

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN A. WASDON,  
Appellant,  
vs.  
G.A. BRAUN, INC.,  
Respondent.

No. 53140

**FILED**

DEC 04 2009

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

ORDER OF REVERSAL

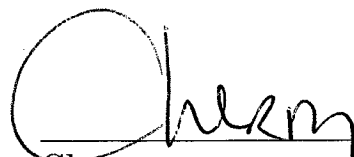
This is an appeal from a district court order dismissing a tort action as a discovery sanction. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.


NRCP 37(d) authorizes sanctions, including dismissal, for the failure to attend a deposition after being served with proper notice. Generally, willful noncompliance with a discovery order is required for discovery sanctions under NRCP 37. Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). This court will not reverse a district court's discovery sanction absent a showing of abuse of discretion. Id. But where the sanction is one of dismissal with prejudice, this court will apply a heightened standard of review and requires that such orders "be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors." Id. at 92-93, 787 P.2d at 779-80.

Here, the district court's order was effectively with prejudice, as appellant concedes that the statute of limitations has run on his claim. The order was solely based on appellant's nonappearance at his deposition and failure to seek a protective order, and it clearly failed to cite to or explain the Young factors. Our examination of the Young factors shows that there was no discovery abuse, as the appellant was not

in violation of any court-ordered discovery. Appellant did not willfully fail to attend the deposition, because he was incarcerated and had given respondent prior notice of his inability to attend, and appellant was awaiting respondent's reply to his suggestion to conduct the deposition at the jail or make alternative arrangements. No evidence was lost and there were other, less severe sanctions that were feasible and not prejudicial to respondent, such as taking the deposition at the jail or ordering appellant to pay the reasonable expenses of preparing for the deposition, obtaining the certificate of nonappearance, or preparing the motion to dismiss. The failure to seek a protective order was not misconduct by appellant's attorney, as parties should be encouraged to reschedule depositions through voluntary cooperation and should be deterred from seeking protective orders each time a minor discovery dispute arises. Because the district court failed to analyze any of the Young factors or provide a written explanation of those factors, we conclude that the court abused its discretion in granting the motion to dismiss under the circumstances of this case. Accordingly, we

ORDER the judgment of the district court REVERSED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Steven R. Kosach, District Judge  
Jill I. Greiner, Settlement Judge  
William R. Kendall  
Wait Law Firm  
Washoe District Court Clerk