

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

In the Matter of

THE W.N. CONNELL and MARJORIE
T. CONNELL LIVING TRUST, dated
May 18, 1972.

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Clerk of Supreme Court

Case No. 73837

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Court Judge
District Court Case No. P-09-066425-T

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Appellant Eleanor Connell Hartman Ahern

As Eleanor Connell Hartman Ahern is an individual, required disclosures regarding parent corporations and stock ownership are not applicable. Attorneys of the following law firms have appeared for, or are expected to appear for, Eleanor Connell Hartman Ahern, in her capacities as trustee and/or beneficiary of The W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972, within this matter:

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Respectfully submitted this 2nd day of July, 2018.

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JURISDICTIONAL STATEMENT

Appellant has standing to appeal under NRAP 3(A)(a) as an appealable judgment was entered against her by the Eighth Judicial District Court (the “district court”). The district court’s judgment is appealable under NRAP 3(A)(b)(1) as it was a judgment concerning compensatory and punitive damages in an action which was commenced in the district court. The judgment is also immediately appealable pursuant to NRS 155.190(1)(j), (l), and (n). Thus, the instant appeal is properly before this Court.

NRAP 4(a)(1) states that a notice of appeal must be filed no later than 30 days after the date that written notice of entry of the judgment is served. Here, written notice of the entry of the judgment was filed on August 9, 2017. (1 AAPP 1.) The notice of appeal of the judgment was filed by Appellant on August 28, 2017. (1 AAPP 18.) Thus, the instant appeal is timely.

ROUTING STATEMENT

This appeal does not fit neatly within NRAP 17 for the purposes of routing. This appeal is not within one of the categories of cases that “shall” be decided by the Supreme Court. NRAP 17(a). Nevertheless, this appeal is not “presumptively assigned” to the Court of Appeals because it is an appeal from an evidentiary hearing involving a trust wherein, upon information and belief, has a corpus valued higher than \$5,430,000, and an appeal from a judgment in excess of \$250,000. See NRAP 17(b)(15) and (5), respectively.

Appellant submits that the Supreme Court is the appropriate court to hear this appeal considering that it has already heard two other appeals concerning this district court case (Nos. 66231 and 71577) and the underlying trust at issue. Indeed, the Supreme Court has already issued a published decision concerning the interpretation of the trust (133 Nev. Adv. Op. 19) and has already reviewed certain conduct of the Appellant as it relates to the trust.

Accordingly, Appellant submits that it is likely most efficient for the Supreme Court to retain assignment of the present appeal.

I.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Appellant was denied her right under NRS 42.005(3) to a separate and subsequent proceeding to determine the amount of punitive damages after the district court judge, as the trier of fact, made a finding that punitive damages would be assessed.
2. Whether the punitive damages award was supported by substantial evidence.
3. Whether the punitive damages award violated the Due Process Clause of the Fourteenth Amendment.
4. Whether the district court abused its discretion when it denied Appellant's motion to continue the evidentiary hearing.

II.

STATEMENT OF THE CASE

A. The Judgments Appealed

This is an appeal from a judgment entered by the Eighth Judicial District Court (the “district court”) in a statutory trust proceeding concerning The W.N. Connell and Majorie T. Connell Living Trust, dated May 18, 2972 (the “Trust”) against Eleanor Connell Hartman Ahern (“Appellant”) for compensatory damages in the net amount of \$1,742,053 (the “Compensatory Judgment”)¹ and punitive damages in the amount of \$3,600,000 (the “Punitive Judgment”). (1 AAPP 1-17.)

B. The Declaratory Relief Proceeding

The genesis of the adversarial trust proceeding which ultimately led to the judgment against Appellant was a petition filed in 2013 by Appellant’s daughters, Jacqueline Montoya and Kathryn Bouvier (collectively, the “Daughters”), which sought declaratory relief concerning the Daughters’ and Appellant’s respective beneficial rights to income from the Trust (the “Declaratory Relief Petition”). (7-8 AAPP 800-936.) The Daughters filed the Declaratory Relief Petition after Appellant stopped making distributions of Trust income to the Daughters in June of 2013.

The district court decided the Declaratory Relief Petition on January 30,

¹ The district court awarded \$2,581,994.92 in compensatory damages but acknowledged a partial satisfaction of the judgment in the amount of \$809,841.92. (1 AAPP 15.)

2015, by way of summary judgment, and concluded that Appellant is entitled to 35% of the Trust's income, and the Daughters, through a separate trust known as the MTC Trust, are entitled to the remaining 65% of the Trust's income (the "Distribution Order").² (1 AAPP 22-38.)

C. The Motion for Assessment of Damages Against Eleanor Ahern; Enforcement of No-Contest Clause; and Surcharge of Eleanor's Trust Income (the "Surcharge Petition")

Prior to its decision and entry of the Distribution Order, the district court entered an interim order on January 6, 2014, which directed Appellant, as Trustee of the Trust, to hold 65% of the Trust's income pending adjudication of the Daughters' and Appellant's respective beneficiary interests in the Trust. (8 AAPP 937-941.)

On March 20, 2015, the district court convened a hearing to determine whether Appellant breached fiduciary duties owed to the Daughters when she unilaterally, and without court instruction, ceased making distributions of Trust income to the Daughters in June of 2013. The district court determined that Appellant did, in fact, breach her fiduciary duties by cutting off distributions. (1 AAPP 41-42.) As a result, the district court removed Appellant as Trustee of the Trust and replaced her with Fredrick Waid, a court-appointed temporary trustee (the

² The Distribution Order was affirmed by this Court On May 4, 2017, in consolidated Case Nos. 62231, 67782, and 68046. See *In the Matter of the W.N. Connell and Marjorie T. Connell Living Trust*, 133 Nev. Adv. Op. 19.

“Court-Appointed Trustee”). (1 AAPP 44-45.)

On June 3, 2015, the Daughters filed their Motion for Assessment of Damages Against Eleanor Ahern; Enforcement of No-Contest Clause; and Surcharge of Eleanor’s Trust Income (the “Surcharge Petition”). (6-7 AAPP 748-771; 1 AAPP 46;94.) The principle relief sought by the Daughters in their Surcharge Petition was (1) damages, which at that time were claimed to be \$2,650,000 for Appellant’s alleged conversion of the Daughter’s 65% share of the Trust income; (2) a declaration that Eleanor triggered the “no-contest” clause of the Trust thereby causing her interest to be reduced to \$1.00; (3) a surcharge of Appellant’s Trust interest in the event a total forfeiture was not declared; and (4) attorneys’ fees. (7 AAPP 768.) Appellant, who was then represented by counsel, filed an opposition to the Surcharge Petition on June 29, 2015. (7 AAPP 772-784.)

On August 5, 2015, the district court heard the Surcharge Petition and it was determined that an evidentiary hearing was necessary to adjudicate Daughters’ claims. (1 AAPP 95-96.)

D. The Evidentiary Hearing

The evidentiary hearing on the Daughters’ Surcharge Petition was effectively bifurcated into two proceedings. The first occurred on February 22, and March 3, 2016 (the “First Phase”). (1-4 AAPP 97-408.) The second occurred on February 9, 2017 and February 10, 2017 (the “Second Phase”). (4-7 AAPP 464-729.) Appellant

was represented by Kirk Lenhard, Esq. during the First Phase, but was not represented by counsel during the Second Phase. (1 AAPP 97; 4 AAPP 464.) Given that the time between the First Phase and the Second Phase was nearly a year, significant activity occurred during that time (the “Interim Phase”) which is relevant to the instant appeal.

1. First Phase of the Evidentiary Hearing

The First Phase primarily dealt with (1) whether Appellant had triggered the “no-contest” provisions of the Trust;³ (2) whether Appellant had complied with the district court’s order to protect the 65% share of the Trust income that was supposed to be segregated for the benefit of the Daughters; and (3) whether Appellant’s failure to segregate warranted surcharge damages against Appellant’s 35% share of the Trust income. (4 AAPP 409-412.) Although it determined that damages and surcharge were warranted, the district court did not determine the amount of damages, nor did it determine whether punitive damages ought to be assessed. (4 AAPP 411-412.) The district court concluded that a future hearing with additional

³ With regard to the “no-contest” claim, the district court determined that Appellant did not trigger the no-contest provisions. (4 AAPP 412.) The Daughters appealed that decision to this Court on October 19, 2016, which has been fully briefed, argued, and has been submitted for decision. See Case No. 71577.

briefing and evidence would be required for such determinations.⁴ *Id.* Notably, the district court recognized that the Daughters' claim for punitive damages would require a separate hearing. (4 AAPP 391-395.)

2. Second Phase of the Evidentiary Hearing

The Second Phase of the evidentiary hearing, which occurred on February 9 and 10, 2017, handled the Daughters' claims for (1) compensatory damages caused by the previously adjudicated breach of fiduciary duty; (2) a finding that Appellant ought to be assessed punitive damages under NRS 42.005; and (3) the amount of punitive damages to be assessed. Although the hearing was technically two days, evidence was presented only on the first day. (4 AAPP 464-465; 6 AAPP 668-669.) The second day was the Daughters' closing argument. (6 AAPP 679-724.)

3. The Interim Phase – Between the First and Second Phases

During the Interim Phase (March 3, 2016 – February 9, 2017), Mr. Lenhard and his firm withdrew as counsel for Appellant on November 23, 2016. (4 AAPP 450-451.) Shortly before the hearing on Mr. Lenhard's motion, Appellant faxed an email to the district court, which the district court provided to all parties present, wherein Appellant requested that the district court instruct the Court-Appointed Trustee to pay for new counsel. (4 AAPP 425-426.) Appellant's request was filed

⁴ Notably, the only witnesses called and examined by the Daughters in their case in chief was the Court-Appointed Trustee, who testified that he was not able at that time to opine on the net damages sustained by the Daughters. (2 AAPP 217, 237.)

that morning as a response to Mr. Lenhard’s motion to withdraw. *Id.* The district court denied the request and permitted Mr. Lenhard’s withdrawal. (4 AAPP 445-446.) The district court admitted however, that Appellant needed counsel. *Id.*

4. The Request for Attorneys’ Fees and the Motion for Continuance

On February 8, 2017 – one day before the Second Phase of the evidentiary hearing was scheduled to commence – the district granted Appellant’s *ex parte* request for the release of funds from the Trust to pay for an attorney to represent her in the Second Phase of the evidentiary hearing. (4 AAPP 463.)

On the morning of February 9, 2018, the Second Phase commenced and Appellant hadn’t been able to retain counsel (4 AAPP 467-469.) Appellant made an oral motion to continue the hearing because she was unrepresented by counsel. (4 AAPP 476.) The motion was denied without explanation by the district court.

5. The District Court’s Assessment of Damages

At the conclusion of the evidentiary hearing, the district court assessed against Appellant compensatory damages in total amount of \$2,581,994 and punitive damages in the amount of \$3.6 million. (5 AAPP 724-727.) The district court arrived at \$3.6 million by “trebling” the amount of an approximate \$1.2 million cashier’s check that Appellant caused to be issued from the Trust account, made payable to the Trust, which is discussed in greater detail *infra* (the “February 2015 Cashier’s Check”). (5 AAPP 724-727.) This appeal follows.

III.

STATEMENT OF FACTS

A. Events Leading Up To Mr. Lenhard's Withdrawal and Appellant's Motion to Continue the Evidentiary Hearing

On October 5, 2016, the district court ordered Appellant to appear for a deposition to be taken by counsel for the Court-Appointed Trustee. (4 AAPP 414-421.) On November 7, 2016, the Court-Appointed Trustee issued a notice to take Appellant's deposition on November 29, 2016, at the law offices of Hutchison & Steffen, LLC, in Las Vegas. (4 422-424.) On November 9, 2016, during a status check, Mr. Lenhard represented to the district court that he was going to seek withdrawal from the case and did not want to be responsible for Appellant's November 29, 2016, deposition. (8 AAPP 942-943.) During the same status check, the district court set the dates for the Second Phase of the evidentiary hearing. *Id.*

On November 21, 2016, Mr. Lenhard filed a motion to withdraw as counsel, which the court heard on November 23, 2016, on shortened time. (4 AAPP 427-451.) During the hearing, Lawrence Semenza, Esq. presented to potentially represent Appellant but had concerns about Appellant's ability to pay and her upcoming deposition. (4 AAPP 430-435.) The district court refused to instruct the trustee to release funds and instead suggested that Mr. Semenza first agree to represent her, enter an appearance, and then file a request for a fee budget. (4 AAPP 445-446.) The district court admitted however, that Appellant needed counsel. *Id.*

On February 8, 2017 – one day before the Second Phase of the evidentiary hearing was scheduled to commence – the district court reversed course, granted Appellant’s request for fees, and directed the Court-Appointed Trustee to release funds from Appellant’s share of the Trust directly to Mr. Semenza for fees to represent Appellant during the Second Phase. (4 AAPP 463.)

On the morning of February 9, 2018, Mr. Semenza presented in district court based on the court’s February 8, 2017, minute order but stated that he could not represent Appellant in the evidentiary hearing because doing so without any advance notice or preparation would be, in his words, malpractice. (4 AAPP 467-469.) In response, Appellant made an oral motion to continue the hearing. (4 AAPP 476.) The motion was denied without explanation by the district court. *Id.*

B. Appellant’s Problematic Appearance at the Second Phase of the Evidentiary Hearing by Videoconference

During the Second Phase, Appellant appeared via video conference upon her request. (4 AAPP 494.) However, Appellant was not provided a copy of the Daughters’ proposed exhibits and had repeated difficulty hearing and understanding both the Daughters’ counsel and the Daughter’s sole witness – the Court-Appointed Trustee. (4-5 AAPP 482, 488, 490, 494-495, 539, 549, 553, 560-561, 563, 564-566, 573, 594) Although in the beginning of hearing Appellant stated that she would not be speaking because she wasn’t represented by counsel, she did speak on several occasions to inform the district court that she could not hear or to request breaks. (4

AAPP 476.) She did not, however, cross-examine the Court-Appointed Trustee nor was she expressly given the opportunity by the district court to cross-examine him. (5 AAPP 602-604.) Similarly, Appellant did not present her own case after the Daughters rested nor was she expressly given the opportunity to do so by the district court. *Id.*

C. The Evidence Offered in Support of the Daughters' Claims for Compensatory and Punitive Damages

The only witness called during the Second Phase of the evidentiary hearing by the Daughters was the Court-Appointed Trustee. (4 AAPP 465.) Appellant was not called as a witness. *Id.* During his examination, the Court-Appointed Trustee heavily relied on his Accounting and Report of Trust Activity From 2013 to 2015, filed on February 1, 2017 (the "Trustee's Report"). (4-5 AAPP 452-462, 502, 532-602.)

With regard to compensatory damages, the Court-Appointed Trustee testified that the Daughters should have received a total of \$3,956,500 in Trust income payments for the years 2013-2015, but that only \$2,214,497 had been paid after Appellant's removal as trustee thus resulting in a deficiency of \$1,742,053. (5 AAPP 540.)

Counsel for the Daughters also examined the Court-Appointed Trustee with regard to monies he discovered and took possession of during his tenure. Notably, the Court-Appointed Trustee testified that he "recovered" a cashier's check in the

amount of \$1,287,580.85, which was made payable to the Trust. (5 AAPP 531, 585.) To the best of Appellant’s knowledge, however, the check itself was neither offered nor admitted into evidence. This testimony is relevant because it later formed the basis for the district court’s assessment of punitive damages. (6 AAPP 725-727.)

The Court-Appointed Trustee’s examination concluded on February 9, 2017. (5 AAPP 602) On February 10, 2017, counsel for the Daughters made his closing argument. (5 AAPP 617.) During his closing argument, counsel for the Daughters asked for compensatory damages in the approximate amount of \$2.5 million, not \$1,742,053, because that number represented the amount that was owing to the Trust before the Court-Appointed Trustee recovered some of the funds. (6 AAPP 636.) Following closing argument, the district court assessed compensatory damages in total amount of \$2,581,994 and punitive damages in the amount of \$3.6 million.⁵ (5 AAPP 724-727.) The district court arrived at \$3.6 million by “trebling” the amount of the approximate \$1.2 million cashier’s check discussed supra. (5 AAPP 724-727.)

D. The District Court’s Concerns about Appellant’s Ability to Represent Herself

On July 20, 2017, just five months after the evidentiary hearing concluded,

⁵ The Compensatory Judgment, however, reflects the net compensatory damages of \$1,742,053, after a recognized partial satisfaction. (1 AAPP 15.)

the Court-Appointed Trustee moved for the appointment of a guardian ad litem over the Appellant in the ongoing trust proceeding. (6 APP 730.) The Court-Appointed Trustee's motion was granted on August 2, 2017. *Id.*

IV.

SUMMARY OF THE ARGUMENT

This appeal boils down to two primary questions: (1) are there problems with the Punitive Judgment such that it cannot be upheld by this Court; and (2) did the district court's denial of Appellant's oral motion to continue the Second Phase of the evidentiary hearing severely and unnecessarily prejudice the Appellant such that the matter should be remanded for a rehearing of the Second Phase.

A. THE PUNITIVE JUDGMENT IS THE PRODUCT OF IMPROPER PROCEDURE, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS UNCONSTITUTIONALLY ARBITRARY AND EXCESSIVE.

Appellant submits that the Punitive Judgment cannot be upheld for three reasons.

First, an assessment of punitive damages under Nevada law requires a proceeding subsequent and separate from the underlying proceeding where a final judgment was entered for compensatory damages. NRS 42.005(3). This did not occur. Instead, the district court only held one hearing for all of the Daughters' claims, including their punitive damage claim. This Court has previously held that NRS 42.005(3) is plain on its face and has been strictly construed. The district

court's error is, therefore, reversible.

Second, punitive damages would only be available if the Daughters could prove with clear and convincing evidence that, in the course of inflicting the harm which caused their injury, Appellant acted with fraud, oppression and/or malice. NRS 42.005(1). This also did not occur. On review, a punitive damages award will be upheld if it is supported by substantial evidence in the record. In this case, the Daughter's injury was the amount of money that they should have received from the Trust but didn't due to Appellant's acts/omission. The Compensatory Judgment equates to that amount of money. The district court's finding of fraud, oppression and malice which justified the Punitive Judgment, however, had to do with a cashier's check that (1) was recovered by the Court-Appointed Trustee; and (2) was not part of the Compensatory Judgment analysis and calculation. In other words, there was no nexus between the fraud/oppression/malice and the Daughters' injury.

Third, under federal Constitutional law, punitive damages must bear a reasonable relationship to compensatory damages and must not be excessive or arbitrary. In this case, there is no relationship between the Compensatory Judgment and the Punitive Judgment. Again, the Compensatory Judgment – \$1,742,053 – is the amount of money that the Daughters should have received from the Trust but did not due to the conduct of the Appellant. The Punitive Judgment – \$3.6 million – however was calculated by trebling the amount of an approximate \$1.2 million

cashier's check that Appellant caused to be issued and made payable to the Trust which was ultimately delivered to the Court-Appointed Trustee by her attorneys. The cashier's check is irrelevant to the Compensatory Judgment. Accordingly, the Punitive Judgment is completely arbitrary and cannot withstand due process scrutiny.

B. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO CONTINUE BECAUSE IT EFFECTIVELY DIVESTED APPELLANT OF HER ABILITY TO BE REPRESENTED BY COUNSEL.

Appellant was represented by counsel during the First Phase of the evidentiary hearing. Appellant' counsel, Mr. Lenhard withdrew, however, on November 23, 2016. During that time period, a district court order prohibited Appellant from using any Trust money for her legal representation. Accordingly, she did not have the financial ability to retain new counsel. On the day of the hearing on Mr. Lenhard's motion to withdraw, Appellant made a request to the district court for an allowance of money from the Trust to hire a new attorney. That request was denied. Shortly before the Second Phase of the evidentiary hearing began, Appellant made a renewed request for an attorney fee allowance which was this time granted by the district court on February 8, 2017; just one day before Phase Two of the evidentiary hearing was scheduled to begin. At the beginning of the hearing on February 9, 2017, Appellant made an oral motion to continue the hearing. Without explanation, the district court denied Appellant's motion.

Appellant, an elderly layperson, appeared at the hearing by videoconference. Appellant was not provided a copy of the Daughters' proposed exhibits, had difficulty hearing the examination and testimony of the Court-Appointed Receiver, and did not cross-examine the Court-Appointed Receiver or make any evidentiary objections.

Appellant submits that the district court abused its discretion in denying her motion for a continuance because (1) Appellant suffered an injustice from the denial of the motion (2) Appellant had only one day of notice before the hearing that she could pay an attorney to represent her; and (3) The Daughters would not have suffered any material prejudice had a continuance been granted.

V.

ARGUMENT

A. THE DISTRICT COURT DENIED APPELLANT HER STATUTORY RIGHT TO A SEPARATE HEARING FOR THE ASSESSMENT OF PUNITIVE DAMAGES.

Appeals involving interpretation of a statute or regulation present questions of law that this Court reviews de novo. *Montage Marketing, LLC v. Washoe County ex rel. Washoe County Board of Equalization*, ___ Nev. ___, 419 P.3d 129, 134 Nev. Adv. Op. 39 (2018) (citing *State v. Bakst*, 122 Nev. 1403, 1409, 148 P.3d 717, 721 (2006)). In interpreting a statute de novo, this Court will not look beyond the plain language when it is clear on its face. *D.R. Horton, Inc. v. Betsinger*, ___ Nev. ___, 335 P.3d 1230, 1232-33, 130 Nev. Adv. Op. 84, (2014).

NRS 42.005(3) states:

If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, **a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed.** The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

(Emphasis added)

This Court has already reviewed NRS 42.005(3) and has determined that the language is “plain and clear” on its face. *Betsinger*, 335 P.3d at 1233. The assessment of punitive damages under NRS 42.005 requires a two-step process. First, there must be a determination made by the trier of fact that punitive damages will be assessed. If such a determination is made, the next step is to convene a subsequent and separate proceeding to determine the amount, if any, of punitive damages to be assessed.

In this case, the district court did not follow this procedure. Instead, the district court combined the underlying surcharge proceeding with the punitive damages proceeding. (1 AAPP 2-17, 4 AAPP 409-412.) What is somewhat perplexing is that during the First Phase of the evidentiary hearing, counsel for

Appellant raised the issue of the requirements of a bifurcated proceeding and a predicate judgment and the district court appeared to understand and agree:

MR. LENHARD: But you're not awarding –
THE COURT: -- that is so –
MR. LENHARD: -- punitive damages in this order yet.
MR. RUSHFORTH: No.
MR. LENHARD: That's in a separate hearing, so we're clear.
THE COURT: That's what I said.⁶
Mr. LENHARD: Okay.
THE COURT: I said that requires a separate hearing. That –
MR. LENHARD: All right.
THE COURT: -- requires a separate type of briefing because it may be different from this concept of: Are they entitled to have their damages trebled?
MR. LENHARD: Well there's all kinds of issues with punitive damages.
THE COURT: There's a whole different issue there and that's why is said I think this conduct of just clear contempt of the Court's order needs to be punished in some way and I think that's punitive damages, but I'm willing to listen to whether instead a statutory approach of trebling damages is the better way to do.
MR. LENHARD: Well you've got to find out first –
THE COURT: I think the conduct rises to punitive –
MR. LENHARD: -- what the damages are.
THE COURT: --damages. Correct. (4 AAPP 394-395.)

Notwithstanding the apparent mutual understanding between the parties and the district court concerning the separate proceeding requirement, the district court concurrently took and considered evidence during Phase Two of the evidentiary

⁶ Previously during the First Phase of the evidentiary hearing, the district court stated: “to impose punitive damages on an individual is a very huge undertaking and it requires its own separate hearing and I take it very seriously...” (4 AAPP 391.)

hearing on (1) the claim for compensatory damages; (2) whether the statutory predicate finding of fraud, oppression and/or malice had been met; and (3) the appropriate amount of punitive damages to be assessed. (4-6 AAPP 464-729.) This is impermissible under Nevada law. *Wyeth v. Rowatt*, 126 Nev. 446, 476, 244 P.3d 765, 785 (2010) (“By statute, Nevada requires that the liability determination for punitive damages against a defendant be bifurcated from the assessment of the amount of punitive damages, if any, to be awarded.”) (citing NRS 42.005(3)).

Accordingly, this Court should vacate the judgment for punitive damages against Appellant because the district court denied her the nondiscretionary right under NRS 42.005(3) for a separate punitive damages assessment proceeding. See *Betsinger*, 335 P.3d at 1234 (where this Court reversed and remanded for a new trial on punitive damages because NRS 42.005(3) was not strictly followed).

B. THE PUNITIVE DAMAGES JUDGMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A judgement for punitive damages first requires a predicate finding supported by clear and convincing evidence that Appellant was guilty of oppression, fraud, or malice, express or implied. NRS 42.005(1). This Court reviews that predicate finding for an abuse of discretion. *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450 (2006). The amount of the judgment, however, is reviewed de novo when such amount is alleged to violate due process rights. *Wyeth*, at 126 Nev. 474,

244 P.3d 784 (citing *Bongiovi*, at 122 Nev. 582-83, 138 P.3d 451-52).

- 1. In arriving at its conclusion that the Daughters proved by clear and convincing evidence that the Appellant acted with fraud, oppression and malice, the district court improperly considered acts and omissions unrelated and irrelevant to the claim which formed the basis for the Compensatory Judgment.**

Punitive damages are intended to punish a defendant for his or her culpable conduct which caused the damages suffered by the plaintiff. *Bongiovi*, at 122 Nev. 580-81, 138 P.3d 450-51. In other words, even though punitive damages are not designed to compensate the plaintiff, they must nevertheless be grounded in the conduct giving rise to the underlying tort claim. *Philip Morris USA v. Williams*, 549 U.S. 346, 351 (2007) (“[E]xemplary damages must bear a reasonable relationship to compensatory damages[.]”) (quotation omitted). To survive appeal, an award of punitive damages must also be supported by substantial evidence. *Bongiovi*, at 122 Nev. 581, 138 P.3d 451. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

In this case, the Daughters’ compensatory damages were the calculation of the amount of Trust income they should have received from the Trust from June 2013 through April 2015 but didn’t because Appellant ceased making distributions during that time period. (4-5 AAPP 452-462, 540, 724-725.) The district court relied on the Court-Appointed Trustee’s Accounting and Report to arrive at its conclusion that the unpaid royalties due and owing to the Daughters at the time of judgment

was \$1,742,053. (5 AAPP 540.) As stated in the district court's findings, \$1,742,053 is the sum of Trust income payments for 2013, 2014 and 2015 that the Daughters were entitled to under the 35/65 split but had not received. (1 AAPP 6-7.)

However, it appears from both the Order itself and the evidentiary hearing transcripts that the primary reason the district court assessed punitive damages against the Appellant was for her conduct during the pendency of the trust proceedings (e.g. not complying with orders, filing inaccurate accountings, filing false statements, etc.), not for her failure to distribute the Daughters' 65% of Trust income and purported squandering of \$1,742,053. (1 AAPP 10-13; 4 AAPP 394.) Indeed, it appears that the district court assessed punitive damages as a sanction for Appellant's purported contempt more than anything else:

District Court's Finding No. C.16 Regarding Punitive Damages for the Issuance of the \$1.2 Million Cashier's Check:

Of the described actions, the Court finds Ms. Ahern's actions in relation to the February 2015 Cashier's Check to be especially troubling and egregious. Although the funds associated with the February 2015 Cashier's Check were eventually recovered through diligent efforts of Mr. Waid, Ms. Ahern's use of this check was nonetheless reprehensible. Mr. Waid testified that such behavior was disturbing. **The Court believes that such willful behavior and disregard of the Segregation Order needs to be discouraged,** and clearly appears to have been intended to defraud the Trust and the Movants. (1 AAPP 13.) (Emphasis added).

Evidentiary Hearing – March 3, 2016:

THE COURT: No. That's where I said – that's where you've got – I said I thought it should be punished by contempt.

MR. RUSHFORTH: But not by the no-contest?

THE COURT: They did not – they were able to successfully defeat my referral for contempt. I still think that conduct was so egregious that it should be punished in some way. That's why I said I think that we need to take a look at punitive damages...⁷ (4 AAPP 394.)

The district court's decision to assess punitive damages against Appellant is not supported by substantial evidence relevant to the predicate claim for compensatory damages because the compensatory damages reflect the amount of money the Daughters should have received from Appellant when she was Trustee but did not; not the amount of the February 2015 Cashier's Check which was recovered by the Court-Appointed Trustee and ultimately distributed to the Daughters. In other words, the 2015 February Cashier's Check has no relevance to the Compensatory Judgment.

2. The district court's punitive damage assessment violates due process because it was based one transaction which did not harm the Daughters, is excessive, and is arbitrary because it is not connected in any way to the compensatory damages.

When reviewing punitive damages awards for Constitutionality, this Court considers three guideposts: "(1) the degree of reprehensibility of the defendant's

⁷ The Honorable Elizabeth Gonzalez granted Appellant's motion to dismiss contempt proceedings on September 10, 2015. (7 AAPP 798-799.)

conduct, (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and (3) how the punitive damages award compares to other civil or criminal penalties that could be imposed for comparable misconduct.” *Wyeth*, at 126 Nev. 474, 244 P.3d 784 (citing *Bongiovi*, at 122 Nev. 582-83, 138 P.3d 451-52).

In this case, the district court arrived at the \$3.6 million punitive damages award by roughly trebling the amount of a purported cashier’s check (the “February 2015 Cashier’s Check”)⁸ that Appellant had issued from the account of the Trust:

C.18 As the Court finds Ms. Ahern’s actions in relations to the February 2015 Cashier’s Check to be the most egregious and reprehensible of Ms. Ahern’s conduct, the Court shall treble the amount of funds removed through the February 2015 Cashier’s Check (\$1,287,580.85) and award such as a punitive damage in favor of the Movants and against Ms. Ahern. Accordingly, the Court intends to award punitive damages against Ms. Ahern in the amount of \$3,600,000 (3 x \$1,200,000). (1 AAPP 13.)

It was undisputed and acknowledged by the district court, however, that the Court-Appointed Trustee eventually received the “February 2015 Cashier’s Check”, thus causing no proven harm to the Daughters. (1 AAPP 13.) Moreover, according to the Court-Appointed Trustee, the check was made payable to the Trust, not to Appellant

⁸ While the Court-Appointed Trustee did testify during the Second Phase of the evidentiary hearing that a cashier’s check in the amount of approximately \$1.2 million was issued by Wells Fargo with funds withdrawn from the Trust’s account, it should be noted that nowhere in the record was a check admitted into evidence in the amount of \$1,287,580.85. (5 AAPP 531, 585.)

or anyone else. (5 AAPP 531.) The Court-Appointed Trustee also testified that he received the check from Appellant's attorneys. (5 AAPP 531.) What the district court found egregious about the issuance of the alleged check was that it constituted a willful disregard of the Segregation Order which "need[ed] to be discouraged." (1 AAPP 13.)

Under *Wyeth*, this Court is required to consider the degree of reprehensibility of Appellant's conduct. *Wyeth*, at 126 Nev. 474, 244 P.3d 784. The conduct at issue was Appellant causing an approximate \$1.2 million cashier's check, payable to the Trust, to be issued with funds drawn from the Trust's account. During the evidentiary hearing, the Court-Appointed Trustee opined that such a practice is extremely reckless because a cashier's check can be endorsed, negotiated and is not protected by any insurance. (5 AAPP 531-532.) While such a practice may be negligent, or even reckless, no evidence was presented at the evidentiary hearing to support a finding that Appellant intended to keep the money for herself. If that were the case, logic suggests that Appellant would have made the check payable to Appellant.

Under *Wyeth*, this Court is also required to consider the ratio of the punitive damages award to the actual harm inflicted on the Daughters. *Wyeth*, at 126 Nev. 474, 244 P.3d 784. The actual harm caused by the issuance of the February 2015 Cashier's Check was nonexistent; it was delivered to the Court-Appointed Trustee

by Appellant's attorneys. The ratio, therefore, of punitive damages to actual harm caused by the issuance of the check is 3600000:0.

Moreover, there is no explanation in the record for why the district court decided to treble amount of the February 2015 Cashier's Check. It is in no way connected to the Compensatory Judgement. The Punitive Judgment is, therefore, completely arbitrary because punitive damages "must bear a reasonable relationship to compensatory damages." *Philip Morris USA*, at 549 U.S. 351.

It is evident that the \$3.6 million punitive damages judgment was the product of the district court punishing Appellant for a violation of its order; not the product of a punishment for harming the Daughters. Statutory punitive damages are not available as a remedy for civil contempt or pretrial litigation abuses. See generally NRS 42.001 – 42.010; *In re Dyer*, 322 F.3d 1178, 1195 (9th Cir. 2003) (holding that punitive damages cannot be awarded as part of the bankruptcy court's imposition of civil contempt sanctions); and *St. Regis Mohawk Dev. Corp. v. Cook*, 581 N.Y.S.2d 877, 879 (1992) ("punitive damages may not be imposed for a civil contempt"). There were other remedies available to redress the district court's Segregation Order which were not exercised by the district court during the pendency of the proceeding.⁹

⁹ See e.g. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (acknowledging a district court's inherent equitable powers to dismiss actions or enter default judgments for abusive litigation practices); NRS 22.010;

The punitive damages judgment should, therefore, be vacated because it is not supported by substantial evidence, is grounded in the disobedience of a court order rather than actual harm inflicted upon the Daughters, and violates the Due Process Clause of the Fourteenth Amendment because the amount is excessive and arbitrary.

C. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY, AND THUS ABUSED ITS DISCRETION, BY DENYING APPELLANT’S REQUEST FOR A CONTINUANCE OF THE EVIDENTIARY HEARING.

This Court reviews a district court’s decision on a motion for continuance for an abuse of discretion. *Bongiovi*, at 122 Nev. 570, 138 P.3d 444.

Although they enjoy broad discretion, district courts ought to weigh factors when faced with a motion to continue a trial or evidentiary hearing, such as (1) whether the movant suffers injustice from the denial of the motion; (2) whether the underlying cause for the motion was unforeseen by the movant and whether the motion is based on dilatory tactics; and (3) whether the prejudice and injustice will befall the opposing party if the motion is granted. See *Neal v. Swaby*, 975 So. 2d 431, 433 (Fla. Dist. Ct. App. 2007) (holding that trial court’s denial of putative father’s motion for a continuance on his pro se petition to determine paternity to

Alper v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 43, 352 P.3d 28, 30–31 (2015) (describing both criminal and civil contempt proceedings to punish past offensive behavior or to coerce or compel future compliance, respectively); and NRCP 37(b).

obtain counsel was an abuse of discretion).¹⁰

1. The district court's granting of attorneys' fees and nearly concurrent denial of a continuance are irreconcilable and severely prejudiced Appellant.

Appellant is mindful of this Court's jurisprudence concerning motions for continuances to retain counsel and/or as a result of withdrawal of counsel. See *Benson v. Benson*, 66 Nev. 94, 204 P.2d 316 (1949) (holding that withdrawal of counsel on the eve of trial, or the engagement of new counsel just before a trial date, are not *ipso facto* grounds for a continuance).

In this case, however, the facts establish that the district court acted arbitrarily and capriciously when it granted Appellant's renewed request to have funds released from the Trust to pay for her attorney literally one day before the Second Phase of the evidentiary hearing was set to begin, yet denied Appellant's motion to continue the hearing made the following day so that she could actually retain an attorney and get him competently up to speed.¹¹ (4 AAPP 463, 467-469, 476.)

i. Appellant suffered an injustice from the denial of the motion.

¹⁰ See also *Villegas v. Carter*, 711 S.W.2d 624 (Tex. 1986) (where Texas Supreme Court found abuse of discretion where the trial court granted a motion to allow the withdrawal of trial counsel two days before the trial was scheduled and then refused the party's pro se motion for a continuance).

¹¹ Indeed, even in *Benson*, this Court acknowledged cause could exist to continue a trial if new counsel could not adequately prepare for trial through no fault of his own or his client's. *Id.*, at 66 Nev. 98-99, 204 P.2d 318.

Appellant suffered prejudice due to the fact that she, an elder person, was forced to defend significant claims for compensatory and punitive damages. Had a continuance been granted, Appellant would likely have been able to retain Mr. Semenza or another attorney who would have been able to competently cross-examine the Daughters' witness and present a case for the Appellant.

ii. Appellant had one day of notice before the hearing that she could pay an attorney to represent her with the Trust.

It is somewhat surprising that the Court-Appointed Trustee, an admitted fiduciary of the Appellant, did not seek to join the Appellant's motion to continue the hearing given that he was authorized by the district court to pay an attorney to represent her in the Second Phase of the evidentiary hearing. In any case, Appellant had no clue that the district court would permit the Court-Appointed Trustee to use Trust funds to pay for her defense until the day before the hearing was scheduled to commence. The district court's abrupt about-face on the fee issue was not foreseeable.

iii. The Daughters would not have suffered any material prejudice had a continuance been granted.

The prejudice to the Daughters would have been minimal if not nonexistent. The Daughters only called one witness – the Court-Appointed Trustee – in their case. Moreover, there was no threat of loss because the Court-Appointed Trustee was in possession of all Trust funds and accounts.

It cannot be said that the district court's decision to deny Appellant's request for a continuance was without error. The district court knew of Appellant's need for a Trust distribution nearly two months prior to the Second Phase, yet waited until the day before the hearing to decide to approve the funds necessary for Appellant to obtain representation.

2. The denial of a continuance also unduly prejudiced Appellant due to procedural problems during the Second Phase of the evidentiary hearing.

Given Appellant's physical limitations, the district court accommodated Appellant's request to appear by video conference. (4 AAPP 494.) However, Appellant was not provided a copy of the Daughters' proposed exhibits and, therefore, could not have competently made evidentiary objections during the examination of the Court-Appointed Trustee or to motions to admit evidence into the record. (4 AAPP 494-495.)

The transcript of the Second Phase also reflects that the district court did not expressly inform Appellant of her right to present a case in defense after the Daughters rested. (5 AAPP 602-604, 607, 617.) Had the hearing been continued and counsel been retained, Appellant would likely have seized the opportunity.

3. Had a continuance been granted, Appellant would have likely been able to present, with counsel, evidence of her financial condition.

Ignoring for a moment the fact that a bifurcated proceeding did not occur for the punitive damages claim, had the hearing been continued and counsel retained,

Appellant would have been able to offer evidence of her financial condition for the district court's consideration. NRS 42.005(4). Whether or not that evidence would have had any impact on the district court's determination is unknown. However, Appellant was effectively deprived of her right to introduce such evidence.

4. Less than six months after the Second Phase, the district court determined that a guardian ad litem was needed to represent Appellant's interests in further proceedings.

It should also be noted that less than six months after the Second Phase of the evidentiary hearing, the district court determined that was in the best interests of the Appellant to have a guardian ad litem appointed to represent Appellant in further proceedings. (6 AAPP 730.) Such a ruling begs the question: how could Appellant have competently represented herself in an evidentiary hearing where millions of dollars in damages were sought (and awarded) just six months before the district court determined that Appellant needed a guardian ad litem?

For the foregoing reasons, Eleanor's request for a continuance to obtain counsel should have been granted and it was an abuse of the District Court's discretion to effectively deny her a fair hearing.

VI.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate the Compensatory Judgment and the Punitive Judgment and remand this

matter to the district court for a new evidentiary hearing wherein Appellant will be able to have a fair hearing with legal representation.

Respectfully submitted this 2nd day of July, 2018.

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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 Microsoft Office Word 2010 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed thirty (30) pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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.

Respectfully submitted this 2nd day of July, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 5(b), I hereby certify that I am an employee of the law firm of Solomon Dwiggins & Freer, Ltd., and that on July 2, 2018, I filed a true and correct copy of the foregoing APPELLANT’S OPENING BRIEF, with the Clerk of the Court through the Court’s e-flex electronic filing system and notice will be sent electronically by the Court to the following:

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