IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTINE ROSENTHAL, N/K/A CHRISTINE SCARPELLO,
Appellant/Cross-Respondent,
vs.
ROBERT ROSENTHAL,
Respondent/Cross-Appellant.

No. 68407

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a final district court order interpreting a provision in the parties' unmerged marital settlement agreement (MSA). Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

The issues in this appeal arise out of the district court's interpretation of a provision in the parties' unmerged MSA where the father agreed to pay for his daughters' "college education." We address three issues in this appeal. First, we address appellant Christine Scarpello's contention that the district court erred by interpreting the provision.[1] Second, we analyze respondent Robert Rosenthal's argument

[1]While the parties label the district court's action as a modification, their unmerged MSA was not subject to modification. *See* NRS 125.150(7) (providing that a district court may modify a property settlement agreement upon written stipulation of the parties); *cf. Gilbert v. Warren*, 95 Nev. 296, 300, 594, P.2d 696, 698 (1979) (finding no error where district

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that the provision is unenforceable. Finally, we address Robert's contention that the district court abused its discretion by refusing to award him attorney fees as the prevailing party.[2] We recount the facts only as necessary to our disposition.

The district court erred in interpreting the provision

Christine claims the district court erred by interpreting the provision because the provision was clear and unambiguous, but even if ambiguous, the district court erred because it did not interpret the provision in accordance with the parties' intent at the time of the agreement. Christine also argues the district court abused its discretion because it did not provide findings of fact and conclusions of law to support its decision.

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court dismissed appellant's claim to modify the parties' property settlement agreement because the "agreement was not merged into the divorce decree and, therefore, was not subject to modification by the district court in the absence of a stipulation by the parties"). Therefore, the question we address is whether the district court erred in interpreting the MSA.

[2]Because the district court did not rule on Christine's motion for contempt, which she made with her motion to enforce, we express no opinion as to the enforceability of the provision in the decree through the district court's contempt powers.

Whether a contract is ambiguous is a question of law, which we review de novo.[3] *Galardi v. Naples Polaris, LLC*, 129 Nev. ___, ___, 301 P.3d 364, 366 (2013). "A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Id.* (internal citation omitted). "Rather, an ambiguous contract is an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Id.* (internal quotation marks omitted). Thus, "[t]his court initially determines whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. ___, ___, 359 P.3d 105, 106 (2015) (internal quotation marks omitted). "[I]f no ambiguity exists, the words of the contract must be taken in their usual and ordinary signification." *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 174, 87 P.3d 1054, 1059 (2004) (internal quotation marks omitted).

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[3]The parties' MSA is subject to principles of contract construction and interpretation because both the MSA and the decree provided that the MSA would not merge with the decree and each contained a survival provision directing the MSA to survive the decree as a separate and independent contract. *Compare Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980) (treating the parties' action as a breach of contract action where the parties' property settlement agreement did not merge into the decree), *with Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964) ("A merger destroys the independent existence of the agreement and the rights of the parties thereafter rest solely upon the decree.").

Here, the provision provides:

> [Robert] shall pay the cost of the children's college education through each child's attainment of a Bachelor's Degree, so long as each child is attending an accredited college or university, pursuing a curriculum leading to a specific degree, making sufficient progress each semester in order to obtain the degree, unless otherwise agreed by both [Christine] and [Robert].

The district court found the provision "fail[ed] for lack of specificity" and applied a "reasonableness test" to determine and ultimately limit Robert's obligation to the equivalent of in-state tuition at UNLV, textbooks, and mandatory student fees. The lack of specificity in the provision, however, does not render the provision ambiguous. *See Love v. Love*, 114 Nev. 572, 581, 959 P.2d 523, 529 (1998) (concluding that "educational expenses" was not ambiguous and clearly included tuition at a private school, as the provision did not expressly exclude private school tuition); *Forstner v Forstner*, 58 N.E.2d 285, 289 (Ohio Ct. App. 1990) (concluding the phrase "college education" was not ambiguous and directing the district court to interpret the phrase in the broadest sense because the father did not place any limitation on the phrase); *Douglas v. Hammett*, 507 S.E.2d 98, 102 (Va. Ct. App. 1998) (concluding "expenses for college education" was not ambiguous and affirming the district court's order that required father to reimburse the mother for "any expenses that are reasonably related to a college education"); *Reynolds v. Diamond*, 605 So. 2d 525, 527 (Fla. Dist. Ct. App. 1992) (concluding that "college education" included tuition, books, supplies, fees, and room and board because the husband did not limit his contribution).

As a result, the district court should have interpreted the words "in their usual and ordinary signification." *See Traffic Control Servs., Inc.*, 120 Nev. at 174, 87 P.3d at 1059. Therefore, we conclude the district court erred in concluding the provision failed for lack of specificity.[4]

The district court did not err in finding the college provision enforceable

On cross-appeal, Robert argues that the district court erred by granting Christine's motion for reconsideration and to amend judgment because the college education provision is unenforceable for seven reasons. We consider only his argument that the provision is unenforceable because there was no consideration for his promise to care for the children after they reached 18 years of age.[5]

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[4]Even if the provision was ambiguous, the district court abused its discretion because it did not apply the proper procedure to interpret the provision. Instead of looking to the parties' intent, the district court applied a reasonableness test and rewrote the parties' agreement. *See Soro*, 131 Nev. at ___, 359 P.3d at 106 ("The objective of interpreting contracts is to discern the intent of the contracting parties."); *Harrison v. Harrison*, 132 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 56, July 28, 2016, at 9) (providing that courts do not rewrite parties' contracts because doing so risks trampling the parties' intent).

[5]We decline to consider Robert's first argument because he failed to cite to any relevant authority to support that his daughter's alienation of him is a valid basis for finding the contract provision unenforceable. Instead, Robert relies on other jurisdictional authority to argue that this court should release him from his obligation to pay for his daughter's college education. We find each of the cited cases unpersuasive as those jurisdictions recognize a parental obligation for post-majority education support and this case involves a contractual, not legal, obligation of

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"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). While this court reviews contract interpretation de novo, "the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence." *Id.* at 672-73, 119 P.3d at 1257. Substantial evidence is "evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

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support. Further, we decline to consider Robert's remaining claims because he fails to identify any authority to support that his reasons are recognized bases for finding a contract provision unenforceable. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider claims not cogently argued or supported with relevant authority). Specifically, he argues that the provision is unenforceable because (1) the parties did not intend for Robert to pay for college expenses at any school his daughters chose; (2) he did not have counsel at the time of divorce; (3) he had already paid more than customary in a divorce proceeding; and (4) Christine's financial position is not keeping with the original intent of the parties. Finally, we decline to consider Robert's claim of unenforceability based on the doctrine of frustration of purpose because he failed to raise it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

NRS 123.080(2) provides that "[t]he mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in subsection 1." NRS 123.080(1) permits agreements between a husband and wife regarding property and the support of either of them or their children during a separation. In its order, the district court found "that under the rules of contract the college provision fails for . . . lack of consideration; however, the provision is enforceable under NRS 123.080."

The record contains substantial evidence of the parties' mutual consent to satisfy the requirement of consideration under NRS 123.080. Both parties signed the MSA and abided by its terms without issue for approximately ten years. Further, both parties requested the district court to ratify, approve, and confirm the MSA in their complaint and answer for divorce. Thus, in the absence of a claim of fraud or mistake which would undermine the meeting of the minds element of contract formation, there is sufficient evidence of mutual consent to support a finding of consideration under NRS 123.080(2). Accordingly, we conclude the district court did not abuse its discretion in finding the provision enforceable. *See Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969) (affirming district court's decision that wife's promise to pay her husband alimony in their property settlement agreement was supported by adequate consideration under NRS 123.080).

The district court erred by not awarding fees in accordance with the MSA and by not making express findings in denying Robert's request for attorney fees

Robert argues that the district court abused its discretion in refusing to award him attorney fees and costs as the prevailing party

pursuant to section 26.1 of the MSA, and moreover, because it failed to provide any findings or explanation for its refusal. This court reviews a district court's award of attorney fees for an abuse of discretion. *Kantor v. Kantor*, 116 Nev. 886, 896, 8 P.3d 825, 931 (2000). A district court may award attorney fees as provided for in an agreement between the parties. NRS 18.010(1).

Here, Robert and Christine agreed to a provision in the MSA entitling the prevailing party to recover attorney fees in any action to enforce the terms of the MSA. Specifically, section 26.1 provided:

> Should litigation arise concerning the terms and conditions of this Agreement, or the breach of same by any party hereto, the prevailing party shall be entitled to attorney's fees and costs in an amount deemed reasonable by the court.

Because the parties had an agreement concerning attorney fees, the district court abused its discretion in failing to award fees in accordance with the MSA. *See Kantor v. Kantor*, 116 Nev. 886, 895, 8 P.3d 825, 830-31; *cf. Davis v. Beling*, 128 Nev. 301, 306, 278 P.3d 501, 515-16 (2012) (providing that prevailing party was entitled to recover reasonable attorney fees in defending against a breach of contract claim where the parties' agreement entitled prevailing party to fees). Moreover, we conclude the district court further abused its discretion because it did not provide any reason or explanation for its decision to deny an award of fees. *See Jones v. Jones*, 86 Nev. 879, 885, 478 P.2d 148, 152 (1970) (concluding the district court abused its discretion because it denied the mother an award of attorney fees but "gave no reason or explanation for the denial" and thus prevented the court from undertaking a reasonable review),

overruled on other ground by Mays v. Todaro, 97 Nev. 195, 198, 626 P.2d 260, 262 (1981); *Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 651, 503 P.2d 1219, 1222 (1972) (same). 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.[6]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. William S. Potter, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Pecos Law Group
Howard & Howard Attorneys PLLC
Eighth District Court Clerk

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[6]We further deny Christine's request for sanctions for Robert's alleged violations of NRAP 28 and 30; however, we caution counsel that future failure to comply with the Nevada Rules of Appellate Procedure when filing briefs or other documents with this court may result in the imposition of sanctions.