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# Golden Road Motor Inn, v. Islam, et. al., 132 Nev. Adv. Op. 49 (Jul. 17, 2016)

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*Golden Road Motor Inn, v. Islam, et. al.*, 132 Nev. Adv. Op. 49 (Jul. 17, 2016)[1]

CONTRACT; TORT: CONVERSION; GAMING

**Summary**

The Nevada Supreme Court held that non-compete agreements cannot extend further than what is reasonable and necessary to protect the interests of the employer and cannot create an undue hardship on the employee. It also held that courts may not "blue line" ("blue pencil") contracts, that is change or delete terms to make the Contract legal. The Court further held that altering player contact information, so long as the information can be restored with minimal disruption to the gaming company does not rise to the level of conversion. Finally, the Court held that a gaming company is not liable for misappropriation of trade secrets under the Nevada Uniform Trade Secrets Act and is if it reasonably relies on representations presented by employees that information was based on prior relationships not possibly stolen information.

The dissent, while agreeing the non-compete was written too broadly, disagreed with the majority when it comes to blue lining contracts. Calling rules that disfavor blue lining antiquated, the dissent would like courts to have the freedom to modify contracts. The dissent also disagreed with the majority on the Uniform Trade Secret Act and would have held that the defendant had enough knowledge of a possible violation because it knew the non-compete agreement existed, and thus, was on notice that it might possess trade secrets.

**Background**

Sumona Islam was employed as a casino host at Golden Road Motor Inn, d/b/a Atlantis Casino Resort Spa in Reno, Nevada. As part of her employment, she signed a series of agreements including a non-compete agreement refraining her from working for another gaming establishment within 150 miles of Atlantis for one year after leaving its employ. Also included in the agreements was an agreement stopping Islam from using, downloading, or uploading data about players without permission.

Islam worked with Atlantis for three years. After those three years, she became unhappy with her job and started looking for new work. While looking for this new work, she hid information in Atlantis' database about players and casino guests and wrote out by hand information about players from Atlantis' database. After she left Atlantis, other casino hosts tried to contact Islam's players and discovered the damaged information. Atlantis fixed the problem, incurring $2,117 in expenses.

GSR hired Islam. During the interview process, she was instructed to only bring relationships she established during her time at Atlantis. Islam instead brought all of the information she copied from Atlantis, but did not indicate to her new employers where she received this information. Once Atlantis became aware Islam was using this data at GSR, it sent a letter to GSR telling it to stop using that information, alleging GSR was had trade secrets. GSR

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asked for specifics about these supposed trade secrets. Instead, Atlantis filed this lawsuit. GSR served Atlantis with an offer of judgment in response.

Atlantis sued both Islam and GSR for, among other things, breach of contract, violation of the Nevada Uniform Trade Secrets Act, conversion, and tortious interference with contractual relationships. Islam and GSR countered, alleging among other things, that the non-compete was unenforceable. The district court found Atlantis and Islam liable for breach of contract and violation of the Nevada Uniform Trade Secrets Act, issuing a permanent injunction prohibiting further use of the trade secrets and awarding compensatory and permanent damages, and attorney's fees. The district court further held that neither Islam nor GSR was liable for tortious interference with contractual relations or conversion or misappropriation of trade secrets. It also held Islam's non-compete agreement was unenforceable. Finally, based on GSR's offer of judgment, the district court awarded GSR attorney's fees and costs, but did not award fees requested under NRS 600A.060.

The parties appealed. Atlantis argued the district court erred in holding the non-compete was invalid, that Islam was not liable for conversion, that GSR was not liable for tortious interference and for the attorney's fees to GSR. Islam appealed the award for attorney's fees to Atlantis. Finally, GSR appealed the denial of fees under NRS 600A.060.

**Discussion**

The Court reviews the district court's ruling de novo,[2] but will only change the district court's rulings if they are "clearly erroneous and not based on substantial evidence."[3]

*Atlantis v. Islam*

*Noncompete agreement*

Atlantis argued that the non-compete agreement was enforceable or that the court should modify the provisions that were too broad. Islam and GSR argued that the non-compete was unreasonable and that the only remedy was to void the contract because the court cannot create new contracts.

*Reasonableness*

Interpretation of contracts is a legal question considered de novo.[4] If the restraint imposes an undue hardship or if it is "greater than required for the protection of the person whose benefit the restraint" benefits, it is unreasonable.[5] A term prohibiting an employee from employment is too broad if it extends further than required to protect the employer's interest.[6] Because Islam's employment agreement prohibits participating in all types of employment with a gaming establishment, it is unreasonable because it restricts her ability to find work.

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[2] Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).
[3] Int'l Fid. Ins. Co. v. State, 122 Nev. 39, 42, 126 P.3d 1133, 1134–35 (2006).
[4] May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).
[5] Hansen v. Edwards, 83 Nev. 189, 191–92, 426 P.2d 792, 793 (1967).
[6] *See* Jones v. Dexter, 112 Nev. 291, 292, 913 P.2d 1272, 1273 (1996); Camco, Inc. v. Baker, 113 Nev. 512, 519–20, 936 P.2d 829, 833–34 (1997).

*Enforceability*

Because the non-compete includes an unenforceable provision, the entire agreement is negated.[7] Nevada courts do not "blue pencil" private contracts as it creates a new contract, which is outside of the court's powers.[8] That the aforementioned contract is a non-compete contract does not change the court's analysis. The court can neither blue pencil ambiguous contracts, nor reform unambiguous contracts.

The court is not required to modify overly broad and unreasonable non-compete contracts. Instead, where a preliminary injunction is in place to stop an employee from working pursuant to a non-compete agreement, the court instead modifies that injunction.[9]

The court cannot change the intent of the parties,[10] and judicial restraint requires courts to refrain from using the blue pencil to modify contracts. Additionally, courts must preserve judicial resources and not take up the work of interpreting contracts on behalf of the parties in disagreement.

The court also refuses to presume an employer acted in good faith when drawing up a contract. Because an employer has a position of better bargaining power,[11] it has more opportunities to "oppress unreasonably."[12] The court should not help an employer with this superior bargaining position. When the court uses its blue pencil to help the employer, the employer has greater freedom to "insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full,"[13] therefore allowing even more unbalanced bargaining power on behalf of the employer.

Blue penciling a contract can render most agreements incoherent. When a contract is blue penciled, it invalidates "only the offending words . . . if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words."[14]

Islam's non-compete agreement, as written, was an unlawful restraint on trade and as such, unenforceable. The court cannot pick up the blue pencil to rewrite the contract and without the contract Islam was not liable for violating the non-compete agreement.

*Conversion*

Atlantis claimed Islam was liable for conversion when she altered player contact information. Conversion is "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title *or* rights therein or in derogation,

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[7] *Jones*, 112 Nev. at 296, 913 P.2d at 1275.
[8] Reno Club, Inc. v. Young Inv. Co., 64 Nev, 312, 323, 182 P.2d 1011, 1016 (1947).
[9] *Hansen*, 83 Nev. at 192, 426 P.2d at 293–94; Ellis v. McDaniel, 95 Nev. 455, 458, 596 P.2d 222, 224 (1979).
[10] Reno Club, 64 Nev. at 323, 182 P.2d at 1016; Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 674 (2008).
[11] Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 924 n.10 (2009).
[12] 15 Grace McLane Gisel, *Corbin on Contracts* § 80.15, at 120 (rev. ed. 2003).
[13] Streiff v. Am. Family Mut. Ins. Co., 348 N.W.2d 505, 509 (Wis. 1984).
[14] Pivateau, *supra* note 10, at 681.

exclusion, or defiance of such title or rights."[15] Altering player contact information does not rise to the level of conversion. One who alters information in this way is, however, liable for the cost of repairs.

*Attorney fees awarded to Atlantis against Islam*

An award of attorney's fees is improper without an itemized list.[16] Islam is entitled to review the full award against her before paying it.

*Atlantis v. GSR*

*Nevada Uniform Trade Secrets Act*

Atlantis argued that GSR was liable for Islam's misappropriation of its trade secrets. GSR argued it did not misappropriate Atlantis' information, that it reasonably relied upon Islam's statements that she had personal relationships with the players she brought into its database.

Trade secret misappropriation occurs when:

> (1) the plaintiff is the owner of a valid trade secret; (2) the defendant acquired the trade secret from someone other than the plaintiff and (a) knew or had reason to know before the use or disclosure that the information was a trade secret and knew or had reason to know that the disclosing party had acquired it through improper means or was breaching a duty of confidentiality by disclosing it; or (b) knew or had reason to know it was a trade secret and that the disclosure was a mistake; (3) the defendant used or disclosed the trade secret without plaintiff's authorization; and (4) the plaintiff suffered harm as a direct and proximate result of the defendant's use or disclosure of the trade secret, or the defendant benefitted from such use or disclosure.[17]

Here, GSR attempted to ensure the information it received from Islam was not protected trade secrets, relying on Islam's representations that her information was based on her own relationships, not information gathered from a protected source.

Further, a demand letter notifying another party of a potential violation must include specifics, not generalities about potential violations. Specifics are required to put a party on notice so it can rectify the situation.

The scope of protected trade secrets is limited.[18] It is important to limit this information so that casinos cannot stop competition by accusing casino hosts of trade secret misappropriation each time he or she began working at a new casino.

Under these circumstances, the Court found GSR could not be found liable for misappropriation. It took reasonable steps to protect from unlawful use of trade secrets

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[15] M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd., 124 Nev. 901, 910, 193 P.3d 536, 542 (2008).
[16] Love v. Love, 114 Nev. 572, 582, 959 P.2d 523, 529 (1998).
[17] MedioStream, Inc. v. Microsoft Corp., 869 F. Supp. 2d 1095, 1114 (N.D. Cal. 2012).
[18] Microstrategy Inc. v. Bus. Objects, S.A. 331 F. Supp. 2d 396, 431 (E.D. Va. 2004).

and relied upon Islam's assertions that the information she brought with her was hers alone.

*Attorney fees awarded to GSR against Atlantis*

GSR received an award of attorney's fees pursuant to its NRCP 68 offer of judgment. GSR argued it was entitled to an additional award of attorney's fees under NRS 600A.060 because of Atlantis' bad faith. However, this Court held Atlantis' claim was not brought in bad faith, thus GSR was only entitled to an award of attorney's fees based on its offer of judgment alone.

**Conclusion**

The Court upheld the district court's rulings on the following: attorney's fees awarded to GSR based on its offer of judgment; lack of misappropriation on behalf of GSR under the Nevada Uniform Trade Secrets Act; that Islam's conduct did not rise to the level of conversion; and that Islam was not liable for violating the non-compete because the non-compete was unreasonable. The Court reversed and remanded the award to Atlantis for its attorney's fees, holding Atlantis must provide an accounting of those fees.

**Dissent**

The dissent agreed that the non-compete was too broad, but argues that, absent a bad faith showing on behalf of Atlantis, the court should modify or sever the agreement to match the parties' intent. Additionally, the dissent argued that because GSR had knowledge of the non-compete it was on notice about possible violations of Nevada's Uniform Trade Secrets Act and thus liable for misappropriation.

*Non-compete agreement*

Courts can alter non-compete agreements, to recognize parties' intent and make the agreements more reasonable.[19] Most jurisdictions adopt this path.[20] Allowing courts to modify agreements in this way preserves parties' intent rather than voiding the entire agreement.[21] Additionally, allowing courts to use the blue pencil to modify agreements lets courts eliminate overly broad parts of non-compete agreements and enforce the rest.[22]

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[19] Ferdinand S. Tinio, Annotation, *Enforceability, Insofar as Restrictions Would Be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61. A.L.R. 3d 397 §§ 4-5 (1975).

[20] Data Mgmt., Inc. v. Greene, 757 P.2d 62, 64 (Alaska 1988); Hilligoss v. Cargill, Inc., 649 N.W. 2d 142, 147 n.8 (2008); Whelan Sec. Co., v. Kennebrew, 379 S.W.3d 835, 844 (Mo. 2012); Merrimack Valley Wood Prods., Inc. v. Near, 876, A.2d 757, 764 (N.H. 2005); Cardiovascular Surgical Specialists, Corp. v. Mammana, 61 P.3d 210, 213 (Okla. 2002); Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1058 (R.I. 1989); Simpson v. C & R Supply, Inc., 598 N.W.2d 914, 920 (S.D. 1999).

[21] 17A C.J.S. Contracts § 381 (2011).

[22] Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 249–50 (2007). *See also* Ellis v. James V. Hurson Assocs., Inc., 565 A.2d 615, 617 (D.C. 1989); Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 730 (Ind. 2008); Hartman v. W.H. Odell & Assocs., Inc., 450 S.E.2d 912, 920 (N.C. Ct. App. 1994); Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 916 (Wis. 2009).

Here, if the court had modified Islam's non-compete by narrowing the section describing scope of future employment, the parties' intent could be preserved. The Court follows old rules when it does not allow modification in this way.[23]

*Uniform Trade Secret Act*

Islam provided GSR with a copy of her Atlantis non-compete while interviewing for the new job. This put GSR on notice that Islam's information might be a trade secret violation. This would not give employers incentive to accuse new employers of trade secret violations.

*Conclusion*

The non-compete can be narrowed instead of invalidated and GSR misappropriated Atlantis' trade secrets, thus the district court erred in dismissing Atlantis' breach of the non-compete agreement, tortious interference with a contractual relationship claim against GSR, and the violation of Nevada's Uniform Trade Secrets Act. As such, the district court should be reversed.

[23] *Durapin*, 559 A.2d at 1058.