

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAREN SCOTT SORENSON,
Appellant,
vs.
WENDELIN CAROL RADEL-
SORENSON,
Respondent.

No. 70756

FILED

JUL 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Daren Scott Sorenson appeals from a special order after final judgment concerning an amended order in a divorce matter. Eighth Judicial District Court, Family Court Division, Clark County; Jennifer Elliott, Judge.

Shortly after the parties' decree of divorce was filed, a stipulated amended behavior order (ABO) was also filed.¹ The ABO stated that respondent Wendelin Carol Radel-Sorenson (Wendy) would waive the retirement pay awarded to her in the decree of divorce if she violated certain portions of the ABO. Later, Daren filed a motion asking the district court to hold Wendy in contempt for violating the ABO and to order her share of the retirement pay waived pursuant to the ABO provision. The record indicates that Wendy was already receiving her share of the retirement pay at the time of the hearing on Daren's motion.

The district court refused to enforce the retirement pay waiver clause, ruling that retirement pay "is a separate property right. Principles of equity disallow this; it is against public policy and constitutional concepts" and expressing its concern that Wendy could become destitute without the retirement income. Further, the district court found that because Daren had

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

violated certain parts of the marital settlement agreement, Wendy's misconduct should be offset by Daren's misconduct and neither party should be sanctioned.

Daren appeals from this order.² He argues that: (1) the district court modified the ABO without jurisdiction to do so by refusing to enforce the retirement pay clause; (2) the district court provided no legal support for its conclusion that the retirement pay clause was unenforceable; (3) the district court violated NRS 125.150(7) by failing to enforce the express terms of a written stipulation agreed to by the parties; and (4) Wendy should be "estopped" from denying the validity of the ABO because she stipulated to it and failed to contest its validity when it was previously enforced and resulted in the loss of her alimony benefits.

Standard of review

We review questions of law de novo. *See Henson v. Henson*, 130 Nev. 814, 818, 334 P.3d 933, 936 (2014). We review the enforceability of a provision in a stipulated order de novo. *See May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (noting that settlement agreements are contracts and contracts are reviewed de novo). We generally review contempt

²Wendy argues that this court lacks jurisdiction to address Daren's appeal because he appeals directly from a contempt order. The Nevada Supreme Court already addressed Wendy's jurisdictional argument when it denied her motion to dismiss Daren's appeal for lack of jurisdiction, concluding that appellate jurisdiction is proper as an appeal from "a special order after final judgment." *See* NRAP 3A(b)(8); *Burton v. Burton*, 99 Nev. 698, 700, 669 P.2d 703, 705 (1983). We are bound by the supreme court's order as the law of the case. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) ("The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case.").

orders for an abuse of discretion. *Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 880 (2016).

The district court did not modify the decree

Daren correctly observes that a district court lacks jurisdiction to modify a divorce decree regarding property rights six months after the decree is entered. *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397-98 (1980). However, in this case, the district court was not asked to modify the decree. Rather, Daren asked the district court to enforce the ABO's retirement pay clause, which the district court chose not to do. The district court has jurisdiction to enforce its own orders. *Cf. Davidson v. Davidson*, 132 Nev. ___, ___, 382 P.3d 880, 883-84 (2016) (holding that a district court has continuing jurisdiction to enforce divorce decrees). Thus, we reject Daren's jurisdictional challenge.

The retirement waiver pay clause is unenforceable in this situation

Daren and Wendy stipulated to the ABO and the record indicates that the agreement was supported by consideration. *See Cain v. Price*, 134 Nev. ___, ___, 415 P.3d 25, 28 (2018) ("Consideration is the exchange of a promise or performance, bargained for by the parties." (quoting *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012))). Thus, we conclude the ABO is facially enforceable. *See generally Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009) (holding a settlement agreement is enforceable when the parties agree to settle and provide consideration to support the agreement).

Wendy contends, however, that the ABO's retirement pay clause is unenforceable because it constitutes an unenforceable liquidated damages penalty. We agree.³

We review whether a party is entitled to a particular measure of damages, such as liquidated damages, de novo. *Dynalectric Co. of Nev., Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 483, 255 P.3d 286, 288 (2011). "Generally, liquidated damage provisions are prima facie valid," *Haromy v. Sawyer*, 98 Nev. 544, 546, 654 P.2d 1022, 1023 (1982), and "serve as a good-faith effort to fix the amount of damages when contractual damages are uncertain or immeasurable," *Khan v. Bakhsh*, 129 Nev. 554, 558, 306 P.3d 411, 414 (2013). "However, liquidated damages provisions may amount to unenforceable penalties." *Mason v. Fakhimi*, 109 Nev. 1153, 1156, 865 P.2d 333, 335 (1993).

As distinguished from liquidated damages, the term "penalty," as used in contract law, is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of non-performance, and it involves the idea of punishment. . . . [The] distinction between a penalty and liquidated damages is that a penalty is for the purpose of securing performance, while liquidated damages is the sum to be paid in the event of non-performance.

Id. (alterations in original) (quoting 22 Am.Jur.2d *Damages* § 684 (1980)).

On appeal, Daren does not oppose Wendy's characterization of the retirement pay clause as an unenforceable penalty. Therefore, Daren

³Wendy also argues that the ABO impermissibly expands the district court's jurisdiction to include her separate property and that the provision constitutes a forfeiture. Because we hold that the retirement clause is an unenforceable penalty under the circumstances of this appeal, we need not address Wendy's other arguments.

concedes this argument. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument had merit and was not addressed in either appellants' opening or reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position").

Even if Daren had not conceded this point, his argument on appeal that the purpose of the ABO was to secure Wendy's performance to not harass or defame him, without any mention of compensation for his damages, indicates that the provision is intended as a penalty. Additionally, the district court stated during the hearing on Daren's motion its conclusion that the parties "felt like [the ABO] needed to be something significant enough that it would prevent [Wendy] from [harassing Daren]." Indeed, the provision itself is in an order titled "Amended Behavior Order," indicating that the purpose of the order was to ensure certain behavior by the parties. Therefore, we conclude that the purpose of this clause was to secure Wendy's performance, not to compensate Daren for damages that could have ensued from Wendy's breach. However, our analysis does not end here.

The party who challenges a liquidated damages provision as an unenforceable penalty "must persuade the court that the liquidated damages are disproportionate to the actual damages sustained by the injured party." *Haromy*, 98 Nev. at 547, 654 P.2d at 1023. The calculation of actual damages occurs at the time of the breach, not at the time of contract formation. *See generally id.* at 547, 654 P.2d at 1023-24 (holding that a liquidated damages provision was a penalty when respondent produced evidence of post-agreement payments, capital improvement expenditures, and increased rental income and appellants failed to prove that they sustained actual damages caused by respondent's breach); *see also Mason*, 109 Nev. at 1156-1157, 865 P.2d at 335-336 (holding that respondent had not rebutted the

presumption that a liquidated damages provision was valid when appellant produced evidence that he expended approximately sixty hours to re-sell the property post-breach and that the resale amount was \$23,000 less than the amount agreed upon by the parties).

At the time of the hearing on his motion, Daren had already retired from the military. Wendy's violations of the ABO consisted of improper postings on internet sites, not communications about him directed to the military command that could have jeopardized his employment, retirement pay, and freedom. There is nothing in the record to show that Daren suffered any damages and, as the appellant, he had the obligation to submit such necessary documents on appeal or we presume the record supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

Accordingly, we conclude that under these circumstances, the loss of lifetime retirement pay earned from almost 13 years of Daren's military service while married to Wendy is disproportionate to Daren's damages, as no actual damages have been shown. We do not address Wendy's contention that the retirement pay waiver provision would always necessarily be so disproportionate to any actual damages Daren might sustain, however, as future violations of the ABO may cause actual damages and at that point, enforcement of the clause may be permissible. Therefore, we conclude only that the retirement pay clause is unenforceable under the circumstances presented in this appeal.

The district court did not abuse its discretion by declining to impose sanctions


As stated above, when appellate jurisdiction is proper, we review contempt orders for an abuse of discretion. *See Lewis*, 132 Nev. at ___, 373

P.3d at 880. “A discretionary standard gives proper deference to the district court’s intricate knowledge of the proceedings, and affords the district court sufficient leeway to exercise its inherent power.” *In re Determination of Relative Rights of Claimants & Appropriators of Waters of Humboldt River Stream Sys.*, 118 Nev. 901, 907, 59 P.3d 1226, 1229-30 (2002) (discussing proper standard of review for direct appeals of contempt orders).

Daren presented the district court with some evidence indicating that Wendy violated the ABO. However, Wendy also presented some evidence that Daren violated their marital settlement agreement. The district court offset the alleged violations of both parties and determined that it would not sanction either party. We conclude that the district court did not abuse its discretion by weighing the evidence and reaching what it determined was the equitable outcome given the circumstances. Accordingly, we

ORDER the judgment of the district court AFFIRMED.^{4 5}


_____, C.J.
Silver


_____, J.
Gibbons

cc: Presiding Judge, Family Division, Eighth Judicial District
Chief Judge, Eighth Judicial District
M. Nelson Segel, Settlement Judge
Michael A. Root
Black & LoBello
Eighth District Court Clerk

⁴We find Daren’s remaining arguments unpersuasive.

⁵The Honorable Jerome T. Tao, Judge, voluntarily recused himself from this case.