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## Nevada Supreme Court Affirms Award Of "Non-Case Concluding" Sanctions For Party's Violation of Discovery Orders

By Andrew B. Downs

Earlier this month, the Nevada Supreme Court issued a warning to all litigants: Serial abuse of the discovery process will be punished – severely. In *Bahena v. Goodyear Tire & Rubber Company*, 126 Nev. Adv. Op. 26 (July 1, 2010), the Court penalized Goodyear's failure to comply with multiple discovery orders by upholding the district court's sanction of striking Goodyear's answer as to liability only. This left Goodyear in a position where liability for a questionable claim was admitted and it could only challenge the evidence of damages. The jury awarded the plaintiffs \$30 million in compensatory damages – a verdict that may have been avoided if Goodyear had been permitted to challenge liability.

Although the *Goodyear* decision is a reminder of the importance of diligence and compliance with discovery rules, deadlines, and orders, the true impact of the case is in the Court's endorsement of what it terms "non-case concluding" sanctions and the overwhelming amount of discretion it vests in the district courts to impose those sanctions for improper discovery conduct. The new standards are likely to encourage relatively unfettered use of these so-called "non-case concluding" sanctions to punish and deter violations of discovery orders. The Nevada Supreme Court lowered the standard of review on appeal and also permitted less thorough evidentiary hearings at the trial court level before the imposition of sanctions.

The standard of review is the lens through which an appellate court looks at the decisions of a trial court. The more relaxed it is, the easier it is to affirm a trial court decision on appeal. The *Goodyear* decision was a marked departure from the heightened standard of review previously required by the court in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777 (1990). The new standard is a general abuse of discretion standard which is highly deferential to the decision of the lower court. Under an abuse of discretion standard, the trial court's ruling stands unless a showing is made that it was contrary to established law or clearly against reason or evidence. The old standard gave the party against whom sanctions were sought more protection because it required that the sanctions be just and that they relate to the claims which are the subject of the discovery.

*Goodyear* also makes it easier for a trial court to impose these sanctions because a full evidentiary hearing at the trial court level is no longer necessary in every case. Building on its newly created category of non-case concluding sanctions, the Nevada Supreme Court concluded that a full evidentiary hearing was only required when the sanction was a dismissal with prejudice or striking an answer as to *both* liability and damages. For anything short of that result, the court gave substantial discretion to the trial court to determine the length and nature of the hearing. The degree to which the standard will be relaxed in practice remains to be seen.

*Goodyear* creates a distinction between non-case concluding or "issue" sanctions and what are colloquially known as "terminating sanctions," the striking of a complaint or answer and entry of judgment against the sanctioned party. Although issue sanctions may eviscerate a significant part of a case, because they leave the sanctioned party with some limited claim or defense, the *Goodyear* decision treats them differently than terminating sanctions. The decision does not affect the mildest form of sanctions, monetary sanctions, where the sanctioned party must simply pay a fine to the court, or the other party's attorney's fees. Before this decision, the judicial standards for the imposition of both types of sanctions were the same. Now, it will be easier to obtain issue/non-case concluding sanctions, while the standard for obtaining terminating sanctions is unchanged.



One likely consequence of the *Goodyear* decision is that the Nevada trial courts may now employ non-case concluding sanctions on a more frequent basis. With this decision, those courts have a greater ability to impose severe sanctions for habitual discovery abuse. The Nevada courts have long been assertive in imposing discovery obligations on business parties. The creation of a lower standard for imposing issue or non-case concluding sanctions increases the risk to the business defendant of resisting discovery requests, particularly once an initial motion to compel has been granted because the sanctions awarded may extend beyond the scope of the discovery in dispute.