

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESP WIRELESS TECHNOLOGIES,
INC.; AND ROBERT F. BARCAL,
Appellants,

vs.

KAREN L. FINGL, AN INDIVIDUAL;
AND ANDERSON COMMUNICATIONS,
INC., A NEVADA CORPORATION,
Respondents.

No. 50672

ESP WIRELESS TECHNOLOGIES,
INC.; AND ROBERT F. BARCAL,
Appellants/Cross-Respondents,

vs.

KAREN L. FINGL, AN INDIVIDUAL;
AND ANDERSON COMMUNICATIONS,
INC., A NEVADA CORPORATION,
Respondents/Cross-Appellants.

No. 50835

FILED

FEB 25 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals and a cross-appeal from a district court amended judgment on a jury verdict in a breach of employment contract action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellants/cross-respondents ESP Wireless Technologies, Inc., and Robert Barcal (collectively, ESP) sought to enforce a noncompete clause to stop respondent/cross-appellant Karen Fingl from being employed by respondent/cross-appellant Anderson Communications, Inc. (collectively, Fingl). After being employed by a company purchased by ESP, ESP and Karen entered into an employment, nondisclosure, and noncompete agreement (the Agreement). The Agreement's noncompete provision was not to become effective unless Karen was fired for a commercially reasonable cause.

After three years of employment with ESP, Karen's relationship with ESP deteriorated and she was fired. Karen then sought and obtained employment with Anderson, a competitor of ESP.

After the case was reassigned and presided over by a plethora of district court and senior judges, a five-day jury trial was held. The jury found no liability on the part of either party in its general verdict. However, pursuant to a special interrogatory, the jury found that the noncompete provision of the Agreement was unenforceable because ESP had failed to show that Karen was terminated for a commercially reasonable reason.

Based on the jury's finding in the special interrogatory, the district court awarded Fingl attorney fees and costs. However, the award of attorney fees and costs was reduced from the amount Fingl submitted to the court. Additionally, the district court ruled that the award of attorney fees and costs was enforceable against ESP only and not against Barcal.¹ All parties now appeal.

On appeal, ESP argues that the district court abused its discretion in awarding Fingl attorney fees and costs.² On cross-appeal,

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

²ESP also argues that: (1) the district court abused its discretion in admitting into evidence certain UPS tracking receipts, (2) the abundance of errors committed by the several judges who presided over this case deprived ESP of its right to due process, (3) the jury's verdict was not supported by substantial evidence, and 4) the district court abused its discretion in submitting a special interrogatory to the jury. We conclude that these arguments are without merit and require no further discussion.

Fingl argues that the district court abused its discretion in ruling that the award of attorney fees and costs was only enforceable against ESP Wireless.³

Standard of review

“The decision whether to award attorney’s fees is within the sound discretion of the [district] court.” Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (citing County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982)). A district court’s award of attorney fees will not be disturbed on appeal absent a manifest abuse of discretion. Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994) (citing County of Clark v. Blanchard Const. Co., 98 Nev. at 492, 653 P.2d at 1220)).

Award of attorney fees to Fingl

ESP argues that the district court abused its discretion in awarding attorney fees and costs to Fingl by finding that Fingl was the prevailing party in the litigation. We disagree.

The attorney fees and costs provision of the Agreement, Paragraph 14, states that,

[i]n the event either party to this Agreement is required to, or does, maintain or defend any claim or cause of action against the other arising out of or relating to this Agreement, then the prevailing party in any such action or arbitration shall be entitled to recover from the other all reasonable

³Fingl also argues that the district court abused its discretion in failing to base the award of attorney fees and costs on the jury’s verdict and in reducing the award of attorney fees and costs. We conclude that these arguments are without merit and require no further discussion.

attorneys' fees incurred therein, in addition to reasonable costs and expenses.

We conclude that the district court did not abuse its discretion in awarding Fingl attorney fees and costs based on its finding that Fingl was the prevailing party in this litigation. The jury answered the special interrogatory given to it asking whether the Agreement between Karen and ESP Wireless was enforceable in the negative. Therefore, based on the language of the attorney fees and costs provision of the Agreement, it was well within the district court's discretion to award Fingl attorney fees and costs.

Attorney fees and costs only enforceable against ESP Wireless

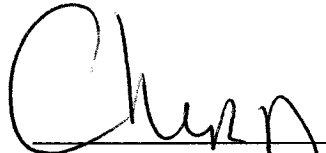
Fingl argues that the district court abused its discretion in ruling that the award of attorney fees and costs was only enforceable against ESP Wireless, and not against Barcal. We disagree because we conclude that Fingl has failed to show that the district court manifestly abused its discretion in finding that the award of attorney fees and costs was only enforceable against ESP Wireless.


The special interrogatory on which the award of attorney fees and costs to Fingl was based only on the issue of the enforceability of the noncompete provision of the Agreement between Karen and ESP Wireless. Additionally, Karen did not enter into the Agreement with Barcal, and it was well within the district court's discretion to limit the party responsible for the award of attorney fees and costs to the party with whom Karen contracted—ESP Wireless. Further, we must reach the conclusion that Fingl's argument is without merit because Fingl has failed to cite any authority to support her argument on this issue. See Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (explaining that it is the appellant's responsibility to

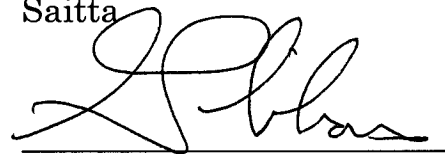
provide authority and cogent arguments to support its position on appeal); see also Carson v. Sheriff, 87 Nev. 357, 360-61, 487 P.2d 334, 336 (1971); NRAP 28(a)(8)(A) (providing that briefs must present an argument containing the appellant's contentions with respect to the issues presented and the reasons therefore, with citations to the authorities and parts of the record upon which the appellant relies). Therefore, we conclude that Fingl has failed to show that the district court abused its discretion in finding that the award of attorney fees and costs was only enforceable against ESP Wireless.

Based on the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District
Hon. Douglas W. Herndon, District Judge
Hon. J. Charles Thompson, Senior Judge
Hon. Jack B. Ames, Senior Judge
Hon. Miriam Shearing, Senior Justice
Israel Kunin, Settlement Judge
Gordon & Silver, Ltd.
Palazzo Law Firm
Eighth District Court Clerk