

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DON M. ESCOBAL,  
Appellant,  
vs.  
HOWARD HUGHES COMPANY, LLC, A  
FOREIGN LIMITED LIABILITY  
COMPANY,  
Respondent.

No. 68779

FILED

SEP 21 2016

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

*ORDER OF AFFIRMANCE*

This is an appeal from a grant of summary judgment for an action in tort. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Appellant Don M. Escobal argues summary judgment was improper because, as a matter of law, NRS 455.010 creates an affirmative duty on Respondent Howard Hughes to fence a drainage wash on its property. Howard Hughes argues that it is afforded immunity from suit under NRS 41.510, and that the exception to statutory immunity does not apply.<sup>1</sup> Having considered the parties' arguments and reviewed the record on appeal, we conclude that Escobal failed to establish grounds for reversal.<sup>2</sup>

---

<sup>1</sup>Howard Hughes also argues Escobal's suit was time-barred under a construction defect statute of repose, but having considered the issue, we conclude this argument is without merit.

<sup>2</sup>We do not recount the facts except as necessary to our disposition.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

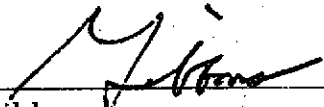
First, we reject Escobal's claim that Howard Hughes' failure to fence in the wash pursuant to NRS 455.010 establishes a genuine issue of material fact regarding whether Howard Hughes engaged in willful conduct. Escobal offered evidence that Howard Hughes knew of dirt bike trails, but offered no evidence that Howard Hughes knew of previous injuries. As a result, Escobal failed to show willful misconduct as a matter of law and NRS 41.510(3)(a)(1) affords Howard Hughes immunity from liability in this instance. *See Boland v. Nev. Rock & Sand Co.*, 111 Nev. 608, 613, 894 P.2d 988, 991-92 (1995) (affirming the grant of summary judgment where a plaintiff did not offer any evidence that the defendant knew of prior accidents at a gravel pit and therefore failed to establish willful conduct under NRS 41.510(3)(a)(1)); *Neal v. Bently Nev. Corp.*, 771 F. Supp. 1068, 1072-73 (D. Nev. 1991) (knowledge that an injury is probable is required to show willful misconduct under NRS 41.510(3)(a)(1)).


Second, we conclude that even if Howard Hughes' drainage wash was an excavation under NRS 455.010, the failure to erect fencing constitutes only negligence per se and does not meet the NRS 41.510(3)(a)(1) standard. *See Gard v. United States*, 594 F.2d 1230, 1232 (9th Cir. 1979) (affirming the grant of summary judgment and holding that a failure to erect a fence under NRS 455.010 establishes, at most,


negligence per se, which is insufficient to overcome NRS 41.510's immunity provisions). Thus, Escobal failed to establish a genuine dispute of material fact as to Howard Hughes' immunity under NRS 41.510.

We therefore,

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Kenneth C. Cory, District Judge  
Carolyn Worrell, Settlement Judge  
Cloward Hicks & Brasier PLLC  
Palumbo Bergstrom  
Eighth District Court Clerk