 624 license. Because the employee in Richards was working on a project that was within the scope of the general contractor's NRS Chapter 624 license when he was injured, this court found that the case fell within the exclusion to NRS 616B.603 and the Meers independent enterprise test did not apply. Id. at 1222, 148 P.3d at 690.

In this case, the district court found that Marnell was the principal contractor responsible for the construction project during which this incident arose, and was Orozco's statutory employer. See NRS 616A.285. It further found Thornton to be a subcontractor-employee of Marnell, making Thornton Orozco's statutory co-employee. See NRS 616A.210(1). Because Marnell was a licensed general contractor pursuant

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NRS 616B.603(1). The statute then defines "independent enterprise" as:

> a person who holds himself or herself out as being engaged in a separate business and:
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> (a) Holds a business or occupational license in his or her own name; or
>
> (b) Owns, rents or leases property used in furtherance of the business.

NRS 616B.603(2).

to NRS Chapter 624 and Orozco was working on a project that was within the scope of Marnell's NRS Chapter 624 license when he was injured, his case falls within the exclusion of NRS 616B.603(3)(a). See Richards, 122 Nev. at 1222, 148 P.3d at 690. As Thornton was also contracted to work on the project, the district court properly characterized Thornton as Orozco's co-employee for the purposes of the NIIA, and since co-employees are immune from suit per NRS 616C.215, all of Orozco's claims are precluded by NIIA exclusivity provisions. Contrary to Orozco's assertion, we need not conduct the Meers test since a further Meers analysis would only be warranted if there was no NRS Chapter 624-licensed principal here. Since Marnell was so licensed, further need for Meers analysis is foreclosed. Accordingly, the district court did not err in granting summary judgment to Thornton on this issue.

Thornton's immunity extends to the product liability claims

Orozco argues that the district court erred in granting summary judgment, as genuine issues of material fact remain as to whether Thornton was negligent in the care and maintenance of the concrete pumping boom and in the welding of the boom under a theory of products liability. Orozco contends that the NIIA does not apply to his product liability claims because the contract that Thornton signed with Marnell has safety, warranty, and indemnification clauses that would remove the product liability issue from the NIIA, and because Thornton is required to assure the safe and efficient operation of its booms and pumps. However, Orozco's arguments are not persuasive.

Initially, Orozco preemptively acknowledges that the dual capacity doctrine (under which an employer normally shielded from tort liability may become liable to his employee if he occupies a second capacity in addition to his capacity as employer) cannot apply, but reasons it is because Thornton was only a service provider and was never a subcontractor or co-employee. This view of Thornton's role does not comport with our conclusion that Thornton was, in fact, a co-employee. It also fails to account for the primary reason why the dual capacity doctrine would be inapplicable, which is this court's hesitancy to adopt the dual capacity doctrine as law in Nevada.

In Noland v. Westinghouse Electric Corp., this court explained that the "dual capacity doctrine" has been defined as:

> [A]n employer normally shielded from tort liability by the [NIIA's] exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.

97 Nev. 268, 269 n.1, 628 P.2d 1123, 1124 n.1 (1981) (citation omitted). In Noland, an employee for a subcontractor was injured by an elevator that was installed on the construction site by another subcontractor, who was also its manufacturer, seller, and installer. Id. at 268-69, 628 P.2d at 1124. This court rejected the injured employee's argument that we should adopt the dual capacity doctrine to allow him to pursue a claim against the subcontractor/manufacturer based upon a strict liability theory. Id. at 270, 628 P.2d at 1125. This court has similarly rejected the dual capacity doctrine in subsequent cases addressing the issue. See e.g., Harris v. Rio Hotel & Casino, 117 Nev. 482, 491, 25 P.3d 206, 212 (2001).

Though Orozco asserts he is not asking this court to apply the dual capacity doctrine, his arguments invite that very analysis, especially when he posits that the NIIA should not be the sole remedy available to him. Orozco's argument that Thornton should be held liable under a product liability theory because it was also acting in the capacity of manufacturer and supplier of the boom is the same argument this court rejected in Noland. See Noland, 97 Nev. at 270, 628 P.2d at 1125. Since Orozco is, in our view, seeking application of the dual capacity doctrine, it is incumbent upon him to offer compelling argument as to why this court should reject its own precedent and adopt the dual capacity doctrine. Since he has failed to do so, we conclude that the district court did not err in finding that NIIA immunity extends to Orozco's product liability claims.

The district court erred in awarding attorney fees

Orozco argues that the district court abused its discretion in awarding attorney fees because he had a reasonable basis for his action, his claims were brought in good faith, and Thornton's fees are unreasonable and excessive.[4] Furthermore, Orozco contends that attorney fees cannot be awarded because the district court failed to consider the

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[4]Thornton also argues that this court lacks jurisdiction over Orozco's appeal from the order awarding attorney fees because the notice of appeal, filed in April 2011, was filed before a written order was entered in the district court. However, the record indicates that a written order awarding attorney fees was filed in the district court on September 15, 2011. Thus, we have determined that jurisdiction is proper in this court. NRAP 4(a)(6) (stating that where a written order is entered before dismissal of a premature appeal, the premature notice of appeal is deemed filed as of the date of the written order).

factors established in Beattie v. Thomas, 99 Nev. 579, 588-589, 668 P.2d 268, 274 (1983).

This court reviews a district court's award of attorney fees for an abuse of discretion. Thomas v. City of North Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). A district court has discretion to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). Further, NRS 17.115 and NRCP 68(f) provide that fees may be awarded to a party whose prior offer of judgment was rejected, if the judgment ultimately obtained by the offeree is less favorable than the original offer. In evaluating the reasonableness of a request for attorney fees, we require the district court to consider the factors set forth in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349-350, 455 P.2d 31, 33 (1969).

In considering whether to award attorney fees or costs pursuant to NRCP 68, a district court must consider:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. at 588-89, 668 P.2d at 274.[5] While explicit findings with respect to the Beattie factors are preferable, a district court's failure to explicate its findings in its order is not a per se abuse of discretion, so long as the record clearly reflects that the district court properly considered these factors. Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001). See also State Drywall v. Rhodes Design & Dev., 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) ("While we have previously affirmed a district court's award of attorney fees though it failed to make express findings regarding the Beattie factors, the record must, nevertheless, reflect the district court considered the Beattie factors" (citations omitted)).

Here, the entirety of the district court's order awarding attorney fees consists of one sentence setting forth the amount of the attorney fees awarded. Further, the district court did not hold a hearing on attorney fees or otherwise explain its reasoning on the record. As a result of the district court's conclusory order and lack of hearing transcript to review, the record before us neither evidences the district court's basis for awarding attorney fees, nor clearly indicates that it considered the Brunzell or Beattie factors in reaching its decision. Accordingly, we vacate the award of attorney fees and remand for the district court to set forth

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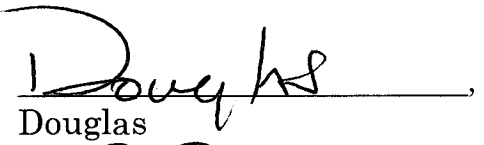
[5]Beattie was decided in accord with Nevada Rules of Civil Procedure as they existed in 1983. Rule 68 was replaced with a 1998 amendment that substantially altered portions of the initial text. Nonetheless, this court has continued to hold, even after the 1998 amendment, that Beattie still provides the correct analysis of when attorney fees will be awarded per NRCP 68, as amended. See, e.g., RTTC Communications v. Saratoga Flier, 121 Nev. 34, 41, 110 P.3d 24, 28 (2005).

upon which grounds (NRS 17.115, NRS 18.010 or NRCP 68) it awarded fees, its basis for awarding attorney fees under the Beattie factors, and to evaluate the reasonableness of the attorney fees awarded under the Brunzell factors. Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
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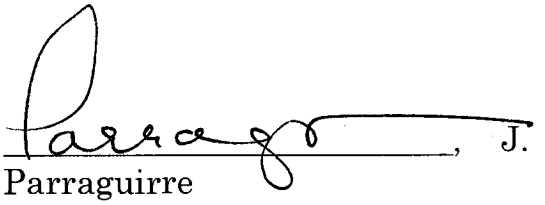

_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Eva Garcia-Mendoza, Settlement Judge
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