IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN D. BAYER AND J.B. ENTERPRISES,
Appellants,
vs.
AYALAS, INC., A NEVADA CORP)RATION; AND DANIEL R. AYALA,
Respondents.

No. 36934

FILED

APR 0 8 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a real estate case.

Bayer and Ayala participated as partners to purchase a ten-acre parcel of land. Bayer acted as the real estate agent in the transaction, as well as the agent of the holding company utilized to take title of the property. When the transaction soured, Ayala brought suit against Bayer and others.

The district court found Bayer liable for breach of duty, breach of implied covenants of good faith and fair dealing, intentional misrepresentation, and constructive fraud. The district court awarded compensatory and punitive damages against Bayer and another defendant, jointly and severally. Bayer appealed, challenging the sufficiency of the evidence, the appropriateness of punitive damages, the imposition of joint and several liability, and the court's twenty-one month delay in issuing its findings of fact and conclusions of law.

A district court's findings of fact will not be set aside "unless they are clearly erroneous or not supported by substantial evidence."[1] Substantial evidence is "that which 'a reasonable mind might accept as adequate to support a conclusion.'"[2] "'[S]ubstantial evidence [does] not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence.'"[3]

NRCP 52(a) provides, in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Thus, when there is conflicting testimony, the trier of fact determines what weight and credibility to give the testimony.[4]

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[1]Sandy Valley Assoc. v. Sky Ranch Estates, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001) (citing Young v. Nevada Title Co., 103 Nev. 436, 438, 744 P.2d 902, 903 (1987)).

[2]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389 (1971)).

[3]Id. at n.1 (quoting Robertson Transp. Co. v. P.S.C., 159 N.W.2d 636, 638 (Wis. 1968)).

[4]Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992) (citing Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981)).

Bayer first challenges the district court's conclusions regarding fraud. In its judgment, the district court found Bayer liable for both constructive fraud and intentional misrepresentation.

"Constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate confidence."[5] Constructive fraud can arise through confidential relationships, including professional, business, social, or familial relationships.[6] The confidential relationship arises when one party, having the confidence of the other, purports to act or advise the other regarding the other's interests.[7]

Intentional misrepresentation requires the following elements: (1) a false representation made by a person, (2) the person making the representations knows that it is false or has an insufficient basis of information to make the representation, (3) an intention to induce another person to act or refrain from acting in reliance on the representation, (4) justifiable reliance upon the representation by the other person, and (5) damage to the other person, resulting from reliance on the representation.[8] "The issue of whether a party has met the elements of

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[5]Long v. Towne, 98 Nev. 11, 13, 639 P.2d 528, 529-30 (1982) (citations omitted).

[6]See Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 337-38 (1995).

[7]Id.

[8]Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (citing Prosser, Law of Torts, 685 (4th ed. 1971)).

intentional misrepresentation is generally a question of fact."[9] When there is conflicting evidence at trial, the determination of a trial judge will not be disturbed if there is substantial evidence to support the decision.[10]

After a thorough review of the record, we conclude that substantial evidence supports the district court's finding of both constructive fraud and intentional misrepresentation. The trial judge had the opportunity to "judge [ ] the credibility of the witnesses" and made findings of fact based on the weight given to the evidence presented at trial.[11]

Bayer next claims there was substantial evidence presented at trial which the trial court failed to incorporate into its findings of fact and conclusions of law, and which would show that Ayala failed to mitigate his damages.

The district court found that Ayala had attempted to mitigate by talking to seven or eight different realtors. The court also found Ayala had received at least two offers, one that was too low and one from an entity that failed to respond to Ayala's counter offer. We conclude that these findings were supported by substantial evidence in the record.

Bayer next asserts that "[a] critical element which was not found by the District Court is the establishment of two escrows, or a 'double escrow' was not illegal or fraudulent." He argues that here, "the

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[9]Blanchard v. Blanchard, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992) (citing Epperson v. Roloff, 102 Nev. 206, 212, 719 P.2d 799, 803 (1986)).

[10]Lubbe v. Barba, 91 Nev. at 599 (citing Fletcher v. Fletcher, 89 Nev. 540, 516 P.2d 103 (1973)).

[11]See NRCP 52(a).

parties to the first escrow transaction were not the same parties, in any manner, as the second escrow transaction" and "[t]hus, the term 'double escrow' was not legally appropriate." Bayer cites Mark Properties, Inc. v. National Title Co.[12] to support his argument.

In Mark Properties, as in this case, the purchaser in the first escrow was the seller in the second escrow.[13] Also, in both Mark Properties and this case, the first escrow involved the transfer of the same property, for a lower price in the first escrow than in the second escrow.[14] Bayer admits that the transaction in Mark Properties is the exact type of arrangement that occurred in this case, yet he claims that this was not a double escrow. In Mark Properties, however, the transaction was referred to as a double escrow.[15] Furthermore, the record contains substantial testimonial evidence that this transaction was a double escrow.

Next, Bayer argues that he fully complied with the real estate laws and regulations in effect at the time and "there was no Nevada law which indicated that the mere existence of a simultaneous escrow was illegal or fraudulent." Bayer claims that Mark Properties provides that there is no duty to disclose information regarding the first escrow to parties who are only involved in the second escrow. Mark Properties,

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[12]116 Nev. 1158, 14 P.3d 507 (2000) (superseded on rehearing by Mark Properties, Inc., v. National Title Co., 117 Nev. 941, 34 P.3d 587 (2001)).

[13]Id. at 1160, 14 P.3d at 508.

[14]Id.

[15]Id.

however, does not deal with the duties of a real estate broker, but only discusses the duties of an escrow agent.[16]

We have stated, "The very practice of double escrowing is fraught with deception, and one who engages in it cannot do so with the candor and honesty demanded of a duly licensed real estate broker without violating and breaching the basic fiduciary trust which is expected of him."[17] Bayer had a duty to fully disclose "all material facts concerning the transaction that might affect the principal's decision."[18] We conclude that the district court properly found that Bayer did not disclose all material facts.

Bayer next claims the district court erred by awarding punitive damages. Bayer also claims the punitive damage award was excessive because the court failed to take into consideration his financial assets and worth in order to avoid financial annihilation.

NRS 42.005(1) provides that a plaintiff may receive damages "for the sake of example and by way of punishing the defendant" when oppression, fraud or malice is proven by clear and convincing evidence. However, a district court's award of punitive damages will stand as long as there is substantial evidence in the record of oppression, fraud or

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[16]Id. at 1164, 14 P.3d at 510 (finding that an escrow agent has no duty to disclose known fraud to a non-party to the escrow).

[17]Holland Rlty. v. Nev. Real Est. Comm'n, 84 Nev. 91, 97, 436 P.2d 422, 425 (1968).

[18]Id. at 97, 436 P.2d at 426.

malice.[19] Because we conclude there is substantial evidence in the record of both intentional misrepresentation and constructive fraud, we also conclude the district court did not err in awarding punitive damages.

The standard for determining excessiveness of punitive damages was articulated in Ace Truck v. Kahn as follows:

> Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.[20]

In Ace Truck, we explicitly stated that this new rule makes it unnecessary to make findings or judgments on factual questions of financial annihilation, although "courts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can be properly imposed in a given case."[21] In this case, the district court considered Bayer's financial circumstances and stated, "for my consideration, there is money available."

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[19]See First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (citing Village Development Co. v. Filice, 90 Nev. 305, 315, 526 P.2d 83, 89 (1974)).

[20]Ace Truck v. Kahn, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (1987) (emphasis in original).

[21]Id. at 510, 746 P.2d at 137.

NRS 42.005(1)(a) allows punitive damages up to three times the amount of compensatory damages if the compensatory damage is $100,000 or more. Here, the compensatory damage award was $185,424.30. Thus, a punitive damage award of $250,000 is less than three times the compensatory damages and does not exceed the statutory limit.

We have previously noted the caution that should be exercised before setting aside a punitive damages award. "[I]t is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."[22] In this case, the amount of punitive damages does not meet this level.

Bayer claims the district court erred by imposing joint and several liability on Bayer and co-defendent Escoto. Joint and several liability is imposed where two or more tortfeasors cause injury through their combined or concurrent tortious conduct.[23] Here, the district court found that both Bayer and Escoto committed tortious acts that resulted in Ayala's harm. Therefore, joint and several liability, under the common law, was correctly applied in this case.

Finally, Bayer argues that the twenty-one month delay between the end of trial and the entry of the court's findings of fact and

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[22]Id. at 510 n.2, 746 P.2d at 137 n.2 (quoting the Lord Chief Justice of England in Huckle v. Money, 95 Eng.Rep. 768, 2 Wils.K.B. 205 (1763)).

[23]See University of Nevada v. Tarkanian, 110 Nev. 581, 593, 879 P.2d 1180, 1187 (1994); Buck v. Greyhound Lines, 105 Nev. 756, 763, 783 P.2d 437, 442 (1989) (citing Prosser, Law of Torts, 328 (5th Ed. 1984)).

conclusions of law was prejudicial and warrants a new trial. Bayer contends "common sense belies the ability of a person to accurately recall the nuances of testimony some two years after the fact." Bayer claims there is no indication that the district court reviewed the transcripts, and "there is absolutely no indication of how the Court made the Findings and Conclusions based upon the evidence, testimony and evidentiary rulings at the time of trial," since the court did not include its notes in the judgment. Therefore, according to Bayer, it is evident that the court relied solely on Ayala's submissions to formulate its decision, thereby making that decision prejudicial, so a new trial is warranted. Bayer offers no legal or factual authority to support his assertions.

"[D]elay, in and of itself, is not necessarily grounds for reversal of a district court's judgment."[24] If, however, delay causes severe prejudice to a party's right to appeal, a new trial can be ordered.[25] In Bergendahl, we remanded for a new trial because there was nearly a seven-year delay and the transcript was no longer available.[26] These factors combined to deprive the parties of the right to appeal.[27]

Here, there is no evidence that the delay between trial and judgment has caused Bayer any prejudice. The transcripts are available. As previously stated, the trier of fact determines the weight and credibility

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[24]Bergendahl v. Davis, 102 Nev. 258, 260, 720 P.2d 694, 695 (1986).

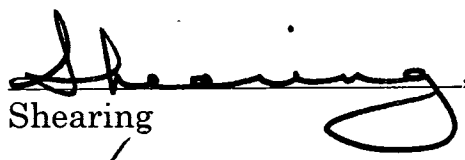
[25]Id.

[26]Id. at 259.

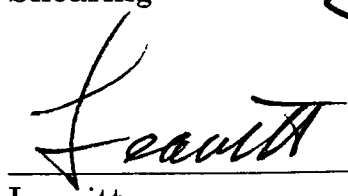
[27]Id. at 260.

to be given to testimony when there is conflicting testimony.[28] In this case, we find substantial evidence in the record to support the trial court's findings of fact and conclusions of law. Accordingly, we

ORDER the judgment of the district court AFFRMED.



_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Jerome A. DePalma
Netzorg & Caschette
Clark County Clerk

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[28]Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992) (citing Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981)); see also NRCP 52(a).