

IN THE SUPREME COURT OF THE STATE OF NEVADA

CREATIVE FLORAL COMPANY, A NEVADA CORPORATION, D/B/A COACHES CORNER FOR NATIONAL PRIME TIME AUTHORITY; JOSEPH HIRSHFELD; DARREN PARKERSON AND BOB MCMORROW,

No. 35327

Appellants,

**FILED**

vs.

APR 06 2001

NATIONAL SPORTS SERVICES, INC., A NEVADA CORPORATION,

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

Respondent.

ORDER OF AFFIRMANCE

This is an appeal from a district court order issuing a preliminary injunction in an unfair competition action. We conclude that the issuance of the preliminary injunction was appropriate, but the district court failed to correctly apply controlling law. We therefore affirm the order of the district court, but base our decision on the application of controlling law.

Respondent National Sports Services, Inc., a Nevada corporation, ("NSS") filed a complaint alleging various tortious actions by appellant Creative Floral Company, a Nevada corporation ("CFC"). Before trial, NSS sought, and was granted, a preliminary injunction preventing CFC from continuing its tortious activities. CFC now appeals, arguing that the district court improperly issued the injunction.

NRS 600A.040 provides that actual or threatened misappropriation may be enjoined. A party seeking the issuance of a preliminary injunction bears the burden of establishing (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's

conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.<sup>1</sup>

The decision to grant or deny a preliminary injunction is within the sound discretion of the trial court, and that discretion will not be disturbed absent abuse.<sup>2</sup> This court's review is limited to "the record to determine whether the lower court exceeded the permissible bounds of discretion."<sup>3</sup> A district court's determinations of fact will not be set aside unless they are clearly erroneous.<sup>4</sup> If the district court's findings are supported by substantial evidence, they will be upheld.<sup>5</sup> Questions of law are reviewed de novo.<sup>6</sup>

CFC argues that it has not misappropriated any trade secrets from NSS. NSS responds that CFC's actions amount to misappropriation, a form of unfair competition.

We conclude that although the district court did not abuse its discretion in granting the preliminary injunction, it failed to correctly apply relevant law.

In 1987, the Nevada Legislature enacted the Uniform Trade Secrets Act ("UTSA"), which provides for statutory remedies for misappropriation of trade secrets. NRS 600A.090 of the UTSA, titled "Effect of chapter on other law and

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<sup>1</sup>See Dangberg Holdings v. Douglas Co. 115 Nev. 129, 142-43, 978 P.2d 311, 319 (1999); see also NRS 33.010.

<sup>2</sup>See Dangberg Holdings, 115 Nev. at 138, 978 P.2d at 319.

<sup>3</sup>Id.

<sup>4</sup>Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990).

<sup>5</sup>Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 25, 866 P.2d 1138, 1139 (1994).

<sup>6</sup>SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

remedies," indicates that the UTSA is designed to supersede conflicting common law tort remedies. NRS 600A.090 provides:

1. Except as otherwise provided in subsection 2, this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.

2. This chapter does not affect:

(a) Contractual remedies, whether or not based upon misappropriation of a trade secret;

(b) Other civil remedies that are not based upon misappropriation of a trade secret; or

(c) Except as otherwise provided in NRS 600A.035, criminal sanctions, whether or not based upon misappropriation of a trade secret.

(Emphasis added.)

The plain language of NRS 600A.090 precludes a plaintiff from bringing a tort or restitutionary action "based upon" misappropriation of a trade secret beyond that provided by the UTSA.<sup>7</sup>

Thus, a federal district court has held that a plaintiff's claims for unjust enrichment and unfair competition were precluded by the UTSA since these two claims were duplicative of plaintiff's claim for misappropriation of trade secrets.<sup>8</sup>

Here, the district court, without citing to the UTSA, granted the preliminary injunction based on the following causes of action: (1) misappropriation, (2) intentional interference with contractual relations, and (3) intentional interference with prospective advantage. These causes of action were precluded by NRS 600A.090 because they

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<sup>7</sup>See *Frantz v. Johnson*, 116 Nev. \_\_, \_\_, 999 P.2d 351, 358 (2000) (noting that these claims are precluded by the UTSA).

<sup>8</sup>See *Hutchison v. KFC Corp.*, 809 F. Supp. 68, 70 (D. Nev. 1992).

all related to the misappropriation of NSS's customer information.

Although the district court erred in grounding liability in common law claims that were displaced by statute, this error was harmless.<sup>9</sup> The error was harmless because NRS 600A.090 codifies the common law elements of misappropriation, and NSS pleaded and proffered sufficient evidence at the hearing on the preliminary injunction to satisfy the requirements of NRS 600A.090.<sup>10</sup>

At common law, the factors for determining whether corporate information such as customer and pricing information was a trade secret included (1) the extent to which the information is known outside the business and the ease or difficulty with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; (3) the extent and manner in which the employer guarded the secrecy of the information; and (4) the former employee's knowledge of the customer's buying habits and other customer data and whether this information is known by the employer's competitors.<sup>11</sup>

NRS 600A.030(5) similarly defines trade secret as follows:

5. 'Trade secret' means information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the

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<sup>9</sup>See NRCP 61.

<sup>10</sup>See Frantz, 116 Nev. at \_\_\_, 999 P.2d at 358.

<sup>11</sup>Woodward Insur., Inc. v. White, 437 N.E.2d 59, 67 (Ind. 1982).

public or any other persons who can obtain commercial or economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

We conclude that NSS's information qualifies as a trade secret because it meets the requirements listed above. First, the information is not available to the general public as it represents the opinions of NSS's handicappers. Second, the information was confidential unless paid for. Third, the information has economic value because the public does not generally know the information and the members of the public are required to pay for the information.

This court has emphasized that not every customer and pricing list will be protected as a trade secret. In Neal v. Griepentrog,<sup>12</sup> we held that discount lists given by hospitals to various medical providers were not trade secrets and should therefore be disclosed to the public.

However, the customer and sports pick information involved in this case is unlike that in Neal because the evidence showed that the sports and customer information was extremely confidential, its secrecy was guarded, and it was not readily available to others.

Based on the foregoing, NSS has demonstrated that it is likely to prevail on the merits on its claim for misappropriation of trade secrets under the UTSA. Moreover, NSS does not have an adequate remedy at law because it would be impossible to calculate and determine the amount of economic damages caused by CFC's alleged wrongful dissemination of NSS's customer lists, trade secrets, and other proprietary information. In addition, the wrongs

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<sup>12</sup>108 Nev. 660, 666, 837 P.2d 432, 435 (1992).

allegedly committed by CFC have the potential to be continual and ongoing because there is no clear method to monitor CFC's actions.

We conclude that the issuance of the preliminary injunction was proper because NSS has met the relevant requirements under the UTSA. We further conclude that the district court's failure to analyze the issues under the UTSA was harmless. We

ORDER the judgment of the district court AFFIRMED.

Young, J.  
Young

Leavitt, J.  
Leavitt

Becker, J.  
Becker

cc: Hon. Michael A. Cherry, District Judge  
Harold P. Gewerter  
Berkley, Gordon, Levine, Goldstein & Garfinkel  
Clark County Clerk