

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY AND GEORGINA
STUART

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK; THE
HONORABLE SUSAN JOHNSON,
DISTRICT JUDGE,

Respondent.

and

STEVE EGGLESTON, an individual,

Real Party-In-Interest.

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CASE NO. 87906

DISTRICT COURT CASE NO.

A-16-748919-C

**PETITIONERS' EMERGENCY MOTION TO STAY
DISTRICT COURT PROCEEDINGS PENDING CONSIDERATION OF
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

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**PETITIONERS' EMERGENCY MOTION TO STAY DISTRICT COURT
PROCEEDINGS PENDING CONSIDERATION OF
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

Petitioners CLARK COUNTY and GEORGINA STUART (“Petitioners”), through their undersigned counsel, respectfully submit this Emergency Motion to Stay District Court Proceedings (“Motion”) pursuant to NRAP 8, pending this Court's determination of Petitioners’ Emergency Petition for Writ of Mandamus. **Trial in District Court is set to begin 1/22/2017. The District Court’s ruling on Petitioners/Defendants’ Motion for Summary Judgment (MSJ) was made on 1/15/2024, at 3:52 p.m., four court days before the 1/22/2024 trial date, and over 90 days after the MSJ was argued on 11/7/2023.¹** The District Court’s 1/15/2024 Order (Findings of Fact, Conclusions of Law and Order)² denies Petitioners qualified and discretionary-act immunity designed to protect them from litigation, including trial, and is thus an immediately reviewable decision pursuant to federal qualified immunity case law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2015, Petitioner Georgina Stuart went to Plaintiff’s home to advise that based on the investigation a child abuse/neglect report, Petitioners,

¹ DOC 3, MTS 0055-0070, Eighth Judicial District Court Docket, highlighted as pertinent hereto

² DOC 5, MTS 0072-0093, Findings of Fact, Conclusions of Law and Order, EJDC, filed 1/15/2024

including Department of Family Services (DFS) Management, determined the children in the home would not be adequately protected without the presence of the children's adult siblings and maternal aunt, who were then visiting from Illinois. Therefore, the children needed to be brought into DFS protective custody. In lieu thereof, Plaintiff and the children's mother were offered an option to grant temporary guardianship of the children to the maternal aunt. After phone consultation with an attorney, Plaintiff elected to sign temporary guardianships as to his two sons. Stuart then left the home without taking the children into protective custody. As required by NRS 432B.300 and NRS 432B.310, on 2/2/2015, Petitioners submitted to the Nevada State Central Registry their substantiation of "Physical Injury Neglect, 14N Physical Injury Risk" as to Plaintiff. These facts were documented as exhibits under seal, in support of Petitioners'/Defendants' MSJ.³

Plaintiff's Complaint filed 12/30/2016,⁴ and amended 8/10/2017,⁵ and Plaintiff's Opposition to the MSJ,⁶ assert Petitioners coerced the temporary guardianships with threats Plaintiff would never again see his children if not signed.

³ DOC 2, Appendix MTS 0024-0054, Defendants' Motion for Summary Judgment, filed 9/29/2023 (without Exhibits which were filed in the District Court under seal)

⁴ DOC 1, Appendix MTS 0001-0023, Complaint, filed 12/30/2016

⁵ DOC 6, Appendix MTS 00094-0120, First Amended Complaint, filed 8/10/2017

⁶ DOC 7, MTS 0121-151, Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed 10/17/2023 (without Exhibits which were filed in the District Court under seal)

Following a complicated procedural history, Petitioner's MSJ sought judgment on all three of Plaintiff's remaining causes of action - Substantive Due Process Civil Rights Violation (42 U.S.C. §1983); Intentional Infliction of Emotional Distress (IIED); and Defamation, Slander, and Libel.⁷ With the MSJ decision pending, at Calendar Call on 12/20/2023, the parties were given a firm jury trial date of 1/22/2024.⁸ The 1/15/2024, lower court's Findings of Fact, Conclusions of Law and Order (Order) denies the MSJ as to Plaintiff's §1983 and Intentional Infliction of Emotional Distress (IIED) claims.⁹ Thereby Petitioners are denied protections of qualified and discretionary-act immunity from litigation.¹⁰

On 1/17/2024 Petitioners submitted to this Court an Emergency Petition for Writ of Mandamus. On 1/16/2024 Petitioner's also submitted to the District Court a Motion For Emergency Stay And Request For Order Shortening Time (OST). On 1/17/2024, at 10:58 a.m., the Court declined to consider the Motion for Stay.¹¹ Accordingly, Petitioners submit this Emergency Motion for Stay, including stay of the 1/22/2024.

⁷ See DOC 2, Appendix MTS 0024-0054, Defendants' Motion for Summary Judgment, filed 9/29/2023 (without Exhibits which were filed in the District Court under seal)

⁸ See DOC 3, MTS 0055-0070, Eighth Judicial District Court Docket, highlighted as pertinent hereto, and Minutes of 12/20/2023 at MTS 0069-0070

⁹ DOC 5, MTS 007-0093, Findings of Fact, Conclusions of Law and Order, EJDC, filed 1/15/2024

¹⁰ *Id.* at MTS 082 (p. 11, para. 10, lines 11-14, re: qualified immunity), and at MTS 0084-0086 (pp. 13-15, paras. 14-16, re: discretionary-act immunity)

¹¹ DOC 4, Appendix MTS 0071, Email from Law Clerk to the Honorable Susan Johnson, January 17, 2024, 10:58 a.m., declining to hear Motion to Stay on an Order Shortening Time

The Stay is necessary because, as set forth in the Emergency Petition for Writ of Mandamus filed January 17, 2023, the District Court's 1/15/2024 Order denying qualified immunity violates federal qualified immunity case law, and federal and state case law concerning §1983 claims and discretionary-act immunity afforded by N.R.S. 41.032(2). Petitioners have no plain, speedy and adequate remedy in the ordinary course of law, because once the trial begins, qualified immunity is effectively lost forever. The lower court's order relied in substantial part on allegations of Plaintiff's Complaint, (seemingly conducting an NRCP 12(b)(5) analysis), without consideration of the factual record provided in support of and in opposition to the MJS, and on that basis determined there are disputed issues of fact. The Order thereby constitutes a clearly erroneous decision and an abuse of discretion. The issue of qualified immunity from litigation is a question of law for the Court.

II. LEGAL STANDARD

In deciding whether to issue a stay, the court generally considers : “(1) whether the object of the appeal or writ petition will be defeated if the stay is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits of the appeal or writ

petition.” NRAP 8(c). “Litigation costs, even if potentially substantial, are not irreparable harm. Similarly, a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.” Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) (*citing* Hansen v. Eighth Jud. Dist. Ct., 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000)). While any one factor does not carry more weight than the others, “if one or two factors are especially strong, they may counterbalance other weak factors.” Mikohn Gaming Corp., *supra* at 253, and 39.

III. LEGAL ARGUMENT

A. The Object of the Writ Will Be Defeated if the Stay Is Denied

Qualified immunity constitutes immunity from litigation, including trial, not just immunity from damages. Denial of qualified immunity, is immediately appealable under federal law. Mitchell v. Forsyth, 472 U.S. 511 (1985), and *see* Behrens v. Pelletier, 516 U.S. 299, 306 (1996). Qualified immunity is “an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question.” Mitchell, *supra*, 472 U.S., at 526. Sound appellate practice and the importance of the qualified immunity doctrine is cause for courts to interpret the appellate rules final judgment requirement of F.R.A.P. 3(b)(1) consistent with the federal approach in §1983 cases. *See e.g.*, Furlong v. Gardner, 956 P.2d 545, 550 (Colo. 1998); Richardson

v. Cheverefils, 552 A.2d 89, 92 (N.H. 1988); Murray v. White, 587 A.2d 975, 977-78 (Vt. 1991); and Park County v. Cooney, 845 P.2d 346, 349 (Wyo. 1992). **The importance of immunity from suit is demonstrated by the availability of an immediate appeal right under federal law in these circumstances. Behrens v. Pelletier, 516 U.S. 299, 306 (1996).**

Summary judgment is a vehicle by which “factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.” Boesiger v. Desert Appraisals, 135 Nev. Adv. Op. 25, p. 4 (2019), quoting Celotex Corp v. Catrett, 477 U.S. 317, 327 (1986). The purpose of the MSJ, to obtain the lower court’s review of the evidentiary record in support of the qualified immunity defenses, is thwarted by the lower court’s reliance on allegations of Plaintiff’s complaint, in lieu of the substantial factual record presented by the parties.

B. Petitioners are Likely to Prevail on the Merits of the Writ Petition

First, Petitioners are entitled to qualified immunity unless “[a] Government official’s conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). Plaintiff bears the burden of showing the rights at issue were clearly established at the time of the defendants’

actions. Robinson v. York, 566 F.3d 817, 826 (9th Cir. 2009), and Momox-Caselis v. Clark County, 2018 WL 6795556, at *3–4. Plaintiff made no such showing. There is no clearly established precedent that the recommended removal, or Petitioners consent to forego removal if the parents signed Temporary Guardianships, would violate a Constitutional right – because it did not. Based on Plaintiff’s choices, Petitioners did not take custody of Plaintiff’s children. Accordingly, Petitioners are entitled both to summary judgment on the §1983 claim, and to qualified immunity under federal law.

The United States Supreme Court holds that “qualified immunity is important to ‘society as a whole,’ and . . . as ‘an immunity from suit,’ qualified immunity ‘is effectively lost if a case is erroneously permitted to go to trial.’ ” Burr v Clark Cnty. Dep’t of Fam. Servs., 2023 WL 5940017, at *5-6, citing S.B. v. Cnty. of San Diego, 864 F.3d 1010, 1015 (9th Cir. 2017), and White v. Pauly, 137 S.Ct. 548, 551 (2017) (*per curiam*) (further citations omitted). See also Momox-Caselis v. Donohue, 2018 WL 6795556, at *3 and 6-8 (D. Nev.), and Hoy v. Clark County, Case No. 2:20:cv-103-CDS-VCF, ECF No. 145, pp. 1, 15-17 and 23 – finding qualified immunity.

Second, it is legally undisputed that governmental decisions regarding removal from a home and the placement of children into foster homes clearly involve personal deliberation and judgment, and are grounded on public policy concerns as expressed in the Nevada Revised Statutes. Henry A., 2014 WL

1809634 at *12-14 (D.Nev.); Henry A. v. Willden, 2013 WL 759479, at *15 (D. Nev.); Nelson v Willden, 2015 WL 4937939, at *6 (D. Nev.). An investigation into alleged child abuse “involves ‘personal deliberation, decision and judgment’ and cannot be construed as ministerial.” Johnson v. Clayton, 2009 WL 10693589, at *4 (D.Nev.), and Henry A. v. Willden, 2014 WL 1809634, at *12 (D. Nev.), citing Martinez v. Marascas, 123 Nev. 433, 168 P.3d 720, 722 (Nev. 2007).

Third, a public official’s decision is entitled to NRS 41.032(2) discretionary-act immunity when it: (1) involves an element of individual judgment or choice; and (2) is based on considerations of social, economic, or political policy. Martinez, *supra*. There is no dispute Petitioner’s child welfare investigation of Plaintiff’s home, and the options provided for a protective environment for the children, involved elements of individual judgment based on social and economic considerations. Plaintiff makes no argument that either element one or two is missing, and instead, argues the discretion was abused. The facts in the summary judgment record before the court do not support Plaintiff’s allegations of coercion, or “negligence unrelated to any plausible policy objectives” as contemplated by Martinez, 123 Nev. at 446, 168 P.3d at 728, and Coulhurst v. United States, 214

F.3d 106, 111 (2nd Cir. 200).¹² Accordingly, Petitioners retain discretionary immunity from Plaintiff's suit.

IV. CONCLUSION

Based upon the foregoing, Petitioners respectfully request this Court grant their Emergency Motion To Stay the District Court proceedings, including the 1/22/2025 trial.

RESPECTFULLY SUBMITTED this 18th day of January, 2024.

OLSON CANNON GORMLEY & STOBERSKI

/s/ Felicia Galati, Esq.

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¹² See DOC 7, MTS 0121-151, Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed 10/17/2023 (without Exhibits which were filed in the District Court under seal)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2024, I served a true and correct copy of the above and foregoing **PETITIONERS' EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS PENDING CONSIDERATION OF EMERGENCY PETITION FOR WRIT OF MANDAMUS** by electronic service through the Nevada Supreme Court's website upon the following:

THE HONORABLE SUSAN J. JOHNSON
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 22
Regional Justice Center, Courtroom 16D
200 Lewis Avenue
Las Vegas, NV 89155
Respondent
Via hand delivery

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