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### Garcia v. Awerbach, 136 Nev. Adv. Op. 27 (May 21, 2020)

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## DAMAGES: PUNITIVE DAMAGES, PERMISSIVE USE AS A DEFENSE

### Summary

The Court concludes that establishing permissive use as a matter of law does not prevent a defendant from defending against punitive damages. In addition, the Court holds that the modification of a discovery sanction is prejudicial if implemented after the trial has already begun.

### Background

Jared Awerbach drove the respondent Andrea Awerbach's car when he collided with the appellant Emilia Garcia. Garcia then filed an amended complaint against Jared for negligence and driving under the influence and against Andrea for negligent entrustment and liability under NRS 41.440. Garcia sought punitive damages for her claims.

In her answer to the amended complaint, Andrea denied giving Jared permission to her car despite having admitted to doing so in both her answer to the original complaint and in her response to Garcia's request for admissions.

At discovery, Garcia sought Andrea's insurance claim file for the collision. Andrea produced the file but gave a redacted note that would have addressed issues surrounding permissive use. Garcia was able to obtain an unredacted version of the note through a subpoena. The note stated that Andrea had only given Jared permission to use the keys to obtain something from the car but did not permit him to use the car that day.

Garcia then filed a motion to strike Andrea's answer to the amended complaint as a discovery sanction for withholding the note. District Court Judge Nancy Allf denied Garcia's motion to strike but granted a sanction that established permissive use as a matter of law. Andrea then sought relief against the order which was later denied since the sanction did not prevent adjudication on the merits of the case.

Judge Allf later recused herself due to a conflict she had with Jared's new counsel. District Court Judge Jerry Wiese then continued with the proceedings after the case was reassigned. Judge Wiese made it known on the first day of the trial of his intention to modify the sanction against Andrea to a rebuttable presumption of permissive use. Judge Wiese clarified that he was modifying the sanction to be consistent with Judge Allf's intention for the sanction whom he had spoken with earlier about the matter.<sup>2</sup> Judge Wiese *sua sponte* entered an order modifying the sanction so that permissive use was established as a rebuttable presumption on the fifth day of trial. Judge Weis's order explained that the modification of the finding would allow "[Andrea] the opportunity to defend against [Emilia's] claim for punitive damages."

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<sup>1</sup> By Tanner Castro.

<sup>2</sup> Although not raised at the district court proceedings or in the body of the court's opinion, Garcia argued on appeal that Judge Wiese improperly modified the sanction based on his communication with Judge Allf in violation of the District Court Rules. *See* D. Ct. R. 18(1) (requiring a district judge to make a written request to modify a sanction).

At trial, the jury found in favor of Andrea who introduced evidence rebutting the presumption of permissive use. Garcia then appealed arguing that the modification to the finding of permissive use as a matter of law was improper.

## **Discussion**

*The district court erred in finding that permissive use, established as a matter of law prevented Andrea from defending against the punitive damages claim*

Garcia claimed that Andrea was liable for negligently entrusting her vehicle to Jared and sought punitive damages as a result of Andrea's actions. A case for negligent entrustment requires (1) that an entrustment occurred, and (2) that the entrustment was negligent.<sup>3</sup> Further, "[P]unitive damages may be awarded when the plaintiff proves by clear and convincing evidence that the defendant is guilty of oppression, fraud or malice, express or implied."<sup>4</sup>

Garcia asserts that permissive use if established as a matter of law would only affect one element of the negligent entrustment claim and not the entirety of the claim. Indeed, a finding of permissive use is effective only at establishing that an entrustment occurred. However, the entrustment must also be established as negligent to succeed on a claim for negligent entrustment. In addition, even if Garcia were to succeed in establishing her claim of negligent entrustment, a punitive damages award requires a showing that the defendant's conduct exceeded mere recklessness or gross negligence. Therefore, Andrea was not prevented from defending the punitive damages claim since permissive use as a matter of law does not on its own establish oppression, fraud, or malice. The district court committed legal error by modifying the sanction under these grounds.

*The timing of the district court's sua sponte modification of the discovery sanction was prejudicial*

Garcia argues that the modification of the discovery sanction unfairly prejudiced her ability to present her case. The district court acknowledged that its finding may result in the parties modifying their trial strategies for the jury. Alternative accommodations, including expedited discovery, were made as a means to not unfairly prejudice either party for the modification. Nonetheless, these accommodations failed to mitigate the underlying circumstances that surrounded the case which made the timing of the sanction modification unduly prejudicial. Garcia's counsel suggested that they would need more time to develop their case by deposing witnesses and gaining additional evidence. However, the parties would have needed a continuance to pursue these matters to not run the risk of violating Nevada's five-year rule, which Andrea was not prepared to accommodate.<sup>5</sup>

Garcia prepared her case with the knowledge that she would not have to present evidence regarding permissive use under the original sanction. The district court's modification would have

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<sup>3</sup> Zugel v. Miller, 100 Nev. 525, 528, 688 P.2d 310, 313 (1984).

<sup>4</sup> Bongiovi v. Sullivan, 122 Nev. 556, 581, 138 P.3d at 450-51 (internal quotations omitted); see also Nev. Rev. Stat. 42.005(1)(2011).

<sup>5</sup> See Nev. R. Civ. P. 41(e)(2)(B) ("The court must dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 5 years after the action was filed.")

required Garcia to present evidence to support the presumption of permissive use if Andrea chose to combat the presumption with her evidence. Therefore, given that the intent to modify the sanction was made known on the first day of trial, the district erred in the timing of the modification for the discovery sanction.<sup>6</sup> Accordingly, the Court vacated the underlying judgment, reversed the district court's order modifying the discovery sanction, and remanded the matter to the district court for a new trial.

## **Conclusion**

The Court holds that permissive use, established as a matter of law, does not prevent a defendant from defending against a claim for punitive damages. The Court further holds that the timing of the district court's modification of the discovery sanction was prejudicial, as trial had already begun. As such, it reverses the district court's order modifying the discovery sanction and remands the case for a new trial consistent with the opinion.

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<sup>6</sup> *See Meyers v. Garmire*, 324 So. 2d 134, 135 (Fla. Dist. Ct. App. 1975) (finding that, although the trial court was permitted to modify a pretrial order that limited the issues to be presented at trial, permitting the addition of matters outside the scope of the pretrial order at the time of trial was prejudicial to petitioners who were not prepared to present evidence on those issues).