IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN BERMAN, M.D., AN INDIVIDUAL; ANDREW C. WESELY, M.D., AN INDIVIDUAL; AND KENNETH PITMAN, M.D., AN INDIVIDUAL,
Appellants,
vs.
KEVIN A. MILES, D.O., AN INDIVIDUAL,
Respondent.

No. 50222

FILED

DEC 03 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order awarding attorney fees under NRS 18.010(2)(b). Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

After denying appellants injunctive relief to enforce a noncompete clause in an employment agreement, the district court concluded that their claim had been brought without reasonable grounds and awarded $11,693.85 in attorney fees. In particular, the district court concluded that appellants had failed to perform adequate research as to whether a noncompete agreement that had been assigned was enforceable.

NRS 18.010(2)(b) allows an award of attorney fees when a claim is brought without reasonable ground or to harass the prevailing party. The statute directs the district court to "liberally construe" the statute to award fees "in all appropriate situations to punish for and deter

frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." A district court's decision to award attorney fees as sanctions for filing a frivolous claim will not be reversed absent a manifest abuse of discretion.[1]

In Traffic Control Services v. United Rentals,[2] we held that "absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee noncompetition covenants are not assignable."[3] In that case, the employee had left a position with United Rentals to accept a position with NES Trench Shoring because he did not wish to work for United Rentals. The employee signed a noncompetition agreement with NES. Approximately two years later, NES agreed to sell its assets to United Rentals; the asset purchase agreement purportedly included all contracts, which United Rentals interpreted to encompass the employee's noncompetition agreement. As the employee still did not wish to work for United Rentals, he accepted a position with Traffic Control.[4]

In determining that the purportedly assigned noncompetition agreement did not prevent the employee from working for Traffic Control,

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[1]Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006).

[2]120 Nev. 168, 87 P.3d 1054 (2004).

[3]Id. at 172, 87 P.3d at 1057.

[4]Id. at 171, 87 P.3d at 1056.

we agreed with jurisdictions holding that such an agreement is personal in nature and may not be assigned absent the employee's consent.[5] In concluding that the rule in these jurisdictions was the better-reasoned position, we noted

> [w]hen an employee enters into a covenant not to compete with his employer, he may consider the character and personality of his employer to determine whether he is willing to be held to a contract that will restrain him from future competition with his employer, even after termination of employment. This does not mean, however, that the employee is willing to suffer the same restriction with a stranger to the original obligation.[6]

Here, in contrast to Traffic Control, appellants are the same individuals with whom respondent worked when he signed the noncompete agreement: the "assignment" to appellants' new business entity resulted from a split between two informal divisions of respondent's former employer. Thus, the concern in Traffic Control over enforcing an agreement against an employee who specifically did not wish to work for the assignee is not present here. Possibly, then, a good faith argument to distinguish Traffic Control exists.[7]

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[5]Id. at 174, 87 P.3d at 1058.

[6]Id.

[7]As appellants failed to appeal from the district court's order denying injunctive relief, the issue of whether Traffic Control is properly distinguished is not before us, and we make no comment on whether such an argument would be looked upon favorably by this court.

Although NRS 18.010(2)(b) is not meant to preclude reasonable, nonfrivolous arguments "for the extension, modification, or reversal of existing law or the establishment of new law,"[8] the statute must be liberally construed in favor of awarding attorney fees whenever appropriate.[9] The record in this case reflects that appellants did not argue in the district court that Traffic Control could be distinguished; rather, they simply failed to perform adequate research to discover and review the opinion. Moreover, the noncompete clause in the employment agreement signed by respondent prohibits him from competing in the performance of anesthesiology services, not pain management services. While appellants' motion for a preliminary injunction summarily states that the parties really meant "pain management services," not anesthesiology, the employment agreement includes a provision stating that it contains the parties' entire agreement and that it could not be modified absent a further written agreement. Under these circumstances, we cannot conclude that the district court manifestly abused its discretion in awarding attorney fees under NRS 18.010(2)(b). Also, the record reflects that the district court considered the Brunzell factors in determining that

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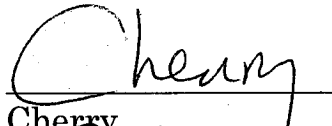
[8]NRCP 11(b)(2); see also Key Bank v. Donnels, 106 Nev. 49, 53, 787 P.2d 382, 385 (1990) (concluding that it was an abuse of discretion to award attorney fees under NRS 18.010(2)(b), when the relevant law "was not free from doubt" and the complaint "presented complex legal questions . . . raised on reasonable grounds").

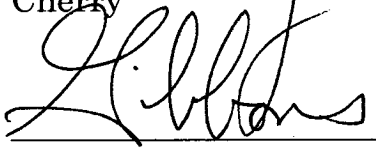
[9]Trustees v. Developers Surety, 120 Nev. 56, 63, 84 P.3d 59, 63 (2004).

the requested fees were reasonable, and we perceive no abuse of discretion in this regard.[10] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



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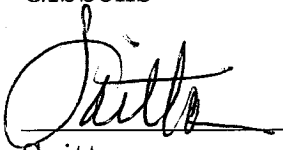

_____, J.
Saitta

cc: Hon. Janet J. Berry, District Judge
Laurie A. Yott, Settlement Judge
Steven F. Bus
Holland & Hart LLP/Reno
Washoe District Court Clerk

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[10]Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).