IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER GARDNER AND CHRISTIAN GARDNER, ON BEHALF OF MINOR CHILD, LELAND GARDNER, Petitioners, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE, Respondent, and BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC.; AND HUGGINS INSURANCE SERVICES, INC., Real Parties in Interest,	)	Supreme Court 81600 District Case No. A722255

ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Patricia Lee (8287)
Hutchison & Steffen, PLLC
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Real Parties In Interest

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Real Parties In Interest Bliss Sequoia Insurance & Risk Advisors, Inc., and Huggins Insurance Services, Inc., have no parent company and are not publically traded. There is no publicly traded company that owns more than 10% of the stock of Bliss Sequoia Insurance & Risk Advisors, Inc., or Huggins Insurance Services, Inc.

The attorneys who have appeared on behalf of Real Parties In Interest in this Court and in district court are:

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Patricia Lee (8287)
Chad A. Harrison (13888)
Hutchison & Steffen, PLLC
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Real Parties In Interest

///

///

///

///

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respectfully submitted this 7 day of October, 2020.

HUTCHISON & STEFFEN, PLLC

Michael K. Wall (2098)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Real Parties in Interest

TABLE OF CONTENTS

AUTHORITIES CITED
RULES AND STATUTES

CASE LAW

ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF

On August 26, 2020, this Court ordered Bliss Sequoia Insurance & Risk Advisors, Inc., and Huggins Insurance Services, Inc. ("the Brokers"), real parties in interest, to answer this petition. This Court directed the Brokers to address the merits of the petition, and also "the propriety of writ relief."

In answer to the first question, the petition has no merit. In answer to the second, there never was a petition for extraordinary relief that was less appropriate for the remedy of mandamus.

This is a factual dispute about whether claims have been pleaded sufficiently to withstand a motion to dismiss. Nothing could be more within the sound discretion of the district court than its ability to rule on motions to dismiss and determine whether additional discovery is warranted before claims are dismissed.

This Court has no interest in involving itself in every question of case administration that arises in district court. Petitioners statement that "if ever there was a case where the Court should exercise discretion to consider writ relief, this is it," Petition at 1, could not be more wrong.

ROUTING STATEMENT

No section of NRAP 17 applies directly to this petition for a writ,

challenging an order of the district court denying a motion to dismiss. The section that comes closest is NRAP 17(b)(13), which would direct this case to the Court of Appeals.

Petitioners argue that this Court should retain this case because it allegedly presents a question of first impression with statewide importance. NRAP 17(a)(13)&(14). This is incorrect. This case is based on laws of pleading that are well-established in Nevada for decades. The issues are neither new, novel nor extraordinary.

Only petitioner's first issue even makes a pretense of presenting a legal issue. Petitioners know they must present a legal issue to get mandamus relief, so they suggest that the district court ruled as a matter of law that an insured owes duties of disclosure to its insurance brokers, and argue that no such duty exists. The district court ruled that such a duty can exist, and that a breach of that duty was sufficiently pleaded to avoid dismissal. The ruling is based on a plethora of factual disputes between the parties, and thus would not present a legal issue for this Court, appropriate for mandamus intervention.

The issue of whether under the disputed facts of this complex litigation a defendant had a duty of disclosure to a third-party defendant broker does not present a novel issue of Nevada law that is in desperate need of this Court's

immediate attention. The issue was not finally resolved by the district court, is dependent for final resolution on related factual disputes, and is not ripe for consideration by this Court. Review on appeal on a complete record is the usual and more appropriate appellate response.

The other three issues could not be more garden-variety in their presentation of mundane pleading issues. The second is expressly based on "contradictory and inconsistent pleading of facts" (paraphrased), and the third and fourth both state that the counterclaim is not pleaded with sufficient particularity. Petition at 6-7. How these issues could be more inappropriate for mandamus relief is hard to imagine.

The petition is a thinly veiled attempt to get a ruling on the merits of the counterclaims prematurely. They are not even couched in terms of legal standards. There is nothing extraordinary about this routine pleading issue. The presumptive assignment to the Court of Appeals is appropriate.

I. INTRODUCTION

Based on the long history of the underlying action and the number of times it has already found its way before this Court, it is no surprise that this Court has ordered an answer to this petition, the fourth petition filed in the underlying matter. But when stripped of the trappings of prior litigation that no longer exists

and is not particularly relevant, this matter does not require intervention into the discretionary affairs of the district court.

The district court's order, denying a motion to dismiss before an answer has even been filed, is undeniably within the its broad discretion over case management.

This case has its genesis in the near-drowning of a child at Henderson Water Park ("HWP"). The long, unquestionably tragic personal injury story, and petitioners' efforts to find sufficient funds to compensate the child for his injuries, is not relevant to determining liability for the claims that remain against and by the Brokers. No amount of sympathy for the victim makes the Brokers more or less responsible for the loss.

On the eve of trial, HWP "attempting to insulate themselves from potential liability," to use petitioners' characterization, brought claims against the Brokers based on a theory that the Brokers were at fault for HWP's insufficient insurance policy. The claims against the Brokers are a stretch, at best.

Following years of litigation, petitioners, HWP and other defendants settled the personal injury case. The settlement is confidential, and has not been provided to this Court, but some details have been provided, which are discussed, *infra*. Importantly, however, the settlement was as to all parties except the Brokers.

Petitioners, who were disdainful of HWP's claims against the Brokers when they were brought, were willing to accept an assignment of these claims as part of the settlement.

Petitioners, as assignee of HWP, filed a new complaint against the Brokers, seeking to assert liability against the Brokers based on the advice the Brokers allegedly gave HWP regarding the amount of insurance it should purchase. Therefore, it is appropriate that petitioners' appendix commences with petitioners' amended third-party complaint filed on November 20, 2019, against the Brokers, in which they assert claims assigned to them on behalf of the defendant that caused Leland Gardner's tragic injuries. PA 1. This is where this case begins, and from a pleadings standpoint, the case is in its infancy.

Petitioners not only seek to cut off the Brokers' defenses at the starting gate, they want to deny the Brokers the right of pleading their defenses and counterclaims against the party that caused them damages. Petitioners accuse the district court of making the case larger than it need be, because petitioners would like their recovery to be simpler than it is. Petitioners' suggest that it would make the case too complicated if the Brokers' defenses and counterclaims are asserted and pursued. Petitioners think this Court should pave them a simpler path to recovery and riches, the lack of liability of the Brokers and the merit of their

defenses and counterclaims notwithstanding.

Concluding that the Brokers counterclaims and defenses have been sufficiently pleaded to allow the case to proceed at this time, the district court denied plaintiff's motion to dismiss. That is the sum and substance of this case and this petition at this time.

If petitioners are correct in their belief that the claims have no merit, they can so prove through discovery, motion practice, and trial. They are not entitled to a prejudgment of the defenses and counterclaims because the litigation will be complex and expensive. They stepped into this complex litigation with advice of counsel and knowing full well the Brokers denied the claims. Denial of a dispositive motion at this stage of these proceedings was not an abuse of discretion. It was effective case management, something that should be left to the district court.

II. FACTUAL BACKGROUND

A. Claims Against the Brokers.

On May 27, 2015, six-year-old Leland Gardner suffered personal injuries at Cowabunga Bay Waterpark. On July 28, 2015, petitioners filed their initial complaint. HWP had a $5 million policy, which it offered following the commencement of the lawsuit. Considering this to be insufficient, petitioners filed

amended complaints, adding as defendants to the lawsuit the owners and managers of HWP, HWPR & O Construction (the waterpark's construction company), and William Rey (the adult accompanying Leland to the waterpark).

More than three years later, in November of 2018, HWP and other defendants filed third party complaints against the Brokers, real parties in interest in this case. The claims asserted that the Brokers gave bad advice on how much insurance coverage HWP should carry.[1] This led to another round of motion practice.

On September 6, 2019, when the case was approaching the five year deadline, all of the parties, including the Brokers, participated in mediation. Petitioners have not provided this Court with documentation regarding the settlement, but from the petition it is admitted that all the parties settled around the Brokers, HWP or its insurer paid its policy of $5 million to petitioners, other defendants contributed to the settlement amount, a total settlement of $49 million was reached, and HWP assigned to petitioners its claims against the Brokers,

---

[1]This is hotly contested. The question of who is responsible for the amount of HWP's insurance policy is a major issue between HWP and the Brokers. These issues are not before this Court and cannot be addressed in this opposition (which emphasizes why appeal is the preferred vehicle for review), but the implication that the Brokers have breached professional duties to HWP is categorically denied by the Brokers.

including all defenses and counterclaims thereto, in return for a covenant not to execute.

The petition gives the distinct and intentional impression that all petitioners obtained through the settlement was HWP's $5 million and, in return for a covenant not to execute, the right to pursue the remainder of the stipulated $49 million settlement amount from the Brokers. This is not a fair statement. The settlement is confidential, but to the extent petitioners have breached that confidentiality by leading this Court to believe that all petitioners recovered is $5 million, the record must be set straight. What petitioners actually obtained through settlement with multiple parties was in excess of $30 million, $5 million of which came from HWP's insurer.

The foregoing facts cannot be cited to the record presented by petitioners, who had a burden of presenting a complete record. NRAP 21(a)(4). They are nevertheless set forth in the petition without citation, and are generally not disputed (the characterizations of these facts in the petition are disputed, but the timeline is correct).

This case begins following the settlement. It concerns only the Brokers' alleged liability for giving HWP bad advice on the amount of insurance it should carry, *i.e.*, breach of fiduciary duty, professional negligence, and negligent

misrepresentation.[2]

After being assigned HWP's claims via settlement, on November 20, 2019, petitioners filed an amended third-party complaint against the Brokers as the assignees of HWP. PA 1. The complaint asserts claims of professional negligence and negligent misrepresentation.

B. The Brokers' Claims.

On March 11, 2020, the Brokers moved for leave to file an amended answer adding parties. PA 10. Petitioners opposed the motion. PA 39-51. In opposition, petitioners argued the merits of the proposed amended pleading, including that the proposed claim for negligent misrepresentation was not pleaded with sufficient particularity. *Id.*

On April 4, 2020, the district court entered findings of fact, conclusions of law and an order granting the Brokers' motion to amend its answer to assert counterclaims and fourth-party claims. PA 92. Specifically, the district court ordered "that [the Brokers'] Motion to Seek Leave to Amend and Add Additional Parties is hereby GRANTED; however, [the Brokers are] ordered to amend [their] proposed counterclaims against HWP to provide more detailed information as it pertains to [their] claim of misrepresentation against HWP." PA 95.

---

[2]Claims for contribution and indemnity were dismissed.

On April 10, 2020, the Brokers filed cross and counterclaims. PA 103. The Brokers asserted a claim against HWP for negligent misrepresentation as to the nature of the safety measures in place at HWP, which affected the Brokers' recommendations as to HWP's policy. PA 108. Additionally, they filed a claim for contribution against new parties Moreton and H&W, two foreign corporations, who were involved in HWP's procurement of its insurance policy. PA 107-08. These are not at issue in this petition.

On April 23, 2020, the Brokers amended their counterclaim. PA 111. The amendment added significant detail to the allegations of misrepresentation, and causes of action against HWP for fraudulent representation and fraudulent concealment. PA 111-20.

C. The Petitioners' Motion to Dismiss.

On April 27, 2020, petitioners moved to dismiss the claims against HWP. PA 125. They argued that the counterclaims failed to allege an actionable misrepresentation of fact, and were not pleaded with sufficient particularity. Based on a timeline scenario never relied on by the Brokers, petitioners argued that the first alleged misrepresentation came after the policy was first purchased, and thus could not have been relied on as a matter of fact. PA 128-33. This remains petitioners' primary argument to this day, but it overlooks the ongoing

nature of the relationship between HWP and its Brokers, which underlies the claims petitioners assert on behalf of HWP. Petitioners' argument regarding the date representations were made is nonsense. Petitioners also argued that the alleged misrepresentations were opinions, not facts. No matter how one views petitioners' arguments, they are undoubtedly disputes as to the facts, not the law.

Regarding the claim of fraudulent concealment, petitioners argued that HWP owed no duty of disclosure to its Brokers. PA 133. Although duty is a legal question, its resolution in this case is based on a plethora of factual issues as to the relationships between the parties.

On May 12, 2020, the Brokers opposed the motion to dismiss, setting forth the strict standard for motions to dismiss at the pleading stage, and demonstrating the sufficiency of their pleadings. PA 140.

On May 27, 2020, petitioners replied, arguing that they had authority to bring the motion, that the facts alleged were untrue or insufficient, and that HWP owed no duty to the Brokers. PA 154-62.

On June 15, 2020, the district court denied petitioners' motion. PA 164. Applying the correct standard, the district court noted that petitioners' argument as to the discrepancy of dates did not require dismissal, and concluded that the special relationship between broker and insured imposes reciprocal duties of

honesty and disclosure. PA 165-66. It also found the allegations to be sufficient to withstand a motion to dismiss. *Id.*

On June 16, 2020, petitioners moved for reconsideration. PA 183. The Brokers opposed. PA 189. On July 31, 2020, the district court denied the motion. PA 195.

III. DISCUSSION

A. Writ Relief is Not an Appropriate Remedy.

> A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. Writ relief is not available, however, when an adequate and speedy legal remedy exists. Accordingly, because an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss.

Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

It cannot be argued that the district court had a mandatory duty to grant petitioners' motion. The argument that the district court has a mandatory duty never to enter an erroneous ruling and that such duty may be enforced by mandamus would authorize extraordinary relief from any decision of the district court, a result that would upend writ practice. Unless this Court can conclude

based on the circumstances of this case that Judge Wiese arbitrarily or capriciously exercised his discretion, mandamus relief is not available.

Generally, an appeal must be viewed as an adequate remedy in the ordinary course of the law. *See Pan v. Dist. Ct.*, 120 Nev. 222, 88 P.3d 840 (2004) (citing numerous cases to the same effect). The fact that an appeal is not immediate and that the parties will suffer expense before the appellate remedy is available does not render an appeal an inadequate remedy. *Id.* That the litigation and trial will be more expensive and complex than petitioners would like if the Brokers are allowed to present their defenses and counterclaims does not render an appeal an inadequate remedy. *Id.*

B. This Court Should Not Exercise its Discretion to Consider this Petition.

For very good reasons, it has not generally been the practice of this Court to involve itself prematurely in questions of pleading or micro-management of the district court's docket by way of extraordinary writ.

As a matter of sound judicial policy, appellate courts should exercise restraint in overseeing by writ the district court's management of pleading issues. Many times district judges make decisions that a Justice of this Court, sitting in the same position, would not have made, but it is a serious matter to second-guess

the district judge in a writ proceeding in such matters, because these decisions are the everyday work of district courts.

This Court has long understood that its discretionary authority to address error correction issues in an interlocutory fashion by way of extraordinary writ should be circumscribed to only the most compelling of cases. This Court's discretionary authority should be reserved for issues that will clarify law and make policy. This is not such a case.

In 1964, in *Dzack v. Marshall*, 80 Nev. 345, 393 P.2d 610 (1964), this Court entered a decision that, although correct on the law, was a significant mistake as a matter of judicial administration and policy.[3] *Dzack* declared that a district court had a mandatory duty to grant a properly made and meritorious motion for summary judgment. This Court also found that the expense and inconvenience of a trial were sufficiently grave that the adequate-remedy requirement was met, even though an appeal would lie following trial. Concluding that a motion for summary judgment that had been denied by the district court had merit, this Court granted a petition for a writ of mandamus. *Id.*

---

[3]Counsel apologizes if this short foray into history appears too basic. However, it appears that a discussion of the development of this Court's present law on the availability of writ relief will illustrate the point that this is not a case warranting interlocutory intervention.

Thereafter, this Court extended the holding of *Dzack* to orders denying meritorious motions to dismiss. *State ex rel. Dep't Hwys. v. District Court*, 95 Nev. 715, 601 P.2d 710 (1979). The decisions in *Dzack* and *Dep't Hwys.* were unwise on multiple levels, most particularly on the issue of when an appeal following final judgment should not be considered an adequate remedy at law precluding writ relief.

The number of petitions for extraordinary relief soared, creating a significant burden on this Court's appellate resources. The problem with *Dzack* was not that the district court did not have a mandatory duty to grant meritorious motions. The problem was that every attorney who brings a motion believes it to be meritorious. With the door to immediate Supreme Court review of every denial of every dispositive motion open, the flood of cases was inevitable.

This Court overruled *Dzack* in *State ex rel. Department of Transportation v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). In rejecting *Dzack* and its progeny, this Court made the following enlightened observation:

> Although both *Dzack* and *Dep't Hwys.* discussed the question of whether mandamus was available, neither of those cases discussed, to any significant extent, the question of whether sound judicial administration justified this court's exercise of its discretion in favor of entertaining mandamus in those contexts. Indeed, the majority opinion in *Dzack* spoke in terms of the petitioner being "entitled" to mandamus. As mentioned above, however, a petitioner is never

> "entitled" to a writ of mandamus. Even when mandamus is available as a remedy, we are not compelled to issue the writ because it is purely discretionary.

Id. at 360-61, 662 P.2d at 1339-40. This Court then concluded that although it certainly has judicial authority to issue writs directing the district court to grant meritorious motions, it would no longer exercise that authority based on considerations of sound judicial administration and policy.

For a decade, *Thompson* was applied by this Court with a vengeance. Petitions for writs challenging orders denying motions to dismiss or for summary judgment were summarily denied without reviewing the issues raised. Indeed, the backlash against *Dzack* was so great, court attorneys were not allowed to cite *Dzack* in any proposed order or disposition, even for propositions for which it was still good law. However, in the mid-1990s, the tide slowly began to turn.

A number of petitions challenging district court orders denying dispositive motions raised important issues of law in circumstances where an appeal following a final judgment would not be an adequate remedy at law. These included cases raising statute of limitation and service of process type issues, where addressing the issues following a trial the law was designed to prevent made little sense. Initially, for the most part, these cases fell victim to *Thompson*, but in the mid-1990s, this Court began making exceptions to *Thompson* in an

increasing number of unpublished decisions where it appeared that considerations of sound judicial economy and administration militated in favor of granting such petitions.

In *Smith v. District Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997), this Court recognized expressly that the rule of *Thompson* does not apply in situations "where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." This Court added that it would "exercise its discretion to consider such petitions when "an important issue of law requires clarification" and declared that "the primary standard" in the determination of whether to entertain a writ petition will be "the interests of judicial economy." *Id.*

In recent years, this Court has expanded further its willingness to consider petitions for extraordinary writs in situations where judicial administration is served. In *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. ___, 464 P.3d 114, 119 (Adv. Op. 29, May 28, 2020), this Court repeated: "Writ relief is also appropriate when 'an important issue of law needs clarification' and this court's invocation of its original jurisdiction serves public policy." (Citation omitted.) As correct and laudable as this statement is, this exception must not be allowed to swallow the general standard that this Court will not interfere in a district court's

exercise of discretion when appeal following final judgment is an available remedy.

The touchstone of writ-ability remains sound judicial economy and administration, addressing only important issues of law that require immediate clarification. *See Nalder v. Eighth Judicial Dist. Court*, 136 Nev. ___, 462 P.3d 677, 681–82 (Adv. Op. 24, April 30, 2020) (writ relief is available "in circumstances of urgency and strong necessity"). Despite recent breathtakingly broad statements of the standard, for purposes of sound administration, this Court should exercise its unfettered discretion only in cases that truly require extraordinary relief.

The *Thompson* problem increases many fold if this Court exercises it judicial authority to second guess and micro-manage the decisions of the district court with respect to basic pleading issues. In this case, petitioners argued below that the Brokers' pleading do not sufficiently set forth claims for fraud and misrepresentation. The district court believed that it should not dismiss a claim at the pleading stage lightly. Neither should this Court overturn the district court's exercise of discretion lightly.

The district court presumed the pleaded facts to be true, and concluded that they were sufficient to warrant answer and investigation. This is classic case

management, something at which Judge Wiese is very good, and which district courts are called upon to do daily.

Does this Court really want to second guess in a writ proceeding such decisions and invite the flood of petitions that will inevitably flow from such a precedent on the slender reed that the pleading does not plead with sufficient particularity? To do so would announce this Court willingness to review every pleading issue, and open the floodgates of writ litigation over the proper scope of pleading, a matter more appropriately left to district court discretion and Supreme Court review on appeal.

At a CLE attended by several of the Justices, Justice Hardesty advised the Bar: "Stop filing petitions that challenge routine orders on evidentiary and pleading issues." (Quoted from memory.) The simple response is "don't grant them." The extent to which this Court is willing in writ proceedings to invade the discretionary province of the district courts drives the bus of writ petition filings.

Each of petitioner's claims is couched in terms of legal standards and failure of pleading, but each actually seeks a determination from this Court, based on the pleadings alone, of the merit of the counterclaims based on a litany of factual issues.

This petition could not be a more mundane challenge to a general order

denying a motion to dismiss at the pleading stage. Such matters are within the discretion of the district court. Mandamus is available only to control a manifest abuse of discretion, even in those rare cases where an important legal issue is presented. In this case, no legal issue is presented. Petitioners simply do not like the district court's ruling on the factual sufficiency of the pleadings to allow the matter to proceed like any garden variety case through discovery, motion practice if appropriate, and trial. If this Court accepts this petition for a writ, it will not be an exception to the doctrine announced in *Thompson*; it will signal the death of *Thompson*, and all of the salutary principles of original appellate court jurisdiction for which it has stood for nearly half a century.

C. Petitioners Lacked Authority to Bring the Motion.

A motion to dismiss a claim can be brought only by the party against whom the claim is made, not a third party. The claims petitioners seek to dismiss are against HWP, not petitioners.

NRCP12(b)(5) does not authorize third parties to file a motion to dismiss a claim against another party. NRCP 12(a)(B) provides that a "party must serve an answer to a counterclaim or crossclaim . . . after being served with the pleading . . . ." This contemplates that the party who must respond is the party sued, not any party in the action. Similarly, NRCP 12(b) states that "[e]very defense to a

claim . . . must be asserted in the responsive pleading," and "a party may assert the following defenses" by motion. Petitioners cannot file a responsive pleading, or a motion, on behalf of HWP.

Petitioners stated in their motion that they "do not represent HWP or the company's interests." PA 125, n.2. Petitioners note that the Brokers' counterclaims against HWP could provide a setoff against any judgment petitioners might obtain based on HWP's claim. *Id.* Petitioners cite no authority for the proposition that a party may plead or move on behalf of a third party they admit not to represent because the claims against the third party might provide the second party with a setoff. Assignment of the claim does not extinguish defenses, including setoffs.

In response to the Brokers' argument that petitioners lacked authority to seek dismissal of claims against HWP, petitioners states that "the general rule is that an obligor may assert against an assignee all claims which he could have asserted against the assignor." PA 156, (citing *Walters v. Iowa-Des Moines Nat. Bank*, 295 N.W.2d 430, 433 (Iowa 1980)). Petitioners neglect the following line from *Walters*: "To put it another way, the assignee of a claim takes subject to all defenses, setoffs, and counterclaims to which his assignor was subject," (citing a litany of cases). Petitioners also ignore that *Walters* states that an obligor *may*

assert claims against an assignee. Nothing in *Walters* or any of the cases cited by petitioners suggests that an obligor *must* assert its claims against the assignee, or that an obligor loses its claims against an assignor by virtue of an assignment. While the Brokers *could have* asserted their counterclaims against petitioners, they did not do so. They asserted the claims against HWP. HWP never answered and never moved to dismiss.

To support their position, petitioners cited *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 391 (3d Cir. 2002), for the proposition that "defendant was required to bring counterclaims against assignee as opposed to assignor because 'the rights that are at stake [ ] are actually [the assignee's] rights, not [the assignors].'" PA 156. *Transamerica* says no such thing.

Transamerica involved whether the failure to bring a counterclaim in a first action precluded the defendant in the first action from bringing that same claim as a plaintiff in a second action. It was about claim preclusion. Transamerica was the defendant in the first action, and the plaintiff in the second action. The assignee (obligor) and the assignor (party) in both cases were *alter egos* opposed to Transamerica.

IIC, the assignee of certain rights in return for accepting certain obligations,

brought claims in Texas against Transamerica in the name of its assignor, North River.[4] Although there was unity of interests and identity between IIC and North River, Transamerica did not assert it claims against IIC/North River in the Texas action. Instead, Transamerica commenced a separate action in New Jersey against IIC and AOA, another IIC related party that was part of the complex transaction that gave IIC the right as assignee to assert the claims of North River in the Texas action. The Third Circuit held that Transamerica should have asserted its counterclaim against IIC/North River in the Texas action (bringing IIC into that action because at that point, IIC owed the obligation previously owed by North River), because Transamerica was at all times aware that IIC/North River were one and the same for purposes of the counterclaims at issue. IIC was in control of both litigations. Transamerica was required to assert its counterclaim against IIC, the assignee, in the first action not because claims must be brought against an assignee rather than an assignor, but because the claim was against the assignee, not the

---

[4]In this case, the assignee, petitioners, and the assignor, HWP, were on opposite sides in the original litigation–plaintiff and defendant. In *Transamerica*, the assignee and the assignor were the same (*alter egos*); the assignment was part of an internal restructuring of the obligations and assets of related insurance carriers. Transamerica's claims were always against the assignee, never against the assignor. As assignee of HWP, petitioners have brought claims in their own names, on their own behalves. These distinctions makes *Transamerica* inapplicable to this case.

assignor, and was a compulsory counterclaim.

Transamerica does not stand for the proposition that every time a claim is assigned, counterclaims against the assignor must only be brought against the assignee. Such a holding would be against every principle of assignment law. Assignees take assigned claims subject to the defenses, offsets and counterclaims of the defendant, and that is black letter law everywhere, not just in Nevada. *TD Auto Fin. LLC v. Reynolds*, 842 S.E.2d 783, 792 (W. Va. 2020) ("As is universally-recognized, an assignee acquires no greater right than that possessed by his assignor.") (citations omitted; punctuation altered); *Valley Boys, Inc. v. Am. Family Ins. Co.*, 306 Neb. 928, 938, 947 N.W.2d 856, 865 (2020) (same); *Unifund CCR Partners v. Harrell*, 509 S.W.3d 25, 29 (Ky. 2017) (same). A five minute internet search will produce similar holdings from every jurisdiction. Claims can be assigned subject to defenses; a party cannot alienate the counterclaims or defenses of another party against it by assignment.

The Brokers did not lose their counterclaims against HWP when HWP assigned its claims against the Brokers to plaintiffs. *Transamerica* does not suggest that when a claim is made against one party, another party has authority to move to dismiss that claim. HWP is the party the Brokers sued. HWP did not move to dismiss the Brokers' claims against it. Petitioners did. When HWP sued

the Brokers, the Brokers were not adverse to petitioners. They were a potential source of recovery for HWP, but petitioners had and have no direct claim against the Brokers. Their claim is by assignment; they stepped into the shoes of HWP for purposes of pursing HWP's claim. They have not stepped into the shoes of HWP for purposes of defending the lawsuit the Brokers have against HWP. That claim belongs to the Brokers.

Petitioners have not cited and cannot cite any case for the proposition that an obligor's defenses and claims against a party may be assigned, and the party can in that manner escape liability. Indeed, the case relied on by petitioners, *Walters*, states that the vast majority rule is to the contrary. HWP may assign its alleged claim against the Brokers to petitioners, but it cannot assign the Brokers' defenses or counterclaims to anyone.

D. The Pleadings Issues.

Three of the four issues raised by petitioners seek intervention on simple pleadings issues. "[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996). Courts liberally construe pleadings to place matters at issue which are fairly noticed to the adverse party.

Id. The district court must "recognize all factual allegations made by [plaintiff] as true and draw all inferences in its favor." *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008); *Squires By Squires v. Sierra Nevada Educ. Found. Inc.*, 107 Nev. 902, 904-05, 823 P.2d 256, 257 (Nev. 1991) (reversing trial court's dismissal of several claims, including intentional and negligent misrepresentation). A "complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew,* at 228, 181 P.3d at 672.

The district court did not abuse its discretion in applying these standards to petitioners' motion to dismiss, and allowing this matter to proceed based on the comprehensive allegations of the counterclaims. The fact that the litigation is more complicated than petitioners anticipated or hoped is no basis to dismiss counterclaims at the infancy of the action. Any party could complain that without defenses, counterclaims and cross-claims, litigation would be simpler. But no law suggests that an assignee is entitled to truncated litigation and assumed liability, free from defenses and counterclaims, just because it is tired of the litigation process under which it obtained its assignment.

The Brokers were brought into this case on the eve of trial, were involved in protracted motion practice, and were excluded from settlement. They are just now

being afforded an opportunity to assert their defenses and counterclaims. That the litigation between HWP and the Brokers, into which petitioners have stepped, is complex is no basis for disallowing full litigation of all counterclaims, offset, and defenses. The settlement with HWP did not and could not guarantee petitioners a simple litigation without allowing the Brokers to defend to the full extent of the law.

The Brokers sufficiently alleged that HWP's April 2015 statement was negligent and fraudulent. With regard to this statement, petitioners asserted only that the Brokers could not have relied on it because it was made after the Brokers' first recommendation regarding the amount of the policy. This factual argument ignores that the Brokers' counterclaim is not limited to a 2014 recommendation, but asserts ongoing misrepresentation throughout the relationship. The Brokers are not required to bring only claims premised on petitioners' theories of the case. The Brokers' counterclaims are not based solely on the April 2015 statement; that is one of several misrepresentations. The Brokers allege that–in addition to other things–they relied on HWP's April, 2015 statement during the renewal of HWP's policy. This was before the accident, at a time when the amount of the policy could have been increased. This fact, as alleged, must be accepted as true.

Petitioners make other factual assertions addressing the merits of the

counterclaims, but these are not proper in a motion to dismiss. They claim that the pleadings are not sufficiently particular to satisfy NRCP 9(b), and are too vague, but the claims are pleaded with detail, and whether allegations are particular and definite enough to support claims of negligent misrepresentation is left to the discretion of the district court. Finally, petitioners claim the allegations of misrepresentation are opinions, not fact. Stating that one follows particular safety guidelines when one does not, and that one has implemented certain safety policies and procedures when one has not, are matters of fact, not opinion. False statements that safety is a priority are actionable. The statements were made while HWP was seeking to insure risks related to the waterpark, which are greatly increased or decreased based on safety procedures. The relationship demands full disclosure.

The cases petitioners cite concern the "puffery doctrine." "Puffing has been described as making generalized or exaggerated statements such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely." *In re All Terrain Vehicle Litig.*, 771 F. Supp. 1057, 1061 (C.D. Cal. 1991) (citing *Cook, Perkiss, Liehe v. Northern California Collection Service, Inc.*, 911 F.2d 242, 246 (9th Cir.1990)). The "puffery doctrine" does not apply here because the Brokers were not HWP's customer. The statements were

intended to influence the Brokers' opinions on the safety requirements of the waterpark. The very nature of the relationship precludes puffery.

Petitioners' primary (and only arguably legal) argument is that the claim of fraudulent concealment fails because HWP had no duty to disclose its inadequate safety measures to the Brokers. Duty is a factually related legal issue. A duty to disclose arises where there is a special relationship such that the complaining party imports special confidence in the defendant and the defendant knows of that confidence. *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1487, 970 P.2d 98, 110 (1998) (abrogated on other grounds, *GES, Inc. v. Corbitt*, 117 Nev. 265 (2001)). Whether a special relationship exists depends on the facts of the case. *See Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 629, 855 P.2d 549, 550 (1993) ("facts may establish a special relationship"); *Cent. Tel. Co. v. Fixtures Mfg. Corp.*, 103 Nev. 298, 300, 738 P.2d 510, 512 (1987) (holding there was "a material factual dispute as to whether a special relationship exists").

The relationship between HWP and the Brokers was one of special reliance in both directions; the Brokers were hired to give an opinion based on information that could only come from HWP. HWP had a duty to honestly and fully disclose that safety information to the Brokers. This Court has recognized a special relationship between an insurer and its insured. *See Ainsworth v. Combined Ins.*

Co. of Am., 104 Nev. 587, 763 P.2d 673 (1988). Contrary to petitioners' argument, this Court has also recognized a fiduciary relationship between a broker and it client. *See Davis v. Beling*, 128 Nev. 301, 318, 278 P.3d 501, 513 (2012). Regarding a broker, Cheryl Davis, this court stated: "Davis is a fiduciary with a heightened responsibility to compensate the clients that she deceived." *Id.*[5] Just because this Court has not considered whether a client can owe a reciprocal duty to a broker if the circumstances so warrant does not mean such a relationship does not exist. Depending on the factual circumstances, such a relationship could exist; nothing in Nevada law precludes it.

This Court has stated: "[E]ven in absence of a fiduciary or confidential relationship and where the parties are dealing at arm's length, an obligation to speak can arise from the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party." *Villalon v. Bowen*, 70 Nev. 456, 467, 273 P.2d 409, 414 (1954). "[T]he general rule is that a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud. *Id.* This would be particularly

---

[5]Before 1995, many Nevada cases described brokers as fiduciaries. In 1995, the legislature codified the special duties of brokers in NRS 645.252, 645.253 and 645.254. Technically, brokers now owe statutory duties only, but they are very similar to fiduciary duties. *See Chamani v. Mackay*, 124 Nev. 1457, 238 P.3d 800 (2008). In any event, there is a special relationship between a broker and client.

so where the false impression was deliberately created.

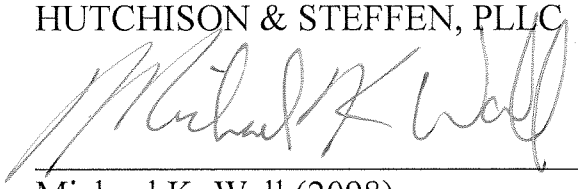
Petitioners cite *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-47, 401 P.3d 218, 223-24 (2017), for the proposition that no duties exist between a broker and an insured, but the duty that did not exist in *O.P.H.* was the duty to monitor the insured's payment of premiums. The case did not address the duty of disclosure. O.P.H. did recognize that based on the conduct of the parties, duties that did not otherwise exist might arise. *Id.* Under the facts of this case, HWP had a duty to disclose honestly its safety policies, practices and procedures. The district court did not err or abuse its discretion in allowing the parties an opportunity to explore the duties involved in this complex relationship.

CONCLUSION

The petition should be denied.

Respectfully submitted this 7 day of October, 2020.

HUTCHISON & STEFFEN, PLLC



Michael K. Wall (2098)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Real Parties in Interest

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF** , 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. I also certify that this brief complies with the formatting requirements of NRAP 21(d) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6). The font type is Times New Roman, font size is 14, the word count is 6,883 excluding the Disclosure Statement, Table of Contents, Table of Authorities, Affidavit, and required certificates (pursuant to NRAP 32(7)(C)).

///

///

///

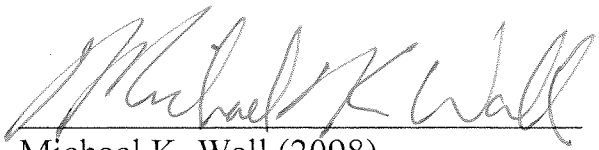
///

///

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 7 day of October, 2020.

HUTCHISON & STEFFEN, PLLC



Michael K. Wall (2098)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
mwall@hutchlegal.com

Attorney for Real Parties in Interest

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on the 7th day of October, 2020 the preceding **ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Donald Campbell, Esq.
Philip R. Erwin, Esq.
Samuel R. Mirkovich, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street,
Las Vegas, NV 89101

Attorneys for Petitioners

Janice Michaels, Esq.
Marian L. Massey, Esq.
WOOD SMITH HENNING & BERMAN, LLP
2881 Business Part Ct., Suite 200
Las Vegas, NV 89128

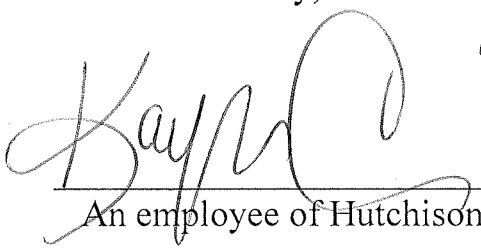
Attorneys for Fred A. Moreton and Company

Steven Guinn, Esq.
Ryan W. Leary, Esq.
9790 Gateway Dr., Suite 200
Reno, NV 89521

Attorneys for Haas & Wilkerson, Inc

Further, a copy was mailed via U.S. Mail to the following:

Judge Jerry A. Wiese II
Eighth Judicial District Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue,
Las Vegas, NV 89155



An employee of Hutchison & Steffen, PLLC