TORT IMMUNITY FOR EMPLOYERS AND CO-EMPLOYEES IN NEVADA

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It is a commonly held misconception that an individual injured "on the job" may not sue for damages if the injury was covered by worker's compensation. Commonly called the "exclusive remedy provision" or "one action rule," Nevada law provides certain protections to tortfeasors against liability for injuries inflicted in a work setting.

However, Nevada worker's compensation law limits that immunity to the employer or co-worker of the injured employee. When an injury "was caused under circumstances creating a legal liability in some person, other than the employer or person in the same employ,"[1] the injured person may bring a civil suit against that third party. The exception to that rule is when a defendant, who might otherwise be considered a third party, is determined to be a "statutory employer" or "statutory co-employee" of the injured worker. To determine if a defendant is the statutory employer or co-employee of the injured worker, one must start with the controlling statute. The relevant law is NRS 616B.603, contained within the Nevada Industrial Insurance Act.

The impetus for this area of Nevada law can be directly attributed to the substantial growth experienced by Nevada in the mid-twentieth century. In 1947, the Nevada Legislature recognized a problem. Thinly-financed construction subcontractors were routinely obtaining work by underbidding jobs. As a predictable result of that serial underbidding, those subcontractors soon became financially strained. Among the first expenses they decided to dispense with were the premiums paid for worker's compensation insurance. When, inevitably, employees of those subcontractors were injured on the job, there were no worker's compensation benefits available as a result of their employer's failure to pay the premiums.

As a resolution to this growing problem, the Nevada legislature hit upon the idea of making the general contractor of a construction job the principal employer of all of the workers on the job-site — including the employees of subcontractors and independent contractors — and thus, responsible for providing those employees with worker's compensation coverage. In

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exchange for the burden of ensuring worker's compensation coverage for all of these statutory employees, the general contractor would enjoy complete immunity from liability for any injuries they might sustain.

However, in crafting Section 75 of Chapter 168 of Laws 1947 (which subsequently evolved into NRS 616C.215), the Legislature selected fairly broad language, subject to an interpretation that would implicate not just the offending construction contractors, but also a wider range of businesses that would arguably be required to maintain worker's compensation coverage for the employees of independent contractors doing business with them.

During the first four decades of this statutory scheme, no cases that examined this concept of immunity of a statutory employer that didn't also involve a construction contractor, reached the Nevada Supreme Court. But in 1985, the Nevada Supreme Court heard the appeal of Ruth Meers, an employee of Central Telephone Company (Centel), in the matter of *Meers v. Haughton Elevator*[2]. The underlying defendant, Haughton Elevator, was a company that performed contracted maintenance on an elevator in Centel's office building; that elevator malfunctioned, causing injury to Meers, who then recovered workers' compensation benefits from Centel. Meers sued Haughton, who pointed to the broad language of NRS 616C.215, arguing that, because Centel met the definition of a principal employer, Haughton and Meers were statutory co-employees of Centel, and Haughton was immune from suit.

The case highlighted the possibility that the broad language of the statute could produce unintended results if applied in a non-construction setting. In an effort to avoid that problem, the Nevada Supreme Court utilized the *Meers* opinion to categorize industrial accident cases into two types: construction and non-construction. Dubbed the "normal work test," the *Meers* court enunciated the parameters for determining a statutory employment relationship in non-construction cases as follows:

> "The type of work performed by the subcontractor or independent contractor will determine whether the employer is the statutory employer: The test is not one of 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. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether that indispensable activity is, in that business normally carried on through employees rather than independent contractors."[3]

Most recently, the Supreme Court took the opportunity to explain that "the court must consider the subcontractor or independent contractor's activity leading to a worker's injury within the context of their other actions, both before and after the injury, and not in isolation."[4] In *D & D Tire v. Ouellette* the court rejected the defendant's narrow interpretation of the normal work test, finding that even though the activity engaged in by the tortfeasor at the exact moment of the injury (driving a truck) was of a kind normally undertaken by the putative employer's own employees, the overall reason for the tortfeasor to be at the site (specialized repair of one of the truck's systems) was the activity to be considered in applying the test.

Seeing the wisdom in the Supreme Court's delineation, the Nevada Legislature subsequently codified a version of the *Meers* rule, but came at the problem from the opposite direction. Known as the "independent enterprise test," the statutory version laid out in NRS 616B.603 states that an independent enterprise — defined as a person who holds a business or occupational license and owns, rents or leases property for use in the business — who contracts with another who is "not in the same trade, business, profession or occupation" is not the statutory employee of the contractor.[5] The approach is slightly different, but the outcome is the same. If the work the independent contractor or sub-contractor is doing is not of the kind normally done by the principal contractor, then immunity does not apply. To avoid any confusion about whether this analysis was applicable in a construction setting, the Legislature included an express exception for principal contractors who held contractor's licenses under NRS Chapter 624.[6]

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In adapting the *Meers* rule, the Legislature attempted to simplify the definition of a construction case as one involving work performed by "a principal contractor who is licensed pursuant to chapter 624 of NRS." In all other cases, the *Meers* normal work test is applied to determine if the principal contractor is obligated to provide worker's compensation coverage for all employees of subcontractors.

Ten years later this interpretation was confirmed in *Oliver v. Barrick Goldstrike Mines*,[7] in which the Nevada Supreme Court reversed the trial court's summary judgment for the employer, based upon a claim of statutory immunity on the grounds that Barrick was Oliver's statutory employer. While Barrick was determined to be the principal contractor, it was held not to be Oliver's employer under the NIIA.[8] In effect, the Nevada Supreme Court ruled that *Barrick* was not a construction case. This determination was not made on the basis of the type of work being performed, which was, arguably, construction work, but upon the fact that Barrick was not "licensed under chapter 624 of NRS." Specifically, while acknowledging that "a principal contractor who is also a licensed contractor under chapter 624 is a statutory employer under the NIIA," an unlicensed principal contractor is a statutory employer only "so long as it is in the 'same trade, business, profession or occupation as the independent enterprise.'"[9]

Interestingly, whether or not the activity being undertaken requires a contractor's license is irrelevant under the analysis. This concept is clearly articulated in the Nevada Supreme Court's ruling in *Tucker v. Action Equipment and Scaffold Co., Inc.,*[10] which plainly states that "[i]f a principal contractor is not a licensed contractor, it will be the statutory employer only if it can show that it is in the 'same trade' under the *Meers* test"[11] making it abundantly clear that, to be considered a construction case under Nevada law, the matter must involve a licensed contractor.

The Nevada Supreme Court further articulated this rule in *Harris v. Rio Hotel & Casino*: "A person who enters into a contract with an independent enterprise in a different line of work, to perform work not normally carried out by the person's own employees, is not considered a statutory employer."[12]

In the 2001 case of *Harris v. Rio Hotel and Casino,*[13] the court expanded statutory immunity to landowners who hire licensed contractors and required NIIA compliance in the contract.[14] During the past 30 years, Nevada has developed substantial jurisprudence in an effort to clarify this historically murky area of the law. The crossover between employment issues, worker's compensation considerations, traditional tort principles and legislative involvement has resulted in a sometimes-fluid environment, in which competing concepts of fairness to injured workers and protection for compliant employers require frequent adaptation. While the immunity enjoyed by employers in construction cases is generally well established, other cases — including those involving "construction-like" fact scenarios — must be carefully analyzed in order to determine whether immunity from suit is a factor. A thorough understanding of the advent and evolution of the concept of the statutory immunity of an employer/co-employee during the pre-litigation analysis phase of a case can mean the difference between a successful claim and one dismissed on summary judgment. **NL**

1. NRS 616C.215(2) (2004) (emphasis added).
2. 101 Nev. 283, 701 P. 2d 1006 (1985).
3. *Id.* at 1007-8.
4. *D & D Tire v. Ouellette*, 131 Nev. Adv, Op. 47, __-__, 352 P.3d 32, 36-37 (2015).
5. NRS 616B.603 provides, in pertinent part:
   1. A person is not an employer for the purposes of this chapter if:
      (a) He enters into a contract with another person or business which is an independent enterprise; and
      (b) He is not in the same trade, business, profession or occupation as the independent enterprise.
   2. As used in this section, "independent enterprise" means a person who holds himself out as being engaged in a separate business and:
      (a) Holds a business or occupational license in his own name; or
      (b) Owns, rents or lease property used in furtherance of his business."
6. NRS 616B.603 further provides, in pertinent part:
   3. The provisions of this section do not apply to a principal contractor who is licensed pursuant to chapter 624 of NRS.111 Nev. 1338, 905 P. 2d 168, (1995).
7. At the time of the litigation the operative statute was NRS 616.262 now renumbered as NRS 616B.603.
8. *Barrick* at 1343, 172. The court also noted that Barrick had no liability for payment of worker's compensation benefits to Oliver. *Id.* at, 1347, 174.
9. *Tucker v. Action Equipment and Scaffold Co., Inc.*, 113 Nev. 1349, 951P.2d 1027 (1997).
10. *Id.* at 1031.
11. 117 Nev. 482, 492, 25 P.3d 206 (2001).
12. 117 Nev. at 495, 25 P. 3d at 215.
13. The *Meers* test is not well-suited for determining immunity in this kind of construction setting, and by specifying that the provisions of NRS 616B.603 do not apply to licensed principal contractors, we believe the Legislature manifested its intent that the *Meers* test not be used to determine immunity in circumstances like these. Instead, under the *Tucker* test as modified herein, if the defendant in a construction case is a property owner that has contracted with a licensed general contractor for property improvements, and where the contract requires compliance with the NIIA, the property owner is immune from the suit as a matter of law for the industrial injury sustained during performance of the construction contract." *Id.* at 495, 214.

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