IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT KATZMAN AND ALLAN RUBIN,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHELLE LEAVITT, DISTRICT JUDGE,
Respondents,
and
ED GARDOCKI; RONALD SWEATT; AND LYDIA SWEATT,
Real Parties in Interest.

No. 43279

FILED

AUG 2 6 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court's oral ruling that attorney Allan Rubin is disqualified from representing petitioner Robert Katzman in his upcoming trial.

FACTS

This dispute began in July of 1998, when real party in interest Edward Gardocki entered into an agreement with petitioner Robert Katzman to purchase Katzman's interest in a parcel of real property in Las Vegas. Katzman owned a 50% interest in Motor City LLC, which held title to the real property at issue. Ron and Lydia Sweatt owned the other 50% interest in Motor City LLC. Allan Rubin, a Michigan attorney whose disqualification is the subject of this writ petition, prepared the purchase

agreement, at Katzman's request. He was also present on July 20, 1998, when Gardocki and Katzman signed the purchase agreement.

After Katzman and Gardocki signed the agreement, however, the Sweatts refused to consent to the sale of Katzman's interest to Gardocki. Gardocki and Katzman filed suit in Nevada state court against the Sweatts and Motor City LLC. After lengthy proceedings, the Nevada district court granted summary judgment to the Sweatts, and concluded that the Sweatts' voting rights were still valid. Thus, because the Sweatts never gave written consent to the sale of Katzman's interest, the district court concluded that the transfer of Katzman's interest to Gardocki was invalid, and the court unwound the transfer.

A dispute arose between Katzman and Gardocki, and Gardocki amended his complaint to include claims for malpractice, fraud, and conspiracy against Rubin, individually, and his law firm, as well as breach of contract, unjust enrichment, fraud, and conspiracy claims against Katzman. Katzman countered with a breach of contract claim against Gardocki. On January 26, 2004, the district court granted summary judgment to Rubin and partial summary judgment to Katzman on the fraud and conspiracy claims. The district court also deferred ruling on Gardocki's unjust enrichment claim, but stated that at the time of trial it would not permit Gardocki to allege the existence of both a written contract and assert a claim for unjust enrichment. Thus, Rubin was dismissed as a party to the action, and the only claims remaining between Gardocki and Katzman were the dueling breach of contract claims and tentatively, Gardocki's unjust enrichment claim.

On May 3, 2004, Gardocki's attorney indicated at a calendar call that he planned to call Rubin as a witness at the upcoming trial.

Consequently, the district court questioned whether Rubin should be disqualified under SCR 178. The parties briefed the issue, and after argument at a May 10, 2004 hearing, the district court orally ruled that Rubin was disqualified from representing Katzman at trial. The transcript of the district court hearing does not provide significant insight into the district court's reasoning for disqualifying Rubin, and no written order has been entered.

Katzman then filed a petition for a writ of mandamus with this court, challenging Rubin's disqualification, and sought a stay of proceedings from the district court. After the district court denied his stay motion, Rubin sought a stay with this court. We granted a temporary stay and ordered Gardocki to answer the petition. Katzman has requested leave to file a reply to the answer, and Gardocki has, in turn, requested permission to file an opposition to Katzman's reply.[1]

DISCUSSION

In light of this court's recent opinion in State, Division of Child and Family Services v. District Court,[2] the district court's oral disqualification order is ineffective.

In DCFS, the Nevada Division of Child and Family Services (Division) filed a petition for a writ of mandamus that challenged a district court's oral contempt order. In the underlying proceedings, the district

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[1]In light of the new issue raised by Gardocki in his answer, we grant Katzman leave to file his reply to the answer, and Gardocki leave to file his opposition to Katzman's reply. We direct the clerk of this court to file Katzman's reply, provisionally received on June 9, 2004, and Gardocki's opposition, provisionally received on June 21, 2004.

[2]120 Nev. ___, 92 P.3d 1239 (2004).

court had orally ordered the release of a fourteen-year-old foster child from a psychiatric treatment facility. The Division did not immediately comply with the order, and when the Division's noncompliance was brought to the district court's attention, the district court orally held the Division in contempt and imposed sanctions.

In granting the Division's petition for a writ of mandamus, we held that the district court's oral orders had to be "written, signed, and filed before they became effective."[3] We went on to explain that because the district court's oral release order was never reduced to writing and filed, the district court could not hold the Division in contempt for violating that order. Additionally, we clarified that "dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective." Conversely, "oral court orders pertaining to case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain an advantage are valid and enforceable."[4]

The district court's oral ruling that disqualified Rubin falls within the category of orders that must be written and filed to be effective. The district court's disqualification order tangentially deals with the merits of the underlying controversy, and Rubin's disqualification arguably grants a tactical advantage to Gardocki. Accordingly, the district court's disqualification order is ineffective. Additionally, given the inherent difficulty in reviewing a written order that neglects to explain the

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[3]Id. at ___, 92 P.3d at 1245.

[4]Id.

basis of a decision under SCR 178, the district court must include written findings explaining its decision in such disqualification matters. Finally, because we have never addressed how a court should analyze an attorney's disqualification under SCR 178 in a published opinion, we take this opportunity to offer guidance to the district court on this issue.

SCR 178(1)

SCR 178(1) states, in relevant part:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: . . .
>
> (c) Disqualification of the lawyer would work substantial hardship on the client.

Accordingly, the district court must first determine if the attorney is likely to be a necessary witness.[5] If so, then the district court must balance the parties' interests and address whether the attorney's disqualification will cause hardship to his client.[6]

Although we have not had occasion to define "necessary witness" under SCR 178, it is well recognized across the country that for an attorney to be a necessary witness, his testimony must be "'relevant, material, and unobtainable elsewhere.'"[7] Accordingly, if the attorney's testimony is merely cumulative, or collateral, or contained in a document

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[5]DiMartino v. Dist. Ct., 119 Nev. 119, 66 P.3d 945 (2003).

[6]Id.

[7]See State v. Van Dyck, 827 A.2d 192, 194 (N.H. 2003) (quoting World Youth Day, Inc. v. Famous Artists, 866 F. Supp 1297, 1302 (D. Colo. 1994)); accord Humphrey ex rel. State v. McLaren, 402 N.W.2d 535, 541-42 (Minn. 1987); Smithson v. U.S. Fidelity & Guar. Co., 411 S.E.2d 850, 856 (W. Va. 1991).

admissible as an exhibit, the attorney is not ordinarily a necessary witness.[8] Moreover, the party seeking disqualification must specifically identify the testimony it seeks to elicit from the attorney, and explain how the testimony relates to the cause of action.

If the attorney is deemed to be a necessary witness, then the court must consider if his disqualification will work a substantial hardship on his client. The substantial hardship exception to SCR 178 requires a balancing of the parties' interests. The court must consider the effect of the disqualification on the attorney's client, as well as the prejudice to the party seeking disqualification if it is denied, and the attorney is allowed to act both as an advocate and a witness.[9] Prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses.[10] In addition, in light of SCR 178's potential misuse as a tactical ploy, in cases where the attorney will be called to testify for the opposing party, the showing of prejudice must be more stringent than when the attorney is testifying on behalf of his client.[11]

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[8]Humphrey, 402 N.W.2d at 541.

[9]See American Bar Association, Annotated Model Rules of Professional Conduct, R. 3.7, cmt 4 (5th ed. 2003).

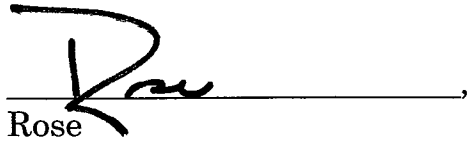
[10]Id.

[11]Zurich Ins. Co. v. Knotts, 52 S.W.3d 555 (Ky. 2001).

CONCLUSION

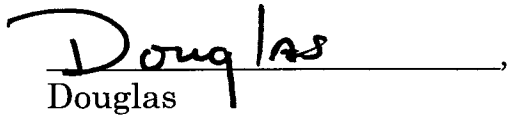
As a result of the absence of a written disqualification order, we grant Katzman's petition for a writ of mandamus and instruct the clerk of this court to issue a writ of mandamus directing the district court to vacate its oral ruling and to issue a written order, including findings, in its place.

It is so ORDERED.[12]



_____, J.
Rose

_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Hall Jaffe & Clayton, LLP
Laxalt & Nomura, Ltd./Reno
Callister & Reynolds
Kerr & Associates
Clark County Clerk

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[12]In light of this order, we dissolve the temporary stay of district court proceedings in District Court Case No. A398514, granted on May 12, 2004.