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### Duong, M.D. v. Fielden Hanson Isaacs Miyada Robinson Yeh, LTD., 136 Nev. Adv. Op. 87 (Dec. 31, 2020)

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## BLUE-PENCILING OF A NONCOMPETITION AGREEMENT

### **Summary**

The Nevada Supreme Court considered whether the district court may blue-pencil an otherwise unenforceable noncompetition agreement, which included a provision authorizing the court to remedy unreasonably restrictive clauses. The Court previously held in *Golden Road* that a district court cannot on its own volition blue-pencil an unreasonably restrictive provision.<sup>2</sup> However, the Court held that *Golden Road* does not prohibit a district court from blue-penciling an unreasonable provision when the agreement itself allows the court to do so. Thus, the Court affirmed the district court's order granting the preliminary injunction, because the agreement at issue had a provision that allowed for a court to blue-pencil unreasonable provisions.

### **Background**

Appellants, Scott and Annie Duong, quit working for respondent, Fielden Hanson Isaacs Miyada Robinson Yeh, LTD (“Fielden Hanson”), and began providing services to other surgeons in Clark County after they had signed an employment contract that included a noncompetition clause that prohibited the Duongs from working at certain facilities. The agreement contained a blue-pencilling provision that allowed a court to change the provision of the agreement to make it enforceable, if that provision was deemed to be unreasonable by a court.

After the Duongs began working at other facilities, Fielden Hanson alleged they violated the noncompetition clause of their employment agreement and filed a complaint to enforce the agreement and a motion for preliminary injunction. The Duongs countered by arguing that the noncompetition clause was unreasonable and thus, unenforceable under *Golden Road*, and that NRS 613.195(5)<sup>3</sup> was not applicable because the statute was not effective until after they signed the agreement.

The district court blue-penciled the noncompetition agreement and granted the preliminary injunction to enforce the blue-penciled agreement because it found that the agreement was overbroad and unreasonable and that NRS 613.195(5)<sup>4</sup> did apply.

### **Discussion**

*This appeal is not moot*<sup>5</sup>

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<sup>1</sup> By Caitlin Pyatt.

<sup>2</sup> *Golden Road Motor Inn, Inc. v. Islam*, 376 P.3d 151, 159 (Nev. 2016).

<sup>3</sup> NEV. REV. STAT. 613.195(5) (requiring a court to revise an unreasonable covenant or provision to the extent that the revision will make it enforceable).

<sup>4</sup> *Id.*

<sup>5</sup> A case is not moot if the court's ruling will affect the legal rights of the parties. *Boulet v. City of Las Vegas*, 614 P.2d 8,9 (Nev. 1980); see *NCAA v. Univ. of Nev., Reno*, 624 P.2d 10, 11 (Nev. 1981) for further explanation of mootness.

The Court first addressed whether the appeal is moot or not and determined that this appeal is not moot. Although the preliminary injunction had since expired, Fielden Hanson is seeking damages for the blue-penciled version of the noncompetition agreement being allegedly violated by the Duongs. Therefore, for Fielden Hanson to have a legal basis to seek damages, the Court must determine whether the district court had the authority to blue-pencil the noncompetition agreement.

*The district court had the authority to blue-pencil the unreasonable noncompetition agreement*

The Court next examined whether the district court had the authority to blue-pencil the noncompetition agreement and determined that the district court did have that authority. The Duongs relied on *Golden Road* as the basis for their argument for the disallowance of the blue-penciling of the agreement. However, the Duongs' reliance is misplaced because *Golden Road* held that a district court could not blue-pencil an unreasonable provision on its own, not that a court was prohibited from blue-penciling an unreasonable noncompetition provision based on the parties' agreement that allows for it.<sup>6</sup>

The Court explained that courts are not allowed to create private contracts.<sup>7</sup> Further, the noncompetition agreement that is at issue in *Golden Road* does not provide a basis for invalidating the blue-penciling provision in the current agreement because there was no blue-penciling provision for the agreement in *Golden Road*.<sup>8</sup>

Thus, because the noncompetition agreement at issue here had a blue-penciling provision, the district court had the discretion to blue-pencil the unreasonable agreement.

## **Conclusion**

The Court concluded that the district court did not abuse its discretion by blue-penciling the unreasonable noncompetition agreement because the agreement had a provision authorizing the court to do so. Thus, the Court affirmed the district court's order granting the preliminary injunction.

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<sup>6</sup> *Golden Road*, 376 P.3d at 159.

<sup>7</sup> *Id.* (citing *Rector-Phillips-Morse, Inc. v. Vronman*, 489 S.W.2d 1, 4 (Ark. 1973)).

<sup>8</sup> *Id.* at 153.