

IN THE SUPREME COURT OF THE STATE OF NEVADA

KMART CORPORATION, A FOREIGN
CORPORATION,

No. 34681

Appellant/Cross-Respondent,

vs.

SHIRLEY RAPP,

Respondent/Cross-Appellant.

FILED

DEC 21 2000

WALTER M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a final judgment in a tort case.

On appeal, appellant/cross-respondent Kmart Corporation contends that the district court abused its discretion in: (1) refusing to set aside the entry of default judgment, and (2) refusing to set aside the monetary sanctions. On cross-appeal, respondent/cross-appellant Shirley Rapp contends that the district court abused its discretion in: (1) failing to award punitive damages, and (2) awarding an insufficient sum as attorney's fees.

First, Kmart contends that the district court abused its discretion in denying its motion to set aside the entry of default judgment. Generally, this court will not substitute its own judgment for that of the district court absent an abuse of discretion. *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). However, Kmart argues that a heightened standard of review should apply because the district court's refusal to set aside the entry of default judgment was a "severe discovery sanction" analogous to a dismissal with prejudice.

NRCP 37(b)(2) "authorizes as discovery sanctions . . . entry of default judgment." *Young*, 106 Nev. at 92, 787 P.2d at 779. Nonetheless, in accordance with NRCP 55(c), an entry of default judgment may be set aside for "good cause shown." "[T]he phrase 'good cause shown' in Rule 55(c) is

broad in scope, and includes the 'mistake, inadvertence, surprise and excusable neglect' referred to in Rule 60(b)." *Intermountain Lumber v. Glens Falls*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967). Good cause, however, "does not embrace inexcusable neglect." *Id.* at 130, 424 P.2d at 886.

In this case, because Kmart failed to respond to Rapp's request for admissions, the facts were deemed admitted and the district court granted Rapp's motion for partial summary judgment on the issue of liability and special damages. Further, because Kmart failed to respond to Rapp's first set of interrogatories and request for production of documents, the district court struck Kmart's answer and entered a default judgment against Kmart.

We conclude that sufficient facts exist to support the district court's decision to enter a default judgment against Kmart. Kmart's failure to cooperate in the discovery process constitutes inexcusable neglect; thus, good cause has not been shown to set aside the entry of default judgment. Accordingly, we conclude that the district court did not abuse its discretion in refusing to set aside the entry of default judgment.

Kmart also asserts that the district court abused its discretion in denying its motion to set aside the monetary sanctions. NRCP 37(b)(2) "authorizes as discovery sanctions . . . awards of fees and costs." *Young*, 106 Nev. at 92, 787 P.2d at 779. Pursuant to NRCP 60(b), a party may be entitled to relief from a court order for "excusable neglect." Moreover, this court will not reverse a district court's discovery sanctions absent an abuse of discretion. *Young*, 106 Nev. at 42, 787 P.2d at 779.

The record reflects that the district court awarded Rapp's counsel \$1,500.00 for time expended preparing and filing motions to compel discovery and seeking sanctions.

Further, at the end of the bench trial, the district court awarded Rapp's counsel additional sanctions of \$5,000.00 for being required to respond to and oppose Kmart's motions for a continuance and to set aside prior sanctions. Because sufficient facts exist to support the district court's decision to impose sanctions, we conclude that the district court did not abuse its discretion in denying Kmart's motion to set aside the monetary sanctions.

On cross-appeal, Rapp contends that the district court abused its discretion in denying her punitive damages. Because Kmart was ordered by the Carson City Community Development Department and Regional Planning Commission to "clean up [its] property, including the handicapped parking area, and to repair existing hazards," Rapp argues that "malicious intent can be conclusively presumed" on the part of Kmart. Thus, Rapp asserts that she is entitled to punitive damages.

Punitive damages may be awarded when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied." NRS 42.005(1). "A plaintiff is never entitled to punitive damages as a matter of right." *Transaero Land & Dev. v. Land Title*, 108 Nev. 997, 1001, 842 P.2d 716, 719 (1992). The decision of whether to grant punitive damages "rests entirely within the discretion of the trier of fact." *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 194, 606 P.2d 1089, 1093 (1980); cf. *Smith's Food & Drug Cntrs. v. Bellegarde*, 114 Nev. 602, 606, 958 P.2d 1208, 1211 (1998) ("The trial court is responsible to determine, as a matter of law, whether the plaintiff has offered substantial evidence of malice, in fact, to support a punitive damage instruction.").

We conclude that because the district court found that Rapp failed to prove by clear and convincing evidence

that Kmart possessed a willful and wanton disregard for the safety of Rapp, the district court did not abuse its discretion in denying Rapp punitive damages.

Finally, Rapp contends that the district court abused its discretion in regard to the amount of attorney's fees awarded. Specifically, Rapp argues that she should have been awarded \$82,485.74 in attorney's fees pursuant to NRCP 68 and NRS 17.115. Further, Rapp asserts that she should have been awarded attorney's fees for the entire litigation pursuant to NRS 18.010(2)(b).

"The award of attorney's fees resides within the discretion of the court. . . . [I]n the absence of manifest abuse of discretion, the court's decision on the issue will not be overturned." County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). Moreover, under NRCP 68 and NRS 17.115, a party who rejects an offer of judgment and fails to obtain a more favorable judgment, must pay the other party taxable costs and reasonable attorney's fees from the time the offer of judgment was made. We have articulated four factors which the district court "must carefully evaluate" in exercising its discretion regarding fees and costs under NRCP 68:

(1) whether plaintiff's claim was brought in good faith; (2) whether the offeror's offer of judgment was brought in good faith; (3) whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether fees sought by the offeror are reasonable and justified in amount.

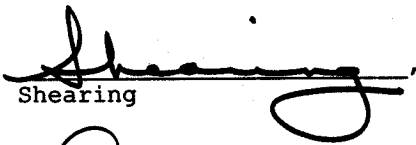
Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 323, 890 P.2d 785, 789 (1995) (citing Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)).

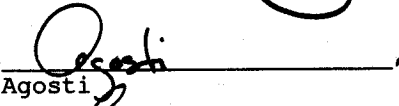
The district court analyzed these factors in its order granting attorney's fees and determined that Rapp's claim and offer of judgment were brought in good faith.


Further, the district court found that Kmart's decision to reject the offer was grossly unreasonable in view of the information provided to it prior to the offer being made. However, the district court found that the fees sought by Rapp were unreasonable. Accordingly, the district court awarded Rapp's counsel \$21,000.00, minus \$6,500.00 already awarded in sanctions, for a total of \$14,500.00. Because sufficient facts exist to support the district court's decision to award the foregoing attorney's fees, we conclude that the district court did not abuse its discretion.

Additionally, Rapp argues that she should have been awarded attorney's fees for the entire litigation pursuant to NRS 18.010(2)(b). NRS 18.010(2)(b) provides that the court may award additional attorney's fees where a defense is "brought without reasonable ground or to harass the prevailing party." Because Kmart obtained a dismissal of Rapp's strict liability cause of action and successfully defended Rapp's punitive damages claim, we conclude that Kmart's defense was reasonable and not brought to harass Rapp. Thus, we conclude that the district court did not abuse its discretion in failing to award additional attorney's fees under NRS 18.010(2)(b).

Having considered Kmart's contentions on appeal and Rapp's contentions on cross-appeal and concluded that they lack merit, we affirm the district court's judgment.


Shearing J.


Agosti J.


Leavitt J.

cc: Hon. William A. Maddox, District Judge
Lemons Grundy & Eisenberg
Edwards, Hale, Sturman, Atkin & Cushing, Ltd.
Arthur J. Bayer Jr.
Carson City Clerk