

IN THE SUPREME COURT OF THE STATE OF NEVADA

GIL AMARAL AND KIM HOUSER-  
AMARAL,  
Appellants,  
vs.  
PAUL SHULL AND LORENE SHULL  
A/K/A LORENE THARP,  
Respondents.

No. 53161

**FILED**

**MAR 21 2011**

TRACEE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a contract and fraud action. Eighth Judicial District Court, Clark County; Sally L. Loehrer and Stefany Miley, Judges.

The parties entered into a contract, under which appellants agreed to purchase from respondents a motor home for \$229,000. The agreement required appellants to assume respondents' \$272,126.36 secured debt on the motor home by making 36 monthly payments to a finance company, and it required respondents to deposit the \$43,397.36 difference in the sale price and the amount owed into a bank account, to be used for the single purpose of paying the balance due on the motor home at the end of the payment period. As a "sign of good faith," appellants provided respondents with a \$100,000 "Certification of Lien" against appellants' real property to be used in the event of default.

After appellants failed to make payments, respondents filed a complaint for breach of contract and fraud, seeking claim and delivery of the motor home, compensatory damages, enforcement of the lien, release of the \$43,397.36 bank account, punitive damages, and attorney fees and costs. Following a hearing, the district court entered an order directing

appellants to return the motor home and release to respondents the \$43,397.36.<sup>1</sup> Appellants returned the motor home on March 21, 2008.

At the subsequent bench trial, respondents testified that after the motor home was returned to them, they were unable to continue making payments and it was repossessed. They asked for compensatory damages in the amount of \$18,315 for nine payments that they made from August 2007, when appellants defaulted, until the motor home was repossessed in April 2008, \$423.39 for having the generator reinstalled, and \$134,000 for the deficiency following repossession and the motor home's sale at auction. Appellants' counsel<sup>2</sup> argued that the damages should be limited to at most \$18,315 because respondents elected their remedy of claim and delivery of the motor home and then allowed the motor home to be repossessed. The district court entered judgment in favor of respondents, for the amount of damages requested. Subsequently, the district court awarded respondents \$40,000 in punitive damages.

Having reviewed the record and considered the parties' arguments, we conclude that substantial evidence supports the district court's determinations. See NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004). Although appellants argue that respondents elected claim and delivery of the motor home and therefore were precluded from recovering damages for breach of contract and fraud, respondents were not required to elect a remedy before trial, and the agreement allowed respondents to demand immediate correction of all

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<sup>1</sup>As set forth in the agreement, respondents deposited the money into a bank account, which required both parties' signatures to access, and appellants were responsible for safeguarding the certificate of deposit. Appellants did not release the bank account and judgment was entered against them for \$43,397.36. That judgment is not at issue in this appeal.

<sup>2</sup>Appellants did not appear at trial and therefore did not testify.

prior deficiencies and to call the entire note due if the deficiencies remained uncorrected. J.A. Jones Constr. v. Lehrer McGovern Bovis, 120 Nev. 277, 289, 89 P.3d 1009, 1017 (2004) (addressing election of remedies). The testimony and evidence supports the court's findings that appellants failed to make the required payments for nine months, appellants breached the agreement by converting the bank account for their own use, appellants defaulted on the payments and failed to correct the deficiency, and a deficiency balance remained after the motor home was sold in a commercially reasonable manner.<sup>3</sup> Based on those findings, the district court properly concluded that respondents acted in accordance with the agreement by calling the entire note due, and that appellants were responsible for the deficiency and for reimbursing respondents for the payments they made after appellants defaulted, and for the generator installation costs.

We also conclude that the punitive damages award was supported by clear and convincing evidence.<sup>4</sup> See NRS 42.001; NRS

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<sup>3</sup>With regard to the deficiency balance, the district court properly relied on admitted documentary evidence showing the balance owing on the motor home after its sale. Appellants did not provide a copy of the exhibit in their appendix. See Jaramillo v. Blackstone, 101 Nev. 316, 318, 704 P.2d 1084, 1086 (1985) (“[W]hen evidence upon which the lower court’s judgment rests is not included in the record on appeal, it is presumed that the record supports the district court’s findings.”). Appellants also assert that the district court impermissibly considered hearsay testimony about the deficiency, but respondents provided a foundation for the document to be admitted and testified that it showed the amount of the deficiency.

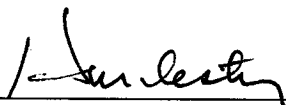
<sup>4</sup>We reject appellants’ arguments that the district court abused its discretion by allowing witness testimony regarding the recording issue and by admitting the lien certification into evidence, as they were directly relevant to respondents’ fraud and breach of contract claims. See NRS 48.015 (defining relevant evidence); NRS 48.035 (providing the test for relevant evidence admissibility); Prabhu v. Levine, 112 Nev. 1538, 1548,

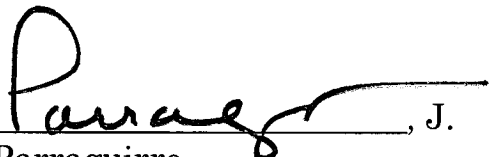
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42.005; Phillips v. Lynch, 101 Nev. 311, 312, 704 P.2d 1083, 1084 (1985) (upholding punitive damages in an action brought on dual theories of contract breach and fraud, reasoning that “[s]uch an action is not one merely upon an obligation arising from contract”), abrogated on other grounds by Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987). The record evidence, which appellants did not refute, adequately supports the court’s findings that appellants acted fraudulently and oppressively by converting the bank account for their own use and that appellants, in securing the purchase of the motor home, provided respondents with a lien certificate that had a forged notary signature and false notary and recorder stamps. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge  
Hon. Stefany Miley, District Judge  
Carolyn Worrell, Settlement Judge  
Kurth Law Office  
Edward G. Marshall  
Eighth District Court Clerk

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930 P.2d 103, 110 (1996) (noting that the district court has broad discretion to make evidence determinations). We also perceive no abuse of discretion in the district court’s decision to permit the notary public’s testimony regarding her stamp and signature. The witness’s name appeared on an exhibit attached to respondents’ complaint, on an initial disclosures list, and on the pretrial memorandum.