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Summary of Gunderson v. D.R. Horton, Inc., 130 Nev. Adv. Op. 9

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CONTRACTS/CIVIL PROCEDURE

Summary

The Court determined three issues, whether the district court abused its discretion by: (1) denying a motion for a new trial due to claims of attorney misconduct; (2) not granting sanctions under NCRP 68² and NRS 17.115³; and/or (3) not considering apportioning sanctions.

Disposition

When a district court sustains an objection to attorney misconduct but fails to admonish counsel or the jury, if a party's counsel does not promptly request the omitted admonishments, they are required to demonstrate that opposing counsel's misconduct was so extreme that its effect could not have been removed by the district court's sustainment of appellants' objection.

When determining whether to award sanctions in a offer of judgment context, the district court abuses its discretion by failing to apply the full, applicable legal analysis if it does not consider the *Brunzell v. Golden Gate Nat'l Bank*⁴ factors in its *Beattie v. Thomas*⁵ analysis.

"[W]hen sanctions are issued against multiple homeowner offerees pursuant to NRS 17.115⁶ and NRCP 68⁷ in a construction defect action, a district court abuses its discretion by imposing those sanctions jointly and severally against the homeowners."

Factual and Procedural History

Appellants/cross-respondents are homeowners in the High Noon at Boulder Ranch community. Appellants hired experts to check their homes for construction defects. The experts' findings included architectural, insulation, waterproofing, and other defects. Appellants sent D.R. Horton a notice detailing these findings. In response, D.R. Horton informed the appellants of its plan to inspect the alleged defects to decide how to proceed to appellants' notice. Appellants filed a complaint, suing D.R. Horton for negligence and breach of warranty.

D.R. Horton decided to repair the defects after receiving the complaint. The district court agreed to allow D.R. Horton to repair the defects and therefore stayed the proceedings. D.R. Horton gave the appellants a formal statement of repairs after completing the work. After the district court lifted the stay, the appellants filed an amended complaint. D.R. Horton filed an answer to appellants' complaint as well as a third-party complaint against several subcontractors.

Prior to trial, D.R. Horton served offers of judgment on each of the appellants based on the extent of each property's respective damage. Only one of the forty appellants accepted the offer; the rest proceeded to trial. During closing arguments, counsel for the appellants objected to several of defendant D.R. Horton's and third-party defendant RCR Plumbing's statements as

¹ By Michael Bowman

² NEV. R. CIV. P. 68.

³ NEV. REV. STAT. § 17.115 (2013).

⁴ 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

⁵ 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983).

⁶ NEV. REV. STAT. § 17.115 (2013).

⁷ NEV. R. CIV. P. 68.

attorney misconduct. The district court sustained many of these objections but did not admonish counsel or the jury. The jury awarded damages to each individual homeowner, which totaled \$66,300. No individual award exceeded the D.R. Horton's offer of judgment.

Following the trial, the appellants and D.R. Horton filed motions for attorney's fees and costs. The district court refused to award D.R. Horton attorney's fees, but did award it post-offer costs. Although the court awarded D.R. Horton post-offer costs, the court denied both motions, claiming that under the circumstances it would be impossible to award apportioned fees and costs. Appellants filed a motion for a new trial; in the alternative, appellants asked for additur. D.R. Horton filed an opposition to appellants' motion and filed a counter-motion for remittitur. Both motions were denied.

Discussion

I. The district court did not abuse its discretion in denying a new trial for attorney misconduct

The homeowners argued that D.R. Horton's counsel repeatedly committed misconduct throughout the trial, and therefore the district court should have granted their motion for a new trial. Appellants allege that D.R. Horton's counsel violated this Court's decision in *Lioce v. Cohen*⁸, as well as NRPC 3.4(e)⁹, by calling the homeowners liars, stating that the trial was a waste of the jury's time, and urging the jury to "send a message" to the homeowners. Appellants also argue that even if the individual statements were insufficient to warrant a new trial, cumulatively the statements required the district court to grant appellants' motion for a new trial.

The decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.¹⁰ "Whether an attorney's comments are misconduct is a question of law, which we review de novo; however, we will give deference to the district court's factual findings and application of the standards to the facts."¹¹

Appellants noted that the district court did not admonish counsel or the jury after D.R. Horton's counsel committed misconduct, even though the court sustained the objection. The Nevada Supreme Court, in addressing this issue for the first time, held:

[W]e now clarify that when a district court sustains an objection to attorney misconduct but fails to admonish counsel or the jury, if objecting counsel does not promptly request the omitted admonishments, he or she must, in seeking a new trial based on the improper conduct, demonstrate that the misconduct was so extreme that the objection and sustainment could not have removed the misconduct's effect.¹² If the district court fails to admonish counsel or the jury after objecting counsel requests such admonishment promptly following his or her sustained objection, a party moving for a new trial must only demonstrate that "an admonition to the jury would likely have affected the verdict in favor of the moving party."¹³

⁸ 124 Nev. 1, 174 P.3d 970 (2008).

⁹ NEV. R. PROF. CONDUCT 3.4(e) (2013).

¹⁰ *Lioce*, 124 Nev. at 20, 174 P.3d at 982.

¹¹ *Id.*

¹² *Cf. Lioce*, 124 Nev. at 17, 174 P.3d at 981.

¹³ *Cf. id.* at 18, 174 P.3d at 981.

Here, because appellants' counsel did not promptly request the omitted admonishments, they were required to demonstrate that D.R. Horton's counsel's misconduct was so extreme that its effect could not have been removed by the district court's sustainment of appellants' objection. The Nevada Supreme Court held that appellants have not met that burden, and therefore, the district court did not abuse its discretion in denying appellants' motion for a new trial.

Appellants also made an argument that D.R. Horton's counsel committed misconduct by encouraging jury nullification. The Court looked to *Lioce*, which found jury nullification where "the attorney encouraged the jurors to make their decision based on something other than the law and the evidence."¹⁴ The Court found that defense counsel did not prod the jury into rejecting the law or the evidence. The Court found that, although defense counsel used the phrase "send a message," counsel was not inappropriately encouraging jury nullification, and therefore the argument did not provide a basis for reversing the district court.

Appellants also argued that the cumulative effect of the misconduct justified a new trial. To obtain a new trial, the appellant "must demonstrate that no other reasonable explanation for the verdict exists."¹⁵ In determining whether this has been shown, the Court will "look at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability."¹⁶ In considering appellants' arguments as a whole, the Court concluded that they failed to meet the standard for reversing the district court's denial of the motion for a new trial.

II. The district court abused its discretion in refusing to issue sanctions pursuant to NRS 17.115¹⁷ and NRCP 68¹⁸ and in failing to apportion those sanctions among the homeowners

The district court found that D.R. Horton's individual offers of judgment were valid pursuant to NRS 17.115¹⁹ and NRCP 68²⁰. Furthermore, the district court found that 39 of the 40 homeowners rejected the offers, and none of them received a jury award higher than his or her offer of judgment. The district court awarded post-offer costs to D.R. Horton based on these findings. The district court then stated that neither side could allocate or receive any costs or attorney fees.

Appellants claim that D.R. Horton's offers of judgment were invalid, preventing D.R. Horton from receiving costs pursuant to NRCP 68²¹ and NRS 17.115²². On the other hand, appellants state that they are entitled to attorney's fees and costs under NRS 40.650²³. D.R. Horton maintains that it is entitled to attorney's fees and costs under NRS 17.115²⁴ and NRCP 68²⁵, because the offers of judgment were valid, and for the same reason, appellants are

¹⁴ 124 Nev. at 21, 174 P.3d at 983.

¹⁵ *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009).

¹⁶ *Id.*

¹⁷ NEV. REV. STAT. § 17.115 (2013).

¹⁸ NEV. R. CIV. P. 68.

¹⁹ NEV. REV. STAT. § 17.115 (2013).

²⁰ NEV. R. CIV. P. 68.

²¹ *Id.*

²² NEV. REV. STAT. § 17.115 (2013).

²³ NEV. REV. STAT. § 40.650 (2013).

²⁴ NEV. REV. STAT. § 17.115 (2013).

²⁵ NEV. R. CIV. P. 68.

precluded from receiving either attorney's fees or costs after they rejected the offers of judgment. Furthermore, D.R. Horton claims that the appellants cannot receive costs because they did not file a required memorandum of costs under NRS 18.110(1)²⁶. Alternatively, D.R. Horton contends that it is the prevailing party entitled to attorney's fees and costs under NRS 18.020²⁷. Appellants argue that D.R. Horton was not the prevailing party and therefore cannot receive attorney's fees and costs under NRS 18.020²⁸.

A. Sanctions

The following test is used to determine whether to award attorney's fees in the offer of judgment context:

(1) [W]hether the plaintiff's claim was brought in good faith; (2) whether the defendant[s] offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.²⁹

In considering the fourth factor, a district court must contemplate the *Brunzell* factors. The *Brunzell* factors include:

(1) *The qualities of the advocate*: his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) *the work actually performed by the lawyer*: the skill time and attention given to the work; (4) *the result*: whether the attorney was successful and what benefits were derived.³⁰

The Court determined that the district court properly concluded that D.R. Horton's offers of judgment were valid. Because appellants each failed to obtain an award greater than his or her rejected offer of judgment, they are precluded under NRS 17.115³¹ and NRCP 68³² from recovering any costs or attorney's fees. Therefore, the Court affirmed the district court's denial of attorney's fees or costs to appellants.

The Court next considered the district court's order regarding D.R. Horton's motion for attorney's fees and costs. The Court noted that the district court was correct in awarding post-offer costs to D.R. Horton. However, the Court found that the district court abused its discretion by failing to apply the full, applicable legal analysis, because it did not consider the *Brunzell* factors in its *Beattie* analysis. On remand, the district court must reconsider its attorney fees analysis in regards to D.R. Horton by properly applying both the *Beattie* and *Brunzell* factors.

²⁶ NEV. REV. STAT. § 18.110(1) (2013).

²⁷ NEV. REV. STAT. § 18.020 (2013).

²⁸ *Id.*

²⁹ *Beattie*, 99 Nev. at 588–89, 668 P.2d at 274.

³⁰ *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

³¹ NEV. REV. STAT. § 17.115 (2013).

³² NEV. R. CIV. P. 68.

Furthermore, the district court is commanded to award D.R. Horton post-offer costs.

B. Apportionment of sanctions issued under NRS 17.115³³ and NRCP 68³⁴

The Court held that “when a district court issues sanctions against multiple offerees pursuant to NRS 17.115³⁵ and NRCP 68³⁶, it has and must exercise its discretion to determine whether to apportion those sanctions among the multiple offerees or impose those sanctions with joint and several liability.” In determining whether to apportion sanctions or impose sanctions with joint and several liability, a district court should consider factors including:

- (1) Whether different offerees raise distinct issues justifying segregating the costs and attorney fees associated with the litigation; and (2) in the case of a prevailing party, whether the party entitled to costs and/or attorney fees would otherwise not likely be able to recover a substantial portion of his or her judgment.³⁷

The Court held that the district court abused its discretion by not making such a determination in this case. The Court further held that “when sanctions are issued against multiple homeowner offerees pursuant to NRS 17.115³⁸ and NRCP 68³⁹ in a construction defect action, a district court abuses its discretion by imposing those sanctions jointly and severally against the homeowners.” Lastly, the Court held: “[O]n remand, the district court must apportion sanctions issued against the homeowners based on their individual offers of judgment.”

Conclusion

The district court did not abuse its discretion in denying appellants’ motion for a new trial. However, the district did abuse its discretion in refusing to issue sanctions pursuant to NRS 17.115⁴⁰ and NRCP 68⁴¹ and in failing to apportion those sanctions among the homeowners.

³³ NEV. REV. STAT. § 17.115 (2013).

³⁴ NEV. R. CIV. P. 68.

³⁵ NEV. REV. STAT. § 17.115 (2013).

³⁶ NEV. R. CIV. P. 68.

³⁷ *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002).

³⁸ NEV. REV. STAT. § 17.115 (2013).

³⁹ NEV. R. CIV. P. 68.

⁴⁰ NEV. REV. STAT. § 17.115 (2013).

⁴¹ NEV. R. CIV. P. 68.