

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEBORAH POND,  
Appellant,  
vs.  
KAREN NELSON AND SANDRA  
NELSON,  
Respondents.

No. 49093

**FILED**

MAY 08 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a personal injury action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

In February 2004, respondents Karen Nelson and Sandra Nelson filed a personal injury complaint against appellant Deborah Pond, arising from a January 2004 motor vehicle accident. Pond filed an answer and counterclaim, alleging that the Nelsons had caused the accident, in which she had sustained injuries.

Although Pond provided unverified answers to interrogatories, the Nelsons were unable to take her deposition, due to Pond's serious medical conditions, despite trying to do so at least four times between June 2005 and July 2006. In September 2006, after the discovery deadline had passed, the Nelsons filed a motion for summary judgment on Pond's counterclaim and for NRC 37 sanctions for Pond's alleged non-cooperation during discovery, contending that Pond had failed to produce any medical records or proof to substantiate her counterclaim and noting her failures to appear for her deposition. Pond opposed the motion.

The district court denied summary judgment, allowing Pond until December 1, 2006, to provide the medical records and billings that she intended to rely upon at trial to support her counterclaim.

In January 2007, the Nelsons filed a motion to strike Pond's answer and counterclaim under NRCP 37(b), on the basis that Pond had not complied with the district court's order to produce the medical records substantiating her claims and had not appeared for her deposition. Pond opposed the motion, contending that her deposition was not taken earlier because of her numerous medical maladies and claiming that there was still ample time to depose her, since trial had been rescheduled to late February 2007.

After a hearing, the district court granted the Nelsons' motion, in part, striking Pond's counterclaim as a discovery sanction, because of Pond's multiple failures to appear for her deposition to testify as to liability and damages. The order also established Pond's liability for the subject accident, permitting her to contest only the Nelsons' damages at trial. Thereafter, the parties agreed to a settlement with respect to the Nelsons' damages, and the district court dismissed their complaint. Pond appeals, essentially arguing that her failure to attend her deposition neither was willful nor used to halt the adversary process, and that therefore, the sanctions were unjust.

NRCP 37(b)(2)(C) and (d) allow the district court to impose appropriate sanctions, including the striking of all or portions of pleadings, if a party fails to obey a discovery order or attend her own deposition. Generally, NRCP 37 sanctions are warranted only for willful

noncompliance or when a party's unresponsiveness has impeded the adversary process.<sup>1</sup> Discovery sanctions are reviewed for an abuse of discretion, and absent such abuse, we will not substitute our judgment for that of the district court as to whether sanctions were warranted, even if we would not have imposed such sanctions in the first instance.<sup>2</sup> When the sanction is dismissal with prejudice, we closely scrutinize the sanction under Young v. Johnny Ribeiro Building.<sup>3</sup>

Based on our review of the parties' briefs and appendices, in light of Young, we conclude that the district court did not abuse its discretion by striking Pond's counterclaim and establishing liability. In particular, these sanctions appear appropriately related to Pond's failure to make available the information sought, but not received, during discovery. Further, because of Pond's inability to appear for a deposition until after the discovery deadline and shortly before trial was scheduled, the Nelsons were left with little time to prepare for trial and unable to conduct any further discovery. Accordingly, Pond's failure to appear effectively impeded the adversary process and prejudiced the Nelsons, who were unable to cross-examine Pond pre-trial or to assess her demeanor and credibility. Thus, while Pond's failure to be available for her

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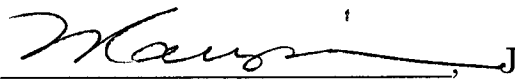
<sup>1</sup>Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 913 (1987).

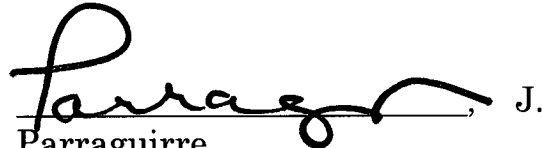
<sup>2</sup>Young v. Johnny Ribeiro Building, 106 Nev. 88, 92-93, 787 P.2d 777, 779-80 (1990) (explaining that the district court must consider the pertinent factors in dismissing a case as a sanction, including the relationship of the sanction to the discovery abuse, the relative prejudices to the parties, and the sanction's fairness under the circumstances).

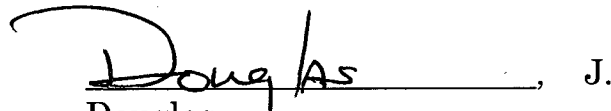
<sup>3</sup>Id.

deposition was apparently not willful, we cannot conclude that the sanctions were inappropriate, considering also that Pond had submitted no admissible evidence of her damages in support of her counterclaim.<sup>4</sup> Notably, Pond was not foreclosed from challenging the Nelsons' damages. Thus, as we cannot conclude that the district court abused its discretion in striking Pond's counterclaim, we

ORDER the district court's judgment AFFIRMED.

  
Maupin

  
Parraguirre

  
Douglas

cc: Hon. Kenneth C. Cory, Judge  
Janet Trost, Settlement Judge  
Kirk T. Kennedy, Las Vegas  
Prince & Keating, LLP, Las Vegas  
Eighth District Court Clerk

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<sup>4</sup>See Skeen v. Valley Bank of Nevada, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973) (affirming a judgment as a discovery sanction when "the adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights").