

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH LAUBE,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF CLARK, AND THE
HONORABLE DOUGLAS HERNDON,
DISTRICT JUDGE,

Respondents,

and

JANA MOWERY AND TARYN THURMOND,
Real Parties in Interest.

No. 53254

FILED

DEC 10 2009

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

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

This original petition for a writ of mandamus and a writ of prohibition challenges a district court order denying petitioner's motion to dismiss the underlying action based on real parties in interest's failure to effect proper service on petitioner.

Petitioner Joseph Laube seeks writs of mandamus and prohibition to compel the district court to dismiss the underlying tort action based on his contention that he has never been properly served with process.¹ Real parties in interest Jana Mowery and Taryn Thurmond have filed an answer, as directed, in which they state that they were unable to personally serve Laube at the address on the traffic accident report, which they contend is a commercial mail receiving agency. They contend, however, that service was properly effected on Laube through the Nevada

¹Because we conclude that mandamus and not prohibition is the appropriate remedy here, we deny petitioner's request for a writ of prohibition.

Department of Motor Vehicles (DMV) under NRS 14.070. Mowery and Thurmond alternatively request that they be given additional time to correct any defects in service and effect proper service on Laube if this court determines that Laube was not properly served through the DMV.

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, or to control a manifest abuse of discretion. See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Mandamus is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within this court's discretion. See Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

In order for substitute service through the DMV to be deemed sufficient, NRS 14.070(2) requires that "notice of service and a copy of the process [be] sent by registered or certified mail by the plaintiff to the defendant at the address supplied by the defendant in [the] accident report." Here, the record demonstrates that Mowery and Thurmond failed to comply with this requirement, as they mailed the service documents to the incorrect address. Although Mowery and Thurmond argue, and the district court apparently agreed, that this failure should be excused because the correct address and the address the documents were actually mailed to are both mailboxes at the same commercial mail receiving agency and, because of how mail is handled at that agency, Laube probably received the service documents, we find this argument to be without merit. NRS 14.070(2) clearly and unambiguously requires that, in order for substitute service through the DMV to be deemed sufficient, the service documents must be mailed to defendant at the address provided in the accident report. Because Mowery and Thurmond failed to comply with

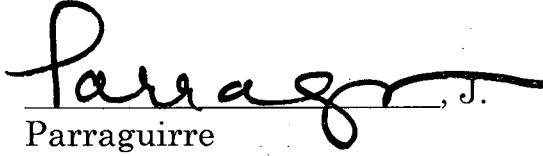
this requirement, we conclude that the district court manifestly abused its discretion in deeming service upon Laube through the DMV to be “appropriate.” Moreover, because the record reveals that Laube has never been properly served with process in the underlying matter, we further conclude that the district court’s denial of Laube’s motion to dismiss was also a manifest abuse of discretion.²

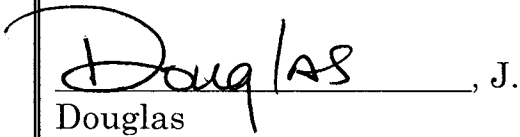
As noted above, however, Mowery and Thurmond have requested that they be given time to cure any defects in service if this court concludes that their efforts to effect service upon Laube through the DMV were improper. Because this request should properly be directed to the district court, we deny it. Nonetheless, under the circumstances presented to us in this petition, we decline to direct the district court to dismiss the underlying case at this juncture. Accordingly, we conclude that the district court should be directed to reconsider Laube’s motion to dismiss the underlying action for failure to effect proper service. The clerk of this court shall therefore issue a writ of mandamus directing the district court to vacate the order denying Laube’s motion to dismiss and reconsider that motion in light of the conclusions set forth in this order and any subsequent motion made by Mowery and Thurmond in the district court seeking to extend the time for properly effecting service on Laube. The writ of mandamus shall further provide that, if Mowery and Thurmond fail to move the district court for additional time to properly

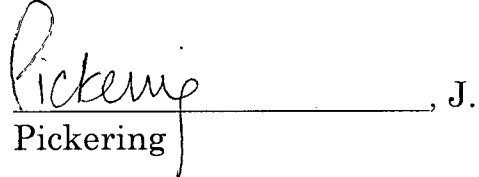
²Because we conclude that Laube has never been properly served, we need not consider his arguments regarding the district court’s grant of Mowery’s and Thurmond’s application to extend the time for effecting service prior to the running of NRCP 4(i)’s 120-day period, which was made in anticipation of their efforts to serve him through the DMV.

serve Laube or if the district court concludes that good cause does not exist for extending the time for service, the district court shall enter an order dismissing the underlying case as required by NRCP 4(i).³

It is so ORDERED.


Parraguirre


Douglas


Pickering

cc: Hon. Douglas W. Herndon, District Judge
Law Offices of Douglas R. Johnson
Nettles Law Firm
Eighth District Court Clerk

³We note that, in his petition, Laube repeatedly refers to the address provided in the accident report as his “residence.” Because Laube has declared this address to be his “residence,” if the district court grants Mowery and Thurmond additional time to serve Laube, substitute service through the DMV would no longer be appropriate. Thus, service would have to be completed by personally serving Laube or by “leaving copies [of the summons and complaint]” at his residence—the address provided in the accident report—“with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.” NRCP 4(d)(6). In light of the dispute between the parties over the true nature of this “residence,” we leave it to the parties and the district court to determine how any such service should be carried out.