

IN THE SUPREME COURT OF THE STATE OF NEVADA

UPPER DECK COMPANY, A NEVADA CORPORATION,

Appellant,

vs.

MATT CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY; HERBERT GORDON PRESS DESIGN ASSOCIATES, A NEVADA CORPORATION A/K/A HGP DESIGN ASSOCIATES; AND ARCO ELECTRIC OF NEVADA,

Respondents.

No. 55246

**FILED**

DEC 20 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

UPPER DECK COMPANY, A NEVADA CORPORATION,

Appellant,

vs.

MATT CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY; HERBERT GORDON PRESS DESIGN ASSOCIATES, A NEVADA CORPORATION A/K/A HGP DESIGN ASSOCIATES; AND ARCO ELECTRIC OF NEVADA,

Respondents.

No. 55575

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court judgment in a construction defect and contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

These consolidated appeals raise issues arising from litigation concerning a construction project at a condominium owned by appellant Upper Deck Company. After a dispute arose among the project's main participants, Upper Deck and respondents Herbert Gordon Press (HGP) (design professional), Matt Construction LLC (general contractor), and Arco Electric of Nevada (subcontractor), Matt Construction and Arco Electric filed mechanic's lien actions against Upper Deck and HGP, and Upper Deck and HGP filed various counterclaims, cross-claims, and third-party claims concerning the project. The actions were consolidated, and ultimately, the district court entered judgments against Upper Deck in favor of respondents based on its determination as a matter of law that HGP acted as Upper Deck's agent and on the jury's findings that Upper Deck failed to pay respondents moneys due for their work on the project. Attorney fees were also awarded, and Upper Deck appealed.

At issue is: (1) whether the district court improperly entered judgment as a matter of law against Upper Deck on the agency issue, (2) whether the district court abused its discretion by allowing HGP to amend its pleadings under NRCP 15(b), (3) whether the district court improperly rejected Upper Deck's proposed amendments to the special verdict form, and (4) whether the district court abused its discretion in awarding attorney fees and costs.<sup>1</sup>

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<sup>1</sup>Upper Deck's arguments pertain primarily to issues concerning HGP; it appears the Matt Construction was named as a respondent to the extent that any reversal on the agency question would necessarily alter the judgment as to it.

The parties are familiar with the facts, and we do not further recount them except as pertinent to our disposition.

The district court did not err in entering judgment as a matter of law against Upper Deck on the issue of whether HGP acted as Upper Deck's agent

Upper Deck argues that the district court erred by granting HGP judgment as a matter of law on the issue of agency. It asserts that it presented substantial evidence that the contractual relationship with HGP did not give rise to an agency relationship; rather, it asserts, HGP was acting as an "independent design consultant." Upper Deck urges reversal because evidence was presented sufficient to support the jury finding that it never held HGP out as its agent and that Matt Construction did not believe that HGP was Upper Deck's agent. Upper Deck maintains that, when the evidence that was presented at trial is viewed in the light most favorable to Upper Deck, a reasonable jury would not have been able to conclude that an agency relationship existed.

This court reviews de novo a district court's decision on a motion for judgment as a matter of law. Winchell v. Schiff, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008). In ruling on such a motion, a court must view the evidence in the light most favorable to the nonmoving party. Id. A district court may grant a motion for a judgment as a matter of law "[i]f during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury." NRCPC 50(a)(1). Such a ruling is proper only "if there is no question of fact remaining," Gordon v. Hurtado, 91 Nev. 641, 646, 541 P.2d 533, 536 (1975), and "any verdict other than the one directed, would be erroneous as a matter of law." Bliss v. DePrang, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965).

“An agency relationship is formed when one who hires another retains a contractual right to control the other’s manner of performance.” Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992). Typically, an architect is considered the owner’s agent in supervising construction. See Berkel and Co. Contractors, Inc. v. Providence Hospital, 454 So. 2d 496, 501 n.3 (Ala. 1984); Trane Co. v. Gilbert, 73 Cal. Rptr. 279, 283 (1968); 5 Am. Jur. 2d Architects §8 (2012). HGP’s duties here appear to resemble an architect’s supervisory work in many ways. Nevertheless, whether HGP was in fact Upper Deck’s agent depends on the parties’ contract and conduct. Trane Co., 73 Cal. Rptr. 279. “The burden of proving an agency relationship rests on the party asserting that such a relationship exists.” Trump v. District Court, 109 Nev. 687, 695 n.3, 857 P.2d 740, 745 n.3 (1993). An agency relationship must be proved by a preponderance of the evidence. Id.

Here, the district court determined that the testimony and other evidence presented by HGP and Upper Deck overwhelmingly showed that HGP had actual authority to act as Upper Deck’s agent. For example, the contract between Upper Deck and HGP allowed HGP to “provide administrative, management and related services to coordinate scheduled activities and responsibilities of the Work”; it required HGP to schedule meetings and provide updates to Upper Deck; and it stated that HGP was to consult a specific designer to determine the meaning and intent of drawings. Under the contract, Upper Deck ultimately retained control over payments related to work it deemed incomplete, and testimony indicated that Upper Deck approved all payments and change orders. As to the parties’ intent underlying the contract, Upper Deck’s owner, Richard McWilliam, testified that HGP’s president, Herbert Press,

would “manage the project, and as being the manager of the project, he could enter into contracts, submit bills, review the work.” Additionally, Press testified that McWilliam specifically told him “I want you to be my agent. I need 10 eyes and ears on the job. I need to be represented.” These uncontradicted statements and contract terms indicate that HGP was acting on behalf of Upper Deck, which ultimately retained control over HGP’s actions, even if such control was not exercised, such that it cannot be disputed that in overseeing the project and payment of contractors, HGP was acting as Upper Deck’s agent.

Accordingly, we conclude that the district court did not err in granting HGP’s motion for judgment as a matter of law regarding agency.

The district court did not abuse its discretion by allowing HGP to amend its pleadings under NRCP 15(b)

Upper Deck contends that the district court abused its discretion by allowing HGP to amend its pleadings, pursuant to NRCP 15(b), to include breach of contract and unjust enrichment cross-claims. This court reviews a district court’s grant or denial of a motion to amend under NRCP 15(b) for an abuse of discretion. University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004).

NRCP 15(b) provides:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the

issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

This court has determined that an issue had been tried by implied consent where counsel "had raised the issue in his opening argument, [opposing counsel] specifically referred to the matter as an issue in the case, that the factual issue had been explored in discovery, that no objection had been raised at trial to the admission of evidence relevant to the issue." Schwartz v. Schwartz, 95 Nev. 202, 205, 591 P.2d 1137, 1140 (1979).

Upper Deck offers no support for its assertion that prejudice resulted from the grant of HGP's motion to amend. Upper Deck only makes the unsupported statement that the amendment resulted in "undue surprise" and "manifest injustice;" it does not show how it was prejudiced by this amendment. HGP's amended claims for breach of contract and unjust enrichment can be logically anticipated by the introduction of evidence regarding outstanding fees owed by Upper Deck to HGP. Furthermore, Upper Deck failed to object to the introduction of evidence and testimony related to the unpaid balance. Thus, the district court did not abuse its discretion in granting leave to add breach of contract and unjust enrichment claims by implied consent under NRCP 15(b).

The district court properly rejected Upper Deck's proposed amendments to the special verdict form

Upper Deck argues that the district court abused its discretion by approving the special verdict form. It contends that this special verdict form essentially eliminated its breach of contract claims that were not

related to actual construction defects, including overcharging, failure to pay subcontractors, and walking off the job. HGP answers that Upper Deck did not plead, present evidence, prove, or claim damages for any breaches of contract by HGP beyond potential construction defects. It asserts that the jury found that Upper Deck breached its contract with HGP, there were no construction defects, and Upper Deck was not entitled to any damages.

This court reviews a district court's decision to give a jury instruction for an abuse of discretion. Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). This same standard applies to its decisions to require a special verdict upon interrogatories and on the form of that special verdict and the interrogatories. Ross v. Giacomo, 97 Nev. 550, 555-56, 635 P.2d 298, 301-02 (1981), abrogated on other grounds by Winston Products Co. v. DeBoer, 122 Nev. 517, 524, 134 P.3d 726, 731 (2006); Kornicki v. Calmar Steamship Corporation, 460 F.2d 1134, 1139 (3d Cir. 1972). However, the court's discretion does not include fashioning the special verdict and interrogatories in a manner that would eliminate any valid theories of recovery that are supported by the evidence. Kornicki, 460 F.2d at 1139; see Jones v. Vicking Freight System, 101 Nev. 275, 276, 701 P.2d 745, 746 (1985) (recognizing that the district court should not give an instruction if it is not supported by the evidence).

At trial, Upper Deck objected to the proposed verdict form and requested that it be amended to include breach of contract claims. During a hearing on this issue, HGP argued that there had not been any allegations until that morning that there was a separate breach of contract claim unrelated to construction defects. The district court limited

Upper Deck to its construction defect claims, noting that “many issues . . . were never disclosed during the course of discovery in this case and never developed. [This was] [n]ever raised as an issue in this case until yesterday and today.”

Upper Deck’s first amended complaint specified that “HGP’s failure to perform its duties and obligations owed to Upper Deck under the Construction Agreement, NRS 40.600 et seq. and common law has caused foreseeable and proximate damages to Upper Deck.” However, Upper Deck’s breach of contract claim does appear to be pleaded as an alternative construction defect claim; as HGP points out, Upper Deck’s amended cross-claim against HGP only prayed for damages associated with alleged construction deficiencies.

Based upon our review of the record, the facts in the underlying matter did not support Upper Deck’s breach of contract theory; therefore, we conclude that the district court did not err in refusing to amend the special verdict form to give a breach of contract instruction to the jury. See Jones, 101 Nev. at 276-77, 701 P.2d 746 (finding that the district court did not err in refusing to give a sudden peril jury instruction when the facts did not support a theory of sudden peril). Moreover, even if it were an abuse of discretion for the district court to refuse to amend the special verdict form, it would not have been prejudicial error, because the amendment of the verdict form would not change the outcome of the case. See Allstate Insurance Co., 125 Nev. at 319, 212 P.3d at 331. The jury found that Upper Deck breached its contract with HGP, which, based upon the jury instructions, necessarily required it to find that HGP did everything that it was required to do under the Construction Agreement.



The district court's rejection of Upper Deck's proposed amendments to the special verdict form was proper.

The district court did not abuse its discretion in awarding attorney fees and costs

Upper Deck argues that the district court abused its discretion in awarding attorney fees and costs to HGP.<sup>2</sup> This court reviews a district court's decision to award attorney fees for an abuse of discretion. Rodriguez v. Primadonna Company, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

HGP moved for the fee award on the basis of having tendered pre-trial settlement offers to Upper Deck pursuant to NRCP 68 and NRS 17.115. The district court ordered Upper Deck to pay HGP's attorney fees in the amount of \$192,559. Under Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), a district court must carefully evaluate four factors when determining whether to award attorney fees under NRCP 68: "(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's 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

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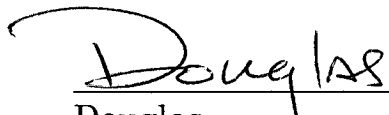
<sup>2</sup>Upper Deck contends that the district court's award of attorney fees was an abuse of discretion and must be reversed in full; however, Upper Deck fails to supply reasons and cite appropriate authority for this claim in its briefs. Furthermore, Upper Deck only specifies that the award to HGP was an abuse of discretion; it neglects to address Matt Construction and Arco. As Upper Deck fails to provide any justification or authority for its claim that Matt Construction's and Arco's awards were improper, this argument is not properly before this court. See NRAP 28(a)(9)(A).

amount.” No single factor under Beattie is determinative, and the court has broad discretion to award fees as long as all appropriate factors are considered. Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998).

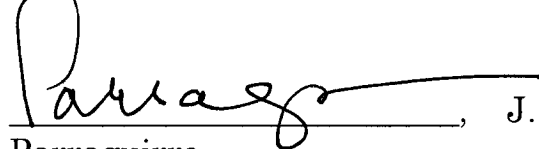
Here, the district court analyzed each of the four Beattie factors. Although Upper Deck argues that its claims were brought in good faith and its rejection of the offer of judgment was reasonable, we conclude that the district court did not abuse its discretion in determining otherwise. Because the district court properly considered each factor of the four-part test required by Beattie, its award of attorney fees was not an abuse of discretion.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Timothy C. Williams, District Judge  
Carolyn Worrell, Settlement Judge  
Craig McKenzie Nicholas  
Jeffrey David Montez  
Cisneros, Clayson & Marias  
The Marks Law Group, LLP  
Lee, Hernandez, Landrum, Garofalo & Blake, APC  
Cooksey, Toolen, Gage, Duffy & Woog  
Ray Lego & Associates  
Bremer Whyte Brown & O'Meara, LLP  
Howard & Howard  
Eighth District Court Clerk