

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARIANNA VERANO, BY AND
THROUGH HER GUARDIAN AD
LITEM HECTOR VERANO;
JACQUELINE VERANO, AND HECTOR
VERANO, INDIVIDUALLY,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
VALERIE ADAIR, DISTRICT JUDGE,
Respondents,

and

ANITA GONDY, M.D.; ANITA GONDY,
M.D., LTD.; SUMMERLIN HOSPITAL
MEDICAL CENTER, LLC; NURSE A.
GLASS; NURSE DONNA CONTRERAS;
NURSE JOANNA BACON; NURSE C.
ZWIJAC; BURNETT, DIAMANT,
EVANS, MERRIMAN, OLSEN, LTD.,
D/B/A ANESTHESIOLOGY
CONSULTANTS, INC.; GEORGE
CHEN, M.D.; AND VALLEY HOSPITAL
MEDICAL CENTER,
Real Parties in Interest.

No. 49042

FILED

APR 23 2008

TRACIE K. INDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER GRANTING EN BANC RECONSIDERATION,
VACATING PRIOR ORDER,
AND RECALLING WRIT OF MANDAMUS

On October 17, 2007, a panel of this court entered an order granting petitioners' request for mandamus relief.¹ Consequently, a writ of mandamus issued, directing the district court to vacate its decision conditionally granting certain real parties in interest's motion for a separate trial. Subsequently, the panel denied those real parties in interest's petition for rehearing. Those real parties in interest now petition this court for en banc reconsideration of the October 17 order,² asserting, among other things, that the order did not properly apply the manifest abuse of discretion standard in evaluating the petition for mandamus relief. As directed, petitioners have timely filed an answer to the petition for en banc reconsideration.

Having reviewed the supporting documentation, the petition for en banc reconsideration and the answer thereto, we conclude that reconsideration by the full court is warranted under NRAP 40A(a) to maintain uniformity amongst this court's decisions that apply the manifest abuse of discretion standard with respect to petitions for writs of mandamus. Accordingly, we grant the petition for en banc reconsideration, vacate the October 17, 2007 order granting the petition for mandamus relief, recall the writ of mandamus issued that same day, and issue this order in place of the October 17 order.

¹Verano v. Dist. Ct., Docket No. 49042 (Order Granting Petition for Writ of Mandamus, October 17, 2007).

²Real party in interest Anita Gondy, M.D., filed the petition for en banc reconsideration and real parties in interest George Chen, M.D., and Anesthesiology Consultants, Inc., have joined in the petition.

As this court's decisions consistently explained, a writ of mandamus may issue to compel the district court to perform a legally required act³ or to control a manifest abuse of discretion.⁴ Here, the decision before the district court—whether to bifurcate a trial—was discretionary,⁵ not required, and thus, a writ of mandamus would be warranted only if the district court manifestly abused its discretion in making that decision.⁶

In granting the petition for mandamus relief, the October 17 order correctly noted the appropriate manifest abuse of discretion standard. The conclusion that extraordinary relief was warranted under that standard, however, was reached only after balancing judicial economy considerations and prejudices to the parties. Because that balancing task falls squarely within the district court's discretion, writ relief is not appropriate even if this court would have decided the matter differently, unless the district court manifestly abused its discretion. Given the district court's considerable discretion to bifurcate trials under NRCP 42(b), we conclude on reconsideration that petitioners have not shown that


³NRS 34.160.

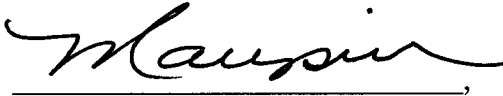
⁴Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

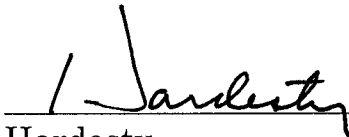
⁵See C.S.A.A. v. District Court, 106 Nev. 197, 199, 788 P.2d 1367, 1368 (1990) (explaining that, under NRCP 42(b), a district court may order a separate trial "in the exercise of its sound discretion").

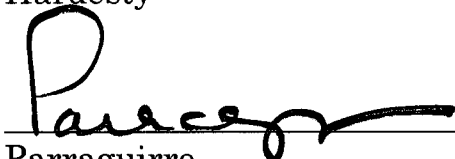
⁶Roventini v. District Court, 81 Nev. 603, 407 P.2d 725 (1965) (explaining that mandamus is not an appropriate remedy to control a district court's permissible exercise of discretion).

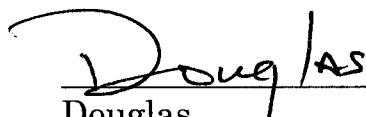
the district court manifestly abused its discretion, and that, therefore, mandamus relief is inappropriate. Accordingly, we deny the petition for mandamus relief.


_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

CHERRY, J., with whom SAITTA, J., agrees, dissenting:

I would deny en banc reconsideration of this matter. In petitioning this court for mandamus relief, the Veranos met their burden to demonstrate that the district court acted arbitrarily or capriciously, and thus manifestly abused its discretion, in granting real parties in interest's motion to sever the trial. Thus, a writ of mandamus compelling the district court to vacate its order conditionally granting the motion for a separate trial was warranted, and the panel's decision should not be

vacated on en banc reconsideration, especially when considered under the rigid standard for en banc reconsideration, which real parties in interest have failed to meet.

Under NRAP 40A(a), “[e]n banc reconsideration of a panel decision is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue.”

Here, with regard to Dr. Anita Gondy’s standard-of-review concern, this court has original jurisdiction to issue writs of mandamus.⁷ This court’s October 17 order granting the petition for mandamus relief specifically noted that writs of mandamus are available to compel an act that the law requires as a duty resulting from an office, or to control manifest abuse of or an arbitrary or capricious exercise of discretion.⁸ Considering that standard, and based upon the panel’s review of the petition, answers, and supporting documentation, the panel concluded that a single trial was mandated, warranting writ relief. Thus, that the district court manifestly abused its discretion was implicit in the order’s conclusion that a single trial was mandated under the circumstances.

As for Dr. Gondy’s assertion that this court improperly relied on Hendrix v. Raybestos-Manhattan, Inc., a case involving trial consolidation as opposed to trial bifurcation, Hendrix aptly explained that, in deciding between one trial or separate trials, the court must consider

⁷Nev. Const. art. 6, § 4.

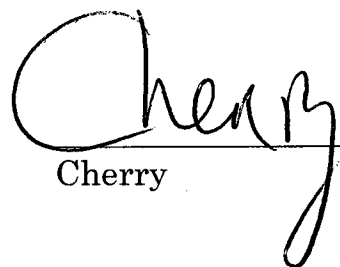
⁸NRS 34.160; Round Hill Gen. Imp. Dist., 97 Nev. 601, 637 P.2d 534.

and weigh “risks of prejudice” and possible confusion against “the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.”⁹ Consistent with the standards under NRCP 42(a) and (b), which sets forth when a trial court may appropriately consolidate matters or order separate trials, the considerations outlined in Hendrix apply to the present matter, since it involved the district court’s decision to order separate trials. In any event, in granting the petition for mandamus relief, the panel focused on the standard set forth under NRCP 42(b), to “avoid prejudice.”¹⁰ Although the decision to grant a trial severance motion is discretionary, the decision is nonetheless constrained by considerations of judicial economy and prejudice, which the panel’s decision pointed out, and in light of those considerations, particularly the prejudice factor, the district court’s decision to grant the trial severance motion was a manifest abuse of its discretion under NRCP 42.


⁹Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985) (quoting Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 193 (4th Cir. 1982)).

¹⁰See United States Gypsum Co. v. Schiavao Bros., Inc., 668 F.2d 172, 181 (3d Cir. 1981) (explaining, in the context of a trial bifurcated into liability and damages phases, that the “touchstone, in reviewing bifurcated proceedings, is whether the party bearing the burden of proof was unfairly prejudiced by the procedures employed[,]” bearing in mind that “Rule 42(b) permits bifurcation to ‘avoid prejudice,’ not to create it”).

Even so, regardless of whether the majority would have declined to grant the petition for a writ of mandamus, real parties in interest failed to meet the standard for en banc reconsideration of the October 17 decision. The unpublished order granting mandamus relief did not upset the uniformity of this court's decisions, especially since this court has consistently and uniformly pointed out that a writ of mandamus may appropriately issue to control a manifest abuse of discretion,¹¹ as was the case here. For these reasons, I would deny en banc reconsideration, and I dissent.

 _____, J.
Cherry

I concur:

 _____, J.

Saitta

cc: Hon. Valerie Adair, District Judge
Christiansen Law Offices
Lewis & Roca, LLP/Las Vegas
Simon Law Office
Hall, Prangle & Schoonveld, LLC/Las Vegas
John H. Cotton & Associates, Ltd.
Mandelbaum & Schwarz, Ltd.
Wheeler Trigg & Kennedy
Eighth District Court Clerk

¹¹See, e.g., International Game Tech. v. Dist. Ct., 122 Nev. 132, 127 P.3d 1088 (2006); Borger v. Dist. Ct., 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004).