

IN THE SUPREME COURT OF THE STATE OF NEVADA

TEVA PHARMACEUTICALS USA, INC.,
MCKESSON CORPORATION,
AMERISOURCEBERGEN DRUG
CORPORATION, CARDINAL HEALTH,
INC., CARDINAL HEALTH 6 INC.,
CARDINAL HEALTH TECHNOLOGIES
LLC, CARDINAL HEALTH 108 LLC d/b/a
METRO MEDICAL SUPPLY,
CEPHALON, INC., ENDO HEALTH
SOLUTIONS INC., ENDO
PHARMACEUTICALS INC., ALLERGAN
USA, INC., ALLERGAN FINANCE, LLC
f/k/a ACTAVIS, INC. f/k/a WATSON
PHARMACEUTICALS, INC., WATSON
LABORATORIES, INC., ACTAVIS
PHARMA, INC. f/k/a WATSON
PHARMA, INC., ACTAVIS LLC, and
MALLINCKRODT, LLC,

Petitioners,

v.

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, in and for
the County of Washoe, and the
HONORABLE BARRY L. BRESLOW,
DISTRICT JUDGE,

Respondents,

and

CITY OF RENO,

Real Party in Interest.

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Case No.: 81121

District Court Case No.
CV18-01895

REAL PARTY IN INTEREST CITY OF RENO'S RESPONSE TO
PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION
FOR WRIT OF MANDAMUS

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I. INTRODUCTION

This Honorable Court directed the parties to provide supplemental briefing evaluating whether Article I, Section 1.020 of the Reno City Charter's language stating that the City "may sue and be sued" is an express grant of authority for purposes of NRS 268.001(3)(a). Reno City Charter, Art. I, §1.020. The answer is, yes. As an initial matter, an analysis of a city's power pursuant to NRS 268.001(3)(a) is only necessary in a scenario where Dillon's Rule has been determined to limit a local government's ability to pursue litigation to recover its own damages. Petitioners do not disagree that the language of the City Charter and Nevada's Constitution grants the City of Reno the capacity to initiate litigation. The disagreement arises with regard to the types of lawsuits the City may file and the causes of action it may allege.

Neither the City Charter nor Nevada's Constitution contain any limitations regarding the types of litigation a City may bring. As with any litigant, the City of Reno is bound by the same rules underlying any lawsuit. It must have standing to sue and it must state claims upon which relief can be granted. Petitioners, however, argue there is another requirement for the City – one that does not exist for individuals or non-municipal corporations – and that is that there must be express

authority for the specific causes of action a City may allege. This reading of Dillon’s Rule, the Reno City Charter, and Nevada’s Constitution is antithetical to the law.

II. THE CITY OF RENO HAS THE EXPRESS AUTHORITY TO FILE LAWSUITS.

There is no question regarding the City of Reno’s capacity to file litigation. The issue before this Honorable Court is whether the City of Reno has the authority to file the particular lawsuit it filed against Petitioners. Nevada law does not prevent the City of Reno from filing litigation to recover damages caused to the City by third parties. Unsurprisingly, Petitioners claim that the capacity to sue must be accompanied by the authority to sue for the specific causes of action and specific damages the City is seeking.

For purposes of this supplemental briefing, the City of Reno focuses on the intersection between the City Charter, Nevada’s Constitution, and NRS 268.001(3)(a). Section 1.020 of the Reno City Charter states that the City of Reno “may sue and be sued in all courts.” Reno City Charter, Art. I, §1.020. Similar language exists in Article 8 of Nevada’s Constitution, which governs municipal and other corporations. Specifically, Article 8 Section 5 states: “Corporations may sue and be sued in all courts, in like manner as individuals.” Nev. Const. Art. 8, §5. Pursuant to NRS 268.001(3)(a), “a city possesses and may exercise only . . . [t]hose powers granted in express terms by the Nevada Constitution, statute or city charter.”

Reading the language of the City Charter and Nevada’s Constitution together, the City of Reno has clearly been granted the express authority to sue subject to the same restrictions and limitations that would be applied to an individual filing a lawsuit. The City of Reno must establish, and has established at the District Court, that it has standing to bring the underlying lawsuit against Petitioners. Additionally, the District Court issued a ruling finding that the City of Reno has asserted claims upon which relief may be granted. Thus, the City of Reno has met all requirements as a litigant and should be permitted to proceed with its lawsuit against Petitioners.

A. The City Charter Grants Reno the Power to Sue.

The language of the Reno City Charter is simple, the City “may sue and be sued in all courts.” The Charter does not contain any exceptions to the language or any limitations upon the City’s ability to sue. Moreover, this language is contained in Article I of the City Charter, which is titled “Incorporation of City; **General Powers**; Boundaries; Wards and Annexations; City Offices; Charter Committee.” Reno City Charter, Art. I. Article I of the Charter does not address law making, ordinance creation, regulation drafting, or any other similar legislative functions. Article II of the City Charter governs the Legislative Department and the City’s powers with regard to ordinances, resolutions, orders, and code enactment. *See Reno City Charter, Art. II.*

Petitioners conflate the ability to sue with the limitations imposed by Dillon’s Rule on a city’s powers to create laws.¹ The creation of laws and the ability to sue are addressed separately throughout the City Charter as well as Nevada’s Constitution and should be considered separately in the NRS 268.001 analysis.

Where a plaintiff, whether it be an individual, corporation, or local government, has the capacity to sue, it must still meet the baseline requirement of standing and must allege viable causes of action. Petitioners’ briefing merely reinforces this basic understanding of what is necessary to pursue litigation. The *Withers* case cited to by Petitioners discusses the difference between the capacity to sue and the existence of a cause of action:

There is a decided difference between capacity to sue and the right to maintain an action, and there is a clear distinction between ‘incapacity to sue’ and ‘insufficiency of facts to sue upon.’ The capacity to sue **is the right to come into court**, and differs from the cause of action, **which is the right to relief in court**. The want of capacity to sue is something pertaining to the person of the party – a personal incapacity – and not to the cause or right of action. A plaintiff having a right of action may yet be without capacity to sue; a plaintiff with capacity to sue may have no right of action.

Withers v. Rockland Mines Co., 58 Nev. 98, 112, 71 P.2d 156, 161 (1937) (emphasis added) (internal citations omitted). This complete quote, which was cited in pieces by Petitioners, discusses the difference between the capacity to sue and the viability

¹ The City of Reno briefed its argument regarding the interpretation of the word “powers” in its Answer to the Petition for Writ of Mandamus. See Answer to Petition for Writ of Mandamus, pp. 10-13.

of a plaintiff's causes of action. *Withers* does not contain any discussion regarding the authority to sue or limitations upon the right to sue.

Moreover, Petitioners overlooked important distinguishing factors in the *State Bar v. Sexton* in which the Court addressed whether the State Bar has the authority to determine whether an individual is qualified to be licensed as an attorney or to have that license revoked and the individual's name removed from the register of attorneys. *State Bar v. Sexton*, 64 Nev. 459, 461-462, 184 P.2d 356, 358 (1947). The act incorporating the State Bar specifically limited its disciplinary powers to disbarment, reproval, or suspension, and did not include "revocation of the order of admission, or of the license to practice." *Id.* at 464, 359. The Court applied the principle of "expression unius est exclusion alterius" when it determined that the language of the act incorporating the State Bar expressly stating what the State Bar could do as it relates to discipline, was a clear indication that the drafters intentionally excluded the power to revoke admission or strike a name from the register of attorneys. *Id.* at 467, 360.

As it relates to the State Bar's capacity to sue, the Court stated that "capacity" must not be confused with the "ability to sue." *Id.* at 476, 365. Simply because the State Bar was granted the capacity to sue, did not give it the ability to "assume the roll [*sic*] of prosecutor" or "sue in regard to property in which it had no legal interest, merely because of general capacity to sue." *Id.*

Like the State Bar, the City of Reno was granted the capacity to sue in its formative document. Unlike the act under which the State Bar was formed, the Reno City Charter does not limit the City's ability to sue or the causes of action for which the City may sue. Additionally, the State Bar attempted to take certain disciplinary actions that were specifically in the jurisdiction of the courts rather than the State Bar organization. It was not suing to recover damages caused by third parties as the City of Reno has done in the District Court.

The cases from other jurisdictions upon which Petitioners rely also do not support their position. *Board of County Commissioners of Dolores County v. Love* out of Colorado and *South Portland v. State* out of Maine both involve lawsuits by local governments against state agencies alleging deficiencies in the work by the state agencies. *See generally, Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 172 Colo. 121, 470 P.2d 861 (Colo. 1970), *City of South Portland v. State*, 476 A.2d 690 (Me. 1984). In both cases, the state agency was granted the power to take certain actions and the local government was not permitted to interfere with the state agencies' actions through litigation. Neither case stands for the position that a city with capacity to sue may only sue for causes of action specifically detailed in state statutes.

Additionally, *Premium Standard Farms, Inc. v. Lincoln Township* involved a local government's attempt to enforce a regulation it had no authority to create. *See*

Premium Std. Farms v. Lincoln Twp., 946 S.W.2d 234 (Mo. 1997). The Township's regulation was void from the beginning and, thus, could not be the basis of a lawsuit. *Id.* There was no discussion regarding the Township's power to pursue litigation to recover damages caused by third parties. *Rocky Mountain Christian Church* also does not support Petitioners' argument. The Colorado Church made a request to the County to expand its building, which was largely denied. *Bd. of County Comm'rs v. Rocky Mt. Christian Church*, 481 F. Supp. 1181, 1185 (Dist. Colo. 2007). In the Board of County Commissioner's resolution rejecting most of the Church's expansion request, the Board granted the County Attorney the power to file a declaratory judgment action in federal court to determine whether the Board's decision was consistent with the federal Religious Land Use and Institutionalized Persons Act (RLIUPA). *Id.* In response to the Church's motion to dismiss, the Board argued that it was authorized to file the action seeking a declaration because state statutes granted counties the power to sue. *Id.* The Court ruled that the power to sue and be sued is "not a blanket power to sue in any situation the county so deems" and that the county must act within its express or implied powers. *Id.* at 1185-1186.

The City of Reno is not suing a Nevada state agency as was the case in *Love* and *South Portland*. It is not impeding upon any state action, state regulation, or state law. It is not creating regulations as was the case in *Premium Standard Farms*

nor did it issue a resolution in which it granted itself the power to sue for declaratory relief as in *Rocky Mountain Christian Church*. Allowing the City to proceed with its litigation against the Petitioners does not equate to adopting a “blanket power to sue in any situation” the City deems appropriate. The City of Reno’s lawsuit contains recognized causes of action upon which relief may be granted. It has the capacity and power to bring such lawsuits in order to recover damages it has suffered as a result of Petitioners’ alleged actions.

B. Nevada’s Constitution Grants Reno the Power to Sue.

Article 8 Section 5 of Nevada’s Constitution states that municipalities “may sue and be sued in all courts, in like manner as individuals.” Nev. Const. Art. 8, § 5. Constitutional provisions are interpreted according to the same rules of construction applied to statutes. *Lorton v. Jones*, 130 Nev. 51, 57, 322 P.3d 1051, 1054 (2014). Where a provision is clear and unambiguous, the court will apply the plain meaning of that language. *Id.* Even if the language may be ambiguous, it is still appropriate to first look to the drafters’ word choice as it “may still provide some indications as to the proper interpretation of the provision.” *Id.* at 60, 1056.

This Court previously reviewed and interpreted the use of “in like manner” in Article 8 Section 5 of the Nevada Constitution in *Derouen v. City of Reno*, which involved an individual’s attempt to sue the City. “In like manner as individuals” was interpreted to mean that a corporation, including a municipal corporation, may

be sued utilizing a similar method of procedure as would be used suing an individual. *Derouen v. City of Reno*, 87 Nev. 606, 608, 491 P.2d 989, 990 (1971). “In like manner” was deemed to include a “similarity in technical methods as to procedure” as well as “the time within which relief may be sought.” *Id.* The issue in *Derouen* was whether the individual complied with the pre-claim certification requirements set forth in NRS 268.020. *See generally, Derouen*, 87 Nev. 606, 491 P.2d 989. The Court found that the Legislature has the right to limit a cause of action or right of action, including imposing certification requirements as set forth in NRS 268.020. *Id.*

Applying the interpretation of “in like manner” from *Derouen* to the City of Reno’s ability to sue leads to a conclusion that the City of Reno must follow all procedural and technical procedures an individual must follow when filing litigation. Accordingly, the City of Reno must establish that it has standing to sue and it must assert claims upon which relief can be granted. The City of Reno must file its lawsuit within any applicable statutes of limitation and satisfy any prerequisites to filing suit that may be imposed by statute.

“In like manner” also suggests that the City of Reno would be permitted to file lawsuits asserting any cause of action that is not otherwise unavailable to the City through specific statutory language. Individuals are not limited to filing lawsuits for only those causes of action specifically outlined in Nevada’s statutes.

There are countless common law causes of action for which individuals may sue. Following Petitioners' logic, however, the City of Reno would be unable to assert any such common law causes of action unless the statutes specifically grant the City the power to do so.

Here, again, Petitioners seek to add limitations and requirements to Nevada's Constitution that have not been included within the document. There is no requirement that the City of Reno sue only for those causes of action that were specifically identified in a statute. The drafters of Nevada's Constitution could have included such limitations in Article 8. They could have differentiated between a corporation and a municipal corporation's power to sue, but they did not. The drafters instead granted municipal corporations the power "to sue and be sued in all courts, in like manner as individuals." The City of Reno filed a lawsuit against Petitioners seeking to recover its damages. The District Court heard argument and ruled that the City of Reno asserted causes of action upon which relief may be granted. Pursuant to the terms of Article 8 Section 5 of the Constitution, the City of Reno has met its requirements to proceed with this litigation.

C. Allowing Reno's Lawsuit to Continue Does Not Render Other Statutes Meaningless.

Contrary to Petitioners' argument, permitting the City to proceed with its litigation does not render any statutes superfluous or meaningless. The mere

existence of statutes creating certain causes of action does not eliminate all other causes of action available. If this were the case, individuals would be prevented from filing suit for any cause of action that was not specifically authorized by statute, which is an illogical result.

In their briefing, Petitioners cite to specific statutes they believe would be meaningless if the City of Reno is permitted to continue with its litigation. The first is NRS 108.590, which grants hospitals the power to pursue liens against any recovery a patient gain from personal injury litigation. The City of Reno is not a hospital, nor is it litigating personal injury claims. There is nothing in the City of Reno's litigation that would prevent hospitals from pursuing such liens in the future. Additionally, neither NRS 211.2415 nor NRS 211.245's language permitting a city to seek reimbursement from prisoners for certain costs is impacted by the City of Reno's lawsuit against Petitioners. The City is not seeking the types of costs it may seek under those statutes.

Moreover, the statutes addressing nuisances in NRS Chapter 268 cited by Petitioners each grant cities the power to create ordinances to abate public nuisances and, if necessary, the power to enforce those city created ordinances. *See* NRS

268.4081, NRS 268.4122, NRS 268.4124, NRS 268.4126, and NRS 4128.² These statutes cover the type of power that is contemplated by Dillon's Rule and NRS 268.001. A city cannot create ordinances without being expressly, or impliedly, granted the power to do so. It is only reasonable that a city cannot then sue to enforce an ordinance it created unless it had the power to create the underlying ordinance. This is precisely the issue that was raised in *Premium Standard Farms* and is separate from the issue of a City's power to initiate civil litigation to recover damages caused by third parties. Each of the statutes in NRS 268 maintain their purpose even if the City of Reno is permitted to proceed with its litigation. There is no contradiction between the City's lawsuit, the City Charter, the Nevada Constitution, and NRS Chapter 268.

III. CONCLUSION

The City of Reno was granted the power to file lawsuits like the one at issue here. This power is clearly stated in Section 1.020 of the Reno City Charter and Article 8 Section 5 of the Nevada Constitution. There is no limitation on the type of

² One exception being NRS 268.408, which grants cities the power to bring a civil lawsuit against an individual for placing graffiti on the property of the city to recover civil damages pursuant to NRS 206.345. There is still a critical distinction here, which is that Nevada's statutes make graffiti a criminal offense for which criminal penalties may be imposed, as set forth in NRS 206.330, and, thus, it is necessary to specifically address a city's authority to bring a civil cause of action against an individual for damage caused by graffiti because it would otherwise run contradictory to the statutory language.

lawsuit the City of Reno may file or the causes of action it may allege, other than the limitations imposed on any corporation or individual pursuing litigation. It must have standing, it must assert claims upon which relief can be granted, it must follow the procedural and technical requirements for litigation, and cannot be expressly barred from pursuing the particular claim. The City of Reno is not seeking a blanket power that would allow it to file any lawsuit or allege any cause of action it may dream up, merely that it be permitted to proceed with litigation alleging cognizable causes of action to recover damages caused by third parties.

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Based upon the foregoing, as well as the briefing already on file, and the oral argument presented to this Court, the City of Reno respectfully requests that the Petitioners Writ of Mandamus be denied and the ruling of the Second Judicial District Court for the State of Nevada be upheld.

RESPECTFULLY SUBMITTED this 8th day of March, 2021.

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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

ROBERT T. EGLET, being first duly sworn, deposes and says:

1. I am over the age of 18 years and am personally familiar with the facts stated in this verification. Pursuant to NRAP 21(a)(5) and NRS 15.010, I am counsel for Real Party in Interest City of Reno. I know the contents of this Response to Petitioners' Supplemental Brief in Support of Petition for Writ of Mandamus.

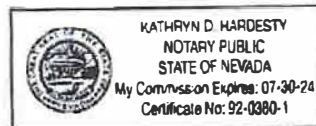
2. The facts stated in this Response are true and correct to the best of my knowledge or based on information and belief. The relevant facts are largely procedural and drawn from the proceedings before the district court or drawn from the publicly accessible state and federal court records and therefore are within my knowledge as counsel for Real Party in Interest City of Reno.

DATED this 8th day of March, 2021.


ROBERT T. EGLET

Subscribed and sworn to before me
this 8th day of March, 2021.


NOTARY PUBLIC



CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with type-volume limitations of NRAP 21(d). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,227 words.

I further certify that I have read this Response to Petitioners' Supplemental Brief in Support of Petition for Writ Of Mandamus, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in 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 on is to be found.

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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.

RESPECTFULLY SUBMITTED this 8th day of March, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of EGLET ADAMS, and that on this 8th day of March, 2021, a copy of the foregoing **REAL PARTY IN INTEREST CITY OF RENO'S RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex) and served via U.S. Mail, postage prepaid, on the following individuals:

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Additionally, in compliance with NRAP 21(a)(1) and Administrative Order 2020-05, a copy of **REAL PARTY IN INTEREST CITY OF RENO'S RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT**

OF PETITION FOR WRIT OF MANDAMUS was served upon the Honorable
Barry Breslow, District Judge, via electronic service and email to
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/s/ *Makaela Otto*
An Employee of EGLET ADAMS