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 REPLY BRIEF

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NEW MEXICO STATUTES AND SUPREME COURT RULES:

Respondent-Appellant, New Mexico Taxation and Revenue Department, Motor Vehicle Division (MVD), and respectfully submits its Reply Brief pursuant to Rule 12-210(B)(2) NMRA 2010. Petitioner-Appellee (Brosious) mailed MVD a copy of his Answer Brief on July 8, 2010. The Reply Brief is timely filed.

REFERENCES TO THE RECORD

References to the record will be to the record proper (RP), to Brosious' Answer Brief (AB) and to MVD's Brief in Chief (BIC).

STATEMENT OF FACTS

Brosious states that there are "undisputed facts and law *sub justice*." (AB 3). Facts 3-7 are factual allegations originally made in the petition for writ of mandamus filed on August 6, 2009 and later incorporated into the second writ filed on December 22, 2009. (RP 1-5, 71-75). The district court erroneously considered the matters contained in the petition when it issued the second writ. These facts and legal issues are not undisputed. These facts and legal issues were only contained in the second writ which was incorrectly issued as a peremptory writ. MVD was not given the opportunity to dispute the law and facts.

The "law" contained in paragraph 8 (AB 5) is an incorrect statement. It appears Brosious is quoting from language in Senate Bill 275 introduced during the first regular legislative of 2009. The bill was amended and then signed into law. NMSA 1978, § 66-5-33.1 (2009) currently states:

Reinstatement of driver's license or registration; ignition interlock; fee. (2009)

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 [66-1-1 NMSA 1978] 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B. If a driver's license was revoked for driving while under the influence of intoxicating liquor or drugs, for aggravated driving while under the influence of intoxicating liquor or drugs or pursuant to the Implied Consent Act [66-8-105 NMSA 1978], the following are required to reinstate the driver's license:

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

(2) completion of the license revocation period;

(3) satisfaction of any court-ordered ignition interlock requirements; and

(4) a minimum of six months of driving with an ignition interlock license with no attempts to circumvent or tamper with the ignition interlock device.

C. The department may reinstate the driving privileges of an out-of-state resident without the requirement that the person obtain an ignition interlock license for a minimum of six months, if the following conditions are met:

(1) the license revocation period is completed;

(2) satisfactory proof is presented to the department that the person is no longer a resident of New Mexico; and

(3) he license reinstatement fee is paid.

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

ARGUMENT

Brosious basically argues that MVD waived any challenge or argument about the writ of mandamus when it failed to respond to his petition for the writ of mandamus. He alleges that MVD is putting form over substance. On the contrary, MVD did not waive any objections to the legal sufficiency of the writ. It pointed out in its Answer that it could not respond to the facts because no facts were contained in the writ. (RP 17). The statutory requirements, and the law interpreting them, are clear that it is the writ - not the petition – that must be examined to ensure it contains all factual allegations necessary to support its issuance, including a statement of the relief the applicant is actually requesting. The matter is reviewed *de novo*. *See OS Farms, Inc. v. N.M. Am. Water Co.*, 2009-NMCA-113, ¶ 19, 147 N.M. 221, 226, 218 P.3d 1269, 1274 (holding that statutory interpretation is an issue of law which is reviewed *de novo*).

The mandamus statutes are quite specific in that the district court can only consider the writ and answer and that all allegations to support the writ must be contained within the four corners of that documents. *See* NMSA 1978, § 44-2-11 (1884) "No other pleading or written allegation is allowed than the writ and answer."). Brosious relies upon the decision in *OS Farms, Inc. v. N.M. Am. Water Co.*, 2009-NMCA-113, 147 N.M. 221, 218 P.3d 1269. (AB 9). *OS Farms* actually supports MVD's argument. In that case, the Commission, relying upon

NMSA 1978, § 44-2-6 (1884), challenged the legal sufficiency of the writ arguing that the facts were not contained in the writ. *Id.*, ¶ 22, 147 N.M. at 227, 218 P.3d at 1275. The Court rejected the Commission's argument and held that the Commission waived its argument because it responded to the allegations in the petition and the writ. "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." *Id.*, ¶ 24, 147 N.M. at 227, 218 P.3d at 1275.

The Court's ruling in *OS Farms* is consistent with the mandamus statutes. *See* NMSA 1978, § 44-2-6 (1884) ("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…); NMSA 1978, § 44-2-11 (1884) ("No other pleading or written allegation is allowed than the writ and answer."). The ruling is also consistent with prior case law on mandamus proceedings. *See Mimbres Valley Irrigation Co.*

v. Salopek, 2006-NMCA-093, ¶ 14, 140 N.M. 168, 172, 140 P.3d 1117, 1121 ("The writ itself is therefore required to set forth the full and complete allegations which entitle the petitioner to the writ."); *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 ("Together, the writ and the answer form the issues that are before the court."); *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 705, 954 P.2d 763, 770 ("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.").

As previously argued by MVD, it did not waive its objections to the legal sufficiency of the writ. The legal requirement that all matters be contained in the writ is so that court testing its sufficiency can determine if the facts support the legal duty that respondent is commanded to do. Also, the legal requirement that all matters be contained in the writ is so that the respondent will know what act it is being compelled to perform. For example, if MVD had failed to respond to the writ issued on August 13, 2009, that writ would have become a peremptory writ. *See* NMSA 1978, 44-2-10 (1884) ("If no answer is made a peremptory mandamus shall be allowed against the defendant..."). However, what was ordered of MVD in the August 13, 2009 did not contain any order dealing with Brosious' driver's

license. There is nothing in that writ that would have alerted MVD to the facts and law that Brosious' believed involved a ministerial duty MVD was required to perform nor did the writ contain the performance of an action that would actually compel MVD to give Brosious the relief he actually wanted – a driver's license. The facts necessary for the writ, along with the relief requested, must be contained within the four corners of the document. A party against whom a writ is issued should not be forced into a guessing game. The district court's ordering 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. With respect to Brosious' claim that MVD's position honors form over substance, MVD points out that it is the statutory provisions regarding the mandamus procedure and the long line of cases interpreting these statutory provisions that makes it abundantly clear that mandamus is an extraordinary remedy that may appropriately be granted only if the technical pleading requirements are strictly followed. *See Mimbres Valley*, ¶ 10, 140 N.M. at 171, 140 P.3d at 1120 ("A mandamus proceeding is technical in nature and closely regulated by statute.").

Brosious argues that mandamus is the only option available because he has no other avenue to challenge the reinstatement requirements. (AB 19). First, Brosious misstates the law. He argues that MVD employs "a slight of hand" by

relying upon language in the Implied Consent Act that refers to reinstatement requirements that he incorrectly asserts were amended in 2009. (BIC 18). The criteria for reinstatement are contained in § 66-5-33.1. The revocation periods under the Implied Consent Act, NMSA §§ 66-8-105 through 112 (2005), are set forth in NMSA 1978, § 66-8-111 (2005). This provision was not amended in 2009 as Brosious states. The language providing that a person's license or privilege to drive remains revoked "until all conditions for license reinstatement are met, whichever is later" was from amendments that occurred in 1993. *See* 1993, N.M. Laws, ch. 66, § 12. Brosious has yet to comply with the 1993 amendments requiring that he meet all conditions for reinstatement mandated in § 66-5-33.1.

Second, had Brosious set forth the factual allegations and argument in the writ, MVD could have responded and pointed out he has an adequate remedy at law. *See* 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 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.").

NMSA 1978, § 66-2-17(I) NMSA (1995) states: "No court of this state has jurisdiction to entertain any proceeding by any person in which the person calls into

question the application to that person of any provision of the Motor Vehicle Code, except as a consequence of the appeal by that person to the district court from the action and order of the secretary or hearing officer as provided for in this section."

These arguments made by Brosious clearly highlight the importance of the statutory requirement that writ of mandamus itself contain all factual allegations and arguments necessary to show the petitioner is entitled to the relief ordered in the writ without reference to factual allegations and argument in the petition for the writ of mandamus. The reason for this requirement is obvious when considering the statutory scheme controlling the mandamus procedure. If the respondent fails to answer an alternative writ of mandamus, it becomes a peremptory writ, which, when served upon the respondent, orders the respondent to perform an explicit ministerial act and set forth the specific facts to show that respondent is obligated by law to do so. *See* § 44-2-6, *supra*.

The August 13, 2009 writ did not set forth facts and it did not contain the relief Brosious ultimately wanted. MVD is not required to guess which legal arguments or facts in the petition are actually the ones Brosious was relying upon in getting the writ issued. It is the writ that the law requires contain those facts and arguments. The district court erred when it failed to test the legal sufficiency of the writ by considering only the language contained within the four corners of that pleading. The district court considered matters contained only in the petition

for the writ. It further erred when it failed to evaluate whether Brosious was entitled to the relief he requested based only on the consideration of the writ and the answer. Instead, the district court, contrary to explicit provisions 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.

Finally Brosious argues that because the writ issued on December 22, 2009 contained the word "issued" on it that it must have been issued. (AB 21-22). Being issued and filed in court does not comply with the mandamus procedures requiring that writ contain service or any other service requirement as MVD previously argued. (BIC 19).

CONCLUSION AND RELIEF REQUESTED

The district court erred when it refused to find that MVD complied with the first writ. Even if Brosious believes the requirement the writ contain all factual allegations necessary to support its issuance puts form over substance, it is nevertheless a requirement set forth in the mandamus statutes. 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,

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CERTIFICATE OF SERVICE

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