

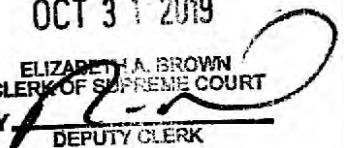
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PANAGIOTIS MALLIOS, AN
INDIVIDUAL,
Appellant,
vs.
BANK OF AMERICA, N.A.; REALTY
ONE GROUP, INC.,
Respondent.

No. 71412-COA

FILED

OCT 31 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Panagiotis Mallios appeals from a final judgment entered following a jury verdict in a tort and breach of contract action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

This case arises from the foreclosure sales of four residential properties that Mallios owned.¹ Mallios purchased four residential properties and fully performed on the loans during the six years following the purchases. But he eventually stopped making payments on the properties on the advice of Serge Armani to try and obtain loan modifications for all four properties. Armani worked as a real estate agent for Realty One but also ran a business known as "Las Vegas Legal Services" out of his Realty One office. Mallios sought Armani's advice after seeing an ad for Las Vegas Legal Services. Because Mallios stopped making payments and defaulted on the loans, Bank of America foreclosed on the four properties and eventually sold them.

During trial, Mallios' daughter Dena testified regarding alleged misrepresentations that Bank of America made. Dena testified that she and Mallios spoke with employees from Bank of America, including someone from

¹We do not recount the facts except as necessary to our disposition.

its President's Office, who represented that the foreclosure sales would be postponed. She also testified that after some of the homes were sold, employees from Bank of America indicated that the sales would be rescinded, and that one employee even stated that a loan modification was approved for one of the properties. However, none of these alleged representations came to fruition.

After Mallios filed this action in the district court, his conduct became a focal point during the litigation. At one point, the district court sanctioned Mallios in the form of attorney fees and costs to Realty One for missing his scheduled deposition, which he claimed was due to health-related reasons. And later, the district court sanctioned Mallios by striking his second amended complaint and reinstating his prior complaint based on inappropriate conduct and comments that Mallios made to opposing counsel during his deposition. At trial, the district court struck parts of Mallios' testimony after admonishing him multiple times to allow counsel to finish questions before responding and to not provide additional comments beyond the scope of counsel's questions.

During the trial, the district court granted Bank of America's motion for directed verdict as to Mallios' negligent misrepresentation claim, and Realty One's motion for directed verdict as to Mallios' claims for negligent misrepresentation, failure to supervise, and gross negligence. The jury ultimately returned a verdict in favor of Bank of America on the breach of the covenant of good faith and fair dealing claim.

On appeal, Mallios argues that the district court erred when it: 1) ordered discovery sanctions against him in the form of striking his second amended complaint and reinstating his prior complaint; 2) ordered discovery sanctions against him in the form of attorney fees and costs; 3) granted Bank of America's motion for directed verdict; 4) granted Realty One's motion for

directed verdict; and 5) granted Bank of America's motion to dismiss his wrongful foreclosure claim; additionally he argues that: 6) the district court committed judicial misconduct during trial.²

As a threshold matter, we need not consider whether the district court erred when it sanctioned Mallios by striking his second amended complaint because the district court never entered a written order stating as much. Typically, a "court's oral pronouncement . . . [is] ineffective for any purpose." *State, Div. Child & Fam. Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (emphasis and internal quotation marks omitted). When a district court makes an oral pronouncement it technically has not "entered" an order, and thus, remains free to alter its decision and issue a different written judgment. *Id.*³ As a result, such oral pronouncements are not appealable. *See Rust v. Clark Cty. School Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (stating "only a written judgment may be appealed"); *see also* NRCP 58 (providing the requirement for entering judgment). Here, the district court did not enter a written order sanctioning

²While Mallios listed the jury's special verdict in his notice of appeal rather than the final judgment, we will nonetheless consider his appeal. Although, this court generally will not consider orders that are not included in the notice of appeal, "this court will not dismiss an appeal where the intent to appeal from a final judgment can be reasonably inferred and the respondent is not misled." *Abdullah v. State*, 129 Nev. 86, 90-91, 294 P.3d 419, 421 (2013) (alterations and internal quotation marks omitted). Here, the respondents have not shown that they were misled as to Mallios' intent to appeal the final judgment which resulted from the jury's verdict.

³We note that here the district court, in effect, did ultimately alter its ruling, considering that Mallios was still allowed to proceed to trial on claims that were pled in his second amended complaint, but not specifically pled in his prior complaint.

Mallios by striking his second amended complaint and reinstating his prior complaint, but instead, simply stated its ruling from the bench. Accordingly, the district court never “entered” an order and therefore this issue is not appealable. Moreover, this is more than a technicality, because despite purporting to “strike” Mallios’ second amended complaint, the district court nonetheless permitted all of the claims asserted in it, that were not previously dismissed, to proceed at trial.⁴ Consequently, the district court’s oral pronouncement ultimately had no effect on Mallios’ claims and did not change the scope of the trial.

Next, we consider whether the district court erred when it awarded attorney fees and costs to Realty One as a discovery sanction against Mallios. We review discovery sanctions for an abuse of discretion. *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). NRCP 37(d) provides the district court with the discretion to impose sanctions, including attorney fees and costs, against a party who fails to attend his deposition “unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”⁵ Here, even before Mallios missed the deposition at issue,

⁴Ultimately, only one of Mallios’ claims was decided by a jury verdict. During the course of the trial Bank of America moved for a directed verdict for the negligent misrepresentation claim, which the district court granted and Mallios voluntarily dropped his breach of contract claim.

⁵The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. To Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). But, those amendments do not affect the disposition of this appeal, as they became effective after the district court entered the orders at issue in this appeal. Accordingly, we cite the previous versions of the applicable rules herein.

his deposition had already been previously rescheduled due to his health issues, such as suffering a stroke, and the need to retain an interpreter proficient in Greek. Also, in order to prevent further delays, the district court stated that it would not move the trial date and therefore discovery would need to be completed expeditiously. Despite knowing this, Mallios nonetheless waited until the very day before the deposition to inform Realty One that he would not attend due to health issues. As a result, the district court awarded \$921.05 in attorney fees and \$195.00 in costs as a discovery sanction. Because Mallios failed to attend his deposition and failed to give more than 24 hours' notice that he would not attend, and because the district court did not impose an excessive monetary sanction, we conclude that the court did not abuse its discretion.

Third, we consider whether the district court erred when it granted Bank of America's motion for a directed verdict on Mallios' negligent misrepresentation claim.⁶ In general, "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability" See *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) (quoting *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 94 Nev. 131,

⁶In making its decision to grant Bank of America's motion for a directed verdict, the district court did not correctly apply the legal standard for a negligent misrepresentation claim. The court found that fraudulent intent was a necessary element. We conclude that in claims such as these a showing of an intent to defraud is not required. However, this misapplication of the law does not affect the result because Mallios was not engaged in a business transaction and thus fails to satisfy a necessary element of a negligent misrepresentation claim.

134, 575 P.2d 938, 940 (1978) (quoting Restatement (Second) of Torts § 552 (1) (1977))).

A necessary element to Mallios' negligent misrepresentation claim is that Bank of America provided him false information for his guidance in a "business transaction." No such transaction existed here. The Nevada Supreme Court has ruled that discussions relating to payments under a residential mortgage do not generally constitute such a "business transaction." See *e.g. Cramer v. Bank of Am.*, Docket No. 66132 (Order of Affirmance, July, 31, 2015) ("[M]onthly mortgage payments [a]re not business transactions."). At least one other court has ruled that "lenders and trustees do not typically have a fiduciary duty [of honesty] to a borrower." *Jordan v. Bank of America*, 2013 WL 5308268 at *7 (D. Nev. Sept. 19, 2013). Here, the situation is even less favorable to Mallios as the alleged misrepresentations arose only after Mallios had already breached the contract by failing to timely make mortgage payments. This breach raises the question of whether any prior contractual relationship had already been terminated, placing the parties in an adversarial pre-litigation posture instead. Parties on the threshold of litigation have no duty to help "guide" their adversaries. See *Halcrow*, 129 Nev. at 400, 302 P.3d at 1153.

Fourth, we consider whether the district court erred when it granted Realty One's motion for directed verdict on his negligent misrepresentation and failure to supervise claims. To establish his negligent misrepresentation claim Mallios needed to show that Realty One had a pecuniary interest in the transaction between him and Armani. See *Halcrow, Inc.*, 129 Nev. at 400, 302 P.3d at 1153. However, Mallios did not present any evidence that Realty One had a pecuniary interest in the transaction between Mallios and Armani, presumably because Armani was acting under the guise of Las Vegas Legal Services, not Realty One, when advising

Mallios. Thus, Mallios failed to present any evidence supporting the necessary element of “pecuniary interest” in his negligent misrepresentation claim against Realty One. Therefore, the district court did not err in entering a verdict in favor of Realty One on this claim.

In order to establish a failure to supervise claim against Realty One, Mallios was required to show that Realty One failed to exercise “reasonable care in the training, supervision, and retention of [its] employees to make sure that the employees are fit for their positions.” *Hall v. SSF, Inc.*, 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996). Importantly, an employer is only responsible for negligent supervision when it “knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee.” *See Giles v. Shell Oil Corp.*, 48 A.2d 610, 613 (D.C. 1985) (emphasis and internal quotation marks omitted). Mallios failed to show that Realty One knew or should have known about Armani’s Las Vegas Legal Services practice and that Armani was carrying out his practice in a dangerous or incompetent manner. Although Mallios presented some evidence that Realty One knew or should have known about Mallios other business because it allowed Armani to display his Las Vegas Legal Services cards on Realty One’s counter, Mallios failed to present any evidence showing that Realty One knew or should have known that Armani was misrepresenting information to or improperly advising his Las Vegas Legal Services clients—specifically Mallios. Thus,

the district court did not err when it granted Realty One's motion for directed verdict.⁷

Fifth, we consider whether the district court erred when it dismissed Mallios' wrongful foreclosure claim. Mallios argues for the first time on appeal that the statutory time limit for him to file his lis pendens should have been tolled. Because Mallios did not make a tolling argument regarding the statutory time limit before the district court, he waived the right to make such an argument on appeal and we decline to consider it. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 ("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.").


Sixth, we consider whether the district court judge committed misconduct during trial. Because Mallios failed to object to the district court judge's conduct during trial, we review the supposed judicial misconduct for plain error. *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368-69, 892 P.2d 588, 590 (1995). An error is plain when it "is so unmistakable that it reveals itself by a casual inspection of the record." *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973) (internal quotation marks omitted). Further, for an error to be plain it must have "had a prejudicial impact on the verdict when viewed in context of the trial as a whole," or "seriously affects the integrity or public reputation of the judicial proceedings." *Parodi*, 111 Nev. at 368, 892 P.2d at 590 (quoting *Libby v. State*, 109 Nev. 905, 911,


⁷To the extent that Mallios challenges the district court's grant of directed verdict as to his gross negligence claim, Mallios has waived such a challenge because he failed to present any argument in his brief as to why the district court erred on this claim. See *Powell v. Liberty Mut. Fire. Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that arguments not made in an appellant's opening brief are deemed waived).


859 P.2d 1050, 1054 (1993)) (internal quotation marks omitted). Here, Mallios has failed to show plain error based on the judge's conduct. At trial, the judge is tasked with providing order and decorum to the proceedings. *Parodi*, 111 Nev. at 367, 892 P.2d at 589. And the judge here did just that. Prior to striking portions of Mallios' trial testimony, the judge instructed him on numerous occasions to stop going beyond the scope of the attorney's questions, to wait for the attorney to finish their questions before answering, and to control his outbursts while testifying by admonishing him outside the presence of the jury. Accordingly, the judge here did not plainly commit judicial misconduct.⁸

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

⁸Also, Bank of America requests that this court expunge the lis pendens still recorded against the properties. However, because the proceeding to expunge a lis pendens is collateral to this appeal, it is the district court, not this court, that retains jurisdiction to entertain such a matter. *See Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 530 (2006) (stating that "the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits"); *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 965 (Cal. 2005) (stating that "a proceeding to expunge a lis pendens is collateral to an appeal from the judgment in the underlying action").

cc: Hon. Gloria Sturman, District Judge
Garman Turner Gordon
Akerman LLP/Las Vegas
Gordon & Rees Scully Mansukhani LLP
Skane Wilcox LLP
Snell & Wilmer
Barbara Buckley
Ann R. Traum
Eighth District Court Clerk