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Summary of Waddell v. L.V.R.V. Inc., 122 Nev. _____

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***Waddell v. L.V.R.V. Inc.*, 122 Nev. ___, 125 P.3d 1160 (Nev. 2006)¹**

**CONTRACT – SUBSTANTIAL IMPAIRMENT OF GOODS –
REVOCATION OF ACCEPTANCE – POST-JUDGMENT INTEREST ON
ATTORNEY FEES**

Summary

Appellants Arthur R. Waddell and his wife, Roswitha M. Waddell (the Waddells), entered into a contract to purchase a 1996 Coachmen Santara motor home (the RV) from cross-appellant L.V.R.V. Inc., D/B/A Wheeler's Las Vegas RV (Wheeler's). In 1996 the Waddells agreed to purchase the RV and an extended warranty from Wheeler's, and requested that various repairs be performed on the vehicle's engine cooling system, that new batteries be installed, and that the door frames be aligned, prior to delivery. The Waddells took delivery of the RV on September 1, 1997. The Waddells noticed problems with the RV on their first out-of-state trip, during which the entry door popped open and the engine overheated. Other defects included faulty air-conditioning and heating. The RV was returned to Wheeler's for repairs, where it remained for a total of seven months during different periods of time between September 1997 and March 1999 while the service department attempted to remedy recurring problems.

The Waddells grew tired of having to continually return the RV for more repairs, and, on June 9, 2000, filed a complaint in district court seeking to revoke their acceptance of the RV or, in the alternative, monetary damages. Wheeler's answered the complaint and filed a third-party complaint against Coachmen Recreational Vehicle Company, Inc. (Coachmen) seeking equitable indemnification and contribution.

Following a bench trial, the district court concluded that the RV's nonconformities substantially impaired its value to the Waddells. The district court permitted the Waddells to revoke their acceptance of the RV, ordered Wheeler's to return all of the Waddell's out-of-pocket expenses, and held that Wheeler's was not entitled to indemnification from Coachmen. Following the judgment, the court awarded the Waddells \$15,000 in attorney fees, entered supplemental findings of fact and conclusions of law, issued an amended judgment, entered a separate order denying post-judgment interest on the attorney fee award, and denied the Waddells' motion to recalculate their costs to include computerized research fees. Both parties appealed.

Wheeler's had argued, *inter alia*,² that (1) the Waddells should not be permitted to revoke their acceptance of the RV because they failed to prove that the RV's nonconformities substantially impaired its value, and (2) the Waddells' revocation of the contract was not made within a reasonable period of time following acceptance. The Waddells argued, *inter alia*,³ that they were entitled to post-judgment interest on attorney fees awarded by the district court.

The Nevada Supreme Court was thus presented with three issues of first impression. First, the court adopted the two-part test of the Supreme Court of Oregon to determine whether the nonconformities of the RV substantially impaired its value to the Waddells, and held they did, since the nonconformities thwarted the Waddells' intended use of the vehicle, and the

¹ By Christian Hale

² See note 4, *infra*.

³ *Id.*

Waddells had presented sufficient evidence of this at trial. Second, the court adopted the reasoning of the Indiana and Arizona Courts of Appeals, that the reasonableness of the time in which a contract may be revoked is an issue of fact for the trial court, and depends upon the nature, purpose, and circumstances of the transaction, and held that the Waddells had revoked the contract within a reasonable period of time. Third, the court adopted the reasoning of the Supreme Court of Ohio, that awarding post-judgment interest on attorney fees properly recognizes the time value of money and makes the prevailing party truly whole, and held that the Waddells were entitled to post-judgment interest on their attorney fees.

Issue and Disposition

Issue⁴

Is the determination of whether nonconformity in a good substantially impairs its value to the buyer an issue of fact to be made in the light of the totality of the circumstances of each particular case?

Does the determination of whether revocation of a contract occurred within a reasonable period of time depend on the nature, purpose, and circumstances of the transaction?

Are attorney fees a "cost" included in a judgment for "damages and costs" such that post-judgment interest on these fees should be awarded to the prevailing party?

Disposition

Yes. The determination of whether nonconformity in a good substantially impairs its value to the buyer is an issue of fact to be made in the light of the totality of the circumstances of each particular case, and the test has both an objective and a subjective prong.

Yes. Whether revocation of a contract occurred within a reasonable period of time depends on the nature, purpose, and circumstances of the transaction. Further, periods of time in which the seller attempts to cure nonconformity do not count against the buyer regarding timely revocation.

Yes. Attorney fees are one of the costs included in a judgment, and post-judgment interest on these fees should be awarded to the prevailing party.

⁴ The court addressed six issues in its opinion; three are not presented for discussion since they are not issues of first impression (Wheeler's motion for attorney fees under NRCP 68 was denied since the Waddell's decision to proceed to trial after rejecting a settlement offer was neither unreasonable nor in bad faith (*see, e.g.*, *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)); Wheeler's claim for indemnification from Coachmen was denied since the district court's findings of fact included that the only issue potentially related to indemnification was a faulty mud flap which had already been repaired, and a trial court's findings of fact, supported by substantial evidence, will not be set aside unless clearly erroneous (*Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996)); the Waddells' claim for computerized research costs failed because the district court found these costs insufficiently itemized, and the determination of allowable costs is "within the sound discretion of the trial court" (*Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998)).

Commentary

State of the Law Before *Waddell*

Substantial Impairment

The issue in *Waddell* of when nonconformity substantially impairs the value of a good to the buyer is one of first impression in Nevada. While nonconformity rising to the level of substantial impairment is addressed in NRS § 104.2608(1),⁵ the court turned to the reasoning of the Supreme Court of Oregon, to apply the law to the facts at bar.⁶

Reasonable Time for Revoking Acceptance

The issue of what is a reasonable period of time in which a contract may be revoked is also one of first impression. Nevada law requires that revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it, and that revocation is not effective until the buyer notifies the seller of it.⁷ To determine what amount of time is reasonable, the court turned to the reasoning of the Indiana and Arizona Courts of Appeals.

Post-judgment Interest on Attorney Fees

The issue of whether post-judgment interest on attorney fees may be awarded to prevailing plaintiffs is also one of first impression. The court noted that interest may be granted on all judgments and decrees, rendered by any court, for any debt, damages or costs.⁸ The court further noted that it had held that a district court judgment includes costs.⁹ To state the policy rationale for awarding post-judgment interest on attorney fees to prevailing plaintiffs, the court adopted the reasoning of the Supreme Court of Ohio.

Other Jurisdictions

Substantial Impairment

The court noted that the Supreme Court of Arkansas had treated the determination of when a nonconformity substantially impairs the value of a good to the buyer as an issue of fact,¹⁰

⁵ NEV. REV. ST. § 104.2608(1) (2003) mirrors UCC § 2-608, and provides that a buyer may revoke his acceptance if the item suffers from a "nonconformity [that] substantially impairs its value to him" and (a) the buyer accepted the goods on the understanding that the seller would cure the nonconformity or (b) the buyer was unaware of the nonconformity and the nonconformity was concealed by the difficulty of discovery or by the seller's assurances that the good was conforming.

⁶ Oregon's legislature, like Nevada's, adopted § 2-208 of the Uniform Commercial Code verbatim. *Waddell*, at 1164.

⁷ See NEV. REV. ST. § 104.2608(2).

⁸ See NEV. REV. ST. § 17.130(1).

⁹ *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1355, 971 P.2d 383, 387-88 (1998).

¹⁰ *Frontier Mobile Home Sales, Inc. v. Tringleth*, 505 S.W.2d 516, 517 (Ark. 1974) (holding that the revocation of a contract for a mobile home was proper where the home was non-conforming to the contract entered into by the parties).

and that the Supreme Court of Massachusetts looked to the facts of the impairment considered in light of the totality of the circumstances of each particular case, including the number of deficiencies and type of nonconformity.¹¹ Noting that the Supreme Court of Oregon had decided this issue and that Nevada's adoption of the Uniform Commercial Code was the same as Oregon's, the court looked to that decision.

The Supreme Court of Oregon has established a two-part test to determine whether a nonconformity, under the totality of the circumstances, substantially impairs the value of the goods to the buyer.¹² The test has both a subjective prong (calling for a consideration of the needs and circumstances of the particular plaintiff who seeks to revoke) and an objective prong (requiring a factual determination, based on evidence, that the nonconformity in fact substantially impairs the value of the goods to the buyer, having in mind his particular needs). The *Waddell* court adopted this test.

Reasonable Time for Revoking Acceptance

The court noted that although it had not yet determined a reasonable timeline for revocation of acceptance of goods under a contract, the Indiana and Arizona Courts of Appeals had ruled that the reasonableness of the time for revocation is a question of fact unique to the circumstances of each case.¹³ Moreover, the issue of reasonableness is generally considered to be an issue of fact for the trial court.¹⁴

Post-judgment Interest on Attorney Fees

While the court had already determined that *prejudgment* interest is available for costs incurred by a prevailing party,¹⁵ it looked to the Supreme Court of Ohio for a rationale for similarly permitting *post-judgment* interest. That court stated that "the modern trend . . . favors the awarding of post-judgment interest on attorney fees as a general rule . . . [because the award] properly recognizes the time value of money by making the prevailing party truly whole and preventing the nonprevailing party from enjoying the use of money that no longer rightfully belongs to it."¹⁶

¹¹ Fortin v. Ox-Bow Marina, Inc., 557 N.E.2d 1157, 1162 (Mass. 1990)

¹² Jorgensen v. Pressnall, 545 P.2d 1382, 1384-85 (Or. 1976) (holding that leaks and other defects in the plaintiffs' home were nonconformities that substantially impaired the value of the home to the plaintiffs).

¹³ See DeVoe Chevrolet-Cadillac v. Cartwright, 526 N.E.2d 1237, 1240-41 (Ind. Ct. App. 1988) (holding no adequate notice of revocation was provided where plaintiffs merely complained after discovering the defect, the notice given was not written, promises to cure were not made, and plaintiffs only offered to negotiate); Golembieski v. O'Reilly R.V. Center, Inc., 708 P.2d 1325, 1328 (Ariz. Ct. App. 1985) (holding a revocation of acceptance of an RV untimely where appellants had traveled 17,000 miles in the vehicle since purchase, 7,000 of which came after resolution of mechanical problems, before giving notice of their wish to revoke acceptance).

¹⁴ See, e.g., Golembieski, P.2d at 1328; Triglath, 505 S.W.2d at 517; Purnell v. Guaranty Bank, 624 S.W.2d 357, 359 (Tex. App. 1981).

¹⁵ Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1355, 971 P.2d 383, 387-88 (1998).

¹⁶ Parker v. I&F Insulation Co., 730 N.E.2d 972, 977-78 (2000). Other jurisdictions adopting this "trend" include Alaska (see Isaacson Structural Steel Co. v. Armco Steel, 640 P.2d 812 (Alaska 1982)), Florida (see Fischbach & Moore, Inc. v. McBro, 619 So.2d 324 (Fla. Dist. Ct. App. 1993)), Massachusetts (see Nardone v. Patrick Motor Sales, Inc., 706 N.E.2d 1151 (Mass. 1999)), Ohio (see Parker v. I & F Insulation Co., 730 N.E.2d 972 (Ohio 2000)), and Washington (see Aguirre v. AT & T Wireless Svc., 75 P.3d 603 (Wash. 2003)).

Effect of *Waddell* on Current Law

Substantial Impairment

In *Waddell*, the court applied the *Jorgensen* two-part test,¹⁷ and found that the RV's chronic and recurring engine overheating problems prevented the Waddells from using the RV to travel as they intended, thus the RV's nonconformity substantially impaired its value to them.¹⁸ Moreover, the court noted the trial court had found substantial evidence that the Waddells' intentions to travel around the country in the RV were frustrated where the engine tended to overheat within ten miles of its starting point, and the vehicle was in Wheeler's service department for repairs for 213 days.¹⁹

Reasonable Time for Revoking Acceptance

The court found that the Waddells revoked their acceptance of the RV within a reasonable time, even though the revocation did not occur until 18 months after the RV was purchased. The court reasoned that the dealer had possession of the RV for seven of the 18 months, the Waddells had notified the dealer each time the defect occurred, and notified the dealer of demand for a refund and revocation of acceptance after the problem could not be resolved. The court held that periods of time in which the seller attempts to cure nonconformity do not count against the buyer regarding timely revocation.

Post-judgment Interest on Attorney Fees

The district court had awarded the Waddells attorney fees in its judgment. The supreme court held that since attorney fees were a cost incurred by the prevailing plaintiff, interest on the fees was appropriate under the *Parker* rationale. The court provided a second rationale in referring to its earlier holding that a prevailing party is entitled to post-judgment interest on *punitive* damage awards.²⁰ There, the court explained that "[t]he purpose of post-judgment interest is to compensate the plaintiff for loss of the use of the money awarded in the judgment."²¹ The Waddells (or at least, their attorneys) had been denied the use of the award of attorney fees, thus interest on the fees was proper to make the prevailing party truly whole.

Unanswered Questions

In holding that the Waddells revoked their acceptance of the RV within a reasonable time of realizing that the RV was not going to be available for its subjectively-based intended use, the court failed to provide guidelines for what constitutes a reasonable timeframe for revocation in subsequent cases. Although Wheeler's had possession of the RV for seven months to attempt repairs, the Waddells retained possession of it for 11 (of 18) months prior to announcing revocation. The court failed to address whether it might have been more reasonable still for the

¹⁷ See 545 P.2d at 1384-85.

¹⁸ The subjective prong of the *Jorgensen* test.

¹⁹ The objective prong of *Jorgensen*.

²⁰ See *Powers v. United Svcs. Automobile Ass'n.*, 114 Nev. 690, 705-06, 962 P.2d 596, 605-06 (1998).

²¹ *Id.* at 705, 962 P.2d at 605.

Waddells' retained attorney to announce revocation early in the summer of 1999 instead of waiting almost a year before doing so in June of 2000. *Waddell* may, perhaps, be interpreted to hold that retention of an attorney to assist in resolving a dispute is as good (in Nevada) as the formal written notice of revocation required in *DeVoe*.²² Further, the court did not find important the number of separate trips the Waddells had made in the RV, or the total number of miles traveled since purchase – a significant determinant of reasonableness in *Golembieski*.²³

Conclusion

In finding that the value of the RV to the Waddells had been substantially impaired by its mechanical problems, the court relied on the Waddells' own testimony as to their intended use for the vehicle at the time they made the purchase. This seems reasonable insofar as one part of the *Jorgensen* test that the court adopted is subjective in nature. However, the "objective" part of the test, requiring evidence of "something more than plaintiffs' assertion"²⁴ as to their needs not being met, appears to rely simply on circumstantial proof not inconsistent with the already-offered subjective testimony. This is good news for buyers of goods in Nevada since, as a result of the *Waddell* holding, the greater emphasis of the *Jorgensen* test appears to be on the subjective prong. This suggests that buyers have a valid remedy for "buyer's remorse" when they can provide a court with any vaguely cogent reason why the purchased item will not meet their needs. In cases like the Waddells', where the item sold is subject to rapid depreciation (or perhaps subject to the whim of fad or fashion), wear and tear, and revocation of acceptance results in additional expense beyond the "sticker price" of the item (Wheeler's was required to reimburse the Waddells for sales tax paid at the time of purchase (\$5,314 long since remitted to the appropriate authority), casualty insurance paid on the vehicle (\$3,576 unrecoverable by Wheeler's), and vehicle registration costs (\$2,589 representing no value to Wheeler's)), a great (objective) financial burden may fall on the seller, perhaps disproportionate to the inconvenience to the buyer alleged through only subjectively-based testimony. A precaution available to sellers might be to contractually limit the time period for revocation rather than repair.

²² See note 13, *supra*.

²³ *Id.*

²⁴ 545 P.2d at 1384-85.