

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY R. LOPEZ, JR. &
ASSOCIATES AND ANTHONY R.
LOPEZ, JR., INDIVIDUALLY,
Appellants,

No. 51541

vs.

JAVIER CORRAL, D.C.,
Respondent.

JAVIER CORRAL, D.C.,
Appellant,

No. 51972

vs.

ANTHONY R. LOPEZ, JR. AND
ASSOCIATES; AND ANTHONY R.
LOPEZ, JR., INDIVIDUALLY,
Respondents.

FILED

DEC 20 2010

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from a district court judgment following a bench trial in a contract and tort action and from a post-judgment order denying a motion for attorney fees. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Anthony R. Lopez, Jr., referred numerous clients to respondent Dr. Javier Corral, a licensed chiropractor. Corral provided chiropractic services to Lopez's clients on a lien or assignment-of-benefits basis, with Corral receiving payment from any settlement that would ultimately occur in the underlying personal injury case. After a lien was executed by Corral and the patient, Lopez would later sign the document and stamp it in red ink with: "WARNING: Law office of Anthony R. Lopez & Assoc. will only agree to withhold 33% of the Bodily Injury Portion of the client's Settlement to pay all the client's medical providers. If this

amount is not acceptable, this lien is void.” Lopez created this language and had been using the red stamp for approximately seven or eight years. A dispute developed between Lopez and Corral regarding whether the red stamp limited the amount each patient owed to Corral. Lopez attempted to resolve the dispute by making Corral settlement offers and issuing checks to Corral for a lesser amount than was owed under the assignment. Many of the checks sent to Corral contained a stamp that read for “Full and final satisfaction of payment.”

This dispute led to Lopez filing a complaint for declaratory relief on the use of the stamp and Corral countersuing. The district court ruled against Lopez and in favor of Corral on counterclaims alleging interference with contract, breach of fiduciary duty, conversion, negligence, and misrepresentation.¹ The district court awarded Corral \$44,664.80 in compensatory damages and \$25,000 in punitive damages, with Corral’s attorney fees included in the punitive damages award. The district court also found Lopez liable under an alter ego theory of liability.

¹Lopez points out that the district court judgment differed from the ruling on the bench; the judgment found in favor of Corral on all six of the claims for relief, but the district court previously did not rule on Corral’s claims for intentional misrepresentation and alter ego. However, the district court specifically ordered Lopez to object to the proposed findings within eight days of receipt if there were any discrepancies. Lopez provides no argument or citations to the record that he timely objected to this possible discrepancy. See Kahn v. Morse & Mowbray, 121 Nev. 464, 480 n. 24, 117 P.3d 227, 238 n. 24 (2005) (recognizing that this court will not consider an argument raised for the first time on appeal). As such, this contention will not be discussed further.

Corral then moved for attorney fees under NRS 18.010 and 7.085, and the district court denied the motion.²

On appeal from the judgment, Lopez argues that the district court erred in: (1) concluding that Lopez breached a fiduciary duty to Corral based upon Lopez's position as a third-party obligor under an assignment of benefits or lien; (2) concluding that Lopez was negligent for placing disputed settlement funds in his trust account pending resolution of the dispute by the district court; (3) failing to apply the economic loss doctrine to bar Corral's unintentional tort claims; (4) concluding that Lopez's actions constituted intentional misrepresentation; (5) concluding that Lopez tortiously interfered with the assignment of benefits or liens between Corral and his patients by attempting to negotiate lower fees with Corral; (6) concluding that Lopez's actions constituted conversion; and (7) awarding punitive damages where there was no evidence of oppression, fraud, or malice and as a means to improperly compensate Corral for his attorney fees.³

In his appeal from the order denying attorney fees, Corral assigns error to the district court's denial of his request for attorney fees

²The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

³Lopez also argues that: (1) the district court erred in concluding that Lopez is the alter ego of his law firm where there is no comingling of funds, undercapitalization, or danger of fraud or unfair prejudice; and (2) it is not clear that sufficient funds remain to pay Corral and the other medical providers the entirety of the amounts billed. We have reviewed these arguments and conclude that both lack merit.

under NRS 7.085 and 18.010 based on maintaining a frivolous action in bad faith.

Standard of review

The district court's factual findings are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence. International Fid. Ins. v. State of Nevada, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2006). However, this court reviews a district court's conclusions of law de novo. Grosjean v. Imperial Palace, 125 Nev. ___, ___, 212 P.3d 1068, 1075 (2009).

Breach of fiduciary duty

Lopez argues that Corral's lien created nothing more than a contractual obligation to withhold money for Corral in the event litigation was successful, and it did not create a fiduciary duty pursuant to NRS 162.020. Lopez further contends that even if a fiduciary duty existed, he did not breach that duty and Corral suffered no damages. We disagree.

Under Nevada law, “[a] fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another.” Powers v. United Servs. Auto. Ass’n, 114 Nev. 690, 700, 962 P.2d 596, 602 (1998) (quoting a jury instruction and noting that the jury was properly instructed regarding the duty an insurance carrier owes to its policyholder). We conclude that a fiduciary relationship existed in this case. The testimony demonstrated that Lopez recognized that Corral placed trust and confidence in him, that it was reasonable under the circumstances for Corral to have done this, and that Lopez intended for Corral to trust him. Lopez admitted at trial that he was serving as fiduciary and had a fiduciary duty to Corral. Moreover, the evidence demonstrated that Corral placed trust and confidence in Lopez—that he would be compensated for his services. Other courts have also held that

this same relationship creates a fiduciary duty. See Crooks v. State Bar, 475 P.2d 872, 878 (Cal. 1970); People v. Fischer, 63 P.3d 373, 384 (Colo. Office of Presiding Disc. J. 2003), reversed on other grounds by In re Fischer, 89 P.3d 817, 817 (Colo. 2004). Thus, we conclude that Lopez owed a fiduciary duty to Corral.

We further conclude that the district court was correct in finding that Lopez breached his fiduciary duty by failing to promptly pay Corral as required by the terms of the assignment. Failing to pay Corral was adverse to Corral's interests, interests that Lopez, as his fiduciary, had a duty to protect.

Negligence

Lopez argues that the district court improperly relied upon Moore v. Weinberg, 644 S.E.2d 740 (S.C. Ct. App. 2007), to conclude that he owed a legal duty to Corral and that he breached that duty under a negligence theory of recovery.

We agree with the reasoning in Moore and conclude that Lopez owed a duty to Corral. In Moore, the South Carolina Court of Appeals recognized the argument that "an attorney who has knowledge of an assignment cannot dishonor the assignment when dispersing funds . . . even if his client instructs him to dishonor the assignment and disburse the funds." 644 S.E.2d at 748. The Moore court then relied upon the Rules of Professional Conduct and established precedent from other jurisdictions to determine that a valid claim for negligence existed. Id. at 747-48 (citing Bonanza Motors, Inc. v. Webb, 657 P.2d 1102, 1104 (Idaho Ct. App. 1983); Brinkman v. Moskowitz, 238 N.Y.S.2d 876, 876-77 (App. Div. 1962)).

This conclusion that Lopez owed a duty to Corral is also consistent with Nevada law. Achram v. Expressway Plaza Ltd., 112 Nev.

737, 741-42, 917 P.2d 447, 450 (1996) (determining that when a client assigns rights to proceeds of a tort action to a creditor, those proceeds no longer belong to the client, and an attorney is not obligated to pay those funds to his clients). This conclusion is further supported by Lopez's testimony wherein he acknowledged that once an attorney becomes aware of an assignment and that attorney has funds, that the attorney has a legal duty to the assignee. In addition, Lopez does not provide any legal support from any jurisdiction to demonstrate a contrary position. See, e.g., State, Dep't. of Mtr. Vehicles v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (concluding that "[g]enerally, unsupported arguments are summarily rejected on appeal").

We conclude that the district court was correct in finding that Lopez breached his duty to exercise due care by failing to promptly pay Corral as required by the terms of the assignment. In some instances, Lopez had Corral's money for more than a year. And as discussed below, Lopez's defense that a bona fide dispute existed over the amount owed is baseless. Accordingly, we conclude that Lopez owed Corral a duty, which he breached when he failed to pay Corral for services rendered, and this breach was the cause of Corral's injury for which he suffered damages. Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991) (holding that the requirements for prevailing on a claim for negligence are: (1) the existence of a duty, (2) a breach of that duty, (3) that the breach was the actual and proximate cause of the injury, and (4) damages as result of the breach). Accordingly, we conclude that, the district court was correct in concluding that Lopez acted negligently.

The economic loss doctrine and the unintentional tort claims

Lopez claims that all of Corral's counterclaims are deficient as a matter of law because the economic loss doctrine bars unintentional tort

actions when the plaintiff seeks to recover pure economic loss. We disagree.

Lopez argues that because the assignment itself is a contract, contract law controls the whole dispute. However, Lopez was not a party to the contract between Corral and his patients and, therefore, the disputes that arose between Lopez and Corral were based in tort law. Of the claims that were resolved, the only unintentional tort claim that the district court found Lopez was liable for was the claim for negligence.

We conclude that the district court's finding of negligence based upon Lopez's legal duty to Corral is not barred by the economic loss doctrine. As indicated in Terracon Consultants v. Mandalay Resort, 125 Nev. ___, ___, 206 P.3d 81, 87 (2009),

[w]hile the doctrine generally provides that purely economic losses are not recoverable in tort absent personal injury or property damage, courts have made exceptions to allow such recovery in certain categories of cases, such as negligent misrepresentation and professional negligence actions against attorneys, accountants, real estate professionals, and insurance brokers.

Here, because of the nature of this case, Corral does not have a contract-law remedy against Lopez, and therefore, the policy considerations behind the economic loss doctrine are inapplicable. See id. at ___, 206 P.3d at 88 (stating that "the economic loss doctrine is driven by financial considerations . . . [it] works to reduce the cost of tort actions, but still provides tort victims with a remedy because less expensive alternative forms of compensation, such as insurance, generally are available to a financially injured party"). Furthermore, the damages here were not solely for economic loss, as they include damages to Corral's reputation and business—his intangible property—as the record demonstrated that

he was forced to reschedule and cancel patients due to this litigation. Accordingly, we conclude that the economic loss doctrine is inapplicable in this case.

We further conclude that regardless of the applicability of the economic loss doctrine, the award of damages was properly given under the theories of tortious interference with contract, intentional misrepresentation, breach of fiduciary duty, and conversion.

Intentional misrepresentation

Lopez argues that the district court erroneously concluded that the “Full and final satisfaction of payment” stamp on the checks issued by Lopez and the language of the red stamp provision constitute misrepresentations. Instead, Lopez contends that the use of the red stamp is a counteroffer. Lopez contends that there is no evidence that he knew that any representations were false, or that Corral was damaged from these alleged misrepresentations. Lopez also argues that a bona fide dispute existed as to the amount owed to Corral, and that he tendered checks with the restrictive language to Corral that attempted to settle the dispute through an accord and satisfaction.

We disagree and conclude that all three factors required to show intentional misrepresentation are present in this case, specifically, “(1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another’s reliance, and (3) damages that result from this reliance.” Nelson v. Heer, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007).

The representation made by the red stamp and the stamp on the checks were intentionally false, and intended to induce Corral to act, or refrain from acting, to preclude Corral from receiving the full benefit of his contract. We conclude that Lopez’s arguments that the red stamp was

a counteroffer, and the stamp on the checks was an attempted accord and satisfaction are meritless. We cannot conclude that any reasonable attorney could rely on the argument that the red stamp was a counteroffer in good faith. It is illogical to conclude that a stamp made on a contract by a third party would act to alter the terms of the contract. Additionally, a nonparty to a contract cannot alter the contract through an accord. See Walden v. Backus, 81 Nev. 634, 636-37, 408 P.2d 712, 713 (1965) (defining “[a]ccord” as “[a]n agreement whereby one of the parties undertakes to give or perform, and the others to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is, or considers himself, entitled to” (quoting 1 C.J.S. Accord and Satisfaction § 1(a) (1936))); see also In re marriage of Thompson, 48 Cal. Rptr. 2d 882, 887 (Ct. App. 1996) (holding that “[a]n accord and satisfaction is the substitution of a new agreement for and in satisfaction of a preexisting agreement between the same parties”).

We further conclude that Lopez acted with intent to induce Corral’s reliance. Lopez himself testified that he intended that his red stamp act as a cap on the amount Corral and other service providers would be paid.

We also conclude that the damages were “proximately caused by reliance on the original misrepresentation or omission.” Nelson, 123 Nev. at 225, 163 P.3d at 426. The foreseeable consequences were “reasonably connected to both the defendant’s misrepresentation or omission and the harm that the misrepresentation or omission created.” Id. at 226, 163 P.3d at 426. Because of the stamp on the checks and the red stamp on the contracts, Corral was not able to collect the money owed

to him when it was due. Corral relied upon the stamp on the check to the extent that he did not cash the checks, was not timely paid for his services, and was forced to file counterclaims against Lopez to collect his money. Corral's damages include money owed to him for services rendered, interest on that money owed, legal fees, and lost business for time spent on this case during work hours.

In sum, we conclude that the district court properly found that the "Full and final satisfaction of payment" stamp on the checks issued by Lopez and the language of the red stamp provision constituted misrepresentations.

Intentional interference with contract

Lopez argues that the district court erred in concluding that the evidence showed that he intentionally interfered with the contract between Corral and his patients. Lopez contends that he was fulfilling his fiduciary duty to protect his clients' interests both when he used the red stamp and in his subsequent attempts at negotiations. Lopez argues that his actions amount to zealous representation and reflect his intent to maximize recovery for his clients. We disagree.

To establish intentional interference with contractual relations, Corral was required to show at trial that: (1) a valid contract existed between Corral and his patients; (2) Lopez had knowledge of the contract, (3) Lopez acted intentionally in a manner designed to interfere with the contract; (4) there was actual disruption of the contract; and (5) there was resulting damage. See J.J. Indus., LLC v. Bennett, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003). To prove an intentional interference action, Corral "must establish that [Lopez] had a motive to induce breach of the contract with the third party." Id. at 275, 71 P.3d at 1268.

Evidence was produced at trial to satisfy all elements of the intentional-interference-with-contractual-relations claim asserted by Corral. Lopez knew of the valid contracts for the assignment of benefits to Corral, as he was a signatory. In stamping these contracts with the red stamp provision that he created, Lopez intentionally altered the contract in a manner that was designed to interfere with the contract and serve as a universal cap on payments to medical providers such as Corral. While Lopez argues that his use of the red stamp was for the sole purpose of protecting his clients, Lopez clearly testified that his utilization of the red stamp enhanced his reputation and increased his business. Further, the use of the red stamp disrupted the contract between Corral and his patients, as Corral was not paid when he should have been, sometimes for up to a year, causing damage to Corral and forcing him to file counterclaims against Lopez. Therefore, we conclude that the evidence presented at trial supports the conclusion that Lopez intentionally interfered with the assignments of benefits between Corral and his patients.

Conversion of Corral's personal property

Lopez argues that the district court erroneously found that clear and convincing evidence supports the conclusion that Lopez converted property belonging to Corral. We disagree.

Under Nevada law, the tort of conversion is defined as a distinct act of “wrongfully exerted [dominion] over personal property in denial of, or inconsistent with, title or rights therein or in derogation, exclusion or defiance of such rights.” Winchell v. Schiff, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (alteration in original) (quoting Edwards v. Emperor's Garden Rest., 122 Nev. 317, 328, 130 P.3d 1280, 1287 (2006)). Conversion deprives a person of his or her property permanently or for an

indefinite time. 18 Am. Jur. 2d Conversion § 1 (2004). “[C]onversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge.” Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000).

At trial, evidence was presented showing that Lopez exerted dominion over Corral’s money by taking possession of the money and placing it in his trust account, which only he had access to. Lopez testified that this money was in his “possession and control,” and he reimbursed his costs and paid himself his attorney fees from the distributions that went into the trust account. While Lopez was exerting dominion and control over the settlement money, his only attempts to pay Corral the undisputed amounts involved checks that stated that the payment was “full and final.” Because Lopez knowingly acted in bad faith in asserting the validity of the red stamp and in asserting that the amount owed was disputed because of the stamp, we conclude that the dominion over the money that Lopez exercised was wrongful and unjustified.

While we agree with Lopez that an attorney who holds disputed funds in his trust account pending resolution of the dispute does not convert those funds as a matter of law, Lopez had no basis for assuming that the funds were disputed, as his clients did not object or request a novation. Instead, Lopez created his own dispute to serve the goals of enhancing his reputation, obtaining more cases, and protecting his interests in the recovery amounts. Moreover, if Lopez believed there was a dispute between the patient and Corral, as he now argues, he should have filed an interpleader action pursuant to NRC 22. See Achrem v. Expressway Plaza Ltd., 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) (holding that if there was a conflict, the attorney should have deposited

the proceeds in a trust account and requested a court to direct the funds' distribution under NRCP 22).

While Lopez may not have had the intent to deprive Corral of all of the funds permanently, Lopez clearly had the intent to deprive Corral of at least some of the funds for an indeterminate time. From the evidence that was presented at trial, the district court could have reasonably inferred that Lopez wrongfully exerted dominion over Corral's money, which was in derogation of Corral's rights in the property. Therefore, we conclude that substantial evidence supports the district court's finding that Lopez committed conversion.

Award of punitive damages

Lopez argues that the district court's conclusion that his conduct constituted fraud, malice, and oppression was erroneous and cannot be supported by either the facts of this case or the law of Nevada. Lopez contends that he in good faith believed that the red stamp provision was valid as a counteroffer, as demonstrated by his settlement attempts and filing the action in the district court to determine the validity of the provision while holding the money in a trust account. Finally, Lopez argues that the district court inappropriately awarded punitive damages to compensate Corral for his attorney fees.

The district court did not err in granting punitive damages

We have long recognized that "punitive damages provide a benefit to society by punishing undesirable conduct not punishable by the criminal law." Republic Insurance v. Hires, 107 Nev. 317, 320, 810 P.2d 790, 792 (1991) (citing Ace Truck v. Kahn, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987), abrogated on other grounds by Bongiovi v. Sullivan, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006)). It is within the district court's discretion to decide whether a "defendant's conduct merits punitive

damages as a matter of law, and we will not overturn an award of punitive damages if it is supported by substantial evidence of oppression, fraud, or malice.” Bongiovi, 122 Nev. at 581, 138 P.3d at 451 (citing Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000)); NRS 42.005. We assume that “the jury believed all the evidence favorable to the prevailing party and drew all reasonable inferences in [that party’s] favor.” Bongiovi, 122 Nev. at 581, 138 P.3d at 451 (internal quotations marks and citation omitted).

We conclude that substantial evidence supports that Lopez acted with oppression, fraud, or malice. The evidence demonstrated that Lopez’s conduct was deliberate, calculated, and done with knowledge that there was a probable harmful consequence to Corral. See NRS 42.005. We further conclude that the \$25,000 in punitive damages was properly awarded both to punish Lopez and to discourage Lopez and others from engaging in this or similar conduct.⁴

Lopez continued to use the red stamp as a standard procedure for seven years while knowing that it was unenforceable. Lopez provided no legal authority to support his use of the red stamp to unilaterally alter the contracts entered into between Corral and his clients. Further, because Lopez used the red stamp on the contracts after they were

⁴Evidence was presented that Lopez did not pay Corral the money that was due to him. While Lopez is correct that he offered Corral checks for a portion of the payment, those checks were stamped with restrictions that read for “[f]ull and final satisfaction of payment.” Lopez is correct that under Pierce Lathing Co. v. ISEC, Inc., 114 Nev. 291, 298-99, 956 P.2d 93, 96-97 (1998), Corral could have cashed the checks under protest and obtained the undisputed amount from Lopez. However, Corral could not have obtained full payment at that time by doing so.

executed, and not in the presence of both parties, there was no meeting of the minds regarding this alleged contract amendment by Lopez. In addition, the use of the red stamp improperly placed Corral in an adversarial position with his patients. Lopez also used the full value of the bills in asserting his clients' claims, while never intending to pay the full value of those bills. Lopez further misrepresented the amount of Corral's bills in one case, and as a result the district court asked Corral's counsel to refer Lopez to the State Bar of Nevada. We conclude that Lopez's behavior, as evidenced by the record, supports the district court's conclusion that punitive damages were warranted.

The punitive damages award improperly included attorney fees


However, it does appear from the record that the punitive damages award included an award for attorney fees. In its ruling from the bench, the district court stated that “[Corral] is going to get attorney’s fees and the way he is going to get attorney’s fees is through the punitive damage award.” While this reasoning was not employed in the district court’s written judgment, it appears that attorney fees were not otherwise awarded. Instead, the strong language used by the district court at trial indicates that attorney fees were part of the basis for the punitive damages award. Therefore, we conclude that because it is improper to include attorney fees in a punitive damages award we must reverse and remand the award of punitive damages to the district court to have the attorney fees portion of this award removed from the punitive damages award. See, e.g., Mac’s Shell Service v. Shell Oil Products Co. LLC, 559 U.S. ___, ___, 130 S.Ct. 1251, 1255 (2010) (indicating that punitive damages and attorney fees are separate remedies); see also Frantz v. Johnson, 116 Nev. 455, 460, 999 P.2d 351, 354 (2000) (same).

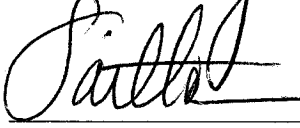
Corral's request for attorney fees

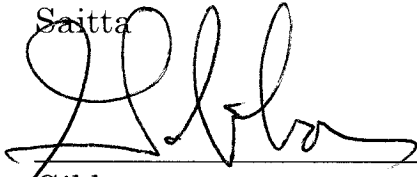
In contesting the district court's denial of an award of attorney fees under NRS 7.085 and 18.010, Corral argues that Lopez filed and maintained an action that was not well-grounded in fact, such that he must pay Corral's costs, expenses, and attorney fees pursuant to NRS 7.085 and 18.010. See NRS 7.085 (providing that attorney fees shall be granted when an action or defense is not well-grounded in fact or not warranted by existing law or by an argument for changing the existing law that is made in good faith); NRS 18.010(2) (providing that attorney fees should be awarded when the court finds that the action or defense was brought or maintained without reasonable ground or to harass the prevailing party). We agree and conclude that the district court was required to award attorney fees under either NRS 7.085 or 18.010. The district court properly concluded that Lopez's action was not warranted by existing law and was brought or maintained without reasonable ground and it appears that it only failed to award attorney fees because it had already done so in the punitive damages award. Despite repeated requests from the district court, Lopez presented no authority supporting his claimed unilateral modification of the contract. Additionally, Lopez did not make any arguments that the existing law should be changed to validate his complaint. The statutes are clear—parties who bring and maintain an action without grounds shall have attorney fees imposed against them. We therefore reverse the district court's decision regarding attorney fees and remand for a determination of attorney fees pursuant to NRS 7.085 and 18.010.

Accordingly we,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Lansford W. Levitt, Settlement Judge
Brownstein Hyatt Farber Schreck, LLP
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