

FILED

AUG 08 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

PETER M. SOUTHWORTH,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE ROB
BARE, DISTRICT COURT JUDGE,

Respondents,

and

LAS VEGAS PAVING CORPORATION,

Real Party in Interest.

S.C. No.: _____

D.C. No.: A-17-754175-A

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

TO: The Supreme Court of the State of Nevada:

Petitioner, PETER M. SOUTHWORTH, hereby respectfully requests issuance of a writ of mandamus or prohibition pursuant to NRAP 21 and NRS 34.160, directing the respondent district court to dismiss the pending small claims appeal from justice court before it for lack of subject matter jurisdiction. In its order denying Petitioner's motion to dismiss appeal entered August 1, 2017, the


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respondent district court found Real Party in Interest, LAS VEGAS PAVING CORPORATION'S, notice of appeal to be untimely but ruled the appeal would be entertained nonetheless.

This Court should direct the respondent district court to vacate its order denying Petitioner's motion to dismiss appeal and prohibit the district court from proceeding to the merits of the appeal, since it has no jurisdiction to do so, and mandate entry of an order so stating.

DATED this 4th day of AUGUST, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.


PETER M. SOUTHWORTH
406 S Desert Candles St
Ridgecrest, CA 93555
(760) 608-3986
No fax number
peter.m.southworth@gmail.com
Petitioner, In Proper Person

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND PROCEDURE

This is an action arising from a vehicle/construction incident. Petitioner filed a small claims complaint in Las Vegas justice court on August 17, 2015.¹ A hearing on the merits was conducted in justice court November 29, 2016, and the case was taken under advisement. The Referee's Findings of Fact, Conclusions of Law and Recommendations was entered December 2, 2016,² and served by mail to both parties December 5, 2016.³ Petitioner filed a formal objection notice on December 7, 2016,⁴ and an order granting a formal objection hearing was entered December 9, 2016.⁵ The matter was then heard on the merits again in justice court March 17, 2017, in a trial de novo, and taken under advisement. The Small Claims Judgment was entered March 22, 2017,⁶ and served by mail to both parties March 24, 2017.⁷ Real Party in Interest subsequently filed a notice of appeal on April 7, 2017.⁸ Petitioner then filed a motion to dismiss appeal for lack of jurisdiction in district court on April 24, 2017.⁹ When Real Party in Interest did not respond,

¹ Petitioner's Appendix ("PA") 5.

² PA 6.

³ PA 7 – PA 9.

⁴ PA 10.

⁵ PA 11.

⁶ PA 12 – PA 15.

⁷ PA 16 – PA 18.

⁸ PA 19 – PA 21.

⁹ PA 22 – PA 27.

Petitioner filed a notice of non-opposition but it is omitted here as impertinent and the motion to dismiss appeal was ultimately opposed May 19, 2017.¹⁰ Petitioner filed a reply May 24, 2017.¹¹ The respondent district court ordered the filing of supplemental briefs at the June 1, 2017, motion hearing. Real Party in Interest filed a supplemental brief June 1, 2017.¹² Counsel for Real Party in Interest observed that it had neglected to sign the supplement and filed an errata correcting this oversight June 7, 2017.¹³ It is included merely for completeness. Petitioner filed a supplemental brief June 13, 2017.¹⁴ The respondent district court denied Petitioner's motion to dismiss appeal in a minute order on June 26, 2017.¹⁵ The respondent district court agreed with Petitioner that the appeal was untimely under Justice Court Rules of Civil Procedure ("JCRCP") 98 but cited JCRCP 1 and *Blanco v. Blanco*, 129 Nev. Adv. Op. 77, 311 P.3d 1170, 1174 (2013) as authorities providing discretion to entertain the appeal nonetheless. The district court also directed Real Party in Interest to draft a final order in compliance with the minute order. The final order was entered August 1, 2017.¹⁶

¹⁰ PA 28 – PA 43.

¹¹ PA 44 – PA 59.

¹² PA 60 – PA 75.

¹³ PA 76 – PA 85.

¹⁴ PA 86 – PA 101.

¹⁵ PA 102 – PA 103.

¹⁶ PA 104 – PA 106.

II. STATEMENT OF ISSUES PRESENTED

Can a district court, acting in its appellate capacity in a small claims civil matter, confer jurisdiction upon itself to entertain an appeal from justice court after finding the appeal untimely?

III. LEGAL ANALYSIS

A. Propriety of the Writ

The Constitution of the State of Nevada grants this Court the authority to issue writs of mandamus, prohibition, and certiorari.¹⁷ This Court has exclusive jurisdiction to issue a writ of mandamus to compel a district court to perform a required act,¹⁸ or to refrain from performing a prohibited act, such as one beyond its subject matter jurisdiction.¹⁹

The district court has final appellate authority in matters originating in justice courts.²⁰ As such, Petitioner has no other plain, speedy and adequate remedy in the ordinary course of law outside writ relief. Petitioner recognizes that, as a general rule, this Court has “declined to entertain writs that request review of a decision of the district court acting in its appellate capacity unless the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or

¹⁷ Nev. Const. Art. 6 § 4.

¹⁸ NRS 34.160.

¹⁹ NRS 34.320.

²⁰ Nev. Const. Art. 6 § 6.

has exercised its discretion in an arbitrary or capricious manner."²¹ The instant matter is precisely described by these conditions thus extraordinary writ relief is warranted. The instant matter is also one of first impression and of statewide significance.

B. The Requirement to Timely File a Notice of Appeal Is Mandatory and Jurisdictional and the Respondent District Court's Ruling Ignoring that Fact Is Contrary to Law.

The Constitution of the State of Nevada provides for appeals from justice courts to district courts but does so only in the most general terms.²² The Nevada Constitution states "[t]he Legislature shall also prescribe by law the manner, and determine the cases, in which appeals may be taken from justices and other courts."²³ The word "shall" imposes a duty to act,²⁴ but the Legislature's only mention of small claims appeals is found in NRS 73.050 and simply holds that the prevailing party's attorney's fees are limited to \$15 on appeal. The Legislature did not prescribe by law the manner in which a small claims appeal may be taken from justice courts in the NRS.²⁵

²¹ *State v. Eighth Jud. Dist. Ct. (Hedland)*, 116 Nev. 127, 994 P.2d 692 (2000).

²² Nev. Const. Art. 6 §§ 6, 8.

²³ Nev. Const. Art. 6 § 8.

²⁴ NRS 0.025(d).

²⁵ See NRS Chapter 73; see also NRS 155.190.

The Nevada Legislature did however empower this Court to create rules for government of courts.²⁶ This Court adopted the JCRCP to govern proceedings in justice courts. This Court has stated “[r]ules of court were intended to be supplemental to provisions of statutes governing proceedings and to have the same force as if incorporated in statute.”²⁷ The only language relating to the manner in which small claims appeals may be taken from justice courts is found in the JCRCP.²⁸ With the Legislature silent on the justice court small claims appeals process, these rules must therefore be interpreted as statutory.

A question of statutory interpretation begins with inquiry into a statute’s plain language.²⁹ The language of JCRCP 98 is plain and states, in part, that for a small claims action, “the filing of a notice of appeal must be done within 5 days from the entry of judgment.” The word “must” expresses a requirement.³⁰ Thus, the conditions of JCRCP 98 are mandatory. This Court willfully and purposefully adopted JCRCP 98’s 5-day deadline to appeal a small claims action and has held that “[t]he rules delineating the timely filing of a notice of appeal must therefore be specific to avoid uncertainty.”³¹ The respondent district court found that Real Party in Interest failed to meet this deadline but ruled the appeal would be entertained

²⁶ NRS 2.120.

²⁷ *Ex Rel. Williams v. District Court*, 48 Nev. 459, 233 P. 843 (1925).

²⁸ JCRCP 98 for small claims actions specifically; JCRCP 72-76B more generally.

²⁹ *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 14 P.3d 511 (2000).

³⁰ NRS 0.025(c).

³¹ *Phelps v. State*, 111 Nev. 1021, 900 P.2d 344 (1995).

nevertheless. This Court has ruled that writ relief is appropriate in a situation such as the instant matter by stating “[p]rohibition will lie where superior court takes jurisdiction of cause on appeal from justice court when party appealing does not perfect appeal as required by statute.”³²

JCRCP 98 provides no direct mechanism for its suspension but does reference JCRCP 72, et seq. JCRCP 76B authorizes four conditions for enlargement of time to appeal, but none of those conditions apply to the instant matter. A court may not look beyond a statute’s language if it is clear and unambiguous on its face.³³ The respondent district court has done just that when citing JCRCP 1 as providing discretion to allow the untimely notice of appeal. JCRCP 1 grants broad discretion to a justice court stating, in part:

Whenever it is made to appear to the court that a particular situation does not fall within any of these rules or that the literal application of a rule would work hardship or injustice in a particular situation, the court shall make such order as the interests of justice require.

The respondent district court has ruled that this same discretion is given to it on appeal. However, JCRCP 1 must not be limitless lest it be used to circumvent all due process of law. This Court has commented on the suspension of rules of procedure by stating:

Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the

³² *Ex Rel. Williams v. District Court*, 48 Nev. 459, 233 P. 843 (1925).

³³ *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 148 P.3d 790 (2006).

courts to enforce them according to their terms. Changes in rules . . . should be effected by the process of amendment, not by ad hoc relaxations . . . in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar.³⁴

Several Nevada judicial district courts have rules containing language identical to or substantially similar to that of JCRCP 1.³⁵ Under the respondent district court's theory, this Court could then entertain an untimely appeal from one of those districts. Neither the respondent district court nor Real Party in Interest cite to case law where this Court has held that language such as that of JCRCP 1 can be used to allow an untimely appeal. Indeed it has long been held by this Court that timely filing a notice of appeal is mandatory and jurisdictional.³⁶

The respondent district court also cited Nevada's policy of adjudicating matters on the merits. Petitioner recognizes the policy, but this Court has said:

While this court has often expressed its adherence to hearing appeals on the merits rather than dismissing the same on technical grounds, it cannot do so in absence of compliance with the jurisdictional requirement for filing notice of appeal within the time limited by the rules.³⁷

³⁴ *Gladys Baker Olsen Family Trust, By & Through Olsen v. Olsen*, 109 Nev. 838, 858 P.2d 385 (1993) (quoting *Thompson v. I.N.S.*, 375 U.S. 384 (1964) (Clark, J. dissenting)).

³⁵ FJDCR 1(4); WDCR 1(3); T.J.D.C.R. 1(D); 4JDCR 1(3); 7JDCR 1(3); NJDCR 1(c); 10JDCR 1(4).

³⁶ *Healy v. Volkswagenwerk*, 103 Nev. 329, 741 P.2d 432 (1987); see also *Walker v. Scully*, 99 Nev. 45, 657 P.2d 94 (1983).

³⁷ *Culinary and Hotel Serv. Workers Union v. Haugen*, 76 Nev. 424, 357 P.2d 113 (1960).

Lacking subject matter jurisdiction, a district court has no choice but to dismiss the matter pursuant to NRCP 12(h)(3) (or the identical JCRCP 12(h)(3)). NRCP 12(h)(3) states “[w]hensoever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Petitioner does not believe NRCP 12(h)(3) to be in conflict with any statute and its language is clearly not permissive. Any judgment from a court without jurisdiction is void.³⁸ In denying Petitioner’s motion to dismiss appeal, the respondent district court willingly disregarded the mandatory and jurisdictional nature of timely filing a notice of appeal, which it cannot do even in the interest of justice, and has made a ruling at odds with well-established Nevada case law.

IV. CONCLUSION

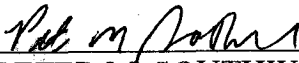
By denying Petitioner’s motion to dismiss appeal and allowing Real Party in Interest’s untimely appeal to proceed, the respondent district court has rendered a legal nullity the very authority that empowers its ability to hear a small claims appeal from justice court. The respondent district court’s ruling is indefensible as a matter of law as it lacks subject matter jurisdiction to entertain the appeal. Therefore, Petitioner requests that writ of mandamus or prohibition issue directing

³⁸ *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 679 P.2d 1273 (1984).

the respondent district court to vacate its order denying Petitioner's motion to dismiss appeal and to dismiss the appeal before it as outside its jurisdiction.

DATED this 4th day of AUGUST, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



PETER M. SOUTHWORTH
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Petitioner, In Proper Person

ROUTING STATEMENT

Pursuant to the categories of cases found in NRAP 17(b), this case cannot be described by any of the categories of cases to be assigned to the Court of Appeals. Therefore, this matter should be retained by the Supreme Court pursuant to NRAP 17(a)(13) and NRAP 17(a)(14).

DATED this 4th day of AUGUST, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



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AFFIDAVIT OF PETITIONER PETER M. SOUTHWORTH

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)


PETER M. SOUTHWORTH, being first duly sworn, upon oath, hereby
deposes and says:

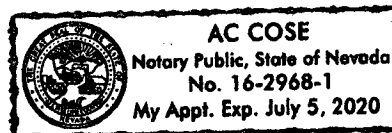
1. That I am the Petitioner herein.
2. That I have read the *Petition for Writ of Mandamus or Prohibition* and
know the contents thereof as true, except as to the matters that are stated therein on
my information and belief, and as to those matters, I believe them to be true.
3. Pursuant to NRS 239B.030, the *Petition for Writ of Mandamus or*
Prohibition does not contain any of the data elements listed in NRS 603A.040.

DATED this 4th day of August, 2017.


PETER M. SOUTHWORTH
Petitioner, In Proper Person

STATE OF NEVADA
COUNTY OF CLARK
SIGNED and SWORN to before me
this 4th day of August, 2017 by PETER MICHAEL SOUTHWORTH.


NOTARY PUBLIC in and for said
County and State



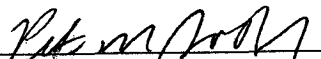
CERTIFICATE OF COMPLIANCE

1. I am the Petitioner herein.
2. There is no plain, speedy, and adequate remedy in the ordinary course of law available to the Petitioner.
3. I hereby certify that this *Petition for Writ of Mandamus or Prohibition* complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the *Petition* has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.
4. I further certify that this *Petition for Writ of Mandamus or Prohibition* complies with page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), the *Petition* does not exceed 16 pages.
5. Finally, I hereby certify that I have read the preceding *Petition for Writ of Mandamus or Prohibition*, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this *Petition* complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the *Petition* regarding matters in the record to be supported by appropriate references to the record in the Appendix. I understand that I may be subject to sanctions in the

event that the accompanying *Petition* is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of AUGUST, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



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CERTIFICATE OF MAILING


Pursuant to Nev. R. Civ. P 5(b), I HEREBY CERTIFY that on the 4th day of AUGUST, 2017, I placed a true and correct copy of the above **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**, in the United States Mail, with first-class postage prepaid, addressed to the following:

PHILLIP R. EMERSON, ESQ.
1055 Whitney Ranch Drive, Suite 120
Henderson, NV 89014
Attorney for Real Party in Interest,
LAS VEGAS PAVING CORPORATION

The Honorable ROB BARE
Eighth Judicial District Court, Department 32
200 Lewis Avenue
Las Vegas, NV 89155
Respondent District Court Judge

DATED this 4th day of AUGUST, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.


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