Case No. 71348

In the Supreme Court of Nevada

EMILIA GARCIA,

Appellant,

vs.

ANDREA AWERBACH,

Respondent.

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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JERRY A WIESE, II, District Judge
District Court Case No. A-11-637772-C

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The Sanction was Not Judgment as a Matter of Law on Negligent Entrustment

It is important to understand the precise nature of Judge Allf's sanction to evaluate this issue. While this Court asks whether judgment as a matter of law on the "negligent entrustment" claim would not have imposed liability on Awerbach for punitive damages, that was not the sanction in this case. Judge Allf's sanction was that she made a "finding" of fact that there was "Andrea gave her son permission to use the car." That was the problem.

Although Judge Allf made a finding of a factual issue ostensibly as a "lesser sanction" to imposing liability by striking the answer (A. App. 644), the finding of that specific fact actually hindered respondent's defense in the punitive damage case, because it took away her only defense on that claim.

Judge Allf Made a Finding that "Andrea Gave Her Son Permission to Use the Car"

Judge Allf's sanction was to "find[]" that respondent "Andrea gave her son permission to use the car." (A. App. 625, 938.) Assuming that the "finding" established an irrebuttable presumption of a fact, plaintiff

repeatedly argued that the purpose of the sanction was to preclude Andrea from disputing permissive use at trial. (A. App. 933-39.)

Establishing that Critical Fact Impaired Andrea's Defense on Punitive Damages

While the judicial establishment of a fact normally would be considered a lesser sanction than allowing the opponent to prevail on a cause of action, that is not so here. By striking the only contested factual issue in the case for Andrea, the Court's sanction eliminated—or at least severely impaired—her defense on punitive damages.

Indeed, if the court had granted judgment as a matter of law on the negligent-entrustment claim, Andrea could still defend the punitive damages claim by arguing that she never gave her son permission to use the car that day. By deeming permissive use to be a fact, however, the district court took away that defense to punitive damages.

Judge Wiese Recognized the Problem

For weeks, Judge Wiese had been wrestling with how the finding of permissive use would impact Andrea's defense to punitive damages. (2 R. App. 332, 345, 355, 349:23–351:6, 353:9–354:5.) To try to have a defense on punitive damages, Andrea's counsel requested that the jury

be informed that the "finding" of permissive use resulted from a discovery sanction and not from any assessment of the evidence. (*Id.* at 380-383.) Plaintiff's counsel contended that the finding *was* binding on the jury's determination of implied malice (*id.* at 383-85), and articulated the futility of Andrea arguing that the judicially established permission was without negligence or conscious disregard of know risks:

> MR. ROBERTS: * * * And if they want to try to argue that I [Andrea] knew that he [her son] got high all the time, I knew he had a problem, I knew he didn't have a license to drive a car, but it wasn't negligent for me to entrust my vehicle to him despite the fact that he was unlicensed and had a prior accident causing property damage in my vehicle, well, then that's the argument they have left.

(*Id.* at 388:7.) Andrea's counsel agreed that such an argument would be ridiculous and that the court taking away her right to contest permissive use effectively precluded her from contesting implied malice at all:

> MR. MAZZEO: That's an argument that it's pointless to argue. That first element [permissive use] is the element that we—we would argue at trial. Since we can't argue the first element because of the finding of permissive use, what's the point? I mean, I don't want to offend the jury.

(*Id.* at 388:20.)

Judge Wiese Modifies the Sanction to Allow a Defense to Punitive Damages

Although Judge Wiese concluded a modification was necessary, he wanted to modify as little as possible. He noted that "negligent entrustment," rather than "permissive use," was what the sanction should have been in the first place. "I'm not going to change from permissive use to negligent entrustment, even though I think that's probably what she envisioned. But I am going to make it a rebuttable presumption as it relate to permissive use. So—and that's based upon what her intention was." (A. App. 1615.)

In his written order, Judge Wiese explained how making the presumption of permissive use rebuttable would be fair to both parties in light of Andrea's defense of the punitive damages claim. He explained how the establishment as a fact of an element of the punitive-damage claim (the only element in controversy) was problematic:

> The Court was not inclined to disturb the prior findings and orders by Judge Allf, but the Court was faced with the dilemma that Judge Allf's prior Order not only established "permission" by Andrea Awerbach to Jared Awerbach, but it also essentially ***established an element of the Plaintiff's claim for punitive damages*** against Andrea Awerbach, ***without allowing Ms. Awerbach the opportunity to explain*** herself. This

> Court was not comfortable with such a finding, ***especially as it applied to the punitive damage claim.***

(A. App. 946, emphasis added.) The district court explained its reasoning, even putting aside Judge Allf expression that her original intention was to have a rebuttable presumption.

> [T]his Court believes that it is more "fair" to all involved parties to, modify Judge Allf's prior Order, and instead of "permissive use" being established as a matter of law, this Court will impose a Rebuttable Presumption that "permissive use" is established against Andrea Awerbach. The presumption still serves the purpose of sanctioning the Defendant for the discovery improprieties, but allows the Defendant to present evidence in an effort to try to rebut the presumption, and ***allows the Defendant the opportunity to defend against the Plaintiff's claim for punitive damages.***

(A. App. 947, emphasis added.)

The Modified Order Corrects the Original Order's Impairment of the Right to Defend Against Punitive Damage

Judge Wiese got it right. There are only two elements plaintiff would have to establish to recover punitive damages:

1. Mom gave her son permission to use her car that day; and
2. Mom knew the risks of letting her son drive, considering his drug use, lack of a license, his accident history, etc.

Andrea's only defense was that she did not give Jared permission to use the car that day. And without Judge Wiese's modification, that defense is eliminated or at least impermissibly impaired.

Faced with the judicial establishment of that "fact," Andrea has not much she can say in defense of the punitive-damages claim. She cannot deny that she knew of Jared's past behavior; in fact, that is why she denied him permission to use the car. She cannot claim that she only gave him permission that day out of some benign reason, absent of malice, because that, too, would be a lie. She didn't give him permission, and she knows that.

Judge Wiese had to—or Judge Allf would have had to if she were still on the case—modify the sanction.

I.

A CONCLUSIVE FINDING OF PERMISSIVE USE IMPAIRS ANDREA AWERBACH'S DEFENSE AGAINST PUNITIVE DAMAGES

A. Punitive Damages Cannot Be Based on a Default

Punitive damages cannot be based on facts established solely because of the default. *See In re Gober*, 100 F.3d 1195, 1205 (5th Cir. 1996) ("[C]onduct sufficient to warrant punitive damages is not regarded as admitted by default."); *Oliver v. Towns*, 738 So. 2d 798, 803

(Ala. 1999) (defaulting defendant entitled to challenge sufficiency of evidence to support punitive-damages award). The principle that a plaintiff is never entitled to punitive damages[1] remains intact even on a default.

B. If the Owner Knows the Driver's Risks, Giving Permission to Use a Car is Enough for Punitive Damages

Here, that principle means that the Court must allow the defendant to defend all disputed elements of a punitive damages claim based on the actual facts, rather than "facts" imposed as a sanction.

1. Punitive Damages Require Just Two Elements: Knowledge of the Risk, and Permission

Negligent entrustment can support a punitive damages claim, just like any tort. A jury may assess punitive damages upon finding just two elements: (1) that the owner knew about the danger posed by giving someone permission to use the car; and (2) that the owner gave the

[1] *See Kelly Broad. Co., Inc. v. Sovereign Broad., Inc.*, 96 Nev. 188, 194 606 P.2d 1089, 1093 (1980), *superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchner*, 124 Nev. 725, 741-73, 192 P.3d 243, 253-55 (2008).

driver that permission. These elements are consistent across states with standards similar to Nevada's.[2]

2. If Knowledge Is Undisputed, Establishing Permission as a Sanction Eliminates the Owner's Defense to Punitive Damages

If the owner does not contest that she knew of the driver's risks, and the district court presumes that the owner gave permission, this

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[2] *Alexander v. Alterman Transp. Lines, Inc.*, 387 So. 2d 422, 426 (Fla. Dist. Ct. App. 1980) (punitive damages for "malice, moral turpitude, wantonness, willfullness, or reckless indifference to the rights of others" based on sending out a driver with a known drinking problem); *DeMatteo v. Simon*, 812 P.2d 361, 364 (N.M. Ct. App. 1991) (punitive damages for "utter indifference for the safety of others" based on giving someone with "questionable driving practices" a company car); *McManus v. Gourd*, 873 P.2d 1060, 1062–63 (Okla. Ct. Civ. App.) (punitive damages for "reckless disregard for the rights of other motorists" based on giving vehicle to the owners' son and friend knowing that they would likely drink and drive); *Ali v. Fisher*, 145 S.W.3d 557, 560 (Tenn. 2004) (punitive damages for "clear and convincing evidence" of recklessness based on an owner who lent his car to a friend with whom he partied, drank, and smoked marijuana and was known to "commit jackassery"). *See also Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987) ("Punitive damages can be imposed if the owner of the vehicle knows or should have known that the entrusted driver was incompetent or habitually reckless and the owner was grossly negligent in entrusting the vehicle to that driver."); *Veal v. Paulk*, 174 S.E.2d 465, 466 (Ga. Ct. App. 1970) (affirming that punitive damages may be based on giving permission "to a person known to drink intoxicants on weekends").

wipes out the owner's defense. She cannot contest punitive damages, if the jury chooses to award them.

3. Sanctions Cannot Force People to Lie

A sanction cannot go so far as to allow—much less compel—a party to lie about the true circumstances. In *FGA, Inc. v. Giglio*, this Court reversed an evidentiary ruling when it was used to paint a false picture to the jury. 128 Nev. 271, 286–87, 278 P.3d 490, 500 (2012). There, one of the witnesses for the defendant FGA, a restaurant, incorrectly testified that the restaurant had a nonrestricted gaming license that required it to keep surveillance footage. *Id.* Although FGA later proved with documentary evidence that it had just a restricted license, the court excluded this evidence, leaving FGA only to orally contradict its earlier witness—a contradiction that plaintiffs exploited to argue that "there was no way to know what type of license FGA possesses because it was never produced." *Id.* This Court reversed, noting exposing the jury to "incorrect statements that FGA had a nonrestricted license" and the misleading argument that FGA needed to maintain surveillance was an abuse of discretion. *Id.* & n.7.

C. The Established "Fact" of Permission to Use the Car Would Have Eliminated Andrea's Truthful Defense to Punitive Damages

Plaintiff correctly notes that a plaintiff must "prove more than negligent conduct to obtain punitive damages." (Supp. Br. 8.) But plaintiff ignores that the sanction here did more than establish negligence; it conclusively found a fact relevant to both negligent entrustment and punitive damages: that "Andrea gave her son permission to use the car." (A. App. 625, 938.)

1. Andrea Awerbach Likely Knew the Danger of Letting Her Son Drive; Her Defense Was that She Didn't Give Him Permission

Here, one of the elements of the punitive damages claims was undisputed: Andrea Awerbach knew that her son should not be driving her car. So her only defense was on the second element: that she did not give him permission to use her car.

2. The Sanction Eliminated Her Truthful Defense

Judge Allf's sanction establishing permission would have impermissibly impaired or even eliminated her defense. Consistent with that sanction, Andrea could not testify to the truth—that she had not given

Jared permission. And to testify that she had a good reason for giving Jared permission would have been a lie.

Judge Wiese correctly recognized this problem in "essentially established an element of the Plaintiff's claim for punitive damages" (A. App. 946), and it was within his discretion to restore Andrea's right to truthfully "explain herself."

D. The Presumed Fact that "Andrea Gave Her Son Permission to Use the Car" Had a Bigger Impact on the Punitive Damages than Negligent Entrustment

Plaintiff cites a number of "negligent entrustment" cases, noting that the tort can be very broad. (Supp. Br. 10, 14 (citing *Zugel ex rel. Zugel v. Miller*, 100 Nev. 525, 688 P.2d 310 (1984)).) They claim that a cause of action for negligent entrustment would lie if Jared exceeded his permission "or even if Jared was expressly told he could not drive the vehicle." It is doubtful that *Zugel* stands for the latter proposition, but it is irrelevant in light of the original sanction here, which "found" more than the mere failure to safeguard keys.

Judge Allf's sanction was to "find[ ]" that respondent "***Andrea gave her son permission to use the car***." (A. App. 625, 938 (emphasis added).) Assuming that the "finding" established an irrebuttable

presumption of a fact, plaintiff repeatedly argued that the purpose of the sanction was to preclude Andrea from disputing that fact at trial. (A. App. 933-39.)

1. The Original Sanction Did Not Allow Andrea to Argue that She Didn't Give Her Son Permission

Under this sanction, without modification, Andrea could not have made the arguments plaintiff now suggests in her supplemental brief. For example, plaintiff claims Andrea could have made this argument to contest punitive damage:

> 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.

(Supp. Br. At 14.) No, that would have clearly violated the order. Judge Allf's sanction was to find that "***Andrea gave her son permission to use the car***." (A. App. 625, 938 (emphasis added).) This argument would have also disputed express permission to use the vehicle, a point that the plaintiff objected to in the district court. (2 R. App. 425.) Plaintiff is again purposefully playing on the confusion between negligent entrustment and the actual order here.

While Judge Wiese suspected that Judge Allf originally intended a sanction related to negligent entrustment, rather than to impose a finding of permission, he attempted to make as narrow a modification as possible. As a result, instead of sweeping changes, he modified the sanction order only from a finding to a rebuttable presumption, which would allow Andrea to defend herself in the punitive-damages claim.

Plaintiff notes that punitive damages are based on "the conduct of the defendant in relation to the negligent entrustment." (Supp. Br. 10-11 (citing *Terrel v. Cent. Wash. Asphalt, Inc.*, 168 F. Supp. 3d 1302, 1313 (D. Nev. 2016)).) But here, plaintiff insisted on the punitive-damages calculus being based on presumed facts known to be untrue.

Indeed, when Andrea offered to stipulate to negligent entrustment—and inform the jury that "the finding of permissive use . . . was based on a discovery sanction and not arising from the circumstances of Andrea actually giving Jared permission to use the vehicle" (R. App. 423)—plaintiff's counsel balked, precisely because it would allow Andrea to tell the jury the truth for defending against punitive damages. According to plaintiff, to inform the jury in "the determination on implied malice" that Andrea "didn't actually give permission" "would be

sanctionable." (R. App. 425.) Just so. The arguments that plaintiff now says Andrea should have made would have invited further sanctions.

2. Bahena *Did Not Establish Facts that Impaired a Punitive-Damages Defense*

While plaintiff discusses *Bahena v. Goodyear*, 126 Nev. 243, 235 P.3d 592 (2010), that was a different sanction. While liability was established as a sanction in *Bahena*, Judge Allf was seeking a lesser sanction here. Unfortunately, the factual finding she made impaired Andrea's ability to defend against punitive damages. This would be similar to if the district court in *Bahena* established as a fact that Goodyear had sold a tire with a known defect. In that situation, such a presumed fact would have impaired Goodyear's ability to defend against the punitive damages claim.[3]

[3] Plaintiff also wanders off into a discussion of whether the sanction in *Bahena* was a "case concluding sanction," which affects the standard of review on appeal. That standard is irrelevant here. The issue here is whether Judge Wiese had the discretion to modify Judge Allf's sanction, especially where it impaired Andrea's ability to defend on punitive damages.

Finally, plaintiff seems to excuse Judge Allf's original sanction by noting that the jury found for Andrea under the modified sanction. This goes more to demonstrate the reasonableness of the modification than the original order.

II.

THE DISTRICT COURT HAD DISCRETION TO MODIFY A SANCTION THAT "COULD HAVE" AFFECTED THE JURY'S ANALYSIS OF PUNITIVE DAMAGES

It is not necessary, moreover, that the original sanction eliminate a defense to punitive damages. The potential effect of that sanction on the jury's analysis of punitive damages was sufficient for the court to reconsider it.

A. The District Court's Discretion is Not Limited to Correcting Clear Errors

While the Court certainly may reconsider any decision that is "clearly erroneous," *Masonry & Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997), it also may reconsider even if "the facts and the law [are] unchanged [and] the judge [is] more familiar with the case by the time the second motion [is] heard, and [is] persuaded by the rationale of the

newly cited authority." *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980). Reconsideration is warranted in many circumstances, including:

> . . . when (1) the matter is presented in a "different light" or under "different circumstances"; (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Wasatch Oil & Gas, LLC v. Reott, 263 P.3d 391, 396 (Utah Ct. App. 2011). It is appropriate whenever the court may have overlooked or misapprehended pertinent facts or law, or for some other reason thought better of an earlier decision.

B. Judge Wiese Properly Considered the Potential Effect on the Jury's View of Punitive Damages

Plaintiff's reliance on *Bahena* is especially misplaced considering what this Court was reviewing there. This Court's conclusion that a particular sanction was *within* the district court's discretion does not mean that modifying a sanction—especially for the reason that it would impact a defense on punitive damages—is an *abuse* of discretion.

Just as a sanction may "impair" a right even if it doesn't altogether "eliminate" it, *see Tate v. State, Bd. of Med. Exam'rs*, 131 Nev. 675, 682, 356 P.3d 506, 511 (2015), so Judge Wiese was right to consider how the jury might view Andrea's conduct for punitive damages through the lens of the finding that she had given Jared permission. Although imposing liability for negligent entrustment wouldn't necessarily entitle plaintiff to punitive damages, the jury could use the established "fact" of Andrea's conduct in determining whether to assess punitive damages. Judge Wiese could properly have been concerned about hindering a defense to punitive damages as much as eliminating it.

III.

PLAINTIFF IS UNFAIR TO THE DISTRICT COURT

Plaintiff now contends Judge Allf's sanction never precluded Andrea from testifying that she told Jared not to drive her car, and the jury would have been free to accept that testimony for purposes of punitive damages. (Supp. Br. 14 ("Andrea could have argued that even though the court found she entrusted Jared with the keys, she allegedly told Jared not to drive the car . . .").) In a footnote to that statement, she then deflects the impropriety of raising an entirely new position by

saying she had a right to conceal it from for tactical purposes, as "the attorney for a plaintiff is not obligated to explain to a defendant how they can effectively defend against plaintiff's claim." (Supp. Br. 15 n.2.) There are two problems with plaintiff's position.

An appellant cannot disparage the trial judge for failing to see some essential rationale that she never mentioned. "The purpose of the requirement that a party object to the action of the trial court at the time it is taken is to allow the trial court to rule intelligently and to give the opposing party the opportunity to respond to the objection." *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988). Here, in the weeks before trial, Andrea's counsel fervently pressed Judge Wiese about how Judge's Allf's sanction would unfairly hobble her ability to effectively defend against punitive damages, the judge openly expressed his concern and intention to consider it. (See R. App. 426-27.) To now criticize the solution Judge Wiese devised to ameliorate that prejudice, yes, plaintiff was "obligated to explain" to both Judge Wiese and Andrea's counsel why their concern was misplaced. *See Landmark Hotel & Casino, Inc.* Moreover, plaintiff needed to raise these new bases for criticism when it would have been helpful,

while the district court was contemplating the issue and asking for input. *See NOLM, LLC v. County of Clark*, 120 Nev. 736, 744–45, 100 P.3d 658, 664 (2004) (declining to consider issues and reasoning raised for the first time in a motion to reconsider).

Plaintiff's waiver goes beyond mere failure to speak, however. This is a circumstance of a party "playing fast and loose with the court,"[4] of "blow[ing] hot and cold as the occasion demands."[5] In the hearing before Judge Wiese modified Judge Allf's sanction—in which Andrea implored the court at least to inform the jury that the "finding" of permissive use was a discovery sanction, as opposed to an assessment of the evidence, and allow Andrea to dispute the permission for purposes of punitive damages (R. App. 426-27)—appellant's counsel argued that the finding of permissive use was as binding on the question of *malice* as it was on liability for compensatory damages, and it would be sanctionable for Andrea's counsel to imply otherwise to the jury:

> MR. ROBERTS: . . . They want to the language in there so they can show it to the jury. And they can contend that regardless of whether it's in a stipulation,

[4] *Scarano v. Cent. R.R.*, 203 F.2d 510, 513 (3d Cir. 1953).

[5] *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n.3 (4th Cir. 1982).

> they're entitled to tell the jury that there wasn't really permission. This is a discovery sanction.
>
> * * *
>
> . . . despite the fact that Judge Allf has ground permissive use, they want to argue that there wasn't really permissive use. She didn't actually give permission. So, therefore, you should take that into account when you're making your award and when you're making the determination on implied malice.
>
> Well, they can't do that. . . . And, in fact, we believe that would be sanctionable if they try to make that type of argument in front of the jury.
>
> THE COURT: I think he's right. (R. App. 424-25.)

Put simply, Judge Wiese decided to modify Judge Allf's sanction from a finding to a rebuttable presumption *because he agreed with appellant's counsel* that Judge Allf's sanction *would* preclude Andrea from testifying in any way that she ever denied Jared full permission.

The new argument in this supplemental brief is exactly the opposite of what appellant contended below. And the Court must notice that appellant omitted Judge Wiese's true rationale from the opening brief altogether. It would be unfair to the district court to hold that it abused its discretion for reasons that appellant is making up as we go along.

CONCLUSION

Judge Wiese modified a sanction that would have impaired Andrea Awerbach's defense to punitive damages by establishing as "fact" the only contested element of that defense. That modification respected the guardrails of judicial discretion, and plaintiff's counsel offered no assistance to fashion a different remedy. This Court should affirm.

Dated this 27th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 3,815 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 27th day of February, 2020.

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