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**Blige v. Terry [State of Nevada], 139 Nev. Adv. Op. 60 (Dec. 28, 2023)**

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*Blige v. Terry [State of Nevada]*, 139 Nev. Adv. Op. 60 (Dec. 28, 2023)<sup>1</sup>

AMENDING A COMPLAINT BY IMPLIED CONSENT BY A DEFAULTING PARTY IS  
IMPERMISSIBLE UNDER NRCP 15(B)(2)

**Summary**

Blige received Bitcoin transfers from Terry and had taken compromising photos of him during a romantic relationship. Blige failed to appear for the damages hearing and the district court proceeded to amend the complaint and default judgment already including conversion, unjust enrichment, and intentional infliction of emotional distress to include extortion as well. However, a party cannot impliedly consent to be tried on claims not included in their original pleadings and thus cannot be tried for the tort of extortion, but is eligible to default on the other claims.

**Background**

Blige admitted taking compromising photos and recordings of Terry. Blige threatened the release of these unless Terry transferred her Bitcoin. Terry complied, but filed a police report of extortion against Blige. In the civil complaint, he sought relief against Blige alleging claims for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment and intentional infliction of emotional distress.

Blige filed an answer, but failed to produce the photographs and recordings during discovery. She fired her attorneys and failed to respond to the district court's order to produce them and the District Court entered default judgment due to her failure to appear in court.

Appellants asserted they were unaware of the court date alleging they were unaware due to (1) counsel's withdrawal (2) did not receive mail (3) motions and papers were mailed to parent's house where she did not live fulltime (4) she could not find anything after the police "trashed" her house during a warrant (5) she was arrested and jailed. The district court denied the motion setting aside the judgment.

Terry moved for a default judgment resulting compensatory damages and punitive damages. At the prove-up hearing the district court granted Terry's motion as to his claims for conversion, unjust enrichment, and intentional infliction of emotional distress. However, they relied on NRCP 15(b)(2) amending the pleadings to conform to the evidence and found Blige liable for damages for the tort of extortion.

**Discussion**

Blige contends the district court abused its discretion by improperly finding that Blige impliedly consented under NRCP 15(b)(2) to trying a claim for tort of extortion; (2) admitting unauthenticated damages evidence; and (3) erred in concluding that Terry made prima facie showings supporting liability and damages for conversion, unjust enrichment, and intentional infliction of emotional distress.

***The District Court Properly Denied Blige's Motion to Set Aside The Default***

Appellant contended because she was unaware of discovery requests the district court abused its discretion by finding no good cause to set aside the judgment for appellee. The Court rejected that argument referencing NRCP 55(c) which allows a district court to set aside a default

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<sup>1</sup> By Kalin W. Sokell.

judgment for good cause. It also referenced NRCP 60(b)(1) and case law stating good cause is limited to “mistake, inadvertence, surprise or excusable neglect.”

Appellant also argued that they provided a response and documentation to their attorneys on the same day they were terminated. The Court responded, holding that since counsel was fired on the same day, the attorney-client relationship was broken and the record contradicts her “reasonable belief” that her attorneys responded to discovery requests.

The address where Blige was served with the NRCP 37 motion and discovery requests was the same address Blige used in her own motion. (**Citing case law**). The NRCP 37 motion was also served by email and Blige did not refute that. Thus the Court denied this request.

The Court addressed Blige’s argument that she could not attend the October 12 hearing on NRCP 37 motion holding that she did not timely claim unavailability of materials and that there was no abuse of discretion because she failed to demonstrate mistake, surprise, excusable neglect, inadvertence or other good cause excuse.

### ***Claims That Were Not Pleaded Cannot Be Tried by Implied Consent Against a Defaulting Party***

Appellant contended the district court erred when relying on NRCP 15(b)(2) when it concluded the parties impliedly consented to trying the unpleaded tort of extortion. The Court accepted that argument as NRCP 15(b)(2)<sup>2</sup> does not allow a defaulting party to impliedly consent to claim that was not pleaded in the complaint. The Court referenced *Schwartz v. Schwartz*<sup>3</sup>, where an amendment to a complaint is only permissible “if prejudice does not result.”

Under NRCP 55(b)(2)<sup>4</sup> a defendant must be served with notice at least seven days prior to a prove-up hearing on a default judgment. A default judgment must not differ from or exceed in amount what is included in the pleadings under NRCP 54(c).<sup>5</sup> The Court relied on case law stating when a defaulting party fails to comply with a discovery order, plaintiffs can amend their complaint to conform with evidence. This did not address whether a defaulting party may impliedly consent to an unpleaded claim being tried against them in defaulting proceedings.

The court then relied on persuasive case law and held issues cannot be tried by implied consent if the opposing party is absent from the proceedings. Here, Blige was present at the prove-up hearing but not the damages hearing and a party needs notice to decide whether to show up. Thus, the default judgment entered against the defaulting party must be limited to damages for the pleaded claims. The court concluded that a defaulting party cannot impliedly consent and be held liable for unpleaded claims, and held in appellant’s favor.

### ***The District Court Did Not Err in Admitting Evidence***

Appellant contended the district court abused its discretion by admitting evidence of Bitcoin transfers to them and to appellee’s car dealer, text messages and Bitcoin valuations. The Court relied on NRS 52.015(1)<sup>6</sup>, where authentication is a condition precedent to admissibility by showing evidence to support proponent claims. The Court then relied on NRS 52.025<sup>7</sup>, where the

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<sup>2</sup> NEV. R. CIV. PROC. § 15(b)(2).

<sup>3</sup> *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1139 (1979).

<sup>4</sup> NEV. R. CIV. PROC. § 55(b)(2).

<sup>5</sup> NEV. R. CIV. PROC. § 54(c).

<sup>6</sup> NEV. REV. STAT. ANN. § 52.015 (2022).

<sup>7</sup> NEV. REV. STAT. ANN. § 52.025.

testimony of a witness is sufficient for authentication if personal knowledge exists. Thus, concluded that authentication is a condition precedent to admissibility to support proponent's claim, but that authentication can exist if a witness has personal knowledge of the incident.

***The district court did not abuse its discretion in admitting evidence related to Bitcoin transfers and text messages***

Appellant argued appellee failed to authenticate screenshots showing Bitcoin transfers and appellee's car dealer and text messages between appellee and appellant. Relying on *Rodriguez v. State*, when an objection is made the proponent of the evidence can provide direct or circumstantial corroborating evidence and explain why they are offered.

The appellee testified the Bitcoin transfers were taken by them on their phone depicting transfers to appellant. Appellee testified the screenshot exhibits in the prove-up hearing depicted funds transferred to car dealer to purchase cars for appellant. The district court agreed.

Regarding the text messages from appellee to appellant. Appellee testified the names used were attached to appellant's phones, sent in the general time period during the alleged extortion. The appellant testified they were received one of the messages. Appellee showed text messages included photos of appellant and appellee together referring to them as the aforementioned names. The district court agreed.

Appellant also contended the admittance of text messages violated NRS 52.245(1)<sup>8</sup> best evidence rule. The Court held the screenshots satisfied the best evidence rule, because appellant failed to raise a genuine question of authenticity or raise issue of unfair prejudice.

***The district court did not abuse its discretion by admitting the evidence related to the Bitcoin valuations.***

Appellant contended that the district court erred in accepting appellee's valuation of Bitcoin transferred between them from May 17, 2019 to October 2020 by failing to provide adequate authority. The Court relied on NRS 47.130(2)(b)<sup>9</sup>, which allows a court to take facts from sources capable of accurate and ready determination when accuracy cannot be reasonably questioned.

Here, the district court relied on *Wall Street Journal Pro Central Banking's* historical Bitcoin prices, which takes averages of "open amount, high, low and close amounts" multiplied by the Bitcoin amount transferred. District court concluded this was a legitimate source and appellant did not provide any reason why this did not reflect accurate prices and the Court held the district court did not abuse its discretion.

***Terry made prima facie showings of conversion, unjust enrichment, and intentional infliction of emotional distress to support the damages award.***

Appellant contended the district court impermissibly awarded appellee damages because appellee failed to make prima facie showings of conversion as they only experienced stress, which is not "severe" enough to qualify for the tort of intentional infliction of emotional distress.

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<sup>8</sup> NEV. REV. STAT. ANN. § 52.245 (1995).

<sup>9</sup> NEV. REV. STAT. ANN. § 47.130(2)(b) (1971).

Relying on case law, the nonoffending party need only to establish a prima facie case when default judgment is entered, because discovery sanctions and damages sought can compensate the nonoffending party or punish the offending party. Thus, ruling against appellant.

***The transfer of property under duress can constitute conversion, and in such cases, demand is not required***

Appellant argued appellee failed to make a prima facie conversion case because appellee failed to show a demand for return or that a demand would be futile. As defined in *Wantz v. Redfield*<sup>10</sup> conversion is a distinct act of dominion wrongfully exerted over another's personal property rights. Here, the court reasoned conversion does not require a taking of property nor the converter's intent, but when an owner is deprived of their property by a wrongful act of another who assumes dominion over it.

Relying on persuasive authority from other states, the Court held conversion includes takings induced by duress. It can also be established by the refusal of a demand for the property.<sup>11</sup> Here, the appellee alleged the transfers were made under duress to protect themselves, because they were threatened with highly personal information. The Court held these threats were wrongful acts used to obtain dominion over appellee's property rights and appellee sufficiently supported the awarded damages with exhibits and historic Bitcoin price records. Thus, the district court did not abuse its discretion and appellee established a prima facie case for conversion and awarding damages.

***The district court properly awarded damages for Terry's claim of intentional infliction of emotional distress***

Appellant argued appellee failed to establish a prima facie case of intentional infliction of emotional distress because stress was insufficient to support severe or extreme emotional distress.

The Court analyzed the four elements of the tort of intentional infliction of emotional distress from *Miller v. Jones*<sup>12</sup>: (1) extreme and outrageous conduct on the part of defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation. The Court affirmed the district court in that the text messages and Bitcoin transfers established appellant's conduct as extreme and outrageous and a high likelihood of causing it.

The Court reasoned appellee suffered extreme or severe emotional distress, as they had trouble sleeping and worried every second resulting in them transferring Bitcoin numerous times.

The Court held the district court was in the best position to evaluate the testimony and manifestations of appellant's distress and the damages were reasonable because it was \$1,000 for each Bitcoin transferred under duress and thus affirmed the district court's ruling.

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<sup>10</sup> *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958).

<sup>11</sup> *Ward v. Carson River Wood Co.*, 13 Nev. 44, 61 (1878), superseded by statute on other grounds as stated in *Meteberry v. Giacometto*, 51 Nev. 7, 12, 267 P. 49, 50 (1928).

<sup>12</sup> *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998).

## **Conclusion**

A party cannot default on claims that were not pleaded in the complaint, and the defaulting party cannot be found to have impliedly consented to try claims unless the plaintiff included the claims in their pleadings. Thus, the district court's ruling is overturned as a court cannot amend a complaint by implied consent under NRCP 15(b)(2). Here, when the district court improperly added the tort of extortion during the default judgment against the appellant, because it was not properly added to the complaint. Thus, the Court overturned the district court's decision.