IN THE SUPREME COURT OF THE STATE OF NEVADA

MIKE SCHAEFER,
Appellant,
vs.
HOWARD L. LOMAX, REGISTRAR OF VOTERS, CLARK COUNTY, STATE OF NEVADA, A/K/A HARVARD L. LOMAX,
Respondent.

No. 43817

FILED

DEC 29 2005

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing a petition that sought to have NRS 293.263, governing the alphabetical listing of candidates on election ballots, declared unconstitutional, and from an order denying a NRCP 60(b)(1) motion for relief from the dismissal order.[1] Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

In the proceedings below, the district court dismissed with prejudice appellant's petition, finding that, although appellant's arguments were "interesting and compelling," dismissal nevertheless was appropriate. The court concluded that appellant had named the wrong parties and the court was "not inclined to engage in judicial activism."

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[1]See Holiday Inn v. Barnett, 103 Nev. 60, 732 P.2d 1376 (1987) (concluding that an order denying a NRCP 60(b) motion is independently appealable). In the same order denying appellant's NRCP 60(b) motion, the district court denied his NRCP 59(e) motion to alter or amend the dismissal order. The denial of the Rule 59(e) motion is not independently appealable in that it did not affect the rights of any of the parties, as determined by the order dismissing the petition. See NRAP 3A(b)(2); Gumm v. Mainor, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002).

First, because the named respondent in this case is responsible for ballot preparation in Clark County, the district court's determination that appellant had failed to name the proper parties is erroneous. Also, the Secretary of State could have been joined as a party, or the court could have allowed appellant, as he had requested, to amend his petition accordingly. Next, the district court's conclusion that it would be "judicial activism" for it to rule on the constitutionality of NRS 293.263 is contrary to the well-established tenet of our legal system, which endows the judiciary with the duty of constitutional interpretation.[2]

Nevertheless, because the record reveals at least one valid and final judgment against appellant on the merits of his claim that NRS 293.263 is unconstitutional, the doctrine of claim preclusion barred him from raising the same claim again in this proceeding.[3] Additionally,

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[2]See Marbury v. Madison, 5 U.S. at 137, 177-78 (1803) (recognizing that it is the duty of the courts to be the final arbiter of statutory construction with Chief Justice John Marshall's statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); Williams v. State, 118 Nev. 536, 545, 50 P.3d 1116, 1122 (2002) (noting that it is the court's duty to determine whether legislation passes constitutional scrutiny); see also NRS 30.040 (providing for judicial determination of a challenged statute's validity).

[3]See Schaefer v. Tighe, Eighth Judicial Dist. Ct., Case No. A344506 (Order Denying Petition for Writ of Mandamus, dated April 11, 1995) (concluding, among other things, that the ballot placement statutes did not impact a matter of constitutional concern and, even if they did, the statutes were rationally related to a legitimate state interest); Schaefer v. Tighe, Docket No. 27159 (Order dismissing appeal, January 23, 1998); Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 835, 963 P.2d 465, 473 (1998) (indicating that, when there exists a valid and final judgment against a party on the merits of a claim, the doctrine of claim preclusion bars that party from raising the same claim in a subsequent proceeding).

applying with equal force here is the general rule of issue preclusion, which provides that, "if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties."[4] After judgment was entered against appellant in the first case, he sought appellate review and this court denied him relief. Thus, because there exists a valid and final judgment on his claim that NRS 293.263 is unconstitutional, and the issue of whether the alphabetical listing provides an unfair advantage to certain candidates has been fully litigated, appellant is precluded from raising the same claim and relitigating the same issue in this action. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.
Becker

Rose, J.
Rose

Maupin, J.
Maupin

Gibbons, J.
Gibbons

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

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[4]See Executive Management, 114 Nev. at 835, 963 P.2d at 473 (quoting University of Nevada v. Tarkanian, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994) (quoting Charles A. Wright, Law of Federal Courts § 100A, at 682 (4th ed.1983)).

cc: Hon. Jessie Elizabeth Walsh, District Judge
Mike Schaefer
Clark County District Attorney David J. Roger/Civil Division
Clark County Clerk