

IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD MCGRATH; PIZZA HUT OF AMERICA, INC., A FOREIGN CORPORATION DOING BUSINESS IN NEVADA; AND JOHN FITZPATRICK, Petitioners,  
vs.  
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE JESSIE ELIZABETH WALSH; AND THE HONORABLE ROB BARE, DISTRICT JUDGES,  
Respondents,  
and  
JEREMY DAMERY,  
Real Party in Interest.

No. 61892

**FILED**

**MAR 18 2014**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

*ORDER GRANTING PETITION FOR WRIT OF MANDAMUS*

This original petition for a writ of mandamus challenges district court orders imposing monetary sanctions on petitioner John Fitzpatrick.

The orders at issue in this petition arose in the context of the trial of real party in interest's tort claims brought against petitioners Todd McGrath and Pizza Hut of America, Inc. John Fitzpatrick, counsel for McGrath and Pizza Hut, was orally sanctioned \$2,500 and \$5,000 by the district court judge for alleged violations of district court orders on motions in limine. Both sanctions were ordered to be paid to the Nevada Law Foundation.

Real party in interest made an oral motion for sanctions against Fitzpatrick at the end of a day of testimony, which Fitzpatrick

orally opposed without having been given notice. The district court granted the oral motion first thing the next morning, without allowing further argument, and sanctioned Fitzpatrick in the amount of \$2,500. The following day, counsel for real party in interest again made an oral motion for sanctions against Fitzpatrick for conduct that occurred during trial on the preceding day. The district court granted the motion, denying Fitzpatrick's objection and request for a hearing, and sanctioning Fitzpatrick an additional \$5,000.

The trial ultimately ended in mistrial and the district court judge recused herself before entering any written order imposing the sanctions. Fitzpatrick paid the sanctions, and obtained a written order from the judge to whom the case was reassigned. The order stated that the sanctions had been imposed for the reasons stated on the record by the previous judge.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether a petition for mandamus relief will be considered is purely discretionary with this court. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Writ relief is generally only available when a petitioner does not have a plain, speedy, and adequate legal remedy. NRS 34.170; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558.

Because Fitzpatrick was not a party to the litigation below, he cannot appeal the district court's order and has no other remedy available to challenge the sanctions order. *Emerson v. Eighth Judicial Dist. Court*,

127 Nev. \_\_\_, \_\_\_, 263 P.3d 224, 227 (2011); *Office of the Washoe Cnty. Dist. Attorney v. Second Judicial Dist. Court*, 116 Nev. 629, 635, 5 P.3d 562,566 (2000).

Having reviewed the petition, answer, and reply and the parties' appendices, we conclude that the district court acted arbitrarily and capriciously in imposing sanctions against Fitzpatrick. The requirement that both "notice and a reasonable opportunity to respond" be afforded before a district court can impose sanctions applies whether the sanctions are initiated by written motion or on the court's initiative. NRCP 11(c); see *Lioce v. Cohen*, 124 Nev. 1, 26, 174 P.3d 970, 986 (2008) (concluding that a trial court may impose sanctions for professional misconduct at trial on a party's motion or sua sponte "after providing the offending party with notice and an opportunity to respond"). Here, no written motion was served on petitioners as required by NRCP 11(c)(1)(A), and thus, we review the district court's award of sanctions under NRCP 11(c)(1)(B), which allows for the imposition of sanctions on the district court's own initiative. Before a district court can impose sanctions on its own initiative, however, it must "enter an order describing the specific [sanctionable] conduct" and direct the attorney or party to show cause why the conduct is not sanctionable. NRCP 11(c)(1)(B). The record here shows that the district court did not enter an order describing Fitzpatrick's specific sanctionable conduct, and Fitzpatrick was provided no notice that real party in interest would be bringing oral motions for sanctions or that the district court would be seeking sanctions on its own initiative. The district court also did not enter any orders describing Fitzpatrick's specific sanctionable conduct, as required, and Fitzpatrick was not provided with a reasonable opportunity to show cause why his conduct was not

sanctionable.. Accordingly, the district court failed to satisfy the requirements of NRCP 11(c)(1)(B), and we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate the orders sanctioning petitioner John Fitzpatrick.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Cherry, J.  
Cherry

cc: Hon. Rob Bare, District Judge  
Hon. Jessie Elizabeth Walsh, District Judge  
Fennemore Craig Jones Vargas/Las Vegas  
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas  
Hutchison & Steffen, LLC  
Prince & Keating, LLP  
Schuetze & McGaha, P.C.  
Eglet Wall Christiansen  
Eighth District Court Clerk