

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK FOULKE,
Appellant,

vs.

ECOLOGY CONTROL INDUSTRIES,
INC., A CALIFORNIA CORPORATION;
CALNEV PIPE LINE COMPANY, A
DELAWARE CORPORATION; AND
GATX TERMINALS CORPORATION, A
CALIFORNIA CORPORATION,
Respondents.

No. 38830

FILED

FEB 08 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order of summary judgment on behalf of Ecology Control Industries, Inc.; CalNev Pipe Line Company; and GATX Terminals Corporation (collectively known herein as ECI) in a torts case. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

FACTS

The underlying controversy arises from injuries sustained by Mark Foulke, a former firefighter/paramedic with the Clark County Fire Department, while attempting to rescue an injured ECI worker inside a large tank located at the CalNev above-ground fuel tank storage facility in Sloan, Nevada. The district court granted ECI's renewed motion for summary judgment. Foulke filed this appeal.

When ECI technicians Roberto Callejas and Alvaro Alanis prepared to clean and repair a forty-foot high gasoline storage tank containing remnants of unleaded gasoline, they donned protective clothing and entered the tank. While inside, Alanis became ill, removed his respirator, and attempted to climb the ladder to exit the tank. When

Alanis reached approximately three feet from the roof of the tank, he fell off the side of the ladder, landing face down on the steel deck. An ECI Foreman advised the CalNev facility to call 911 and request a rescue unit. The Clark County Fire Department, including Foulke, a firefighter/paramedic, arrived and began rescue operations.

When the firefighter personnel arrived, there was about an inch and a half of gasoline in the bottom of the tank. Foulke had some familiarity with this fuel storage facility, for he had responded to an incident at the storage facility one week prior because the same tank had experienced a problem with overflowing fuel.

After consultation with the Clark County Hazardous Materials Unit, Foulke's captain decided that Foulke and firefighter/paramedic Ron Lupton would enter the tank to rescue Alanis. Before entering the tank, Foulke was advised that he would be entering a hazardous situation with high vapor ratio inside the tank. Members of the rescue team took readings of the air quality inside the tank and deemed it permissible to enter the tank. Foulke and Lupton entered the tank wearing "full structural turnout" clothing.

Lupton entered the tank first, followed by Foulke. When Foulke reached the bottom of the ladder, Lupton advised him that Alanis still had a pulse. Foulke climbed out of the tank to obtain a clean mask for Alanis; however, when Foulke returned with the mask, Alanis no longer had a pulse. Foulke and Lupton lifted Alanis out of the tank with a basket. The rescue operation lasted twenty-six minutes. Once Foulke exited the tank and entered the decontamination process, he experienced difficulty breathing and tightness in his chest.

Foulke indicated that other than a slight shortness of breath, tightness in his chest, and some general fatigue, he felt fine after the rescue attempt. However, the next day he experienced shortness of breath, sweating, and an increased heart rate. Foulke received treatment at University Medical Center and consulted with several doctors and specialists concerning his respiratory problems.

Foulke alleges that he contracted “upper respiratory illness, reactive airway disease syndrome, and multiple chemical sensitivities” while acting in his capacity as a Clark County firefighter/paramedic, and that those injuries have prevented Foulke from returning to his job with the Clark County Fire Department. As a result, Foulke filed an action against ECI for negligence, negligence per se, respondeat superior, strict liability, and declaratory relief. In November 2001, the district court entered an order granting ECI’s motion for summary judgment. Foulke filed this appeal.

DISCUSSION

Standard of Review

When reviewing a district court’s order granting summary judgment, this court applies a de novo standard of review.¹ Summary judgment should be granted only when, based on the pleadings and discovery, no genuine issue of material fact exists.² “A genuine issue of

¹Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

²NRCP 56(c).

material fact [exists when] a reasonable jury could return a verdict for the non-moving party.”³

The “Firefighter’s Rule” bars Foulke’s claim

Foulke argues the “Firefighter’s Rule” does not bar his claim against ECI.

“At common law, the ‘Firefighter’s Rule’ bars a public safety officer from recovering damages in a negligence action for injuries received as a result of a risk occurring within the scope of his official duties.”⁴ Thus, “[s]uch officers, in accepting the salary and fringe benefits offered for the job, assume all normal risks inherent in the employment as a matter of law and thus may not recover from one who negligently creates such a risk.”⁵

Nevertheless, “NRS 41.139 limits the common law rule’s bar against recovery to instances where the negligent act complained of is the same act which requires [the firefighter’s] presence at the scene.”⁶ NRS 41.139 was enacted “to narrow the ‘Firefighter’s Rule’ to allow recovery by public servants where recovery was not previously allowed.”⁷

³Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

⁴Borgerson v. Scanlon, 117 Nev. 216, 220, 19 P.3d 236, 238 (1990).

⁵Steelman v. Lind, 97 Nev. 425, 427-28, 634 P.2d 666, 667 (1981) superceded by statute as explained in Wiley v. Redd, 110 Nev. 1310, 1314, 885 P.2d 592, 595 (1994).

⁶Borgerson, 117 Nev. at 220, 19 P.3d at 238.

⁷Moody v. Manny’s Auto Repair, 110 Nev. 320, 328, 871 P.2d 935, 940 (1994) superceded by statute as explained in Wiley, 110 Nev. at 1314, 885 P.2d at 595.

ECI did not engage in willful or negligent conduct, permitting Foulke's claim against ECI

Foulke contends that ECI engaged in intentional or willful conduct that allows him to recover under an exception to the "Firefighter's Rule," pursuant to NRS 41.139(1)(a) and (b).

NRS 41.139, states in pertinent part and with emphasis added:

(1)[A] peace officer, fireman or emergency medical attendant may bring and maintain an action for damages for personal injury caused by the willful act of another, or by another's lack of ordinary care or skill in the management of his property, if the conduct causing the injury:

(a) Occurred after the person who caused the injury knew or should have known of the presence of the peace officer, fireman or emergency medical attendant; [or]

(b) Was intended to injure the peace officer, fireman or emergency medical attendant;

ECI's failure to disclose the cause of the problem in the tank did not violate NRS 41.139. The alleged negligence or failure to disclose the condition of the tank did not occur after ECI knew or should have known that peace officers or firefighters were present. No evidence indicates that any omission by ECI was intended to injure the firefighters.

ECI did not engage in a statutory violation that permits Foulke to recover under the exceptions to the "Firefighter's Rule"

Foulke also argues that recovery should be permitted for a statutory violation under NRS 41.139(1)(c). NRS 41.139(1)(c) states that recovery is not permitted by a firefighter unless the actions causing that injury violated a statute, ordinance or regulation "(1) Intended to protect the peace officer, fireman or emergency medical attendant; or

(2) Prohibiting resistance to or requiring compliance with an order of a peace officer or firefighter.” Foulke claims that ECI violated Nevada Occupational Safety and Health Act (Nevada OSHA) provisions, NRS Chapter 618, or regulations promulgated thereunder, and federal regulations 29 C.F.R. §§ 1910.134 and 1910.146. Foulke points to citations issued by Nevada OSHA against ECI to support his contention that ECI engaged in intentional and willful violations.

Citations issued by Nevada OSHA are inadmissible, for NRS 618.365(2) provides, in pertinent part and with emphasis added:

Statements, reports and information obtained or received by the Division in connection with an investigation under, or the administration or enforcement of, the provisions of this chapter must not be admitted as evidence in any civil action other than an action for enforcement, variance hearing or review under this chapter.

Therefore, evidence of these citations is inadmissible to support Foulke’s contention that ECI violated a statute, ordinance, or regulation intended to protect the firefighters or to prohibit resistance against the firefighters.


Even if the citations were admissible, the regulations and statutes cited by Foulke in this instance are inapplicable to the statutory exceptions to the “Firefighter’s Rule.” First, 29 CFR § 1910.134 provides that “[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee.” Second, 29 CFR § 1910.146 indicates in pertinent part, “[t]his section contains requirements for practices and procedures to protect employees in general industry from the hazards of entry into permit-required confined spaces.” Finally, the general scope and purpose of the OSHA provisions in NRS

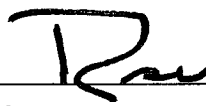
Chapter 618 is “to provide safe and healthful working conditions for every employee.”⁸ Nothing in Chapter 618 indicates that the OSHA laws are imposed in order to provide additional safety to peace officers or firefighters. Neither Nevada OSHA nor the federal regulations deal with the safety of “peace officer[s], firem[e]n or emergency medical attendant[s].”⁹ Therefore, no statutory exception under NRS 41.139(c) is available to allow Foulke to avoid the “Fireman’s Rule.”

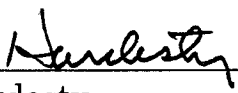
In this case, the negligence for which Foulke seeks damages from ECI, the failure to maintain its tank, is the same act that required his presence on the scene. Therefore, the “Firefighter’s Rule” precludes Foulke from bringing a claim against ECI for injuries sustained during the course and scope of his employment as a firefighter. Further, there is no statute, as read with NRS 41.139, that provides Foulke an exception to the “Firefighter’s Rule.” Therefore, the district court did not err in granting summary judgment.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Hardesty

⁸NRS 618.015

⁹See NRS 41.139

cc: Eighth Judicial District Court Dept. 11, District Judge
Albert D. Massi, Ltd.
Earley Savage
Kummer Kaempfer Bonner & Renshaw/Las Vegas
Clark County Clerk