

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA EX REL.
DEPARTMENT OF
TRANSPORTATION,
Petitioner,

vs.

THE FOURTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ELKO,
AND THE HONORABLE J. MICHAEL
MEMEO, DISTRICT JUDGE,

Respondents,

and

GRACYNE BACKUS, GARY C.
BACKUS, AND FREDERICK DEVIN
PARKER,

Real Parties in Interest.

No. 45111

FILED

DEC 27 2005

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

ORDER DENYING PETITION FOR WRITS
OF MANDAMUS AND PROHIBITION

This original petition for writs of mandamus and prohibition challenges a district court order refusing to dismiss an action against petitioner for insufficient service of process.

Specifically, petitioner asserts that the district court is obligated to dismiss the underlying action against it because the statutory conditions precedent to the waiver of sovereign immunity under NRS 41.031 have not been met, and therefore the district court lacks jurisdiction over this matter. Real parties in interest have filed an answer to the petition, as directed.¹

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

¹We deny petitioner's motion to strike the answer.

station,² or to control an arbitrary or capricious exercise of discretion.³ The counterpart to a writ of mandamus, a writ of prohibition is available when a district court acts without or in excess of its jurisdiction.⁴ Neither writ will issue, however, when the petitioner has a plain, speedy and adequate remedy in the ordinary course of law.⁵

In the district court, petitioner moved under NRCP 12(b)(4) (governing insufficiency of process) and NRCP 4(i) (giving plaintiffs one hundred and twenty days from filing a complaint to perfect service of process) to dismiss the complaint against it. According to petitioner, service of process was not perfected under NRS 41.031's requirements for service upon state agencies within one hundred and twenty days from the filing of the complaint. Petitioner subsequently pointed out that another statute, NRS 408.611, also governs service of process upon it, and argued that service had not been perfected under that statute, either. But petitioner never argued that real parties in interest's failure to properly comply with the statutory service requirements meant that state sovereign immunity had not been waived and that, therefore, the district court lacked subject matter jurisdiction.

The district court, apparently determining that good cause existed to excuse untimely service of process under NRCP 4(i), refused to

²NRS 34.160; see also Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

³Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

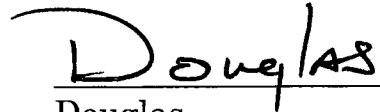
⁴State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320.

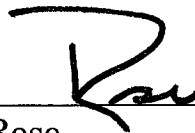
⁵Gumm v. State, Dep't of Education, 121 Nev. __, __, 113 P.3d 853, 856 (2005); NRS 34.170; NRS 34.330.

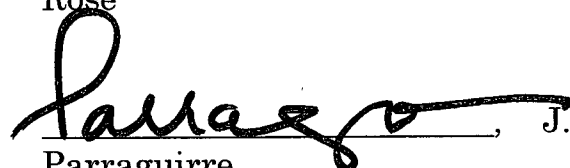
dismiss the complaint against petitioner.⁶ The district court did not address sovereign immunity or expressly determine that service had been perfected under NRS 41.031 or NRS 408.611.

Under NRCP 12(h)(3), the district court must dismiss an action at any time that “it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter.” Accordingly, with regard to its waiver of sovereign immunity argument, it appears that petitioner has an adequate legal remedy that precludes writ relief at this time.⁷ Consequently, we

ORDER the petition DENIED.


_____, J.
Douglas


_____, J.
Rose


_____, J.
Parraguirre

⁶See Scrimmer v. Dist. Ct., 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000) (enumerating several factors for a court to consider when determining whether good cause exists to excuse untimely service of process under NRCP 4(i)).

⁷See, e.g., Greene v. Utah Transit Auth., 37 P.3d 1156, 1159 (Utah 2001) (recognizing that compliance with an immunity act “is necessary to confer subject matter jurisdiction upon a trial court to hear claims against governmental entities[,] . . . failure to comply with [an immunity act] requires a trial court to dismiss a complaint”).

cc: Hon. J. Michael Memeo, District Judge
Attorney General George Chanos/Carson City
G. C. Backus
Gracyne Backus
Frederick Devin Parker
Elko County Clerk