

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED FINANCIAL MORTGAGE  
CORP., AN ILLINOIS CORPORATION,  
Appellant,

vs.

DAVID CREED; MARK LEVIN; AND  
KEITH JESKE,  
Respondents.

No. 38530

FILED

NOV 04 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment, entered following a bench trial, in a case involving a contract dispute over unpaid employee commissions.

In January 1995, Mark Levin and Keith Jeske entered into a net branch office agreement with UFMC. Shortly thereafter, Creed filled out UFMC employment application materials in order to become a loan officer for the Levin/Jeske UFMC net branch.

Approximately nine months into the net branch's operation, UFMC notified Levin and Jeske that payroll checks would not be issued to the net branch due to previous excessive losses by the net branch. Creed asserts that he, as an employee of UFMC, is owed substantial unpaid commissions from this time.

In October 1995, Creed and a fellow loan officer, Ira Epstein, executed a net branch agreement, which, in effect, allowed them to take over the Levin/Jeske net branch.<sup>1</sup> During the Creed/Epstein net branch's eight-month operation, Creed attempted to obtain payment of the unpaid commissions. Creed secured counsel and demanded payment from UFMC,

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<sup>1</sup>Creed's involvement with the Creed/Epstein agreement ended sometime in 1996.

as well as from Levin and Jeske. When Creed's collection efforts failed, Creed filed a complaint for breach of contract and breach of fiduciary duty against Levin, Jeske, and UFMC. The complaint was subsequently amended twice.

The district court concluded that Creed was an employee of UFMC and was, therefore, entitled to a net judgment of \$84,107.52. In so ordering, the district court granted UFMC an offset for half of the losses listed on the June 1996 profit and loss statement, \$2,313.12. The district court further concluded that UFMC was not entitled to an offset for a phone system that UFMC alleges was removed from the Las Vegas net branch office by Creed.

UFMC first argues that substantial evidence does not support the district court's conclusion that Creed was an employee of UFMC. "A district court's findings will not be disturbed on appeal unless they are clearly erroneous and are not based on substantial evidence."<sup>2</sup>

UFMC argues that under the doctrine of respondeat superior, UFMC did not exercise significant control and direction over Creed to be considered his employer. To the contrary, Creed contends that both the unambiguous language of the Levin/Jeske net branch agreement and the doctrine of respondeat superior support the conclusion that Creed was an employee of UFMC. We conclude that both of Creed's theories are persuasive.

Respondeat superior attaches only when the employee is under the control of the employer and when the acts complained of are

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<sup>2</sup>Campbell v. Maestro, 116 Nev. 380, 383, 996 P.2d 412, 414 (2000); see NRCP 52(a).

within the scope of employment.<sup>3</sup> “This element of control requires that the employer ‘have control and direction not only of the employment to which the contract relates but also of all its details and the method of performing the work.’”<sup>4</sup>

UFMC had control over the manner, method and means of Creed’s employment. The district court listed thirteen facts that support a finding of an employment relationship between UFMC and Creed. The most indicative of this relationship include: (1) control over whether Creed received payment for his services; (2) the requirement that Creed submit an employment application on UFMC materials to UFMC before he could be hired by the Levin/Jeske net branch, (3) Creed’s participation in the UFMC sponsored 401K plan, (4) IRS tax documents (i.e., W-4 and W-2 forms) prepared by Creed allowing UFMC to deduct federal tax withholdings, (5) the language of § 2.1 of the Levin/Jeske net branch agreement stating all persons shall be employees of UFMC, and (6) the credibility of the witnesses as determined by the district court. Therefore, substantial evidence supports the district court’s finding of an employer-employee relationship. We conclude that the district court did not abuse its discretion in concluding that Creed was an employee of UFMC.

Additionally, we conclude that substantial evidence supports the finding that Creed was an employee under the Levin/Jeske Branch Office Agreement.

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<sup>3</sup>Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (citing Molino v. Asher, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980)).

<sup>4</sup>Kennel v. Carson City School Dist., 738 F. Supp. 376, 378 (D. Nev. 1990) (quoting 53 Am. Jur. 2d Master and Servant § 2 (1970)).

[E]stablished doctrines of contractual interpretation [dictate that]: (1) the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself; and (2) ambiguities are to be construed against the party . . . who drafted the agreement or selected language used.<sup>5</sup>

The unambiguous language of the Levin/Jeske Branch Office Agreement clearly indicates that persons working for the net branch are employees of UFMC.

Next, UFMC disputes the district court's award of damages to Creed. "We have repeatedly expressed our reluctance to substitute our judgment for that of the trier of fact on the issues of damages."<sup>6</sup> Thus, unless the damage award is "flagrantly improper," this court will let it stand.<sup>7</sup>

Specifically, UFMC claims that the district court abused its discretion in concluding that Creed was entitled to a judgment amount which includes unpaid commissions and improper deductions. Our review of the record convinces us that substantial evidence exists to support the district court's determination of damages.

Additionally, UFMC argues that the district court abused its discretion in determining the amount of offset that UFMC was entitled to

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<sup>5</sup>Davis v. Nevada National Bank, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987) (internal citations omitted); see also Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278-79, 21 P.3d 16, 20 (2001).


<sup>6</sup>Automatic Merchandisers, Inc. v. Ward, 98 Nev. 282, 284, 646 P.2d 553, 555 (1982).

<sup>7</sup>See id. at 285, 646 P.2d at 555 (quoting Southern Pacific Co. v. Watkins, 83 Nev. 471, 495, 435 P.2d 498, 513-14 (1967)).

from Creed for losses sustained by the Creed/Epstein net branch. Under the Creed/Epstein net branch agreement, Creed was jointly responsible with Epstein for the losses and expenses. However, the district court concluded, based on the witnesses it found to be credible, that Creed was locked out of the office at the end of June 1996, and therefore unable to conduct further business. The district court also did not find Epstein and UFMC's president's testimony regarding Creed's termination date as credible as Creed's testimony. Because the trier of fact determines which witnesses are or are not worthy of belief, we conclude that the district court correctly determined that Creed should only be liable for half of the losses, up to the date of the lock out.

Further, UFMC asserts that the district court abused its discretion in determining that UFMC is not entitled to an offset for the collection action taken by G.E. Capital for the phone system leased by Creed and Epstein. The district court determined, after hearing conflicting testimony, that Creed did not take the equipment with him when he left the branch office. Since substantial evidence exists to support its finding, the district court did not abuse its discretion when it determined that UFMC was not entitled to an offset for the collection action by G.E. Capital for the phone system. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Agosti

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Becker

cc: Hon. Stewart L. Bell, District Judge  
Tharpe & Howell  
Nik Skrinjaric  
Woods, Erickson, Whitaker & Miles, LLP  
Clark County Clerk