IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN KOZMARY, M.D.; STEVEN KOZMARY, M.D., A PROFESSIONAL CORPORATION; JOHN THALGOTT, M.D., INDIVIDUALLY; AND THALGOTT & KABINS, A PROFESSIONAL CORPORATION,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,
and
JENNIFER LINDSAY-KOEHLER,
Real Party in Interest.

No. 49018

FILED

OCT 0 2 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying petitioners' summary judgment motion with respect to real party in interest's third-party complaint seeking indemnity or contribution against petitioners.

Real party in interest Jennifer Lindsay-Koehler was involved in a motor vehicle accident with Michael Davis, after which Davis filed a personal injury complaint against Lindsay-Koehler. Lindsay-Koehler then filed a third-party complaint seeking indemnity or contribution from petitioners, who were Davis's treating physicians. According to Lindsay-Koehler, she is entitled to "equitable indemnity and/or indemnity implied in law" because any damages that Davis suffered resulted from

petitioners' "medical malpractice" in rendering unnecessary treatment to Davis in the course of an alleged conspiracy between Davis and petitioners to maximize the amount of fees for treatment.

Petitioner Steven Kozmary, M.D., then filed a motion to dismiss Lindsay-Koehler's third-party complaint, in which petitioner Dr. John Thalgott, M.D., joined. The district court granted the motion, after which Lindsay-Koehler moved for reconsideration. The district court then granted reconsideration and vacated its dismissal order. Subsequently, Dr. Kozmary filed a summary judgment motion. The district court denied the summary judgment motion, concluding that Lindsay-Koehler had a viable cause of action.

Dr. Kozmary now petitions for writ relief, in which Dr. Thalgott has joined, asking this court to compel the district court to grant summary judgment because no basis in Nevada law exists for a "partial equitable indemnity" claim, and courts that recognize partial equitable indemnity do so on the ground of "common liability" between the third-party plaintiff and third-party defendant, which is not present here. According to petitioners, summary judgment is mandated because implied indemnity is only available when the indemnitee is free from active wrongdoing with respect to the plaintiff's injuries.

Lindsay-Koehler has filed an answer, as directed, asserting that, because she and petitioners are successive, rather than concurrent tortfeasors, Reid v. Royal Insurance Co., Ltd.,[1] is inapposite. Lindsay-Koehler maintains that Davis's injuries are severable at a point of time,

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[1]80 Nev. 137, 390 P.2d 45 (1964).

and neither she nor petitioners had the opportunity to guard against the others' acts. According to Lindsay-Koehler, comparative fault principles weigh in favor of adopting the doctrine of partial equitable indemnity.

A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse or an arbitrary or capricious exercise of discretion.[2] By contrast, a writ of prohibition may issue to confine the district court to the proper exercise of its prescribed jurisdiction when the court has acted in excess of its jurisdiction.[3] Both mandamus and prohibition are extraordinary remedies, and it is within this court's discretion to determine if such petitions will be considered.[4]

This court declines to exercise its discretion to consider writ petitions that challenge district court orders denying summary judgment motions, unless an important issue of law requires clarification or summary judgment is clearly mandated by a statue or rule, and public policy and judicial economy principles weigh in favor of considering the petition.[5] Petitioners carry the burden of demonstrating that extraordinary relief is warranted.[6]

Having considered the petition and the answer thereto, we conclude that our extraordinary intervention is not warranted. In denying

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[2]NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[3]See NRS 34.320.

[4]See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

[5]Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

[6]Pan v. Dist. Ct., 120 Nev. 222, 228-29, 88 P.3d 840, 844 (2004).

this petition for extraordinary relief, we recognize that it raises novel and important issues. These issues concern the potential application of proximate cause principles in the context of an alleged post-accident conspiracy to maximize damages, as well as the potential application of equitable indemnity and contribution with respect to the tortfeasor and alleged conspirators under such circumstances. These legal issues, however, necessarily turn on the existence of a conspiracy, which at this juncture has only been alleged. If the parties proceed with litigation in the district court, they will necessarily develop the factual issues concerning Lindsay-Koehler's contention that petitioners are involved in a conspiratorial scheme with Davis and/or his attorneys to inflate Davis's medical expenses, and they can address any legal issues related to proximate cause, indemnity, and contribution that are implicated by Lindsay-Koehler's liability theory. Thus, we conclude that our intervention at this time is inappropriate. Instead, after the factual and legal issues are developed in the trial court, we can better review them in the context of an appeal from the final judgment. Accordingly, we

ORDER the petition DENIED.

_____, C.J.
Maupin

_____, J.
Hardesty

_____, J.
Douglas

cc: Hon. James M. Bixler, District Judge
Horner Law Firm
John H. Cotton & Associates, Ltd.
Atkin Winner & Sherrod
Gary Logan
Eighth District Court Clerk