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### Summary of Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. Adv. Op. No. 39

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***Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. Adv. Op. No. 39 (June 12, 2008)<sup>1</sup>**

**CONTRACT LAW – LIEN WAIVER AND PAY-IF-PAID PROVISION  
VALIDITY**

**Summary**

Appeal from three consolidated district court judgments, and from post-judgment orders denying a new trial and awarding attorney’s fees and costs.

**Disposition/Outcome**

The lower court’s judgment denying a new trial where the parties failed to contest the jury verdict prior to the jury being dismissed was reversed and remanded for a new trial. The Court affirmed the district court in holding a lien waiver and a pay-if-paid provision both unenforceable. The Court also affirmed the district court’s judgment in the amount of \$980,488 as acquiesced to by the parties in the form of stipulations. Finally, the Court vacated the district court’s award of attorney’s fees and costs, and reversed its award of sanctions, remanding these issues for further proceedings.

**Factual and Procedural History**

The Venetian Resort (“Venetian”), through its predecessor Las Vegas Sands, Inc., entered into a Construction Management Agreement with Lehrer McGovern Bovis (“Bovis”) under which Bovis agreed to manage the remaining construction of the Venetian. Under this agreement, Bovis was to hire subcontractors and provide the work, labor, services, materials, supplies, and equipment necessary to complete the project.

In connection with this agreement, Bovis subcontracted with Bullock Insulation (“Bullock”) to install fire retardant materials. Under the subcontract, Bullock was to install “firestop putty pads” around certain electrical boxes, but the parties disputed whether Bullock was required to install the putty pads around all of the electrical boxes in the walls separating the hotel’s rooms.

The subcontract also contained a lien waiver clause, whereby Bullock was prohibited from filing any lien or other encumbrance against the Venetian project. The lien waiver was completely independent of Bullock receiving payment for work completed or materials used. The subcontract further contained a pay-if-paid provision, under which Bullock was not to receive any payment unless Bovis received payments from Venetian.

The subcontract required Bullock to obtain written approval from Bovis before deviating from any of its provisions, and Bullock Insulation presented no evidence of any written approval or change order eliminating putty pad requirements. The subcontract further provided that

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<sup>1</sup> By Katie Weber

Bullock would bear the cost for any corrective work resulting from unapproved deviations from its terms.

When the project was nearing completion, the Clark County Building Department issued a correction notice stating that firestop putty pads were required around the electrical boxes in the rooms' separation walls. Although Bullock provided Bovis with confirmation that it had installed the putty pads in accordance with the subcontract, putty pads had not been installed in most of the rooms' separation walls. Bovis thus directed Bullock to install the omitted putty pads, which required a substantial amount of work.

After installing the remaining putty pads, Bullock recorded a mechanic's lien on the project, and filed a district court complaint against Venetian and Bovis for breach of contract, foreclosure of the mechanic's lien, and other claims. Bovis counterclaimed for breach of contract. At trial, Bovis and Bullock made oral stipulations, excluding the putty pad issue, regarding the value and amount owed to Bullock for various approved changes. The parties later disputed which items were included in the stipulations, but failed to put the agreed upon stipulations in writing.

As for the putty pads, Bullock and Bovis stipulated that Bullock incurred labor costs of \$326,905 and Bovis incurred \$788,170 in damages resulting from installing the omitted putty pads.

At the conclusion of the trial, the district court drafted its own interrogatories. Pursuant to these interrogatories, the jury found that Bullock was required under the original subcontract to install the putty pads on electrical boxes in the guest room separation walls; that Bovis did not modify or waive such installation; that Bullock was entitled to compensation above and beyond the original subcontract for installing the additional putty pads; and that Bovis could not collect its additional costs in connection with the installation of the additional putty pads. Thus, though the jury found that the subcontract required Bullock to install the putty pads, it also found that the subcontract required Bovis to pay Bullock extra compensation for doing so. The jury's general verdict awarded Bullock \$326,905, the amount to which Bovis and Bullock had stipulated as Bullock's costs for the additional work, and denied Bovis recovery of its costs in connection with the same. Neither Bovis nor Venetian objected to the jury verdict before the jury was discharged.

Although Bovis asserted that the pay-if-paid provision precluded Bullock from recording a lien, the district court found that the pay-if-paid provision was unenforceable as a matter of public policy because construction workers have a statutory right to record a mechanic's lien, and the provision deprives them of that right. Based on the jury's answers to the special interrogatories and its general verdict, the district court entered judgment awarding Bullock \$326,905, plus pre-judgment interest, for the costs related to the new putty pads. Applying the orally stipulated value of the remainder of Bullock's claims, along with Bovis's orally stipulated offsets, the district court concluded that, excluding any amounts related to the at-issue putty pads, Bovis owed Bullock \$980,488 under the subcontract, plus interest. The district court further struck down the lien waiver provision in the subcontract, concluding that lien waiver clauses are against public policy, as codified in NRS Chapter 108.

Bovis and Venetian moved for a new trial based on the inconsistencies in the jury's responses to the district court's special interrogatories. However, neither Bovis nor Venetian objected to the judgment's principal amount of \$980,488. The district court denied the motion,

concluding that the jury's answers to the interrogatories could be reconciled with each other and with the evidence presented at trial.

Finally, the district court entered orders awarding Bullock costs, pursuant to NRS Chapter 18, and attorney's fees, based on Bovis's rejection of Bullock's offer of judgment in the amount of \$1,100,000. The district court awarded Bullock additional attorney's fees of \$250,000, based on its finding that Bovis had defended the action in bad faith. Venetian and Bovis brought the subject appeal of the district court's judgment and the order denying their motion for a new trial, and Bovis additionally appealed from the orders awarding Bullock costs, attorney's fees, and sanctions. Finally, Bovis also appealed from the district court's order against Bovis awarding costs to respondent Insurance Company of the West.

## **Discussion**

### **Inconsistent Jury Verdicts**

Venetian and Bovis argued that the district court abused its discretion by entering a judgment despite the inconsistencies among the jury's answers to the special interrogatories and general verdict. Bullock argues that the parties waived any objection to any such inconsistencies by failing to object before the jury was dismissed.

The Court referenced *Eberhard Manufacturing Co. v. Baldwin*<sup>2</sup>, which held that the parties therein had waived the right to argue inconsistent verdicts because they failed to object before the jury had been discharged, emphasizing the need for the "efficient administration of justice."<sup>3</sup> Though the Court reiterated that this objective remains an important consideration in finding error based on inconsistent jury verdicts, it concluded that the rule in *Eberhard* is not absolute. Rather, when the interrogatory answers are inconsistent with each other, and at least one is also inconsistent with the general verdict, NRCP 49(b) requires the district court not to direct the entry of judgment.

Here, the jury had concluded that, while the subcontract required Bullock to install the putty pads, Bovis still had to pay Bullock extra compensation to complete the installation of the putty pads. The Court disagreed with the district court's finding that the answers to these special interrogatories were not inconsistent with one another or with the general verdict reached. Thus, the special interrogatory answers resulted in an inconsistent judgment on the general verdict, contrary to NRCP 49(b).

The Court distinguished *Eberhard* from this case, noting that *Eberhard* did not consider NRCP 49(b). Unlike in *Eberhard*, the district court in this case could not construct a judgment on the jury's general verdict without automatically contradicting two of the jury's answers to the special interrogatories.

Therefore, the Court concluded that the district court abused its discretion when it authorized four interrogatories that resulted in an inconsistent jury verdict, entered judgment on the inconsistent verdict, and denied Bovis's and Venetian's motion for a new trial.

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<sup>2</sup> *Eberhard Mfg. Co. v. Baldwin*, 628 P.2d 681 (Nev. 1981).

<sup>3</sup> *Id.* at 682.

## Lien Waiver Provision

Venetian argued that the district court erred by concluding that the agreement's lien waiver clause was unenforceable based upon public policy considerations as codified by NRS Chapter 108, Nevada's mechanic's lien laws.

A contractor has a statutory right to a mechanic's lien for the unpaid balance of the price agreed upon for labor, materials, and equipment furnished.<sup>4</sup> The purpose of the mechanic's lien statutes is to assure that those who perform labor or provide materials to improve properties will be compensated by the owner.<sup>5</sup> The Court has held previously that the statutes are meant to be remedial in nature "and should be liberally construed."<sup>6</sup>

The Court also looked to California law, where mechanic's lien laws are also liberally construed and are considered to be remedial.<sup>7</sup> The California Supreme Court has concluded that "[public] policy strongly supports the preservation of laws which give the laborer and materialman security for their claims."<sup>8</sup> This policy stems from the notion that contractors are often in a vulnerable position because they extend large amounts of credit; invest significant time, labor, and materials into projects; and have a number of employees depending on them for payment.<sup>9</sup> The Nevada Supreme Court adopted this reasoning in overruling *Dayside Inc. v. District Court*<sup>10</sup>, where the Court had previously found that "a waiver of mechanic's lien rights is not contrary to public policy" and will be enforced so long as it is clear and unambiguous<sup>11</sup>. Instead, the Court found that whether a lien waiver clause is enforceable should be resolved on a case-by-case basis, considering whether the form violates Nevada's public policy to assure payment to contractors.

Here, the lien waiver provision at issue applied regardless of whether Bullock received any payment. The Court found that, because it failed to assure Bullock would be paid, the provision was in violation of public policy. Therefore, the district court was correct in finding the lien waiver provision to be unenforceable.

## Pay-if-paid Provision

Bovis argued that the district court erred when it found the pay-if-paid provision of the subcontract to be unenforceable based on public policy in connection with the statutory right to a mechanic's lien.

Because a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed, such a provision impairs the subcontractor's statutory right to place a

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<sup>4</sup> NEV. REV. STAT. § 108.222(1)(a) (2005).

<sup>5</sup> *Schofield v. Copeland Lumber*, 692 P.2d 519, 520 (Nev. 1985).

<sup>6</sup> *Las Vegas Plywood v. D & D Enterprises*, 649 P.2d 1367, 1368 (Nev. 1982).

<sup>7</sup> *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 938 P.2d 372, 375-76 (Cal. 1997).

<sup>8</sup> *Id.* at 376 (quoting *Connolly Develop., Inc. v. Sup. Ct. of Merced Cty.*, 553 P.2d 637, 653-54 (Cal. 1976)).

<sup>9</sup> *Connolly Develop., Inc.*, 553 P.2d at 653.

<sup>10</sup> *Dayside Inc. v. Dist. Ct.*, 75 P.3d 384 (Nev. 2003).

<sup>11</sup> *Id.* at 387.

mechanic's lien on the construction project.<sup>12</sup> As Nevada's public policy favors securing payment for materialmen and contractors, the Court concluded that pay-if-paid provisions are unenforceable as against public policy. Thus, it affirmed that portion of the lower court's judgment finding the pay-if-paid provision of the subcontract to be unenforceable.

### The Judgment

Venetian argued that the district court abused its discretion by entering judgment in the principal amount of \$980,488 because it included pending change order amounts and consequential damages to which Venetian did not stipulate.

Preliminarily, approved change orders, which may be included within the scope of work that would otherwise be considered consequential damages, become part of the contract because the parties mutually agree to that work through the approval process.<sup>13</sup>

The Court found the stipulations to be valid because the district court minutes from April 22, 2005, revealed that the district court entered an order in the minutes based on the stipulations. Further, the Court concluded that the surrounding circumstances revealed that the parties had acquiesced to the stipulations. Specifically, the parties assented to the terms of the stipulations because they did not object to the district court's decision to limit the presentation of evidence based on the fact that such evidence was unnecessary in light of the stipulations. After trial, the parties did not object to the principal judgment amount of \$980,488, which was based on the stipulations, and appeared in the proposed and final judgments, as well as in Bovis' and Venetian's motion for a new trial. Thus, the Court concluded that the stipulations were valid, the parties acquiesced to the principal judgment amount of \$980,488, and they waived any objection to it by not raising objections to the judgment.

The Court further concluded that the district court was correct in determining that when Bovis and Bullock stipulated to the amounts of the pending change orders, those pending change orders became approved change orders. They were therefore a part of the contract and could be subject to a lien.<sup>14</sup> Accordingly, the Court affirmed this portion of the district court's judgment, with interest.

### Attorney's Fees and Sanctions

Bovis argued that the district court abused its discretion when it awarded Bullock costs and attorney's fees because Bullock was not the prevailing party, as the pay-if-paid provision prohibited Bullock from receiving payment before Bovis was paid. Further, Bovis asserted that it did not hide facts from the court and it argued in good faith that pay-if-paid provisions had been upheld in other district courts.

The Court vacated the award of attorney's fees based on its partial reversal of the judgment in the case. Further, upon review of the record, the Court concluded that substantial

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<sup>12</sup> See *Wm. R. Clarke Corp.*, 938 P.2d at 376 (concluding that a pay-if-paid provision "has the same practical effect as an express waiver of [mechanic's lien] rights").

<sup>13</sup> *California Commercial v. Amedeo Vegas I*, 67 P.3d 328, 332 (Nev. 2003).

<sup>14</sup> *Id.* at 332 (explaining that approved change orders become part of the contract price and are therefore lienable).

evidence did not support the district court's conclusion that Bovis defended the action in bad faith. Therefore, the district court abused its discretion and its award of sanctions was reversed.

### **Conclusion**

Where the district court creates special interrogatories that result in irreconcilably inconsistent verdicts and the parties fail to object to them before the jury is discharged, the parties do not necessarily waive the right to appeal the judgment based on the inconsistent verdicts. Pursuant to NRC 49(b), the district court shall not enter judgment on irreconcilably inconsistent verdicts. Therefore, in this case, the district court abused its discretion when it entered judgment on the inconsistent answers to the special interrogatories and the general verdict. Accordingly, the judgment on the breach of contract claim, as it relates to the additional putty pad issue, was reversed and remanded for a new trial.

The Court agreed with the lower court's finding that the lien waiver provision was unenforceable, affirming the portion of its judgment enforcing the lien. The Court further concluded that the district court properly struck down the pay-if-paid provision as unenforceable based on public policy. With respect to the portion of the judgment that was unrelated to the additional putty pad issue, the Court found the parties' stipulations to be valid, thus affirming that portion of the judgment with interest. Finally, the Court vacated the district court's award of attorney's fees and reversed the award of sanctions, remanding the matter back to the district court for further proceedings consistent with its opinion.