

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEREMY PAGE,

Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF
WASHOE; AND THE HONORABLE
KATHLEEN M. DRAKULICH,
DISTRICT JUDGE,

Respondents,

and

DEBRA L. HARRIS,

Real Party in Interest.

No. 83160-COA

FILED

SEP 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order requiring disclosure of financial records and information in discovery.

Real party in interest Debra L. Harris filed a complaint against multiple defendants, including petitioner Jeremy Page, asserting claims for violation of NRS 113.130, fraud, and negligent misrepresentation in connection with an alleged failure to disclose defects in a single-family residence prior to selling it. In relevant part, Harris—who now owns the subject property—alleged that Page knowingly concealed defects in the home's foundation when facilitating its sale from his company (the LLC) to two of Harris's predecessors (the Bermeosolos) and that this concealment ultimately resulted in Harris purchasing the property without knowledge of the defects, which she must now repair. The complaint included a request for punitive damages, and Harris ultimately sought financial records and

information from Page—the only remaining defendant—in connection with that request in discovery.

Page refused to produce the requested material and filed a motion for a protective order, which the discovery commissioner recommended granting in part and denying in part. The commissioner rejected Page's arguments against disclosure to the extent they challenged the legal merits of Harris's claims, noting that such analysis was inappropriate in the context of a discovery dispute and that Page could file a motion for summary judgment if he wished to challenge the claims on their merits. The commissioner further concluded that Harris had demonstrated a factual basis for her request for punitive damages such that discovery on Page's financial condition should be permitted, but that such discovery should be limited to a narrower range of topics and documents than that covered by Harris's discovery requests. Page objected to the discovery commissioner's recommendation and requested that the district court grant his motion for a protective order in its entirety. The district court issued an order overruling Page's objection and adopting the discovery commissioner's recommendation, and this petition followed.

In his petition, Page argues that the district court improperly shifted the burden to him to demonstrate that Harris's request for punitive damages lacked a factual basis when it declined to consider his arguments concerning the legal merits of Harris's claims and concluded that a motion for summary judgment would be the appropriate vehicle for such a challenge. Page also challenges the merits of Harris's claims in arguing that he owed her no duty of disclosure because she purchased the property long after the LLC sold it to the Bermeosolos and she had no personal dealings with Page. Finally, Page argues that even if Harris has actionable

claims, the district court incorrectly concluded that Harris had shown a factual basis for punitive damages because—according to Page—it relied solely on Harris’s allegations of fraud in her complaint.

“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.” *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (internal quotation marks omitted). Because a petition for a writ of mandamus is an appropriate vehicle to challenge a district court order requiring disclosure of financial records and information in discovery in connection with a request for punitive damages, see *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 515, 519-21, 874 P.2d 762, 763, 765-66 (1994), we consider Page’s petition on its merits. See *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (noting that the appellate courts have “complete discretion to determine whether to consider [writ petitions]”).

“[A] defendant’s financial condition is a proper subject of discovery on th[e] issue [of punitive damages].” *Hetter*, 110 Nev. at 519, 874 P.2d at 765. But our supreme court acknowledged in *Hetter* that such discovery should “not be had for the mere asking,” and it observed that “[c]laims for punitive damages can be asserted with ease and can result in abuse and harassment if their assertion alone entitles plaintiff to financial discovery.” *Id.* at 520, 874 P.2d at 766. Accordingly, the court held that “before tax returns or financial records are discoverable on the issue of punitive damages, the plaintiff must demonstrate some factual basis for its punitive damage claim.” *Id.* And although a plaintiff must ultimately prove by clear and convincing evidence that a defendant engaged in “oppression,

fraud or malice” to obtain punitive damages, NRS 42.005(1), our supreme court has indicated that a plaintiff may demonstrate a factual basis for such damages sufficient to warrant discovery under *Hetter* if she merely presents some evidence in support. *See Cain v. Price*, 134 Nev. 193, 198-99, 415 P.3d 25, 30-31 (2018) (holding that although the plaintiffs’ proffered evidence might not have satisfied the clear-and-convincing standard, it was at least some evidence of fraud sufficient to warrant discovery on the issue of the defendant’s financial condition).

Because it is the plaintiff’s burden to demonstrate a factual basis for punitive damages, *Hetter*, 110 Nev. at 520, 874 P.2d at 766, Page contends that the district court impermissibly shifted that burden when it refused to entertain his arguments attacking the legal merits of Harris’s claims and suggested that he instead file a motion for summary judgment to make such a challenge. If the district court had ended its analysis there, we might agree with Page, but the court—by adopting the discovery commissioner’s recommendation in its entirety—proceeded to correctly hold Harris to her burden by evaluating certain pieces of evidence she presented in support of alleged fraud and concluding that she had indeed presented some factual basis for her request for punitive damages. *See Cain*, 134 Nev. at 198-99, 415 P.3d at 30-31; *Hetter*, 110 Nev. at 520, 874 P.2d at 766.

Moreover, the district court correctly declined to consider Page’s merits-based arguments—and we likewise decline to do so in resolving this petition—as consideration of the legal sufficiency of a party’s claims is inappropriate in the context of a discovery dispute. *See Chubb Integrated Sys. Ltd. v. Nat’l Bank of Wash.*, 103 F.R.D. 52, 59 (D.D.C. 1984) (“In ruling on questions of discovery, typically, courts do not determine the legal sufficiency of claims and defenses.”); *Exec. Mgmt., Ltd. v. Ticor Title Ins.*

Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (noting that federal cases applying the Federal Rules of Civil Procedure are strong persuasive authority); Scott A. Moss, *Litigation Discovery Cannot be Optimal but Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L.J. 889, 916-17, 917 n.136 (2009) (compiling federal cases in support of the notion that “[c]ourts rarely say anything about case merits in deciding discovery disputes” and that, when they do, “it almost always is to disclaim any consideration of the merits”). Page has therefore failed to demonstrate that relief is warranted on this point.

Turning to the district court’s evaluation of Harris’s evidence, Page contends that none of that evidence demonstrated that he engaged in any fraud; rather, he contends, the only basis the district court identified for fraud was Harris’s allegations of the same in her complaint, which is insufficient to meet her burden. As noted above, if Page were correct about the scope of the district court’s decision on this point, we might agree, but Page largely ignores the extent to which the discovery commissioner—and by extension, the district court—specifically relied on certain pieces of evidence that could at least support an inference that Page knew of a defect in the residence and then intentionally made a false representation concerning the defect to the Bermeosolos in an effort to induce them to purchase the property.¹ See NRS 42.001(2) (defining “[f]raud” as used in

¹We acknowledge that portions of both the discovery commissioner’s recommendation and the district court’s order adopting it seemed to imply that a defendant may never rely on a lack of evidentiary support for a plaintiff’s claims in opposing financial discovery and may only make such a challenge in the context of something like a motion for summary judgment. Insofar as these were misstatements of the law as set forth in *Hetter*, 110

NRS Chapter 42 as “an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person”).

Contrary to Page’s assertions, the district court relied upon multiple pieces of evidence that it believed gave rise to at least an inference of fraud when considered together. Specifically, it identified a listing of the property from 2010—when the predecessor to Page’s LLC owned it—disclosing that the home had suffered flood damage in 2009 and would need “some rehab work,” and the court concluded that the listing supported Harris’s allegation that, when the LLC purchased the property, Page knew of the water damage and of the instability in the soil underneath the home caused by infiltration of excess moisture. The district court also identified a building permit obtained while the LLC owned the property to remove and replace drywall therein, and it concluded that the permit supported Harris’s allegation that Page intended to perform superficial repairs and then sell the property without fully disclosing its defects.

On this point, the district court further identified an engineer’s report procured by Page and provided to the Bermeosolos before they purchased the property. The report found that there was no evidence of any

Nev. at 520, 874 P.2d at 766, and *Cain*, 134 Nev. at 198-99, 415 P.3d at 30-31, as a defendant may rely on such a lack of evidentiary support to the extent it constitutes a lack of evidence of oppression, fraud, or malice as set forth in NRS 42.005(1), any error on this point was harmless in light of the district court’s adoption of the extensive analysis in the discovery commissioner’s recommendation, which acknowledged the importance of Harris presenting evidence in support of her allegations of fraud. *Cf. Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (“When an error is harmless, reversal is not warranted.”).

instability in the soil or the home's foundation in part because there were no cracks in the drywall to indicate such instability, and the district court concluded that the report, which did not mention the previous repairs to the drywall, supported the allegation that Page had concealed the repairs from the engineer. And finally, the district court identified the seller's real property disclosure form Page's LLC provided to the Bermeosolos, which disclosed that there were "[p]revious or current moisture conditions and/or water damage," but denied knowledge of various other conditions, including "[a]ny foundation sliding, settlement, movement, upheaval, or earth stability problems that have occurred on the property."

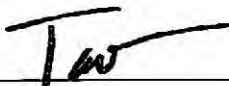
With regard to the foregoing, Page argues only that his disclosure of the engineer's report and the existence of water damage demonstrated transparency in the sale of the property to the Bermeosolos, not fraudulent concealment. But Page ignores the extent to which the district court specifically relied on the building permit for drywall repairs and the omission of any mention of those repairs in the engineer's report in support of an inference that Page was concealing possible instability in the foundation (i.e., that if the engineer had been fully informed about the condition of the property, he would have concluded that the home's foundation was unstable, and that information would have been disclosed to the Bermeosolos).² In light of Page's failure to meaningfully challenge

²Page points to the fact that the Bermeosolos obtained their own inspection of the property that revealed issues that were not included in the engineer's report, and also that, on the basis of that inspection and the LLC's disclosures, the Bermeosolos negotiated a lower sale price. Although these facts might be relevant to the ultimate resolution of Harris's claims,

the district court's analysis on this point, and because we agree with the district court that the proffered evidence gave rise to at least an inference of fraud as defined in NRS 42.001(2), Page has failed to meet his burden to demonstrate that writ relief is warranted, *see Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004), and we

ORDER the petition DENIED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge
Wallace & Millsap LLC
Law Office of James Shields Beasley
Washoe District Court Clerk

they do not undermine the extent to which Harris's proffered evidence gave rise to an inference of fraud of the sort described in NRS 42.001(2).

³In resolving this petition in the manner set forth herein, we stress—as did the discovery commissioner and the district court below—that nothing in our disposition shall be construed as making any factual finding or legal conclusion in support of Harris's claims on their merits; instead, we simply decline to disturb the district court's conclusion that Harris met her relatively low burden of setting forth "some factual basis" for her request for punitive damages to warrant discovery concerning Page's financial condition. *Hetter*, 110 Nev. at 520, 874 P.2d at 766.