

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN L. WISDOM,
Appellant,

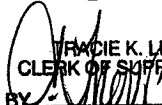
vs.

JEFFREY A. DICKERSON, AN INDIVIDUAL;
DAVID R. GRUNDY, AN INDIVIDUAL;
DAVID R. GRUNDY, DIRECTOR OF
ATTORNEYS LIABILITY PROTECTION
SOCIETY AND ALPS, INC.; LEMONS
GRUNDY & EISENBERG, A PROFESSIONAL
CORPORATION; ATTORNEYS LIABILITY
PROTECTION SOCIETY, A MUTUAL RISK
RETENTION GROUP; ALPS, INC., A
MONTANA CORPORATION; ERNEST
ADLER, AN INDIVIDUAL; KILPATRICK,
JOHNSTON & ADLER, A GENERAL
PARTNERSHIP; AND JOHN ANTHONY
FETTO, AN INDIVIDUAL,
Respondents.

No. 47430

FILED

FEB 11 2008

FRACIE K. LANDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order striking appellant's complaint and dismissing with prejudice his malpractice action as a sanction for discovery violations and a post-judgment order that awarded attorney fees and costs. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Allen L. Wisdom instituted the underlying malpractice action against respondents based on conspiracy, fraud, contractual interference, civil rights violations, conversion, breach of contract, and violations of Nevada RICO statutes. The district court granted respondents Ernest Adler and the Kilpatrick, Johnston & Adler firm's motion for summary judgment, and, with respect to the remaining

respondents, ultimately dismissed Wisdom's complaint with prejudice as a sanction for his discovery violations. Thereafter, the district court awarded Adler and the Kilpatrick, Johnston & Adler firm (the Kilpatrick firm) attorney fees and costs. This appeal followed.

Summary judgment

This court reviews an order granting summary judgment de novo.¹ Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law."²

Having reviewed the record and the parties' briefs in light of that standard, we cannot conclude that the district court erred when it granted summary judgment to Adler and the Kilpatrick firm on Wisdom's claims for conspiracy, fraud, contractual interference, and violations of Nevada RICO statutes.

Discovery violations

With respect to the district court's order dismissing Wisdom's complaint with prejudice as a sanction for discovery violations, we note that a district court's exercise of its power to impose sanctions for discovery violations will not be disturbed, absent an abuse of discretion.³

¹Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

²Id. at 731, 121 P.3d at 1031.

³Kelly Broadcasting v. Sovereign Broadcast, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980).

Nevertheless, when the sanction is one of dismissal with prejudice we apply a heightened standard of review.⁴ Dismissal as a sanction may be warranted when the litigation process has been halted by a party's actions.⁵

Having reviewed the record on appeal, Wisdom's appendix, and the parties' briefs,⁶ we conclude that the district court did not abuse its discretion. Specifically, substantial record evidence demonstrates that Wisdom failed to attend at least four court-ordered dates for which he had reasonable notice⁷ and he never complied with valid discovery orders. In

⁴Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Any dismissal of a case with prejudice that is ordered as a discovery sanction must be supported "by an express, careful, and preferably written explanation of the court's analysis of the pertinent factors." Id. at 93, 787 P.2d at 780. Such factors include, but are not limited to, "the degree of willfulness of the offending party, . . . the severity of the sanction of dismissal relative to the severity of the discovery abuse," the policy on adjudicating cases on their merits, and the need to deter the parties and future litigants from similar abuses. Id.

⁵GNLV Corp. v. Service Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

⁶Respondent John Fetto failed to submit an answering brief.

⁷See generally Brown v. Brown, 96 Nev. 713, 715-16, 615 P.2d 962, 964 (1980) (noting that due process requires that a party receive notice of the proceeding and an opportunity to be heard); Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998) (providing that the notice required under due process must be "reasonably calculated" to inform interested parties "of the pendency of the action and afford them an opportunity to present their objections.") (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1949)); Browning, 114 Nev. at 217, 954 P.2d at 743 (stating that the reasonableness of the notice required to be given depends on the particular circumstances).

light of that conduct, which effectively halted the underlying litigation, we conclude that the district court did not abuse its discretion in striking Wisdom's complaint and dismissing his case with prejudice.⁸

Award of attorney fees and costs

Wisdom alleges that the district court improperly granted Adler and the Kilpatrick firm's motion for attorney fees and costs in violation of its own May 11, 2006, order that stayed the district court's proceedings in this case because the court did not grant leave to file the motion prior to granting the motion itself.

An award of attorney fees and costs is within the district court's discretion and we generally review a district court's decision regarding attorney fees for an abuse of discretion.⁹ Having reviewed the record and the parties' briefs, we conclude that the district court did not abuse its discretion. Specifically, DCR 13(3) provides that the failure to timely file an opposition is deemed an admission that the motion is meritorious and consent to granting the relief requested. Additionally, WDCR 12(5) states that a decision is made based on the submission of the parties' motions, without oral argument, unless argument is ordered by the court.

⁸Young, 106 Nev. 88, 787 P.2d 777; see also Durango Fire Protection v. Troncoso, 120 Nev. 658, 662, 98 P.3d 691, 693 (2004) and Temora Trading Co. v. Perry, 98 Nev. 229, 645 P.2d 436 (1982) (affirming a default judgment entered against a defendant corporation when its officers failed to show up for depositions and the defendant corporation failed to adequately respond to interrogatories).

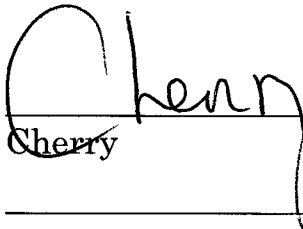
⁹Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722-23 (1993).


Here, Wisdom did nothing to protect his interests. Although there was a stay in place, Wisdom had only to prepare an opposition and request permission to file it in order to preserve his rights. Accordingly, based on Wisdom's inaction, which constitutes acquiescence, he waived his right to complain in this appeal,¹⁰ and we conclude that the district court's award was not an abuse of discretion.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

¹⁰See Johnson v. Johnson, 90 Nev. 270, 524 P.2d 544 (1974); Scapecchi v. Harold's Club, 78 Nev. 290, 297, 371 P.2d 815, 818-19 (1962).

¹¹Wisdom requests that we treat respondent John Fetto's failure to file an answering brief as a confession of error and reverse the district court's order dismissing his complaint as it relates to the claims against Fetto. This court has the discretion to treat the failure to file an answering brief as a confession of error. State of Rhode Island v. Prins, 96 Nev. 565, 613 P.2d 408 (1980). Nevertheless, in light of this order, the submission of briefs by the remaining respondents, which address the pertinent issues, and our preference for deciding cases on the merits,¹¹ we deny Wisdom's request. We admonish Fetto, however, for his failure to comply with this court's order directing him to file an answering brief, and we note that, in the future, similar disregard for this court's directives may result in the imposition of sanctions.

Having considered all of the issues Wisdom raised, we conclude that his other contentions lack merit and do not warrant reversal of the district court's judgment.

cc: Hon. Brent T. Adams, District Judge
Allen L. Wisdom
Burton Bartlett & Glogovac
John Anthony Fetto
Kilpatrick Johnston & Adler
Wait Law Firm
Washoe District Court Clerk