

IN THE SUPREME COURT OF THE STATE OF NEVADA

XTREME FAITH ACADEMY, INC.,
D/B/A ABUNDANT LIFE ACADEMY, A
UTAH CORPORATION; ROBIN
CROUCH; AND HIDDEN CANYON
RANCH, INC., A NEVADA
CORPORATION,

Appellants/Cross-Respondents,

vs.

ROBIN LANDRY, INDIVIDUALLY,
AND AS RURAL MANAGER OF THE
DIVISION OF CHILD PROTECTIVE
SERVICES OF THE STATE OF
NEVADA; AND STATE OF NEVADA,
EX REL. ITS DIVISION OF CHILD
PROTECTIVE SERVICES,
Respondent/Cross-Appellant.

No. 52044

FILED

DEC 14 2009

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

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court judgment on a jury verdict in a torts action and from a post-judgment order denying a motion for a new trial. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

Appellants/cross-respondents Xtreme Faith, Inc., d.b.a. Abundant Life Academy; Robin Crouch, a teacher and counselor; and Hidden Canyon Ranch, Inc. (collectively "ALA") operated a private boarding school in White Pine County, Nevada. Respondents/cross-appellants Division of Child Protective Services and its rural manager,

Robin Landry (collectively "CPS") removed 33 students from ALA's facility.¹

After a district court determined that the removal of the children was unreasonable, ALA sued CPS for, among other claims, abuse of process. Prior to trial, CPS moved for judgment on the pleadings, arguing that it was protected under NRS 41.032(2) by discretionary immunity. The district court denied this motion. CPS also moved for summary judgment, arguing that the district court should dismiss the abuse-of-process claim. Regarding the motion for summary judgment, the district court denied Landry immunity and dismissed all of ALA's claims except the abuse-of-process claim. At trial, the jury returned a verdict in ALA's favor. Initially, the jury awarded Xtreme Faith Academy \$340,858.77, Robin Crouch \$36,000, and Hidden Canyon Ranch \$74,666. The district court then capped Xtreme Faith Academy's and Hidden Canyon Ranch's damages at \$50,000 each and awarded Robin Crouch \$36,000. CPS also moved for judgment as a matter of law and for a new trial, arguing that the evidence did not support ALA's abuse-of-process claim. The district court denied CPS's motion.

On appeal, ALA argues that the district court erred by applying the \$50,000 damages cap to Xtreme Faith Academy's and Hidden Canyon Ranch's damages. On cross-appeal, CPS argues that the district court erred by (1) denying its motion for judgment on the pleadings regarding discretionary immunity and (2) denying its motion for judgment as a matter of law regarding ALA's abuse-of-process claim. Based on the

¹We direct the clerk of this court to adjust the caption for this appeal on the court's docket to reflect the caption on this order.

following discussion, we affirm the district court's judgment on the jury verdict and post-judgment order. Because the parties are familiar with the facts of this case, we do not recount them here except as necessary to our disposition.

DISCUSSION

I. The district court did not err by applying a \$50,000 damages cap

The jury awarded Xtreme Faith and Hidden Canyon over \$50,000 in damages on the abuse-of-process claim. The district court applied NRS 41.035(1)'s statutory cap and limited their damages to \$50,000 each. On direct appeal, ALA argues that the district court erred when it applied the \$50,000 damages cap to Xtreme Faith's and Hidden Canyon's damages. According to ALA, it was entitled to damages on a per-person, per-claim basis. We disagree with ALA's interpretation of this concept.

Pursuant to the version of NRS 41.035(1) in effect at the time the events at issue in this action took place, in a tort lawsuit against the State or against a state employee or political subdivision, the recoverable damages were capped at \$50,000. 2007 Nev. Stat., ch. 512, § 3.3, at 3024-25. In construing NRS 41.035(1), this court has held that the \$50,000 damages cap applies on a per-person, per-claim basis, meaning "one statutory limitation for each cause of action, regardless of the number of [government] actors." County of Clark v. Upchurch, 114 Nev. 749, 759-60, 961 P.2d 754, 761 (1998).

ALA's amended complaint listed three claimants: Xtreme Faith Academy, (2) Robin Crouch, and (3) Hidden Canyon Ranch. ALA then raised the following six claims: (1) bad faith, (2) abuse of process, (3) malicious prosecution, (4) intentional interference with contractual relations, (5) kidnapping, and (6) negligence. However, ALA did not label

the claims as separate “causes of action.” Nevertheless, ALA also listed 35 causes of action, including one for each child (totaling 33) removed from its facility.

In Clark County School District v. Richardson Construction, 123 Nev. 382, 385-86, 168 P.3d 87, 89-90 (2007), a general contractor sued Clark County School District for, among other things, wrongful interference with a prospective business advantage. The contractor alleged that the school district “engaged in five separate instances of tortious interference.” Id. at 390, 168 P.3d at 92. Thus, the contractor argued that the \$50,000 statutory cap applied to each tortious interference claim, and therefore, the jury’s award of \$225,000 was appropriate. Id. This court disagreed, stating that although the contractor asserted five separate instances, all five instances fell under one claim of tortious interference. Id. Therefore, the contractor was only entitled to recover a total damage award of \$50,000 (covering all five instances). Id. Particularly, this court stated that for the purposes of applying the per-person, per-claim rule “‘claim’ means ‘cause of action,’ not each instance of the wrong.” Id.

In this case, the district court applied Richardson and found that “claim” meant cause of action, which in this case solely consisted of a cause of action for abuse of process. As a result, the district court concluded that there was only one cause of action, abuse of process, which included all 33 children. Therefore, the district court capped Xtreme Faith’s and Hidden Canyon’s damages for the abuse of discretion claim at \$50,000 each.

We conclude the district court correctly applied Richardson to the facts of this case. Here, although CPS’s removal of all 33 children

constitutes 33 independent wrongs, all 33 wrongs are consolidated in ALA's only surviving cause of action: abuse of process. Although ALA attempted to label each wrong as a cause of action, these wrongs made up the total specific factual circumstances that applied to ALA's abuse-of-process claim. Therefore, Xtreme Faith, Crouch, and Hidden Canyon Ranch are each entitled to a maximum of \$50,000. Because Xtreme Faith's and Hidden Canyon's damages exceeded \$50,000, the district court correctly capped both parties' total damages at \$50,000.

II. The district court did not err by denying CPS's motion for judgment on the pleadings regarding discretionary immunity

CPS argues that the district court erred by denying its motion for judgment on the pleadings regarding discretionary immunity. We disagree. Before addressing CPS's claim, however, we first address whether CPS preserved the discretionary immunity issue for appellate review.

A. CPS preserved the discretionary immunity issue for appeal

ALA argues CPS failed to preserve the discretionary immunity issue for appeal because it did not renew this issue through a post-trial motion for judgment as a matter of law, directed verdict, or judgment notwithstanding the verdict. We disagree.

NRCP 8(c) states that affirmative defenses must be affirmatively pleaded. If an affirmative defense is "affirmatively pleaded, tried by consent, or otherwise litigated in a matter," then the issue is preserved for appeal. Boulder City v. Boulder Excavating, 124 Nev. ___, ___, 191 P.3d 1175, 1178 (2008).

In this case, CPS listed discretionary immunity as an affirmative defense in its original answer and its answer to ALA's amended complaint. Because CPS affirmatively pleaded the defense of

discretionary immunity, this issue was preserved and we may review it on appeal. NRCF 8(c); Boulder City, 124 Nev. at ___, 191 P.3d at 1178-79.

B. Discretionary immunity pursuant to NRS 41.032(2)

CPS argues it has discretionary immunity pursuant to NRS 41.032(2) against the claim asserted by ALA. However, we cannot say the district court erred by denying CPS's motion for judgment on the pleadings regarding discretionary immunity.

Whether discretionary immunity under NRS 41.032(2) applies is a mixed question of law and fact. Martinez v. Maruszczak, 123 Nev. 433, 438, 168 P.3d 720, 724 (2007). This court reviews conclusions of law de novo, and will not disturb a lower court's findings of fact if supported by substantial evidence. Id. at 438-39, 168 P.3d at 724.

While this case was pending before the district court, this court adopted the United States Supreme Court's Berkovitz-Gaubert test. Id. at 446-47, 168 P.3d 729. Generally, if a substantive change in the law arises while a case is on direct appeal, then the substantive change will apply retroactively to the case on appeal. See Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993) (regarding the United States Supreme Court applying federal law). Therefore, the Berkovitz-Gaubert test would be applicable to the case at hand.

When applying the Berkovitz-Gaubert test, a court must assess the facts of the case while keeping in mind the purpose of discretionary immunity: to prevent the judiciary from second guessing legislative decisions rooted in social, economic, and political policy. Butler v. Bayer, 123 Nev. 450, 466, 168 P.3d 1055, 1066-67 (2007). However, this court cannot perform such an analysis in this case because CPS did not provide a trial transcript in the record on appeal. Because a trial

transcript was not provided, we are unable to determine whether the district court's findings of fact were supported by substantial evidence.

Further, when a trial transcript is not provided, we must presume "that the testimony, and the inferences to be drawn from it, support the trial court's findings." Hay v. Hay, 92 Nev. 663, 663, 556 P.2d 1264, 1264 (1976). Therefore, we cannot determine whether the district court erred by denying CPS's motion for judgment on the pleadings regarding discretionary immunity.

III. The district court did not err by denying CPS's motion for judgment as a matter of law and for a new trial regarding ALA's abuse-of-process claim

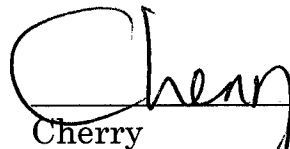
CPS also argues that the district court erred in finding a genuine issue of material fact regarding ALA's claim for abuse of process. According to CPS, there was no legal process or proceeding abused because CPS did not initiate any legal proceeding against ALA. However, we can not say the district court erred by denying CPS's motion for judgment as a matter of law and for a new trial because CPS did not provide a trial transcript in the record on appeal.


In this case, CPS filed a motion for summary judgment and a motion for judgment as a matter of law and for a new trial on the abuse-of-process claim. Because the parties litigated this issue, this court need only review the district court's denial of CPS's motion for judgment as a matter of law and for a new trial. See Locricchio v. Legal Services Corp., 833 F.2d 1352, 1358 (9th Cir. 1987). A motion for a judgment notwithstanding the verdict is essentially a challenge to the jury verdict, and therefore, we review the record for any substantial evidence to support the jury verdict. Dudley v. Prima, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968). A judgment notwithstanding the verdict is improper where

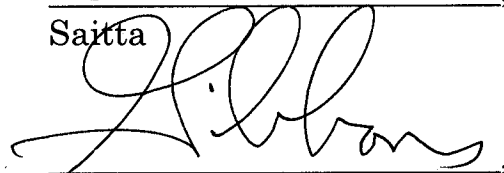
there is any evidence supporting the verdict or there is a conflicting question of fact that the jury could decide either way. Id.

Here, the parties failed to provide a trial transcript in the record on appeal. Because a trial transcript was not provided, we are unable to determine whether there is substantial evidence supporting the jury verdict. Also, we must presume that the evidence submitted at trial and inferences drawn from it support the district court's findings. Hay, 92 Nev. at 663, 556 P.2d at 1264. Therefore, the district court did not err in finding a genuine issue of material fact regarding ALA's claim for abuse of process. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Cherry, J.


Saitta, J.


Gibbons, J.

cc: Hon. Dan L. Papez, District Judge
Carolyn Worrell, Settlement Judge
Bowen, Hall, Ohlson & Osborne
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Reno
White Pine County Clerk