

IN THE SUPREME COURT OF THE STATE OF NEVADA

FARMERS INSURANCE EXCHANGE,
Petitioner,

vs.

THE NINTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
DOUGLAS, AND THE HONORABLE
MICHAEL P. GIBBONS, DISTRICT
JUDGE,

Respondents,

and

TIMOTHY TOTARO AND DEBORAH
TOTARO,
Real Parties in Interest.

No. 49812

FILED

AUG 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Vane
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying petitioner's motion for summary judgment and granting real parties in interest's motion for partial summary judgment.

One night, apparently unconscious from suffering a seizure, Russell Nafus drove his automobile into real parties in interest Timothy and Deborah Totaro's detached garage, which housed their tractors and boat. As a result of the crash, Nafus's automobile was covered by substantial debris and wedged against the Totaros' boat. The Totaros did not learn of the accident until the following morning when law enforcement officers informed them of the collision and apparently sought

Timothy's help in rescuing Nafus, who remained unconscious and trapped inside his automobile.

While assisting law enforcement and medical personnel in freeing Nafus, Timothy tripped and fell, sustaining injuries purportedly requiring medical treatment, including surgery. Based on those injuries, the Tataros instituted a tort action against Nafus, resulting in a \$25,000 settlement—Nafus's automobile insurance policy limits.

Believing that amount was insufficient to compensate Timothy for his injuries, the Tataros filed a claim with their automobile insurer, petitioner Farmers Insurance Exchange, under the Underinsured Motorist Provision of their policy. Farmers Insurance denied the claim. Consequently, the Tataros instituted the case below against Farmers Insurance, including causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, and seeking declaratory relief.

Thereafter, Farmers Insurance moved for summary judgment on all of the Tataros' claims, essentially arguing that Timothy's injuries did not "arise out of the ownership, maintenance[,] or use of [Nafus's] vehicle," which the underinsured motorist provision of the Tataros' policy with Farmers Insurance required. That argument was based in part on a Nevada federal district court decision, which noted that for an injury to "arise out of" the "use" of an automobile, "a causal connection between [the] use and the resulting injury" must exist.¹ The federal district court

¹Great West Casualty Co. v. See, 185 F. Supp. 2d 1164, 1169 (D. Nev. 2002).

further explained, “the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile.”²

The Tataros countered, moving for summary judgment on their claims for breach of contract and declaratory relief, essentially arguing that so long as the injury would not have happened “but for” the use of the vehicle, a sufficient causal connection between the use and injury exists to fall within the Underinsured Motorist Provision.³ The district court, agreeing with the Tataros’ analysis, ultimately entered an order denying Farmers Insurance’s motion and granting partial summary judgment to the Tataros on their breach of contract and declaratory relief claims. But the district court declined to make findings with respect “to the extent or value of any damages,” reserving those issues for trial. This petition followed.

Both mandamus and prohibition are extraordinary remedies, and whether a petition for extraordinary relief will be considered is within our discretion.⁴ A writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse

²Id. at 1170 (quoting Fidelity & C. Co. of N. Y. v. North Carolina F. B. M. I. Co., 192 S.E.2d 113, 118 (N.C. Ct. App. 1972)).

³Butzberger v. Foster, 89 P.3d 689, 694 (Wash. 2004).

⁴See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

or arbitrary or capricious exercise of discretion.⁵ This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial function, when such proceedings are in excess of the district court's jurisdiction.⁶

This court will not exercise its discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.⁷ Even then, a writ may issue only when petitioner has no plain, speedy, and adequate legal remedy,⁸ and this court has consistently held that an appeal is an adequate legal remedy precluding writ relief.⁹ Farmers Insurance, moreover, as petitioner, bears the burden of demonstrating that extraordinary relief is warranted.¹⁰

Having considered this petition and its supporting documentation in light of those principles, we are not persuaded that our intervention by way of extraordinary relief is warranted. In particular, while the proper construction of the Underinsured Motorist Provision

⁵See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁶See NRS 34.320.

⁷Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

⁸NRS 34.170; NRS 34.330.

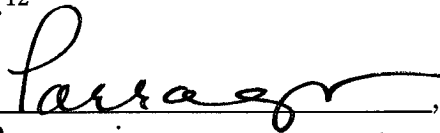
⁹See Pan v. Dist Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

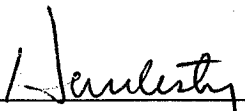
¹⁰Id. at 228, 88 P.3d at 844.


language at issue here, might be an issue of law requiring clarification, under the circumstances of this case, Farmers Insurance's right to appeal any adverse final judgment appears to be an adequate legal remedy precluding extraordinary relief.¹¹

Accordingly, we

ORDER the petition DENIED.¹²

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

cc: Hon. Michael P. Gibbons, District Judge
Feldman Graf
Lemons Grundy & Eisenberg
Burton Bartlett & Glogovac
Douglas County Clerk

¹¹NRS 34.170; NRS 34.330; Pan, 120 Nev. at 224; 88 P.3d at 841.

¹²NRAP 21(b); Smith, 107 Nev. 674, 818 P.2d 849.