IN THE SUPREME COURT OF THE STATE OF NEVADA

AFFORDABLE FUEL & OIL COMPANY, A NEVADA CORPORATION AND DOUG LIPPINCOTT, INDIVIDUALLY AND AS PRESIDENT OF AFFORDABLE FUEL & OIL COMPANY,
Appellants,
vs.
ISU STETSON-BEEMER INSURANCE, INC., AND LARRY HENKES,
Respondents.

No. 44490

FILED

DEC 01 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a complaint in an insurance action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

A franchise agreement between Tosco Corporation, a distributor of Union 76 Petroleum products, and appellant Affordable Fuel & Oil Company, permitted Affordable to subcontract with certain retail gas stations, permitting them to operate under the Union 76 brand name and trademark. At one of these retail gas stations, static electricity ignited gasoline that a patron was pumping into a gas can resting on the carpeted bed of his pick-up truck. Based on his injuries from the fire, the patron instituted an action against, among other defendants, Tosco.

When Tosco tendered its defense to Affordable, based on terms of the parties' franchise agreement requiring Affordable to obtain general liability insurance for it and Tosco, Affordable made an insurance claim with respondent ISU Stetson-Beemer, Inc. In filing the claim, however, Affordable discovered that no general liability insurance with ISU had

been procured for it or Tosco. According to Affordable's president, appellant Doug Lippincott, he had obtained general liability insurance for Affordable and Tosco with ISU through an insurance salesperson, respondent Larry Henkes. Nevertheless, ISU denied the claim, and as a result, Tosco instituted a third-party action against Affordable and Lippincott for failure to obtain general liability insurance as required by the franchise agreement. Thereafter, Tosco settled with the injured patron, while obtaining a judgment on its third-party claim against Affordable.

In return for Tosco's agreement to not execute on its judgment or to further pursue Affordable or Lippincott, Affordable assigned to Tosco any legally assignable claims it had against Henkes and ISU, based on the denial of Affordable's insurance claim. Because Affordable and Lippincott assigned any claims against Henkes and ISU, the district court granted Henkes and ISU's motion for summary judgment. In granting summary judgment to Henkes and ISU, the district court noted that, because Affordable and Lippincott had assigned their claims to Tosco, they retained no viable claims against Henkes and ISU. Although the district court ultimately entered a final judgment in the form of a dismissal order, Affordable and Lippincott challenge, on appeal, the district court's interlocutory summary judgment order.[1]

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[1]See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (providing that this court, in reviewing an appeal from a final judgment, may properly consider interlocutory orders).

Summary judgment

This court reviews an order granting summary judgment de novo, and without deference to the lower court's findings.[2] Summary judgment will be upheld when, after reviewing the record in a light most favorable to the nonmoving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3]

Assignability of claims[4]

Affordable first contends that the district court erred in entering summary judgment against it based on its assignment of claims to Tosco. According to Affordable, it expressly retained its claims of negligence, misrepresentation, deceptive trade practices, and breach of fiduciary duty, as under Nevada law, those claims are not legally assignable. Based upon its purported retention of these claims, Affordable also argues that its claims for emotional distress and punitive damages remain. Affordable also contends that its ability to recover attorney fees was expressly retained.

Although Affordable maintains that the district court erred in determining the assignment agreement unambiguous it alternatively

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[2]Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993).

[3]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[4]Although Affordable initially argues that the district court abused its discretion in continuing the trial and permitting Henkes and ISU to renew their summary judgment motion, since the original motion was not timely filed under the local rules, we conclude that this argument is without merit.

argues that, even if all claims were assigned, it retains claims related to the certain misrepresentations made by Henkes, since the assignment agreement only applied to claims arising out of Henkes' failure to procure insurance.

Henkes and ISU counter that the assignment agreement was unambiguous, and it assigned "all" of Affordable's claims to Tosco. They also argue that all of Affordable's contract claims were legally assignable, and that all the non-contract claims were also legally assignable since they did not involve personal injury. They further contend that the non-contract claims, even if not assignable, were barred by the economic loss doctrine. Henkes and ISU claim that NRS 41.100, Nevada's survival statute, eliminates earlier prohibitions on assignment of claims.

Finally, Henkes and ISU argue that Affordable and Lippincott failed to create a genuine issue of material fact as to the alleged failure of Henkes to procure insurance for Affordable.

As an initial matter, our reading of the assignment agreement makes it clear that the agreement is unambiguous, as determined by the district court,[5] and that what remains on appeal for this court to determine is whether any claims of Affordable and Lippincott were not assignable as a matter of law.

With respect to the scope of the assignment, as all of Affordable's claims here were made as a result of its allegations that Henkes and ISU did not procure and provide appropriate insurance, all of its claims were potentially assigned to Tosco.

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[5]See NGA #2 Ltd. Liab. Co. v. Rains 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997) (noting that construction of a contract is a question of law).

Additionally, although Henkes and ISU correctly argue that the economic loss doctrine would bar Affordable's non-intentional tort causes of action since the only damages were monetary,[6] this court will disregard that argument, since Henkes and ISU did not make the argument in the district court.[7]

In 1910, this court stated that rights of action for fraud are personal to the one defrauded, and are therefore not assignable.[8] The United States District Court for the District of Nevada recently cited that holding in a bankruptcy proceeding, noting that "Nevada law prohibits the assignment of fraud and negligent misrepresentation claims."[9]

In Achrem v. Expressway Plaza Ltd., a 2006 decision, this court distinguished between assigning the rights to a personal injury action and assigning the proceeds from such an action in permitting an assignment of proceeds to an attorney through a contingency fee agreement.[10] Achrem determined that the assignment of proceeds is appropriate, as long as the personal injury action itself is not assigned.

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[6]See Jordan v. State, Dep't of Motor Vehicles, 121 Nev. 44, 74, 110 P.3d 30, 51 (2005).

[7]Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

[8]Prosky v. Clark, 32 Nev. 441, 445, 109 P. 793, 794 (1910); see also Gruber v. Baker, 20 Nev. 453, 469, 23 P. 858, 862 (1890).

[9]In re Agribiotech, Inc., 319 B.R. 207, 210 (D. Nev. 2004).

[10]112 Nev. 737, 741, 917 P.2d 447, 449 (1996).

Thus, in Nevada, only personal injury torts and fraud claims are not legally assignable. Therefore, the district court properly granted summary judgment in favor of Henkes and ISU on the claims of breach of contract and breach of implied covenants.

As to Affordable's claims that Henkes and ISU violated statutes dealing with deceptive and unfair trade practices, the evidence before the district court demonstrates that the certificates of insurance were not intended to represent to Affordable that it was insured at the time of the fire. It is undisputed that Affordable was not insured at the time of the fire. Even if the certificates misrepresented Affordable's insurance coverage after the fire, that misrepresentation could not be material to the dispute over coverage at the time of the fire. Further, Henkes' deposition testimony indicates that he mistakenly thought that Affordable could be added to the certificates; Affordable never produced any clear and convincing evidence that Henkes intentionally misinterpreted Affordable's coverage. Finally, Affordable cannot prove the element of justifiable reliance necessary to a misrepresentation claim, since Affordable could not have acted before the fire in reliance upon the after-produced certificates.

Thus, we conclude that summary judgment was proper as to the claims for violation of deceptive trade and insurance practices, as well as for misrepresentation.

As to Affordable's claims of negligence and breach of fiduciary relationship, we conclude that they are grounded in injury to property and breach of contract and therefore assignable. In El Ranco, Inc. v. First National Bank of Nevada, a 1968 case in federal court involving breach of contract and conspiracy claims between an entertainment producer and a

Las Vegas casino/hotel, the casino/hotel argued that the producer was unlawfully assigned fraud and tort causes of action by other original plaintiffs.[11] The Ninth Circuit Court of Appeals, affirming the judgment of the District Court for the district of Nevada, concluded that the assignment of the causes of action was proper, noting that the alleged fraud and tort claims were "based upon injury to property rights and breach of contract both of which can generally be assigned."[12] Thus, summary judgment was also proper as to these claims.

Claims for emotional distress, punitive damages and attorney fees

Henkes and ISU contend that emotional distress cannot be claimed by a corporation as a matter of law. We agree.

As to punitive damages, under NRS 42.005(1), punitive damages are available "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied[.]"[13]

The assignment states that "any rights or claims that are not legally assignable, including claims for . . . punitive damages are not being assigned to [Tosco]." However, as discussed above, because the claims

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[11]406 F.2d 1205, 1209 (1968); c.f., Horton v. New South Ins. Co., 468 S.E.2d 856, 858 (N.C. Ct. App. 1996) (holding that, although claims arising from a contract are generally assignable, personal tort claims against an insurance company for breach of fiduciary duty, bad faith refusal to settle, and tortious breach of contract were not assignable).

[12]Id., n.4 (citing both Prosky, 32 Nev. 441, 109 P. 793; and 6 Am. Jur. 2d Assignments, §§ 33, 41 (1963)).

[13]See also Mackintosh v. California Fed. Sav., 113 Nev. 393, 406, 935 P.2d 1154, 1162 (1997).

were assignable, we conclude Affordable has no remaining underlying claim to support punitive damages.

As to attorney fees, they are not available absent a rule or statute; such rules and statutes require a party to prevail in the litigation, along with either a finding that the opposing party's claims were not brought in good faith, a judgment below the statutory minimum, or obtaining a judgment in excess of an offer of judgment.[14] Since Henkes and ISU were properly granted summary judgment, we conclude that Affordable did not retain any claim for attorney fees.

Lippincott's standing to pursue claims

Lippincott contends that he never assigned his individual claims, and that those claims are not derivative of Affordable's claims since Henkes owed Lippincott fiduciary duties, and since Lippincott was a personal guarantor of the agreement between Affordable and Tosco. Lippincott further claims he has standing to bring claims against Henkes and ISU as a shareholder of Affordable, arguing that he has claims that seek relief for injuries independent of any injury suffered by Affordable.

Henkes and ISU argue that Lippincott had no standing to assert causes of action as an individual, since the only injury suffered was by Affordable.

The Eighth Circuit Court of Appeals has stated that generally, shareholders or guarantors of corporations "may not bring individual actions to recover what they consider their share of the damages suffered

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[14]Bergmann v. Boyce, 109 Nev. 670, 674-77, 856 P.2d 560, 562-64 (1993); NRS 18.010; NRCP 11; NRCP 68.

by the corporation."[15] The court went on to state, however, that recovery is available where a shareholder or guarantor is owed a special duty.[16]

We concur with Henkes and ISU's contention, as well as the judgment of the district court, that Lippincott's claims are all derivative of the claims of Affordable, and were therefore assigned to Tosco. The complaint does not allege any injury or cause of action personal to Lippincott; nor is any such injury or cause of action evident from the course of this litigation.

As to any special duty owed to Lippincott, Affordable argues that summary judgment was improper since there were genuine issues of material fact to show that Henkes concealed material facts and breached fiduciary duties owed to Lippincott and Affordable. In its reply brief, Affordable, for the first time, argues that the district court's denial of partial summary judgment as to Affordable's breach of fiduciary duty claim should be reversed.

Henkes and ISU contend that there was no fiduciary relationship between them and Affordable as a matter of law, and further, that Affordable assigned any cause of action for breach of fiduciary duty to Tosco.

In Havas v. Carter, this court held that an insurance agent owes a client a duty of reasonable diligence in procuring the insurance sought by the client.[17] The case involved a used car dealer who, despite being repeatedly told by his insurance agent that the desired insurance

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[15]Taha v. Engstrand, 987 F.2d 505, 507 (8th Cir. 1993).

[16]Id.

[17]89 Nev. 497, 499-500, 515 P.2d 397, 399 (1973).

had not yet been procured, still brought suit to recover monies for a stolen car. The dealer argued that there was an implied contract for procurement of insurance, which attached liability for loss to the insurance agent.[18] This court disagreed, noting that the dealer did not establish negligence on the part of the agent "by any proof even approaching a preponderance of the evidence."[19]

Even if a claim for breach of fiduciary duty existed, as noted earlier, any claim was assigned to Tosco. Therefore, we conclude that the district court properly granted summary judgment in Henkes and ISU's favor as to the claim for breach of fiduciary duty.

Improper findings of fact

Affordable argues that the district court erred in making two findings of fact, in its written order, that were in dispute and not supported by the record. This court concludes that these arguments are without merit.

Award of costs

Affordable also challenges the district court's award of costs to Henkes and ISU, arguing without citation to any authority, that such costs should have been apportioned between the amounts Henkes and ISU spent defending against Tosco and against Affordable. This court may decline to consider this issue on appeal, based on the lack of citation to relevant legal authority.[20]

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[18]Id. at 499, 515 P.2d at 398.

[19]Id. at 500, 515 P.2d at 399.

[20]Montes v. State, 95 Nev. 891, 897, 603 P.2d 1069, 1074 (1979).

Henkes and ISU claim, also without citation, that Affordable's challenge of the award of costs "is moot and/or not ripe for adjudication," contending that the district court has not yet entered an order. However, a notice of entry of judgment, including the judgment of dismissal and the award of costs, was included in the record on appeal to this court.

The district court did not indicate any basis for the award of costs, but the costs were likely awarded under NRS 18.020(3), which makes such an award mandatory in favor of the prevailing party. This court has held that "[t]he determination of which expenses are allowable as costs is within the sound discretion of the trial court."[21] If the district court makes no express findings of fact and conclusions of law as to such an award, "this court must rely on an examination of the record to see if the trial court's decision constitutes an abuse of discretion."[22]

A review of the memorandum of costs submitted by Henkes and ISU to the district court reveals that with one exception, it is impossible to separate out costs incurred defending against Affordable rather than Tosco. The one item expressly identified as relating to the case with Tosco is the amount of $9,790.83, listed as "[f]ees for Plaintiff TOSCO's expert Pauline Thomas' deposition." However, since both Tosco and Affordable brought identical claims against Henkes and ISU, it is likely that the expert's deposition was in support of both Affordable and Tosco's claims; Affordable has not demonstrated otherwise.

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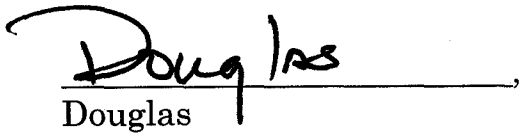
[21]Bergmann v. Boyce, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993).

[22]Schouweiler v. Yancey Co., 101 Nev. 827, 831, 712 P.2d 786, 789 (1985).

Thus, we conclude it was not an abuse of discretion for the district court to allow costs as ordered. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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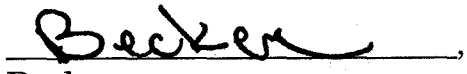

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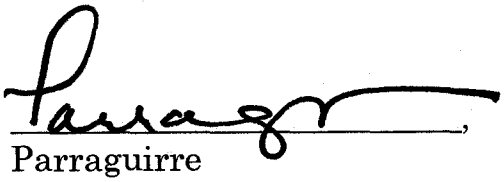

_____, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Terry A. Simmons, Settlement Judge
Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd.
Georgeson Thompson & Angaran, Chtd.
Washoe District Court Clerk