IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY and GEORGINA STUART,

Petitioners,

vs.

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

Respondents,

and

STEVE EGGLESTON,

Real Party in Interest.

No. 87906

ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

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CLARK COUNTY and GEORGINA STUART, Petitioners, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, Respondents, and STEVE EGGLESTON, Real Party in Interest.	No. 87906 **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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1. STEVE EGGLESTON is an individual.

The above-named Real Party in Interest is represented in the district court below and in this Court by Paola M. Armeni, Esq. and William D. Schuller, Esq. of Clark Hill PLLC. The Real Party in Interest is not using a pseudonym herein.

DATED this 16th day of February 2024.

CLARK HILL PLLC

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Constitutions

Real Party in Interest Steve Eggleston hereby answers the Emergency Petition for Writ of Mandamus.

I. ROUTING STATEMENT

This case is retained by the Supreme Court pursuant to NRAP 17(a)(10) – i.e., "[c]ases involving the termination of parental rights or NRS Chapter 432B."

II. RELIEF SOUGHT

In the Petition, Defendants/Petitioners CLARK COUNTY and GEORGINA STUART (collectively, "Defendants") request that this Court compel the District Court to issue an order granting them: 1) qualified immunity; 2) summary judgment on Eggleston's §1983 substantive due process claim alleging a violation of his parental rights; and 3) discretionary act immunity on Eggleston's intentional infliction of emotional distress claim ("IIED"). *Id*. at p. 1.

III. ISSUES PRESENTED

The issues presented for review concerning the Findings of Fact, Conclusions of Law and Order (on Motion for Summary Judgment) ("Order") are as follows:

1. Whether the District Court erred in denying Defendants qualified immunity on Eggleston's §1983 claim?[1]

[1] Defendants needlessly split this issue in two, stating that the issues include "[w]hether the district court erred in denying Defendants summary judgment on the § 1983 claim, [and] erred in denying Defendants qualified immunity…" *See* Petition at p. 8. As Defendants' only argument regarding Eggleston's 1983 claim is qualified immunity, it is a distinction without a difference.

2. Whether the District Court erred in denying Defendants discretionary-act immunity on Eggleston's IIED claim?

IV. RELEVANT FACTS

The determination as to whether a defendant is entitled to qualified immunity and/or discretionary-act immunity requires fact intensive inquiries. *See*, e.g., *Williams v. Nevada*, 2018 WL 4305773, at *5 (D. Nev. Sept. 10, 2018); and *Roberts v. Nye Cnty.*, 2023 WL 2499340, at *6 (D. Nev. Mar. 14, 2023). Absent from the Petition is any recitation of the underlying relevant facts.[2] This omission is in violation of NRAP 17(a)(3)(D), which requires that a petition for a writ of mandamus *must state* "the facts necessary to understand the issues presented by the petition." The Petition does not enable this Court to conduct a proper analysis of the issues presented.

A. Underlying Facts

Defendants, based on a referral from an anonymous source, opened a child abuse/neglect case against non-party Laura Rodriguez (formerly Battistella) (Case: 1362581 – RODRIGUEZ, LAURA). *See* EXH027. CPS assigned Stuart to investigate and assess the family's needs. *Id*. At the time, the family consisted of minor children K.R., J.R., H.E., and R.E.; Laura (biological mother of all four minor

[2] As noted in Eggleston's opposition to Defendants' motion to stay, filed January 19, 2024, discovery below included approximately 11,500 pages of documents, 100 witnesses, and 12 depositions. *Id*. at p. 3.

children); and Eggleston (biological father of H.E. and R.E. ("Eggleston Boys")). *See* EXH027. Eggleston was primarily responsible for supporting all four minor children. The family lived in a four-bedroom, three-bathroom rented house in Las Vegas, Nevada. During the investigation, Laura's two older children, Alexis and Selena Rodriguez, were visiting from Illinois while on winter break from college and high school, respectively. *See* EXH027.

Stuart's UNITY Case Notes (EXH027-46) are telling in that they demonstrate Eggleston and Laura were cooperative during the investigation; Stuart's general lack of contact with Eggleston; Lisa Callahan, maternal aunt, relaying to Stuart that "[s]he is hoping that her sister will allow her to take the children back to Illinois with her…" (EXH035); and Laura apparently signed the temporary guardianship prior to Eggleston (EXH041). Lisa Callahan's comment and Eggleston's delay in signing are indicative of the fact that Laura, but not Eggleston, was in favor of temporary guardianship.

After arranging to obtain in-home services and rental assistance for the family from December 23, 2014, through January 6, 2015, Stuart arrived at the Eggleston family's home on January 7, 2015, and presented Eggleston a Catch-22 ultimatum: 1) agree to guardianship of the Eggleston Boys to Laura's sister and brother-in-law, Lisa and Brian Callahan, who reside in Illinois; or 2) have CPS place the Eggleston Boys in foster care. *See* WRIT036. Eggleston had to make this impossible decision,

demanded of him abruptly and without forewarning in the presence of police officers, without sufficient time to process all the potential implications. Eggleston reluctantly agreed to the *temporary* guardianship.

The CPS record shows that Stuart was in active communications with Lisa, and to a lesser extent Alexis, about her plans for the minor children, all the while leaving Eggleston in the dark. *See*, e.g., EXH035, EXH037.

On December 30, 2014, Stuart sends Lisa McKay, a DFS manager, an email stating "[t]his is a case that I staffed for removal." *See* EXH560-564. However, at 2:00 p.m., a DFS Child and Family Team (CFT) Meeting was held in the family home with Stuart, Eggleston, Laura, Boys Town, Mojave Mental Health, and the children (except for H.E., who was in the hospital due to appendicitis), during which the family agreed to in-home services. *See* WRIT035 and EXH037. Stuart does not express any concerns regarding Eggleston. *Id*. At 7:54 p.m., there is an email exchange between Stuart and Lisa discussing daycare for the minor children. *See* EXH566. While Stuart indicates removal was needed because several family members were leaving town, she did not yet know when H.E. was going to be released from the hospital. *See* EXH037 ("[H.E.] continues to be at Sunrise Hospital due to his appendicitis and surgery…His discharge date is not known at this time. Possibly 7-10 days.")). In fact, Lisa did not leave until after H.E. was released. *See* EXH505; and EXH447. Prior to January 7, 2015, Stuart called Alexis and Lisa and

informed them that the decision had been made that the minor children could not remain in the home with Laura and Eggleston. *See* EXH499-503; and EXH450-453.

Stuart did not conduct any background investigation on the Callahans. *See* EXH531-532. If Stuart had done her due diligence, she would have known that in January 2015, the Callahans lacked the necessary resources to take care of the minor children. Their condo in Orland Hills, Illinois only had two bedrooms and two bathrooms. *See* EXH506. The first night, the children slept on blow up mattresses and a pullout couch. *See* EXH507. As a result, K.R. and J.R. then went to stay with Lisa's cousin, for several weeks. *See* EXH507. The Callahans also had to immediately apply for government assistance, including food stamps and a monthly stipend, the latter of which they were still receiving as of March 2023. *See* EXH497-498. Furthermore, Brian was not even in Las Vegas during Stuart's investigation. *See* EXH508; and EXH513.

Stuart's only two issues with Eggleston continuing to care for the Eggleston Boys were daycare and rent. *See* EXH519-520. As part of her job duties, Stuart helps arrange for families in need to receive daycare and rental assistance (including $2,000 that can be used for "anything to get the family stable"). *See* EXH528-530. Notably, Stuart prepared a present danger plan under which Eggleston, Alexis, and Selena agreed to "provide 24 hour supervision of the children until further notice of

DFS." (EXH031). Defendants do not allege that Eggleston violated the present danger plan. *See* WRIT028-058.

Both experts opined that Defendants failed to complete a safety plan before determining removal was necessary. *See* EXH489-492; and EXH543-544. ("There is no documentation showing the Safety Plan Determination (SPD) was completed to determine if in-home services were needed to keep the children safe in the home. … Without completing an SPD there is no systematic way to know if a Safety Plan is needed and what type of services need to be implemented."). Pursuant to DFS policy 2700. Taking Protective Custody, "PC may be taken **only** when it has been determined that the child is unsafe **and** when no safety plan will adequately control the relevant safety threats." *See* EXH779 (emphasis in original).

In her notes for the underlying DFS investigation, Stuart references a meeting on January 6, 2015: "Case staffing regarding safety services in the home at DFS south office. Present was DFS in home specialist, this specialist, Mojave Mental health, Sup Mary Ateberry [sic], Sharon Savage and Clint Holder." *See* EXH040. The emails produced during discovery shed some light on the subject matter for this meeting. On January 5, 2015, Stuart advises McKay of her plan for removal and the return of the check if that occurs. McKay then advises Stuart to staff this and "come up with a better plan." *See* EXH561-563. In other email exchanges between Atteberry, Stuart, McKay, Savage, Holder, there is discussion that the family is on

board with Mojave and Boystown services, that this is a good case for those programs and the in-home safety plan needs to be solidified. There is further discussion about Present Danger Assessment and the SPD [Safety Plan Determination] being done prior to the staffing meeting. *See* EXH 258-EXH261. Lastly, there are further emails that discuss the request for money to assist with rent and daycare. *See* EX263-269. However, after the January 6 meeting, Stuart advises the money is no longer needed "as the children will be removed from the home." *See* EX263-269.

These emails demonstrate: 1) the County, including Atteberry, Stuart, McKay, and Savage, were considering providing Eggleston's family with in-home services through multiple providers prior to the January 6 staff meeting; and 2) a decision was made during the January 6 staff meeting to not provide any services and instead, remove the minor children from the home despite no safety plan determination.

B. Procedural History

On January 15, 2024, the District Court filed the Order (WRIT240-261), which includes conclusions of law addressing both qualified immunity and discretionary-act immunity in detail. As to qualified immunity:

> Defendants propose, even if there remain genuine issues of material fact regarding whether a deprivation of civil rights occurred, [they] are entitled to qualified immunity as a matter of law. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective reasonableness" of the action, assessed in light of the legal rules that

> were "clearly established" at the time the action was taken. *Anderson v. Creighton*, 483 U.S. 635, 635, 107 S.Ct. 3034, 3036, 97 L.Ed.2d 523 (1987), *citing Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In order to conclude the right which the official allegedly violated is "clearly established," the contours of the right must be sufficiently clear a reasonable official would understand what he is doing violates that right. *Id.*, 483 U.S. at 635, 107 S.Ct. at 3036-3037. In this Court's view, the conflicting facts presented do not support the conclusion [Stuart] is entitled to the protection of qualified immunity as a matter of law. While it appreciates the positions taken by [Defendants], **this Court cannot ignore the facts [Eggleston] has presented in opposition. [Eggleston] presented evidence, *inter alia*, [Stuart] (1) concealed material facts about her investigation and intentions from him, (2) misrepresented her authority to offer rental assistance and in-home services and (3) coerced [Eggleston] and [Laura] into executing the temporary guardianship papers under the guise he would see his minor boys in several days when, at this juncture, he has not seen his children for years.** If the jury finds such actions were taken, such would not be objectively reasonable in light of the legal rules that were clearly established at the time they occurred. For the aforementioned reasons, this Court denies Defendants' Motion for Summary Judgment as it pertains to the First Cause of Action.

WRIT250 (emphasis added).

As to discretionary-act immunity, the District Court conducted an extensive analysis (WRIT252-55), noting that "discretionary-act immunity does not apply to a government official's intentional torts." WRIT255. Furthermore, the District Court concluded that "if the jury finds [Stuart] did, indeed, coerce [Eggleston] and the children's mother to sign the temporary guardianship papers under the guise [Eggleston] would see his children again in several days, such act would not fall

within the considerations of social, economic or political policy or meet the second criterion of the *Berkovitz-Gaubert* test." *See* WRIT255.

V. THE WRIT OF MANDAMUS SHOULD NOT ISSUE.

A. Legal Standard for Entitlement to Mandamus Relief

Pursuant to NRS 34.160, "[t]he writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." When there is no plain, speedy, and adequate remedy in law, the writ "shall be issued upon affidavit, on the application of the party beneficially interested." NRS 34.170. In *Walker v. Second Judicial Dist. Court in & for Cnty. of Washoe*, this Court set forth three prerequisites for writ relief. 136 Nev. 678, 476 P.3d 1194 (2020).

First, the question of whether a petitioner has a legal right to any particular action by the lower court, as required for mandamus relief, turns, in part, on whether the action at issue is one typically entrusted to that court's discretion, and whether that court has exercised its discretion appropriately. *Walker*, 136 Nev. at 680, 476 P.3d at 1196 citing NRS 34.160 and *Segovia v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 133 Nev. 910, 911-12, 407 P.3d 783, 785 (2017).

Second, where a district court is entrusted with discretion on an issue, the petitioner's burden to demonstrate a clear legal right to a particular course of action

by that court, as required for mandamus relief, is substantial; the Supreme Court can issue traditional mandamus only where the lower court has manifestly abused that discretion or acted arbitrarily or capriciously. *Walker*, 136 Nev. at 680, 476 P.3d at 1196-97 *citing Martinez Guzman v. Second Judicial Dist. Court in & for Cnty. of Washoe*, 136 Nev. 103, 105, 460 P.3d 443, 446 (2020) (additional citation omitted). Thus, traditional mandamus relief does not lie where a discretionary lower court decision results from a mere error in judgment; instead, mandamus is available only where the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will. *Walker*, 136 Nev. at 680-81, 476 P.3d at 1197 *citing State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (additional citation omitted).

Third, because mandamus is an extraordinary remedy, the court does not typically employ it where ordinary means, already afforded by law, permit the correction of alleged errors. *Walker*, 136 Nev. at 681, 476 P.3d at 1197 citing *Pan v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) and *Rawson v. Ninth Judicial Dist. Court in & for Cnty. of Douglas*, 133 Nev. 309, 316, 396 P.3d 842, 847 (2017).

This Court's general policy is to not consider writ petitions challenging district court orders denying summary judgment. *Starr Surplus Lines Ins. Co. v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 139 Nev. Adv. Op. 32, 535 P.3d

254, 259 (2023) *citing Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court of State ex rel. Cnty. of Washoe*, 127 Nev. 583, 585, 262 P.3d 699, 700 (2011). More specifically, because an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, Nevada generally declines to consider petitions for writ of mandamus that challenge interlocutory district court orders denying motions to dismiss or for summary judgment. *Orbitz Worldwide, LLC v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 139 Nev. Adv. Op. 40, 535 P.3d 1173, 1178 (2023) *quoting Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Defendants' *res judicata* argument is thus not properly before the Court via a writ.

While qualified immunity – "an *immunity from suit* rather than a mere defense to liability" (*Saucier*, 533 U.S. at 200-01, 121 S.Ct. at 2156) – may be an appropriate basis for granting summary judgment, where material facts are genuinely in dispute, a jury's resolution of those disputes may be required before the court's determination of the official's entitlement to immunity. *Garver v. Washoe Cnty.*, No. 3:09-CV-00463-LRH, 2011 WL 6002969, at *6 (D. Nev. Nov. 28, 2011). More specifically, the existence of reasonable cause, the sufficiency of an investigation, and the scope of an intrusion are questions of fact which may preclude summary judgment on the immunity issue. *Ansara v. Maldonado*, 647 F. Supp. 3d 958, 972 (D. Nev. 2022), *appeal dismissed*, No. 23-15142, 2023 WL 3221749 (9th Cir. May 1, 2023).

B. Defendants Lack Qualified Immunity on Eggleston's §1983 Claim.

Defendants first argument is that they are entitled to qualified immunity under the two-pronged inquiry set forth in *Saucier v. Katz* 533 U.S. 194, 121 S. Ct. 2151 (2001) and under *res judicata*. *See* Petition at pp. 8-12.

As a threshold matter, a court must ask whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201, 121 S. Ct. at 2156. If no constitutional violation would exist even if the allegations were taken as true, the inquiry ends, and a finding of qualified immunity is appropriate. *Id.* However, if the parties' submissions indicate a possible constitutional violation, the reviewing court must assess whether the constitutional right was clearly established at the time of the alleged violation. *Id*.

1. A Constitutional Violation Exists.

Petitioners are not entitled to qualified immunity because parents and children possess a constitutionally protected liberty interest in companionship and society with each other. *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc). This liberty interest is rooted in the Fourteenth Amendment to the United States Constitution, which states in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1. The protected liberty interest is independently held by both parent and child. *City of*

Fontana, 818 F.2d at 1418. A parent's right includes a custodial interest when the child is a minor. *Id.* at 1419.

A claim of interference with the parent-child relationship in violation of the Fourteenth Amendment may be brought as either a procedural due process claim or a substantive due process claim. *See City of Fontana*, 818 F.2d at 1419-20. Eggleston asserted both. Procedural due process "guarantees that parents will not be separated from their children without due process of law except in emergencies." *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) *quoting Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2001). Substantive due process protects from impermissible interference with familial association when a state official harms a parent or child in a manner that shocks the conscience. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008) *quoting Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

2. A Constitutional Right Was Clearly Established.

In 2015, the Ninth Circuit clearly established that officials, including social workers, violate these rights if they remove a child without a warrant absent "information at the time of the seizure that establishes 'reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.'" *Garver*, 2011 WL

6002969, at *6 *citing Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir.2001).

In *Romero v. Washoe Cnty.*, No. 3:11-CV-00582-LRH, 2013 WL 5592269, at *3 (D. Nev. Oct. 9, 2013) (citations omitted), Washoe County conceded that the law was clearly established in the Ninth Circuit but argued that *reasonable cause*, *imminent danger*, and *serious bodily harm* were not clearly defined. The *Romero* Court rejected this argument, holding that "the Ninth Circuit has stated explicitly that '[a] reasonable social worker would need nothing more to understand that she may not remove a child from its home [absent reasonable cause to believe the child is in imminent danger of experiencing serious bodily harm].'" 487 F.3d at 1297. Thus, the Court declined to find that the law is not clearly established for purposes of Defendants' qualified immunity defense. 2013 WL 5592269, at *3, *aff'd sub nom. Romero v. Cnty. of Washoe*, 602 F. App'x 408 (9th Cir. 2015).

In *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1115, n. 14 (9th Cir. 2010), the Ninth Circuit stated: "Our sister circuits have denied qualified immunity to social workers who removed children from their families based on unreliable evidence in violation of the due process right of family integrity." *See*, e.g., *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1127 (3d Cir.1997) (denying qualified immunity to a social worker who separated a child from

her parent on the basis of an uncorroborated anonymous tip and without "objectively reasonable grounds").

Eggleston's constitutional rights were clearly established and thus Defendants are not entitled to qualified immunity of Eggleston's substantive and procedural due process claims.

3. Res Judicata Does Not Apply.

Defendants' *res judicata* argument, presented without any legal authority or any citation to the Record, is premised on the Amended Order Denying Petition for Judicial Review ("Judicial Review Order") filed in *Steven Eggleston vs. Clark County Department of Family Services*, First Judicial District Court Case No. 20 OC 00164 1B. *See* WRIT174-214. Eggleston's appeal of the Judicial Review Order is pending; his opening brief is not due until March 14, 2024.[3] *See* Exemption from Settlement Program - Notice to File Documents, **Exhibit A** hereto.

Furthermore, *res judicata* precludes parties or those in privity with them from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction. *Kuptz-Blinkinsop v. Blinkinsop*, 136 Nev. 360, 364, 466 P.3d 1271, 1275 (2020) (citations omitted). The doctrine can take two forms: *issue*

[3] In addition to misapplying the law, District Judge James E. Wilson, Jr. signed off on an overbroad, unprofessional order opposing counsel submitted. On October 20, 2023, just one week after Judge Wilson issued the Judicial Review Order, Governor Joe Lombardo announced Judge Wilson's retirement, effective January 8, 2024.

preclusion is implicated when the parties to an earlier suit are involved in a subsequent litigation on a different claim; and *claim preclusion* applies when a valid and final judgment on a claim precludes a second action on that claim or any part of it. *Id*. (citation omitted). While Defendants do not specify which form of *res judicata* they are arguing, it appears to be *issue preclusion* as to qualified immunity. *See* Petition at p. 12. For issue preclusion to apply, the issue decided in the prior litigation must be identical to the issue presented in the current action. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), *holding modified by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015).

Here, the only issue before the First Judicial District Court was substantiation of Clark County's allegations of Physical Injury/Physical Risk against Eggleston. Because "the First Judicial District Court did not decide all the issues within [Eggleston's] claims filed" in the Eighth Judicial District Court – including § 1983, IIED, and defamation – issue preclusion only applies to the substantiation. WRIT248.

Additionally, this Court previously considered Defendants' argument that because Eggleston's state law tort claims are related to DFS' finding of child maltreatment, Eggleston had to first exhaust his administrative remedies. *Eggleston v. Stuart*, 137 Nev. 506, 513, 495 P.3d 482, 490 (2021). More specifically, the *Eggleston* Court held that the district court erred in dismissing Eggleston's state law tort claims because they do not implicate any administrative process. *Id*. "Any preliminary,

procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy." *Id*. *quoting* NRS 233B.130(1). NRS 432B.317(1) provides for the administrative appeal of the substantiation of the agency's report of abuse or neglect and "the agency's intention to place the person's name in the Central Registry." *Id*. Where an agency "is powerless to grant the relief appellants seek in their suit, the doctrine of exhaustion of administrative remedies is not applicable." *Ambassador Ins. Corp. v. Feldman*, 95 Nev. 538, 539, 598 P.2d 630, 631 (1979).

The *Eggleston* Court thus ruled that the district court improperly dismissed Eggleston's tort claims based on a failure to exhaust administrative remedies because "to the extent that Eggleston's…claims rest on his allegations that he was forced to sign a temporary guardianship over his children, exhaustion is not required because, as explained above, these allegations do not arise from an administrative process." 137 Nev. at 513, 495 P.3d at 491. In other words, "while related, the [petition for judicial review and the action below] ultimately seek different remedies for different wrongs." *Id*., 137 Nev. at 507, 495 P.3d at 486.

Therefore, Defendants are also not entitled to qualified immunity based on *res judicata*.

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C. Defendants Lack Discretionary-Act Immunity on the IIED Claim.

Defendants second *argument* is that they are entitled to discretionary-act immunity under NRS 41.032(2), which states that an action cannot be brought if it is "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused." *See* Petition at p. 13. In a close case, courts must favor a waiver of sovereign immunity under NRS Chapter 41. *Hagblom v. State Dir. of Motor Vehicles*, 93 Nev. 599, 602-03, 571 P.2d 1172, 1174-75 (1977) (citation omitted). Additionally, in analyzing discretionary-act immunity under Nevada law, courts must assess cases on their facts. *Salehian v. Nevada State Treasurer's Office*, 618 F. Supp. 3d 995, 1005 (D. Nev. 2022) (citation omitted).

Here, Defendants do not provide any facts in concluding discretionary-act immunity applies. Rather, Defendants cite to three distinguishable cases – *Henry A. v. Willden*, 2014 WL 1809634 (D. Nev. May 7, 2014); *Nelson v. Willden*, 2015 WL 4937939 (D. Nev. Aug. 19, 2015); and *Johnson v. Clayton*, 2009 WL 10693589 (D. Nev. Nov. 4, 2009). *See* Petition at pp. 13-14.

In *Henry A.*, the plaintiffs alleged negligence, not violation of parental rights under § 1983 as Eggleston has here. 2014 WL 1809634 at *3. Regardless, the District of Nevada did not find that discretionary act immunity applied:

> Here, as a general matter, a decision not to remove a child from the custody of a parent involves elements of judgment and choice, and Osemwengie's [the DFS investigator] choice not to remove the children from the custody of their parents was grounded on public policy concerns as expressed in the Nevada Revised Statutes. Plaintiffs have not alleged malice, but rather only negligence, however gross. As terrible as the situation is, and as negligent as Osemwengie might have been (assuming Plaintiffs' evidence is true), **the discretionary immunity statute might still protect Osemwengie from civil liability**.
>
> On the other hand, Plaintiffs are correct that Osemwengie had a statutory duty to investigate reports of child abuse or neglect. *See* Nev.Rev.Stat. §§ 432B.260, 432B.300. Plaintiffs note that Osemwengie did not investigate after receiving the emails from the father to the boys and the pornographic magazine. That is, after she received the evidence, she closed the case and chose not to further investigate, without even looking at the additional evidence, based upon her previous visit to the father's home and observation of the boys there. The Court accepts Plaintiffs' argument that failing to take any further action to investigate after receiving the previously unexamined evidence could constitute a failure to investigate under the statute, which is a mandated task, the failure of which would prevent Osemwengie from asserting the qualified immunity defense. The Court therefore intends to leave it to the jury whether Osemwengie satisfied her statutory duty to investigate in this case. **A reasonable jury could decide the issue either way based upon the evidence currently adduced.**

Id. at *14 (emphasis added).

In *Nelson*, the District of Nevada did not explicitly dismiss plaintiffs' IIED claim because of discretionary-act immunity. Rather, the *Nelson* Court held:

> Plaintiffs again fail to allege adequate facts to demonstrate that the State Defendants explicitly and in their individual capacity engaged in intentional acts surrounding the situation. The Court is not persuaded by Plaintiffs' attempts to argue **general systemic failures** as rising to the level of intentional conduct. Thus, the Court dismisses Plaintiffs' intentional infliction of emotional distress claim as to the State Defendants.

2015 WL 4937939 at *4 (emphasis added). Conversely, the District Court held that the jury could find that Stuart coerced Eggleston into signing the temporary guardianships through misrepresentations – i.e., intentional misconduct. WRIT255. *See*, e.g., *Morales v. Cnty. of Mendocino*, 16-CV-02429-EMC, 2018 WL 11257426, at *5 (N.D. Cal. Feb. 5, 2018) *quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 98 S.Ct. 2041, 2048 (1973) ("[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force."); and *Sangraal v. City & Cnty. of San Francisco*, C 11-04884 LB, 2013 WL 3187384, at *10 (N.D. Cal. June 21, 2013), *aff'd sub nom. Jones v. City & Cnty. of San Francisco*, 621 Fed. Appx. 437 (9th Cir. 2015) *quoting Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1127 (3rd Cir. 1997) (a threat of removal is nonetheless coercive where the social worker "lacked objectively reasonable grounds to believe" that the child had been abused or was in imminent danger of abuse).

Finally, in *Johnson*, the District of Nevada held that discretionary-act immunity applied as "[t]he claims that Clark County was negligent because it failed to supervise or investigate are based on clearly discretionary functions." 2009 WL 10693589 at *4

citing Foster v. Washoe Cnty., 114 Nev. 936, 944, 964 P.2d 788, 793 (1998). Again, Eggleston is not alleging negligence; his allegations are specific to Stuart and the decision Defendants reached at the conclusion of the investigation to either remove the minor children or require temporary guardianships.

Acts that violate the Constitution are not discretionary, and thus, do not qualify for immunity under NRS 41.032. *See*, e.g., *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1133 (9th Cir. 2017) (decisions made in bad faith, such as abusive conduct resulting from hostility or willful or deliberate disregard for a citizen's rights, including constitutionally protected interest in the companionship of children, are not protected under NRS 41.032(2) even if they arise out of a discretionary function); *Koiro v. Las Vegas Metro. Police Dept.*, 69 F. Supp. 3d 1061, 1074 (D. Nev. 2014), *aff'd*, 671 Fed. Appx. 671 (9th Cir. 2016) (acts taken in violation of the Constitution cannot be considered discretionary within meaning of NRS 41.032); *Goodman v. Las Vegas Metro. Police Dept.*, 963 F. Supp. 2d 1036, 1061 (D. Nev. 2013), *aff'd in part, rev'd in part, dismissed in part*, 613 Fed. Appx. 610 (9th Cir. 2015) (if defendants violate the Constitution, the discretionary function exception to Nevada's waiver of sovereign immunity will not shield them from state liability); and *Walker v. City of N. Las Vegas*, 394 F. Supp. 3d 1251, 1275 (D. Nev. 2019) (genuine issue of material fact as to whether police officers' actions violated the Constitution precluded summary judgment on officers' statutory immunity defense under Nevada law to plaintiff's state law claims).

Therefore, Defendants are also not entitled to discretionary-act immunity.

DATED this 16th day of February 2024.

CLARK HILL PLLC

By /s/ Paola M. Armeni, Esq.
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Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer 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) because:

[X] This answer has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14; or

[ ] This answer has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 5,230 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this answer, 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 answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the answer regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of February 2024.

CLARK HILL PLLC

By /s/ William D. Schuller, Esq.
WILLIAM D. SCHULLER, ESQ.
Nevada Bar No. 11271

Attorneys for Real Party in Interest

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that on February 16, 2024, I caused the foregoing **ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS** to be served as follows:

[X] E-Service to all registered parties:

[X] U.S. Mail:

Eighth Judicial District Court
Honorable Susan H. Johnson
Department 22
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

/s/ Tanya Bain
An Employee of CLARK HILL PLLC

Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

STEVE EGGLESTON,
Appellant,
vs.
CLARK COUNTY DEPARTMENT OF FAMILY SERVICES,
Respondent.

Supreme Court No. 87583
District Court Case No. 20 OC 00164 1B

EXEMPTION FROM SETTLEMENT PROGRAM - NOTICE TO FILE DOCUMENTS

TO: Clark Hill PLLC \ Paola M. Armeni
Clark Hill PLLC \ William D. Schuller
Clark County District Attorney/Juvenile Division \ Felicia R. Quinlan
Clark County District Attorney/Juvenile Division \ Amity C. Latham

Upon review of this matter, it has been determined that this appeal will not be assigned to the settlement program. Accordingly, appellant shall have 14 days from the date of this notice to comply with NRAP 9(a).

Appellant shall have 120 days from the date of this notice to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

DATE: November 15, 2023

Elizabeth A. Brown, Clerk of Court

By: Jan Scott
Settlement Program Officer

Notification List
Electronic
Clark Hill PLLC \ Paola M. Armeni
Clark Hill PLLC \ William D. Schuller
Clark County District Attorney/Juvenile Division \ Felicia R. Quinlan
Clark County District Attorney/Juvenile Division \ Amity C. Latham