IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACEY BRYAN, Appellant, vs. MICHELLE M. TOMLINSON AND JAMES M. KIRBY, CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF MARK E. TOMLINSON; AND THE ESTATE OF MARK E. TOMLINSON, Respondents.	No. 45601
TRACEY BRYAN, Appellant, vs. MICHELLE M. TOMLINSON AND JAMES M. KIRBY, CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF MARK E. TOMLINSON; AND THE ESTATE OF MARK E. TOMLINSON, Respondents.	No. 46393

FILED

NOV 14 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a district court order dismissing appellant's complaint with prejudice and an order awarding attorney fees. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

In February of 2004, appellant Tracey Bryan ("Tracey") filed a complaint against respondent the estate of Mark Tomlinson ("Mark") and his personal representatives, respondents Michelle Tomlinson and James Kirby, alleging that before his death, she and Mark had been romantically involved, and entered into an agreement to combine their assets and incur liabilities as if they were married. Based on this marriage-like relationship, Tracey alleged multiple claims for breach of implied contract,

monies due and owing, and unjust enrichment. She sought monetary damages and attorney fees, including return of the entire $15,000 Red Rock Country Club membership deposit that she claimed she purchased jointly with Mark.

In January of 2005, respondents identified Karen Cardinale ("Karen"), another woman with whom Mark had been romantically involved, as a potential trial witness. On March 22, 2005, the anniversary of Mark's death, Tracey left a series of five profanity-laden messages on Karen's voicemail, blaming Karen for Mark's death, and threatening that if Karen testified in court, she would "take [her] down," and do everything in her power to ensure that Karen lost custody of her minor daughter. As a result of these messages, the district court granted respondents' motion to strike Tracey's complaint with prejudice, and ordered all proceeds from the Red Rock Country Club membership currently in escrow distributed to Mark's estate. Tracey appeals from this dismissal order in Docket No. 45601.

After dismissal of Tracey's claims, respondents filed a motion for attorney fees and costs pursuant to NRCP 68 and NRS 18.010(2)(b) in July of 2005. At a hearing on September 27, 2005, the court indicated that it would award costs and fees pursuant to both provisions. However, the court clarified in its subsequent written order that fees were awarded under NRS 18.010(2)(b) only. Tracey appeals from this decision in Docket No. 46393.

When sanctions are within the power of the district court, this court will not reverse the imposed sanction absent a showing of abuse of

discretion.[1] However, as established in Young v. Johnny Ribeiro Building, when a district court imposes sanctions in the form of default or dismissal with prejudice, this court performs a slightly heightened review, requiring the sanction to be supported by "an express, careful and preferably written explanation of the [district] court's analysis of the pertinent factors."[2] Under Young, these factors may include, but are not limited to the following: the degree of willfulness of the offending party, the severity of the sanction relative to the severity of the misconduct, the feasibility and fairness of lesser sanctions, whether the non-offending party would be prejudiced by lesser sanctions, whether any evidence was irretrievably lost by the conduct, whether sanctions unfairly penalize a party for an attorney's misconduct, and the need to deter future litigation abuses.[3]

Young primarily addressed the power of the district court to impose dismissal as a sanction for discovery violations, which is explicitly authorized by NRCP 37(b). Nonetheless, this court in Young further recognized that beyond the authorization of NRCP 37(b), courts have "'inherent equitable powers'" to dismiss actions as a result of "'abusive litigation practices.'"[4] The Young court therefore warned that "[l]itigants

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[1]Clark Cty. Sch. Dist. v. Richardson Constr., 123 Nev. ___, ___, ___ P.3d. ___, ___ (Adv. Op. No. 39, October 4, 2007); Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990); see also Durango Fire Protection v. Troncoso, 120 Nev. 658, 662, 98 P.3d 691, 693 (2004).

[2]Young, 106 Nev. at 93, 787 P.2d at 780.

[3]Id.

[4]Id. at 92, 787 P.2d at 779 (quoting Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987)).

and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute."[5]

On appeal, Tracey asserts that the district court abused its discretion in dismissing her complaint, because it did not properly analyze all factors established in Young, and instead based its decision to dismiss primarily on the severity of Tracey's conduct and the need to deter future litigation abuses. We disagree. Because the Young court only listed factors that a district court "may" consider in determining whether dismissal is appropriate, we conclude that the district court was within its discretion in basing its decision primarily on the severity of Tracey's conduct and the need to deter future litigation abuses. Further, while the district court did not provide extensive analysis, it listed all of the Young factors in its order of dismissal, suggesting that the court considered these

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[5]Id.; see also GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995) (noting that dismissal may be imposed as a sanction when the litigation process has been "halted" by the actions of a party). Courts from varying jurisdictions have also held that a court has inherent power to dismiss a complaint as a result of other abusive litigation practices outside the realm of discovery violations. See Young v. Office of U.S. Senate Sergeant at Arms, 217 F.R.D. 61, 79 (D. D.C. 2003) (holding that plaintiffs actions in tampering with several witnesses "warrants the most serious sanction of dismissal"); Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co., No. 00 C 5658, 2002 WL 1433717, at *4 (N.D. Ill. July 2, 2002) (noting that federal courts have inherent authority to sanction a litigant for general bad faith conduct); Kugle v. DaimlerChrysler Corp., 88 S.W.3d 355, 364-67 (Tex. App. 2002) (upholding dismissal as a sanction for tampering with witnesses and evidence).

factors, even if it did not discuss them.[6] Accordingly, in light of the egregious nature of Tracey's behavior, and the strong public policy interest in preventing abusive conduct towards witnesses, we conclude that the district court did not err in dismissing Tracey's complaint in Docket #45601.[7]

Tracey further argues that the district court abused its discretion in awarding attorney fees to the respondents. We agree. Absent a manifest abuse of discretion, this court will not overturn the

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[6]In addition, we note that examination of other Young factors further indicates that dismissal was appropriate. While dismissal is a severe sanction, Tracey's conduct was likewise severe. Despite Tracey's contention that she was under the influence of alcohol and prescription drugs, we conclude that conduct was also "willful" and a result of her own volition, and not a result of her attorney's influence or misconduct. Testimony from respondents' attorney further indicated that the incident with Tracey frightened Karen, and may have caused her to become reluctant to testify. While Karen's testimony was not dispositive on the issue of whether Tracey and Mark had an agreement to acquire property as a married couple, Karen's testimony that she and Mark planned to combine their own assets and move in together is relevant to show that Mark was not acting as though he was bound by any agreement with Tracey.

[7]We further conclude that the district court did not err when it ordered that the entirety of the proceeds in escrow from the Red Rock Country Club membership be paid to respondents. While Tracey argues that she already owned half of the membership at the time she filed her complaint, indicating that the entire value of the membership was never at issue, we note that Tracey's complaint sought the full $15,000 value of the membership. Accordingly, we conclude that Tracey's complaint placed the full value of the membership at issue, and discern no error in the district court's disposition of those funds.

district court's award of attorney fees on appeal.[8] NRS 18.010(2)(b) provides that a court may award attorney fees to a prevailing party if it determines that the claim "was brought or maintained without reasonable ground or to harass the prevailing party." For the purposes of an award of attorney fees pursuant to NRS 18.010(2)(b), "[a] claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence at trial'."[9] "[W]hether the claim 'was brought' without reasonable grounds" is determined at the time the claim is initiated.[10] In Western States Construction v. Michoff, this court recognized that unmarried couples who live together have the same right to contract with one another regarding their property as married couples.[11] This court further indicated that no express writing is required to enforce such an agreement.[12]

Here, Tracey and Mark lived together for nine years, combined at least some of their assets into a joint bank account, and appeared to purchase a membership to Red Rock Country Club as "husband and wife."

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[8]See Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994); County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

[9]Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993) (quoting Western Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984)).

[10]Barozzi v. Benna, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996) (quoting Duff v. Foster, 110 Nev. 1306, 1308, 885 P.2d 589, 591 (1994)).

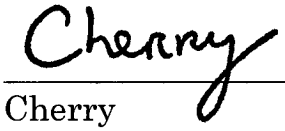
[11]108 Nev. 931, 937, 840 P.2d 1220, 1224 (1992).

[12]Id. at 937-38, 840 P.2d at 1224.

We conclude that this evidence is sufficient to support the claims in Tracey's complaint, indicating that her claim was not groundless at the time of filing or intended to harass respondents. Accordingly, we conclude that the district court abused its discretion in awarding attorney fees pursuant to NRS 18.010(2)(b) in Docket No. 46393. We note, however, that because respondents made a settlement offer prior to dismissal, fees may be appropriate under NRCP 68. Therefore, we remand for determination of whether respondents are entitled to fees pursuant to NRCP 68. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Gibbons



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Kenneth C. Cory, District Judge
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