

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAPID MOUNTING DISPLAY,
Appellant/Cross-Respondent,
vs.
EXPOSURE GRAPHICS,
Respondent/Cross-Appellant.

No. 44664

FILED

FEB 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal and cross-appeal from a district court judgment in a contract and tort action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Both parties challenge the district court's compensatory damages award. In addition, appellant/cross-respondent Rapid Mounting Display challenges the district court's decision to award punitive damages, attorney fees, and prejudgment interest. For the following reasons, we conclude that substantial evidence supports the district court's calculation of compensatory damages, but that the court erred in calculating punitive damages. In addition, we conclude that the district court abused its discretion in awarding attorney fees under Nevada's offer of judgment provisions. Finally, we conclude that the district court erred in awarding prejudgment interest on respondent/cross-appellant Exposure Graphic's punitive damages award. Accordingly, we reverse the judgment of the district court and remand this case for further proceedings consistent with our order. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Compensatory damages

Both parties challenge the district court's valuation of compensatory damages for Rapid's conversion of Exposure's alien

standees. On the one hand, Rapid argues that the court's award of \$4 per standee was excessive because the standees had no value at the time of the conversion.¹ By contrast, Exposure asserts that the district court's award of \$4 per standee was inadequate because the evidence produced at trial supported a value between \$10 and \$15 each.²

We have consistently recognized that the district court has wide discretion in calculating an award of damages and that its award will not be disturbed on appeal absent an abuse of discretion.³ With respect to damages for conversion, we have concluded that "the full value of the

¹Rapid also contends that there is insufficient evidence to support the district court's determination that it converted all 26,295 alien standees in its possession. We conclude that this contention lacks merit. In its findings of fact and conclusions of law, the district court specifically determined that, of those standees that were not recycled without permission, "[m]any . . . had been mishandled and stacked so they were torn, folded, water and/or mold damaged. What remained and was saleable was of such a small quantity as to not justify the sales and marketing costs." Testimony by Pat Sullivan and Jon Kline, as well as Rapid's own internal documents, all support this conclusion. Accordingly, the district court did not abuse its discretion in awarding conversion damages for all of the unsold standees in Rapid's possession.

²Exposure also argues that the district court abused its discretion by reopening the issue of compensatory damages to consider certain evidence discovered by Rapid after trial. We disagree because the record in this case does not suggest that Rapid acted in bad faith or with a lack of diligence regarding the discovery of the evidence that led to the reopening of trial. See Ford v. Ford, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (1989) ("the decision to reopen a case for the introduction of additional evidence is within the sound discretion of the trial court").

³Frantz v. Johnson, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) (quoting Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997)).

property at the time of conversion” is an appropriate measure of damages “when the defendant keeps possession of the property he has converted.”⁴

After reviewing the record, we conclude that the district court did not abuse its discretion in awarding Exposure \$4.00 per standee. Although the bulk sale to Advanced Graphics (at \$4.00 per standee) occurred 5 months before Rapid began to convert the standees, Exposure has failed to demonstrate an increase in value of the standees in Rapid’s possession during the 5 month period between the bulk sale and the conversion.⁵ Thus, we conclude that the district court did not abuse its discretion in determining that the fair market value of the unsold standees at the time of the conversion was \$4.00 each.⁶

Punitive damages

Rapid raises three alternative arguments with respect to the district court’s award of punitive damages. First, Rapid contends that punitive damages were prohibited by NRS 42.005 because Exposure’s

⁴Bader v. Cerri, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980), overruled on other grounds by, Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 607-08, 5 P.3d 1043, 1049-50 (2000).

⁵While Advanced Graphics was apparently able to sell the standees at a price of \$12.50 in late 1998, Exposure’s inability to sell the standees at that price is demonstrated by its willingness to sell the standees to Advanced at the highly discounted rate of \$4.00 in August 2000.

⁶Notably, the parties do not discuss whether the district court based its award of \$4.00 per standee on fraud rather than conversion. Instead, both Rapid and Exposure focus entirely on whether the district court applied the proper measure of conversion damages. Because the parties have not discussed the proper measure of fraud damages we will not address this issue in our order.

claims arose from the parties' contract. Second, Rapid asserts that, even if punitive damages were available, Exposure failed to provide clear and convincing evidence of oppression, fraud, or malice. Third, Rapid argues that the district court's punitive damages award was excessive in light of the evidence produced at trial. While we disagree with Rapid's first two arguments, we agree that the district court's punitive damages award was excessive in this case.

NRS 42.005 does not bar punitive damages in this case

Under NRS 42.005, punitive damages are only available "in an action for the breach of an obligation not arising from contract."⁷ Here, Exposure sued Rapid for breach of contract, fraud, and conversion. Following trial on these claims, the district court found in Exposure's favor and awarded compensatory damages "on its fraud and intentional conversion claims for relief."

As this court has made clear, "[t]orts can . . . be committed by parties to a contract."⁸ Thus, before awarding punitive damages, the question to be determined in cases presenting mixed tort and contract claims "is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged express agreement between the parties."⁹

⁷Emphasis added.

⁸Bernard v. Rockhill Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting Malone v. University of Kansas Medical Center, 552 P.2d 885, 888 (Kan. 1976)).

⁹Id.

In this case, Rapid had a separate legal duty not to issue fraudulent invoices or to intentionally destroy Exposure's standees. Thus, given the district court's conclusion that Rapid "intentionally converted" Exposure's standees and made several material and fraudulent misrepresentations of fact upon which Exposure relied, we conclude that NRS 42.005 does not bar punitive damages.¹⁰

Substantial evidence supports the district court's findings of fraud and malice

We have repeatedly recognized that "[t]he district court has discretion to determine whether the defendant's conduct merits punitive damages as a matter of law," and an award of punitive damages will not be overturned "if it is supported by substantial evidence of oppression, fraud, or malice."¹¹ Furthermore, in reviewing an award of punitive damages, we will assume that the district court "believed all the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor."¹²

In this case, the district court awarded punitive damages based on Rapid's fraud and intentional conversion of Exposure's standees. Specifically, the court concluded that Dave Wilson (Rapid's president) "intentionally and fraudulently with malice aforethought, made

¹⁰Cf. Amoroso Constr. v. Lazovich and Lazovich, 107 Nev. 294, 298, 810 P.2d 775 (1991) (noting that, in a case involving claims for breach of contract and torts, "[p]unitive damages are not available on the count for breach of contract and are precluded in the absence of compensatory damages for the claim sustaining the punitive award").

¹¹Bongiovi v. Sullivan, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006).

¹²Id. (internal quotation marks and emphasis omitted).

misrepresentations to Exposure upon which Exposure relied to its detriment”¹³ In addition, the district court found that “Mr. Wilson’s conduct in handling the matter between Exposure and Rapid [was] equivalent to thievery.” In particular, the court condemned the unauthorized destruction of Exposure’s standees at Wilson’s direction.

After reviewing the record, we conclude that substantial evidence supports the district court’s determination that Rapid acted intentionally, fraudulently and with malice. Although the parties dispute whether Exposure understood that the standees would only be fully assembled on an as-needed basis,¹⁴ both Dave Wilson’s internal letters and Rapid’s written invoices suggest fraudulent intentions. For example, Wilson’s internal letter to Rapid’s CFO specifically admits that the job was not complete and misrepresents that he had permission to destroy the standees. In addition, Wilson wrote to another Rapid employee that “we have completed a portion of the job, but by no means the entire job. We invoiced and have been paid for the entire job.” Similarly, all of the invoices sent by Rapid to Exposure represented that the standees were complete and properly stored on warehouse pallets. Even Rapid’s warehouse supervisor, Pat Sullivan, knew that these invoices misstated the status of the standees. In light of this evidence, all of which was

¹³These misrepresentations included numerous invoices that Rapid sent to Exposure between 1997 and 1999, which represented that Rapid’s production of the standees was complete and, therefore, manufacturing and storage fees were due.

¹⁴Curt Carnes, the Rapid salesperson who dealt most closely with Exposure, testified that Rapid’s job was to stay ahead of whatever orders Exposure needed filled.

presented at trial, we conclude that the district court's findings of fraud and malice were not unreasonable.¹⁵ Accordingly, we conclude that the district court did not err in awarding punitive damages.

The district court's award of punitive damages was excessive

Rapid also contends that the district court's punitive damages award was excessive. Because the district court's award of \$300,236.72 in punitive damages did not exceed the statutory limit, this court must consider its excessiveness under Bongiovi v. Sullivan.¹⁶

In Bongiovi, this court adopted the U.S. Supreme Court's "three guideposts for deciding when a punitive damage award has violated due process."¹⁷ These guideposts are "(1) 'the degree of reprehensibility of the defendant's conduct,' (2) the ratio of the punitive damage award to the 'actual harm inflicted on the plaintiff,' and (3) how the punitive damages award compares to other civil or criminal penalties 'that could be imposed

¹⁵Rapid points out that several of its other employees, such as Curt Carnes, immediately attended to Wilson's wrongdoings and attempted to get him to stop. In Rapid's view, this conduct forecloses a finding of malice. Rapid's attempts to remedy the situation, however, do not lessen the intentionality of Wilson's misconduct. Thus, we conclude that this argument lacks merit.

¹⁶122 Nev. 556, 138 P.3d 433; see NRS 42.005(1)(a) (when the amount of compensatory damages is \$100,000 or more, the statutory limit on punitive damages is 3 times the compensatory award). The district court's punitive award of \$300,236.72 equals 2.5 times the compensatory damages awarded to Exposure following the reopening of trial.

¹⁷122 Nev. at 582, 138 P.3d at 451-52.

for comparable misconduct.”¹⁸ On appeal, we review these guideposts de novo to “ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”¹⁹

Applying the Bongiovi guideposts to this case, we conclude that the district court’s punitive award was excessive. First, the reprehensibility of Rapid’s conduct was fairly limited given that this case stems from a business transaction. As we recognized in a pre-Bongiovi case, “a simple business sales transaction in which the plaintiffs accused the defendants of misrepresentation and fraud . . . can probably be said to be toward the lower end of the spectrum of malevolence found in punitive damage cases.”²⁰ Although not couched in terms of “reprehensibility,” we believe that this conclusion still applies under our current punitive damages framework.

Second, the ratio of the district court’s punitive damages award to the injury suffered by Exposure was fairly high. In fact, at 2.5:1, the ratio of punitive damages to compensatory damages approaches the 3:1 statutory limit.²¹ In our view, punitive awards equaling 2.5 times the

¹⁸Id. (quoting BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 580, 583 (1996)).

¹⁹Id. at 582-83 (quoting State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003)).

²⁰Ace Truck v. Kahn, 103 Nev. 503, 511, 746 P.2d 132, 137 (1987).

²¹NRS 42.005(1)(a).

injured party's compensatory damages must be limited to cases in which the injured party demonstrates a higher degree of reprehensibility.²²

Third, this court dealt with an award of punitive damages punishing similar tortious conduct in Evans v. Dean Witter Reynolds.²³ In that case, the court affirmed an award of punitive damages equal to 2.4 times the injured party's compensatory damages because the defendants' fraud and intentional conversion resulted "in the substantial depletion of the multi-million-dollar estate of their mentally and physically incompetent client."²⁴ Although the defendants in both Evans and this case were found liable for fraud and conversion, we conclude that the conduct in Evans was more reprehensible than the conduct at issue here: the Evans defendants converted the property of an incompetent, elderly client. Accordingly, we conclude that a higher ratio was more appropriate in Evans than in this case.

Because none of the three Bongiovi guideposts supports the district court's punitive damages award, we conclude that the award is excessive and should be reduced. Accordingly, we direct the district court to recalculate punitive damages on remand, and, in doing so, to support its recalculation under each of the Bongiovi guideposts.

²²See Bongiovi, 122 Nev. at 583, 138 P.3d at 452 (upholding a punitive damages award equal to the compensatory award where defendant's "conduct was reprehensible to a large degree because of the egregiousness and offensiveness of his statements" about plaintiff).

²³116 Nev. 598, 614, 5 P.3d 1043, 1053 (2000) (affirming a punitive damages award of \$6,000,000).

²⁴Id.

Attorney fees

Rapid contends that the district court abused its discretion in awarding \$449,145.95 in attorney fees to Exposure under NRCP 68 and NRS 18.010(2). The award under NRS 18.010(2) pertained to those fees incurred from the initiation of the action through the date of Exposure's offer of judgment. The award under NRCP 68 pertained to those fees incurred from the date of Exposure's offer of judgment through February 2005.

Generally, this court reviews a district court's decision to award attorney fees for a "manifest abuse of discretion."²⁵ When the attorney fees matter implicates questions of law, however, the proper review is de novo.²⁶

The district court abused its discretion in awarding attorney fees under NRCP 68

Under NRCP 68, if a party rejects a valid offer of judgment and then fails to obtain a more favorable outcome, the offeree may be required to pay the offeror's reasonable attorney fees.²⁷ Before awarding attorney fees pursuant to NRCP 68, however, the district court "must carefully evaluate" four factors:

- (1) whether the plaintiff's claim was brought in good faith;
- (2) whether the . . . offer of judgment

²⁵Thomas v. City of North Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).

²⁶Id.

²⁷The district court also awarded fees under NRS 17.115. Because NRS 17.115, like NRCP 68, concerns offers of judgment, we do not discuss it separately.

was reasonable and in good faith in both its timing and amount; (3) whether the . . . 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.²⁸

In this case, Exposure made a timely offer of judgment for the total amount of \$353,925.23, which was broken down as follows: \$262,208.00 in damages, \$85,137.23 in prejudgment interest, and \$6,580.00 in taxable costs. After Rapid rejected this offer, Exposure amended its complaint to include a punitive damages claim. Following a bench trial, the district court found in Exposure's favor, awarding \$120,094.69 in compensatory damages, \$300,236.72 in punitive damages, \$106,020.57 in prejudgment interest, and \$449,145.95 in attorney fees.

On appeal, Rapid contends that the district court abused its discretion in awarding attorney fees under NRCPC 68 because the court should not have considered punitive damages in calculating whether Rapid obtained a more favorable outcome at trial. In Rapid's view, because Exposure did not enter a request for punitive damages until after Exposure made its offer of judgment, the district court should have compared only the compensatory aspects of Exposure's offer with the eventual judgment in determining whether to award attorney fees. Following this approach, Rapid contends that it obtained a more favorable outcome at trial because the court only awarded \$120,094.69 in compensatory damages (compared to Exposure's offer of \$262,208.00).

²⁸Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

As we have recognized, “[a]n offer of judgment is an offer to settle the entire case, including claims both known and unknown and both certain and uncertain.”²⁹ Although technically not a “claim” for relief, we conclude that Exposure’s request for punitive damages was implicitly included in its offer of judgment as part of “the entire case.” However, we also conclude that Exposure may have acted in bad faith by adding its punitive damages request only after Rapid rejected Exposure’s offer of judgment. As Exposure conceded during oral argument, it had the information necessary to bring its punitive damages request at the time it submitted its offer to Rapid. The fact that Exposure did not amend its complaint until after that offer had expired smacks of bad faith and an intent to mislead. Thus, we conclude that additional analysis under Beattie is necessary and that this case must be remanded for further consideration of Exposure’s conduct in light of the Beattie test.³⁰

The district court did not abuse its discretion in awarding attorney fees under NRS 18.010(2)

NRS 18.010(2)(b) permits the district court to award attorney fees “when the court finds that [a] . . . counterclaim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.” In deciding whether to award fees under this statute, “[t]he court shall liberally construe [its] provisions . . . in

²⁹Clark v. Lubritz, 113 Nev. 1089, 1100, 944 P.2d 861, 868 (1997) (quoting Lutynski v. B.B. & J. Trucking, Inc., 628 A.2d 1, 5 (Conn. Ct. App. 1993)).

³⁰As discussed below, however, further consideration of Exposure’s conduct may not be necessary if the district court decides to award all of Exposure’s attorney fees under NRS 18.010(2).

favor of awarding attorney's fees in all appropriate situations.”³¹ Still, attorney fees are only available if the claim or defense in question was frivolous at the time it was initiated.³²

In this case, the district court determined that “Rapid’s counterclaim for storage charges was not advanced on reasonable grounds but to harass Exposure.” According to the district court, “Rapid’s claim for storage charges were [sic] brought without reasonable ground because it knew that it did not finish the standees (a condition precedent to storage fees under the contact [sic]) when it filed its counterclaim.” This finding is supported by Pat Sullivan’s testimony that he knew that the standees were not complete and that Rapid should not have been billing for storage. Accordingly, we conclude that the district court did not abuse its discretion in awarding attorney fees under NRS 18.010(2)(b).

Issue to be resolved on remand

Because additional analysis of the Beattie test is necessary, we reverse the portion of the district court’s attorney fees award made pursuant to NRCP 68. By contrast, because the district court did not abuse its discretion in awarding attorney fees under NRS 18.010(2), we affirm the portion of the district court’s award pertaining to that statute.

Separately, we note that although the district court initially awarded \$63,461.00 in attorney fees under NRS 18.010(2), it is unclear whether the district court would have awarded Exposure any additional fees under that statute had it not based the remainder of its award on

³¹NRS 18.010(2)(b).

³²Barozzi v. Benna, 112 Nev. 635, 638-39, 918 P.2d 301, 303 (1996).

NRCP 68. Thus, on remand, the district court may wish to address whether Exposure can recover any additional attorney fees pursuant to NRS 18.010(2).³³

Prejudgment interest

Rapid contends that the district court erred in awarding Exposure prejudgment interest on punitive damages.³⁴ In Rapid's view, prejudgment interest is never available with respect to punitive damages because such interest does not qualify as "applicable interest" under NRS 17.115 and NRCP 68.³⁵

We review challenges to prejudgment interest for error.³⁶ In Ramada Inns v. Sharp, we concluded that an "award of prejudgment interest on . . . [a] punitive damage award [is] . . . clearly erroneous.

³³Specifically, the district court may wish to address whether Exposure is owed attorney fees under NRS 18.010(2) for any time after December 7, 2002, the date of Exposure's offer of judgment. If Exposure can recover all of the fees that it incurred after that point under NRS 18.010(2), the district court may not need to determine whether additional fees are due under NRCP 68 and Beattie.

³⁴The district court awarded Exposure "prejudgment interest at the legal rate on [the] punitive damage award of \$300,236.72 from . . . the date Exposure served the Offer of Judgment . . . in the amount of \$38,695.58."

³⁵Prejudgment interest is available under NRS 17.115 and NRCP 68 when an offeree rejects an offer of judgment and fails to obtain a more favorable result at trial. In such circumstances, NRS 17.115 makes the award of "any applicable" prejudgment interest discretionary. In addition, NRCP 68 specifically provides that "the offeree shall pay . . . applicable interest on the judgment from the time of the offer to the time of entry of the judgment."

³⁶Bongiovi, 122 Nev. 556, 579, 138 P.3d 433, 449 (2006).

Prejudgment interest is viewed as compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty.”³⁷ In addition, according to Ramada, because “[a] plaintiff is never entitled to punitive damages as a matter of right . . . the amount of punitive damages to be awarded is not known until the judgment is rendered . . .”; thus, “prejudgment interest may not be granted by a trial court on punitive damage awards.”³⁸ We conclude the court’s reasoning in Ramada applies to this case because the policy against awarding prejudgment interest as a penalty overrides any desire to encourage the settlement of disputes. Accordingly, we reverse the district court’s award of prejudgment interest on the award of punitive damages.³⁹

³⁷101 Nev. 824, 826, 711 P.2d 1, 2 (1985).

³⁸Id. (citations omitted).

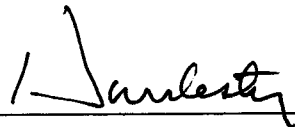
³⁹Both parties presume that Uniroyal Goodrich Tire v. Mercer (and not Ramada) controls this case because the interest in question was awarded under Nevada’s offer of judgment provisions. See 111 Nev. 318, 890 P.2d 785 (1995), superseded by statute on other grounds as stated in RTTC Communications v. Saratoga Flier, 121 Nev. 34, 110 P.3d 24 (2005). This is incorrect. Although we stated in Uniroyal that the type of damages ultimately awarded are immaterial to the basic purpose of NRS 17.115, id. at 324, 890 P.2d at 790, we did not discuss or distinguish Ramada’s conclusion that prejudgment interest (unlike an award of punitive damages) is not designed as a penalty, 101 Nev. at 826, 711 P.2d at 2. Because Ramada specifically concluded that it is plain error to grant prejudgment interest on punitive damages, we conclude that Ramada (and not Uniroyal) controls the availability of such interest in this case.

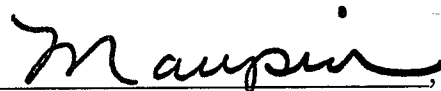
Separately, at the time the court decided Uniroyal, NRS 17.115 simply permitted an award of “interest.” See 111 Nev. at 324, 890 P.2d at 789. Since we decided Uniroyal, however, NRS 17.115 and NRCP 68 have
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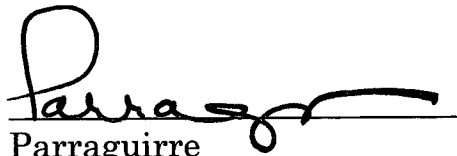
Conclusion

We conclude that although the district court properly calculated Exposure's compensatory damages, the court's punitive damages award was excessive. We therefore remand this case for a recalculation of punitive damages. In addition, we conclude that additional analysis is needed with respect to attorney fees. However, we affirm the portion of the district court's attorney fees award made pursuant to NRS 18.010(2). Finally, we reverse the district court's award of prejudgment interest on punitive damages. In light of these conclusions, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Hardesty


_____, J.
Maupin


_____, J.
Parraguirre

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been amended to limit prejudgment interest awards to "applicable interest." In light of Ramada, we conclude that "applicable" prejudgment interest does not include interest on punitive damages.

cc: Hon. Valorie Vega, District Judge
Carolyn Worrell, Settlement Judge
Lewis & Roca, LLP/Las Vegas
R. Clay Hendrix, P.C.
Eighth District Court Clerk