IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDERSON DAIRY, INC., A NEVADA CORPORATION, Appellant, vs. BENNETT ELLIOTT, Respondent.	No. 37397
THERESA DOWLING, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and BENNETT ELLIOTT, Real Party in Interest.	No. 40134

FILED

JUN 03 2003

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

ORDER OF REVERSAL AND REMAND (No. 37397) and
ORDER GRANTING PETITION FOR WRIT OF MANDAMUS (No. 40134)

This is an appeal from a judgment pursuant to a jury verdict in favor of Bennett Elliott against his former employer, Anderson Dairy, Inc. (Anderson), for the alleged tortious conduct of Anderson employees. This case is also consolidated with Anderson's attorney's petition for a writ of mandamus or prohibition, challenging the imposition of sanctions by the district court for perceived violations of Nevada Supreme Court Rules.

The jury awarded Elliott $5,000 for the assault claims, $25,000 for battery, and $6,500 for intentional infliction of emotional distress. The jury also awarded Elliott $285,000 in punitive damages

against Anderson. The jury, ruled in favor of Anderson however, on a constructive discharge claim.

Anderson first argues that the exclusive remedy provisions of Nevada's workers' compensation laws should have barred Elliott's personal injury claims. NRS 616A.010(3) provides, "The provisions of chapters 616A to 617, inclusive, of NRS are based on a renunciation of the rights and defenses of employers and employees recognized at common law." NRS 616A.020(1) further provides, "The rights and remedies provided in chapters 616A to 616D, inclusive, of NRS for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive . . . ."

We have previously held that acceptance of a workers' compensation award extinguishes any common law claims the employee could have brought.[1] Even if or when an employee originally could have brought an intentional tort action, once the employee has accepted a workers' compensation award for his injury, the common law right of action is "merged by accord with a compensation award accepted in its place."[2] An "injured employee [is] permitted only one recovery."[3]

Furthermore, an employee who files a workers' compensation claim cannot argue ignorance regarding the waiver of his common law

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[1]Advanced Countertop Design, Inc. v. Dist. Ct., 115 Nev. 268, 270, 984 P.2d 756, 758 (1999) (citing Artega v. Ibarra, 109 Nev. 772, 776, 858 P.2d 387, 390 (1993) (citations omitted)).

[2]Id. at 272-73, 984 P.2d at 759.

[3]Id. at 271, 984 P.2d at 758.

rights.[4] "An injured employee making a statutory workers' compensation claim is charged with knowledge of the statutory scheme's provisions, including its exclusive remedy provision."[5]

In this case, Elliott filed a C-4 form and a SIIS incident report seeking compensation under the workers' compensation laws for the rib fracture he suffered as a result of an incident in which Joseph Gemma, production manager for the department where Elliott worked, jokingly told Manny Rivas, Elliott's best friend at Anderson, to "squeeze the shit outta Elliott and get him outta here, please." Rivas complied by giving Elliott a bear hug, which caused the rib fracture.

Elliott's claim was accepted and medical benefits were paid on the claim. Because he elected to seek compensation for his rib injury through workers' compensation, Elliott's right to any common law remedy for this injury was lost. "Having accepted benefits for an accidental injury, [the employee] cannot now change his position, assert the injury was not accidental, and pursue an intentional injury claim."[6]

Here, in addition to the broken rib incident, Elliott asserted other incidents of intentional behavior by Gemma, the production manager, and Brian Guido, who was designated as "lead man," but was not considered management. Anderson claims that these other claims of personal injury (assault, battery and infliction of emotional distress) also

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[4]Id. at 272, 984 P.2d at 759.

[5]Id.

[6]Id. at 271, 984 P.2d at 759.

fall under the exclusive remedy provision of the workers' compensation laws.

Employers do not enjoy immunity from their intentional torts through reliance on the exclusive remedy provisions of the workers' compensation statutes when the employee does not elect to recover under workers' compensation.[7] Furthermore, before an employee can elect to recover under workers' compensation, there must be an "injury."[8] NRS 616A.265(1) defines injury as "a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence."

In this case, Elliott only filed a claim under workers' compensation for the broken rib he sustained from Rivas' bear hug. He did not file a claim for any other injury arising out of the other alleged torts. Therefore, although the district court should have granted Anderson's summary judgment motion for the rib injury incident, the exclusive remedy provisions of the workers' compensation laws do not preclude Elliott's other intentional tort claims. Accordingly, we reverse and remand for a new trial based on the other tort allegations, alone.

Next, Anderson argues that the district court erred by allowing the jury to consider liability against Anderson for Guido's tortious acts. In order for an employer to be liable for the intentional torts of an employee, the tort must have occurred "within the course and scope

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[7]Id. at 270-71, 984 P.2d at 758.

[8]See NRS 616A.020(1).

of employment."[9] In Prell Hotel Corp. v. Antonacci, we clarified what constitutes "within the course and scope of employment."[10] "[I]f the employee's tort is truly an independent venture of his own and not committed in the course of the very task assigned to him, the employer is not liable."[11] "Where, however, the willful tort is committed in the course of the very task assigned to the employee, liability may be extended to the employer."[12]

In Prell, this court concluded that a card dealer was acting within the scope of his employment and thus, the employer was liable when the employee punched a guest in the eye while he was dealing.[13] Similarly, although some of Guido's acts appear to be outside the scope of his employment, others could arguably have been within the scope of his employment. Whether Guido's acts were within the scope of his employment was a proper determination for the jury to make.

At trial, Anderson requested the same jury instructions regarding employer liability that were used in Prell. The requested instructions are as follows:

> An employer is liable for an assault and battery committed by an employee when the

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[9]Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970).

[10]Id. (citing Chapman v. City of Reno, 85 Nev. 365, 455 P.2d 618 (1969); J. C. Penney Co. v. Gravelle, 62 Nev. 434, 155 P.2d 477 (1945)).

[11]Id.

[12]Id.

[13]Id. at 392.

> employee is acting in the course and scope of his employment.
>
> When an employee is acting within the course and scope of his employment, that is, while engaged in the service and work of his employer, and he does an act personal to himself that is so inextricably intertwined with his service to his employer, his doing so does not break the employment relationship so as to release the employer from responsibility for the employee's conduct.
>
> On the other hand, when an employee departs from the business or service of his employer, and pursues some activity or object not for his employer and not reasonably embraced within his employment, the employer is not responsible for anything done or not done in such activity.[14]

Rather than give Anderson's proffered instruction, the district court gave the following instruction:

> Anderson Dairy is a corporation and as such can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his authority or employment is the act or omission of such corporation.
>
> The principal is liable for a tort which an agent commits in the course of his employment. This is so even though the principal may have no knowledge that his agents are committing the tort. If the employee is acting in the scope of his or her real or apparent authority, then the employee is deemed the agent of the principal and the principal is liable for the employee's actions.

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[14]Id. at 392, 469 P.2d at 401.

> Defendant Anderson Dairy is liable for the harm and injury caused by the intentional actions of its employees unless; the intentional conduct was an independent venture of the employee; was not committed in the course of a task assigned to the employee; or, the intentional conduct was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of the employee's duties.
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> The conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and probability of injury.

Anderson claims that the district court erred by not giving the jury its proffered instructions and allowing the jury to consider the acts of Guido in assessing tort damages against Anderson. However, as we stated in Prell, it is not error to refuse a party's proffered jury instructions if those instructions are merely embellishments of the proper instructions already provided to the jury.[15] Here, the jury was properly instructed on the issue of employer liability for an employee's intentional torts.

Anderson next argues that the jury should not have considered its employees' acts in the determination of punitive damages. Smith's Food & Drug Centers v. Bellegarde,[16] adopting the Restatement (Second) of Torts § 909 (1977), provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

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[15]86 Nev. at 392, 469 P.2d at 400 (citing Duran v. Mueller, 79 Nev. 453, 386 P.2d 733 (1963)).

[16]114 Nev. 602, 958 P.2d 1208 (1998).

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.[17]

Also applicable to this case is NRS 42.007(1), which provides,

1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:

(a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

(b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

(c) The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the

[17]Id. at 610, 958 P.2d at 1214.

> corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

We have stated that to determine if a person is acting in a managerial capacity, "'[the key] is to look to what the individual is authorized to do by the principal and to whether the agent has discretion as to what is done and how it is done. Job titles . . . should be of little importance.'"[18] Recently, we adopted a definition of a managerial agent as one who has been granted discretion or policy-making authority.[19]

In this case, neither Guido, nor Gemma, was shown to have discretion or policy-making authority, and they are not managerial agents. Furthermore, there was no evidence showing that a managerial agent had ratified their actions. Thus, the the district court erred by imposing punitive damages on the basis of Guido and Gemma's actions.

Next, Anderson challenges several of the district court's evidentiary rulings. First, Anderson claims that the district court erred by admitting irrelevant evidence of its business practices and products, including evidence of bacteria at the plant, evidence that deer meat was occasionally stored in the company's refrigerator, evidence of insects and rodents, evidence of water leaks in the plant, and other food quality issues. Anderson further contends that this irrelevant evidence prejudiced the jury.

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[18]Smith's, 114 Nev. at 611, 958 P.2d at 1214 (quoting J. Ghiardi and J. Kirchner, Punitive Damages Law and Practice, ch. 24, at 15 (1987)).

[19]Nittinger v. Holman, 119 Nev. ___, ___ P.3d ___ (Adv. Op. No. ___ May 30, 2003).

"Trial courts have considerable discretion in determining the relevance and admissibility of evidence."[20] A trial court's ruling will not be disturbed absent clear abuse.[21] However, when the district court's evidentiary rulings, taken together, deny a party the fair opportunity to present his case, this court is compelled to reverse and remand for a new trial.[22]

NRS 48.015 defines relevant evidence 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." However, relevant evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury" or "if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[23]

Elliott argues that evidence of Anderson's business practices and products is relevant to show the amount of control that Anderson officials had over the company and that Elliott's mistake in pouring acid sanitizer into the eggnog "was fabrication and nothing more than an excuse to get rid of him." This argument is not persuasive.

Although Elliott, in his second suit, made a claim for tortious discharge, the district court granted summary judgment on this claim.

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[20]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996) (citing Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992)).

[21]Id.

[22]See Woods v. State, 101 Nev. 128, 137, 696 P.2d 464, 470 (1985).

[23]NRS 48.035(1) and (2).

Furthermore, Elliott cannot claim that he was constructively discharged in retaliation for his complaints about Anderson's sanitary conditions because Elliott did not report anything to anyone outside of Anderson.[24] Therefore, evidence of Anderson's products and business practices does not have "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" and is not relevant.[25]

We conclude that the district court abused its discretion in admitting evidence of Anderson's business practices and products because the evidence was highly prejudicial, predominately remote in time, cumulative and irrelevant.

During a deposition of Elliott's union representative, Gary Mauger, Anderson's attorney learned that Elliott's first attorney, Patrick King,[26] had met with Mauger and told him that his client, Elliott, was paranoid, that he did not believe his story, and that King was looking for "dirt" on Anderson to bolster his client's case. During the trial, Anderson attempted to offer this evidence during direct examination of Mauger. The court excluded this testimony, ruling that it was prejudicial. On appeal, Anderson argues that the evidence was admissible.

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[24]See Wiltsie v. Baby Grand Corp., 105 Nev. 291, 293, 774 P.2d 432, 433 (1989) ("Because appellant chose to report the activity to his supervisor rather than the appropriate authorities, he was merely acting in a private or proprietary manner.").

[25]NRS 48.015.

[26]King was disqualified from the case due to violations of Nevada's Supreme Court Rules. The district court's disqualification order precluded Elliott's new attorneys from discussing the facts of the case with King.

Elliott argues that (1) these statements are unfairly prejudicial because they appear nowhere in the written record of the case and Elliott's counsel had no way of knowing about them; (2) the statements were of questionable reliability because Mauger displayed animosity that he had to testify; (3) "these statements are the type of banter and negotiation which opposing attorneys routinely exchange while discussing settlement," so they are excluded as settlement matters; and (4) there was no evidence that Elliott authorized King to make these statements or that they were made within the scope of representation.

Under NRCP 37(b)(2), evidence can be excluded if a party fails to obey an order to provide or permit discovery. In this case, however, Anderson did not fail to provide or permit discovery. Elliott could have obtained information regarding King's statements to Mauger through discovery, but failed to do so. There is no rule that excludes a party's evidence merely because the other party was unaware of the information.

We have previously stated that it is the jury's function to weigh the credibility of witnesses.[27] Therefore, even if Mauger was not a credible witness due to his alleged animosity, this is for the jury to weigh, and does not affect the admissibility of his testimony.

Evidence of a compromise or an offer to compromise is inadmissible to prove liability.[28] Here, however, when King made these statements to Mauger, he was not attempting to compromise or settle the claim. He was speaking to the union representative, not a representative

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[27]See, e.g., Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979).

[28]See NRS 48.105(1).

from Anderson. Therefore, King's statements to Mauger do not fall under the exclusion provisions of NRS 48.105.

NRS 51.035(3) provides that a statement offered against a party and "[a] statement by his agent or servant concerning a matter within the scope of his agency or employment, made before the termination of the relationship" is not hearsay.[29] Here, King was representing Elliott at the time the statements were made to Mauger. In addition, King was meeting with Mauger to discuss the case, which was clearly within the scope of his agency or employment. Therefore, King's statements are admissible as a statement offered against a party.

The final question is whether the relevance of this evidence is substantially outweighed by the danger of unfair prejudice.[30] By its very nature, all evidence presented against a party is prejudicial. Here, Anderson claims that this evidence shows that Elliott's credibility is questionable and that the evidence regarding Anderson's business practices was actually motivated as a smear tactic. This evidence was relevant for those purposes and should have been allowed. However, because we conclude that the district court erred by admitting evidence of Anderson's business practices and products, evidence of King's statements will not be relevant in a new trial where evidence of Anderson's business practices and products will not be admitted.

Shortly after Elliott filed his first lawsuit against Anderson, Elliott's attorney contacted David Coon, Anderson's Vice-President, telling him that neither he nor any Anderson representatives could speak to

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[29]NRS. 51.035(3)(d).

[30]See NRS 48.035.

Elliott about employment issues. When Anderson tried to present this evidence at trial, the district court excluded the testimony on the ground that it was cumulative. Anderson contends that this was erroneous. We agree.

Although testimony had been admitted showing that Elliott's attorney had instructed Elliott not to talk to Anderson representatives, no evidence had yet been presented showing that Anderson's management was prohibited from talking to Elliott, especially about issues that Elliott raised. Therefore, this evidence could not have been cumulative. Furthermore, by not allowing this evidence to be admitted, the jury was left with the impression that Anderson did not attempt to address Elliott's complaints regarding working conditions at Anderson, when, in actuality, Anderson was prohibited from doing so. This was prejudicial to Anderson.

Anderson next contends that the district court erred by excluding evidence of Guido's motivation for making threats against Elliott.

Elliott's initial complaint for assault, battery, intentional infliction of emotional distress and related causes of action included Guido and Gemma as defendants. Prior to trial, however, Guido and Gemma settled with Elliott and were dismissed from the case. Because evidence of settlement is inadmissible, the district court allowed Elliott to redact all reference to the fact that Guido was originally a defendant in the case from the physical evidence.

On the day Guido was served with legal papers, he allegedly called Elliott's home and left a message on his answering machine, saying "you are going to pay for this." Later, at work, Elliott allegedly heard Guido state that he was going to "kick Elliott's ass."

In Elliott's diary and on a union grievance form, Elliott indicated that these threats were in response to the lawsuit against Guido, himself. However, once the district court allowed the portions of the grievance form and the diary referring to the lawsuit against Guido to be redacted, Elliot and his attorneys insinuated to the jury that the threats were a result of the suit against Anderson and that Guido's threats were made on behalf of Anderson.

Evidence of a settlement offer or acceptance is not admissible to prove liability.[31] This evidence can be admitted for other purposes.[32] However, "where there has been a settlement between a plaintiff and one of several defendants, the jury may not be informed as to either the fact of the settlement or the sum paid."[33] In applying this rule, it should be remembered that the purposes of the rules of evidence are to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[34]

Here, where Elliott took advantage of the district court's evidentiary rulings by misleading the jury, the goals of fairness and truth were frustrated. Anderson should have been allowed to show that Guido's motive for his threats toward Elliott was the fact that he was personally

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[31]NRS 48.105(1).

[32]NRS 48.105(2).

[33]Moore v. Bannen, 106 Nev. 679, 680-81, 799 P.2d 564, 565 (1990).

[34]NRS 47.030.

sued, not that Anderson was sued. This would discredit Elliott's testimony when he later asserted that Guido's threats were due to the lawsuit against Anderson.

During trial the district court did not allow admission of deposition testimony of Karen Slade regarding the fact that Elliott disclosed personal, sexual information to his co-workers. The court determined that this information was unduly prejudicial. Anderson argues that this information should have been admitted to show the cause of Elliott's "victimization" at work. This argument is not persuasive.

When probative value is substantially outweighed by the danger of unfair prejudice, relevant evidence is inadmissible.[35] Here, the proposed testimony was as follows:

> He would discuss how his wife would come home and find him . . . masturbating to watching porno flicks. Then he brought in puppets that he used to -- or wigs that he had for hand puppets so his hand would resemble a female. He brought them in and showed them to everybody, had them in his locker, in some -- a little storage area, then proclaimed that somebody went and took those out of his car and all these other things when people started picking on him in the plant about it.

The trial court was correct in ruling that this testimony would be highly prejudicial. This evidence was not necessary to show that Elliott shared private information with his co-workers because there was other, less prejudicial testimony of this fact included in the deposition of Karen Slade that was read to the jury. Therefore, the danger of unfair prejudice substantially outweighed the probative value.

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[35]NRS 48.035(1).

Taken as a whole, we conclude that the district court's erroneous evidentiary rulings denied Anderson the opportunity to present its case. Therefore, we reverse the judgment on the assault, battery, intentional infliction of emotional distress claims, and punitive damages award and remand for a new trial.

In Elliott's first complaint, his wife, Elaine Elliott, also asserted a loss of consortium claim. On the first day of trial, Elliott's attorney sought to withdraw Elaine's loss of consortium claim. Anderson's counsel had no objection. Anderson now claims that it is entitled to costs for the loss of consortium claim under NRS 18.020, which provides, "Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered . . . ." We disagree.

NRS 18.020 provides as a prerequisite to an award of costs that a judgment be rendered. Furthermore,"[w]e have held that a party cannot be considered a prevailing party in an action that has not proceeded to judgment."[36] Here, since Elaine Elliott was voluntarily dismissed with prejudice, there was no judgment by the district court. Therefore, there was no prevailing party. Thus, Anderson is not entitled to costs.

Anderson next claims it was entitled to costs and attorney fees for the constructive discharge claim since this claim was originally part of a separate complaint, but was later consolidated with Elliott's other claims.

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[36]Eberle v. State ex rel. Redfield Trust, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992).

Here, although the jury returned a verdict in favor of Anderson on the constructive discharge claim, we are reversing the judgment on the assault, battery, and intentional infliction of emotional distress claims and the punitive damages award and remanding for a new trial. Therefore, we need not address the issue of costs and fees.

Finally, Anderson's counsel, Teresa Dowling, has petitioned this court for a writ of mandamus or prohibition based on her argument that the district court erred by imposing sanctions against her. This petition was subsequently consolidated with Anderson's appeal.

"This court has original jurisdiction to issue writs of mandamus."[37] Mandamus can be issued to control the district court's arbitrary or capricious exercise of its discretion.[38] A writ may issue only if there is "no plain, speedy, and adequate remedy at law."[39]

An attorney who has sanctions imposed during the course of a civil trial has no plain, speedy, or adequate remedy at law because she was not a party to the underlying civil action.[40] Therefore, a petition for extraordinary relief is appropriate.[41]

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[37]Washoe County Dist. Attorney v. Dist. Ct., 116 Nev. 629, 635, 5 P.3d 562, 566 (2000).

[38]See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (citations omitted).

[39]Civil Serv. Comm'n v. Dist. Ct., 118 Nev. ___, ___, 42 P.3d 268, 270 (2002) (citing NRS 34.170; NRS 34.330).

[40]Albany v. Arcata Associates, 106 Nev. 688, 690 n.1, 699 P.2d 566, 568 (1990).

[41]Id.

District courts have the power to impose sanctions for litigation abuse.[42] In this case, the district court imposed sanctions against Dowling in the amount of $7,218.75 for violating SCR 173(5) and SCR 172(1)(a). The sanctions were based on Dowling's trial conduct of eliciting Mauger's testimony regarding statements made to him by Elliott's former attorney, King.

SCR 173(5) provides that a lawyer shall not:

> In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Based on our analysis of the admissibility of Gary Mauger's testimony, we conclude that Dowling could have reasonably believed that Mauger's testimony was relevant and admissible. Therefore, sanctions for violation of SCR 173(5) were arbitrary and capricious.

SCR 172(1)(a) provides, "A lawyer shall not knowingly [m]ake a false statement of material fact or law to a tribunal."[43] Based on the plain language in this rule, unless a misstatement of fact or law is made with knowledge, rather than through inadvertence or mistake, there is no violation.

In this case, after Elliott's attorney objected to Mauger's testimony regarding King's statements to him, Dowling indicated in her

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

[43]SCR 172(1)(a).

offer of proof that she learned of this information during Mauger's deposition and that the parties all had knowledge of this information. These statements were not accurate. In actuality, although Dowling did learn of this information at Mauger's deposition, it was not recorded in the deposition transcripts, but rather was off the record. In addition, at the time of Mauger's deposition, Elliott was still represented by King. Therefore, King had knowledge of the information, but because Elliott's new counsel was prohibited from contacting King, they did not obtain the information.

Here, although the court could have misunderstood the meaning of Dowling's explanations, this does not rise to the level of "knowing" misrepresentations. In Sierra Glass & Mirror v. Viking Industries, we concluded there was a knowing violation of SCR 172 where the attorney, once aware of a misstatement, failed to correct it.[44] Here, Ms. Dowling attempted to clarify her statements once she realized her mistake.

We conclude that the district court erred by imposing sanctions against Dowling. We also conclude that the exclusive remedy provisions of Nevada's workers' compensation laws should have barred Elliott's tort claim based on the fractured rib incident, that the award of punitive damages was improper, and that the district court's erroneous evidentiary rulings denied Anderson the opportunity to present its case. Therefore, we reverse the district court's judgment and remand for a new trial on the assault, battery, and intentional infliction of emotional distress claims, exclusive of the fractured rib incident. We, however,

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[44]107 Nev. 119, 127, 808 P.2d 512, 516 (1991).

affirm the district court's ruling on the constructive discharge claim. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order. We also ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS compelling the district court to vacate its order imposing sanctions on Theresa Dowling.

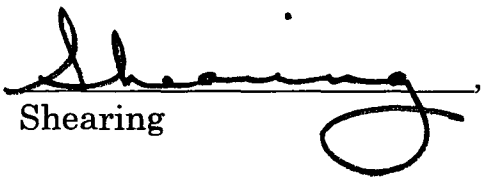
Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Nancy M. Saitta, District Judge
Lemons Grundy & Eisenberg
Theresa M. Dowling, P.C.
Brenske & Christensen
Clark County Clerk

SHEARING, J., concurring in part and dissenting in part:

I concur in the order of the majority on all issues except the issue of retaliatory discharge. I would allow Elliott to go to trial on his claim of retaliatory discharge. I do not agree with the holding in Wiltsie v. Baby Grand Corp.[1] that making internal complaints may not result in retaliatory discharge.



Shearing, J.

[1]105 Nev. 291, 293, 774 P.2d 432, 433 (1989).