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.: 75743

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

DATED: July 20, 2018

/s/ Charity F. Felts
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I. PROCEDURAL HISTORY

To begin, clarification regarding the procedural history provided by Mr. Smaellie in his Answer is needed. In the hearing held by the Honorable Judge Williams on May 22, 2014, concerning the City's original motion to dismiss, Judge Williams did not issue a decision on the statute of limitations issue and his subsequent order did not address the issue at all. V1 APP 070. The Order issued June 5, 2014, simply stated that the motion to dismiss is denied without prejudice pending further direction from this Court in *Dixson et al. v. City of North Las Vegas*, Case No. 64016. *Id.*; V2 APP 207. Judge Williams specifically limited the issue of the case and any discovery to the sole cause of action pleaded by Mr. Smaellie – breach of contract. V2 APP 209. There has never been a ruling on the issue of the applicable statute of limitations in a hybrid action such as the one brought by Mr. Smaellie on August 10, 2017.

II. ARGUMENT

A. The law-of-the-case doctrine does not preclude the Court's entry of writ.

Mr. Smaellie clearly acknowledges in his Answer that he did not bring a duty of fair representation claim in his original complaint filed on February 9,

2014, and that this Court affirmed the prior dismissal because it did not contain that necessary component. *See* Real Party in Interest's Answer, p. 4, ll. 13-15. It is this Court's prior order in the earlier appeal that provides the law of the case, namely that a breach of the duty of fair representation claim is "required to state a hybrid action" and that Mr. Smaellie "was required to allege that the Association breached its duty." V1 APP 025 *citing DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). When Mr. Smaellie brought that claim for the first time in August 2017, the City responded with the motion to dismiss that is the subject of this writ. It did so because any conceivable statute of limitations applicable to a duty of fair representation claim, which is integral to a hybrid action, has expired. Further, the City brought the motion to dismiss because there has not been a final determination on the issue of the applicable limitations period, despite Mr. Smaellie's suggestion that the City abandoned its limitations argument.

In the prior district court case, Judge Williams did not issue a final appealable judgment that ruled on the statute of limitations issue. V1 APP 070-71; V2 APP 180-199. When the district court ultimately granted the City's renewed Motion to Dismiss on January 7, 2016, the decision of the district court was based on lack of standing. V1 APP 021-23. And, when this Court issued its Order on

April 17, 2017, it did not announce a limitations period applicable to the hybrid action that Mr. Smaellie had thus far failed to advance. V1 APP 025-027.

Mr. Smaellie's reliance on *Hsu v. Cty. of Clark*, 123 Nev. 625, 173 P.3d 724, (2007), is a misapplication of the law-of-the-case doctrine. According to *Hsu*, "[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*, 123 Nev. 625, 629–30, 173 P.3d 724, 728. The rule of law concerning the applicable statute of limitations was not previously decided by this Court and was only recently decided by the district court to be six years. That decision is what has precipitated this writ petition. Thus, the City's arguments are not precluded under the law-of-the-case doctrine.

The City's earlier motion to dismiss and this writ petition do not ask this Court to revisit and rule on an issue it previously decided. *See 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.")

The issue that was previously decided, and which does form the law-of-the-case, concerns what is required to state a hybrid claim. This Court's prior decision on that issue is perfectly clear. V1 APP 025. 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), which Mr. Smaellie claims prohibits the "reassertion of a statute of limitations defense." In *Lee*, 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 of the case. *See Hsu*, 123 Nev. at 629-630 (must state a principle or rule of law necessary to a decision).

Further application of the law-of-the-case doctrine prevents the adoption of the *Anderson* standard Mr. Smaellie advocates for once again. *See* Answering Brief, pp. 12, 16. That is the same approach he requested this Court adopt in the prior appeal. It did not.

B. Mr. Smaellie's second complaint includes a hybrid action and the applicable limitations period must be measured based on that action.

Try as he might, Mr. Smaellie cannot avoid the fact that his second complaint is a hybrid action. Convenience and a desire to avoid the application of the limitations period applicable to a hybrid claim, pushes Mr. Smaellie to distance himself from the true nature of his complaint – a hybrid case. Relying on *DelCostello*, this Court clearly stated that the duty of fair representation claim is required and the employee may choose to sue one defendant and not the other but the case to be proven is the same. V1 APP 025-026. Attempting to excuse his tardy filing of a fair representation claim, Mr. Smaellie argues that he was not required to sue the union to maintain his hybrid action. The City has never argued otherwise; however, the City has repeatedly maintained that the second half of the hybrid action – the duty of fair representation claim – is what was glaringly absent from the second complaint filed on August 10, 2017. It is also what this Court has held "is required to state a hybrid action." V1 APP 025. This late attempt to salvage his hybrid action by finally advancing a duty of fair representation claim well beyond any limitations period that would be applicable to such a claim cannot be condoned.

In his argument for a six-year limitations period, Mr. Smaellie disingenuously 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. Likewise, *Smith v. Evening News Assoc*., 371 U.S. 195 (1962), did not concern a hybrid action and duty of fair representation claim. For authority on the issue relevant to this case, this Court need look no further than *DelCostello*, issued after *Charles Dowd Box Co*. and *Smith v. Evening News*. *See DelCostello*, 462 U.S. 151, 164-165) (noting that *Smith v. Evening News* allows an individual to bring a breach of contract action but that such a suit is comprised of two causes of action for breach of the collective bargaining agreement and breach by the union of the duty of fair representation).

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. Further, the progression of Supreme Court case law regarding hybrid actions requires the application of a six-month statute of limitations. *DelCostello*, 462 U.S. at 172.

C. Tolling does not save Mr. Smaellie's complaint.

Mr. Smaellie's employment was terminated on February 13, 2013. V2 APP 131. On April 2, 2013, a meeting of the Union membership was held to discuss Mr. Smaellie's grievance related to his termination and determine whether the membership wished to vote in favor of supporting his grievance. V2 APP 132-133. Mr. Smaellie claims that the underlying record is not properly developed to determine the date on which he received unequivocal notice that the union was abandoning his grievance. That is not the case. Mr. Smaellie was informed on that same day that the membership voted not to advance his grievance to arbitration. *See* V2 APP 132-133, ll. 17-20, 1-5 *citing* V5 APP 891, *Smaellie v. City of Mesquite*, Case No. 69741. This is clearly part of the record. Thus, there is no fact-finding required on the part of this Court.

Based on the unequivocal notice to Mr. Smaellie on April 2, 2013, the limitations period regarding his duty of fair representation claim started to run on

that date. *See City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 639, 261 P.3d 1071, 1077 (2011) (limitations period to start running when the alleged victim receives unequivocal notice of a final adverse decision). The date on which Mr. Smaellie filed his duty of fair representation is also unequivocal – August 10, 2017. V1 APP 001. That date is more than four years after the event that triggered the limitations period.

The duty of fair representation claim was not tolled by the underlying appeal because it was not even a claim to be considered in that action. This is not an example of "circumstances beyond plaintiff's control." *See* Answer, p. 14, ll. 10-11. Mr. Smaellie could have filed the duty of fair representation claim – the second component of his hybrid action – in his original complaint. He elected not to, and to toll a claim that was never advanced works its own inequities. *See Kimble v. DPCE, Inc.*, No. CIV. A. 91-2290, 1991 WL 236468, at *1 (E.D. Pa. Nov. 5, 1991) (unpublished decision) (plaintiff who never asserted claims until after the expiration of the limitations period was not misled by employer and was not prevented from asserting his right, thus providing no ground for tolling the limitations period) *citing Kocian v. Getty Ref. & Mktg. Co.*, 707 F.2d 748, 752 (3d Cir. 1983) (*superceded on other grounds*) (plaintiff in employment case must show she was prevented "in some extraordinary way" from timely filing her claims).

Whether a claim should be subject to equitable tolling turns on whether there was an excusable delay by the plaintiff. *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 639, 261 P.3d 1071, 1077 (2011). This is not a situation in which "a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period." *Id.* On the contrary, Mr. Smaellie was very aware of the duty of fair representation claim but elected only to file a breach of contract claim in his original complaint. And he has been represented the entire time by counsel with a great deal of experience in this area of the law. *Kocian*, 707 F.2d 748, 755. When challenged by way of the City's original motion to dismiss, Mr. Smaellie argued for the application of the *Casey/Anderson* standards and hoped this Court would adopt that approach in the *Dixson* case which Mr. Smaellie described as the "perfect test case." V2 APP 192-193; *Anderson v. California Faculty Ass'n*, 25 Cal.App.4th 207 (1994); *Casey v. City of Fairbanks*, 670 P.2d 1133 (1983). It did not. V1 APP 025-027.

To be sure, Mr. Smaellie has been making calculated decisions during the entirety of this lengthy litigation. His decision not to bring a duty of fair representation claim in his first complaint was entirely his own. V1 APP 048-49. Moreover, when he filed his second complaint, he did not include any factual allegations which would support an argument for equitable tolling. *See Gorski v.*

Lewis Univ., No. 99 C 5244, 1999 WL 1250192, at *3 (N.D. Ill. Dec. 22, 1999) (unpublished memorandum opinion) (when plaintiff's complaint demonstrates it is untimely, then plaintiff must plead some facts to demonstrate the untimely filing should be excused).

Furthermore, Mr. Smaellie does not get to tack on 120 days to his statute of limitations simply by virtue of the fact that he filed an action. The cases cited by Mr. Smaellie and his suggestion of an additional 120 days are not supported in the law. The cases cited by Mr. Smaellie merely state that once a claim is filed, the plaintiff receives 120 to effectuate service. There is no further benefit afforded Mr. Smaellie.

Likewise there is no benefit to Mr. Smaellie for the pendency of the appeal in the underlying case. Mr. Smaellie's appeal concerned his sole cause of action for breach of contract. He elected, with eyes wide open, not to file a duty of fair representation claim. Having never commenced the duty of fair representation claim until August 10, 2017, there was nothing to toll during the appeal.

III. CONCLUSION

This is not a simple contract action as suggested by Mr. Smaellie. The true nature of his second complaint is a hybrid action and, as such, subjects the action to dismissal under the statute of limitations applicable to such an action.

Consistent with this Court's prior reliance on federal law labor, as well as the state statutory limitations prescribed by the Employee Management Relations Act for fair representation claims, application of a six-month limitations period is appropriate rather than six years as decided by the District Court. However, even under more generous limitations periods found applicable in hybrid cases, Mr. Smaellie's second complaint is still beyond the period, is not subject to equitable tolling, and should have been dismissed.

Extraordinary relief is appropriate to remedy the District Court's order. Petitioner respectfully requests this Court issue a writ of mandamus, or in the alternative if more appropriate, a writ of prohibition, compelling the District Court to vacate its order, apply the limitations period applicable to hybrid actions as deemed appropriate by this Court, and dismiss Mr. Smaellie's complaint.

DATED: July 20, 2018

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 28 & 32

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

2. Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 points or more, and contains 2,526 words, and 11 pages.

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

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

DATED this 20th day of July, 2018.

/s/ Charity F. Felts

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I certify that I am an employee of Erickson, Thorpe & Swainston, Ltd., and that on this date I caused to be served from Reno, Nevada, a true and correct copy of the *Reply in Support of Petition for Writ of Mandamus or Prohibition* via the court mandated E-Flex filing service to the following:

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Eighth Judicial District Court, Dept. 26
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DATED this 20th day July, 2018.

_/s/Jennifer Jacobsen_____
Jennifer Jacobsen