IN THE SUPREME COURT OF THE STATE OF NEVADA

DARIA HARPER, AN INDIVIDUAL AND DANIEL WININGER, AN INDIVIDUAL,
Appellants,
vs.
BRUCE G. FAGEL, A LAW CORPORATION A/K/A LAW OFFICES OF BRUCE G. FAGEL & ASSOCIATES, A CALIFORNIA CORPORATION,
Respondent.

No. 88807

ORDER OF AFFIRMANCE

This is an appeal from a district summary judgment, certified as final under NRCP 54(b), in a legal malpractice action. Eighth Judicial District Court, Clark County; Danielle K. Pieper, Judge.

FACTS AND PROCEDURAL HISTORY

After suffering a work-related injury in Arizona, Daria Harper received medical treatment in Las Vegas that rendered her quadriplegic. *Harper v. CopperPoint Mut. Ins. Holding Co.*, 138 Nev. 300, 301, 509 P.3d 55, 57 (2022). Harper received substantial workers' compensation benefits through CopperPoint Mutual Insurance Company for her injury.

Harper and her husband (together, Harper) retained California attorney Kenneth Marshall Silberberg to bring a medical malpractice action in Nevada. Silberberg associated a Nevada-licensed attorney, Thomas Alch, to act as local counsel as required by SCR 42(2). At the time, Alch worked for another California firm, the Law Offices of Bruce G. Fagel (Fagel Law), which maintained an affiliate office—The Law Offices of Thomas S.

Alch—in Nevada. Fagel Law had referred cases to Silberberg in the past. Silberberg promised to give Fagel Law 50 percent of any contingent fees recovered, and Fagel Law would then share 10 percent of its compensation with Alch—an arrangement which the attorneys later testified was a gift for Fagel Law's prior referrals to Silberberg.

Alch filed the complaint and sponsored Silberberg's pro hac vice admission. Silberberg controlled the case's strategy and direction, handling the depositions, expert retention, and discovery. He notified Harper that he had associated Alch and Fagel Law but advised Harper that he remained in full control of the case. Neither Bruce Fagel nor Fagel Law entered appearances in the case, only Silberberg and Alch.

After Alch filed the complaint and pro hac vice paperwork for Silberberg, he left Fagel Law. Alch continued on as local counsel for Silberberg. Eight months after Alch left Fagel Law, Silberberg settled the cases for $6.5 million. Alch did not attend the mediation that led to the settlement. Silberberg then split his legal fees with Fagel Law and Alch.

Harper alleges that Silberberg committed legal malpractice in settling the medical malpractice suit. Specifically, Harper alleges that Silberberg told them that the workers' compensation insurer, CopperPoint, had no right to share in the proceeds of the settlement. This proved incorrect. *See Harper*, 138 Nev. at 302, 309, 509 P.3d at 58, 62 (upholding CopperPoint's claim of lien against the malpractice settlement).

Harper sued Silberberg, Fagel Law, and Alch for legal malpractice, seeking the amount by which the CopperPoint lien reduced the settlement. Harper's claims against Silberberg are for direct negligence, but her claims against Fagel Law stand on a theory of vicarious liability for the negligence of Silberberg and/or Alch. As pertinent to this appeal, Harper alleges that Fagel Law and Silberberg were engaged in a joint venture and that Fagel Law was therefore vicariously liable for Silberberg's acts and omissions during the venture.

Fagel Law moved for summary judgment, which the district court granted. Since its ruling eliminated Fagel Law as a defendant, the district court certified its order as final under NRCP 54(b). Harper appealed. The case remains pending against Silberberg and Alch in district court.

DISCUSSION

Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A district court's grant of summary judgment is reviewed de novo. *Nuleaf CLV Dispensary, LLC v. State, Dep't of Health & Hum. Servs.*, 134 Nev. 129, 132, 414 P.3d 305, 308 (2018). "Issues involving statutory and contractual interpretation are legal issues subject to our de novo review." *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012), *abrogated on other grounds by Tahican, LLC v. Eighth Jud. Dist. Ct.*, 139 Nev. 11, 15-16, 523 P.3d 550, 554 (2023). "Whether or not a joint venture exists is normally a question to be answered by the trier of fact." *Armor v. Lantz*, 535 S.E.2d 737, 743 (W. Va. 2000); *accord DLZ Ind., LLC v. Greene County*, 902 N.E.2d 323, 328 (Ind. Ct. App. 2009). "However, where that question can be resolved by looking only to undisputed facts or an unambiguous contract, the existence of a joint venture is a question of law appropriate for summary judgment." *DLZ Ind., LLC*, 902 N.E.2d at 328. "Further, where an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper." *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998) (citation modified).

"A joint venture is a contractual relationship in the nature of an informal partnership wherein two or more persons conduct some business enterprise, agreeing to share jointly, or in proportion to capital contributed, in profits and losses." *Bruttomesso v. L.V. Metro. Police Dep't*, 95 Nev. 151, 154, 591 P.2d 254, 256 (1979). To impose vicarious liability on a joint venture or joint enterprise theory, shared control must be shown, in addition to an agreement to share profits and losses. *See* Restatement (Second) of Torts § 491 cmt. c (1965) (stating that one of the elements needed for joint enterprise liability is "an equal right to a voice in the direction of the enterprise, which gives an equal right of control"); *Howard, Adm'r of the Est. of Sean David Howard, Sr. v. Szozda*, 224 N.E.3d 1259, 1262 (Ohio Ct. App. 2023) (stating that "joint venture," "joint enterprise," and "joint adventure" are interchangeable terms); *cf. Radaker v. Scott*, 109 Nev. 653, 659, 855 P.2d 1037, 1040 (1993) (emphasizing that "both parties could control the actions of the other to a certain extent" in affirming finding of joint venture); *L.V. Mach. & Eng'g Works v. Roemisch*, 67 Nev. 1, 10, 213 P.2d 319, 323 (1950) (noting that a partnership or joint venture "includes as an essential element the joint participation in the conduct of the business").

Because a plaintiff must prove each element of a joint venture, the absence of a single element supports summary judgment for the defendant, even where evidence could support the other elements. *See Fry v. Shaw*, 508 S.W.2d 142, 144, 146 (Tex. Ct. Civ. App. 1974) (holding that no joint venture existed when, despite there being an agreement to share profits, there was no joint control or loss-sharing); *cf. Barmettler*, 114 Nev.

at 446-47, 956 P.2d at 1386 (holding summary judgment was proper where the plaintiff could not prove an essential element of his claim). The district court concluded that Harper failed to produce evidence from which an agreement to share control, share profits, or share losses could be found. We conclude that, though the district court erred in finding no genuine issue of material fact as to profit-sharing, it correctly determined that evidence of the other two elements required for joint venture liability—shared control and shared losses—was lacking.

A genuine issue of fact exists as to profit-sharing

To impose vicarious liability on a joint venture theory, the foreign and local counsel must agree to share profits to some degree. *Armor*, 535 S.E.2d at 743; *see also Bruttomesso*, 95 Nev. at 154, 591 P.2d at 256 (defining joint venture in Nevada). Courts have found an agreement to share profits where, for instance, the foreign law firm was to receive 25 percent of the recovery and the local firm was to receive 8.33 percent. *Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C*, 42 So.3d 667, 669, 678 (Ala. 2009). Further, on the matter of gifts versus agreement to share profits, "there can be no gift without an intent to give and receive as such, and the question of intent is a question of fact for the jury." *Martin v. Jennings*, 29 S.E. 807, 811 (S.C. 1898).

Relying on the attorneys' deposition testimony that the $540,026 was a gift for Fagel Law's past referrals to Silberberg, the district court found no evidence of an agreement to share profits in this case. But the inferences reasonably drawn from the record create a genuine issue of material fact as to profit sharing. The sheer size of the shared fee was sufficient for a factfinder to reject Silberberg's and Fagel's testimony that this was a gift for past referrals. We therefore conclude that the district court erred by accepting Silberberg's and Fagel's gift explanation as an uncontested fact at the summary judgment stage.

Fagel Law did not have or exercise shared control

The lead counsel/local counsel relationship does not automatically establish the degree of shared control required for joint venture liability. More must be shown:

> A rule commonly encountered is that a lawyer from another jurisdiction must associate with local counsel when temporarily appearing in litigation in a state. In most such situations the designated local lawyer plays a largely passive role. Courts should therefore be reluctant to visit the local lawyer with vicarious liability. But if the relationship is one of more nearly equal responsibility, authority, and profit sharing, it may fit the legal description of a joint venture, permitting an injured party to hold both foreign and local lawyer to joint and several liability.

Charles W. Wolfram, *Modern Legal Ethics* 237-38 (practitioner's ed. 1986) (citations omitted); *see also Ortiz v. Barrett*, 278 S.E.2d 833, 840 (Va. 1981) (affirming finding of no joint venture liability where control and management of the litigation was vested in foreign and not local counsel and other elements of joint venture liability were not met); *Armor*, 535 S.E.2d at 745-46 (affirming summary judgment in favor of local counsel in an attorney malpractice case where no evidence was provided showing local counsel shared control of the litigation with lead counsel) (citing *Wolfram*, *supra*, at 238).

In many cases, joint or shared control presents an issue of fact. But in this case, the evidence was united that Silberberg had sole control over the medical malpractice case, including from the plaintiffs themselves.

In deposition, Daria Harper testified that Silberberg "was in full control regarding the direction and the handling of" the medical malpractice lawsuit. Her husband and co-plaintiff, Daniel Wininger, likewise testified that it was his "understanding that Silberberg had the sole control and direction of [the] lawsuit." Harper additionally concedes on appeal that "Alch and Fagel understood that all pre-trial litigation decisions and strategy were to be made by Silberberg."

Despite these concessions, Harper argues that shared control may be unequal or delegated and that here Fagel Law, through its associate Alch, exercised "control of the necessary Nevada connection." She notes, for example, that Alch's filing of the complaint and his sponsorship of Silberberg's pro hac vice admission under SCR 42(14) were necessary for the suit to have been brought and maintained in Nevada and that a Fagel Law paralegal helped Alch with filings in the case. But this is not enough to establish the control needed to impose vicarious liability on Fagel Law on a joint venture theory. The control sought to be imputed to Fagel Law by virtue of Alch's association as local counsel, moreover, ended when Alch left Fagel Law and continued to represent Harper as their Nevada counsel of record. This occurred eight months before the mediation at which Silberberg allegedly engaged in legal malpractice. Though Bruce Fagel received occasional emails about the case after Alch left Fagel Law, the district court correctly found no evidence Fagel Law exercised the control over the case or its settlement required for joint venture liability.

Of note, unlike the Model Rules of Professional Conduct (MRPC), the Nevada Rules of Professional Conduct (NRPC) do not require lawyers dividing fees to assume joint responsibility for the representation. *Compare* MRPC r. 1.5(e)(1) (permitting fee division between lawyers not of the same firm only if "the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation"), *with* NRCP 1.5(e)(1) (omitting the MRPC provision and designating the numbered paragraph reserved). A finding of shared control or "joint responsibility" thus does not follow as a matter of law in Nevada from an agreement to share fees, as it does in states that have adopted MRPC 1.5(e)(1). *Duggins v. Guardianship of Washington*, 632 So. 2d 420, 426-27, 432 (Miss. 1993) (concluding a 50/50 fee split supported joint control), *superseded by statute on other grounds as recognized in Pettis v. Simrall*, 354 So.3d 295, 301-02 (Miss. 2023). Even crediting Harper's position that Silberberg's payment to Fagel Law amounted to profit sharing and not a gift for past referrals, this does not provide evidence of shared or joint control by Fagel Law over the medical malpractice case and its settlement by Silberberg.

The facts do not support an agreement to share losses

Finally, joint venture liability generally requires an agreement to share losses. *See Bruttomesso*, 95 Nev. at 154, 591 P.2d at 256 (defining joint venture in Nevada as a contractual relationship where two or more persons agree "to share jointly, or in proportion to capital contributed, in profits and losses"); *Hook v. Giuricich*, 108 Nev. 29, 31-32, 823 P.2d 294, 296 (1992) (overturning summary judgment in part for the party's failure to show shared losses). Harper argues that even if Silberberg and Fagel Law did not agree to share losses in terms of outlays for experts and other expenses, Fagel Law would have lost the value of Alch's time invested in the litigation had Silberberg not prevailed.

On this record, however, Fagel Law's actual or potential financial losses do not support a loss-sharing agreement of the type needed to support joint venture liability. Because Harper, who is not a party to the joint venture, seeks to impose vicarious tort liability based on another's purported joint venture, the contingency fee agreement—the objective manifestation of the parties' financial arrangement—is important. *See Foote v. Posey*, 330 P.2d 651, 654 (Cal. Ct. App. 1958) ("In the case of third parties the fundamental question is what had those parties the right to believe from the language of any contract and from the conduct of the parties to it as affecting them, and not as affecting each other."); *see also Botsford v. Van Riper*, 33 Nev. 156, 180-81, 193-94, 110 P. 705, 706-07, 711 (1910) (analyzing shared losses in context of dispute between participants in a joint venture). That agreement was between Harper, her husband, and Silberberg alone and placed all financial responsibility on Silberberg: "If there is no recovery, Attorney [Silberberg] shall be responsible for all costs incurred by them . . . ." *See Thompson v. Hiter*, 826 N.E.2d 503, 513 (Ill. App. Ct. 2005) ("[W]ith respect to lawyers and clients, the key factor to consider in determining the existence of a joint venture is whether the client named each of her attorneys in the initial contingent fee agreement. Having done so, they are deemed to be in a joint venture . . . .").

Further, Fagel Law advanced minimal costs to file and to serve the lawsuit—less than $3,000—which Silberberg reimbursed. In contrast, and by Harper's own admission, Silberberg incurred at least $125,070 in expert fees and other litigation expenses, and that was *before* trial. *See In re UNR Indus.*, No. 82 B 9841 – 82 B 9851, 1984 U.S. Dist. LEXIS 16233, at *43 (N.D. Ill. May 31, 1984) (noting disproportionate losses in holding that no joint venture existed at any relevant time). If the medical malpractice lawsuit had been unsuccessful, Silberberg alone would have borne the responsibility for that amount and the substantial trial expenses that would have followed. *See Ortiz*, 278 S.E.2d at 840 (holding that no joint venture existed between foreign and local counsel where the attorneys lacked an agreement to share losses). Nothing in this record suggests a separate expense or risk-sharing arrangement existing as between Silberberg and Fagel Law or Alch.

Neither do Fagel Law's actual and potential nonmonetary losses support a loss-sharing agreement in this context. Fagel Law did not appear in the case and the services Alch provided Harper while still employed at Fagel Law were minimal compared to Silberberg's. Under the facts as presented, Fagel Law's risk of loss of services was not of the sort that would indicate a loss-sharing agreement for the medical malpractice case. *See Am. Equity Ins. Co. v. Beck*, 108 Cal. Rptr. 2d 728, 730, 736 (Cal. Ct. App. 2001) ("[T]he only loss ordinarily contemplated in a contingency fee tort action is the loss of advanced costs in the event there is no recovery."); *rev. granted, Am. Equity Ins. Co. v. Beck*, 31 P.3d 1270, 1270 (Cal. 2001), *aff'd on other grounds, Beck v. Wecht*, 48 P.3d 417, 418, 423 (Cal. 2002).

CONCLUSION

A joint venture requires shared control, along with an agreement to share profits and an agreement to share losses. Although a genuine issue of material fact existed with respect to profit-sharing, no such issue exists as to the shared control and loss-sharing elements of Harper's vicarious liability claim against Fagel Law. We therefore find no error in the district court's grant of summary judgment in favor of Fagel Law and against Harper.[1]

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[1]We have reviewed Harper's other arguments and conclude they are without merit.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.

Parraguirre, J.

Bell, J.

cc: Hon. Danielle K. Pieper, District Judge
Israel Kunin, Settlement Judge
Maier Gutierrez & Associates
Blumberg Law Corporation
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk