

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD L. TANKERSLEY;
TANKERSLEY CONSTRUCTION, INC.;
TREEHOUSE CUSTOM HOMES, LLC;
CONSTRUCTION EQUIPMENT
LEASING, INC.; NORTH SPRINGS
ESTATE BUILDERS, INC.; AND VISTA
CAL HOLDINGS, LTD.,

Appellants,

vs.

K & M AND ASSOCIATES, INC., A
NEVADA CORPORATION,
Respondent.

No. 38509

FILED

NOV 05 2003

JANETTE L. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment and an order granting pretrial interest, attorney fees, and costs in an action arising out of a partnership dispute. Appellant Ronald Tankersley claims the district court erred by allowing the jury to decide an equitable claim. He also claims the district court erred by allowing respondent K & M and Associates, Inc., (K&M) to adjudicate its claims in violation of the exclusivity rule. Lastly, Tankersley argues the district court abused its discretion by allowing Timothy Lockwood to testify because K&M improperly paid Lockwood for his testimony, made payment contingent upon the case's outcome, and violated ethical and discovery rules in obtaining Lockwood's testimony. We do not address the exclusivity rule since the accounting claims were dismissed. We find Tankersley's remaining claims to be without merit. Therefore, we affirm the district court's order and judgment.

FACTUAL BACKGROUND

In 1994, K&M listed for sale 192 acres of land it owned in Spanish Springs. K&M intended to develop the land as a residential subdivision. The tentative map showed 370 houses to be built. The parties referred to the property as "the subdivision." K&M also owned twenty-two acres of adjacent land referred to as "the commercial property." Tankersley, a California-based home developer, contacted K&M through his real estate agent, Charlie Casey. Instead of purchasing the property, Tankersley suggested they enter into a partnership to build houses on the property.

The parties formed North Springs Estate, Ltd. (NSE), a Nevada limited partnership, to develop the residential property. Each partner was given a fifty percent stake in NSE and was entitled to fifty percent of the profits made from home sales. Tankersley served as general partner and had exclusive control over the management of NSE. K&M served as a limited partner. The partners agreed that Tankersley would receive \$5,000 per month for managing NSE. Also, K&M would receive \$5,000 per month for a five-year period for providing project management services. Tankersley, however, paid K&M only \$15,000 for providing project management services under the service agreement during this period. In addition, Tankersley denied K&M access to the NSE books and records despite repeated requests.

As part of the partnership agreement, K&M agreed to sell its residential property to NSE for approximately \$3,000,000. NSE gave K&M a note and deed of trust on the residential property for the sales price. Later, Tankersley asked K&M to reduce its note and deed of trust for the residential property from \$2,570,000 to \$1,870,000. This reduction was to assist NSE in acquiring financing to develop the first phase of

homes. The residential property served as collateral for the loan secured by NSE. Tankersley then asked K&M to convert the note and deed of trust to a capital contribution to acquire more funding for development. In exchange, Tankersley gave K&M a note and deed of trust on the residential property in the amount of \$300,000.

Appellants Tankersley Construction, Inc., Construction Equipment Leasing, Inc., and Treehouse Custom Homes, LLC, performed the construction work for the subdivision. These companies are all affiliated with Tankersley. Tankersley is the sole owner of Tankersley Construction, Inc., and Construction Equipment Leasing, Inc. He has at least a ninety percent interest in Treehouse Custom Homes, LLC.

In 1996, Tankersley negotiated to sell nearly half the homes to an outside developer to acquire additional funding to develop the remaining lots. Since the deal would cause K&M to lose a portion of its expected profits, the parties agreed that K&M would be entitled to a \$300,000 bonus after the last lot in the subdivision was sold.

When K&M initially sold the residential property to NSE, it agreed to pay Casey an \$81,000 sales commission for consummating the sale. Instead of compensating Casey in cash, K&M issued Casey a note and deed of trust against its separate commercial property for the amount owed. As part of a subsequent arrangement, the partners agreed that NSE would pay Casey's \$81,000 commission instead of K&M. K&M blindly relied on NSE to pay the commission, so it did not bother to rescind the note and deed of trust on its commercial property. NSE ultimately failed to compensate Casey. Casey commenced a foreclosure proceeding on K&M's commercial property to recover his real estate commission. K&M filed for bankruptcy to prevent foreclosure of the commercial property. The bankruptcy trustee paid Casey when the

property was sold. During the bankruptcy proceeding, Tankersley testified that he terminated K&M's service agreement for project management services, for cause, three months after origination.

In March 1999, Tankersley contacted K&M for a capital contribution, claiming the funding was necessary to continue development. He also stated that he assigned his partnership interest to North Springs Estates Builder, Inc. NSE stopped building homes in the subdivision because K&M did not make a capital contribution. At that point, NSE had completed improvements on 117 lots and built only 87 homes. The subdivision had 450 lots.

In February 1999, Timothy Lockwood contacted K&M to provide information about improprieties in which Tankersley and his entities had engaged. Lockwood worked for Tankersley and his entities as an accountant/controller from September 1997 to the end of December 1998, when Tankersley terminated him. Before working for Tankersley, Lockwood was incarcerated at a federal penitentiary for an interstate travel and aid of racketeering conviction. K&M hired Lockwood as a consultant to advise it on proper accounting procedures and help determine the authenticity of documents relating to NSE, Tankersley, and Tankersley's entities. Lockwood was also "to furnish to K&M any information or documents in his possession which may materially assist K&M to recover moneys or property that may be due them." In exchange, K&M agreed to pay Lockwood \$90 per hour for a minimum of 130 hours. Further, K&M agreed to pay Lockwood a bonus if his information and consulting advice proved to be a major factor in a suit against Tankersley. In July 1999, K&M filed a complaint against Tankersley and Tankersley's business entities for numerous claims.

In November 1999, NSE held a partnership meeting to discuss the sale of the remaining property to an outside developer. K&M voted against the proposal. K&M pursued financing and outside contractors to complete the remaining homes. To prevent K&M from interfering with the management of NSE, Tankersley moved the district court to dissolve the partnership. After a hearing on the matter, the district court dissolved the partnership. The remaining lots were sold to an outside developer, and the sale proceeds were placed in trust pending the outcome of the instant case.

K&M filed a third amended complaint,¹ alleging the following causes of action: (1) breach of partnership agreement; (2) breach of service agreement; (3) breach of Casey agreement; (4) fraudulent concealment; (5) conversion; (6) negligence; (7) declaratory relief; (8) accounting; (9) breach of fiduciary duty; and (10) breach of the covenant of good faith and fair dealing. Tankersley asserted numerous affirmative defenses and filed a counterclaim for attorney fees.² K&M filed a demand for a jury trial.

Tankersley filed a motion to strike the jury demand and bifurcate the trial or, in the alternative, to dismiss the case. The district court denied the motion. Tankersley filed a motion in limine to preclude Lockwood from testifying.³ The district court denied the motion, finding

¹K&M filed prior amended complaints in September 1999 and April 2000.

²Tankersley also filed a third-party complaint against the shareholders of K&M. He sued Max Bartmess for misrepresentation. He also sued Max Bartmess, Diane Bartmess, and Clarence Niebuhr for intentional interference with contractual relations.

³Tankersley also filed five other motions in limine unrelated to Lockwood's testimony.

that the relevance of Lockwood's testimony outweighed any prejudice to Tankersley. The district court held that the payments Lockwood would receive for assisting K&M and Lockwood's prior felony went to the credibility of Lockwood's testimony, but did not preclude it.

After a seven-day trial, the jury awarded K&M \$3,253,745 in compensatory damages and \$750,000 in punitive damages. The jury found Tankersley liable for fraud. The district court upheld the jury verdict and also awarded K&M \$815,596 in prejudgment interest for the period between July 1, 1999, and May 11, 2001, \$129,443 in attorney fees, and \$72,681 in costs. Tankersley filed a motion for amendment of judgment or new trial. Tankersley also filed a motion for judgment notwithstanding the verdict and/or a new trial. He requested that judgment be entered in his favor on the breach of agreement of limited partnership claim and a new trial be granted on K&M's remaining claims. The district court denied the motions.

On August 17, 2001, the district court issued an order granting declaratory judgment on K&M's seventh claim for relief regarding the validity of certain liens claimed by Tankersley against NSE's assets. Tankersley valued the three liens in the amount of \$1,617,065. The district court held that K&M should be granted equitable relief since the jury found Tankersley guilty of fraud.

DISCUSSION

Equitable claims

We review questions of law de novo.⁴ In Clark Sanitation v. Sun Valley Disposal,⁵ we recognized that a district court could have a jury decide a claim for damages, but reserve to itself an equitable claim for declaratory relief.

Tankersley argues that the district court erred by allowing the case to be heard before a jury because K&M included equitable claims for accounting and declaratory relief in its complaint. However, the accounting claim was subsequently dismissed.

The district court wanted the evidence of the legal and equitable claims to be decided in the same proceeding for purposes of "judicial efficiency and economy."⁶ The district court decided the claim for a declaratory judgment based upon the trial evidence after the jury decided the non-equitable claims. We conclude that the district court did not err in its decision to try the legal and equitable claims together because the district judge only adjudicated the equitable claims.

Lockwood's testimony

K&M argues that Tankersley is precluded from raising the issue of whether the district court abused its discretion by allowing Lockwood to testify. It claims that although K&M filed a motion in limine to exclude Lockwood's testimony, Tankersley was also required to object to

⁴SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

⁵87 Nev. 338, 339, 487 P.2d 337, 338 (1971).

⁶The district court cited to Clark Sanitation, 87 Nev. at 339, 487 P.2d at 338.

Lockwood's testimony at trial to preserve the issue for appeal. In Richmond v. State,⁷ we held "that where an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal."

Both parties briefed the district court on the issue, and an evidentiary hearing was held on all pretrial motions ten days before trial. The district court unconditionally denied the motion in limine to exclude Lockwood's testimony, stating that the relevance of Lockwood's testimony would outweigh any prejudice to Tankersley. The district court also held that Lockwood's testimony was proper, notwithstanding the compensation he received or his felony conviction. Tankersley's motion in limine was sufficient to preserve this issue for appeal.

It is within the sound discretion of the district court to admit or exclude relevant evidence, after balancing the prejudicial effect of the evidence against its probative value.⁸ The district court's determination will not be overturned absent an abuse of discretion.⁹ Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."¹⁰

⁷118 Nev. ___, ___, 59 P.3d 1249, 1254 (2002).

⁸K-Mart Corporation v. Washington, 109 Nev. 1180, 1186, 866 P.2d 274, 278 (1993).

⁹Id.

¹⁰NRS 48.015.

Tankersley argues that it was improper for K&M to pay Lockwood for his testimony. He claims that Lockwood's payment was contingent on the outcome of the case and "probably induced biased, unreliable testimony."

As the district court pointed out, the facts that Lockwood received payment for the information he provided K&M and would receive a bonus if his information was material in recovering damages from Tankersley do not preclude his testimony. These factors affect the weight and credibility of the testimony. The jury heard not only testimony that Lockwood was paid for his services, but also that he has a prior criminal record. It was up to the jury to decide whether Lockwood was a credible witness. Instruction No. 10 also instructed the jury that

[t]he credibility or 'believability' of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness lied about any material fact in the case, you may disregard the entire testimony of that witness.

The district court did not abuse its discretion in allowing Lockwood to testify at trial or admitting his statements into evidence.

In Palmer v. Pioneer Inn Associates, Ltd.,¹¹ this court interpreted the application of SCR 182 to employees of organizational clients. SCR 182 provides:

¹¹118 Nev. ___, ___, 59 P.3d 1237, 1249 (2002).

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The court held that the purpose of the rule "is to protect the attorney-client relationship, not to protect an organization from the discovery of adverse facts."¹² The court adopted the managing-speaking agent test to determine whether an employee is considered to be a "party."¹³ The test "does not protect the organization at the expense of the justice system's truth-finding function by including employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior."¹⁴ Rather, it protects "only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense."¹⁵ "[W]hile any confidential communications between such an employee and the organization's counsel would be protected by the attorney-client privilege, the facts within that employee's knowledge are generally not protected from revelation through ex parte interviews by opposing counsel."¹⁶ Further, in Palmer v. Pioneer Hotel & Casino,¹⁷ the United States District Court for the District of Nevada held that an adverse

¹²Id. at ___, 59 P.3d at 1248.

¹³Id.

¹⁴Id.

¹⁵Id. (quoting Wright By Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984) (citations omitted)).

¹⁶Id.

¹⁷19 F. Supp. 2d 1157, 1167 (D. Nev. 1998).

attorney may communicate with a former employee of an organization, so long as the attorney does not "inquire into areas subject to the attorney-client or work product privileges."

Tankersley claims that the attorney-client privilege prevented Lockwood's testimony because the parties were represented by counsel during the bankruptcy proceeding and Lockwood worked for him at the time of the bankruptcy proceeding.¹⁸ However, Lockwood rendered services on behalf of the limited partnership at the specific request of Tankersley. As a limited partner, K&M had the right to discover relevant information about the limited partnership from Lockwood.

K&M filed for bankruptcy in May 1996. During a bankruptcy proceeding, Tankersley testified that K&M's service agreement was terminated three months after origination. He claimed to have written proof of the termination. In the instant case, Lockwood revealed that Tankersley approached him after the bankruptcy proceeding. Tankersley directed him to draft a termination letter and back-date it to three months after formation of the partnership. Tankersley then signed the false document and gave it to his attorney. The attorney submitted the document to the bankruptcy trustee.

In December 1998, Tankersley terminated Lockwood from his job as controller. Lockwood no longer worked for Tankersley when he approached K&M in February 1999 to discuss Tankersley's improprieties. Thereafter, Lockwood entered into an agreement with K&M to interpret financial documents and provide information about Tankersley's dealings. The instant case was not filed until July 1999. Lockwood, therefore, was

¹⁸Tankersley cites to SCR 182, Cronin v. District Court, 105 Nev. 635, 781 P.2d 1150 (1989) (discussing SCR 182), and NRCP 26.

not a "party" to this case. Lockwood did not become a "party" simply because he worked for Tankersley while Tankersley was represented by counsel in a separate matter. Lockwood's assistance in helping Tankersley mislead the bankruptcy trustee also does not warrant the preclusion of Lockwood's testimony because the actions do not fall within the attorney-client privilege. Lastly, the communication between Tankersley and Lockwood was not confidential as defined by NRS 49.055.¹⁹

Transcripts

K&M argues that the appeal should be dismissed because Tankersley failed to file transcripts. This is the same issue K&M raised and the court denied in two separate orders. In the last order, the court denied the motion because Tankersley paid the deposit for the requested transcripts and the transcripts were being prepared. Since the transcripts were filed, and we reviewed them as part of the record on appeal, we refuse to dismiss this appeal for failure to file transcripts.

CONCLUSION

We conclude that the district court did not err in allowing K&M to bring an accounting claim. K&M was entitled to bring an accounting claim pursuant to NRS 87.220.

We also conclude that the district court did not abuse its discretion by allowing Lockwood to testify at trial because Lockwood's testimony did not violate SCR 182. The payment that Lockwood received


¹⁹NRS 49.055 states, "A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

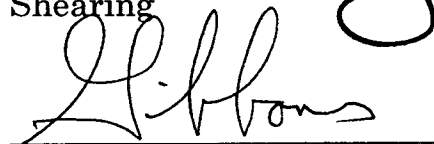
for his testimony also did not preclude his testimony, but went to the weight and believability of his testimony given by the jury. We find the other arguments of Tankersley to be without merit.

Since the trial transcripts were eventually included as part of the record on appeal, we deny K&M's request to dismiss this appeal for failure to file transcripts.

For the foregoing reasons, we affirm the judgment and order of the district court.²⁰


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Marshall Hill Cassas & de Lipkau
Law Office of Mark Wray
Washoe District Court Clerk

²⁰Although K & M dismissed its claim for an accounting, an accounting should be done incidental to the dissolution of NSE under NRS 87.220. NRS Chapter 87 governs any matter not provided for in NRS Chapter 88 pursuant to NRS 88.635.