

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUSSELL BRONLEY; AND UNION
CAB COMPANY, D/B/A ABC UNION
CAB,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
JESSIE WALSH, DISTRICT JUDGE,
Respondents,
and
HARRY HAMEL,
Real Party in Interest.

No. 49323

FILED

NOV 19 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

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

This original petition for a writ of mandamus challenges a district court order denying petitioners' motion to dismiss for failure to effect timely service under NRCPC 4(i).

This petition arises from a personal injury action filed in the district court by real party in interest Harry Hamel against petitioners Russell Bronley and Union Cab Company. As the 120-day period for serving his complaint drew to a close, Hamel filed an ex parte motion for an extension of time to serve petitioners based on his contention that he had been engaging in settlement negotiations with petitioners' insurance carrier. The district court granted the motion, and Hamel eventually served petitioners with his complaint within the time granted in the extension.

After the complaint was served, petitioners moved to dismiss based on Hamel's alleged failure to show good cause why the complaint was not timely served within the time required by NRCP 4(i). Petitioners' motion was based primarily on their contention that, contrary to Hamel's assertion in his motion for an extension of time, no settlement negotiations were ongoing during the 120-day period. Hamel opposed the motion, arguing that the parties had been communicating in an effort to settle the case. After a hearing at which only petitioners' counsel was present, the district court denied the motion to dismiss. The district court's order simply states, without any explanation, that the motion to dismiss is denied. Although the motion and opposition addressed this court's decision in Scrimmer v. District Court,¹ which set forth factors for the district court to consider when determining whether a party has shown good cause for failure to effect timely service under NRCP 4(i), it appears that the only factor considered by the district court was whether petitioners were prejudiced by the delay in service. Moreover, it does not appear that the district court ever made a determination as to whether the parties had actually engaged in settlement negotiations during the 120-day period.

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 station,² or to control a manifest abuse of discretion.³ Mandamus is an

¹116 Nev. 507, 998 P.2d 1190 (2000).

²See NRS 34.160.

extraordinary remedy, and it is within this court's discretion to determine if a petition will be considered.⁴ Here, petitioners ask this court to issue a writ of mandamus directing the district court to grant their motion to dismiss the complaint. Alternatively, petitioners ask this court to direct the district court to reconsider the motion to dismiss while considering all of the Scrimmer factors.

As it appears that the district court never determined whether the parties had actually engaged in settlement negotiations and failed to consider all of the Scrimmer factors in denying the motion to dismiss, we grant the petition, to the extent that it asks us to compel the district court to reconsider the dismissal motion. We deny the petition to the extent that it asks us to direct that the motion to dismiss be granted.

We therefore direct the clerk of this court to issue a writ of mandamus compelling the district court to vacate its order denying petitioners' motion to dismiss and to conduct a new hearing on the motion, with notice to all parties. In resolving the motion, the district court shall specifically determine whether the parties engaged in settlement negotiations before the 120-day period expired and then resolve the motion to dismiss, taking all of the Scrimmer factors into consideration. If the district court determines that no settlement negotiations took place during the 120-day period, then it shall take that determination into

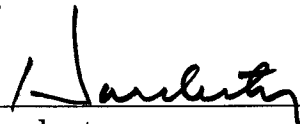
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³See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

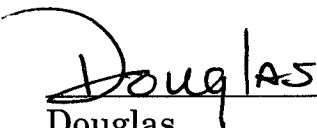
⁴See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

account in evaluating the tenth Scrimmer factor, regarding extensions of time for service granted by the district court.⁵ Finally, the writ shall direct the district court, in its order resolving the motion, to enter specific written findings and conclusions setting forth its resolution of the settlement negotiation issue and detailing why, in light of the Scrimmer factors, it reached its decision on the motion to dismiss.

It is so ORDERED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Jessie Elizabeth Walsh, District Judge
Hutchison & Steffen, Ltd.
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Demetrios A. Dalacas
Eighth District Court Clerk

⁵See Scrimmer, 116 Nev. at 516, 998 P.2d at, 1196.