IN THE SUPREME COURT OF THE STATE OF NEVADA

LYNN CARDIELLO AKA LYNN KERECMAN, AN INDIVIDUAL,
Appellant,
vs.
VENUS GROUP, INC., A CALIFORNIA CORPORATION; AND RAJ PATEL, AN INDIVIDUAL,
Respondents.

No. 58925

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a complaint in a tort action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

BACKGROUND

This appeal arises from the dismissal of appellant Lynn Cardiello's complaint against respondents for negligence and negligence per se.[1] The complaint alleged that respondents had negligently failed to provide workers' compensation coverage and that this failure resulted in the injuries appellant sustained in an auto accident that occurred while she was driving her personal vehicle for business purposes. Appellant also alleged that respondents' acts constituted negligence per se. Respondents moved to dismiss the complaint for failure to state a claim, arguing that

[1]The complaint also listed Myrna Cardona, another driver involved in the accident, as a defendant, but it appears that Cardona was not properly served, and thus, was not a party below.

there is no private cause of action against an employer for failing to carry workers' compensation coverage, and that the workers' compensation statutes were not intended to prevent injuries but to instead ensure compensation for injured employees. Appellant opposed the motion, arguing that, based on a statutory presumption, respondents were the proximate cause of her injuries because of their failure to provide workers' compensation coverage. The district court agreed with respondents and granted their motion to dismiss. This appeal followed.

DISCUSSION

On appeal, appellant first argues that the workers' compensation statutes create a private right of action against an employer who fails to carry the required insurance. Respondents disagree. When an employer fails to provide workers' compensation insurance coverage, an injured employee may bring a tort claim against that employer as if the workers' compensation statutes did not apply. *See* NRS 616B.612(1); NRS 616B.636(1); *Antonini v. Hanna Indus.*, 94 Nev. 12, 18, 573 P.2d 1184, 1188 (1978), *overruled on other grounds by Harris v. Rio Hotel & Casino, Inc.*, 117 Nev. 482, 25 P.3d 206 (2001). In such an action, "it is presumed that the injury to the employee was the result of the negligence of the employer and that such negligence was the proximate cause of the injury." NRS 616B.636(3). Here, the sole act of negligence that appellant alleged as causing her injury was respondents' failure to provide workers' compensation insurance. Nevada's workers' compensation statutes do not give rise to a private cause of action for merely failing to carry workers' compensation insurance, however, but instead allow an injured employee to pursue a common-law claim against the employer for personal injuries suffered on the job. *See* NRS 616B.636(1); *Richardson Constr., Inc. v.*

Clark Cnty. Sch. Dist., 123 Nev. 61, 65, 156 P.3d 21, 23 (2007) (explaining that "when a statute does not expressly provide for a private cause of action, the absence of such a provision suggests that the Legislature did not intend for the statute to be enforced through a private cause of action"); *see also Nickels v. Napolilli*, 29 P.3d 242, 249 (Alaska 2001) (explaining that the lack of workers' compensation insurance in itself is not an "injury" that gives rise to a tort action). Thus, the district court properly determined that NRS 616B.636 does not create a private cause of action.

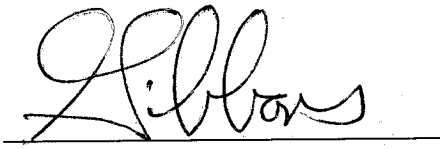
Next, appellant argues that because of notice pleading, her complaint against respondents should not have been dismissed. Respondents dispute this assertion. With regard to appellant's negligence claim, that claim fails for two reasons. First, appellant's complaint specifically alleged that respondents' failure to provide workers' compensation insurance was the negligent act that resulted in her injuries. But, as explained above, this failure does not in itself give rise to a private cause of action. Second, while appellant is correct that there is a presumption that a workplace injury is caused by the employer's negligence when the employer fails to carry workers' compensation insurance, *see* NRS 616B.636(3), appellant herself rebutted that presumption by alleging that the auto accident that resulted in her injuries was caused by the negligence of the two drivers that rear ended her vehicle. *See Sherburne v. Miller*, 94 Nev. 585, 587-88, 583 P.2d 1090, 1091-92 (1978) (explaining that the presumption created by NRS 616B.636(3)'s predecessor can be rebutted and the employer cannot be held liable when there is a complete absence of negligence on its part).

Appellant's negligence per se claim also fails because there is no evidence that NRS 616B.636, or the workers' compensation statutes generally, were intended to prevent the type of injury that appellant suffered, and thus, these statutes did not create a duty on the part of respondents. *See* NRS 616A.010(1) (explaining that the purpose of the workers' compensation statutes is to ensure quick and efficient compensation to injured employees); *Vega v. E. Courtyard Assocs.*, 117 Nev. 436, 440, 24 P.3d 219, 221 (2001) (defining negligence per se); *see also Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828-29, 221 P.3d 1276, 1283-84 (2009) (affirming dismissal of a negligence per se claim where respondents owed no duty to appellant under the statute). Therefore, we find no error in the district court's conclusion that appellant's complaint failed to state a claim upon which relief could be granted. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (explaining that this court reviews de novo an order granting an NRCP 12(b)(5) motion to dismiss, accepting all factual allegations in the complaint as true and drawing all inferences in the plaintiff's favor).

Finally, with regard to the district court's refusal to allow appellant to amend her complaint, appellant's request for leave to amend was devoid of any information about the nature or substance of her proposed amendment, aside from asserting that the amendment would "specifically add" a claim under NRS 616B.636. As set forth above, NRS 616B.636 does not create a private cause of action for the failure to maintain workers' compensation insurance. Therefore, we conclude that the district court did not abuse its discretion when it dismissed appellant's complaint without granting leave to amend. *See Allum v. Valley Bank of*

Nev., 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (explaining that this court reviews a denial of leave to amend a complaint for an abuse of discretion). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

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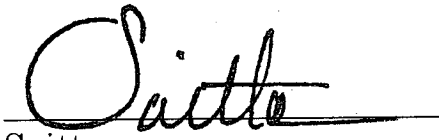
Douglas



_____, J.
Saitta

cc: Eighth Judicial District Court Dept. 4
M. Nelson Segel, Settlement Judge
Cogburn Law Offices
Holland & Hart LLP/Reno
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Eighth District Court Clerk