IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANDREY DUBININ; AND AMANDA DUBININ,
Appellants,
vs.
THE FREMONT STREET EXPERIENCE LLC,
Respondent.

No. 76616-COA

FILED

FEB 11 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Andrey Dubinin and Amanda Dubinin appeal from a district court order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

In 2013, The Fremont Street Experience LLC (FSE) entered into a contract with Silver State Rope and Rigging, Inc. (Silver State), to construct the wiring for Slotzilla, a zip line attraction located in Las Vegas. Silver State, in turn, contracted with Kamikaze Inc. to provide riggers to work on Slotzilla, and Kamikaze hired Andrey Dubinin. On November 13, 2013, Andrey was seriously injured after a ¾-ton chain hoist failed and caused a pulley to strike his head. Even though Silver State's own job specifications required a 3-ton chain hoist, Silver State used the wrong chain hoist, which then failed. FSE had no control over the choice of chain hoist, did not own it, and did not ask Silver State to use it.

Andrey and Amanda Dubinin (collectively, Dubinin) filed a complaint against Silver State and FSE under various theories including negligence, negligence per se, res ipsa loquitor, strict products liability, and loss of consortium. In 2017, the district court granted summary judgment in favor of Silver State, concluding that Dubinin's exclusive remedy against

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Silver State was via workers' compensation. The district court concluded that Silver State was the principal contractor of Kamikaze and therefore was not liable for Dubinin's injuries. In 2018, the district court granted summary judgment in favor of FSE on the ground that the landowner does not owe a duty of care to employees of an independent contractor, and that the use of the rigging equipment was not dangerous; it only became dangerous when Silver State selected the wrong chain hoist. Andrey apparently received a workers' compensation award for medical expenses and his permanent disability.[1]

Dubinin contends that the district court erred by granting summary judgment because (1) FSE, as a landowner, owed a duty of care to Andrey, an employee of an independent contractor, and (2) the jury should have determined whether constructing a zip line is an extrahazardous activity, which would have imposed a duty upon FSE. We disagree.

We review an order granting summary judgment de novo, and summary judgment is appropriate when the pleadings and other evidence on file demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Wood v. Safeway,*

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[1]The appendices filed have no record explicitly showing that Dubinin received a workers' compensation award. Respondent's appendix, however, includes a copy of the district court's order granting summary judgment in favor of Silver State, which preceded and is separate from the order granting summary judgment in favor of FSE. The district court granted summary judgment in favor of Silver State on the ground that Dubinin's sole remedy was via workers' compensation because Silver State was a principal contractor of Kamikaze under NRS 616A.285(3). The supreme court dismissed Dubinin's appeal of that judgment because he did not pay the filing fee. *See Dubinin v. Silver State Wire Rope & Rigging, Inc.*, Docket No. 73544 (Order Dismissing Appeal, September 26, 2017).

Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (noting that inferences are viewed in a light most favorable to the nonmoving party).

Workers' compensation benefits are the exclusive remedy for an employee injured by an accident "arising out of and in the course of employment." NRS 616A.020(1). "[P]roperty owners that . . . [contract with] licensed principal contractors to complete a project carried out under that license . . . [are] immune from suit for damages for industrial injuries, to the extent that those injuries result from risks associated with completing the licensed work on that project." *Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 1223-24, 148 P.3d 684, 691 (2006). Also, the supreme court has held workers' compensation protections extend to the party hiring the independent contractor when the contractor's employees are injured:

> Because workers' compensation shields an independent contractor from tort liability to its employees, applying the peculiar-risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury.

San Juan v. PSC Indus. Outsourcing, Inc., 126 Nev. 355, 364, 240 P.3d 1026, 1032 (2010) (internal quotations omitted).

Dubinin's first argument—that FSE owed a duty of care—is not supported by existing precedent. Dubinin fails to cite *San Juan*, which stated, "absent control, negligent hiring, or other basis for direct liability, a person who hires an independent contractor to provide a service is not ordinarily liable for the torts the independent contractor commits." *Id.* at 363, 240 P.3d at 1031. Instead, Dubinin cites to an unpublished disposition from a federal court, *see Snow v. United States*, Nos. 86-1629, 86-1673, 86-

2199, 1989 WL 4131, at *4 (9th Cir. 1989) ("[T]he duty imposed in *McGarry* is based upon the employment of a contractor to perform extrahazardous work and is a duty owed by the employer itself." (citing *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976))), to argue that FSE owed him a duty of care because rigging was an extrahazardous job.

The cases Dubinin references, however, have never been cited by the Nevada Supreme Court, which has not adopted the extrahazardous language used in *McGarry* or *Snow*.[2] Thus, Dubinin's argument falls more precisely under Nevada's established precedent of *San Juan*, which held that "applying the peculiar-risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person . . . to greater liability than that faced by the independent contractor whose negligence caused the employee's injury." 126 Nev. at 364, 240 P.3d at 1032. Further, Dubinin has cited no authority (from any jurisdiction) to show that rigging is an extrahazardous or abnormally dangerous activity. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38

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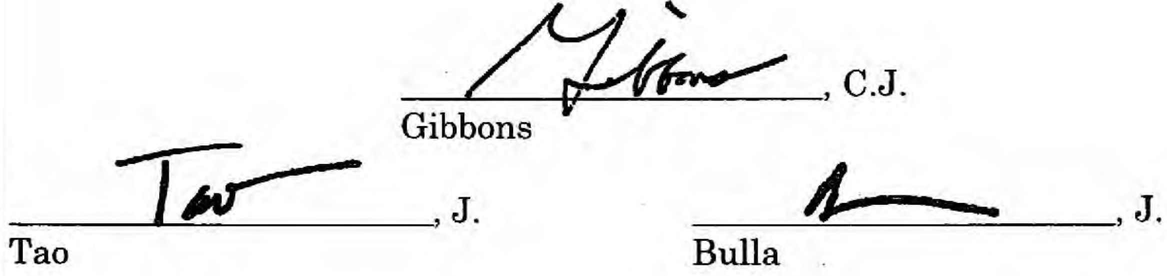
[2]Nevada has adopted the abnormally dangerous doctrine under the Restatement (Second of Torts) Sections 519-20 (Am. Law Inst. 1977), which imposes strict liability upon a party that "carries on an abnormally dangerous activity." *See Valentine v. Pioneer Chlor Alkali Co.*, 109 Nev. 1107, 1110, 864 P.2d 295, 297 (1993) (explaining that the determination of whether an activity is abnormally dangerous is "fact specific" under the six factors provided in Section 520). Here, Dubinin did not make any arguments under these authorities on appeal, nor did he create a record to show that the Section 520 factors made rigging an abnormally dangerous activity, and therefore, he has waived this argument on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (noting that arguments not raised in the appellate briefs are deemed waived).

(2006) (providing that an appellate court need not consider claims that are not cogently argued or supported with citations to relevant authority).

In addition, workers' compensation is the exclusive remedy for Dubinin's injuries because FSE hired Silver State, which was the principal contractor. *See* NRS 616A.020(1); *Richards*, 122 Nev. at 1223-24, 148 P.3d at 691. Therefore, we conclude that (1) Dubinin's exclusive remedy is through workers' compensation, and (2) FSE did not owe a duty of care to Dubinin. Thus, the district court did not err in granting summary judgment because FSE was entitled to judgment as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]



_______________, C.J.
Gibbons

_______________, J.
Tao

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Bulla

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[3]Insofar as Dubinin argues that the determination of whether an activity is extrahazardous is for the jury, we need not reach this argument given the disposition of our appeal (i.e., FSE did not owe Dubinin a duty of care). We note that Dubinin cites to *Bimberg v. Northern Pacific Railway Co.*, 14 N.W.2d 410 (Minn. 1944), for his argument that the jury should determine whether an activity is extrahazardous. *Bimberg*, like Dubinin's other authorities, has never been cited by the Nevada Supreme Court. In addition, the Minnesota court focused on under what circumstances a jury could find *ordinary negligence, rather than determining if an activity is extrahazardous*. *Id.* at 414. *Bimberg* did not provide any criteria for determining whether an activity is extrahazardous, and the only mention of an extrahazardous activity is in the dissent. *Id.* at 417 (Loring, C.J., dissenting). Therefore, this authority does not show that reversal is warranted.

cc: Hon. James Crockett, District Judge
Bighorn Law/Las Vegas
Pyatt Silvestri
Eighth District Court Clerk