

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN C. WOOD, AN UNMARRIED
MAN,
Appellant,

vs.

BARRY W. LIPPARELLI AND LYNN
LIPPARELLI, HUSBAND AND WIFE;
DENNIS S. LIPPARELLI AND KERRY
LIPPARELLI, HUSBAND AND WIFE;
AND MICHAEL LIPPARELLI,
INDIVIDUALLY,
Respondents.

No. 38635

FILED

NOV 13 2003

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

BARRY W. LIPPARELLI AND LYNN
LIPPARELLI, HUSBAND AND WIFE;
DENNIS S. LIPPARELLI AND KERRY
LIPPARELLI, HUSBAND AND WIFE;
MICHAEL LIPPARELLI,
INDIVIDUALLY; 4L PARTNERSHIP;
AVANTI PROPERTIES; RIMROCK
DEVELOPMENT, LLC; MOUNT ROSE
MINI STORAGE; AND LIPPARELLI
FAMILY TRUST,
Cross-Appellants,

vs.

JOHN C. WOOD, AN UNMARRIED
MAN,
Cross-Respondent.

No. 39635

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a final judgment in a dispute between business partners.

On appeal, John C. Wood alleges the district court erred when it (1) found the deed conveying the business investments was valid; (2) did

not award him punitive damages; (3) did not allow him to prove attorney fees as special damages; (4) awarded Barry, Dennis, and Michael Lipparelli and their wives (Lipparellis) \$50,000 in damages for breach of fiduciary duty; (5) awarded Rimrock \$19,000 for conversion prior to Rimrock's dissolution; and (6) denied Wood's appraisal witness. The Lipparellis filed a cross-appeal alleging the district court erred by granting Wood attorney fees and costs. We affirm the judgment of the district court.

FACTUAL BACKGROUND

Wood and the Lipparellis are relatives. They formed Avanti Properties and Rimrock Development, LLC, for the purpose of investing in and developing real estate. The parties also owned Mount Rose Mini Storage in partnership with a third party. Further, the Lipparellis formed 4L partnership, a separate entity, without Wood.

Wood and the Lipparellis each own fifty percent of Avanti, a general partnership. Avanti owns real estate located at Beck Street, Forest Street, and Warren Way in Reno; an RV park in Reno; and two adjacent parcels and equipment in Plumas County, California. Wood owns twenty-five percent of Rimrock and the Lipparellis own seventy-five percent. Rimrock owns real estate parcels in Reno known as the Continental Center. Wood and the Lipparellis each own twenty-five percent of Mount Rose Mini Storage, a partnership. The partnership owns Mount Rose Mini Storage Complex. Wood managed the businesses for several years. The Lipparellis supplied a majority of the capital.

Wood experienced severe financial problems and borrowed \$250,000 from the Lipparellis. Wood already owed Avanti \$277,500 for his portion of the initial investment costs. The parties signed a five-year note

for the loan. The Lipparellis were to receive Wood's portion of monthly rents from Mount Rose Mini Storage as payment. If Wood defaulted on the loan, the Lipparellis had the option to accept Wood's share in Mount Rose Mini Storage as repayment for both the loan and debt Wood owed to Avanti. The Lipparellis could exercise the option without notice if Wood performed any act constituting a default under the agreement.

When the parties initially discussed the \$250,000 loan, Barry had several concerns regarding Wood's health and financial condition. To minimize Barry's fears, Wood signed, acknowledged and delivered two blank deeds to Barry. Wood verbally authorized Barry to execute the deeds if Wood became incapacitated or died.

Wood failed to communicate with the Lipparellis for long periods of time. After contacting David Halstead, a Reno accountant who maintained the businesses' records, the Lipparellis discovered how Wood had been conducting the businesses, the state of affairs of the businesses, and the total amount Wood withdrew. In a three-year period, Wood withdrew more than \$442,000 from the Avanti and Rimrock corporate accounts. The Lipparellis also learned the Plumas County, California investment was in default and required immediate capital to prevent foreclosure.

Wood informed Barry that he was sick and could not manage the investments. Barry and Michael went to Reno to meet with Wood. They prepared deeds to remove Wood's name from the investment property titles. The deeds included all Avanti and Rimrock properties sans the Plumas County property and one parcel located in the Continental Center. Wood signed and delivered the deeds to Barry. The parties agreed the deeds would be notarized the next morning. Wood,

however, wanted financial consideration for signing the deeds, so he instructed the notary not to acknowledge the deeds.

Next, Barry noticed a meeting of Avanti and Rimrock investors where he was appointed as the managing member of Rimrock and managing partner of Avanti. Barry transferred the businesses' books and financial records to Stephen Parish in Elko. Barry also recorded the two blank deeds he received from Wood in March 1998. On one deed, Barry listed nearly all the properties belonging to Rimrock and Avanti. On the second deed, Barry listed Wood's twenty-five percent interest in Mount Rose Mini Storage. Wood was not in default on his \$250,000 loan at the time.

The deeds transferred the business property to the Lipparellis as individuals. The district court noted that Wood purchased water rights for Warren Way on behalf of the partnership and placed the title in his individual name.

When Wood learned the Lipparellis recorded the deeds, he withheld payment on the \$250,000 note. As a consequence, the Lipparellis exercised their option to divest Wood of his twenty-five percent interest in Mount Rose Mini Storage. Wood filed suit, and the Lipparellis deeded the investment properties to Avanti and Rimrock. The Mount Rose Mini Storage interest was not returned to Wood.

Wood sued the Lipparellis to set aside the deeds, enjoin the Lipparellis from further alienating partnership properties, and recover damages. He abandoned his defamation and slander claims prior to trial. The Lipparellis filed a counterclaim for breach of fiduciary duty, damages, dissolution of Avanti and Rimrock, and a judicial foreclosure on certain property. Both parties requested an accounting.

After a bench trial, the district court held that (1) neither party was entitled to punitive damages; (2) the deed conveying business properties to Rimrock and Avanti was valid; (3) the parties must deed any other property belonging to the businesses, but held in an individual's name, back to the respective business; (4) the parties must render an accounting to the businesses regarding any monies they may have realized from sales made between March 1999 and the present; (5) Wood was not damaged by the transfer of business properties to Rimrock and Avanti; (6) Wood suffered damages from the transfer of his interest in Mount Rose Mini Storage; (7) Wood was entitled to recover his Mount Rose Mini Storage interest; (8) the Lipparellis were entitled to the monthly interest payments on the \$250,000 loan from April 1999 to the present; (9) Rimrock and Avanti were to be dissolved and an accounting performed; (10) Wood was entitled to an accounting to ascertain his ownership interests after deducting his withdrawals; (11) the parties must retain an independent accountant to perform the accounting; and (12) Wood is entitled to attorney fees and costs.

The district court issued an addendum to resolve outstanding issues, finding that (1) the Lipparellis were entitled to \$50,000 in damages because Wood breached his fiduciary duties by failing to properly manage the businesses and failing to inform his co-partners about the condition of their investments; (2) Wood must reimburse Rimrock \$19,000 for business funds he unlawfully converted; (3) Wood was entitled to broker fees for sales he made on behalf of Rimrock; and (4) a court master will be appointed to settle the accounting if the parties cannot agree on an independent accountant.

DISCUSSION

Validity of deed

A district court's findings of fact will not be set aside unless they are clearly wrong or unsupported by substantial evidence.¹ Substantial evidence is evidence which "a reasonable mind might accept as adequate to support a conclusion."²

Wood argues the blank deed filled out and recorded by the Lipparellis transferring investment properties was a fraudulent transaction and thus void. The district court found the deed that conveyed property belonging to the business entities was valid and did not constitute a fraudulent transfer because the properties listed on the deed in issue belonged to Rimrock and Avanti, not the individual investors.

We conclude the deed in question was not valid because it failed to comply with the Statute of Frauds. Therefore, the district court erred in finding the deed valid. When Wood gave the deed to the Lipparellis, he left the entire document blank except for his signature. The deed did not describe the property to be transferred nor to whom the property was being transferred. The error, however, is harmless since the properties in question will be sold when Rimrock and Avanti are dissolved.³ At the parties' request, the district court ordered these

¹Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001).

²Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938)), quoted in State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

³See NRCP 61.

businesses to be dissolved and an accounting performed to determine the parties' interests. All property belonging to Rimrock and Avanti will be liquidated as part of the dissolution, and proceeds will be distributed in accordance with the accounting. Further, the district court has the ability to redistribute funds after the businesses are dissolved. The parties will receive their fair share of proceeds from the sale of the properties. Therefore, the issue of the deed's validity has been rendered moot.⁴

Punitive damages

"Nevada law requires clear and convincing evidence of malice before punitive damages may be recovered."⁵ "A plaintiff is never entitled to punitive damages as a matter of right."⁶ "Rather, where the district court has determined that the conduct at issue is, as a threshold matter, subject to civil punishment, the allowance or denial of exemplary or punitive damages rests entirely in the discretion of the trier of fact."⁷

Wood argues the district court should have awarded him punitive damages because the Lipparellis committed forgery and fraud to avoid creditors. The Lipparellis decided to fill out and record the deeds when they (1) discovered the extent of Wood's neglect in managing the partnership properties; (2) realized Wood was financially distraught and

⁴See Humboldt Basin Newspapers v. Sunderland, 95 Nev. 794, 798, 603 P.2d 278, 281 (1979).

⁵Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000).

⁶Ramada Inns v. Sharp, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985), quoted in Evans, 116 Nev. at 612, 5 P.3d at 1052.

⁷Evans, 116 Nev. at 612, 5 P.3d at 1052.

thought Wood's financial position might adversely affect their businesses; (3) were unable to convince Wood to transfer his interest in the investment properties to protect the business assets; (4) discovered how much money Wood had withdrawn from the businesses over the past few years; and (5) failed to hear from Wood on matters affecting their mutual business interests. Further, the investment properties listed on one of the deeds belonged to Rimrock and Avanti, not Wood.

We conclude the district court's decision not to award punitive damages was supported by substantial evidence. Based on the facts presented, the Lipparellis did not act with malice. They were merely trying to protect their business properties and prevent the businesses' financial collapse.

Attorney fees as special damages

"[W]hen a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages."⁸ The attorney fees must be pleaded as special damages pursuant to NRCP 9(g) and proven the same as any other element of damages.⁹ It is insufficient to merely mention attorney fees in a complaint's general prayer for relief.¹⁰ "As a practical matter, attorney fees are rarely awarded as damages simply because parties have a difficult time demonstrating that the fees were proximately and necessarily caused by the actions of the opposing party and that the

⁸Sandy Valley Assocs., 117 Nev. at 956, 35 P.3d at 969.

⁹Id.

¹⁰Id. at 956-57, 35 P.3d at 970.

fees were a reasonably foreseeable consequence of the breach or conduct."¹¹ When attorney fees have not been pleaded as special damages, but evidence of such fees was presented at trial, the district court may nevertheless grant the fees to resolve a conflict between the pleadings and evidence pursuant to NRCP 15(b) or NRCP 54(c).¹²

Although Wood failed to plead special damages, he claims the district court should have allowed him to present evidence of attorney fees as damages during trial pursuant to NRCP 15(b) and NRCP 54(c). We conclude the district court did not abuse its discretion when it precluded evidence regarding attorney fees as damages. NRCP 15(b) and NRCP 54(c) merely serve as remedial measures available to the district court in the event pleadings do not conform to evidence presented at trial. The district court is not required to admit evidence of damages that have not been properly pleaded.

Damages for breach of fiduciary duty

The district court has broad discretion in calculating compensatory damages. We will not disturb the award of damages absent an abuse of discretion.¹³ The movant must provide an evidentiary basis for determining the amount of damages.¹⁴ Damages, however, do not need to be proven with mathematical precision and recovery will not be

¹¹Id. at 957, 35 P.3d at 969-70.

¹²Id. at 959, 35 P.3d at 971.

¹³Frantz v. Johnson, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000).

¹⁴Id.

precluded by the mere fact that some uncertainty exists regarding the exact amount.¹⁵

Wood argues the evidence presented at trial does not support the \$50,000 damage award, the award is contrary to the district court's initial decision, the district court did not make findings on how it calculated the award, and awarding the Lipparellis damages is contrary to good reasoning because the Lipparellis allegedly engaged in fraudulent conduct. He further claims the Lipparellis are not entitled to damages until the businesses have been dissolved.

The district court awarded the Lipparellis \$50,000 in damages because it found Wood breached his fiduciary duty. After a thorough review of the record, we conclude substantial evidence supports the district court's finding that Wood breached his fiduciary duty to the Lipparellis. The record shows the Lipparellis incurred expenses, fees, and losses due to Wood's misconduct. Therefore, there is substantial evidence to support the award of \$50,000 which should be paid to the Lipparellis as part of the final accounting. However, the final accounting must be done to ensure the Lipparellis do not receive a double recovery.

Rimrock reimbursement

"Conversion is 'a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or

¹⁵Id.

rights."¹⁶ In addition, conversion does not require a wrongful intent and is not excused by lack of knowledge, good faith, or care.¹⁷ Whether a conversion has occurred is a question of fact.¹⁸ As stated above, the district court's award of damages will be upheld absent an abuse of discretion.¹⁹

Wood claims the district court's decision to award Rimrock \$19,000 was premature since the businesses were not yet dissolved and affairs had not been wound up. We conclude the district court did not abuse its discretion in awarding Rimrock \$19,000 for conversion. Wood admits he accepted \$19,000 from a contractor which should have been paid to Rimrock. The evidence shows Wood has not reimbursed Rimrock. The district court was not required to wait until Rimrock was dissolved before it decided the issue of damages.

Appraisal witness

"[T]he right to discovery is subject to the discretion of the district court. Absent a clear abuse of discretion, we will not disturb a district court's decision regarding discovery."²⁰ NRCP 16.1 and NRCP 26 govern mandatory pre-trial discovery procedures in civil cases and are

¹⁶Evans, 116 Nev. at 606, 5 P.3d at 1048 (quoting Wantz v. Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)).

¹⁷Id.

¹⁸Id.

¹⁹Frantz, 116 Nev. at 469, 999 P.2d at 360.

²⁰Matter of Adoption of Minor Child, 118 Nev. ___, ___, 60 P.3d 485, 489 (2002).

meant to "aid in the efficient and fair administration of justice."²¹ The procedures require the disclosure of witnesses prior to trial.²² The district court may waive "certain requirements when such waiver is warranted."²³

It is undisputed that Wood failed to disclose his appraisal witness prior to trial. Rather, he claims the district court erred because it initially excused his misconduct and then sustained an objection by Lipparellis' counsel when the witness was called to testify at trial.

We conclude the district court did not abuse its discretion by refusing to allow Wood's expert witness to testify at trial since Wood failed to comply with mandatory pre-trial discovery requirements. The district court has wide discretion to control discovery and was entitled to exclude Wood's appraisal witness regardless of comments it may have made at the beginning of trial.

Attorney fees and costs

"A district court's award of attorney fees and costs will not be disturbed on appeal unless the district court abused its discretion in making the award. A district court is not permitted to award attorney fees or costs unless authorized to do so by a statute, rule or contract."²⁴

The Lipparellis claim the district court abused its discretion in awarding Wood attorney fees because he was not the prevailing party. We

²¹Mays v. District Court, 105 Nev. 60, 62, 768 P.2d 877, 878 (1989).

²²Id.


²³Id.


²⁴U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. ___, ___, 50 P.3d 170, 173 (2002).

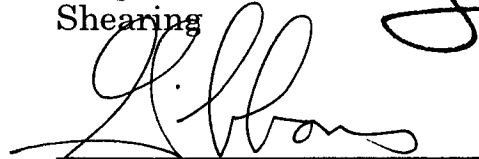
conclude the district court did not abuse its discretion in awarding Wood attorney fees and costs. When the Lipparellis loaned Wood \$250,000, the parties signed an option agreement allowing the Lipparellis to purchase Wood's interest in Mount Rose Mini Storage in the event Wood defaulted on the loan. The agreement included a clause for attorney fees and costs which states that if "either party [is] required to seek legal action to enforce or interpret the terms and conditions of this contract, the prevailing party shall be entitled to reasonable attorney fees and costs." Wood filed this suit because the Lipparellis recorded two blank deeds, one of which transferred Wood's Mount Rose Mini Storage interest. Wood sought to enforce the contract and recover his interest in Mount Rose Mini Storage. Therefore, the district court had the discretion to award costs and attorney fees to Wood.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
James F. Sloan
Walther Key Maupin Oats Cox & LeGoy
Washoe District Court Clerk