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### Summary of Clark Cty. Sch. Dist. v. Richardson Constr., 123 Nev. Adv. Op. 39

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*Nevada Law Journal*

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*Clark Cty. Sch. Dist. v. Richardson Constr.*, 123 Nev. Adv. Op. 39  
(Oct. 4, 2007)<sup>1</sup>

**CIVIL PROCEDURE – STATUTORY DAMAGES AND SANCTIONS**

**Summary**

Appeal from judgment awarding \$225,000 to Richardson Construction and order imposing sanctions upon Clark County School District (hereinafter “CCSD”).

**Disposition/Outcome**

Remanded. The Nevada Supreme Court held that (1) NRS 41.035 limited Richardson’s claim of tortious interference to the \$50,000 statutory cap on tort damages against Nevada and its political subdivisions, and (2) while the district court was proper in imposing sanctions upon CCSD, it subsequently applied the sanctions in an overly broad manner, which was error.

**Factual and Procedural History**

CCSD hired Richardson Construction to construct improvements to the school district’s food service facilities. When construction was complete, a subcontractor filed a complaint against Richardson for unpaid amounts due for its work. Subsequently, Richardson brought a third-party complaint against CCSD for various claims, including indemnity, contribution, and wrongful interference with a prospective business advantage. The third-party complaint is the subject of this suit.

During discovery, Richardson was late in producing its expert’s report on delay damages allegedly caused by CCSD. CCSD filed a motion in limine to exclude the expert’s report. CCSD argued it did not have sufficient time to prepare a defense against the claim of delayed damages.

At the hearing on CCSD’s motion, Richardson argued that its expert’s report was late because CCSD had not produced documents needed to complete the report, including a file from CCSD employee Dan McPartlin (hereinafter “McPartlin”). McPartlin provided an affidavit which stated that no other material existed regarding the subject matter of the lawsuit that had not already been provided. The district court relied on this affidavit and found that CCSD was not responsible for delaying Richardson’s expert’s report. Thus, the court granted CCSD’s motion to exclude the expert’s testimony on delay damages.

However, conflict arose during trial because McPartlin testified that he possessed a file which had not been given to the parties’ attorneys. McPartlin stated that he did not think the file contained anything that had not already been produced during discovery. The court ordered McPartlin to produce the file, which contained nearly 1,700 documents. The court then held a

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<sup>1</sup> Summarized by Danielle Tarmu

hearing to determine whether and how to sanction CCSD for not producing the documents earlier.

After considering conflicting testimonies of Richard Prato, a CCSD attorney, and McPartlin at the sanctions hearing, the district court issued sanctions against CCSD. The court found that of the 1,700 documents McPartlin produced, 500 to 700 of them had not been previously produced by CCSD. Therefore, the court determined that in addition to CCSD producing documents late, McPartlin had issued a false affidavit. Among other sanctions not at issue in this case, the court struck all of CCSD's affirmative defenses, stating that "[CCSD] will not be able to raise any facts or issues relative to their affirmative defenses."<sup>2</sup>

During the remainder of the trial, the district court prevented CCSD from presenting evidence on any of its affirmative defenses. The court did so without analyzing whether the evidence was offered in support of an affirmative defense or if it was offered to rebut Richardson's prima facie case. To prevent the jury from considering earlier admitted evidence related to CCSD's affirmative defenses, the court also approved three limiting jury instructions.

The jury returned a verdict in Richardson's favor, awarding it (among other damages) \$225,000 for CCSD's wrongful interference with a prospective business advantage and \$500,000 on its claims for contribution and indemnification. CCSD moved for a new trial, but soon thereafter requested that the district court summarily deny the motion, which the court did. CCSD then appealed from the judgment and from the order denying its new trial motion. Although the Nevada Supreme Court dismissed the appeal from the order denying a new trial, it permitted CCSD to proceed with its appeal from the district court's judgment entered upon the jury verdict.

## **Discussion**

### *1. Statutory Limitation on Tort Damages Under NRS 41.035*

CCSD asserted that the district court erred in upholding the jury's verdict of \$225,000 on Richardson's tortious inference claim because NRS 41.035 puts a statutory limitation of \$50,000 on tort damages awarded against political subdivisions. Richardson argued that CCSD waived any such limitation by failing to assert it as a defense.

The Court concluded that the statutory limitation could not be waived because under the doctrine of sovereign immunity, Nevada and all its political subdivisions received blanket immunity from tort liability.<sup>3</sup> Despite this blanket immunity, the legislature has waived this immunity on a limited basis,<sup>4</sup> and included a limitation permitting a party to recover up to \$50,000 against such Nevada institutions.<sup>5</sup> The statutory cap functions *automatically* as a

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<sup>2</sup> Clark Cty. Sch. Dist. v. Richardson Constr., 123 Nev. Adv. Op. 39 (Oct. 4, 2007).

<sup>3</sup> See County of Clark v. Upchurch, 114 Nev. 749, 756, 961 P.2d 754, 759 (1998).

<sup>4</sup> NEV. REV. STAT. § 41.031(1).

<sup>5</sup> NEV. REV. STAT. § 41.035(1).

damage limitation up to \$50,000 in tort recovery against Nevada and its political subdivisions. Thus, CCSD did not have a duty to assert the damage limitation as an affirmative defense.

Richardson further asserted that the \$225,000 award was proper because CCSD engaged in five separate instances of tortious interference. However, the \$50,000 cap applies on a per-person, per-claim basis.<sup>6</sup> “Claim” means “cause of action”<sup>7</sup> – not each instance of the wrong. Richardson’s third-party complaint stated only one cause of action for tortious interference against CCSD. Therefore, the Court concluded that the jury’s verdict of \$225,000 for tortious interference with a prospective business advantage must be capped according to NRS 41.035. The Court remanded the case to district court and ordered that if the jury found for Richardson on this claim, the court could not award more than \$50,000.

## 2. *District Court Error in Applying its Sanction Order*

CCSD argued that the district court erred in applying its sanction order because the court did not only preclude evidence related to CCSD’s affirmative defenses, but also all evidence needed to defend against Richardson’s prima facie case, effectively striking CCSD’s entire answer. The Nevada Supreme Court concluded that while the district court’s sanction of striking CCSD’s affirmative defenses was appropriate, the court’s application of its sanction order effectively defaulted CCSD because not all of CCSD’s stated affirmative defenses were, in fact, affirmative defenses under NRCP 8(c). Therefore, the district court abused its discretion in applying the sanction order.

Under NRCP 37(b)(2), a district court has discretion to sanction a party for failure to comply with a discovery order. In this case there was substantial evidence to support the district court’s decision to sanction CCSD by striking CCSD’s affirmative defenses. McPartlin signed an affidavit stating that all pertinent files had been produced. The affidavit was false because there existed one file containing 500 to 700 documents that had not been previously produced, as required under the NRCP 16.1 production provisions. Therefore, the district court did not abuse its discretion in striking CCSD’s affirmative defenses as a sanction.

However, in applying the sanction, the district court abused its discretion by striking more than CCSD’s affirmative defenses because this sanction effectively struck CCSD’s entire answer. Not all of CCSD’s stated affirmative defenses were true NRCP 8(c) affirmative defenses.<sup>8</sup> Some of the purported affirmative defenses were merely defenses to Richardson’s prima facie case. Although NRCP 8(c) enumerates many affirmative defenses, to find which of CCSD’s stated affirmative defenses were “true” affirmative defenses under NRCP 8(c) the Court had to determine which defenses fell under its “catchall” provision. Thus, the Court adopted the test used by federal courts – allegations must be pleaded as affirmative defenses if they raise

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<sup>6</sup> *Upchurch*, 114 Nev. at 759, 961 P.2d at 761.

<sup>7</sup> *See id.* at 757-59, 961 P.2d at 759-61.

<sup>8</sup> NRCP 8(c) states which defenses a party must plead affirmatively. A party must affirmatively plead “accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver.” The rule also provides a “catchall” that “any other matter constituting an avoidance or affirmative defense” must be set forth affirmatively.

“new facts and arguments that, if true, will defeat the plaintiff’s . . . claim, even if all allegations are true.”<sup>9</sup>

The Court addressed each of CCSD’s stated affirmative defenses and applied its newly adopted test. The Court determined that the following defenses raised new facts and arguments that, if proven, would defeat Richardson’s claim and were thus true affirmative defenses: mitigation of damages, failure of Richardson to fulfill conditions precedent, breach of covenant of good faith and fair dealing, and waiver. Since these were all NRCP 8(c) affirmative defenses, the district court properly precluded CCSD from presenting evidence related to them. However, CCSD did not need to plead the remaining stated defenses affirmatively. These defenses are as follows: failure to state a claim,<sup>10</sup> Richardson’s damages were caused by others,<sup>11</sup> Richardson’s damages are speculative,<sup>12</sup> and CCSD performed under the contract.<sup>13</sup> Since these defenses were not true affirmative defenses, the district court abused its discretion by precluding evidence related to them.

### **Conclusion**

CCSD could not waive its statutory damages protection under NRS 41.035, but the district court erred in its application of sanctions against CCSD. Any tort damages awarded must be limited to \$50,000, even though CCSD did not raise its immunity under NRS 41.035 in its answer. The Court affirmed the district court’s decision to impose sanctions against CCSD, but concluded that the district court applied the sanction in an overly broad manner. The sanctions precluded all evidence that CCSD presented relating to all CCSD’s stated affirmative defenses, although not all of the defenses were true affirmative defenses under NRCP 8(c). Accordingly, the Court reversed the district court’s judgment upon the jury verdict and remanded for a new trial on the tort and contract claims consistent with its opinion.

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<sup>9</sup> *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003); *see also* *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995).

<sup>10</sup> NRCP 12(h)(2) permits raising the NRCP 12(b)(5) defense of failure to state a claim upon which relief can be granted at the pleading stage, by a motion for judgment on the pleadings, or at trial on the merits. An affirmative defense under NRCP 8(c) is waived if not set forth in a pleading. Comparing these requirements caused the Court to conclude that an NRCP 12(b)(5) defense is not an affirmative defense because it can be asserted at any time.

<sup>11</sup> This stated affirmative defense essentially claimed that Richardson’s damages were not caused by CCSD. In tort actions, a defendant’s allegations that a party other than the defendant caused the plaintiff’s damages does not need to be set forth affirmatively because such allegations negate an essential element of the plaintiff’s claim – proximate cause. Similarly, causation is an essential element to breach of contract claims. *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1289 (7th Cir. 1986). Here, Richardson asserted both tort and contract claims, alleging that CCSD was the cause of Richardson’s damages. Since CCSD’s stated affirmative defense sought to negate an essential element of Richardson’s claims (causation), CCSD did not have to plead it affirmatively.

<sup>12</sup> The plaintiff has the burden to prove the amount of damages it is seeking. *Frantz v. Johnson*, 116 Nev. 455, 469-70, 999 P.2d 351, 360 (2000). Courts placing this burden on the plaintiff generally maintain that an allegation that the plaintiff’s damages are speculative need not be pleaded as an affirmative defense because the plaintiff’s burden necessarily puts at issue whether the damages are speculative. *See Clark v. Milam*, 152 F.R.D. 66, 73 (S.D. W. Va. 1993); *Gilbert v. Eli Lilly & Co. Inc.*, 56 F.R.D. 116 125 (D. P.R. 1972); *Sharon Leasing v. Phil Terese Transp.*, 701 N.E.2d 1150, 1157-59 (Ill. Ct. App. 1998).

<sup>13</sup> This stated affirmative defense merely asserts that CCSD did not breach the contract, which was put at issue by Richardson’s claims. Therefore, CCSD did not need to plead this allegation affirmatively.