IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY DOBBS, INDIVIDUALLY; WALLACE DOBBS, INDIVIDUALLY; AND WALLACE DOBBS AND TERRY DOBBS, D/B/A 7-ELEVEN,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GENE T. PORTER, DISTRICT JUDGE,
Respondents,
and
KENNETH JACKSON, AS THE PERSONAL REPRESENTATIVE OF MARY JACKSON, DECEASED,
Real Party in Interest.

No. 39505

FILED

MAR 17 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of prohibition or, in the alternative, mandamus, challenges a district court order granting a motion for reconsideration and allowing the complaint to be amended. Petitioners Terry and Wallace Dobbs filed this petition for writ of prohibition, requesting that this court prevent the district court from exercising personal jurisdiction over them or, in the alternative, a writ of mandamus, requesting this court instruct the district court to reinstate its earlier order of summary judgment.

A writ of prohibition may issue to arrest the proceedings of a district court when such proceedings are in excess of a district court's

jurisdiction.[1] The fact that an appeal is available from a final judgment does not necessarily preclude the issuance of a writ, especially in situations where the lower court is alleged to have exceeded its jurisdiction and the challenged order is not appealable.[2] Petitions for extraordinary relief are addressed to the sound discretion of this court, and generally may only issue when there is no plain, speedy, and adequate remedy at law.[3]

The Dobbs first argue the district court lacked jurisdiction to grant plaintiff's motion for reconsideration and motion to amend the complaint because the case was previously dismissed in its entirety by summary judgment, and no new law or fact was presented to support the untimely filed motion for reconsideration.

EDCR 2.24(b) states:

> A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30 day period for filing a notice of appeal from a final order or judgment.

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[1]See NRS 34.320; State v. Dist. Ct., 116 Nev. 953, 957, 11 P.3d 1209, 1211 (2000).

[2]See G. & M. Properties v. District Court, 95 Nev. 301, 304, 594 P.2d 714, 715-16 (1979).

[3]See NRS 34.330; State, 116 Nev. at 957, 11 P.3d at 1211.

In this case, the district court granted summary judgment. Thereafter, the personal representative of the real party in interest, Kenneth Jackson, untimely filed a motion for reconsideration by forty-three days. The district court granted the motion for reconsideration. Jackson subsequently filed a motion to amend the complaint, which the district court granted.

We conclude the plain meaning of EDCR 2.24(b) suggests the district court has the discretion to consider an untimely-filed motion for reconsideration because it may shorten or enlarge the ten-day time limit by order. We conclude the time limit in EDCR 2.24 is procedural and not mandatory, and thus, writ relief is not warranted on this ground.

Lastly, the Dobbs argue writ relief is warranted because the district court granted plaintiff's motion to amend the complaint after the statute of limitations had expired. The motion to amend the complaint was filed approximately twenty-six months after the statute of limitations had expired.

A district court has the discretion to consider a motion to amend a complaint, and its decision will not be disturbed absent a showing of abuse of discretion.[4] In certain circumstances, a district court will allow an amendment of a complaint when the statute of limitations has previously expired, where such an amendment relates back to the filing of the original complaint and, thus, is not time-barred.[5] To do so, a

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[4]See Stephens v. Southern Nevada Music Co., 89 Nev. 104, 105, 507 P.2d 138, 139 (1973).

[5]Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991).

district court must apply the following three-pronged test from Nurenberger Hercules-Werke v. Virostek:

> (1) Pleading fictitious or doe defendants in the caption of the complaint; (2) pleading the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based; and (3) exercising reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional.[6]

The original complaint pleads Does I-V and Roe Corporations I-V in its caption. Thus, we conclude the first prong was satisfied.

Doe defendants may not be pled in a complaint merely as a precautionary measure so that other theories of liability can later be added by amendment.[7] In addition, the added or substituted party must be rationally connected to the activity or omission upon which the allegation of liability is based.[8] In this case, the complaint states the following as the basis for naming Does I-V and Roe Corporations I-V:

> That the true names or capacities, whether individual, corporate, associate or otherwise of Defendants Does I through V and Roe Corporations I through V, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and thereupon states and alleges that each of the Defendants designated herein as a Doe

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[6]Id.

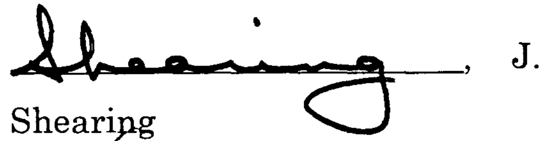
[7]Id. at 881, 822 P.2d at 1105.

[8]Id. at 881-82, 822 P.2d at 1105-06.

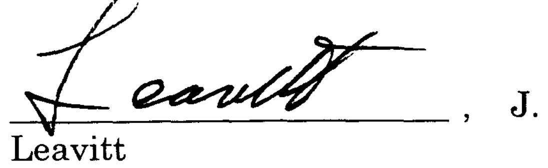
or Roe Corporation is responsible in some manner for the events and happenings referred to and caused damages proximately thereby to Plaintiff as herein alleged.

We conclude the complaint does not clearly specify a connection between Does I-V or Roe Corporations I-V and the conduct, activity, or omission upon which the cause of action is based. The general language indicating that Doe/Roe defendants are responsible in some manner does not meet the Nurenberger Hercules-Werke v. Virostek test. It does not, for example, state that the Doe/Roe defendants were the owners of the property or maintained it. Thus, the second prong was not satisfied. We further conclude reasonable diligence was not exercised in ascertaining the true identity of Does I-V or Roe Corporations I-V because the personal representative of the real party in interest was first notified about the existence of the franchisees during discovery on June 20, 2000, yet the personal representative did not first attempt to amend the complaint until November 8, 2001. Thus, we conclude the third prong was not satisfied. Because the amendment fails to relate back to the filing of the original complaint, the motion to amend the complaint was time-barred. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting reconsideration and allowing amendment of the complaint.

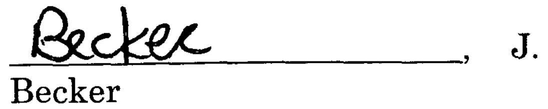
It is so ORDERED.



Shearing, J.



Leavitt, J.



Becker, J.

cc: Hon. Gene T. Porter, District Judge
Edwards, Hale, Sturman, Atkin & Cushing, Ltd.
Albert D. Massi, P.C.
Clark County Clerk