

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 26 2022 12:41 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

ROBERT KERN,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE
HONORABLE NANCY L. ALLF, DISTRICT JUDGE,

Respondents.

**RESPONDENTS' ANSWER TO PETITION FOR
EXTRAORDINARY RELIEF**

AARON D. FORD

Nevada Attorney General

STEVE SHEVORSKI

Chief Litigation Counsel

Office of the Attorney General

555 E. Washington Ave., Ste. 3900

Las Vegas, NV 89101

(702) 486-3420 (phone)

sshevorski@ag.nv.gov

Attorney for Respondents

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION.....	1
II. STATEMENT OF JURISDICTION	2
III. ROUTING STATEMENT	3
IV. STATEMENT OF THE ISSUES	3
V. STATEMENT OF THE CASE	3
A. Procedural background	3
B. Facts relevant to Mr. Kern’s writ proceeding	4
1. Proceedings on June 10, 2020	4
2. Proceedings on June 12, 2020	5
3. Proceedings after the June 12, 2020 hearing	7
VI. ARGUMENT SUMMARY	7
VII. ARGUMENT.....	9
A. Standards of review	9
1. Extraordinary writs are discretionary	9
2. Sanctions reviewed for abuse of discretion.....	10
B. This Court did not abuse its discretion to issue sanctions for Kern’s intentional non-appearance.....	11
C. Kern was provided procedural due process	14

VIII. CONCLUSION	16
------------------------	----

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>Bradford v. Eighth Jud. Dist. Ct.</i> , 129 Nev. 584, 308 P.3d 122 (2013)	9
<i>Burleigh v. State Bar of Nev.</i> , 98 Nev. 140, 643 P.2d 1201 (1982)	14
<i>Callie v. Bowling</i> , 123 Nev. 181, 160 P.3d 878 (2007)	14
<i>Emerson v. Eighth Jud. Dist. Ct.</i> , 127 Nev. 672, 263 P.3d 224 (2011)	8, 10, 14
<i>Flatt v. Sup. Ct.</i> , 885 P.2d 950 (Cal. 1994)	13
<i>Hamlett v. Reynolds</i> , 114 Nev. 863, 963 P.2d 457 (1998)	11
<i>Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.</i> , 124 Nev. 193, 179 P.3d 556 (2008)	9
<i>Lioce v. Cohen</i> , 124 Nev. 1, 174 P.3d 970 (2008)	10, 14
<i>Marcus v. Bamberger</i> , 180 A.D.2d 533 (N.Y. Sup. Ct. 1992)	14
<i>McGuire v. State</i> , 100 Nev. 153, 677 P.2d 1060 (1984)	13
<i>Otak Nev., LLC v. Eighth Jud. Dist. Ct.</i> , 129 Nev. 799, 312 P.3d 491 (2013)	9

<i>Valley Health Sys., LLC v. Estate of Doe by and through Peterson,</i> 134 Nev. 634, 427 P.3d 1021 (2018)	15-16
<i>Watson Rounds, P.C. v. Eighth Jud. Dist. Ct.,</i> 131 Nev. 783, 358 P.3d 228 (2015)	2, 11
<i>Wyssbrod v. Wittjen,</i> 798 So.2d 352 (Miss. 2001).....	11
<i>Young v. Johnny Ribeiro Bldg.,</i> 106 Nev. 88, 787 P.2d 777 (1990)	6, 8, 10

STATUTES

NRS 1.210	11
NRS 34.160	9

OTHER AUTHORITY

NEV. CONST. art. 6, § 4.....	2
NRAP 17.....	3
NRCP 16.....	11

I. INTRODUCTION

This Court has long recognized a district court's inherent power to both control the orderly proceedings before it and sanction attorney misconduct that stifles those proceedings. This Court has also recognized that attorney sanctions in the civil context are within the district court's discretion and that this Court will not substitute its judgment for the district court's even if it would not have issued sanctions itself. The necessary consequence of these principles is that a district court's attorney sanctions orders are only disturbed where a clear abuse of discretion is present.

Petitioner, Robert Kern (**Kern**), contends that this is the rare petition where this Court should vacate the District Court's sanction order. Kern excuses his knowing failure to appear for a hearing because it was done on an emergency basis, and he had to prepare for and attend a moot court for another matter. Kern's argument is not persuasive since (i) he filed a written opposition for the hearing the same day, (ii) had written communications with opposing counsel regarding the hearing, (iii) the hearing was due to be short as Kern had no substantive opposition, and (iv) the District Court permitted telephonic appearances.

Worse, Kern instructed his staff to communicate that he was unavailable, even when the District Court's staff called to discuss the arrangements. The District Court did not abuse its discretion.

The Court's precedents also provide a clear path for resolving Kern's procedural due process challenge against him. Kern was provided a full opportunity to explain his non-appearance at a subsequent hearing. Further, Kern never sought reconsideration of the District Court's order despite having over a year to do so while the case was pending with the District Court prior to judgment.

In sum, there is no basis for disturbing the District Court's sanction order against Kern.

II. STATEMENT OF JURISDICTION

This Court has original jurisdiction to issue writs of mandamus and prohibition. NEV. CONST. art. 6, § 4. This Court has discretion to consider an extraordinary writ where a district court issues sanctions against a non-party attorney. *Watson Rounds, P.C. v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 786-87, 358 P.3d 228, 231 (2015).

III. ROUTING STATEMENT

This Court should retain jurisdiction. The Court is required to retain all cases originating in Business Court. NRAP 17(a)(9). The underlying matter from which the attorney sanctions order arose is a business court matter. RESP. APP001.

IV. STATEMENT OF THE ISSUES

1. Where firmly entrenched precedent confirms a district court's power to sanction any attorney misconduct, did the District Court abuse its discretion by imposing a \$100 sanction against Kern for knowingly failing to appear for an emergency telephonic hearing in favor of attending a moot court on another matter?

2. Was the flexible concept of procedural due process satisfied where Kern had a full opportunity during a hearing to explain his failure to appear and then never sought reconsideration of the \$100 sanction during the litigation's pendency before the District Court?

V. STATEMENT OF THE CASE

A. Procedural background

The underlying matter is a dispute between two owners of a limited liability company, Chef Exec Suppliers, LLC (**CES**). One of the owners,

Dominique Arnould (**Arnould**) brought derivative claims on behalf of CES against CES's other owner Clement Muney (**Muney**) and CES for: (1) Declaratory relief for the appointment of a receiver and judicial dissolution of CES; and (2) an accounting of CES and breach of fiduciary duty. RESP. APP001. Muney answered and counterclaimed seeking monetary damages based on tort and equitable theories. RESP. APP006.

B. Facts relevant to Mr. Kern's writ proceeding

1. Proceedings on June 10, 2020

During the underlying proceeding, Arnould made an emergency request for the appointment of a receiver to take over a warehouse used by CES or, alternatively, to allow Arnould access to it on June 10, 2020. RESP. APP018. Arnould had driven from Los Angeles to Las Vegas to garner inventory needed for CES' Los Angeles customers, but the CES' warehouse's locks had been changed. RESP. APP020. Arnould requested an emergency telephonic hearing to resolve the issue. RESP. APP018.

Muney filed a written opposition. RESP. APP022. Kern, Muney's counsel, wrote that he could not attend a hearing on Arnould's motion until after a Nevada Supreme Court argument scheduled for the following day. *Id*

Kern also emailed opposing counsel and the District Court. APP 09. Kern in his email addressed the merits and requested that Arnould's request for a receiver be continued until June 12, 2020. *Id.*

The District Court set the matter for a telephonic hearing at 1:30 p.m. RESP. APP025. The District Court instructed its staff to contact Kern's office regarding the hearing but was told that Mr. Kern was not available. APP 12. Kern did not appear. RESP. APP025. The District Court, *sua sponte*, deferred ruling on Arnould's request for appointment of receiver until it could hear from both sides on June 12, 2020. *Id.*

2. Proceedings on June 12, 2020

The hearing on Arnould's emergency motion for appointment of a receiver occurred on June 12, 2020. All counsel appeared, including Mr. Kern for Muney. APP 15.

The District Court asked Kern why he did not appear for his client at the hearing on June 10, 2020. APP 15. Kern stated he previously scheduled a moot court with 8 other attorneys to prepare him for oral argument before this Court. APP 16. When the District Court explained that the hearing on the appointment of receiver would have lasted 15 minutes, Kern reiterated his preference for attending a moot court. APP

16. The District Court sanctioned Kern \$100, which was to be paid to Nevada Legal Services, Clark County Library, or the Legal Aid Center of Southern Nevada. APP 28.

The Court issued a written order explaining its sanctions order against Kern. APP 12. The Court explained in its order that Kern justified his failure to appear by citing a putative need to prepare for oral argument in another case. *Id.* The Court further wrote that attempts to reach Kern for the June 10, 2020 hearing were rebuffed by Kern's office who said he was unavailable. *Id.* The Court held, after considering *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990), that sanctions were warranted under the District Court's inherent power to address professional misconduct where, as here, an attorney failed to appear for a hearing and respond to the District Court's staff who were trying to discover his whereabouts. APP 12-13.

The District Court then addressed the merits. Kern stated that his client did not oppose appointment of a receiver. APP 18. The District Court granted Arnould's motion to appoint a receiver. RESP. APP028.

3. Proceedings after the June 12, 2020 hearing

The underlying litigation continued before the District Court. Kern never sought reconsideration of the District Court's sanction order. Rather, Kern filed an interlocutory appeal challenging the District Court's sanction order, which this Court dismissed on jurisdictional grounds in Case #81356.

After discovery, Arnould moved for summary judgment. The District Court granted Arnould's motion for summary judgment on all claims and against Muney's counterclaims. RESP. APP031. Judgment has been entered against Muney. RESP APP057. Muney's appeal is pending before this Court in Cases #83641 and 83869.

VI. ARGUMENT SUMMARY

Kern never contests that an attorney's failure to appear at a hearing is professional misconduct. He also does not dispute that a court has inherent power to sanction an attorney for failing to appear. Rather, he asks this Court (i) to second guess the District Court's judgment that Kern's excuse for his non-appearance was unconvincing and (ii) ignore that he had ample notice and opportunity to be heard during the June

12, 2020 hearing and thereafter to seek reconsideration during the litigation's pendency at the trial court level.

Consistent with his theme that this Court should substitute its judgment for the District Court, Kern contends that this Court should conduct a *de novo* review. Br. 6. Kern's argument ignores that this Court reviews statutes or rules *de novo*, *not* a district court's inherent power to sanction an attorney for misconduct.

Relying on the dubious principle that preparing one hearing is more important than actually attending one, Kern argues that his non-appearance was excusable because it was not significant misconduct. Br. 6. Well established precedent empowers a district court, *sua sponte*, to issue sanctions "for any 'litigation abuses not specifically proscribed by statute.'" *Emerson v. Eighth Jud. Dist. Ct.*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) (quoting *Young v. Ribero*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)). The district court's discretion is cabined by proportionality, which \$100 for knowingly failing to appear at a court ordered hearing is.

And finally, having failed to demonstrate an abuse of discretion, Kern argues he was deprived of procedural due process. Kern disregards that during the June 12, 2020 hearing the District Court specifically

asked him for his justification for failing to appear. Kern also had ample time during the litigation's pendency to seek reconsideration, which he did not do. Kern received procedural due process at the June 12, 2020 hearing, but even if he did not, any due process concerns were cured by his failure to seek reconsideration.

VII. ARGUMENT

A. Standards of review

1. Extraordinary writs are discretionary

Mandamus relief is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). The decision of whether to entertain a mandamus petition is discretionary. *Bradford v. Eighth Jud. Dist. Ct.*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). It is the petitioner's burden to demonstrate that our extraordinary intervention is warranted. *Otak Nev., LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 804, 312 P.3d 491, 495 (2013).

2. Sanctions reviewed for abuse of discretion

District courts have broad discretion to impose sanctions for professional misconduct at trial. *See Young*, 106 Nev. at 92, 787 P.2d at 779 (1990). The district court's broad discretion permits the district court to issue sanctions for any "litigation abuses not specifically proscribed by statute." *Young*, 106 Nev. at 92, 787 P.2d at 779. Sanctions must be proportionate to the misconduct. *Emerson*, 127 Nev. at 681, 263 P.3d at 230. Proportional sanctions are those that are roughly similar to sanctions issued in comparable scenarios, but given the infinite variety of mischief that lawyers get up to and aggravating or mitigating factors such comparisons are not often determinative. *Id.*

Kern contends that whether an attorney has committed misconduct is a question of law for this Court subject to de novo review. Br. 6. No authority says so. Kern's cite to *Lioce v. Cohen* is misplaced since the issue there was the appellate standard of review of motions for new trial based on attorney misconduct. 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). Kern does no better by stating that "all questions of law are reviewed *de novo*." Br. 6. The District Court relied on its inherent power to sanction Kern for abusive litigation practices under *Young*, *supra*. It did not cite a

rule or statute as a basis for issuing sanctions against him, and therefore, the abuse of discretion standard applies here. *Watson Rounds*, 131 Nev. at 787, 358 P.3d at 231.

B. This Court did not abuse its discretion to issue sanctions for Kern's intentional non-appearance

Generally, “this court will not reverse sanctions absent a clear showing of abuse of discretion.” *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998). Here, the District Court did not clearly abuse its discretion by sanctioning Kern.

While Kern writes that he did not commit misconduct Br. 7 he does not contest that the failure to appear at a court hearing, even one set on an emergency basis, is misconduct. *Id.* It could not be otherwise when every court has the power “[t]o enforce order in the proceedings before it...” NRS 1.210(2). This power includes the power to issue sanctions for non-appearance. *See e.g., Wyssbrod v. Wittjen*, 798 So.2d 352, 359 (Miss. 2001). For example, a court may sanction an attorney for a non-appearance at a pre-trial conference. NRCP 16(f)(1)(A). Because Kern makes no effort to contest that failing to appear is sanctionable, the issue is whether the District Court clearly abused its discretion in not crediting Kern's excuse.

But Kern's conduct goes beyond a non-appearance. He also does not dispute that he instructed his staff to stiff arm the District Court's staff who tried to reach him to work out a hearing time on June 10, 2020. By instructing his staff to say he was unavailable, Kern thwarted any attempt by the District Court to reach a reasonable accommodation to ensure that the proceedings before it continued apace with the Court's aim to hear Arnould's motion.

Kern's excuse for his non-appearance does not hold water for several reasons. First, Kern could have easily attended a telephonic hearing from his moot court location. Kern does not argue otherwise. Second, the June 10, 2020 hearing posed no threat to Kern's preparation as it would have been brief, as evident by the length of the June 12, 2020 hearing. Third, nothing prevented Kern from requesting that the hearing occur prior to his moot court. An earlier hearing posed no danger to his moot court preparation as evident by his written communications with opposing counsel prior to his moot court. Fourth, Kern stymied any attempt by the District Court's staff to work on the June 10, 2020 hearing's timing by instructing his staff that he was unavailable.

Kern cites the expense that his client was due to incur because of the moot court. Br. 7. But Kern never indicates that he even sought a brief accommodation from the attorneys he had assembled for the moot court to allow him to also attend the telephonic emergency hearing. Accordingly, there is nothing in the record demonstrating that the scheduled moot court posed any obstacle to his attending a brief emergency hearing before the District Court.¹

And finally, Kern argues that this Court has limited attorney sanctions to “extreme cases.” Br. 8. This Court has done no such thing. The authority Kern cites, *McGuire v. State*, was an example of extreme misconduct warranting monetary sanctions against a prosecutor, as well as vacation of a conviction, for attorney misconduct. 100 Nev. 153, 159-60, 677 P.2d 1060, 1065 (1984). This Court explained sanctions in civil

¹ Kern writes that it would have been malpractice for him to attend the emergency hearing before the District Court rather than the moot court. Br. 8. Kern’s argument is a red herring since nothing prevented him from doing both due to the telephonic nature of the hearing. Moreover, Kern has it backwards. Nothing permits Kern to prefer one client over another by knowingly failing to appear for a court hearing in favor of preparing for another hearing for a different client. *See generally Flatt v. Sup. Ct.*, 885 P.2d 950, 958 (Cal. 1994) (describing generally the duty of loyalty as requiring the attorney to “devot[e] his entire energies to his client’s interests.”) (*italics omitted*).

cases “are best considered in the first instance by the district court. *Emerson*, 127 Nev. at 680, 263 P.3d at 229 (citing *Lioce*, 124 Nev. at 26, 174 P.3d at 986)).

The District Court’s inherent authority to issue attorney sanctions is not limited to extreme cases but is constrained by the rule of proportionality. *Emerson*, 127 Nev. at 681, 263 P.3d at 230. Kern cites the rule of proportionality (Br. 8) but, consistent with his theme, merely argues that any sanction would be disproportionate since he did not commit misconduct. *Id.* A sanction of \$100 is proportionate to sanctions in other courts for similar misconduct. *See e.g., Marcus v. Bamberger*, 180 A.D.2d 533, 534 (N.Y. Sup. Ct. 1992) (sanction of \$100 for attorney lateness upheld).

C. Kern was provided procedural due process

Procedural due process requires notice and an opportunity to be heard. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). Due process is a flexible concept and requires that the process given be tailored to what the situation demands. *Burleigh v. State Bar of Nev.*, 98 Nev. 140, 145, 643 P.2d 1201, 1204 (1982).

In the context of attorney sanctions, this Court has blessed this flexible concept. All that is required is that the attorney be provided notice that the court was considering sanctions and that the attorney be permitted to explain their actions. *See Valley Health Sys., LLC v. Estate of Doe by and through Peterson*, 134 Nev. 634, 647, 427 P.3d 1021, 1032 (2018). Kern contends that a district court must specifically say it is considering sanctions, but due process does not require any magic words. What due process requires is that the attorney be provided notice that the district court is considering his conduct, rather than his client's. *Id.* And that is just what the District Court did. The District Court specifically asked Kern to explain his non-appearance. Kern did not request to provide any briefing on the matter. The flexible concept of due process was satisfied considering the situation that arose.

However, even if Kern were correct regarding the June 12, 2020 hearing, Kern forfeited any due process argument by forgoing an opportunity to seek reconsideration of the District Court's sanctions order whilst the case was pending at the trial court level. All that is required to cure a procedural due process concern is "a subsequent

opportunity to fully brief the issue of imposition of attorney sanctions...”

Valley Health Sys., LLC, 134 Nev. at 647, 427 P.3d at 1032.

VIII. CONCLUSION

For these reasons, this Court should exercise its discretion to deny Kern’s petition for extraordinary relief.

Dated this 26th day of January, 2022.

AARON D. FORD
Attorney General

By: /s/ Steve Shevorski
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel

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 Word 2010 in 14 pt. font and Century Schoolbook; or

☐ This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of 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 is either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 2,971 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

☐ Does not exceed ____ 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 this 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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to 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.

Dated this 26th day of January, 2022.

AARON D. FORD
Attorney General

By: /s/ Steve Shevorski
Steve Shevorski
Chief Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 26th day of January, 2022, and e-served the same on all parties listed on the Court's Master Service List.

/s/ Traci Plotnick

Traci Plotnick, an employee of
the office of the Nevada Attorney General