

IN THE SUPREME COURT OF THE STATE OF NEVADA


HEATH WILLS, AN INDIVIDUAL;
PATRICIA WILLS, AN INDIVIDUAL;
ASSURITY HEALTHCARE, INC., A
FOREIGN CORPORATION; AND
BANDAR ENTERPRISES, LLC, D/B/A
CUUR DIAGNOSTICS, A NEVADA
LIMITED LIABILITY COMPANY,
Appellants/Cross-Respondents,
vs.

COLLINS CAPITAL, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
SINGLE HELIX INVESTMENT
TECHNOLOGY, LLC, A WYOMING
LIMITED LIABILITY COMPANY;
SUSAN KAPLAN, AN INDIVIDUAL;
STEPHEN GELLER, AN INDIVIDUAL;
AND MARTIN FABRIKANT, AN
INDIVIDUAL,
Respondents/Cross-Appellants.

No. 88201

FILED

JUN 18 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court judgment in a civil action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Appellants/cross-respondents Heath Wills, Patricia Wills, Assurity Healthcare, Inc., and Bandar Enterprises, LLC, D/B/A CUUR Diagnostics (collectively the Wills Parties), formed Attom Genetics LLC d/b/a Xymbio with Jay Fabrikant, a non-party in this action who acts through respondent/cross-appellant Single Helix Investment Technology,

LLC.¹ Xymbio was designed to be a molecular testing laboratory that would provide testing kits and administer testing results during the COVID-19 pandemic, primarily generating revenue through government contracts and insurance billing. The Wills Parties allegedly began co-mingling Bandar's operation with Xymbio to effectively steal Xymbio's property without the Helix Parties realizing what was happening. The Helix Parties eventually initiated the underlying lawsuit against the Wills Parties in April 2020 alleging fraud, misrepresentation, conversion, and other causes of action.²

Months after the lawsuit was initiated, the Wills Parties were sanctioned \$70,000 for discovery violations but only paid \$10,000. They were then sanctioned for further discovery abuses before the district court issued its final, case-terminating sanctions. The district court subsequently held a prove-up hearing and entered judgment against the Wills Parties in the amount of \$3,533,469.04—comprised of \$860,000 in compensatory damages, \$1,700,000 in punitive damages, and the remaining amount representing prejudgment interest. The Wills Parties argue on appeal that the district court erred in issuing case-terminating sanctions, allowing improper evidence during the default prove-up hearing, and awarding punitive damages.³ The Helix Parties argue on cross-appeal that the

¹The respondents/cross-appellants in this matter are comprised of Collins Capital, LLC, Single Helix Investment Technology, LLC, Susan Kaplan, Stephen Geller, and Martin Fabrikant (collectively the Helix Parties).

²The parties are familiar with the extensive procedural history, and we only recount that which is necessary to our disposition.

³We decline the Helix Parties' invitation to dismiss the Wills Parties' appeal under the theories of unclean hands or equitable mootness.

district court erred in denying a lost profit damages claim. We disagree with both parties' contentions and affirm the district court's judgment.

Wills Parties' appeal

1. The district court did not abuse its discretion in issuing case-terminating sanctions

The district court detailed the Wills Parties' repeated failure to comply with discovery orders and found that case-terminating sanctions were appropriate because it was uncontroverted that the Wills Parties failed to respond to discovery requests and were aware they were abusing the discovery process. The Wills Parties contend the district court erred in issuing case-terminating sanctions because it failed to conduct an evidentiary hearing when the Wills Parties raised issues of fact relevant to the factors set out in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

This court has recognized that courts have "inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices." *Id.* at 92, 787 P.2d at 779 (alteration in original) (quoting *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987)). An evidentiary hearing is required prior to issuing case-terminating sanctions when questions of fact are raised as to the *Young* factors. *Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992). While discovery sanctions are generally reviewed for an abuse of discretion, case-terminating sanctions are afforded "a somewhat heightened standard of review." *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010).

The Wills Parties contend they raised issues of fact for six of the eight *Young* factors, challenging the district court's findings as to

the degree of willfulness of the offending party, the extent to which the non-offending party would be

prejudiced by a lesser sanction, . . . whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, [and] whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney

Young, 106 Nev. at 93, 787 P.2d at 780. The Wills Parties argue because they raised issues of fact, the district court was required to conduct an evidentiary hearing. We disagree with the Wills Parties that they raised any issues of fact. The record makes clear that the Wills Parties knew of their discovery violations when they paid \$10,000 of the \$70,000 sanction imposed against them to the Helix Parties—as the district court recognized in its order. Moreover, the receiver assigned to this case issued findings that clearly indicate the Wills Parties had the means to pay the monetary sanction but chose not to. Finally, the receiver’s findings indicated Bandar was improperly used to pay Heath and Patricia Wills’ personal bills and did not maintain adequate accounting records. While public policy favors adjudication on the merits, that consideration is diminished when a party fails to preserve and produce evidence. Because no controverted facts existed as to the Wills Parties’ willful disregard for discovery orders and sanctions, the district court did not abuse its discretion in issuing case-terminating sanctions without holding an evidentiary hearing.

2. The district court did not abuse its discretion in the manner it conducted the default prove-up hearing

Ten days prior to the prove-up hearing, the Helix Parties disclosed witnesses and evidence they intended to use at the hearing. The Wills Parties contend the district court erred in allowing the Helix Parties to use the witnesses and evidence at the hearing because the late

disclosures violated NRCP 16.1(a)(1)(C), NRCP 37(c), and their due process right to meaningfully challenge the evidence presented. We disagree.

When a district court conducts a prove-up hearing under NRCP 55(b)(2), the court has broad discretion to determine how the “hearing should be conducted and the extent to which the offending party may participate.” *Foster v. Dingwall*, 126 Nev. 56, 68, 227 P.3d 1042, 1050 (2010). The extent to which a defaulting party may participate in a prove-up hearing should be determined on a case-by-case basis by the district court. *Hamlett v. Reynolds*, 114 Nev. 863, 866-67, 963 P.2d 457, 459 (1998). Thus, the challenges to evidence used at the prove-up hearing are reviewed for an abuse of discretion. *See id.* at 867, 963 P.2d at 459.

The Wills Parties challenged the Helix Parties’ alleged discovery violations after case-terminating sanctions were entered but prior to the prove-up hearing. The district court declined to grant relief to the Wills Parties, reasoning “Rule 16 and discovery is closed. . . . We’re in a Rule 55. We’re done, other than prove-ups.” We agree with the district court—the opportunity to seek relief for any alleged NRCP 16 and NRCP 37 violations had passed. Moreover, the Wills Parties were allowed to cross-examine witnesses at the prove-up hearing. Thus, the district court did not abuse its discretion in the manner it conducted the prove-up hearing.

3. The district court did not err in awarding the Helix Parties punitive damages

As noted, the district court entered a judgment against the Wills Parties that included \$1,720,00.00 in punitive damages. The Wills Parties contend that the court erred in awarding punitive damages and violated their due process rights because they were not given a meaningful

opportunity to challenge the award.⁴ The Wills Parties argue that they were not on notice the Helix Parties were seeking punitive damages because they did not disclose punitive damages in their default judgment application, NRCP 16.1 disclosures, or NRCP 55 disclosures. The Wills Parties further argue that the punitive damages award was improper because a prevailing party cannot obtain damages exceeding those sought in their default application. Again, we disagree.

This court reviews the district court's legal conclusions regarding court rules de novo. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). The plain language of NRCP 54(c) provides that "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the *pleadings*." (Emphasis added.) Here, punitive damages were clearly sought in each of the Helix Parties' pleadings and the amount ultimately awarded was less than the amount requested. Therefore, the district court did not abuse its discretion in awarding punitive damages.

Helix Parties' cross-appeal: the district court did not abuse its discretion in denying a lost profit damages award

Finally, the district court declined to award the Helix Parties lost profit damages. At the prove-up hearing, the Helix Parties designated an expert, Amit Payan, to testify to lost profits based on a similarly situated testing company. Ultimately, the district court declined to award lost profit damages because Payan was unable to calculate precise numbers under a "but for" scenario and the amount presented was too speculative. "The district court has 'wide discretion in calculating an award of damages, and

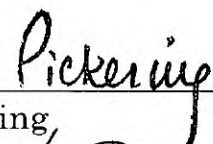
⁴Consistent with the analysis in the previous section, we reject the Wills Parties' contention that the compensatory damage award was flawed based on an untimely submitted expert report.

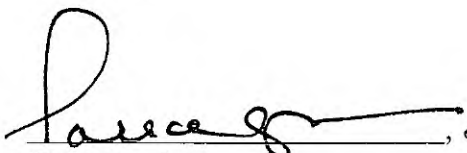
this award will not be disturbed on appeal absent an abuse of discretion.” *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) (quoting *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997)).

The Helix Parties are correct that lost profit damages must be proved to a reasonable certainty. *Eaton v. J. H. Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978). Further, when the trier of fact is presented with lost profits to a reasonable certainty, “[t]he existence and extent of lost profits . . . become issues of evidentiary weight instead of admissibility.” *Houston Expl. Inc. v. Meredith*, 102 Nev. 510, 512-13, 728 P.2d 437, 439 (1986). In this case, we must recognize the district court’s role in weighing the credibility and reliability of the expert’s testimony. While the district court partly relied on Payan’s admission that he could not calculate precise lost profits under a “but for” scenario in denying the claim for lost profits, it did so within the context of Xymbio being a brand-new venture. It cannot be said the district court abused its discretion in finding that lost profits were speculative under the circumstances and thus denying lost profit damages. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

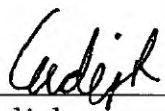

_____, C.J.
Herndon


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Bell


_____, J.
Stiglich


_____, J.
Cadish


_____, J.
Lee

cc: Hon. Timothy C. Williams, District Judge
Hutchings Law Group, LLC
Holland & Knight LLP/Denver
McDonald Carano LLP/Las Vegas
Hogan Hulet PLLC
Eighth District Court Clerk