IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN JESUS MENDOZA, AN INDIVIDUAL; MICAELA RASCON-ROMERO, AN INDIVIDUAL; AND JUAN CARLOS OCTAVO CHAVEZ, AN INDIVIDUAL, Appellants, vs. ALEKA JACKSON, AN INDIVIDUAL; AND BETTY JACKSON, AN INDIVIDUAL, Respondents.	No. 85091
JUAN JESUS MENDOZA, AN INDIVIDUAL; MICAELA RASCON-ROMERO, AN INDIVIDUAL; AND JUAN CARLOS OCTAVO CHAVEZ, AN INDIVIDUAL, Appellants, vs. ALEKA JACKSON, AN INDIVIDUAL; AND BETTY JACKSON, AN INDIVIDUAL, Respondents.	No. 85557

FILED

AUG 14 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a district court default judgment and a post-judgment order denying NRCP 60(b) relief in a tort action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

24-28802

Facts and procedural history

In March 2019, respondents Aleka and Betty Jackson were involved in an accident with appellants Juan Jesus Mendoza, Micaela Rascon-Romero, and Juan Carlos Octavo Chavez (collectively, when possible, the "Mendoza parties"). The Jacksons filed a complaint in district court, alleging that they were injured when Chavez negligently operated a truck, rear-ending the Jacksons' car. The Jacksons alleged that Rascon-Romero and Mendoza owned the truck and negligently entrusted it to Chavez.

Discovery commenced and in December of 2020 the Jacksons sent the Mendoza parties requests for admissions as well as interrogatories. In her response to the Jacksons' requests for admissions, Rason-Romero objected to a request for her to admit her vehicle was involved in the accident, as "Breanna Phoumiphat was purchasing the vehicle involved in the subject accident." Further, Rason-Romero denied that she gave Chavez permission to drive the truck involved in the accident and stated, "Breanna Phoumiphat was the vehicle operator." In Mendoza's responses, he denied owning the truck.[1] In response to the Mendoza parties' requests for admissions, Aleka Jackson admitted she was not making a claim for future medical damages for injuries related to the accident.

In April 2021, the Jacksons filed a motion to compel the Mendoza parties' answers to interrogatories. The district court granted the

[1]Based on these answers, the Jacksons filed a motion to amend their complaint to add Phoumiphat as a defendant. In the proposed amended complaint attached to their motion, the Jacksons alleged that both Phoumiphat and Chavez were driving and/or operating the truck. While the district court granted the motion to amend, the Jacksons did not file an amended complaint, nor did they serve it on Phoumiphat.

motion to compel, ordered the Mendoza parties to answer the interrogatories within 30 days, and awarded $1,582 in attorney fees and costs to the Jacksons. In July 2021, the Jacksons filed a motion to strike the Mendoza parties' answer and for default, alleging "refusal to participate in written discovery" and failure to comply with the discovery commissioner's report and recommendation. At a hearing on the motion, the Mendoza parties' attorney explained that answers to the interrogatories had not been provided because the attorney had not been able to locate the Mendoza parties. The district court denied the motion to strike in October 2021, finding that case terminating sanctions were not appropriate under the policy favoring a merits decision and a lack of "indication of a level of willful violation that would warrant the same." The district court ordered the Mendoza parties to move forward with discovery and answer the interrogatories within 14 days.

In November 2021, the Jacksons filed a second motion to strike the Mendoza parties' answer and enter default against them as the Mendoza parties still had not provided interrogatory answers. In February 2022, the district court granted the motion to strike as to both liability and damages and set the matter for a prove-up hearing. With respect to the factors from *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), the district court found the Mendoza parties' continued violation of the order to respond to outstanding discovery and to pay attorney fees and costs sanctions showed willfulness; the non-responsiveness prejudiced the Jacksons; striking the answer was proportional to the offenses; less severe sanctions were not feasible given that the Mendoza parties had not

participated in the case for more than six months; the Mendoza parties waived policy considerations favoring adjudication on the merits; the Mendoza parties were not being sanctioned for their attorney's conduct because their attorney "was already given a monetary sanction and did not pay for the sanction on the date of this hearing;" and striking the answer may serve as a deterrent to similar abuses because it directly related to the Mendoza parties' failure to participate and their willful violations of court orders. After a prove-up hearing, the district court entered judgment against the Mendoza parties for $767,270.80. The judgment included $484,379 for Aleka ($263,665 for future medical expenses), $60,313 for Betty, $217,876.80 in attorney fees (40 percent of the $544,692 damages judgment), and $4,702 in costs.

In July 2022, the Mendoza parties filed a motion for relief from the district court order striking their answer. The district court denied NRCP 60(b) relief, concluding the motion was not prompt and was an attempt to relitigate the case without good cause. These consolidated appeals followed.

Discussion

The Mendoza parties argue that the district court failed to (1) properly evaluate the *Young* factors before issuing case-terminating sanctions; (2) hold a required evidentiary hearing on the factors; (3) conduct an investigation into the driver's negligence to establish the negligent entrustment claim; (4) join Phoumiphat as a necessary party under NRCP 19 when the Mendoza parties alleged she drove the vehicle at the time of the accident; (5) properly analyze the *Brunzell*[2] factors before awarding

[2]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

attorney fees; (6) apply judicial estoppel to the Jacksons' claim for future medical expenses; and (7) apply the appropriate legal standard to the motion for NRCP 60(b)(1) relief.

The district court properly evaluated the Young *factors*

Nevada law permits the district court to strike a party's pleadings for failure to obey a discovery order. NRCP 37(b)(1)(C); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). We generally review a district court's imposition of discovery sanctions for an abuse of discretion. *Young*, 106 Nev. at 92, 787 P.2d at 779. However, when a district court imposes case-ending sanctions, due process concerns are heightened, and we will find an abuse of discretion "if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated." *Foster*, 126 Nev. at 65, 227 P.3d at 1048. In determining whether case-ending sanctions meet the heightened standard, we look to whether the district court thoughtfully considered the pertinent factors, which include:

> [(1)] the degree of willfulness of the offending party, [(2)] the extent to which the non-offending party would be prejudiced by a lesser sanction, [(3)] the severity of the sanction of dismissal relative to the severity of the discovery abuse, [(4)] whether any evidence has been irreparably lost, [(5)] the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, [(6)] the policy favoring adjudication on the merits, [(7)] whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and [(8)] the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780.

Here, the district court denied the Jacksons' first motion to strike the Mendoza parties' answer, instead imposing a lesser sanction of attorney fees and costs associated with the motion to compel and ordering the Mendoza parties to participate in discovery. *See Foster*, 126 Nev. at 66, 227 P.3d at 1049 (explaining that "continued discovery abuses and failure to comply with the district court's first sanction order evidence[d] [appellants'] willful and recalcitrant disregard of the judicial process, which presumably prejudiced" respondents). In granting the second motion to strike, the district court found that the Mendoza parties failed to participate in the litigation and no good cause excused the continued lack of participation in the discovery process, which supported its conclusion as to the willfulness of their continued violations and the lack of feasibility of lesser sanctions. The district court further found striking their answer was proportional to the Mendoza parties' conduct, which included months of failure to participate even after being directed to do so, on multiple occasions, by the court. While the district court's analysis was succinct, we are satisfied that the court sufficiently analyzed the factors in *Young*. *See Foster*, 126 Nev. at 64, 227 P.3d at 1047 (concluding that the district court did not err by striking defendants' pleadings because their conduct was "repetitive, abusive, and recalcitrant"). Under these circumstances, we perceive no abuse of discretion in the district court's order striking the answer.

The district court was not required to hold an evidentiary hearing

"If the party against whom dismissal may be imposed raises a question of fact as to any of [the *Young*] factors, the court must allow the parties to address the relevant factors in an evidentiary hearing." *Nevada*

Power Co. v. Fluor Illinois, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992). Here, unlike in *Fluor Illinois*, the Mendoza parties did not dispute the factual basis for the motion to strike, i.e. the failure to comply with the orders to respond to interrogatories and pay the sanction of attorney fees and costs. Instead, the Mendoza parties disputed the application of the *Young* factors, which they were able to present argument on in their opposition to the motion to strike and at the hearing. Beyond that, the Mendoza parties could have sought to introduce evidence to support their lack of willfulness argument at the hearing on the motion or requested an evidentiary hearing in court or in their opposition to the motion to strike, but did not do so. Further, the prejudice in this case stemmed from continued delay after multiple interventions from the district court. Again, the Mendoza parties did not dispute this continued delay, and failed to generate a question of fact as to the prejudicial effect of the delay. Under these circumstances, we perceive no reversible error in the district court's decision to impose case-ending sanctions without first holding an evidentiary hearing.

Chavez's negligence as the driver was established when the district court struck the Mendoza parties' answer

The Mendoza parties argue that the negligent entrustment claim cannot stand because there was no underlying negligence claim to support it. When the court is presented with an application for default, it may conduct a hearing to "establish the truth of any allegation by evidence." NRCP 55(b)(2)(C). However, when a district court strikes an answer and enters default, "the facts alleged in the pleadings will be deemed admitted." *Foster*, 126 Nev. at 67, 227 P.3d at 1049. While the Mendoza parties claimed

that Phoumiphat was the actual driver of the vehicle, the Jacksons' allegation that Chavez was negligently operating the vehicle was deemed admitted when the district court struck the Mendoza parties' answer. The Jacksons' amended complaint, which was never filed, does not change this analysis because the Jacksons consistently maintained that Chavez drove the vehicle. Beyond that, on numerous occasions, the Mendoza parties offered to concede liability, which included conceding Chavez was a negligent driver, in attempts to avoid default. Because the district court properly deemed admitted the allegation that Chavez was the truck's driver, it did not err in not holding a hearing under NRCP 55.

The Jacksons were not required to join Breanna Phoumiphat

"If a defendant before the court may be subjected to future litigation, or danger of loss . . . the absent person must be made a party." *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979). Whether to add defendants under NRCP 19 is entrusted to the discretion of the district court. *Lund v. Eighth Jud. Dist. Ct.*, 127 Nev. 358, 364, 255 P.3d 280, 284 (2011). The Mendoza parties fail to present any cogent argument as to why Phoumiphat is a necessary party other than labeling her as such and suggesting her alleged negligent actions gave rise to the same accident at issue here. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument or relevant authority). Further, the record does not reveal that without Phoumiphat the district court was unable to accord complete relief among the parties. *See* NRCP 19(a)(1) (listing circumstances under which a defendant must be joined). While the district court granted the motion to amend to add Phoumiphat as

a defendant, the Mendoza parties fail to cite any authority to support that a party must file a proposed amended complaint once leave is granted. Therefore, we perceive no error in the district court not requiring Phoumiphat to be joined as a defendant.

Judicial estoppel did not preclude the future damages award

The Mendoza parties argue that judicial estoppel should have applied to Aleka Jackson's request for future medical damages because she stated in her response to request for admissions that she was not seeking such damages. The Mendoza parties did not object to future damages on judicial estoppel grounds, and thus our review is confined to plain error. *Moretto v. Elk Point Country Club Homeowners Ass'n, Inc.*, 138 Nev. 195, 198 n.1, 507 P.3d 199, 202 n.1 (2022) ("[I]ssues not raised by a party in the district court are deemed waived on appeal."); *see Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (providing that this court consider relevant issues sua sponte in order to prevent plain error).

The record does not show that the responses to requests for admissions from Aleka were presented to the district court such that the court was notified of Aleka's response as to future medical damages. And in all other relevant filings regarding damages, the Jacksons stated that Aleka would be seeking future medical damages. Thus, the district court did not plainly err in not applying judicial estoppel. *See Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017) (outlining the elements of judicial estoppel).

The district court abused its discretion in awarding attorney fees

The Mendoza parties argue the award of $217,876.80 in contingent attorney fees was improper because the district court failed to properly evaluate the *Brunzell* factors. We review attorney fees and costs

awards for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). When exercising that discretion, the district court must make findings under both *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983), and *Brunzell*. *Capriati Construction Corp., Inc. v. Yahyavi*, 137 Nev. 675, 679, 498 P.3d 226, 231 (2021). "District courts may award NRCP 68 attorney fees based on a contingency-fee agreement without billing records so long as the party seeking fees satisfies the *Beattie* and *Brunzell* factors." *Capriati*, 137 Nev. at 680, 498 P.3d at 231. Under *Brunzell*, the district court must 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, 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; (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

Here, taking the *Brunzell* factors together, they do not support $217,876.80 in contingent attorney fees. At bottom, attorney fees must be reasonable. Here, the character of the work performed was not particularly difficult or intricate, as the case was decided on the Mendoza parties' failure to answer interrogatories and motion practice was limited to the undisputed discovery abuses. Further, because the Mendoza parties failed to participate in discovery, the case did not proceed to trial. While the Jacksons' attorneys were successful, the success was derived from a default, which is less complicated than successful representation through trial. *Cf.*

Capriati, 137 Nev. at 676, 681, 498 P.3d at 229, 232 (upholding a district court's award of $2.3 million in attorney fees based on a 40 percent contingency fee and the $5.9 million verdict). The Jacksons failed to justify why 40 percent of $544,692 was reasonable in this case. *Id.* at 680, 498 P.3d at 232 ("We reiterate that a party seeking NRCP 68 attorney fees based on a contingency-fee agreement must still satisfy the *Beattie* and *Brunzell* factors."). Therefore, the district court abused its discretion in awarding attorney fees in that amount.

The district court did not abuse its discretion in denying the Mendoza parties' NRCP 60(b) motion

We review a district court's decision "to grant or deny a motion to set aside a judgment under NRCP 60(b)" for an abuse of discretion. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). We conclude that the district court properly determined that the Mendoza parties failed to meet the standard for NRCP 60(b)(1) relief after considering the relevant factors. *See Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982) (directing a court hearing a motion to set aside judgment to consider whether a party promptly applied to remove the judgment, whether there is an absence of an intent to delay the proceedings, a lack of knowledge of procedural requirements, and good faith), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997). In particular, the discovery requests at issue were first propounded on December 8, 2020. The Mendoza parties were compelled to answer the interrogatories and were sanctioned with attorney fees on July 6, 2021. The district court ordered the Mendoza parties to pay the fees by September 2021. In denying the first motion to strike, the district court gave the Mendoza parties until November 2, 2021, to file their interrogatory answers. Throughout the litigation, the Mendoza parties were represented

by counsel. While counsel claimed that the failure to pay the sanction was a mere oversight, payment was not made until August 12, 2022, and the interrogatories were never answered. Therefore, the district court did not abuse its discretion in denying NRCP 60(b) relief.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART as to the attorney fees award only, AND REMAND this matter to the district court for proceedings consistent with this order.

Stiglich, J.

Stiglich

Pickering, J.

Pickering

Parraguirre, J.

Parraguirre

cc: Hon. Adriana Escobar, District Judge
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