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### Summary of D&D Tire, Inc., v. Ouellette, 131 Nev. Adv. Op. 47 (Jul. 02, 2015)

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*Nevada Law Journal*

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EMPLOYMENT LAW: LIABILITY OF SUBCONTRACTORS AND INDEPENDENT CONTRACTORS

**Summary**

The Court held that a subcontractor or independent contractor is not immune to liability for workplace injuries if the work being performed is a specialized repair. Ouellette was injured by an employee of Purcell while performing a task that would not be considered a specialized repair. The employee, however, was only present on the job site because of a specialized repair. The Court, however, held that the activity leading to the injury must be considered in context and the employee would not have been present but for the repair.

**Background**

Jack Ouellette was employed by Allied Nevada Gold Corporation to perform tire service work for mining equipment. He drove and operated a tire changing boom truck owned by Purcell Tire & Rubber Company<sup>2</sup> and leased to Allied. Following a problem with the truck, Purcell contracted with an independent repair company, Dakota Diesel. Additionally, Purcell sent its own technician, Ryan Wintle, to assist with repairs. When the repairs were completed, Wintle planned to move the truck to another area for further testing. While backing up, the truck struck Ouellette and pinned him against a dumpster causing injury to his shoulder.

At trial Purcell claimed that it was a statutory employee of Allied and was immune from liability under the Nevada Industrial Insurance Act (NIIA). The district court denied Purcell's motion for judgment as a matter of law and the jury returned a verdict for Ouellette. Purcell renewed its motion for a judgment as a matter of law and it moved for a new trial, claiming that the court's refusal to give a mere happening jury instruction materially affected its substantial rights. The district court denied Purcell's motion.

**Discussion**

Purcell argued that the district court erred in denying its motion because Purcell was a statutory employee and thus not liable for the injury under NIIA. Purcell also argued that the district court abused its discretion by refusing to give a mere happening jury instruction. Ouellette argued that because Purcell was performing a specialized repair at the time of the injury, Purcell was not a statutory employee of Allied.

*The district court did not err by denying Purcell's motion for judgment as a matter of law*

The Court discussed that a district court's order granting or denying a motion for a judgment as a matter of law is reviewed de novo. A district court may grant judgment as a matter

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<sup>1</sup> By Jaymes Orr.

<sup>2</sup> D & D Tire, Inc. is a subsidiary of Purcell Tire & Rubber Company.

of law when “a claim or defense cannot under the controlling law be maintained or defeated.”<sup>3</sup> A district court should deny such a motion if sufficient evidence exists that a jury could grant relief to the non-moving party.

*An independent contractor is not immune from liability when performing specialized repairs*

The Court repeated its holding from previous decisions, which states that a subcontractor or independent contractor is not immune from liability under NIIA if it “is not in the same trade, business, profession or occupation as the employer of the injured worker.”<sup>4</sup> Although the NIIA differs from industrial insurance acts of many states, in that it extends immunity to subcontractors and independent contractors, not all types of subcontractors and independent contractors are considered statutory employees. In order to determine whether the subcontractor or independent contractor is in the same trade as the injured employee, the Court considers the normal work test.

The Court articulated in *Meers v. Haughton Elevator*, the test is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors.<sup>5</sup> The test does not consider whether the subcontractor or independent contractor’s activity is useful or necessary. The Court in *Meers* further clarified that the “rule is that major repairs, or specialized repairs of the sort, which the employer is not equipped to handle with his own force, are held to be outside his regular business.”<sup>6</sup>

*Purcell’s interpretation of the Meers normal work test is incorrect*

The Court did not agree with Purcell’s argument that the focus of the normal work test is on the work being performed at the time the injury occurred. Although Purcell conceded that the repair would be a specialized repair under the Meers test, it argued that Dakota Diesel performed the service and that Wintle was merely supervising the process and not performing a specialized repair.

Because Ouellette was injured while Wintle was moving the truck, a job normally performed by Allied employees, Purcell argued that the work was not a specialized repair. The Court rejected this argument because the case law relied upon by Purcell was easily distinguishable<sup>7</sup> and because such a narrow interpretation of the test could produce absurd results. If the exact moment of injury were to be the test, the status of a worker would change from moment to moment depending on the task being performed at that exact moment.

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<sup>3</sup> NEV. R. CIV. P. § 50(a)(1).

<sup>4</sup> *Hays Home Delivery, Inc. v. Emp’rs Ins. Co. of Nev.*, 117 Nev. 678, 682, 31 P.3d 367, 369-70 (2001).

<sup>5</sup> 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985).

<sup>6</sup> *Id.*

<sup>7</sup> *See State Industrial Insurance Sys. v. Ortega Concrete Pumping, Inc.*, 113 Nev. 1359, 1363-64, 951 P.2d 1033, 1036 (1997); *Employers Insurance Co. of Nev. v. United States*, 322 F.Supp. 2d 1116, 1118 (D. Nev. 2004) (The Court found that nothing in these cases supported Purcell’s contention as the normal work test was not applied in *Ortega* and the totality of the circumstances, and not the exact moment of injury, was considered in *Employers Insurance*).

*Wintle was performing a specialized repair at the time of Ouellette's injury*

The Court held that, in order to determine whether a subcontractor or independent contractor was performing a specialized repair, a court must consider the subcontractor or independent contractor's activity leading to the injury and not the injury in isolation.

In this case, Purcell sent Wintle to accompany the contractor who was hired to perform a specialized repair. Even if Wintle merely supervised the repair, he was only onsite due to the need of a specialized repair. Among other actions, Wintle's moving of the truck to fill with oil, although a task usually performed by Allied employees, was performed in the furtherance of a specialized repair. Therefore Wintle was not a statutory employee of Allied and the district court did not err in denying Purcell's motion for judgment as a matter of law.

The district court did not improperly reject Purcell's jury instruction

A decision to admit or refuse jury instruction is reviewed as an abuse of discretion or judicial error. The Court reviews de novo whether the jury instruction accurately states Nevada law. A party is entitled to a jury instruction on every theory of its case, however the offering party must demonstrate that the instruction is warranted by state law.

In this case, Purcell requested an instruction that stated that the mere fact that there was an accident was not itself a sufficient basis for negligence.

*The omitted portions of Purcell's jury instruction were adequately covered by other instructions*

The Court found that Purcell's instruction inaccurately stated Nevada law by omitting the statement that negligence is never presumed but must be established by substantial evidence. If an instruction is not technically correct the context of all of the jury instructions should be considered.

In this case Purcell's instruction was adequately covered by other instructions and taken as a whole the jury was sufficiently instructed.

*Purcell's proposed jury instruction was adequately covered by other instructions*

The number of instructions is within the district court's discretion. Here the district court's jury instructions covered the issues of negligence, proximate cause, and the need to find Purcell's negligence.

## **Conclusion**

The evidence was sufficient to suggest that Wintle was present for the furtherance of a specialized repair. Therefore he was not a statutory employee of Allied. The district court did not err in denying Purcell's motion for judgment as a matter of law nor did the district court abuse its discretion in refusing to give Purcell's mere happening jury instruction.