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9-27-2018

### Valley Health Sys. v. Estate of Jane Doe, 134 Nev. Adv. Op. 76 (Sept. 27, 2018) (en banc)

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#### Recommended Citation

Stafford, Amanda, "Valley Health Sys. v. Estate of Jane Doe, 134 Nev. Adv. Op. 76 (Sept. 27, 2018) (en banc)" (2018). *Nevada Supreme Court Summaries*. 1195.

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## CIVIL PROCEDURE: SANCTIONS

### **Summary**

The Court held that the district court acted within its discretion in sanctioning the party for discovery violations. Further, it determined that the district court's citation to the Nevada Rules of Professional Conduct causes reputational harm that amounts to a sanction and that the district court correctly found that the attorneys did in fact violate Nevada Rule of Professional Conduct 3.3(a)(1).<sup>2</sup>

### **Background**

In May 2008, the appellants —Valley Health System, Centennial Hills Hospital Medical Center, and Universal Health Services — collectively referred to as Centennial, hired Steven Farmer as a certified nurses' assistant. On May 14, 2008, Steven Farmer sexually assaulted patient Jane Doe in her hospital room. Farmer sexually assaulted another patient on May 15, 2008 and May 16, 2008.

Once the assault was reported to Centennial, they began investigating and hired Hall Prangle. Hall Prangle attorneys interviewed nurses at the facility, including Margaret Wolfe, Christine Murray, and Ray Sumera. Wolfe and Murray both also gave statements to the police. The nurses expressed concern to the police that Steven Farmer was (1) extra interested in female patients, (2) eager to perform procedures where female breasts would be exposed and or touched, and (3) once an elderly woman yelled, "Get outta here! I don't want you by me!", when Farmer was with her.

In September 2008, the second woman assaulted filed a complaint against Centennial and Farmer, then Doe filed a lawsuit in July 2009 for vicarious liability for Farmer's actions and negligent failure to maintain the premises in a safe manner. In August 2009, Centennial hired Hall Prangle to represent them in the matter. When Hall Prangle filed their initial list of witnesses and documents Wolfe, Murray, and Sumera were not included.

In September 2014, Doe filed for summary judgment claiming Centennial was strictly liable for Farmer's actions regarding the assault. Hall Prangle, on behalf of Centennial, argued Farmer's actions were not foreseeable. The district court denied this motion.

Hall Prangle filed a writ petition challenging the district court's, granting in part a motion for summary judgment in April of 2015. This writ was denied.

Hall Prangle was ordered to produce the file provided to them by the Las Vegas Metro Police Department regarding their investigation of Farmer for the sexual assault in October 2014. In 2015, Doe received the file and first learned of the statements made by Wolfe, Murray, and Sumera. Upon receiving this information, Doe filed a motion for sanctions for Hall Prangle's nondisclosure of the nurses. The discovery commissioner recommended the nurses police statements be fully admitted and that Centennial pay sanctions, as well as to have an evidentiary hearing. The evidentiary hearing would address whether (1) it was appropriate to issue case-terminating sanctions for failure to disclose witnesses, (2) if Centennial's actions were intentional

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<sup>1</sup> By Amanda Stafford.

<sup>2</sup> Nevada Rule of Prof'l Conduct, Rule 3.3(a)(1) (2018).

and (3) to find out if Centennial misled the court. As a result of the evidentiary hearing, the district court sanctioned Centennial by striking its answer, only allowing Centennial to litigate damages, and ordering monetary sanctions in the amount of \$18,000 — \$9,000 to Doe’s counsel and \$9,000 to Legal Aid of Southern Nevada. The district court also found that Hall Prangle violated Nevada Rule of Professional Conduct 3.3(a)(1) by representing that they had not withheld any relevant evidence. Hall Prangle filed a motion for reconsideration alleging that the district court erred by not providing notice that their conduct was under consideration. The district court denied the motion and explained that, Hall Prangle’s conduct was taken into consideration, but Hall Prangle was not sanctioned and that the sanction order was for Centennial’s misconduct and Centennial’s actions not Hall Prangle. Centennial appeals the sanctions and Hall Prangle filed a petition for writ of mandamus on the finding that they violated Nevada Rule of Professional Conduct 3.3(a)(1).

## **Discussion**

*The district court acted within its discretion when it struck Centennial’s answer as a sanction for violating NRCP 16.1*

### *Standard of Review*

Imposition of discovery sanctions are reviewed for an abuse-of-discretion standard. The Court will defer to the district court, unless the findings are clearly erroneous.

### *NRCP 37 sanctions*

The abuse-of-discretion standard with regard to discovery standards is taken from *Young*, considering:

[T]he degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, 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, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both parties and future litigants from similar abuses.<sup>3</sup>

The district court addressed each of these factors. Centennial argues that the district court misapplied the “collective knowledge doctrine” and thus incorrectly found that Centennial willfully and intentionally concealed discoverable information.

### *Centennial’s misconduct was willful*

The district court found by clear and convincing evidence that Centennial’s misconduct was willful. The district court also expressed that it did not even apply the “collective knowledge

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<sup>3</sup> *Young v. Johnny Riberio Bldg., Inc.*, 106 Nev. 82, 93, 787 P.2d 777, 780 (1990).

doctrine.” The district court found that Centennial’s management was aware of the nurses’ knowledge and denied the knowledge for years.

Although the district court claims it did not apply the “collective knowledge doctrine,” Centennial argues that the court did use the doctrine to aggregate the employees’ knowledge. Centennial relies on *Ginena v. Alaska Airlines, Inc.* for the premise that the collective knowledge doctrine cannot does not show actual malice unless someone had the required culpability. Centennial argues that without naming a particular employee with required culpability, the district court erred as a matter of law.

The Court determined this to not be true. In *Ginena* actual malice was an element of the offense for intentional tort liability. This was not true in this case. Further, the district court put forth a 17-point overview of proof of why the district court concluded that Centennial willfully acted in withholding evidence from discovery disclosure. The Court found that there was more than enough support in the record to make the determination that Centennial acted willfully.

#### *The district court did not penalize Centennial for its attorneys’ conduct*

Centennial argues that striking its answer based on Hall Prangle’s misconduct is an abuse of the district court’s discretion and that it is unfair to sanction a client for an attorney’s failure to comply. The district court found that Centennial knew of the information and still allowed their attorneys to submit disclosures that omitted the information about the nurses and Centennial provided verifications for all of the disclosures, no less than eight total disclosures that failed to mention the nurses and their statements. The Court concluded that the district court did not penalize Centennial for its attorney’s conduct.

#### *Other Young factors support the district court’s decision*

Centennial argues these sanctions were extreme, arguing that this violates public policy of deciding a case on the merits. Moreover, Centennial argues the sanctions are extreme based on their argument that the likeliness that they engage in future misconduct is very low and that it is speculative to say Doe was prejudiced by the failure to produce the evidence.

The district court found Doe to be prejudiced to such a degree that the only way to undo the prejudice was to strike Centennial’s answer. Striking the answer was not considered a case ending sanction because Centennial was still able to litigate the damages. Thus, the Court concluded the district court did not abuse its discretion.

The district court also properly applied the *Young* factor, regarding chance of repeating conduct, as the factor requires the court to consider not only the chance this party will commit future misconduct but also future litigants.

The district court further did not abuse its discretion in finding that there was substantial prejudice to Doe for the failure to produce discoverable information.

#### *Hall Prangle’s writ petition is denied because the district court’s sanction was a fair comment on the attorneys’ conduct*

Hall Prangle argues they were not given notice that the district court was considering attorney sanctions and that they did not violate Nevada Rule of Professional Conduct 3.3(a)(1). In

response, the Honorable Richard Scotti, Eighth Judicial District Court and Jane Doe all filed answers to the petition.

*Petition for writ relief should be entertained*

The district court found twice that Hall Prangle violated Nevada Rule of Professional Conduct 3.3(a)(1). The Court held that this is a reputational sanction and for that reason the Court has a basis to entertain this petition.

The Court looked to *United States v. Talao* to determine that a court finding a violation of Rules of Professional Conduct provides a basis for appeal.<sup>4</sup> The district court made a finding and that an attorney knowingly and willfully violated a specific rule of ethical conduct. This finding constitutes a sanction. This same principle is applied in this case, that a finding that an attorney violated a specific rule is considered a sanction. For this reason, the Court entertained the petition from Hall Prangle to consider if the reputational sanction is appropriate.

*The district court properly found that Hall Prangle violated RPC 3.3*

Nevada Rule of Professional Conduct 3.3(a)(1) states that: “(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal.”<sup>5</sup> The district court noted two instances in which Hall Prangle violated this rule. The first was when Hall Prangle stated: “In the instant situation, there were absolutely no known prior acts by Mr. Farmer that could potentially put Centennial on notice that Mr. Farmer would assault a patient.” The second time being when it said that “there were no known prior acts or any other circumstances that could have put Centennial on notice that Farmer would sexually assault Ms. Doe.” The district court found both of these to be false statements of fact. Hall Prangle argues this is not a violation as it was argument mixed with opinion about the evidence about reasonable foreseeability. Further, Hall Prangle argues the second statement was made in reference to what arguments had been made and was thus not a false statement. The Court determined Hall Prangle was aware of the statements and did make a false statement of facts to the court. Thus, the district court did not abuse its discretion in finding that Hall Prangle did violate Nevada Rule of Professional Conduct 3.3(a)(1).

*The district court’s sanction complied with due process*

Hall Prangle argues they were not on notice that the district court was contemplating sanctions for the attorneys’ actions and thus they were deprived of due process. The district court claims Hall Prangle was on notice as the attorneys’ conduct would be examined under the *Young* analysis. The district court made an order setting an evidentiary hearing on the discovery commissioner’s report and recommendations in that order there was no mention that the district court would consider sanctioning Hall Prangle. The Court found this is insufficient notice.

Arguing in the alternative, the district court judge argues any due process violation would have been cured in Hall Prangle’s motion for reconsideration. The judge relies on *Sun River Energy, Inc. v. Nelson*, where the Tenth Circuit determined sanctions of an attorney given without notice can be cured through a motion for reconsideration. The Court held, consistent with the Tenth

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<sup>4</sup> *United States v. Talao*, 222 F.3d 1133, 1135 (9th Cir. 2000).

<sup>5</sup> Nevada Rule of Prof’l Conduct, Rule 3.3(a)(1) (2018).

Circuit,<sup>6</sup> that if the attorney is given a chance to fully brief the issue of attorney sanctions then that is sufficient to cure an initial due process violation, and here there was a subsequent opportunity to brief and thus cured the due process violation.

### **Conclusion**

The Court held that the district court acted within its discretion in striking Centennial's answer as a sanction. The district court thoroughly analyzed the *Young* factors and the "collective knowledge doctrine" was not applied. Thus, the district court's order to strike Centennial's answer is affirmed. Moreover, the Court determined that a district court's finding that an attorney violated a rule of professional conduct is a reputational sanction. An opportunity to fully brief the issue of the imposition of an attorney sanction is sufficient to cure any initial due process violation. Thus, Hall Prangle's petition for a writ of mandamus is denied.

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<sup>6</sup> Sun River Energy, Inc. v. Nelson, 800 F.3d 1219, 1231 (10th Cir. 2015).