DISTRICT COURT

NEGLIGENCE/INSURANCE: Fact issue as to whether conveyor operator breached duty of reasonable care when he brushed snow off and caught hand, no need to address causation and rescue doctrine as to ice fall by Plaintiff rescuer . . . since liability not reasonably clear, Plaintiff not entitled to declaration that operator's insurer responsible to advance medicals/wages, insurer entitled to summary judgment as to advance-pay based solely on pleadings . . . Salvagni.

Brian Weidenaar was preparing a conveyor to load potatoes onto Dan Logterman's semi. He brushed snow off the running belt and caught his hand. The belt has a sign: "WARNING: KEEP HANDS & CLOTHING CLEAR OF CONVEYOR AND DRIVE PARTS AT ALL TIMES." Weidenaar shouted for help. Logterman rushed to hit the switch and slipped on ice and fell, breaking his ankle. He missed 4 months of work and incurred medicals. He submitted a claim to Weidenaar's insurer Mountain West Farm Bureau Mutual Ins., which denied the claim. He sued Weidenaar and Weidenaar Ranches alleging negligence and requesting a declaration that because Weidenaar's liability is reasonably clear, Farm Bureau is required to pay his wages and medicals prior to final judgment. Weidenaar denied negligence and raised affirmative defenses. Farm Bureau denied Logterman's entitlement to declaratory relief and asserted affirmative defenses.

Logterman asserts the rescue doctrine – "Danger invites rescue," Cardoza, Wagner (NY 1921), recognized in Kiamas (Mont. 1982) – an application of the general tort rule that a normal intervening force resulting from a situation caused by negligence will not be considered a supervening force, cutting off liability. Restatement of Torts § 445 cmt. a. If an "actor's negligent conduct threatens harm to another's person, land, or chattels, the normal efforts of the other or a third person to avert the threatened harm are not a superseding cause of harm resulting from such efforts." Id. This applies equally where, as here, the actor's negligence only imperils himself, if "he should reasonably anticipate that others might attempt to rescue him from his self-created peril, and sustain harm in doing so." Id. at cmt. d. The Restatement provides this illustration:

> A negligently drives a tank truck full of gasoline so that it goes off of the highway and is wrecked. A is knocked unconscious, and the truck catches fire. B, a bystander, attempts to rescue A from the burning truck, and while he is doing so the gasoline explodes, injuring B. A is subject to liability to B.

There must be "an actual danger of injury to person or property" and "a definite emergency." Bossard (Mont. 1994). Logterman makes a convincing case for the rescue doctrine. However, it only goes to causation and foreseeability. He must first establish that Weidenaar had a legal duty of care, which he breached. While § 27-1-701 and the rescue doctrine appear sufficient to establish his general duty of care, breach of the duty of care, which turns on reasonableness of a party's actions, is generally a fact question for the fact-finder. Craig (Mont. 1999). Nevertheless, a judge may resolve it on summary judgment when "reasonable minds could reach but one conclusion as to whether a duty was breached." Id. Logterman asserts that Weidenaar breached his duty of care by brushing the snow off the conveyor with his hand while it was running, in disregard of the warning sign. The Court does not find this sufficiently one-sided to resolve the question of his negligence on summary judgment. Violation of a non-statutory standard may only be used as evidence of negligence and is insufficient to find negligence per se. Harwood (Mont. 1997). The warning sign is analogous to a non-statutory standard. This is not the inexorable evidence that would lead all reasonable people to conclude that he failed to exercise reasonable care. Further, he stated that he was following his routine and has owned the conveyor for 10 years without suffering or hearing of a similar injury. Logterman is not entitled to summary judgment for liability on his first claim, and the Court need not address causation and the rescue doctrine.

Since there are material fact issues as to whether Weidenaar was negligent, liability is not reasonably clear, and thus Logterman is not entitled to a declaration that Farm Bureau is responsible for his medicals and wages in advance of final judgment or settlement, and Farm Bureau is entitled to summary judgment on this issue. The Court declines to treat Farm Bureau's motion for summary judgment like a more demanding motion to dismiss, as Logterman urges since its motion does not rely on materials outside the pleadings. A party moving for summary judgment "may rely solely on the pleadings" to satisfy his initial burden. Celotex (US 1986); Rule 56(a) (a party may move for summary judgment "with or without supporting affidavits"). It is only after the moving party has met its initial burden that the non-moving party must move beyond the pleadings to establish a material fact issue. 56(e).

Logterman v. Weidenaar Ranches and Mountain West Farm Bureau Mutual Ins., Gallatin DV 08-1004, 8/10/09.

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