

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA EX REL.  
BOARD OF REGENTS OF THE  
UNIVERSITY AND COMMUNITY  
COLLEGE SYSTEM OF NEVADA; AND  
DOUGLAS HILL,  
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK, AND THE HONORABLE  
JESSIE WALSH, DISTRICT JUDGE,  
Respondents,  
and  
PAUL HARRIS,  
Real Party in Interest.

No. 48208

**FILED**

DEC 13 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *Jessie Walsh*  
CHIEF DEPUTY CLERK

ORDER GRANTING IN PART  
AND DENYING IN PART  
PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus or prohibition challenging a district court order denying summary judgment in a tort action.

The parties are familiar with the facts, and we will not recount them except as pertinent to our disposition.

Real party in interest Paul Harris was a sergeant with the police department at the University of Nevada Las Vegas, when he and several other officers conducted a drug raid in the UNLV dormitories. Thereafter, the department received some complaints about the manner in which the raid was performed, and subsequently Harris was placed on

paid administrative leave. Ultimately, the Nevada Division of Investigations (NDI) conducted an investigation.

After Harris returned to work from administrative leave, he was temporarily and then permanently reassigned to a position with what were purportedly minimal supervisory responsibilities and little opportunity for overtime pay. According to Harris, overtime pay constituted approximately twenty-five percent of his income in his previous position. Thereafter, Harris interviewed for a position with the State Department of Parole and Probation (Department). In August 2000, the UNLV Department of Public Safety issued Harris a written reprimand for his involvement in the drug raid.

Harris administratively challenged the written reprimand, requesting that his personnel file be cleared of any indication of the reprimand. In the meantime, Harris left the UNLV Police Department for a position with the Division of Parole and Probation. In a background report conducted by Parole and Probation around January 2001, Harris's written reprimand from UNLV surfaced.

Harris ultimately won the administrative appeal before the Employee-Management Committee (EMC). The EMC concluded that UNLV did not provide Harris with a copy of the NDI report, and that it failed to produce any factual evidence to support the written reprimand. In response to the EMC's ruling, UNLV removed the reprimand from Harris's personnel file.

In September 2000, petitioner Board of Regents of the University and Community College System of Nevada held a public meeting, at which petitioner Douglas Hill, a board member, made some derogatory comments about the UNLV drug raid and the group of officers

involved in it. Later, in Attorney General v. Board of Regents,<sup>1</sup> this court determined that the comments were made in violation of Nevada's open meeting law, as the drug raid was not on the agenda when the comments were made.

After his administrative appeal was resolved, Harris filed the underlying action against the petitioners, as well as UNLV's student newspaper, the Rebel Yell. Harris's complaint asserted the following claims: (1) a request for injunctive or other extraordinary relief to prevent UNLV from harassing him and to remove items referring to his written reprimand because the reprimand was referenced in the Department's files (although not in UNLV's files); (2) negligence per se, based on violations of the report, notice and hearing requirements of NRS Chapters 284 and 289, and for retaliation against Harris for filing a grievance/negligent constructive discharge; (3) breach of contract, based on the same statutory violations just noted; (4) breach of the implied covenant of good faith and fair dealing, for the same violations just noted; (5) intentional and negligent infliction of emotional distress, for the derogatory conduct of UNLV president Carol Harter, Hill, and the heads of the UNLV Police Department; (6) defamation-slander and libel per se, based on statements made by Hill at the board meeting and to the Rebel Yell newspaper; and (7) wrongful discharge/constructive termination. Harris additionally requested compensatory damages from the Board of Regents for his "demotion," and punitive damages against Hill.

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<sup>1</sup>119 Nev. 148, 67 P.3d 902 (2003).

The Board of Regents requested, and the district court ultimately denied, summary judgment. The Board of Regents sought summary judgment based on, among other things, (a) res judicata, because Harris's personnel grievances had already been heard and addressed by the EMC; (b) mootness, because UNLV had already removed any reference of the written reprimand from its files; (c) failure to exhaust administrative remedies, because Harris failed to raise the purported statutory, regulatory, and departmental policy violations before the EMC; (d) NRS Chapters 284 and 289 as providing the exclusive remedies for any grievances or violations; (e) governmental immunity; and (f) failure to produce evidence sufficient to survive summary judgment. The district court denied summary judgment, and documents before this court reveal that the district court summarily concluded that factual issues existed as to each claim, and it did not specify which issues were unresolved.

#### Standards for writ relief

This court may issue a writ of mandamus to compel the performance of an act which the law requires or to control a manifest abuse or an arbitrary or capricious exercise of discretion.<sup>2</sup> Writs of mandamus may only issue where there is no plain, speedy or adequate remedy at law.<sup>3</sup> Writs of prohibition on the other hand, "may issue to arrest the proceedings of a district court when such proceedings are in

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<sup>2</sup>NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604 (1981).

<sup>3</sup>See NRS 34.020(2).

excess of the district court's jurisdiction."<sup>4</sup> Further, writs of prohibition and mandamus are extraordinary remedies and it is within this court's discretion to determine if a petition will be considered.<sup>5</sup>

Generally, this court will not consider writ petitions that challenge orders denying motions for summary judgment.<sup>6</sup> However, this court may grant relief when no factual disputes exist and, under a statute or rule's clear authority, the district court is required to grant summary judgment.<sup>7</sup>

#### Declaratory and injunctive relief claims

We conclude that Harris's claims, in the district court, for declaratory and injunctive relief are moot. Specifically, Harris requested that (1) the Board of Regents remove "items" referring to his written reprimand from all state files, and (2) that the district court enjoin UNLV and the Board of Regents from harassing him in the future or from making representations affecting his professional reputation.

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<sup>4</sup>Civil Serv. Comm'n v. Dist. Ct., 118 Nev. 186, 188 (2002); NRS 34.320.

<sup>5</sup>Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

<sup>6</sup>State ex. rel. Dep't Transp. v. Thompson, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983) (holding that the supreme court would no longer consider petitions challenging orders denying summary judgment, because such petitions are usually not meritorious, disruptive to the orderly administration of civil cases, and create unnecessary expense for the parties and the reviewing court).

<sup>7</sup>Smith v. Dist. Ct., 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997); see Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1031 (2005) (summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law).

A claim may be moot when it no longer presents a justiciable controversy.<sup>8</sup> Harris admits that UNLV has removed the written reprimand from its personnel files. The only remaining mention of the written reprimand is contained within the Department's investigative background report. That report was dated prior to the EMC's ruling requiring UNLV to remove any mention of the written reprimand. UNLV subsequently removed the reprimand from its files. However, neither UNLV nor the Board of Regents control the Department's personnel files. Thus, there would be no practical effect in ordering the Board of Regents to remove the Department's investigative background report.<sup>9</sup> The Department is not a party to the underlying action, and Harris provides no evidence that the Board of Regents has the ability to remove or amend the Department's background investigative report.<sup>10</sup>

Consequently, we conclude that the district court was obligated to grant summary judgment to the petitioners as to Harris's claim for removal of the written reprimand from his personnel file.

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<sup>8</sup>See NCAA v. University of Nevada, 97 Nev. 56, 57 (1981); Doe v. Bryan, 102 Nev. 523, 525 (1986).

<sup>9</sup>University of Nevada v. Tarkanian, 95 Nev. 389, 394, 594 P.2d 1159, 1162 (1979) (concluding that this court has a duty to address actual controversies that can have a practical effect on the matter in issue, not to redress grievances caused by the actions of some third party).

<sup>10</sup>Harris contends that the state is a party to this action. While the state is a party to the action in relation to the Board of Regents, the entire State of Nevada and its subdivisions, including the Department are not parties to the litigation. Harris's contention should be directed to the Department.

As to Harris's request that the district court enjoin the Board of Regents from further harassing him, or making any future representations that might damage his professional reputation, we conclude that this request is also moot. Injunctive relief is usually available upon a showing that (1) the party seeking relief enjoys a reasonable probability of success on the merits, and (2) "the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy."<sup>11</sup>

The only instances of harassment that Harris complains of occurred prior to his resignation. Even though Harris contends that his written reprimand is still mentioned in his personnel file, the documents before this court indicate that the reprimand has been removed from the personnel file that the Board of Regents controls. The reprimand is mentioned in the Department's personnel file.<sup>12</sup> Further, there is no evidence in the documents before this court, nor sufficient allegations in the complaint, to suggest that the Board of Regents or its employees continue to harass Harris. Because there is no ongoing pattern of harassment, we conclude that there is no ongoing behavior for the district court to enjoin.

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<sup>11</sup>Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 780-81, 587 P.2d 1329, 1330 (1978).

<sup>12</sup>It appears that Harris's true grievance is with the information contained within the Department's background investigative report, not with the Board of Regent's personnel files.

Consequently, we conclude that Harris's request for injunctive relief is moot in its entirety and that the district court was compelled to grant summary judgment on Harris's first claims.

Negligence per se claim

The Board of Regents contended that actions for negligence per se should not apply to statutes created for the administration of the state employment system, especially where those statutes expressly provide remedies for the aggrieved employees. Harris replied that negligence per se is not precluded by NRS Chapter 284 and 289, because NRS Chapters 284 and 289 do not provide the exclusive remedies for classified employees and peace officers.

We conclude that the language in NRS Chapters 284 and 289 does not contemplate a common law cause of action for negligence per se.

Whether NRS Chapters 284 and 289 were intended to provide the basis for a claim of negligence per se is a question of statutory construction. We review issues of statutory construction de novo, even in the context of writ petitions.<sup>13</sup> Further, where the "words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute."<sup>14</sup>

NRS 289.120 provides that an aggrieved peace officer may seek judicial relief after he exhausts applicable internal grievance procedures and "other administrative remedies." Further, NRS 289.120

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<sup>13</sup>Marquis & Aurbach v. Dist. Ct., 122 Nev. \_\_\_, \_\_\_, 146 P.3d 1130, 1136 (2006).

<sup>14</sup>Carson-Tahoe Hosp. v. Building and Const. Trades Council of Northern Nevada, 122 Nev. 218, 219, 128 P.3d 1065, 1066 (2006).



only allows appropriate injunctive relief or other extraordinary relief to prevent future violations and to prevent retaliatory action by the employer against the peace officer. Had the Legislature intended to create a cause of action in tort when it created NRS Chapter 289, it could have easily included language to that effect. However, the plain language of NRS 289.120 specifically permits injunctive and extraordinary relief, and is silent as to claims for damages in tort.

As for NRS Chapter 284, one of the stated purposes of this statutory scheme is to “increase efficiency and economy” and to improve “methods of personnel administration” for state jobs.<sup>15</sup> NRS 284.390(1) provides that an employee who is dismissed, demoted or suspended may request a hearing from the EMC to determine the reasonableness of the action, and if the employee is not satisfied with the EMC’s findings, the employee may seek judicial relief under NRS Chapter 233B.<sup>16</sup> By specifically referring to NRS Chapter 233B, the Legislature contemplated judicial review of the EMC’s decisions, and not a separate action for negligence per se.<sup>17</sup> Additionally, it would not be efficient, economical, or an improvement of personnel administration to allow employees to bring negligence per se claims based on statutory violations with specific remedies.

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<sup>15</sup>NRS 284.010(c).

<sup>16</sup>NRS 284.390(8).

<sup>17</sup>NRS 233B.020 provides that the intent behind NRS Chapter 233B is to provide judicial review of the adjudicatory procedures of administrative agencies.

Consequently, Harris may not hash out alleged violations of NRS Chapters 284 and 289 in a claim for negligence per se, and thus, we conclude that the district court was required to grant summary judgment on the negligence per se claim.

Limitation on damages and punitive damages

Any award of damages sounding in tort against the state cannot exceed \$50,000 per claim.<sup>18</sup> Thus, any award of tort damages Harris may recover against the Board of Regents would be capped at \$50,000 per claim as a matter of law. The same limitation applies to damages awarded against Hill to the extent that he was acting within the scope of his public duties or employment when he made the allegedly defamatory statements.

Additionally, Harris seeks punitive damages against Hill. However, NRS 41.035 precludes any award of punitive damages against a current or former officer or employee of any political subdivision of the state, so long as the officer is acting within the scope of his public duties or employment. Thus, before the district court can entertain an award of punitive damages against Hill, it must determine whether Hill was acting within the scope of his public duties or employment, and whether his alleged acts were wanton and malicious.<sup>19</sup>

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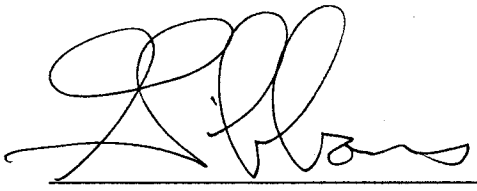
<sup>18</sup>See NRS 41.031.

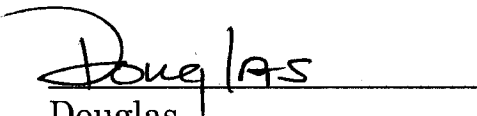
<sup>19</sup>NRS 41.0348.

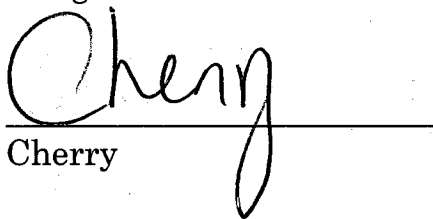
Remaining claims

As to the remaining claims, we conclude that the district court was not compelled to grant summary judgment, due to the existence of genuine issues of material fact.<sup>20</sup> Accordingly, we grant the petition in part and deny it in part. The clerk of this court shall issue a writ of mandamus directing the district court to grant summary judgment as to the declaratory and injunctive relief claims and the negligence per se claims in the underlying action, and to conduct further proceedings consistent with this order.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

cc: Hon. Jessie Elizabeth Walsh, District Judge  
Marc P. Cardinalli  
Richard C. Linstrom  
Bunin & Bunin  
Eighth District Court Clerk

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<sup>20</sup>The Board of Regents and Hill have not challenged the district court's denial of summary judgment; therefore, we do not address their arguments set forth in support of their countermotion for summary judgment.