IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. MONA, JR., Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHAEL L. DOUGLAS, DISTRICT JUDGE, Respondents, and JOSEPH EISENBERG, ESQ., Real Party in Interest.	No. 38520
JOSEPH EISENBERG, ESQ., Appellant, vs. RHONDA MONA, Respondent.	No. 38861

FILED

MAR 2 8 2005

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

ORDER AFFIRMING (38861)
AND
GRANTING PETITION IN PART (38520)

Docket No. 38861 is an appeal from a district court order that denied appellant's motion to compel binding arbitration in a legal malpractice case. Docket No. 38520 is an original petition for a writ of mandamus or prohibition challenging a district court order that granted real party in interest's motion to compel binding arbitration. These cases have been consolidated.[1] Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.[2]

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[1]See NRAP 3(b).

[2]The Honorable Michael Douglas, Justice, did not participate in the decision of this matter.

05-05919

On appeal, Joseph Eisenberg argues that (1) public policy favors arbitration of Rhonda Mona's claims; (2) Rhonda is a third-party beneficiary to the arbitration agreement; (3) Rhonda had an implied contract with Eisenberg with an arbitration agreement; and (4) Rhonda should be compelled to arbitrate because she is married to Michael J. Mona, Jr.

Seeking writ relief, Michael argues that (1) Eisenberg is not entitled to compel arbitration of a legal malpractice action; (2) the arbitration agreement is unconscionable and, therefore, unenforceable; and (3) the district court's order compelling arbitration will deprive Michael of his constitutional and statutory rights.

Standard of review

On Eisenberg's appeal, we conduct an independent review of contractual provisions that require arbitration.[3] We have original jurisdiction over a writ of mandamus.[4] "A writ of mandamus may issue to compel the performance of an act which the law requires."[5] A writ of mandamus will only issue in "cases where there is not a plain, speedy and adequate remedy in the ordinary course of law."[6] We will not issue a writ of mandamus to control a district court's discretionary action unless the

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[3]Phillips v. Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

[4]Nev. Const. art. 6, § 4; NRS 34.160.

[5]Civil Serv. Comm'n v. Dist. Ct., 118 Nev. 186, 188, 42 P.3d 268, 270 (2002).

[6]NRS 34.170.

court manifestly abused its discretion.[7] We have also held that we "may exercise . . . discretion where . . . an important issue of law requires clarification."[8] Additionally, "a writ of prohibition is available to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court."[9]

Eisenberg's appeal

Public policy favors the arbitration of claims.[10] Nevada strongly favors arbitration in contractual provisions that specify arbitration as the method of dispute resolution.[11] However, although Nevada favors arbitration, we have never compelled individuals to arbitrate their claims when they were not a party to an arbitration agreement. There is no authority that requires a non-signatory spouse to arbitrate her tort claims simply because her spouse has signed an arbitration agreement. More accurately, "[a]n arbitration clause does not bind one not a party to the contract."[12]

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[7]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

[8]Smith v. District Court, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

[9]Salaiscooper v. Dist. Ct., 117 Nev. 892, 901, 34 P.3d 509, 515 (2001).

[10]See Clark Co. Public Employees v. Pearson, 106 Nev. 587, 589, 798 P.2d 136, 138 (1990); Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988).

[11]Phillips, 106 Nev. at 417, 794 P.2d at 718.

[12]Christian & Sons v. Nashville P.S. Hotel, 765 S.W.2d 754, 757 (Tenn. Ct. App. 1988).

Eisenberg advances Berman v. Dean Witter & Company, a California case where a wife's arbitration agreement with her stockbroker bound her non-signatory husband.[13] In Berman, Jack Berman purchased currency futures contracts on margin using his wife's stock brokerage account and sustained severe losses. Jack argued that his wife's agreement with the stockbroker, which contained an arbitration clause, did not apply because he did not sign the agreement. The California Court of Appeals held that Jack's "purchases arose out of and were related to the customer agreement. Thus it follows that any dispute concerning those purchases arose out of and were related to the agreement."[14] The California court also held that although Jack did not sign the agreement, he acted as an agent for his wife when he purchased the futures contracts.[15] The California court held that the claims should be arbitrated pursuant to the agreement.[16]

Berman is distinguishable from the instant case. In Berman, the California court determined that Jack's complaint was based on contract theory, whereas here, Rhonda alleges no contract claims. Michael signed an agreement for legal services with Eisenberg and the firm Jeffer, Mangels, Butler & Marmaro, LLP. The agreement specifically provided for arbitration as the method of dispute resolution. The agreement, however, did not mention Rhonda. Eisenberg and Michael signed the

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[13]119 Cal. Rptr. 130 (Ct. App. 1975).

[14]Id. at 133.

[15]Id.

[16]Id. at 133-34.

agreement, Rhonda did not. Additionally, Rhonda's claims are based on the tort theory of professional negligence, not contract theory. Because Rhonda relied on Eisenberg's legal advice and professional representations, her complaint based on professional negligence was proper.

Eisenberg also claims Rhonda is a third-party beneficiary of his agreement with Michael or an implied agreement existed with Rhonda. We have held that a third-party beneficiary may maintain a cause of action.[17] "Where a contract contains a promise for the benefit of a stranger to the contract, the third-party beneficiary has a direct right of action against the promissor."[18] To obtain third-party beneficiary status, "there must clearly appear a promissory intent to benefit the third party, and ultimately it must be shown that the third party's reliance thereon is foreseeable."[19]

In this case, the contract does not demonstrate an intent to benefit Rhonda. Rhonda's name is not mentioned in the agreement and she did not sign it. There is no promissory intent to benefit Rhonda in any way. Additionally, Eisenberg has not shown that Rhonda relied on the agreement or that it was foreseeable that she would rely on the agreement. The agreement contains no promise for Rhonda's benefit.

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[17]Hemphill v. Hanson, 77 Nev. 432, 436 n.1, 366 P.2d 92, 94 n.1 (1961).

[18]Gibbs v. Giles, 96 Nev. 243, 246, 607 P.2d 118, 120 (1980).

[19]Lipshie v. Tracy Investment Company, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977).

Accordingly, Eisenberg's third-party beneficiary argument necessarily fails.

While an express contract is stated in words, an implied contract is manifested by the parties' conduct.[20] Both types of contracts "are founded upon an ascertainable agreement."[21] We have held that to prevail on an implied contract, "the court would necessarily have to determine that both parties intended to contract . . . and that promises were exchanged."[22] Although an implied contract may contain an arbitration clause, the moving party has the burden to demonstrate that the clause is valid, binding, and enforceable.[23]

The record contains no evidence that Rhonda promised anything to Eisenberg or that Eisenberg discussed arbitration or dispute resolution with Rhonda. Accordingly, even if an implied contract existed, Eisenberg did not demonstrate that it included a binding arbitration clause. We conclude that the district court did not err in denying Eisenberg's motion to arbitrate since he failed to meet his burden.

Michael's writ petition

Generally, the party moving to enforce an arbitration clause has the burden of persuading the district court that the clause is valid.[24]

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[20]Smith v. Recrion Corp., 91 Nev. 666, 668, 541 P.2d 663, 664 (1975).

[21]Id. at 668, 541 P.2d at 665.

[22]Id. at 669, 541 P.2d at 665.

[23]D.R. Horton, Inc. v. Green, 120 Nev. ___, ___, 96 P.3d 1159, 1162 (2004); Obstetrics and Gynecologists v. Pepper, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985).

[24]Pepper, 101 Nev. at 108, 693 P.2d at 1261.

Here, the district court could have held that the arbitration agreement was a contract of adhesion. An adhesion contract is "'a standardized contract form offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract.'"[25] The most prominent characteristic of a contract of adhesion is that "the weaker party has no choice as to its terms."[26] The arbitration agreement before us clearly falls into this category. It was prepared by Eisenberg and presented to Michael as a condition of representation. Michael had no opportunity to modify any of its terms and his choice was to sign the existing agreement or forego representation.

Yet, not all adhesion contracts are unenforceable.[27] Rather, an adhesion contract is enforceable "if it falls within the reasonable expectations of the weaker . . . party and is not unduly oppressive."[28] We will not, however, enforce the provisions of an adhesion contract that limit the "duties or liabilities of the stronger party absent plain and clear notification of the terms and an understanding of consent."[29] In this case, the district court did not conduct an evidentiary hearing to determine whether the disputed arbitration agreement was enforceable. Although

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[25]Id. at 107, 693 P.2d at 1260 (quoting Miner v. Walden, 422 N.Y.S.2d 335, 337 (1979)).

[26]Pepper, 101 Nev. at 107, 693 P.2d at 1260.

[27]See Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172-73 (Cal. 1981).

[28]Pepper, 101 Nev. at 107-08, 693 P.2d at 1261.

[29]Id.

Eisenberg submitted an affidavit on this matter, the record is insufficient for us to conclude that Michael had the necessary sophistication to knowingly enter into the arbitration agreement.

Michael also argues that he did not knowingly waive his right to a jury trial. Because this case involves the enforceability of a binding arbitration clause, our case law regarding jury trial waivers does not apply.[30]

CONCLUSION

We conclude that Eisenberg's arguments on appeal lack merit. Rhonda neither signed an arbitration agreement with Eisenberg nor does her marriage to Michael create an agreement to arbitrate. Rhonda's claims are based on tort principles; therefore, the district court's order denying Eisenberg's motion to compel arbitration was proper. Consequently, we affirm the district court's order denying Eisenberg's motion to compel Rhonda to arbitrate her legal malpractice claims.

Regarding Michael's writ petition, the issue of whether Michael possessed the necessary sophistication to enter into the arbitration agreement is unclear from this record. Additionally, it is unclear as to whether Michael knowingly, voluntarily, and intentionally waived his right to a jury trial. Accordingly, we direct the clerk of this court to issue a writ of mandamus compelling the district court to conduct an evidentiary hearing to determine whether Michael (1) possessed the

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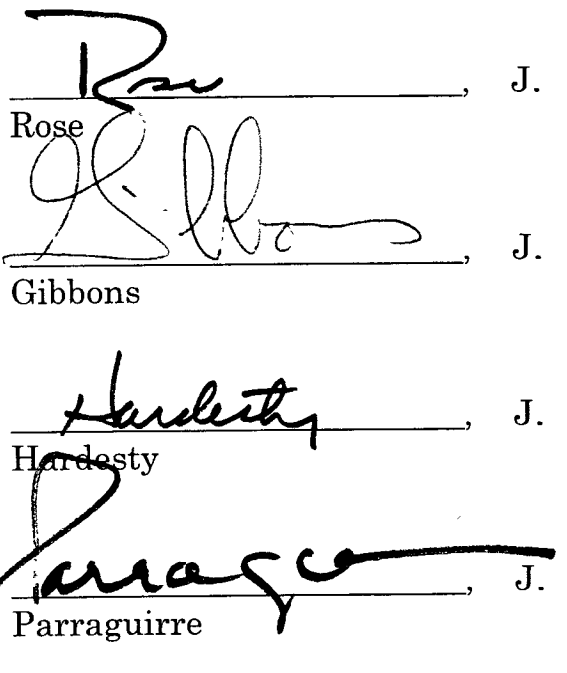
[30]See D.R. Horton, Inc. v. Green, 120 Nev. ___, ___ n.4, 96 P.3d 1159, 1162 n.4 (2004) (stating that when a contract does not contain a waiver clause, "our case law regarding enforceability of jury trial waivers is not applicable to the enforceability of a binding arbitration clause").

necessary sophistication to enter into the arbitration agreement; and (2) knowingly, voluntarily, and intentionally waived his right to a jury trial.

It is so ORDERED.



_____, J.
Rose

_____, J.
Gibbons

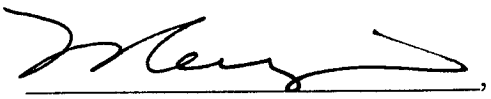
_____, J.
Hardesty

_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 11, District Judge
Albert D. Massi, Ltd.
Hunterton & Associates
Clark County Clerk

MAUPIN, J., with whom BECKER, C.J., agrees, concurring:

I concur in the result.

 , J.
Maupin

I concur:

 , C.J.
Becker