

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM E. SHACK, JR., AND
NICOLLE JONES PARKER A/K/A
NICOLLE SHACK PARKER,
Appellants/Cross-Respondents,

vs.

BARBARA ANN HOLLIER TRUST;
BARBARA ANN HOLLIER LAWSON
A/K/A BARBARA ANN LAWSON AND
BARBARA ANN HOLLIER,
INDIVIDUALLY AND AS TRUSTEE OF
THE BARBARA ANN HOLLIER
TRUST; AND ACADIAN REALTY, INC.,
A NEVADA CORPORATION,
Respondents/Cross-Appellants.

No. 53039

FILED

MAR 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court judgment in a real property action and from a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellants/cross-respondents William E. Shack, Jr., and Nicolle Jones Parker (collectively, Lessees) leased, with an option to purchase, commercial property from respondents/cross-appellants Barbara Ann Hollier Trust, Barbara Ann Hollier Lawson, and Acadian Realty, Inc. (collectively, Lawson), and provided a \$100,000 security deposit and per Lawson's request, put a \$100,000 payment for the option to purchase in an escrow account for Lawson. Lessees subsequently sued Lawson, who filed a counterclaim.

Before trial, the district court entered partial summary judgment against Lessees on several claims concerning the sale of the

property and specific performance of the option to purchase, and the remainder of the case proceeded to trial.¹ During deliberations, the jury specifically asked if it was to consider attorney fees in calculating the damages awards, and the district court instructed the jury that it was not to do so. The jury awarded Lessees \$265,600 for breach of contract and \$620,000 for breach of the covenant of good faith and fair dealing and rejected Lawson's counterclaims for breach of contract and fraud. The jury initially found for Lawson on an abuse-of-process counterclaim and awarded Lawson \$105,000 in damages, which the jurors noted on the form represented the \$100,000 option money that was in escrow and \$5,000 in attorney fees. After being informed by the district court that Lawson's abuse-of-process cause of action had been dismissed prior to the jury's deliberations, the jury reconsidered and stated that the award was not applicable.

The district court denied Lawson's post-judgment motions for judgment as a matter of law, for new trial, to alter or amend the judgment, for remittitur, and for stay. The court partially granted the Lessees' post-judgment motion for attorney fees and awarded \$58,387.50 of their \$158,387.50 request. The court determined that the jury had included \$100,000 as attorney fees in its damages award to the Lessees. The court also reduced the jury's award to the Lessees by \$100,000 as an offset to Lawson because it determined that the jury wanted to give Lawson the

¹The Lessees did not appeal from the grant of partial summary judgment.

\$100,000 option money and ordered the funds held in escrow to be released to the Lessees.²

On appeal, the Lessees' argue that: (1) the district court abused its discretion in interpreting the general jury verdict to include \$100,000 of their attorney fees; and (2) the district court erred in altering the judgment to include a \$100,000 offset to Lawson. On cross-appeal, Lawson contends that: (1) the damages were improper as a matter of law because the Lessees could only collect expectancy damages under their breach-of-contract claim, (2) Lawson should be granted a new trial because the verdict was inconsistent and irregularities at trial tainted the verdict, and (3) the Lessees are judicially estopped from objecting to the district court's order releasing escrow funds to Lawson.

We conclude that the amounts of the jury's damages awards are not supported by the evidence, and we also conclude that the district court cannot accept a verdict with interlineations on the verdict form. Accordingly, we reverse and remand this case for a new trial on the issue of damages and attorney fees only.

Damages awards

From the record on appeal, we cannot determine how the jury arrived at the damages figure, and it appears that the award to the Lessees may include an improper double recovery. We have held that a jury has wide latitude in awarding compensatory damages but that the award must be supported by substantial evidence. Bahena v. Goodyear Tire & Rubber Co., 126 Nev. ___, ___, 235 P.3d 592, 601-02 (2010).

²The parties are familiar with the remaining facts and we do not recount them further except as is necessary for our disposition.

“Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.” Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (internal quotations omitted). Although there is evidence of damages in the record, we cannot determine from the evidence in the record how the jury calculated damages nor can the damages awards be substantiated. While there is the potential that the Lessees may be entitled to damages, the awards did not indicate any breakdown for the amounts awarded and we cannot make sense of the calculations.

In the summation of damages, the Lessees requested \$2,058,400 in damages, and the jury awarded the Lessees \$885,600 in total damages. Within the damages award, the Lessees’ counsel requested \$1,440,400 for seven years of lost profits but offered no real explanation to support this requested award. The Lessees merely stated a conclusory value, without further foundation or explanation to support the award. Because of the difference between the requested amount and the actual damages awards, it is unclear whether the jury awarded the Lessees damages for lost profits or the \$100,000 in attorney fees that the district court assumed was included in the Lessees damage award. Thus, we conclude that the awards lacked the requisite “evidentiary basis for determining a reasonably accurate amount of damages.” Winchell v. Schiff, 124 Nev. 938, 950, 193 P.3d 946, 954 (2008) (Hardesty, J., concurring in part and dissenting in part) (quoting Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co., Inc., 105 Nev. 855, 857, 784 P.2d 954, 955 (1989)). Nothing in the record provided the jury with a method to adjust the value of the damages from the requested \$2,058,400 to \$885,600. We further conclude that because there was no indication as to

what the jury's awards consisted of, the district court abused its discretion in awarding the difference between what the district court would have awarded for attorney fees and the amount that the district court assumed that the jury awarded. See McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 673, 137 P.3d 1110, 1129 (2006) (stating that a district court's award of attorney fees will not be disturbed on appeal absent a manifest abuse of discretion).

Moreover, it is clear from a review of the record that the jury disregarded the instructions given to it by the district court. Although it is presumed that a jury follows the instructions given to it by the district court, Western Technologies v. All-Am. Golf Center, 122 Nev. 869, 875, 139 P.3d 858, 862 (2006), we recognize that this is not always the case. See Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982) (holding that the district court may grant a new trial if the jury has manifestly disregarded the instructions of the court). Here, the jury asked if it was to consider attorney fees when calculating the damages awards, the district court responded that it should not. However, the jury then went on to award attorney fees in connection with the abuse-of-process claim, inserting such an award on the verdict form in violation of the district court's express instruction. It would have been impossible for the jury to award attorney fees if they had applied the district court's instructions.

Furthermore, "[w]e may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable." 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, 455, 686 P.2d 925, 932 (1984)). It is not for this court

to retry the case or second-guess the jury—we are “not a secondary trial court formed to retry the facts of a case and supersede the decision of the district court.” Gardner v. Gardner, 110 Nev. 1053, 1060, 881 P.2d 645, 649 (1994) (Young, J., dissenting); see also Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982).

Because this court cannot act as a fact-finder, it was incumbent upon the district court to determine what the jury intended by its verdict. In Wyeth v. Rowatt, 126 Nev. ___, ___, 244 P.3d 765, 785 (2010), as authored by Justice Cherry, this court recognized the long-held principle that jury verdicts should be properly corrected by the district court before the jury is discharged. To avoid a substantial waste of judicial and party resources, this court has repeatedly admonished district court judges to clarify potentially defective verdicts through new instructions and additional deliberations. See, e.g., Carlson v. Locatelli, 109 Nev. 257, 263, 849 P.2d 313, 316-17 (1993); Eberhard Mfg. Co. v. Baldwin, 97 Nev. 271, 273, 628 P.2d 681, 682 (1981). Here, regarding the motion for attorney fees, the district court stated that because the verdict form did not provide for a breakdown of the awards, the district court did not know what comprised the awards. The district court further stated that the trial may have created more questions than it answered and indicated that it was not known what the jury did and did not do. However, upon acknowledging the problems with the verdict, the district court did not ask the jurors to reveal how they reached their decision, an error that now results in the necessity of a new trial on the issue of damages.

Interlineations on the verdict form


Second, the district court cannot accept a general verdict with interlineations on the form. The jury in this case wrote the amount \$105,000 on the line for the amount to be awarded for the abuse-of-process claim, plus the impermissible additional language that the award consisted of the \$100,000 option money plus \$5,000 in attorney fees. As discussed above, the jury was specifically told not to consider attorney fees. “A verdict which goes beyond the issues of the case as stated in the instructions on the law given by the court to the jury, is not in conformity with the instructions and is therefore insufficient” and should be corrected. Maxwell v. Powers, 28 Cal. Rptr. 2d 62, 65 (Ct. App. 1994) (internal citations and quotations omitted); id. at 67 (determining that “the jury misunderstood its mission” and that the consequential defect in the verdict form could not be corrected without a new trial because the jury note does not shed light on how it reached its awards for future damages and damages for pain and suffering). While this award was later determined to be nonapplicable after the jury learned that the claim had been struck by the district court, we remind the district court that it cannot accept interlineations on general verdict forms.


Because neither this court nor the district court has any way of knowing what amount the jury attributed to each claim or how exactly it arrived at these verdicts on damages, we remand the matter to the district court to hold a new trial on the issue of damages, with each side presenting their damages claims.³

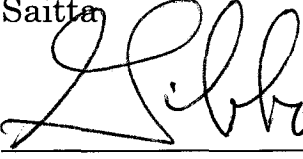
³In light of the decision rendered in this matter, we decline to address the parties’ other arguments on appeal and cross-appeal.

In light of the foregoing, we

ORDER the judgment of the district court REVERSED as to damages and attorney fees and REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
Israel Kunin, Settlement Judge
Gordon & Silver, Ltd.
Jimmerson Hansen, P.C.
Eighth District Court Clerk

⁴We further decline to award attorney fees and costs on appeal.