

IN THE SUPREME COURT OF THE STATE OF NEVADA

FARAMARZ FAYEGHI, A/K/A FRED
FAYEGHI,
Appellant,
vs.
R. PAUL SORENSON,
Respondent.

No. 36303

FARAMARZ FAYEGHI, A/K/A FRED
FAYEGHI,
Appellant,
vs.
R. PAUL SORENSON,
Respondent.

No. 36384

FILED

OCT 15 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *Richard*
CHIEF DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Appellant Faramarz Fayeghi filed appeals¹ from the district court's order denying his motion to set aside the district court's order of summary judgment and amended judgment nunc pro tunc. We conclude that the district court's awards of compensatory and punitive damages and attorney fees were unreasonable. We vacate the awards and remand this matter to the district court for a determination of reasonable awards.

Fayeghi first contends that the district court's order of summary judgment, entered after Fayeghi failed to appear for trial, was an abuse of discretion because Fayeghi never received proper notice of the trial date. Fayeghi asserts that personal service was inappropriate, as Michael Amador had never withdrawn as counsel when the law firm of

¹On January 17, 2001, this court, for all appellate purposes, ordered the appeals consolidated in Docket No. 36303 and No. 36384.

Beckley Singleton became co-counsel, and therefore, Amador was still officially counsel of record when Beckley Singleton withdrew as counsel. Fayeghi contends that since Amador was counsel of record, Amador should have been served rather than Fayeghi. Alternatively, Fayeghi contends that he received less than the ten days notice of the motion for summary judgment as required by NRCP 56(c).

Personal service upon Fayeghi was proper. When Fayeghi appeared in court on March 14, 2000, he informed the court that he was without counsel. Additionally, Fayeghi gave the court his business address for personal service purposes.

NRCP 56(c) requires a party to serve a motion for summary judgment at least ten days before the time fixed for a hearing. The notice requirement is not violated, however, if the opponent is not prejudiced by the shorter notice.² Fayeghi was not prejudiced by the shortened notice; summary judgment was not granted until after the trial date had been continued twice. Since Fayeghi should have been prepared for trial on either of the continued trial dates, he should have been equally prepared to defend himself against a motion for summary judgment. Accordingly, the district court did not abuse its discretion by permitting shortened notice for respondent's motion for summary judgment.

EDCR 2.26 requires that an order shortening the time for notice of a hearing to less than ten days may not be served by mail. EDCR 2.26 and NRCP 56(c) are compatible so long as the opposing party to the motion for summary judgment is not prejudiced and the notice is not

²Cheek v. FNF Const., Inc., 112 Nev. 1249, 1253, 924 P.2d 1347, 1350 (1996).

served by mail.³ Since Fayeghi was personally served and was not prejudiced by the shortened notice, NRCP 56(c) and EDCR 2.26 were not violated.

Second, Fayeghi argues that the district court's order of summary judgment was really an order of default judgment and a sanction against Fayeghi. Summary judgment is only appropriate "when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law."⁴ Based on the evidence R. Paul Sorenson submitted with the motion for summary judgment, in combination with the fact that Fayeghi was found in criminal contempt for assaulting Sorenson, there were no genuine issues of material fact as to Fayeghi's liability for assault. Therefore, the district court's order of summary judgment was not a default judgment and likewise was not a sanction against Fayeghi. Accordingly, the district court did not abuse its discretion in awarding Sorenson summary judgment.

Third, Fayeghi asserts that the district court's damages award is excessive.⁵ After Fayeghi failed to appear for the damages hearing, the district court awarded Sorenson damages in excess of \$3 million. The award of compensatory damages totaled \$1,517,726.28, including

³Id. at 1253-54, 924 P.2d 1347, 1351.

⁴Sawyer v. Sugarless Shops, 106 Nev. 265, 267, 792 P.2d 14, 15 (1990).

⁵Fayeghi also argues that he did not receive notice of the damages hearing pursuant to NRCP 55(b)(2). However, it is established that when parties fail to attend the first day of trial or otherwise participate, the notice requirements for default judgments are inapplicable. See Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989); see also 10A Charles Alan Wright et al., Federal Practice and Procedure, § 2687 (3d ed. 1998).

\$53,726.28 for past damages, \$250,000.00 for emotional distress and \$1,214,000.00 for personal security measures. The district court also awarded \$1,500,000.00 in punitive damages.

Except for the district court's minutes of the hearing, the record is devoid of any evidence from the hearing. No transcripts or exhibits were presented in the record on appeal. Due to the inadequacy of the record to support the district court's judgment, we vacate the damages award and remand the case to the district court for a determination of a reasonable award. Based upon our limited review of the damages award, we conclude that the district court's damages award was clearly excessive.

Although Sorenson alleged that Fayeghi had a history of threatening him and his family, Sorenson has submitted nothing in the record to indicate that he suffered either severe or extreme emotional distress. Further, Sorenson has not submitted any evidence that he spent over \$1,000,000.00 on personal security measures due to his fear of Fayeghi. Accordingly, the district court must conduct a more thorough evaluation of Sorenson's claims for compensatory damages.

The district court also awarded Sorenson \$1,500,000.00 in punitive damages. NRS 42.005(1) permits an award of punitive damages when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied." Further, the purpose of punitive damages "is to punish and deter culpable conduct."⁶ The amount of punitive damages lies within the discretion of the fact-finder.⁷ However, "[p]unitive damages are legally excessive when

⁶Ace Truck v. Kahn, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987).

⁷Id.

the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case."⁸ This standard allows a court to "focus on a judicial determination of what is fair, just, and reasonable as opposed to being disproportionate and legally excessive."⁹ Relevant circumstances to consider include "the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind."¹⁰

While Fayeghi displayed the requisite malice by assaulting an attorney in a federal courthouse and making threats to Sorenson,¹¹ the award of punitive damages was clearly disproportionate. The district court never attempted to determine Fayeghi's financial position. Although Sorenson accused Fayeghi of hiding millions of dollars overseas, the underlying assault occurred after an appearance for Fayeghi's bankruptcy proceeding. Sorenson has not proven that Fayeghi is in a financial position to pay a punitive damages award of \$1.5 million.

⁸Id. at 509, 746 P.2d at 136-37.

⁹Id. at 510, 746 P.2d at 137.

¹⁰Id.

¹¹Bader v. Cerri, 96 Nev. 352, 359, 609 P.2d 314, 318-319 (1980) (stating that "[t]he term malice as used in the statute means malice in fact and denotes ill will, or a desire to do harm for the mere satisfaction of doing it").

Additionally, Sorenson did not suffer a debilitating injury warranting such a large punitive damages award. Although Sorenson's personal friend and longtime physician found permanent brain injury as a result of Fayeghi's attack, the neurologist that Sorenson was referred to could not establish a causal relationship between the attack and the brain injury. Rather, the neurologist determined that Sorenson only suffered a mild concussion as a result of Fayeghi's attack. Both physicians agreed that the injury would not hinder Sorenson's ability to continue work or to lead an active lifestyle in the future. Therefore, the award of punitive damages was clearly excessive. Accordingly, we remand this matter to the district court to determine an appropriate award of punitive damages.

Finally, Sorenson filed an ex parte motion for judgment nunc pro tunc, to amend the judgment and to enter an award of attorney fees. Fayeghi contends that the district court did not have authority to amend the judgment nunc pro tunc, that he never received notice of the amended judgment and that the district court's award of attorney fees was unreasonable. To determine whether notice was required, we must evaluate whether the amendment was sought due to a clerical error or a judicial error. NRCP 60(a) states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." A clerical error is "one which cannot reasonably be attributed to the exercise of judicial consideration or discretion."¹² In

¹²Alamo Irrigation Co. v. United States, 81 Nev. 390, 395, 404 P.2d 5, 7 (1965).

contrast, judicial error is "one made when the court reaches an incorrect result in the intentional exercise of the judicial function. It occurs when a judge reaches a wrong or incorrect decision in deciding a judicial question."¹³

The amended judgment nunc pro tunc was for the purpose of correcting a judicial, rather than clerical, error. Sorenson filed the ex parte motion to amend the judgment because he forgot to include prejudgment interest on the total judgment in the original judgment. However, "[a]n order nunc pro tunc cannot be made use of nor resorted to, to supply omitted action."¹⁴ Moreover, the omission was not a "mistake in writing or copying" that we have defined as a clerical error, but rather it was a substantive error.¹⁵ The amendment subjected Fayeghi to over \$300,000.00 in additional interest and an award of attorney fees of \$1,121,602.22. These are substantial awards for which Fayeghi should have received notice. The district court's amended judgment nunc pro tunc is vacated and remanded for a hearing on Sorenson's motion for amended judgment and attorney fees.¹⁶

¹³Id. (quoting Marble v. Wright, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961)).

¹⁴Robertson v. State, 109 Nev. 1086, 1088 n.1, 863 P.2d 1040, 1041 n.1 (1993) (quoting Finley v. Finley, 65 Nev. 113, 118, 189 P.2d 334, 337 (1948), overruled on other grounds, Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964)).

¹⁵Alamo, 81 Nev. at 394, 404 P.2d at 7.

¹⁶Fayeghi also argues that Sorenson's offer of judgment was in bad faith, and therefore, should not serve as the basis for the amended award of prejudgment interest. Fayeghi contends that Sorenson filed an offer of judgment on March 19, 2000, just two days before trial. Fayeghi is
continued on next page . . .

In its amended judgment nunc pro tunc, the district court awarded Sorenson attorney fees of \$1,121,602.22. NRS 69.030 requires that an award of attorney fees be reasonable. When determining the reasonable value of an attorney's services, a court should consider:

"(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, the time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived."¹⁷

Additionally, SCR 155 lists the factors that are important in determining the reasonableness of a fee.¹⁸ These factors are:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

... continued

mistaken, as Sorenson filed an offer of judgment on March 19, 1999. Therefore, Fayeghi's argument is without merit.

¹⁷Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (quoting Schwartz v. Schwerin, 336 P.2d 144, 146 (Ariz. 1959)) (quoted in Schouweiler v. Yancey Co., 101 Nev. 827, 833-34, 712 P.2d 786, 790 (1985)).

¹⁸Harvey v. United Pacific Ins. Co., 109 Nev. 621, 624, 856 P.2d 240, 241 (1993).

(c) The fee customarily charged in the locality for similar legal services;

(d) The amount involved and the results obtained;

(e) The time limitations imposed by the client or by the circumstances;

(f) The nature and length of the professional relationship with the client;

(g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(h) Whether the fee is fixed or contingent.¹⁹


Here, the district court awarded attorney fees based on the 33 1/3 percent contingency fee agreement Sorenson had entered into with his attorney. Instead of allowing Sorenson's counsel to take his percentage from the total judgment, the district court took 33 1/3 percent of the total judgment and added it to the amended judgment. Further, the district court awarded \$1,121,602.22 in attorney fees without any inquiry into the number of hours Sorenson's counsel had invested in the case or the hourly rate customarily charged for the kind of services provided by Sorenson's attorney. Moreover, the district court awarded in excess of \$1.1 million in attorney fees despite the fact that the case never proceeded to trial. An award of attorney fees of this magnitude, and under these circumstances, shocks the judicial conscience.²⁰ Notwithstanding our order to vacate the amended judgment nunc pro tunc, we offer the authorities cited herein to


¹⁹SCR 155(1)(a)-(h) (for an excellent summary of these factors, see Johnson v. Incline Village General Improvement District, 5 F. Supp. 2d 1113, 1116 (1998)).

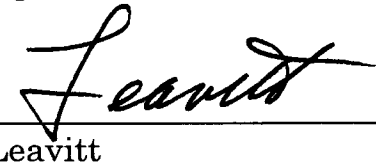
²⁰See Hernandez v. City of Salt Lake, 100 Nev. 504, 508, 686 P.2d 251, 253 (1984).

the district court for use in determining on remand whether a reasonable attorney fee award is justified.

Accordingly, we ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Allan R. Earl, District Judge
Beckley, Singleton, Chtd.
E. M. Gunderson
Clark County Clerk