IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMIE HANDLEY,
Appellant/Cross-Respondent,
vs.
BLUE CROSS AND BLUE SHIELD OF UTAH, AN INDEPENDENT LICENSEE OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION; BLUE CROSS AND BLUE SHIELD OF NEVADA, AN INDEPENDENT LICENSEE OF THE BLUE CROSS AND BLUE SHIELD ASSOCIATION; THE BLUE CROSS AND BLUE SHIELD ASSOCIATION, A BUSINESS ORGANIZATION OF FORM UNKNOWN; AND ROCKY MOUNTAIN HEALTH CARE CORPORATION,
Respondents/Cross-Appellants.

No. 38496

FILED

MAR 24 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in favor of respondents in a breach of contract action concerning insurance coverage and a cross-appeal from orders denying attorney fees and sanctions.

Smith's Food and Drug Company provided group health insurance benefits to its employees, including appellant Jamie Handley, through respondent Blue Cross and Blue Shield of Utah (BCBS), pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).[1] Covered employees enjoyed no right of automatic conversion to individual coverage upon termination of employment. Handley terminated her employment after allegedly receiving erroneous advice that her health

[1]29 U.S.C.A. § 1001.

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coverage included such a right of conversion. Upon terminating her employment with Smith's, Handley continued her health insurance coverage under the Consolidated Omnibus Reconciliation Act of 1985 (COBRA)[2] and was injured in a car accident.

Around the time her COBRA coverage lapsed, Handley applied for: (1) a group conversion policy from BCBS Utah, and (2) an individual policy from respondent Blue Cross and Blue Shield of Nevada (BCBS Nevada).

Upon being denied coverage, Handley filed suit in Nevada state district court against respondents BCBS Utah, BCBS Nevada, BCBS Association, and Rocky Mountain Health Care Corporation (collectively BCBS), asserting multiple claims, including breach of contract. Based on ERISA preemption, the case was removed to federal district court.

After discovery was completed, the federal district court: (1) determined that Handley had no conversion rights under the group ERISA plan, (2) concluded that it therefore lacked subject matter jurisdiction, and (3) remanded the matter to state district court. The order of remand contained the following comment, "Judicial estoppel . . . will likely bar [Handley] from asserting any rights to an individual conversion health insurance policy after COBRA coverage ended based on any ERISA plan or in any relationship thereto."

Upon remand, the district court granted summary judgment to BCBS. Handley filed a motion to alter or amend the judgment, which the district court denied. BCBS requested Rule 11 sanctions based on Handley's motion, which the district court denied. BCBS filed a motion for attorney fees pursuant to NRS 18.010(b), which the district court denied.

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[2]Pub.L. 99-272, 100 Stat. 82.

On appeal, Handley argues that the district court erred in interpreting the federal district court's comments regarding judicial estoppel and using them as a basis for granting summary judgment.

This court reviews orders granting summary judgment de novo.[3] Summary judgment is appropriate when the record, viewed in a light most favorable to the non-prevailing party, demonstrates that no genuine issue of material fact remains in dispute and that the prevailing party is entitled to judgment as a matter of law.[4]

In this case, judicial estoppel precluded Handley from asserting any right to conversion benefits under the group ERISA plan, which was governed by federal law. However, judicial estoppel did not bar Handley's state law breach of oral contract claim.

Viewing the record in a light most favorable to Handley, we conclude that no genuine issue of material fact existed concerning her breach of oral contract claim. We conclude that, because Handley did not provide any consideration or detrimental reliance in exchange for BCBS's alleged verbal assurances, no oral contract existed. Accordingly, we conclude the district court did not err in granting summary judgment on behalf of BCBS.[5]

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[3]Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994).

[4]Id.

[5]Having considered Handley's other arguments regarding the district court's denial of additional discovery and the federal district court's alleged error, we conclude they are without merit. Handley never requested additional discovery from the district court. As appellant acknowledged, we lack jurisdiction to review a federal district court's actions.

Turning to the cross-appeal, BCBS first argues that the district court abused its discretion in not awarding Rule 11 sanctions based on Handley's motion to alter or amend the judgment. We disagree.

This court reviews a district court's denial of Rule 11 sanctions for abuse of discretion.[6] Rule 11 sanctions should be imposed for frivolous actions.[7] To determine whether a motion is frivolous, this court must examine whether: (1) it is well grounded in fact and warranted by existing law or a good faith argument for its extension, modification or reversal; and (2) the attorney made a reasonable and competent inquiry into the facts.[8] Rule 11 sanctions are not intended to "chill an attorney's enthusiasm or creativity in reasonably pursuing factual or legal theories, and a court should avoid employing the wisdom of hindsight in analyzing an attorney's action."[9]

Because Handley's motion to alter or amend the judgment is not included in the record, we cannot conclude the district court abused its discretion in denying Rule 11 sanctions.[10]

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[6]See Marshall v. District Court, 108 Nev. 459, 465-66, 836 P.2d 47, 52 (1992).

[7]Id. at 465, 836 P.2d at 52.

[8]See Bergmann v. Boyce, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993) (internal citation omitted); see also NRCP 11.

[9]Marshall, 108 Nev. at 465-66, 836 P.2d at 52.

[10]Hampton v. Washoe County, 99 Nev. 819, 821 n.1, 672 P.2d 640, 641 n.1 (1983) (indicating that this court will presume a district court acted correctly when the record is insufficient to allow review of a district court's decision).

Finally, BCBS argues that the district court abused its discretion in not awarding attorney fees pursuant to NRS 18.010(b). We disagree.

NRS 18.010(2)(b) provides, in pertinent part, that a district court may award attorney fees to a prevailing party when the court finds that a claim was brought without reasonable ground or to harass the prevailing party.[11] A district court's award of attorney fees will not be disturbed on appeal unless there is a manifest abuse of discretion.[12] If an action was not frivolous when it was initiated, the fact that it later becomes frivolous will not support an award of attorney fees.[13]

In this case, Handley testified, via deposition, that, prior to filing suit, she believed she had a right to a conversion policy. We conclude that nothing in the record indicates that Handley brought her claims without reasonable ground when she filed suit or to harass BCBS.[14] Thus, we conclude the district court did not abuse its discretion in denying BCBS's motion for attorney fees. Accordingly, we

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[11]See also Duff v. Foster, 110 Nev. 1306, 1308, 885 P.2d 589, 591 (1994) (concluding that the proper inquiry under NRS 18.010(2)(b) is whether the claim was brought without reasonable grounds), overruled on other grounds by Halbrook v. Halbrook, 114 Nev. 1455, 971 P.2d 1262 (1998).

[12]Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994).

[13]See Duff, 110 Nev. at 1309, 885 P.2d at 591.

[14]Having considered BCBS's request for sanctions against Handley, we decline to impose any additional sanctions.

ORDER the judgment of the district court AFFIRMED.[15]

_____, C.J.
Shearing

_____, J.
Agosti

_____, J.
Rose

_____, J.
Becker

_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Stephen N. Scheerer
Bible, Hoy & Trachok
Washoe District Court Clerk

[15]The Honorable Myron E. Leavitt, Justice, having died in office on January 9, 2004, this matter was decided by a six-justice court.