IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SUMMA EMERGENCY ASSOCIATES, INC.,
Appellant,
vs.
EMERGENCY PHYSICIANS INSURANCE COMPANY, RRG, N/K/A EMERGENCY PHYSICIANS INSURANCE EXCHANGE, RRG,
Respondent.

No. 72913

ORDER OF AFFIRMANCE

Summa Emergency Associates, Inc. appeals from a district court final judgment, following remand, confirming an arbitration award and denying attorney fees and costs. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

After nearly five years of contracting with Emergency Physicians Insurance Company, RRG ("EPIC") for medical malpractice insurance coverage, Summa Emergency Associates, Inc. ("SEA") terminated their contract.[1] Later, it requested EPIC return the more than $500,000 that SEA had paid into EPIC's risk retention group as capital contribution; EPIC denied that request. The parties entered arbitration, where the arbitrator awarded SEA a refund of half its capital contribution. EPIC moved the district court to confirm the favorable parts of the award but to vacate the refund portion; it also moved for attorney fees under NRS 38.243, both of which the district court granted. SEA appealed those rulings to the Nevada Supreme Court. The supreme court reversed the

[1]We do not recount the facts except as necessary to our disposition.

18-900795

district court, ordered it to confirm the arbitration award in full, and vacated EPIC's attorney-fee award. SEA then moved for attorney fees under NRS 38.243, which the district court denied.

SEA appeals, arguing that the district court abused its discretion in: 1) applying NRS 38.243 differently to the two parties when each had been, at some point in the proceeding, a "prevailing party"; and 2) employing a "having any merit" standard to determine whether a prevailing party is awarded attorney fees and then subsequently relying on its own prior, overturned decision to satisfy that newly adopted standard.

The decision to award attorney fees is within the discretion of the district court and will not be overturned absent an abuse of discretion. *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Further, a court abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016).

First, we consider SEA's contention that the district court abused its discretion in applying "different standards to the parties when each was in the position as the prevailing party under NRS 38.243."

NRS 38.243 governs awards of attorney fees in arbitration cases. It provides that "[o]n application of a prevailing party . . . the court *may* add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a

judgment confirming, vacating without directing a rehearing, modifying or correcting an award." NRS 38.243(3) (emphasis added). It is worth noting, however, as the district court did, that NRS 38.243 provides no guidance as to when the court should exercise its discretion to award attorney fees and costs. But SEA seems to argue that because the district court ruled one way for EPIC when it was the original prevailing party, it was required to rule the same way for SEA when reversal made it a prevailing party. No language in the statute requires such "equal" treatment of prevailing parties, nor does any Nevada case law support this argument. Indeed, the Nevada Supreme Court ruled that another statute in the same chapter, which contains a similarly deferential standard, NRS 38.238, "merely gives an arbitrator the discretion to award fees; it is not a requirement to do so." *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. ___, ___, 360 P.3d 1145, 1149 (2015). Thus, we similarly conclude that the district court was not required to award SEA attorney fees as a prevailing party under NRS 38.243—it was within its discretion to determine whether such an award was appropriate upon SEA's individual request.

We next consider whether the district court abused its discretion in adopting a "having any merit" standard to determine whether a prevailing party is awarded attorney fees, and then subsequently relying on its own overturned decision to satisfy that newly adopted standard.

Citing NRS 38.243's lack of guidance, the district court turned to outside sources to determine whether to grant fees to SEA. The district court consulted the uniform law that was adopted and codified as NRS

38.243: Section 25 of the Uniform Arbitration Act of 2000.[2] The district court used both the comments to the uniform law and the language from NRS 38.248 to arrive at a policy rationale for its decision and to justify using caselaw from another jurisdiction as a basis for analysis. The district court noted that "Section 25(c) [of the Uniform Arbitration Act] promotes the statutory policy of finality of arbitration awards" and "tend[s] to discourage all but the most meritorious challenges of arbitration awards." (quoting Unif. Arbitration Act § 25(c) cmt. 3). The district court then employed the "having any merit" test set forth in *Duke v. Graham*, 158 P.3d 540 (Utah 2007).[3]

We conclude that it was reasonable for the district court to adopt the *Duke* test. As the sole support for its argument against using the test, SEA cites a rule that identifies abuse of discretion when a "district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am.*, 132 Nev. at ___, 367 P.3d at 1292. But SEA fails to show how the district court did either. In using *Duke*, the district court did not disregard controlling law because

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[2]Section 25 of the Uniform Arbitration Act and NRS 38.243 share nearly identical language: "On [application] of a prevailing party . . . the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award." Unif. Arbitration Act § 25(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2000).

[3]The *Duke* court assessed the merits of a challenge to an attorney-fee award as a means of balancing the policy of finality of awards with the need to avoid "unduly burden[ing] parties with the threat of fees when they have legitimate concerns about the legal validity of an award." 158 P.3d at 548.

there is no Nevada law on this issue. And SEA does not argue that the district court made an erroneous factual determination. Further, given the lack of guidance in NRS 38.243 and the absence of any applicable Nevada law, it was appropriate for the district court to seek guidance elsewhere: namely, in caselaw from another jurisdiction and from the uniform law upon which NRS 38.243 was based. Finally, the *Duke* test advances the policy rationale behind awarding attorney fees—discouraging vexatious claims, conserving judicial resources, and promoting expeditious resolution of meritorious claims—while balancing the need to not unduly burden those who legitimately question the validity of an award. Thus, it was reasonable for the district court to utilize similar analysis in this case.

We further conclude that the district court did not abuse its discretion in denying fees to SEA based on its order to confirm in part and vacate in part the arbitrator's award, later reversed by the supreme court. First, SEA's argument on this issue consists solely of conclusory statements unsupported by analysis and authority. Consequently, we need not address it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the court need not consider claims not cogently argued).

But even if the district court erred by relying on its reversed order to decide SEA's attorney-fees motion, as SEA contends, any error was harmless because, as noted above, the statute's language is permissive and the standard at issue here is deferential. They do not entitle SEA to fees; they merely allow them. *See Khoury v. Seastrand*, 132 Nev. ___, ___, 377 P.3d 81, 94 (2016) (holding that to warrant reversal, a party must show an error "affect[ed] [its] substantial rights so that, but for

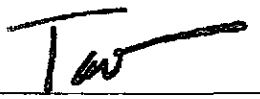
the alleged error, a different result might reasonably have been reached" (internal quotation marks omitted)). Thus, no substantial right was affected. Further, even if the district court had based its ruling on different legal reasoning, it might reasonably have reached the same conclusion within its discretion. Therefore, we conclude that the district court's error, if any, did not affect the outcome of this case.

In conclusion, NRS 38.243 allows courts to award attorney fees but does not require them to do so. Further, it was reasonable for the district court to employ a "having any merit" test to determine whether to grant attorney fees to SEA. But even if the reasoning the district court applied to deny fees was erroneous, any error was harmless due to the discretionary nature of attorney-fee awards under NRS 38.243.

Accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Lansford W. Levitt, Settlement Judge
Summa Emergency Associates, Inc.
Parsons Behle & Latimer/Reno
Holland & Hart LLP/Las Vegas
Holland & Hart LLP/Reno
Washoe District Court Clerk