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Eby v. Johnston Law Office, P.C., 138 Nev. Adv. Op. 56 (Sep. 08, 2022)¹

NON-LAWYER AGENT THAT IS GRANTED POWER OF AUTHORITY CAN NOT LITIGATE A CLAIM BELONGING TO THE PRINCIPAL, AND COURTS MUST APPLY THE YOUNG FACTOR TEST TO IMPOSE CASE CONCLUDING SANCTIONS

Summary

The Nevada Supreme Court affirmed the district court's decision to strike the second amended complaint and reversed the decision to dismiss the remaining malpractice claim with prejudice. According to Nevada's Uniform Power of Attorney Act, the Court held a non-lawyer agent working under a power of attorney² regarding claims and litigation could not litigate an action pro se in place of the principal or engage in the practice of law on the principal's behalf. The trial court correctly held that the appellant's non-lawyer agent under a power of attorney was engaged in the unauthorized practice of law. The decision to dismiss the action with prejudice after the appellant failed to timely file a proper amended complaint amounted to a sanction for the appellant's failure to comply with a court order.

Background

Appellant Donald Douglas Eby was sued by a victim to a related crime that Eby committed against the victim. Eby retained respondents Johnston Law Office, P.C., Brad M. Johnston, and LeAnn E. Schumann. Eby executed a power of attorney giving the respondents authority to settle the case, which they did in October 2018. The case resulted in a settlement amount of \$500,000. In September 2020, Eby filed this action in pro se against the respondents, asserting different causes of action, including legal malpractice. Later, Eby filed an amended complaint adding claims and detailed allegations.

Additionally, Eby vaguely alleged that respondents forced him to sign the power of attorney granting them the power to settle. The first two pleadings were only signed by Eby. Respondents moved to dismiss the first amended complaint, arguing that Eby failed to state a claim under Nevada Rules of Civil Procedure 12(b)(5). Eby opposed the motion, again in papers signed only in his name.

Before the scheduled hearing on the motion to dismiss, Eby moved the court to allow Theodore Stevens, an inmate serving a sentence, to appear at the hearing on Eby's behalf. In the motion, Eby stated that he relied on Steven's assistance to prepare the legal filings, could not argue the case alone, and required Steven's assistance at the hearing. The district court issued a written order denying the motion because Stevens was not a licensed attorney in the State of Nevada and could not represent Eby because any representation would be the unauthorized practice of law.

The district court then held the hearing on the respondents' motion to dismiss, at which Eby appeared on his behalf. Arguments followed by the parties, and the court ruled that it was dismissing the first amended complaint in its entirety, except for Eby's malpractice claim that he

¹ By Davit Sargsian.

² NEV. REV. STAT. 162A.090 (2021).

was forced to sign a power of attorney. The court granted Eby leave to amend to provide a more definite statement on the power-of-attorney allegation. The court made clear if Eby failed to amend the second complaint within 30 days that it would dismiss that action without prejudice. The court also told Eby that he must prepare the pleadings himself or with an attorney, but without Stevens's help.

After the hearing, the court dismissed the first amended complaint with prejudice under NRCPP 12(b)(5), except for the malpractice claim. Eby was granted leave to amend to provide a more definitive statement. With help from Stevens, Eby filed an objection to the written order but did not challenge the ruling that dismissal for failure to comply with it would be prejudice. Eby, helped by Stevens, filed a second amended complaint on the last day of the thirty days. The pleading stated that Stevens would substitute as the plaintiff under a power of attorney. The pleading was signed by Stevens in that capacity. The district court entered a written order striking all documents written by Stevens because he was engaged in the unauthorized practice of law. The court dismissed the action with prejudice for failure to comply with its prior order. That was done before any response to the pleading was filed and without holding a hearing. The appeal followed.

Discussion

There are two main issues before the Nevada Supreme Court. The first issue is whether a non-lawyer agent who was granted authority over claims and litigation by a power of attorney can litigate a claim belonging to the principal. Second is the issue of what test a court must use to impose case-concluding sanctions.

An individual may not authorize a non-lawyer to litigate in pro se or practice law on their behalf by a power of attorney

The appellant argues that Stevens could represent and litigate on his behalf because Eby signed the limited power of attorney, giving Steven the authority. Eby argues that two statutes³ allow a principal to authorize an attorney-in-fact under a power of authority. The Court rejected this argument relying on statutes and cases. The Court discussed NRS Chapter 162A and Nevada's Uniform Power of Attorney Act (UPOAA). The Court specifically reviewed "[c]onstruction of authority generally" under NRS 162A.470.⁴ Within this statute, the Court reviewed what "subject[s] described in NRS 162A.200 to 162A.600" should be considered. The Court found the explanation in NRS 162A.560, which explains the agent's authority.⁵ This authority enumerates other powers granted to an agent.⁶ Finally, the Court agreed that UPOAA

³ NEV. REV. STAT. 162A.470 (2021); NEV. REV. STAT. 162A.560 (2021).

⁴ "Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in NRS 1.62A.200 to 162A.660, inclusive, . . . a principal authorizes the agent to . . . [d]emand, receive and obtain, *by litigation* or otherwise, money or another thing of value to which the principal is, may become or claims to be entitled . . ."

⁵ "[P]ower of attorney grants an agent 'general authority with respect to claims and litigation,' the agent may '[a]ssert and maintain before a court . . . a claim, claim for relief, [or] cause of action, . . . including an action to recover . . . damages sustained by the principal.' NRS 162A.560(1)."

⁶ NEV. REV. STAT. 162A.560(2), (5), (6) (2021).

permits a principal to give significant authority over litigation of their causes of action to an agent under power of attorney.

At any rate, the Court proceeded to prove that Nevada does not allow an unlawful person to practice law in Nevada. First, the Court established that it is unlawful for a person to practice law in Nevada unless that person is an active member of the State Bar.⁷ Second, the Court relied on their previous decision in *Guerin*⁸ to explain that a non-attorney is not permitted by any rule or statute to represent an individual. But an individual can represent themselves in court. The Court further used *In re Discipline of Lerner*⁹, to explain that there is a prohibition on unauthorized practice of law to ensure the public is provided attorneys that are competent, have gone through the training, and must abide by the regulations and discipline.

The appellant agrees that Stevens was engaged in practicing law. Still, the appellant claims that UPOAA allows a non-lawyer agent with power of attorney to step in the principal's shoes and proceed as a pro se for the principal. The Court disagreed with this as well. The Court has not answered this specific issue about a non-attorney agent that could represent another person, but this was answered in a similar issue in *Martinez*.¹⁰ In that case, the district court determined that a non-attorney agent couldn't represent a person claiming unemployment benefits under a statute that allowed one to be represented by other authorized agent. Only a licensed attorney can represent a person in a court of law.

The Court then focused on the power of attorney issue and used the *Handley*¹¹ case. In that case, a non-lawyer acting under a power of attorney represented the plaintiff in a civil action. The court granted the defendant's motion to dismiss because the power of attorney statute did not circumvent NRS 7.285's prohibition on the unauthorized practice of law. The Court agreed with this decision.

The Court used a Californian case, *Drake*,¹² to support their position. In *Drake*, the court considered whether a recently adopted power of attorney act abrogated the statutory prohibition against the practice of law by a person not admitted to the Bar. The court evaluated the broad powers of an attorney-in-fact under a California code, which is similar to NRS 162A.560. The plaintiff received power of attorney from two other individuals and attempted to appear in legal proceedings on their behalf. The lower court rejected this, and the plaintiff attempted to get a writ of mandate to allow him to appear. The court of appeals denied this petition because the court determined that the power of attorney act has broad language but does not permit an attorney-in-fact to engage in legal activities under a power of attorney.

Principals under a power of attorney can appear pro se, but an agent cannot do so on their behalf. The Court went further by showing that if the court allowed the plaintiff's argument, it

⁷ NEV. REV. STAT. 7.285(1)(a) (2021).

⁸ *Guerin v. Guerin*, 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000).

⁹ *In re Discipline of Lerner*, 124 Nev. 1232, 1237, 197 P.3d 1067, 1072 (2008).

¹⁰ *Martinez v. Eighth Jud. Dist. Court*, 102 Nev. 561, 729 P.2d 487 (1986).

¹¹ *See Handley v. Bank of Am., N.A.*, No. 2:10-cv-01644-RLH-PAL, 2010 WL 4607014, at *2 (D. Nev. Nov. 4, 2010).

¹² *Drake v. Superior Court*, 26 Cal. Rptr. 2d 829 (Ct. App. 1994)

would reach absurd results, such as sanctioning criminal conduct by allowing the unauthorized practice of law. Further, the Court held that there is a distinction between an attorney-in-fact and an attorney-at-law. Accordingly, the Court found *Drake* persuasive, adopted this similar approach, and concluded that Stevens could not appear pro se on the appellant's behalf; only the appellant could.

The Court concluded that UPOAA allowed a principal to grant an agent the authority over claims and litigation the principal would have as a client in an attorney-client relationship.

The district court erred by imposing a case-concluding sanction without conducting the requisite analysis

The appellant argues that the district court's dismissal was incorrect because it conflicted with the court's oral ruling at the hearing on the respondents' motion to dismiss. The court said it would dismiss the action without prejudice if Eby failed to file an amended complaint properly within thirty days. Accordingly, the appellant contends that the district court intended to dismiss the case with prejudice and that the Court should reverse the dismissal.

The Court disagreed with this argument because the appellant did not follow the written order instructions, and the order stated it would dismiss the case with prejudice. The appellant also failed to raise the issue before the district court and waived it. That said, the Court decided to consider this issue on sua sponte to prevent a plain error because they are allowed to by case law.¹³

The Court determined that the district court erred in dismissing the appellant's last legal malpractice claim with prejudice because the district court did not conduct the analysis required for imposing concluding sanctions under the *Young*¹⁴ case. In *Young*, the Nevada Supreme Court held that a heightened standard of review applies when the sanction is dismissed with prejudice. Dismissal with prejudice is considered a harsh remedy only to be used in extreme situations where a court must weigh the policy favoring the disposition of cases on their merits. *Young* requires trial courts to support every order of dismissal as a discovery sanction through a written explanation of the court's analysis through the *Young* factors: "the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, . . . [and] the feasibility and fairness of alternative, less severe sanctions." The Court then provided multiple cases in which the district courts applied or failed to apply the *Young* factor test to their analysis.

The Court analyzed the district court's reason as to why they did not apply the *Young* factor test and couldn't determine exactly why it occurred. Otherwise, the Court determined that the district court's decision to dismiss the action with prejudice was a case-concluding sanction. The Court does point out that NCRP 12(e) allows a court to strike a pleading or issue (word missing here?) any other appropriate order if the court orders a more definite statement and the order is not obeyed within the time the court sets. At the same time, it compared the order to the

¹³ Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986).

¹⁴ Young v. Johnny Ribeiro Bldg., Inc., 106 Nev 88, 787 P.2d 777 (1990).

identical Federal Rule of Civil Procedure 12(e) as being sanctions for noncompliance with the court's orders. Even though NCRP 12(e) broadly offers dismissal for noncompliance in a certain situation, the district court must apply the *Young* factor rule.

The Court concluded that the district court needed to support and explain its decision to dismiss the action with prejudice through the *Young* factors. Thus, the Court reversed the district court's order dismissing the appellant's malpractice claim with prejudice and remanded it for further proceedings.

Conclusion

The Court affirmed the district court's ruling in part. It explained that a non-lawyer agent working under a power of attorney pursuant to Nevada's Uniform Power of Attorney Act regarding claims and litigation could not litigate an action in pro se in place of the principal or engage in the practice of law on the principal's behalf. Accordingly, the Court reversed and remanded the decision to dismiss the action with prejudice after the appellant failed timely to file a proper amended complaint. Hence, it amounted to a case concluding sanction for which the district court must apply the *Young* factor test in explaining why it is dismissing with prejudice.