IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRY S. VESTED,
Appellant,
vs.
CRIS CONVERSE,
Respondent.

No. 38757

FILED

AUG 25 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, AND REVERSING IN PART

This is an appeal from the district court's judgment against appellant Harry S. Vested. Vested makes four assignments of error: (1) that the district court abused its discretion by failing to set aside the deemed admissions; (2) that the district court abused its discretion by denying Vested's motion to set aside the order granting summary judgment; (3) that the district court erred by admitting hearsay evidence; and (4) that the district court erred by awarding Converse $50,000.00 in punitive damages, even though it lacked information regarding Vested's financial condition. We conclude that the district court erred by awarding Converse $3,000.00 for unpaid rent, plus corresponding prejudgment interest. We affirm in all other respects.

Vested, the president of a company called High Sierra Heli-Skiing, Inc., met Converse at Lake Tahoe in the summer of 2000. Vested convinced Converse to invest $50,000.00 in the company to become a twenty percent owner, by falsely representing that the company had completed all terrain studies, that it had permits from the United States Forest Service, that it had sponsorships and that it was debt-free. When Converse discovered that the representations were false, she demanded her money back. Vested agreed, by promissory note, to give her $53,000.00 back, $3,000.00 of which represented Vested's unpaid rent for staying at her house. Converse then learned that Vested had used her

credit, without her knowledge or consent, to obtain credit cards for his use in her name. She reported the incident to the sheriff's office, which resulted in the criminal prosecution of Vested for the credit card fraud.

At the same time, Converse brought a civil suit against Vested regarding her investment based on his misrepresentations. Although Vested filed an answer in propria persona,[1] he failed to respond to Converse's requests for admission. After the time for responding expired, Converse moved for summary judgment. Vested failed to oppose the motion, and the district court granted it, as the requests for admission were deemed admitted and no material issue of fact remained. A hearing was held on damages only, at which attorney Mark Wray entered an appearance on behalf of Vested and moved to set aside the deemed admissions and the judgment. The district court took the motion under advisement and conducted the damages hearing, after which the district court denied the motion.

Through the criminal case, Converse recovered $45,000.00, and the criminal case was dismissed. She had reclaimed $5,000.00 of her $50,000.00 investment in the form of her Jeep, which Vested possessed. Therefore, in the civil suit, she was only pursuing $3,000.00, based on the promissory note for back rent, plus punitive damages. The court awarded her $48,000.00 with credit for the $45,000.00 already paid by Vested, plus $50,000.00 in punitive damages. Vested moved the district court to reconsider its denial of the motions to set aside and its award of compensatory and punitive damages. The district court denied the motion, and Vested brought the instant appeal.

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[1]The record suggests that Vested is a law school graduate.

This court will not disturb the district court's factual findings that are supported by substantial evidence.[2] We review the district court's refusal to set aside the deemed admissions and its decisions regarding the admission of evidence for an abuse of discretion.[3] Similarly, we review an order denying a motion to set aside a judgment for an abuse of discretion.[4] An order granting summary judgment, however, is subject to de novo review.[5] Finally, this court will not overturn an award of punitive damages so long as oppression, fraud or malice has been shown by clear and convincing evidence.[6]

Vested argues that the district court abused its discretion by refusing to allow Vested to withdraw the deemed admissions because the district court was aware of factual issues that were in dispute, as evidenced by the numerous witnesses and hundreds of pages of exhibits introduced at the damages hearing. Vested further asserts that: (1) he

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[2]Lorenz v. Beltio, Ltd., 114 Nev. 795, 803-04, 963 P.2d 488, 493-94 (1998); Campbell v. Lake Terrace, Inc., 111 Nev. 1329, 1333, 905 P.2d 163, 165 (1995).

[3]Wagner v. Carex Investigations & Sec., 93 Nev. 627, 630, 572 P.2d 921, 923 (1977) (stating that it is within the district court's discretion to grant relief from a failure to submit timely responses to requests for admissions); Chowdhry v. NLVH, Inc., 109 Nev. 478, 485, 851 P.2d 459, 463 (1993) (stating that the district court's determinations regarding the probative value and relevance of the evidence will not be disturbed absent an abuse of discretion).

[4]Cook v. Cook, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996).

[5]Pegasus v. Reno Newspapers, Inc., 118 Nev. ___, ___, 57 P.3d 82, 87 (2002).

[6]NRS 42.005(1); see also Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000).

could not respond to the requests for admission without potentially incriminating himself in the pending criminal case because, even if the responses to the requests for admission could not be used in the criminal action, evidence derived from those responses could be used;[7] and (2) that the district court admitted that Vested might have meritorious defenses in the civil case. Vested asserts that, in light of the Legislature's preference that matters be resolved on the merits and Converse's failure to show that she would be prejudiced by withdrawal of the admissions,[8] the district court's refusal to set aside the admissions was an abuse of discretion.

We conclude that Vested's arguments lack merit. First, NRCP 36(b) specifically prohibits the use of responses to requests for admission against the party making admissions in any other proceeding. Second, while the protection of the Fifth Amendment of the United States Constitution may be asserted in civil proceedings where the witness's disclosure could be used against him in a criminal prosecution, or could lead to evidence that could be used in a criminal action,[9] the witness must

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[7]LeBlanc v. Spector, 378 F. Supp. 310, 315 (D. Conn. 1974).

[8]See NRCP 36(b) (stating that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits"); Kahn v. Orme, 108 Nev. 510, 513, 835 P.2d 790, 793 (1992).

[9]Vested cites State v. Ott, 808 P.2d 305 (Ariz. Ct. App. 1990) and LeBlanc, 378 F. Supp. 310, for this proposition. His reliance on these cases is misplaced, however, as the parties to whom requests for admission were propounded objected to the requests on Fifth Amendment grounds. Here, Vested did not timely object to the requests based on his right not to incriminate himself; in fact, he did not object to the requests until after summary judgment had been granted against him.

have reasonable cause to believe that his disclosure could be used against him.[10] "'The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself . . . . It is for the court to say whether his silence is justified . . . .'"[11] Here, Vested did not timely object to the requests for admission on Fifth Amendment grounds. By waiting to do so until after summary judgment had been entered against him, Vested waived the right to assert his Fifth Amendment privilege, especially since the record suggests that Vested is knowledgeable in the law.[12]

Vested next contends that the district court abused its discretion by refusing to set aside summary judgment pursuant to NRCP 60(b)[13] because the policy behind NRCP 60(b) is to allow the court

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[10]LeBlanc, 378 F. Supp. at 314.

[11]Id. (quoting Hoffman v. United States, 341 U.S 479, 486 (1951)).

[12]See Yakus v. United States, 321 U.S. 414, 444 (1944) (stating that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right").

[13] NRCP 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . . The motion shall be made within a reasonable time, and . . . not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

flexibility to relieve injustices caused by excusable neglect or surprise.[14] He argues that the requirements of NRCP 60(b) have been satisfied.[15]

"Motions under NRCP 60(b) are within the sound discretion of the district court,"[16] and we will not disturb the district court's decision so long as there is competent evidence to support the district court's decision.[17] Vested has the burden of showing mistake, inadvertence, surprise or excusable neglect by a preponderance of the evidence.[18]

> Vested contends that the concurrent criminal investigation into the alleged consumer fraud scheme, and his desire to avoid self-incrimination, constituted excusable neglect. However, for the reasons discussed above, Vested should have petitioned the district court to delay the civil proceedings until the criminal case was resolved, or to at least timely object to the requests for admission on the grounds that engaging in the civil suit could result in a violation

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[14]See La-Tex Partnership v. Deters, 111 Nev. 471, 475-76, 893 P.2d 361, 365 (1995) (stating that "Rule 60(b), which is a remedial provision that is to be construed liberally, may operate to relieve the harshness of rigid form by applying the flexibility of discretion"); Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987) (stating that "[t]he salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party").

[15]See Stoecklein v. Johnson Electric, Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993).

[16]Deal v. Baines, 110 Nev. 509, 512, 874 P.2d 775, 777 (1994).

[17]Lesley v. Lesley, 113 Nev. 727, 732, 941 P.2d 451, 454 (1997), overruled on other grounds by Epstein v. Epstein, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997).

[18]Kahn, 108 Nev. at 513-14, 835 P.2d at 793.

> of his Fifth Amendment privilege.[19] Moreover, the record supports the district court's conclusion that Vested failed to show excusable neglect.[20]

While Vested's motion to set aside summary judgment was timely made, and the district court stated that Vested may have had meritorious defenses, the other factors weigh against Vested.

Vested claims his intent was not to delay the proceedings but rather to avoid self-incrimination in the concurrent criminal investigation and that his failure to respond to discovery or motions actually accelerated the judgment for Converse, supporting his lack of intent to delay. This argument is disingenuous. It might be plausible had Vested not subsequently moved to set aside the judgment. Furthermore, there is no evidence in the record that his failure to participate in the civil proceeding was due to his fear of self-incrimination in the criminal action, not even an affidavit to that effect. Even if such were the case, the proper remedy was to move the district court to postpone the civil suit until the criminal case had been resolved.

Vested does not argue that he lacked procedural knowledge; rather, he contends that his noncompliance with procedural requirements in the civil case was due to the pending criminal investigation. For the reasons discussed above, we conclude that this argument also lacks merit.

Vested next contends that he brought the motion in good faith in order to have his day in court to be heard on the merits of the case.

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[19]Vested claims that his Fifth Amendment privilege was brought to the district court's attention by his criminal attorney, who filed a motion to quash the subpoena duces tecum. However, this privilege was asserted only in regard to the document sought by the subpoena.

[20]See Stoecklein, 109 Nev. at 271, 849 P.2d at 307.

This argument also lacks merit, as Vested already had several opportunities to address the merits of his case and enjoy his day in court. The record reveals that Vested ignored discovery requests and the two letters sent by Converse's counsel warning him that if he failed to take action, a default judgment could be entered against him. He ignored Converse's motion to strike his seventh affirmative defense. He ignored Converse's motion for summary judgment. He did not make an appearance at the damages hearing. In fact, after his initial answer to the complaint, Vested did absolutely nothing in regard to the civil case until after summary judgment had been entered against him. It does not appear from the record that Vested's motion was brought in good faith. To grant Vested's motion to set aside the judgment would "'turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be.'"[21] The record supports the district court's determination that Vested's failure to participate in the civil case was not the result of excusable neglect. Accordingly, we affirm the district court's order in this respect.

We now turn to Vested's allegations regarding improperly admitted evidence. Vested argues that the damage award of $3,000.00 for unpaid rent was erroneous because Converse did not plead the alleged obligation, rendering irrelevant any evidence concerning unpaid rent. Vested also contends that the district court erroneously admitted double hearsay when it allowed the admission of Detective Tim Minister's investigative report into the credit card fraud allegations. Vested further

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[21]Kahn, 108 Nev. at 515, 835 P.2d at 793-94 (emphasis omitted) (quoting Union Petrochemical Corp. v. Scott, 96 Nev. 337, 339, 609 P.2d 323, 324 (1980)).

argues that the report was also irrelevant because Converse did not plead consumer fraud as to persons who had made reservations with High Sierra Heli-Skiing, Inc., but had only pleaded fraud as to herself. Vested also contends that the district court improperly admitted character evidence against him under NRS 48.045 because it was irrelevant and because the district court failed to hold a Petrocelli[22] hearing to determine its admissibility.[23]

Although pleadings are liberally construed to place matters in issue to which the adverse party had fair notice,[24] Converse's complaint would not put a defendant on notice that unpaid rent was part of the damages sought. The unpaid rent claim was not covered by her claim for unjust enrichment because she only pleaded facts related to her investment in High Sierra Heli-Skiing. Nor was the issue raised by the evidence regarding Vested's liability for fraud, because the requests for admission were silent as to any agreement to pay rent. Neither did Vested manifest an express or implied consent to litigate this issue.[25] In fact,

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[22]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[23]In Taylor v. Thunder, 116 Nev. 968, 973, 13 P.3d 43, 46 (2000), this court extended the rule to civil cases that a Petrocelli hearing must be held before evidence of prior bad acts may be admitted. Although the district court did not conduct a Petrocelli hearing in this case, we conclude that the failure to do so was harmless error because there was substantial evidence to support the district court's determination that Vested was liable for fraud. Hence, "the result would have been the same had the district court not admitted the evidence." King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000).

[24]Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1309, 971 P.2d 1251, 1254 (1998); see also NRCP 15(b).

[25]See NRCP 15(b).

Vested's attorney, at the hearing on damages, timely objected to the relevance of the evidence regarding unpaid rent, which consisted of a promissory note in the amount of $53,000.00 from Vested to Converse, reflecting Converse's $50,000.00 investment, plus the $3,000.00 Vested agreed to pay Converse for rent and telephone bills. Because Converse had reclaimed her Jeep and Vested had paid her $45,000.00, constituting the $50,000.00 Converse had invested in High Sierra Heli-Skiing, the district court awarded Converse $3,000.00 in compensatory damages plus prejudgment interest for unpaid rent. We conclude that the district court erred. We reverse the judgment as to the $3,000.00 damage award and corresponding prejudgment interest.

Next, regarding Detective Minister's investigative report, we conclude that the district court's admission of this report, which contained hearsay, was harmless error.[26] First, we conclude that Detective Minister's investigative report was relevant to the determination of whether punitive damages were warranted.[27] In determining whether the defendant's conduct was worthy of punishment, the district court properly considered the entire fraudulent scheme, not just the misrepresentations made to Converse, because the fact that Vested took money from potential customers to reserve seats indicated to Converse that the business was

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[26]See NRS 47.040(1)(a) (providing in pertinent part that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection").

[27]Pursuant to NRS 48.015, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

legitimate. His failure to refund deposits to customers was therefore relevant to show Vested's fraudulent intent and that his misrepresentations to Converse were not merely an isolated event. The danger of unfair prejudice stemming from the admission of this evidence did not substantially outweigh the probative value of the evidence, especially since this hearing was conducted without a jury [28]

However, the district court did err by admitting the investigative report over Vested's hearsay objection, as the report included testimony from alleged victims and letters from government officials who did not testify at the hearing. The trial court's reliance on NRS 51.155[29] was misplaced because the report included not only the investigating officer's observations and factual findings, but also out-of-court statements by alleged victims of Vested's fraudulent scheme that were offered for their truth.

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[28]NRS 48.035(1).

[29]NRS 51.155 provides:

> Records, reports, statements or data compilations, in any form, of public officials or agencies are not inadmissible under the hearsay rule if they set forth:
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> 1. The activities of the official or agency;
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> 2. Matters observed pursuant to duty imposed by law; or
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> 3. In civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,
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> unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.

We conclude, however, that the error was harmless because (1) the hearsay was, in eight out of twelve cases, corroborated by documentary evidence in the form of email receipt confirmations addressed to Harry Vested, and customer credit card receipts for heli-ski trip reservations; and (2) substantial evidence supports the district court's determination even in the absence of the consumers' statements.[30]

Finally, we turn to the issue of punitive damages. Although not raised by the pleadings, an issue of whether punitive damages are even warranted arises because we have concluded that the $3,000.00 award must be reversed, reducing the compensatory damages award to zero. "Because punitive damages cannot be awarded unless compensatory damages are also awarded,"[31] it could be argued that there are no compensatory damages and, thus, no punitive damages may be awarded. However, compensatory damages in the amount of $48,000.00 were awarded, but were offset by the amount that Vested had already tendered. When the $3,000.00 in unpaid rent is reversed, Converse's remaining award of $45,000.00 is completely offset by Vested's payment of $45,000.00. "[T]he term 'award' in NRS 42.005 refers to an award of actual damages by the [finder of fact], not the net award calculated after equitable offsets."[32] Hence, Converse could still be awarded punitive damages and justice would be furthered by doing so.

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[30]After reviewing the record, we conclude that Vested's other allegations regarding improperly admitted evidence are without merit.

[31]Evans, 116 Nev. at 615, 5 P.3d at 1054.

[32]Id.

The next issue is whether the punitive damages award was excessive.[33] The factors to be considered in determining whether a punitive damages award is excessive under the standard set forth in Ace Truck v. Kahn 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."[34]

The record reveals that Vested had engaged in highly reprehensible conduct. He misrepresented to Converse that HSHS had conducted all the necessary legwork to obtain heli-skiing permits, that HSHS had, in fact, obtained all necessary permits to conduct heli-skiing operations in the Sierras, and that HSHS was debt-free, all the while knowing that the company was largely in debt, the legwork had not been done, and the only permits issued had been for the Pine Nut Mountain Range, which was completely inadequate for heli-skiing operations because it lacked the vertical footage desired by extreme skiers. Converse's injuries included not only her $50,000.00 investment, but the time and expense of litigation, including attorney fees, the time and

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[33]See Ace Truck v. Kahn, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (footnote omitted) ("Punitive damages are legally excessive when 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. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.")

[34]Id. at 510, 746 P.2d at 137.

expense of making sure she was not held liable for the credit cards fraudulently obtained in her name and the emotional stress of having to vacate her own home to get away from Vested, who refused to move out of her house. Furthermore, Vested held out HSHS as a fully operational company to the general public, and took thousands of dollars in deposits from the skiing public for heli-skiing bookings, none of which were refunded. This fraudulent scheme is highly offensive to the public's sense of justice, and some form of monetary penalty is warranted to punish and deter Vested and others from engaging in this kind of conduct in the future.

The one factor that impedes such an award is the lack of evidence presented regarding Vested's financial condition. Vested's financial position is relevant to determine the amount of a punitive damages award that would be sufficient to deter and punish him, without financially destroying him.[35] However, Vested should not be allowed to escape punitive damages by failing to comply with the discovery process. Converse is not in the position to know Vested's financial condition. Although Converse duly sought to obtain such information through discovery, Vested repeatedly failed to provide the requested information. The district court considered this factor, determined that the lack of financial information was the fault of Vested and concluded that there was no evidence that a $50,000.00 punitive damages award was oppressive or would financially destroy Vested. We conclude that the district court did not err, given Vested's large-scale fraudulent conduct and his choice to ignore the judicial process. Vested was obliged to offer evidence that the

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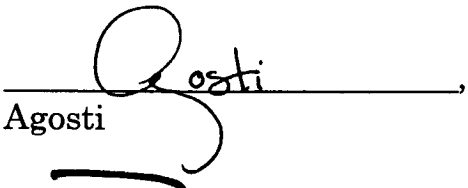
[35]Dillard Department Stores v. Beckwith, 115 Nev. 372, 381, 989 P.2d 882, 887-88 (1999).

punitive award would cause his financial destruction. He chose neither to participate fully in the lawsuit nor to present any such proof.

For the foregoing reasons, we reverse the district court's award of $3,000.00 to Converse for unpaid rent, plus the corresponding prejudgment interest, and we affirm the judgment of the district court in all other respects.

It is so ORDERED.



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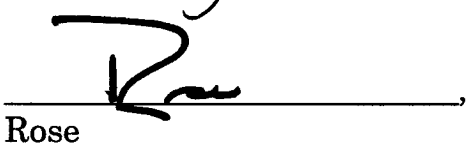

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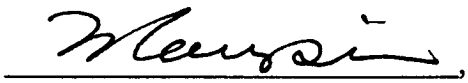

_____, J.
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cc: Hon. Michael P. Gibbons, District Judge
Law Office of Mark Wray
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