

IN THE SUPREME COURT OF THE STATE OF NEVADA

BROWN & BROWN, INC.,
Appellant,
vs.
CHRISTOPHER T. OLSEN,
Respondent.

No. 45738

FILED

NOV 17 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a district court judgment in a breach of employment contract action and a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Respondent Christopher T. Olsen is an insurance producer. Appellant Brown & Brown, Inc. (Brown) is an insurance brokerage firm and Olsen's former employer. This dispute arose when Brown fired Olsen and refused to pay him his share of the commissions from the insurance policies he sold before being fired.

At trial, the district court found the employment contract between Brown and Olsen ambiguous. Unable to resolve the ambiguity, the district court interpreted the contract against Brown, its drafter. The district court then found that Brown had breached the contract. It also found that Brown breached the implied covenant of good faith and fair dealing. The district court awarded Olsen damages for both claims, attorney fees, and costs.

Brown argues on appeal that the district court erred in (1) finding the contract ambiguous, (2) finding breach of contract and breach of the implied covenant of good faith and fair dealing, and (3) awarding

attorney fees and costs. We disagree. However, we conclude that the district court did err in awarding full damages for the breach of contract claim and additional damages for the breach of the implied covenant of good faith and fair dealing claim, which amounted to an impermissible double recovery.

Standard of review

This court will not disturb a district court's findings of fact when supported by substantial evidence.¹ We review questions of law de novo.² When the facts are not in dispute, contract interpretation is a question of law.³

Brown breached its contract with Olsen

"A contract is ambiguous if it is reasonably susceptible to more than one interpretation."⁴ If necessary, the court can examine extrinsic evidence to determine the parties' intent and explain any ambiguity in a contract.⁵ Ambiguous contract terms should be construed against the party who drafted them.⁶

¹Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

²Id.

³Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

⁴Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994).

⁵Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).

⁶Id.

Olsen's contract states that upon termination, he was entitled to a "final accounting" from Brown. Brown and Olsen each argue conflicting but reasonable interpretations of that language. We conclude that Olsen's employment contract is ambiguous. Brown concedes that it drafted the contract. Therefore, we must construe the contract against Brown.

The district court found that Brown did not provide Olsen with a final accounting within thirty days or pay him the commissions to which he was entitled. Substantial evidence in the record supports those findings. We conclude that the district court did not err in finding Brown in breach of its contract with Olsen.

Implied covenant of good faith and fair dealing

An implied covenant of good faith and fair dealing exists in all contracts.⁷ Nevada law recognizes two versions of breach of that covenant: one based in contract, the other based in tort.⁸ To prove the contract version of breach of that covenant, a party must prove (1) actions or performance that are unfaithful to the purpose of the contract, and (2) the denial of the other party's justified expectations.⁹

One purpose of the contract was to ensure that Brown provided Olsen a final and timely accounting of the policies he sold and to

⁷A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 914, 784 P.2d 9, 10 (1989).

⁸A.C. Shaw, 105 Nev. at 915, 784 P.2d at 10; see also K Mart Corp. v. Ponsock, 103 Nev. 39, 45-46, 732 P.2d 1364, 1368-69 (1987).

⁹Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991).

ensure that Brown paid Olsen commissions for those policies. The district court found that Brown failed to fulfill the purpose of the contract when it gave Olsen a belated and abbreviated record of his sales. Brown also paid Olsen only a small portion of the commissions he was entitled to receive. Brown therefore denied Olsen his expectations under the contract. Substantial evidence supports those findings. Therefore, we conclude that the district court did not err in finding that Brown breached its implied covenant of good faith and fair dealing.

The court gave Olsen an impermissible double recovery

Where the district court finds both a breach of contract and a breach of implied covenant of good faith and fair dealing, it can award damages for both, but the total award cannot exceed the total amount of contract damages.¹⁰ An award that exceeds the contract damages is only allowed where the plaintiff pleads and proves that the offending party's conduct constitutes a tort and that the contract damages alone are insufficient to make the plaintiff whole.¹¹

Olsen did not allege that Brown's actions were tortious. The district court made Olsen whole by awarding him all the contract damages he suffered from Brown's breach. It awarded Olsen an additional \$500 damages for Brown's breach of its implied covenant of good faith and fair dealing. We conclude that since the \$500 award was in addition to Olsen's contract damages, it was an impermissible double recovery.

¹⁰See Ponsock, 103 Nev. at 45, 732 P.2d at 1368 (in other words, there can be no double recovery of the contract damages).


¹¹Ponsock, 103 Nev. at 45, 48-49, 732 P.2d at 1368, 1370-71.


The district court did not abuse its discretion by awarding attorney fees

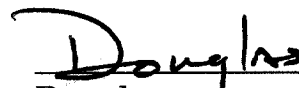
A district court can award attorney fees only if “authorized to do so by a statute, rule or contract.”¹² We will not disturb an award of attorney fees absent an abuse of discretion.¹³ Where there is a written agreement providing for attorney fees, it will control.¹⁴

Here, the parties’ contract authorized the award of “all expenses and attorneys’ fees incurred” to the prevailing party. A prevailing party is a party that succeeds on any significant issue in the litigation.¹⁵ Olsen succeeded on his breach of contract claim. We conclude that Olsen is the prevailing party because he prevailed on the most significant issue in this litigation. Therefore, the district court did not abuse its discretion by awarding attorney fees and costs.

Accordingly, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART. We REMAND this case for further proceedings consistent with this order.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

¹²U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002).

¹³Id.

¹⁴NRS 18.010(1); NRS 18.010(4).

¹⁵Valley Elec. Ass’n v. Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005).

cc: Hon. Elizabeth Goff Gonzalez, District Judge
John J. Graves Jr., Settlement Judge
Littler Mendelson/Las Vegas
Black, Lobello & Sparks
Clark County Clerk