

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALIGN CHIROPRACTIC, A NEVADA
CORPORATION,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF

CLARK; AND THE HONORABLE
NANCY L. ALLF, DISTRICT JUDGE,

Respondents,

and

DOUGLAS B. ROSS, M.D., AN
INDIVIDUAL,

Real Party in Interest.

No. 72955

FILED

MAY 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER DENYING PETITION FOR
WRIT OF MANDAMUS OR PROHIBITION*

This original petition for a writ of mandamus or, alternatively, prohibition, challenges district court orders imposing sanctions on a non-party in a contract, tort, and fraud action and denying reconsideration of the sanctions decision.

After commencing the underlying action, real party in interest Douglas B. Ross, M.D., served a subpoena duces tecum on petitioner Align Chiropractic, which was not a party below. When Align refused to produce certain documents requested in the subpoena, Ross moved to compel it to comply and for \$2,550 in attorney fees under NRCP 37(a)(4)(A) for having to bring the motion. Align opposed that motion. The district court ordered Align to comply, but deferred ruling on Ross's attorney fees request until it could assess whether Align obeyed its order. Eventually, following several status check hearings and additional requests from Ross for attorney fees and costs, the district court indicated that it would address the issue of

attorney fees and costs at a subsequent status check hearing if Ross filed an affidavit and documentation to support his request and Align had an opportunity to oppose it.

Six days before the status check hearing, Ross filed an affidavit and exhibits indicating it was now seeking \$54,050 in attorney fees and costs based primarily on Align's purported failure to fully obey the subpoena after being ordered to do so. Align did not file a written opposition to that request or otherwise move for an extension of time to file such an opposition.

During the subsequent status check hearing, the district court specifically asked Align whether it had received Ross's affidavit and had an opportunity to review it, and Align responded in the affirmative without challenging the timeliness of Ross's affidavit, requesting an extension of time to address the affidavit, or otherwise objecting to the court considering Ross's request for attorney fees and costs at that time. The district court then orally granted Ross's request, again without any objection from Align with regard to the court's authority to do so, its findings in support of the decision, or the reasonableness of Ross's requested fees. Thereafter, the district court entered a written order granting Ross's request in which it found that Align failed to produce certain materials, that it violated the subpoena and order compelling it to comply therewith, that it deliberately frustrated Ross's discovery efforts, and that Ross's expenses were reasonable and necessarily incurred.

Align later moved for reconsideration, arguing that the district court was required to address its purported noncompliance as a contempt sanction under NRCP 45(e) or NRS 22.030(2), and that the court violated its right to due process by imposing sanctions without full briefing and an evidentiary hearing. The district court denied that motion, however, finding that it could rely on its inherent power to sanction Align. Moreover,

the court found that because Align opposed Ross's original motion to compel and participated in the subsequent status check hearings, it received sufficient notice and opportunity to be heard as to sanctions. This petition followed.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the district court's jurisdiction. See NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Whether to entertain a petition for extraordinary relief is within this court's discretion and we will not do so when the petitioner has a plain, speedy, and adequate remedy at law. See NRS 34.170; NRS 34.330; *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736-37 (2007). Petitioner bears the burden of demonstrating that extraordinary relief is warranted. See *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Here, Align was not a party below and, as a result, it lacks standing to appeal. See *Watson Rounds, P.C. v. Eighth Judicial Dist. Court*, 131 Nev. ___, ___, 358 P.3d 228, 231 (2015) (holding that a sanctioned law firm lacked standing to appeal because it was not a party below). Because Align therefore lacks a plain, speedy, and adequate remedy to challenge the sanctions order, we conclude that a writ proceeding is appropriate, *see id.* (recognizing that non-parties may seek appellate review of sanctions orders through extraordinary writs), and exercise our discretion to entertain this petition. *D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737.

In its petition, Align challenges the district court's exercise of its inherent authority, asserting that the court could only sanction it under NRCP 45(e), which authorizes the district court to sanction a nonparty for failing to comply with a subpoena, or NRS 22.030(2), which applies to contempt committed outside the presence of the district court. Nevada's appellate courts have explained, however, that when the district court's exercise of inherent authority is part of its "day-to-day functioning or regular management of its internal affairs," the court may rely on that authority notwithstanding an applicable rule of civil procedure. *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 363-64, 302 P.3d 1118, 1129 (2013); see *Hunter v. Gang*, 132 Nev. ___, ___, 377 P.3d 448, 454-55 (Ct. App. 2016) (concluding that the district court may dismiss a case for want of prosecution based on its inherent authority or NRCP 41). And because the district court here was enforcing discovery procedures and its order granting the motion to compel, which is part of its day-to-day functioning—the administration of justice—it could properly exercise its inherent authority to sanction Align. See *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007) (explaining that a district "court has inherent power to protect the dignity and decency of its proceedings and to enforce its decrees, and thus it may issue contempt orders and sanction or dismiss an action for litigation abuses").

Nevertheless, Align further contends that it was not adequately protected as a nonparty to the underlying proceeding and that its due process rights were violated insofar as the district court did not follow the procedures for imposing sanctions under NRCP 45(e) and NRS 22.030(2) and because it did not receive adequate notice of Ross's request for \$54,050 in attorney fees. To the extent this argument is grounded in Align's belief that it could not be sanctioned based on the court's inherent authority, any

such assertion fails for the reasons set forth above. And to the extent Align takes issue with the specific procedures used below or the notice it received, those assertions are unavailing.

In particular, Align had notice that the district court was going to consider Ross's request for attorney fees and costs at the status check hearing from both the prior hearing and Ross's supporting affidavit and documentation. And while Align therefore had an opportunity to challenge Ross's request for attorney fees and costs, or at least to seek an extension of time to do so, it wholly failed to present any challenges or objections to that request. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (recognizing that procedural due process requires meaningful notice and an opportunity to be heard). Indeed, Align did not file an opposition and, at the status check hearing, Align did not argue that it had insufficient time to respond to Ross's supporting affidavit and documentation or otherwise seek an extension of time to oppose his request for fees and costs. And when the district court ruled on the merits of Ross's request, Align did not present *any* objections¹ to the imposition of sanctions, much less argue that it was entitled to additional procedural protections or otherwise present any argument with regard to NRCP 45(e) or NRS 22.030(2). Instead, Align improperly waited to present these arguments until it moved for reconsideration of the district court's order granting that request. *See*


¹We note that, at the status check hearing, Align did assert that Ross orally raised issues with regard to its compliance with the subpoena that were not addressed in his affidavit. But consistent with its approach at this hearing, Align did not object to the district court considering those issues along with Ross's affidavit, although Align did opt to present argument with regard to the merit of these specific points while simultaneously failing to object to or otherwise address the issues and requests raised in Ross's affidavit.

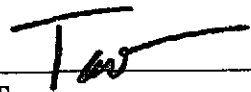
EDCR 2.20(e) (providing that a party's failure to file a written opposition to a motion may be construed as an admission that the motion is meritorious and a consent to granting the relief requested therein); *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (providing that reconsideration is appropriate “[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached”). Thus, because Align had notice and an opportunity to object to Ross’s request or seek an extension of time to do so, yet failed to take any steps to protect and preserve its rights, we conclude that its due process argument is unavailing. *See Callie*, 123 Nev. at 183, 160 P.3d at 879.


Although Align further challenges the district court’s reliance on its inherent authority by arguing that the district court could only impose sanctions based on a finding of bad faith or willful noncompliance, Nevada law imposes no such requirement for non-case concluding sanctions such as the imposition of attorney fees and costs. *Compare Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92-93, 787 P.2d 777, 779-80 (1990) (explaining what findings the district court is required to make when imposing case concluding sanctions), *with Watson Rounds*, 131 Nev. at ___, 358 P.3d at 233 (providing that a district court’s order imposing attorney fees as a sanction must be supported by “sufficient reasoning and findings”). And while Align otherwise challenges the sufficiency of the findings in the district court’s sanctions order, its challenge fails as that order, along with the transcripts from the various status check hearings, fully support the court’s decision in this matter. *See Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) (explaining that “even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied”).

Given the foregoing, we conclude that Align failed to demonstrate that extraordinary writ relief is warranted. *See Pan*, 120 Nev. at 228, 88 P.3d at 844. Accordingly, we deny the petition. *See NRAP 21(b)(1); D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737.

It is so ORDERED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Nancy L. Allf, District Judge
Howard & Howard Attorneys PLLC
Law Office of Karen H. Ross
Levine Garfinkel Eckersley & Angioni
Eighth District Court Clerk

²Having reviewed Align's remaining arguments, we discern no basis for relief. And in light of this order, we vacate the temporary stay imposed on the underlying proceeding and deny as moot Align's stay motion.