

*Countrywide Home Loans v. Thitchener*, 124 Nev. Adv. Op. No. 64 (Sept. 11, 2008).<sup>1</sup>

## CIVIL- PUNITIVE DAMAGES

### Summary

Appeal and cross-appeal from a district court order on compensatory and punitive damage issues concerning a breach of contract and tort case.

### Disposition/Outcome

The Supreme Court affirmed the district court's judgment of punitive damages and reversed the judgment concerning breach of contract and negligence. In addition, the Court affirmed the award of damages for trespass to real property, but reversed on the trebling of damages for conversion of personal property.

### Factual and Procedural History

This case stems from an incident when Countrywide Home Loans ("Countrywide") mistakenly foreclosed on the wrong condominium unit, and emptied the unit of all personal property owned by the Thitcheners.

The Thitcheners purchased a condominium in Las Vegas and financed the purchase through Countrywide. While maintaining the Las Vegas condominium as a personal residence, the Thitcheners lived also lived in Arizona for an extended period of time.

The Thitcheners missed three mortgage payments to Countrywide during their stay in Arizona.<sup>2</sup> When Countrywide instituted foreclosure proceedings the Thitcheners

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<sup>1</sup> By Shannon Rowe

<sup>2</sup> Although they missed the mortgage payments they continued to pay utility bills, property taxes, and the HOA dues.

found a new loan to avoid foreclosure. While the foreclosure proceedings were going forward, however, Countrywide requested that a contractor inspect the unit.

Countrywide initiated foreclosure proceedings on James Rangel a few days after the Thitcheners cured their default. Rangel's condo is located in the same complex as the Thitcheners. An inspection request sheet without a unit number on it was given to an inspector. Because no unit number was specified, the inspector assumed he was supposed to investigate the Thitcheners' unit, and wrote their unit number on the sheet. Countrywide then associated the Thitcheners' unit number with Rangel's foreclosure proceedings in their computer system, and continued from that point forward with the wrong information.

Countrywide hired James Standley, a real estate agent, to prepare the unit for sale. When Standley inspected the unit he determined it was abandoned, but afterwards called Countrywide to verify the unit number, which they did. All of the personal property inside the unit was removed and the utilities were transferred into Standley's name. Standley again asked Countrywide to verify the unit number when he discovered that the HOA dues were current. Countrywide's foreclosure department assured him the unit number was correct.

The Thitcheners discovered the problem in April of 2003 when they received utility bills in Standley's name. Around the same time Countrywide also discovered the error and stopped the sale of the unit. Countrywide's legal department did not respond to the Thitcheners' phone calls, and when the Thitcheners returned to Las Vegas in August 2003 they found their condo empty.

The district court granted judgment as a matter of law against the Thitcheners' claims of negligent infliction of emotional distress (NIED) and negligence per se. The Thitcheners also claim breach of contract, trespass, conversion, negligence and breach of covenant of good faith and fair dealing. The jury awarded a total of \$922,690 in general and special damages,<sup>3</sup> and awarded \$2,500,000 in punitive damages. The district court trebled the amount of compensatory damages awarded for trespass and conversion.

The district court capped damages at three times the untrebled amount of the trespass and conversion damages.<sup>4</sup> The final judgment for the Thitcheners totaled \$3,077,057.50. Countrywide appealed on the grounds that the awards were excessive and the Thitcheners cross-appealed on the grounds that remittitur was granted in error and the dismissal of their NIED and negligence per se claims.

## Discussion

### *Compensatory Damages*

The district court trebled the trespass and conversion damages after the jury verdict, increasing the award for compensatory damages to \$1.57 million. Countrywide brings up three points; 1) duplicativeness, 2) conversion damages should not have been trebled, and 3) the award for list personal property was excessive.

### *Duplicative Awards*

Countrywide argued that the breach of contract and negligence awards duplicate the awards for conversion and trespass. The Court states that the jury did not properly follow instructions forbidding the award of duplicative damages. The only contract in this case that could lead to an award for breach of contract was the loan agreement, which

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<sup>3</sup> This included \$322,690 for trespass and conversion.

<sup>4</sup> This reduced the punitive damage award to \$968,070.

is unrelated to the claims of property damages. Therefore any contract claims were inappropriate because the case did not revolve around the contract. Similarly, since there were no damages besides those to the personal property of the Thitcheners, negligence claims were inappropriate. The Court ruled that the jury could only award damages for trespass and conversion claims.

#### *Trebled Damages to Personal Property*

Countrywide argued that damages should not be trebled for personal property under NRS 40.170.<sup>5</sup> The Court agreed and reversed the decision of the district court. The Court stated that the section heading the statute is under uses the term “Real Property,” and the purpose behind the statute was to ease the difficulty of determining damages for trespass to real property. The Court then reduced the Thitcheners’ personal property damages to \$321,690, and only allowed trebling of the \$1,000 award for actual damage to real property.

#### *Special Damages Awards*

Countrywide also argued that the damages awarded for nonmarketable property was excessive because the district court did not use the jury instructions on special value they offered. The Court disagreed, stating that the district court has wide discretion concerning what jury instructions to use, and its decision will only be overturned for abuse of discretion, which was not the case here.<sup>6</sup> Since the jury instructions were not made in error, the awards for general and special damages were affirmed.

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<sup>6</sup> The Court did state that the District Court’s jury instructions were incomplete in the sense that it failed to instruct the jury not to attach a monetary amount to sentimental value, but the instruction did not misstate the law.

### *Punitive Damages*

Countrywide challenged the \$968,070 award in punitive damages (after remittitur), arguing that the Thitcheners failed to demonstrate the presence of implied malice or oppression as required to justify an award of punitive damages under NRS 42.005(1). Specifically, Countrywide states there was no evidence of consciousness to do harm. The Supreme Court agreed with the District Court that Countrywide's failure to investigate the warning signs that the foreclosure proceeding was on the wrong unit constituted implied malice.

The Court used plain language to deduce that the statute only required a state of mind more culpable than recklessness or gross negligence to infer implied malice. Also under the new statute, the court retreated from the use of the term, "unconscionable irresponsibility," which was previously used to describe the limit at which culpable conduct was immunized to civil punishment.

The Court also disagreed with Countrywide that there was not enough evidence about punitive damages for it to go to the jury. The Thitcheners presented evidence about Countrywide ignoring the signs that they were foreclosing on the wrong house, Countrywide failing to review the title report that showed the owners to be the Thitcheners, and that the real estate agent asked Countrywide twice if they were sure the unit number was correct, which the Court deemed an ample amount of evidence for the question to go to the jury. The Court also rejected Countrywide's argument that the damages were excessive, stating that the award was less than three times the trespass and conversion damages, which is the statutory cap.

The Court agreed with Countrywide that the District Court erred by instructing the jury under Smith's Food & Drug Centers v. Bellegarde<sup>7</sup> instead of NRS 42.007 for issues of vicarious liability. The basis of the argument was that the case law was less stringent than the statutory standard. The Court overruled Bellegarde and stated that the district court abused its discretion by allowing a jury instruction following the complicity set out in Bellegarde rather than the statutory standard. The Court still ruled, however, that the error was harmless because the jury could have imputed liability from the asset manager who assured Standley of the correctness of the unit number to Countrywide under the statutory standard.

#### The Thitchener's Cross-Appeal

The Court upheld the district court's judgment as a matter of law on the negligent infliction of emotional distress because it is not a proper claim for damage to real property, similarly the judgment for the negligence per se claim was upheld because the Thitcheners presented no evidence that the statutes at issue allowed for a negligence per se claim. The Thitcheners also wanted the original \$2.5 million in special damages reinstated, but the Court rejected this because it exceeded the statutory cap.

#### Conclusion

Since compensatory damages were not allowed on claims aside from trespass and conversion, the awards for breach of contract and negligence were reversed. In addition, the personal property damages were improperly trebled and therefore those damages were also reversed. The matter was remanded with instructions for the district court to amend the judgment to reduce the Thitcheners' personal property damages.

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<sup>7</sup> 122 Nev. 556, 582-83, (2006).