

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD FREEMON,  
Appellant,  
vs.  
ADAM FISCHER, D/B/A ADAM  
FISCHER CONSTRUCTION, A/K/A AF  
CONSTRUCTION,  
Respondent.

No. 50543

**FILED**

JAN 23 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a contract action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. Appellant specifically challenges the district court's orders denying his motion for a trial continuance and granting respondent's motion in limine to exclude all evidence of appellant's damages.

FACTS

Appellant Richard Freemon filed a district court complaint against respondent Adam Fischer, dba Adam Fischer Construction, aka AF Construction, seeking compensatory and punitive damages for Fischer's alleged failure to properly construct a home and for overcharging Freemon. Fischer filed an answer and counterclaim for breach of contract. An early case conference was held on June 20, 2006, and a joint case conference report was filed on June 30, 2006. The last day to file expert

witness disclosures was March 3, 2007, 90 days before the June 1, 2007, close of discovery.

Claiming that Freemon had not provided his damages expert's report as required by NRCP 16.1, 26, and 33, Fischer filed a June 4, 2007, motion in limine to exclude any evidence of damages at trial, as an appropriate sanction under NRCP 37, which Freemon opposed. The district court directed the parties to meet with the discovery commissioner regarding Fischer's motion in limine. On June 22, 2007, Freemon moved to continue the trial that was set for July 16, 2007, and to reopen discovery.

After a telephone conference with both parties, the discovery commissioner filed a June 22, 2007, recommendation to the district court, which concluded that although Freemon had not acted in bad faith, his failure to make timely disclosures under NRCP 16.1 and 26 were not substantially justified and the expert's late-disclosed calculation of damages significantly prejudiced Fischer, who had estimated considerably lower damages, was precluded from obtaining further discovery, and would be forced to sacrifice time that should have been available for trial preparation. While recognizing that the exclusion of all damages evidence would be an extreme sanction, the discovery commissioner concluded that Fischer should not suffer the significant prejudice resulting from Freemon's discovery violations, for which Fischer was entirely without fault. Citing NRCP 37(c)(1), the discovery commissioner thus recommended that, unless the court allowed the case to be continued, Fischer's motion in limine should be granted and Freemon should be precluded from presenting any evidence of damages.

On July 9, 2007, the district court found no good cause for a continuance and entered an order denying Freemon's motion to continue trial and reopen discovery. Thereafter, at a July 11, 2007, hearing on Fischer's motion in limine, the district court orally adopted the discovery commissioner's recommendation and determined that Freemon could present no evidence of damages.

At the hearing, after the district court's oral ruling, Freemon waived his right to a jury trial and asked the court to enter summary judgment in Fischer's favor, claiming that without evidence of damages, there were no genuine issues of material fact remaining and there was no reason to go to trial on his claims. Fischer stipulated to reinstate the jury trial in the event Freemon was successful on appeal. Therefore, the district court orally granted the summary judgment on Freemon's claims.

On July 13, 2007, the district court entered a written order confirming, approving, and adopting the discovery commissioner's recommendation. On July 19, 2007, the district court entered its written order granting Fischer's motion in limine and summary judgment in favor of Fischer. On September 25, 2007, the district court also entered an order granting Fischer \$2,017.93 in costs under NRS 18.020.

While Freemon has filed a timely appeal from the summary judgment, he does not challenge the September 25 order granting costs and instead focuses his appellate arguments on the district court's denial of his motion for continuance and its granting of Fischer's motion in limine to exclude all evidence of damages. Freemon claims that these two orders should be properly viewed as a single decision that essentially resulted in an unwarranted dismissal of his case, without proper consideration of the

factors in Young v. Johnny Ribeiro Building, 106 Nev. 88, 787 P.2d 777 (1990), regarding the propriety of such a discovery sanction.

Freemon further admits his NRCP 16.1 discovery deficiencies in failing to provide an initial disclosure of his damages computation and his damage expert's report. But Freemon claims that Fischer delayed in providing him documents needed by his expert, that his expert's report was given to Fischer as soon as it was possible to do so, that he did not willfully violate the discovery rules, and that he did not act in bad faith. Finally, Freemon argues that the expert's report was not the only evidence that he could use to meet his burden of proof and that the trial court erred in excluding all evidence of his damages.

Fischer, on the other hand, contends that the district court did not abuse its discretion in refusing to grant Freemon's belated motion for a trial continuance, as there was no good cause shown under WDCR 13(1) and no due diligence shown under NRS 16.010.<sup>1</sup> Even in the absence of Freemon's willful noncompliance, Fischer contends that his motion in limine was properly granted as a discovery sanction under NRCP 37(c) because of Freemon's clear violations of NRCP 16.1(a)(1)(C), 16.1(a)(2), and 26(e)(1) and (2).

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<sup>1</sup>Fischer also argues on appeal that no excusable neglect was shown under NRCP 6(b). As this argument was not made to the district court, we will not consider it on appeal. Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

## DISCUSSION

### Standard of Review

We review an order granting summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id. The pleadings and other proof must be construed in a light most favorable to the non-moving party. Id. But once the movant has properly supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid having summary judgment. Id. at 729, 121 P.3d at 1030-31; NRCPC 56(e).

A motion for continuance, however, is reviewed under an abuse of discretion standard. Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). Additionally, we recognize that the district court has wide discretion in controlling pretrial discovery. MGM Grand, Inc. v. District Court, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991).

### Characterization of challenged orders

Despite Freemon's claims, the July 9 order denying his motion for trial continuance and reopening of discovery and the July 13 order granting Fisher's motion in limine to exclude damages evidence did not essentially combine into one order resulting in the dismissal of his complaint. There was no pending motion to dismiss and it was Freemon who voluntarily moved for summary judgment against himself, conceding that there were no genuine issues of material fact if all evidence of damages was excluded. The July 19 summary judgment was the final

judgment from which Freemon could appeal. NRAP 3A(b)(1); see Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining a final judgment as “one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney’s fees and costs”). Thus, the July 9 and 13 interlocutory orders Freemon also challenges are now reviewable on appeal from the final judgment. Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

July 9 order denying trial continuance

Freemon filed his motion for continuance and reopening of discovery based on WDCR 13(1), NRS 16.010, and this court’s general policy of deciding cases upon their merits. Fischer opposed the motion, alleging that Freemon had not demonstrated good cause as required by WDCR 13(1) and Freemon had not used due diligence to procure material evidence necessary for trial as required for a trial postponement under NRS 16.010. The district court agreed that there was no good cause to continue the trial under WDCR 13(1) and denied Freemon’s motion on July 9, 2007, without addressing the NRS 16.010 argument.<sup>2</sup>

WDCR 13(1) states, in relevant part, “[n]o continuance of a trial in a civil or criminal case shall be granted except for good cause.” In

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<sup>2</sup>NRS 16.010 allows a motion to postpone a trial on the ground of the absence of evidence, to be made only upon an affidavit showing the materiality of the evidence to be obtained and that due diligence has been used to procure it. By the time Freemon’s motion was filed, however, he had submitted his tardy expert’s report, so no evidence was missing. In any event, for the same reasons that Freemon failed to show good cause for a continuance under WDCR 13(1), he also failed to show due diligence in timely obtaining his expert’s damages report.

this case, Freemon failed to show good cause for granting a trial continuance. Freemon did not explain why he did not provide his expert with the documents that were already in Freemon's possession before December or why he waited another three months to provide his expert accountant with approximately 1300 pages of documents, during the height of the tax season. Rather, Freemon attempted to blame Fischer for being six months late in providing 657 pages of documents, despite Freemon's lack of objection to this delay until after Fischer filed his June 4 motion in limine to exclude the damages evidence. Additionally, Fischer had indicated his desire to obtain the expert's report months before trial, as he had requested damages information in interrogatories served on February 28, 2007, to which Freemon provided inadequate answers and failed to supplement. Despite Freemon's agreement to the March 3 deadline for expert witness disclosures and the June 1 close of discovery, he did not provide his expert's report until June 12 and he did not move for a continuance until June 22, only three weeks before the July 16 trial date. Consequently, the district court did not abuse its discretion in denying Freemon's motion to continue the trial and to reopen discovery. Fitzgerald, 94 Nev. at 243, 577 P.2d at 1235.

July 13 order excluding all damages evidence

Fischer's motion in limine sought to exclude all damages evidence as an NRCP 37 discovery sanction, on the basis that he was prejudiced by Freemon's failure to timely provide the expert's report, as required by NRCP 16.1, 26, 33, and 37. As noted above, the expert's report was not provided to Fischer until June 12, 2007, which was eight days after the motion in limine was filed, 342 days after the NRCP 16.1(a)(1)(C) deadline for damages computation, 101 days after the NRCP

16.1(a)(2)(C) deadline for disclosure of expert witness reports, and 34 days before the July 16 trial date. Ultimately, the district court adopted the discovery commissioner's recommendation and excluded all damages evidence as a sanction under NRCP 37(c)(1), due to Freemon's failure to provide his initial damages calculation as required by NRCP 16.1(a)(1)(C), his failure to timely provide his expert witness disclosure as required by NRCP 16.1(a)(2)(C), and his failure to timely provide supplemental answers to his interrogatories as required by NRCP 26(e)(1).

On appeal, Freemon has admitted his discovery deficiencies. Freemon nevertheless argues that the district court abused its discretion in adopting the discovery commissioner's recommendation to grant the motion in limine and exclude all evidence of damages, because he claims that this was essentially a dismissal with prejudice, entered as a discovery sanction, which was not warranted under Young v. Johnny Ribeiro Building, 106 Nev. 88, 787 P.2d 777 (1990), in the absence of any bad faith on his part. He further claims that the district court did not set forth in detail its consideration of the Young factors, as required.

Young, however, does not apply here. In Young, we expressly stated that, absent a showing of abuse of discretion, we will not substitute our judgment for that of the district court, even if we would not have imposed the same sanctions. Young, 106 Nev. at 92, 787 P.2d at 779. Although a heightened standard of review is applied when the sanction is one of dismissal with prejudice, id., no such dismissal occurred in this case, as Fischer merely sought the exclusion of damages evidence as a sanction under NRCP 37(c)(1). Freemon moved for summary judgment against himself, and the parties stipulated to reinstate Freemon's claims if he was successful on appeal. Additionally, Young involved willful fabrication of



evidence, something which is not alleged in this appeal. Consequently, the factors used to review the sanction of dismissal with prejudice that was imposed under NRCP 37(b)(2) in Young do not apply in this case.

Instead, this case is more akin to Arnold v. Kip, 123 Nev. \_\_\_, 168 P.3d 1050 (2007). In Arnold, the defendants moved to dismiss a medical malpractice action without prejudice under NRCP 16.1(e)(2), due to the plaintiff's admitted failure to timely file his case conference report. We concluded that nothing in the language of NRCP 16.1(e)(2) requires a demonstration of prejudice to the defendants as a condition to granting a dismissal without prejudice and that it was within the district court's discretion to impose sanctions to ensure compliance with specific deadlines, even if the dismissal resulted in the plaintiff's inability to pursue his claim due to the expiration of the statute of limitations. Arnold, 123 Nev. at \_\_\_, 168 P.3d at 1053. We further noted that the district court's consideration of an NRCP 16.1(e)(2) dismissal without prejudice was limited to addressing factors that promote the rule's purpose, such as

the length of the delay, whether the defendant induced or caused the delay, whether the delay has otherwise impeded the timely prosecution of the case, general considerations of case management such as compliance with any case scheduling order or the existence or postponement of any trial date, or whether the plaintiff has provided good cause for the delay.

Id. We distinguished Young, because the sanctions there were imposed under NRCP 37(b)(2) and involved an actual order of dismissal with prejudice, rather than a dismissal without prejudice under NRCP 16.1(e)(2) as in Arnold. Id. at \_\_\_, 168 P.3d at 1055.

In the present case, the district court did not dismiss the case and, instead, excluded Freemon's damages evidence as a sanction for his NRCPC 16.1 and 26 violations. The sanction was imposed under NRCPC 37(c)(1), which states

[a] party that without substantial justification fails to disclose information required by Rule 16.1 or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed.

Additionally, NRCPC 16.1(e)(3) requires the district court to impose appropriate sanctions, including the exclusion of evidence under NRCPC 37(b)(2), if an attorney fails to reasonably comply with any provision of the rule.

Before excluding Freemon's damages evidence, the district court considered NRCPC 16.1's purpose and addressed the Arnold factors, such as the lengthy delay before Freemon provided the expert's report, which impeded the timely prosecution of the case and resulted in his belated request for a trial continuance. As the discovery commissioner and district court noted, although Fischer contributed to the delay by providing 657 pages of documents in December 2006, Freemon provided no substantial justification for (1) his delay in waiting an additional three months before providing all 1,300 or so pages of documents to his expert accountant in March 2007, during the busy tax season and already past the March 3 expert disclosure deadline; (2) failing to request a modification of the deadlines set forth in the case conference report when it became apparent that his expert's report would not be timely disclosed; (3) not seeking a continuance until a month before trial was scheduled; and (4) not supplementing his answers to interrogatories before discovery

closed on June 1. Fischer had no control over Freemon's expert and was harmed by the late disclosure of the expert's report, which estimated damages far in excess of what Fischer had anticipated; not only had discovery closed by the time of the tardy disclosure, but Fischer would be forced to sacrifice time that should have been available for trial preparation. Therefore, it was within the district court's discretion to grant Fischer's motion in limine to exclude the expert's damages report as a sanction for Freemon's admitted discovery violations, which prejudiced Fischer and were not substantially justified.

Freemon nevertheless argues that he had other damages evidence, which should not have been excluded by the district court. Based on the depositions of Freemon and his architect, Fischer estimated Freemon's arguable damages to be \$8,000. In contrast, Freemon's expert's report estimated that damages may be between \$209,000 and \$340,000. As discovery had closed, Fischer had no opportunity to depose the expert or conduct other discovery concerning the basis for this widely divergent damages amount. The discovery commissioner recognized that the exclusion of all damages evidence was an extreme sanction and that Freemon had not acted in bad faith, but concluded that without a trial continuance, Fischer should not be forced to suffer significant prejudice due to Freemon's discovery violations, for which Fischer was entirely without fault. Having already determined that the district court acted within its discretion in denying Freemon's motion for a continuance, we further conclude that the district court did not abuse its discretion in adopting the discovery commissioner's recommendation to exclude all evidence of damages as an appropriate sanction for Freemon's discovery violations. NRCP 37(c)(1); see Arnold, 123 Nev. \_\_\_, 168 P.3d 1050 (2007)

(finding no abuse of the district court's discretion in imposing the sanction of dismissal without prejudice for NRCP 16.1 violations). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, C.J.  
Hardesty

Parraguirre, J.  
Parraguirre

Douglas, J.  
Douglas

cc: Hon. Janet J. Berry, District Judge  
Jonathan L. Andrews, Settlement Judge  
Morris Pickering & Peterson/Reno  
Bradley Paul Elley  
Washoe District Court Clerk