

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN CHEW,  
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE, AND THE HONORABLE  
CONNIE J. STEINHEIMER, DISTRICT  
JUDGE,

Respondents,

and

PETER DUBE,  
Real Party in Interest.

No. 48763

FILED

FEB 08 2007

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order striking a preemptory challenge as untimely. As discussed below, we conclude that the district court erred in applying SCR 48.1's time requirement. In addition, since petitioner has no plain, speedy, and adequate remedy at law, mandamus is available to enforce the rule's provisions.

The underlying district court action is currently assigned to Department 7 of the Second Judicial District Court. The Honorable Bridget Robb Peck of that department ruled on contested matters during the fall of 2006. Judge Peck was defeated in the November 2006 election. In December 2006, the parties set the matter for trial in March 2007.

Judge Peck's successor, the Honorable N. Patrick Flanagan, was sworn in on January 2, 2007. No notice of this event was provided to the parties or counsel in cases pending in Department 7. Judge

07-03170

Flanagan's public investiture ceremony occurred on January 5, 2007. On January 8, 2007, counsel for petitioner telephoned Department 7 and learned that Judge Flanagan had been sworn in on January 2, 2007. Petitioner Brian Chew then immediately, on January 8, 2007, filed a peremptory challenge against Judge Flanagan.

The case was randomly reassigned to Department 4. Real party in interest Peter Dube then moved to strike the peremptory challenge as untimely. Dube argued that a peremptory challenge was due no later than January 5, 2007, three days after Judge Flanagan was actually sworn in.<sup>1</sup> The district court agreed, struck the peremptory challenge, and reassigned the matter to Department 7. This writ petition followed; we ordered Dube to file an answer, which he has done.

A peremptory challenge is addressed to the individual judge, not simply the department number.<sup>2</sup> Thus, any peremptory challenge before Judge Flanagan was sworn in would be ineffective, since he was not a judge at that time. We therefore reject Dube's argument that Chew should have filed a peremptory challenge in December 2006, before the matter was set for trial: at that time, Judge Flanagan was not yet a judge; rather, Judge Peck was still in office.

SCR 48.1 provides, in pertinent part and with emphasis added:

4. If a case is not assigned to a judge before the time required for filing the peremptory challenge, the challenge shall be filed:

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<sup>1</sup>See SCR 48.1(4)(a).

<sup>2</sup>See SCR 48.1(1) (requiring that a peremptory challenge "state the name of the judge to be changed").

(a) Within 3 days after the party or his attorney is notified that the case has been assigned to a judge.

The emphasized language clearly contemplates some notice of the new assignment. Here, although Chew presumably was aware shortly after the November election that Judge Flanagan had won the election and thus would be succeeding Judge Peck, any peremptory challenge would be premature until Judge Flanagan had actually taken office. No notice of Judge Flanagan's January 2 swearing in was provided to Chew or his counsel, and the publicized formal investiture took place on January 5. We have previously stated, "The [peremptory challenge] privilege must be exercised with dispatch or permanently forfeited."<sup>3</sup> Here, we perceive no lack of dispatch: the peremptory challenge was filed on January 8, 2007, three days after Judge Flanagan's public investiture and before he heard any contested matters. We thus conclude that the challenge was timely.<sup>4</sup>

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station,<sup>5</sup> or to control a manifest abuse of discretion.<sup>6</sup> Mandamus is an extraordinary remedy, and it is within this court's discretion to determine

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<sup>3</sup>See Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 852 (1991).

<sup>4</sup>See SCR 48.1(4)(a); see also Smith, 107 Nev. at 678, 818 P.2d at 852 (concluding that peremptory challenge filed shortly after newly elected judge took the bench was timely).

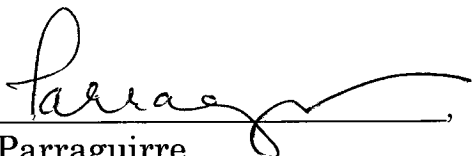
<sup>5</sup>See NRS 34.160.

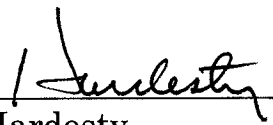
<sup>6</sup>See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).


if a petition will be considered.<sup>7</sup> Further, a writ of mandamus may issue only when there is no plain, speedy, and adequate legal remedy.<sup>8</sup>

We are persuaded that Chew has demonstrated that writ relief is warranted in this case.<sup>9</sup> SCR 48.1 mandates that the district court reassign the matter to a judge other than Judge Flanagan. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order striking Chew's peremptory challenge as untimely and to reassign the case to a judge other than Judge Flanagan.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Connie J. Steinheimer, District Judge  
Hon. N. Patrick Flanagan, District Judge  
Brooksbank & Associates  
Law Offices of Roderic A. Carucci  
Washoe District Court Clerk

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<sup>7</sup>See Smith, 107 Nev. at 677, 818 P.2d at 851.

<sup>8</sup>See NRS 34.170.

<sup>9</sup>See State Engineer v. Truckee-Carson Irrig., 116 Nev. 1024, 13 P.3d 395 (2000) (granting mandamus relief to correct improperly stricken peremptory challenge).