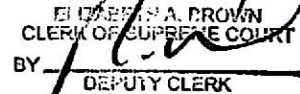
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL CARLSON, INDIVIDUALLY AND AS MANAGER OF PFG BROKERAGE, LLC,
Appellant,
vs.
DEMPSEY, ROBERTS & SMITH, LTD.,
Respondent.

No. 79049-COA



MAY 2 0 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER VACATING JUDGMENT

Michael Carlson appeals a district court order adjudicating an attorney's lien and awarding attorney fees, costs, and interest. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Michael Carlson hired Dempsey, Roberts & Smith, Ltd. (DRS) in July 2011 to litigate a partnership dispute between Carlson and his business partner.[1] The agreement between DRS and Carlson stated that DRS' fee would be based on the total time that DRS devoted to the case. Carlson paid a $5,000 retainer and made another $5,000 payment in August 2011. By January 2012, Carlson had an outstanding balance owed of $27,209 because he had failed to make any other payments to DRS. That month, DRS filed a motion to withdraw as counsel, which was granted. DRS also filed a notice of an attorney lien in January 2012 pursuant to NRS 18.015. In February 2013, Carlson's business partner filed for bankruptcy, and a stay was issued in Carlson's litigation against the business partner. The bankruptcy was apparently concluded in August 2016.

[1]We do not recount the facts except as necessary for our disposition.

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In November 2016, Carlson and the business partner stipulated to dismiss the state litigation, with each party bearing their own attorney fees. More than two years later, in February 2019,[2] DRS filed its motion to adjudicate its lien under the current version of NRS 18.015 (amended 2013).[3] The district court ruled in DRS' favor and reduced the lien to a judgment for $27,209.36, interest at 2% per month in the sum of $44,078.58 based upon the contract, for a total of $71,287.94. The court then awarded additional fees and costs of $2,593 to DRS for its efforts collecting on the lien.

On appeal, Carlson argues that (1) the 2012 charging lien was not perfected, (2) the district court lacked jurisdiction to adjudicate the 2012 charging lien, (3) DRS never perfected a retaining lien, (4) DRS' motion to adjudicate the lien was untimely, and (5) the district court abused its discretion when it awarded attorney fees and costs because the amount of the lien was unreasonable. DRS argues that if it did not have a charging lien, that it then had a retaining lien.

The district court lacked jurisdiction to adjudicate a charging lien

Carlson argues that the district court lacked jurisdiction to adjudicate a charging lien because there was no affirmative recovery. DRS argues that the district court had jurisdiction and that the cases Carlson

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[2]When asked by the district court why DRS waited so long to adjudicate the lien, DRS stated it "had more critical things to look at. And . . . didn't notice that the case had been dismissed." DRS then admitted "it would have probably been better lawyering on [its] part had we known and observed the case [was] dismissed" and "immediately have done [its] motion to adjudicate."

[3]*See* 2013 Nev. Stat., ch. 79, § 1, at 271.

relies on were decided before the attorney lien statute, NRS 18.015, was amended and are thus inapplicable. We agree with Carlson.

A district court's jurisdiction to resolve an attorney lien is a question of law and reviewed de novo. *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 531, 216 P.3d 779, 782 (2009), *superseded by NRS 18.015 on other grounds as stated in Fredianelli v. Fine Carman Price*, 133 Nev. 586, 588-89, 402 P.3d 1254, 1255-56 (2017). In Nevada, there are two types of attorney fee liens: charging liens and retaining liens. *Id.* at 531-32, 216 P.3d at 782. Charging liens were created by statute. *Id.* The judicial common law created the retaining lien to allow clients to obtain their files from their counsel. *Id.* at 532, 216 P.3d at 782.

Jurisdiction for the liens arose differently prior to the amendments to NRS 18.015 in 2013. For charging liens, "the court has in rem jurisdiction to resolve a fee dispute between an attorney and client . . . because the attorney's fee 'is recovered on account of the suit or other action.'" *Argentena,* 125 Nev. at 532, 216 P.3d at 783 (quoting NRS 18.015(3) (1977) (effective to June 30, 2013)). In *Argentena,* the supreme court held that a district court could not have incidental jurisdiction over a charging lien when the attorney's services procured the dismissal of a case but no affirmative recovery. *Id.* at 534, 216 P.3d at 783-84.

In contrast, retaining liens "allow[ed] a discharged attorney to withhold the client's file and other property until the court, at the request of the client, adjudicate[d] the client's rights and obligations with respect to the lien." *Id.* at 532, 216 P.3d at 782. Retaining liens were considered passive liens, and attorneys could not actively enforce the liens. *Id.* at 533,

216 P.3d at 783. Thus, district courts had jurisdiction for retaining liens only when clients requested to obtain their files from the attorney. *Id.*

However, in 2013, the Legislature amended NRS 18.015 to codify and expand the scope of retaining liens.[4] The amended NRS 18.015(3) allows an attorney to perfect a retaining lien by serving notice on the party. Additionally, under the revised statute, attorneys—upon their own motion—can seek to reduce their retaining lien to a judgment and no longer need to wait for the client to request the file through the district court, partially abrogating *Argentena*. *Compare* NRS 18.015(6), *with* *Argentena*, 125 Nev. at 533, 216 P.3d at 783; *see also* 2013 Nev. Stat., ch. 79, Legislative Counsel's Digest, at 271 ("This bill also supersedes Nevada common law by providing that . . . a lien may be adjudicated by a court at the request of the attorney . . . rather than only by request of the client whose files have been retained under the lien.").

Here, DRS contends that because *Argentena* was decided before the 2013 amendments to NRS 18.015, *Argentena* is no longer good law. However, the supreme court, when deciding a retaining lien issue under the current version of NRS 18.015, noted that "while *Argentena* and our other cases *remain good law* concerning common-law retaining liens," the current version of NRS 18.015 allows an attorney to actively recover on a retaining lien and thus retaining liens are no longer "passive" liens. *Fredianelli*, 133 Nev. at 589, 402 P.3d at 1256 (emphasis added). Additionally, attorney Tom Standish, the proponent of the bill in 2013, specifically stated that the bill did "not change[ ] what the Supreme Court has interpreted the charging

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[4]*Compare* 2013 Nev. Stat., ch. 79, § 1, at 271, *with* 1977 Nev. Stat., ch. 401, § 3 at 773.

lien statute to be." Hearing on S.B. 140 Before the Assembly Committee on Judiciary, 77th Leg. (Nev., May 3, 2013) (statement of Tom Standish).

Therefore, to the extent that the prior caselaw does not conflict with the amended NRS 18.015, particularly in regard to attorneys' rights to perfect a retaining lien and seek to reduce it to a judgment on their own motion, the prior caselaw is still applicable. In this case, there was no affirmative recovery. Thus, under *Argentena*, the district court lacked jurisdiction to adjudicate the charging lien.

DRS did not perfect a retaining lien

DRS argues, in its answering brief, that the 2013 amendments to NRS 18.015 allow the district court to adjudicate a retaining lien against Carlson. Carlson argues that the 2013 amendments to NRS 18.015 are not retroactive, and even if the amended version of NRS 18.015 applies retroactively, DRS never perfected a retaining lien, only a charging lien. Also, Carlson avers that at no point in the litigation below did DRS argue that it had a retaining lien.[5]

DRS filed its notice of and perfection of its lien in 2012 pursuant to the prior version of NRS 18.015. Prior to the amendments in 2013, NRS 18.015 only contemplated charging liens. *See Fredianelli*, 133 Nev. at 588, 402 P.3d at 1255. However, on appeal, DRS argues that it also had a retaining lien under the current version of NRS 18.015. DRS does not

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[5]While Carlson is correct that DRS did not argue that it had a retaining lien below, this argument goes to the district court's jurisdiction to adjudicate the attorney lien, and thus, it is not waived. *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.").

suggest it perfected the retaining lien under the current version of NRS 18.015. Rather, DRS only relies on the January 2012 perfection.[6] Thus, DRS implies that the current statute allows it to have both liens, even if it only specifically perfected one.

NRS 18.015's construction is a question of law and is reviewed de novo. *Leventhal v. Black & LoBello*, 129 Nev. 472, 476, 305 P.3d 907, 910 (2013). "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and [the courts] are not permitted to search for its meaning beyond the statute itself." *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 822, 313 P.3d 849, 855 (2013) (internal quotations omitted). If the statute is ambiguous, "legislative intent is controlling" and legislative history guides the courts. *In re Orpheus Trust*, 124 Nev. 170, 175, 179 P.3d 562, 565 (2008) (internal quotations omitted). NRS 18.015(1)(a) establishes that attorneys have a charging lien "[u]pon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or action has been instituted." NRS 18.015(1)(b) gives attorneys a retaining lien "[i]n any civil action, upon any file or other property properly left in possession of the attorney by a client." NRS 18.015(3) states

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[6]Carlson also argues that NRS 18.015's amendments are not retroactive, however, the enacting language belies his argument. NRS 18.015's enacting language explicitly states that the statute has retroactive effect. 2013 Nev. Stat., ch. 79, § 2, at 271 ("The amendatory provisions of this act apply to any fee for the services of an attorney incurred by a client for services rendered before, on or after July 1, 2013."). Thus, DRS had the right to perfect a retaining lien under the new statute even though its services to Carlson ended in 2012, the year before the amendment, yet it never did.

> [a]n attorney perfects a lien described in [NRS 18.015(1)] by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien.

NRS 18.015(3) does not state whether an attorney has to delineate the type of lien it is asserting in the notice. Thus, the statute could be read to allow an attorney to assert a lien in general terms, not indicating which subsection of NRS 18.015 the attorney is relying on. However, doing so would destroy the distinction between the liens now specifically codified into NRS 18.015(1)(a)-(b). Thus, when read as a whole, because NRS 18.015(1) delineates two different types of liens, in order to perfect the lien under NRS 18.015(3), the attorney must provide notice of the type of lien the attorney is claiming.[7] Moreover, in this case, DRS could not have filed a retaining lien in 2012, but after the statute was amended, it could have filed notice of, thus perfecting, a retaining lien, and then filed a motion to adjudicate. DRS failed to provide notice of—and thus perfect—its retaining lien and therefore cannot enforce the 2012 charging lien as a retaining lien.[8] *See*

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[7]The legislative history also supports this construction. At a hearing for the proposed amendments, Senator Hutchison asked, "Attorneys have to first send out notice and let the client know they are going to assert that lien [(referring to a retaining lien)] under the statute. Is that correct?" To which Tom Standish responded, "Yes. They file the attorney lien document in the file, and they serve it on all parties and counsel." Hearing on S.B. 140 Before the Senate Committee on Judiciary, 77th Leg. (Nev., March 4, 2013) (discussion between Senator Hutchison and Tom Standish).

[8]We also note that DRS' motion to adjudicate was likely not timely. *Cf. Leventhal*, 129 Nev. at 476, 479, 305 P.3d at 909, 911 (noting that a motion to adjudicate a charging lien must be timely). Furthermore, at a legislative hearing, Tom Standish stated "there [is] no prejudice in refiling

Tonopah Lumber Co. v. Nev. Amusement Co., 30 Nev. 445, 455, 97 P. 636, 639 (1908) ("[A] lien can only legally exist when perfected in the manner prescribed by the statute creating it . . . ." (internal quotation omitted)). Accordingly,[9] we

VACATE the judgment of the district court.

_______________, C.J.
Gibbons

_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. Timothy C. Williams, District Judge
Palazzo Law Firm
Dempsey Roberts & Smith, Ltd.
Eighth District Court Clerk

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your motion to adjudicate unless your contractual statute of limitations [has] expired." Hearing on S.B. 140 Before the Senate Committee on Judiciary, 77th Leg. (Nev., March 4, 2013) (statement of Tom Standish). DRS filed its motion to withdraw as counsel in January 2012 and could no longer incur fees after that point. DRS had six years from the breach of the agreement point to bring a breach of contract action. *See* NRS 11.190(1)(b). Thus, January 2018 would be the latest it could file that cause of action. However, DRS filed its motion to adjudicate in February 2019.

[9]In light of our disposition, we need not address the other issues raised on appeal.