

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN SHAFRON AND MARGARET SHAFRON, INDIVIDUALLY AND AS HUSBAND AND WIFE; AND KEVIN D. JANISON AND TERRI S. JANISON, INDIVIDUALLY AND AS HUSBAND AND WIFE,
Appellants,

vs.

ACCESS WORLDWIDE FUNDS, LLC, A NEVADA LIMITED LIABILITY COMPANY; MARTIN FREYMUTH, INDIVIDUALLY; AND WASHINGTON MUTUAL,
Respondents.

WASHINGTON MUTUAL,
Appellant,

vs.

MARTIN SHAFRON AND MARGARET SHAFRON, INDIVIDUALLY AND AS HUSBAND AND WIFE; AND KEVIN D. JANISON AND TERRI S. JANISON, INDIVIDUALLY AND AS HUSBAND AND WIFE,
Respondents.

No. 43396

FILED

MAY 17 2006

Manette M. Bloom
MANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered upon a jury verdict in a contract and tort action. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge.

Appellants Kevin Janison, Terri Janison, Martin Shafron, and Margaret Shafron applied for a residential mortgage through respondents Martin Freymuth and Washington Mutual (WAMU). After the mortgage rate changed despite Freymuth's representations that it would be fixed for the first five years, the appellants sued. A jury found WAMU and

Freymuth intentionally misrepresented the terms of the mortgages and awarded appellants compensatory and punitive damages, but not attorney fees.

With respect to appellants' contentions, we conclude that the Janisons failed to plead attorney fees as special damages and that the district court did not abuse its discretion in denying attorney fees. Since rescission was not an available remedy, the district court properly denied the Janison's motion for rescissory damages. In addition, the district court did not abuse its discretion by excluding evidence of threatening letters the appellants received after commencing litigation since it could find that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

With respect to the respondents' contentions, we conclude that the district court properly found, as a matter of law, that Freymuth acted as WAMU's agent. Finally, substantial evidence supports the award of punitive damages and, based on WAMU's fault and ability to pay, the award was not unconstitutionally excessive.

The Janisons did not properly plead attorney fees as special damages

We disagree with the Janison's contention that they were entitled to present evidence of their attorney fees as an element of damages.¹ Under NRS 18.010(1), "[t]he compensation of an attorney and counselor for his services is governed by agreement, express or implied,

¹"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." U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). However, a district court may not award fees or costs "unless authorized to do so by a statute, rule or contract." Id.

which is not restrained by law.” The district court may also award attorney fees to a prevailing party that recovers less than \$20,000.² If a plaintiff claims attorney fees as special damages, the fees must be specifically stated as required by NRC 9(g).

No statute or contract authorized the award of attorney fees in this case. The Janisons, as the prevailing party, recovered a total of \$104,100 in damages, and were thus not entitled to a discretionary award of attorney fees under NRS 18.010(2). Further, their complaint did not plead attorney fees with sufficient specificity in order to meet the standard required by NRC 9(g). Rather, the complaint repeated the same standard phrase for each cause of action: “The plaintiffs have been forced to retain an attorney to pursue this cause of action and are entitled to attorney fees and costs.” The Janisons incurred attorney fees as an incident of litigation, rather than as a special element of damages. We conclude that the district court did not abuse its discretion by refusing to admit evidence of attorney fees as damages during the trial and by denying the award of attorney fees.

The district court did not abuse its discretion by denying the Janison’s motion for rescissory damages

We conclude that the district court properly denied the Janison’s motion for rescissory damages because the Janisons had refinanced their loan by the conclusion of the trial making rescission an inapplicable remedy. “Rescission is an equitable remedy which totally abrogates a contract and which seeks to place the parties in the position

²NRS 18.010(2)(a).

they occupied prior to executing the contract.”³ A party is precluded from obtaining both rescission and damages for breach of contract because this would constitute double recovery.⁴ When rescission, though appropriate, is impossible or not feasible, courts may substitute by awarding rescissory damages.⁵ “Rescissory damages are a ‘money award designed to be as nearly as possible the financial equivalent of rescission.”⁶ Rescissory damages aim to return an injured party to the position they occupied before entering into a transaction.⁷ We conclude that the jury’s award of damages compensated the Janisons for their losses resulting from Freymuth’s and WAMU’s misrepresentations and that the district court did not abuse its discretion by denying the motion for rescissory damages. The district court properly found that Freymuth acted as WAMU’s agent

We conclude that in procuring loans for customers, Freymuth was acting as a dual agent for both the borrowers and WAMU. NRS 645B.0127(1) defines a mortgage broker, in relevant part, as a person who, directly or indirectly:

(a) Holds himself out for hire to serve as an agent for any person in an attempt to obtain a loan which will be secured by a lien on real property;

³Bergstrom v. Estate of DeVoe, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993).

⁴Id. at 577-78, 854 P.2d at 861-62.

⁵Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 345 (Ariz. Ct. App. 1996).

⁶Id. (quoting In re MAXXAM, Inc., 659 A.2d 760, 775 n.15 (Del. Ch. 1995)).

⁷Id.

(b) Holds himself out for hire to serve as an agent for any person who has money to lend, if the loan is or will be secured by a lien on real property.

We have previously concluded, in Young v. Nevada Title Co., that the statute contemplates that a mortgage broker acts as a dual agent for both the borrower and the lender.⁸ In Young, we were interpreting the former NRS 645B.010(3) that defined a mortgage company in the same terms as NRS 645B.0127.⁹ We stated that “[t]he same person or entity may act as the agent for two parties interested in the same transaction when their interests do not conflict and where loyalty to one does not necessarily constitute breach of duty to the other.”¹⁰

Here, the plain meaning of NRS 645B.0127 supersedes the Mortgage Broker Agreement executed by WAMU and Freymuth. Although the agreement specifically stated that Freymuth was as an independent contractor, Freymuth nevertheless used WAMU almost exclusively as the lender for his customers. Further, Freymuth was part of WAMU’s premier broker program, and he submitted to an extensive investigation as part of the approval process. The district court properly concluded as a matter of law that Freymuth acted as WAMU’s agent in procuring loan customers.

Substantial evidence supports the jury’s findings of fraud and misrepresentation

We conclude that substantial evidence supports the jury’s finding that both Freymuth and WAMU intentionally misrepresented the

⁸103 Nev. 436, 439, 744 P.2d 902, 903 (1987).

⁹Id.

¹⁰Id.

terms of the loan, and that their conduct in dealing with the appellants constituted fraud.¹¹ In an action for intentional misrepresentation, the plaintiff must show by clear and convincing evidence that (1) “the defendant made a false representation to him, with knowledge or belief that the representation was false or without a sufficient basis for making the representation; [(2)] the defendant intended to induce the plaintiff to act or refrain from acting on the representation; [(3)] the plaintiff justifiably relied on the representation;” and (4) the plaintiff suffered damage as a result of his reliance.¹²

Both the Janisons and Shafrons filled out handwritten loan applications with Freymuth that reflected their desired percentage rate. However, the appellants received closing documents from WAMU containing different terms. At trial, Freymuth testified that WAMU must have switched the loan documents. After both the Janisons and Shafrons questioned the differing terms in the loan documents, Freymuth assured the appellants that they would receive their desired rates if they chose the correct option on the payment coupons each month. Freymuth and WAMU both asserted that they were not responsible for the change in the loan terms. Based on this evidence, the jury could find that Freymuth and

¹¹We will not overturn a jury verdict “supported by substantial evidence, unless, from all the evidence presented, the verdict was clearly wrong.” Ringle v. Bruton, 120 Nev. 82, 91, 86 P.3d 1032, 1038 (2004) (quoting Bally’s Employees’ Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). “Substantial evidence is evidence that “a reasonable mind might accept as adequate to support a conclusion.” Edison Co. v. Labor Board, 305 U.S. 197, 299 (1938) (quoted in Ringle, 120 Nev. at 91, 86 P.3d at 1038).

¹²Blanchard v. Blanchard, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992) (quoting Epperson v. Roloff, 102 Nev. 206, 210-11, 719 P.2d 799, 802 (1986)).

WAMU intentionally misrepresented the terms of the loan and that their conduct amounted to fraud.

WAMU ratified Freymuth's misconduct

Further, we conclude that WAMU ratified Freymuth's misconduct. Because the district court properly concluded that Freymuth acted as WAMU's agent in brokering the loans, the jury could find WAMU liable for the misconduct of its agent. A principal will only be bound by his agent's representations if he consents or acquiesces to the representations.¹³ A principal can show acquiescence by its silence or failure to repudiate.¹⁴ "A principal may be bound by the acts of its agent as to third parties . . . who have no reason to know of the agent's improper conduct. This is so even when the agent acts for his own motives and without benefit to his principal."¹⁵

Both the Janisons and the Shafrons put WAMU on notice that something was wrong with their loans as soon as they received their first payment notice. WAMU presented evidence that its customer service representatives did not have authority to make any changes to the loan and were merely following company policy by refusing to release either the Janisons or the Shafrons from their loan obligations and from the pre-payment penalties. However, Martin Shafron testified that a WAMU regional manager advised him that the bank would do nothing regarding the loan. The jury could conclude that this representative was in a

¹³Orbit Stations, Inc. v. Curtis, 100 Nev. 205, 207, 678 P.2d 1153, 1154-55 (1984).

¹⁴Goldstein v. Hanna, 97 Nev. 559, 562, 635 P.2d 290, 292 (1981).

¹⁵Young, 103 Nev. at 439, 744 P.2d at 903.

position of sufficient authority to act on behalf of WAMU and ratify Freymuth's misconduct.

The district court did not err in awarding punitive damages

We disagree with WAMU's contention that it cannot be liable for punitive damages.¹⁶ Punitive damages are not awarded to compensate a party, but are awarded "for the sake of example and by way of punishing the defendant."¹⁷ Pursuant to NRS 42.007(1)(b), (c), an employer is liable for punitive damages for the wrongful act of an employee if "[t]he employer expressly authorized or ratified" the employee's wrongful conduct or if "[t]he employer is personally guilty of oppression, fraud or malice, express or implied."¹⁸ Because WAMU ratified Freymuth's misconduct and because the jury found that WAMU itself was guilty of fraud, the district court did not err in awarding punitive damages against both Freymuth and WAMU.

Finally, we conclude that the award of punitive damages was not unconstitutionally excessive. "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

¹⁶We will not overturn an award of punitive damages supported by substantial evidence. Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 703, 962 P.2d 596, 604 (1998).

¹⁷NRS 42.005(1).

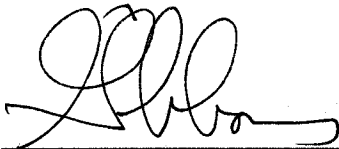
¹⁸See also Nittinger v. Holman, 119 Nev. 192, 195, 69 P.3d 688, 691 (2003).

circumstances of a given case.”¹⁹ Here, the district court’s order for punitive damages pursuant to the jury verdict was not clearly disproportionate to WAMU’s blameworthiness for fraud. Further, WAMU, as a large, publicly traded financial institution has the ability to pay \$180,000 in punitive damages. Therefore, the amount of punitive damages was not unconstitutionally excessive. Accordingly, we

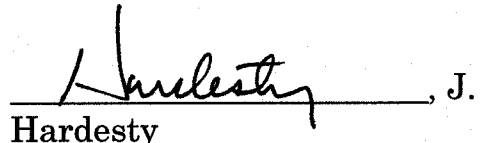
ORDER the judgment of the district court AFFIRMED.²⁰



Maupin



Gibbons



Hardesty

cc: Eighth Judicial District Court Dept. 3, District Judge
Lewis Brisbois Bisgaard & Smith, LLP
Access Worldwide Funds, LLC
Martin Freymuth
Laxalt & Nomura, Ltd./Las Vegas
Laxalt & Nomura, Ltd./Reno
Clark County Clerk

¹⁹Guaranty Nat’l Ins. Co. v. Potter, 112 Nev. 199, 208, 912 P.2d 267, 273 (1996) (quoting Ace Truck & Equipment Rentals, Inc. v. Kahn, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (1987)).

²⁰We have not reached the claims of Shafron and Janison that the district court erred in rejecting their evidence concerning death threats. They have sought our review of this ruling only in the event that WAMU’s claims on appeal result in a reversal and retrial below.