

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK WHITE CUSTOM HOMES, A
NEVADA CORPORATION; AND JACK
WHITE, AN INDIVIDUAL,
Appellants/Cross-Respondents,

vs.

HERBERT M. BURRIDGE; VIRGINIA
M. BURRIDGE; AND MCGUIRE
MURRAY LIMITED PARTNERSHIP, A
NEVADA LIMITED PARTNERSHIP,
Respondents/Cross-Appellants.

JACK WHITE CUSTOM HOMES, A
NEVADA CORPORATION; AND JACK
WHITE, AN INDIVIDUAL,
Appellants,

vs.

HERBERT M. BURRIDGE; VIRGINIA
M. BURRIDGE; AND MCGUIRE
MURRAY LIMITED PARTNERSHIP, A
NEVADA LIMITED PARTNERSHIP,
Respondents.

No. 46662

No. 47612

FILED

SEP 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

These are consolidated appeals and a cross-appeal from a district court amended judgment entered after a bench trial in a lien foreclosure, contract, and tort action, and a post-judgment order denying attorney fees and costs. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.¹

¹ The Honorable Mark Gibbons, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

On December 6, 2001, Dr. Herbert Burridge and his wife Virginia (the Burridges) signed a contract with Jack White Custom Homes (Jack White)² to provide labor and materials to build a house. The contract was for \$743,660.51, less a credit of \$61,500. The parties disputed the purpose of the credit. The Burridges testified that the original contract price included completion of the attic and the credit was to exclude the basement. Jack White testified that in an unwritten agreement, made after the original contract, his company agreed to complete the attic in exchange for not giving the Burridges the \$61,500 credit. The district court found that the non-written attic agreement was not part of the contract, and, thus, was an 'extra' under the contract to be charged to the Burridges at cost. The court found that the cost for the attic was \$17,169 plus additional labor and materials for a total of \$20,000.³

On February 18, 2003, Jack White filed a notice of mechanic's lien. On June 9, 2003, Jack White filed a complaint to enforce the mechanic's lien, for breach of express or implied contract, and for quantum meruit. On September 30, 2003, the Burridges counterclaimed for: (1) breach of contract, (2) breach of duty of care, (3) false representation concerning credits for construction costs, (4) willful, oppressive, and malicious false representation, (5) a request for accounting for proper

²Jack White Custom Homes, Inc. and Jack White, individually, were the plaintiffs in the underlying district court case and are hereinafter referred to collectively as Jack White.

³Because neither party provided the actual cost for the additional labor and materials, the district court estimated this amount.

construction costs, (6) elder exploitation, and (7) misappropriation of assets.

The Burridges filed a complaint with the Nevada State Contractors Board (NSCB) to investigate their claims of Jack White's poor workmanship. The NSCB issued a notice to correct seventy-two items of defective workmanship. Jack White did not respond. On December 16, 2003, the NSCB filed an amended complaint against Jack White Custom Homes listing thirteen causes of action. After a disciplinary hearing, the NSCB entered an amended decision and order on April 14, 2004, dismissing four of the Burridges' complaints and ordered Jack White to pay the Burridges \$900 for violation of the remaining complaints and to reimburse the NSCB investigative costs in the amount of \$1300.

On February 25, 2005, the Burridges filed a motion for leave to amend their answer and a motion for partial summary judgment. On April 18, 2005, the district court granted partial summary judgment for construction defect liability, based on the NSCB's preliminary factual findings. The district court also allowed the Burridges to amend their answer to include the affirmative defense of collateral estoppel. Jack White claims that it offered to correct the items on the NSCB correction list and complete the remaining work.

On June 22, 2005, Jack White filed motions to exclude the testimony of the Burridges' expert witness, Paul Baffico, on the basis that he had no experience with residential construction and was not a licensed inspector in Nevada, and, therefore, could not testify as an expert. The district court denied Jack White's motion.

The bench trial began on June 29, 2005. During Jack White's opening statement, Judge Gibbons announced that he had been involved

in a similar lawsuit over the construction of his home. The next day Jack White filed a motion to disqualify Judge Gibbons. This court ordered Judge Michael Griffin to hear the motion to disqualify Judge Gibbons. Judge Griffin denied the motion and the trial continued.

On October 20, 2005, the district court entered its judgment. While the court found a lack of credibility in the two experts' estimates, the court found that the repairs totaled \$81,300 and credited the Burridges that amount. Additionally, the court denied, with prejudice, the claims for fraud and elder exploitation because of insufficient evidence.

On December 22, 2005, the district court entered amended findings of fact and conclusions of law. The court amended its calculation of damages by beginning with the fixed contract price of \$842,066.73⁴ instead of the actual cost of \$777,543. The district court also found that the doctrine of mitigation of damages did not affect the amounts due between the parties and that the doctrine of quantum meruit was not applicable. Further, regarding the costs of the attic construction, Jack White was entitled to a charge of \$2,831, and the Burridges were entitled to a credit of \$61,500. As to interest charges, the district court deleted a \$1,000 credit to the Burridges because there was no showing that they timely made the payments.

In its March 10, 2006, order the district court found that neither party was the prevailing party and allowed no attorney fees and costs. Jack White timely filed the instant appeal.

⁴This price consists of the contract price of \$743,660.51, which includes the credit of \$61,500 and the management fee of \$85,000, plus the extras and interest of \$98,406.22.

Of the many issues raised by the parties, we conclude that we need consider only two: (1) whether Judge Gibbons should have been disqualified and (2) whether the amounts awarded for repair costs and the value of the attic are supported by substantial evidence. We affirm as to the denial of the motion for judicial disqualification, and we reverse and remand for a new trial as to the determination for the repair costs and the value of the attic. As to the other issues not expressly discussed in this order, we affirm the district court's judgment.

Jack White argues that Judge Gibbons should have recused himself. On appeal, we review a decision on a motion for recusal of a judge for an abuse of discretion.⁵ Canon 3E(1) of the Nevada Code of Judicial Conduct (NCJC) provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" However, In Las Vegas Downtown Redevelopment Agency v. Hecht, we concluded that

to permit a justice or judge to be disqualified on the basis of bias for or against a litigant's counsel in cases in which there is anything but an extreme showing of bias would permit manipulation of the court and significantly impede the judicial process and the administration of justice.⁶

⁵See Jacobson v. Manfredi, 100 Nev. 226, 230-31, 679 P.2d 251, 254 (1984) (where this court concluded that allegations of prior professional relationship with respondent and a current professional relationship with respondent's relative did not demonstrate sufficient judicial bias to conclude that it was an abuse of discretion to strike appellant's motion for recusation).

⁶113 Nev. 632, 636, 940 P.2d 127, 129 (1997).

In the motion for disqualification, Jack White contends that Judge Gibbons' comments concerning his personal involvement in a similar case reasonably brought his impartiality into question. Jack White argues that the proper test is whether an appearance of bias existed, not whether Judge Gibbons believed he was biased. However, the district court found, and we agree, that Jack White failed to meet the burden of proof under either test to disqualify Judge Gibbons. The evidence presented failed to suggest that Judge Gibbons could not perform his duties as a judge without bias. Further, Jack White failed to provide evidence that would support even an appearance of bias on behalf of Judge Gibbons.

Jack White argues that Judge Griffin erred in not recognizing that the similarities between the present case and Judge Gibbons' personal case present a reasonable question of bias. Additionally, Jack White contends that two decisions made by Judge Gibbons in this case before disclosing information concerning his personal lawsuit may have been the result of bias. However, Judge Gibbons' personal case was over ten years prior to the present case and he had since heard several construction defect cases and ruled in favor of contractors and homeowners alike without bias or issue. The district court denied Jack White's motion for disqualification because it found that Jack White did not establish sufficient factual grounds to warrant disqualification of the presiding judge. After reviewing the record, we agree with the district court's ruling and the basis for its decision.

Jack White next argues that it is entitled to fair market value for construction of the attic. In Flamingo Realty v. Midwest Development, Inc., we concluded that "[a] district court is given wide discretion in

calculating an award of damages and an award will not be disturbed on appeal absent an abuse of discretion.”⁷ Concerning the construction of the attic, the district court found that the non-written attic agreement was not part of the contract, and, thus, was an “extra” under the contract to be charged to the Burridges at cost. The court found the cost was \$17,169 plus an undeterminable amount for labor and materials. The court estimated the additional cost to be \$2,831, for a total of \$20,000. Regarding the repair costs, the district court found that the two experts lacked credibility and accordingly discounted their estimates to determine the proper repair costs.

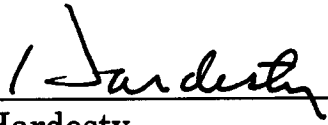
We conclude that the district court was correct in limiting the charge for the attic to the cost of construction. However, we also conclude that the district court abused its discretion in finding that substantial evidence in the form of invoices and trial testimony supported the \$20,000 cost for attic construction. Further, we determine that the assessment of repair costs is not supported by substantial evidence, since it appears to represent a speculative amount somewhere between appellants’ evidence and respondents’ evidence.

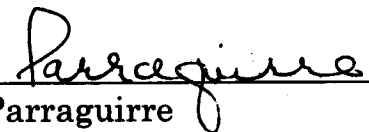
We therefore reverse that portion of the district court’s judgment relating to the attic and repair costs and remand these matters with instructions to the district court to limit the value of the attic to \$61,500 in lieu of the credit in the contract and we affirm in all other

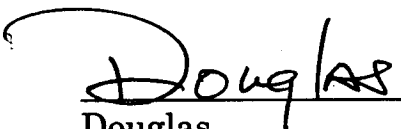
⁷110 Nev. 984, 987, 879 P.2d 69, 71 (1994) (where the measure of damages under quantum meruit used by district court was appealed).


respects. We remand this matter to the district court for further proceedings consistent with this order.

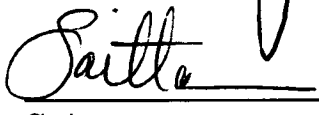
It is so ORDERED.⁸

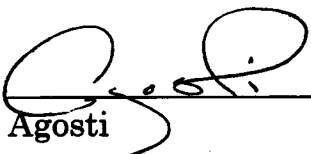
, J.
Hardesty

, J.
Parraguirre

, J.
Douglas

, J.
Cherry

, J.
Saitta

, Sr.J.
Agosti

⁸The Honorable Deborah A. Agosti, Senior Justice, participated in the decision of this matter under a general order of assignment.

cc: Hon. Michael P. Gibbons, District Judge
Patrick O. King, Settlement Judge
Sullivan Law Offices
Sullivan Law Offices
Kelly R. Chase
Kelly R. Chase
Douglas County Clerk

MAUPIN, J., concurring:

I concur in the result reached by the majority.

Maupin

J.

Maupin