IN THE SUPREME COURT OF THE STATE OF NEVADA

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| REBECCA ANN WHITLOCK, AN INDIVIDUAL; AND WILLOW LP, Appellants, vs. HARBOR COVE HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, Respondent. | No. 50649 ✓ |
| REBECCA ANN WHITLOCK, AN INDIVIDUAL; AND WILLOW LP, Appellants, vs. HARBOR COVE HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION; AND TERRY STRONG, Respondents. | No. 51738 |

FILED

SEP 28 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court judgment entered after a bench trial in a real property action and a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant Rebecca Ann Whitlock appeals the grant of injunctive relief requiring her to remove additions to her home that the district court found were not approved by respondent Harbor Cove Homeowners Association, and in violation of Harbor Cove's Covenants, Conditions, and Restrictions (CC&Rs). Whitlock also appeals the district court's post-judgment order awarding Harbor Cove attorney fees. Whitlock contends that (1) the order requiring her to remove her addition was not supported by substantial evidence; (2) the order requiring her to

repaint her exterior was in violation of NRS 116.31065; (3) she is not personally liable for the attorney's fee award; and (4) the attorney's fee award was excessive. We address each of Whitlock's contentions in turn and affirm.[1]

Substantial evidence supports the district court's finding that Whitlock did not have Harbor Cove's approval to construct the extended balcony on her home

The district court awarded injunctive relief based on its finding of fact that Harbor Cove did not approve the extended balcony Whitlock added to her home. The CC&Rs required Harbor Cove's approval for property construction, Whitlock's balcony did not conform to Harbor Cove's standards, and the CC&Rs allowed Harbor Cove to require a homeowner to remove unapproved construction. Whitlock concedes these points, but argues that the evidence at trial establishes that Harbor Cove approved her addition after it was built.

"Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." Beverly Enterprises v. Globe Land Corp., 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." Bally's Grand Employees' Federal Credit Union v. Wallen, 105 Nev. 553, 556 n.1, 779 P.2d 956, 957 n.1 (1980) (citations and internal quotation marks omitted). Additionally, "due regard shall be

[1]Willow LP and Terry Strong are named as additional parties. Willow LP appears to be a limited partnership that Whitlock created after this litigation began, which Whitlock claims is the current owner of the property. Terry Strong is a neighbor of Whitlock's who was dismissed from this case by stipulation of the parties during the proceedings below.

given to the opportunity of the trial court to judge the credibility of the witnesses." NRCP 52(a).

The district court examined the evidence and heard the testimony offered at trial, which presented contested issues of fact. Its finding that Harbor Cove did not approve the addition before or after construction is supported by the lack of an unequivocal application for Whitlock's actual construction on file with Harbor Cove, Harbor Cove's consistent communications with Whitlock that it had neither received nor approved such an application, and the handwritten changes that made up Whitlock's proffered modified application that she claimed was approved. For Whitlock to prevail, her testimony had to be believed. The district court found that Whitlock fabricated the modified application for approval of her addition and thus lacked credibility. NRCP 52(a). Because the district court carefully evaluated the evidence in findings that were thorough and thoughtful, we are not in a position to second guess its factual determinations. Each of the district court's findings was supported by substantial evidence, and we therefore affirm the injunction requiring Whitlock to remove the unapproved construction.

NRS 116.31065 does not prevent Harbor Cove from enforcing the requirement in its CC&Rs that all exteriors must be painted with the color "cielo blanco"

Whitlock has cited a statute that applies, by its terms, to a community's rules, as distinguished from its covenants. NRS 116.31065(5) ("The rules adopted by an association . . . Must be uniformly enforced under the same or similar circumstances against all units' owners. Any rule that is not so uniformly enforced may not be enforced against any unit's owner.") (Emphases added). A community's rules are distinct from

its covenants. See, e.g., Restatement (Third) of Property § 6.7 cmt. b (2000).

Whitlock has provided no authority beyond NRS 116.31065 for her argument that Harbor Cove cannot enforce its covenants selectively. Thus we affirm the provision of the district court's injunction requiring Whitlock to repaint her exterior wall in "cielo blanco," as required by the covenants.

Whitlock is personally liable for attorney fees

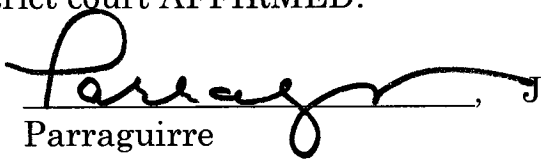
Whitlock argues, for the first time on appeal, that she should not be personally liable for the award of attorney fees, claiming that Willow, LP owns the property, not her. As Whitlock brings this issue up for the first time on appeal, it is not properly before the court and we will not consider it. Canyon Villas v. State, Tax Comm'n, 124 Nev. ___, ___ n.27, 192 P.3d 746, 755 n.27 (2008).

The award of attorney fees was not excessive

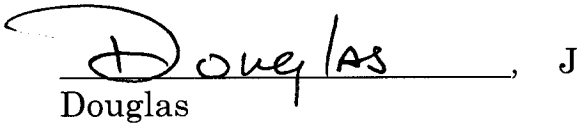
This court reviews an award of attorney fees for abuse of discretion. Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 350, 455 P.2d 31, 33 (1969). The district court considered the Brunzell factors in determining a reasonable attorney fee award, awarded Harbor Cove $43,330.29 in attorney fees, and ordered Whitlock to also pay $1,130.98 in costs. The contract between the parties provided for fees. Additionally, NRS 38.330(7)(b) independently authorizes their award where, as here, a party brings a civil action on a claim that was the subject of arbitration under the provisions of NRS 38.310 and fails to obtain a more favorable judgment on the arbitrated matter in district court.

For the foregoing reasons we

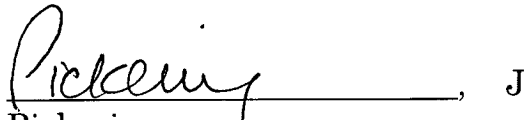
ORDER the judgment and post-judgment order awarding attorney fees and costs of the district court AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Jennifer Togliatti, District Judge
Israel Kunin, Settlement Judge
Law Office of Joshua L. Harmon
Hampton & Hampton
Eighth District Court Clerk