

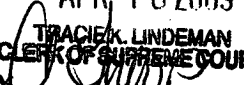
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN STEVEN OLAUSEN,  
Appellant,  
vs.  
THE STATE OF NEVADA  
DEPARTMENT OF CORRECTIONS,  
Respondent.

No. 51210

**FILED**

ORDER OF AFFIRMANCE

APR 10 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

This is a proper person appeal from a district court order dismissing a tort action. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

FACTS

Proper person appellant John Steven Olausen is a prisoner serving a life term. While working at the Ely State Prison, appellant alleges that he suffered various injuries, was denied adequate medical care, and was required to work more than 40 hours per week, for which he sought injunctive relief and damages in a district court complaint filed on September 28, 2006.

On November 7, 2006, before any contested matters were heard, appellant filed a peremptory challenge against Judge Dan Papez under SCR 48.1, without filing an affidavit or alleging bias. In an order entered the same day, Judge Papez denied the request and struck the challenge from the record, on the basis that appellant was not exempt from paying the \$300 fee required by SCR 48.1 and that NRS 12.015, under which appellant had been granted in forma pauperis (IFP) status, applied only to the fees charged by county clerks and not to the fees required to be remitted to the court. Judge Papez found no exception under SCR 48.1 to the fee's payment by IFP litigants and concluded that

the rule's adoption after the enactment of NRS 12.015 suggests that this court did not intend to create such an exception. Judge Papez concluded that because NRS 12.015's IFP fee waiver applies only to necessary pleadings or papers, a preemptory challenge under SCR 48.1 did not meet this requirement, as other methods not requiring the payment of a fee are available to allow an indigent party to challenge a judge without adversely impacting the litigant's access to the courts, such as by following the procedures outlined in NRS 1.230 and 1.235. Finally, Judge Papez was mindful of a fee waiver's adverse impact upon court administration, as there would be great potential for judge shopping by inmates.

On January 23, 2007, respondent State of Nevada Department of Corrections filed an NRCP 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted.<sup>1</sup> Despite being granted numerous extensions of time by the district court over respondent's vigorous opposition and a stern warning from the court that it would grant no further extensions of time after June 1, 2007, appellant filed a May 11, 2007, motion seeking a further extension until July 1, 2007, and/or a stay

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<sup>1</sup>Respondent's motion to dismiss was brought on behalf of the State and all individually named defendants, except Jackie Crawford, who was no longer employed by the Nevada Department of Corrections (NDOC) and "Dr. Long," who was not identified as an employee by NDOC.

The complaint named the State of Nevada Department of Corrections, 11 individuals, and John Doe defendants. There is no record, however, of service of the summons upon any of the defendants, which means that Crawford and Long were not parties in the underlying case and thus the order granting the motion to dismiss was the final judgment in this case. Rae v. All American Life & Cas. Co., 95 Nev. 920, 605 P.2d 196 (1979) (stating that a judgment is not final unless the rights and liabilities of all parties are adjudicated, but that a person named as a co-defendant is not a party unless he has been served).

of the proceedings, claiming that he was unable to file his opposition due to serious medical issues.<sup>2</sup> On May 11, 2007, appellant also filed a motion for appointment of counsel, on the basis that he had been appointed counsel in a federal habeas corpus case in which prison officials had allegedly not provided him access to his medical records. Following opposition by respondent, the district court denied both motions on August 2, 2007, because appellant had been previously granted generous extensions of time, his alleged health issues had not been adequately shown, and a federal judge's rulings in another lawsuit were irrelevant to the present state case.

Appellant did not file his opposition to respondent's motion to dismiss until August 21, 2007. Consequently, in a January 23, 2008, order, the district court struck appellant's late opposition, noting that it had been belatedly filed 210 days after the motion to dismiss was filed, 81 days after the court's final extension period expired, and 119 days after the time allotted by DCR 13(3). Having stricken appellant's untimely opposition, the court then construed appellant's nonopposition as an admission that the motion to dismiss was meritorious and a consent to granting the motion under DCR 13(3). On that basis, the district court granted respondent's motion to dismiss. This appeal followed.

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<sup>2</sup>Appellant claims that he suffered brain seizures, anxiety, and abnormal heart problems as a result of the injuries that he incurred due to respondent's alleged negligence. He further asserts that he had no prior medical history of brain seizures, and that he was adjusting to new medication for his seizures during the time that he received his extensions of time.

## DISCUSSION

On appeal, appellant challenges the district court's denial of his peremptory challenge and the subsequent dismissal of his case. We address each of appellant's arguments in turn.

### Peremptory challenge

Appellant argues that the district court's November 7, 2006, order denying his peremptory challenge against Judge Papez and striking the peremptory challenge from the record violated his due process rights under the federal and state constitutions. We conclude that this argument lacks merit.

Due process under the United States and Nevada constitutions fundamentally requires notice and opportunity to be heard. Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314 (1950); Barrett v. Baird, 111 Nev. 1496, 1512, 908 P.2d 689, 700 (1995), overruled on other grounds by Lioce v. Cohen, 124 Nev. \_\_\_, 174 P.3d 970 (2008). Even in criminal cases, the United States Supreme Court has rejected arguments that a defendant has a due process right under the federal constitution to exercise peremptory challenges. Rivera v. Illinois, 556 U.S. \_\_\_ (No. 07-9995, March 31, 2009) (holding that a state criminal defendant's federal constitutional rights were not violated by the denial of his peremptory challenge of a juror and stating that "States may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial'") (internal citations omitted).

Likewise, here, appellant's peremptory challenge of a judge in a civil matter does not implicate any state or federal constitutional rights. Moreover, although the district court denied appellant's peremptory challenge, appellant had an alternate method available to seek Judge Papez's disqualification from this case. Specifically, NRS 1.235 provides a

method for challenging a judge based on actual bias that does not require the payment of a fee. Thus, appellant's due process rights under the United States and Nevada constitutions were not violated by the district court's conclusion that he was required to pay court fees to make a peremptory challenge when he had alternative means available to contest the district court's alleged bias without payment of a fee. See Ortwein v. Schwab, 410 U.S. 656 (1973) (holding that the Oregon appellate filing fee, as applied to indigents seeking to appeal adverse welfare decisions, did not violate the due process or equal protection clauses of the Fourteenth Amendment); United States v. Kras, 409 U.S. 434, 446 (1973) (holding that the payment of bankruptcy filing fees has a rational basis and recognizing that the petitioner had other alternatives to court action to discharge his bankruptcy debts, such as by negotiating agreements with his creditors).

Here, appellant failed to avail himself of the relief available under NRS 1.235 and has waived any right to disqualify Judge Papez, because he failed to file an affidavit alleging facts to show bias or prejudice and to timely follow the other procedures detailed in that statute. Brown v. F.S.L.I.C., 105 Nev. 409, 412, 777 P.2d 361, 363 (1989); A Minor v. State, 86 Nev. 691, 476 P.2d 11 (1970); State ex rel. Dep't Welfare v. District Ct., 85 Nev. 642, 646, 462 P.2d 37, 39 (1969). Consequently, we conclude that the district court did not improperly deny appellant's peremptory challenge.<sup>3</sup>

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<sup>3</sup>Appellant also argues that the denial of his peremptory challenge violated his rights under the Fourth (search and seizure) and Eighth (cruel and unusual punishment) Amendments to the United States Constitution. Having considered this argument, we conclude it lacks merit. In light of the alternate method available to seek Judge Papez's

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Grant of motion to dismiss

With regard to appellant's challenge of the district court order granting the respondent's motion to dismiss, appellant agrees that he was granted extraordinary extensions of time, but contends that they were necessitated by serious medical conditions for which he had received inadequate medical attention, such that he should have been granted additional time or have had counsel appointed to allow him to file an opposition. Respondent contends that the district court did not abuse its discretion in granting the dismissal motion under DCR 13(3) due to appellant's lack of diligence and dilatory tactics. Respondent also contends that appellant had no right to counsel in the underlying case solely because he had been appointed counsel in an unrelated federal case and respondent argues that appellant has not shown that he was incapable of handling the present case himself.

We apply an abuse of discretion standard in reviewing a district court's dismissal for failure to oppose a motion to dismiss. See Walls v. Brewster, 112 Nev. 175, 912 P.2d 261 (1996) (holding that the district court did not abuse its discretion in dismissing a case with prejudice, due to a party's failure to diligently oppose the motion to dismiss). Here, DCR 13(3) plainly states that the failure to timely serve and file a written opposition "may be construed as an admission that the motion is meritorious and a consent to granting the same." We conclude

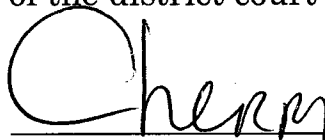
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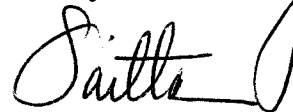
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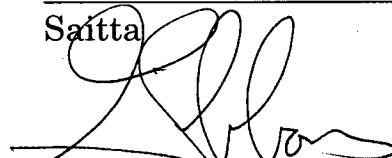
disqualification, we likewise conclude that appellant's contention that he was prejudiced by the denial of his peremptory challenge lacks merit.

that the district court did not abuse its discretion in granting the motion to dismiss, as appellant was not entitled to appointment of counsel. See Rodriguez v. Dist. Ct., 120 Nev. 798, 804, 102 P.3d 41, 45 (2004) (recognizing that there is generally no Sixth Amendment right to appointed counsel in a civil case). We further conclude that appellant failed to meet his duty to use diligence and expedite the prosecution of his case, despite being given numerous extensions of time and a clear warning that no further extension would be granted. See Walls, 112 Nev. at 178, 912 P.2d at 263; King v. Cartlidge, 121 Nev. 926, 124 P.3d 1161 (2005) (affirming a summary judgment due to a party's tardy opposition filed several days past the DCR 13(3) deadline and after three continuances had been granted). Therefore, the district court did not abuse its discretion in striking appellant's untimely opposition and granting respondent's motion to dismiss. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

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

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Dan L. Papez, District Judge  
John Steven Olausen  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Las Vegas  
White Pine County Clerk