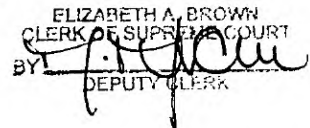
IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS; AND MICHELE FIORE,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARIA A. GALL, DISTRICT JUDGE,
Respondents,
and
VICTORIA SEAMAN,
Real Party in Interest.

No. 86623

FILED

JUN 25 2024



ORDER DENYING PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

This is an original petition for a writ of mandamus, or in the alternative, prohibition challenging a district court order denying two motions to dismiss.

Real party in interest Las Vegas City Councilmember Victoria Seaman alleges that then-Las Vegas City Councilmember Michelle Fiore attacked her at City Hall. In her complaint, Seaman alleges that, before and after the incident, she asked the City for accommodations, to enforce its policies, and for an investigation to address the hostile work environment. When the City did not address Seaman's request, she sued both the City and Fiore for damages and other relief on several theories. The City moved to dismiss for failure to state a claim under NRCP 12(b)(5). The district court dismissed one claim, but it allowed the other claims to proceed because the complaint sufficiently alleged facts to survive the motion to dismiss. The City then filed a motion to dismiss under NRCP

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12(b)(1), asserting a lack of subject matter jurisdiction. The district court denied this motion as well, finding that the complaint alleged facts that, if true, were sufficient to establish jurisdiction. The City now petitions this court for a writ of mandamus or, alternatively, prohibition to order the district court to dismiss the remaining claims against it, arguing that (1) the City cannot conspire with a City Councilmember, (2) the City is protected by discretionary immunity, and (3) the district court does not have jurisdiction over the claims against the City because they are barred by the Nevada Industrial Insurance Act (NIIA).

This court has discretion whether to entertain a petition for extraordinary writ relief. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Writ relief may issue to compel a lower court to act in accordance with the law or to correct a "'clear and indisputable' legal error." *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). A writ of prohibition may issue to halt a district court from exceeding its jurisdiction. NRS 34.320; *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). It is the petitioner's burden to show a clear legal right to the requested course of action, and where the district court has discretion on the issue, the petitioner must show a manifest abuse of discretion. *Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 680, 476 P.3d 1194, 1196 (2020). Mandamus relief is ordinarily available only where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. An appeal of a final judgment is usually an adequate remedy, and "we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss."

Int'l Game Tech., Inc. v. Second Jud. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

The issues the City raises are fact-bound and represent matters to which the district court may return as the case progresses. Specifically, the district court ruled that (1) Seaman's civil conspiracy claim survived a motion to dismiss because she sufficiently alleged illegal activity outside the scope of employment to take the matter outside the intracorporate conspiracy doctrine; (2) Seaman's negligence-based claims survived dismissal because she sufficiently alleged activities outside the scope of NRS 41.032's discretionary immunity shield; and (3) the second motion to dismiss for lack of jurisdiction was in fact an untimely motion to dismiss for failure to state a claim and regardless Seaman sufficiently alleged injuries outside the ambit of the NIIA.

Under the intracorporate conspiracy doctrine, "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities." *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983); *see also* 15A C.J.S. Conspiracy § 11 (2024) (addressing the intracorporate conspiracy doctrine). Application of this doctrine depends on whether the alleged co-conspirators are employees or agents of the City who were acting in their official capacity when they committed the torts alleged—questions of fact that the parties dispute. *See El Jen Med. Hosp., Inc. v. Tyler*, 139 Nev. Adv. Op. 36, 535 P.3d 660, 664 (2023) (stating that the existence of an agency relationship is a question of fact) (citing *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 549, 331 P.3d 850, 856 (2014); *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 659, 584 P.2d 689, 692 (1978) ("Whether an employee was engaged in the scope of employment when the tortious act

occurred raises an issue of fact which is within the province of a jury."). In ruling on an NRCP 12(b)(5) motion to dismiss, the district court must accept the well-pleaded facts as true. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). It thus was not clear error or a manifest abuse of discretion for the district court to take the allegations as true and defer further factual analysis until after the parties developed the record.

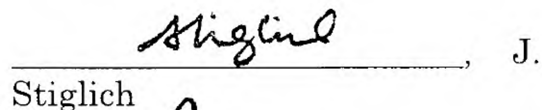
Regarding discretionary immunity, the district court applied the federal test from *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988) and *United States v. Gaubert*, 499 U.S. 315, 322 (1991), adopted by Nevada in *Martinez v. Maruszczak*, 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007). Applying the *Berkovitz-Gaubert* test requires assessment of the underlying questions of fact. *Id.* at 446, 168 P.3d at 729; *see also Clark Cnty. Sch. Dist. v. Payo*, 133 Nev. 626, 632, 403 P.3d 1270, 1276 (2017) ("determining whether discretionary-function immunity applies involves (1) an assessment of the facts . . . ."). Given that the district court applied the correct rule and that the *Berkovitz–Gaubert* analysis is a factual one on its face, it was not clear error or a manifest abuse of discretion for the district court to defer the factual analysis until after the parties further developed the record.

To the jurisdictional issue, the district court concluded that the second motion to dismiss was in fact an untimely motion to dismiss for failure to state a claim and that Seaman sufficiently alleged injuries outside the NIIA's ambit. Although NRCP 12(g)(2) prohibits serial NRCP 12(b)(5) motions to dismiss, a motion to dismiss for want of subject matter jurisdiction under NRCP 12(b)(2) is exempt from the NRCP 12(g)(2) limitation. *See* NRCP 12(h)(3). Even so, whether Seaman's injuries arose

out of her service on the City Council and are within the NIIA's ambit is a fact in dispute, and the factual question must be settled before the jurisdictional one. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 733-35, 121 P.3d 1026, 1032-33 (2005) (assessing whether a party's injuries arose out of the course of her employment, as an issue of fact, prior to determining whether they were within the ambit of the NIIA's coverage). At the motion to dismiss stage, it was not clear error or a manifest abuse of discretion for the district court to defer the factual analysis until after the parties further developed the record. We note that subject matter jurisdiction may be challenged at any time, so the City may raise this issue again after the record is better settled, *see Landreth v. Malik*, 127 Nev. 175, 179-180, 251 P.3d 163, 166 (2011), and as an affirmative defense in its answer, *see Flint v. Franktown Meadows, Inc.*, No. 74728, 2019 WL 4740531, at *2 (Nev., Sept. 26, 2019) (Order Affirming in Part, Reversing in Part, and Remanding). Finally, the City argues that interlocutory relief is necessary to save it from "invest[ing] tens of thousands of dollars in defending itself unnecessarily." This is insufficient to show that appeal of a final judgment is not a plain, speedy, and adequate remedy in the ordinary course of law.

For these reasons, we conclude that writ relief is inappropriate in this case at this time. Accordingly, we

ORDER the petition DENIED.



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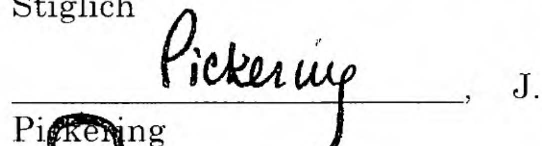

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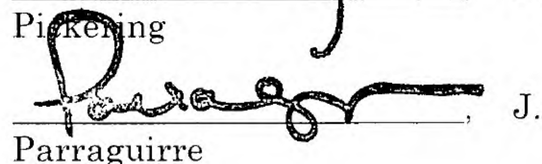

_______________________, J.
Parraguirre

cc: Hon. Maria A. Gall, District Judge
Angulo Law Group, LLC
Chattah Law Group
Christian Morris Trial Attorneys
Eighth District Court Clerk