IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH SARBACHER,
Appellant/Cross-Respondent,
vs.
EWING BROS., INC., A NEVADA CORPORATION,
Respondent/Cross-Appellant.

No. 45478

FILED

DEC 01 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and a post-judgment order denying a new trial motion. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Respondent Ewing Bros., Inc. towed an illegally parked classic car belonging to appellant Sarah Sarbacher. The following day, Ewing wrongfully released the car to a person claiming to be the owner. The vehicle was discovered stripped and destroyed several months later. Sarbacher sued Ewing for conversion and negligence and was awarded $40,000 in damages. Ewing then unsuccessfully moved for a new trial based on a host of alleged errors. This appeal followed. The parties are familiar with the facts and we do not recount them here except as necessary to our discussion.

Excessive damages

Ewing argues that the jury's verdict was excessive because Sarbacher was not entitled to loss of use damages. We agree.

When a party injures the property of another, the damage award should "compensate the injured party in full measure for the total harm proximately caused by the defendant's breach of duty."[1] In cases involving the destruction of a vehicle, the plaintiff may recover not only the value of the vehicle but reasonable loss of use damages while the vehicle is replaced.[2]

Although the jury announced its damages award on a general verdict form, expert testimony at trial indicated that the car was worth $15,000, and the parties have essentially conceded as much. The remainder of the damages award, then, must have been intended to compensate Sarbacher for the loss of using her car.[3]

However, Sarbacher was never deprived of the use of her car because she was not legally entitled to drive it. At the time of the theft, the automobile was neither insured nor registered in the state of Nevada. Although Sarbacher had acquired a temporary drive-away permit for the car, there was no evidence presented at trial that she had taken any steps toward resolving the title issues in California and registering the car in

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[1]Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 24, 866 P.2d 1138, 1139 (1994).

[2]See, e.g., Reynolds v. Bank of America National T. & S. Ass'n, 345 P.2d 926, 927 (Cal. 1959).

[3]Sarbacher calculated her loss of use damages at $30 per day, the cost of renting an automobile. She alleged that she was without transportation from January 2002 (when she acquired a valid license) to June 2004 (when she purchased a replacement car). Sarbacher thus requested 27 months of loss of use damages at $30/day, totaling approximately $25,000.

Nevada.[4] Without proper registration or car insurance Sarbacher could not have legally driven the automobile in the period of time immediately after the theft. Additionally, Sarbacher's driver's license was suspended at the time of the tow and was not reinstated until January 2002, nine months after the Bel Air disappeared.[5]

NRCP 59(a)(6) permits the court to grant a new trial based upon "[e]xcessive damages appearing to have been given under the influence of passion or prejudice." Here, there is simply no cognizable legal or factual theory under which Sarbacher is entitled to loss of use damages. As a result, we conclude that the jury's damages award was excessive and, as a result, the district court should have granted Ewing's motion for a new trial.

However, Nevada courts have the power to condition an order for a new trial on the plaintiff's acceptance of remittitur.[6] Therefore, we remand this matter to the district court for either a new trial on the issue

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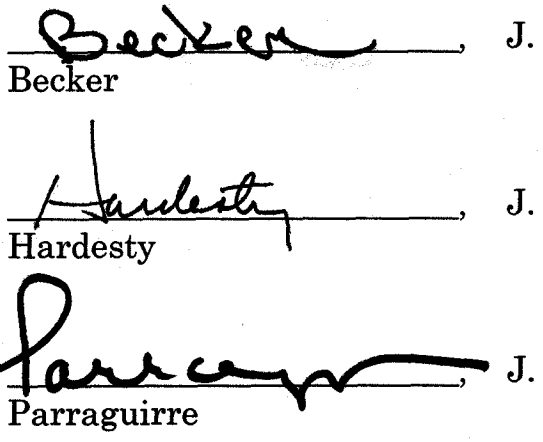
[4]See NRS 482.3955(1).

[5]Even if Sarbacher could demonstrate she suffered loss of use damages, a damages award compensating her for 27 months of car rental expenses could likely be unreasonably excessive. See Reynolds, 345 P.2d at 927 (holding that four or five months' rental expense was sufficient to compensate plaintiff for the loss of use of his airplane); Lenz Const. Co. v. Cameron, 674 P.2d 1101, 1103 (Mont. 1984) (holding that plaintiff was not entitled to 33 months of rental expenses for loss of use of destroyed forklift).

[6]See, e.g., Hahn v. Yackley, 84 Nev. 49, 52, 436 P.2d 215, 217 (1968); Hotel Riviera, Inc. v. Short, 80 Nev. 505, 521, 396 P.2d 855, 863 (1964); Bonelli v. Jones, 26 Nev. 176, 180, 65 P. 374, 375 (1901); cf. Drummond v. Mid-West Growers, 91 Nev. 698, 708, 542 P.2d 198, 205 (1975) (reaffirming the constitutionality of remittitur).

of damages or Sarbacher's acceptance of remittitur of the judgment to $15,000 (the value of the car) plus attorney fees, costs, and prejudgment interest.[7] Accordingly, we

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



Becker, J.

Hardesty, J.

Parraguirre, J.

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[7]We have considered Ewing's other arguments (including the denial of its motion for judgment as a matter of law on Sarbacher's negligence and conversion claims; the denial of its new trial motion based upon the exclusion of Ewing's expert and trial exhibits, alleged errors in the jury instructions, Sarbacher's opening argument, and ex parte communications; and the denial of its motion to dismiss for failure to join an indispensable party) and conclude they lack merit.

We also have considered and rejected Sarbacher's claim that the district court improperly granted judgment as a matter of law on her claims for fraud and punitive damages.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Howard Roitman, Settlement Judge
Cliff W. Marcek
H. Bruce Cox
Clark County Clerk