IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF MESQUITE,

Petitioner,

vs.

THE EIGHT JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

DOUGLAS SMAELLIE,

Real Party in Interest

Case No.:_____

District Court
Case No: A-17-759770-C

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

REBECCA BRUCH, ESQ.
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NRAP 26.1 DISCLOSURE STATEMENT

Petitioner certifies that there are no persons or entities, as described in NRAP 26.1(a), who must be disclosed. There are no corporations or publicly-held companies which Petitioner must disclose. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Petitioner is represented by Rebecca Bruch, Esq. and Charity F. Felts, Esq., of the law firm of Erickson, Thorpe & Swainston, Ltd. Mr. Smaellie is represented by the Adam Levine, Esq., of the Law Office of Daniel Marks.

DATED: May 2, 2018

/s/ Charity F. Felts
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ROUTING STATEMENT

According to NRAP 17(a)(1), (a)(13), and (a)(14) this case is presumptively retained by the Supreme Court because it is a proceeding involving the Supreme Court's original jurisdiction. The issues presented in this writ petition do not fall into the exception outlined in NRAP 17(b)(8) because the issues do not involve challenges to pretrial discovery orders or orders resolving motions in limine.

DATED: May 2, 2018

/s/ Charity F. Felts
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PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Petitioner City of Mesquite (the "City"), respectfully petitions this Court for a writ of mandamus or prohibition to vacate the District Court's March 20, 2018 Order denying Defendant's Motion to Dismiss, wherein the District Court found that the statute of limitations applicable to the underlying case is six years pursuant to NRS 11.190(1)(b). V3 APP 286-287.

I. INTRODUCTION

This is the second time these parties and the set of facts forming the basis for Real Party in Interest Douglas Smaellie's ("Mr. Smaellie") lawsuit have come before this Court. Mr. Smaellie's first lawsuit and related complaint ("Complaint #1") was filed in the District Court of Clark County, Department 16, on February 19, 2014. V1 APP 018-019. In Complaint #1, Mr. Smaellie asserted one cause of action against the City of Mesquite for breach of the collective bargaining agreement ("CBA") when the City allegedly terminated Mr. Smaellie's employment without just cause. *Id.* That case concluded at the District Court level with a dismissal by the Honorable Timothy C. Williams. V1 APP 021-023. Dismissal was followed by an appeal to this Court, which resulted in an order affirming the dismissal, but vacating the dismissal as being one with prejudice. V1 APP 025-027.

In affirming the dismissal of Complaint #1, this Court found that Mr. Smaellie did not properly allege in Complaint #1 that he was a beneficiary of the CBA, nor did he allege that the Union breached its duty of fair representation, "which is required to state a hybrid action." V1 APP 025. A hybrid action is an action brought against the employer alleging breach of the collective bargaining agreement and against the union alleging breach of the duty of fair representation. Even if Mr. Smaellie was not required to join the Union as a party, he was required to bring the claim that the Union breached its duty. *Id.* This was the Court's decision in the prior appeal and thus amounts to the law of the case. V1 APP 025-027.

After his first unsuccessful lawsuit, Mr. Smaellie filed a new lawsuit ("Complaint #2), on August 10, 2017, again alleging that the City breached the CBA, but also alleging *for the first time* that the Union breached its duty of fair representation. V1 APP 001-004, 003. Complaint #2 was filed more than four years after the alleged adverse action by the Union which forms the basis for Mr. Smaellie's duty of fair representation claim. Because this is the first attempt ever by Mr. Smaellie to properly allege a duty of fair representation which is one of the necessary components of a hybrid action, his action is subject to a limitations period applicable to the duty of fair representation. A six-year statute of

limitations period for written contracts cannot apply to the type of action brought by Mr. Smaellie. To simply classify this as a traditional contract case ignores the prior order issued by this Court (V1 APP 025-027) and works against sound public policy by exposing employers and unions to liability for six years, far longer than the period of time authorized under federal labor law, state law, and well beyond that period of time adopted by other courts confronted with this same issue. Based on this Court's prior order and reliance on federal precedent on this issue, the limitations period applicable in this case has expired.

II. STATEMENT OF ISSUE

This petition presents the Court with an opportunity to decide an issue of first impression, with broad, statewide importance: the statute of limitations period applicable to a hybrid action consisting of claims against the employer for breach of the CBA and a breach of the duty of fair representation claim against the union. The answer to this issue necessarily impacts local government employers across the State of Nevada, their employees, and the unions who represent the workforce.

III. STATEMENT OF FACTS

A. The underlying lawsuit

The City is the sole defendant in a civil lawsuit arising out of the termination of Douglas Smaellie's employment. V1 APP 001-004. Mr. Smaellie, is the plaintiff

in the underlying action. *Id.* The underlying lawsuit, filed on August 10, 2017, alleges that the City terminated Mr. Smaellie's employment without just cause, in violation of the CBA. *Id.* at 002. Complaint #2 also alleges that the Union acted in an arbitrary and capricious manner and breached its duty of fair representation when it elected not to advance Mr. Smaellie's grievance to arbitration. *Id.* at 003. Complaint #2 is the first time Mr. Smaellie pleaded a duty of fair representation claim as part of a hybrid action. Complaint #1 contained a breach of contract action only. V1 APP 018-019.

In resolving the appeal of the Mr. Smaeillie's first lawsuit and Complaint #1, this Court's order specifically found that "Mr. Smaellie also did not allege that the Mesquite Police Officer's Association breached its duty of fair representation, which is required to state a hybrid action." V1 APP 025. Prior to the Court's April 17, 2017 order concerning Mr. Smaellie's first lawsuit, this Court issued an Order of Affirmance in *Clark County v. Tansey*, Case No. 69741 (unpublished opinion), which addressed a district court's jurisdiction to hear a hybrid action. V1 APP 029-033. In the *Tansey* Order, this Court followed federal labor law on the issue of hybrid actions, specifically, the U.S. Supreme Court decisions in *Vaca v. Sipes*, 386 U.S. 174 (1967) and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). *Id.* at 032. In the *Tansey* order, this Court noted that the two

claims that constitute a hybrid action are "inextricably interdependent" and an employee "must not only show that [his] discharge was contrary to the contract but must also carry the burden of demonstrating breach of the duty by the Union" even if the employee elects not to sue the Union directly. *Id.* Here, Mr. Smaellie's first lawsuit (Complaint #1) was limited to one claim for breach of the CBA. When Mr. Smaellie filed Complaint #2, he asserted the elements of a hybrid action, including the new fair representation claim, and specifically referred to *Vaca* as his authority to do so. V1 APP 003.

In the earlier appeal in this case the Court followed the federal approach concerning hybrid actions and noted that Mr. Smaellie's Complaint #1 did not include a duty of fair representation claim. V1 APP 025. For this reason, the City filed its Motion to Dismiss Complaint #2 because Mr. Smaellie's duty of fair representation claim, filed for the first time on August 10, 2017, was not timely under any limitations period applicable to hybrid actions. V1 APP 005-033. The District Court denied the City's Motion to Dismiss and disregarded this Court's prior Order issued April 17, 2017, in Case No. 69741. V3 APP 286-287. Petitioner submits that this was an abuse of discretion by the district court which leaves Petitioner without a plain, speedy, and adequate remedy in the ordinary course of law.

IV. ARGUMENT

A. Writ relief is an appropriate and necessary remedy in this case.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *Borger v. District Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004); NRS 34.160; *see also Lewis v. Smart*, 96 Nev. 846, 619 P.2d 1212 (1980) (mandamus available when respondent has mandatory duty to perform specific act). Mandamus is appropriate where a petition raises important legal issues that are likely to be the subject of litigation within the Nevada district court system. *Borger*, 120 Nev. at 1025-26. When there are only legal issues presented that are dispositive of the suit, and not questions of fact, a writ petition is appropriate. *Poulos v. Eighth Judicial Dist. Court.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Writ review is also appropriate when the case presents "serious issues of substantial public policy, or which involve[] important precedential questions of statewide interest." A writ of prohibition is available when proceedings are without or in excess of the jurisdiction of the tribunal. *State v. District Court (Anzalone)*, 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320.

Generally this Court will not consider a writ petition that challenges an order denying a motion to dismiss absent a worthy exception. An exception exists when "an important issue of law requires clarification." *Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 632, 636, 97 P.3d 607, 609 (2004). This Court has previously held that when a case involves an important matter of first impression, such as the application of a statute of limitations to a construction defect claim, it is appropriate to exercise discretion to consider the petition. *Id.* The statute of limitations issue presented in this case is likewise an issue of first impression, destined to be relevant in future hybrid actions, which affects employees, local-government employers, and unions throughout the state. Furthermore, resolving this issue at this stage of the proceedings, after the parties already proceeded through more than three years of litigation and appeal in the prior lawsuit, promotes judicial economy. *Double Diamond v. Second Jud. Dist. Ct.*, 131 Nev. Adv. Op. 57, 354 P.3d 641, 643 (2015)

This Court will also exercise its discretion to entertain a writ petition where an important issue of law needs to be decided, and where circumstances indicate an urgency or strong necessity. *Civil Service Comm 'n v. District Court*, 118 Nev. 186, 188-89, 42 P.3d 268 (2002). Additionally, where, as here, there is a potential for the district courts to inconsistently interpret the legal issue raised in a writ

petition, the court may elect to exercise its discretion to entertain a writ petition and clarify an issue of law. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 121, 272 P.3d 134, 136 (2012). Finally, extraordinary relief is available where the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law. *State v. District Court*, 116 Nev. 953, 957, 11 P.3d 1209 (2000).

In the present case, there is no right to an immediate appeal from the District Court's order denying the City's Motion to Dismiss. NRAP 3A. Thus an appeal from the final judgment is not an adequate remedy. To force the City to litigate this issue again when it has already spent three years litigating the first component of the hybrid action is anything but a plain, speedy, and adequate remedy in the normal course.

Availability of writ relief when an action is barred by the statute of limitations was addressed in *Ash Springs Dev. Corp. v. O'Donnell*, 95 Nev. 846, 847, 603 P.2d 698, 699 (1979). *O'Donnell* involved a motion for summary judgment which sought to terminate the lawsuit because it was barred by the statute of limitations. "Where an action is barred by the statute of limitations no issue of material fact exists and mandamus is a proper remedy to compel entry of summary judgment." *Id.* To require the City to move forward with the underlying

litigation again, including discovery, motion practice, and possibly trial, when the applicable statute of limitations period has passed, is an inadequate remedy.

The considerations governing whether or not to grant extraordinary relief weigh considerably in favor of this Court exercising its discretion to accept the writ petition. There are no factual disputes involved in this writ petition. The City contends that the District Court erred, as a matter of law, by ignoring this Court's prior order and deciding that the six-year statute of limitations period applicable to written contracts governs this case.

Complaint #2 is the first lawsuit brought by Mr. Smaellie in which he correctly pleaded a hybrid action consisting of a breach of contract claim and a duty of fair representation claim. This happened only after this Court, in the appeal of the first lawsuit which affirmed the dismissal of Mr. Smaellie's lawsuit, determined that a hybrid action necessarily consists of two components and Mr. Smaellie did not plead the required second component in the first lawsuit. V1 APP 025. Now the City faces a second lawsuit and a six-year limitations period despite the prior orders of this Court. The practical implication is that any public employer that terminates the employment of a union-represented employee, and any union that elects not to advance the employee's grievance to arbitration are subject to a six-year limitations period on the related claims. This is contrary to labor law

which seeks prompt resolution of these cases. Six years is anything but prompt. For these reasons, the City is entitled to seek extraordinary relief.

B. The statute of limitations applicable to a hybrid action expired before the filing of Complaint #2.

A review of Complaint #1 unequivocally establishes that Mr. Smaellie never brought a duty of fair representation claim prior to August 17, 2017. V1 APP 018-019. Additionally, this Court stated in its Order in the prior appeal that Mr. Smaellie's allegation in Complaint #1 that the Union prevented him from exhausting his administrative remedies was not enough to allege a breach of the Union's duty of fair representation. V1 APP 025. Having failed to file the required claim, Complaint #2, with its new duty of fair representation claim, is beyond any potentially applicable limitations period. Without an ability to bring a duty of fair representation claim, Mr. Smaellie cannot advance the "inextricably interdependent" breach of contract claim and Complaint #2 should have been dismissed by the District Court. *DelCostello*, 462 U.S. 164; *Smith v. Pac. Bell Tel. Co., Inc.*, 649 F. Supp. 2d 1073, 1099 (E.D. Cal. 2009) (Plaintiff can only maintain his cause of action for breach of contract against the employer if he can maintain the corresponding breach of duty of fair representation claim against the union). When an employee's claim against the union for breach of the duty of fair

representation is dismissed in a hybrid suit, the employee's claim against the employer for breach of the collective bargaining agreement must also be dismissed. *Nikci v. Quality Bldg. Servs.*, 995 F. Supp. 2d 240, 250 (S.D.N.Y. 2014) *citing Flanigan v. (Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.) Truck Drivers Local No. 671*, 942 F.2d 824, 827 (2d Cir. 1991) (action against union for breach of duty of fair representation was time-barred due to filing after the six-month limitations period when the plaintiff knew or should have known the union breached its duty and was properly dismissed); *DelCostello*, 462 U.S. at 164–65 (to prevail against the employer, plaintiff must also carry the burden of demonstrating a breach of duty by the union). Because Mr. Smaellie's duty of fair representation claim is time-barred, the entire hybrid action must be dismissed.

1. The six-month limitations period established by *DelCostello* has expired.

Relying on *DelCostello*, this Court clearly held in its prior Order that Mr. Smaellie was required to allege that the Union breached its duty. V1 APP 025; *see also* V1 APP 029-033. In *DelCostello*, the United States Supreme Court acknowledged that in a hybrid action, any breach of contract action against the employer must be advanced concurrently with a breach of the duty of fair

representation against the union. Following federal labor law is consistent with the Court's decision in *Weiner v. Beatty*, 121 Nev. 243, 249, 116 P.3d 829, 832 (2005), in which the Court held that state labor law should be interpreted consistently with federal labor law such that precedent interpreting federal labor statutes is persuasive.

"To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." *DelCostello* at 164-65. "Such a suit, as a formal matter, comprises two causes of action." *DelCostello* at 164. Regardless of who the employee chooses to sue, he must prove his breach of contract claim and his breach of the duty of fair representation claim. *Id.* at 165. A party cannot successfully prove a duty of fair representation claim when the applicable limitations period associated with that claim has expired.

In *DelCostello*, the Court was also tasked with determining which statute of limitations period applies to a hybrid action alleging breach of the CBA and breach of the duty of fair representation. *DelCostello* at 158. The Court quite logically looked to the statutory period in the National Labor Relations Act ("NLRA") for bringing claims of unfair labor practices and determined that the six-month

limitation period governs these claims. *Id.* at 169. Likewise, Nevada's Employee Management Relations Act ("EMRA"), found at NRS Chapter 288, assigns a six-month limitations period to unfair labor practices. *See* NRS 288.110(4). There is little doubt that a duty of fair representation claim is an unfair labor practice. *DelCostello* at 170 ("The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices."). In Nevada, fair representation by the union concerning the terms of a CBA is a right arising under the EMRA and failure of the union to fairly represent the employee interferes with that right. *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 447, 49 P.3d 651, 653 (2002), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007). Any rights arising under the EMRA are clearly subject to a six-month statute of limitations. *Id.*

As a general principle, this Court has stated that the EMRA should be construed to be consistent with federal labor laws. *See Timothy Frabbiele v. City of North Las Vegas; North Las Vegas Police Department and North Las Vegas Police Officers Association*, EMRB Case No. A1-045929, Item No. 680F, 2010 WL 9595056, at *3 (Feb. 1, 2010) *citing Weiner v. Beatty*, 121 Nev. 243, 116 P.3d 829 (2005); *Rosequist*, 118 Nev. 444, 447. Thus, applying the six-month

limitations to the hybrid action brought by Mr. Smaellie, including the duty of fair representation component, is consistent with Nevada law and federal precedent.

It is logical that the six-month limitation period would apply in this case because this Court has already decided the law of the case and followed the federal approach on hybrid actions as expressed in its prior order. V1 APP 025-027. Adoption of the six-month limitation period is merely consistent with this Court's prior decision.

Application of the six-month limitation period to this case required that Mr. Smaellie's duty of fair representation be filed six months after the Union's decision not to advance his grievance to arbitration, which occurred on April 2, 2013. V2 APP 132-133. Complaint #2 was filed August 10, 2017, well beyond the limitations period. V1 APP 001-004. The District Court should have dismissed Mr. Smaellie's complaint as untimely filed.

2. Even a more generous three-year limitations period has expired.

This Court has already followed the portion of *DelCostello* that permits an employee-plaintiff to file a hybrid action in state district court. It follows that this Court would likewise follow the six-month limitations period announced in *DelCostello*. However, if this Court were not inclined to apply a six-month statute

of limitations to the present action, it could adopt a three-year statute of limitations as decided by other courts. This option was likewise presented to the District Court for its consideration.

For instance, in *Giffin v. United Transportation Union*, 190 Cal. App. 3d 1359, 236 Cal. Rptr. 6 (Cal. Ct. App. 1987), a union member brought an action against his union for breach of the duty of fair representation. The court was reluctant to apply the noted six-month limitations period applicable to federal duty of fair representation claims, so, instead, it applied the limitations period applicable to liability created by statute.

Giffin involved a bus driver employed by the Southern California Rapid Transit District whose employment was terminated for failure to report an accident. *Id.* at 1361. Following his termination, the union refused to move Mr. Giffin's grievance to arbitration. Mr. Giffin claimed the union's refusal was arbitrary and capricious and filed a complaint for breach of contract three and a half years after the union's refusal to take his grievance to arbitration. Mr. Giffin asked the Court to apply the four-year state of limitations for actions on a written contract. The Appellate Court expressly declined. The Court looked to the substance of the pleading, not the labels assigned within the pleading, and found the cause of action was for breach of the duty of fair representation. *Id.* at 1362.

Because breach of the duty of fair representation is a specific and well-defined liability under federal and state law, and not ordinary contract liability, the court elected to apply the statute of limitations of three years for liability created by statute. In this case, too, we are not dealing with ordinary contract liability.

In Nevada, breach of the duty of fair representation is a well-defined statutory liability. NRS 288.270(2); *see also, Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 479, 998 P.2d 1178, 1182 (2000) *citing* NRS 288.140(1) and NRS 288.270(2). In *Weiner v. Beatty*, the Nevada Supreme Court noted that, by enacting the EMRA, the Legislature "intended to apply principles similar to those of the NLRA to its public employers" and looks to federal statutes in interpreting and applying the EMRA. *Weiner*, 121 Nev. at 249. There is no doubt that a duty of fair representation claim is created by statute. NRS 288.270(2); *Rosequist*, 118 Nev. 444, 449. In Nevada, the limitations period for actions based upon liability created by a statute is three years. NRS 11.190(3)(a). Mr. Smaellie alleged for the first time in Complaint #2 that the Union's decision not to demand arbitration on his behalf was arbitrary and capricious and a breach of its duty of fair representation. V1 APP 002. Applying a three-year limitations period to the facts of this case would have required Mr. Smaellie to bring his duty of fair representation claim within three years of the date

the Union notified him that it would not be advancing his grievance to arbitration, April 2, 2016. Even under this more generous limitations standard, the District Court should have dismissed Mr. Smaellie's complaint as untimely filed.

3. Even the most generous four-year limitations period has expired.

The six-month limitation period is well supported by federal labor law and Nevada state law. Similarly, the three-year period decided in *Giffin* is well-reasoned in that it relies upon the limitations period when liability is created by statute. Even allowing a larger, but unnecessary, benefit of the doubt, the outside parameter for this type of hybrid claim has been enlarged to four years by some courts. In *Graham v. Quincy Food Serv. Employees Ass'n*, 555 N.E.2d 543 (Mass. 1990), the court applied the limitations period applicable to tort claims and attorney malpractice, finding that the action was similar to a tort claim due to the alleged breach of duty by the union or could be compared to a malpractice claim because the union member depends on the union for representation much like a client relies upon an attorney. Thus, the *Graham* court decided the appropriate limitations period was three years. In Nevada, tort claims for negligence must be brought within two years, so Mr. Smaellie is tardy under that theory also because his deadline was April 2, 2015. *See* NRS 11.190(4). And, even if the limitations

period for attorney malpractice claims was applied in this case, he filed it after the April 2, 2017 deadline. *See* NRS 11.207.

Finally, a New York appellate court adopted the catch-all limitations period for duty of fair representation claims rather than the six-month limitations period clearly established by federal labor law. *See Baker v. Bd. of Educ. of W. Irondequoit Cent. Sch. Dist.*, 70 N.Y.2d 314, 322, 514 N.E.2d 1109, 1113 (1987) (applied the six-year catch all limitation period to teacher's claim against public section union for breach of duty of fair representation but declined to adopt the period applicable to contract actions). If this Court were to accept the catch-all limitations period provided for in Nevada, then Mr. Smaellie is still tardy because that period also expired four years after the accrual of his duty of fair representation claim, April 2, 2017. *See* NRS 11.220.

Petitioner submits that the six-month limitations period is the period most consistent with existing federal and state labor law and provides the level of predictability favored in labor law. This is predictability that can be relied upon by all parties to this arrangement – the employee, employer, and the union. However, even if this Court were not inclined to follow the remainder of the *DelCostello* decision and apply the six-month statute of limitations period, even the more

generous periods adopted by other courts still result in an untimely filing by Mr. Smaellie, subjecting Complaint #2 to dismissal with prejudice.

If this Court accepts the district court's determination that the six-year limitations period applicable to written contract applies to a hybrid action, that result would be entirely inconsistent with this Court's prior decision to follow federal precedent concerning hybrid claims. V1 APP 025-026. To acknowledge that this case undoubtedly concerns a hybrid case but to apply concepts applicable only to traditional written contract cases works an absurd result and ignores the reality of the action brought by Mr. Smaellie.

4. Disregarding this Court's prior Order filed April 17, 2017 ignores the law of the case.

In his opposition to the City's Motion to Dismiss, Mr. Smaellie argued that the law-of-the-case doctrine precludes the City from advancing its statute of limitations defense. That argument ignores the fact that the statute of limitations applicable to this type of action has never been decided. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 629–30, 173 P.3d 724, 728 (2007). However, this Court did affirm the dismissal of the prior appeal and found that Mr. Smaellie never advanced a duty of fair representation claim as required to state his hybrid action. V1 APP 025.

In fact, the law-of-the-case doctrine and, by extension, the prior order of the Nevada Supreme Court, necessitates dismissal of Complaint #2. In affirming the dismissal of the prior appeal, the Court held that: (1) Mr. Smaellie did not allege the Union breached its duty of fair representation in Complaint #1; (2) Mr. Smaellie was required to allege that claim, even if he elected not to sue the Union; and (3) the District Court has jurisdiction over a hybrid claim. V1 APP 025-027. The facts in this case are simple. Mr. Smaellie did not properly file his hybrid action, including the necessary duty of fair representation claim, until the filing of Complaint #2 on August 10, 2017. *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975) ("The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."). The filing of Complaint #2 is well beyond the sixth-month limitations period announced by *DelCostello* and it is even beyond the more generous potential limitations periods of three and four years.

In the prior appeal, the City successfully advocated for the application of *DelCostello*, which the Court had previously relied upon in its decision in *Tansey*. V1 APP 032. *DelCostello* also stands for the proposition that the appropriate statutory limitations period to be applied in hybrid actions is six months. This is not a traditional contract claim that would necessitate the application of a six-year

limitations period. For the first time, in Complaint #2, Mr. Smaellie brings the entirety of a hybrid action, including a duty of fair representation claim. However, Mr. Smaellie is now conveniently characterizing Complaint #2 as an action on a written instrument for which a six-year limitations period applies and he seeks to disregard the necessary duty of fair representation claim and treat this case as a basic contract case. V1 APP 215, ll. 17-21. That is not an accurate description of this case; and, unfortunately, the district court approved of this mischaracterization which necessitates this writ petition. To apply a six-year limitations period ignores the nature of this action, and the prior ruling of this Court.

Given that these types of hybrid actions are frequently filed and make their way to the Supreme Court, resolution of this issue is necessary for the consistent application of law throughout the State of Nevada and to give public entities and unions some predictability in determining how long they could be subject to a hybrid action brought by an employee.

V. CONCLUSION

As outlined in this petition, the District Court abused its discretion by denying the City's Motion to Dismiss after determining that the applicable statute of limitations period is six years under NRS 11.190. Extraordinary relief is appropriate to remedy the District Court's order. Petitioner respectfully requests

this Court issue a writ of mandamus, or in the alternative if more appropriate, a writ of prohibition, compelling the District Court to vacate its order and apply the limitations period applicable to hybrid actions as deemed appropriate by this Court.

DATED: May 2, 2018

_/s/ Charity F. Felts_____
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VERIFICATION

STATE OF NEVADA)
)ss:
COUNTY OF WASHOE)

Charity F. Felts, Esq., hereby deposes and states under penalty of perjury:

1. I am an attorney with the law firm of Erickson, Thorpe & Swainston, Ltd., counsel of record for Petitioner City of Mesquite. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those facts, I believe them to be true.

2. I certify and affirm that this Petition for Writ of Mandamus or Prohibition is made in good faith and not for purposes of delay.

DATED this 2nd day of May, 2018.

Charity F. Felts

SUBSCRIBED and SWORN to before
me this 2nd day of May, 2018

NOTARY PUBLIC in and for said
County and State

JENNIFER JACOBSEN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 14-13950-2 - Expires June 11, 2018

CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 28 & 32

1. I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: it has been prepared in proportionally spaced typeface using Microsoft Word in font 14 Times New Roman.

2. Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 points or more, and contains 4,864 words, and 22 pages.

3. Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedures, in particular NRAP 28(e), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

4. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of May, 2018.

Charity F. Felts, Esq.
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City of Mesquite

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I certify that I am an employee of Erickson, Thorpe & Swainston, Ltd., and that on this date I caused to be served from Reno, Nevada, a true and correct copy of the Petition for Writ of Mandamus or Prohibition and Petitioner's Appendix (Vol I-III) via US Mail addressed to:

The Honorable Gloria Sturman
Eighth Judicial District Court, Dept. 26
200 Lewis Avenue
Las Vegas, NV 89155

Adam Levine, Esq.
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101

DATED this 2nd day May, 2018.

Jennifer Jacobsen