IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 40109

JOSEPH BOURDEAU,
Appellant/Cross-Respondent,
vs.
BANK OF AMERICA NEVADA,
Respondent/Cross-Appellant.

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal and cross-appeal from a final judgment on a jury verdict in an intentional interference with prospective business relations action and from orders denying motions for a new trial, additur and remittitur. This is the second appeal; the case was before us in 1999.[1] Bank of America (B of A) terminated Joseph Bourdeau, a branch manager, after an internal branch review revealed numerous violations of bank policies. Bourdeau subsequently attempted to start a new bank and submitted applications to the Nevada Division of Financial Institutions (NDFI) and to the Federal Deposit Insurance Corporation (FDIC). The FDIC conducted an investigation, which included interviewing several B of A employees, and denied Bourdeau's application. Bourdeau sued B of A alleging, among other claims, slander, fraudulent misrepresentation, and intentional interference with prospective business relationship. The Bourdeau I jury found for all defendants on the slander and fraudulent misrepresentation claims, but found for Bourdeau on the intentional interference claim after the trial court refused to give a conditional privilege instruction. B of A appealed, and we remanded the case for a

[1]Bank of America Nevada v. Bourdeau, 115 Nev. 263, 982 P.2d 474 (1999).

new trial on the issue of conditional privilege as it related to the intentional interference with prospective business relationship claim.

On remand, the Bourdeau II jury again found for Bourdeau on the intentional interference with prospective business relationship claim and awarded $800,000.00 in compensatory damages and $1.5 million in punitive damages. The district court denied B of A's motions for judgment notwithstanding the verdict, for a new trial due to juror misconduct, and for a remittitur. The court also denied Bourdeau's motions for additur and for a new trial on the slander claim, alleging litigation fraud. Both parties appealed.

On appeal, Bourdeau argues that the district court erred in denying his motion for a new trial on the slander claim and his motion for additur. B of A raises six major issues on appeal. First, B of A contends that the trial court erred in upholding the jury's finding on the intentional interference with business relationship claim. Second, B of A argues the district court improperly allowed (a) circumstantial evidence of an implied conspiracy between B of A and authorities to keep Bourdeau out of the banking business, (b) evidence as to Bourdeau's prior work performance and social activities, and (c) information derived from an unemployment hearing. Third, B of A urges that the trial court erred in precluding B of A from addressing a release Bourdeau signed in connection with the NDFI application. Fourth, B of A contends that the district court erred in upholding the jury verdict when the jury considered extraneous evidence and disregarded jury instructions. Fifth, B of A claims that the jury award is excessive and unsupported by the evidence. Finally, B of A maintains that the punitive damages award cannot stand as a matter of law because (a) the doctrines of res judicata and "law of the case" bar the

punitive damages award, (b) there is insufficient evidence to support the verdict, and (c) there is insufficient evidence to establish that B of A ratified the employees' statements under NRS 42.007.

FACTS

Joseph Bourdeau was an at-will employee of B of A and served as a manager of the Incline Village branch. Prior to becoming a B of A branch manager, Bourdeau had worked as a Valley Bank branch manager for nine years. After B of A and Valley Bank merged in 1992, Bourdeau continued managing the Incline Village branch. After an internal branch review revealed numerous violations of bank policies, some of which exposed B of A to criminal liability, B of A asked Bourdeau to resign. Bourdeau denied the violations and stated that the persons conducting the review did not like him and were "out to get him." The bank threatened Bourdeau with termination and loss of his earned bonus, but allowed him to resign and keep the bonus if he did so immediately without consulting an attorney. B of A promised to keep the reasons for Bourdeau's resignation confidential.

Subsequently, Bourdeau assembled a group of investors and raised $3.5 million to start a new bank named Bank of Lake Tahoe (BLT). Bourdeau anticipated becoming BLT's chief executive officer (CEO) and president. To start BLT, Bourdeau had to apply to the NDFI for a state charter and to obtain the FDIC's approval. The two agencies usually jointly investigate all people who would participate in any policy-making at the new bank. The FDIC investigator talked to former or current B of A employees and filed a report recommending against Bourdeau's President and CEO designation. The report contained damaging information about

Bourdeau concerning his lending ability and the reasons he left his job with B of A.

Bourdeau and his investors sold their potential bank to an existing bank before the FDIC and NDFI ruled on Bourdeau's application. He became a branch manager for the existing bank and received a $50,000.00-$60,000.00 salary per year. He sued B of A and several employees, alleging, among other claims, slander, fraudulent misrepresentation, and intentional interference with prospective business relations. The jury found for all defendants on the slander and fraudulent misrepresentation claims.

On the intentional interference with prospective business relations claim, B of A requested a jury instruction concerning an absolute or conditional privilege as to any communications to the FDIC, claiming that the FDIC acted in a quasi-judicial capacity. The Bourdeau I trial judge refused the instruction and gave only a conditional privilege instruction regarding intra-bank communications. The jury found against B of A on the intentional interference with prospective business advantage claim and awarded Bourdeau $1.2 million in compensatory damages. The jury also considered punitive damages, but declined to assess any such damages against the bank. B of A appealed the judgment pertaining to Bourdeau's intentional interference with prospective business relations claim. We reversed and remanded the case for a new trial on the issue of conditional privilege as it related to the intentional interference with prospective business relations claim.[2]

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[2]Bourdeau, 115 Nev. at 267, 982 P.2d at 476.

On remand, the jury again found for Bourdeau on the intentional interference claim and awarded $800,000.00 in compensatory damages and $1.5 million in punitive damages. B of A moved for judgment notwithstanding the verdict, for a new trial due to juror misconduct, and for a remittitur. Bourdeau moved for an additur and for a new trial on the slander claim, alleging litigation fraud. The district court denied all motions. Both parties appealed.

DISCUSSION

Bourdeau's appellate issues

A. Slander

Bourdeau alleges that the district court should have granted his motion for a new trial on the defamation claim based on newly discovered evidence showing litigation fraud. The alleged litigation fraud stems from B of A's closing argument, which indicated that B of A did not know of any B of A employees who had defamed Bourdeau. Bourdeau claims that discovery of an allegedly defamatory FBI report and an internal B of A memorandum, which B of A supposedly withheld from Bourdeau during the first trial, warrants retrying Bourdeau's slander claim. We disagree.

A district court may grant a new trial to a party if the prevailing party's misconduct or newly discovered material evidence affects the aggrieved party's substantial rights.[3] The decision to grant or deny a motion for a new trial rests within the district court's discretion

[3]NRCP 59(a)(2), NRCP 59(a)(4).

and will not be disturbed on appeal absent palpable abuse.[4] A party must serve an NRCP 59(a) motion within ten days of entry of judgment.[5]

The FBI "report" Bourdeau mentions reflects an FBI investigation of a 1991 night drop loss at the Incline Village branch. Bourdeau learned of the document after he filed a Freedom of Information Request following the first trial. According to Bourdeau, the document proves B of A referred him to the FBI for prosecution and thus B of A must have defamed him. We find Bourdeau's contention inapposite because the FBI report does not even contain Bourdeau's name and there is no evidence that Bourdeau ever took a polygraph test. Bourdeau's assertion that the report is defamatory because it refers to the "bank supervisors within the branch" is disingenuous. During trial, Bourdeau maintained that he, as a branch sales manager, did not oversee the branch's operations. Instead, he spent time outside the branch soliciting customers. We conclude that the FBI report shows no B of A misconduct affecting Bourdeau's substantial rights. The district court did not abuse its discretion by failing to grant his motion for a new trial.

Bourdeau's B of A internal memorandum claim is not persuasive. First, Bourdeau failed to file another motion to compel discovery during the Bourdeau I appeal. Second, the law of the case doctrine bars rearguing the defamation issue because the jury found

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[4]Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988) (quoted in Smith's Food & Drug Cntrs. v. Bellegarde, 114 Nev. 602, 605-06, 958 P.2d 1208, 1211 (1998)).

[5]NRCP 59(b).

against Bourdeau on the slander claim and we affirmed the jury's finding.[6] We conclude that the district court did not abuse its discretion by denying Bourdeau's motion for a new trial based upon B of A's closing argument remarks.

B. Additur

Bourdeau argues that the district court should have granted his motion for additur because the jury award was inadequate and because B of A did not rebut Bourdeau's damages evidence. We conclude that Bourdeau's argument lacks merit.

"'[A]dditur is a just, speedy, efficient, and inexpensive vehicle to correct an inadequate jury verdict.'"[7] We have set forth a two-prong test for additur: (1) whether the damages are clearly inadequate, and (2) whether the case would be a proper one for granting a motion for a new trial limited to damages.[8] We review additur orders for abuse of discretion.[9]

Bourdeau contends that the jury award is inadequate because the jury ignored the damages incident to a failed stock sale, allegedly worth $7 million. However, "'[i]n actions for damages in which the law provides no legal rule of measurement it is the special province of the jury

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[6]Bourdeau, 115 Nev. at 267, 982 P.2d at 476.

[7]Hogle v. Hall, 112 Nev. 599, 609, 916 P.2d 814, 821 (1996) (quoting Drummond v. Mid-West Growers, 91 Nev. 698, 712 n.8, 542 P.2d 198, 207 n.8 (1975)).

[8]Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 616, 5 P.3d 1043, 1054 (2000).

[9]Donaldson v. Anderson, 109 Nev. 1039, 1041, 862 P.2d 1204, 1206 (1993).

to determine the amount that ought to be allowed.'"[10] As the trier of fact, the jury has the responsibility to weigh the credibility of the witnesses. Absent passion, prejudice or jury corruption, the district court is not justified in reversing the case or granting a new trial.[11] The jury heard testimony on the stock sale agreement and chose to award $800,000.00 in compensatory damages. Bourdeau presented no evidence indicating that passion or prejudice motivated the jury award. His mere dissatisfaction with the award is insufficient to show that the jury verdict was "clearly inadequate" or improper. The district court did not abuse its discretion in denying Bourdeau's motion for additur.

B of A's appellate issues

A. Intentional interference claim

B of A contends that the jury "clearly and undisputably" erred in finding that B of A intentionally interfered with Bourdeau's prospective contractual relationship. We disagree.

The standard of review for a jury verdict is whether substantial evidence supports the verdict.[12] "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"[13] We will not overturn the jury's verdict if it is supported by

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[10]Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001) (quoting Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 454, 686 P.2d 925, 932 (1984)).

[11]Id.

[12]Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

[13]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)) (citations and quotations omitted).

substantial evidence, unless the verdict was clearly wrong.[14] We are not at liberty to weigh conflicting evidence.[15]

While B of A attempts to argue the merits of Bourdeau's intentional interference claim, the issue on remand was whether B of A abused its conditional privilege to communicate with the FDIC.[16] A conditional privilege is "abused by bad faith, malice with spite, ill will, or some other wrongful motivation, and without belief in the statement's probable truth."[17] Thus, the issue is whether there is substantial evidence to support the jury's finding of malice, ill will, and lack of belief in the statement's probable truth.

Christopher Colella, an FDIC investigator, began evaluating Bourdeau's application in January 1994. During the course of the investigation, Colella interviewed current and former B of A employees including Earnest Martinelli, Russell Browne, Robert Underwood, and Julie Castle. Although the testimony of Martinelli, Browne, and Underwood, standing alone, may not have established an abuse of the privilege, when combined with Castle's testimony, the record demonstrates sufficient evidence to support the jury's verdict.

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[14]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989).

[15]Taylor, 116 Nev. at 974, 13 P.3d at 46.

[16]Bourdeau, 115 Nev. at 267, 982 P.2d at 476.

[17]Id.

B. Evidentiary rulings

B of A alleges that the district court erred in admitting evidence on several issues. We have briefly addressed some of the district court's rulings.

The district court has considerable discretion in determining evidence admissibility, and we will not disturb a district court's ruling absent an abuse of that discretion.[18] Even if the district court erred in admitting evidence, we will disregard any error that does not affect the substantial rights of the parties.[19]

1. FBI report

B of A argues that the district court erred when it permitted references to the FBI document on the 1991 night drop loss investigation. We agree, but we conclude that the error does not rise to the level of prejudice warranting a new trial.

Authentication or identification is a condition precedent to admissibility.[20] Before admitting the report into evidence, Bourdeau's counsel continuously referred to its contents throughout trial. After counsel questioned three witnesses about the document, the district court held two hearings on the record because B of A's counsel objected on foundation grounds. During the second hearing, Bourdeau submitted to the court that Rick Parsons, a former B of A security employee, allegedly

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[18]Matter of Parental Rights as to N.J., 116 Nev. 790, 804, 8 P.3d 126, 135 (2000).

[19]NRCP 61.

[20]NRS 52.015(1).

confirmed that he gave the FBI report to the FDIC. Despite Bourdeau's statement, Parsons later testified that he never told Bourdeau that B of A gave the FBI report to the FDIC and he never saw such a report.

Although Bourdeau failed to lay proper foundation, the district court eventually admitted the FBI report into evidence and permitted Bourdeau's counsel to continue referring to the document throughout trial. We conclude that the district court should have excluded the document and precluded the FBI references. However, we conclude that the error does not warrant a new trial because the report did not contain Bourdeau's name and the FDIC investigator denied receiving the FBI report. We conclude that the error does not justify a new trial.

2. Gornichec "out to get" Bourdeau

B of A asserts that the district court erred in admitting evidence that Gornichec was "out to get" Bourdeau. We disagree.

At trial, Bourdeau's counsel referred to a scheme to terminate Bourdeau's employment. Castle testified that she complained to Gornichec about Bourdeau calling her incompetent and that Gornichec wanted to "do something about it." Although Castle stated that she decided to drop the matter because Bourdeau was entitled to his opinion, the jury could have reasonably disbelieved her testimony.

3. Prior work experience and social activities

B of A contends that the district court erred in permitting testimony about (1) Bourdeau's prior work experience with Valley Bank and (2) Bourdeau's community involvement. We conclude that B of A's arguments have merit, but the district court's error was harmless and does not warrant a new trial.

Over B of A's objection, the district court allowed a witness to testify about Bourdeau's favorable performance reviews as a Valley Bank

manager. The witness also testified that Bourdeau was hardworking and willing to learn. During trial, the jury heard that Bourdeau contributed to the community and received gubernatorial recognition for his charitable work.

We conclude that the district court erred in allowing the testimony. Bourdeau's performance reviews as a Valley Bank manager do not attest to his fitness as a B of A manager. Because different banks utilize different standards of performance review, Bourdeau's Valley Bank evaluations are not indicative of his performance under B of A standards. The district court also erred in admitting testimony about Bourdeau's character and charitable activities. Such evidence had no bearing on whether B of A abused its conditional privilege. However, there was extensive testimony that Bourdeau subsequently failed to comply with B of A's policies and procedures. We conclude that this evidence offset the effect the wrongfully admitted evidence may have had on the jury. Consequently, we conclude that the district court's error was harmless and does not justify a new trial.

4. Unemployment hearing

B of A alleges that the district court violated NRS 612.265 in admitting findings from Bourdeau's unemployment hearing. We conclude that the district court did err, but the error was harmless.

Pursuant to NRS 612.265(1), information obtained from any employer or person in the course of an unemployment hearing and any determination as to the benefit rights of any person is confidential and may not be disclosed or be open to public inspection in any manner which would reveal the person's or employer's identity.

At Bourdeau's June 1993 unemployment hearing, an officer from the Unemployment Division allegedly informed Castle that

Bourdeau's last review contained insignificant violations. At trial, Bourdeau's counsel refreshed Castle's recollection with the officer's written statement. Counsel then asked Castle, "Did you receive anything in writing . . . from anyone other than Mr. Bourdeau that determined there was no preponderance of evidence as to whether Mr. Bourdeau or his subordinates were actually in violation of those policies"? Castle answered, "Yes. And there's as much evidence that they were not."

The court admitted the evidence in violation of NRS 612.265 because counsel revealed Bourdeau's identity and elicited information related to an unemployment hearing. However, the error was harmless because the court did not admit the writing into evidence and the jury never heard the context or source of the information. On re-cross examination, Castle testified that the hearing information did not change her opinion of the branch review.

C. Compensatory damages

B of A asserts that the district court should have granted a new trial because the jury's $800,000.00 award was excessive and unsupported by the evidence. We disagree.

The standard of review for a jury verdict is whether substantial evidence supports the verdict.[21] "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a

[21]Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

conclusion.'"[22] We will not overturn the jury's verdict if it is supported by substantial evidence, unless the verdict was clearly wrong.[23]

After the FDIC denied Bourdeau's application, another bank purchased BLT's assets and Bourdeau began working for the bank as a sales person. The bank that purchased BLT subsequently sold for $35 million. The jury also heard that Bourdeau could not find a job in the industry following his B of A termination, despite over ten interviews with other banks. There was evidence that Bourdeau lost $70,000.00 in salary, a bonus up to $150,000.00, and stock options and benefits after the FDIC denied BLT's application.

There was testimony that Bourdeau's alleged losses were significantly less, and Colella maintained that BLT's shares belonged to BLT, not to Bourdeau. However, we are not free to weigh conflicting evidence; we must draw all inferences in favor of the prevailing party.[24] There is substantial evidence to support the jury's determination as set forth in the verdict form. Consequently, we affirm the $800,000.00 compensatory damages award.

D. Punitive damages

B of A next asserts that there is insufficient evidence to support the punitive damages award under NRS 42.005. We find B of A's arguments persuasive.

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[22]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1993) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)) (citations and quoted material omitted).

[23]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989).

[24]Smith v. Timm, 96 Nev. 197, 202, 606 P.2d 530, 532 (1980).

NRS 42.005 requires clear and convincing proof of malice, fraud, or oppression before the jury can award punitive damages. As we discussed above, there is substantial evidence to support the jury's finding of malice or oppression by preponderance of the evidence. However, there is not substantial evidence for the jury to find the requisite wrongful state of mind by clear and convincing evidence. Colella's trial testimony regarding communications with B of A employees only reflected conversations with Castle, Underwood, Martinelli, Furbush, and Browne. Furbush retired prior to the FDIC investigation, so B of A is not responsible for his statements. Browne stated that Bourdeau had little in-depth experience, but he also told Colella that Bourdeau had a very good credit judgment. Colella testified that Castle was unwilling to provide specific information regarding Bourdeau's departure and he had to "draw answers out" of her. Underwood testified that he merely answered Colella's questions and did not volunteer any information. Underwood felt compelled to cooperate with the FDIC. Although Martinelli told Colella that he heard Bourdeau was "loosey goosey" on credit and "too lenient across the board," Martinelli also testified that Bourdeau was a great banker and would have selected him for a bank president. In light of this testimony, we conclude that no reasonable jury could find that B of A actions meet NRS 42.005's "oppression, fraud or malice" standard by clear and convincing evidence. We, therefore, reverse the jury's punitive damages award.

We have considered B of A's other claims and find them without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Mirch & Mirch
Hale Lane Peek Dennison & Howard/Reno
Washoe District Court Clerk