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McNamee v. Eighth Judicial District Court, 135 Nev. Adv. Op. 52 (Oct. 17, 2019)

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CIVIL LAW: WRIT OF MANDAMUS

Summary

The Court overruled *Barto v. Weishaar*, partly granted the petitioner's writ of mandamus, and held that if a suggestion of death is properly served, the 90-day deadline to file a motion to substitute is triggered regardless of which party files it and whether it identifies the deceased party's successor or representative.²

Background

James McNamee rear-ended another vehicle. Consequently, the driver and passenger suffered injuries. Opposing counsel sued McNamee for damages, alleging negligence and negligence per se.

Before the case was resolved, McNamee died. On September 20, 2017, McNamee's attorney filed and served opposing counsel with a suggestion of death without naming a successor or representative. On the same day, McNamee's attorney also filed a petition naming Susan Clokey as petitioner. Clokey was an employee of the law firm representing McNamee. The probate court subsequently granted this petition.

On December 14, 2017, just short of 90 days after the suggestion of death was filed, McNamee's attorney filed a motion to substitute the special administrator for McNamee as the defendant in the negligence suit. The district court denied this motion and ordered the parties to give three names for the court to consider as administrators for McNamee's estate. The district court denied the motion to substitute Clokey. Instead, the district court named Fred Waid as the general administrator of McNamee's estate.

Afterwards, McNamee's attorney filed a motion to dismiss the negligence case since his motion to substitute was denied and no other motion to substitute was filed within NRCAP 25(a)(1)'s 90-day deadline. The district court denied McNamee's motion to dismiss and granted his motion to amend the appointment of Waid as special and general administrator of McNamee's estate.

Discussion

A writ of mandamus allows the court to control an arbitrary or capricious exercise of discretion.³ A writ relief may be granted in three instances: (1) the record reflects clear legal error, (2) the record reflects manifest abuse of discretion by the district court, or (3) when an important issue of law requires clarification.⁴ The Nevada Supreme Court allows "very few exceptions where considerations of sound judicial economy and administration militate[] in favor of granting such petitions."⁵ Here, the Court agrees to review McNamee's petition to clarify NRCAP 25(a)(1)'s requirements and correct the district court's manifest abuse of discretion in denying McNamee's motion to substitute.

¹ By Alfa Alemayehu.

² 101 Nev. 27, 692 P.2d 498 (1985).

³ See NEV. REV. STAT. 34.160 (2015); *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

⁴ *Archon Corp. v. Eighth Judicial Dist. Ct.*, 133 Nev. 816, 819-20, 407 P.3d 702, 706-07 (2017).

⁵ *Smith v. Eighth Judicial Dist. Ct.*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997).

The first issue is whether the district court properly denied McNamee's motion to dismiss the negligence case. While the district court may rule on a motion to substitute, McNamee's counsel argued that the district court should have dismissed the negligence case because his motion to substitute was denied and no other motion was filed within 90 days. Opposing counsel argued that the district court properly denied McNamee's motion to dismiss because the 90-day deadline was not even triggered since the suggestion of death didn't identify a successor or representative, under *Barto*. McNamee's counsel advised the court to reconsider its holding in *Barto* arguing that it is bad law and bad policy.

Here, the Court said it incorrectly held *Barto* and acknowledged that it broadly interpreted the scope of NRC 25(a)(1). *Barto* was based on *Rende v. Kay*.⁶ In *Rende*, the court stated that since the federal rule would allow a party, successor, or representative to file the suggestion of death, the advisory committee "plainly contemplated" that the deceased party's counsel would identify a successor or representative.⁷ The Nevada Supreme Court disagreed since this requirement was not affirmed by either the federal rule or the advisory committee notes. The Court is also not worried about the possibility of burdening the plaintiff to find the estate's representative within 90 days because a party may request more time to file the motion to substitute under NRC 6(b).⁸ The Court also reasoned that since McNamee's suggestion of death did not trigger the 90-day deadline, the district court was not required to dismiss the negligence case against McNamee, under NRC 25(a)(1). Thus, the Nevada Supreme Court held that NRC 25(a)(1) doesn't require that a suggestion of death include the name of the deceased party's successor or representative to trigger the 90-day deadline.

The second issue is whether the district court's exercise of discretion was arbitrary or capricious when it denied McNamee's motion to substitute the special administrator appointed by the probate court and instead appoint and substitute a different representative for McNamee's estate. The district court denied McNamee's motion because it was "bothered" that McNamee's counsel wanted to substitute his law firm's employee, Clokey, as the defendant. The court didn't think the choice was "improper" but that it "just felt it would be better to have a third party come in." Therefore, since the district court's decision was based solely on preference, the Nevada Supreme Court concluded that this was an arbitrary or capricious exercise of the district court's discretion.

Conclusion

The Nevada Supreme Court held that the district court arbitrarily or capriciously exercised its discretion when it denied McNamee's motion to substitute based solely on the court's preference that someone other than the special administrator appointed by the probate court be appointed as administrator of McNamee's estate. The Court also overruled *Barto* stating that it broadly interpreted NRC 25(a)(1). Finally, the Court held that if a suggestion of death is properly served, the 90-day deadline to file a motion to substitute is triggered regardless of which party files it and whether it identifies the deceased party's successor or representative. All in all, the Court granted the petition in part and direct the clerk to issues a writ of mandamus directing the district court to vacate its orders and reconsider the motion to substitute.

⁶ 415 F.2d 983 (D.C. Cir. 1969).

⁷ 415 F.2d at 985.

⁸ *Moseley v. Eighth Judicial Dist. Ct.*, 124 Nev. 654, 662-64, 188 P.3d 1136, 1142- 43 (2008).