IN THE SUPREME COURT OF THE STATE OF NEVADA

CYNTHIA PRICE,
Appellant,
vs.
DOLORMYLENE T. CRUZ, INDIVIDUALLY; PETER CRUZ, INDIVIDUALLY; ROSA FEF D. QUINN, INDIVIDUALLY; AND GEANIA MOTES, INDIVIDUALLY,
Respondents.

No. 38665

FILED

JUN 03 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This appeal is taken from a district court order granting summary judgment. Appellant Cynthia Price, an employee of the Nevada Department of Motor Vehicles (DMV), allegedly received injuries while administering driving tests to three separate driver's license examinees. Price filed a workers' compensation claim against the DMV. Then, Price filed a complaint in district court, asserting a negligence claim against the examinees. The examinees sought summary judgment, claiming that an agency relationship existed between themselves and the DMV, thereby protecting them from a suit by Price under the exclusive remedy provisions of the Nevada Industrial Insurance Act. The district court granted summary judgment.

03-09271

Summary judgment is appropriate where there are no genuine issues of material fact and "the moving party is entitled to judgment as a matter of law."[1] We review summary judgment orders de novo.[2]

We have consistently held that an injured employee's sole remedy against his employer for an injury arising out of and in the course of his employment is a workers' compensation claim.[3] The exclusive remedy provisions extend to those in the same employ as the injured employee, including subcontractors and independent contractors.[4] However, the exclusive remedy provisions do not extend to a third party who is responsible for the employee's injuries.[5]

NRS 616C.215(2) provides:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under

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[1]NRCP 56(c).

[2]Clark County School Dist. v. Riley, 116 Nev. 1143, 1146, 14 P.3d 22, 24 (2000).

[3]Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353, 951 P.2d 1027, 1030 (1997) (citing Frith v. Harrah South Shore Corp., 92 Nev. 447, 452, 552 P.2d 337, 340 (1976)) holding modified by Harris v. Rio Hotel & Casino, 117 Nev. 482, 25 P.3d 206 (2001); see also NRS 616A.020(1) ("The rights and remedies provided in chapters 616A to 616D, inclusive, of NRS for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive . . . .").

[4]Aragonez v. Taylor Steel Co., 85 Nev. 718, 720, 462 P.2d 754, 755-56 (1969).

[5]See American Federal Savings v. Washoe County, 106 Nev. 869, 872, 802 P.2d 1270, 1273 (1990) (citing Leslie v. J. A. Tiberti Constr., 99 Nev. 494, 496, 664 P.2d 963, 965 (1983)).

> circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee, or in case of death his dependents, may take proceedings against that person to recover damages, but the amount of the compensation the injured employee or his dependents are entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of the damages recovered, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.
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> (b) If the injured employee, or in case of death his dependents, receive compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer, or in case of claims involving the uninsured employers' claim account or a subsequent injury account the administrator, has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of his dependents to recover therefor.

"Therefore, an injured employee may sue a third person in common law if that third person is not the employee's statutory employer or co-employee."[6] If the injured employee recovers from a third person, the insurer or administrator has "a right to reimbursement by creating a lien on the 'total proceeds' that an injured employee recovers from third

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[6]Tucker, 113 Nev. at 1353-54, 951 P.2d at 1030.

persons, which might include recovery for non-economic as well as economic damages."[7]

In this case, Price agrees that her injuries arose out of and in the course of her employment. Price received compensation from EICON, and EICON has filed notice of a statutory lien on any settlement or judgment rendered in Price's favor. Price is seeking to recover from the examinees, as third parties, for their alleged negligence that caused her injuries. The examinees, however, claim that they are not third parties, but are analogous to independent contractors or subcontractors. They claim that because Price directed them where they should drive, they were under the control and direction of the DMV and were, thus, agents of the DMV.

An agent is defined as "[a] person authorized by another (principal) to act for or in place of him; one intrusted with another's business."[8] "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[9] "It is a cardinal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal, and not for the

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[7]Rubin v. State Farm Auto. Ins. Co., 118 Nev. ___, ___, 43 P.3d 1018, 1019 (2002) (citing Breen v. Caesars Palace, 102 Nev. 79, 715 P.2d 1070 (1986)).

[8]Black's Law Dictionary 41 (abridged 6th ed. 1998); see also Daly v. Lahontan Mines Co., 39 Nev. 14, 22, 151 P. 514, 516 (1915) ("An 'agent is one who has authority to act for another.'") (quoting 1 Words and Phrases, 262).

[9]Black's Law 40 (citing Restatement (Second) of Agency § 1).

agent . . . ."[10] An agency relationship is not created every time one party exercises some control over another party.[11]

In the case of DMV examinations, the examinee is not acting on the DMV's behalf or for the benefit of the DMV. Examinees are seeking driver's licenses on their own behalf. Further, the examiner exercises control only over what driving maneuvers must be completed, but exerts no control over how well these maneuvers are executed. NRS 483.330 provides that a driving examination may include "an actual demonstration of [the examinee's] ability to exercise ordinary and reasonable control in the operation of a motor vehicle of the type or class of vehicle for which [the examinee] is to be licensed."[12] Thus, one of the purposes of the driving test is to determine whether the examinee has the ability to control the vehicle. The DMV does not exert control over the examinee.

In conclusion, the examinees provide no legal basis for their assertion that they became agents of the DMV merely because the examiner directed what driving maneuvers should be made. Because there is no agency relationship between the examinees and the DMV, the exclusive remedy provisions of Nevada's Industrial Insurance Act are inapplicable. Therefore, Price may pursue her negligence claim against the examinees, as third parties, and summary judgment was improper.

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[10]Edwards v. Carson Water Co., 21 Nev. 469, 484, 34 P. 381, 386 (1893).

[11]See Hunter Mining v. Management Assistance, 104 Nev. 568, 570, 763 P.2d 350, 352 (1988) (no agency found where seller maintained control over the manner in which buyer handled seller's products.)

[12]NRS 483.330(1)(d).

Price next contends that the district court erred by granting a motion in limine regarding the imputed liability of an owner of a motor vehicle for damages resulting from the alleged negligence of an immediate family member.

This court has stated that interlocutory rulings may be properly considered on appeal "if the opening brief properly specifies such rulings as errors of law."[13] Price, in her opening brief, claims the district court erroneously applied only NRS 41.440 and NRS 41.450, but failed to apply NRS 483.300. This is a sufficient specification of error of law to justify a review of this ruling.

NRS 41.440 provides that an owner of a motor vehicle shall be jointly and severally liable with his family member for any damages proximately resulting from negligence or willful misconduct by the family member while driving the owner's vehicle with the owner's permission. NRS 41.450 limits the imputed liability provided in NRS 41.440 by stating that the operator of the vehicle must "be made a party defendant if service of process can be had upon the operator as provided by law," before liability for negligence can be imputed to the owner.

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[13]Levine v. Remolif, 80 Nev. 168, 170 n.2, 390 P.2d 718, 719 n.2 (1964); see also Bowyer v. Davidson, 94 Nev. 718, 720 n.1, 584 P.2d 686, 687 n.1 (1978) (summary judgment entered earlier, but not containing certification provided by NRCP 54(b), was interlocutory in nature and was properly appealable upon entry of final judgment); Outboard Marine Corp. v. Schupbach, 93 Nev. 158, 161, 561 P.2d 450, 452 (1977) ("Although not an appealable ruling per se, we may review the propriety of an interlocutory ruling following judgment if properly assigned as error.) (citing Levine).

In this case, Price never named the two minor examinees, the actual operators of two of the vehicles, as defendants or served them with process. Therefore, under NRS 41.440 and NRS 41.450, liability cannot be imputed to the owners of the vehicles based on the alleged negligence of these operators. Thus, the district court did not err in granting the motion in limine on this basis.

Price next claims that imputed liability can be had through NRS 483.300(2), which provides:

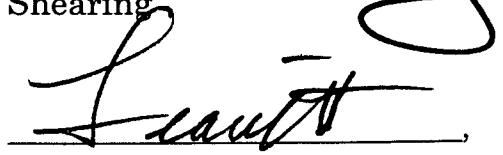
> Except as otherwise provided in NRS 41.0325, any negligence or willful misconduct of a minor under the age of 18 years when driving a motor vehicle upon a highway is imputed to the person who has signed the application of the minor for a permit or license and that person is jointly and severally liable with the minor for any damages caused by such negligence or willful misconduct.

This statute provides for imputed liability based on a parent who signs the application for the minor to obtain a driver's license. This liability is not based upon ownership of the vehicle. The district court, in its order granting the motion in limine, only addressed imputed liability of the owner of a motor vehicle, not imputed liability under NRS 483.300(2). Nothing in the record indicates that NRS 483.300(2) imputed liability was ever raised in the district court. Thus, this issue is not properly before us. Price, however, is not precluded from raising the issue of imputed liability under NRS 483.300(2) on remand.

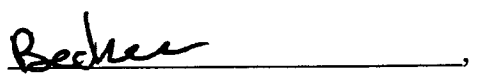
We conclude that because the exclusive remedy provisions of the Nevada Industrial Insurance Act do not apply to third parties such as driving examinees, the district court erred by granting summary judgment. Accordingly, we reverse the district court's judgment and remand this matter to the district court for further proceedings.

It is so ORDERED.

_____, J.
Shearing



_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Michael A. Cherry, District Judge
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