IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT R. GARDNER AND CRISTALLEE GARDNER,
Appellants,
vs.
FARM FRESH MARKETING, INC., AND DENNIS D. WENK,
Respondents.

No. 42625

FILED

JUL 06 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment and an order awarding attorney fees and costs in a personal injury action. Seventh Judicial District Court, White Pine County; Norman C. Robison, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. Appellants Gilbert and Cristallee Gardner allege that the district court committed numerous errors during their personal injury action against respondents Farm Fresh Marketing and Farm Fresh's employee Dennis Wenk. For the following reasons, we affirm.

Striking of offer of judgment

The Gardners primary claim is that the district court improperly refused to accept a NRCP 68 offer of judgment allegedly entered into by the parties. Farm Fresh submitted an offer of judgment to the Gardners, offering to pay $2,500 for property damage, $3,312 for lost income, $17,000 for Mr. Gardner's damages, and $30,000 for Mrs. Gardner's damages. The Gardners attempted to reject the portion of the offer pertaining to Mrs. Gardner's damages while accepting the other terms. The Gardners then filed the offer and a notice of partial acceptance with the district court. The district court concluded that the Gardners

never accepted the offer and struck it from the record. This decision was proper.

An offer of judgment under NRCP 68 is contractual in nature and construed according to fundamental contract principles.[1] Thus, there must be a meeting of the minds and both parties must have a clear understanding of the offer's terms in order for there to be a valid acceptance.[2] Likewise, under general contract principles, a reply to an offer that is conditional on the offeror's assent to different essential terms is not an acceptance but rather a rejection of the offer and a counter-offer.[3]

Based on these legal principles, the Gardners did not properly accept Farm Fresh's offer of judgment. Their purported acceptance attempted to change the offer's essential terms and, as a result, was instead a rejection of the original offer and a counter-offer.[4] Contrary to the Gardners' claims, no evidence indicates Farm Fresh ever accepted this counter-offer. Because Farm Fresh's offer of judgment was never

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[1]Fleischer v. August, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987); see Arbor Hill Concerned Citizens v. County of Albany, 369 F.3d 91, 95 (2d Cir. 2004).

[2]Fleischer, 103 Nev. at 246, 737 P.2d at 521.

[3]Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 421, 580 P.2d 955, 957 (1978).

[4]Id.

accepted, the district court properly struck it from the record.[5] Thus, the Gardners' claim lacks merit.[6]

District court orders regulating discovery

The Gardners also argue that the district court committed four separate errors concerning pre-trial discovery: (1) barring the Gardners from introducing medical expert testimony after they failed to make their experts available for a deposition; (2) compelling the Gardners to produce their federal income tax returns and medical records; (3) denying the Gardners' motion to strike Wenk's answer after he failed to appear at a scheduled deposition; and (4) granting Farm Fresh's motion compelling Mrs. Gardner to submit to an independent medical examination.

The district court enjoys wide discretion to control a litigant's conduct during pretrial discovery.[7] The Gardners have provided no cognizable explanation why the district court's decisions were an abuse of this discretion. Therefore, their claims lack merit.

Appellate misconduct

The Gardners' briefs, submitted on their behalf by attorney Gary C. Backus, contain numerous violations of the Nevada Rules of Appellate Procedure. In order to make clear that this court will not tolerate such appellate misconduct, we take a moment to detail some of the more egregious violations.

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[5]See Kason v. Amphenol Corp., 132 F.R.D. 197 (N.D. Ill. 1990) (striking an unaccepted offer of judgment from court files).

[6]We note that the parties have not raised–and thus we will not decide–whether an unapportioned offer of judgment is a basis for recovery of attorney fees and costs under NRCP 68.

[7]Hahn v. Yackley, 84 Nev. 49, 54, 436 P.2d 215, 218 (1968).

First, elementary appellate procedure requires that every assertion made in a brief submitted to this court "be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found."[8] The briefs submitted by Backus repeatedly violated this rule. For example, the statement of facts included in the Gardners' opening brief contained no citations to the appendix; instead, the only citations are to "page 1," "page 2," etc. Fortunately, Farm Fresh's answering brief explained that these citations referred to the pages of the statement of the evidence filed with this court. However, Backus failed to include the statement of the evidence in the Gardners' appendix.

Furthermore, the Gardners' briefs repeatedly fail to indicate which of the several challenged district court orders is being addressed. When an appellant assigns error to several different orders entered by the district court, it is imperative to delineate which order each argument refers to. Not only did Backus fail to do so, he also failed to include many of these orders in the appendix. This constitutes a clear violation of NRAP 30's requirement that all judgments or orders appealed from be included in the appendix.[9]

In addition, the Gardners' briefs are replete with unsubstantiated assertions that are of questionable accuracy. These assertions are too numerous to list but include the claim that Farm Fresh demanded Mrs. Gardner travel to Reno for an independent medical examination. This assertion is directly contradicted by the correspondence in the record indicating that Farm Fresh attempted to accommodate the

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[8]NRAP 28(e).

[9]NRAP 30(b)(2)(viii).

Gardners in scheduling such an examination. We particularly disapprove of the final passage in the Gardners' reply brief. This diatribe contains countless unsubstantiated claims and implies that the district court judge was biased against the Gardners. Such comments will not be condoned by this court.[10]

In conclusion, we admonish Backus to become familiar with the Nevada Rules of Appellate Procedure before filing any future documents with this court because any future NRAP violations will result in severe sanctions.

Conclusion

We have reviewed the Gardners' remaining claims and conclude they lack merit. Although the Gardners also appealed the district court's order awarding attorney fees and costs, their failure to address the order in their briefs precludes us from questioning its validity.[11] Accordingly, we

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[10]See NRPC 8.2(a).

[11]See Edwards v. Emperor's Garden Rest., 122 Nev. ____, ____ n.38, 130 P.3d 1280, 1288 n.38 (2006).

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Norman C. Robison, Senior Judge
Carolyn Worrell, Settlement Judge
G. C. Backus
Matthews & Wines
White Pine County Clerk