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.:

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Elizabeth A. Brown
Clerk of Supreme Court

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

APPENDIX VOLUME III OF III

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DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS SMAELLIE,

Plaintiff,

vs

CITY OF MESQUITE,

Defendants.

Case No. A-17-759770-C
Dept. No.: 26

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant CITY OF MESQUITE, by and through its counsel, ERICKSON, THORPE & SWAINSTON, LTD., and REBECCA BRUCH, ESQ., and CHARITY F. FELTS, ESQ., hereby submits its Reply in Support of its Motion to Dismiss. This motion is based upon the memorandum of points and authorities and exhibits submitted in support of this motion, the papers and pleadings on file in this case and the prior case, as well as the arguments of counsel at the hearing of this matter, and any other matter the Court may properly consider.

MEMORANDUM OF POINTS & AUTHORITIES

I. Legal Argument

A. The City's Motion to Dismiss is not barred by the law-of-the-case doctrine.

Mr. Smaellie claims that because the City did not argue its statute of limitations defense in the prior appeal, it waived its ability to advance that defense now. That is a misapplication of the law-of-the-case doctrine. In *Hsu v. County of Clark*, the law-of-the-

Case Number: A-17-759770-C

case doctrine is described as "[w]hen an appellate court states a principle or rule of law *necessary to a decision*, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal." *Hsu v. Cty. of Clark*, 123 Nev. 625, 629–30, 173 P.3d 724, 728 (2007) (emphasis added). The City's Motion to Dismiss does not ask this Court to revisit and rule on an issue previously decided. Furthermore, the Supreme Court's prior order did not state a rule of law regarding the statute of limitations because it was not necessary to the decision.

In the prior district court case, Judge Williams did not issue a final appealable judgment that ruled on the statute of limitations issue. During the hearing on the City's first Motion to Dismiss in May 2014, the district court mentioned the limitations period, and heard some argument on the limitations issue, but it did not decide the motion on that basis.[1] Instead, the district court denied the motion to dismiss without prejudice and acknowledged that since the Nevada Supreme Court was considering the issue of hybrid actions in a different appeal (the *Dixson* case), it might elect to apply federal law and combine the breach of contract and duty of fair representation claims into a hybrid action. *See* Exhibit 13, Plaintiff's Appendix for Opposition to Motion to Dismiss, pp. 26-27, ll. 24-25, 1; p. 28, ll. 7-12. When the district court ultimately granted the City's renewed Motion to Dismiss in January 2016, the decision of the district court was based on lack of standing.

The facts here are very different from *Lee v. Chun Ka Luk*, 127 A.D.3d 612, 613, 8 N.Y.S.3d 288, 289 (N.Y. App. Div. 2015), cited in Mr. Smaellie's Opposition, in which the defendant asserted a statute of limitations defense for a second time, after his first motion to dismiss on those grounds was denied. There was simply never any ruling on the statute of limitations applicable to a hybrid action in the prior case, and thus there was never an appealable order that was later decided by the appellate court which could become the law

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[1] Mr. Smaellie suggests in his opposition that the district court denied the City's initial Motion to Dismiss without prejudice on the standing issue, but suggests that denial was with prejudice on the statute of limitations issue. *See* Opposition, p. 4, ll. 17-19. This is incorrect. Judge Williams did not issue any ruling on the statute of limitations issue in the initial motion or on the renewed motion.

of the case. *See Hsu v. Cty of Clark*, 123 Nev. at 629-630 (must state a principle or rule of law necessary to a decision).

Furthermore, the Nevada Supreme Court has held the law-of-the-case doctrine does not apply where the Court's prior order did not mention, let alone address and decide, any rule of law concerning the issue. *Las Vegas Sands Corp. v. Suen*, No. 64594, 2016 WL 4076421, at *2 (Nev. July 22, 2016) (unpublished decision); citing *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003) (law-of-the-case doctrine governs the same issues in subsequent proceedings and only applies to issues previously determined, not matters left open by the appellate court); *Recontrust Co. v. Zhang*, 130 Nev. Adv. Op. 1, 317 P.3d 814, 818 (2014) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default.").

Though he faults the City for not arguing the statute of limitations issue on appeal, Mr. Smaellie likewise did not argue the applicable limitations period in his appellate briefing. He argued that the district court erred by deciding the case based on standing and that jurisdiction in the district court was proper because the EMRB will not exercise jurisdiction over hybrid actions. *See* Exhibit 5, Smaellie Opening Brief, Docket No. 69741, pp. 10, 18, 22. Using Mr. Smaellie's logic, he is likewise barred from arguing that the applicable limitations period is six years. However, the law-of-the-case doctrine does not require that result.

In fact, application of the law-of-the-case doctrine and, by extension, the prior order of the Nevada Supreme Court, necessitates dismissal of Complaint #2. In a nutshell, 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. *See* Exhibit 3, pp. 1-2. 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 potentially applicable six-month, three-year, and four-year statute of limitations.

In the prior appeal, the City successfully advocated for the application of *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983), which the Court relied upon in its decision in *Clark Cty v. Tansey*. *See* Exhibit 4, p. 4.[2] *DelCostello* also stands for the proposition that the appropriate statutory limitations period to be applied in hybrid actions is six months. While a decision on the applicable limitations period was not necessary for resolution of Mr. Smaellie's earlier district court and appellate case, it is necessary now. And the applicable time period is not six years as suggested by Mr. Smaellie because this is not a traditional breach of contract claim. The statute of limitations defense is still an outstanding issue and ripe for this Court's determination. And it is more relevant than ever given the extreme tardiness of the filing of the duty of fair representation claim for the first time in Complaint #2.

B. Mr. Smaellie's arguments in opposition to the City's Motion to Dismiss disregard the nature of the hybrid action.

Interestingly, Mr. Smaellie is now distancing himself from the description he has previously used to describe the nature of his complaint – a hybrid case. In the underlying appeal of Complaint #1, his Opening Brief filed with the Nevada Supreme Court was packed with references to his hybrid action, and the fact that such an action has been recognized by the U.S. Supreme Court in *DelCostello*. *See e.g.*, Exhibit 5, p.6, ll. 19-20. The order resulting from the earlier appeal confirms the adoption of federal precedent, that is, a hybrid action against an employer for breach of the collective bargaining agreement and against the union for breach of the duty of fair representation can be brought to the district court, but

[2] Reference to Exhibits 1 through 4 refer to the exhibits previously attached to the City's Motion to Dismiss filed November 3, 2017.

both claims must be advanced. *See* Exhibit 2, p. 1; Exhibit 4, pp. 3-4.[3] Now, however, Mr. Smaellie seeks to cherry-pick only the portions helpful to his case from the decisions in his prior case and the *DelCostello* case which has been adopted by our highest court. That approach must not be accepted.

To confuse the issue, Mr. Smaellie's opposition states that "the City fails to realize that [he] is not required to bring an action against his Union." And he summarizes his argument in opposition by stating that the Nevada Supreme Court's decision in his prior case "properly recognized that Smaellie need not bring a claim against his Union and it is sufficient to plead such a breach in his Complaint." *See* Opposition to Motion to Dismiss, p. 8, ll. 21-22; p. 9, ll. 7-9. Mr. Smaellie has misstated his obligation with regard to his hybrid action. Unlike Mr. Smaellie, the City is not relying only on parts of *DelCostello* and instead correctly stated in its Motion to Dismiss that "[e]ven 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." *See* Defendant's Motion to Dismiss, p. 3, ll. 16-17. The second half of the hybrid action – the duty of fair representation claim – is what was glaringly absent from Complaint #1. It is also what the Nevada Supreme Court has held "is required to state a hybrid action." *See* Exhibit 3, p. 1. Now, all these years later, Mr. Smaellie attempts to salvage this hybrid action by finally advancing a duty of fair representation claim well beyond any limitations period that would be applicable to such a claim.

To be clear, the statutory limitations period we are concerned with in this action is the limitations period applicable to a hybrid action which includes a duty of fair representation claim. Mr. Smaellie did not bring that claim in Complaint #1. *See* Exhibit 3, p. 1 ("Appellant 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."). For the first time, he brings the entirety of a hybrid action, including a duty of fair representation claim, in Complaint #2. However, Mr. Smaellie would like this Court to simply view Complaint #2

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[3] *Id.*

as an action on a written instrument for which a six-year limitations period applies and he seeks to treat this case as a basic contract case. That is not the reality in which we find ourselves. To apply a six-year limitations period ignores the nature of this action, and the prior ruling of the Nevada Supreme Court.

Mr. Smaellie argues that the City's Motion to Dismiss can be denied on the merits because the six-month limitations period should not be applied to his hybrid action. In support of that position, Mr. Smaellie characterizes his action as solely one for breach of contract and argues that a collective bargaining agreement can be enforced pursuant to *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). That case concerned a lawsuit brought by a union against an employer, seeking declaratory judgment that a valid collective bargaining agreement existed between the parties. It did not concern a duty of fair representation claim or a hybrid action. For authority on that issue, this Court need look no further than *DelCostello*, issued subsequent to *Charles Dowd Box Co.*

In *Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 864 (1987), the U.S. Supreme Court remanded a hybrid action back to the Court of Appeals to determine whether such a claim should be subject to the six-month statute of limitations adopted in *DelCostello*. *Hechler* also recognized the prior ruling in *Charles Dowd Box Co.*, but clarified that when a state court is deciding a hybrid claim, it must apply federal law. *See Hechler*, 481 U.S. at 856. Thus, the *Charles Dowd Box Co.* decision is not dispositive of the issue presented to the Court by way of this motion.

When an employee's claim against the union for breach of 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). A plaintiff cannot carry the burden of demonstrating a breach by the union if he is time barred from bringing that claim.

In a hybrid suit, one does not exist without the other. The breach of contract and duty of representation claims are inextricably interdependent. *See* Exhibit 3, pp. 1-2; Exhibit 4, p. 4; *DelCostello*, 462 U.S. at 164-65. The failure to timely file a duty of fair representation claim is fatal to Complaint #2.

C. The City has presented three limitations periods that could apply to this case, and Mr. Smaellie only opposed one.

Mr. Smaellie's opposition only addressed and opposed the six-month limitations period. He ignored the three- and four-year limitations periods which have been applied by state courts in hybrid suits like this. *See* EDCR 2.20(e); D.C.R. 13(3) (absence of a memorandum in opposition may be construed as an admission that the motion is meritorious). Significantly, Mr. Smaellie declined to address *Giffin v. United Transportation Union*, 190 Cal. App. 3d 1359, 236 Cal. Rptr. 6 (Cal. Ct. App. 1987), in which the California Court of Appeal declined to apply the four-year statute of limitations for actions on a written contract to a duty of fair representation claim. Because it was not ordinary contract liability in *Giffen*, application of the limitations period for written contracts was inapplicable.

The history of the instant case, including the determination of the Nevada Supreme Court in the earlier appeal also demonstrates that this is no ordinary contract case. This is a hybrid action, that includes a duty of fair representation claim, but that claim was not filed until August 10, 2017. The limitations periods potentially applicable to this hybrid action have expired, which requires dismissal of this action.

II. Conclusion

The law-of-the-case doctrine does not bar the City's Motion to Dismiss and the statute of limitations defense. The issue is ripe for this Court's determination and regardless of which potentially applicable limitations period this Court elects to apply, Mr. Smaellie is late under all of them. This case should be dismissed with prejudice.

Affirmation Pursuant to NRS 239B.030

The undersigned hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 16th day of February, 2018.

REBECCA BRUCH, ESQ. (SBN 7289)
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CERTIFICATE OF SERVICE

I certify that I am an employee of ERICKSON, THORPE & SWAINSTON, LTD., 99 West Arroyo Street, Reno, Nevada 89509; over the age of 18 years, and not a party to the within action; that pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically served a copy of the foregoing document via Odyssey File & Serve to the following recipients:

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Adam Levine, Esq.
Law Office of Daniel Marks
office@danielmarks.net
gguo@danielmarks.net

DATED this 16th day of February, 2018.

Jennifer Jacobsen

INDEX OF EXHIBITS

Exhibit No.	Description
5	Opening Brief, *Smaellie v. City of Mesquite*, Docket No. 69741, filed 7/25/2016

EXHIBIT 5

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

DOUGLAS SMAELLIE,

Appellant,

v.

CITY OF MESQUITE,

Respondent

_____/

DOCKET NO. 69741

APPELLANT DOUGLAS SMAELLIE'S OPENING BRIEF

LAW OFFICE OF DANIEL MARKS
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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made an order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel Marks. There are no parent corporations.

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in the District Court in the form of an Order Granting a Motion to Dismiss the Complaint of Appellant. Both that Order, and Notice of Entry thereof, were filed January 7, 2016. (APP Vol. VII at 1223-1228). The Notice of Appeal was filed February 4, 2016. (APP Vol. VII at 1229).

ROUTING STATEMENT

This case should remain with the Supreme Court pursuant to NRAP 17 (a)(13) as it involves a question of first impression in the State of Nevada: Whether a local government employee may bring a breach of contract action for violation of his collective bargaining agreement under what is known in other jurisdictions as the *Vaca v. Sipes,* 386 U.S. 171, 87 S. Ct. 903 (1967) exception, or alternatively under the approach utilized in *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983) and *Anderson v. California Faculty Association*, 25 Cal. App. 4th 207, 31 Cal. Rptr. 2nd 406 (1994). This same issue is currently pending before this Court in *Clark County v. Mark Tansey*, Docket No. 68951.

STATEMENT OF ISSUES ON APPEAL

1. Should Nevada adopt the rule from *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967) permitting judicial enforcement of a collective bargaining agreement where a local government employee is terminated in violation of the

collective bargaining agreement and the union breaches its duty of fair representation by failing to advance the meritorious grievance to arbitration?

2. Alternatively, should Nevada adopt the rule from *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983) and *Anderson v. California Faculty Association*, 25 Cal. App. 4th 207, 31 Cal. Rptr. 2nd 406 (1994) which permits an employee to judicially enforce the collective bargaining agreement, so long as they attempted to exhaust their contractual remedies, without requiring a demonstration that the union's conduct rose to the level of a breach of the duty of fair representation?

3. Did the District Court err in dismissing Appellant's Complaint on grounds of "standing"?

STATEMENT OF THE CASE

This was an action filed in the district court by Douglas Smaellie alleging that he was terminated without just cause from his position as a police officer with the City of Mesquite in violation of his collective bargaining agreement, and that his union breached its duty of fair representation by refusing to advance his meritorious grievance to arbitration. (APP Vol. I at 2-3). Smaellie filed a Motion to Stay pending this Court's decision in *Dixson et al. v. City of North Las Vegas*, Docket No. 64016 which, it was hoped at the time, would address the issues presented in this case. (APP Vol. I at 4-35). The Motion to Stay attached a

decision from the EMRB establishing that it would not hear such a "hybrid" case, and two (2) decisions from differing departments of the district court reaching contrary conclusions as to whether a court may hear such a claim. (APP Vol. I at 16-35). [1]

The City of Mesquite filed a Motion to Dismiss arguing that a breach of contract action could not proceed without an accompanying claim that the union breached its duty of fair presentation. (APP Vol. I at 38-111). The district court, after carefully studying the issue, denied the Motion to Dismiss without prejudice because the State of Nevada Local Government Employee Management Relations Board did not have jurisdiction over breach of contract claims. The district court further denied the Motion to Stay. (APP Vol. I at 168-199; Vol. II at 211-212).

Following the close of discovery, the City filed a Motion for Summary Judgment. (APP Vol. II at 221 through APP Vol. V at 923). In that Motion, the City pointed out that on May 22, 2014 this Court issued its Order of Affirmance in *Dixson et al v. City of North Las Vegas*, Docket No. 64016 wherein it declined to address the *Vaca v. Sipes* problem, and dismissed the case based upon "standing" because the Plaintiffs did not expressly claim to have been third-party

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[1] The EMRB order, and one (1) of the district court decisions, involved the case now pending before this Court in *Clark County v. Mark Tansey*, Docket No. 68951.

beneficiaries under the language of their Complaint. (APP Vol. II at 248-250; Vol. V at 916-917). Despite the fact that unpublished dispositions were not to be cited, let alone be considered precedent under SCR 123 in effect at that time, the district court declined to address the matter as a Motion for Summary Judgment, and instead granted the City's renewed Motion to Dismiss on the grounds of "standing". (APP Vol. VII at 1226-1228).

STATEMENT OF FACTS

Douglas Smaellie was employed as a police officer with the City of Mesquite. (APP Vol. V at 971-972). Police officers employed by the City of Mesquite are represented by the Mesquite Police Officers Association (hereafter "MPOA") for purposes of collective bargaining. Under the collective bargaining agreement entered into by the City and MPOA, Smaellie could not be discharged without "cause". (APP Vol. II at 352-356; Vol. IV at 729).

On December 12, 2012, while off-duty, Douglas Smaellie found his estranged wife Nicole having lunch with another man, Ruskin Felshaw, in one of the Smaellie's vehicles parked in a parking garage in his hometown of St. George, Utah. After Nicole called the police, Smaellie was arrested on a charge of "domestic violence unlawful detention". The St. George police reached this conclusion because Smaellie had parked his vehicle at an angle behind the truck in which his wife and Felshaw occupied. Felshaw was cited for disorderly conduct.

When being booked into jail, the St. George police added a charge of disorderly conduct for Smaellie. (APP Vol. VI at 1019-1021).[2]

Smaellie pled not guilty to both charges. The charge of "domestic violence unlawful detention" was dismissed. Smaellie pled *nolo contendere* to the charge of disorderly conduct with the plea held in abeyance such that if he completed and anger management course, the charge would be dismissed. Smaellie successfully completed the course and the charge was ultimately dismissed. (APP Vol. VI at 1019-1021).

Despite the dismissal of charges, the City of Mesquite terminated Smaellie's employment. (APP Vol. IV at 661-663). Douglas Smaellie filed a timely grievance regarding his discipline through the MPOA. (APP Vol. VI at 1061-1062). Smaellie through the MPOA requested to see the full internal affairs file. (APP Vol. VI at 1021). Under NRS 289.080(8) Smaellie was entitled to a review and "*copy the entire file concerning the internal investigation, including, without limitation, any recordings, notes, transcripts of interviews and documents contained in the file.*" The City refused the request and would only permit

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[2] The very substantial evidence demonstrating that Smaellie had not committed the crime of "domestic violence unlawful detention", and the lack of "cause" to terminate his employment, is detailed in Smaellie's Opposition to the City of Mesquite's Motion for Summary Judgment. (APP Volume V at 932 through Volume VI at 1126). However, because the underlying facts were not germane to the district court's disposition of the case, they need not be detailed in this Brief.

Smaellie's MPOA representative to review the file in a conference room and prohibited any photocopies. (APP Vol. VI at 1066-1067).

The MPOA had purchased coverage for its members in connection with disciplinary matters through the Legal Defense Fund (LDF) of the Police Officers Research Association of California (PORAC). However, the MPOA's former President had decided to obtain the cheapest version of LDF coverage which did not cover off-duty incidents. (APP Vol. VI at 1070-1071). Smaellie received written notice from the MPOA stating that the MPOA would not support his grievance because "The MPOA's Legal Defense Fund does not cover MPOA members when the member is off-duty. It is our understanding that the Utah incident happened while you were off duty." (APP Vol. VI at 1081). Smaellie filed an appeal to the general membership. Following a secret vote the MPOA affirmed its decision not to provide a defense to Smaellie. (APP Vol. VI at 1070-1077).

Smaellie utilized attorney David Ford to contact the City to request arbitration. (APP Vol. VI at 1083-1084). The City refused to arbitrate because of the decision of the MPOA Grievance Board. (APP Vol. VI at 1086-1087).

SUMMARY OF ARGUMENT

A "hybrid action" is the term recognized by the United States Supreme Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151,

103 S. Ct. 2281 (1983) for a case where an employee alleges that they were terminated without just cause in violation of the collective bargaining agreement governing their employment, and that their union breached its duty of fair representation by failing to advance a meritorious grievance to arbitration. The appropriate forum for a local government employee to bring such a hybrid action against the employer has not yet been decided in Nevada.

Some states allow such hybrid actions to be brought before their version of Nevada's Employee Management Relations Board ("EMRB") where there are statutes define breach of a collective bargaining agreement as a prohibited labor practice. Other states have adopted the standard from *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967) which permits direct judicial enforcement of a collective bargaining agreement by an employee where the employer has either repudiated the grievance/arbitration mechanism in the bargaining agreement, or the employee can demonstrate as part of their case in chief before the court that their union breached its duty of fair representation. A third set of states permit direct enforcement by the employee in court without actually having to demonstrate a breach of the duty of fair representation by the union. In excusing the employee from having to demonstrate a breach of the duty of fair representation, such courts have recognized that public employees have a property interest in their

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employment protectable by the Due Process Clause. See *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983).

The judgment of the district court should be reversed. The district court initially denied the Motion to Dismiss. The district court only reversed its position when the City of Mesquite improperly cited to an unpublished disposition in *Dixson et al. v. City of North Las Vegas*, Docket No. 64016. That unpublished disposition incorrectly addressed the issue as one of "standing". However, the right of individuals to judicially enforce collective bargaining agreements is well established and supported by what the United States Supreme Court has referred to as "strong public policy". The right of judicial enforcement is, however, subject to an affirmative defense that the employee did not attempt to exhaust the contractual grievance procedures.

The EMRB will not hear hybrid claims. Accordingly, requiring Smaellie to have first filed with the EMRB would have been futile. Not only does the failure to permit an employee to judicially enforce a collective bargaining agreement under circumstances where his union breaches the duty of fair representation constitute what the United States Supreme Court called an "unacceptable injustice", for public sector employees with a property interest in their employment any failure to recognize a judicial remedy effectively permits the employer to deprive them of their property interest in their employment without a

post-termination hearing as required by the Fourteenth Amendment's Due Process Clause.

A reasonable jury could conclude that the MPOA breached its duty of fair representation by not advancing Smaellie's grievance to arbitration because it had chosen to purchase the cheapest form of the PORAC legal defense plan which did not cover off-duty conduct. Whether this Court adopts the approach from *Vaca v. Sipes*, supra, the approach taken in *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983), or *Anderson v. California Faculty Association*, 25 Cal. App. 4th 207, 31 Cal. Rptr. 2nd 406 (1994), this Court needs to provide guidance to the district courts as to how and where such "unacceptable injustice(s)" are to be remedied.

STANDARD OF REVIEW

Issues of law are reviewed *de novo*. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006).

ARGUMENT

I. INDIVIDUAL JUDICIAL ENFORCEMENT OF COLLECTIVE-BARGAINING AGREEMENTS HAS LONG BEEN RECOGNIZED UNDER WELL-ESTABLISHED LAW.

NRS Chapter 288, which grants local government employees the right to collectively bargain, is modeled upon the provisions of the National Labor Relations Act. Accordingly, this court has repeatedly held that it is appropriate to

look to the NLRA when interpreting NRS Chapter 288. *City of North Las Vegas v. State Local Government Employee-Management Relations Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011); *Truckee Meadows Fire Protection District v. International Association of Firefighters Local 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993)

A. The United States Supreme Court Has Recognized Individual Standing To Enforce Collective Bargaining Agreements Is Supported By "Strong Policy" And Necessary To Avoid "Unacceptable Injustice".

As stated by the United States Supreme Court in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S. Ct. 2281 (1983) "It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement". 462 U.S. at 163, 103 S. Ct. at 2290 citing *Smith v. Evening News Assn.*, 371 U.S. 195, 83 S. Ct. 267, 9 L.Ed.2d 246 (1962). As emphasized by the Supreme Court in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976) "The strong policy favoring judicial enforcement of collective-bargaining contracts was sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board." 424 U.S. at 562, 96 S. Ct. at 1055.

However, the Supreme Court further recognized that the "strong policy" favoring judicial enforcement of collective-bargaining agreements had to be balanced against congressional policy set forth under Section 203(d) of the Labor Management Relations Act that "(f)inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes". *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, 80 S. Ct. 1343, 1346, 4 L.Ed.2d 1403, 1404 (1960). This national policy is mirrored for local government employees in Nevada by NRS 288.150(2)(o) which makes "Grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements" a subject of mandatory collective bargaining.

In order to balance the "strong policy favoring judicial enforcement of collective-bargaining contracts" with the labor policy of utilizing methods agreed upon by the parties "for settlement of grievance disputes", the Supreme Court held in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S. Ct. 614 (1965) that as a general rule "labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress" and the employee "must afford the union the opportunity to act on his behalf." 379 U.S. at 652-653, 85 S. Ct. at 616.

Two (2) years after its decision in *Republic Steel Corp. v. Maddox*, the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) addressed the circumstances where an employee is excused from using the contractual grievance process and may resort to judicial enforcement. The first exception recognized by the Supreme Court is where the employer repudiates the arbitration requirement:

> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. *Drake Bakeries, Inc. v. Local 50, Am. Bakery, etc., Workers*, 370 U.S. 254, 260—263, 82 S. Ct. 1346, 1350—1352, 8 L.Ed.2d 474. See generally 6A Corbin, Contracts s 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

386 U.S. at 185, 87 S. Ct. at 914.

The second exception permitting direct judicial enforcement is where the union breaches its duty of fair representation:

> We think that another situation when the employee may seek judicial enforcement of his contractual rights arises, if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the

> employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee.

Id. This exception was grounded in the Supreme Court's recognition that "Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures", did not intend "to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract", nor did Congress intend "to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." *Id.*

In *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281 (1983) the court reiterated that any rule prohibiting direct judicial enforcement of the collective bargaining agreements "works an unacceptable injustice" when the union breaches its duty of fair representation in connection with the grievance process. "In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." 462 U.S. at 164, 103 S. Ct. at 2290.

In *Del Costello* the Supreme Court coined the phrase "hybrid action" to describe an action for breach of a collective bargaining agreement accompanied by a union's breach of its duty of fair representation. 462 U.S. at 165, 103 S. Ct. at 2291. However, the Court recognized that "the two claims are inextricably

interdependent". *Id.* Accordingly, the plaintiff "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" *Id.* "The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both." *Id.*

B. The Policy Favoring Individual Judicial Enforcement Of Collective Bargaining Agreements Is Even Stronger For Public Sector Employees Who Have A Property Interest In Their Employment Within The Meaning Of The Fourteenth Amendment's Due Process Clause.

Other states addressing the issue of individual judicial enforcement of bargaining agreements for public sector employees have adopted the rationale and approach of *Vaca v. Sipes*. See e.g. *Braswell v. Lucas Metropolitan Housing Authority*, 26 Ohio App.3d 51, 498 N.E.2d 184 (1985); *Jackson v. Regional Transit Service*, 54 A.D.2d 305 N.Y.S.2d 441 (1976).

However, post-probationary public sector employees differ from their private sector counterparts under the NLRA in one very important aspect. Public sector employees have a property interest in their employment protectable under the Fourteenth Amendment's Due Process Clause. See e.g. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985); *State ex rel. Sweikert v. Briare*, 94 Nev. 752, 588 P.2d 542 (1978). In addition to the minimal pre-deprivation hearing requirements under *Loudermill*, supra, due process further

requires a more formal post-deprivation evidentiary hearing "at a meaningful time and in a meaningful manner". *Bary v. Barchi*, 443 U.S. 55, 66, 99 S. Ct. 2642, 2650 (1979); *Loudermill,* supra, 470 U.S. at 546-547, 105 S. Ct. at 1495-1496.

An arbitration before a neutral arbitrator would satisfy all of the due process requirements for a post-deprivation evidentiary hearing. However, by agreeing to collectively bargain on issues such as "Grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements" under NRS 288.150(2)(o), public sector employees do not thereby give up their constitutional due process rights in connection with their jobs. Accordingly, such concerns led the Alaska Supreme Court to hold in *Casey v. City of Fairbanks,* 670 P.2d 1133 (Alaska 1983) that the federal approach requiring the employee to prove a breach of the duty of fair representation by his union as part of his case in chief should not be applied to public sector employees in connection with judicial enforcement of collective bargaining agreements:

> Federal labor law requires an employee to show that his union breached its duty to represent him fairly in the grievance procedures provided under a collective bargaining agreement before the employee may directly sue his employer in court for wrongful discharge. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1976). The Labor Management Relations Act, upon which this rule is based, expressly exempts state and municipal government employers from coverage. Thus, Casey's suit against the City of Fairbanks falls outside the scope of federal law.

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We are unable to adopt the federal rule in this state because it is inconsistent with our conclusion that persons who are employed other than "at will", see *Breeden v. City of Nome*, 628 P.2d 924, 926 (Alaska 1981), have a sufficient property interest in continuing their employment, absent just cause for their removal, to require that they be given notice and an opportunity to be heard under the due process clause of the Alaska Constitution (art. I, §7) before their employment is terminated. See *Gorham v. City of Kansas City*, 590 P.2d 1051 (Kan.1979); *State ex rel. Sweikert v. Briare*, 588 P.2d 542 (Nev.1978). See also *University of Alaska v. Chauvin*, 521 P.2d 1234 (Alaska 1974); *Simpson v. Western Graphics Corp.*, 643 P.2d 1276 (Or.1982).

Section 4.6 of the Working Agreement states that "[i]n cases where it is determined [that] an employee has been discharged unjustly and without cause, the [Arbitration] Committee shall order the City to return the employee to his position without loss of seniority or pay." Casey accordingly was not an "at-will" employee, but could be terminated only for "cause." Casey alleges that he was terminated because he refused to comply with illegal instructions. The Union refused to process his grievance and, under the Working Agreement, there is no other means by which Casey's claim can proceed to arbitration. If the *Vaca* rule were applied, Casey would be deprived of any review of the decision to terminate him unless he were able to prove that the Union acted wrongfully in refusing to process his grievance; i.e., its decision was "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190, 87 S. Ct. at 916, 17 L.Ed.2d at 857. Although the evidence suggests the contrary, it is possible that the Union's decision was erroneous without being arbitrary, discriminatory or in bad faith. To deny Casey a hearing on his termination except upon proof that the Union's conduct was wrongful places too great a burden upon Casey's right to due process.

Because the Working Agreement does not permit Casey to unilaterally initiate arbitration proceedings, Casey's due process rights can be satisfied only by permitting Casey to maintain an independent action against the City of Fairbanks for breach of contract.

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670 P.2d at 1138; See also *Storrs v. Municipality of Anchorage*, 721 P.2d 1146 (Alaska 1986).

The California Court of Appeals in *Anderson v. California Faculty Association*, 25 Cal. App. 4th 207, 31 Cal. Rptr. 2nd 406 (1994), is directly on point. The Court of Appeals was facing the same issue of first impression in California which this case now presents to this Court for Nevada: "whether, in a hybrid case, the [trial court] has jurisdiction over both an employee's claim for breach of contract against an employer and his claim alleging unfair representation by the union." 25 Cal. App. 4th at 213.

The Court of Appeals concluded, based upon both statutory interpretation and public policy, that claims against the union for breach of its duty of fair representation must be brought before California's version of the EMRB, the Public Employment Relations Board ("PERB"). This is in accordance with this Court's holding in *Rosequist v. International Association of Firefighters Local 1908*, 118 Nev. 444, 451, 49 P.3d 651 (2002).

However, the *Anderson* court further held that the superior court had concurrent jurisdiction over the breach of contract action against the employer. Like the approach taken by the Alaska Supreme Court in *Casey v. City of Fairbanks,* supra, the California Court of Appeals noted "that the private sector context in which *Vaca* was decided substantially limits its application to the

instant case", and that a public employee may prevail on a breach of contract claim "without regard to whether the unions negligently or purposefully declined to carry their grievance". 25 Cal. App. 4th at 216, 218.

Just as Congress did not intend "to deprive injured employees of all remedies for breach of contract" under the NLRA, *Vaca,* supra, 386 U.S. at 185, 87 S. Ct. at 914, the Nevada Legislature did not intend to deprive injured local government employees of all remedies for breach of contract, or their due process right to a meaningful post-termination evidentiary hearing, through the adoption of the Local Government Employee Management Relations Act, NRS Chapter 288. Regardless as to whether this Court adopts the *Vaca v. Sipes* approach, or alternatively the *Casey/Anderson* approach, Douglas Smaellie should be not be deprived of his property interest in his employment without a forum to vindicate his contractual rights simply because the MPOA purchased limited legal defense fund coverage which did not cover off-duty conduct.

II. THE DISTRICT COURT ERRED BY DECIDING THE CASE BASED ON "STANDING".

The district court should not have dismissed Smaellie's claim on the grounds of "standing". It did so based upon a misreading of *Ruiz v. City of North Las Vegas*, 127 Nev. ___, 255 P.3d 216 (2011) and an unpublished disposition in *Dixson v. City of North Las Vegas,* Docket No. 64016.

The district court cited to *Ruiz v. City of North Las Vegas* in the Order Granting Defendant's Motion To Dismiss to support dismissal on the issue of "standing" stating:

> A unionized employee lacks standing to appeal the outcome of negotiated grievance procedures when a collective bargaining agreement expressly provides that the Union is the party responsible for filing a grievance in pursuing arbitration.

(APP Vol. VII at 1221).

The issue before the court in *Ruiz* turned upon the statutory language of NRS 38.241. Police Officer Lazario Ruiz *received an arbitration.* When the arbitrator upheld his termination after admitting evidence which Ruiz alleged should have been excluded pursuant to NRS 289.085, Ruiz filed an action to vacate the arbitrator's award pursuant to NRS 38.241. This Court based its decision upon the language of NRS 38.241 which provides "[u]pon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if: [one of several grounds is applicable]." 255 P.3d at 220. This Court ultimately determined that the union, not Ruiz, was the "party to an arbitral proceeding". *Id.*[3]

"Standing" is an issue of subject matter jurisdiction. *Vaile v. Eighth Judicial Dist. Court ex rel. County of Clark,* 118 Nev. 262, 44 P.3d 506 (2002); *Applera*

[3] Undersigned counsel were counsel of record for Lazario Ruiz.

Corp. v. MP Biomedicals, LLC, 93 Cal.Rptr.3d 178, 192 (Ct.App.2009). However, the federal circuit courts addressing the issue have held that employer claims that an employee has failed to exhaust contractual remedies under *Vaca v. Sipes* does not implicate the issue of subject matter jurisdiction. Rather, such claims are to be analyzed under F.R.C.P. 12(b)(6) for failure to state a claim upon which relief may be granted. See *Roman v. United States Postal Service,* 821 F.2d 382, 385 (7th Cir. 1987).

This is because it has long been recognized that the failure to exhaust contractual remedies is an affirmative defense. *Vaca v. Sipes*, 386 U.S. at 186, 87 S. Ct. at 914 ("For these reasons, we think the wrongfully-discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies..."); *Johnson v. General Motors*, 614 F.2d 1075, 1079 (2d Cir. 1981) (holding that the burden of establishing entitlement to the exhaustion defense lies with the party raising the defense); *Dorn v. Meyers Parking Sys.*, 395 F. Supp. 779, 786 (E.D.Pa.1975) (exhaustion need not be addressed in the complaint and that the party against whom the claim is made has the initial burden to plead and establish the affirmative defense of failure to exhaust); *Miller v. Illinois California Express, Inc.*, 358 F. Supp. 1378 (E.D. Ill. 1972).

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Likewise, even if the EMRB did have jurisdiction over hybrid claims, the issue of "standing" or subject matter jurisdiction would not be implicated. In *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007) this Court overruled its prior decision in *Rosequist v. International Ass'n of Firefighters*, 118 Nev. 444, 49 P.3d 651 (2002) and held that the failure to exhaust an administrative remedy does not implicate subject matter jurisdiction. Rather, it simply renders a case "nonjusticiable". 123 Nev. at 571, 170 P.3d at 993.

"It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement". *DelCostello v. International Brotherhood of Teamsters*, supra 462 U.S. at 163, 103 S. Ct. at 2290 citing *Smith v. Evening News Assn.*, 371 U.S. 195, 83 S. Ct. 267, 9 L.Ed.2d 246 (1962). In *Smith* the United States Supreme Court held that the state courts had jurisdiction to hear an action by an employee against an employer for damages resulting from alleged violations of the collective bargaining agreement even though the alleged conduct of the employer might also be an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board.

Because the "standing" of individual employees to enforce collective bargaining agreements has "long been established", the district court erred in dismissing the case on grounds of "standing". The proper analysis is whether the

availability of some other forum capable of granting complete relief renders Smaellie's case "nonjusticiable". As set forth below, there is no alternative forum.

III. SMAELLIE'S CASE WAS NOT NONJUSTICIABLE BECAUSE THE EMRB WILL NOT EXERCISE JURISDICTION OVER HYBRID CLAIMS.

In some other states, hybrid actions may be brought before that state's version of Nevada's EMRB. See e.g. *Lee v. United Public Workers, AFSCME, Local 646*, 125 Haw. 317, 260 P.3d 1135 (2011). However, the jurisdiction to hear such hybrid actions by administrative agencies in such states is because the statutory definition of a prohibited labor practice includes the violation of a collective bargaining agreement. See e.g. Hawaii Revised Statute §89-13(a)(8); Oregon Revised Statute 243.672 (1)(g).

In Nevada, the prohibited practices subject to the EMRB's jurisdiction are set forth in NRS 288.270. Unlike other states which have statutes defining the breach of a collective bargaining agreement as a prohibited labor practice, NRS 288.270 does not include violations of contract as a prohibited practice subject to the EMRB's jurisdiction. Rather, Nevada's EMRB is like its federal counterpart, the National Labor Relations Board ("NLRB"), which likewise does not have jurisdiction over contract claims.

If Douglas Smaellie had attempted to bring his hybrid action before the EMRB it would have been dismissed. Smaellie provided the district court with the

Complaint filed with the EMRB alleging a hybrid action in the case of *Mark Tansey v. Clark County*, EMRB Case No. A1-045973, and the EMRB's Order dismissing the case. (APP Vol. I at11-17). This Court may take judicial notice that the EMRB filed an *amicus curiae* brief with this Court in *Dixson et al. v. City of North Las Vegas* Docket No. 64016 in support of its position that it lacks jurisdiction to hear such cases.

"The law does not require the doing of a futile act." *People v. Herrera*, 232 P.3d 710 (Cal. 2010); *Alldredge v. Archie*, 93 Nev. 537, 569 P.2d 940 (1977). Attempting to seek redress before the EMRB would have been futile.

Likewise, simply proceeding against the MPOA before the EMRB for breach of its duty of fair representation would not afford Smaellie significant relief. In order to receive his back pay and benefits, including PERS contributions, perhaps more importantly in order to be reinstated, any action would have to be brought against the employer. As noted by the United States Supreme Court in *Vaca v. Sipes*, supra, to leave the employee without a remedy is "a great injustice." 386 U.S. at 185-186, 87 S. Ct. at 914.

IV. CONCLUSION/REMEDY REQUESTED

Douglas Smaellie lost his property interest in his employment without any type of post-termination hearing before a neutral decision maker for no reason other than the fact that his union purchased the lowest level of insurance coverage

under their legal defense plan. It is time for this Court to address what the United States Supreme Court has referred to in *Vaca v. Sipes* as "a great injustice" and in *Del Costello v. International Brotherhood* of *Teamsters* as "an unacceptable injustice".

For all of the reasons set forth above the judgment of the district court should be *reversed* and the matter remanded to the district court with instructions to proceed under either the approach set forth in *Vaca v. Sipes*, supra, or alternatively the approach utilized in *Casey v. City of Fairbanks* and *Anderson v. California Faculty Association*, supra.

DATED this 22nd day of July, 2016.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28(e) AND NRAP 32(a)(8)

I hereby certify that I have read this Opening Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that it complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the Opening Brief regarding any material issue which may have been overlooked to be supported by a reference to the page of the transcript or appendix where the matter overlooked is to be found. I further certify that this Opening Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14, has 23 pages, double spaced, and contains 5,278 words. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of July, 2016.

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CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 25th day of July, 2016, I did serve the above and forgoing APPELLANT DOUGLAS SMAELLIE'S OPENING BRIEF, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, to the following email address on file for:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS SMAELLIE, Plaintiff, vs. CITY OF MESQUITE, Defendant.	CASE#: A-17-759770-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

TUESDAY, MARCH 6, 2018

RECORDER'S TRANSCRIPT OF HEARING
DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS

APPEARANCES:

For Plaintiff: ADAM LEVINE, ESQ.
.

For the Defendant: CHARITY F. FELTS, ESQ.
REBECCA BRUCH, ESQ.
BOB SWEETIN, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, March 6, 2018

[Case called at 10:03 a.m.]

THE COURT: Smaellie v City of Mesquite. 759770.

MR. LEVINE: Good morning, Your Honor. Adam Levine for Doug Smaellie.

THE COURT: Smaellie. Thank you for correcting it.

MS. FELTS: Good morning, Your Honor. Charity Felts for the City of Mesquite, as well as Rebecca Bruch for the City of Mesquite. And representative for the City of Mesquite is City Attorney Bob Sweetin.

THE COURT: Mr. Sweetin was my law clerk for a couple of months in 2011, so it was many, many years ago.

And Mr. Levine, do you have any issues with that?

MR. LEVINE: No.

THE COURT: Okay. Thank you very much.

All right. We'll proceed then.

THE CLERK: Can we get a bar number for Rebecca Bruch?

MS. FELTS: I'm sorry?

THE CLERK: Can we get a bar number for Rebecca Bruch?

MS. FELTS: Yes, 7289.

MS. CLERK: Okay.

MS. BRUCH: Good morning, Your Honor.

THE COURT: Good morning.

Okay. So Defendant's motion to dismiss.

MS. FELTS: Thank you, Your Honor.

THE COURT: Has a lengthy procedural history.

MS. FELTS: Yes. So, you know, the city brings this motion to dismiss on the basis that Mr. Smaellie's claim is untimely and beyond any applicable statute of limitations.

And this goes back to -- well looking at this Complaint that's the operative Complaint in this particular case, which we've dubbed Complaint Number 2 in our motion and in our briefing. That was filed on August 10th, 2017. And in that Complaint, Mr. Smaellie argues and claims that the city breached its -- breached the collective bargaining agreement for allegedly terminating him without cause. And for the first time in this Complaint, the -- Mr. Smaellie brings a breach of the duty of fair representation claim against the union.

Combined together, these two claims make a hybrid action. And one component of the hybrid action can't -- cannot survive without the other component.

When you look at back Complaint Number 1, which was filed by Mr. Smaellie back in February of 2014, there was no duty of fair representation claim in that Complaint. That Complaint, as you've seen from the briefing, that Complaint was dismissed by Judge Williams. It went up on appeal to the Nevada Supreme Court. The Nevada Supreme Court ultimately affirmed the order of dismissal, except to change it to a dismissal without prejudice rather than with prejudice. So -- and it's also important to note that in making its decision, the Nevada Supreme Court noted that Mr. Smaellie did not

in Complaint Number 1 file a duty of fair representation claim. And the Court specifically said in that order of affirmance that type of claim is required to state a hybrid action.

So it appears that Mr. Smaellie is evidently trying to correct the mistake in not having brought that duty of fair representation claim initially with the Complaint that was filed back in February of 2004 -- or excuse me, 2014. But unfortunately for Mr. Smaellie, it's too late to correct that. The statute of limitations, the applicable period of limitations that would be applicable to this type of DFR, duty of fair representation claim, which is that component of the -- of the hybrid action, what would be applicable to that, those periods would have expired by now.

And we provided to the Court in our briefing, potentially applicable statutes of limitations. We talked about the six-month statute of limitation that is -- that is the federal standard. We talked about the fact that the Nevada Supreme Court follows the federal precedent on those issues, the *Weiner versus Beatty* case. And specifically when you look back at this particular order of affirmance in this case, as well as an order of affirmance in the *Clark County versus Tansey* case for which Mr. Levine was -- is very familiar with as he was plaintiff's counsel on that, that dealt with the issue of hybrid actions. You know, *Vaca versus Sipes* and *DelCostello*, those two cases are the one that were adopted by our Nevada Supreme Court and which that was part and parcel of the earlier decision. So

those cases, those federal cases, provide for a six-month statute of limitations as one option.

Also in Nevada under Chapter 288, in the Local Government Employee Management Relations Act, six months -- a DFR claim, a duty of fair representation claim, is an unfair labor practice. It would be subject to six months. So there's -- there is an option.

There are also, as we provided in our briefing, under the *Giffin* case out of the California Court of Appeals, that particular court elected not to apply the six months statute of limitations, but instead applied the one that's applicable to liability that's created by statute. Again, we have liability created by statute here, and that in that case if you applied the applicable limitations period would be three years. Mr. Smaellie is beyond that period as well.

There are a couple of other cases in which the courts -- and one out of Massachusetts and one out of New York. The Massachusetts case applied a two-year statute, or excuse me, a statute of limitations applicable to tort claims sounding in negligence or attorney malpractice claims. If you're -- the Court were to elect to apply either of those, we'd be dealing with two or four years under both of those. Mr. Smaellie's duty of fair representation claim is tardy. It is not timely. It is beyond that statutory period.

And finally, in the New York case, the *Baker* case, the catch-all statute of limitations period was applied in that particular case. If using Nevada law and what that is under Chapter 11 of the

NRS, that would be four years. Again, Mr. Smaellie is beyond that period.

It's really important not to lose sight of the nature of this particular case. It is a hybrid action. It is not a traditional contract claim. It is one in which there's a contract component and there is a duty of fair representation component. Rather than applying the -- and it -- what this is --

THE COURT: Is there any tolling?

MS. FELTS: I'm sorry?

THE COURT: Is there any tolling?

MS. FELTS: I don't believe so, because this DFR claim, excuse me, the duty of fair representation claim was never filed. There's no tolling of a claim that was never filed. It was filed for the first time in August of 2017. So no, there's no tolling.

THE COURT: Okay. Thanks.

MS. FELTS: And if you have any other questions or need me to address anything else, I'm happy to do that.

THE COURT: No. Thank you.

MS. FELTS: Thank you.

THE COURT: Okay. Mr. Levine?

MR. LEVINE: Yes. Your Honor, what seems like eons ago when I was probably still a young attorney, I set out on a mission in the Mark Tansey case to figure out where and under what standard does an employee have a remedy when they are terminated in violation of their collective bargaining agreement and the union will

not advance their case to arbitration.

There are two approaches that are taken by other states addressing this issue. There's the approach from the public sector -- I'm sorry, the private sector, which is the *Vaca versus Sipes* approach. Other approaches such as Alas -- we call it the *Casey* approach from *Casey versus City of Fairbanks*, and the California approach from *Anderson*, says no, you don't have to prove a breach of the duty of fair representation, you just have to show you attempted.

In the *Tansey* matter --

THE COURT: Attempted what?

MR. LEVINE: To -- to -- attempted to arbitrate and exhaust the arbitration requirements in the collective bargaining agreement. The other courts such as *Casey* said public sector is different than private sector, because public sector involves due process. The employees have a property right subject to the due process clause that is not applicable in the private sector.

Ultimately, Judge Bonaventure, who heard the case in *Tansey* said I don't have to decide which approach Nevada would adopt of the *Casey* -- or the California/Alaska approach or the federal approach, because I find that *Tansey* appeal prevails under both standards, that enter a judgment in favor of Mark Tansey. The case went up on appeal while this case was going forward. *Tansey* was going on before the facts giving rise to this case occurred.

Now what happened in this particular case, their statute of

limitations argument fails both procedurally and on the merits. I'm going to address procedure, first. And the procedure, of course, is the law of the case, which was when Doug Smaellie filed this case, while *Tansey* was working its way through the system --

THE COURT: The first Complaint?

MR. LEVINE: The first Complaint. The Defendant filed a motion to dismiss on statute of limitations grounds and on the grounds of standing. They argued both grounds.

Judge Williams rejected the statute of limitations argument. And it's right on there he pointed out, this argument that you're making about six months, it is directly contrary to a Nevada statute, which says that a action for breach -- action founded upon a written instrument is six years. And he even pointed -- they made the same argument. Well, look at the six-month statute of limitations for the EMRB.

And Judge William says: No, the ERMB has no jurisdiction over this matter. And it would -- as he pointed out, it would probably violate the Nevada constitution if the EMRB did have jurisdiction. So he rejected that claim and said on the issue of standing, can employees pursue this? I'm going to deny that without prejudice, pending some guidance from the Nevada Supreme Court.

Fast forward, after all the discovery is done, they filed a motion for summary judgment and a renewed motion to dismiss on the standing issue based upon an unpublished decision in *Dixson*. Judge Williams said: I'm going to grant it on the standing issue in

light of *Dickson.* He'd already rejected it on the statute of limitations grounds, but he granted it on the standing ground. And then we, of course, appealed.

Now, in that appeal, they did not raise as an alternative grounds for affirmance, which they are allowed to do. Hey, even if Court, you find that there is standing, they're still untimely under the statute of limitations. They abandoned the argument.

Now, in their opposition, I pointed out in my -- sorry, in their reply, I pointed out in my opposition the law of the case says it applies not only to arguments, which were raised, but which could have been raised.

In their reply, they cite the -- a portion of the Reconstruct or -- I'm going to mispronounce this -- *Recontrust Company versus Zhang*. And they quote a portion, the wrong portion, to imply that law of the case does not apply. But the actual operative portion of that case is under headnote 6.

First, the District Court did not rule on the equitable subrogation before *Zhang II*. Waiver in the law of the case context applies only when the trial court has expressly, and this is the key part, or impliedly ruled on a question, and there has been an opportunity to challenge that ruling on a prior appeal. Since the District Court did not decide equitable subrogation there was no error for Countrywide to argue.

This case is different, because Judge Williams did address and impliedly reject the statute of limitations defense in the first go-

around. So they did have an opportunity to raise it, and therefore it is barred procedurally under the law of the case.

Now, let me turn to the substantive why it fails on the merits. The law has long recognized, well before 1947 with the adoption of the Labor Management Relations Act in Section 301, which they are trying to rely upon, the law has always been that collective bargaining agreements can be enforced under the state law of contracts. Collective bargaining agreements are a third-party beneficiary contract. It is a contract between the employer and the union with the employees as the beneficiaries. And third-party beneficiaries, since the inception of common law, have always had the right to bring an action to enforce the contract that they are the beneficiary of under the law of contracts, subject to the statute of limitations for the law of contracts.

The six-month statute of limitations that they are relying upon is from Section 301 of the Labor Management Relations Act. But guess what? Section 301 and the entire Labor Management Relations Act, does not apply to the employees of the states or their political subdivisions. They are arguing for a statute of limitations adopted by Congress for the private sector only that does not apply to somebody like Doug Smaellie.

So unless and until the Nevada Legislature decides to impose a different statute of limitations for collective bargaining third-party beneficiaries, it is the six-month statute for written instruments, which applies. There is an old --

THE COURT: Six year?

MR. LEVINE: What?

THE COURT: Six year?

MR. LEVINE: Six year, sorry.

There is an old Latin phrase recognized by Nevada, which I'm not going to attempt to butcher, but translated is the expression of the one thing is to the exclusion of the other. Where you have a statute of limitations for six years for an action based upon a written instrument, you do not go and start looking to other statute of limitations. Six years for written instruments means all these others are excluded.

Now, with regard -- I need to point something out, because there was an inaccuracy in the characterization by the defendants. Doug Smaellie is not filing or bringing a claim for breach of the fair -- duty of fair representation against the Union. It is not necessary that he do so.

I'm going to quote for you what his actual burden is. In *DelCostello*, the language which is adopted by our supreme court in *Tansey* was the Plaintiff quote: 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. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Our burden is to show as part of our case in the breach of

contract case, the union breached its duty. But we don't have to file a case against the union. We don't have to bring a case against the union and we're not. The union has not been made a defendant in this case. The Union will not be made a defendant in this case. The case is only against the City of Mesquite and just like in the *Tansey* matter, all we have to do is show that we were deprived of the opportunity to go to arbitration because the union breached its duty.

So with that, I will finish by saying it's -- we have a six-month statute of limitations that applies on its face. They had an opportunity --

THE COURT: Six month or six --

MR. LEVINE: Six year, I'm sorry. Too many sixes.

THE COURT: Uh-huh.

MR. LEVINE: Six-year statute of limitations for written instruments, which applies on its face any argument that we should be looking to a federal law that is expressly inapplicable makes no sense. And that was the same conclusion that Judge Williams drew and they had an opportunity to challenge it and they didn't.

And even if the four-year statute applied, which it does not, Your Honor raised the issue of tolling, yeah, tolling would actually apply during the period that this matter was on appeal to the Nevada Supreme Court. But again, I don't think you have to reach tolling, because six years is six years and we're within the six years.

THE COURT: Okay. So the portion of this *Tansey* opinion that would be significant in this case is the Court determined that is

unreasonable to only allow an employee to bring a breach of -- a breach of duty of fair representation claim against a union, when the union breach is related to an employer's breach of the collective bargaining agreement.

So I'm reading from *Tansey*, and if this is --

MR. LEVINE: Right.

THE COURT: -- this is what the conclusion is. The Court determined that it is unreasonable to only allow an employee to bring a breach of duty or fair representation claim against the union, when the union's breach is related to an employer's breach of the collective bargaining agreement.

So the employer breaches the collective bargaining agreement, the union says we aren't going to pursue this to arbitration for you.

MR. LEVINE: Uh-huh.

THE COURT: So the claim is related to you -- the Union wouldn't represent me on this and it rises as though out of the employer's breach of the same collective bargaining agreement.

MR. LEVINE: That is correct, because in *Vaca versus Sipes* the Neva -- U.S. Supreme Court said that in conferring upon unions, the right to --

THE COURT: In the public sector.

MR. LEVINE: Right.

THE COURT: The public sector's different.

MR. LEVINE: In the private sector, the right to negotiate

and take these cases to arbitration, Congress did not intend to insulate --

THE COURT: The employer.

MR. LEVINE: -- employers from liability from the breaches of their contract.

THE COURT: So the failure to raise a causative action against the union earlier does not insulate the governmental entity from its own original liability of allegedly breaching the --

MR. LEVINE: That is correct.

THE COURT: -- collective bargaining agreement.

MR. LEVINE: That is correct. And --

THE COURT: However, the union's failure to act doesn't protect the --

MR. LEVINE: Does not protect the employer --

THE COURT: -- the employer.

MR. LEVINE: -- from his own breach of the bargaining agreement. And again, some states have said for due process reasons we're not going to make you show a full-fledged breach of the duty of fair representation claim.

The Nevada Supreme Court said, like other states, we're going to go with the federal model which is as part of your breach of contract case, your burden. It's not that we have to file a claim against the union, the language from *DelCostello* quoted is: It's our burden to demonstrate a breach of the duty. We have to show in order to get to the jury that the union breached its duty of fair

representation. And that's an issue of proof, not 12(b).

THE COURT: And this -- that -- the *Tansey* decision adopting that federal approach came out just one month before the decision on the first Complaint in this case?

MR. LEVINE: That is correct.

THE COURT: So why didn't they publish them?

MR. LEVINE: I have forever pondered the mysteries of what does and does not get published, and why? The --

THE COURT: Uh-huh. Join the club.

MR. LEVINE: -- cynic in me says it's based upon caseload, and workload.

THE COURT: Okay. All right.

MR. LEVINE: But that's one of those imponderable mysteries that we will probably never get an answer to.

THE COURT: Okay.

Counsel, go ahead.

MS. FELTS: Going back to *Tansey*, Your Honor, one of the things that in *Tansey* was mentioned is the Court is -- the Court -- the Nevada Supreme Court specifically says in citing to *DelCostello* notably the Court recognized that the two claims are inextricably interdependent. So yes -- and we've never suggested otherwise. We've never suggested -- the city has not suggested that there needs to be -- the union needs to be made a party in order to bring the duty of fair representation claim. We understand that *DelCostello* says they can sue one or the other or both. We understand that.

THE COURT: But your point is they need to do it originally. That in this case where he started with a different claim, it's really issue preclusion isn't it?

MS. FELTS: Well, I mean the issue was never decided. The issue -- and to go back to Judge -- what Judge Williams was deciding in that very early motion to dismiss that we had back in 2014 --

THE COURT: Uh-huh.

MS. FELTS: -- the issue was isolated specifically by Mr. Smaellie's own doing by the way that that Complaint was crafted as a breach of contract action solely. So that was what was presented to Judge Williams.

And in addressing that and bringing our motion to dismiss then, yes, we talked about the DFR, the duty of fair representation claim that is also needing to be brought. And we talked about the statutory -- the statute of limitations issue.

But that particular motion to dismiss was denied without prejudice. The issue specifically on which statute of limitations applies was not directly addressed because we were only dealing with the one thing that was the isolated issue as presented by Plaintiff himself was, this is a breach of contract claim. Well, that's not the nature of this particular case. This is not simply just a breach of contract claim, this is a hybrid action.

The *Tansey* case, adopting *DelCostello*, or the Supreme Court in the earlier *Smaellie* case that went up on appeal, again

looking at it saying that they're using *DelCostello.* And we're not saying you can only apply a six-month statute of limitations period. That's what *DelCostello* that has done. There is under Nevada law, an unfair labor practice needs to be brought within six months. But that is not the only statute of limitations period that potentially could be applied to this hybrid action.

There are others and we've talked about those. We've looked at the other states, California being our neighbor, what -- one that's done that. And in that particular case, which did deal with a hybrid action, unlike the *Charles Dowd Box Company* case that Mr. Smaellie relies on in his opposition, which wasn't even a hybrid action, did not even include a duty of fair representation in claim. In fact, was just a claim brought by the union against the employer for declaratory relief looking to enforce a collective bargaining agreement, so it was strictly based on breach of -- potentially breach of contract. That's not where we find ourselves in this particular case.

And so, in *Giffin* they were -- that particular court was presented with the argument similar to Mr. Smaellie's that you can apply the statute of limitations as it is applied to written instruments. And they declined to do that because this was in that case and also in this case not a traditional contract claim. That is not where we are. The nature of this particular claim is one that is sounds in breach of contract and breach of the duty of fair representation. *DelCostello* says they're inextricably interdependent.

The other cases that we cited in our reply, one says one is the indispensable, the DFR claim is the indispensable predicate to the success of the other claim. And so even though there exists a breach of contract component, these two components work together making this hybrid action. And application of the six-year statute of limitations on written instrument disregards the nature of the case, disregards the duty of fair representation claim.

THE COURT: Okay. Well, putting that aside, assuming that it is six years, this really seems to me like we should be analyzing this under issue and claim preclusion and not statute of limitations. I mean, because the question is what was dealt with in the first complaint? Is it so inextricably a part of the claim being brought here, that the decision in the prior action precludes this action? It really seems to me it's a claims preclusion problem.

MR. LEVINE: May I address that issue, Your Honor?

THE COURT: No.

MR. LEVINE: Okay.

MS. FELTS: Well, so the claim that was decided is -- well, it was to set it on the standing issue. But if you use -- if you claim an issue preclusion, if you look at what our Supreme Court decided, if you look at specifically the order of dismissal in the Supreme Court's order of affirmance, excuse me, you know it does -- it goes to these issues. It addresses the specific issues that we're talking about here. Appellant did not allege that the union breached its duty of fair representation, which is stated to or is required to state a hybrid

claim. We're specifically dealing with a hybrid claim situation here.

It goes on to say he was required to allege that the association breached that duty. Mr. Smaellie didn't allege that. So talking issue or claim preclusion, our Supreme Court in affirming this dismissal have said those were the -- these issues then have been addressed. The claim that needed to be brought was the DFR claim. It wasn't brought.

So then, you know, fast forward all of this time later when it's brought for the very first time beyond any potentially applicable statute of limitations claim, then yeah we do have a preclusion issue.

THE COURT: Well, so Mr. Levine, I'd like to hear from you on that. Because to me this seems like I'm inclined to agree with you it's six years. But I got hung up on issue and claims preclusion.

MR. LEVINE: And let me tell you why it doesn't apply.

THE COURT: And nobody briefed it. Nobody briefed it.

MR. LEVINE: And let me tell you why it doesn't apply.

THE COURT: Okay.

MR. LEVINE: Issue or claim preclusion requires a decision on the merit. You cannot have issue or claim preclusion on a dismissal without prejudice.

THE COURT: Uh-huh. Thank you.

MR. LEVINE: It would have to have been a dismissal -- in other words, if issue preclusion or claim preclusion apply, the Supreme Court would have dismissed the case with prejudice. It's without prejudice. They sent it back saying your original pleading

was deficient and that's it. There is no claim or issue preclusion in a dismissal without prejudice.

THE COURT: And as Counsel pointed out, they specifically say you had to have at least alleged -- we agree. I mean, it's very clear from both of these decisions that they absolutely agree that you do not have to sue the union.

MR. LEVINE: Uh-huh.

THE COURT: That's understood. And so they agree with you on this whole *Tansey* approach. The *Tansey* approach is -- agrees with you on this whole like *Baca*, the fed --

MR. LEVINE: Right.

THE COURT: -- and the *DelCostello*, the federal approach. So I agree with you.

I also agree with you on the six years. But where I -- what I didn't see anywhere mentioned in here is issue and claim preclusion. So I'm sorry for --

MR. LEVINE: Because it wouldn't apply.

THE COURT: -- putting you on the spot right here, just to end, you know, on your feet.

MR. LEVINE: It can't apply onto a dismissal without prejudice.

THE COURT: Okay.

MR. LEVINE: That's why claim and issue preclusion wasn't raised by them or me. And if they had raised it, I would have pointed out it was a dismissal without prejudice. They dismissed it

without prejudice, because they found my original complaint was deficient. My original complaint simply said *Tansey* was prevented by his union from pursuing the --

THE COURT: No, no. In this case, I'm looking at the decision in this case.

MR. LEVINE: Yes. The decision in this case, when the Supreme Court reversed -- affirmed in part and reversed in part, they affirmed the dismissal, but they took the with prejudice and turned it to without prejudice because they original complaint in Case Number 1 only said the union prevented him. It didn't say they breached their duty of fair representation. My pleading, initial pleading, they found to be not clear enough.

THE COURT: Uh-huh.

MR. LEVINE: In other words, they wanted a specific allegation. So they dismissed it without prejudice. Without prejudice means you have the right to refile and so I refiled with the exact language they wanted in.

THE COURT: Okay. Thanks.

MS. FELTS: And the refiling that happened, yes the -- this was dismissed on standing. The Court said what it said, what I just told you that the DFR claim was absolutely required in order to state this hybrid action. And but the Court goes on to say, nevertheless, the dismissal was for a lack of standing issue to dismiss, been dismissed without prejudice.

Okay. So to the extent that you have the ability, that you

have the proper standing, and you have time to do it, yeah you can go back. Mr. Smaellie doesn't have time to do it. This is a hybrid action. It is not simply a breach of contract claim. The two go together.

And I think in some of the cases, and we've provided this is in our reply and I would -- I'm just -- think it's important to point this out in some of these other cases. The -- it's the *Nicky* case and the citing *Flanigan*. You know, it talks about when an action against a union for breach of duty of fair representation is time barred due to filing after the -- in that case it was a six-month limitations period because of the federal component -- when it's filed after that period, and the Plaintiff knew or should have known, then it's properly dismissed.

Again, so we're not talking about -- we're just not talking about a traditional contract claim. We're talking about a hybrid action where we think using the six years, it's actually more appropriate to use one that's applicable, because that DFR claim, the duty of fair representation claim is a really critical component of this. And it was dismissed without prejudice to the extent he had the ability to refile. We maintain he's beyond that applicable -- any of those applicable limitations period and no ability to refile.

THE COURT: Okay. I'm going to deny the motion to dismiss. I do think it's six years as you've argued. And I am satisfied on the claims preclusion discussion that it would -- we -- the without prejudice saves it. Nobody briefed it and I didn't know why,

so I appreciate you talking to me about it just on the fly here in court. So I'm satisfied on it that we are not violating the *Five Star Capital* rules that this without prejudice is not an adjudication on the merits. It was simply dismissed on standing, not on the merits of the case. And I think on the merits, reading as I said the case, it was decided literally a month earlier than the first -- the appeal on the first Complaint here, that he's within what *Tansey* stated. That we can proceed under a six-year statute, which has not expired. That's why I asked about the tolling. I think we're okay here. It was -- I think 2013 case firing, so I think we're well within the five-year statute.

MR. LEVINE: Six.

THE COURT: And we don't have to calculate any -- in any tolling. My whole question on tolling was just if by filing a case that was ultimately dismissed on standing grounds, and the Supreme Court's saying well, it's without -- it's without prejudice were they looking at that statute of limitations having been tolled? And again, we didn't really get into briefing tolling. But statute of limitations can be raised at any time, unfortunately, Mr. Levine.

And I haven't looked at tolling. Again, tolling and issue and claim preclusion were the two things I didn't see argued anywhere here that I thought might be relevant. You know, I still have a question on tolling, but I don't this it's sufficient to grant the motion. I feel comfortable that it's six years and we don't have to worry about whether filing a case that's dismissed years later on standing grounds, whether that does or doesn't toll this action.

Because the decision in this action follows in six months of the decision in this action. So.

MR. LEVINE: Your Honor, I will prepare the order.

THE COURT: That's the tolling argument, I guess.

MR. LEVINE: The only question I have is for purposes of the -- making a complete record and clarity of the order. Is the Judge going to be issuing any sort -- any -- including within the order a ruling on my argument regarding law of the case since it was raised previously, denied by Judge Williams, they had an opportunity to appeal it. I don't know. I don't like leaving arguments raised out of the dispositional order, so I would like some guidance from you as to how you want it handled in your order.

THE COURT: Well, that was my question on tolling. Is what's the significance of Judge Williams saying what he said in 2014 --

MR. LEVINE: Teen.

THE COURT: -- that was then appealed. Then that not addressed --

MR. LEVINE: I guess -- well, there's two things you --

THE COURT: -- I don't know what -- and not having seen the briefs, I don't know what was addressed. I just know what's in the actual order sending this case, the first Complaint in this case back down. They didn't address it?

MR. LEVINE: I can handle the order this way, Your Honor, by saying in light of your ruling that the six-month statute of

limitations applies, you don't need to --

THE COURT: The six years.

MR. LEVINE: -- address the issue of the law of the case.

THE COURT: Six years. Mr. Levine, you're going to mess this up. It's six years.

MR. LEVINE: Six years, sorry.

THE COURT: When you're dictating this to your secretary, it's six years.

MR. LEVINE: Six years.

THE COURT: Yeah. And so -- and that I specifically -- I have not gotten into the issues of statute of limitations because it was not addressed in the order sending this back down. So I think we never really got into a discussion of tolling.

MR. LEVINE: I will put in the order that you're not issuing a ruling on law of the case.

THE COURT: I think tolling, I think tolling is an issue. And that's so --

MS. FELTS: Your Honor, can I speak?

THE COURT: -- like I said, I'm not going to rule on tolling. Yeah.

MS. FELTS: May I comment on your --

THE COURT: Sure.

MS. FELTS: -- the tolling? If you're talking about NRS 11.500 where it talks about how -- because you said something about see filing within six months after the decision. It does offer for

recommencement of action, but it talks about an action maybe recommenced. Our whole point is that there's no --

THE COURT: They filed their material new.

MS. FELTS: -- commencement ever. There was never a commencement of a DFR claim. There's no duty of fair representation claim that ever existed until August of 2017. So that doesn't revitalize something if you file within 90 days.

MR. LEVINE: Your Honor, could --

THE COURT: On a different topic. Okay.

MR. LEVINE: That saved the -- that saving statute referencing is only if you file in a court or in a forum that is the -- has no subject matter jurisdiction.

THE COURT: Right.

MR. LEVINE: Obviously, the District Court does have subject matter jurisdiction that --

THE COURT: And I think they specifically found that it was standing that was the problem.

MR. LEVINE: Right. Right. So just so we're clear, you're -- I'm going to prepare an order that says you find the six-year --

THE COURT: Yes. Thank you.

MR. LEVINE: -- statute of limitation applies.

THE COURT: Right.

MR. LEVINE: And in light of that ruling, you do not need to address the law of the case issues raised or tolling.

THE COURT: Right. Because tolling and the *Five Star*

Capital issues were not addressed. Although discussed in court, they were not addressed in the briefs, so I'm not specifically ruling on them. I just think it's -- I think it's just the six years and we're okay, because the time.

MR. LEVINE: Right.

THE COURT: But I do think those are issues.

MR. LEVINE: Uh-huh. All right.

THE COURT: I'm just not -- I'm not -- I'm not going to rule on them, they weren't specifically addressed in the pleadings.

MR. LEVINE: Okay. I will prepare an order and run it by counsel.

THE COURT: But I think you're still okay. I think you'd still be okay under six months, but anyway we didn't actually brief and discuss tolling. So I know I don't want to --

MR. LEVINE: Right. I'm not going to put anything about tolling. It's just simply I --

THE COURT: And I'm not going to add something --

MR. LEVINE: -- raised the law of the case issue.

THE COURT: Right. I'm not going to rule on something that would just create an issue if they take a writ. I don't want to do it.

MR. LEVINE: Right.

THE COURT: So it's -- I'm strictly sticking on the six. I think six years we're okay. It's within time under six years.

MR. LEVINE: Yep.

MS. FELTS: And without having to get to the other issues, then.

MR. LEVINE: Right.

MS. FELTS: That's -- it's just the six years --

THE COURT: Correct. Yeah.

MR. LEVINE: Right.

MS. FELTS: -- is what you're saying is applicable.

THE COURT: Correct. Yeah, but I think it's six years controls and we've talked about a lot of other issues that I think impact on this. They weren't briefed. We're not going to put them in the order for that reason. Hopefully that will be enough for them.

MR. LEVINE: Understood. I did brief law of the case, but we'll just have the --

MS. FELTS: And I'm happy to provide --

MR. LEVINE: -- indicate that you're not issuing a ruling.

MS. FELTS: -- more information on that and why we opposed that it was -- it's not law of the case.

THE COURT: Okay. All right.

MR. LEVINE: All right.

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THE COURT: Good enough.

MR. LEVINE: All right.

THE COURT: We'll just leave it -- leave it on that one issue, so we don't invite other issues.

[Hearing concluded at 10:36 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

_____

Myra Severtson
Court Recorder/Transcriber

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DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS SMAELLIE,

Plaintiff,

v.

CITY OF MESQUITE,

Defendant,

_____/

Case No. A-17-759770-C
Dept. No. XXVI

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter having come on for hearing on this 6th day of March, 2018 at the hour of 9:00 a.m. with Plaintiff Douglas Smaellie represented by his counsel, Adam Levine, Esq., of the Law Office of Daniel Marks; Defendant City of Mesquite represented by its counsel Rebecca Bruch, Esq. and Charity Felts, Esq. of Erickson, Thorpe and Swainston; the Court having reviewed the pleadings and having heard arguments of counsel, it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss on the grounds of the Statute of Limitations is denied. The court finds that the appropriate statute of limitations is the six (6) years limitations period under NRS 11.190(1)(b).

Smaellie v. City of Mesquite
Case No. A-17-759770-C
Dept. No.: XXVI

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that in light of the disposition set forth above, it is not necessary for the court to rule on other issues raised in the pleadings for the first time or during oral argument.

DATED this 16th day of March, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

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