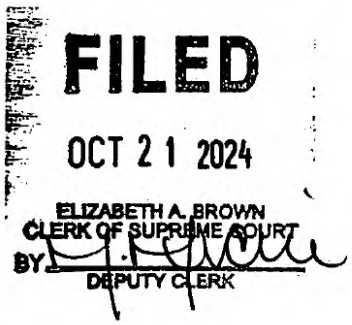
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD DOUGLAS EBY,
Appellant,
vs.
JOHNSTON LAW OFFICE, P.C.; BRAD M. JOHNSTON; AND LEANN E. SCHUMANN,
Respondents.

No. 86220-COA



ORDER OF AFFIRMANCE

Donald Douglas Eby appeals a district court order dismissing his complaint with prejudice. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

This appeal involves proceedings following remand in *Eby v. Johnston Law Office, P.C.*, 138 Nev., Adv. Op 63, 518 P.3d 517 (Ct. App. 2022). Eby filed a complaint against his former attorneys: respondents Johnston Law Office, P.C., Brad Johnston and Lee Ann Schumann on September 30, 2020. Although Eby initially indicated that he was representing himself, he eventually informed the district court that the complaint and several other papers he filed were written by nonlawyer Theodore Stevens—a fellow inmate—and formally requested to have Stevens appear on his behalf in the action. After several months of litigation—wherein Eby continued to file documents prepared by Stevens in violation of the district court's orders, and the respondents filed a motion to dismiss Eby's complaint, which he opposed—the district court entered an

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order granting the motion to dismiss in part. In that document, the district court dismissed all of Eby's claims for relief—with the exception of his legal malpractice claims—with prejudice, but granted Eby leave to file an amended complaint regarding his malpractice claims. Importantly, the court noted that, while Eby "is entitled to be represented by the counsel of his choice," "[a]ny future filings . . . authored by [Stevens]" would be rejected. Similarly, the court stated that it would dismiss the remaining malpractice claims with prejudice if Eby failed to file an amended complaint complying with the local rules within 30 days of the entry of the order.

Instead of filing an amended complaint, Eby—through Stevens—filed several documents with the court, including a limited power of attorney, a motion for an enlargement of time, and an objection to the district court's order regarding the motion to dismiss. Eby later filed a second amended complaint which was prepared by Stevens and contained the claims for relief that were previously dismissed by the district court. Thereafter, the district court entered an order striking all documents authored by Stevens and dismissed the action with prejudice for failure to comply with the court's prior order. Following several post-judgment motions—which were also prepared by Stevens and were ultimately denied—Eby appealed, and this court issued an opinion affirming in part, reversing in part, and remanding in *Eby*, 138 Nev., Adv. Op 63, 518 P.3d 517.

In that opinion, we held that district courts must consider and apply the relevant factors under *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), when dismissing a complaint with prejudice under NRCP 12(e) for noncompliance with a court order. *Eby*, 138

Nev., Adv. Op 63, 518 P.3d at 528-29. And because the district court had failed to analyze the *Young* factors before dismissing Eby's complaint with prejudice, we reversed and remanded this matter for further consideration by the district court. *Id.* at 529.

On remand, the district court directed the parties to brief the issue of whether Eby's malpractice claim should be dismissed with or without prejudice under *Young*. Thereafter, respondents filed a memorandum of points and authorities analyzing the *Young* factors and arguing that the district court should dismiss the case with prejudice. Eby filed a motion "to vacate order," which appears to relate back to a previous oral ruling made before he filed his first appeal, and then filed a memorandum of points and authorities related to the motion to dismiss. In that document, Eby did not mention the *Young* factors or expressly respond to any of respondents' arguments regarding dismissal. Instead, Eby argued that the district court should allow him to amend his complaint as originally planned. Following a hearing, the district court entered a 12-page order analyzing the *Young* factors and dismissing Eby's complaint with prejudice. Eby now appeals.

On appeal, Eby—who is now represented by counsel—argues that the district court abused its discretion by entering case-concluding sanctions, which he contends violated Nevada's public policy of trying cases on the merits. Eby argues that, although he did not argue the *Young* factors below, leniency should have been provided due to his pro se status and the fact that this court needed to publish an opinion to demonstrate that Eby's course of conduct in the previous proceedings was incorrect. Moreover, Eby argues that the sanction imposed by the district court was unduly punitive

against a pro se litigant and that the district court should have let him amend his complaint as originally planned. Eby further contends that lesser sanctions, like attorney fees or a vexatious litigant order would be more appropriate and comply with Nevada's public policy of deciding cases on the merits. According to Eby, when lesser sanctions are available, it is an abuse of discretion for a district court to enter case-concluding sanctions against a pro se litigant.

Respondents urge this court to affirm the district court's order and argue that the district court made the necessary findings under *Eby* and *Young* when it entered its order on remand. Moreover, respondents point out that Eby failed to address the *Young* factors or directly challenge the request for a dismissal with prejudice below, and that he has therefore waived that argument on appeal. We agree with respondents.

A district court's decision to implement sanctions is reviewed for an abuse of discretion. *Young*, 106 Nev. at 92, 787 P.2d at 779. However, this court employs "a somewhat heightened standard of review" for case-concluding sanctions. *Id.* And although a dismissal with prejudice "'need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case,'" which include, among others "'the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, . . . [and] the feasibility and fairness of alternative, less severe sanctions.'" *Eby*, 138 Nev., Adv. Op. 63, 518 P.3d at 527 (quoting *Young*, 106 Nev. at 92-93, 787 P.2d at 780) (alterations in original).

In its order, the district court examined the procedural history of the case and provided an analysis of each of the relevant *Young* factors. *See* 106 Nev. at 92-93, 787 P.2d at 780. For the first factor, the district court found that less severe sanctions were considered and applied before case-concluding sanctions. In particular, the district court found that it denied Eby's requests to have Stevens represent him several times, orally informed Eby that he would be reporting him to the state bar, and provided him the opportunity to amend his complaint without penalty, but these sanctions did not "deter or cure Eby's misconduct." Next, the court found that Eby was not being penalized for the actions of his counsel as he was not represented by counsel in this matter, and that the sanction of dismissal with prejudice does not penalize Eby for a non-lawyers conduct.

The court also reviewed the factors regarding the severity of the sanction, the willfulness of Eby's conduct, and the need to deter repetition of the conduct in the future. *See id.* Related to the severity of the sanction, the court found that it could "identify few examples of conduct more severe than filing an amended complaint that runs contrary to the law, disregards and violates the Court's prior decisions and orders, and includes the criminal act of the unauthorized practice of law." Further, the court found that Eby's conduct was willful and deliberate as the court provided him with multiple warnings that his and Stevens' actions constituted the unauthorized practice of law subject to sanctions. And in line with that finding, the court also found that Eby continued to violate the applicable court rules and orders and that there is a need to deter this sort of conduct in the future.

The court next considered Nevada's public policy that cases should be adjudicated on their merits, *see id.*, but found that this consideration had been outweighed by Eby's egregious conduct and the fact that he failed to file a valid complaint against the respondents. Finally, the court found that the respondents would be prejudiced by a lesser sanction as they have been forced to respond to Eby's improper documents and disregard for procedure for over two years. In addition to the *Young* factors, the district court also expressly considered Eby's status as a pro se litigant, but found that his status did not warrant a lesser sanction as Eby consciously decided to proceed with Stevens filing documents on his behalf despite the court's admonishments.

As respondents point out, Eby failed to present arguments regarding the application of the *Young* factors and whether dismissal with prejudice was improper during the proceedings on remand, which standing alone, supports affirming the district court's order. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

But even considering Eby's newly raised appellate arguments, they fail as the sanction of dismissal with prejudice in this case is supported by the district court's reasoning and the record before us. *See generally MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 242, 416 P.3d 249, 256 (2018) (holding that case-concluding sanctions typically must be supported by an express written explanation of the court's analysis of the pertinent factors that guided the decision). On appeal, Eby presents no arguments contesting the factual accuracy of the district court's findings

and conclusions set forth in the challenged order. He instead argues that the sanctions were too severe for a pro se litigant, and that the district court failed to consider the spirit of the *Young* factors, which, in his words, "guard against case-concluding sanctions against a pro per litigant who is acting without the advice of counsel, [] unless there are truly extraordinary circumstances and unless no lesser sanction will suffice." But Eby provides no authority to support this assertion. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that the court need not consider claims that are not cogently argued or lack relevant authority). Indeed, our appellate courts have repeatedly recognized that court rules and procedures "cannot be applied differently merely because a party not learned in the law is acting pro se." *Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 718 (2012) (quotation marks omitted).

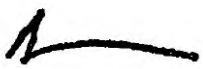
Further, even under a heightened standard of review, the ability to fashion sanctions is best left to the discretion of the district court, and "[e]ven if [this court] would not have imposed such sanctions in the first instance, we will not substitute our judgment for that of the district court." *Young*, 106 Nev. at 92, 787 P.2d at 779; *see also Sparks v. Bare*, 132 Nev. 426, 433, 373 P.3d 864, 868 (2016) (stating a "primary aspect of [the district court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process" (internal quotation marks omitted)). This is consistent with the supreme court's holding that a dismissal with prejudice under *Young* "need not be preceded by other less severe sanctions," but should only be imposed after "thoughtful

consideration of all the factors involved in a particular case." *Young*, 106 Nev. at 92, 787 P.2d at 780.

Because the district court's order included an express and careful review of the pertinent *Young* factors as directed by this court's opinion in *Eby*, we affirm the district court's order dismissing Eby's complaint with prejudice.

It is so ORDERED.[1]

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. John Schlegelmilch, District Judge
Liberators Criminal Defense
Whitmire Law, PLLC
Third District Court Clerk

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[1]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.