

IN THE SUPREME COURT OF NEVADA

JAMES J. COTTER, JR., derivatively
on behalf of Reading International,
Inc.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,
DEPT. 11,

Respondents,

and

DOUGLAS MCEACHERN,
EDWARD KANE, JUDY CODDING,
WILLIAM GOULD, AND
MICHAEL WROTNIAK,

Real Parties in Interest.

Electronically Filed
Oct 20 2020 04:38 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO.: 75053 and 76981

District Court Case No. A-15-719860-B

**PETITION FOR REHEARING UNDER
NRAP 40**

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James J. Cotter Jr. petitions the Court to rehear its decision of October 1, 2020, in Docket Nos. 75053 and 76981 in which the Court held "the district court erred when it denied RDI and the directors' motions to dismiss for lack of standing." Op. at 13. Neither RDI nor the directors appealed that or any other order of the district court on the subject of standing. Nor did Cotter Jr. appeal or in any other manner raise his standing as an issue for this Court to decide.¹ In point of fact, however, RDI and the directors raised the issue of Cotter Jr.'s standing in 2016 in motions to dismiss that the district court denied.

That 2016 decision of the district court was the subject of a writ petition in this Court in 2017 that the Court denied because, among other things, the petitioners (RDI and the directors) had an adequate remedy by appeal to contest the district court's order rejecting their challenge of Cotter Jr.'s standing. But neither RDI nor the directors took an appeal, as explained below. Nor did RDI or the directors disclose in their briefs or make a part of the record this Court's decision in April 2017 denying their

¹ Cases cited in the Court's opinion as authority for assessing standing by de novo review were appeals from district court decisions involving issues, including standing that were in the district court orders/judgments under review. There was no such appeal in this case; the 2016 order of the district court denying the respondents' motions to dismiss for Cotter's alleged lack of standing was **never appealed**, nor was the order an integral part of the district court orders later in 2017 and in 2018 granting judgments in favor of the directors and the Cotter sisters that were appealed by Cotter Jr. In short, there was no procedural basis for the Court's review of the district court's 2016 order that the Court held was erroneous. Op. at 13.

writ petition and pointing out that they could contest the district court's order and Cotter Jr.'s standing by an appeal they elected not to take.

In 2017 RDI and the directors petitioned the Court for a writ of prohibition or mandamus to overturn the district court's denial of their challenge to Cotter Jr.'s standing, Docket No. 72261, arguing in an exhaustive 54-page brief, supported by an appendix of 12 volumes, that

To allow a terminated officer such as Plaintiff (whose personal interests so clearly conflict with those of other stockholders) standing to derivatively assert such a dangerous cause of action and to seek such an invasive remedy, as the District Court has done, would be bad policy. It would subvert the broad discretion afforded corporate boards under Nevada law; force the Nevada judiciary to micromanage the unique judgments that corporate boards must make regarding the performance of their officers; implement an unworkable, after-the- fact, mindset-based test that is entirely subjective; add uncertainty in the marketplace as to board oversight of companies' business affairs and management succession; and make Nevada law substantially less favorable to directors than the law of any other jurisdiction.

Id. at ii-iii.

The Court denied the respondents' petition in an order expressing doubt that a decision on Cotter Jr.'s standing would "dispose of the entire controversy," adding that, in any event, "**we are not persuaded that the petitioners lack an adequate remedy in the form of an appeal.**" Order, 04/14/2017 document # 17-12342, Docket No. 722261, a copy of which is appended as Exhibit 1.

Notwithstanding this express invitation to address Cotter Jr.'s standing in an appeal, neither RDI nor the directors appealed the district court's denial of their motions to dismiss, which they easily could have done by filing a cross-appeal in in Docket No. 75053. Absent an appeal to invoke the power of the Court to review the district court's order refusing to dismiss for Cotter Jr.'s lack of standing, suggested by the Court in 2017, there does not appear to be an adequate procedural basis in the record to support the Court's holding that "the district court erred when it denied RDI and the directors' motions to dismiss for lack of standing," Op.at 13.²

Surely, on this record, the Court did not mean to hold that it may review de novo a decision of the district court that is not properly before the Court. The Court can, of course, assess the standing of the Nevada Secretary of State to sue the Legislature in an original mandamus proceeding in which the Secretary asks the Court to violate the separation of powers doctrine by ruling in his favor against the Legislature, as

² The district court's order granting summary judgment for the directors and the order granting dismissal of the Cotter sisters and Ed Cane that Cotter Jr. appealed did not concern his standing, as pointed out in the text. Thus, "to alter the rights and/or remedies of any party [as RDI and the directors request]. . . regardless of whether the party seeks to attack the district court's decision or address a matter not discussed in it . . . **[the] party must timely file a cross-appeal,**" which was not done here. *Nevada Appellate Practice Manual* (2018 ed.) at 3-10, sec. {3:26}, citing *Ford v. Showboat Operating Co.*, 110 Nev. 752, 754-56, 877 P.2d 546, 548-49 (1994), and *Sierra Creek Ranch, Inv. v. J.I. Case*, 97 Nev. 457 460, 634 P.2d 458, 460 (1981).

occurred in *Heller v. Legislature of the State of Nevada*, 120 Nev. 456, 460, 93 P.3d 746. 749 (2004), but this case is not an original proceeding in this Court or analogous to one.

For these reasons, Cotter Jr. respectfully asks the Court to grant rehearing on the issue of his standing and decide the appeal in Docket Nos. 75053 and 76981 on their merits.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **PETITION FOR REHEARING UNDER NRAP 40**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 972 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the **PETITION FOR REHEARING UNDER NRAP 40** to be served electronically through the Eighth Judicial District Court Portal E-Serve System and a copy to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below:

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**Courtesy Copy
Delivered by Email**

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Dated: October 20, 2020

By: /s/ TRACI K. BAEZ_____

EXHIBIT 1

April 14, 2017 Order Denying Petition for Writ of
Prohibition or Mandamus

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET COTTER; ELLEN
COTTER; GUY ADAMS; EDWARD
KANE; DOUGLAS MCEACHERN;
JUDY CODDING; MICHAEL
WROTONIAK; AND READING
INTERNATIONAL, INC.,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ELIZABETH GOFF GONZALEZ,
DISTRICT JUDGE,
Respondents,
and
JAMES J. COTTER, JR.,
INDIVIDUALLY AND DERIVATIVELY
ON BEHALF OF READING
INTERNATIONAL, INC.,
Real Party In Interest.

No. 72261

FILED

APR 14 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

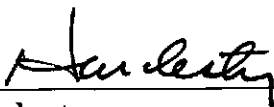
*ORDER DENYING PETITION
FOR WRIT OF PROHIBITION OR MANDAMUS*

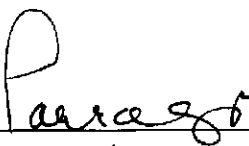
This original petition for a writ of prohibition or mandamus challenges a district court order denying a motion for partial summary judgment in a derivative shareholder action.


Having considered the petition and supporting documents, we are not persuaded that our extraordinary and discretionary intervention is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991). In particular, even if we were to grant petitioners' requested relief, doing so would not appear to dispose of all the

claims between petitioners and real party in interest James J. Cotter, Jr.¹ See *Moore v. Eighth Judicial Dist. Court*, 96 Nev. 415, 417, 610 P.2d 188, 189 (1980) (determining that mandamus is not an appropriate remedy when resolution of the writ petition would not dispose of the entire controversy). Additionally, we are not persuaded that petitioners lack an adequate remedy in the form of an appeal. *Pan*, 120 Nev. at 224, 228, 88 P.3d at 841, 844. Accordingly, we

ORDER the petition DENIED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Stiglich

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Quinn Emanuel Urquhart & Sullivan, LLP
Cohen Johnson Parker Edwards
Greenberg Traurig, LLP/Las Vegas
Yurko, Salvesen & Remz, P.C.
Eighth District Court Clerk

¹Petitioners suggest that "Plaintiff's lack of standing with respect to his derivative action is case-dispositive." However, it does not appear that the district court has clearly addressed petitioners' NRCP 23.1 argument raised in this writ petition, and this petition challenges only one component of Mr. Cotter's claims. Consequently, based on the existing record, we are not persuaded that Mr. Cotter's lack of standing with respect to the challenged component would result in a lack of standing with respect to the non-challenged components.