IN THE SUPREME COURT OF THE STATE OF NEVADA

CAPITAL PACIFIC HOMES, INC., F/K/A DURABLE HOMES INC.; AND COLEMAN HOMES, INC.,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ALLAN R. EARL, DISTRICT JUDGE,
Respondents.

No. 41972

FILED

DEC 30 2004

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

ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order requiring the parties to participate in an electronic filing and service program. Petitioners contend that the district court exceeded its authority by requiring them to participate in the program without their consent, and to pay the fees and costs associated with the program.

NRS 1.117 recognizes this court's authority to adopt rules governing electronic filings in the courts of this state:

> 1. The Supreme Court may adopt rules not inconsistent with the laws of this state to provide for the electronic filing, storage and reproduction of documents filed with the courts of justice.
>
> 2. If the Supreme Court adopts such rules, each court of justice may provide for the electronic filing, storage and reproduction of documents filed with the court in accordance with those rules.

This court has yet to adopt formal rules for the establishment and management of an electronic court system. In recognizing the need for

04-23738

formal rules, on July 14, 2004, we entered an order staying expansion of the electronic filing program, and directing that no additional cases should be added to the system absent "the consent of all parties or implementation of procedures by which non-consenting parties may file their pleadings without using the private vendor's services and paying the requisite fees."[1]

The issues underlying this case arose from the Eighth Judicial District Court's implementation, on a trial basis, of a pilot program for the electronic filing, service, and storage of court documents. Initially, some complex construction litigation cases were assigned to the program, with the intent that participation would benefit the parties and the court by the efficiencies and cost-savings associated with electronically filing, serving, and storing documents. Additionally, the pilot program would allow the district court to evaluate electronic filing and record storage, and to gather information about the program's operation and ideal parameters, which would ultimately assist this court in implementing uniform statewide electronic filing rules under our administrative docket. We applaud the Eighth Judicial District Court's efforts in implementing such a pilot program.

Many of the issues raised in this petition regarding the use of a private vendor to coordinate the electronic filing and storage, and the assessment of fees are best left to the enactment of uniform rules under our administrative docket. When this court adopts its formal statewide administrative rules, it will carefully consider the issues of fairness and

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[1]ADKT No. 372 (In Re Amendments to Eighth Judicial District Court Rules Affecting Electronic Filing, July 14, 2004).

access to justice, uniformity in fees, and the methods by which cases will be assigned to the program. With appropriate rules and guarantees in place, electronic filing and service programs can be a real boon to the taxpayers, allowing the courts to process and manage cases, and to store information in a more efficient and cost-effective manner.

The question before us, however, involves the inherent power of a district court to issue an electronic filing and service order in a case in which the parties did not consent. We recognize that the district court implemented the pilot program and has the general inherent authority to manage it. The district court's power to manage the program will allow the court to collect vital information, and ultimately facilitate our adoption of the formal administrative rules.[2]

Nevertheless, in the instant case, the district court could not rely upon its inherent authority to order the parties to participate, at their expense, in the electronic filing program, with reference to a general decision that all construction defect cases should be subject to the program run by a private vendor. No approval was sought, and none was given, to expand a voluntary pilot program into a mandatory program that appears to financially benefit a private vendor through the charging of fees.

We do not conclude, however, that the district court could not issue an order in a particular case if the circumstances warranted the use of the electronic filing system for effective case management. Because the

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[2]See Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 14 P.3d 1275 (2000) (holding that the municipal courts have the authority to collect reasonable bail bond filing fees pursuant to the courts' inherent judicial powers); see also Harvey v. Dist. Ct., 117 Nev. 754, 32 P.3d 1263 (2001) (noting that the district court has the inherent and constitutional authority to administer the judicial system).

pilot program is intended for use with complex cases, the district court has the inherent case-management authority to assign complex cases to the program. But, if a party objects to an electronic filing and service order, we conclude that the district court must hold a hearing and determine that assignment to the program and use of the outside vendor is essential to the district court's ability to properly manage the case. In addition, the district court must determine that the fees charged are for services not provided by the court, such as electronic service of documents. Consequently, the district court necessarily must exercise its inherent case-management authority on a case-by-case basis.

Here, petitioners objected to the assignment of their cases to the program, and the district court summarily denied their unopposed motions to strike the electronic filing and service orders. Based on the limited documentation before us,[3] we have no findings or record indicating why these cases cannot be managed in a conventional manner and without imposing expenses upon unwilling parties for services rendered by an outside vendor. Without such a record, we conclude that the district court exceeded its authority in assigning the underlying cases to the electronic filing and service program.

This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.[4] A

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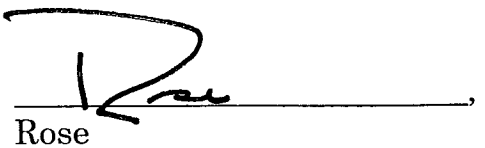
[3]Because the petitions are not accompanied by complete trial court records, they provide this court with limited information concerning the proceedings below.

[4]NRS 34.320.

petition for a writ of prohibition is addressed to this court's sound discretion.[5] This extraordinary remedy is available when, as here, the petitioners have no plain, speedy, and adequate legal remedy.[6]

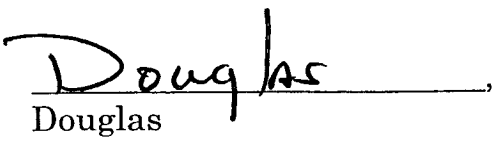
Accordingly, we grant the petition for a writ of prohibition. The clerk of this court shall issue a writ prohibiting the district court from enforcing the electronic filing and service orders entered in the underlying cases.

It is so ORDERED.



_____, J.
Rose

_____, J.
Becker



_____, J.
Douglas

cc: Hon. Allan R. Earl, District Judge
Gonzalez Howard & Reade, Ltd.
Attorney General Brian Sandoval/Las Vegas
Clark County Clerk

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[5]Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[6]NRS 34.330.

SHEARING, C.J., with whom MAUPIN, J., agrees, concurring in part and dissenting in part:

I agree with the majority that this court should grant the petition for writ of prohibition on the ground that the Eighth Judicial District Court exceeded its jurisdiction by conditioning access to the court upon the payment of fees to a private vendor. However, I do not agree with the majority that the jurisdiction to do so can be granted by a judge who determines that the use of, and payment to, a private vendor is necessary for effective case management of a particular case.

Case management and document storage and retrieval are basic functions of the court. Private vendors may be used to assist the court in performing these functions through contracts. However, the court cannot abdicate its responsibility to provide case management and document storage and retrieval and require the litigants to pay for it. There is no dispute that the Eighth Judicial District Court has the inherent authority to administer its own affairs, including the institution of electronic filing. However, with that authority comes the concomitant responsibility to perform the functions of a court without conditioning public access to the courts on payment of substantial fees by litigants, especially to private vendors. In Angell v. District Court, this court stated:

> [I]t would generally be viewed as inimical to our system of justice to make the accessibility of courts to any of our citizens dependent upon the capacity of the immediate litigants to underwrite the costs of providing court facilities and personnel.[1]

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[1]108 Nev. 923, 926, 839 P.2d 1329, 1331 (1992).

It is equally as inimical, if not more so, to make accessibility to the courts dependant on payments to private vendors.

Even if payment of a fee to a private vendor were appropriate, there has been absolutely no showing that a fee of $10 for filing every single document in a case is reasonable. In fact, since it is proposed that this e-filing system be used throughout the court, the fee appears per se unreasonable. Considering the number of case filings in the Eighth Judicial District Court in the last fiscal year, and assuming a minimum of five documents per case, the fees collected by the vendor would be over $4 million. Of course, most cases have far more than five documents. An e-filing system should cost a fraction of the amount that the private vendor would make in one year. If direct payment to a private vendor is continued, it is absolutely essential that the court examine the fees to determine that they are reasonable for the service provided. Litigants may be required to pay the costs of e-filing, but not to provide huge profits for a private vendor that is performing court functions.

The fee now being charged may be reasonable in complex, multi-party litigation, in which it has been used thus far, especially when service of process (a non-court function) is included. However, for the majority of routine cases, the fee appears excessive.

The Eighth Judicial District Court argues that the use of private vendors provides cost savings to the parties. If that is so, it stands to reason that the parties would voluntarily participate; there would be no reason to mandate payment to the private vendor for access to the court. Obviously some litigants do not agree that the mandated system offers advantages to them.

Filing, management and maintenance of court records electronically offers major advantages and is to be encouraged. However, it appears that in the Eighth Judicial District Court the parties are also paying a private vendor to perform functions that are inherent court responsibilities. If litigants agree to make those payments, they are free to do so. However, there must be an alternative procedure to allow access to the court for those who do not agree.

It may eventually be necessary for the court to charge higher fees for electronic case management. The appropriate fees for the court to charge can be determined using existing procedures. Then the traditional safeguards for litigants will be in place. The procedure of allowing a private vendor to establish and collect fees for performing court functions does not protect the public's access to the courts.

Shearing, C.J.

Shearing

I concur:

Maupin, J.

Maupin

AGOSTI, J., concurring in part and dissenting in part:

I join in the comments made by my colleague, Chief Justice Shearing, who agrees with that portion of the majority's decision that grants the petition for a writ of prohibition, reasoning that the district court exceeded its jurisdiction. I also agree with Chief Justice Shearing's dissent from the majority view that a trial court may compel litigants to pay a private vendor for electronic filing and other electronic services if the trial judge determines that effective case management requires e-filing and other e-services in a given case.

I write separately to express my concern that approving the pilot program proposed by the Eighth Judicial District Court may inadvertently impair the uniform dispensation of justice in Nevada and to equal access to justice.

Before I comment about the case at hand, however, I do want to underscore my support for the Nevada trial courts' continuing efforts to take advantage of modern electronic technology in performing judicial functions and tasks. The district courts play a critical role in investigating the ways in which automation can be useful and helpful to the courts and, in turn, experimenting with electronic technology, leading the way to the implementation of effective and responsible electronic filing systems. I believe that e-filing is the only viable future for the courts at every level. Properly approached, e-filing is efficient, precise, saves time, results in substantial cost savings to the taxpayers, increases the accuracy of records-keeping by the courts, substantially reduces the need for storage space, reduces the need to enter and then re-enter the same data, provides an efficient and inexpensive way to transmit records to the Supreme Court on appeals, provides the courts as well as the public with quick,

inexpensive access to public judicial records and enhances access to justice.

In this case, I believe the Eighth Judicial District Court has not properly approached e-filing. As a result, many of the benefits that would ordinarily flow from an e-filing system do not so flow or are benefits not fully reaped.

In addition to the defects in the Eighth Judicial District's program as identified in the partial dissent and partial concurrence (all of which with I agree), I specifically object to the Eighth Judicial District Court or any general or limited jurisdiction court in this state establishing a schedule of fees and mandating that litigants pay them without the court first obtaining from the Supreme Court of Nevada an advance review and approval for statewide application. The Supreme Court of Nevada, the administrative head of the all courts, is the appropriate body to approve such proposals.[1] I foresee chaos, public distress and a very substantial detriment to the laudable and necessary goal of equal access to justice if each of our 150 district, municipal and justices' courts were free to charge whatever, in their opinion, is fair and reasonable to e-file a complaint, e-file an answer, e-file a motion, e-file an answer to a complaint, e-file an answer to a motion or in any fashion attempt to electronically access these public records.

I believe the statutory filing fee is what the litigants expect to pay when they are parties to a case.[2] Any sum in excess of the filing fee, regardless of the nobility of the cause the fee promotes, ought to be

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[1]See Nev. Const. art. 6, § 19; NRS 2.120(2); see also NRCP 83.

[2]See, e.g., NRS 19.020 – NRS 19.0335.

permitted only by either a stipulation or a properly enacted and uniformly applied Supreme Court Rule.

I also observe that an e-filing system that relies upon a private vendor may not be the preferred system in all the district courts. Some courts may prefer to handle the e-filing program "in-house" rather than through a private vendor. Yet, because the Eighth Judicial District's e-filing system is the first to receive the Supreme Court of Nevada's attention, theirs may well end up defining the kind of program each court eventually adopts (namely, a private vendor program).

I am concerned that each court, following the Eighth Judicial District Court's example, will set its own fee structure for e-filings. This possibility is unpalatable, unworkable and indefensible.

Just as the legislature has set the fee that the courts must uniformly charge to file a complaint and to file an answer, the Supreme Court of Nevada has an obligation, in my opinion, to assure that fees, if any, for e-filing and e-access are uniform throughout the state, reasonable in amount, and logically related to the cost of the service provided. Moreover, in the name of equal access to justice, it is incumbent upon the Supreme Court of Nevada to establish a mechanism, identical in every lower court, which allows for application for a waiver of fees for e-services on account of indigency.

The majority makes the point that the Eighth Judicial District's fees are related to functions that the court doesn't ordinarily provide—like service of process—and somehow concludes that the district court may invoke its inherent authority to manage cases in order to justify the e-fees. I disagree with the notion that the trial court or worse—the clerk of the court—has the inherent authority, rationalized as case

management, to compel parties to pay a private vendor or to pay the court or the clerk who in turn compensates a private vendor to perform functions that are not judicial functions. For example, it is not a judicial function for the court to undertake the responsibility to serve a motion on a party on behalf of the party opponent. I wonder, in the event that the service of process by the court goes wrong, what happens to the application of judicial immunity, an absolute immunity enjoyed by judges. It is well settled that judicial immunity does not apply to acts which are not judicial in nature.[3] The case can easily be made that service of motions on a party by the court instead of the party opponent is not a judicial act. I wonder further if the trial court, in the event it is sued, will be able to avoid liability by blaming the private vendor, with whom the court has contracted, for any malfeasance.

The dissent also relies very heavily upon Active Products Corp. v. A.H. Choitz & Co. Inc.,[4] but Active Products is not a decision resulting from an adversary conflict between or among parties to the action; rather, it is a published case management order.

Finally, as pointed out in Chief Justice Shearing's partial concurrence and partial dissent, simple math demonstrates that the Eighth Judicial District Court's private vendor stands to collect over four million dollars after only one year of operation if the fee structure in question is permitted. I believe, as does Chief Justice Shearing, that with the predictability of that kind of profit margin, the Eighth Judicial

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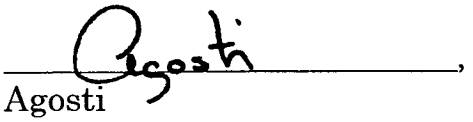
[3]See State of Nevada v. Dist. Ct. (Ducharm), 118 Nev. 609, 615-16, 55 P.3d 420, 424 (2002).

[4]163 F.R.D. 274 (N.D. Ind. 1995).

District, and all the district courts of Nevada, are better off considering experimentation with in-house e-filing programs. The public would save, the litigants would save, the taxpayers would save, and the courts would prosper.



_____, J.
Agosti

GIBBONS, J., dissenting:

I respectfully dissent. As recognized by the majority, the district court has inherent authority to determine how it will implement and manage electronic records.[1] However, the majority diverges from relevant law in two ways. First, it fails to discuss NRS 719.350(1), which expressly empowers the district court to determine how it will process electronic records. Under NRS 719.350(1), the district court can order parties to participate in electronic filing based upon a pilot program.

Second, even though the majority recognizes Harvey v. District Court, where we held that "the [district] court has inherent and constitutional authority to administer the judicial system," the majority fails to apply that reasoning today.[2] Not only does the district court have express authority to mandate electronic filing under NRS 719.350, but it also has inherent authority to do so under Harvey.

Additionally, it is the chief judge's responsibility "to assure quality and continuity of services necessary to the operation of the court."[3] If there was a problem with the pilot program, the chief judge would be responsible to alter or amend the program to ensure the quality and continuity of electronic filing. The district court must have been satisfied with the electronic filing pilot program because the chief judge has not altered or changed it in any way.

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[1]See Harvey v. Dist. Ct., 117 Nev. 754, 768, 32 P.3d 1263, 1273 (2001); Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1221, 14 P.3d 1275, 1280 (2000).

[2]117 Nev. at 768, 32 P.3d at 1273.

[3]EDCR 1.30(b)(8).

The United States District Court for the Northern District of Indiana has also discussed the use of an electronic filing system by an outside vendor where a large number of parties are involved in the litigation in the context of a case management order.[4] The court reviewed two main issues: (1) whether the court could proceed when there were no formal rules adopted for electronic filing, and (2) whether the clerk or vendor lacked statutory authority to collect fees for using the electronic filing system.[5]

First, the court determined that Federal Rule of Civil Procedure (FRCP) 5(e) specifically envisioned an electronic filing system.[6] In 1995, the federal district courts had not yet adopted any standards for electronic filing.[7] Similarly, this court has not yet adopted electronic filing standards. The Active Products court further reasoned that under FRCP 1, the rules are to be construed to secure the "just, speedy, and inexpensive determination of every action."[8]

Second, the court held that the fees discussed in 28 U.S.C. § 1914 were designed to prevent the public from taking undue advantage of the clerk's office with frivolous and overly burdensome requests. The court concluded that the electronic filing system would "facilitate the functioning of the Clerk's office and the ability of the parties and counsel

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[4]Active Products Corp. v. A.H. Choitz & Co. Inc., 163 F.R.D. 274 (N.D. Ind. 1995).

[5]Id. at 280-81.

[6]Id. at 281.

[7]Id.

[8]Id. at 280.

to secure information."[9] Based on this reasoning, the court ruled that the case should proceed under the electronic filing program using an outside vendor.[10]

I find the reasoning of Active Products persuasive. First, the court relied on FRCP 1, which is identical to NRCP 1. Second, although there was no express authority for the vendor's electronic filing fees, the court determined that the benefits of the system outweighed the minimal costs. Finally, with nearly 2,000 parties involved in the lawsuit, an electronic filing system was the most economical, cost effective, and practical resource available to prevent the unnecessary consumption of precious judicial resources.

In her dissent, Justice Agosti minimizes Active Products as being inapplicable to the case at bar because it is a "published case management order" and not a decision from an adversarial conflict. I disagree. A "published case management order" by the United States District Court regarding e-filing is very relevant to the determination of the case before us.

To further demonstrate that the Eighth Judicial District Court properly commenced an e-filing pilot program, I suggest a review of pertinent California Court Rules. California has adopted rules governing the electronic filing and service of court documents.[11] Under those rules, a court may order all parties involved in a lawsuit to serve and file all

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[9]Id. at 281.

[10]Id. at 279-81.

[11]Cal. R. Ct. 2051.

documents electronically.[12] The California rules also allow courts to contract with outside vendors and allow the vendors to charge reasonable fees for their services in addition to the court's filing fees.[13] An electronic filing system provides obvious advantages that would enable Nevada courts to operate effectively and efficiently. The success of electronic filing programs has been demonstrated by California courts and federal courts.

In the instant case, the district court's electronic filing and case management pilot program has been expanded to include all construction defect cases. Managing cases on a trial basis using a pilot program allows the district court to gain experience before adopting specific rules. It would be better for the court to adopt formal electronic filing rules after obtaining experience from a pilot program.

Finally, I address the aspirational and well-meaning suggestions by my colleague, Justice Agosti. She suggests that the Eighth Judicial District Court "experiment" with an in-house e-filing program. Unfortunately, her suggestion is unrealistic because, unlike our federal courts, creating and implementing an in-house e-filing program would require a substantial initial investment by the court which must be financed by the Clark County Commission. The initiation of an e-filing program may cost hundreds of thousands of dollars. In addition, there could be a lengthy time delay in bringing such a program to fruition. Other judicial districts in our state may have even greater difficulty in obtaining funding from their local county commissions to initiate an e-filing program.

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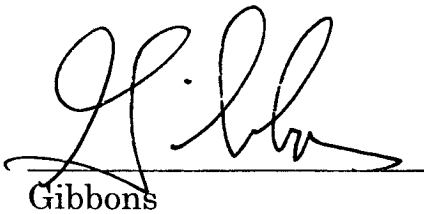
[12]Cal. R. Ct. 2053.

[13]Cal. R. Ct. 2055.

Even if Clark County appropriated the funds to the Eighth Judicial District Court in their next annual budget to create and implement an e-filing program, a private vendor may provide a more economical solution. It is more realistic to allow private vendors to front all necessary capital to establish an e-filing program. In this case, the Eighth Judicial District Court chose a private vendor for its e-filing program which has provided document access programs, e-service, e-filing, and e-storage services since 1995. The vendor has already established the technology and infrastructure for e-filing and has also provided a cost-effective solution for complex cases with numerous parties.

The Eighth Judicial District is the first state court in Nevada to experiment with an e-filing pilot program. Without the efforts of the district judges who handle complex construction defect litigation, the County Clerk and her staff who put the time and effort to establish protocols for e-filing, and a private vendor willing to make the financial commitment and to expend the time and effort to develop specialized technology needed by the Eighth Judicial District for complex litigation, the initiation of e-filing in the Nevada state courts may have been years away.

The Eighth Judicial District Court had authority to implement its current e-filing program under Nevada law and to follow the practice of our sister states and the federal courts. Therefore, I would deny the petition.



_____, J.
Gibbons