IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURICH AMERICAN INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; INTERSTATE FIRE & CASUALTY COMPANY; ARCH SPECIALTY INSURANCE COMPANY; NATIONAL FIRE & MARINE INSURANCE COMPANY; ACE AMERICAN INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BOWPN1900216; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BOWPN1900217; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BOWPN1900376; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BOWPN1900381; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BOWPN1900411; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. 19CVSSPNP301531; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. B62030BAA; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. PD-10319-05; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BOWPN1900218; CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. BNPD19AA507A; CONTINENTAL

No. 88362

FILED

SEP 12 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

24-33485

CASUALTY COMPANY; EVEREST INDEMNITY INSURANCE COMPANY; LIBERTY MUTUAL FIRE INSURANCE COMPANY; GREAT LAKES INSURANCE SE; AND TOKIO MARINE AMERICA INSURANCE COMPANY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE,
Respondents,
and
HILTON WORLDWIDE HOLDINGS, INC.,
Real Party in Interest.

ORDER DENYING PETITION

This original petition for writ of mandamus challenges the district court's denial of petitioners' motion to dismiss under the doctrine of *forum non conveniens*. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Real Party in Interest Hilton sued petitioners (collectively "Insurers") in Nevada for declaratory judgment, breach of contract, unfair claims practices, and breach of the covenant of good faith and fair dealing related to denied coverage claims for business interruption and other alleged losses associated with the COVID-19 pandemic. Insurers moved to dismiss under the doctrine of *forum non conveniens*, arguing the case should proceed in Virginia where Hilton is headquartered and where much of the policy negotiations took place. The district court denied the motion to dismiss, finding that Hilton's choice of forum was entitled to deference

because Hilton and the claims at issue have a strong connection to Nevada, and that private and public interest factors weigh in favor of Hilton's chosen forum. Insurers appealed this order, which we dismissed for lack of jurisdiction. *Zurich Am. Ins. Co. v. Hilton Worldwide Holdings, Inc.*, No. 86689, 2024 Nev. Unpub. LEXIS 9 (Jan. 9, 2024).

Insurers now seek relief through a petition for a writ of mandamus. They argue that the district court reversibly erred when it (1) accorded deference to Hilton's choice of forum based on Hilton's connections to Nevada rather than the case's and claims' connections to Nevada; and (2) considered nontraditional private and public interest factors. Hilton raises the defense of laches, but because Hilton does not argue or otherwise establish that the delay has resulted in changed circumstances prejudicing Hilton, we conclude that Hilton does not carry its burden to show laches bars the petition. *See State of Nev. v. Eighth Jud. Dist. Ct.(Hedland)*, 116 Nev. 127, 134-35, 994 P.2d 692, 697 (2000). We therefore consider whether traditional or advisory mandamus may be available here.

The decision to entertain a petition for a writ of mandamus lies within our sole discretion. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851-52 (1991). Writ relief is an extraordinary remedy, available 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)). It is 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). When traditional mandamus is

unavailable, advisory mandamus may be available if exceptional circumstances warrant clarifying a statewide "substantial issue of public policy or precedential value." *Id.* at 684, 476 P.3d at 1198-99 (quoting *Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455-56, 652 P.2d 1177, 1178 (1982)); *Archon*, 133 Nev. at 825, 407 P.3d at 710. Fact-bound issues will not qualify for advisory mandamus where sufficient evidence supports the district court's finding. *See id.* at 684, 476 P.3d at 1199.

The doctrine of *forum non conveniens* permits a court to decline its exercise of jurisdiction over a case if another forum is more convenient for parties and better serves justice. 21 C.J.S. Courts § 82. A district court should dismiss a case for *forum non conveniens* "only in exceptional circumstances when the factors weigh strongly in favor of another forum." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 301, 350 P.3d 392, 396 (2015), (quoting *Eaton v. Second Jud. Dist. Court*, 96 Nev. 773, 774-75, 616 P.2d 400, 401 (1980), *overruled on other grounds by Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004)). A district court considering a motion to dismiss for *forum non conveniens* must first "determine the level of deference owed to the plaintiff's forum choice." *Id.* at 300-01, 350 P.3d at 396 (citing *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir.2003)). A plaintiff's choice is generally entitled to considerable deference, *id.* at 301, 350 P.3d at 396, but "[a] sister-state-resident plaintiff's[ ] choice of a Nevada forum is entitled to less deference unless she can show the case has bona fide connections to this state." *Pepper v. C.R. England*, 139 Nev., Adv. Op. 11, 528 P.3d 587, 591 (2023). Broadly speaking, bona fide connections are those that show a valid reason for the forum choice, such as one related to convenience or expense as opposed to one motivated by forum-shopping. *See, e.g., DiRienzo v. Philip*

Servs. Corp., 294 F.3d 21, 28 (2d Cir. 2002); 14D Charles Alan Wright et al., Fed. Prac. & Proc.: Juris. § 3828.2 (4th ed. 2014 and Supp. 2024). Next, the court "must determine 'whether an adequate alternative forum exists,'" and if so, "the court must then weigh public and private interest factors to determine whether dismissal is warranted." *Placer Dome*, 131 Nev. at 301, 350 P.3d at 396 (quoting *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir.2001)). Nevada's analysis of the public and private interest factors aligns with the conventional *forum non conveniens* analysis employed by federal courts first established in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) *superseded by statute on other grounds. Id.*; *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 235 (1981) (relying on the *Gulf Oil* test); *Pollux Holding Ltd.*, 329 F.3d at 70 (same); Wright, et al., *supra*, at § 3828 (describing the *Gulf Oil* factors). Analysis of the private and public interest factors is a fact-intensive inquiry, and dependent on the circumstances of each case. Wright et al., *supra*, at § 3828.4.

This issue is not appropriate for traditional mandamus relief

First, though Insurers argue otherwise, Hilton's motion to dismiss the earlier appeal did not concede that mandamus relief is warranted. It argued only that a petition for mandamus, not appeal, was the appropriate procedural mechanism available to Insurers to challenge the denial of their motion to dismiss on an interlocutory basis. Insurers also argue that *forum non conveniens* should be treated like arbitration in that the issue could be lost if interlocutory review is not granted, but the case they rely on does not support that theory or draw any connection to *forum non conveniens*. *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 747 (2023) (granting stay while appeal of denial of motion to compel arbitration is pending). In any event, arbitration and *forum non conveniens* are clearly dissimilar because, unlike arbitration, *forum non conveniens* is not required

by statute or contract right. *See* 21 C.J.S. Courts § 82. To that point, unlike with *forum non conveniens*, Nevada statutes provide for interlocutory review of orders denying motions to compel arbitration and granting motions to stay arbitration. NRS 38.247(1)(a)-(b).

Insurers' primary argument for traditional mandamus rests largely on the premise that the district court improperly deferred to Hilton's choice of venue based on Hilton's participation in Nevada's hospitality industry, rather than correctly evaluating whether the case itself has bona fide connections to Nevada. This theory is based on the recent *Pepper* decision, which stated that a plaintiff's "choice of a Nevada forum is entitled to less deference unless she can show the case has bona fide connections to this state." 139 Nev., Adv. Op. 11, 528 P.3d at 591. If the plaintiff must establish connections between the *case* and Nevada, then by implication this would exclude consideration of connections between the *plaintiff* and the forum—which other jurisdictions consider for deference determination. *See, e.g.*, *Pollux Holding Ltd.*, 329 F.3d at 71 ("the level of deference given to a plaintiff's choice of forum depends on the bona fide connection the plaintiff has with that forum") (citing *DiRienzo*, 294 F.3d at 28); Wright et. al., *supra*, § 3828.2 (discussing deference due "a plaintiff with a strong bona fide connection to the forum"). As Insurers point out, the district court noted Nevada's "strong interest in its hospitality industry" and Hilton's "millions of dollars here in this state," which connect Hilton to Nevada and may not create bona fide connections under *Pepper* standing alone.

The district court also found, however, that "the claims at issue likewise have a strong connection to this forum." Among the case's Nevada connections, the order described three large insured Nevada properties that suffered extraordinary losses during the pandemic. It also noted the unique

importance to the case of two of the Nevada properties, the Waldorf Astoria and the Elara. The order further considered other Nevada-based evidence in the case, including hotel management staff located in Nevada and evidence related specifically to the Waldorf Astoria property, which Hilton used as the "loss model" for its insurance claims. Even crediting Insurers' narrow reading of *Pepper*, the analysis in the record is sufficient to show the district court found bona fide connections between the case and Nevada, and it did not manifestly abuse its discretion or commit a clear and indisputable legal error in doing so.

Insurers also argue that the district court improperly considered unconventional public and private interest factors that should not have been given weight, including the forum's connection to the industry, the plaintiff's willingness to pay for their own witness's travel, and the convenience of remote audiovisual technology. Even assuming arguendo that the district court improperly weighed some unconventional public and private interest factors, it sufficiently considered appropriate factors as well. These public factors included the investment and presence of several insured properties in Nevada, the court's ability to apply the applicable law, the local jurors' ability to handle the issues, and the court's calendar. The district court also weighed the wide-ranging locations of the potential witnesses, making the difference in travel convenience in going to Nevada rather than Virginia negligible. The private factors included the lack of Insurer witnesses in Virginia, the willingness of the third-party witnesses to appear in Nevada, and that Nevada and Virginia have the same compulsory process to obtain testimony. Finally, the district court found that Insurers did not identify any witness who would be unable to testify in Nevada, and the nonparty witnesses are not located in Virginia

and would have to travel regardless of where trial is held if their testimony is to be presented in person. The district court applied the correct rule and considered correct factors, and it did not manifestly abuse its discretion by denying Insurers' motion to dismiss for *forum non conveniens*. In any event, Insurers cite no authority holding it is clear error or manifest abuse for the district court to consider additional facts. Insurers therefore do not raise an important question of law or describe manifest abuse of discretion or clear authority requiring dismissal sufficient to warrant traditional mandamus.

This issue is not appropriate for advisory mandamus relief

Insurers alternatively argue for advisory mandamus, contending that by applying an improper level of deference based only on Nevada's interest in Hilton's industry and favorably weighing Hilton's willingness to fly in witnesses, the district court opened a "floodgate" for foreign corporations to litigate in Nevada. Insurers point to a motion in another case before this court describing a similar claim and denial of a motion to dismiss for *forum non conveniens*. But the district court applied the correct test for *forum non conveniens*, and the weight given case-specific factors does not present exceptional circumstances or a substantial issue of public policy or precedential value. Furthermore, the other case cited by Insurers was brought by the same counsel, and a single firm advocating the same theory in two cases does not signal an issue of statewide importance. Finally, because *forum non conveniens* analysis is a fact-intensive inquiry dependent on the circumstances of the case, this issue is not appropriate for advisory mandamus so long as the district court applied the correct rule, which it did. *Walker*, 136 Nev. at 683-84, 476 P.3d at 1198-99. Insurers do not meet their burden to show a substantial issue of public policy or

precedential value that raises questions beyond the facts presented in their petition, and thus advisory mandamus relief is not warranted.

For these reasons, we conclude that writ relief is inappropriate. Accordingly, we

ORDER the petition DENIED.

Stiglich, J.

Pickering, J.

Parraguirre, J.

cc: Hon. Joanna Kishner, District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Clyde & Co US LLP/Las Vegas
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Duane Morris LLP/Las Vegas
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