

IN THE SUPREME COURT OF THE STATE OF NEVADA

HILLSBORO ENTERPRISES INC, A
NEVADA CORPORATION; MOBILE
BILLBOARDS, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
EBVB HOLDINGS, LLC., A NEVADA
LIMITED LIABILITY COMPANY;
VINCE BARTELLO, AN INDIVIDUAL;
AND ERICA BARTELLO, AN
INDIVIDUAL.

Appellants,

vs.

SEAN FITZGERALD,

Respondent,

CASE NO. 79686

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REPLY

From the Eight Judicial District Court, Department IX
The Honorable Christina Silva, District Judge
District Court Case No. A-15-716570-C

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRA 26.1(a), and must be disclosed:

HILLSBORO ENTERPRISES INC., MOBILE BILLBOARDS, LLC., and EBVB HOLDINGS, LLC., have no parent company and no publicly listed company owns 10% or more of the Appellant's stock.

This representation is made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 7th day of November 2020.



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STATEMENT OF FACTS

On April 10, 2014, Appellants MOBILE BILLBOARDS, LLC hired Sean Fitzgerald as a mechanic. (Appendix Volume II, Exhibit 8, APP000307). Respondent was hired to perform maintenance on the billboard trucks and wash them, among other duties (Appendix Volume II, Exhibit 8, APP00193). The Respondent received a total of Four (4) paychecks while working for MOBILE BILLBOARDS, LLC. Respondent's first paycheck was issued by HILLSBORO ENTERPRISES, INC. The remaining Three (3) were issued by Mobile Billboards, LLC. (Appendix Volume V, Exhibit 15, APP000897-APP000900). Appellant VINCE BARTELLO provided testimony that the initial check was issued in error by a new HR employee. (Appendix Volume III, Exhibit 8, APP000450-APP000451). The HR employee was fired soon after on approximately May 10, 2014. (Appendix Volume V, Exhibit 14, APP000878).

On Wednesday, April 30, 2014, the Respondent injured his thumb while at work resulting in a partial amputation of the tip of his thumb. (Appendix Volume II, Exhibit 188, APP000329). Appellant's HR employee was not handling the Respondent's HR Claim properly so the Appellant VINCE BARTELLO took charge of the claim and began making phone calls regarding the claim to assist Respondent in getting the care he required. (Appendix Volume III, Exhibit 8, APP000467). In fact, Sean Fitzgerald was paid his Worker's Compensation claim (Appendix Volume

II, Exhibit 7 APP000329). Despite Mr. Fitzgerald's allegation, regarding Workers Compensation Insurance being an issue,

On Friday May 9th, Appellant VINCE BARTELLO contacted Respondent concerning the Mobile Billboard trucks not being washed and ready for their Friday, Saturday, Sunday runs (Appendix Volume V, Exhibit 14, APP000877-APP000880). Thereafter, the Respondent advise Appellant for the first time that Respondent could not perform certain job duties because he could not get his wound wet (Appendix Volume V, Exhibit 14, APP000877-APP000880). As a result, Appellant sent the Respondent a text advising him not to return to work unless Respondent has a note from a Doctor clearing him for all his work duties (Appendix Volume V, Exhibit 14, APP000887).

Appellant attempted to process payroll for the Respondent, but Respondent's timecard was missing. Appellant's staff went into the Respondent's toolbox to retrieve the timecard so that MOBILE BILLBOARDS LLC could process payroll. (Appendix Volume V, Exhibit 14, APP000888-APP000890). The Appellant did not consent to entry into his toolbox, which was stored at MOBILE BILLBOARDS LLC, and was greatly upset by this action. The Respondent stated that he would come into the shop and retrieve his toolbox the next day (Appendix Volume V, Exhibit 14, APP000893).

On May 15, 2014, the Respondent showed up at the MOBILE BILLBOARDS LLC offices and requested his toolbox (Appendix Volume II, Exhibit 7, APP000252). Appellant VINCE BARTELLO stated that wanted to perform an inventory of the toolbox before allowing it to be returned to the Respondent (Appendix Volume III, Exhibit 8, APP000434). A disagreement ensued and the Las Vegas Police Department was requested on-site. Thereafter, Respondent was asked to leave the premises. (Appendix Volume II, Exhibit 7, APP000254).

During the inventory, the Appellant's employee found painkillers prescribed to Appellant in the toolbox The presence of the painkillers did not is not in dispute/ Appellant informed his insurance carrier of the painkillers located in the toolbox, as he should have. (Appendix Volume III, Exhibit 8, APP000565). No further evidence was presented at trial that showed Mr. Bartello pursued the issue of the painkiller beyond informing his Worker's compensation representative.

On May 19, 2014 Respondent returned to the premises and retrieved his tools. Respondent inspected his toolbox for approximately Two (2) hours. (Appendix Volume II, Exhibit 7, APP000259-APP000260). Respondent alleged that various tools and a laptop were missing. (Appendix Volume II, Exhibit 7, APP000270). Thereafter the Respondent was paid from Worker's Compensation for his claim (Appendix Volume II, Exhibit 7, APP000329-330).

SUMMARY OF THE ARGUMENTS

A. Appellants VINCE BARTELLO and ERICA BARTELLO were found to be personally liable for wrongful termination. The Respondent was an employee of Appellant MOBILE BILLBOARDS, INC. Pursuant to Nevada Law, officers, owners, and shareholders are not personally liable for the wrongful actions of the corporation. The Respondents did not provide evidence at trial as to why the Jury should ignore corporate liability protection and pierce the corporate veil to personal liability for VINCE and ERICA BARTELLO. Nevada's statutory scheme shows a strong public policy against personal liability. Respondent did not prove the factors required to show that Appellant MOBILE BILLBOARDS, INC. is the alter ego of VINCE or ERICA BARTELLO or that those factors led to his injury.

B. Appellant EBVB HOLDINGS LLC was also found to be liable for wrongful termination. The Respondent was an employee of Appellant MOBILE BILLBOARDS, INC. Pursuant to Nevada Law, officers, owners, and shareholders are not personally liable for the wrongful actions of the corporation. The Respondents did not provide evidence at trial as to why the Jury should ignore corporate liability protection and hold EBVB HOLDINGS, LLC liable for the actions of Appellant MOBILE BILLBOARDS, INC. Furthermore, the Respondent did not show that Appellant EBVB HOLDINGS, LLC had any connection to the

Respondent or that Appellant EBVB HOLDINGS, LLC has caused any injury to Respondent.

C. Appellant HILLSBORO ENTERPRISES INC. was also found to be liable for Wrongful Termination. The Respondent was mistakenly put on the payroll for HILLSBORO ENTERPRISES, INC. for his first pay period by Appellant's new HR person. The Appellant VINCE BARTELLO advised his HR employee to place Respondent under the payroll for Appellant MOBILE BILLBOARDS LLC. Thereafter, Respondent received his next Three (3) checks from Appellant MOBILE BILLBOARDS LLC. Appellant HILLSBORO ENTERPRISES, INC. is a properly formed limited liability company and is entitled to the protections thereof. One payroll check should not remove those protections and impute liability onto HILLSBORO ENTERPRISES, INC. for the actions of Appellant MOBILE BILLBOARDS LLC.

D. The District Court abused its discretion by allowing Jury Instruction 26 to be accepted as a jury instruction over Appellant counsel's objection. The instruction put forth by the Respondents would create broad-based liability for an employee, agent, or officer of the corporation for any "legally wrongful act causing damages". This instruction is not supported by Nevada law and flies in the face of statutory policy limiting liability for individuals when done in furtherance of corporate interests.

E. Respondents Jury Award of damages is not supported by substantial evidence. The lone piece of evidence regarding the Respondents lost wages is his lone self-serving testimony induced by counsel. The Respondent did not produce into evidence, tax record, bank statements, paystubs, or any such evidence that would support his testimony regarding the amount of damages he incurred as a result of Appellant's alleged retaliatory termination.

ARGUMENT

I. THE JURY'S APPLICATION OF PERSONAL LIABILITY TO VINCE AND ERICA BARTELLO WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard Of Review

"This court upholds a jury verdict if there is substantial evidence to support it but will overturn it if it was clearly wrong from all the evidence presented." *Soper By & Through Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (citing *Bally's Grand Employees' Fed. Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834 , 335 P.3d 211, 214 (2014).

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B. Individual Liability Is Not Supported by Substantial Evidence in this Matter.

The Appellants ERICA and VINCE BARTELLO are entitled to the statutory protections provided by Nevada Law. They have properly formed and maintained their corporation and LLCs and the personal liability protections provided by NRS 78.747(1)-(2) and NRS 86.376 should not be lightly discarded. In this matter, the Jury in this matter inappropriately disregarded those Corporate protections and assessed personal liability on behalf of both VINCE and ERICA BARTELLO.

There is no evidence that Appellant ERICA BARTELLO took any action to retaliate against the Respondent. Her finding of personal liability is especially egregious. The Jury did not understand the corporate formalities or the protections the statute provided and the finding of personal liability against VINCE and particularly ERICA BARTELLO should be reversed.

II. THE FINDING OF LIABILITY AGAINST EBVB HOLDINGS LLC WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard of Review

"This court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented." *Soper By & Through Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (citing *Bally's Grand Employees' Fed. Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). Substantial evidence is evidence that a reasonable

mind might accept as adequate to support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 335 P.3d 211, 214 (2014). In determining whether substantial evidence exists, we do not revisit questions of credibility, but merely inquire whether the evidence that was most favorable to the prevailing party would have been sufficient to support the verdict had it been entirely believed by the jury and had the opposing party's contrary evidence been disbelieved. See *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986).

B. Liability Is Not Supported by Substantial Evidence against Appellant EVBV HOLDINGS, LLC.

The Evidence brought forth by the Respondent are not enough to find liability for the Appellant EBVB HOLDINGS, LLC. The Nevada Supreme Court has held that, though generally “[t]he corporate cloak is not lightly thrown aside,” (emphasis added) nevertheless there are some situations in which blind “adherence to the fiction of a separate entity [of the corporation] [would] sanction a fraud or promote injustice.” *Baer v. Amos J. Walker, Inc.*, 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).

Nevada recognize the separateness of corporate parents and subsidiaries. See, e.g., *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979) (stating the “mere showing that one corporation is owned by another, or that the two share interlocking officers or directors” cannot cast aside separate corporate identities).

No evidence was presented at trial that EBVB HOLDINGS, LLC played any part in the conduct alleged by the Respondent. This Corporation was formed in 2007, and the Respondent presented no evidence that it is a “shell”. It is a property formed Nevada Corporation. Any allegedly tortious conduct committed while operating another separate legal entity should not subject EBVB HOLDINGS, LLC to liability.

III. THE FINDING OF LIABILITY AGAINST HILLSBORO ENTERPRISES INC WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard of Review

"This court upholds a jury verdict if there is substantial evidence to support it but will overturn it if it was clearly wrong from all the evidence presented." *Soper By & Through Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (citing *Bally's Grand Employees' Fed. Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 335 P.3d 211, 214 (2014). In determining whether substantial evidence exists, we do not revisit questions of credibility, but merely inquire whether the evidence that was most favorable to the prevailing party would have been sufficient to support the verdict had it been entirely

believed by the jury and had the opposing party's contrary evidence been disbelieved. See *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986).

B. Liability Against HILLSBORO ENTERPRISES INC. Is Not Supported by Substantial Evidence in this Matter.

The alleged wrongful termination occurred after the Appellant's payroll was corrected to MOBILE BILLBOARDS LLC. The Respondents final paystubs were all issued by MOBILE BILLOARDS LLC. (Respondents Appendix RA0050-RA0052). At the time of the alleged Wrongful Termination, the Respondent was not an employee of both HILLSBORO ENTERPRISES, INC. and MOBILE BILLBOARDS LLC. He either worked for one or the other. After his first pay stub, the remaining Three (3) paychecks were issued by MOBILE BILLBOARDS LLC. There is no evidence that HILLSBORO ENTERPRISES, INC. was responsible for the damages suffered by Respondent.

Appellant HILLSBORO ENTERPRISES, INC. is a properly formed Nevada Corporation and, like the other Appellants, deserves the protection of Nevada's limited liability laws. The conduct of Appellant MOBILE BILLBOARDS, LLC should not be imputed to another separate corporation.

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IV. THE DISTRICT COURT COMMITTED ERROR BY ALLOWING JURY INSTRUCTION NO. 26

A Standard of Review

A District Court's decision to give or refuse to give a specific jury instruction is reviewed for abuse of discretion. *Gibson v. State*, 127 Nev. 1136, 373 P.3d 917 (2011); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009); *Skender v. Brunsonbuilt Const. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) ("However, we review de novo whether a proffered instruction is an incorrect statement of the law." *Fulbrook v. Allstate Ins. Co.*, No. 61567, 2015 WL 439598, at *3 (Nev. Jan. 30, 2015)); *Banks v. Sunrise Hospital*, 120 Nev. 822, 830, 102 P.3d 52, 58 (2004) "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003).

A court abuses its discretion when it does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *Jeff D. v. Otter*, 643 f.3d 278 (9th Cir. 2011) (citing 362 F.3d 1254, 1257 (9th Cir. 2004)).

B. The Court Abused Its Discretion By Allowing Jury Instruction 26.

Jury Instruction Number 26, states that proposes a broad-based liability for an employee, agent, or officer of the corporation for any "legally wrongful act causing

damages”. (Appendix Volume V, Exhibit 10, APP000814) and should not have been presented to the Jury.

Counsel for Appellant objected to the Instruction (then numbered as Instruction 25) (Appendix Volume IV, Exhibit 9, APP000588-AP000591). A tortious discharge in violation of public policy may arise in an at-will employment setting. *K Mart v. Ponsock*, 103 Nev. 39, 47, 732 P.2d 1364, 1369 (1987). The Nevada Supreme Court first recognized this cause of action in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984). Counsel for the Respondent still have not provided Nevada Case law that shows personal liability for wrongful termination.

This Jury Instruction is directly connected to the jury’s finding of personal liability for Appellants VINCE and ERICA BARTELLO. It is in direct conflict with current Nevada Law and its inclusion is an abuse of discretion and another factor supporting reversal of the Jury’s the finding of personal liability for Appellants.

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V. THE JURY’S FINDING OF DAMAGES WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Standard of Review

"This court upholds a jury verdict if there is substantial evidence to support it but will overturn it if it was clearly wrong from all the evidence presented." *Soper By & Through Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (citing *Bally's Grand Employees' Fed. Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 335 P.3d 211, 214 (2014). In determining whether substantial evidence exists, we do not revisit questions of credibility, but merely inquire whether the evidence that was most favorable to the prevailing party would have been sufficient to support the verdict had it been entirely believed by the jury and had the opposing party's contrary evidence been disbelieved. See *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986).

B. Respondent Provided No Documentation Regarding His Damages.

The Respondent in this matter had the burden to prove each and every element of his cause of action by a “preponderance” of the evidence. In this matter the damages element of Respondents claim was not supported by substantial evidence.

A jury has wide latitude in awarding special damages so long as there is an evidentiary basis for determining an amount that is reasonably accurate. Wyeth v. Rowatt, 126 Nev. 446, 244 P.3d 765, 782 (2010).

There is no such basis in this matter. The Respondent's testimony regarding the alleged damaged of Fifty-Six Thousand Dollars and Zero Cent (\$56,0000.00) is the lone piece of evidence proffered to prove his damages claim. He testified vaguely to his wages and dates during his testimony NRCP 16.1(a)(1)(A)(iv) requires a computation of damages claimed by the disclosing parties. This was never presented in this matter. The Respondent was essentially passed a note by his counsel so that the could "recall" the amount of his damages. The argument that counsel for the Appellant did not object to the document used to refresh his recollection is specious. The document was never admitted into evidence. The Respondent did not supply tax returns, bank statements, or paystubs to prove his lost income from the alleged retaliatory termination. The damages element of the Respondent's Claim for Retaliatory Discharge is not supported by substantial evidence and should be reversed.

CONCLUSION

For the foregoing reasons, the Judgment on Jury Verdict issued on August 23, 2020 finding VINCE BARTELLO, ERICA BARTELLO, EBVB HOLDINGS LLC, and HILLSBORO ENTERPRISES INC. liable for Wrongful Termination should be

reversed. Additionally, the damage award to Respondent for Fifty-Six Thousand Dollars and Zero Cents (\$56,000.00) should also be reversed as not supported by substantial evidence.

Date: November 7, 2020

HURTIK LAW & ASSOCIATES

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this reply brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 4219 words.

FINALLY, I CERTIFY that I have read this Appellant's Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this November 7, 2020

HURTIK LAW & ASSOCIATES

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CERTIFICATE OF SERVICE

I JONATHON R. PATTERSON, HEREBY CERTIFY that I am an employee of HURTIK LAW AND ASSOCIATES, and that on the 7th Day of November, I electronically filed the foregoing with the Supreme Court of Nevada by using the Court's Electronic filing system. I certify that all participants in the case are registered and that service will be accomplished by the Supreme Court of Nevada's Electronic Filing System.

Date: November 7, 2020



JONATHON R. PATTERSON
Employee of Hurtik Law and Associates