IN THE SUPREME COURT OF THE STATE OF NEVADA

WORLDNET MANAGEMENT, LLC, A COLORADO LIMITED LIABILITY COMPANY; TEXAS CRIPPLE CREEK, LLC, A COLORADO LIMITED LIABILITY COMPANY; AND TELESERVICE SYSTEMS INTERNATIONAL, INC.,
Appellants,
vs.
WILLIAM P. KNIGHT; AND LEANN ERSKINE,
Respondents.

No. 37409

ORDER OF AFFIRMANCE

This an appeal from a final judgment in a breach of contract action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

FACTS

In 1996, Worldnet attempted to start an Internet gaming operation in Antigua, West Indies. Worldnet sought respondents William P. Knight and Leann Erskine to relocate from Lake Tahoe to Antigua for at least two years to operate the business. Upon return from a Worldnet-sponsored trip to Antigua, Knight and Erskine agreed to work for Worldnet and resigned from their positions at a Lake Tahoe casino. Knight and Erskine signed an employment contract drafted by Worldnet after extensive negotiations. In reliance on that contract, Knight and Erskine leased their homes, sold their cars, and went to Las Vegas to await departure. While in Las Vegas, Knight attempted to help Worldnet complete its website software because it was behind schedule. When Knight explained the actual workings of a sports book, Worldnet realized that its software was wrong and would need to be rewritten. Knight's and

Erskine's departure date for Antigua continued to be delayed. In addition, Worldnet failed to pay Knight's $15,000 cash advance and Erskine's salary. In November 1996, Knight and Erskine learned that there was insufficient capital funding for Worldnet and the Internet gaming project would not proceed. Knight and Erskine returned to Lake Tahoe to search for work.

Knight and Erskine subsequently filed a complaint, alleging breach of employment agreement, fraud, breach of fiduciary duty, creditor's enforcement of operating agreement, and fraudulent transfer. They also requested attorney fees. Knight and Erskine submitted the claim for breach of employment agreement to arbitration pursuant to the employment contract.

Appellants Texas Cripple Creek (TCC) and Teleservice Systems International (TSI), along with World Gaming Link, Ltd. (WGL), were the sole members of Worldnet, LLC. A. Wayne Olson was the chief executive officer of Worldnet, president of TSI, manager of TCC, and owned a twenty-five percent interest in TCC. TSI owned a twenty-five percent interest in TCC and was the managing member of Worldnet. Olson negotiated employment contracts with Knight and Erskine on behalf of Worldnet.

The members dissolved Worldnet immediately prior to the arbitration hearing. TCC was formed in Colorado, as was Worldnet. TSI and WGL are incorporated in Nevada. After Worldnet dissolved, Knight and Erskine sought relief against TCC and TSI.

Under the arbitration award, Knight received $93,681.91 in compensatory damages, plus $26.78 in post-judgment interest per day until the award was paid. Erskine received $41,443.36 in compensatory damages, plus $11.76 per day in post-judgment interest until the award

was paid. The district court confirmed the arbitration award and allowed Knight and Erskine to proceed with their remaining claims.

In April 1999, the district court found that the dissolution of Worldnet constituted a fraudulent transfer of assets under NRS Chapter 112 because the members dissolved Worldnet and transferred its assets in an attempt to avoid liability to Knight and Erskine. The district court voided the dissolution to the extent necessary to satisfy Knight and Erskine's claims and enjoined Worldnet and TCC from disposing of assets until the claims were paid.

In November 2000, the district court held that (1) TSI, TCC and Worldnet were jointly and severally liable for breach of employment contract as a matter of law; (2) a genuine issue of material fact existed regarding the existence of knowing misrepresentation sufficient to prove fraud; (3) TSI, TCC, and Worldnet breached their fiduciary duty to Knight and Erskine as creditors as a matter of law (whether Olson should be held personally liable and the amount of punitive damages to be assessed against TSI and TCC were material issues of fact to be decided at trial); (4) Knight and Erskine were entitled to joint and several judgments against TCC and TSI to satisfy their judgments against Worldnet; and (5) TCC and TSI were enjoined from the transfer, disposition or alteration of assets until payment of Knight's and Erskine's judgments. The court further found that Worldnet, TCC, and TSI failed to plead, and thus waived, the affirmative defense of illegality of contract.

On November 14, 2000, the district court conducted a bench trial to resolve the outstanding issues of fraud and breach of fiduciary duty. In December 2000, the district court found that Knight and Erskine had failed to prove by clear and convincing evidence that the defendants had knowledge of the misrepresentation and there was insufficient

evidence to find Olson personally liable for breach of fiduciary duty. The court awarded Knight $93,681.91 and Erskine $41,443.36 in punitive damages for breach of fiduciary duty. TCC and TSI were held to be jointly and severally liable and the awards could be enforced based on the relief of fraudulent transfer claim.

On appeal, TCC and TSI argue that the district court erred when it (1) applied Nevada law; (2) granted summary judgment on the fraudulent transfer claim; (3) applied NRS 78.615 and NRS 86.391; (4) granted summary judgment on the breach of fiduciary duty claim; (5) enjoined TSI from transferring or disposing of its assets; (6) precluded an illegality of contract defense; and (7) awarded punitive damages without a hearing.

DISCUSSION

Nevada law governs claims arising under the employment contract

TCC and TSI argue that the district court should have applied Colorado law to the employment contract because Worldnet was incorporated in Colorado. We disagree.

We have adopted the substantial relationship test to determine conflict of law questions in contracts cases.[1] In Sotirakis v. U.S.A.A., we delineated five factors to consider when determining whether a state's law is substantially related to the contract in issue: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of

[1]Sotirakis v. U.S.A.A., 106 Nev. 123, 124-26, 787 P.2d 788, 789-90 (1990).

business of the parties."[2] This test revolves around the parties' expectation at the time of contracting.[3]

Under this test, Nevada, not Colorado, has the most significant relationship to the employment contract at issue in this case. First, Nevada was the place of both negotiation and contracting. Worldnet enticed Knight and Erskine away from their Lake Tahoe, Nevada, employment to work on its Internet gaming venture, and the employment contract was negotiated and signed in Las Vegas.[4] The place of domicile or formation demonstrates that both Colorado and Nevada have some interest in applying their law to this case. Both Knight and Erskine were and are Nevada domicillaries. Worldnet, on the other hand, was formed in Colorado.

On balance, we conclude that Nevada has the most significant relationship to the employment contract; thus, Nevada law governs the claims arising thereunder. The contract was negotiated and signed in Nevada and the respondents were both domiciled in Nevada at all relevant periods. Furthermore, though Worldnet was formed in Colorado, it did business in Nevada by recruiting Nevadans for employment and signing an employment contract here. By voluntarily negotiating and signing a contract in Nevada, Worldnet triggered Nevada's interest in governing the performance of that contract.

Colorado law is in accord. In Ficor Inc. v. McHugh, the Supreme Court of Colorado held that Colorado law governed the rights

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[2]Id. at 126, 787 P.2d at 790.

[3]Id.

[4]The place of performance was Antigua, West Indies, which supports the application of neither Colorado nor Nevada law.

and obligations between Colorado creditors and fiduciaries of a corporation incorporated in another state.[5] The court relied in part on the Restatement (Second) of Conflict of Laws § 309, which states:

> The local law of the state of incorporation will be applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship . . . to the parties and the transaction, in which event the local law of the other state will be applied.

The significance of a relationship is determined by the policies of the forum state, needs of the interstate systems, policies of other interested states and their interests in deciding the issue, protection of justified expectations, ease in determining and applying the law, policies underlying the area of law, and uniformity, predictability, and certainty of result.[6]

Worldnet's employment contract selected Nevada law to govern disputes arising under the contract. Olson worked in Las Vegas. Knight and Erskine were recruited from Lake Tahoe and relocated to Las Vegas to await their transfer to Antigua, and they both worked for Worldnet while in Las Vegas. Other than being formed in Colorado, Worldnet conducted all its activities in Nevada. Furthermore, Nevada law governing the most pertinent issues in this case is so similar to Colorado law that applying Colorado law would result in the same outcome as

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[5]639 P.2d 385, 391 (Colo. 1982) (holding that Colorado had a more substantial relationship because Ficor Inc. was incorporated solely for the purpose of acquiring and developing Colorado real estate).

[6]Id. at 391 n. 10.

applying Nevada law. Accordingly, we conclude that Nevada law governs the contract and that a Colorado court would agree with this result.

NRS Chapter 112 – fraudulent transfer

TCC and TSI argue that the district court erred in finding that a fraudulent transfer occurred pursuant to NRS Chapter 112 because Colorado does not have a parallel fraudulent transfer statute and Worldnet did not transfer assets. We disagree.[7]

NRS 112.190(1) provides that a debtor's transfer is fraudulent if the creditor's claim arose before the transfer and the debtor was insolvent at the time of the transfer, failed to receive sufficient consideration for the transfer, or the transfer left the debtor insolvent.

Section 38-10-117(1) of the Colorado Revised Statutes (CRS) invalidates any transfer of a debtor made with the intent to delay, defraud, or hinder creditors. In Harvey v. Harvey, the Colorado Court of Appeals upheld the trial court's finding of a fraudulent transfer under this statute where the transfer was made just prior to judgment on the creditor's claim and the transfer rendered the debtor insolvent.[8]

We conclude that Nevada law and Colorado law are nearly identical regarding fraudulent transfers and that Nevada law governs claims arising under the employment contract. Thus, we further conclude that the district court did not err in applying NRS Chapter 112 in this case.

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[7]We note that the pertinent statutes in Nevada and Colorado are substantially the same. Knight and Erskine were entitled to relief under either state's law.

[8]841 P.2d 375, 377-78 (Colo. Ct. App. 1992).

TCC and TSI next argue that Knight and Erskine are not entitled to relief under NRS Chapter 112. They contend that Worldnet never had any real assets and that Knight and Erskine failed to prove which assets were fraudulently transferred. We find this argument unpersuasive.

The district court decided this issue as a matter of law without a hearing. Accordingly, we review this issue as though the district court granted summary judgment. We review summary judgment orders de novo.[9] Summary judgment is appropriate if, based on the pleadings and discovery on file, no genuine issue of material fact exists for trial and the moving party is entitled to judgment as a matter of law.[10] The moving party bears the burden to prove that no genuine issues of material fact exist.[11] In considering a motion for summary judgment, "[a]ll of the non-movant's statements must be accepted as true, and a district court may not pass on the credibility of affidavits."[12] Nevertheless, the non-moving party may not rely on conclusory statements or pleading allegations alone to avoid summary judgment.[13]

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[9]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

[10]NRCP 56(c).

[11]Pacific Pools Constr. v. McClain's Concrete, 101 Nev. 557, 559, 706 P.2d 849, 851 (1985).

[12]Jones v. First Mortgage Co. of Nevada, 112 Nev. 531, 534, 915 P.2d 883, 885 (1996).

[13]Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1095 (1995).

On April 26, 1999, the district court granted Knight and Erskine's motion for relief from fraudulent transfer. The court found a fraudulent transfer as a matter of law because Worldnet dissolved and transferred its assets to its members without making a provision to pay judgments in favor of Knight and Erskine.

In 1987, the Nevada Legislature adopted the Uniform Fraudulent Transfer Act (UFTA) and codified it in NRS Chapter 112.[14] Nevada adopted the UFTA "to further the substantive social policy of assuring that the efforts of judgment creditors and others to satisfy their claims will not be defeated by fraudulent transfers."[15] NRS 112.190(1) states:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.[16]

A creditor bears the burden to prove that the debtor was insolvent at the time of transfer or that the debtor received inadequate

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[14]See NRS 112.140-250.

[15]Casentini v. District Court, 110 Nev. 721, 728, 877 P.2d 535, 540 (1994).

[16]The legislature defined transfer broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." NRS 112.150(12).

consideration.[17] "However, where the creditor establishes the existence of certain indicia or badges of fraud, the burden shifts to the defendant to come forward with rebuttal evidence that a transfer was not made to defraud the creditor."[18] Widely accepted indicia of fraud include a threat of, or existing, litigation; hurried or secret transaction; relationship between transferee and transferor; and transfer of all the debtor's assets.[19] Where such indicia are proved, the debtor must either prove solvency at the time of the transfer and that the transfer did not render him insolvent or show that the transfer was supported by fair consideration.[20]

Knight and Erskine satisfied their burden by proving indicia of fraud surrounding Worldnet's dissolution. While Knight and Erskine sought relief through arbitration, as required by their employment contract, the members of Worldnet surreptitiously dissolved Worldnet and transferred whatever assets it had back to the members. Although Worldnet was required to provide notice to its creditors prior to dissolution, neither Knight nor Erskine received such notice. Worldnet's members also erroneously signed a dissolution document stating that no lawsuits were pending against Worldnet at the time of dissolution. Furthermore, there was a significant inter-connection between Worldnet and its members. Olson exerted control over, and owned substantial amounts of, stock in Worldnet, TCC, and TSI.

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[17]Sportsco Enter. v. Morris, 112 Nev. 625, 632, 917 P.2d 934, 938 (1996).

[18]Id.

[19]Id.

[20]Id.

Based on this evidence, the burden shifted to the members of Worldnet to provide rebuttal evidence that Worldnet was not dissolved for the purpose of avoiding payment of a potential judgment.[21] Substantial evidence supports the district court's determination that the members of Worldnet failed to rebut the presumption of fraudulent transfer. Contrary to appellants' arguments, Knight and Erskine need not prove which specific assets were transferred pursuant to Worldnet's dissolution.

Furthermore, appellants' actions demonstrate a substantial disregard for Knight's and Erskine's legal rights to be fully compensated. During arbitration, the arbitrator found that Worldnet had not secured sufficient financing to fund its operations at the time it entered into the employment contracts. The arbitrator further found that Worldnet apparently believed that it could rescind the employment contracts due to lack of funding without being held accountable. The arbitrator concluded that Worldnet's failure to perform the employment contracts was without legal excuse or justification. Finally, Olson testified below that he had no intention of keeping Worldnet operational, and continuing to lose money, just so Knight and Erskine could recover on their claims.

Knight and Erskine met their burden of proof to show indicia of fraud. The burden of proof then shifted to TCC and TSI to disprove a fraudulent transfer. The district court found that TCC and TSI failed to meet their burden. Accordingly, the district court did not abuse its discretion by finding a fraudulent transfer as a matter of law.

NRS 86.391 – creditor enforcement of operating agreement

TCC and TSI argue that NRS Chapter 86, which governs limited liability companies, applies only to foreign corporations registered

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[21]Id.

in Nevada. Appellants note that Worldnet was not registered in Nevada; thus they argue that the statute does not apply. We disagree.

Although Worldnet conducted business in this state, it failed to comply with statutory registration requirements by foreign limited liability companies.[22] However, "failure of a foreign [LLC] to register in this state does not impair the validity of any contract or act" of the foreign LLC.[23] We conclude that the members of Worldnet may not escape liability for wrongs committed against Nevadans merely because Worldnet failed to register in Nevada.

NRS 86.391 states:

> 1. A member is liable to a limited-liability company:
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> (a) For a difference between his contributions to capital as actually made and as stated in the . . . operating agreement as having been made; and
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> (b) For any unpaid contribution to capital which he agreed in the . . . operating agreement to make in the future at the time and on the conditions stated in the . . . operating agreement.
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> . . . .
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> 3. [A] waiver or compromise [of a member's liability] does not affect the right of a creditor of the company to enforce the liabilities if he extended credit or his claim arose before the effective date of an amendment of the . . . operating agreement effecting the waiver or compromise.

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[22]See NRS 86.544.

[23]NRS 86.548(2).

In Worldnet's operating agreement, TCC pledged $1,413,969.24 in assets and TSI pledged $416,284.34 in assets and $100,000 in management services. However, TCC and TSI never actually transferred those assets to Worldnet. Worldnet's actual assets were "minimal" and consisted primarily of promised funds and pledges.

We conclude that NRS 86.391 is applicable and the district court did not err in concluding, as a matter of law, that members of Worldnet are liable for the amount necessary to pay the judgments awarded to Knight and Erskine. Accordingly, we conclude that TCC and TSI are jointly and severally liable for the judgments; however, their liability extends only to the extent of the assets pledged to Worldnet.

Colorado law governs whether Knight and Erskine's claims survived Worldnet's dissolution

TCC and TSI argue the district court erred in concluding that NRS 78.615 governed Worldnet's dissolution. Specifically, they argue that the statute does not apply to Worldnet because Worldnet is a Colorado LLC. We agree.

The Second Restatement of Conflicts states that the local law of the state of incorporation governs the appropriate methods for effecting a corporation's dissolution.[24] The Supreme Court of Colorado has adopted this reasoning.[25] We also find this reasoning persuasive and conclude that Colorado law governs this issue.

Colorado has long followed the common law view that voluntary dissolution of a corporation does not destroy the creditor's

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[24]Restatement (Second) of Conflict of Laws § 299 and comment (g).

[25]Ficor, Inc. v. McHugh, 639 P.2d 385, 391 (Colo. 1982).

ability to recover on debts outstanding at the time of dissolution.[26] This view has since been codified in the CRS. CRS 7-80-804(4) states that a creditor's claim survives the debtor LLC's dissolution if no notice of the dissolution was given to the creditor. Under CRS 7-80-806, the creditor may enforce any such surviving claim against either the dissolved LLC or a former member of the dissolved LLC. The member is only liable, however, for the value of assets distributed to him upon dissolution and he may seek contribution from his fellow members for any amount paid to the creditor.[27]

Rather than following Colorado law, the district court applied NRS 78.615 and held respondents' judgments survived Worldnet's dissolution and that appellants were liable to satisfy those judgments. NRS 78.615, like CRS 7-80-804, states that a creditor's claim survives dissolution if no notice of dissolution was given.

Initially, we note that the district court's application of Nevada law to this issue was error. However, we note further that Nevada law and Colorado law regarding the survival of creditors' claims are nearly identical. Accordingly, though the district court applied the wrong law, it came to the right result.[28] We thus conclude that any error in applying Nevada law was harmless.

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[26]Dick v. Petersen, 6 P.2d 923, 925 (Colo. 1931); Dutton Hotel Co. v. Fitzpatrick, 193 P. 549, 550 (Colo. 1920); Lucifer Coal Co. v. Buster, 171 P. 61, 61 (Colo. 1918).

[27]CRS 7-80-806(1)(b).

[28]"If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons." Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981).

The district court did not err in granting summary judgment for respondents on their breach of fiduciary duty claim

TCC and TSI argue that the district court erred in granting summary judgment for breach of the fiduciary duty to Knight and Erskine because material issues of fact remain which should have been decided at trial. In particular, TCC and TSI urge that the following issues of material fact remain: whether assets were available to pay creditors, whether Worldnet transferred assets prior to dissolution, whether Knight and Erskine should have received protection as creditors, and if so, the amount of assets that should have been set aside for Knight and Erskine. We disagree.

As stated above, summary judgment is appropriate where no genuine issue of material fact exists for trial and the moving party is entitled to judgment as a matter of law.[29] We review summary judgment orders de novo.[30]

A "'fiduciary relationship' exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence."[31] As a general rule, debtors owe no fiduciary duty to their creditors. However, we have previously recognized that a fiduciary duty arises in certain "special relationships."[32] In particular, we

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[29]NRCP 56(c).

[30]Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

[31]Long v. Towne, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982).

[32]K Mart Corp. v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1370-71 (1987).

have extended tort liability for breach of the fiduciary duty where contract damages are inadequate to compensate relying plaintiffs for the "grievous and perfidious misconduct" of defendants.[33] We believe that a "special relationship" existed in this case. Accordingly, in this particular circumstance, it is appropriate to extend tort liability to compensate for TCC and TSI's "grievous and perfidious misconduct" in attempting to circumvent their responsibilities to Knight and Erskine.

The United States Bankruptcy Court for the District of Nevada has recognized that officers and directors owe a fiduciary duty to creditors when the corporation is insolvent.[34] In this case, the ownership, control, and direction of Worldnet was shared by TCC and TSI. The district court held that TCC and TSI owed Knight and Erskine a fiduciary duty as creditors, which they breached.[35] The district court took judicial notice that Worldnet dissolved while litigation was pending and Worldnet made no provision to pay the judgment awards. Additionally, the dissolution of Worldnet without providing for debts owed to Knight and Erskine was in disregard of Worldnet's operating agreement. Section 24.3 of the Operating Agreement provides for the distribution of assets upon dissolution. The agreement states that assets are to be distributed to creditors first. Members of the corporation were to receive satisfaction only after the creditors had been paid.

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[33]Id.

[34]In re Western World Funding, Inc., 52 B.R. 743, 762-63 (Bankr. D. Nev. 1985).

[35]"Any alleged breach of such a duty is a question for the trier of fact after examination of all the evidence." Leavitt v. Leisure Sports, Inc., 103 Nev. 81, 86, 734 P.2d 1221, 1224 (1987).

TCC's and TSI's arguments contradict the evidence presented to the district court. In his testimony below, Olson conceded that Worldnet distributed any assets it may have had at dissolution to the member companies. Olson also testified that Worldnet was a "shell company" with minimal assets because it never collected the assets pledged by its members. Furthermore, TCC and TSI knew that Knight and Erskine were seeking compensatory damages through arbitration. TCC and TSI moved forward with the dissolution despite their knowledge of the outstanding judgments. We conclude that no issues of fact remain regarding the breach of fiduciary duty claim. Therefore, summary judgment was proper.

The district court did not err in enjoining TSI from transferring or disposing of assets

On April 26, 1999, the district court enjoined TCC from transferring or disposing of its assets until Knight and Erskine received payment. On November 11, 2000, the district court placed the same restrictions on TSI. TSI argues that the district court arbitrarily imposed this restriction without justification. We disagree.

We note initially that TSI cites to neither case law nor statute to support its argument. Instead, TSI simply argues the district court was not justified in restricting its ability to transfer or dispose of assets.

The district court may enjoin a corporation from transferring assets, and thus avoid the creditor's judgment, where the defendant corporation shares unity of ownership and control with the debtor corporation.[36] TCC, TSI, and Worldnet were interrelated and all operated

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[36]McCleary Cattle Co. v. Sewell, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957).

under Olson's control. TSI served as the managing member of Worldnet and pledged $416,284.34 in assets for Worldnet's operation. Olson simultaneously served as president of TSI, manager of TCC, and chief executive officer of Worldnet. Olson also owned twenty-five percent of the stock in TCC. TCC itself owned twenty-five percent of the stock in TSI. If not enjoined, TSI could have diverted its assets to avoid paying judgments awarded to Knight and Erskine.

To avoid this inequitable result, the district court enjoined TSI from dispensing of its assets before Knight and Erskine received compensation for their judgment awards. We conclude that the district court did not err.

The district court did not err in precluding TSI from raising the affirmative defense of illegality of the contract

TCC and TSI contend that they should have been able to raise the defense of illegality of contract, although they did not plead it as an affirmative defense. We disagree.

In Elliott v. Resnick, we held that "[i]f affirmative defenses are not pleaded or tried by consent, they are waived."[37] Nevertheless, "'an affirmative defense can be considered (even if not pleaded) if fairness so dictates and prejudice will not follow.'"[38]

On September 21, 2000, Knight and Erskine moved the district court for summary judgment. On October 13, 2000, TCC and TSI opposed the motion and presented an illegality of contract defense. Relying on Elliott, the district court held that TCC and TSI had waived

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[37]114 Nev. 25, 30, 952 P.2d 961, 964 (1998).

[38]Id. (quoting Ivory Ranch v. Quinn River Ranch, 101 Nev. 471, 473, 705 P.2d 673, 675 (1985)).

that defense by failing to raise it in their answer. The district court further held that TCC and TSI could not claim the employment contracts were illegal because the arbitrator had found that Worldnet's non-performance was without legal excuse or justification. TCC and TSI filed a motion for reconsideration of this issue. The district court denied the motion during a bench trial.

On appeal, TCC and TSI argue that the district court should have taken testimony before it precluded the defense. They claim that paying an award for an allegedly illegal act may have negative implications in future applications for gaming or other privileged licenses. We disagree.

TCC and TSI failed to raise the affirmative defense in their pleadings. TCC and TSI further failed to demonstrate below that assertion of the defense was dictated by fundamental fairness and would not prejudice Knight and Erskine. Accordingly, the defense was waived and could not be considered by the district court.

The district court did not err in awarding punitive damages

TCC and TSI contest the award of punitive damages because the district court did not include specific findings regarding the amount of punitive damages awarded. We conclude that the district court did not err because the hearing was satisfactory, substantial evidence supports the award, and the award was not grossly excessive.

The punitive damages hearing satisfied statutory requirements

TCC and TSI argue that the punitive damages awards are improper because the district court did not conduct a sufficient hearing to decide the amount of the awards. We disagree.

NRS 42.005(3) provides that in assessing punitive damages, the trier of fact must determine the amount of punitive damages to be

assessed in a "subsequent proceeding." In this case, the district court considered the punitive damages award in a separate hearing immediately following the bench trial. The district court based the awards on evidence presented during the bench trial.

We conclude that this procedure was sufficient to satisfy NRS 42.005's requirements. Accordingly, the district court did not err.

Substantial evidence supports the punitive damages award

We will not disturb a punitive damages award unless "the record lacks substantial evidence to support the required finding of 'oppression, fraud or malice, express or implied.'"[39]

As noted above, Knight and Erskine demonstrated indicia of fraud surrounding the transfer of assets from Worldnet to TCC and TSI. The district court found that TCC and TSI failed to rebut that evidence. Based on the record below, we conclude that substantial evidence supports the district court's order.

The punitive damages were not grossly excessive

"The amount of punitive damages appropriate to the stated purpose of punishment and deterrence lies in the discretion of the fact-finder."[40] In Ace Truck v. Kahn, we set forth the following test to determine whether punitive damages are excessive:

> Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the

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[39]First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (quoting Village Development Co. v. Filice, 90 Nev. 305, 315, 526 P.2d 83, 89 (1974)).

[40]Ace Truck v. Kahn, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987).

> tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.[41]

Relevant factors include, but are not limited to, "the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice . . . and the means which are judged necessary to deter future misconduct."[42]

The district court awarded Knight and Erskine $93,681.91 and $41,443.36 in punitive damages, respectively. These awards are not clearly disproportionate to the blameworthiness of TCC and TSI; the members of Worldnet are culpable for refusing to compensate former employees for wages and benefits they were legally entitled to receive, and the awards are sufficient to deter TCC and TSI from engaging in future conduct of this nature.

TCC and TSI argue that the district court made no finding and considered no evidence of their respective financial positions at the time of trial. TCC and TSI further argue that the district court failed to consider the financial burden posed by the punitive damages awards. However, TCC and TSI failed to provide a trial transcript for appellate review. Without a trial transcript, it is impossible to determine whether evidence was presented regarding the current financial conditions of TCC

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[41]103 Nev. at 509, 746 P.2d at 136-37.

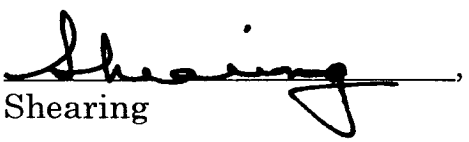
[42]Id. at 510, 746 P.2d at 137.

or TSI.[43] Accordingly, we conclude that the punitive damages were not excessive based on the record before this court.

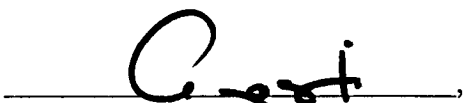
CONCLUSION

The district court did not err in applying Nevada law to claims arising under the employment contract. The district court did err in applying Nevada law to determine whether respondents' claims survived Worldnet's dissolution. That error was harmless, however, because Nevada law and Colorado law are nearly identical on that issue. Furthermore, the district court did not err in granting summary judgment on the breach of fiduciary duty claim, enjoining TCC and TSI from transferring assets until respondents' judgments are paid, precluding the illegality of the contract defense, or awarding punitive damages. Accordingly, we

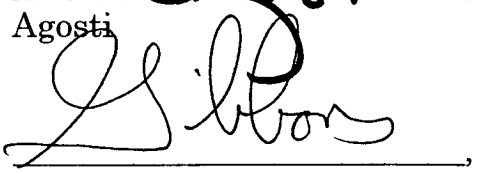
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Shearing



_____, J.
Agosti



_____, J.
Gibbons

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[43]See, e.g., Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) (holding that we will not consider issues which are unsupported by the record because "[i]t is the appellant's responsibility to provide the materials necessary for this court's review.")

cc: Hon. Valorie Vega, District Judge
Bell Lukens & Kent
Caldwell & Associates
Clark County Clerk