

IN THE SUPREME COURT OF THE STATE OF NEVADA

HELEN MCFARLAN AND JOHN
MCFARLAN,
Appellants,

vs.

MAINOR & HARRIS, LAWYERS, A
PARTNERSHIP OF PROFESSIONAL
CORPORATIONS, AND ROBERT W.
COTTLE, RICHARD A. HARRIS,
CLARK SEEGMILLER, AND W.
RANDALL MAINOR, INDIVIDUALLY,
Respondents.

No. 39549

FILED

AUG 19 2003

JANETTE W. D'OLIVE
CLERK OF SUPREME COURT
BY *J. Richards*

ORDER OF REVERSAL AND REMAND

This is an appeal of a district court order dismissing a legal malpractice complaint for failure by the plaintiff to convene and report the findings of an early case conference pursuant to NRCP 16.1.

This court has placed discovery sanctions within the power of the district court.¹ Thus, this court will not reverse a particular sanction imposed unless there has been an abuse of discretion.² But when the sanction imposed is dismissal with prejudice, this court employs a "somewhat heightened standard of review."³

Regarding sanctions, this court has cautioned that the sanction must fit the violation: "Fundamental notions of fairness and due

¹Nevada Power v. Fluor Illinois, 108 Nev. 638, 644, 837 P.2d 1354, 1358-59 (1992).

²Id.

³Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue.”⁴ Regarding the specific sanction of dismissal, this court has cautioned further that “while dismissal 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.”⁵ Further, dismissal as a sanction “should be used only in extreme situations; if less drastic sanctions are available, they should be utilized.”⁶ Alternative sanctions are listed in NRCP 37(b).

In Young v. Johnny Ribeiro Building, this court set out an inexhaustive list of eight factors that a court should consider before using dismissal as a sanction:

- (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 dismissal relative to the severity of the abusive conduct;
- (4) whether evidence has been irreparably lost;
- (5) the feasibility and fairness of alternative and less severe sanctions, such as an order deeming facts relating to improperly lost or

⁴GNLV Corp. v. Service Control Corp., 111 Nev. 866, 870, 900 P.2d 323, 325 (1995) (citing Young, 106 Nev. at 92, 787 P.2d at 779-80).

⁵Young, 106 Nev. at 92, 787 P.2d at 780 (citing Auode v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989)).

⁶Nevada Power, 108 Nev. at 645, 837 P.2d at 1359 (citing Moore v. Cherry, 90 Nev. 390, 528 P.2d 1018 (1974)).

- 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.⁷

In addition, the district court must hold a hearing before resorting to the extraordinary sanction of dismissal.⁸ The purpose of the hearing is to explore the scope of the propounded discovery and the adequacy of the answers thereto as well as any other facts bearing on the Young analysis.⁹ Here, the hearing was held by the discovery commissioner.

Further, this court requires that the district court engage in “thoughtful consideration” of the Young factors and any others that might pertain to the particular case.¹⁰ In particular, the district court must provide “an express, careful and preferably written explanation of the court’s analysis of the pertinent factors.”¹¹ The record reflects the discovery commissioner considered the Young factors before recommending dismissal. The district court never provided any evidence

⁷GNLV Corp., 111 Nev. at 870, 900 P.2d at 325-26, (citing Young, 106 Nev. at 93, 787 P.2d at 780).

⁸Nevada Power, 108 Nev. at 646, 837 P.2d at 1360.

⁹Id.

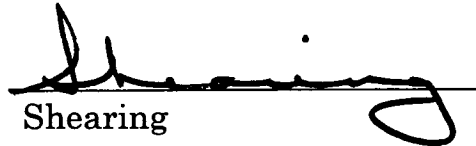
¹⁰GNLV Corp., 111 Nev. at 870, 900 P.2d at 325.

¹¹Young, 106 Nev. at 93, 787 P.2d at 780.


of its analysis because of a mistaken belief that no opposition to the discovery commissioner's recommendation had been received by the commissioner's office.

Because a timely opposition was filed, we reverse and remand this matter for the district court to consider the commissioner's recommendation in light of the Young factors and the severity of the sanctions. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Mark R. Denton, District Judge
Richard R. Reed
Hutchison & Steffen, Ltd.
Clark County Clerk