

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW MORONEY an Individual,

Appellant,

vs.

BRUCE ARTHUR YOUNG, individually;
POINT MINING & MILLING
CONSOLIDATED, INC.;
Respondents

CASE NO.: 82948

Electronically Filed
Mar 18 2022 11:44 a.m.
Elizabeth A. Brown
District Court Case No. CV1905109-C
Clerk of Supreme Court

Appeal from the Fifth Judicial District
Court, Esmeralda County, Nevada

APPELLANT'S OPENING BRIEF

KIMBALL JONES, ESQ.

Nevada Bar No.: 12982

BIGHORN LAW

3675 W. Cheyenne Ave., Suite 100

North Las Vegas, Nevada 89032

Telephone: (702) 333-1111

Email: kimball@bighornlaw.com

Attorney for Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities must be disclosed pursuant to NRAP 26.1(a). These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Kimball Jones, Esq., with the Law Offices of **BIGHORN LAW** has appeared for Appellant in this case and is expected to appear for them in this Court.

DATED this 17th day of March, 2022.

BIGHORN LAW

Kimball Jones, Esq.

KIMBALL JONES, ESQ.

Nevada Bar No.: 12982

3675 W. Cheyenne Ave., Suite 100

North Las Vegas, Nevada 89032

Telephone: (702) 333-1111

Email: kimball@bighornlaw.com

Attorney for Appellant

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE	i
TABLE OF AUTHORITIES	iiiv
JURISDICTIONAL STATEMENT	1
ROUTING STATEMENT.....	1
ISSUES PRESENTED FOR REVIEW	1
1. The Court’s holding in Scrimmer notes that a significant factor in determining whether there exists good cause to enlarge time for service is whether the Defendant is evading service. Did the Trial Court err in refusing to enlarge time to for service when there was evidence that the Defendants were evading service?.....	1
2. Rule 4(e)(3) states, “If a plaintiff files a motion for an extension of time before the 120-day service period--or any extension thereof-- expires and shows that good cause exists for granting an extension of the service period, the court must extend the service period and set a reasonable date by which service should be made.” Appellants in this matter timely filed their Motion to Enlarge Time and noted that the Defendants were evading service. Did the Court err in ignoring the mandatory language of Rule 4 and declining to enlarge service?.....	1
STATEMENT OF THE CASE	1
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	5
STANDARD OF REVIEW	7
ARGUMENT	8

A.	The trial court erred in refusing to enlarge time as Young’s apparent attempt to evade service constituted Good Cause to Enlarge Time (Issue 1)	8
B.	The Good Cause shown by Appellant triggers a mandatory enlargement of time under Rule 4(e)(3) (Issue 2)	80
CONCLUSION.....		11
CERTIFICATE OF COMPLIANCE.....		12
CERTIFICATE OF SERVICE		13

TABLE OF AUTHORITIES

<u>Bonnell v. Lawrence,</u> 128 Nev. 394, 400-01, 282 P.3d 712, 716 (2012).....	7
<u>Hotel Last Frontier v. Frontier Prop.,</u> 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963).....	6, 9
<u>Kahn v. Orme,</u> 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)	6, 9
<u>Sanchez v. Wal-Mart Stores,</u> 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).....	7
<u>Scrimmer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,</u> 116 Nev. 507, 514, 998 P.2d 1190, 1194 (2000).....	1, 5-11
Rules	
FRCP 4.....	7, 10
NRCP 4.....	5-10

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal of a final judgment under NRAP 3A.

ROUTING STATEMENT

This appeal may be properly assigned to the Court of Appeals. This case involves an appeal “from a judgment, exclusive of interest, attorney fees, and costs, of \$250,000 or less in a tort case.” NRAP 17(b)(5). Additionally, this appeal does not involve a “question of first impression involving the United States or Nevada Constitutions or common law” or any other issue under NRAP 17(a) which would demand that the Nevada Supreme Court retain the matter.

ISSUES PRESENTED FOR REVIEW

1. The Court’s holding in Scrimmer notes that a significant factor in determining whether there exists good cause to enlarge time for service is whether the Defendant is evading service. Did the Trial Court err in refusing to enlarge time to for service, when there was evidence that the Defendants were evading service?
2. Rule 4(e)(3) states, “If a plaintiff files a motion for an extension of time before the 120-day service period--or any extension thereof--expires and shows that good cause exists for granting an extension of the service period, the court must extend the service period and set a reasonable date by which service should be made.” Appellants in this matter timely filed their Motion to Enlarge Time and noted that

the Defendants were evading service. Did the Court err in ignoring the mandatory language of Rule 4 and declining to enlarge service?

STATEMENT OF THE CASE

The underlying incident in this matter is an assault which occurred on July 3, 2017. Appellant was an invitee on Respondents' property, when Respondent BRUCE ARTHUR YOUNG negligently and carelessly attacked Appellant inflicting bodily harm upon him. Appellant was caused to be injured and seeks to recovery for medical treatment.

Appellant timely filed his claim in the District Court in this matter on March 19, 2019. Within the 120-day time limit noted in Rule 4, Appellant filed his Ex-Parte Motion to Enlarge Time for Service of Respondents on July 17, 2019.

In requesting to enlarge service, Appellant noted that a process server was given the assignment to complete service on Respondent Bruce Arthur Young at his last known addresses in rural Gold Point, Nevada. (APP 16-17). On July 8, 2019, Estela Sandoval, an employee of Elite Investigations ("Process Server") commenced an effort to locate Respondents' address. The Process Server learned from one Lieutenant Matthew of the Esmeralda County Sheriff's Office the location of Respondent Young's residence. The Process Server traveled to Respondent's home and was told by Respondent's "unidentified neighbor" that "Bruce Arthur Young was 'out shopping' and [the neighbor] did not know when Bruce Arthur

Young would be home.”. Respondent’s “unidentified neighbor” also stated that Respondent “would not be interested in receiving a court Summons.”

The Court conducted the hearing on the Motion to Enlarge, on September 3, 2019, and the Court denied the motion, after finding that Plaintiff’s Motion to Enlarge did not sufficiently demonstrate due diligence and good faith, this, despite the fact that Appellant presented evidence that Respondents may have been attempting to evade service (APP 6-17).

No written Order was entered dismissing Appellant’s Complaint (APP 51-55).

On April 27, 2020, Appellant filed an *Amended Complaint* against Respondents, asserting a claim against Respondents for battery. (APP 18-20). Respondents filed an Answer on July 7, 2020. (APP 21-27). ON July 17, 2020, Respondents filed a Motion to Dismiss (APP 28-37).

On April 15, 2021, the Trial Court entered an Order affirming that no enlargement of time was granted and that Appellant was barred from filing and serving the Amended Complaint. Appellant’s Case was thus dismissed by the Court (APP 51-55).

PROCEDURAL HISTORY

Appellant’s initial complaint was filed on March 19, 2019. (APP 1-5). On July 17, 2019, Appellant filed an ex-parte Motion to Enlarge Service. (APP 6-17). On

September 3, 2019, the Court denied Appellant's Motion to Enlarge. No written Order was entered. APP 51-55

On April 27, 2020, Appellant filed an Amended Complaint claiming that Respondents also committed battery. (18-20). On July 7, 2020, Respondents answered Appellant's Complaint. APP. On July 17, 2020, Appellants Filed a Motion to Dismiss. On April 15, 2021, the Court dismissed Appellants' Case noting that there was no enlargement of time to grant service granted in response to Appellant's July 17, 2019 request. (APP 51-55).

STATEMENT OF FACTS

Appellant was injured in an assault committed by Respondent Young on July 3, 2017.

Appellant filed a claim with the District Court on March 19, 2019. On July 17, 2019, Appellant filed a Motion to enlarge time to Serve Respondents. This Motion contained the affidavit of Appellant's retained process server, who noted that she attempted to serve Mr. Young and she was apprised by Young's neighbor that Young would not wish to be served. The difficulties encountered in serving Young give the appearance that he was evading service. (APP 16-17).

The Court conducted the hearing on the Motion to Enlarge, on September 3, 2019, the Court denied the motion after finding that Plaintiff's Motion to Enlarge did not sufficiently demonstrate due diligence and good faith, this, despite the fact

that Appellant presented evidence that Respondents may have been attempting to evade service (APP 6-17).

The Court dismissed Appellant's case on April 15, 2021. Appellant thereafter filed this appeal.

SUMMARY OF ARGUMENT

The Scrimmer Court analyzed when it was appropriate to find good cause to enlarge time for service:

We conclude that a number of considerations may govern a district court's analysis of good cause under NRCP 4(i), and we emphasize that no single consideration is controlling. Appropriate considerations include: (1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, (4) difficulties encountered by counsel, (5) the running of the applicable statute of limitations, (6) the parties' good faith attempts to settle the litigation during the 120-day period, (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant, (8) the prejudice to the defendant caused by the plaintiff's delay in serving process, (9) the defendant's knowledge of the existence of the lawsuit, and (10) any extensions of time for service granted by the district court.

Scrimmer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 116 Nev. 507, 514, 998 P.2d 1190, 1194 (2000).

The *Scrimmer* Court indicated that Nevada courts should use a flexible approach when determining motions to dismiss under Rule 4. Moreover, they explained that even a single listed factor could, in some instances, prove sufficient grounds to establish good cause:

We specifically disavow and overrule *Lacey* to the extent that it stands for the proposition that "settlement negotiations alone will not constitute good cause for a plaintiff's failure to serve process within 120 days of the filing of the complaint." *Lacey*, 109 Nev. at 345, 849 P.2d at 262. Negotiations with an eye to settlement, undertaken in good faith in a serious effort to settle the litigation during the 120-day period, may constitute good cause for untimely service under NRCP 4(i). Additionally, we renounce our dictum in *Dougan*, which suggests that an inflexible approach should be used in assessing motions to dismiss under Rule 4(i).

Id.

The *Scrimmer* Court went on to explain that the policy behind Rule 4 is partially to ensure diligent prosecution of complaints, but was not meant to become an automatic sanctioning mechanism. Moreover, it should still allow for cases to be heard on their merits:

Underlying these considerations is the policy behind Rule 4(i)—to encourage the diligent prosecution of complaints. ***Rule 4(i) was not adopted, however, to become an automatic sanction when a plaintiff fails to serve the complaint within 120 days of filing. When making a determination under NRCP 4(i), the district court should recognize that "good public policy dictates that cases be adjudicated on their merits."*** Kahn v. Orme, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992) (citing Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963)). (*emphasis added*).

Id.

Appellant was tasked with serving a defendant who wished to avoid service. To that end, Appellant would point to the second *Scrimmer* factor—namely that

Respondents were evading service. The Court noted that this factor is especially dispositive in determining whether to enlarge time:

We note that the federal courts, under Federal Rule of Civil Procedure 4(m), the current analog to NRCP 4(i), may consider “if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.” Fed.R.Civ.P. 4 advisory committee's notes.

Scrimmer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 116 Nev. 507, 514, 998 P.2d 1190, 1194 (2000).

Appellant presented affirmative evidence of the fact that Young did not want to be served. This evidence of evasion constituted good cause to enlarge time to serve Respondents.

When there is good cause to enlarge time, Rule 4 states that enlargement is mandatory, “If a plaintiff files a motion for an extension of time before the 120-day service period--or any extension thereof--expires and shows that good cause exists for granting an extension of the service period, the court must extend the service period and set a reasonable date by which service should be made.” NRCP 4(e)(3).

STANDARD OF REVIEW

A district court order granting a motion to dismiss is subject to rigorous appellate review. Sanchez v. Wal-Mart Stores, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). In reviewing the dismissal order, the court will accept a plaintiff's factual allegations as true, however, these "allegations must be legally sufficient to constitute the elements of the claim asserted." Id. The court applies a de novo

standard of review to all questions of law. Id.; Bonnell v. Lawrence, 128 Nev. 394, 400-01, 282 P.3d 712, 716 (2012).

ARGUMENT

A. The trial court erred in refusing to enlarge time as Young's apparent attempt to evade service constituted Good Cause to Enlarge Time (Issue 1)

The Trial Court's Order dismissing Appellant's Case appeared to focus on the fact that Appellant had not been diligent in attempting to serve Respondents (APP 51-55). This determination takes into account one of the factors enumerated by the Court in determining whether it is appropriate to enlarge time:

We conclude that a number of considerations may govern a district court's analysis of good cause under NRCP 4(i), and we emphasize that no single consideration is controlling. Appropriate considerations include: (1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, (4) difficulties encountered by counsel, (5) the running of the applicable statute of limitations, (6) the parties' good faith attempts to settle the litigation during the 120-day period, (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant, (8) the prejudice to the defendant caused by the plaintiff's delay in serving process, (9) the defendant's knowledge of the existence of the lawsuit, and (10) any extensions of time for service granted by the district court.

However, the *Scrimmer* Court indicated that Nevada courts should use a flexible approach when determining motions to dismiss under Rule 4. Moreover, they explained that even a single listed factor could, in some instances, prove sufficient grounds to establish good cause to enlarge time:

We specifically disavow and overrule *Lacey* to the extent that it stands for the proposition that "settlement negotiations alone will not constitute good cause for a plaintiff's failure to serve process within 120 days of the filing of the complaint." *Lacey*, 109 Nev. at 345, 849 P.2d at 262. Negotiations with an eye to settlement, undertaken in good faith in a serious effort to settle the litigation during the 120-day period, may constitute good cause for untimely service under NRCP 4(i). Additionally, we renounce our dictum in *Dougan*, which suggests that an inflexible approach should be used in assessing motions to dismiss under Rule 4(i).

Scrimmer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 116 Nev. 507, 514, 998 P.2d 1190, 1194 (2000).

The *Scrimmer* Court went on to explain that the policy behind Rule 4 is partially to ensure diligent prosecution of complaints, but was not meant to become an automatic sanctioning mechanism. Moreover, it should still allow for cases to be heard on their merits:

Underlying these considerations is the policy behind Rule 4(i)—to encourage the diligent prosecution of complaints. ***Rule 4(i) was not adopted, however, to become an automatic sanction when a plaintiff fails to serve the complaint within 120 days of filing. When making a determination under NRCP 4(i), the district court should recognize that "good public policy dictates that cases be adjudicated on their merits."*** Kahn v. Orme, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992) (citing Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963)).

Id. (*emphasis added*).

Appellant would point to the second *Scrimmer* factor—namely that Respondent Young was evading service. This factor was not given due analysis by the Court in their evaluation of whether there was good cause to enlarge time. The Court noted

that this factor is especially dispositive in enlarging time, not just in State Court, but Federal Court as well:

We note that the federal courts, under Federal Rule of Civil Procedure 4(m), the current analog to NRCP 4(i), may consider “if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.” Fed.R.Civ.P. 4 advisory committee's notes.

Id.

Both of these factors—an expired statute of limitations, as well as the fact that Young’s neighbor indicated that Young “would not want to be served” and may have been avoiding service—was seemingly ignored by the trial court.

Moreover, Appellants believe that they did show diligence in hiring a process server who made stops not only to Young’s home, but also to the Esmeralda County Sheriff’s Office, and to Young’s neighbor’s home, in attempting to effectuate service.

The Trial Court erred in focusing solely on whether Appellant “could have done more” and failed to acknowledge the entirety of the Scrimmer factors in determining “good cause.”

B. The Good Cause shown by Appellant triggers a mandatory enlargement of time under Rule 4(e)(3) (Issue 2)

As noted above, under Nev. R. Civ. P. 4(e)(3), if a Plaintiff “files a motion for an extension of time before the 120-day service period--or any extension thereof--expires and shows that good cause exists for granting an extension” the Court must

grant the extension. The request is mandatorily granted, if timely filed and if proper rationale is presented.

Appellant presented good cause for an extension, and the Court was thus, required to grant an enlargement of time. The Court's failure to abide by the mandatory language of Rule 4 constitutes an error by the Trial Court and merits reversal.

CONCLUSION

Appellant presented the Court with good cause to enlarge time by noting that Respondent Young was believed to be evading service. The Court did not properly analyze the Scrimmer factors and failed to take into account Respondent's evasiveness. This presentation of good cause should have triggered a mandatory grant of enlargement of time by the Court. The Court erred by not granting the enlargement of time upon being presented with evidence of Young's evasiveness. As such, the dismissal of Appellant's Complaint was improper.

DATED this 17th day of March, 2022.

BIGHORN LAW

/s/ Kimball Jones, Esq.

KIMBALL JONES, ESQ.

Nevada Bar No.: 12982

3675 W. Cheyenne Ave., Suite 100

North Las Vegas, Nevada 89032

Telephone: (702) 333-1111

Email: kimball@bighornlaw.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 this brief has been prepared in a proportionally spaced typeface us Times New Romans in 14-size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(B), it is proportionately spaced, has a typeface of 14 points or more and contains 2,615 words.

3. I further hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Date: March 17, 2022.

BIGHORN LAW

Kimball Jones, Esq.

KIMBALL JONES, ESQ.

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of **BIGHORN LAW** and that I served the foregoing **APPELLANT'S OPENING BRIEF** on the parties listed below by causing a full, true, and correct copy to be served in the matter identified

Michael M. DeLee.
DELEE LAW OFFICES, LLC
P.O. Box 96
18 South Powerline Road
Amargosa Valley, NV 89020
Attorney for Respondents.

Date: March 18, 2022

BIGHORN LAW

/s/ Erickson Finch
an employee of **BIGHORN LAW**