

NEVADA POWER CO. V. HAGGERTY: THE NEVADA SUPREME COURT'S EXPANSION OF THE INDEPENDENT DUTY DOCTRINE

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TABLE OF CONTENTS

Introduction

I. Background

II. Facts and Procedural Background of *Nevada Power Co. v. Haggerty*

III. The Reasoning in *Nevada Power Co. v. Haggerty*

A. The Majority's Reasoning

1. The Independent Duty Doctrine

2. Definition of Overhead Power Lines

B. The Dissent's Reasoning

IV. Analysis

A. The Majority did not define "independent duty."

B. Other jurisdictions have not allowed exceptions to exclusivity provisions of workers' compensation acts.

C. *Haggerty* is not consistent with public policy underlying the Nevada Industrial Insurance Act's exclusive remedy provision.

D. The Nevada Supreme Court's Statutory Interpretation in *Haggerty* is inconsistent with public policy in Nevada.

Conclusion

INTRODUCTION

The notion that workers' compensation benefits are an injured worker's exclusive remedy against an employer following a work related accident is the defining principle of workers' compensation law.¹ These exclusive remedy

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¹ See William Bassin, *An Analysis of Employer Contribution to Third Parties Under Workers' Compensation Statutes*, 30 TORT & INSURANCE LAW JOURNAL 3:843 (1995). *E.g.*,

provisions grant an employer who provides workers' compensation benefits to an employee injured in the course and scope of employment immunity from other liability for the employee's injury.²

The clearest exception to the exclusive remedy provisions is a third-party's right to enforce an express contract in which the employer agrees to indemnify the third-party for the very kind of loss that the third-party has been made to pay the employee.³ Prior to *Nevada Power Co. v. Haggerty*⁴, it was well established in Nevada that an employer was only liable in a third-party indemnity action when an express indemnity contract existed between an employer and a third-party.⁵ The specific question of whether an employer should indemnify a third-party under high voltage power line statutes was an issue of first impression in Nevada. Consequently, *Nevada Power Co. v. Haggerty* was an important decision. Unfortunately, it will have a grave impact on workers' compensation law and well-established principles of the Nevada Industrial Insurance Act.⁶

This note will illustrate how the Nevada Supreme Court implicitly expanded Nevada's application of the independent duty doctrine in *Nevada Power Co. v. Haggerty*, contrary to fundamental principles in workers' compensation law, by holding the provisions of Nevada Revised Statutes ("NRS") 455.200-455.250 apply to an employer whose employee is injured by contact with an overhead power line, when the employer fails to notify the appropriate public utility prior to allowing the employee to work in close proximity to high

U.S. Borax & Chem. Corp. v. Superior Court, 167 Cal. App. 3d 406, 213 Cal. Rptr. 155 (1985); Mountain States Telephone & Telegraph Co. v. Montoya, 581 P.2d 1283 (N.M. 1978); Henderson v. State, 715 P.2d 978, cert. denied, 106 S.Ct. 3282, 91 L.Ed.2d 571 (Idaho 1986). See also Arthur Larson, Larson's workers' Compensation Law § 100.01(1):

Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts. *Id.* at 100-2-3.

² See, e.g., NRS § 616A.020(1) (2000) for (the rights and remedies provided in chapters 616A to 616D, inclusive, of NRS, for an employee on account of any injury by accident sustained arising out of and in the course of employment shall be exclusive, except as otherwise provided in those chapters, of all other rights and remedies of the employee, his personal or legal representative, dependents or next of kin, at common law or otherwise, on account of such injury); CAL. LAB. CODE § 3602 (West 1989); N.Y. WORKERS' COMPENSATION LAW § 11 (McKinney 1992); ARIZ. REV. STAT. ANN. § 23-1022 (West 1995). See also *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1342, 905 P.2d 168, 171 (1995).

³ See Larson, §121.04(2). See also *Porello v. US*, 153 F.2d 605 (2nd Cir. 1946), *aff'd in part and rev'd in part and remanded sub. nom.*, *American Stevedores v. Porello*, 330 U.S. 446 (1947). Only Alabama holds to the contrary in *Paul Krebs & Assoc. v. Matthews & Fruits Constr. Co.*, 356 So.2d 638 (Ala. 1978).

⁴ 115 Nev. Adv. Op. No. 52 (December 13, 1999). See 989 P.2d 870 (1999).

⁵ See, e.g., *American Federal Savings Bank v. Washoe County*, 106 Nev. 869, 802 P.2d 1270 (1990). See discussion *infra* Part II.

⁶ The Nevada Industrial Insurance Act is compiled in chapters 616A to 616D, inclusive, of NRS

voltage power lines. Part I will describe the nature of workers' compensation law, the independent duty doctrine and the Nevada Industrial Insurance Act's exclusive remedy provision.⁷ Part II will introduce the facts and procedural background of *Nevada Power Co. v. Haggerty*.⁸ Part III will explain the Majority and Dissent's reasoning.⁹ Part IV will analyze the Nevada Supreme Court's holding in *Nevada Power Co. v. Haggerty*, particularly the Majority's failure to define "independent duty," other jurisdictions' analysis of exclusivity provisions of their own workers' compensation acts, *Haggerty's* inconsistency with public policy underlying the Nevada Industrial Insurance Act's exclusive remedy provision and the Majority's erroneous statutory interpretation.¹⁰

I. BACKGROUND: WORKERS COMPENSATION LAW AND THE NEVADA INDUSTRIAL INSURANCE ACT'S EXCLUSIVE REMEDY PROVISION AND INDEPENDENT DUTY DOCTRINE

Prior to workers' compensation acts, all "employer liability" legislation accepted the basic common law idea the employer was liable to the employee only for its own negligence, fault or, at most, the fault of someone for whom it was generally responsible under the respondeat superior doctrine.¹¹ The movement to enact the modern workers' compensation system, which imposed liability without fault upon the employer, began at the end of the nineteenth century, when the coincidence of increasing industrial injuries and decreasing remedies for employees called for radical change.¹² Actual enactment of workers' compensation schemes began in 1902 when Maryland established a cooperative accident fund for miners, but courts initially held these acts unconstitutional.¹³ As a result, state legislatures were reluctant to pass complete

⁷ See text and accompanying notes 6-43, *infra*.

⁸ See text and accompanying notes 45-48, *infra*.

⁹ See text and accompanying notes 49-73, *infra*.

¹⁰ See text and accompanying notes 74-145, *infra*.

¹¹ See LARSON, *supra* note 1, at § 2.05. "The most the 'Employer's Liability' statutes set out to accomplish was the restoration of the employee to a position no worse than that of a stranger injured by the negligence of the employer or his servants." p. 2-7. Professor Larson notes the first such acts can be found at Ga. Laws 1855, p. 155; Iowa Laws 1852, ch. 169, sec. 7; Kan. Stats. 1874, ch. 93, sec. 1; Wis. Laws 1875, ch. 173; Wyo. Terr. Act 1869. The effect of this remedial legislation is that the common law defenses of vicarious liability, assumption of risk and contributory negligence were available as defenses to the employer and the employee was left without a remedy in eighty-three percent of all cases. See LARSON, *supra* note 1, at § 2.03.

¹² See LARSON, *supra* note 1, at § 2.07. The modern workers' compensation system made the employer bear the entire burden of any insurance against that liability.

¹³ See LARSON, *supra* note 1, at § 2.07. The Maryland Act (found at Md. Laws 1902, Ch. 139) was held unconstitutional in an unappealed lower court decision, *Franklin v. United Rys. & Elc. Co. of Baltimore*, 2 Baltimore City Rep. 304 (1904). Similarly, in 1909, another miner's compensation act was passed in Montana and suffered the same fate in *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 P. 554 (1911). In 1910, New York passed the first act with compulsory coverage of certain "hazardous employments." The Court of Appeals held it unconstitutional in 1911, on the ground that the imposition of liabil-

workmen's compensation acts with comprehensive and compulsory coverage and opted instead for "optional" or "elective" statutory schemes.¹⁴ As a result of *Ives v. South Buffalo Ry.*,¹⁵ New York adopted a constitutional amendment permitting a compulsory law in 1913 and such a law was passed in the same year.¹⁶ In 1917, the United States Supreme Court held the New York compulsory law constitutional,¹⁷ and, with fears of constitutional impediments virtually removed, the compensation system grew "with a rapidity that probably has no parallels in any comparable field of law."¹⁸ By 1920, all but eight states had adopted compensation acts, and in 1963, Hawaii was the last state to adopt a workers' compensation system.¹⁹

The modern workers' compensation system is recognized as a mutually beneficial bargain between employers and employees.²⁰ Arthur Larson, the foremost expert on workers' compensation law, described workmen's compensation theory in its idealized form as follows:

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to

ity without fault upon the employer was a taking of property without due process of law. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911). As to initial arguments regarding the constitutionality of workman's compensation laws, see Boyd, *Compensation for Injuries to Workmen*, pp. 153-204 (1913).

¹⁴ See LARSON, *supra* note 1, at § 2.07. Under these early workmen's compensation laws, employers could choose whether or not they would be bound by the compensation plan, with the alternative of being subject to common-law action without benefit of the common-law defenses (vicarious liability, assumption of risk and contributory negligence). Similarly, a number of states limited their coverage to "hazardous" employments because of doubt as to the extent of the police power. *Id.* at p. 2-14. There remain eight states with this limitation: Maryland, New Mexico, Wyoming, Louisiana, Oklahoma, Oregon, Kansas and Montana.

¹⁵ 201 N.Y. 271, 94 N.E. 431 (1911). In 1910, New York passed a workers' compensation act with compulsory coverage of certain "hazardous employments." Larson, § 2.07, p. 2-14; Laws of 1910, ch. 674. *Ives* is a pinnacle case in which the New York Court of Appeals held this act unconstitutional on the ground that "the imposition of liability without fault upon the employer was a taking of property without due process of law under the state and federal constitution." *Id.*

¹⁶ N.Y. CONST. Art. I, § 18.

¹⁷ See *New York Central R.R. v. White*, 243 U.S. 188 (1917). Also in 1917, the Supreme Court held an elective type workmen's compensation law as passed in Iowa and the Washington exclusive-state-fund-type law constitutional. See *Hawkins v. Bleakley*, 243 U.S. 210 (1917) and *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

¹⁸ See LARSON, *supra* note 1, at § 2.07, p. 2-15.

¹⁹ See LARSON, *supra* note 1, at § 2.08.

²⁰ See Bassin, *supra* note 1, at 843. See, e.g., NRS 616A.010(1) which provides "The provisions of chapters 616A to 617 [the Nevada Industrial Insurance Act], inclusive, of NRS must be interpreted and construed to ensure the quick and efficient payment of compensation to injured and disabled employees at a reasonable cost to the employers who are subject to the provisions of those chapters."

the most appropriate source of payment, the consumer of the product.²¹

Though social in philosophy, the modern American workers' compensation system is mainly a private matter between employees, insurance carriers and employers.²² In sum, employees injured in the course and scope of their employment trade their right to pursue possible negligence actions against employers in exchange for guaranteed payment regardless of fault.²³ A compensation system, unlike tort recovery, does not pretend to restore to the injured worker what he has lost; it gives the worker a sum, which added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others or to society.²⁴ The right to compensation depends on one simple test: Was there a work-related injury?²⁵ Negligence, and, for the most part fault, are not at issue and cannot affect the result.²⁶ Conversely, the employer pays workers' compensation benefits regardless of fault in exchange for

²¹ See LARSON, *supra* note 1, at § 1.03(2).

²² See LARSON, *supra* note 1, at § 3.10. See, e.g., NRS 616C.010, which provides that an employee must "forthwith" provide notice of an injury suffered in the course and scope of employment to the employer, the employer may request the injured employee to seek medical treatment, the treating physician shall report the character and nature of the injury to the employer, and the insurer must authorize further medical treatment.

²³ Bassin, *supra* note 1, at 843. See, e.g., NRS 616A.010(3) which provides "The provisions of chapters 616A to 617, inclusive, of [NRS] are based on a renunciation of the rights and defenses of employers and employees recognized at common law." See also NRS 616A.020(2) which provides "The terms, conditions and provisions of chapters 616A to 616D, inclusive, of NRS, for the payment of compensation and the amount thereof for injuries sustained or death resulting from said injuries shall be conclusive, compulsory and obligatory;" CAL. LABOR CODE § 3602(a) (West 1989). Note that CAL. LABOR CODE § 3602(b) allows an injured employee to bring an action in certain specific enumerated circumstances, e.g., where the employee's injury or death is proximately caused by a willful physical assault by the employer.

²⁴ See LARSON, *supra* note 1, at § 1.03(5), p. 1-10. Professor Larson further notes that workers compensation, unlike the tort compensation system, only compensates injuries which either actually or presumptively produce disability and thereby presumably affect earning power. LARSON at § 1.03(4), p.1-9. See, e.g., NRS 616C.490(6), which sets forth a specific schedule of the percentage of a worker's salary to which he/she would be entitled in the event of a permanent partial disability. The percentages are incremental based on the severity of the disability. See also NRS 616C.440, which provides that employees who suffer a permanent total disability in the course and scope of their employment are entitled to sixty-six and two-thirds percent of their average monthly wage.

²⁵ See LARSON, *supra* note 1, at §1.03(2), 1-5. NRS 616C.150 requires an injured employee to establish by a preponderance of the evidence that the employee's injury arose out of and in the course of employment.

²⁶ See LARSON, *supra* note 1, at § 1.03(1); "Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues." *Id.* See, e.g., NRS 616A.020(2), *supra* note 2; CAL. LABOR CODE § 3600 (West 1989).

immunity from further employee action.²⁷

For example, in *Oliver v. Barrick Goldstrike Mines*,²⁸ a mining company hired a welder employed by an independent contractor to work on a mill. After he was injured on the job, the welder brought a negligence action against the mining company and the mining company claimed statutory immunity on grounds it was the welder's statutory employer. The district court granted summary judgment for the mining company and the welder appealed. The Court interpreted NRS 616B.612²⁹ and the Nevada Industrial Insurance Act to mean that "under Nevada law, every employer, within the provisions of [NRS] chapter 616, must 'provide and secure' compensation for injured employees."³⁰ In return for providing such compensation, employers enjoy the benefit of the exclusive remedy and immunity provisions. . . . "These provisions grant an employer. . . immunity from other liability for recovery of damages or other compensation for the personal injury of an employee arising out of employment."³¹ The Court remanded the case for a trial on its merits and held: "(1) statutory immunity under the Nevada Industrial Insurance Act is not limited to licensed contractors; (2) the test used to determine whether the employer of an independent contractor is a "statutory employer" entitled to immunity is whether the independent contractor's activity is normally carried on through employees rather than independent contractors; and (3) the mining company and independent contractor hired to modify its mill were not in the "same trade," and thus the mining company was not the welder's statutory employer."³²

Similarly, in *Outboard Marine Corp. v. Schupbach*,³³ employees of a chemical plant brought a personal injury action against a manufacturer of an electric cart and a chemical plant as a result of an explosion caused when a spark from the cart ignited benzene gas which accumulated from leaky pipes. The Court held employers who accept the Industrial Insurance Act and secure compensation for employee's injuries arising out of and in the course of employment are relieved from other liability.³⁴

Perhaps the most evenly-balanced controversy in all of compensation law is the question whether a third-party in an action by an employee can get con-

²⁷ Bassin, *supra* note 1, at 843. See, e.g., NRS 616A.020(1), *supra* note 2, which provides "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 employment shall be exclusive, except as otherwise provided in those chapters, of all other rights and remedies of the employee, his personal or legal representative, dependents or next of kin, at common law or otherwise, on account of such injury."

²⁸ 111 Nev. 1338, 905 P.2d 168 (1995),

²⁹ Previously NRS 616.270.

³⁰ *Oliver* at 1342.

³¹ *Id.*

³² 111 Nev. 1338, 1339, 905 P.2d 168, (1995)(per curium).

³³ 93 Nev. 158, 561 P.2d 450 (1977).

³⁴ *Id.* at 164.

tribution or indemnity from a negligent employer.³⁵ The classical compensation doctrine is that the employer is relieved of all tort liability to its own employee by the exclusive remedy clause of the compensation act and cannot be liable to the third-party for contribution or for non-contractual indemnity.³⁶ However, if the third-party and employer stand in a special legal relationship that carries with it the employer's obligation to indemnify the third-party, this relational right of indemnity may be enforced without offending the exclusive remedy clause.³⁷ Specifically, the right to indemnity is clear when the obligation springs from a separate contractual relation.³⁸ Professor Larson has described the dilemma and general rule regarding implied contractual agreements as follows:

In summary, when the relation between the parties involves no contract or special relation capable of carrying with it an implied obligation to indemnify, the basic exclusiveness rule generally cannot be defeated by dressing the remedy itself in contractual clothes, such as indemnity, since what governs is not

³⁵ See LARSON, *supra* note 1, at § 121.01(1). Professor Larson notes: "This sentence, first published in 1953, has been frequently quoted as a preamble to opinions or articles on this question. See, e.g., opinion of Wisden, J., in *General Electric Co. v. Cuban Am. Nickel Co.*, 396 F.2d 89 (5th Cir. 1968), opinion of Pettine, J., in *Newport Air Park Inc. v. U.S.*, 293 F.Supp. 809, 816 (D.R.I. 1968), opinion of Hyde, J., in *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 at 794 (Mo. 1959) and comment by Robert M. Bonnin, 22 N.A.C.C.A.L.J. 236 (1958). The statement is as true as it ever was." p. 121-3. It is also important to note the difference between contribution and indemnity. The right of contribution is based either upon contribution-between-tortfeasor statutes or upon common law or admiralty contribution, where available and applicable. The right of indemnity is based upon an independent duty or obligation owed by the employer to the third party, either as the result of express contract or as the result of an implication raised by law. p. 121-12.

³⁶ See LARSON, *supra* note 1, at § 121.01(3), p. 121-7. See also § 121.02 which notes the great majority of jurisdictions have held an employer cannot be sued or joined as a joint tortfeasor in a third party claim even if its negligence contributed to the employee's injury. The ground is simple, the employer is not jointly liable to the employee in tort; therefore, he cannot be a joint tortfeasor. The liability that rests upon the employer is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits; his claim against the third person is for damages. The two are different in kind and cannot result in a common liability. See *Rizzuto v. Joy Mfg. Co.*, 834 F.2d 7 (1st Cir. 1987), *Galimi v. Jetco, Inc.*, 514 F.2d 949 (2nd Cir. 1975), *Williams v. White Mountain Constr. Co.*, 749 P.2d 423 (Colo. 1988), *Farrall v. Armstrong Cork Co.*, 457 A.2d 763 (Del. Super. Ct. 1983), *Roberts v. American Chain & Cable Co.*, 259 A.2d 43 (Maine 1969), *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033 (1983), *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308 (1978), *Farren v. New Jersey Turnpike Authority*, 106 A.2d 752 (N.J. 1954), *Cacchillo v. H. Leach Mach. Co.*, 305 A.2d 541 (R.I. 1973).

³⁷ See LARSON, *supra* note 1, at § 121.05(1). See, e.g., *Houston Lighting & Power Co. v. Eller Outdoor Advertising Co.*, 635 S.W.2d 133 (Tex. Civ. App. 1982); *Tucson Elec. v. Swengel-Robbins Constr.*, 153 Ariz. 486, 737 P.2d 1385 (Ct. App. 1987); *Flint Elec. Membership Corp. v. Ed Smith Constr. Co. Inc.*, 270 Ga. 464, 511 S.E.2d 160 (1999). See discussion *infra* Part V.A.

³⁸ See generally LARSON, *supra* note 1, at § 121.04(2). E.g., *American Federal Savings Bank v. Washoe*, 106 Nev. 869, 802 P.2d 1270 (1990).

the delictual or contractual form of the remedy but the question: is the claim "on account of" the injury, or on account of a separate obligation running from the employer to the third-party?³⁹

Prior to *Nevada Power Co. v. Haggerty*, the Nevada Supreme Court recognized and validated the fundamental legal doctrine that an employer is only liable in a third-party indemnity action when an express contract exists between an employer and a third-party.

In *American Federal Savings v. Washoe*,⁴⁰ Washoe County contracted to lease the Union Federal Building from First Federal. One provision of the lease agreement required Washoe County to indemnify First Federal "for any loss, injury, death or damage to persons allowed to use or occupy the premises."⁴¹ Washoe County employees injured themselves while in the course and scope of their employment, and though they were entitled to workers' compensation benefits from Washoe County, sued First Federal as owner of the building. One of the injured employees recovered damages against First Federal. As a result, Washoe County brought a declaratory action against First Federal, seeking a declaration of Washoe County's obligations under the lease agreement. First Federal then counterclaimed seeking indemnification and contribution against Washoe County for damages it paid in the first case. The Nevada Supreme Court recognized a common law tort action against a third-party may be an appealing alternative to an injured employee if that third-party is concurrently or exclusively responsible for the employee's injuries and the employee does not feel totally compensated by workers' compensation benefits.⁴² However, where the third-party, in an effort to defend against an adverse monetary judgment, seeks indemnity back from an employee's employer pursuant to an implied or express contract agreement, the employer may turn to the Nevada Industrial Insurance Act's exclusive remedy provisions for a defense.⁴³ The Court reasoned "employers, and co-employees are insulated by the Nevada Industrial Insurance Act's provisions absent an independent duty owed to a third-party. . .not only from liability to employees, but also from liability by way of indemnity to a third-party."⁴⁴ Additionally, the Court held that if an indemnity agreement enlarges the liability imposed by the Nevada Industrial Insurance Act as between an employer and employee, the indemnity agreement is not based upon an independent duty between the employer and a third-party and is,

³⁹ See LARSON, *supra* note 1, at § 121.08(4).

⁴⁰ 106 Nev. 869, 802 P.2d 1270 (1990).

⁴¹ *Id.* at 870, 1271.

⁴² See *Am. Fed. Sav.*, 106 Nev. at 872, 802 P.2d at 1273.

⁴³ *Id.*

⁴⁴ *Id.* at 106 Nev. at 873, 802 P.2d at 1273. The Court's decision is consistent with Nevada precedent. For example, in *Kellen v. District Court*, 98 Nev. 133 (1982), the Court held that absent an independent duty owed to a third party, employers, and co-employees, are insulated by the provisions of the Nevada Industrial Insurance Act, not only from liability to employees, but also from liability by way of indemnity to a third-party. *Id.* at 134.

therefore, void under NRS 616.265.⁴⁵ However, implied indemnity generally cannot create an independent duty between an employer and a third-party.⁴⁶ Thus, an express indemnity contract is all that remains to establish the independent duty recognized in *Outboard Marine*.⁴⁷

The *American Federal Savings* holding is consistent with basic principles underlying workers' compensation law. In that regard, the clearest exception to the exclusive liability clause is the third-party's right to enforce an express contract in which the employer agrees to indemnify a third-party for the very kind of loss the third-party paid.⁴⁸ Prior to *American Federal Savings*, the employer's immunity doctrine was so valued in Nevada that even express indemnity contracts were not allowed as evidenced by the Ninth Circuit in *Aetna Cas. & Surety Co. v. L.K. Comstock & Co.*⁴⁹ In summary, although the fundamental notion of freedom of contract outweighs certain policies behind workers' compensation law,⁵⁰ courts interpreting Nevada law and commentators on workers' compensation law revere the exclusive remedy provisions and, prior to *Nevada Power Co. v. Haggerty*, agreed the policy behind the exclusive remedy statutes in workers' compensation law overrode the notion of implied indemnity agreements between employers and third-parties.

II. FACTS AND PROCEDURAL BACKGROUND OF *NEVADA POWER CO. V. HAGGERTY*

At the center of *Nevada Power Co. v. Haggerty* was an incident involving

⁴⁵ Am. Fed. Sav., 106 Nev. at 877, 802 P.2d at 1276. NRS 616.265 has been recodified and its provisions are now in NRS 616B.609 which provides: (1)(a) A contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by chapters 616A to 616D, inclusive, of [NRS]; (b) A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by chapters 616A to 616D, inclusive, of [NRS] is void.

⁴⁶ Am. Fed. Sav., 106 Nev. at 873, 802 P.2d at 1275.

⁴⁷ *Id.*

⁴⁸ See LARSON, *supra* note 1, at 121.04(2). See, e.g., *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 713 F.Supp 1350 (D. Idaho 1989); *United Cable Television of Jeffco, Inc. v. Montgomery LC, Inc.*, 942 P.2d 1230 (Colo. 1997); *Freund v. Utah Power & Light Co.*, 793 P.2d 362 (Utah 1990); CAL. LABOR CODE § 3864 (West 1989) which provides "if an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

⁴⁹ 684 F.2d 1267 (9th Cir. 1982). *Aetna*, the insurer for a property owner, settled two wrongful death actions which arose from the deaths of two of Comstock's employee's on the owner's property. *Aetna* then brought the present action against Comstock to recover on an express indemnity contract between Comstock and the property owner. The Ninth Circuit held an express indemnity contract is void under NRS 616.265.

⁵⁰ Bassin, *supra* note 1, at 845, noting the fundamental principle parties should be held to the agreements they sign.

Raymond Haggerty, a maintenance engineer at the Horseshoe Hotel & Casino. On July 12, 1996, Haggerty entered a room in the Horseshoe's basement which contained high voltage equipment owned by Nevada Power Company.⁵¹ Haggerty went into a vault and noticed a dirty vent located next to an electrical bus bar that ran along the top of high voltage transformers.⁵² As he began to clean the debris from a wall near an intake grill ventilation system, his right shoulder came into contact with an exposed electrically charged copper wire resulting in a high voltage electric shock causing Haggerty to suffer various personal injuries.⁵³

Haggerty applied for and received workers' compensation benefits.⁵⁴ Subsequently, he returned to work at the Horseshoe. Pursuant to the Nevada Industrial Insurance Act and, more specifically, NRS 616B.612, Haggerty could not pursue litigation against the Horseshoe for negligence or any other cause surrounding the accident. Specifically, NRS 616B.612 grants immunity to an employer who has provided workers' compensation coverage to an injured worker.⁵⁵

Haggerty instead sued the Nevada Power Company for negligence.⁵⁶ Nevada Power Company filed a third-party complaint against the Horseshoe alleging negligence, indemnification, contribution and statutory indemnification under NRS 455.240.⁵⁷ The Horseshoe filed a motion to dismiss Nevada Power

⁵¹ 989 P.2d at 872.

⁵² 989 P.2d at 872.

⁵³ *Id.*

⁵⁴ 989 P.2d at 873.

⁵⁵ Relevant sections of the statute provide:

(1) Every employer within the provisions of chapters 616A to 616D, inclusive, or 617 of [NRS] [the Nevada Industrial Insurance Act], and those employers who shall accept the terms of those chapters and be governed by their provisions, as in those chapters provided, shall provide and secure compensation according to the terms, conditions and provisions of those chapters for any and all personal injuries by accident sustained by an employee arising out of and in the course of employment. . . (4) In such cases the employer shall be relieved from liability for the recovery of damages or other compensation for such personal injury, unless by terms of chapters 616A to 616D, of [NRS] otherwise provided.

⁵⁶ 989 P.2d at 873.

⁵⁷ Relevant sections of the Nevada High Voltage Overhead Power Line Act read as follows:

NRS 455.230. Conducting of activities near line; Authorization; powers and duties of public utility; payment of expenses for preventative measures.

1. A person may perform an act or operate equipment in closer proximity to an overhead power line carrying high voltage than authorized by [NRS] 455.220 if, before performing the work:

(a) Notice of the work to be performed is provided to the public utility operating the overhead line carrying high voltage; and

(b) The public utility operating the overhead line carrying high voltage consents to the performance of the work.

2. If the work can be performed with reasonable safety, the public utility shall promptly consent to the performance of the work. As a condition of consent, the public utility may:

(a) Reasonably limit the time, place and manner of the work to preserve public safety.

(b) Place temporary mechanical barriers to separate and present contact between material, equipment or persons and the overhead line carrying high voltage.

Company's third-party complaint. At the hearing, the Horseshoe argued it was immune from further liability under NRS 616B.612 because it paid full workers' compensation coverage to Haggerty. The district court granted the motion to dismiss on August 28, 1997, and Nevada Power appealed.

On appeal, the Nevada Supreme Court affirmed the District Court's dismissal of the third-party complaint. The Court held that overhead power line statutes create an independent duty to indemnify in favor of a utility company and constitute an exception to the employer immunity provisions of the workers' compensation laws.⁵⁸ Additionally, the Court held the electrical equipment which caused Haggerty's injuries did not fall within the definition of an overhead power line.⁵⁹

III. THE REASONING IN *NEVADA POWER CO. V. HAGGERTY*

A. *The Majority's Reasoning*

1. *The Independent Duty Doctrine*

The Majority held that, as a general rule, an employer who provides compensation to an injured employee under the Nevada Industrial Insurance Act is insulated from further liability to that employee.⁶⁰ Likewise, "absent an express indemnification agreement or an independent duty between the employer and the third-party, an employer will not be liable to a third-party for indemni-

(c) Temporarily disconnect power to the overhead line, ground the overhead line or relocate the overhead line.

3. Except as otherwise provided in this subsection, the person responsible for performing the work in the vicinity of the overhead line carrying high voltage shall pay any actual expenses incurred by the public utility in carrying out the preventative measures.

NRS 455.240. Liability for violation causing contact with line.

If an act constituting a violation of any provision of this chapter causes contact with an overhead line carrying high voltage, each person who committed the violation or caused another person to commit the violation shall pay the public utility operating the overhead line carrying high voltage for:

1. All damages to property of the public utility.

2. All reasonable costs and expenses incurred by the public utility as a result of the contact; and

3. The costs and expenses incurred by the public utility as a result of the contact for damages to third persons.

Each person who committed a violation causing the contact or who caused another person to commit a violation causing the contact is jointly and severally liable for the payment required by this section.

⁵⁸ 989 P.2d at 877.

⁵⁹ *Id.* at 879. NRS 455.200(2) defines an "overhead line" as a bare or insulated electrical conductor installed above ground.

⁶⁰ *See, e.g.,* *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1342, 905 P.2d 168, 171 (1995).

fication arising out of an injury to an employee.”⁶¹ Nonetheless, the Court concluded overhead power line statutes do create an independent duty to indemnify in favor of a utility and therefore constitute an exception to Nevada workers’ compensation law’s employer immunity provisions.⁶² The Court noted four states that have addressed this issue concluded overhead power line statutes allow a power company to seek indemnification from an employer, despite the employer’s general immunity under workers’ compensation law. Specifically, the Court cited cases from Texas, Arizona, Oklahoma and Georgia.⁶³ The only case the Court cited contrary to its holding is *Rodriguez v. Nurseris, Inc.*⁶⁴

The Court briefly mentioned the legislative history of overhead power line statutes and noted there is none to support either position of workers’ compensation issues in the hearings’ records.⁶⁵ However, by utilizing rules of statutory construction, the Majority concluded NRS 455.240 constitutes an exception to the employer immunity provision and such an interpretation promotes the purpose of the overhead power line statutes with minimal interference and with the general purpose of the workers’ compensation laws.⁶⁶ The Court reasoned

⁶¹ 989 P.2d at 874. See, e.g., *American Federal Savings v. Washoe County*, 106 Nev. 869, 877-78, 802 P.2d 1270, 1275 (1990); *Outboard Marine Co. v. Shupbach*, 93 Nev. 158, 164-65, 561 P.2d 450, 454 (1977); LARSON, *supra* note 1, at § 76.40 at 14-819 & § 76.50 at 14-857 (1998).

⁶² 989 P.2d at 877.

⁶³ 989 P.2d at 875-76. The Court cites *Olson v. Central Power and Light Co.*, 803 S.W.2d 808, 812 (Tex. Ct. App. 1991); *Houston Lighting, Etc. v. Eller Outdoor Adv.*, 635 S.W.2d 133,135 (Tex. Ct. App. 1982); *Tucson Elec. v. Dooley-Jones and Assoc.*, 746 P.2d 510 (Ariz. Ct. App. 1987); *Tucson Elec. v. Swengel-Robbins Const.*, 737 P.2d 1385 (Ariz. Ct. App. 1987); *Travelers Insurance Co. v. L.V. French Truck Service*, 770 P.2d 551 (Okla. 1988); *Flint Electric Membership v. Ed Smith Construction*, 511 S.E.2d 160 (1999). See discussion *infra* Part V.A.

⁶⁴ 815 P.2d 1006 (Colo. Ct. App. 1991). In *Rodriguez*, the Colorado court determined that if the Colorado legislature had intended the overhead power line statutes to operate as an exception to the exclusivity provision of workers’ compensation, “it would have done so clearly,” and held an employer is immune from suit by the power company. See discussion *infra* Part V.A.

⁶⁵ 989 P.2d at 876.

⁶⁶ 989 P.2d at 877. Specifically, the Majority notes “It is an accepted rule of statutory construction that a provision which specifically applied to a given situation will take precedence over one that applied only generally;” see, e.g., *Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P.2d 56, 57-58 (1979) citing *W.R. Co. v. City of Reno*, 63 Nev. 330, 172 P.2d 158 (1946); “When the legislature enacts a statute, this Court presumes that it does so ‘with full knowledge of existing statutes relating to the same subject’;” see, e.g., *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19, 604 P.2d 498, 500 (1985);

“ . . . whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes;” see e.g., *Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *City Council of Reno v. Reno Newspaper*, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989); “In addition, statutory interpretation should avoid absurd or unreasonable results;” see, e.g., *General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995); *Las Vegas Sun v. District Court*, 104 Nev. 500, 511, 761 P.2d 849, 851 (1988); *Sheriff v. Smith*, 91 Nev. 729, 733, 542 P.2d 440, 443 (1975). See also NORMAN J. SINGER, SUTHERLAND STATUTORY

overhead power line statutes were specifically enacted to protect all persons from the hazards associated with working in close proximity to high voltage overhead power lines.⁶⁷ The Nevada Industrial Insurance Act, enacted prior to the overhead power line statutes, only provides a general method for workers to be compensated for work-related injuries.⁶⁸ In support of its analysis, the Court cites *Sierra Life Ins. Co. v. Roltman*,⁶⁹ which established the general rule of statutory construction: “a provision which specifically applies to a given situation will take precedence over one that applies only generally.”⁷⁰ The Court also relies upon *City of Boulder v. General Sales Drive*,⁷¹ which noted when the legislature enacts a statute, the court presumes it does so “with full knowledge of existing statutes relating to the same subject.”⁷² With this guidance, the Majority concluded NRS 455.240 should take precedence over NRS 616B.612.⁷³ Moreover, the Court looked to the public policy behind the Nevada Industrial Insurance Act’s exclusive remedy provision and the overhead power line statutes and added:

The people who are most likely to be injured around an overhead power line are individuals who are working in the scope of their employment. If employers cannot be sued in indemnification pursuant to NRS 455.240(3) for injuries sustained by their employees, an important incentive for compliance involving the major beneficiaries of the act would be eliminated. Thus, this interpretation would yield an unreasonable result. Finding that NRS 455.240 constitutes an exception to the employer immunity provision fully promotes the purpose of the overhead power lines statutes with minimal interference with the general purpose of the workers’ compensation laws. This is a more harmonious resolution of the conflict between the two statutes than gutting the power line statute in favor of workers’ compensation laws.⁷⁴

2. Definition of Overhead Power Lines

NRS 455.200(2) provides: “‘Overhead’ line means a bare or insulated electrical conductor installed above ground.” Subsequent to the *Haggerty* Court’s independent duty analysis, the Nevada Supreme Court applied rules of statutory construction to analyze the meaning of the term overhead lines and

CONSTRUCTION § 45.05 at 31 (6th ed. 2000) which provides “In construing the meaning of a statute the courts must consider the history of the subject matter involved, the end to be attained, the mischief to be remedied and the purpose to be accomplished. It has also been stated to show that all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used and that language must be construed in the light of the intended purpose.”

⁶⁷ 989 P.2d at 876.

⁶⁸ *Id.* at 877.

⁶⁹ 95 Nev. 654, 608 P.2d 56 (1979).

⁷⁰ 95 Nev. at 656, 608 P.2d at 57-8.

⁷¹ 101 Nev. 117, 694 P.2d 498 (1985).

⁷² 101 Nev. at 118-19, 694 P.2d at 500.

⁷³ 989 P.2d 877.

⁷⁴ 989 P.2d at 877.

noted the most consistent definition was outdoor, electrical equipment.⁷⁵ The Court reasoned interpreting the statute any other way would require employees to contact Nevada Power any time they entered the electrical vault room and Nevada Power could charge a fee each time to supervise the work.⁷⁶ In that regard, the Majority found defining “overhead power lines” any other way than to mean outdoor, electrical equipment would actually undermine workers’ safety, because Nevada Power would have no incentive to maintain safety measures to protect people from accidental contact because of the fee provision.⁷⁷ Specifically, the Majority determined the statutory intent is better served by not imposing the provisions of the overhead power line laws to high voltage electrical equipment located within a building.⁷⁸

B. *The Dissent’s Reasoning*

The dissent noted important flaws in the Majority’s reasoning. Initially the dissent concluded the majority never should have decided that overhead power line statutes create an independent duty to indemnify because the Majority held the circumstances of the case did not bring it within the “parameters of the overhead line statutes.”⁷⁹

Most important, the dissent stated the electrical equipment which caused Haggerty’s injuries does fit within the definitions of overhead power lines. The dissent reasoned the language of NRS 455.200(2)⁸⁰ does not constrain the interpretation to mean the line must be in open air, outside or above sea level. Therefore, the best interpretation of “above ground” is not buried.⁸¹ The dis-

⁷⁵ 989 P.2d at 878. Once again, the Majority enumerates several specific rules of statutory construction: “When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it;” *see e.g.*, *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989); “When a statute is ambiguous, it should be construed ‘in line with what reason and public policy would indicate the legislature intended’;” *see, e.g.*, *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983) *quoting Cannon v. Taylor*, 87 Nev. 285, 288, 486 P.2d 493, 495 (1971); “Several factors can be used to determine legislative intent. The title of a statute can be considered;” *see, e.g.*, *A Minor v. Clark Co. Juvenile Ct. Serve.*, 87 Nev. 544, 548, 490 P.2d 1248, 1250 (1971); “Other words or phrases used in the statute or separate subsections of the statute can be reviewed to determine the meaning and purpose of the statute;” *see, e.g.*, *Bd. Of County Comm’rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983); “Finally, the subject matter of the statute and policy to be effectuated can be used in statutory construction;” *see, e.g.*, *Welfare Div. V. Washoe Co. Welfare Dep’t*, 88 Nev. 635, 503 P.2d 457 (1972). The Majority reasoned that the statute in question, NRS 455.200-NRS 455.250, is entitled “Overhead Lines Carrying High Voltage” and language of the statute covers outdoor, not indoor electrical equipment. *Id.* at 878-79.

⁷⁶ 989 P.2d at 879.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 989 P.2d at 880.

⁸⁰ NRS 455.200(2) defines overhead power lines as bare or insulated electrical conductors installed above ground, *supra* note 47.

⁸¹ 989 P.2d at 880.

sent recognized a liberal interpretation of the overhead power line statutes as the best interpretation to promote workers' safety.⁸² In that regard, the dissent reasoned neither the legislature or statute distinguish between indoor and outdoor power lines, and the danger to workers is not affected whether the line is indoors or outdoors.⁸³ Specifically, the purpose of the law, to promote worker safety, is best accomplished "if the statutes were interpreted to apply to all exposed power lines, without regard to whether they are located outside or inside, on a wooden pole or in a basement."⁸⁴

Finally, the dissent noted the majority's decision was partly based on concerns that a ruling for Nevada Power Company would mean Nevada Power Company could charge repeated supervisory fees to an employer such as the Horseshoe Club whenever an employee works near the electrical room.⁸⁵ The dissent found this reasoning flawed because nothing in the record existed to support this assertion.⁸⁶

⁸² *Id.* The dissent compared the high voltage power line statute to mining and real estate statutes that had been liberally interpreted: "This court has consistently determined that a statute with a protective purpose should be liberally construed in order to effectuate the intended protection." *Id.* at 881. In *Tobin v. Gartiez*, 44 Nev. 179, 191 P. 1063 (1920), the Court interpreted a statute which prohibited unauthorized grazing on the land of a person with legal title and determined that "legal title" included a lessee because the statute was enacted to protect those with a right to the exclusive occupation of the land. *Id.* at 186-187, 191 P. at 1065. In *Ex Parte Douglass*, 53 Nev. 188, 295 P. 447 (1931), the Court held that a statute which required mine shafts to be equipped with a "safety cage, safety crosshead or safety skip" required a safety cage and wither a safety crosshead or safety skip, rather than reading the statute with three alternative, because the statute was enacted to promote the safety of miners as they traveled up and down the mine shafts. *Id.* at 191-92, 295 P. at 448 (quoting Section 10480, N.C.L. as amended (1913 Nev. Stat. ch. 267, § 1, at 422-23)). In *Brill v. State Real Estate Division*, 95 Nev. 917, 604 P.2d 113 (1979), the issue was whether a twenty-five dollar fee charged by the defendant for access to an index of available homes for sale and rent was an "advance fee," thus mandating that the defendant obtain a real estate license. This court determined that the fee was in fact an "advance fee," because the purpose of the real estate license was to protect the public from unqualified persons. *Id.* at 919-20, 604 P.2d at 114. Lastly, in *Colelo v. Administrator; Real Estate Div.*, 100 Nev. 344, 683 P.2d 15 (1984), the appellants received a judgment against a real estate licensee on the basis of fraud, misrepresentation and embezzlement. After appellants unsuccessfully attempted to collect from the licensee, they obtained \$10,000.00 from the Real Estate Education, Research and Recovery Fund ("Fund") pursuant to Nevada law. The Court held that appellants were only required to assign \$10,000.00 of their judgment to the Fund despite statutory language that "the judgment creditor shall assign all his right, title and interest in the judgment" because the statute was intended to protect judgment creditors without requiring them to forsake their entire judgment to collect a portion. *Id.* at 346 n.2 and 347-48, 683 P.2d at 16 n. 2 and 16-17. The dissent argued the high voltage power line statute is entitled to the same liberal interpretation as the Court construed these cases. 989 P.2d at 881.

⁸³ 989 P.2d 881.

⁸⁴ 989 P.2d at 881.

⁸⁵ *Id.*

⁸⁶ *Id.*

IV. ANALYSIS

The Majority in *Nevada Power Co. v. Haggerty* implicitly expanded the independent duty doctrine and this implication will have far reaching ramifications in the State of Nevada. The Majority based its decision upon rules of statutory construction and courts in other states with similar holdings. However, the Majority fails to define and/or explain the independent duty between Horseshoe and Nevada Power Co. The holding in this case does not harmonize the two statutory schemes but instead minimizes, and perhaps nullifies, important policies behind Nevada workers' compensation law.

A. *The Majority did not define "independent duty."*

The majority correctly notes that an employer who provides compensation to an injured employee under the Nevada Industrial Insurance Act is insulated from further liability to that employee.⁸⁷ The Court further recognizes the conflict between the plain meaning of the overhead power line statutes and the laws governing employer immunity under workers' compensation statutes.⁸⁸ Ironically, the Court still held Nevada's overhead power line statutes should be an exception to the Nevada Industrial Insurance Act's exclusive remedy provision.⁸⁹ The Court based its decision on only four states which have similarly decided overhead power line statutes constitute an exception to workers' compensation acts' exclusive remedy provision.⁹⁰

In *Houston Lighting, Etc., v. Eller Outdoor Adv.*,⁹¹ an electric utility company sought indemnity against an outdoor advertising company seeking recovery of the amount of a settlement it paid to an employee's family when the employee was electrocuted in the course and scope of his employment. The court held a party entitled to indemnification for damages to an injured employee, under the Public Utilities Act, would be entitled to recover from an employer covered by the Workers' Compensation Act.⁹² In so holding, the court

⁸⁷ The Majority cites *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1342, 905 P.2d 168, 171 (1995). See also NRS 616.270(3).

⁸⁸ 989 P.2d at 876.

⁸⁹ *Id.* at 877.

⁹⁰ *Id.* at 875.

⁹¹ 635 S.W.2d 133 (Tex. App. 1982). The Court also cited *Olson v. Central Power and Light Co.*, 803 S.W.2d 808 (Tex. App. 1991) in which an employee of Olson sued Central Power when he sustained personal injuries as a result of coming into contact with an electrical overhead power line owned by Central Power and Light Co. Central Power then sought indemnity from Olson. The Texas court noted the issue of the relationship between the Texas Public Utilities and the Workers Compensation Act was correctly addressed in *Houston Lighting Co.* 803 S.W.2d at 812. In that regard, the Public Utilities Act, being a later and more specific statute, is controlling. *Id.* The court further noted none of the cases appellant submitted provide authority for applying the express negligence rule regarding a contractual indemnity agreement between two parties to statutory indemnity imposed by the Legislature. *Id.*

⁹² 635 S.W.2d at 133.

reasoned the Public Utilities Act was enacted subsequent to the Texas Workers' Compensation Act's exclusive remedy provision and that the later, more specific Public Utilities Act should be given controlling effect over the older, more general Workers' Compensation Act.⁹³ The Texas court noted only this construction permitted the two statutes to be given a harmonious interpretation most consistent with legislative intent to protect workers and assure employers will follow minimum statutory requirements while performing work near hazardous high voltage lines.⁹⁴

Although the Nevada Supreme Court in *Haggerty* cites *Houston Lighting, Etc.*, *Houston Lighting* is clearly distinguishable. Initially, in *Houston Lighting*, the employee was working on a billboard at the time of his death and was therefore electrocuted by overhead power lines. In *Haggerty*, the Nevada Supreme Court ultimately held the overhead power line statutes were inapplicable because the employee was shocked by power lines in a basement. The *Houston Lighting* court reasoned its holding was appropriate because it was consistent with legislative intent and with the legislature's goal of protecting workers' safety. This reasoning is inconsequential in Nevada. Legislative history on the relationship between the Nevada High Voltage Safety Act and the Nevada Industrial Insurance Act's exclusive remedy provision is non-existent and the High Voltage Safety Act already has a civil remedy provision as an incentive for employers to adhere to the regulations and to promote workers' safety.⁹⁵ Additionally, Texas and Nevada indemnification law differed greatly prior to *Houston Lighting* and *Haggerty*. The court in *Houston* noted "Indemnity suits have been allowed in Texas, but only in those instances where the employer and the third-party have a contractual or implied contractual agreement providing for indemnification, as provided by the Workers' Compensation Statute."⁹⁶ It should not be forgotten that prior to *American Federal Sav-*

⁹³ *Id.* at 135.

⁹⁴ *Id.*

⁹⁵ The Majority notes there is no mention of workers' compensation issues in the record of the hearings and, therefore, the legislative history cannot resolve whether the legislature intended the statutes to operate as an exception to workers' compensation immunity provisions. 989 P.2d at 877.

NRS 455.250 provides:

Civil penalty: Action for enforcement; amount; disposition of proceeds; judicial review.

1. An action for the enforcement of a civil penalty pursuant to this section may be brought before the public service commission of Nevada by the attorney general, a district attorney, a city attorney or legal counsel for the public service commission of Nevada.

2. Any person who violated a provision of [NRS] 455.200 to 455.240, inclusive, is liable for a civil penalty not to exceed \$1,000 per day for each violation.

3. The amount of any civil penalty imposed pursuant to this section and the propriety of any settlement or compromise concerning a penalty must be determined by the public service commission of Nevada upon receipt of a complaint by the attorney general, an employee of the public service commission of Nevada who is engaged in regulatory operations, a district attorney or a city attorney.

4. In determining the amount of the penalty or the amount agreed upon in a settlement

ings & Loan, Nevada did not allow even express indemnity agreements.⁹⁷ Texas had already defined an implied contractual relationship between the recipient of worker's compensation benefits and a negligent employer.⁹⁸ Specifically, Texas allowed indemnity to arise implicitly from relationships rather than solely from an express contract as in Nevada. Although *Haggerty* is the first case in Nevada to allow indemnity absent an express contract, the Court does not define an implied contractual agreement between Nevada Power Company and the Horseshoe Club but instead simply lists cases and then bases its decision on statutory interpretation.

In *Tucson Elec. v. Swengel-Robbins Const.*,⁹⁹ the Tucson Electric Company sought indemnity from a construction company arising from a claim brought by the widow of an employee who died in the course and scope of his employment. The court held the indemnity statute does not violate the workers' compensation statute's exclusive remedy provisions.¹⁰⁰ The court reasoned "the statute limits the employee's options regarding employer liability based on a legal relationship with a third-party and noted the relationship is created by the statute establishing the distance requirements for equipment and persons."¹⁰¹ The court further reasoned that not allowing an indemnity action would frustrate legislative intent while allowing the indemnity action would

or compromise, the public service commission of Nevada shall consider:

- (a) The gravity of the violation;
- (b) The good faith of the person charged with the violation in attempting to comply with the provisions of [NRS] 455.200 to 455.240, inclusive, before and after notification of a violation; and
- (c) Any history or previous violations of those provisions by the person charged with the violation.

5. A civil penalty recovered pursuant to this section must first be paid to reimburse the person who initiated the action for any cost incurred in prosecuting the matter. Any amount remaining after such reimbursement must be deposited in the state general fund.

6. Any person aggrieved by a determination of the public service commission of Nevada pursuant to this section may seek judicial review of the determination in the manner provided by [NRS] 233B.130 to 233B.150, inclusive.

⁹⁶ 635 S.W.2d at 134-5 (emphasis added).

⁹⁷ See, e.g., *Aetna Cas. & Surety Co. v. L.K. Comstock & Co.*, 684 F.2d 1267 (9th Cir. 1982) *supra* note 49.

⁹⁸ 635 S.W.2d at 134-5. The court noted "An indemnity action is derivative of the primary suit for damages and a defendant has no right of indemnity or contribution against whom the injured has no cause of action. . . Where, as in the instant case, an employee has contracted away his right to sue his employer, and has accepted workers' compensation benefits, the third party has no right of indemnity against the negligent employer."

⁹⁹ 737 P.2d 1385 (Ariz.App. 1987).

¹⁰⁰ *Id.* It should be noted the court also held "the statute requiring a person conducting activity in the vicinity of high voltage overhead lines to indemnify the electric company with respect to resulting damages, including damages to third persons, is not unconstitutionally vague or fundamentally unfair to the extent that it requires indemnity even where injury results in whole or part from utility's independent negligence." *Id.*

¹⁰¹ 737 P.2d at 1388.

harmonize the two statutory schemes.¹⁰² In *Tucson Elec. v. Dooley-Jones and Assoc.*,¹⁰³ a surveyor who was injured when he came into contact with a high voltage power line sued the power company and the power company filed a third-party claim for indemnity against the surveyor's employer. The court held workers' compensation remedies do not bar a power company's indemnification claim against an employer.¹⁰⁴ The court further noted the claim was based solely on a statutory duty.¹⁰⁵ "When a claim for indemnity is based on a statutory right, it is the statute that determines the effect of the indemnitee's own negligence."¹⁰⁶

The *Haggerty* court should not have noted Arizona authority, nor cited *Tucson v. Swengel-Robbins*, because the *Haggerty* court did not define or establish the contractual relationship from which an implied indemnity action may arise in Nevada. Specifically, if implied indemnity can be allowed between an employer and power company under the overhead power line statutes, the "door is open" for implied indemnity agreements between other public utility statutory schemes and employers or other implied indemnity agreements. In that regard, the *Haggerty* court notes the *Tucson v. Swengel-Robbins*' decision was based on legislative intent and "harmonized the two statutes." However, the legislative intent reasoning is inapplicable in Nevada because there is virtually no legislative history on this subject and the legislature inserted a civil remedies provision for the purpose of encouraging employers to promote worker safety.¹⁰⁷ Further, allowing indemnification of public utilities does not "harmonize the two statutes" in Nevada. As previously noted, it was not until 1990 in *American Federal Savings Bank* that Nevada allowed even express indemnity agreements.¹⁰⁸ Therefore, the concept of express indemnity agree-

¹⁰² *Id.* The court had previously noted "the indemnity provision of the high voltage power line statutes represent a determination by the legislature that where work is being performed near power lines, the person or entity performing the work is in the best position to prevent injury-whether caused by its negligence or that of the utility-by giving notice so that appropriate protective measures may be taken." *Id.* at 1387.

¹⁰³ 746 P.2d 510 (Ariz.App. 1987). The Arizona court mainly relies upon *Tucson Elec. v. Swengel-Robbins*, 737 P.2d 1385 (Ariz. Ct. App. 1987), and notes that in that case, "the court made it clear that the legislature intended that utilities [in similar situations] can be indemnified even if they were also negligent." *Id.* at 512.

¹⁰⁴ 746 P.2d at 511.

¹⁰⁵ *Id.* at 514. A.R.S. § 40-360.43 requires any person or business entity who desires to temporarily carry on any function, activity or work within six feet of a high voltage overhead power line to promptly notify the utility operating the high voltage line before performing the work. Failure to notify allows a utility to seek indemnity for "all damages to the facilities and all costs and expenses, including damages to third persons, incurred by the public utility as a result of the contact.

¹⁰⁶ 746 P.2d at 514.

¹⁰⁷ See text and accompanying note 88.

¹⁰⁸ NRS 616.265 forbid express indemnity contracts to modify or in any way alter the specifications of the Nevada Industrial Insurance Act. See text and accompanying note 45. See also, e.g., *Aetna Cas. & Surety Co. v. L.K. Comstock & Co.*, 684 F.2d 1267 (9th Cir. 1982),

ments interfering with the rights and liabilities under the Nevada Industrial Insurance Act is a relatively new concept in Nevada law. The Court's holding in *Haggerty* does not harmonize the overhead power lines statutes and exclusive remedy provision but introduces a brand new concept to Nevada workers' compensation law. Specifically, instead of harmonizing the two statutes, the *Haggerty* Court potentially obliterates the exclusive remedy provision of the Nevada Industrial Insurance Act by paving the way for any sort of implied indemnity agreement to constitute an exception to the exclusive remedy provision.

The *Haggerty* Court also mentioned Oklahoma's stance on the exclusive remedy/implied indemnity agreement issue. In *Traveler's Ins. Co. v. L.V. French Truck Service, Inc.*,¹⁰⁹ an employee of L.V. French Truck Service, Inc., was injured in the course and scope of his employment when, while transporting a drill across a country road, he came across a clearance insufficient for the truck and attempted to raise the power line. The employee received workers' compensation benefits, then sued Cimarron Electric Cooperative. Traveler's Insurance Company, Cimarron's liability carrier, brought an indemnity claim against French Truck Service to recover the loss it had paid. The court noted that a third-party's right to indemnity must arise out of an independent legal relationship between the employer and the third-party.¹¹⁰ The court reasoned ". . . although French's liability, as well as the loss paid by Travelers, arose out of the same facts, the gravamen of Traveler's claim is enforcement of a statutorily created duty which is imposed without regard to whether any other kind of obligation may result from the violation, i.e., responsibility to pay compensation for an employee's on the job injury."¹¹¹

The Court also mentioned *Flint Electric Membership v. Ed Smith Construction*,¹¹² to support its holding that the overhead power line statutes and, more specifically, NRS 455.240, constitute an exception to the exclusive remedy provision of the Nevada Industrial Insurance Act. In *Flint*, an employee brought a negligence action against Flint Electric arising out of an electrical shock he sustained while in the course and scope of his employment when a crane came into contact with a high voltage power line. Flint Electric then sought indemnity from Ed Smith Construction although the employee had received workers' compensation benefits from Ed Smith. The court held:

. . . the better construction of these two statutes is to hold that the indemnity provision of the HVSA (High Voltage Safety Act) may be enforced without offending the exclusive remedy provision of the WCA (Worker's Compensation Act) by according indemnity actions pursuant to the HVSA the same dig-

supra note 49; *American Federal Savings Bank v. Washoe County*, 106 Nev. 869, 802 P.2d 1270 (1990).

¹⁰⁹ 770 P.2d 551 (Okla. 1988).

¹¹⁰ *Id.* at 554.

¹¹¹ *Id.*

¹¹² 511 S.E.2d 160 (Ga. 1999).

nity case law has given contractual indemnity provisions executed by private parties. Thus, while the WCA remains an employee's sole remedy against an employer on account of a work related injury, the HVSA authorizes a power-line company to obtain indemnification from an employee on account of the employer's failure to abide by the safety provisions of the HVSA.¹¹³

The only case the *Haggerty* court cites in opposition to its holding is *Rodriguez v. Nurseries, Inc.*,¹¹⁴ in which an employee of the nursery and his wife brought an action against the nursery seeking recovery in excess of workers' compensation benefits already received for an injury sustained in the course and scope of his employment. The court held the High Voltage Safety Act did not create an exception to the workers' compensation act's exclusivity provision.¹¹⁵ This case is clearly distinguishable from *Haggerty* because in *Rodriguez*, the injured employee sued his employer directly. In that regard, it is surprising the *Haggerty* Court would even note *Rodriguez* since the Colorado case does not even deal with issues surrounding indemnity/contribution. Nonetheless, *Rodriguez* still considers fundamental rules of statutory construction which are important to the Nevada Supreme Court's analysis in *Haggerty*. In that regard, the court noted there is a presumption all laws are passed with knowledge of those already existing and the General Assembly does not intend to repeal a statute without so declaring.¹¹⁶ Specifically, as it pertains to the immunity from suit of a complying employer, the workers' compensation act's exclusivity has been continually reaffirmed and if the General Assembly had wanted to limit it, it would have done so clearly.¹¹⁷

Although *Rodriguez* appears misplaced in the random cases the *Haggerty* court mentions in its opinion, and the other cases can generally be distinguished from *Haggerty*, the common thread linking the cases is the courts' analysis of when an independent duty exists between an employer and third-party and why an exception to the exclusive remedy provision of workers' compensation acts will arise from that relationship. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.¹¹⁸ Noncontractual or equitable indemnity is similar to common law contribution; one who is only constructively or vicariously obligated to pay damages because of another's tortious conduct may recover the

¹¹³ 511 S.E.2d at 162.

¹¹⁴ 815 P.2d 1006 (Colo. Ct. App. 1991).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1008, citing *City & County of Denver v. Rinker*, 366 P.2d 548 (1961).

¹¹⁷ 815 P.2d at 1008. See also *Popovich v. Irlanda*, 811 P.2d 379 (Colo. 1991).

¹¹⁸ See *Travelers Ins. Co. v. French Truck Service*, 770 P.2d 551, 556 (Okla. 1988); 15 O.S. 1981 § 421. See also BLACK'S LAW DICTIONARY 772 (7th ed. 1999) which provides indemnity is (1) a duty to make good any loss, damage, or liability incurred by another; (2) the right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty; (3) Reimbursement or compensation for loss, damage, or liability in tort, esp., the right of a party who is secondary liable to recover from the party who is primarily liable for reimbursement or expenditures paid to a third party for injuries resulting from a common law duty.

sum paid from the tortfeasor.¹¹⁹ In that regard, all of the courts mentioned in *Haggerty* recognize a statutory or contractual duty from which the obligation to indemnify will arise.

In Texas, only a party entitled to indemnification for damages to an injured employee would be entitled to recover indemnity from an employer under the Public Utilities Act.¹²⁰ In Arizona, a legal relationship between an employer and third-party is created by statute establishing the distance requirements for equipment and persons.¹²¹ Similarly, in Oklahoma the basis of a third-party indemnity action is the enforcement of a statutorily created duty.¹²² In Georgia, the indemnity action is based strictly on the legislative enactment.¹²³

Although the Majority in *Haggerty* acknowledges other jurisdictions' holdings regarding the third-party implied indemnity issue in the public utility context, the Court disregards the fact other jurisdictions defined and explained the independent duty between an employer and third-party power companies.¹²⁴ In *Haggerty*, the Majority fails to define the independent duty under which an implied indemnity agreement creates an exception to the exclusive remedy provision of the Nevada Industrial Insurance Act. In that regard, the Majority fails to explain why an independent duty exists between an employer and third-party, or specifically an employer (Horseshoe) and Nevada Power Company. Nonetheless, the Court still held an employer can be required to indemnify a power company despite employer immunity under the Nevada Industrial Insurance Act's exclusive remedy provision.¹²⁵ To reach such a con-

¹¹⁹ See *Traveler's* at 556. See also *Braden v. Hendricks*, Okl., 695 P.2d 1343, 1349 (Okl. 1985); *Porter v. Norton Stuart Pontiac-Cadillac of Enid*, Okl., 405 P.2d 109, 113 (Okl. 1965); *Burrell v. Rodgers*, 441 F.Supp. 275, 278 (W.D. Okla. 1977).

¹²⁰ See *Houston Lighting, Etc. v. Eller Outdoor Adv.*, discussed *supra*. In that regard, one needs to have some liability or be owed some damage and a relationship arises therefrom.

¹²¹ See *Tucson Elec. v. Swengel-Robbins Const.*, *Tucson Elec. v. Dooley-Jones and Assoc.*, discussed *supra*. See also A.R.S. § 40-360-42 which provides unless danger against contact with high voltage overhead lines has been effectively guarded against as provided by § 40-360.43: (1) A person or business entity shall not, individually or through an agent or employee, require any other person to perform any function or activity upon any land, building, highway, or other premises if at any time during the performance of any function or activity it is possible that the person performing the function or activity could move or be placed within six feet of any high voltage overhead line or if it is possible that any part of any tool or material used by the person could be brought within six feet of any high voltage overhead line during the performance of any function or activity.

¹²² See *Traveler's Ins. Co. v. L.V. French Truck Service, Inc.*, discussed *supra* Part IV.A.

¹²³ See *Flint Electric Membership v. Ed Smith Construction*, discussed *supra* Part IV.A.

¹²⁴ The Court cites *Tucson Electric Power Company v. Swengel-Robbins*, 737 P.2d 1385 (Ariz. Ct. App. 1987), and notes the Arizona court held that an employer can be required to indemnify a power company despite employer immunity under workers' compensation law. *Id.* at 1388. However, the Tucson court reasoned the [exclusive remedy] statute limits the employer's options regarding employer liability, but does not limit the employer's liability based on a legal relationship with a third party. *Id.* This relationship is created by the statute establishing the distance requirements for equipment and persons. *Id.* Similarly, NRS 455.220 provides distance requirements for persons, tools, or materials working near high voltage overhead power lines.

dustrial Insurance Act's exclusive remedy provision.¹²⁵ To reach such a conclusion requires explanation. Failing to define the independent legal duty opens the door for Nevada courts to broadly interpret the independent duty doctrine in the future.

A broad interpretation of the independent duty doctrine could be fatal to Nevada workers' compensation law's exclusive remedy provision. Employers would be liable to third-parties whether or not a legal duty exists between them because the independent duty as established in *Outboard Marine* has been expanded. Nullifying the exclusive remedy provision potentially exposes employers to double liability because they will now have to pay workers' compensation benefits to injured workers and possibly have to indemnify third-parties in the same matter. Therefore, one of the major premises of workers' compensation law is nullified and the fundamental mutual benefit and policy underlying workers' compensation is removed from the statutory scheme.

B. Other jurisdictions have not allowed exceptions to exclusivity provisions of workers' compensation acts.

Although the Majority cited cases from four jurisdictions in support of its holding the overhead power line statutes constitute an exception to the Nevada Industrial Insurance Act's exclusivity provision, the Majority overlooks the fact other jurisdictions have not allowed exceptions to workers' compensation acts.

For example, in New Jersey, in *Ramos v. Browning Ferris Industries*,¹²⁶ appellant was injured when, while moving a drum of solid waste on the premises of his employer, Laminating Corporation of America, he tripped over a rut made by a solid waste hauler, Browning-Ferris Industries of South Jersey, Inc. Appellant recovered workers' compensation benefits from Laminating Corporation and sued Browning-Ferris Industries, which in turn filed a third-party complaint against Laminating Corporation. The New Jersey Supreme Court held:

The New Jersey [Exclusivity] Rule is consistent with that of the great majority of jurisdictions, which hold that the exclusive-remedy provision of the Workers' Compensation Act precludes a claim for contribution against an employer whose concurring negligence contributed to the injury of an employee.¹²⁷

In *Ramos*, the New Jersey Supreme Court found holding the third-party tortfeasor solely responsible to the injured employee "may seem unfair. Indeed, Professor Larson describes the issue of the effect of the exclusive-liability provision of the Worker's Compensation Act on the right of a third-party tortfeasor

¹²⁵ 989 P.2d at 877. The holding in *Haggerty* effectively overrules *American Federal Savings Bank*, discussed *supra*, which established a duty created by an express indemnity contract must exist to indemnify a third party and escape the provisions of the Nevada Industrial Insurance Act.

¹²⁶ 510 A.2d 1152 (N.J. 1986). The relevant New Jersey high voltage power lines statutes are found at N.J. REV. STAT. §§ 34:6-47.5-47.7a (1991).

¹²⁷ 510 A.2d at 1156.

to recover contribution or indemnification from an employer whose negligence was a concurrent cause of the plaintiff-employee's injury as '[p]erhaps the most evenly balanced controversy in all of compensation law. . .',¹²⁸

Also in New Jersey, in *Bradford v. Kupper Associates*,¹²⁹ an injured employee of a contractor and estate of a deceased employee of a contractor brought a negligence action against a municipal utility and engineering firm arising from the employee's exposure to hydrogen sulfide gas while repairing a sewer. The court held:

Although a third-party tortfeasor cannot seek contribution from an employer, it may obtain indemnification where that course is specifically permitted by way of an express contract. The [Workers Compensation] Act does not preclude the employer's assumption of a contractual duty to indemnify a third-party through an express agreement.¹³⁰

In the leading case establishing the rule that when the relation between the parties does not spring from contract or special position such as bailee or lessee, the third-party cannot recover indemnity from the employer, Judge Learned Hand interpreted New Jersey law and gave the following reason for the rule:

. . .we shall assume that, when the indemnitor and indemnitee are both liable to the injured person, it is the law of New Jersey that, regardless of any other relation between them, the difference in gravity of their faults may be great enough to throw the whole loss upon one. We cannot, however, agree that that result is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong. If so, when one of the two is not so liable, the right of the other to indemnity must be found in rights and liabilities arising out of some other legal transaction between the two.¹³¹

In *Carl T. Madsen, Inc., v. Babler Brothers, Inc.*,¹³² a subcontractor (Madsen) brought a declaratory judgment action to absolve itself from liability under an alleged agreement to indemnify a contractor (Babler), and the contractor counterclaimed seeking indemnity from the subcontractor. The Washington Court stated:

Although the Industrial Insurance Act 'immunizes' participating employers from third-party claims arising out of negligent injury to their workers, our Court has recognized a right of action where the employer has voluntarily assumed an independent duty or obligation to indemnify such a third-party (citations omitted). [S]o long as the claim of indemnity arises on account of a separate obligation running from the employer to the third-party and not merely because the employer's negligence caused the employee's injury, an action for indemnification is judicially cognizable (citations omitted).¹³³

¹²⁸ *Id.* See also LARSON, *supra* note 1, at § 76.11.

¹²⁹ 662 A.2d 1004 (N.J. Super. Ct. App. Div. 1995).

¹³⁰ 662 A.2d at 1019. See also *Port Authority of New York v. Honeywell Protective Services*, 535 A.2d 974 (N.J. Sup. Ct. App. Div. 1987).

¹³¹ *Slattery v. Marra Bros., Inc.*, 186 F.2d 134, 139 (2d Cir. 1951).

¹³² 610 P.2d 958 (Wash. Ct. App. 1980).

¹³³ 610 P.2d at 960-1.

Furthermore, the Washington Court added “although the independent duty running to an employer and third-party cannot arise solely by implication (citations omitted), where the independent duty is expressly found in the contract, the implied right to indemnification may be found.”¹³⁴

In a Utah case, *Freund v. Utah Power & Light Co.*,¹³⁵ appellant was injured when he came in contact with an electrical power line as he was splicing amplifiers into a television cable previously hung by Cablemain, Inc., on utility poles owned by Utah Power & Light Co. Appellant worked for Jones Intercable, Inc., and recovered workers’ compensation benefits from his employer. Appellant then sued Cablemain and Utah Power & Light, who brought a third-party indemnity claim against Jones Intercable, Inc. The Utah Supreme Court concluded “indemnity should be enforced only where the employer has expressly agreed to indemnify, thereby affirmatively waiving the immunity afforded him by the exclusive remedy provision. . . [and] refused to allow indemnity against an employer based upon an implied agreement.”¹³⁶ The court reasoned:

If such an agreement to indemnify were to be implied, the employer would be obligated to pay damages to an injured employee, through a third-party, over and above the amount of compensation fixed by the Act, and thus imposed the very liability against which the Act declared the employer should be insulated. This does not appear to be the legislative intention and the Court will not, by decision, alter the plain, clear language of the legislative enactment.¹³⁷

The State of Oregon also recognizes employer indemnity under its workers’ compensation laws. Specifically, Oregon has a statute that voids indemnity or other device that changes or waives any liability created.¹³⁸ In *Roberts v. Gray’s Crane and Rigging, Inc.*,¹³⁹ Appellant’s estate brought a wrongful death action against an equipment lessor which had leased equipment to decedent’s employer, a subcontractor on a construction project. The equipment lessor filed a third-party complaint against the general contractor seeking contribution. The general contractor brought a fourth-party complaint against the subcontractor for indemnity or contribution. The equipment lessor moved to amend its third-party complaint to include a claim against the subcontractor based on the indemnity provisions of the lease agreements. The Oregon court held the indemnity agreement between the subcontractor and lessor was void

¹³⁴ *Id.* at 961.

¹³⁵ 793 P.2d 362 (Utah 1990). The relevant Utah high voltage power line statutes are found at UTAH CODE ANN. §§ 54-8c-2 and 54-8c-4 (1988).

¹³⁶ *Id.* at 368.

¹³⁷ 793 P.2d at 368. See also LARSON at § 76.20, at 14-730 (1993); and Comment, *The Effect of Workers’ Compensation Laws on the Rights of a Third Party Liable to an Injured Employee to Recover Contribution or Indemnity from the Employer*, 9 SETON HALL L. REV. 238, 264 (1978).

¹³⁸ See OR. REV. STAT. § 656.018 (1993). See also OR. REV. STAT. § 757.805 (1999) regarding work near high voltage power lines: “Accident prevention; required for work near high voltage lines; effect of failure to comply; applicability; other remedies unaffected.”

¹³⁹ 697 P.2d 985 (Or. Ct. App. 1985).

under a workers' compensation statute which provides that an employer's duty to provide coverage shall be its exclusive liability for injuries to its workers.¹⁴⁰ In interpreting OR. REV. STAT. § 656.078 (1993), the court reasoned "the legislature was concerned that third-party indemnity claims against employers would circumvent and undermine the exclusive liability provision" of workers' compensation.¹⁴¹

In *Iddings v. Me-Lee*,¹⁴² a nurse brought a negligence action against a doctor to recover for injuries allegedly received in a workplace accident. The court held that absent an express written contractual indemnification agreement between the indemnitor and the indemnitee, or another duty distinct from the duty to provide the employee with a safe place to work, the indemnitee will not be able to secure indemnity from the indemnitor for a judgment against him in a suit by the employee, should the employee prevail.¹⁴³

In a Montana case, *Cordier v. Stetson-Ross, Inc.*,¹⁴⁴ an employee of Champion International Corporation was injured in an industrial accident and received workers' compensation. The employee subsequently sued Stetson-Ross, Inc., alleging negligence in connection with machinery Stetson-Ross, Inc., sold to Champion. Stetson-Ross then filed a third-party complaint against Champion seeking indemnity for any damages it may have to pay to Champion's injured employee. Montana permitted a claim of indemnity against an employer even though the injury occurred under the Worker's Compensation Act, because a written save harmless agreement existed between indemnitor and indemnitee.¹⁴⁵ The Montana Supreme Court therefore saw the employer had a separate obligation to the employee.¹⁴⁶

C. Haggerty is not consistent with public policy underlying the Nevada Industrial Insurance Act's exclusive remedy provision.

In holding the overhead power line statutes constitute an exception to the exclusive remedy provision of the Nevada Industrial Insurance Act, the Majority mentions the important public policy behind overhead power line statutes. Specifically, the Majority states:

Many states have enacted high voltage safety acts designed to decrease the number of injuries suffered by people, particularly workers, as a result of accidental contact with high voltage electrical equipment. These statutes require

¹⁴⁰ *Id.*

¹⁴¹ 696 P.2d at 989.

¹⁴² 919 P.2d 263 (Hawaii 1996).

¹⁴³ *Id.* at 278.

¹⁴⁴ 604 P.2d 86 (Mont. 1979). See also *Lefoski v. Ravalli County Elec. Co.-Op.*, 439 P.2d 370 (Mont. 1968), in which the widow of an employee filed a wrongful death action against her deceased husband's employer electric company. The court held that to indemnify a party against his own negligence, the indemnity must be expressed in clear and unequivocal terms. *Id.* at 371.

¹⁴⁵ 604 P.2d at 91.

¹⁴⁶ *Id.*

persons to contact the local utility company before working near certain types of high voltage electrical systems. The utility company can then ensure that the work is performed in a safe manner, without damage to persons or property.¹⁴⁷

As the Majority notes, the Nevada High Voltage Overhead Power Line Act was enacted in 1993 for the purpose of protecting workers who work in the vicinity of high voltage overhead power lines.¹⁴⁸ The legislature was aware of the importance of the act in promoting workers safety; it allows for penalties in the event its provisions are violated.¹⁴⁹ Ironically, the Court still finds it necessary to allow an exception to exclusive remedy provisions, also to promote worker safety. This exception is not only unnecessary, but ignores important policies behind workers' compensation law in Nevada.

The fundamental policy in Nevada is to construe workers' compensation statutes liberally for the protection of the worker.¹⁵⁰ Similarly, the public policy encompassing workers' compensation statutes dictates a broad interpretation of the exclusive remedy rule.¹⁵¹ The Oklahoma Supreme Court distinctly framed the policy considerations surrounding this issue writing "Worker's compensation legislation was enacted to provide a substitute remedy to an employee for accidental injuries received during employment without the burden of his proving negligence. In exchange for this exposure the employer is protected from any other liability to the employee. To be equitable as well as effective, this protection must extend to [all] liability either directly or indirectly derived from the employee's injuries."¹⁵²

Similarly, Nevada has always had a strong public policy to uphold the Ne-

¹⁴⁷ 989 P.2d 873.

¹⁴⁸ See, e.g., statement of Curtis Risley, Manager, Risk Management and Claims Department, Sierra Pacific Power Company: ". . .this style of law best protects the worker, and gives the crane operator incentive to obey the law, thus avoiding injury;" and statement of Donald Fabbri, Manager of Safety Services, Nevada Power Company: "the vast majority of accidents he has investigated could have been avoided by this type of legislation." *Discussion of S.B. 400 Before the Senate Comm. on Commerce and Labor*, 67th Legis. Sess. (Nev. 1993).

¹⁴⁹ See NRS 455.240 *supra* note 45. See also statement of Keith Ashworth, testifying in support of S.B. 400 in behalf of Nevada Power Company: ". . .if the utility was not notified first and a problem occurred as a result of the activity, then the person who caused the damage would be held responsible. . .if a violation occurred, the person causing the violation would be required to pay damages." *Hearing in S.B. 400 Before the Assembly Comm. on Health and Human Services*, 67th Legis. Sess. (Nev. 1993).

¹⁵⁰ See, e.g., *SIIS v. Campbell*, 109 Nev. 997, 1000, 862 P.2d 1184, 1185 (1993); *Ransier v. SIIS*, 104 Nev. 742, 746, 766 P.2d 274, 276 (1988); *Dep't Ind. Relations v. Circus Circus*, 101 Nev. 405, 411-12, 705 P.2d 645, 649 (1985).

¹⁵¹ See, e.g., *Smith v. Vestal*, 494 N.W.2d 370, 375 (N.D. 1992). See generally *Beam v. Concord Hospitality*, 873 F.Supp. 491 (Kan. 1994); *Oliver v. Barrick Golstrike Mines*, 111 Nev. 1338 (1995).

¹⁵² See *Harter Concrete Products, Inc. v. Harris*, 592 P.2d 526, 528 (Okla. 1979).

vada Industrial Insurance Act's exclusive remedy provisions.¹⁵³ This policy is consistent with Nevada's policy of liberally construing workers' compensation statutes for the protection of the worker.¹⁵⁴ In that regard, the pinnacle benefit for an employer to contribute to the Nevada Industrial Insurance Act is the employer's immunity from third-party claims. Under the modern workers' compensation system the costs will ultimately be placed on the consumer; that is, on the employers and employees. Specifically:

Workers' compensation is a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product.¹⁵⁵

[The Workers] compensation system does not place the cost on the "public" as such, but on a particular class of consumers, and thus retains a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product.¹⁵⁶

Nevada has incorporated this fundamental principal into the Nevada Industrial Insurance Act. In that regard, for employers insured under the state insurance system, NRS 616B.206(7) provides "The manager shall adopt by regulation a plan for reviewing employers insured by the system who have excessive losses. . .in order to encourage those employers to pay for their losses and correct their loss experience." Similarly, the law in Nevada provides:

A self-insured employer must, in addition to establishing financial ability to pay, deposit with the commissioner a bond by the employer as principal, and by a corporation qualified under the laws of this state as surety, payable to the State of Nevada, and conditioned upon the payment of compensation for injuries and occupational diseases to employees. The bond must be in an amount reasonably sufficient to ensure payment of compensation, but in no event may it be less than 105 percent of the employer's expected annual incurred cost of claims, or less than \$100,000. In arriving at an amount for the expected annual cost of claims, due consideration must be given to the past and prospective experience of the employer with losses and expended within this state, to the hazard of catastrophic loss, to other contingencies, and to trends within the state. In arriving at the amount of the deposit required, the commissioner may consider the nature of the employer's business, the financial ability of the employer to pay compensation and his probable continuity of operation.¹⁵⁷

In effect, *Nevada Power Co. v. Haggerty* "opens the door" for future ex-

¹⁵³ See, e.g., *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 905 P.2d 168 (1995); *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 561 P.2d 450 (1977); *American Federal Savings v. Washoe*, 106 Nev. 869, 802 P.2d 1270 (1990).

¹⁵⁴ See text and accompanying note 145.

¹⁵⁵ See LARSON, *supra* note 1, at § 1.00.

¹⁵⁶ See LARSON, *supra* note 1, at § 1.04(2). Where experience rating, i.e., the adjustment of premium on the individual basis of past accident and liability record, is applied to individual employers, this competitive impact is carried one step further, in that an individual employer with a bad safety record might conceivably in time incur premiums so high that its cost of production would not permit it to compete. LARSON, *supra* note 1, p.1-14.

¹⁵⁷ NRS 616B.300(2).

ceptions to the Nevada Industrial Insurance Act's exclusive remedy provision. In that regard, if implied indemnity agreements can be allowed between an employer and power company under the overhead power line statutes, the door is now open for implied indemnity agreements between other public utility statutory schemes and employers, and potentially any other implied indemnity agreements. Forcing employers to indemnify third-parties under implied indemnity agreements means employers will be paying many more claims above and beyond those paid to injured employees.¹⁵⁸ As a result, insurance companies who insure self-employed insurers and the Employers Insurance Company of Nevada can potentially raise employer's insurance premiums for their workers compensation coverage as permitted by NRS 616B.206(7) and NRS 616B.300(2). Ultimately this cost will be passed on to the employee, possibly through lower wages, or even lower workers' compensation benefits if the legislature can be influenced by powerful, wealthy corporations.¹⁵⁹ While wealthy corporations obviously disfavor implied indemnity agreements because of the risk of higher insurance premiums, the Nevada Supreme Court's holding in *Haggerty* is potentially fatal to small businesses.¹⁶⁰ Forcing small businesses

¹⁵⁸ Cf. Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 509 (1988), suggesting one possible solution to subjecting employer's to outrageous indemnity exposure would be to shift the loss from the third party to the employer up to the extent of the employer's workers' compensation liability. In that way, the employer's maximum exposure would be the equivalent of losing the subrogation interest.

¹⁵⁹ An injured worker is entitled to a statutorily fixed sum depending on the nature of the injury and the injured employee's incapacity. See, e.g., NRS 616C.490(6) and NRS 616C.440 *supra* note 18. See also, e.g., Commissioner J. Randolph Ward, *Primary Issues In Compensation Litigation*, 17 CAMPBELL L. REV. 443, 469 (1995), discussing the problem of rising workers' compensation costs in North Carolina:

The anecdotal evidence suggests the rising cost of workers' compensation insurance has been accompanied by an increase in the number of employers subject to the act going non-insured. Premiums actually billed employers increased an average of 144% from 1987 through 1993. . . a concurrent problem has been the underreporting of "all injuries"-traditionally defined as one serious enough to require a physician's attention off the workplace premises. . . Reports of "medical only" claims have fallen by 60,000 in recent years, presumably due to employers trying to avoid the adverse effect on the "experience modification" formula that sets their premium rate according to risk.

¹⁶⁰ See, e.g., Mark C. Zebrowski, *Indemnity Clauses and Workers' Compensation: A Proposal for Preserving the Employer's Limited Liability*, 70 CAL. L. REV. 1421 (1982). Mr. Zebrowski similarly contends that in the contractor-subcontractor context, forcing a subcontractor to insure against a risk does not obviate the need for insurance against the same risk by the general contractor or owner. Thus, several parties have to purchase insurance for the same underlying risk. The increased insurance burden thwarts the incentive structure of the tort system. For example, if the general contractor is continually able to contract out responsibility for its own negligence, neither its insurance costs nor its profits will reflect a poor safety record, and it will have little incentive to increase workers safety. On the other hand, the subcontractor will repeatedly be exposed to liability, at least in part for the negligence of others. These higher costs may reduce its capacity for competitive bidding and thus diminish its ability to compete in the market. *Id.* at 1428-29. As evidence of the problem of spiraling workers' compensation costs, since 1990, according to the National Foundation for

to pay claims for implied indemnity agreements may make workers' compensation insurance premiums unmanageable.¹⁶¹

With the "door now open" in Nevada for implied indemnity agreements to constitute an exception to the Nevada Industrial Insurance Act's exclusivity provision, the previously settled "most evenly balanced controversy" Professor Larson refers to is now potentially a controversy in Nevada.¹⁶² Specifically, third-parties sued by injured employees may be more likely to pursue employers in indemnity/contribution claims. Therefore, attorneys in Nevada will embrace *Haggerty* and the extensive legal battles which may result. This gives attorneys less incentive to fight for employees' safety or even to expediently settle workers' compensation claims. For example, if attorneys and courts are aware third-parties will be able to recover some of their losses from negligent employers, they may be less likely to quickly settle claims in injured workers best interest and more likely to litigate matters.¹⁶³ The injured employee who may be dependent upon workers' compensation benefits will suffer as a result of not obtaining an expedient settlement. Specifically, the Nevada Supreme Court's holding in *Haggerty* potentially nullifies the exclusive remedy provision of the Nevada Industrial Insurance Act and reeks havoc on the workers' compensation system which was created for the protection of the worker.¹⁶⁴

Employment Compensation and Workers' Compensation (3/31/95), over twenty—five states have enacted major reform bills aimed at bring down spiraling workers' compensation costs.

¹⁶¹ See text and accompanying note 151.

¹⁶² *But see Exceptions to the Exclusive Remedy Requirements of Workers' Compensation*, 96 HARV. L. REV. 1641, 1654 (1983): "[J]udicial reluctance to adopt exceptions to the exclusive remedy rule has stemmed from an unwillingness to tamper with what courts see as the fixed terms of the carefully designed legislative bargain underlying workers' compensation. Courts taking this view regard the exclusive remedy rule as a reluctantly conceded bargaining chip essential to the original deal and, in turn, to the preservation of the compensation system. Such courts perceive constraints on their authority to modify the bargain and they therefore defer to legislatures for the enactment of any needed reform."

¹⁶³ See Lester Brickman, *On the Reference of the Admissibility of Scientific Evidence: Tort Systems Outcomes are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1769-70 (1994): "The incentive for lawyers to press personal injury tort claims is the return they earn for their efforts. As hourly rates of return have increased, more claims have been brought, resulting in expansion of the scope of liability of those assessable as liable for harm infliction." This statement is analogous to lawyers' incentives to pursue third party indemnity claims, although ultimately not in injured workers' best interests. Additionally, Mr. Brickman notes that contingent fees usually recovered from personal injury cases [and workers' compensation cases] are extremely lucrative as evidenced by the fact contingent fee lawyers generally refuse to disclose their hourly rates of return while also refusing to enter into hourly rate contracts. *Id.*

¹⁶⁴ *E.g.*, in the maritime area, where workers are protected by the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950 (1976 & Supp. IV 1980), Congress has reduced similar indemnification problems. Most important, Congress enacted section 905(b) of the Longshore and Harbor Worker's Compensation Act, which absolutely limits the employer's liability to the imposed by the compensation statute by prohibiting any claim for indemnity from the employer. H.R. REP. NO. 1441, 92d Cong., 2d Sess. at 3, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4704; 33 U.S.C. § 905(b) (1976). In abol-

D. The Nevada Supreme Court's Statutory Interpretation in Haggerty is inconsistent with public policy in Nevada

Ultimately, the Nevada Supreme Court bases its decision in *Haggerty* on rules of statutory interpretation. NRS 455.200(2) provides: "Overhead lines" means a bare or insulated electrical conductor installed above ground." Specifically, the Nevada Supreme Court in *Haggerty* noted the most consistent definition of this statute was "outdoor, electrical equipment."¹⁶⁵ Therefore, the Court reasoned, the provisions of the overhead power statutes do not apply to high voltage electrical equipment located within a building, and Nevada Power Company is not entitled to indemnification from the Horseshoe because the accident surrounding this claim occurred when an employee of the Horseshoe came into contact with an exposed electrically charged copper wire in the basement of the casino.¹⁶⁶ In that regard, the Court probably should never have addressed the exclusive remedy issue as its reasoning was irrelevant to its ultimate determination. Additionally, its application of the rules of statutory construction is also confusing. Generally:

Most mainstream judges and lawyers faced with a statutory construction task will look at (although with varying emphasis) the text of the statute, the legislative history of the provision, the context of the enactment; evident congressional purpose, and applicable agency interpretations, often employing canons of construction for assistance. Although orthodox judicial thought suggests that the judge's role is confined to discerning textual meaning or directives of the enacting legislature, courts also often examine subsequent legal developments and the overall legal terrain in rendering an interpretation.¹⁶⁷

At the onset, the Court defining "overhead power lines" to mean outdoor electrical equipment is not inconsistent with general rules of statutory interpretation. In that regard, the Court's reasoning in its definition is applicable even if the Court had found "overhead power lines" also referred to indoor electrical equipment. Specifically, the Majority feared including indoor electrical equipment would require employers to contact Nevada Power any time they

ishing such indemnity claims, Congress reasoned that "unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act [establishing the statutory benefits as absolute and maximum liability for employers] by requiring indemnification from a covered employer for employee injuries." H.R. REP. NO. 1441, 92d Cong., 2d Sess. at 7, reprinted in 1972 U.S. CODE CONG. & AD. NEWS at 4704. *But see Exceptions to the Exclusive Remedy Requirements of the Workers' Compensation Statutes*, HARV. L. REV. 1641, 1660 (1983), which sets forth "using exceptions to eradicate the exclusive remedy rule altogether would extend them beyond their individual justifications and would effectively redesign the workers' compensation itself. Notwithstanding these caveats, however, the adoption of suitably confined exceptions to the exclusive remedy rule remains a desirable and legitimate use of judicial authority."

¹⁶⁵ 989 P.2d at 878.

¹⁶⁶ *Id.* at 879-80.

¹⁶⁷ Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 589 (1991).

entered an electrical vault room and Nevada Power could charge a fee each time to supervise the work. Therefore, Nevada Power would have no incentive to maintain safety measures to protect workers safety.¹⁶⁸ However, NRS 455.230, which allows Nevada Power Co. to charge the supervisory fees, could be just as easily abused when referring to employees that work outside with outdoor power lines. In light of this fact, it is confusing why the Court interprets NRS 455.200(2) to mean only outdoor electrical equipment.

The Majority correctly notes the legislative history of the overhead power line statutes does not resolve this issue because there is no mention of an exception to the workers' compensation immunity provisions in the record of the hearings.¹⁶⁹ As previously noted, the basic policy in Nevada is to construe workers' compensation statutes liberally for the workers' protection.¹⁷⁰ The general rule of liberal construction of workers' compensation statutes does not justify the exclusion of a substantive right that cannot be supported by any fair reading of the statutory scheme.¹⁷¹ Where the language of a statute is plain and unambiguous, such that the legislative intent is clear, a court should not 'add to or alter [the language] to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.'¹⁷²

Initially, there is no reason to interpret the overhead power line statutes broadly for the protection of the workers because doing so ultimately does not protect the worker. The primary benefit for an employer to contribute to the Nevada Industrial Insurance Act is the employer's immunity from third-party claims. Broadly interpreting the Nevada Industrial Insurance Act's exclusivity provisions to allow exceptions does not protect workers because ultimately the employer's costs of paying additional claims will be placed on the employee.¹⁷³ Conversely, Nevada has always had a strong public policy in upholding the Nevada Industrial Insurance Act's exclusive remedy provision.¹⁷⁴

¹⁶⁸ 989 P.2d at 879.

¹⁶⁹ See also *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation*, 96 HARV. L. REV. 1641, 1656 (1983) providing "Because the [exclusive remedy] exceptions are an outgrowth of circumstances prevalent only within the current structure of the tort system and the workplace, rules to govern these situations could not have been contemplated by the designers of the statutory schemes. Hypothesized original intent should therefore not constrain judicial decisionmaking about the exceptions."

¹⁷⁰ See *SIIS v. Campbell*, 109 Nev. 997, 1000, 862 P.2d 1184, 1186 (1993); *Ransier v. SIIS*, 104 Nev. 742, 746, 766 P.2d 274, 276 (1988); *Dep't of Ind. Relations v. Circus Circus*, 101 Nev. 405, 411-12, 705 P.2d 645, 649 (1985).

¹⁷¹ See *SIIS v. Campbell*, 109 Nev. 997, 1000, 862 P.2d 1184, 1186 (1993); *Weaver v. SIIS*, 104 Nev. 305, 306, 756 P.2d 1195, 1196 (1988).

¹⁷² See *SIIS v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997); *Breen v. Ceasar's Palace*, 102 Nev. 79, 82, 715 P.2d 1070, 1072 (1986).

¹⁷³ See text and accompanying note 154.

¹⁷⁴ See, e.g., *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 905 P.2d 168 (1995); *Out-board Marine Corp. v. Schupbach*, 93 Nev. 158, 561 P.2d 450 (1997); *American Federal Savings v. Washoe*, 106 Nev. 869, 802 P.2d 1270 (1990).

The Majority bases its holding on the conclusion that the overhead power line statutes are more specific and therefore take precedence over the more general exclusive remedy provision in the Nevada Industrial Insurance Act.¹⁷⁵ NRS 455.240 specifically provides for persons violating the High Voltage Safety Act to pay costs, expenses and/or damages to the public utility. While this provision is more specific than NRS 616B.612, which provides generally for employer immunity, finding NRS 455.240(3) takes precedence over NRS 616B.612 is inconsistent with Nevada's fundamental policy of protecting workers. Nevada Power Company is a huge, multi-million dollar corporation which probably does not need the legislature's protection. Yet Nevada Power already has the legislature's protection as evidence by NRS 455.240.¹⁷⁶ The Court's holding in *Haggerty* should therefore prompt the legislature to redraft NRS 455.240(3) so that the political and judicial system in Nevada does not appear to be so impartial to the multi-million dollar power company. For example, something similar to the Colorado Safety Act would be more consistent with the Nevada High Voltage Safety Act and more harmonious with the Nevada Industrial Insurance Act's exclusive remedy provisions. The Colorado Act reads:

A person or entity that violates the [Safety] Act:

may be liable for all damages and all costs and expenses, incurred, as a result of the contact, as determined by a court of record, or by settlement made by all parties who may become liable for such damages prior to the filing of or during the course of a civil action.¹⁷⁷

CONCLUSION

The notion that workers' compensation benefits are the workers' exclusive remedy against an employer following a work related accident is the mainstay of workers' compensation law.¹⁷⁸ Prior to *Nevada Power Co. v. Haggerty*, it was well established in Nevada that an employer is only liable in a third-party indemnity action when an express indemnity contract exists between an employer and a third-party.¹⁷⁹

Although *Nevada Power Co. v. Haggerty* is the first case in Nevada to allow indemnity absent an express indemnity agreement, the Nevada Supreme Court does not define the implied contractual agreement between Nevada Power Co. and Haggerty but instead simply lists cases and bases its holding on rules of statutory construction. This decision will have an important impact on workers' compensation law. In that regard, the Court in *Haggerty* does not

¹⁷⁵ 989 P.2d at 877.

¹⁷⁶ See text and accompanying note 52.

¹⁷⁷ COLO. REV. STAT. § 9-2.5-104(2) (1986).

¹⁷⁸ See Bassin, *supra* note 1, at 843. See also LARSON, *supra* note 1, at § 65.

¹⁷⁹ See generally *American Federal Saving Bank v. Washoe County*, 106 Nev. 869, 802 P.2d 1270 (1990).

harmonize the overhead power line statutes and exclusive remedy provision but introduces a brand new concept into Nevada law. The Nevada Supreme Court has ignored fundamental principles of workers' compensation law while potentially obliterating the Nevada Industrial Insurance Act's exclusive remedy provision.