Death Penalty Without a Hearing? How the Nevada Supreme Court's Decision in *Bahena v. Goodyear* Incorrectly Defines Discovery Sanctions and Denies Due Process to Civil Litigants

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I. INTRODUCTION

In recent years, perhaps nothing has changed complex civil litigation more than the ever-expanding role of discovery. With the arrival of e-discovery, courts now demand that litigants locate, categorize, and produce every document, e-mail, voice-mail, or text message that could possibly lead to relevant evidence.¹ Unsurprisingly, as courts augmented the production burden, the number of discovery disputes increased.² Consequently, more and more courts across the country must consider when and whether to issue discovery sanctions, including the civil justice system's ultimate discovery sanction—the "civil death penalty."³ A court invokes the civil death penalty by striking a party's pleadings for discovery abuses, thereby quashing any defense that party may have regarding the merits of its underlying claims.⁴ Practitioners call such sanctions the "death penalty" because the sanctioned party loses its constitutional right to defend itself.⁵

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¹ See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 1–2 (2008), http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf.

 $^{^2}$ See id.

³ See Retta A. Miller & Kimberly O'D. Thompson, "Death Penalty" Sanctions: When to Get Them and How to Keep Them, 46 BAYLOR L. REV. 737, 738 (1994); Sherman Joyce, The Emerging Business Threat of Civil 'Death Penalty' Sanctions, LEGAL OPINION LETTER (Wash. Legal Found., D.C.), Sept. 10, 2009, at 1, http://www.wlf.org/publishing/publication_detail.asp?id=2102.

⁴ See Miller & Thompson, supra note 3, at 739-41.

⁵ See, e.g., Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 850 (Tex. 1992) (referring to a court's striking of pleadings as the death penalty). The civil death penalty implicates due process rights because the sanction acts as an adjudication of a party's claims based on the party's conduct during discovery and not the merits of the party's claims. *See* Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 591 (9th Cir. 1983) ("Sanctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an

Large corporations frequently sued for product liability accuse personal injury attorneys of purposely manipulating discovery requests as a litigation tactic in order to coax the judge into imposing the civil death penalty.⁶ Alternatively, plaintiff attorneys view the death penalty as a necessary means of preventing wealthy businesses from dragging out litigation through "document dumping" and vague answers to interrogatories.⁷ In the end, courts' use of the civil death penalty relies heavily on judicial discretion and varies widely by jurisdiction.⁸

Nevada courtrooms are no exception to discovery disputes in the information age.⁹ In *Bahena v. Goodyear*, the Nevada Supreme Court attempted to clarify Nevada's discovery sanction standard by differentiating between "caseconcluding" and "non-case concluding" sanctions.¹⁰ In particular, the majority reasoned a discovery sanction striking a defendant's answer as to liability is

Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. However, if a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it. Although punishment and deterrence are legitimate purposes for sanctions, they do not justify trial by sanctions. Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules.

TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991) (citations omitted).

⁶ Joyce, *supra* note 3, at 1. Some attorneys and judges have noticed an increase in requests for sanctions that appear to be a tactical maneuver instead of a legitimate dispute; for example, some attorneys may request electronically stored information that may or may not even exist with the hopes of securing sanctions against the opposing party for failing to produce the requested discovery. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS, *supra* note 1, at 21.

⁷ See Jason Ochs, *The "Death Penalty" in Civil Litigation*, THE PATIENT TORT REP. (Aug. 10, 2010), http://patient-tort-report.com/?tag=pharmapress. Ochs describes "document dumping" as a litigation tactic wherein a defendant produces a large amount of documents and essentially tells the Plaintiff "to 'go fish'—as opposed to producing specific documents in response to specific requests so as to identify which specific documents were being produced with respect to which specific request." *Id.*

⁸ See In re Seroquel Prods. Liab. Litig., 244 F.R.D. 650, 659–60, 664–66 (M.D. Fla. 2007) (imposing sanctions for "purposeful sluggishness" and for failing "to make a sincere effort to facilitate an understanding of what records [were] kept"); Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005045XXOCAI, 2005 WL 679071, at *5 (Fla. Cir. Ct. Mar. 1, 2005) (sanctioning Morgan Stanley for discovery abuses which resulted in a verdict of 850 million dollars); Pinkstaff v. Black and Decker Inc., 211 P.3d 698, 704 (Colo. 2009) (refusing to use the civil death penalty because such sanctions deny due process).

⁹ See generally Amici Curiae Brief of Chamber of Commerce of the United States of America, et al. in Support of Respondent/Cross-Appellant, Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592 (Nev. 2010) (No. 49207), *available at* http://www.nam.org/~/media/2C9D5CE7581A4692A852988143AD3B2B/Bahena_v_Goodyear.pdf.

¹⁰ Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 596 (Nev. 2010). Many members of the Nevada legal community refer to the *Bahena* litigation in terms of *Bahena I* and *Bahena II* because Goodyear petitioned for rehearing and the Nevada Supreme Court enti-

infraction that did not threaten to interfere with the rightful decision of the case."); Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977) ("[T]he opportunity to be heard is a litigant's most precious right and should be sparingly denied."). In *TransAmerican Natural Gas Corp. v. Powell*, the Texas Supreme Court explained its reluctance to impose the civil death penalty sanctions:

"non-case concluding," whereas a sanction striking a defendant's answer as to liability *and* damages is "case-concluding."¹¹ Moreover, the Court held district court judges must conduct evidentiary hearings only when discovery sanctions are case-concluding.¹² This Note argues the Nevada Supreme Court erred in deciding *Bahena* because striking an answer as to liability is case-concluding under Nevada precedent. Furthermore, this Note argues the Court's holding in *Bahena* violated Goodyear's due process rights because Nevada law requires an evidentiary hearing before courts impose case-concluding discovery sanctions.

In Part II, this Note defines Nevada's civil death penalty by examining the pertinent Nevada Rules of Civil Procedure, the historical development of Nevada's discovery sanctions test, and the Nevada Supreme Court's application of the civil death penalty. Part III addresses the facts and holding of *Bahena v. Goodyear* and introduces "non-case concluding" sanctions. Part IV describes how the Nevada Supreme Court's holding in *Bahena* strayed from Nevada precedent, failed to provide adequate due process rights, and could lead to abuse of the sanctioning process. Finally, this Note concludes by conducting a jurisdictional analysis of discovery sanction standards and suggests alternative sanctions to those the Nevada Supreme Court imposed in *Bahena*.

II. DEFINING NEVADA'S CIVIL DEATH PENALTY

Nevada trial judges possess inherent equitable powers to punish parties for abusive litigation practices.¹³ If a party to litigation fails to obey an order to provide or permit discovery, Rule 37(b)(2) of the Nevada Rules of Civil Procedure authorizes courts to impose "just" discovery sanctions.¹⁴ The sanctions available to the court, among other less severe sanctions, include an order striking out pleadings or part of pleadings, dismissing the action or any part of the action, or rendering a judgment by default against the disobedient party.¹⁵ If a district court determines that a party's actions warrant discovery sanctions, the Nevada Supreme Court will not reverse the decision unless the district court

tled its rehearing decision "Bahena II." Although this note references Bahena II, for clarity purposes, this Note will refer to the litigation simply as "Bahena."

¹¹ *Id.* Essentially, under the Nevada Supreme Court's new discovery sanction standard, noncase concluding sanctions include any sanction that leaves a party with some claim or defense. For example, in *Bahena*, the Court struck all of Goodyear's defenses as to liability but allowed Goodyear to defend itself as to damages. Thus, because Goodyear could defend itself as to damages, the Court reasoned its sanction was non-case concluding. On the other hand, case-concluding sanctions, which trigger a higher standard of review, include only sanctions which deprive a party of all defenses. *See id.*

¹² *Id.* at 603.

¹³ Young v. Johnny Ribeiro Bldg., Inc., 787 P.2d 777, 779 (Nev. 1990).

¹⁴ NEV. R. CIV. P. 37(b)(2). For a discussion of the meaning of the word "just" in regard to discovery sanctions, see *infra* note 119.

¹⁵ Bahena, 235 P.3d. at 596–97. As discussed *infra* Part IV, sec. F, Nevada district courts should, and are arguably obligated to, consider less serious sanctions before striking pleadings or entering a default judgment. *See Young*, 787 P.2d at 780. Less serious sanctions include monetary fines, deeming evidence as fact, and sanctioning the recalcitrant attorney. *Id.*; Nev. R. Civ. P. 37.

abused its discretion.¹⁶ As such, Nevada trial judges have broad discretion to determine whether discovery abuses have occurred during litigation and how harshly to punish recalcitrant parties.

A. Nevada's Discovery Sanctions Test: Young v. Jonny Ribeiro

Although the Nevada Supreme Court reviews discovery sanctions under an abuse of discretion standard, prior to 1990, Nevada case law provided little guidance as to what types of decisions actually constituted an abuse of discretion.¹⁷ Then, in 1990, the Nevada Supreme Court developed the state's modern approach for determining discovery sanctions by listing factors a judge should consider when deciding whether to impose sanctions. Moreover, the Court held a heightened standard of review should apply when a district court orders a sanction dismissing a pleading with prejudice.¹⁸ Thus, as outlined below, the Court reaffirmed the abuse of discretion standard, but began to develop and further specify the standard's parameters through common law.

Nevada's watershed discovery sanction case, *Young v. Johnny Ribeiro Building, Inc.*, concerned a failed real estate business venture that resulted in claims for breach of contract and breach of fiduciary duty.¹⁹ During discovery, Young turned over two personal business diaries to Ribeiro as part of a supplemental discovery response.²⁰ Young testified in a deposition that he made certain entries into his diaries during specific conversations with Ribeiro.²¹ However, Ribeiro suspected Young fabricated the discovery evidence.²² After a full evidentiary hearing, the district court held Young willfully fabricated the evidence and sanctioned him by dismissing his complaint with prejudice.²³ On appeal, the Nevada Supreme Court upheld the decision but provided a new standard for reviewing discovery sanctions that dismiss pleadings with prejudice.²⁴ Specifically, the court held a "somewhat heightened standard of review should apply" to protect the non-moving party's fundamental right to due process²⁵ and make certain such sanctions are imposed only after

¹⁶ Kelly Broad. Co. v. Sovereign Broad., Inc., 606 P.2d 1089, 1092 (Nev. 1980).

¹⁷ Young, 787 P.2d at 781.

¹⁸ Id. at 779.

¹⁹ Id. at 778.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id. at 779–80.

²⁵ As discussed previously in footnote 5, although stated in slightly different terms, discovery sanctions inherently implicate due process rights because such sanctions require trial courts to balance the conflicting policies of preventing unnecessary delay and deciding cases on their merits. Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977). For example, in regard to preserving due process, the Eight Circuit Court held:

Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney fees or even an attorney's citation for contempt would be a more just and effective sanction. Dismissal and entry of a default judgment should be the rare judicial act.

Id. at 773.

"thoughtful consideration of all the factors involved in a particular case." 26

As noted previously, the Nevada Supreme Court also listed factors to assist district court judges in carrying out the heightened standard of review.²⁷ In particular, the Court required every discovery sanction resulting in dismissal with prejudice to "be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors."²⁸ The non-exhaustive factors included: 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.²⁹ Even though district courts are not required to use less severe sanctions before striking a litigant's pleadings, the Nevada Supreme Court made clear trial judges should strongly consider the listed factors before implementing a civil death penalty sanction.³⁰

The *Young* holding is important to discovery sanction litigation in Nevada for several reasons. First, the Nevada Supreme Court recognized Nevada's discovery sanctions standard was unclear prior to its decision in *Young*.³¹ Specifically, the Court admitted "Young's belief that the court went too far in dismissing the entire complaint was understandable, especially given the lack of clear authority in this state governing the proper scope of discovery sanctions."³² As a result, the *Young* decision created the modern standard for discovery sanction litigation in Nevada. Second, the Court recognized sanctions dismissing pleadings with prejudice should be subject to a higher standard of review because due process requires the sanctions relate to the claims at issue in the discovery order.³³ Finally, the Court determined the sanctions against Young were not manifestly unjust because Young had a full evidentiary hear-

³² *Id.*

²⁶ *Young*, 787 P.2d at 780. "Because dismissal sounds 'the death knell of the lawsuit,' district courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (citing Damiani v. R.I. Hosp., 704 F.2d 12, 17 (1st Cir. 1983)).

²⁷ Young, 787 P.2d at 780.

²⁸ Id.

²⁹ Id.

³⁰ See id. at 780–81.

³¹ Id. at 781.

³³ *Id.* at 779. One example of a sanction that fails to relate to the claims at issue in a discovery order is a sanction that is imposed merely as a punishment. The Ninth Circuit Court held, "Sanctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 591 (9th Cir. 1983).

ing and the opportunity to clarify his testimony before imposition of the civil death penalty.³⁴

B. Application of the Young Standard

Two years after *Young*, the Nevada Supreme Court reaffirmed its heightened standard of review for civil death penalty sanctions and emphasized the importance of holding an evidentiary hearing to preserve the sanctioned party's due process rights.³⁵ In *Nevada Power Company v. Fluor Illinois*, the district court abused its discretion by failing to conduct an evidentiary hearing before dismissing a claim with prejudice.³⁶ There, Fluor Illinois accused Nevada Power of various discovery abuses, including violating a discovery order by demolishing an allegedly defective cooling tower without court approval.³⁷ The district court held that Nevada Power willfully violated the court's order by demolishing the tower and dismissed its pleadings with prejudice.³⁸ More importantly, the district court reasoned that "the facts in dispute were sufficiently addressed by way of affidavits, documents, pleadings and argument of counsel" thereby making an evidentiary hearing unnecessary.³⁹

On appeal, the Nevada Supreme Court overturned the sanctions because the trial judge abused his discretion by failing to hold an evidentiary hearing.⁴⁰ The Court reasoned that determining whether a party failed to obey a court order "involves factual questions as to the meaning of the order allegedly disobeyed and questions as to whether the disobedient party did, in fact, violate the court's discovery order."⁴¹ Therefore, an evidentiary hearing was required to allow the accused party to introduce evidence, cross-examine the moving party's witnesses concerning the discovery order, and address questions regarding the sanction factors described in *Young*.⁴²

Fifteen years later, the Nevada Supreme Court again overruled a district court for applying sanctions that denied the offending party due process. In *Clark County School District v. Richardson Construction, Inc.*, the Court held that a discovery sanction striking all of a party's affirmative defenses was akin to a dismissal with prejudice.⁴³ In that case, Richardson brought a third-party action against the Clark County School District (CCSD) and CCSD asserted a number of affirmative defenses.⁴⁴ During discovery, CCSD failed to disclose 1,700 documents and Richardson countered by seeking sanctions.⁴⁵ The district court responded by sanctioning CCSD and striking all of CCSD's affirmative

³⁴ Young, 787 P.2d at 778. Although the court offered Young the opportunity to clarify his testimony, Young declined. *Id.*

³⁵ Nev. Power Co. v. Fluor Ill., 837 P.2d 1354, 1359–60 (Nev. 1992).

³⁶ *Id.* at 1360.

³⁷ Id. at 1357.

³⁸ *Id.* at 1357–58.

³⁹ *Id.* at 1358 (internal quotation marks omitted).

⁴⁰ Id. at 1359.

⁴¹ *Id*.

⁴² *Id.*

⁴³ Clark Cnty. Sch. Dist. v. Richardson Constr., Inc., 168 P.3d 87, 89, 94 (Nev. 2007).

⁴⁴ Id. at 90.

defenses.⁴⁶ However, the district court broadly applied the sanction by prohibiting CCSD from presenting any defenses, not just affirmative defenses, to rebut Richardson's prima facie case.⁴⁷

On appeal, the Supreme Court limited the sanction because the district judge's broad application of the sanction "effectively defaulted" CCSD.⁴⁸ The Court reasoned that "[t]he district judge meant to strike CCSD's affirmative defenses, not to strike its answer altogether."⁴⁹ Because the sanction prevented CCSD from defending against Richardson's prima facie case, the judge's application of the sanction was akin to "a far greater sanction" of striking CCSD's answer as to liability.⁵⁰ Therefore, the district court judge abused her discretion by applying the sanction too broadly and denying CCSD an opportunity to present non-affirmative defenses as to liability.⁵¹

The Court's application of the *Young* standard in *Richardson* and *Nevada Power* reflected the Court's desire to preserve due process when imposing discovery sanctions. Specifically, the Court reversed the district court's sanctions in *Nevada Power* because due process required an evidentiary hearing to properly address unresolved factual questions.⁵² Similarly, in *Richardson*, the Court sought to protect the offending party's ability to defend itself from the plain-tiff's prima facie case.⁵³ In both cases, the Court was willing to impose sanctions.⁵⁴ However, the Court refused to impose the civil death penalty without an evidentiary hearing and struck affirmative defenses only after altering the sanction to ensure the punishment fell short of the civil death penalty.⁵⁵

In 2010, the Court adjudicated its last substantial discovery sanction case before *Bahena v. Goodyear* by upholding a district court's order striking all of a litigant's pleadings.⁵⁶ In *Foster v. Dingwall*, Foster's discovery abuses included failure to appear for a deposition and failure to supplement answers to interrogatories and responses to requests for production of documents.⁵⁷ After Dingwall sought sanctions, the district court held an evidentiary hearing on the factors set forth in *Young*⁵⁸ and found Foster's conduct, "repetitive, abusive, and recalcitrant."⁵⁹ On appeal, the Nevada Supreme Court affirmed the decision and held such "sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders" or the judicial process.⁶⁰ Thus, even though the Court's decisions in *Nevada Power* and *Richardson* sought to assure due process by protecting the accused party's

⁵⁹ Id.

⁴⁶ *Id.*

⁴⁷ *Id*. at 94.

⁴⁸ *Id.* at 93.

⁴⁹ *Id.* at 94.

⁵⁰ Id.

⁵¹ Id. at 93.

⁵² Nev. Power Co. v. Fluor Ill., 837 P.2d 1354, 1359 (Nev. 1992).

⁵³ *Richardson*, 168 P.3d. at 94.

⁵⁴ *Id.*; *Nev. Power*, 837 P.2d. at 1359.

⁵⁵ Richardson, 168 P.3d. at 93–94; Nev. Power, 837 P.2d. at 1358–59.

⁵⁶ Foster v. Dingwall, 227 P.3d 1042, 1045 (Nev. 2010).

⁵⁷ Id. at 1046–47.

⁵⁸ Id. at 1047.

⁶⁰ Id. at 1049.

right to defend itself, the *Foster* holding demonstrated that, once an accused party had the opportunity to defend itself, the Court was ready and willing to sanction litigants for abuse of the discovery process.

III. BAHENA V. GOODYEAR AND NON-CASE CONLUDING SANCTIONS

Recently, in *Bahena v. Goodyear*, the Nevada Supreme Court created a new category of discovery sanctions called "non-case concluding" sanctions.⁶¹ According to the majority, striking an answer as to liability only is not "case-concluding" because the sanctioned party still has an opportunity to defend itself from damages. Therefore, non-case concluding sanctions do not trigger the heightened standard of review required by *Young*.⁶² Relying on the factors dictated in *Young*, the Court determined the district court did not abuse its discretion by striking Goodyear's answer as to liability, despite denying Goodyear a full evidentiary hearing.⁶³ In so holding, the Court announced the following rule:

[W]hen [a] court does not impose ultimate discovery sanctions of dismissal of a complaint with prejudice or striking an answer as to liability *and* damages, the court should, at its discretion, hold such hearing[s] as it reasonably deems necessary to consider matters that are pertinent to the imposition of appropriate sanctions.⁶⁴

Dennis Kennedy, a Las Vegas attorney representing Goodyear, called the decision a "shot heard around the United States business community."⁶⁵

The *Bahena* case originated as a wrongful death and products liability action brought against the tire manufacturer Goodyear.⁶⁶ The appellants were family members and friends who rented a van in Las Vegas and drove to a boxing tournament in Kansas.⁶⁷ While driving through Moab, Utah, the left rear tire of the van separated from the vehicle and the van rolled several times.⁶⁸ Evertina Tapia, Frank Enriquez, and Andres Torres died in the accident.⁶⁹ The accident injured seven others and one fourteen-year-old boy's significant head injuries left him in a persistent vegetative state.⁷⁰

During the discovery process, Bahena filed a motion requesting sanctions because she believed Goodyear's responses to certain interrogatories were inadequate and Goodyear's production of 74,000 documents required an index.⁷¹ After hearing the motion, the discovery commissioner ordered Goodyear to verify its interrogatory answers and provide an index for the 74,000 documents, but Goodyear failed to comply with either order.⁷² Subsequently,

⁶¹ Bahena v. Goodyear, 235 P.3d 592, 596 (Nev. 2010).

⁶² Id.

⁶³ *Id.* at 600–01.

⁶⁴ Id.

⁶⁵ Doug McMurdo, *Goodyear Allies Fight Decision Upholding \$30 Million Verdict*, LAS VEGAS REV. J., Aug. 14, 2010, at 1B.

⁶⁶ Bahena, 235 P.3d at 594.

⁶⁷ Mcmurdo, *supra* note 65.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ See id.

⁷¹ Bahena, 235 P.3d. at 594–95.

⁷² *Id.* at 594.

another discovery dispute arose when a Goodyear representative failed to appear for a deposition.⁷³ Bahena filed a motion for relief and former District Judge Sally Loehrer sanctioned Goodyear by striking its answer as to liability and damages.⁷⁴

Goodyear responded by filing a motion for reconsideration of the discovery sanctions.⁷⁵ During the hearing, the district court questioned the attorneys about the discovery disputes and examined the many exhibits and affidavits presented by both parties.⁷⁶ Although the district court held Goodyear's conduct caused unnecessary delay and was a purposeful attempt to get the court to vacate the trial date, the district court reduced the sanctions and struck Goodyear's answer as to liability only.⁷⁷ Judge Loehrer opined, "It is clear that Goodyear has taken the approach of stalling, obstructing and objecting."⁷⁸ Based on the issue of damages alone, the jury returned a verdict of \$30 million in compensatory damages against Goodyear.⁷⁹

On appeal, the Nevada Supreme Court upheld the sanctions and the \$30 million judgment against Goodyear.⁸⁰ The majority likened the sanctions against Goodyear to the sanctions of striking CCSD's affirmative defenses in Richardson.⁸¹ In particular, because the sanctions against Goodyear and CCSD were not "case-concluding," neither party was entitled to an evidentiary hearing required by Young.⁸² Further, the majority described Goodyear's discovery violations as "strikingly similar" to the violations in Foster.⁸³ In both Bahena and Foster, the sanctioned party failed to appear for a deposition and failed to supplement its responses to interrogatories despite a court order.⁸⁴ Lastly, the majority held the district court properly addressed and applied the Young factors by "prepar[ing] nine pages of carefully written findings of fact and conclusions of law analyzing the Young factors."85 Therefore, based on the district court's application of the Young factors and the Supreme Court's holdings in Richardson and Foster, the district court did not abuse its discretion by striking Goodyear's answer as to liability despite denying Goodyear an evidentiary hearing.86

Justice Pickering's dissent argued the district court abused its discretion because the sanctions against Goodyear were case-concluding, thereby requiring an evidentiary hearing under *Young*.⁸⁷ Instead of relying on *Young* and *Foster* like the majority, the dissent claimed *Bahena* was like *Nevada Power*,

⁷³ Id. at 594–95.

⁷⁴ *Id.* at 595.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id. at 595–96.

⁷⁸ Mcmurdo, *supra* note 65.

⁷⁹ Bahena, 235 P.3d at 596.

⁸⁰ Id. at 600, 602.

⁸¹ Id. at 600.

⁸² Id. at 600–01.

⁸³ Id. at 599.

⁸⁴ Id.

⁸⁵ *Id.* at 598.

⁸⁶ *Id.* at 594.

⁸⁷ Id. at 602 (Pickering, J., dissenting).

where the district court erred as a matter of law by not conducting an evidentiary hearing.⁸⁸ Justice Pickering reasoned, "The reality is that striking Goodyear's answer did effectively conclude this case. . . . Liability was seriously in dispute in this case, but damages, once liability was established, were not, given the catastrophic injuries involved."⁸⁹ Furthermore, Justice Pickering concluded an evidentiary hearing was necessary to address unresolved issues of fact.⁹⁰ According to the dissent, the district court did not resolve whether Goodyear willfully abused the discovery process, whether the alleged discovery abuses prejudiced Bahena, or whether Bahena contributed to the prejudice by making delayed discovery requests.⁹¹ Justice Pickering labeled the district court ruling as an example of "[s]entence first—verdict afterwards," undeserving of deference from the Nevada Supreme Court.⁹²

IV. Analysis

A. The Supreme Court Incorrectly Applied Nevada Precedent

The Supreme Court's holding in *Bahena* incorrectly applied Nevada precedent in two ways. First, as stated in Justice Pickering's dissent, the majority erroneously relied on *Young* and *Foster* because the Court affirmed sanctions in those cases only after the offending party received a full evidentiary hearing.⁹³ Second, the majority incorrectly likened the non-case concluding sanctions against Goodyear to the sanctions in *Richardson* because the sanctions in *Richardson* were, in fact, case-concluding.

1. Young and Foster do not support the Court's reasoning in Bahena

The Court's first misapplication of precedent in *Bahena* occurred in its reliance on *Young* and *Foster*. In *Young*, the Court set forth a number of factors for district courts to consider when determining sanctions and eventually affirmed sanctions against Young.⁹⁴ However, the Court affirmed the sanctions only after giving Young a full evidentiary hearing.⁹⁵ Even though the district court in *Bahena* "prepared nine pages of carefully written findings of fact and conclusions of law" analyzing Goodyear's behavior under the *Young* factors, the court did not allow Goodyear an opportunity to present factual evidence in an evidentiary hearing.⁹⁶ The Court's refusal to hold an evidentiary hearing was especially significant because Goodyear avoided punitive damages by arguing a road hazard, not a tire defect, caused the tire failure.⁹⁷ Such evidence suggests Goodyear's defenses as to liability had merit and could have been

⁸⁸ Id. at 603.

⁸⁹ Id. at 602-03 (footnote omitted).

⁹⁰ Id. at 603.

⁹¹ *Id.* at 604–05.

⁹² *Id.* at 603.

⁹³ Id.

⁹⁴ Young v. Johnny Ribeiro Bldg., Inc., 787 P.2d 777, 780 (Nev. 1990).

⁹⁵ *Id.* at 778.

⁹⁶ Bahena, 235 P.3d at 598, 600.

⁹⁷ Id. at 603 n.1 (Pickering, J., dissenting).

successful.⁹⁸ Nevertheless, the mere fact that the Court sanctioned Goodyear without conducting an evidentiary hearing demonstrates the *Young* decision does not support the Court's reasoning in *Bahena*.

Additionally, the *Foster* opinion does not support the Court's reasoning in *Bahena* because the offending party in *Foster* also received a full evidentiary hearing. Even though Goodyear engaged in abusive discovery practices similar to the defendant in *Foster*, like failing to appear for a deposition and failing to supplement answers to interrogatories, the Court affirmed sanctions in *Foster* only after giving the offending party a full evidentiary hearing.⁹⁹ Therefore, as Justice Pickering argued in *Bahena*, the reasoning in *Young* and *Foster* fundamentally differs from *Bahena* because Goodyear did not have the benefit of raising factual arguments in an evidentiary hearing.¹⁰⁰ As a result, neither *Young* nor *Foster* are consistent with the majority's decision to sanction Goodyear.

2. The Richardson decision does not support the Court's reasoning in Bahena

The Nevada Supreme Court supported its decision to affirm discovery sanctions in *Bahena* by analogizing to its *Richardson* decision.¹⁰¹ As noted previously, in *Richardson*, the Court held the district court abused its discretion by broadly applying a sanction that deprived the offending party of its affirmative defenses.¹⁰² The district court judge applied the sanction in a manner that precluded the offending party from presenting any defenses, not just affirmative defenses, to rebut the plaintiff's prima facie case. The judge's overbroad application was an abuse of her discretion because the sanction effectively resulted in striking the offending party's answer as to liability.

Despite the Court's determination in *Richardson* that striking an answer as to liability is akin to a default judgment, the Court re-characterized the very same sanction as non-case concluding in *Bahena*.¹⁰³ The Court stated: "In *[Richardson] . . . [n]on-case concluding sanctions could have included striking the school district's answer as to liability only, as well as striking all of its affirmative defenses.* The district court chose the latter."¹⁰⁴ This reasoning is inconsistent and contradictory. According to the Court's reasoning in *Richardson*, a judge's decision to strike all of an offending party's affirmative defenses would be non-case concluding. However, if the judge's application of the sanction rose to the level of striking the answer as to liability, then the sanction between a sanction striking all affirmative defenses and a sanction striking an answer as to liability. Therefore, the Nevada Supreme Court erred in its ad hoc

⁹⁸ Id.

⁹⁹ Foster v. Dingwall, 227 P.3d 1042, 1047 (Nev. 2010).

¹⁰⁰ See Bahena, 235 P.3d at 603 (Pickering, J., dissenting).

¹⁰¹ Id. at 596, 599 (majority opinion).

¹⁰² Clark Cnty. Sch. Dist. v. Richardson Constr. Inc., 168 P.3d 87, 93 (Nev. 2007).

¹⁰³ Bahena, 235 P.3d at 596.

¹⁰⁴ Id. (emphasis added).

determination that the sanction of striking an offending party's answer as to liability is non-case concluding.

In actuality, the most logical conclusion is that the sanction in *Richardson* was case-concluding.¹⁰⁵ The Court in *Richardson* held sanctions that effectively strike an answer as to liability are akin to a default judgment, or in *Bahena* terminology, are akin to case-concluding sanctions. Perhaps the Court developed the non-case concluding sanction category as means of discouraging discovery abuse without having to overturn precedent. Perhaps the Court was trying to coerce Nevada businesses into more fully and consistently complying with discovery obligations.¹⁰⁶ No matter the Court's reasoning, the distinction between non-case concluding and case-concluding sanctions is inconsistent and misguided. If the Nevada Supreme Court wanted to strengthen its stance on discovery abuses, it should have specifically overruled *Richardson* instead of erroneously transforming the *Richardson* holding into a flawed source of support for non-case concluding sanctions.

B. The Sanctions in Bahena Were Case-Concluding and the Nevada Power Decision Should Govern Such Sanctions

Just like the sanction in *Richardson*, the sanctions in *Bahena* were caseconcluding even though the district court did not strike the offending party's entire answer. As the Court correctly pointed out in *Richardson*, but curiously abandoned in *Bahena*, sanctions that deprive a party of its ability to defend against a prima facie case are akin to a dismissal with prejudice.¹⁰⁷ In *Bahena*, Goodyear raised serious questions as to its liability after successfully avoiding punitive damages by proving a road hazard, instead of a manufacturing defect, caused the tire failure.¹⁰⁸ However, as Justice Pickering pointed out in her dissent, by establishing Goodyear's liability for the accident, the Court effectively concluded the case.¹⁰⁹ Specifically, because several plaintiffs suffered severe injuries and three individuals died in the accident, the jury was certain to award the plaintiffs a significant amount in damages.¹¹⁰ Thus, by removing Goodyear's ability to defend itself as to liability, the Court essentially entered a default judgment against Goodyear.

¹⁰⁹ Id.

¹⁰⁵ The distinction between case concluding and non-case concluding sanctions is quite thin. *Goodyear* creates a distinction between non-case concluding or 'issue' sanctions and what are colloquially known as 'terminating sanctions,' the striking of a complaint or answer and entry of judgment against the sanctioned party. Although issue sanctions may eviscerate a significant part of a case, because they leave the sanctioned party with some limited claim or defense, the *Goodyear* decision treats them differently than terminating sanctions.

Kristol Bradley Ginapp & Andrew B. Downs, Nevada Supreme Court Affirms Award Of "Non-Case Concluding" Sanctions For Party's Violation of Discovery Orders, BULLIVANT HOUSER BAILEY (Jul. 2010), http://www.bullivant.com/Violation-of-Discovery-Orders.

 $^{^{106}}$ Id. ("The Nevada courts have long been assertive in imposing discovery obligations on business parties.").

¹⁰⁷ See Richardson, 168 P.3d at 94; see also Bahena, 235 P.3d at 603 n.1 (Pickering, J., dissenting).

¹⁰⁸ Bahena, 235 P.3d at 603 n.1 (Pickering, J., dissenting).

¹¹⁰ Id. at 594 (majority opinion), 603 (Pickering, J., dissenting).

The *Nevada Power* holding should govern *Bahena* because, in both cases, the district court erred by imposing case-concluding sanctions without first conducting an evidentiary hearing. In *Nevada Power*, the Nevada Supreme Court reversed the district court's sanction because an evidentiary hearing was needed to determine the meaning of the discovery order allegedly disobeyed and whether the disobedient party actually violated the court's order.¹¹¹ Similarly, by withholding an evidentiary hearing in *Bahena*, the district court prevented Goodyear from introducing evidence and cross-examining Bahena's witnesses concerning the discovery order.¹¹² Goodyear was also unable to specifically address factual questions regarding the sanction factors developed in *Young*.¹¹³ Therefore, in cases like *Bahena*, where the district court imposes the sanction of striking an answer as to liability, the Court should follow its *Nevada Power* precedent and require an evidentiary hearing.¹¹⁴

C. The Court's Holding in Bahena Violated Goodyear's Due Process Rights

The Fifth Amendment of the Constitution requires no litigant be deprived of life, liberty, or property without due process of law.¹¹⁵ The United States Supreme Court held that court-imposed sanctions "must be read in light of the provisions of the Fifth Amendment" and that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes."¹¹⁶ In regard to discovery sanctions and due process, the United States Supreme Court has recognized that discovery sanctions can implicate constitutional property rights under the Due Process Clause.¹¹⁷ As a corollary, the Ninth Circuit has recognized that two standards limit a district court's ability to impose discovery sanctions.¹¹⁸ First, the sanctions must be just.¹¹⁹ Second, the sanctions must specifically relate to the particular claim or defense affected by the miscon-

¹¹² Id.

¹¹³ Id.

¹¹⁴ Bahena, 235 P.3d at 603 (Pickering, J., dissenting).

¹¹⁵ U.S. CONST. amend. V. In *Denton v. Texas Department of Public Safety Officers Association*, Denton asserted his Fifth Amendment privilege against self-incrimination and refused to produce certain documents as ordered by the court. Denton v. Tex. Dep't of Pub. Safety Officers Ass'n, 862 S.W.2d 785, 787 (Tex. App. 1993). In response, the trial court dismissed Denton's suit because of his failure to comply with the court's order. *Id.* However, on appeal, the Austin Court of Appeals held that the trial court erred in dismissing Denton's suit because, among other things, dismissal denied Denton due process pursuant to the Fifth Amendment. *Id.* at 793–94.

¹¹⁶ Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 209 (1958).

¹¹⁷ Id.

¹¹⁸ Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 591 (9th Cir. 1983).

¹¹⁹ *Id.* Although the meaning of the word "just" likely cannot be succinctly defined, The United States Supreme Court has described the imposition of sanctions as "just" when the offending party willfully disobeys a discovery order and the district court gives adequate notice to the offending party. Specifically, in upholding a trial court's imposition of sanctions, the Court reasoned, "Petitioners failed to comply with the discovery order; they also failed to make any attempt to meet [the] burden of proof. This course of behavior, coupled with the ample warnings, demonstrates the 'justice' of the trial court's order." Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 708 (1982).

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¹¹¹ Nev. Power Co. v. Fluor Ill., 837 P.2d 1354, 1359-60 (Nev. 1992).

duct.¹²⁰ The Nevada Supreme Court has adopted the due process test applied by the Ninth Circuit Court of Appeals.¹²¹

Notwithstanding the procedural safeguards provided by the two-pronged Ninth Circuit test, discovery sanctions must also serve case specific purposes and systemic goals.¹²² For example, sanctions are meant to deter future litigants from engaging in similar abuses.¹²³ Accordingly, deterrence "requires a readiness to impose relatively severe sanctions," otherwise the sanctions themselves would become mere empty threats of punishment and would fail to stop recalcitrant litigants.¹²⁴ Moreover, because abuse of the judicial process can be difficult to prove, when courts do find abuse, they often hand down severe sanctions.¹²⁵ Sanctions must also serve a curative function by placing the harmed party in the same position they would have been in had the discovery violations not occurred.¹²⁶

Using sanctions to curb abuse of discovery orders is a legitimate use of a judge's authority¹²⁷ and Goodyear deserved punishment. Goodyear's initial production of 74,000 documents without an index was a stall tactic commonly referred to as a "document dump."¹²⁸ Bahena justifiably sought sanctions against Goodyear and the discovery commissioner agreed Goodyear was acting in bad faith.¹²⁹ The district court determined "Goodyear knew full well that not responding to discovery in good faith would require the trial date to be vacated."¹³⁰ In fact, Goodyear did not even object to the discovery commissioner's findings at that point in the litigation.¹³¹ Further, the Court noted Goodyear's delay tactics unduly prejudiced Bahena because Goodyear's conduct caused the estates of the three dead plaintiffs to be in limbo for over two years.¹³² Regardless of the reasons motivating Goodyear's behavior, the district court correctly concluded that Goodyear's conduct caused stalling and unnecessary delays.¹³³

Despite Goodyear's questionable and perhaps deplorable behavior, the sanction was not "just" because the district court failed to give Goodyear

¹²⁰ Wyle, 709 F.2d at 591.

¹²¹ Young v. Johnny Ribeiro Bldg., Inc., 787 P.2d 777, 779-80 (Nev. 1990).

¹²² Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289, 322–23 (2007).

¹²³ Young, 787 P.2d at 780.

¹²⁴ Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 275 (1979); Tew, *supra* note 122, at 322.

¹²⁵ Renfrew, *supra* note 124, at 275.

¹²⁶ Tew, *supra* note 122, at 323.

¹²⁷ See Renfrew supra, note 124. The United States Supreme Court has stated that "sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'" Roadway Express, Inc. v. Piper, 447 U.S. 752, 763–64 (1980) (quoting Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976)).

¹²⁸ Bahena v. Goodyear, 235 P.3d 592, 594–95 (Nev. 2010).

¹²⁹ Id. at 595.

¹³⁰ Id. at 596.

¹³¹ Id. at 594.

¹³² Id. at 595.

¹³³ See id.

enough time or specific instruction to comply with the discovery orders.¹³⁴ For example, the Court issued the second discovery order forcing Goodyear to produce an index for the 74,000 documents just four days before its decision to strike Goodyear's answer.¹³⁵ Additionally, the second discovery order directed both parties to reach an agreement as to which discovery obligations each party had not yet fulfilled.¹³⁶ However, the terms of the second order gave Goodyear until January 15, 2007 to respond to the request and the district court struck Goodyear's answer on January 9th.¹³⁷

Finally, neither party knew how to comply with the third discovery order requiring Goodyear to produce a representative to authenticate the 74,000 documents.¹³⁸ Bahena even offered to ask the discovery commissioner to clarify how the parties were supposed to satisfy the request, but neither party was able to meet with the commissioner because he retired on December 31, 2006.¹³⁹ Therefore, although Goodyear failed to properly produce the requested discovery material, the district court's inadequate and impossible time constraints, paired with its vague orders, did not give Goodyear proper notice and were not "just" under the Ninth Circuit's due process test.

The district court also violated the second prong of the Ninth Circuit's sanctions test because, without an evidentiary hearing to determine disputed facts, the district court could not have fashioned sanctions specifically related to the particular claim or defense affected by the misconduct.¹⁴⁰ During the discovery process, Goodyear raised questions of fact as to whether its actions actually prejudiced Bahena and whether Bahena's delayed discovery requests contributed to the discovery disputes.¹⁴¹ Goodyear argued Bahena was prepared for trial without the additional discovery requests and Bahena actually admitted being ready for trial five days before the district court struck Goodyear's answer.¹⁴² Thus, Goodyear's alleged failure to produce additional discovery could not have prejudiced Bahena if Bahena was ready for trial without the discovery.

Moreover, Goodyear argued Bahena's expert witnesses were already prepared for trial prior to Bahena's additional discovery requests.¹⁴³ In fact, expert witness Dennis Carlson stated he was prepared to testify before Bahena made her additional discovery requests, and expert witness Allan Kam had already formed his testimony based on prior litigation against Goodyear involving the

 $^{^{134}}$ Discovery sanctions cannot be just if such sanctions deny a civil litigant notice. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980). As noted previously, discovery sanctions implicate many aspects of due process—and notice is one such aspect of due process. *Id.* For example, the United States Supreme Court has recognized that "sanctions . . . should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.*

¹³⁵ Bahena, 235 P.3d at 603 (Pickering, J., dissenting).

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Id. at 603–04.

¹³⁹ *Id.* at 604.

¹⁴⁰ See id. at 605.

¹⁴¹ *Id.* at 603–05.

¹⁴² Id. at 604.

¹⁴³ *Id.*

very same 74,000 documents.¹⁴⁴ Goodyear further argued Bahena contributed to the delay by filing a motion to compel after the discovery cutoff date.¹⁴⁵ However, the Court did not allow Goodyear to raise these questions in an evidentiary hearing,¹⁴⁶ and instead, simply relied on the district court's finding that Bahena suffered prejudice.¹⁴⁷ Consequently, the sanction also violated the second prong of the Ninth Circuit's sanctions test because the Court never determined whether Goodyear's misconduct actually prejudiced Bahena.

D. The Bahena Holding Could Lead to Abuse of the Sanctioning Process

The adversarial system guarantees gamesmanship will likely always play a role in litigation.¹⁴⁸ Nonetheless, the Court's ruling in *Bahena* may tip the scales too far in favor of plaintiffs. Granted, as a result of the *Bahena* holding, sophisticated defendants like Goodyear will likely answer more timely and specifically.¹⁴⁹ The *Bahena* holding will also greatly reduce the ability of sophisticated defendants like Goodyear to take advantage of the discovery process by dragging out litigation and bleeding the plaintiff's funds dry.¹⁵⁰ The major problem with *Bahena*, however, is an evidentiary hearing is no longer required for sanctions that effectively default a party. Although some discovery disputes are a result of bad faith, oftentimes discovery problems stem from a genuine misunderstanding or inability to comply with complex discovery orders.¹⁵¹ Without an evidentiary hearing to produce a record that sheds light on the particular discovery dispute, appellate courts cannot accurately determine whether the dispute was a result of bad faith, instigating tactics, or an honest mistake.

The *Bahena* discovery dispute was likely a mixture of both bad faith on the part of Goodyear and instigating tactics on the part of Bahena. One of the *Young* factors requires courts to balance the need to impose sanctions with the policy favoring adjudication on the merits,¹⁵² and the *Bahena* holding does not adequately consider the policy favoring adjudication on the merits. Because the Court held striking an answer as to liability is a "lesser sanction" not deserving of an evidentiary hearing, attorneys are now incentivized to "litigate by sanc-

¹⁴⁴ Id.

¹⁴⁵ Id. at 604 n.4.

¹⁴⁶ *Id.* at 605.

¹⁴⁷ Id.

¹⁴⁸ See Miller & Thompson, supra note 3, at 738; Tew, supra note 122, at 293–302.
¹⁴⁹ See Ochs, supra note 7. The Rules exist to ensure justice.

If the rules get broken, its [sic] up to the opposing lawyer to address it and raise it with the Court if efforts to informally address lead to nowhere with the Defendant. The Nevada Supreme Court made the right call, applying the 'civil death penalty' and sending a message that the rules must not be broken.

Id.

¹⁵⁰ See Tew, supra note 122, at 292. "[C]alculating wrongdoers may seize on the technical nature of the electronic material being discovered as a shield, counting on a tendency of courts to view electronic discovery lapses as merely negligent and to be unduly forgiving of discovery lapses." *Id.*

¹⁵¹ Amici Curiae Brief of Chamber of Commerce of the United States of America, et al. in Support of Respondent/Cross-Appellant, *supra* note 9, at 10–11.

¹⁵² Young v. Johnny Ribeiro Bldg., Inc., 787 P.2d 777, 780 (Nev. 1990).

tion" even when the facts or law are not in their favor.¹⁵³ As a result, attorneys will likely attempt to "prime" judges by intentionally provoking discovery disputes to turn judges against the allegedly recalcitrant party.¹⁵⁴ In doing so, crafty litigants can use discovery as a means of transforming genuine or minor discovery mistakes into irreparable sanctions.¹⁵⁵ Further, requests for sanctions could become part of boilerplate motions, causing courts to be "mired in endless hearings about the good or bad faith of parties and lawyers."¹⁵⁶ Thus, in order to comply with the *Young* factors and properly account for the goal of adjudication on the merits, the Court should require trial courts hold an evidentiary hearing before striking a party's answer to assure the appellate court has an adequate record to review.

E. Jurisdictional Analysis: How Discovery Sanctions in Other States Reveal Nevada's Contradictory Application of the Civil Death Penalty

Although Nevada developed the *Young* factors to help courts determine when to apply discovery sanctions, many other state courts determine sanctions based on "generalized notions of bad faith."¹⁵⁷ Consequently, many litigants in such states argue district court judges are applying the sanctions in unpredictable and inconsistent ways.¹⁵⁸ Like Nevada, some states have taken steps to develop the factors district court judges must consider before imposing the civil death penalty.¹⁵⁹ For example, in Texas, district courts must consider and test the effectiveness of lesser sanctions before imposing the civil death penalty unless exceptional circumstances exist.¹⁶⁰ Similarly, in Georgia, a district court can issue a civil death penalty only after considering whether the offending party's actions actually prejudiced the opposing party.¹⁶¹

Despite the *Young* factors, many businesses and their attorneys believe Nevada is not doing enough to protect the rights of sanctioned parties. Dan Polsenberg, an attorney for Goodyear, stated, "Courts are enforcing rules differently from how they used to and differently from each other. And what they are doing is coming in and [issuing] extreme sanctions just for punishment and just for deterrence rather than to actually address willfulness or prejudice."¹⁶²

As personal injury lawyers often sue them, business associations and groups are now encouraging each other to participate in amicus curiae briefs to further develop civil death penalty standards.¹⁶³ Alternatively, Plaintiff's attorneys celebrate the Nevada Supreme Court's decision in *Bahena* and perceive

¹⁵³ Bahena v. Goodyear, 235 P.3d 592, 600–01 (2010); Nathan L. Hecht, *Discovery Lite!*-*The Consensus for Reform*, 15 Rev. LITIG. 267, 270 (1996).

¹⁵⁴ See Joyce, supra note 3, at 1.

¹⁵⁵ See Tew, supra note 122, at 292.

¹⁵⁶ Renfrew, *supra* note 124, at 278.

¹⁵⁷ Joyce, *supra* note 3, at 2.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Cire v. Cummings, 134 S.W.3d 835, 842 (Tex. 2004).

¹⁶¹ See Stephens v. Trust for Pub. Land, 479 F. Supp. 2d 1341, 1346 (N.D. Ga. 2007).

¹⁶² Joyce, *supra* note 3, at 2 (internal quotation marks omitted).

¹⁶³ *Id. See generally* Amici Curiae Brief of Chamber of Commerce of the United States of America, et al. in Support of Respondent/Cross-Appellant, *supra* note 9.

the ruling as a way to force big businesses to play by the rules and prevent them from using discovery to bleed their opponents dry.¹⁶⁴

The following cases from Florida and Colorado provide perspective on when and how courts in other states apply the civil death penalty. More importantly, these cases shed light on how the Nevada Supreme Court strayed from its own precedent in *Bahena*. Overall, many Florida courts appear to accept a more liberal application of discovery sanctions whereas the Colorado Supreme Court is much more reluctant to apply sanctions.¹⁶⁵ Prior to *Bahena*, the Nevada Supreme Court applied sanctions in a similar manner to the Colorado Supreme Court. However, with *Bahena*, the Nevada Supreme Court moved toward a more liberal application of discovery sanction, strayed from its own precedent and produced conflicting law.

1. Florida

In 2007, the Florida Supreme Court presided over a seminal and highly publicized e-discovery sanction case.¹⁶⁶ In *Morgan Stanley & Co., Inc. v. Cole-man (Parent) Holdings, Inc.*, a majority owner of a company sued an investment bank for fraud.¹⁶⁷ There, Morgan Stanley failed to preserve and produce business emails in violation of federal law and a discovery order.¹⁶⁸ In response, the district court judge sanctioned Morgan Stanley for its discovery abuses and entered a partial default judgment against Morgan Stanley.¹⁶⁹ The default judgment ordered the jury to assume that Morgan Stanley engaged in fraud during the discovery process by hiding e-mail evidence, making it much easier for the jury to hold Morgan Stanley liable.¹⁷⁰ Later, when the trial entered the damages phase, Morgan Stanley attempted to present evidence that conflicted with the prior determination of fraud, but the district judge barred Morgan Stanley from using such defenses to mitigate its damages.¹⁷¹ As a result, the jury found Morgan Stanley liable and returned a verdict of \$850 million.¹⁷²

On appeal, the Florida Supreme Court reversed the ruling on a completely separate issue from the discovery sanctions.¹⁷³ However, in a special concurring opinion, Justice Ehrlich argued the court should have reversed on the issue of sanctions because "[d]ue process thus requires that defendant must necessarily have the right to offer admissible evidence that members of the community might logically and reasonably consider as mitigating its blameworthiness for

¹⁶⁴ Ochs, *supra* note 7.

¹⁶⁵ See Pinkstaff v. Black & Decker Inc., 211 P.3d 698, 704 (Colo. 2009); Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc., 955 So.2d 1124 (Fla. Dist. Ct. App. 2007); Joyce, *supra* note 3, at 1–2.

¹⁶⁶ See Tew, supra note 122, at 325, 328.

¹⁶⁷ Morgan Stanley, 955 So. 2d at 1125–26.

¹⁶⁸ Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. 502003CA005054 5XXOCAL, 2005 WL 679071, at *5 (Fla. Cir. Ct. Mar. 1, 2005).

¹⁶⁹ *Id.* at *7.

¹⁷⁰ Landon Thomas, Jr., Jury Tallies Morgan's Total at \$ 1.45 Billion, N.Y. TIMES (May

^{19, 2005),} http://www.nytimes.com/2005/05/19/business/19perelman.html.

¹⁷¹ Morgan Stanley, 955 So. 2d at 1139.

¹⁷² *Id.* at 1126.

¹⁷³ Id.

such punishment. In this case the trial judge essentially denied Morgan Stanley that right."¹⁷⁴

Despite Justice Ehrlich's strong words against using sanctions that effectively default a party, Florida district court judges have continued to impose similar sanctions.¹⁷⁵ Most notably, Florida judges have issued death penalty sanctions against Du Pont for discovery abuses in long-running product liability litigation surrounding "Benlate," the company's fungicide.¹⁷⁶ Perhaps Florida district court judges are more eager to use sanctions simply because they are less tolerant of discovery disputes. On the other hand, the occurrence of sanctions might stem from Florida's sanction rules, which expressly provide for default judgments when the offending party is also the defendant.¹⁷⁷ Either way, many Florida district courts appear to be more concerned with punishing parties for discovery abuses and deterring parties from potential abuses in the future.

2. Colorado

Contrastingly, in 2009, the Colorado Supreme Court overturned an order striking a litigant's affirmative defenses and answer as to liability.¹⁷⁸ In *Pinkstaff v. Black & Decker, Inc.*, an employee brought an action against Black & Decker seeking to recover unpaid wages.¹⁷⁹ Throughout the discovery process, Black & Decker failed to comply with discovery requirements and trial court orders.¹⁸⁰ In fact, Black & Decker's counsel admitted his behavior exposed him to sanctions and exhibited a "passive/aggressive" attitude that appeared to dare the court to sanction him.¹⁸¹ Nevertheless, Black & Decker accused the plaintiff of instigating discovery disputes in order to obtain sanctions against it.¹⁸² Ultimately, the district court struck Black & Decker's affirmative defenses and its answer as to liability for abusing the discovery process.¹⁸³

¹⁸² See id. at 702.

¹⁷⁴ *Id.* at 1140.

¹⁷⁵ Sam Rodgers Properties, Inc. v. Chmura, 2007 WL 6341609 (Fla. Cir. Ct. Oct. 5, 2007), *overruled by* Chmura v. Sam Rodgers Properties, Inc., 2 So. 3d 984, 985 (Fla. Dist. Ct. App. 2008) (district court judge struck defendant's answer, affirmative defenses, and counterclaim as a sanction for failure to comply with a court order); Sidran v. E.I. Du Pont De Nemours & Co., No. 92-18377 CA 23 ORDR TTX, 2011 WL 400097 (Fla. Cir. Ct. Jan. 19, 2011) (striking DuPont's pleadings and entering default judgment for discovery abuses).

¹⁷⁶ Sidran, 2011 WL 400097; E.I. DuPont De Nemours & Co. v. Aquamar, S.A., 33 So. 3d 839, 840–41 (Fla. Dist. Ct. App. 2010) (trial court's order striking all of DuPont's defenses reversed on appeal).

¹⁷⁷ Tew, *supra* note 122, at 310.

¹⁷⁸ Pinkstaff v. Black & Decker Inc., 211 P.3d 698, 704 (Colo. 2009).

¹⁷⁹ *Id.* at 700.

¹⁸⁰ Id. at 700–01.

¹⁸¹ *Id.* at 701. The Court cautioned the defendants on several occasions that "counsel's dysfunction" would result in sanctions. *Id.* However, the defendant continued to violate the court's discovery orders by failing to provide responses to the Plaintiff's discovery requests. *Id.* The district court noted that "[i]t almost seemed to this Court that [defendant's counsel] was daring it to take such action. [Counsel] evidences a passive/aggressive behavior and a defiant attitude that this Court has never experienced." *Id.*

¹⁸³ *Id.* at 701.

On appeal, the Colorado Supreme Court held the sanction of striking Black & Decker's answer was too harsh.¹⁸⁴ In particular, the court reasoned that the imposed penalty was not proportional to the actions of the offending party.¹⁸⁵ The court held, "Although [Black & Decker] committed some discovery violations and attempted to stonewall many of Pinkstaff's requests, striking the answer was an unwarranted sanction."¹⁸⁶ More importantly, the court recognized striking an answer as to liability is effectively a default judgment.¹⁸⁷ Even though Black & Decker still had the opportunity to argue the issue of damages, its inability to contest issues of liability placed it in the same position it would have been had the district court ordered a default judgment.¹⁸⁸ Accordingly, the Colorado Supreme Court stressed the district court had many other options for sanctions, including imposing money damages, deeming facts as admitted, staying proceedings, and excluding evidence—striking the answer was simply too drastic.¹⁸⁹

3. Application to Nevada

Nevada precedent more closely parallels the Colorado Supreme Court's reasoning in Pinkstaff rather than the Florida district courts' approach in Morgan Stanley and the Benlate cases. Prior to the Bahena decision, the Nevada Supreme Court seemed to strike a balance between punishing wrongdoers and promoting universal notions of fairness. As noted previously, in *Richardson* and Nevada Power the Nevada Supreme Court supported sanctions against parties who abused the discovery process, but the Court also made sure the sanctioned party received a meaningful opportunity to defend its case on the merits.¹⁹⁰ Moreover, in Foster and Young, the Nevada Supreme Court affirmed the civil death penalty sanction against parties who seriously abused the discovery process, but only after the parties received an evidentiary hearing.¹⁹¹ As a result, Nevada Supreme Court precedent resembled the Colorado approach to discovery sanctions. Both courts were willing to impose sanctions, but only if the punishment fit the crime and ensured fundamental due process rights.¹⁹² In contrast, the Bahena Court affirmed an ultimate sanction against a party whose liability was in question without granting the offending party an evidentiary hearing.¹⁹³ This approach is similar to the application of discovery sanctions against defendants in many Florida district courts and appears to be much more concerned with punishing parties for discovery abuses and deterring parties from potential abuses in the future.

¹⁸⁴ Id. at 704.

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Id. at 703.

¹⁸⁸ Id.

¹⁸⁹ Id. at 704.

¹⁹⁰ Clark Cnty. Sch. Dist. v. Richardson Constr., Inc., 168 P.3d 87, 94 (Nev. 2007); Nev. Power Co. v. Fluor Ill., 837 P.2d 1354, 1359 (Nev. 1992).

¹⁹¹ Foster v. Dingwall, 227 P.3d 1042, 1047 (Nev. 2010); Young v. Johnny Ribeiro Bldg., Inc., 787 P.2d 777, 778 (Nev. 1990).

¹⁹² Pinkstaff, 211 P.3d at 705; Richardson, 168 P.3d at 94; Young, 787 P.2d at 778.

¹⁹³ Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 600 (Nev. 2010).

Because the reasoning in the Colorado *Pinkstaff* decision is substantially similar to Nevada case law precedent, and the Nevada Supreme Court did not overturn *Young* or *Richardson*, the Court should have followed reasoning similar to that of *Pinkstaff* in *Bahena*. Although Goodyear was deserving of sanctions, questions of whether Bahena contributed to the discovery disputes or whether Goodyear's actions actually prejudiced Bahena remained unresolved.¹⁹⁴ One of the *Young* factors asks courts to analyze the extent to which the non-offending party would be prejudiced by a lesser sanction.¹⁹⁵ In *Bahena*, the district court could have imposed a variety of sanctions less drastic than the civil death penalty, like monetary sanctions or establishing facts. However, the court struck Goodyear's answer as to both liability and damages as its very first sanction.¹⁹⁶ Only upon a motion for reconsideration was Goodyear able to reduce the sanction to liability only.¹⁹⁷

Furthermore, as noted previously, some parts of the record suggest Goodyear's discovery tactics, while dilatory, may not have actually prejudiced Bahena.¹⁹⁸ Consequently, the Court should have followed the Colorado Supreme Court's reasoning and considered lesser sanctions. After all, one *Young* factor asks courts to consider lesser sanctions before imposing the civil death penalty.¹⁹⁹

F. Sanctions the Court Should Have Applied Before Striking Goodyear's Answer

Before *Bahena*, the Nevada Supreme Court was very reluctant to affirm civil death penalty sanctions. In fact, in *Moore v. Cherry*, the Nevada Supreme Court held the civil death penalty for failure to obey a discovery order should be used only in extreme situations, and if less drastic sanctions are available, the court should impose the lesser sanctions.²⁰⁰ Perhaps the reason the Court's application of the civil death penalty in *Bahena* was so alarming was because the Court did not impose lesser sanctions prior to striking Goodyear's answer.²⁰¹ The Nevada Rules of Civil Procedure offer alternatives to the civil death penalty and the Court reserves inherent power to sanction parties outside of statutorily-created penalties.²⁰² The following alternative sanctions would have been more appropriate considering the important questions of fact the Court left unanswered.

1. Monetary Fine

Although NRCP 37 does not specifically list monetary fines as a possible sanction, judges have the inherent equitable power to sanction parties for abu-

¹⁹⁴ Id. at 603–04 (Pickering, J., dissenting).

¹⁹⁵ Young, 787 P.2d at 780.

¹⁹⁶ Bahena, 235 P.3d at 595 (majority opinion).

¹⁹⁷ Id.

¹⁹⁸ Id. at 604 (Pickering, J., dissenting); see discussion supra Part IV, sec. C.

¹⁹⁹ Young, 787 P.2d at 780.

²⁰⁰ Moore v. Cherry, 528 P.2d 1018, 1021 (Nev. 1974).

²⁰¹ Bahena, 235 P.3d at 595.

²⁰² NEV. R. CIV. P. 37; Young, 787 P.2d at 779.

sive litigation practices.²⁰³ Moreover, the *Young* court recognized "[1]itigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute."²⁰⁴ However, just like every other discovery sanction, a monetary sanction must be "just"²⁰⁵ and could potentially constitute a civil death penalty sanction if the penalty was so significant as to render a party unable to further defend itself.²⁰⁶

In *Bahena*, the district court should have imposed monetary sanctions against Goodyear before using the death penalty. Although Goodyear is a multi-million dollar company and monetary fines might not have had a deterrent effect, the court did not even attempt to sanction Goodyear monetarily as a means of promoting compliance. As the Colorado Supreme Court argued in *Pinkstaff*, "The simple fact that a party to a lawsuit has what a court estimates to be great financial resources does not necessarily imply that monetary sanctions will have no deterrent effect."²⁰⁷ Monetary sanctions could have been a first step for the Court to test Goodyear's willingness to comply and also would have bolstered the Court's decision to apply civil death penalty sanctions if Goodyear continued to commit discovery abuses.

2. Sanction Goodyear's Attorneys

Much of the misconduct by Goodyear involved phases of litigation controlled by Goodyear's attorneys, and it may have been unfair to punish Goodyear for its attorney's misdeeds.²⁰⁸ In fact, one *Young* factor asks Nevada judges to consider whether the sanctions imposed by the court unfairly penalize a party for the misconduct of its attorney.²⁰⁹ Although Goodyear was likely responsible for some of the violations, the sanctions in *Bahena* largely punished Goodyear for the actions of its attorneys. The district judge imposed sanctions, in part, because the discovery commissioner believed Goodyear was evasive and noncompliant with regard to interrogatory responses.²¹⁰ However, Goodyear's attorneys failed to object to the discovery commissioner's findings

²⁰⁹ Young, 787 P.2d at 780.

²⁰³ In terms of monetary sanctions, N.R.C.P. only lists reasonable expenses and attorney's fees as a sanction. Nev. R. Civ. P. 37; *Young*, 787 P.2d at 779.

²⁰⁴ Young, 787 P.2d at 779.

²⁰⁵ Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 591 (9th Cir. 1983).

²⁰⁶ See Miller & Thompson, supra note 3, at 783-84.

²⁰⁷ Pinkstaff v. Black & Decker Inc., 211 P.3d 698, 704 (Colo. 2009).

²⁰⁸ Several Circuit Courts have recognized that, in certain circumstances, a faultless client should not be held responsible for the mistakes of its attorney. Specifically, because the civil death penalty deprives the client of its right to defend itself, the client is denied due process based on wrongdoings it did not, or could not have, committed. *See* Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1168–71 (9th Cir. 2002) (recognizing that a court may set aside a default judgment for gross negligence on the part of client's counsel); Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 806–08 (3rd Cir. 1986) (imposing sanctions against an attorney for, inter alia, failing to provide discovery answers and failing to appear at a pretrial conference); Greenspun v. Bogan, 492 F.2d 375, 382 (1st Cir. 1974) (recognizing potential attorney liability for attorney's failure to act on behalf of his client where the client's own internal procedures were not at fault).

²¹⁰ Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 600 (Nev. 2010).

regarding the interrogatories, so the district court subsequently approved the findings and entered an order against Goodyear.²¹¹

Moreover, the court sanctioned Goodyear, in part, for failing to comply with a discovery order to produce a witness.²¹² However, instead of objecting to the discovery order before the discovery commissioner's recommendations were scheduled to take place, Goodyear's attorneys waited until after the dead-line to comply and the court did not receive the objections before striking Goodyear's answer.²¹³ By striking Goodyear's answer as to liability, the court denied Goodyear its right to defend itself based largely on the actions of its attorneys. If the district court had threatened or imposed sanctions on the attorneys, rather than the company, Goodyear's responses would likely have been more specific and more timely,²¹⁴ and the Court would likely not have had to take the drastic measure of depriving Goodyear of its right to defend itself.

The Nevada Rules of Civil Procedure do not outline specific punishments for discovery abuses by attorneys. However, Texas's landmark discovery sanctions case suggested specific ways to punish attorney misconduct.²¹⁵ First, a trial court may "use the reprimand as a method of embarrassing the lawyer who has committed the offense."²¹⁶ For example, a court could "require the reprimanded lawyer to provide a certified copy of the reprimand order to the members of his law firm."²¹⁷ The court could also order the reprimanded lawyer to take legal education courses on topics like discovery and ethics.²¹⁸ Regardless of the way a court decides to punish a recalcitrant attorney, the *Young* factors require a trial court impose sanctions without unduly punishing parties like Goodyear for the actions of its attorneys.²¹⁹

V. CONCLUSION

Every litigation attorney in Nevada should be aware of *Bahena v. Good*year and understand the consequences of potential discovery abuses under

²¹⁷ Id.

²¹¹ Id. at 594.

²¹² *Id.* at 600.

²¹³ See id. at 603 (Pickering, J., dissenting).

²¹⁴ The practice of sanctioning an attorney instead of the client furthers fundamental notions of fairness and common sense notions of culpability. For example, the Ninth Circuit has recognized "an unknowing client should not be held liable on the basis of a default judgment resulting from an attorney's grossly negligent conduct, and that in such cases sanctions should be imposed on the lawyer, rather than on the faultless client." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002). In this case, it is certainly debatable as to whether Goodyear's attorneys crossed the line between negligent and grossly negligent, especially considering the court's decision to strike Goodyear's answer before the discovery order cutoff date discussed *supra*. However, the point is that *Young* requires district courts to consider whether sanctions unfairly penalize a party for the actions of its attorneys, and the district court in *Bahena* struck Goodyear's answer, in part, because its attorneys failed to comply with, and object to, discovery orders. Thus, before imposing the civil death penalty, the court should have considered sanctions against Goodyear's attorneys.

 ²¹⁵ TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 n.2 (Tex. 1991).
 ²¹⁶ Id.

²¹⁸ Miller & Thompson, *supra* note 3, at 782.

²¹⁹ Young v. Johnny Ribeiro Bldg., Inc., 787 P.2d 777, 780 (Nev. 1990).

Nevada's new standard.²²⁰ Prior to *Bahena*, the *Young* standard required district courts to conduct an evidentiary hearing before imposing the death penalty.²²¹ However, after *Bahena*, district courts may ignore many due process considerations and strike pleadings under the ambiguous term now known as "non-case concluding" sanctions.²²² The Court's willingness to cast aside its own precedent is quite striking—and telling. After *Bahena*, it appears Nevada district courts will focus more on punishing wrongdoers than preserving due process and adjudication on the merits. Although sophisticated defendants will likely be more willing to play by the discovery rules, the decision could drive large businesses out of Nevada.²²³ In essence, *Bahena* may tip the scales too far in favor of plaintiff attorneys.²²⁴

In Young, Richardson, and Fluor Illinois, the Nevada Supreme Court seemed to recognize that discovery is not "a tournament where victory awaits the dirty fighter" in which instigating tactics replace adjudication on the merits.²²⁵ Unfortunately, non-case concluding sanctions appear to incentivize and reward such instigating tactics more than equitably punish the wrongdoer. Instead of creating the new category of non-case concluding sanctions, the Nevada Supreme Court should have simply re-emphasized the efficacy of lesser sanctions, such as hefty monetary fines and even professional sanctions upon the offending attorneys, before striking a party's answer. If so, Nevada courts could more effectively curb discovery abuses while also preserving due process considerations and promoting the ultimate goal of adjudication on the merits.

²²⁰ During its annual meeting in June 2011, the State Bar of Nevada conducted a CLE which specifically addressed the *Bahena* decision and the decision's ramifications. Interview with Alan Lefebvre, State Bar of Nevada Board of Governors, in Las Vegas, Nev. (July 19, 2011).

²²¹ Young, 787 P.2d at 779-80.

²²² See discussion supra Part IV, sec. B.

²²³ See Joyce, supra note 3, at 1–2.

²²⁴ See discussion supra Part VI, sec. D; Joyce, supra note 3, at 1.

²²⁵ Tew, *supra* note 122, at 330; *see Young*, 787 P.2d at 779–80; Clark Cnty. Sch. Dist. v. Richardson Constr., Inc., 168 P.3d 87, 89, 94 (Nev. 2007); Nev. Power Co. v. Fluor III., 837 P.2d 1354, 1359–60 (Nev. 1992).