IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY RIBEIRO BUILDER, INC. OF NEVADA, A NEVADA CORPORATION D/B/A THE RIBEIRO CORPORATION,
Appellant,
vs.
STONEWEAR, INC., A NEVADA CORPORATION; AND STONEWEAR BY MAGNALITE, INC., A NEVADA CORPORATION,
Respondents.

No. 38973

FILED

AUG 20 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment entered in favor of respondent, Stonewear, Inc., after a bench trial in a breach of contract and warranty action.[1]

Johnny Ribeiro Builder, Inc. of Nevada ("Ribeiro") entered into a contract with Stonewear, whereunder Stonewear manufactured and installed three exterior fountains for Ribeiro. Although Ribeiro paid Stonewear for the manufacture of the fountains, it refused to pay Stonewear its installation charges, alleging that the fountains were defective, structurally unsound and in need of repair and/or retrofit. Despite Stonewear's efforts to address Ribeiro's complaints, Ribeiro sued Stonewear for breach of contract and warranty. Stonewear counter-claimed for its own damages under theories of breach of contract, quantum meruit, unjust enrichment, design interference and breach of accord and satisfaction. Also, Stonewear served Ribeiro with two pre-trial offers of

[1]See NRAP 3A(b)(1).

judgment, one dated September 15, 2000, and the other dated August 23, 2001, both of which Ribeiro rejected.

The matter proceeded to trial and the district court granted relief to Stonewear. The district court granted Stonewear's motion for attorney fees based upon the first offer of judgment. Ribeiro appeals.

On appeal, Ribeiro argues that the district court erred by: (1) failing to award Ribeiro repair and retrofit costs; (2) ordering Ribeiro to pay Stonewear for the cost of removing the "roundabout" fountain; (3) allowing Stonewear to retain the roundabout fountain, which Stonewear removed without an offset to Ribeiro; and (4) awarding Stonewear attorney fees.

1. Ribeiro claims that the district court erred in failing to award Ribeiro the costs it would have incurred in repairing and/or retrofitting the fountain(s).

A district court's "findings of fact 'will not be disturbed on appeal if they are supported by substantial evidence.'"[2] In deciding a challenge to a district court's failure to award damages on the grounds that the district court's conclusion is not supported by substantial evidence, we determine whether the record contains any substantial evidence, contradicted or uncontradicted, to support the district court's findings.

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[2]Leonard v. Stoebling, 102 Nev. 543, 548, 728 P.2d 1358, 1361-62 (1986) (quoting Burroughs Corp. v. Century Steel, Inc., 99 Nev. 464, 470, 664 P.2d 354, 357 (1983)).

The district court declined to award repair and retrofit damages to Ribeiro based on its specific findings that: (1) Stonewear designed and built the fountains as directed; (2) repairs were needed to the roundabout fountain following its installation, but Stonewear performed the necessary repairs at its expense and, subsequent to their completion, Ribeiro agreed to and accepted the repairs on the condition that support rods be replaced with stainless steel rods, which Stonewear agreed to do; (3) after Stonewear repaired the roundabout fountain, it was in good operating condition; (4) prior to its removal, the roundabout did not leak, ran properly, was level and was not structurally defective; (5) Stonewear offered to extend its warranty from one year to five years for Ribeiro; (6) Stonewear was not required to have an engineer design the fountains to be earthquake resistant; (7) the fountains, as built, met all contractual requirement; (8) Stonewear was willing and able to repair and warrant the fountains to meet contract specifications; (9) Stonewear delivered the fountains as contracted; and (10) Ribeiro's complaints about the fountains either did not describe breaches of contract or concerned matters which Stonewear was willing to repair under warranty. In sum, the district court's findings indicate that the fountains were not defective and that Stonewear did not breach the contract and/or warranty.

The record presents substantial evidence that supports the district court's findings. Evidence elicited by both sides supports the findings that that the fountains were built per the designs of Ribeiro, Jr., that Ribeiro, Jr. did not specify that a structural engineer stamp the design and that the fountains were manufactured according to design. Stonewear's expert testified that the roundabout was capable of doing what it was designed to do and that the fountain worked in accordance

with its design. There was testimony that none of the fountains ever leaked. Additionally, evidence was presented that Stonewear was at all times willing to remedy any problems with the fountains, even those for which Stonewear was not responsible. The record confirms that Stonewear made several efforts to address Ribeiro's complaints, including aesthetic changes at Ribeiro's request and at no charge. Given the evidence presented, we conclude that substantial evidence supports the district court's findings that the fountains were not defective, that Stonewear did not breach the contract and/or warranties and, therefore, Ribeiro was not entitled to damages for repair and/or retrofit costs.

2. Ribeiro claims that the district court erred in awarding Stonewear $4,763.00 in costs for the removal of the roundabout fountain since this amount was: (1) not part of the parties' contract; (2) not plead in Stonewear's counterclaim; (3) not later agreed to between the parties; and that the parties agreed that this item would not be considered at trial in the computation of damages. Ribeiro also maintains that Stonewear failed to seek leave to file a supplemental pleading adding the removal cost as a claim.

Normally, failure to plead a claim precludes a party from introducing evidence in proof of it. However, under NRCP 15(b), parties can be deemed to have impliedly tried an issue not explicitly pleaded.[3]

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[3]See NRCP 15(b), which provides in part:

> 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

continued on next page . . .

Additionally, failure to amend pleadings when an issue is implicitly tried does not affect the result of a trial on these issues.[4]

Stonewear presented testimony that it received a letter from Ribeiro wherein Ribeiro indicated it intended to remove the roundabout fountain at a cost of $12,000.00. Stonewear concluded that it could remove the fountain for significantly less and submitted a bid to Ribeiro. Stonewear's bid was introduced into evidence, with no objection by Ribeiro. Testimony was also presented regarding Stonewear's ultimate removal of the fountain. Based on this evidence, we conclude that Stonewear's claim for costs for removal of the fountain was tried with Ribeiro's implied consent. Therefore, Stonewear's failure to properly plead a claim for these specific damages does not bar the district court's award. Finally, our review of the record does not confirm that Stonewear agreed to forego this claim of damages.

3. Ribeiro argues that the district court improperly required Ribeiro to pay the full price of the roundabout fountain when it allowed Stonewear to remove, keep and potentially re-sell the fountain. Accordingly, Ribeiro argues that Stonewear has been unjustly enriched at

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> 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.

See also Schmidt v. Sadri, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) (recognizing that "it is rudimentary that when an issue not raised by the pleadings is tried by express or implied consent of the parties, those issues shall be treated as if they were raised in the pleadings").

[4]Schwartz v. Schwartz, 95 Nev. 202, 205, 591 P.2d 1137, 1139 (1979).

Ribeiro's expense. Therefore, Ribeiro maintains that the district court should have awarded Ribeiro the "retained value" of the roundabout fountain.

We have held that we will not consider an issue raised for the first time on appeal.[5] Since Ribeiro failed to raise this issue below, we decline to consider it on appeal.

4. Finally, Ribeiro asserts that the district court's award of attorney fees to Stonewear, under NRCP 68 and NRS 17.115, was improper since Ribeiro refused Stonewear's offer in good faith, relying on the deposition testimony of Stonewear's expert, which changed at trial.

A party that rejects an offer of judgment pursuant to NRCP 68 and NRS 17.115, and thereafter fails to obtain a better result at trial may be required to pay the offeror's attorney fees.[6] However, such party is not entitled to attorney fees as a matter of right.[7] Rather, an award of attorney fees is made at the discretion of the district court after considering the four requisites set forth in Beattie v. Thomas:[8]

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[5]Hewitt v. Allen, 118 Nev. ___, ___ n.6, 43 P.3d 345, 347 n.6 (2002); see also Dermody v. City of Reno, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (quoting Powers v. Powers, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)) (stating that "[p]arties 'may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below'").

[6]Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722 (1993).

[7]See Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998).

[8]99 Nev. 579, 668 P.2d 268 (1983).

> (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 amount.[9]

This court will not overturn a district court's discretionary ruling concerning the Beattie factors unless it is arbitrary or capricious.[10]

The district court found that Stonewear made an offer of judgment, which Ribeiro rejected, and thereafter, Ribeiro failed to obtain a more favorable verdict. The district court considered the Beattie factors in exercising its discretion regarding the allowance of fees and costs and concluded that Ribeiro's rejection of Stonewear's first offer of judgment was unreasonable and the fees sought by Stonewear were reasonable. It was within the district court's proper discretion to reject Ribeiro's argument that it reasonably relied on testimony of Stonewear's expert in refusing the offer of judgment. The district court awarded Stonewear fees based on an offer of judgment dated September 15, 2000. Ribeiro took the deposition of Stonewear's expert on September 5, 2001, almost one year after the offer of judgment was made. Ribeiro could not have relied on this testimony in rejecting the offer of judgment, as it claims.

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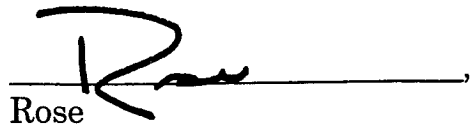
[9]Id. at 588-89, 668 P.2d at 274.

[10]Yamaha, 114 Nev. at 252, 955 P.2d at 672.

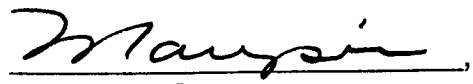
We therefore conclude that the district court properly awarded Stonewear requested attorney fees.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[11]



_____, J.
Rose



_____, J.
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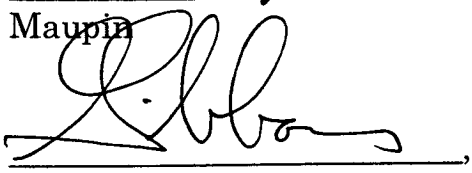

_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Prezant & Mollath
James M. Walsh
Washoe District Court Clerk

[11]We have considered Ribeiro's other claims of error on appeal and find them without merit, including the issues raised in connection with local building codes.