5-3-2018

MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc., 134 Nev. Adv. Op. 31 (May 3, 2018)

Joseph K. Fabbi
University of Nevada, Las Vegas -- William S. Boyd School of Law

MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc., 134 Nev., Adv. Op. 31 (May 3, 2018)[1]

Intellectual Property Law: Trade Secrets

Summary

The Court held that jury instructions must be aligned with a Nevada statute if the Nevada statute has plain meaning via "facially clear" language. Further, the Court determined there must be discretionary abuse by a district court if an appellate court over rules its decision regarding a motion to amend, a motion to compel discovery, a motion for case concluding sanctions, or a motion in limine regarding evidence. The Court concluded that NRS 600A.060 does not preclude a court from awarding attorney fees via other appropriate statutes.

Background

MEI-GSR Holdings, LLC, who owns the Grand Sierra Resort and Casino (GSR), caught Peppermill Casino, Inc. employee Ryan Tors in July 2013 using a slot machine key on machines at its GSR property to access par values. The Nevada Gaming Control Board (NGCB) investigated Tors and Peppermill. It revealed that Peppermill executives had encouraged Tors' conduct since 2011. The NGCB did not find that Peppermill used par values from any casinos to adjust its slot machines and Peppermill agreed to a $1 million fine.

GSR filed suit against Tors and Peppermill on August 2, 2013 for violating the National Trade Secrets Act (NTSA). GSR and Peppermill engaged in discovery with regard to Peppermill's emails between executives that the NGCB obtained during its investigation. GSR was never fully satisfied with the discovery decisions by the district court. A jury trial ensued, where GSR offered a proposed jury instruction with a definition for the term "trade secret" that did not align with NRS 600A.030. The district court rejected GSR's jury instruction and instructed the jury that someone who obtained information by reverse engineering does not have liability because reverse engineering is a proper way to obtain and discover information.

The jury returned a verdict which favored Peppermill, finding that stolen par values are not "trade secrets" via NRS 600A.030 because GSR did not prove by a preponderance of the evidence that par values are not readily ascertainable by proper means. Peppermill filed a motion for attorney's fees and costs, when GSR rejected Peppermill's offer of judgment and desire to obtain a better judgment via NRCP 68. The district court awarded Peppermill attorney fees and entered an amended judgment in Peppermill's favor. The district court denied GSR's motion for a new trial. GSR appealed.

Discussion

In GSR's appeal, it argued that the district court erred by instructing the jury in regard to trade secrets under NRS 600A.030 by: denying to amend GSR's complaint; denying GSR's motions to compel Peppermill to reveal all emails that the NGCB obtained during its Peppermill investigation; denying GSR's motion which asked for case-concluding sanctions; excluding evidence that showed Peppermill stole par values from other casinos; and awarding Peppermill attorney's fees under NRCP 68.

[1] Joseph K. Fabbi

Whether the district court erred in instructing the jury concerning trade secrets under NRS 600A.030

GSR argued that the district court did not properly instruct the jury under NRS 600A.030. It argued that the statute makes it impossible for a defendant to show that information is readily ascertainable and not a trade secret, when the defendant stole the information. GSR did not show that its offered jury instruction aligned with Nevada law[2] by demonstrating that NRS 600A.030's statutory language, which is "facially clear," coincided with GSR's jury instructions. Under this situation, the court must give the statute's language plain meaning.[3]

NRS 600A.030(5) says that information can be a "[t]rade secret" only if it is not "readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use." Other persons in the public could have properly obtained the information that GSR disclosed in its machine, for example, by reverse engineering; therefore, just because Peppermill obtained the par values improperly, did not make it impossible for Peppermill to show the par values are readily ascertainable by other people. The Court held that GSR did not show that its jury instructions were supported by Nevada law.

Whether the district court erred in denying GSR's motion to amend complaint

GSR filed a motion to amend its complaint with seven new claims and add Peppermill's general manager as a defendant, a year and a half after bringing the suit against Peppermill. GSR explained that the amendment should be granted because its depositions with Tors brought newly discovered information to light. The district court denied the motion to amend because the information that GSR claimed to be new was available from the Peppermill investigation by NGCB and was conceded in the parties' prior pleadings. As such, the district court found that GSR brought the motion with undue delay.

Under NRCP 15(a) the trial court has discretion to amend a motion and its decision to deny amending a motion can only be overruled if there is a showing that the trial court abused its discretion. GSR argued that the trial court had insufficient grounds to deny an amended complaint because undue delay only. Yet, the Nevada Supreme Court has found that undue delay is a sufficient reason to deny a motion to amend.[4] As such, the district court did not abuse its discretion when it denied GSR's motion to amend its complaint because GSR amended the motion with undue delay.

Whether the district court erred in denying GSR's motions to compel Peppermill to produce all emails obtained by the NGCB in its investigation of the underlying matter

GSR requested that all emails that NGCB obtained from Peppermill during its investigation be produced during discovery. Peppermill untimely objected to the request. GSR moved the court to compel the Peppermill emails' disclosure. It argued that Peppermill waived all objections to the request when it untimely objected to the request.

The parties engaged in discovery conferences, negotiated the requested email production, and then agreed to a word-search to find relevant emails. The parties did not agree upon common

[2] D & D Tire, Inc. v. Ouellette, 131, Nev. 462, 470, 352 P.3d 32, 37 (2015).
[3] D.R. Horton, Inc. v. Eighth Judicial Dist. Court, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009).
[4] Kantor v. Kantor, 116 Nev. 886, 891–93, 8 P.3d 825, 828 (2000).

search terms. Peppermill notified GSR that it compiled the emails and transferred them onto a computer. GSR could view the emails on the computer located at Peppermill's counsels' office. Peppermill told GSR that it could use the search terms it desired, but Peppermill would review and approve any emails GSR requested prior to producing them. GSR opposed Peppermill's production method, viewed the emails, and then moved to compel Peppermill to produce the emails. The district court denied GSR's motion to compel again and found that Peppermill satisfied its burden of production.

GSR appealed that Peppermill's production is unaligned with NRCP 34(b)(2)(E)(i) because Peppermill did not provide the emails according to the usual course of business. GSR argued that it was entitled to email copies in their electronic format. Discovery matters are in the district court's discretion and courts will not likely disturb a district court's ruling unless the district court has clearly abused its discretion.[5]

GSR argued that Peppermill should have produced the emails in the format that the emails were stored on the hard drive.[6] Yet, *McKinney* stated that a party complied with the usual course of business requirement by allowing the requesting party to inspect documents where the documents are maintained and how they are organized by the producing party.[7]

Furthermore, GSR argued that Peppermill could have produced electronic email copies easily and that Peppermill's inspection method was unduly burdensome to GSR. However, GSR did not specify in its discovery request what form it would like the emails in, and as such, Peppermill could produce the emails in any ordinary, reasonable, and usable form.[8] The Court found that Peppermill produced the emails in a reasonably usable form, that GSR's difficulty reviewing the emails was because its broad discovery request, and that the district court did not abuse its discretion when it denied GSR's motions to compel Peppermill to produce emails.

Whether the district court erred in denying GSR's motion for case concluding sanctions under NRCP 37

GSR moved for case-concluding sanctions against Peppermill according to NRCP 37. The district court denied GSR's motion without fact findings or conclusions of law. GSR appealed and argued that the district court abused its discretion when it denied GSR's motion for case-concluding sanctions because there were no fact findings and law conclusions included and Peppermill used abusive discovery practices.

Appellate courts review a district court's decision to implement sanctions for an abuse of discretion.[9] The court, however, has a "heightened standard of review" for case-concluding sanctions.[10] District court orders denying case-concluding sanctions must be supported by a thorough court analysis and explanation in written format that tells what factors guided the district court's determination about sanctions.[11]

On appeal, GSR only relied upon NRCP 37 when it sought case-concluding sanctions. As such, the Court only considered if Peppermill used abusive discovery practices according to NRCP

---

[5] Okada v. Eighth Judicial Dist. Court, 131 Nev., Adv. Op. 83, 359 P.3d 1106, 1110 (2015).
[6] McKinney/Pearl Restaurant Partners, L.P. v Metropolitan Life Insurance Co., 322 F.R.D. 235, 250 (N.D. Tex. 2016).
[7] Id. at 249.
[8] NRCP 34(b)(2)(E)(ii).
[9] Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).
[10] Id.
[11] Blanco v. Blanco, 129 Nev. 723, 729, 311 P.3d 1170, 1174 (2013) (2013).

37. GSR did not persuade the Court upon the record's review that Peppermill did not comply with a discovery order, did not hide information during discovery, or that Peppermill's discovery practices were an "extreme situation" stated in NRCP 37 (b)–(c) that constituted case concluding sanctions. The Court held that the district court did not abuse its discretion when it denied GSR's case concluding sanctions motion.

Whether the district court erred in excluding evidence of Peppermill obtaining par values from other casinos

Peppermill filed motions in limine to exclude evidence that it stole other casinos' par values. GSR moved for a hearing to clarify when the district court granted Peppermill the motions. The district court explained that it excluded irrelevant evidence pursuant to NRS 48.025 and that under NRS 48.035, the evidence that Peppermill stole par values from other casinos would cause time waste. The district court has discretion to exclude evidence that is more prejudicial than probative, and an appellate court will not overturn a trial judge's determination unless the trial court abused its discretion.[12]

Peppermill conceded that it stole GSR's par values from the beginning. Any probative value in admitting this evidence is outweighed by time waste. GSR also failed to show how Peppermill stealing other casinos' par values is probative to GSR's case and not prejudicial towards Peppermill. Thus, the Court held that the district court did not abuse its discretion when it excluded evidence that Peppermill stole par values from other casinos.

Whether the district court erred in awarding Peppermill attorney fees under NRCP 68

GSR argued that NRS 600A.060 is the sole way to recover attorney fees in a case concerning trade secret misappropriation and that under the district court's NRCP 68 evaluation it did not properly consider factors in *Beattie v. Thomas* and *Brunzell v. Golden Gate National Bank*. The Court disagreed with GSR.

Whether NRS 600A.060 supersedes NRCP 68

Since the Court did not review GSR's appeal regarding an award for attorney fees for abuse of discretion, but for an appropriate law question, the Court decided upon the issue *de novo*.[13] The Nevada Supreme Court has found that NRS 600A.060 and other statutes that award attorney's fees are "independently applicable" by examining the record to find which statute is appropriate for the district court's award.[14] In accord with *Frantz*, the Court ruled that NRS Chapter 600A was not the only way that Peppermill could obtain attorney fees; further, NRS Chapter 600A does not preclude attorney fees recovery by NRCP 68. As such, the Court held NRS 600A.060 did not stop Peppermill from using other statutes to recover attorney's fees.

[12] Univ. & Cmty. Coll. Sys. V. Sutton, 120 Nev. 972, 985, 103 P.3d 8, 16–17 (2004).
[13] Gunderson v. D.R. Horton, Inc., 130 Nev. 67, 82, 319 P.3d 606, 616 (2014).
[14] Frantz v. Johnson, 116 Nev. 455, 471–72, 999 P.2d 351, 361–62 (2000).

Whether the district court properly considered the Beattie and Brunzell factors

When a district court uses NRCP 68 it must consider the *Beattie* factors when it determines if it should award a party attorney fees.[15] After the district court determines a party should be offered attorney fees, the court must use the *Brunzell* factors to determine if the requested amount is acceptable.[16] Though an appellate court prefers explicit findings, if a district court fails to show explicit findings, it has not abused its discretion.[17] The district court only needs to show it considered the factors, and there must be substantial evidence that supports the award.[18]

The district court demonstrated that it had used the factors under *Beattie* and *Brunzell* and that Peppermill submitted attorneys' invoices. The Court concluded that the district court considered the required factors found in *Beattie* and *Brunzell* and that Peppermill's attorney invoices were substantial evidence to show attorney's fees.

Conclusion

The Court affirmed the district court's amended judgment on the jury verdict and the post-judgment orders awarding attorney fees and costs. Further, the Court affirmed the district court's denial of GSR's motion for a new trial.

[15] Gunderson, 130 Nev. at 81, 319 P.3d at 615.
[16] Id.
[17] Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001).
[18] Logan v. Abe, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).