IN THE SUPREME COURT OF THE STATE OF NEVADA

GLADYS HAWKINS AND JOE BOB BARNETT, AS CO-GUARDIANS OF THE ADULT WARD, TOBY JOE BARNETT,

Appellants,

vs.

RYAN WILLIAM BARR, PHYLLIS J. BARR, ROUVAUN WEAVER, INDIVIDUALLY AND AS AN EMPLOYEE OF SILVER STATE DISPOSAL SERVICE, INC., A NEVADA COMPANY; SSDS LIQUIDATING CORPORATION, D/B/A SILVER STATE DISPOSAL SERVICE, INC., A NEVADA CORPORATION; REPUBLIC INDUSTRIES, INC., A FLORIDA CORPORATION; AND REPUBLIC SILVER STATE DISPOSAL SERVICE, INC., A NEVADA CORPORATION,

Respondents.

No. 35374

FILED

JAN 23 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court, as modified, dismissing appellants' claims against Ryan Barr and Phyllis Barr (hereinafter jointly referred to as the "Barrs") in a negligence lawsuit.

The July 7, 1999, order, as modified by order dated October 11, 1999, grants the Barrs' motion to dismiss. However, neither the July 7, 1999, order nor the October 11, 1999, order expressly states whether the district court dismissed appellants' claims against the Barrs pursuant to NRCP 12(b)(5) or NRCP 56(c). Our review of the record on appeal indicates that the Barrs' motion to dismiss, filed May 11, 1999, incorporated as an exhibit a document entitled "covenant not to execute," which was signed on October 23, 1997. Appellants' complaint filed on April 24, 1998, makes no reference to the covenant not to execute. Accordingly, we conclude that the district court entered the challenged orders pursuant to NRCP 56(c). See NRCP 12(b) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon

which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .").

Our review of an order granting summary judgment is de novo.[1] Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989). When a contract is clear on its face, it will be construed from the written language and enforced as written. See Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). Furthermore, parole evidence is inadmissible to determine the true intent of the parties when a contract is unambiguous. See Young Electric Sign v. Lynch, 77 Nev. 416, 419, 365 P.2d 684, 650 (1961).

The Barrs asserted before the trial court and on appeal that the covenant not to execute was intended to function as a release. These efforts to recharacterize the covenant not to execute as a release are unpersuasive. More than thirty years ago, this court acknowledged the differences between a release and a covenant not to execute. See Whittlesea v. Farmer, 86 Nev. 347, 469 P.2d 57 (1970). In Whittlesea, this court concisely and clearly stated that a covenant not to execute upon a judgment "is not the same as a release." 86 Nev. at 349-50, 469 P.2d at 58. This court went on to explain that a covenant not to execute upon a judgment does not "extinguish[] the plaintiff's cause of action, as does a release." 86 Nev. at 350, 469 P.2d at 58.

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[1]The outcome of this appeal would not differ were we to instead apply the appellate standard of review applicable to orders of dismissal predicated upon NRCP 12(b)(5). See Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) ("A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.") (internal quotes omitted).

Courts in our sister jurisdictions have likewise noted the differences between a covenant not to execute and a release. The Arizona Court of Appeals has stated:

> A covenant not to execute against the insured's personal assets does not fully protect the insured because it permits the plaintiff to proceed with the litigation against the insured.
>
> . . . .
>
> Nor does a covenant fully protect the insured from liability. Such a covenant may protect the insured's personal assets from execution, but it does not prevent the entry of a judgment against the insured. That judgment is a debt of the insured.

California Cas. Ins. v. State Farm Mut., 913 P.2d 505, 511 (Ariz. Ct. App. 1996) (Lankford, J., concurring in part and dissenting in part).

The South Carolina Court of Appeals has described the differences as follows:

> The term "release" has been defined as the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." 76 C.J.S. Release § 2 (1994).
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> . . . .
>
> A covenant not to execute "is a promise not to . . . execute a judgment when one had such a [prospective] right at the time of entering into the agreement." 76 C.J.S. Release § 4 (1994). It is merely a contract and not a release. Id.
>
> . . . .
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> The intention of the parties governs in determining whether an instrument is a covenant not to execute or a release.

Wade v. Berkeley County, 529 S.E.2d 743, 746-48 (S.C. Ct. App. 2000). Other courts have likewise characterized the legal distinction between a release and a covenant not to execute. See, e.g., Rager v. Superior Coach Sales & Service of Arizona, 516 P.2d 324 (Ariz. 1973); Kobbeman v. Oleson, 574 N.W.2d 633 (S.D. 1998); Ard v. Gemini Exploration Co., 894 S.W.2d 11 (Tex. App. 1994).

We now turn to the language within the contract at issue in the case at hand to determine whether it is a release or merely a covenant not to execute. The relevant language

within the contract executed on October 23, 1997, reads as follows:

> THIS AGREEMENT is made and entered into this 23[rd] day of October, 1997, by and between Gladys Louise Dula Hawkins and Joe Bob Barnett, special guardians for Toby Barnett, sometimes hereinafter jointly referred to as "Covenantors", and Phyllis W. Barr, Ryan Barr and MCM Corporation, a North Carolina corporation, dba Occidental Fire & Casualty Insurance Company of North Carolina, sometimes jointly referred to as "Covenantees".
>
> 1. Covenantors presently have a claim for damages against the Covenantees arising out of an automobile accident occurring on April 27, 1996, at the intersection of Windmill Lane and Bermuda Road, in the City of Las Vegas, County of Clark, State of Nevada.
>
> 2. In the event that a lawsuit based on the above-referenced claim proceeds to trial, and/or results in a judgment, it is the express intent of the parties that Covenantees, their agents, employees, representatives and assigns, shall never at any time be liable to Covenantors, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based.
>
> 3. In consideration of Nine Thousand Dollars ($9,000.00), represented by a check in the amount of $9,000.00, drawn by Occidental Fire & Casualty Company of North Carolina, made payable to Gladys Louise Dula Hawkins and Joe Bob Barnett, guardians ad litem for Toby Barnett, and their attorneys, Curran & Parry, and University Medical Center, receipt of which is hereby acknowledged, Covenantors agree that they will not at any time, nor shall anyone for them or on their behalf, enforce by execution or otherwise, any judgment that may be rendered pursuant to the claim and/or any legal action referenced hereinabove.
>
> 4. This Covenant Not to Execute shall not be deemed a satisfaction, in whole or in part, of any judgment or liability or cause of action or causes of action for injuries or damages against any person or persons, or entity or entities, except, and subject to the reservations hereinbefore enunciated, but rather is executed solely as a Covenant Not to Execute, and the Covenantors expressly reserve all rights of action, claims, and demands against all other persons and entities other than Covenantees in connection with that certain automobile accident which occurred on or about the 27th day of April, 1996.

(Emphasis added.)

The express language of the document itself, emphasized above, indicates that the covenantors reserved the right to file and prosecute a lawsuit against the Barrs. The emphasized language in paragraphs two and three further reflects that the

covenantors reserved the right to seek and obtain a monetary judgment against the Barrs. In exchange for the nine thousand dollars, the covenantors agreed not to seek to enforce, by execution or otherwise, any judgment that may be rendered against the Barrs and in favor of Toby Barnett or his special guardians.

The contract executed on October 23, 1997, is clear and unambiguous on its face. The contract is a covenant not to execute upon a judgment that does not extinguish appellants' claim(s) against the Barrs. See Whittlesea, 86 Nev. at 350, 469 P.2d at 58. In the event that the district court based its order of dismissal, as modified, on the covenant not to execute, we conclude that the district court committed reversible error.

In the district court, the Barrs asserted that appellants' claims against them should be dismissed so as to avoid a waste of monetary resources,[2] and because dismissal was warranted under NRS 17.245. Although these assertions are not addressed on appeal, the district court did not indicate the basis for its order of dismissal. We therefore note that the Barrs' assertions below do not support the district court's orders. First, the Barrs' appeal to equity does not support the orders appealed from. Were such a plea to equity deemed viable by this court, every indigent or judgment-proof defendant in a civil lawsuit could raise it in an NRCP 12(b)(5) motion or an NRCP 56 motion so as to avoid being forced to defend a lawsuit. Similarly, NRS 17.245 does not support the district court's order, as modified. See Evans v.

[2]Specifically, the Barrs asserted that as long as they remain defendants in this lawsuit, "their interest[s] must be defended at trial. This representation would cost a minimum of $1,500.00 each day of trial, plus significant pre[-]trial preparation and expenses. This is unnecessary based on the agreements contained in the Covenant Not to Execute."

Dean Witter Reynolds, Inc., 116 Nev. ___, 5 P.3d 1043 (2000); Medallion Dev. v. Converse Consultants, 113 Nev. 27, 930 P.2d 115 (1997); Russ v. General Motors Corp., 111 Nev. 1431, 906 P.2d 718 (1995); Velsicol Chemical v. Davidson, 107 Nev. 356, 811 P.2d 561 (1991); General Motors Corp. v. Reagle, 102 Nev. 8, 714 P.2d 176 (1986); State v. Eaton, 101 Nev. 705, 710 P.2d 1370 (1985), overruled on other grounds by State, Dep't of Transp. v. Hill, 114 Nev. 810, 963 P.2d 480 (1998), abrogated by Grotts v. Zahner, 115 Nev. 339, 989 P.2d 415 (1999); Van Cleave v. Gamboni Construction, 101 Nev. 524, 706 P.2d 845 (1985); Van Cleave v. Gamboni Constr., 99 Nev. 545, 665 P.2d 250 (1983). NRS 17.245 merely provides, in relevant part, that: (1) a tortfeasor who settles in good faith with a claimant is not liable to a joint-tortfeasor for contribution or equitable indemnity; and (2) a non-settling tortfeasor is entitled to a reduction of any monetary award entered in favor of the claimant and against the non-settling tortfeasor.

We need not reach the issue raised by the parties as to whether NRS 41.141 will apply to this case. On appeal, the litigants have raised concerns as to: (1) whether NRS 41.141(3) precludes evidence of the Barrs' negligence from being admitted into evidence; and (2) whether the Silver State defendants will end up severally liable pursuant to NRS 41.141(4) or jointly and severally liable pursuant to NRS 41.141(5)-(6). The applicability of NRS 41.141 to this case is wholly contingent upon whether Toby Barnett, a passenger in the Nissan pickup, committed an act or omission which constitutes comparative negligence. Hence, the applicability of NRS 41.141 is not presently ripe for adjudication by either this court or the district court. See Texas v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at

all.'") (citations omitted). In the event that the comparative negligence claim is abandoned by the Silver State defendants,[3] succumbs to a motion for summary judgment filed by appellants, or the finder of fact determines there was no negligence on the part of Toby Barnett, then the issue as to the applicability of NRS 41.141 becomes moot.

In light of the foregoing discussion, we reverse the order of dismissal dated July 7, 1999, as modified by the order dated October 11, 1999, and remand this case for further proceedings consistent with this order.

It is so ORDERED.[4]

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
Curran & Parry
Cohen, Johnson, Day, Jones & Royal
Pyatt & Silvestri
Clark County Clerk

[3]The phrase "Silver State defendants" refers to Rouvaun Weaver, individually and as an employee of Silver State Disposal Service, Inc.; SSDS Liquidating Corporation d/b/a Silver State Disposal Service, Inc.; Republic Industries, Inc.; and Republic Silver State Disposal Service, Inc.

[4]We deny as moot the motion to expedite filed by appellants on October 30, 2000.