

SUPREME COURT OF NEVADA

Albios v. Horizon Communities, Inc.

132 P.3d 1022 (Nev. 2006) · No. No. 41589 · Decided April 27, 2006

SUMMARY

The Nevada Supreme Court addresses the interaction between Nevada’s construction-defect attorney-fee statute, offers-of-judgment rules, and prejudgment interest provisions. It holds that successive offers of judgment extinguish prior offers, that Horizon’s final offer was controlling, and that the Albioses’ recovery exceeded that offer when prejudgment interest was included. The court affirms in part, reverses in part, and remands for recalculation of attorney fees and prejudgment interest.

CASE DETAILS

|                       |                                                                                                                                                                                                                                              |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Nevada                                                                                                                                                                                                                      |
| WRITING FOR THE COURT | Rose, C.J.; Becker, J.; Maupin, J.; Douglas, J.; Hardesty, J.; Parraguirre, J.                                                                                                                                                               |
| JURISDICTION          | Nevada                                                                                                                                                                                                                                       |
| DECIDED               | April 27, 2006                                                                                                                                                                                                                               |
| DOCKET                | No. 41589                                                                                                                                                                                                                                    |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                        |
| PROCEDURAL POSTURE    | The homeowners appealed, and the construction developer cross-appealed, from a district court judgment awarding the homeowners costs and partial attorney fees after a jury verdict in their favor.                                          |
| STANDARD OF REVIEW    | Attorney-fee decisions are reviewed for abuse of discretion; statutory interpretation is reviewed de novo; challenges to prejudgment-interest awards are reviewed for error; and the allowance of costs is reviewed for abuse of discretion. |
| PRECEDENTIAL VALUE    | Published, precedential Nevada Supreme Court opinion decided en banc.                                                                                                                                                                        |
| PARTIES               | Dionicio Albios, Kathryn Albios v. Horizon Communities, Inc.                                                                                                                                                                                 |

TOPICS

- construction defects
- offer of judgment
- attorney fees
- prejudgment interest
- construction law

## PRACTICE AREAS

construction law

civil procedure

appellate procedure

remedies

## QUESTIONS PRESENTED

1. Whether NRS 40.655 precludes application of the attorney-fee and cost penalties in NRCP 68 and NRS 17.115.
2. Whether Horizon's unapportioned offers of judgment to the two homeowner plaintiffs were valid under NRCP 68 and NRS 17.115.
3. Whether a successive offer of judgment extinguishes prior offers and controls the comparison with the trial verdict.
4. Whether the Albioses' recovery exceeded Horizon's final offer when pre-offer prejudgment interest was included.
5. Whether the district court abused its discretion by awarding only \$50,000 in attorney fees without applying the Brunzell factors.
6. Whether prejudgment interest could be awarded on the entire verdict, costs, and attorney fees, and whether the correct statutory interest rate was used.
7. Whether the district court properly denied some claimed costs and post-trial attorney fees and costs.

## HOLDINGS

1. NRS 40.655 does not preclude the application of the penalty provisions of NRCP 68(f) and NRS 17.115(4); a party foreclosed from recovering costs and attorney fees under those penalty provisions is likewise foreclosed from recovering them under NRS 40.655.
2. An unapportioned offer of judgment to multiple plaintiffs is valid when the plaintiffs assert a single common theory of liability and the same person is authorized to decide whether to settle all plaintiffs' claims. In a married couple's joint construction-defect action concerning jointly owned property, each spouse is presumed as a matter of law to have authority to settle the claims for both spouses.
3. The most recent offer of judgment extinguishes all prior offers and controls the post-trial comparison under NRCP 68 and NRS 17.115.
4. The Albioses recovered more than Horizon's final \$100,000 offer because \$12,983.46 in pre-offer prejudgment interest was added to the \$95,000 judgment. The Albioses therefore remained entitled to attorney fees and costs.
5. The district court abused its discretion by awarding only \$50,000 in attorney fees without analyzing the Brunzell factors: the advocate's professional qualities, the nature of the litigation, the work performed, and the result.
6. The district court did not err by awarding prejudgment interest on the entire verdict because the claimed move-out expenses were past abatement damages, even though they related to repairs that might occur in the future.

7. Prejudgment interest is recoverable on costs and on attorney fees awarded as an element of damages. Interest on costs runs from when the costs were incurred if proven, or otherwise from the judgment date; interest on attorney fees runs from service of the summons and complaint.
8. The district court properly applied NRS 17.130 rather than NRS 99.040 because the general verdict, reduced for comparative negligence, was unrelated to amounts due under a contract. However, the court used the wrong rate and must apply the single rate in effect on the date of judgment.
9. The district court did not abuse its discretion by disallowing certain claimed costs or by denying the Albioses' request for post-trial attorney fees and costs.

#### KEY QUOTATIONS

*“Thus, we adopt the reasoning of our sister state California and hold that the most recent offer of judgment extinguishes all prior offers of judgment and is controlling for purposes of NRCP 68 and NRS 17.115.” (132 P.3d 1032)*

*“Accordingly, we hold that when attorney fees are awarded as an element of damages, the prevailing party is entitled to recover prejudgment interest on the attorney fees.” (132 P.3d 1036)*

#### FACTUAL BACKGROUND

The Albioses sued Horizon over constructional defects in their single-family home. Horizon made three successive offers of judgment, the last for \$100,000 exclusive of attorney fees and costs, but the Albioses rejected each offer. A jury awarded the Albioses \$100,000, reduced by 5 percent comparative negligence to a \$95,000 judgment. When pre-offer prejudgment interest was added, the recovery exceeded Horizon's final offer.

#### PROCEDURAL HISTORY

The Albioses sued Horizon for constructional defects in their residence. After a jury awarded \$100,000, reduced to \$95,000 for comparative negligence, the district court awarded the Albioses \$50,000 in attorney fees, \$179,985 in costs, and prejudgment interest, while denying interest on attorney fees and costs. Both parties appealed. The Nevada Supreme Court affirmed the Albioses' entitlement to attorney fees and costs, reversed the fee and prejudgment-interest calculations, and remanded for recalculation.

#### DISPOSITION

reversed\_and\_remanded

#### REMAND INSTRUCTIONS

Recalculate the attorney-fee award using the Brunzell factors and recalculate prejudgment interest using the rate in effect on the date of judgment, including interest on allowable costs and attorney fees. The Albioses must prove when costs were incurred to obtain interest from those dates; otherwise, interest on costs runs from the judgment date.

#### CASES CITED

- Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 860 P.2d 720 (1993)
- State, Department of Human Resources v. Fowler, 109 Nev. 782, 858 P.2d 375 (1993)
- Banks v. Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004)
- Paramount Insurance v. Rayson & Smitley, 86 Nev. 644, 472 P.2d 530 (1970)
- Whitlock v. Salmon, 104 Nev. 24, 752 P.2d 210 (1988)
- Goldberg v. District Court, 93 Nev. 614, 572 P.2d 521 (1977)
- Dillard Department Stores v. Beckwith, 115 Nev. 372, 989 P.2d 882 (1999)
- Lentz v. I.D.S. Financial Services, 111 Nev. 306, 890 P.2d 783 (1995)
- General Motors v. Jackson, 111 Nev. 1026, 900 P.2d 345 (1995)
- Bowyer v. Taack, 107 Nev. 625, 817 P.2d 1176 (1991)
- Beazer Homes Nevada, Inc. v. District Court, 120 Nev. 575, 97 P.3d 1132 (2004)
- Sheriff v. Smith, 91 Nev. 729, 542 P.2d 440 (1975)
- Nevada Power v. Metropolitan Development Co., 104 Nev. 684, 765 P.2d 1162 (1988)
- Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983)
- Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 890 P.2d 785 (1995)
- RTTC Communications v. Saratoga Flier, 121 Nev. \_\_\_, 110 P.3d 24 (2005)
- Fick v. Fick, 109 Nev. 458, 851 P.2d 445 (1993)
- Forrest v. Forrest, 99 Nev. 602, 668 P.2d 275 (1983)
- Pombo v. Nevada Apartment Association, 113 Nev. 559, 938 P.2d 725 (1997)
- Nava v. District Court, 118 Nev. 396, 46 P.3d 60 (2002)
- Distefano v. Hall, 263 Cal. App. 2d 380, 69 Cal. Rptr. 691 (1968)
- Wilson v. Wal-Mart Stores, Inc., 72 Cal. App. 4th 382, 85 Cal. Rptr. 2d 4 (Ct. App. 1999)
- T.M. Cobb Co. v. Superior Court, 36 Cal. 3d 273, 682 P.2d 338 (1984)
- Kaufman v. Smith, 693 So. 2d 133 (Fla. Dist. Ct. App. 1997)
- Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530 (Nev. 2005)
- Sengel v. IGT, 116 Nev. 565, 2 P.3d 258 (2000)
- Sandy Valley Associates v. Sky Ranch Estates, 117 Nev. 948, 35 P.3d 964 (2001)
- University of Nevada v. Tarkanian, 110 Nev. 581, 879 P.2d 1180 (1994)
- Hazelwood v. Harrah's, 109 Nev. 1005, 862 P.2d 1189 (1993)
- Vinci v. Las Vegas Sands, 115 Nev. 243, 984 P.2d 750 (1999)
- Stickler v. Quilici, 98 Nev. 595, 655 P.2d 527 (1982)
- Farmers Home Mutual Insurance v. Fiscus, 102 Nev. 371, 725 P.2d 234 (1986)
- BHY Trucking v. Hicks, 102 Nev. 331, 720 P.2d 1229 (1986)
- Gibellini v. Klindt, 110 Nev. 1201, 885 P.2d 540 (1994)
- Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 971 P.2d 383 (1998)
- McNair v. Rivera, 110 Nev. 463, 874 P.2d 1240 (1994)
- Bradley v. Romeo, 102 Nev. 103, 716 P.2d 227 (1986)

- Western Industries, Inc. v. General Insurance Co., 91 Nev. 222, 533 P.2d 473 (1975)

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