

IN THE SUPREME COURT OF THE STATE OF NEVADA

G. STANMORE RASMUSSEN,  
Appellant/Cross-Respondent,

vs.

CARLOS LOPEZ, DERIVATIVELY AS A  
STOCKHOLDER ON BEHALF OF THE  
CARSTAN CORPORATION, A NEVADA  
CORPORATION,

Respondent/Cross-Appellant.

No. 53738

FILED

DEC 27 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *H. Ingersoll*  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal and cross appeal from a district court judgment, entered on remand, in a shareholder derivative action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

This court has previously considered two appeals in the underlying case. See Rasmussen v. Lopez, Docket No. 36958 (July 11, 2002); Lopez v. Rasmussen, Docket No. 43114 (February 16, 2006). Both appeals resulted in remands. In 1987, appellant/cross-respondent G. Stanmore Rasmussen formed Carstan Corporation with respondent/cross-appellant Carlos Lopez. The purpose of Carstan was to obtain and license "Supplemental Type Certificates" (STCs), which are authorizations issued by the Federal Aviation Administration (FAA) to allow an increase in the design weight limitations for an existing aircraft. Carstan's pre-incorporation agreement provided that Rasmussen's engineering firm, G. S. Rasmussen and Associates (GSR), would provide to the FAA the aeronautical engineering designs necessary to support the STC applications. The pre-incorporation agreement also permitted either Rasmussen or Lopez to independently pursue a project to develop any STC

if that party first presented the opportunity to Carstan and Carstan rejected or abandoned the opportunity.

A dispute over Lopez's and GSR's expenses arose. Lopez's expenses were negotiated, but Lopez and Carstan never resolved the dispute regarding GSR's expenses. Subsequently, two opportunities (the Omni opportunity and the Pegasus opportunity) arose for Carstan to pursue the development of STCs. The Pegasus opportunity consisted of two pairs of STCs, and the Omni opportunity consisted of one pair of STCs. Because of GSR's unpaid invoices, Rasmussen and Lopez, on behalf of Carstan, were unable to agree on how to finance the STCs and how to pursue the STCs. Rasmussen then pursued both of these opportunities on his own, which ultimately included the developing and licensing of three pairs of STCs.

At the bench trial following the second remand, the district court considered whether the Pegasus opportunity, comprised of two pairs of STCs, was actually two separate opportunities, one of which Rasmussen did not disclose. The district court concluded that the second pair of Pegasus STCs was an opportunity separate from the other Pegasus opportunity and the Omni opportunity. The court also found that Rasmussen did not disclose this separate opportunity. Thus, the district court awarded damages to Carstan for usurping a corporate opportunity, but reduced the award by \$150,000 based on an estimate of expenses necessary to develop the STCs. The district court also refused to reduce the damages further based on Rasmussen's estimate of expenses necessary to ensure the future marketability of the STCs.

Rasmussen argues on appeal that the district court erred because substantial evidence did not support the finding that there was a

third opportunity that Rasmussen usurped.<sup>1</sup> On cross appeal, Lopez argues that the district court erred in determining that Carstan rejected the first Pegasus opportunity and the Omni opportunity.

We conclude that substantial evidence supports the district court's determinations regarding the first pair of Pegasus STCs and the Omni STCs. However, we conclude that substantial evidence did not support the district court's finding of a third corporate opportunity, and thus, we reverse in part the district court's judgment.

## DISCUSSION

### Standard of Review

This court reviews a district court's findings of fact for an abuse of discretion and will only reverse such findings if they are clearly erroneous or unsupported by substantial evidence. NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004). In a bench trial, a determination based on conflicting evidence will not be reversed if it is supported by substantial evidence. Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996). Substantial evidence is what a

---

<sup>1</sup>Rasmussen argues on appeal that the district court erred by refusing to grant him summary judgment against Lopez under the doctrine of unclean hands. This argument lacks merit because previous jury verdicts against Lopez did not conclusively establish that he had unclean hands. See Las Vegas Fetish & Fantasy v. Ahern Rentals, 124 Nev. 272, 275-77, 182 P.3d 764, 766-67 (2008) (concluding that a jury verdict regarding abuse of process and award of \$1 in compensatory damages did not “conclusively” establish the plaintiff's unclean hands). Furthermore, genuine issues of material fact remained as to whether his conduct was connected to the usurpation of the Carstan corporate opportunities and if such conduct was sufficiently egregious or harmful enough to justify applying the doctrine. See id.

reasonable mind would consider adequate to support a conclusion. Radakar v. Scott, 109 Nev. 653, 657, 855 P.2d 1037, 1040 (1993). A conclusion of law is reviewed de novo. Bedore v. Familian, 122 Nev. 5, 10, 125 P.3d 1168, 1171 (2006). Findings of fact and conclusions of law may be presumed when the record is clear and supports the judgment. Luciano v. Diercks, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981).

Substantial evidence supports the district court's determination regarding the first pair of Pegasus STCs and the Omni STCs, but not the existence of a third opportunity

Rasmussen argues that substantial evidence supported the district court's determination that he did not usurp the first pair of Pegasus STCs or the Omni opportunity, but that substantial evidence did not support the district court's determination that Rasmussen usurped the second Pegasus opportunity. Lopez argues that the district court erred by determining that Rasmussen did not usurp the Pegasus and Omni opportunities, but that substantial evidence supported the determination that Rasmussen usurped the second Pegasus opportunity.

Directors breach their fiduciary duty if they "exploit an opportunity that belongs to the corporation." Bedore, 122 Nev. at 12 n.25, 125 P.3d at 1173 n.25 (quoting Leavitt v. Leisure Sports Inc., 103 Nev. 81, 87, 734 P.2d 1221, 1225 (1987)). "An opportunity belongs to the corporation if it is one in which the corporation has an expectancy interest or property right." Id. The burden is on the plaintiff to prove, by a preponderance of evidence, that a defendant director usurped a corporate opportunity belonging to the corporation. Bedore, 122 Nev. at 12 n.23, 125 P.3d at 1172-73 n.23. This court will affirm a district court's determination regarding the usurping of a corporate opportunity if it is

supported by substantial evidence.<sup>2</sup> Leavitt, 103 Nev. at 89, 734 P.2d at 1226.

Substantial evidence supports the district court's determination that Rasmussen did not usurp the first pair of Pegasus STCs

Lopez argues that the district court erred in concluding that Carstan rejected the opportunity to develop the first pair of Pegasus STCs. We disagree.

Lopez fails to demonstrate how the district court erred by determining that Rasmussen did not usurp the opportunity to develop the first pair of Pegasus STCs because (1) Rasmussen disclosed the opportunity to Lopez, (2) Carstan was deadlocked and unable to pursue the opportunity, and (3) the deadlock was largely attributed to the actions of Lopez and his attorney, which thereby caused Carstan to reject the opportunity. See Lussier v. Mau-Van Development, Inc. I, 667 P.2d 804, 813 (Haw. App. 1983) (concluding that the record demonstrated that the alleged usurper received implied consent from the corporation after

---

<sup>2</sup>This court declines the parties' request to adopt a rigid approach to the corporate opportunity doctrine. In Leavitt, this court explained that determining whether a corporate opportunity exists within a small, private corporation requires a flexible analysis of the "corporate opportunity doctrine," under which a "fiduciary is accused of diverting a business opportunity [in] which the corporation ha[d] an expectancy interest or property right," and that "opportunity, in all fairness, should belong to the corporation." 103 Nev. at 87, 734 P.2d at 1225. This flexible approach to small corporations is based upon the generally contractual nature of small corporations, in which the "small number of players in a private venture result [sic] in better communication between the members" and "agreements are entered into which are tailored to particular situations and objectives." Id. at 87-88, 734 P.2d at 1225. Here, Leavitt controls and fully resolves the issues.

disclosing the purported opportunity to the board of directors and the board did not object). The district court heard testimony from both Rasmussen and Lopez regarding the first pair of Pegasus STCs. Rasmussen disclosed the opportunity to Lopez in a telephone call, a meeting, and a letter. Following the disclosure, Lopez declined to pay GSR's outstanding invoices or advance one-half of the potential project costs. Based on Lopez's actions, Rasmussen was free to pursue the opportunity under the pre-incorporation agreement. Therefore, substantial evidence supports the district court's finding that Rasmussen did not usurp the first pair of Pegasus STCs.

Substantial evidence supports the district court's determination that Rasmussen did not usurp the Omni STCs

Lopez argues that the district court erred in concluding that Carstan rejected the opportunity to develop the Omni STCs. We disagree.

The record reveals that Carstan was deadlocked due to the dispute over GSR's expenses and that this impasse was more attributable to Lopez than Rasmussen. Given the nature of the pre-incorporation agreement and the fact that the Omni opportunity arose after litigation ensued between Lopez and Rasmussen, we conclude that substantial evidence supported the district court's determination that Rasmussen did not usurp a Carstan opportunity by pursuing the Omni STCs after Lopez refused to pay GSR's outstanding invoices.

Substantial evidence does not support the district court's determination that Rasmussen usurped a third corporate opportunity

Rasmussen argues that substantial evidence did not support the finding of the existence of a third corporate opportunity consisting of the second pair of Pegasus STCs.<sup>3</sup> We agree.


At the outset, the district court's determination that there was a third opportunity, separate and apart from the Pegasus opportunity, is not supported by Paragraph 8 of the Pre-Incorporation Agreement. Assuming for purposes of argument that Lopez could overcome this hurdle, the district court still erred. When determining whether a corporate opportunity exists, a court examines a number of factors, including whether the corporation is financially able to exploit the opportunity and whether the corporation has an interest or expectancy in the opportunity. Broz v. Cellular Info. Systems, Inc., 673 A.2d 148, 154-55 (Del. 1996). At the time the alleged third opportunity arose, Carstan was on the verge of dissolution and Lopez had refused to release Carstan's frozen funds for the development of any additional STCs. Thus, a third corporate opportunity did not exist because Carstan had no ability to


---


<sup>3</sup>Rasmussen also argues that the district court exceeded this court's mandate on remand when it allowed Lopez to assert a third corporate opportunity by treating the two pairs of Pegasus STCs as two separate opportunities, because the remand order instructed the district court to determine simply whether Rasmussen usurped the "Pegasus" or "Omni" opportunities. Rasmussen waived this issue by not timely objecting. See Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1235-36 (1978) (stating that appellant waived his right to challenge respondent's closing argument when the objection was first made in the appellant's motion for a new trial).

develop the STCs and Carstan could not have had an interest in the opportunity given its pending dissolution and financial status. See Broz, 673 A.2d at 155-56 (holding no corporate opportunity existed when corporation recently emerged from bankruptcy proceedings and was facing financial difficulties). Therefore, substantial evidence does not support the district court's finding of a third corporate opportunity and award of damages. 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.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Brent T. Adams, District Judge  
Robert G. Berry, Settlement Judge  
Lemons, Grundy & Eisenberg  
Holland & Hart LLP/Reno  
Molof & Vohl  
Washoe District Court Clerk