

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD DOUGLAS EBY,

Appellant,

vs.

JOHNSTON LAW OFFICE, P.C.;
BRAD M. JOHNSTON; AND
LEANNE E. SCHUMANN,

Respondents.

Supreme Court No. 86220

District Court Case No: 20-cv-01031

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RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record 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.

Donald Douglas Eby, Appellant
Johnston Law Office, P.C., Respondent
Brad Johnston, Respondent
Leanne Schulman, Respondent

There is no parent corporation or public entity that owns 10% or more of the parties set forth above.

/s/ James E. Whitmire
Attorney for Respondents

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I. INTRODUCTION

Although Respondents Johnston Law Offices, P.C., Brad M. Johnston, and LeAnne E. Schumann (collectively, “Respondents”) are not required under NRAP 46A(c) to respond to Appellant Donald Eby’s (“Eby”) informal *pro se* brief, they take this opportunity to briefly summarize the history of this case to assist this Court’s consideration of Eby’s current appeal.¹

This appeal is the second time Eby has taken an appeal from a district court order dismissing his lawsuit against the Respondents. *See Eby v. Johnston Law Offices, P.C.*, 138 Nev. Adv. Rep. 63, 518 P.3d 517, 2022 WL 4113189, 2022 Nev. App. LEXIS 6 (Sept. 8, 2022) (“*Eby I*”). In *Eby I*, Eby appealed from a district court order that struck his second amended complaint and dismissed his case with prejudice. As explained in *Eby I*, the district court struck Eby’s second amended complaint and dismissed his case against Respondents with prejudice because Eby, contrary to the district court’s admonitions, sought to have a non-lawyer inmate at the Lovelock Correctional Center – Theodore Stevens – prosecute this case on his behalf as attorney-in-fact. *See id.* 2022 Nev. App. LEXIS at *3-6.

The issues on appeal in *Eby I* were (1) whether non-lawyer Ted Stevens could prosecute this case in tandem with or on behalf of Eby, (2) whether the district court

¹ Respondents request leave to file a more detailed formal answering brief if the Court deems additional briefing is necessary.

properly struck Eby's second amended complaint, and (3) whether the district court, after striking Eby's second amended complaint, properly dismissed the case with prejudice.

The Nevada Court of Appeals in *Eby I* first affirmed the district court's decision to strike Eby's second amended complaint, holding that "a nonlawyer agent under a power of attorney is not entitled to appear in pro se in the place of the principal or engage in the practice of law on the principal's behalf." *Id.* at *20. The Court of Appeals consequently "affirm[ed] the district court's order insofar as it struck Eby's second amended complaint." *Id.* at *20.

However, the Nevada Court of Appeals then held in *Eby I* that the district court committed plain error by dismissing Eby's case with prejudice without "conducting the analysis required for imposing case-concluding sanctions under the seminal case of *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990), and its progeny." *Id.* at * 21. The Nevada Court of Appeals accordingly remanded the case to the district court for a determination of whether Eby's case should be dismissed with or without prejudice under the *Young* factors. *See id.* at *20-27.

On remand following *Eby I*, the district court first held a status conference with the parties on November 4, 2021. At that status conference, the district court directed the parties to submit briefs on whether Eby's case should be dismissed with prejudice under the factors set forth in *Young* and its progeny. Respondents briefed

the *Young* factors, demonstrating the case should be dismissed with prejudice, but Eby did not.

Instead, Eby argued that the district court should afford him leave to file an amended complaint because the district court was “bound by the law stated in the COA opinion [*Eby I*] and its prior ruling to order again a more definite statement.” Eby accordingly never briefed the *Young* factors on remand or even acknowledged that his second amended complaint was properly struck as the Nevada Court of Appeals concluded in *Eby I*. Consequently, the district court, after carefully addressing the *Young* factors in detail, dismissed this case with prejudice, noting that “[d]ue to Eby’s willful misconduct, the record before this Court, and all factors to be considered under *Young*, the Court finds that this case should be dismissed with prejudice.”

Eby then filed this appeal, arguing now that he should have been afforded an opportunity to file another amended complaint on remand because he and Mr. Stevens “were not intentionally violating the law, [sic] we thought we were allowed to do so by law.” Appellant’s Informal Brief at pp. 5-6.

II. STATEMENT OF THE ISSUES AND STATEMENT OF FACTS

Appellant's statement of facts and issues are virtually unintelligible. This case involves Appellant's failure to comply with the law, rules of court and clear directives of the District Court. The District Court did not abuse its discretion or otherwise commit reversible error in connection with the dismissal of this case.

III. SUMMARY OF ARGUMENT/ARGUMENT

The District Court committed no error below and its decision to dismiss this case with prejudice should be affirmed. Respondents initially note that Appellant has repeatedly violated rules and/or admonishments from the Nevada courts. These violations include, but are not limited to, the following:

- Failing to prevent and/or aiding and abetting the unauthorized practice of law by "jailhouse lawyer" Theodore Stevens, who is serving a life sentence in the Lovelock Correctional Facility;²
- Failure to meet court-imposed deadlines;
- Failing to adhere to the court rules;

² On February 18, 2021, the District Court (Hon. John P. Schleigelmilch presiding) entered an "Order Denying Motion and Request to have an unlicensed 'jailhouse lawyer,' Theodore Stevens, serving a life sentence in Lovelock Correction Center" to appear on behalf of Appellant in the District Court proceedings. The Court correctly noted, "[a]ny representation would be the unauthorized practice of law."

- Failing to file an amended complaint that substantively and procedurally complied with the District Court's order granting Appellant leave to file an amended complaint.

Putting aside the pattern of procedural irregularities, Appellant's legal position is substantively incorrect. Eby's assertion that he should have been afforded the opportunity to file an amended complaint on remand following *Eby I* misses the mark and should be rejected.

First, nothing in the Nevada Court of Appeals' decision in *Eby I* remotely suggests that Eby should have been given an opportunity to file an amended complaint. The Court of Appeals squarely held in *Eby I* that the district Court properly struck Eby's second amended complaint. The only issue following the Court of Appeals' decision in *Eby I* was whether Eby's case should be dismissed with or without prejudice under the *Young* factors.

Eby tellingly did not address that issue in the district court, and he does not address it now on appeal. Therefore, Eby has waived any argument that district court misapplied the *Young* factors. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). This alone demonstrates that the district court's decision should be affirmed.

Second, to the extent Eby argues that he thought he and Ted Stevens did what the power of attorney statutes permitted, that argument does not warrant reversal because it would only excuse Eby's first attempt to have Ted Stevens appear on his behalf. It does not excuse the numerous attempts Eby made to have Ted Stevens appear in the case that flaunted the district court's admonitions. Indeed, the district court summarized Eby's escalating misconduct – and the court's corresponding responses – in its order dismissing Eby's case with prejudice as follows:

When Eby first asked to have Mr. Stevens appear in this case, this Court did not sanction or discipline Eby. The Court simply denied Eby's request and advised Eby, in writing, that Mr. Stevens' presence would constitute the unauthorized practice of law. Eby did not, however, accept or abide by this Court's ruling. Instead, in an improper attempt to circumvent this Court's ruling, Eby and Mr. Stevens filed a *Motion for Leave to File a Second Amended Complaint* on February 4, 2021, seeking to add Mr. Stevens as a plaintiff. In response to that act, the Court denied Eby's motion, explained to Eby that Mr. Stevens could not participate in this case, and advised Eby that the Court would be reporting him to the proper authorities, including the State Bar, with respect to his active participation in Mr. Stevens' unauthorized practice of law.

This was the first disciplinary action or sanction the Court took, which did not affect Eby's ability to pursue this case in accordance with the applicable rules of procedure and governing substantive law. The Court also granted Eby another chance and opportunity to file an amended complaint, without Mr. Stevens' involvement. In giving Eby this opportunity, the Court admonished Eby, in no uncertain terms, that his failure to comply with the Court's order would result in the dismissal of this case with prejudice. ... But Eby still refused to heed the Court's warning or abide by the Court's orders because Eby and Mr. Stevens filed more fugitive documents and ultimately a Second Amended Complaint that violated this Court's prior rulings. It was only then that

the Court struck Eby's complaint and dismissed this case with prejudice.

Order Dismissing Case With Prejudice Filed on January 31, 2023 at 7-8.

Thus, even if Eby sincerely believed that he could prosecute this matter in tandem with Ted Stevens, the district court corrected his mistaken belief and afforded him the opportunity to cure his misconduct after placing him on notice to do so. However, Eby repeatedly chose not to alter his course, warranting dismissal of his case with prejudice under the *Young* factors as the district court rightly concluded with detailed reasoning in support of that ruling..

Third, the district court afforded Eby every opportunity to amend his complaint and provided Eby with clear and specific instructions on how he could do so. Yet, Eby did not follow the district court instructions or its prior orders, resulting in the district Court, as the Nevada Court of Appeals held, properly striking his second amended complaint. Thus, there is no basis for Eby to now ask this Court in a second appeal for yet another chance to amend his complaint.

Eby can only try to demonstrate that his case should have been dismissed without prejudice, and he has utterly failed to do so. In fact, Eby has never addressed the *Young* factors other than claim his conduct was not willful. But that claim, as noted above, rings hollow in light of the multitude of times he violated the district court's orders and admonitions.

As the Court of Appeals held in *Eby I*, the district court properly struck Eby's second amended complaint because it violated that court's prior orders. The only question now is whether Eby's case should have been dismissed on remand with or without prejudice under the *Young* factors. Due to Eby's willful misconduct and all of the other relevant factors to be considered under *Young*, this case was properly dismissed with prejudice, and Eby has tellingly offered nothing to suggest otherwise. The district court's decision should be affirmed.

IV. CONCLUSION

This issue before the district court on remand following *Eby I* was whether Eby's case should be dismissed with or without prejudice, giving due consideration to the *Young* factors, after Eby's second amended complaint was struck based on his willful violations of the district court's admonitions. Eby never addressed that issue in the court below. Nonetheless, the district court carefully evaluated the *Young* factors and Eby's status as a *pro se* litigant and determined that dismissal with prejudice was warranted in light of Eby's repeated defiance of the district court's rulings and admonitions. The district court did not abuse its discretion in this regard, and therefore, its decision dismissing this case with prejudice should be affirmed.

DATED this 23rd day of August, 2023.

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RULE 28.2 CERTIFICATE OF COMPLIANCE

This certification is intended to comply with NRAP 28.2.

1. I 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.

2. I 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 of the transcript or appendix where the matter relied on is to be found.³

3. 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 it has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman font.

4. This brief conforms with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points and contains no more than 2,528 words (which is less than 14,000 words permitted by NRAP 32(a)(7)).

³ The underlying record from the District Court was not available on-line. Matters in the record in the District Court were referenced by date of filing of a particular Order, motion, pleading or other paper on file with the Court.

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

DATED this 23rd day of August, 2023.

WHITMIRE LAW, PLLC

/s/ James E. Whitmire

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 23rd day of August, 2023, a true and correct copy of **RESPONDENTS' ANSWERING BRIEF**, was served by electronically filing with the Clerk of the Supreme Court using the EFlex system and served upon the persons/parties in the matter and identified on such system. A copy of this filing has also been mailed to:

Donald Eby
1262 Centerville Lane
Gardnerville, Nevada 89460

DATED this 23rd day of August, 2023.

/s/ James E. Whitmire
Whitmire Law, PLLC