11-21-2018

McGowen v. Second Jud. Dist. Ct., 134 Nev. Adv. Op. 89 (Nov. 21, 2018) (en banc)

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McGowen v. Second Jud. Dist. Ct., 134 Nev. Adv. Op. 89 (Nov. 21, 2018) (en banc)[1]

CIVIL LAW: WRIT OF MANDAMUS

Summary

The Court determined that Nevada caselaw and NRCP 4(c) give conflicting opinions on whether an attorney or their employee can serve someone for their client. Moreover, the Court clarified that the purpose of the 2004 amendment to NRCP 4(c) was to mirror FRCP 4(c)(2) to interpret the exclusion of counsel as a "party".

Background

McGowen is a licensed and practicing attorney in Texas. McGowen was invited to a settlement conference in Nevada by a party to an unrelated dispute in which one of his client's had an interest in. McGowen attended the settlement conference and a deposition in Nevada on behalf of his client. He was later served with a summons and complaint after the conclusion of the deposition. There are conflicting arguments as to whether W. Chris Wicker, the attorney of the plaintiff in the complaint, or Dianne Kelling, Wicker's assistant at his firm, served McGowen.

McGowen moved to quash the service and dismiss the case, interpreting NRCP 4(c) to state that plaintiff's counsel and employees of the counsel cannot serve on behalf of their client because they are not disinterested persons to the complaint.

Discussion

We elect to consider the writ petition

The Court must first determine if it will consider the petition for writ. The Court relied on language from *Cote H. v. Eighth Judicial Dist. Ct.*, which states that "[a] writ of mandamus is available to compel the performance of an act which the law . . . [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion."[2] Further, NRS § 34.170 clarifies that this type of relief is typically only given when no "plain, speedy and adequate remedy in the ordinary course of law" is available.[3]

McGowen argued that there is no plain, speedy or adequate remedy because, even if he appeals the district court's decision after the case has ended, he would have wasted a large amount of resources on the case. Further, he does not believe the district court even has jurisdiction over it because he does not have enough minimum contacts in Nevada. McGowen argues that the caselaw in Nevada and the NRCP conflict in language on whether an attorney or their employee may serve as a disinterested person on behalf of their client, and therefore his petition should be considered. Crystal, the plaintiff of the unrelated case that was attempting to serve McGowen, argues that the language of NRCP 4(c) is unambiguous and McGowen's writ should be denied.

The Court agreed with McGowen that there is conflicting language between the NRCP and Nevada caselaw and accepted his petition accordingly.

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[1] By Darcy Bower.

[2] 124 Nev. 36, 39, 175 P.3d 906, 907–08 (2008).

[3] NEV. REV. STAT. § 34.170 (2017).

NRCP 4(c) does not prohibit service of process by a plaintiff's attorney or the attorney's employee

The specific language of the rule states that "[p]rocess shall be served . . . by any person who is not a party and who is over 18 years of age."[4] McGowen argues that the 2004 amendment to the rule codifies *Sawyer v. Sugarless Shops, Inc.*, such that the term "party" includes the attorney for the plaintiff and their employees.[5] Crystal, on the other hand, argues that the district court's holding does not violate the plain language of NRCP 4(c) because the 2004 amendment to the rule superseded the common law. Further, dicta from Sawyer only said that "service is *best* taken away from the parties or their counsel or counsel's employees"[6] Finally, Crystal argues that the language of the rule is almost identical to the FRCP4(c)(2), which the federal courts have interpreted to allow service by an attorney of the plaintiff or their employee.

The Court discusses three inconsistencies within the drafter's note of the 2004 amendment to NRCP 4(c). The first inconsistency is the reference to the common law term "disinterested person." While the drafter's note uses this term, it failed to include the term in the language of the rule amendment. Second, when the drafter's note cites to *Sawyer*, it did not use "disinterested person," but rather restated the plain language of the rule. Lastly, the drafter's note discusses that the purpose of the amendment is to make it consistent with the federal rule. At the time of the amendment, the federal courts interpreted FRCP 4(c)(2) to allow service by plaintiffs' attorneys.

The drafter's note to the 2004 amendment clearly states that the goal was to conform the rule to its federal counterpart which interprets the word "party" to exclude counsel and, therefore, the Court concluded that NRCP 4(c)'s language does so as well.

Conclusion

The Court held that the plain language of NRCP 4(c) does not exclude the plaintiff's attorney or employees of the attorney. Accordingly, the Court held that the district court properly denied the motion to quash and thus denied McGowan's petition for a writ of mandamus.

PICKERING, J., Dissented

There is long-standing Nevada precedent in *Sawyer* which holds that the term "party" includes the lawyers of the parties of the case.[7] Further, this Court does not defer to federal case law to interpret the state rules for three reasons. First, the federal case law that the majority relies on is thin and split among the districts. Second, the Court cannot read this starting on a fresh slate, but rather needs to take into consideration the long-standing Nevada caselaw, which states that the party and the attorney to the party might as well be the same person. Third, the majority relies on the drafter's note to the 2004 amendment, however that note expressly supports the holding in *Sawyer*.[8] The dissent therefore concludes that this Court is bound by previous Nevada precedent and should have granted the writ.

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[4] NEV. R. CIV. P. 4(c).
[5] 106 Nev. at 270, 792 P.2d at 17.
[6] *Id.* (emphasis added).
[7] 106 Nev. 265, 269-70, 792 P.2d 14, 17 (1990).
[8] 106 Nev. at 269, 792 P.2d at 17.