

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARYANN DECKER,  
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE, AND THE HONORABLE  
PETER I. BREEN, DISTRICT JUDGE,  
Respondents,  
and  
NANCY ROBERTS,  
Real Party in Interest.

No. 44881

**FILED**

FEB 24 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of prohibition challenges a district court order denying a motion to quash service of process. Petitioner Maryann Decker seeks a writ of prohibition barring the district court from exercising personal jurisdiction over her in the underlying case. Although Decker has requested that this court issue a writ of prohibition, we conclude that the issues raised in this petition are more properly addressed in the context of a petition for a writ of mandamus; thus we construe the petition as one seeking mandamus relief.<sup>1</sup>

On June 9, 2004, real party in interest Nancy Roberts filed a personal injury lawsuit against Decker based on injuries allegedly

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<sup>1</sup>See Attorney General v. District Court, 108 Nev. 1073, 1074 n.1, 844 P.2d 124, 124 n.1 (1992) (treating a petition for a writ of prohibition as seeking relief in mandamus and prohibition).

incurred in a traffic accident. Decker and Roberts apparently agree that, on that same day, Roberts attempted to serve Decker with the summons and complaint at the address provided on the accident report. Roberts was unable to effect service of the summons and complaint, however, because Decker no longer resided at that address. The parties further agree that, the next day, Roberts attempted to serve the summons and complaint on Decker through the Department of Motor Vehicles, pursuant to NRS 14.070(2). Decker contends that, after attempting to effect service at the address on the accident report and learning that Decker no longer lived at that address, Roberts made no further attempts to locate Decker before resorting to substitute service through the DMV. Roberts makes no argument that any additional attempts to locate Decker were made before resorting to substitute service through the DMV.

Decker moved to quash service of process in the district court, arguing that Roberts had failed to exercise reasonable diligence in locating Decker before resorting to substitute service through the DMV, as required by Browning v. Dixon.<sup>2</sup> Roberts opposed the motion, noting her belief that Decker had ultimately received actual service. Roberts also sought to strike Decker's motion based on her contention that Decker had failed to support the motion's factual contentions by affidavit as required by DCR 13 and WDCR 12.<sup>3</sup> The district court denied Decker's motion to quash, concluding that Roberts "exercised due diligence by attempting to

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<sup>2</sup>114 Nev. 213, 954 P.2d 741 (1998).

<sup>3</sup>Roberts, in her motion to strike filed in the district court, improperly cites to WDCR 17 as delineating the affidavit requirement, Rule 17, pertains to ex parte orders. The WDCR rule requiring that factual contentions in motions be supported by affidavit is WDCR 12.

locate [Decker] at the address listed by actually going to the address.” In that same order, the district court also denied Roberts’s motion to strike, based apparently on its denial of the motion to quash. This petition followed the denial of Decker’s motion.

In Browning, we held that before resorting to substitute service through the DMV, a plaintiff must conduct a diligent search to determine whether the defendant has actually left the state or cannot be located within the state.<sup>4</sup> Only when the plaintiff demonstrates that, after due diligence, the defendant cannot be found within the state, may the plaintiff effect service through the DMV under NRS 14.070(2).<sup>5</sup> Applying this standard, we concluded in Browning, that the plaintiff had not exercised due diligence in attempting to locate and serve the defendant, even though the plaintiff had made routine checks to locate the defendant, including checking telephone directories and “real property.”<sup>6</sup> Here, Roberts apparently made only one attempt to locate Decker, by attempting to serve her at the address provided on the police report. Based on the documents before us, it appears that Roberts has not even alleged, much less provided evidence, that she took any further steps to locate Decker before resorting to substitute service through the DMV. As a matter of

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<sup>4</sup>114 Nev. 213, 954 P.2d 741.

<sup>5</sup>Id.

<sup>6</sup>Id. Price v. Dunn, 106 Nev. 100, 787 P.2d 785 (concluding that a plaintiff’s attempts to discover the defendant’s address through the telephone book, inquires at the power company, and a conversation with the defendant’s stepmother, although technically compliant with the requirements for service by publication under NRCP 4(e)(1)(i), fell short of the required due diligence).

law, this single attempt at service, without more, would fall well short of the diligent search required before service may be properly effected through the DMV.

A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion.<sup>7</sup> It appears that the district court manifestly abused its discretion in denying the motion to quash, if the motion was denied solely on the basis that Roberts had “exercised due diligence by attempting to locate [Decker] at the address listed by actually going to the address.”

We note, however, that it appears that Decker’s motion to quash may have been defective, based on her alleged failure to include the required supporting affidavits.<sup>8</sup> Although the challenged order denies Roberts’s motion to strike, it appears to do so based on the denial of the motion to quash. Additionally, it is not clear what, if any, conclusion was reached with regard to Decker’s contention that her counsel was not served with Roberts’s motion to strike and opposition to motion to quash, as the challenged order does not address this issue. Accordingly, we conclude that the district court should reconsider the motions, and therefore we grant in part and deny in part, Decker’s petition. The clerk of this court shall issue a writ of mandamus directing the district court judge to vacate the order denying Decker’s motion to quash and Roberts’s motion to strike. The writ of mandamus shall further direct the district court to hold a new hearing to resolve the affidavit issue raised in the


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<sup>7</sup>See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

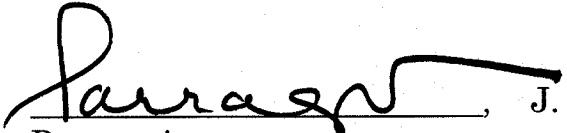
<sup>8</sup>See DCR 13; WDCR 12.

motion to strike and the service issue raised in Decker's opposition to the motion to strike and reply to the opposition to her motion to quash. Finally the writ shall indicate that, if the district court concludes that Decker's motion was not defective, and if, in fact, Roberts made only one attempt to locate Decker, by attempting to serve her at the address provided on the police report, before resorting to substitute service, the court shall enter an order granting Decker's motion to quash service of process.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Parraguirre

cc: Second Judicial District Court Dept. 7, District Judge  
Turner & Riddle/Reno  
Lawrence D. Wishart  
Washoe District Court Clerk