IN THE SUPREME COURT OF THE STATE OF NEVADA

TINA M. ROBINSON, AS ADMINISTRATOR FOR THE ESTATE OF ROBERT ROBINSON, DECEASED,
Appellant,
vs.
LAS VEGAS SANDS, INC.,
Respondent.

No. 38668

FILED

MAY 15 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting summary judgment in a negligence action on behalf of respondent Las Vegas Sands Expo.

The facts in this case are undisputed. On June 10, 1999, during the normal course of his employment duties as a forklift operator for Freeman Companies, appellant Robert Robinson stepped on a charged electrical drop cord. He received a shock and was injured. Robinson filed for and received workers' compensation benefits.

Robinson worked for Freeman Companies, a company that assembles and tears down convention exhibits. Freeman Companies contracted with Reed Exhibition Companies to assemble and tear down jewelry shows at conventions across the country. Reed contracted with the Sands d/b/a Sands Expo for space and facilities to use for a jewelry show at the Expo Center in Las Vegas, Nevada. Sands Technical Services (STS), a division of the Sands, provided electrical services to the convention vendors.

Robinson filed a suit against the Sands, alleging negligence. The Sands filed a motion for summary judgment on the grounds it was immune from suit as a matter of law under the Nevada Industrial Insurance Act (NIIA) and that Robinson's sole and exclusive remedy was

under the NIIA. The Sands also argued Freeman employees were statutory co-employees and that the Sands and Freeman Companies were engaged in the same trade, business, profession or occupation. The district court, following a hearing, granted summary judgment on behalf of the Sands, finding that the case was a construction case, and the Sands and Freeman were engaged in the same trade, business or profession.

Robinson argues this is a non-construction case, and the Sands has the burden of establishing immunity under NIIA. According to Robinson, because this is not a construction case, the Sands must meet the "normal work test" in order to establish immunity under the NIIA.[1] In support of his contention, Robinson asserts he was not an employee of the Sands, did not have workers' compensation benefits through the Sands, was not a principal contractor licensed pursuant to NRS chapter 624, and was not working pursuant to a construction agreement with a licensed principle contractor. Therefore, Robinson argues there is no direct employment immunity for the Sands under the NIIA. Further, Robinson contends that even if this were a construction case, the Sands is not the principal contractor, there was no construction agreement, and the normal work test is still used to determine immunity. In particular, Robinson asserts the Sands and STS electricians were not doing the normal work of a forklift driver.

Relying on GES, Inc. v. Corbitt,[2] Robinson argues that, as a forklift operator for Freeman Companies, he was engaged in the assembly, not the construction of exhibits, during the ordinary scope of his

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[1]Citing Meers v. Haughton Elevator, 101 Nev. 283, 701 P.2d 1006 (1985); NRS 616B.603.

[2]117 Nev. 265, 21 P.3d 11 (2001).

employment duties within the Sands Expo. Further, Robinson contends that Harris v. Rio Hotel & Casino[3] has not overturned the rule that construction cases must be differentiated from non-construction cases for the purposes of NIIA immunity.[4] Thus, it is Robinson's contention that, as a forklift operator for Freeman Companies, he was not engaged in the same trade, business or profession as the Sands STS electricians. We agree.

This court's review of an order granting summary judgment is de novo.[5] Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[6] "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."[7]

When a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth

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[3]117 Nev. 482, 25 P.3d 206 (2001).

[4]Noting that Harris overturned several cases which relied on the "control test" to determine immunity under the NIIA.

[5]Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

[6]NRCP 56; see also Great American Ins. v. General Builders, 113 Nev. 346, 350-351, 934 P.2d 257, 260 (1997).

[7]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

specific facts demonstrating the existence of a genuine factual issue.[8] The non-moving party's documentation must be admissible evidence, as "he is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture."[9] However, all of the non-movant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition.[10]

The NIIA provides the exclusive remedy of an employee against his employer for workplace injuries.[11] "'The reason for the employer's immunity is the quid pro quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts.'"[12] Thus, 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."[13]

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[8]NRCP 56(e); see also Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981).

[9]Posadas, 109 Nev. at 452, 851 P.2d at 442.

[10]Great American Ins., 113 Nev. at 351, 934 P.2d at 260 (citing Sawyer v. Sugarless Shops, 106 Nev. 265, 267, 792 P.2d 14, 15 (1990)).

[11]Lipps v. Southern Nevada Paving, 116 Nev. 497, 499, 998 P.2d 1183, 1185 (2000).

[12]Meers, 101 Nev. at 285, 701 P.2d at 1007 (quoting 2A Larson, Laws of Workman's Compensation, § 72.22, 14-86 (1983)) (emphasis added).

[13]Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353-54, 951 P.2d 1027, 1030 (1997); see also Lipps, 116 Nev. at 499, 998 P.2d at 1185.

Workplace immunity issues are first resolved by determining whether the workplace injury took place in a construction or non-construction setting.[14] Generally, the assembly of exhibition booths for the purpose of conventions or shows is considered a non-construction workplace setting.[15]

In the non-construction setting, the "normal work test," articulated in Meers v. Haughton Elevator and codified at NRS 616B.603, determines whether a sub-contractor or independent contractor is an "employee" under the NIIA.[16] Specifically, NRS 616B.603 provides that an entity is not an employer under the NIIA "if the entity enters into a contract with an independent enterprise[17] and the contracting entity is not

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[14]Lipps, 116 Nev. at 500, 998 P.2d at 1185.

[15]See GES, Inc., 117 Nev. at 269, 21 P.3d at 13-14 (exhibition booth and lighting assembly are displays requiring assembly, not construction); Antonini v. Hanna Industries, 94 Nev. 12, 16-17, 573 P.2d 1184, 1187 (1978) (laborer hired by local union to assist with the assembly and tear-down of exhibit booths by the Las Vegas Convention Center was part of a tripartite employer-employee relationship), overruled on other grounds by, Harris, 117 Nev. at 489, 25 P.3d 206, 211 (expressly overruling the use of the "control test" as the primary method for resolving NIIA immunity issues).

[16]Hays Home Delivery, Inc. v. EICON, 117 Nev. 678, 682, 31 P.3d 367, 369-70 (2001); see also NRS 616A.105 (defining "employee" to mean "every person in the service of an employer under any appointment or contract of hire or apprenticeship"); NRS 616A.210 (including subcontractors and independent contractors within the definition of "employee").

[17]NRS 616B.603(2) defines an "independent enterprise" to mean a

> [P]erson who holds himself out as being engaged in a separate business and:

continued on next page . . .

in the same trade, business, profession or occupation as the independent enterprise."[18] In order to determine whether a party is in the same trade, business, profession or occupation, the court asks "whether . . . [the] activity is, in that business, normally carried on through employees rather than independent contractors."[19] Thus, "the test is not whether the subcontractor's activity is useful, necessary, or even absolutely indispensable, to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service."[20]

The normal work test is also applied in construction cases when a defendant is not a principal contractor licensed pursuant to NRS chapter 624 or is not working pursuant to a construction agreement with such a licensed principal contractor.[21] The party asserting NIIA immunity has the burden of proof under the normal work test.[22]

In the present case, the Sands did not argue it was a principal contractor licensed pursuant to NRS chapter 624 or that it was working

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. . . *continued*

> (a) Holds a business or occupational license in his own name; or
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> (b) Owns, rents or leases property used in furtherance of his business.

[18]Hays, 117 Nev. at 682-83, 31 P.3d at 370 (quoting NRS 616B.603) (emphasis in original).

[19]Id. at 684, 31 P.3d at 370-71 (emphasis in original).

[20]Id. at 684, 31 P.3d at 370.

[21]Id. at 683-84 n.8, 31 P.3d at 370 n.8; GES, Inc., 117 Nev. at 269, 21 P.3d at 13-14.

[22]Hays, 117 Nev. at 683-83, 31 P.3d at 370.

pursuant to a construction agreement with a principal contractor. The Sands did state in its reply brief, that it had contracted with a principal contractor. However, the Sands did not reference NRS chapter 624 or cite to any authority or information in the record for this proposition. We conclude that this case is a non-construction case involving the assembly and tear-down of exhibits for a convention/show which was held on the Sands' property. Thus, the normal work test articulated in Meers and codified at NRS 616B.603 applies to determine the Sands' immunity under the NIIA.

In the present case, Reed Exhibition entered into a contractual agreement with the Sands to lease space for its jewelry show. The Facilities Licensing Agreement between Reed and the Sands indicates that the Sands provided space and facilities for the presentation of exhibitions and shows.[23] Reed used, as it had in several other jewelry shows, Freeman Companies for the assembly and tear-down of its exhibits/booths. The contract between Reed and the Sands provided that Reed would have the necessary workers' compensation insurance for its employees. Similarly, the agreement between Reed and Freeman Companies provided that Freeman would have the necessary workers'

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[23]The Facilities Licensing Agreement indicates that the Sands can exclusively provide, at an additional fee, the following services: (1) electrical, wiring and services; (2) plumbing, gas and compressed air services; (3) telephone systems wiring, services and operation; (4) general cleaning and maintenance of authorized areas, and trash collection and disposal; (5) customer service center facilities; (6) rigging; and (7) food and beverage services. This was not an exclusive list of services the Sands could provide, and the contract required that Reed notify the Sands with a notice of the contractual services it would require at the time it filed its plan of operation.

compensation insurance, as statutorily required by the state in which the work took place, for its employees.

While the Sands/Sands Expo's business is also convention-based, it seems clear that the assembly and tear-down services are an independent enterprise since Freeman Companies held a business license in its own name and owned property for use in furtherance of its business.[24] Further, although the record indicates a duplication of services provided between the three contractual parties (e.g., electrical services), the record does not indicate that the Sands employed persons who normally carried out the functions provided by Freeman Companies. Therefore, since the Freeman Companies did not perform work normally carried out by Sands' employees, the Sands would not be considered the statutory employer of Freeman Companies employees.[25] As noted in Harris, this scheme makes sense "given the overall purpose of workers' compensation because it places responsibility on the independent enterprises, which are separate business entities, for their own employees and not the employees of other independent enterprises with which they interact."[26]

Accordingly, we conclude Freeman Companies was an independent enterprise and that it did not perform the work normally carried out by Sands' employees. Therefore, the Sands was not the statutory employer of Freeman Companies' employees, including Robinson, and is not immune from a common law tort action on this

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[24]See NRS 616B.603(2).

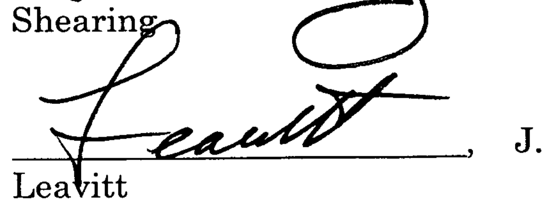
[25]Harris, 117 Nev. at 492, 25 P.3d at 212-13.

[26]Id. at 492, 25 P.3d at 212-13.

ground.[27] Because the Sands was not entitled to NIIA immunity, under the normal work test analysis, the district court erred by granting the Sands' motion for summary judgment.[28] Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for further proceedings.

_________________________, J.
Shearing



_________________________, J.
Leavitt

_________________________, J.
Becker

cc: Hon. Ronald D. Parraguirre, District Judge
Dennis A. Kist & Associates
David R. Ford
Prince and Keating, LLP
Clark County Clerk

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[27]See GES, Inc., 117 Nev. at 269, 21 P.3d at 13-14.

[28]Id. at 269, 21 P.3d at 14.