IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CHRISTOPHER D. BROSIOUS,

Petitioner/Appellee,

vs.

Court App. No. 30,211
District Court NO. D 101 CV 2009-02560

RICK HOMANS ex rel. NEW MEXICO DEPARTMENT OF TAX AND REVENUE MOTOR VEHICLE DIVISION,

Respondent/Appellant.

Appeal from the District Court of the First Judicial District
Santa Fe County
Honorable Daniel A. Sanchez, District Judge

PETITIONER-APPELLEE'S ANSWER BRIEF

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

a. New Mexico caselaw

b. Other New Mexico Citations

REFERENCES TO THE TRANSCRIPT OF PROCEEDINGS

The August 13, 2009 and October 8, 2009 district court hearings were electronically recorded starting at the time of the scheduled hearings, 10:00 a.m. and 9:00 a.m. respectively. Citations to the hearings use the date of the hearing contained on the compact disc of the hearing.

The November 9, 2009 district court hearing is contained in the Transcript as prepared in booklet form by the district court. All citations to this hearing use the date, page and line format. For example: [TR 11/4/09, p. 5 l.8 - p. 6 l. 20].

REFERENCES TO THE RECORD

References to the record will be to the record proper, RP.

III. SUMMARY OF PROCEEDINGS

A. Summary of the Proceedings

Petitioner-Appellee [hereinafter "Brosious"] supplements Respondent-Appellant's [hereinafter "MVD"] Summary of Proceedings as follows. By November 4, 2009, MVD had been properly served with the Petition and Writ and had provided a response to the Petition and 8/13/09 Writ which denied the factual allegations of the Petition but provided no substantive response . [RP 15; TR 11/4/09 p. 5 l.8 - p. 6. l. 20] At the hearing on November 4, 2009, the court ordered MVD to respond to the Petition for Writ of Mandamus within ten days of November 4, 2009. [RP 62] MVD failed to file a response. MVD sought to quash neither the Writ of Mandamus issued on August 13, 2009 nor the Writ of Mandamus issued on December 22, 2009. MVD appealed the Writ of Mandamus issued on December 22, 2009, but not the Writ issued on August 13, 2009. MVD has never substantively challenged the merits of Brosious's allegations of fact and law concerning reinstatement of his driver's license, whether contained in the Verified Petition for Writ of Mandamus or the Writ of Mandamus issued on December 22, 2009.

B. Statement of Facts

MVD states that "the only relief requested in the [8/13/09] writ was that it file an answer and include the administrative record." The 8/13/09 Writ orders MVD to

"prepare and file with the Court within twenty (20) days after service of this writ on Respondent a Response to the petition including the administrative record..." [RP 13-14] (emphasis added) MVD filed an general denial "answer" to the 8/13/09 Writ but never a "Response to the petition" which addressed Brosious's allegations of fact and law.

At the November 4, 2009 hearing, the district court declined MVD's demand that Brosious submit a new petition and "revised writ" to cure the alleged defect with the 8/13/09 Writ; instead, the district court determined that it had already given MVD twenty days to respond to the Petition (by virtue of the 8/13/09 Writ) and that it would give MVD ten more days to provide a response to the Petition. [TR 11/4/09 p. 10. l. 6 - p. 12 l. 10; RP 62]. The district court also ordered that "the Court will issue a determination on the merits based on the submissions of the parties." *Id.* MVD did not file a Response to the Petition for Writ of Mandamus. The district court issued the 12/22/09 Writ after the expiration of the ten day deadline contained in the Order on Motion for Expedited Hearing on the Merits. [RP 62]

With regard to the substantive facts before the Court, MVD has taken somewhat inconsistent positions regarding its stance on the verified facts before the district court. MVD's central position has been that MVD did not have to respond

to the Verified Petition because the factual allegations were not contained in writ form. However, MVD did state in its Limited Entry of Appearance and Answer to Writ of Mandamus that "[t]o the extent that Paragraph 2 [of the Verified Petition] can be interpreted to contain factual allegations, [MVD] denies those allegations." [RP 17] MVD also alluded to the fact that it filed a general denial at the November 4, 2009 hearing. [TR 11/04/09 p. 10, l. 17 - p. 11, l. 1]

Having noted this distinction, and the fact that the general denial does not present facts which can be treated as substantive rebuttal, Brosious contends that the undisputed facts and law *sub justice* are as follows[1]:

1. Petitioner is a resident of New Mexico, driver's license number 106274738.

2. Respondent is the Secretary of the New Mexico Department of Tax and Revenue Motor Vehicle Division.

3. This matter concerns the application of Senate Bill 275, an amendment to NMSA 1978, § 66-5-33.1 (1985), to the reinstatement of the driver's license of Petitioner. The law became effective July 1, 2009.

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[1] See *Collado v. New Mexico Motor Vehicle Division*, 137 N.M. 442, 112 P.3d 303 (effect of not contesting facts in unverified petition for writ of mandamus).

4. Petitioner's license was revoked pursuant to an administrative action under the Implied Consent Act, Citation Number 0013104963, for a period of six months beginning July 30, 2007.

5. Petitioner timely appealed the revocation to the Second Judicial District Court in the matter captioned D-202-CV-200706604 and ultimately did not prevail. During the pendency of the appeal, Petitioner received two consecutive Orders of Temporary Driving Privileges. *Id.* The first Order of Temporary Driving Privileges was entered on August 1, 2007 for a period of 120 days or until a final order is entered by the District Court, whichever occurs sooner, which expired on November 28, 2007. There were forty-three (43) days without an order of temporary driving privileges. The second Order of Temporary Driving Privileges was entered on January 10, 2008 for a period of 120 days or until a final order is entered by the District Court, whichever occurs sooner, which expired on May 9, 2009. The final mandate was filed by the District Court on December 23, 2008. There were two hundred twenty seven (227) days without an order of temporary driving privileges. Petitioner's privilege to drive was revoked for a total of two hundred seventy (270) days.

6. According to MVD, Petitioner's period of revocation was effective January 13, 2009 to July 13, 2009. Petitioner detrimentally relied on the revocation period represented by the Petitioner.

7. During the period of Petitioner's driver's license revocation, Petitioner did not equip his vehicle with an interlock device, as this action was not required at the time of Plaintiff's conviction. Instead, Petitioner did not operate a motor vehicle.

8. On July 14, 2009, Petitioner sought to reinstate his driver's license. Respondent refused to reinstate his license based on the aforementioned statutory amendment, specifically the new subparagraphs (B)(2) and (D) of NMSA 1978, §66-5-33.1, which state:

> Section 1. Section 66-5-33.1 NMSA 1978 (being Laws 1985, Chapter 47, Section 1, as amended) is amended to read:
>
> 66-5-33.1. REINSTATEMENT OF DRIVER'S LICENSE OR REGISTRATION – ALCOHOL-FREE DRIVING – FEE.
>
> A. Whenever a driver's license or registration is suspended or revoked and an application has been made for its reinstatement, compliance with all appropriate provisions of the Motor Vehicle Code and the payment of a fee of twenty-five dollars ($25.00) is a prerequisite to the reinstatement of any license or registration.
>
> B. If a driver's license was [~~suspended or~~] revoked for driving while under the influence of intoxicating liquor or drugs, for aggravated driving while under the influence of intoxicating liquor or drugs or [~~for~~

~~a violation of~~] pursuant to the Implied Consent Act, [~~an additional fee of seventy-five dollars ($75.00) is~~] the following are required [~~to be paid~~] to reinstate the driver's license.

(1) an additional fee of seventy-five dollars ($75.00); and

(2) a minimum of six months of alcohol-free driving with an ignition interlock device.

C. Fees collected pursuant to [this] Subsection B of this section are appropriated to the local governments road fund. The department shall maintain an accounting of the fees collected [~~pursuant to this subsection~~] and shall report that amount upon request to the legislature.

D. As used in this section, "six months of alcohol-free driving" means driving a vehicle that is equipped with an ignition interlock device on at least one hundred fifty days out of a one-hundred-eight-two day period, during which time the ignition interlock device does not record an alcohol concentration of more than five one hundredths in the driver's breath."

Section 2. EFFECTIVE DATE. – The effective date of the provisions of this act is July 1, 2009.

9. The new portions of the statute referenced above impose a penalty that did not exist at the time of the Petitioner's conviction. It is a basic rule of statutory construction that new statutes are to be applied prospectively only unless the legislature specifically directs otherwise. *State v. Perea*, 2001-NMSC-026, ¶5, 130 N.M. 732, 31 P.3d 1006. It is a basic rule of constitutional law that statutes cannot

be passed which penalize past conduct. N.M. Const. Art. II, § 19. Therefore, Respondent's refusal to reinstate Petitioner's privilege to drive is illegal because Respondent is applying the statute retroactively in an unconstitutional manner.

10. Respondent has failed to properly calculate the proper time period of Petitioner's revocation. Pursuant to the orders of the District Court, Petitioner was granted temporary driving privileges for a limited period. Two hundred seventy (270) days passed where Petitioner did not have driving privileges while the matter was pending appeal. Therefore, Respondent's refusal to reinstate Petitioner's driver's license is illegal because Petitioner has already satisfied the revocation period required and allowed by law.

11. Respondent improperly refused to reinstate Petitioner's privilege to drive because he detrimentally relied on the representations of Respondent MVD. MVD stated in its December 30, 2008 notice of revocation that Petitioner's privilege to drive was being revoked from January 13, 2009 through July 13, 2009. At the time of this revocation, Respondent was not required to install the interlock as required by § 66-5-33.1 NMSA 1978 (being Laws 1985, Chapter 47, Section 1, as amended). However, due to Petitioner's detrimental reliance, this law should not be applied to Petitioner's revocation based on equitable estoppel. *In re Kilmer*, 2004-NMCA-122,

¶27, 136 N.M. 440, 99 P.3d 690 (equitable estoppel claims apply to the government). Therefore, Respondent's refusal to reinstate Petitioner's privilege to drive is illegal because Respondent has already satisfied the revocation period allowed by law. [RP 1-10, 64-68].

IV. STANDARD OF REVIEW

Brosious agrees that statutory construction is reviewed *de novo*. However, Brosious contends that MVD's failure to respond to the Petition and both Writs is an issue of waiver. Waiver of a procedural right is reviewed under an abuse of discretion standard. *Amkco Corp .v Welborn*, 2001-NMSC- 012, ¶ 8, 130 N.M. 155, 21 P.3d 24. An abuse of judicial discretion will be found if the trial court exceeded the bounds of all reason, all circumstances being considered. *Wolf & Klar Cos . v. Garner,* 101 N.M. 116, 118, 679 P.2d 258, 260 (1984).

V. ARGUMENT

This case illustrates the attempt by MVD to put form over substance. MVD appears to argue that the district court did not have the authority to require MVD to respond to the Verified Petition. However, Court of Appeals has time and time again refrained from allowing technical procedural issues to preclude relief under the mandamus statute where due process was otherwise afforded the agency. The case

which seems to deflate MVD's central argument is *OS Farms, Inc. v. New Mexico American Water Company, Inc.*, 2009-NMCA-113, ¶ 22-24, 147 N.M. 221, 218 P.3d 1269, wherein the New Mexico Public Regulation Commission made similar arguments as MVD makes in the instant case:

> The Commission asserts that there were technical errors in the form and presentation of Farms' petition and in the peremptory and permanent writs. It complains that neither of the writs contained any recitation of the facts in support of the writs, as required under Section 44-2-6, which states that "[t]he alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it[.]" It also complains that, while the peremptory writ refers to the petition and states that it is attached as required under Rule 1-065(E), the petition was not attached to the writ, that Rule 1-065(E) has nothing to do with the remedy of mandamus, and that even if the petition had been attached to the writ, it would have been insufficient to establish the facts required to support issuance of a writ under Section 44-2-6. *See Mora County Bd. of Educ. v. Valdez*, 61 N.M. 361, 365, 300 P.2d 943, 945 (1956) (stating that 'allegations of fact in an application for [an alternative] writ form no part of the writ and ordinarily cannot be so considered in determining the legal sufficiency of the writ').
>
> . . .
>
> For several reasons, we do not see how the Commission can complain. Although it stated it was not waiving its right to assert that the writ was defective, the Commission answered both the peremptory writ and the petition while at the same time seeking to quash the writ and dismiss the petition. The Commission fully argued the merits of the issues of jurisdiction and administrative remedies. The Commission does not show why we should not construe this full-scale response as a waiver of a claim that the writ was defective. *See Mimbres Valley Irrigation Co.*

> *v. Salopek*, 2006-NMCA-093, ¶¶ 14-15, 140 N.M. 168, 140 P.3d 1117 (stating that where a party answers the allegations of a writ that is deficient in factual statements, the party waives the defect). Further, the Commission had the opportunity to ask the court to revisit the facts and decision before issuance of the permanent writ on December 27, 2007, but appears not to have taken that opportunity. Also, there is every indication that the Commission had adequate notice of the grounds for the writ, which were essentially legal rather than factual. The hearing examiner had set out the background in her recommended decision to the Commission. In issuing its order, the Commission itself relied on what it considered to be a significant observation of the hearing examiner that explained why prior approval of the sale was necessary. In addition, no rule requires a permanent writ that follows an alternative writ to contain the recitation of facts required in Section 44-2-6. We hold that the Commission cannot successfully attack the permanent writ for legal insufficiency.

See also *State of New Mexico ex rel. Board of County Commissioners, County of San Miguel v. Williams*, 2007-NMCA-036, ¶ 16, 141 N.M. 356, 155 P.2d 761 (mandamus allegations to be handled generally as in a civil matter).

From Brosious's standpoint, these cases demonstrate the central fallacy of MVD"s argument. The district court gave MVD every opportunity to respond to the substance of Brosious's complaint concerning his driver's license. MVD repeatedly employed technical language of the statute to deflect a challenge to the merits. Even when the district court made itself abundantly clear that a certain procedure would be

employed to get to the meat of the matter, MVD failed to take the opportunity given it.

This case also presents a good example of why the mandamus statute is not interpreted nearly as strictly as MVD pretends in the instant case. MVD has been party to several prior appeals that resulted in precedent demonstrating the flexibility of the mandamus statute, typically due to conduct resulting in waiver. Brosious contends that this case presents several examples of waiver by MVD. By failing to take the opportunities provided by the district court to reach the merits, MVD waived its challenge to the sufficiency of the process employed by the district court to fashion relief.

The critical difference between this case and the cases cited by MVD in support of its argument is the issue of whether a particular writ is sought *ex parte* or by appearance. The strictest of protections afforded by the mandamus statute are predicated on the issuance of an *ex parte* writ followed by a hearing similar to an order to show cause hearing which provides the respondent with the opportunity to "answer" the writ; thus, by the time the writ is served, the court's decision is already in the form of an order that could result in contempt if not followed. If the writ is peremptory, the opportunity to show cause may not exist.

In the present case, the district court declined to approach the case as an *ex parte* matter. The district court expressed reservations in issuing Brosious's original form of writ "because it had problems with the form of writ Brosious prepared and it wanted to give MVD the opportunity to address problems with the form of writ before it signed and issued the writ." MVD's Brief in Chief, p. 2. In fact, the district court issued the 8/13/09 Writ to make the procedural ground more fertile for MVD, not less fertile.

The parties had two more hearings wherein MVD complained about lack of service and the form of the 8/13/09 Writ, but by November 4, 2009, MVD could no longer complain about service and had had the Verified Petition in its possession for over three months. The district court had the administrative record before it and demanded that MVD provide a substantive response to the Petition. The district court apparently did not believe that issuing another writ which merely regurgitated the facts contained in the Petition was in the interest of judicial economy. [TR 11/4/09 p. 10 l. 5 - p. 12 l. 18] The district court gave MVD ten days from November 4, 2009 to "answer" the Petition as probably would have been the case had the matter been presented as an alternative writ under NMSA 1978, §44-2-6 (1984). MVD chose not to respond to the Petition and therefore waived any procedural defects of the writ.

See *Barreras v. New Mexico Motor Vehicle Division*, 2005-NMCA- 055, ¶ 1, 137 N.M. 435, 112 P.3d 296, 299; *City of Sunland Park v. New Mexico Public Regulation Commission*, 2004-NMCA-024, ¶ 8,135 N.M. 143, 85 P.3d 267.

Moreover, MVD failed to appeal the 8/13/09 Writ. The essence of MVD's legal challenge to this entire process is the alleged failure of Brosious to recite the facts contained in the Verified Petition again in the form of writ allowed by the district court. It must be remembered that the 8/13/09 Writ contained the statement that "this Court has jurisdiction over [MVD]" and that "the Petition makes a prima facie showing that Petitioner may be entitled to the relief sought by the petition." [RP 13] MVD did not appeal the issuance of the 8/13/09 Writ and therefore cannot be heard to complain about its form.

Even if MVD could be seen as preserving its argument concerning the 8/13/09 Writ, because the facts contained in the Verified Petition remained uncontested after the November 4, 2009 ten day response period expired, the facts contained in the Petition should be deemed admitted. *Collado v. New Mexico Motor Vehicle Division,* 2005-NMCA-056, ¶ 9, 137 N.M. 441, 112 P.2d 303 ("there was no indication below, nor any indication on appeal, that MVD in any way contests the facts alleged in the petition." (emphasis added))

ISSUE I. MVD WAIVED ITS RIGHT TO CHALLENGE EITHER WRIT

MVD's argument that "Brosious [had] complete control over the form of the writ, including the form of any requested relief" and that "Brosious elected to proceed without modifying the proposed writ an to seek execution of the writ by the district court" is inaccurate. The district court chose to set the matter for hearing after declining to enter Brosious's form of writ which directed MVD to reinstate his license. In response to MVD's personal jurisdiction objections, the court set and then re-set the matter to give MVD the opportunity to be satisfied as to service of process even though MVD generally denied the facts of the Verified Petition and arguably waived its personal jurisdiction defense.[2]

On November 4, 2009, the district court could have ordered the issuance of a new writ containing the exact same allegations contained in the Petition for Writ of Mandamus, but after months of banting about jurisdiction, the district court chose not

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[2] MVD wishes to have it both ways with regard to the facts. It wants to avoid subject matter jurisdiction by refusing to respond to the Verified Petition, yet it seems to want to be able to challenge the substance of the Verified Petition by stating that its "Answer" contains a general denial of the facts of the Verified Petition and providing argument concerning the merits in its Brief in Chief.

to do so and ordered MVD to file a substantive response. Therefore, Brosious was not in "complete control"over the process.

Furthermore, MVD's argument that "the relief Brosious ultimately sought differed significantly from the relief requested in the first writ..." is erroneous. The relief requested by Brosious was clearly stated in the Petition for Writ of Mandamus; the reinstatement of Brosious's driver's license. The 8/13/09 Writ was issued in order to make the administrative record available (again furthering this matter from the *ex parte* nature of the mandamus statute) and to require MVD to file a "Response to the Petition". [RP 13-14].

ISSUE II. THE DISTRICT COURT DID NOT ERR IN PUTTING SUBSTANCE OVER FORM, AND IN ANY EVENT MVD WAIVED THIS DEFENSE.

MVD's argument in this regard is erroneous in several ways. First, in its Limited Entry of Appearance and Answer to the Writ of Mandamus, MVD provided a general denial of the facts contained in the Verified Petition. [RP 17] By providing an answer to the substantive allegations of the Verified Petition, MVD waived any right to insist that those same facts be realleged in the writ. See *City of Sunland Park v. New Mexico Public Regulation Commission*, 2004-NMCA-024, ¶ 8,135 N.M. 143,

85 P.3d 267; *OS Farms, Inc. v. New Mexico American Water Company, Inc.*, 2009-NMCA-113, ¶ 22-24, 147 N.M. 221, 218 P.3d 1269.

Second, MVD failed to file a responsive pleading within the ten days as required by the November 4, 2009 Order. There can be no clearer example of waiver than a litigant failing to file a responsive pleading when required to do so by court order. MVD had been served with process months after it had the Verified Petition and had produced the administrative record. MVD attended three hearings. MVD was instructed in clear terms as to the procedure that the district court was going to employ to reach the merits of the matter.

There can be only one explanation for MVD's failure to file a pleading within ten days of November 4, 2009; that it still believed that the district court did not have jurisdiction over it <u>despite</u> the fact that MVD failed to appeal the 8/13/09 Writ which contained the finding of jurisdiction over MVD. If this truly the reason for the failure to plead, then MVD should be estopped attempting to take advantage of procedural "Catch 22" of its own creation and to Brosious's detriment.

ISSUE III. THE DISTRICT COURT GAVE MVD EVERY OPPORTUNITY TO ANSWER.

It is at this point that MVD appears to tardily challenge the merits of Brosious's Verified Petition. The attempt by MVD to raise issues regarding the merits should be disregarded out of hand. These arguments could and should have been made at the district court level. The district court gave MVD months to challenge the "factual allegations to demonstrate conclusively that Brosious had a right to a driver's license or that there could be no basis for MVD's determination not to allow Brosious to obtain a driver's license", but MVD declined to do so.

MVD completely fails to explain how it was left without "an opportunity to respond to the allegations in the second writ". They are the same allegations contained in the Verified Petition. The very suggestion that MVD did not have a forum to preserve its arguments for "appellate review" is an affront to the efforts made by the district court to allow MVD to respond to these allegations.

The mandamus statute does not require a writ to be label of peremptory or alternative. *OS Farms, Inc. v. New Mexico American Water Company, Inc.*, 2009-NMCA-113, ¶ 22-24, 147 N.M. 221, 218 P.3d 1269. The district court chose to pursue a path that gave MVD every opportunity to defend the merits of the matter.

By avoiding the *ex parte* nature of the mandamus procedure and setting the matter for multiple hearings, the district court gave MVD every opportunity to "avail himself of any valid objection to [the writ's] sufficiency, or may countervail it by evidence in direct denial or by way of avoidance." MVD simply chose not to "avail" itself of the opportunity to rebut Brosious's facts and law. MVD cannot do so now on appeal.

Page 15 of MVD's Brief in Chief contains a citation that deserves particular attention. Without waiving Brosious's argument that MVD's attempt to argue the merits of the Verified Petition are far too late, Brosious would point out that MVD has inadvertently highlighted another central fallacy of its position below. In the second full paragraph, MVD cites "NMSA 1978, Section 66-8-111(C)(1)(2005)" for the proposition that "Brosious admits that MVD will allow him to reinstate his driver's license if he meets the statutory criteria for reinstatement". By citing the old statute, MVD employs a slight of hand by avoiding the central issue raised by Brosious at the district court level while speciously addressing the issue at the appellate level. The 2005 statute was amended in 2009, after Brosious had complied with the reinstatement requirements of the 2005 version of the statute. Brosious was denied reinstatement because the 2009 statute went into effect thirteen days before Brosious applied for reinstatement. For MVD to attempt to argue the merits of the

matter without addressing this cardinal issue (the issue that the Verified Petition was based on to begin with) is inexplicable.

Finally, MVD's argument as to an adequate remedy at law is flawed for several reasons. First, and at the risk of being redundant, MVD did not raise this issue at the district court level. Second, MVD's argument concerning the right to appeal is so absurd that it is almost difficult to explain the obviousness of the error. Brosious did appeal the revocation to the district court and lost. [RP 7-9] NMSA 1978, §66-8-112(H) is not an avenue to appeal the failure of MVD to reinstate a driver's license. This statute is the avenue to appeal MVD's initial revocation and the scope of such review is limited to "determine only whether reasonable grounds exist for revocation or denial of the person's license or privilege to drive based on the record of the administrative proceeding." *Id.* The facts concerning compliance with the requirements for reinstatement would not even exist at the time of the statutory appeal and would certainly not be part of the administrative record.

Despite MVD's groundless statement to the contrary, there is no statutory right to appeal the failure of MVD to properly reinstate a driver's license under NMSA 1978, §66-8-112. There is no order of "non-reinstatement" upon which a Rule 1-074 or 1-075 appeal could be based. The failure to reinstate a driver's license is an

administrative act; a driver goes to an MVD office and the MVD service center teller informs the driver whether he or she is eligible for reinstatement. This activity creates no administrative record or order. Stated another way, the *ex post facto* issue did not exist at the time of the statutory right to appeal.

Moreover, even if Brosious could conceivably appeal under Rule 1-075 NMRA (without a final order of the agency), Brosious would not have the right to a beneficial stay of the agency order. Any such "stay" under Rule 1-075(Q) is discretionary and, if granted, would have resulted in the "stay" of the non-reinstatement, i.e., Brosious would have continued to be unlicensed during the Rule 1-075 appeal process.

Simply put, mandamus was Brosious's only avenue of relief. It is unreasonable to demand that Brosious appeal his revocation to the district court, lose that appeal, and then attempt to appeal the non-reinstatement back to the district court without a final order from MVD upon which to base his Rule 1-075 appeal and without an administrative record as to the basis for the denial of reinstatement.[3]

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[3] MVD's statement that Brosious would have had relief under Rule 1-060(B) NMRA is similarly inexplicable. Brosious cannot reasonably respond to this statement.

Finally, MVD's argument that this case demonstrates a good example of why "peremptory writs are rarely used" is ironic at best. MVD itself fails to describe a reasonable alternative route for relief to drivers like Brosious. Moreover, MVD did in fact "have the opportunity to be heard and raise these issues, along with its position on the factual allegations, and thereby allow the district court to make a reasoned ruling on the relief ordered in the second writ." MVD Brief in Chief, p. 17. MVD simply chose to disregard that opportunity and the clear directive of the district court when it failed to plead within ten days of November 4, 2009.

ISSUE IV. SERVICE OF THE SECOND WRIT

Brosious contends that service of the second writ should be governed by Rule 1-005(B) NMRA, similar to the service of an amended complaint. There is no dispute that the 8/13/09 Writ was formally served. MVD's focus on the requirement of personal service in this context is impractical where there is a second writ issued after the entry of appearance of an attorney. If an amended complaint in a civil action need not be personally served where an attorney has appeared, there is no reason to require personal service of a second writ of mandamus under the same circumstances. One can only imagine the absurdity of requiring personal service of writ after writ, even where the attorney of record for the agency appears at hearing after hearing. This

interpretation of the mandamus statute would only create delay and unnecessarily increase the cost and complexity of such proceedings.

Moreover, the issue of waiver again rears its head. MVD did more in this case than appearing to contest jurisdiction. It provided a general denial to the Petition and asked the district court to issue a second or amended writ at the November 4, 2009 hearing. This request should be considered analogous to "any action upon the part of the defendant, except to object to jurisdiction, which recognizes the case as in court" and therefore amounts "to a general appearance". *Barreras v. New Mexico Motor Vehicle Division*, ¶7 137 N.M. 435, 112 P.3d 296 (citation omitted)

With regard to the application of Rule 1-005(B), the record is clear that the 12/22/09 Writ was "ISSUED." [RP 64] The record is also clear that MVD received the 12/22/09 Writ and attached it to its notice of appeal. [RP 71]

From Brosious's standpoint, this final argument of MVD captures the self-serving and hyper-technical approach that MVD has taken throughout this process. In a few weeks, Brosious's driver's license will have been revoked for three years. MVD unfairly denied Brosious reinstatement, despite compliance with his punishment and MVD compounds the unfairness by propounding these arguments.

VI. RELIEF SOUGHT

For the reasons stated above, the Court should affirm the lower courts' ruling and order reinstatement of Brosious's driver's license.

Respectfully submitted:

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I hereby certify that a true and correct copy of the foregoing pleading was mailed by first class mail to the following:

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on this 8 day of July, 2010.

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