

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM E. SCHAEFFER,
ESMERALDA COUNTY DISTRICT
ATTORNEY,
Petitioner,
vs.
THE FIFTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
ESMERALDA AND THE HONORABLE
JOHN P. DAVIS, DISTRICT JUDGE,
Respondents,
and
KENNETH N. ELGAN, ESMERALDA
COUNTY SHERIFF AND LEWIS
TAITEL, ACTING DISTRICT
ATTORNEY FOR THE COUNTY OF
ESMERALDA,
Real Parties in Interest.

No. 43852

FILED

NOV 16 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of prohibition challenges district court orders (1) striking petitioner's preemptory challenge to the district judge and (2) appointing an "acting district attorney" to prosecute a removal action against petitioner. We directed the real parties in interest to file an answer, which they timely filed. We also grant petitioner's motion for leave to file a reply, and direct the clerk to file the reply received on September 30, 2004.

This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court.¹ A

¹NRS 34.320.

petition for a writ of prohibition is addressed to the sound discretion of this court.² Further, such a writ may issue only when there is no plain, speedy, and adequate remedy at law.³ Prohibition will lie to arrest the proceedings of the district court if it improperly strikes a peremptory challenge.⁴

The district court concluded that a summary removal proceeding under NRS 283.440 was not a "civil action" to which SCR 48.1 applied, and so the district court struck petitioner's peremptory challenge. Petitioner argues that since a removal proceeding is not criminal, it must be civil and thus, SCR 48.1 applies. The real parties in interest counter that a statutory removal proceeding is neither criminal nor civil, but a special proceeding in which the normal rules of civil procedure do not apply. They further contend that Schaeffer is free to file an affidavit of bias and prejudice under NRS 1.235 if he believes the district judge is biased against him, and that the summary proceeding contemplated by NRS 283.440 would not be well served by allowing a delay for peremptory challenges.

We note that SCR 48.1 is not part of the Nevada Rules of Civil Procedure, and so we need not consider whether the rules of civil procedure generally apply to summary removal proceedings. We perceive no reason for excluding summary removal proceedings from the general

²Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

³NRS 34.330.

⁴State, Dep't Mtr. Veh. v. Dist. Ct., 113 Nev. 1338, 1342-43, 948 P.2d 261, 263 (1997).

application of SCR 48.1. The California Court of Appeals has said, with respect to its statute authorizing peremptory challenges:


The right to exercise a peremptory challenge . . . is a substantial right and an important part of California's system of due process that promotes fair and impartial trials and confidence in the judiciary. As a remedial statute, [it] is to be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if the statute absolutely forbids it.⁵

Although peremptory challenges in Nevada are governed by rule instead of statute, we agree with the California court's determination that a liberal construction best serves the rule's purpose. Accordingly, we grant the petition in part,⁶ and we instruct the clerk of this court to issue a writ of prohibition preventing Judge Davis from presiding over this case.

It is so ORDERED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁵Davcon, Inc. v. Roberts & Morgan, 2 Cal. Rptr. 3d 782, 786 (Ct. App. 2003) (quoting Stephens v. Superior Court, 116 Cal. Rptr. 2d 616, 622 (Ct. App. 2002)).

⁶We are not persuaded that the district court acted improperly in appointing a special prosecutor to pursue the removal action, cf. NRS 283.430, and so we deny the petition to the extent that it seeks relief from this order. In addition, we vacate the stay imposed by our August 31, 2004 order.

cc: Hon. John P. Davis, District Judge
Esmeralda County District Attorney
Kenneth N. Elgan
Lewis S. Taitel
Esmeralda County Clerk