IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO



CHRISTOPHER D. BROSIOUS,
Petitioner-Appellee,

vs.

Ct. App. No. 30,211
District Court No. D-101-CV-200902560

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

Respondent-Appellant.

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

# RESPONDENT-APPELLANT'S BRIEF IN CHIEF

GARY K. KING
Attorney General

Julia Belles
Special Assistant Attorney General
Taxation & Revenue Department
P O Box 630
Santa Fe, NM 87504-0630
(505) 827-9807
julia.belles@state.nm.us

Attorneys for Respondent/Appellant

## TABLE OF CONTENTS

**Page**

## 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 hearing use the date of the hearing and the time index contained on the compact disc of the hearing, 08-13-09, Tr. 10:08:34, for example

## TABLE OF AUTHORITIES

**Page**

**NEW MEXICO CASES:**

**NEW MEXICO STATUTES AND SUPREME COURT RULES:**

Respondent-Appellant, New Mexico Taxation and Revenue Department, Motor Vehicle Division (MVD), and respectfully submits its Brief-in-Chief pursuant to Rule 12-210(B)(2) NMRA 2010. On March 24, 2010, the parties were informed that the transcript of proceedings was received. The Brief is timely filed.

## REFERENCES TO THE RECORD

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

## SUMMARY OF THE PROCEEDINGS

On August 6, 2009, Brosious filed a verified petition for a writ of mandamus. (RP 1-5). The district court scheduled a hearing on the petition on August 13, 2009. (08-13-09, Tr. 10:04:19; 10:06:27). A writ of mandamus was filed on August 13, 2009. (RP 13-15). MVD filed a Limited Entry of Appearance and Answer to the Writ of Mandamus (answer) on September 10, 2009. (RP 15-49). The court scheduled the matter for a hearing on October 8, 2009. (RP 54).

On November 4, 2009, the district court heard argument on the merits of the writ. (RP 60). The district court ordered MVD to respond to the petition within ten days. The district court's order requiring MVD to file an answer within ten days was filed on December 16, 2009. (RP 62-63). A second writ was filed on December 22, 2009. (RP 64-68). MVD filed its notice of appeal on January 14, 2010 and timely filed its docketing statement on February 15, 2010. (RP 69-88). The Court assigned the matter to the general calendar on March 16, 2010.

## STATEMENT OF FACTS

On August 6, 2009, Brosious filed a verified petition for a writ of mandamus (petition). (RP 1-5). The district court scheduled a hearing on the petition on August 13, 2009. (RP 08-13-09, Tr. 10:04:19). Brosious sent MVD a copy of his petition by facsimile on August 10, 2009 and by mail which was received on August 11, 2009. (RP 19-25).

MVD appeared for the August 13, 2009 hearing and made a limited entry of appearance. (08-13-09, Tr. 10:05:0410-05:20). MVD asserted that until the writ of mandamus was issued and properly served on MVD, the district court did not have jurisdiction over it. MVD further argued that, upon issuance, the writ would replace the petition and that the writ must contain all the factual allegations necessary to support the writ. (08-13-09, Tr. 10:05:41-10:06:08; 10:08:22-10:09:17). The district court advised the parties that it scheduled a hearing on the petition 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. (08-13-09, Tr. 10:06:27-10:07:07).

Brosious provided two alternative forms of a proposed writ to the court and the court selected and signed one of the writs presented. The court stated it no longer had a problem with the form of writ since it was now signed by Brosious' attorney and had a return date for MVD to appear before the court. (08-13-09, Tr.

10:10-39-10:11:32; 10:12:27-10:13:03). Upon questioning by Brosious, the district court stated it would consider allowing Brosious leave to amend the writ. (08-13-09, Tr. 10:13:37-10:13:50). The writ was filed on August 13, 2009. (RP 13-14).

On August 21, 2009, Brosious served the Secretary of the Taxation and Revenue with the writ. (RP 16). The writ ordered MVD to "prepare and file with this Court within twenty (20) days after the date of service of this writ on the Respondent a Response to the petition including the administrative record pertaining to petitioner's driver license number 106274738." (RP 13-14). In response, MVD filed a Limited Entry of Appearance and Answer to the Writ of Mandamus (answer) on September 10, 2009. (RP 15-49). MVD made two arguments in its answer. First, MVD argued that the district court did not have jurisdiction over it because Brosious did not serve the petition and writ on the Secretary in the manner required by Rule 1-004(H) NMRA 2010. Brosious also failed to serve the petition and writ on the attorney general. MVD argued that he failed to comply with Rule 1-004 NMRA 2010 and this Court's decision in *Trujillo v. Goodwin*, 2005-NMCA-095, 138 N.M. 48, 116 P.3d 839. (RP 15-18).

Second, MVD responded by identifying to the court that the only relief requested in the writ was that it file an answer and include the administrative record. (RP 17). MVD argued that there were no facts in the writ to which MVD

could respond. (*Id.*). Under NMSA 1978, § 44-2-11 (1884), MVD could not respond to the facts set forth in the petition. (*Id.*). MVD requested that the writ be quashed or, alternatively, that the court find that MVD complied with the writ. (RP 18).

The court scheduled the matter for a hearing on October 8, 2009. (RP 54). MVD again made a limited entry of appearance to assert that it had not been properly served. The court agreed and stated it could not proceed until service was properly made. (10-08-09, Tr. 9:01:50; 9:08:44-9:09:11).

On November 4, 2009, the court heard argument on the merits of the writ. MVD argued that it complied with the writ and that, if Brosious was alleging factual matters, he failed to include any factual allegations in the writ or to specify the relief requested. MVD argued that under § 44-2-11 and the decision in *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, 124 N.M. 698, 954 P.2d 763, the court could only consider the writ and the answer and that it could not consider allegations or relief that were requested in the petition but not found in the writ. MVD further argued that if Brosious wanted to allege additional facts or request additional relief, he needed to file another petition and writ.

The court declined to order Brosious to submit a new petition and writ and, instead, ordered MVD to respond to the petition within ten days. The court's order requiring MVD to file an answer within ten days was filed on December 16, 2009.

(RP 62-63). A second writ was filed on December 22, 2009. Although it was not labeled as a peremptory or alternative writ, it did not allow MVD to respond or show cause why MVD had not complied with the second writ and it ordered MVD to restore Brosious' driver's license. (RP 64-68).

MVD filed its notice of appeal on January 14, 2010 and timely filed its docketing statement on February 15, 2010. The Court assigned the matter to the general calendar on March 16, 2010.

## STANDARD OF REVIEW

MVD presents four issues to this Court. First, the district court erred when it refused to find that MVD complied with the first writ. It should have found that MVD complied with the writ or, alternatively, have required Brosious to submit an amended writ that contained factual allegations and specified the actual relief sought. Second, the district court erred when it ordered MVD to respond to factual allegations and requests for relief contained in the petition and not found in the writ. Third, the district court erred when it issued the second writ. The writ was legally insufficient and it failed to allow MVD to respond to it. Fourth, because the second writ was not served on MVD, the district court lacked jurisdiction over MVD. The four issues raised by MVD require an interpretation of the statutes dealing with a mandamus proceeding and are reviewed *de novo*. *See OS Farms, Inc. v. N.M. Am. Water Co.*, 2009-NMCA-113, ¶ 19, __ N.M. __, 218 P.3d 1269,

1274 (holding that statutory interpretation is an issue of law which is reviewed *de novo*).

## ARGUMENT

This case illustrates why it is essential that a party seeking issuance of a writ of mandamus, and the court considering the request, conform strictly to the statutory procedures. The district court must ensure that any proposed writ meet all statutory requirements before signing and issuing the writ compelling action by a public official.

A mandamus action is a technical proceeding that is closely regulated by statutes. It should only be invoked in extraordinary circumstances. *See In re Grand Jury Sandoval County*, 106 N.M. 764, 766, 750 P.2d 464, 466 (Ct. App. 1988). ("Mandamus is a drastic remedy to be invoked in extraordinary situations, and it may not be used as a substitute for appeal.") The writ "may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." NMSA 1978, § 44-2-4 (1884). *See also Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 11, 140 N.M. 168, 171, 140 P.3d 1117, 1120 ("Mandamus lies only to compel a public officer to perform an affirmative act where, on a given

state of facts, the public officer has a clear legal duty to perform the act and there is no other plain, speedy, and adequate remedy in the ordinary course of the law.")

The proceeding is initiated by the applicant filing a verified petition for a writ of mandamus. *See Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 703, 954 P.2d 763, 768 ("The party seeking a writ must first file an application or petition."). The writ is either issued as an alternative writ or a peremptory writ.

> The writ is either alternative or peremptory. The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ with his certificate of having done as he is commanded. The peremptory writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, shall be omitted.

NMSA 1978, § 44-2-6 (1884).

NMSA 1978, § 44-2-7 (1884) states: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued." A peremptory writ should rarely be issued because it is done without notice and an opportunity to be

heard. *See Mimbres Valley,* ¶ 12, 140 N.M. at 172, 140 P.3d at 1121 ("it will be an exceedingly rare case where a peremptory writ is proper.).

Once the writ is issued, it replaces the petition or application. Nothing set forth in the petition or application is implicitly or by reference made a part of the writ; all factual allegations must be specifically stated in the writ itself. The writ is then served and on the return date specified in the writ "the party on whom the writ is served may show cause by answer, made in the same manner as an answer to a complaint in civil action." NMSA 1978, § 44-2-9 (1884)

The district court, when determining the legal sufficiency of the writ, can only rely upon the writ and the answer. "No other pleading or written allegation is allowed than the writ and answer. They shall be construed and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried and further proceedings had in the same manner as in a civil action." NMSA 1978, § 44-2-11 (1884).

> In determining the legal sufficiency of a writ, the court considers only the allegations in the writ and the answer. *Mora County Bd. of Educ. v. Valdez*, 61 N.M. 361, 365, 300 P.2d 943, 945 (1956); *see also State ex rel. State Highway Comm'n v. Quesenberry*, 72 N.M. 291, 295, 383 P.2d 255, 257 (1963) ("The issues in mandamus are created solely by and are limited to the allegations of the writ and the answer thereto.").
>
> Allegations in the application or petition for a writ of mandamus form no part of the writ and ordinarily cannot be considered in determining the legal sufficiency of the

> writ. *Sandoval County,* 106 N.M. at 766, 750 P.2d at 466. The writ itself must therefore contain allegations of all facts necessary to authorize relief. *Mora County*, 61 N.M. at 365, 300 P.2d at 945 (citing *State ex rel. Burg v. City of Albuquerque*, 31 N.M. 576, 249 P. 242 (1926)). The writ must "state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it . . . ." NMSA 1978, § 44-2-6 (1884). Allegations in the writ should be made as in ordinary actions, and the usual rules applicable in testing the sufficiency of a complaint in an ordinary civil action apply. *Mora County*, 61 N.M. at 365, 300 P.2d at 945.

*Brantley Farms,* ¶¶ 13-14, 124 N.M. at 703, 954 P.2d at 768.

The district court erred when it refused to find that MVD complied with the first writ when MVD did what it was ordered to do in the first writ. The district court failed to test the sufficiency of the writ by relying solely on the writ and answer but, instead, relied upon factual allegations made in the petition and the relief requested in the petition that were not set forth in the writ. The statutes governing a mandamus proceeding do not permit a response to the petition and the district court's order that MVD respond to the petition was improper. After being made aware of the deficiencies in the writ, the district court should have either found that MVD complied with the writ or instructed Brosious to amend his writ. The district court also lacked any jurisdiction over MVD to compel action based on the second writ because the second writ was never served on MVD.

ISSUE I. THE DISTRICT COURT ERRED WHEN IT REFUSED TO FIND THAT MVD COMPLIED WITH THE WRIT OR REQUIRE BROSIOUS TO AMEND HIS WRIT.

The first writ issued on August 13, 2009 ordered MVD to file a response to the petition and file the administrative record. MVD submitted the administrative record and filed a response but asserted out that it could not respond to any factual allegations contained exclusively in the petition since the court could only consider the writ and MVD's answer. To the extent the writ attempted to make factual allegations, MVD denied those allegations. (RP 17, ¶ 2). MVD argued that it complied with the first writ when it filed its answer on September 10, 2009 which included the administrative record. MVD further asserted that, because there were no factual allegations in the writ, the writ was legally deficient. (RP 17).

The district court was required to review the sufficiency of the writ and answer the same as in a civil matter. The writ it issued on August 13, 2009 contained no factual allegations and simply ordered MVD to file the administrative record. Brosious was aware of the problem with the writ because MVD advised him during the August 13, 2009 hearing on the petition that the writ would replace the petition and that all factual allegations needed to be set forth in the writ. Brosious elected to proceed without modifying the proposed writ and to seek execution of the writ by the district court. Brosious had complete control over the form of writ, including the form of any requested relief. Ultimately, MVD fully

complied with the relief ordered in the writ. *See Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 737, 31 P.3d 1008, 1011 ("A case is moot when 'no actual controversy exists," id., and the court cannot grant 'actual relief.' *Atchison, Topeka & Santa Fe Ry. Co. v. State Corp. Comm'n*, 79 N.M. 793, 794, 450 P.2d 431, 432 (1969).").

Following MVD's compliance with the writ, the district court had two options. It could either find that MVD had completed the required compliance with the writ or, the district court could find that MVD presented additional issues to which Brosious should be required to respond to by filing an amended writ. The possibility that Brosious might need to amend the writ was discussed by Brosious and the district court during the August 13, 2009 hearing on the petition.

It appears clear from the proceedings in this case, that the relief Brosious ultimately sought differed significantly from the relief requested in the first writ and ordered by the court in the first writ. The district court erred when it filed to solely test the legal sufficiency of the writ and the answer. Instead, the district court, contrary to explicit provision of the mandamus statutes, relied upon the factual allegations in the petition, and erroneously ordered MVD to respond to allegations in the petition not found in the writ.

ISSUE II. THE DISTRICT COURT ERRED WHEN IT ORDERED MVD TO RESPOND TO THE VERIFIED PETITION FOR WRIT OF MANDAMUS.

The district court erred when it ordered MVD to respond to the petition. MVD has maintained throughout the course of this case that the law requires all factual allegations to be contained in the writ and that a writ lacking factual allegations is legally deficient. (08-13-09, Tr. 10:08-22-10:09:17; RP 17). It made this argument at the August 13, 1009 hearing on the petition and when it filed its answer on September 9, 2009. When the district court ordered MVD to respond to the petition, the district court violated the laws controlling a mandamus proceeding and essentially ordered MVD to waive its objections based upon defects in the writ.

Section 44-2-11 allowed the district court to consider only the writ and the answer. Section 44-2-11 required Brosious to set forth in the writ all his factual allegations to support the relief sought. In *City of Sunland Park v. N.M. Pub. Regulation Comm'n*, 2004-NMCA-024, ¶ 7, 135 N.M. 143, 147, 85 P.3d 267, 271, the Public Regulation Commission (PRC) argued that a writ issued against it was legally insufficient because it did not contain the factual allegations necessary to show the relief requested from the district court. This Court held that the PRC waived any objection to the legal sufficiency of the writ since it did not challenge that matter when it filed its answer. *Id.*, ¶ 9, 135 N.M. at 147, 85 P.3d at 271. The

Court pointed out that PRC's failure to raise any objections meant that the City was not made aware of the problem and given the opportunity to amend its writ. *Id.*

In this case, by contrast, MVD did not waive its objections to the legal sufficiency of the writ. As stated in its answer, the writ did not contain any factual allegations to which MVD could respond. The district court's order to MVD to answer the petition is contrary to the mandamus statutes that specify which pleadings the district court is to rely upon in its consideration of the issuance of the writ. The district court order was in error because it violated the mandamus statutes and compelled force MVD to waive objections to defects in the writ.

ISSUE III. THE DISTRICT COURT ERRED WHEN IT FOUND THE SECOND WRIT TO BE LEGALLY SUFFICIENT AND ISSUED IT WITHOUT ALLOWING AN ANSWER FROM MVD.

The district court issued the second writ on December 22, 2009, as a peremptory writ. The district court erred in doing so because the second writ does not contain sufficient 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. The second writ also fails to provide sufficient factual allegations to demonstrate conclusively that Brosious did not have an adequate remedy at law. Because MVD was given no

opportunity to respond to the allegations in the second writ, it was not able to preserve any of its objections or arguments for appellate review.

The second writ does not explicitly state whether it is a peremptory writ or an alternative writ. It appears, however, to take the form of a peremptory writ because it fails to contain any return date for MVD to appear before the court to respond to the allegations and explain why it did not comply with the relief ordered in the second writ. The second writ ordered relief that was neither requested nor ordered in the first writ.

By law, a peremptory writ only issues when the "right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it." Section § 44-2-7. *See also* NMSA 19978, § 44-2-10 (1884) "If no answer is made a peremptory mandamus shall be allowed against the defendant; if an answer is made containing new matter, the plaintiff may, on the trial or other proceedings, avail himself of any valid objection to its sufficiency, or may countervail it by evidence either in direct denial or by way of avoidance."

In the December 22, 2009 writ, Brosious acknowledged that his driver's license was revoked and that he was required to reinstate his driver's license. (RP 65, ¶ 7-66, ¶ 8). Brosious failed to provide any factual support that writ to demonstrate that any right was involved. In *Johnson v. Sanchez*, 67 N.M. 41, 46,

351 P.2d 449, 452 (1960), the New Mexico Supreme Court recognized that a "license to operate a vehicle is a mere privilege, and not a property right."

Once MVD revoked Brosious' license, he no longer had that privilege. Upon the revocation of his driving privileges by MVD, Brosious does not have any right to reacquire it or reinstate it under particular conditions. *See State ex. rel. Schwartz v. Kennedy*, 120 N.M. 619, 631, 904 P.2d 1044, 1065 (1995) ("By revoking a conditionally granted license because of noncompliance with the conditions governing its issuance, the government intends to protect the public from licensees who are unfit to participate in the regulated activity or occupation."). *Compare Minero v. Dominguez*, 103 N.M. 551, 553, 710 P.2d 745, 747 (for procedural due process, continued retention of limited work license during revocation period driver's license is an important protected property interest).

The factual allegations in the second writ also fail to establish that MVD has no valid reason for not allowing Brosious to reinstate his license. Brosious admits that MVD will allow him to reinstate his driver's license if he meets the statutory criteria for reinstatement. (RP 66, ¶ 8). *See* NMSA 1978, § 66-8-111(C)(1) (2005) (if chemical test results are .08 or greater MVD shall revoke the privilege to drive for "six months or until all conditions for license reinstatement are met, whichever is later, if the person is twenty-one years of age or older.'). Additionally, Brosious asserts that MVD did not correctly calculate the time period his license was

revoked. (RP 65, ¶¶ 4-6). MVD has a valid rationale, including the language of the order granting the stay, for how it calculated when it started the revocation period but was not able to assert this rationale because of the use of the peremptory writ.

Lastly, the second writ does not contain any factual allegations to show that Brosious does not have an adequate remedy at law. NMSA 1978, § 44-2-5 (1884) states: "The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law." *See also Shepard v. Board of Education of Jemez Springs Municipal Schools,* 81 N.M. 585, 586, 470 P.2d 306, 307 (1970) (mandamus is only a proper remedy after exhaustion of administrative remedies). Many of the factual allegations in the writ demonstrate that Brosious had an adequate remedy at law.

The factual allegations provided by Brosious indicate he appealed an administrative action taken pursuant to the Implied Consent Act to district court. (RP 65, ¶¶ 4-5). The Implied Consent Act, NMSA 1978, § 66-8-112(H) (2003), provide for a statutory right to appeal. Brosious' appeal fell under the provisions of Rule 1-074 NMRA 2008 which, under paragraph S, allowed for a stay. The writ does not provide any factual allegations demonstrating why that legal proceeding was an inadequate remedy at law. Brosious had the opportunity to have the judge that issued the stay determine the time period in which the stay of the revocation

was granted and what, if any, time periods were not subject to the stay was not in place and how that would impact the calculation of the revocation time period. *See* Rule 1-074(R) NMRA 2008 (allowing party to file a motion for reconsideration after final decision from district court); Rule 1-060(B) NMRA 2008 (party can motion court for relief from judgment where judgment satisfied or any other reason justifying relief).

The circumstances surrounding the issuance of the second writ demonstrate why peremptory writs are rarely to be issued. The issues identified above clearly demonstrate the district court's error in issuing the second writ. The second writ granted Brosious relief he had not request in the first writ. Had the second writ been issued as an alternative writ, MVD would have had 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. *See Rivera v. Nunn*, 78 N.M. 208, 430 P.2d 102 (1967) (reversing issuance of peremptory writ because as a matter of law, the facts in the writ failed to show "that no valid excuse can be given for not performing the acts sought to be compelled.").

ISSUE IV. THE DISTRICT COURT NEVER OBTAINED JURSIDICITON OVER MVD BECAUSE MVD WAS NEVER SERVED WITH THE SECOND WRIT.

MVD was never served with the second writ, and consequently, the district court never obtained jurisdiction over it. Because the issue of service is jurisdictional, this Court may review it for the first time on appeal without regard to preservation of the issue in the district court. *See* Rule 12-216(B) NMRA 2010 (where issue jurisdictional, party not required to preserve argument below); *Perea v. Baca*, 94 N.M. 624, 626, 614 P.2d 541, 543 (1980) ("Jurisdiction of the district court may be raised on appeal, since that court could not act if it did not properly have jurisdiction.").

The lack of service of process in this matter involves a question of law which is reviewed *de novo* review. *See Harrell, v. Hayes*, 1998-NMCA-122, ¶ 11, 125 N.M. 814, 817, 965 P.2d 933, 936 ("In reviewing an appeal from an order granting or denying a motion to dismiss for lack of personal jurisdiction, the determination of whether personal jurisdiction exists is a question of law, which an appellate court reviews *de novo* when the relevant facts are undisputed.").

In *Trujillo v. Goodwin*, 2005-NMCA-095, 138 N.M. 48, 116 P.3d 839, the Court held that compliance with Rule 1-004 NMRA 2010 is required in order to give the district court jurisdiction over a respondent in a mandamus proceeding. The Court stated:

> The proper manner of service in this case is provided in NMSA 1978, § 38-1-17(A) & (H) (1970) and Rule 1-004(F)(3)(b) NMRA, which state that service on the State of New Mexico in any action in which a department is named a party is by "handing," § 38-17-17(H), or "delivering," Rule 1-004(F)(3)(b), the summons and complaint, or in this case the alternative writ and petition, to the head of the department and the attorney general. .

*Id.*, ¶ 9, 138 N.M. at 49-50, 116 P.3d at 840-841.

The record indicates that the second writ was issued on December 22, 2009. It does not "direct the manner of service." NMSA 1978, § 44-2-8 (1884). The record proper does not contain any indication that the district court sent the writ to the parties or that Brosious served it on MVD. *See* Rule 1-004(L) NMRA 2010 ("The party obtaining service of process or that party's agent shall promptly file proof of service.").

The lack of service of the second writ upon MVD and its impact on the district court jurisdiction results in the second writ not being binding upon it. *See Dorado Utils. v. Galisteo Domestic Water Users Ass'n*, 120 N.M. 165, 168, 899 P.2d 608, 611 (Ct. App. 1995) ("In the typical civil case in district court, failure to serve a party with process in a proper manner generally means only that the court has no power over that party and cannot render judgment binding that party").

## CONCLUSION AND RELIEF REQUESTED

The district court erred when it refused to find that MVD complied with the first writ. It should have either found that MVD complied and there was no longer an issue between the parties or that Brosious should have the opportunity to amend his petition and writ. The mandamus statutes do not allow the district court to order MVD to respond to the petition for writ of mandamus. The second writ issued by the court was doubly fatal because it did not meet the criteria for a peremptory writ and it was never served on MVD.

MVD requests that the Court find it complied with the first writ issued on August 13, 2009 and that the Court quash the second writ issued on December 22, 2009.

Respectfully submitted,

GARY K. KING
Attorney General

Julia Belles

Julia Belles
Special Assistant Attorney General
Taxation & Revenue Department
P O Box 630
Santa Fe, NM 87504-0630
(505) 827-9807
julia.belles@state.nm.us

Attorneys for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify I mailed a true and correct copy of the Brief in Chief this 7th day of May 2010, to:

Crowley & Gribble, P.C.
Attorneys for Christopher Brosious
4811 Hardware Dr. NE, Bldg D, Suite 5
Albuquerque, NM 87109
(505) 314-1450

Julia Belles
Special Assistant Attorney General