No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

APPELLANT'S SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF JUDGE ALLF'S SANCTION ON LIABILITY FOR PUNITIVE DAMAGES

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I.

INTRODUCTION

By Order dated December 27, 2019, this Court directs the parties to address "whether the district court properly altered the sanction after considering the sanction's effect on appellant's claim for punitive damages." The parties were specifically directed to "address whether negligent entrustment established as a matter of law could also establish oppression, fraud or malice, express or implied, for purposes of punitive damages."

II.

SUMMARY OF ARGUMENT

The district court ***did not*** properly alter the sanction after considering the sanction's effect on appellant's claim for punitive damages because negligent entrustment, established as a matter of law, could never establish oppression, fraud, or malice for purposes of punitive damages because the tort of negligent entrustment does not require proof of a culpable state of mind. The same holds true of permissive use, the only element of negligent entrustment established as a matter of law by the sanction entered in the district court by Judge Allf. Accordingly, it was improper for the district court to alter Judge Allf's sanction as a result of its mistaken conclusion that a finding of permissive use, alone, would prevent Andrea from disputing liability for punitive damages.

III.

ARGUMENT

A. THE STANDARD FOR PUNITIVE DAMAGES UNDER NEVADA LAW.

Punitive damages are appropriate and 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.' "*Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450-51 (2006) (quoting NRS 42.005(1)). Implied malice "means ... despicable conduct [that] is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3). Similarly, oppression is "despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001(4). A defendant acts with conscious disregard when he has "knowledge of the probable harmful consequences of a wrongful act and ... willful[ly] and deliberate[ly] fail[s] to act to avoid those consequences." NRS 42.001(1). With the passage of NRS 42.001, there can no longer be any debate conscious disregard requires a culpable state of mind and therefore denotes conduct that, at a minimum, must exceed negligence or even gross negligence.

The requirement to prove a "culpable state of mind" was explained by this Court in *Countrywide Homes Loans, Inc. v. Thitchener*:

> In short, the enactment of NRS 42.001 has retired the malice debate and clarified the proper role of a defendant's conscious disregard in our law of punitive damages. Under NRS 42.001, implied malice is a discrete basis for assessing punitive damages where conscious disregard can be demonstrated. To eliminate confusion regarding this mental element, the Legislature defined conscious disregard under NRS 42.001(1) in plain and unambiguous terms. Rather than rely on past cases that pre-dated NRS 42.001(1), in defining what conduct would amount to conscious disregard, we look no further than the statute's language. ***Since its language plainly requires evidence that a defendant acted with a culpable state of mind, we conclude that NRS 42.001 (1) denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence.***

124 Nev. 725, 742–43, 192 P.3d 243, 254–55 (2008) (emphasis added).

Wichinsky v. Mosa, 109 Nev. 84, 847 P.2d 727 (1993), cited by this Court in its December 27 Order, also establishes that Nevada law requires proof of more than mere negligent conduct to justify a punitive damages award. *Wichinsky*

involved a commercial dispute between co-owners of a closely-held business. An arbitrator awarded compensatory and punitive damages for breach of contract and tort claims, and the district court confirmed the award. This Court reversed, vacating the punitive damage award for failure of proof:

> .... NRS 42.005 provides for an award of punitive damages upon a showing of fraud, oppression or malice by clear and convincing evidence. ***Tort liability alone is insufficient to support an award of punitive damages***. . . . Our review of the record discloses no evidence which would support a finding of fraud, oppression or malice attributable to Wichinsky. Therefore, the $ 205,000 punitive damages award must also be vacated.

Wichinsky, 109 Nev. at 89, 847 P.2d at 730 (emphasis added) (citing *First Interstate Bank of Nevada v. Jafbros Auto Body, Inc.*, 106 Nev. 54, 57, 787 P.2d 765, 767 (1990)).

The requirement to prove more than negligent conduct to obtain punitive damages is illustrated in *Taylor v. Aria Resort & Casino, LLC*, No. 2:11-CV-01360-APG, 2015 WL 751360 (D. Nev. Feb. 23, 2015). In *Taylor*, the federal court granted Aria's motion for summary judgment as to punitive damages even though it acknowledged that a jury could find that "Aria acted negligently". 2015

WL 751360, at *3–4. Although there was sufficient evidence to allow negligence to go the jury, the plaintiffs did not provide evidence that raised a genuine issue of material fact as to whether Aria consciously disregarded their rights or safety during their stay at the hotel. *Id.* ("Showing that Aria's conduct was reckless or grossly negligent is not enough; Plaintiffs must demonstrate that Aria acted with 'a conscious disregard' of their rights or safety"; *see also Elliott v. Prescott Companies, LLC*, No. 215CV01143APGVCF, 2016 WL 2930701, at *2 (D. Nev. May 17, 2016) ("Conscious disregard requires a "culpable state of mind" and therefore "denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence").

B. Negligent Entrustment, Found As A Matter Of Law, Is Not Enough to Justify Liability for Punitive Damages.

Under the cases cited above, tort liability alone -- in this case negligent entrustment tort liability -- is not sufficient to support a punitive damages award under Nevada law. Something more is required; specifically, proof of fraud, oppression, or malice by the entrustor. *See, e.g., Wichinsky*, 109 Nev. at 89, 847 P.2d at 730.

A finding of negligent entrustment is not sufficient to justify punitive damages because it is a simple tort of negligence. Under the doctrine of negligent entrustment, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person, such as a minor child unlicensed to drive a motor vehicle, may

be found liable for damages resulting thereby". *Zugel by Zugel v. Miller*, 100 Nev. 525, 527–28, 688 P.2d 310, 312 (1984) (*citing McCart v. Muir,* 230 Kan. 618, 641 P.2d 384 (1982); *Sedlacek v. Ahrens,* 165 Mont. 479, 530 P.2d 424 (1974); and *Connell v. Carl's Air Conditioning,* 97 Nev. 436, 634 P.2d 673 (1981)). The "key elements" of a negligent entrustment cause of action are "whether an entrustment actually occurred, and whether the entrustment was negligent." *Id.* (*citing McCart,* 641 P.2d at 389). Liability for negligent entrustment does not require proof of a "culpable state of mind."

In fact, the Nevada Supreme Court noted in *Zugel by Zugel* that "the entrusting person need not have known that the motor vehicle was going to be driven on a public roadway," and "a parent who entrusts his child with a motor vehicle may be found liable under a theory of negligent entrustment even when the parent expressly instructs the child not to use the vehicle on a public roadway". *Id.,* at 527–28, 688 P.2d at 312 (*citing Sedlacek v. Ahrens*, 165 Mont. 479, 484, 530 P.2d 424, 426 (1974) ("The fact that such a minor deviates from the consent given and exceeds its limitations will not relieve the provider from liability")).

Of course, even though merely establishing the tort of negligent entrustment cannot justify an award of punitive damages, the **conduct of the defendant** in relation to the negligent entrustment claim can support allowing the punitive damages question to go to the jury. In *Terrell v. Cent Wash. Asphalt, Inc.*, 168 F.

Supp. 1302 (D. Nev. 2016), the plaintiff sued the negligent driver and the driver's employer following a crash, alleging negligent entrustment against the employer and seeking punitive damages. The employer sought to dismiss the negligent entrustment claim as redundant to its admitted vicarious liability in *respondeat superior*. The court disagreed, predicting this Court "would hold that a negligent entrustment claim is not redundant of vicarious liability, particularly where, as here, punitive damages are sought." *Terrell*, 168 F. Supp. 3d at 1313. This, because "negligent entrustment is not just a means to hold the employer [or entrustor] liable for the employee's [or entrustee's] negligence. Rather, it is a separate tort that addresses the employer's [or entrustor's] own negligent conduct." *Id.* (citing *Wright v. Watkins & Shepard Trucking, Inc.*, 968 F. Supp. 2d 1092, 1095 (D. Nev. 2013)). "Additionally, punitive damages in Nevada must be shown by clear and convincing evidence and vicarious liability for punitive damages is not automatic. . . . ***Evidence of the employer's [or entrustor's] conduct thus may be needed to meet the clear and convincing standard.***" *Id.* (emphasis added; internal citations omitted).

In other words, explained the court, "[t]he plaintiffs are 'not automatically entitled to punitive damages'" against the entrustor—even if, as here, they are entitled to punitive damages against the entrustee. *Id.* at 1317 (citing *Bongiovi*, 122 Nev. At 581, 138 P.3d at 450. Instead, the fraud, oppression, or malice of the

entrustor may entitle the plaintiff to punitive damages against the entrustor. *See id.* at 1319 ("[the employer/entrustor's] own conduct in relation to the negligent entrustment claim supports allowing the punitive damages question to go to the jury.").

The established fact that Andrea entrusted her vehicle to Jared, alone, could not have justified punitive damages against Andrea, even though Jared was found liable for punitive damages at the first trial, and may be again on re-trial. Instead, evidence of Andrea's own "conduct", *i.e.* her own acts or omissions, was needed to independently support punitive damages against Andrea. And that evidence had to meet the higher evidentiary standard of clear and convincing.

C. Andrea Could Have Contested Punitive Damages Under The Sanction Entered By Judge Allf.

Looking to the actual sanction entered by Judge Allf, there was no finding of negligent entrustment as a matter of law. Rather, Judge Allf limited her sanction to a finding of permissive use. *See* AA at 626 ("COURT FURTHER FINDS after review Andrea gave her son permission to use the car and a finding of permissive use is appropriate because the claims note was concealed improperly, was relevant, and was willfully withheld by Defendant Andrea") (all caps in original). Similarly, after Andrea filed a "Motion for Relief from Final Court Order", AA at 630, Judge

Allf once again limited her sanction to a finding of permissive use. AA at 642-645.[1]

Notably, the only fact needed to establish permissive use is a finding of permission, express or implied. *See* NRS 485.3091(1)(b) and NRS 41.440. Permissive use, while sufficient in and of itself to make Jared an insured under Andrea's motor vehicle liability policy, *id.*, is only one element of a negligent entrustment claim. As explained above, permissive use alone cannot establish the tort of negligent entrustment, and even if proven, the tort of negligent entrustment alone cannot justify a punitive award. Judge Allf's sanction found permissive use but did not prevent Andrea from contesting either negligent entrustment or punitive damages based on her own conduct.

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[1] Andrea, then, challenged the propriety of Judge Allf's sanctions order by filing a Petition for Writ of Mandamus or, Alternatively, of Prohibition (the "Writ Petition") with this Court in 2015. Andrea argued Judge Allf's sanction was too harsh because it "basically precludes Petitioner from contesting her liability ...." Writ Petition at p. 9, lns. 1-2. The Nevada Supreme Court found Andrea's arguments to be "unavailing" and denied any relief, upholding Judge's Allf's sanctions order. *See* Order filed Sept. 11, 2015 (citations omitted). This Court's decision denying Andrea's Writ Petition and upholding Judge Allf's sanction thus became the law of the case, binding on the parties and the trial court. *See Sherman Gardens Co. v. Longley*, 87 Nev. 558, 563, 491 P.2d 48, 51-52 (1971) (An appellate court's decision "is the law of the case, not only binding on the parties and their privies, ***but on the court below*** and on this court itself.") (emphasis added) (citing *Wright v. Carson Water Co.,* 22 Nev. 304, 308, 39 P. 872, 873-874 (1895)).

Even under Judge Allf's sanction, Andrea could have disputed conscious disregard, and attendant liability for punitive damages. For example, in the claims note withheld by Andrea, she admitted that she had given "opac" [Jared] permission to use the vehicle in the past and admitted that she "had let opac have the keys earlier that day [the day of the accident] to get something out of her car." AA at 564. She says she did not realize it, but Jared never gave the keys back, *id.* These admissions were consistent with the sanction finding permissive use. By giving her keys to Jared, she had entrusted him with the vehicle. At that point, under the rule announced in *Zugel by Zugel*, it did not matter whether Andrea knew Jared kept the keys and used them to drive the car. If the other elements of a negligent entrustment claim were established, it was no defense to negligent entrustment that Jared exceeded the scope of the express permission granted, or even if Jared was expressly told he could not drive the vehicle. *Zugel by Zugel,* 100 Nev. at 527–28, 688 P.2d at 312 (finding negligent entrustment even though parent "expressly instructs the child not to use the vehicle on a public roadway").

The same facts, however, could have served as a defense to punitive damages. Andrea could have argued that even though the court found she had entrusted Jared with the keys, she allegedly told Jared not to drive the car and she did not believe she was endangering the public by giving Jared the keys solely for the purpose of getting something out of the car. These arguments, and others based

on her own alleged conduct, would not have been inconsistent with the finding of permissive use entered as a sanction.[2]

Certainly, Andrea was left in a situation no worse than Goodyear in *Bahena v. Goodyear Tire & Rubber Co.* (*Bahena I*), 126 Nev. 243, 259, 235 P.3d 592 (2010) (clarified by *Bahena v. Goodyear Tire & Rubber Co.* (*Bahena II*), 126 Nev. 606, 245 P.3d 1182 (2010)). In *Bahena I*, this Court approved a sanction striking Goodyear's answer as to liability only, making Goodyear liable as a matter of law for all damages that Plaintiffs could prove. *Id.* at 254, 235 P.3d at 599. Nevertheless, in the punitive phase Goodyear was able to successfully defend against punitive damages by convincing the jury that its tire did not cause the plaintiffs' injuries. *Id.* at 259, 235 P.3d at 603 n.1 (dissenting opinion) ("Goodyear avoided punitive damages in this case by arguing that a road hazard, rather than design or manufacturing defect, caused the tire failure from which this accident resulted").

The Bahena plaintiffs contended on appeal that "the district court improperly required the appellants to establish liability for punitive damages". *Id.*. This Court disagreed, finding that the district court had the discretion to determine what

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[2] Andrea's attorneys have argued that Appellant did not explain below how punitive damages could be defended under Judge Allf's sanction. Certainly, the attorney for a plaintiff is not obligated to explain to a defendant how they can effectively defend against plaintiff's claims.

degree Goodyear was entitled to participate in the trial when it struck Goodyear's answer as to liability. *Id.* Given this discretion, it simply could not have been necessary to alter the sanction based solely on its effect on punitive damages. Judge Weise had discretion to allow Andrea to participate in the punitive phase to whatever degree he deemed fair without altering the sanction in the compensatory phase.

It is anticipated that Andrea may argue, as she did below, that permissive use was the only element of negligent entrustment and punitive conduct that was seriously in dispute, making the factual finding of permission fatal as a practical matter. This logic was soundly rejected in *Bahena I.* There, the dissent argued:

> Liability was seriously in dispute in this case, but damages, once liability was established, were not, given the catastrophic injuries involved. Thus, striking Goodyear's answer was akin to a case concluding sanction.

Id. at 259, 235 P.3d at 603 (dissenting opinion). The majority obviously rejected this view, finding that the sanction was not dispositive of compensatory damages, regardless of the merits of the factual defense to damages.

Of course, analyzing Andrea's potential defenses to punitive damages based her own conduct is now strictly an academic exercise done for the purpose of

determining if the modification of the sanction by the district court was an abuse of discretion. The jury did not find Andrea liable for punitive damages, and Appellant did not appeal that finding. This appeal will only resolve whether Jared had permission to drive Andrea's car, express or implied. This determines whether Jared was an insured under Andrea's auto liability policy while he was driving her car on the day he injured Appellant Emelia Garcia. It also impacts joint liability under NRS 41.440. Regardless of the decision here, Appellant can no longer seek punitive damages directly against Andrea for her own conduct.

IV.

CONCLUSION

Negligent entrustment established as a matter of law, without more, could never establish oppression, fraud, or malice for purposes of punitive damages. The same holds true of permissive use, the only element of negligent entrustment established as a matter of law by the sanction entered in this case by Judge Allf. Accordingly, it was improper for the district court to alter Judge Allf's sanction as

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a result of its mistaken conclusion that a finding of permissive use would prevent Andrea from disputing liability for punitive damages.

DATED this 13th day of January 2020.

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RULE 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point, double-spaced, Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7)(ii) because, even including the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 3,481 words (less than 7000 words).

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be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2020, the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF JUDGE ALLF'S SANCTION ON LIABILITY FOR PUNITIVE DAMAGES** was filed electronically with the Nevada Supreme Court's eFlex system, which shall be served in accordance with the service list as follows:

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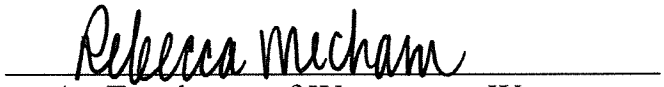

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