

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID LEE PHILLIPS, AN
INDIVIDUAL; AND ARTHUR ICKE, AN
INDIVIDUAL,
Appellants,
vs.
VALLEY VIEW SURGICAL, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,
Respondent.

No. 81592-COA

FILED

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ORDER OF AFFIRMANCE

David Lee Phillips and Arthur Icke appeal from the district court's findings of facts and conclusions of law following a bench trial and a later order awarding plaintiff attorney fees. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Icke suffered a shoulder injury in a 2015 car accident, and he maintained a personal injury action to recover damage from the accident.¹ He retained co-appellant Phillips as his personal injury attorney. Concerned that Icke's insurance would not cover the surgery, Phillips and Icke entertained alternative funding options. Specifically, Phillips and Icke

¹We recount the facts only as necessary for our disposition.

contacted Valley View Surgical, LLC, about funding Icke's shoulder surgery.

Valley View does not perform surgeries; it is a medical financing company. In some cases, Valley View pays for a patient's operation upfront so long as the patient signs a lien giving Valley View an interest in the patient's subsequent personal injury proceeds. Before entering these arrangements, Valley View investigates the patient's claim to evaluate the risk involved with paying for the surgery upfront. Relatedly, Valley View only provides this service if the injured party has retained counsel. Valley View then gives the patient and his attorney a rough estimate of the final cost before proceeding to fund the surgery.

After the medical services are performed, the medical providers issue an itemized accounting to Valley View, and Valley View issues a comprehensive invoice to the patient. Valley View has a relationship with the medical providers, so the rates billed to Valley View by the medical providers are sometimes less than the amount billed to standard consumers. Nevertheless, to make its profit, the amount in this invoice is greater than the total amount billed to Valley View by the medical providers. The formula used to calculate this mark-up is proprietary, so the forms supporting the agreement are vague with respect to how Valley View reaches the figure in its comprehensive invoice. That invoice is then satisfied via the lien against the patient's eventual personal injury proceeds.

Phillips, Icke, and Valley View followed that business model here. Valley View investigated Icke's claim and gave Phillips a general quote for the operation. In the end, Valley View determined that the

relevant car insurance policies provided sufficient coverage to provide upfront funding for Icke's shoulder surgery.

On the morning of his surgery, Icke reported to Affinity Surgery Center. After arriving, and shortly before the operation, Affinity personnel gave Icke three documents, all of which were from Valley View, not Affinity Surgery Center. The documents included the lien agreement, a waiver of private medical insurance, and a disclosure that stated Valley View was not a medical provider. In the disclosure, Icke agreed to pay a usual and customary amount to be set by Valley View. Icke signed all the forms and had the shoulder surgery. After the surgery, Phillips, Icke's attorney, received the same lien agreement (but not the other two forms), and he signed the lien agreement under language that provided "[t]he undersigned attorney of record acknowledges this lien and agrees to observe the above terms for the protection of said medical provider."

With the surgery complete, Valley View received the bills from the medical provider, composed the comprehensive invoice for Icke and Phillips, sent the invoice to Phillips, and started following Icke's case. Primarily, Valley View followed Icke's case by way of updates from Phillips's law firm. In the months after the surgery, Valley View representative Stefanie Hass communicated with a woman named Tiffany in Phillips's office. After some time, Tiffany left Phillips's office and Hass communicated directly with Phillips. Despite Hass's diligent efforts, communication was sparse as many of her requests for an update went unanswered. Occasionally, and as late as December 2017, Phillips responded to Hass's inquiry by saying Icke's claim was still open. Based on these representations, Valley View waited for a resolution. During this period,

Hass kept a communication log as she does with all cases after Valley View pays for the medical services.

That December 2017 message was the last between Phillips and Valley View. In June 2018, after several more requests for information, Hass notified Phillips that she was going to involve Valley View's legal counsel because Phillips had stopped responding. After counsel for Valley View was involved, Valley View learned that Icke's claim had actually settled in 2016. The claim had settled for the policy limits on two applicable insurance policies, and Phillips had used Valley View's invoice to help secure \$150,000 in total insurance proceeds.

Valley View sued both Icke and Phillips to enforce its lien contract. In December 2018, Valley View extended an offer of judgment under NRCP 68 to Phillips and Icke, offering to settle the case for \$49,999. Phillips and Icke did not accept this offer. The case eventually went to a two-day bench trial where Valley View called two witnesses: Stefanie Hass and David Phillips. The parties submitted closing arguments in writing, and the district court issued its findings of fact and conclusions of law in July 2020. The district court found the lien contract enforceable and entered a judgment against Phillips and Icke. Subsequently, Valley View filed a motion for attorney fees based on NRCP 68. Phillips and Icke timely appealed the district court's findings and conclusions. Afterward, the district court granted the motion for attorney fees in the amount of \$42,185 and for costs in the amount of \$7,126.45. Phillips and Icke timely appealed the fees order as well. We now address these consolidated appeals.

Foremost is Phillips and Icke's challenge to the enforceability of the lien contract. Contract enforceability prompts a dual standard of review; we review questions of law de novo while giving deference to the

district court's factual determinations. *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

Phillips and Icke offer numerous theories, arguing each is sufficient to preclude enforcement of the lien contract here. Namely, they argue Valley View did not prove that it was entitled to Phillips and Icke's performance, that Valley View's practices are deceptive, that the agreement offends public policy, and that the agreement is unconscionable. We address each point in turn below.

First, Phillips and Icke assert they did not owe Valley View, a medical financing company, any duties because Phillips and Icke signed a lien with the "medical provider" while Valley View is a medical financier, not a medical provider.² In other words, Phillips and Icke argue that their misunderstanding regarding the nature of Valley View's business renders the lien agreement unenforceable. We disagree.

A unilateral mistake makes a contract voidable only if the mistake is material. *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-59, 741 P.2d 1355, 1356 (1987). Further, a "contract should be construed, if logically and legally permissible, so as to effectuate valid contractual relations, rather than in a manner which would render the

²Phillips and Icke also challenge the lien because it does not fit any of the statutory lien categories under NRS Chapter 108; however, they do not offer any authority to support the proposition that all liens must come from NRS Chapter 108 and in fact argue this case as a lien contract. Accordingly, we reject this argument. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

agreement invalid, or render performance impossible.” *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 111, 424 P.2d 101, 104 (1967).

Here, it is undisputed that Phillips, Icke, and Valley View agreed to a contractual relationship wherein Icke would receive a shoulder surgery and Phillips would ensure Valley View received compensation via a lien on Icke’s later personal injury recovery. The sole dispute on this point deals with a slight incongruity between the language on the lien and the nature of Valley View’s business.³ Despite Phillips and Icke initially contacting Valley View, Valley View’s investigation into Icke’s personal injury claim, and the quote from Valley View to Phillips and Icke, they assert language discrepancy renders the entire agreement unenforceable notwithstanding the parties’ understanding of the relationship before Icke underwent surgery. Phillips and Icke agreed to a lien on Icke’s personal injury recovery with Valley View; their only arguable mistake is with respect to their interpretations of Valley View’s business. This lien contract can be logically construed as a valid agreement, and because any mistake on the part of the parties was immaterial, we elect to construe it as an enforceable agreement.

In all, we disagree that the use of the “medical provider” language in Valley View’s lien can invalidate an otherwise understood and agreed-to lien contract.

After challenging the language of the lien, Phillips and Icke assert the agreement should not be enforced because Valley View’s business is a deceptive trade practice. While we acknowledge some understandable

³As an aside, we note that this argument only applies to Phillips because Icke signed a separate acknowledgement that explained the nature of Valley View’s business.

confusion we agree with the district court that no deceptive practice occurred.

Under the Nevada Deceptive Trade Practices Act (NDTPA), a business may not knowingly make a false representation as to its affiliation with another entity, NRS 598.0915(3), or any other element of the transaction, NRS 598.0915(15). “Knowingly” is “the intent to do that which the law prohibits.” *Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 283-84, 449 P.3d 479, 483 (Ct. App. 2019) (internal quotation marks omitted). And finally, the commercial entity’s misrepresentation must relate to a material fact, meaning either (a) a reasonable person would attach importance to the fact, or (b) the representing party has reason to know the recipient will find the fact important. *Id.* at 287-90, 449 P.3d at 485-87.

Here, and similar to the discussion above, any mistake or alleged deception falls to an inconsequential fact. Phillips and Icke sought alternative funding solutions for Icke’s shoulder surgery, and they started the process with Valley View. In the end, the parties agreed to a lien on Icke’s recovery in exchange for upfront surgery funding. The nature of Valley View’s business is immaterial. Moreover, Phillips and Icke cite NRS 598.0915(3) and (15), but they fail to show Valley View knowingly misrepresented any affiliation. Phillips and Icke merely demonstrate that Valley View’s full name (Valley View Surgical) is similar to another entity in the area (Valley View Surgery Center).

Thus, Phillips and Icke have failed to show that Valley View acted with the requisite intent to violate the NDTPA, and the district court did not err on this point when it enforced the lien contract.

Next, Phillips and Icke assert the lien should not be enforced because it offends public policy. We disagree.

Any contract that tends to operate to the detriment of the public interest is void. *Clark County v. Bonanza No. 1*, 96 Nev. 643, 652, 615 P.2d 939, 945 (1980). A contract operates to the detriment of the public interest when the interest in the contract's enforcement is clearly outweighed by a public policy against enforcement. *Sylver v. Regents Bank, N.A.*, 129 Nev. 282, 290, 300 P.3d 718, 723 (2013). For example, the Nevada Supreme Court has refused to enforce contracts that deter whistleblowing. *Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 480-81, 25 P.3d 215, 223-24 (2001) (noting whistleblowing was one of two justifications for denying enforceability). Thus, to refuse enforcement under public policy, the effects of the contract must have implications for the public at large.

Here, the lien contract does not threaten the public at large. Unlike agreements that deter whistleblowing, the public is, on an individual scale, helped by lien contracts such as the one in this case. Phillips and Icke entertained alternative funding solutions because they were concerned that Icke's insurance would not cover the operation. After Valley View agreed to fund the operation, Icke proceeded with the surgery to repair his shoulder. We acknowledge Phillips and Icke's arguments regarding Valley View's proprietary formula for cost calculation and the fact that paying for an operation through Valley View may be more expensive than it would be otherwise. At the same time, however, we recognize that Icke may not have received the surgery without Valley View.

Thus, the district court did not err when it enforced the contract despite Phillips and Icke's public policy challenges.⁴

Finally, Phillips and Icke ask this court to refuse enforcement of the lien because it is unconscionable. Again, we not persuaded.

This court may refuse to enforce a contract upon a determination that the contract is unconscionable. *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 441, 49 P.3d 647, 649 (2002). To prevent enforcement, the party arguing unconscionability must establish both procedural and substantive unconscionability. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553-54, 96 P.3d 1159, 1162 (2004), *overruled on other grounds by U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 192, 415 P.3d 32, 42 (2018). Procedural unconscionability occurs when a party lacks an opportunity to meaningfully review the terms or the meaning of those terms are not readily apparent from the face of the agreement. *Id.* at 554, 96 P.3d at 1162. Put another way, procedural unconscionability generally involves one party's failure to reasonably inform the other. *U.S. Home Corp.*, 134 Nev. at 190, 415 P.3d at 40-41. Substantive unconscionability refers more to the one-sidedness of the terms. *D.R. Horton*, 120 Nev. at 554, 96 P.3d at 1162-63.

The documents here are not unconscionable and do not warrant this court's intervention. Procedurally, Icke was in a challenging position where he was presented with the forms at the medical center shortly before his surgery. However, the procedural concerns on this agreement end there.

⁴Further, a contract may be void for public policy if its formation represents a violation of a statute. *See Sylver*, 129 Nev. at 290-91, 300 P.3d at 724. We considered the statutes cited by Phillips and Icke and conclude they are inapplicable. *E.g.*, NRS Chapter 604C (passed in 2019 and not retroactive); NRS 645E.920 (repealed statute governing mortgage bankers).

The forms themselves do not contain any fine print or hidden clauses, they are not overwhelmingly long, and they are not difficult to understand. Moreover, the documents are clearly titled and affiliated with Valley View. Substantively, Phillips and Icke concede in their briefing that this half of the analysis is the weaker of the two. The terms here are not especially one-sided. Icke receives a shoulder surgery without any upfront payment. Valley View receives a profitable return at a later date after bearing the risk of Icke receiving a personal injury recovery and in a sufficient amount.

Accordingly, the agreement here is neither procedurally nor substantively unconscionable, and we decline to intervene on these grounds.

Having determined the lien contract is enforceable, we turn now to the district court's award of attorney fees under NRCP 68. We will not disturb a fee award under NRCP 68 absent an abuse of discretion by the district court. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 555-56, 429 P.3d 664, 669 (Ct. App. 2018).

NRCP 68 governs offers of judgment and the concomitant penalties. It applies to multiple defendants if (1) there is a single common theory of liability against the defendants, and (2) the same plaintiff entity is authorized to settle the case against the defendants. NRCP 68(c)(2). This rule was amended in 1999; the rule now permits un-apportioned offers to multiple defendants. Under NRCP 68(f), if defendants reject a qualifying offer, the defendants-offerees "must pay the offeror's post-offer costs and expenses." To assist in future analyses, the Nevada Supreme Court issued factors in the *Beattie* decision:

- (1) whether the plaintiff's claim was brought in good faith;
- (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount;
- (3) whether the plaintiff's decision to reject the offer and

proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). These are factors for the district court to weigh; they are not elements. *Id.* at 589, 668 P.2d at 274. The district court must consider these factors before awarding the full amount of fees requested. *Id.*

Here, the fact that Valley View made the offer to multiple defendants without apportioning the offer is immaterial due to the 1999 NRCP 68 amendments. Next, the district court considered all the factors under *Beattie* on the way to granting fees under the offer of judgment rule. The district court couched its *Beattie* analysis in the fact that the offer of judgment, \$49,999, was reasonable compared to Valley View's actual recovery of over \$60,000.

Thus, Phillips and Icke's arguments on the un-apportioned offer are misplaced based on outdated court rules, and the district court considered the *Beattie* factors before awarding fees. We discern no abuse of discretion here.

In addition to the propriety of the award, Phillips and Icke also challenge its amount as outrageous for a two-day trial. When determining the reasonableness of an award, a district court must consider the *Brunzell* factors:

- (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill;
- (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;
- (3) the work actually performed by the lawyer: the skill, time and attention given to the work;
- (4) the

result: whether the attorney was successful and what benefits were derived.


Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

Here, Phillips and Icke's argument misconstrues the nature of the fee award. As an award issued under NRCP 68, this award does not compensate Valley View for the trial; it compensates Valley View for fees incurred between Phillips and Icke's rejection of the Rule 68 offer and the case's final resolution. From this perspective, the attorney fees are understandable as Valley View issued the offer in December 2018 and the trial concluded in March 2020.

Without more, there is insufficient evidence the district court abused its discretion here. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 2
Christopherson Law Offices
Royal & Miles, LLP
Eighth District Court Clerk

⁵Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.