

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID COWAN,  
Appellant,

vs.

TAMARA BERGERON, N/K/A TAMARA  
SCHMIDT; ROBERT J. "BOBBY"  
SCHMIDT, JR.; ROBERT J. SCHMIDT,  
SR.; MURIEL "MYRA" L. SCHMIDT;  
BILL MERLE MARTIN; BRUCE  
BRUNSON; AND RBG, LLC, D/B/A  
CASABLANCA RESORT & CASINO,  
Respondents.

No. 49759

**FILED**

DEC. 19 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.<sup>1</sup>

On January 20, 2005, appellant David Cowan filed the underlying negligence action that arose out of the murder of his daughter. Cowan did not serve his complaint within the 120-day period as required by NRCP 4(i), and thereafter, on July 8, 2005, his counsel filed an ex parte "affidavit" seeking to extend the time for service. The district court entered a July 21, 2005, order extending the time for service.

Thereafter, respondents Bill Merle Martin, Bruce Brunson, and RBG, LLC D/B/A Casablanca Resort & Casino (collectively Casablanca) moved the district court to dismiss Cowan's complaint under

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<sup>1</sup>Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

NRCP 4(i) because it was served 77 days late without good cause and under NRCP 12(b)(5) because Nevada law assertedly does not recognize Cowan's claim for parent-child loss of consortium. Respondents Tamara Schmidt, Robert Schmidt, Jr., Robert Schmidt, Sr., and Muriel Schmidt (collectively the Schmidts) were not served with Cowan's summons and complaint, and ultimately they moved the district court to strike the order enlarging the time for service, to dismiss all claims, and for attorney fees and costs. The Schmidts argued that the order enlarging the time for service should be stricken for lack of good cause under NRCP 4(i) and that the case should be dismissed under NRCP 12(b)(5) for failure to state a claim. Cowan filed an opposition to Casablanca's and the Schmidts' motions and specifically argument against the NRCP 12(b)(5) dismissal motions.

On November 29, 2005, following a hearing, the district court entered an order granting Casablanca's motion to dismiss and the Schmidts' motion to strike the order enlarging the time to serve the complaint and to dismiss all claims, but denying the Schmidts' motion for attorney fees and costs. In particular, the November 2005 order stated that the court had "consider[ed] the motion documents submitted by the parties, the oral arguments of [counsel], and [had given] careful consideration of the ten factors enumerated in Scrimmer [sic]."<sup>2</sup> Subsequently, on May 25, 2007, the district court entered a final judgment in the consolidated action, which dismissed with prejudice all remaining parties and claims. This appeal followed.

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<sup>2</sup>Scrimmer v. Dist. Ct., 116 Nev. 507, 998 P.2d 1190 (2000).

On appeal, Cowan challenges the district court's November 29, 2005 order,<sup>3</sup> arguing, as the sole issue, that the district court abused its discretion in dismissing Cowan's claims due to his attorney's failure to serve the summons and complaint upon Casablanca and the Schmidts within 120 days under NRCP 4(i). As respondents point out in their answering brief, Cowan is not challenging the portion of the November 29, 2005, order that granted respondents' NRCP 12(b)(5) relief. In his reply brief, Cowan counters that the November order was limited to a dismissal based under NRCP 4(i) and Scrimmer.

A review of the district court's order shows that the court determined that late service under NRCP 4(i) was one issue it considered, and that it also granted the motions based on all arguments made, including Cowan's alleged failure to state a claim for relief under NRCP 12(b)(5). Thus, even if, as Cowan asserts, the district court improperly failed to allow him to serve his summons and complaint after the 120-day service period under NRCP 4(i), Cowan's failure to challenge the portion of the November 29, 2005, order granting dismissal under NRCP 12(b)(5) is fatal to his appeal from the dismissal of his claims against Casablanca and the Schmidts.<sup>4</sup> Accordingly, because Cowan has not challenged the NRCP

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<sup>3</sup>An interlocutory order may be challenged within the context of an appeal from a final judgment. Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

<sup>4</sup>See Nevada Classified Sch. Emp. Ass'n. v. Quaglia, 124 Nev. \_\_\_, \_\_\_, n.8, 177 P.3d 509, 512 n.8 (2008) (affirming a district court's order denying a motion for a new trial as the issue was not addressed by the appellant); Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (refusing to consider the district court's

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12(b)(5) dismissal of his claims against Casablanca and the Schmidts and because he makes no argument regarding the dismissal of his claims against the remaining parties, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.  
Parraguirre

Douglas, J.  
Douglas

Cherry, J.  
Cherry

cc: Hon. Timothy C. Williams, District Judge  
Law Offices of Leslie Mark Stovall  
Barron & Pruitt, LLP  
Carbajal & McNutt, LLP  
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas  
Eighth District Court Clerk

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dismissal of claims that were not addressed in the appellant's brief or supplemental memorandum on appeal).