IN THE SUPREME COURT OF THE STATE OF NEVADA

MACOY CAPITAL PARTNERS, INC.; DAVID ROSENBERG; AND MITCH OHLBAUM,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JACOB A. REYNOLDS, DISTRICT JUDGE,
Respondents,
and
LIVELIFE, LLC,
Real Party in Interest.

No. 88028

FILED
DEC 30 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus challenges a district court order denying a motion to dismiss a complaint as barred by the three-year statute of limitations in NRS 11.190(3)(d), which applies to actions based on fraud or mistake.

In its complaint, LiveLife, LLC (LiveLife) alleges that Macoy Capital Partners, Inc. and its agents (Macoy) negligently represented it in a loan transaction. Specifically, it alleges that Macoy failed, among other things, to properly obtain and record a first deed of trust on LiveLife's behalf. LiveLife asserts claims against Macoy for "Negligence," "Breach of Contract," and "Breach of the Implied Covenant of Good Faith and Fair Dealing." Macoy moved to dismiss the claims as time barred. The complaint was filed more than three years but less than four years after

LiveLife suffered harm. The district court determined that the four-year limitations period in NRS 11.220 applied to all of LiveLife's claims and denied the motion to dismiss on that basis. Macoy now petitions this court for a writ of mandamus.

A writ of mandamus is an extraordinary remedy and "is not a substitute for an appeal." *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017); *see also Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 678, 476 P.3d 1194, 1195 (2020) ("Extraordinary relief should be extraordinary . . . ."). Traditional mandamus will not issue unless the petitioner can show that "the district court judge has committed clear and indisputable legal error" or "an arbitrary or capricious abuse of discretion," *Archon*, 133 Nev. at 819-20, 407 P.3d at 706 (internal quotations omitted), and that the petitioner has no "plain, speedy and adequate remedy in the ordinary course of law," *Washoe Cnty. Hum. Servs. Agency v. Second Jud. Dist. Ct.*, 138 Nev., Adv. Op. 87, 521 P.3d 1199, 1203 (2022) (internal quotation marks omitted); *see also Archon*, 133 Nev. at 819-20, 407 P.3d at 706 ("mandamus requires not only a clear error but one that unless immediately corrected will wreak irreparable harm") (quoting *In re Linee Aeree Italiane*, 469 F.3d 638, 640 (7th Cir. 2006)). In rare instances, where "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition," *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 558-59 (2008), advisory mandamus may issue, *Walker*, 136 Nev. at 673-84, 476 P.3d at 1198-99. Finally, writ relief from an order denying a motion to dismiss is the exception, not the rule, and will not be granted if the legal issue depends on undeveloped facts or unresolved

factual disputes. *See Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59.

We decline to entertain Macoy's petition insofar as it seeks traditional mandamus. We cannot say that the district court committed clear legal error in denying Macoy's motion to dismiss that, if not corrected, will inflict irremediable harm. In determining which limitations period applied to LiveLife's claims against Macoy, the district court concluded that the gravamen of the claims was "breach of fiduciary duty." It then concluded that the statute of limitations for breach of fiduciary duty claims applied to these claims. It noted that 2021 amendments to NRS 11.220 superseded the doctrine of analogous claims. *See Martel v. HG Staffing, LLC*, 138 Nev. 602, 605, 519 P.3d 25, 29 (2022). The court stated that any claims that "do not fall under any other specific limitations period, are covered solely by the 4-year limitations period of NRS 11.220, rather than by applying the doctrine of analogous limitations." It determined that because there is no statute of limitations specifically for breach of fiduciary duty claims, NRS 11.220 applied, which provides a four-year limitations period for actions "not hereinbefore provided for." Finally, the court concluded that LiveLife's claims were not time barred because the complaint was filed within the applicable four-year period.

Macoy argues that the district court should have applied NRS 11.190(3)(d)'s three-year period instead of NRS 11.220. NRS 11.190(3)(d) applies to "action[s] for relief on the ground of *fraud or mistake*." (emphasis added). Macoy argues that breach of fiduciary duty *is* fraud for statute of limitations purposes. As support, it cites *Allen v. Webb*, 87 Nev. 261, 485 P.2d 677 (1971), as well as other cases. Macoy

mischaracterizes these cases. None of them involve the court's determination of which limitations period applies to claims like the ones pleaded here. Macoy's out-of-context quotations—such as "[a] *breach of fiduciary duty is a fraud* giving rise to the application of the three year statute of limitations"—represent dicta in those cases. *See Shupe v. Ham*, 98 Nev. 61, 64, 639 P.2d 540, 542 (1982) (emphasis added).

In *Allen*, an escrow agent negligently failed to record a deed of trust. *Allen*, 87 Nev. at 267, 485 P.2d at 680. The escrow agent's failure to record occurred in 1956. *Id.* at 268, 485 P.2d at 681. But the plaintiff did not learn of this failure until 1968—over a decade later. *Id.* The issue was whether the statute of limitations was tolled until the plaintiff discovered the escrow agent's failure. *Id.* If not, the claim would have been time barred. *Id.* Macoy takes *Allen*'s language out of context, quoting, "[W]e regard this action as founded upon the constructive fraud." *See Allen*, 87 Nev. at 271, 485 P.2d at 683. Earlier in its opinion, however, the court explained that "[i]n the event the party relied upon in a fiduciary situation fails to fulfill his obligations, *and if it also fails to tell the other party of this failure, there is said to be fraudulent concealment and constructive fraud, so the statute of limitations may be tolled.*" *Allen*, 87 Nev. at 269, 485 P.2d at 681 (emphasis added). Therefore, *Allen*'s discussion of fraud concerns the theory underpinning discovery-rule tolling—the "failure to tell" warranted treating it as fraud for statute-of-limitations tolling purposes.

In its complaint, LiveLife does not allege facts suggesting that Macoy committed fraud. LiveLife alleges that it suffered injury as a result of Macoy's negligence, failures to act to protect LiveLife as it had contractually agreed to do, and failures to represent LiveLife with due care.

Nor did LiveLife allege that Macoy had a fiduciary duty to reveal but nonetheless concealed its breaches of contract and negligence from LiveLife. This case, therefore, does not appear to assert claims involving actionable fraud. Nor does it appear to implicate the discovery rule and tolling of the statute of limitations. At best, LiveLife's allegations suggest that Macoy's conduct was "analogous" to fraud. Therefore, we conclude that the district court did not commit clear legal error in applying NRS 11.220 instead of NRS 11.190(3)(d).

The district court's denial of the motion to dismiss does not appear to inflict irremediable harm. Of note, in its answering brief LiveLife disagrees with the district court's conclusion that the gravamen of its complaint is "breach of fiduciary duty." In a footnote, LiveLife states that, because this issue is beyond the scope of the present petition, it "reserves [its] right to appeal" the district court's gravamen conclusion "in any subsequent proceeding." In district court, LiveLife argued that its claims were actually claims for professional negligence and breach of an oral agreement, asserting that the limitations period in NRS 11.190(2)(c) should apply. NRS 11.190(2)(c) provides a four-year limitations period for "action[s] upon a contract, obligation or liability not founded upon an instrument in writing." We have previously applied this statute to claims for breach of obligations arising from an oral agreement, *see MacDonald v. Kassel*, 97 Nev. 305, 307, 629 P.2d 1200, 1201 (1981), as well as claims for professional negligence, *see Sorenson v. Pavlikowski*, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978). If LiveLife is correct, the four-year limitations period would apply to some or all of its claims. This would be consistent

with the district court's ultimate conclusion—even if its intermediate conclusion on the gravamen of the claims was not.

This case is still in the pleading stage. The facts are undeveloped. As this case progresses and as the facts develop through discovery, the parties may be able to renew their arguments concerning the gravamen of LiveLife's claims and which statute of limitations applies. For now, we conclude that the district court did not commit clear and irremediable legal error in denying Macoy's motion to dismiss. Accordingly, traditional mandamus is not warranted.

Nor is advisory mandamus warranted. This standard is met only when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559; *see Walker*, 136 Nev. at 683, 476 P.3d at 1198-99 (noting that "so-called 'advisory' mandamus" may issue if the petition presents "legal issues of statewide importance requiring clarification, and [the court's] decision promote[s] judicial economy and administration by assisting other jurists, parties, and lawyers" (internal quotations omitted)). Advisory mandamus requires "a serious issue of substantial public policy" or an "important precedential question[ ] of statewide interest." *Walker*, 136 Nev. at 684, 476 P.3d at 1199. We have cautioned that advisory mandamus must not be misused to subvert the final judgment rule. *Id.* at 684, 476 P.3d at 1199.

Here, we are not certain that LiveLife's claims implicate the statute of limitations for breach of fiduciary duty claims. Thus, the question posed by Macoy—which statute of limitations applies to *breach of fiduciary duty* claims after the 2021 amendment to NRS 11.220—appears to be

divorced from the factual allegations and claims asserted in LiveLife's complaint. With this question's subject matter not assuredly in play here, we decline to answer it in the abstract—untethered from concrete facts. For the foregoing reasons, we hereby

ORDER the petition DENIED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Jacob A. Reynolds, District Judge
Lipson Neilson P.C.
Gerrard Cox Larsen
Eighth District Court Clerk