139 Nev., Advance Opinion 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEGGY WHIPPLE REGGIO, AN INDIVIDUAL; AND JOHN REGGIO, AN INDIVIDUAL,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
BETSY L. WHIPPLE, INDIVIDUALLY AND AS SHAREHOLDER OF WHIPPLE CATTLE COMPANY, INC., A NEVADA CORPORATION,
Real Party in Interest.

No. 84233

FILED
MAR 09 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Original petition for a writ of mandamus or prohibition challenging a district court order striking a peremptory challenge of a judge.

Petition denied.

Legal Resource Group, LLC, and T. Augustus Claus, Henderson, for Petitioners.

Howard & Howard Attorneys, PLLC, and Cami M. Perkins and Karson D. Bright, Las Vegas,
for Real Party in Interest.

BEFORE THE SUPREME COURT, STIGLICH, C.J., HERNDON, J., and SILVER, Sr. J.[1]

OPINION

By the Court, STIGLICH, C.J.:

Supreme Court Rule (SCR) 48.1 governs peremptory challenges of judges. At issue in this writ petition is how SCR 48.1(1), 48.1(5), and 48.1(9) apply in the context of consolidated cases. Generally, when cases are consolidated, the second-filed case is transferred to be heard with the first-filed case. *See* EDCR 2.50(a)(1) ("Motions for consolidation of two or more cases must be heard by the judge assigned to the first case commenced . . . . If consolidation is granted, the consolidated case will be heard before the judge ordering consolidation."). Here, the defendants in the second case filed a peremptory challenge after their case was consolidated with an earlier-filed first case. Because the first-case defendants had already waived their right to a peremptory challenge under SCR 48.1(5), the district court found that the second-case defendants were barred from filing a peremptory challenge post-consolidation. The second-case defendants now challenge that ruling.

SCR 48.1(1) contemplates that, upon consolidation, the second case essentially becomes part of the first case. *Panko v. Eighth Judicial District Court*, 111 Nev. 1522, 902 P.2d 706 (1995), confirms this reading, and we reaffirm that holding here. And in *Gallen v. Eighth Judicial District Court*, 112 Nev. 209, 211, 213, 911 P.2d 858, 859-60 (1996), we interpreted SCR 48.1 to mean that when one party in a case waives their right to

[1]The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.

exercise a peremptory challenge, that waiver also bars another party on the same side of the case from filing a peremptory challenge. Applying SCR 48.1(1), *Panko*, and *Gallen*, we conclude that if a party waives their right to a peremptory challenge under SCR 48.1(5), that waiver also applies to any other party on the same side of a later consolidated action.

Further, parties are entitled to an additional peremptory challenge under SCR 48.1(9) if their case is reassigned. But when a second case is transferred as a result of consolidation to be heard with the first, we conclude that there is no "reassignment" at all because the second case is already considered part of the first case and the first case remains before the same judge before and after consolidation. Consequently, parties in consolidated cases are entitled to an additional peremptory challenge under SCR 48.1(9) only if the first case is reassigned, not when the second case is transferred to be heard with the first. Because the district court's order striking the second-case defendants' peremptory challenge accords with our conclusion, extraordinary relief is not warranted. Accordingly, we deny the petition.

FACTS AND PROCEDURAL HISTORY

Real party in interest Betsy Whipple sued Whipple Cattle Company (WCC), her family-owned-and-operated cattle farm, various family members, and other affiliated entities, alleging misconduct in handling the business and its assets (the first case). Eventually, the case was assigned to the Honorable Nancy Allf. She ruled on several matters, including motions for a preliminary injunction, to disqualify the defendants' lawyer, and for attorney fees.

Over a year later, Whipple filed a second lawsuit against her sister and brother-in law, petitioners Peggy and John Reggio (the second case). Whipple had not named the Reggios as defendants in the first case.

In the second case, Whipple alleged that she purchased WCC shares from the Reggios but the Reggios failed to transfer the shares to her. The second case was assigned to the Honorable Mark R. Denton.

Whipple moved to consolidate the first and second cases under NRCP 42(a). The Reggios did not contest the motion, and the cases were consolidated. As a result of the consolidation, the second case was reassigned to Judge Allf. The Reggios filed a peremptory challenge against Judge Allf under SCR 48.1. As a result, the case was transferred back to Judge Denton. Whipple then moved to strike the Reggios' peremptory challenge, arguing that SCR 48.1 barred the challenge. The Reggios opposed the motion, arguing that SCR 48.1 did not bar their peremptory challenge and that SCR 48.1(9) specifically provided them with one.

In striking the Reggios' peremptory challenge, the district court did not address SCR 48.1(9). Instead, the court found that the first-case defendants waived their right to a peremptory challenge under SCR 48.1(5) because they failed to file any challenge before Judge Allf ruled on contested motions in the first case. Because the first and second cases were consolidated, the court determined that the second case became part of the first case. Accordingly, the court found that the first-case defendants' waiver applies to the Reggios, thereby barring their peremptory challenge. The Reggios petitioned for a writ of mandamus or prohibition, seeking a writ directing the district court to accept their peremptory challenge.

DISCUSSION

We exercise our discretion to hear the merits of this petition

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* NRS 34.160. A writ of

prohibition serves to restrain a district court from acting outside of or in excess of its jurisdiction. NRS 34.320; *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

Although we have complete discretion on whether to entertain the merits of a writ petition, *Smith*, 107 Nev. at 677, 818 P.2d at 851, "[e]xtraordinary relief is the appropriate remedy when the district court improperly grants or fails to grant a peremptory challenge under SCR 48.1," *Turnipseed v. Truckee-Carson Irrigation Dist.*, 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000). We may also choose to entertain a writ petition when it "raises an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration." *Int'l Game Tech., Inc.*, 124 Nev. at 198, 179 P.3d at 559. Because extraordinary relief is appropriate in SCR 48.1 cases and this case presents an issue of first impression that warrants clarification, we exercise our discretion to hear the merits of this petition.

The district court properly granted Whipple's motion to strike the Reggios' peremptory challenge

In resolving this writ petition, we first determine whether the district court's interpretations of SCR 48.1(1) and SCR 48.1(5) were correct. Second, we consider whether SCR 48.1(9) applies to allow an additional peremptory challenge after cases are consolidated.

Standard of review

Although we review a district court's decision to grant or deny a motion to strike for abuse of discretion, the issue here is the district court's interpretation of SCR 48.1. We review a district court's interpretation of a Supreme Court Rule de novo. *See Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) (noting that de novo review applies to the interpretation of a statute or court rule, even

in the context of writ petitions); *see also City of Henderson v. Eighth Judicial Dist. Court*, 137 Nev. 282, 284, 489 P.3d 908, 910 (2021) ("While the decision to deny the motion to strike was addressed to the district court's discretion, the ultimate question presented in this petition is one of law.").

"The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for . . . the government of the district courts." NRS 2.120(1). In these rules, this court regulates "judicial proceedings in all courts of the State." NRS 2.120(2). The rules of statutory interpretation apply to the Supreme Court Rules. *See Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013). Thus, we first consider the plain meaning of the rule. *Id.* In determining the "plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1998); *see also Orion Portfolio Servs. 2, LLC v. County of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."). Further, in reading a statute "a word . . . is presumed to bear the same meaning throughout a text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). And "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *Id.* at 180.

The district court correctly determined that the first and second cases, post-consolidation, merged into a single action under SCR 48.1 and that the first-case defendants' waiver bars the Reggios from using a peremptory challenge

The first-case defendants waived their peremptory challenge under SCR 48.1(5), which governs waiver of peremptory challenges. *See Smith*, 107 Nev. at 678, 818 P.2d at 852 ("Failure to file within the time strictures of the rule results in waiver of the right to make a peremptory challenge."). Under SCR 48.1(5), a party must file a peremptory challenge against a judge before that judge rules on any contested matter in the case. Here, the parties do not dispute that the first-case defendants waived their right to a peremptory challenge by failing to file such a challenge before Judge Allf ruled on contested motions. However, the parties disagree on the effect of that waiver.[2]

The Reggios argue that when cases are consolidated, they do not merge into a single case, but rather both the first and second cases retain their separate character. As a result, they argue, the first-case defendants' waiver has no bearing on their ability, as the second-case defendants, to file a peremptory challenge.

Whipple counters that when one case is consolidated with another, the two cases become a single case—Whipple is on one side of the

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[2]Whipple, below and on appeal, also argues that the first-case defendants' appeal, which was pending when the Reggios filed their peremptory challenge, bars the Reggios' peremptory challenge under SCR 48.1(1). The district court did not use this reasoning. Because we agree with the district court that SCR 48.1(1) and SCR 48.1(5) bar the Reggios' peremptory challenge for other reasons, this argument, even if accepted, would not change the result here. Accordingly, we decline to address it. *See APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, 136 Nev. 569, 575 n.4, 473 P.3d 1021, 1027 n.4 (2020) (declining to reach certain arguments where the appeal was resolved on another basis).

litigation, while the first- and second-case defendants are collectively on the other side. Because the first-case defendants waived their right to a peremptory challenge in the first case, Whipple argues, that waiver applies to the Reggios because the Reggios and the first-case defendants are on the same side of the consolidated case.

Under SCR 48.1(1), "each side" of a civil case pending in district court "is entitled, as a matter of right, to one change of judge by peremptory challenge." Significantly, the rule provides that "[e]ach action or proceeding, whether single or consolidated, shall be treated as having only two sides," and "[i]f one of two or more parties on one side of an action files a peremptory challenge, no other party on that side may file a separate challenge." *Id.*

SCR 48.1(1) contemplates that, upon consolidation, the second case becomes part of the first case

SCR 48.1(1) itself dispenses of the Reggios' argument. SCR 48.1(1) contemplates that, upon consolidation, the first and second cases merge into a single action for peremptory challenge purposes because the rule expressly treats a consolidated case as having only two sides. We confirmed this reading in *Panko*. In *Panko*, the plaintiffs filed a lawsuit against a first defendant. 111 Nev. at 1523, 908 P.2d at 707. The plaintiffs used a peremptory challenge, so the case was reassigned. *Id.* The plaintiffs then filed a lawsuit against a second defendant. *Id.* The first and second defendants moved to consolidate the cases, and the plaintiffs did not oppose consolidation. *Id.* As a result of consolidation, the second case was transferred to the department where the first case was heard. *Id.* The plaintiffs then filed a second peremptory challenge. *Id.*

We held that the plaintiffs' second peremptory challenge violated SCR 48.1(1). *Id.* at 1524, 908 P.2d at 708. Pointing to the "two

sides" language in SCR 48.1(1), we reasoned that "when the second action was consolidated with the first action and was scheduled to take place in front of the judge assigned to the first action, the second action essentially became part of the first action." *Id.* Accordingly, "because [the plaintiffs] had exercised their right to a peremptory challenge in the first action, they were precluded from exercising a second peremptory challenge in the consolidated case." *Id.* We reaffirm *Panko*'s interpretation of SCR 48.1(1)'s "two sides" language in the context of a consolidated case—that upon consolidation the second case becomes part of the first case—because it properly interprets the text of SCR 48.1(1).

The Reggios argue that this result flies in the face of *In re Estate of Sarge*, 134 Nev. 866, 432 P.3d 718 (2018), and *In re Wynn Resorts, Ltd.*, No. 80928, 2020 WL 3483757 (Nev. June 25, 2020) (Order Dismissing Appeal). In *Sarge*, we held that consolidation did not merge two cases into a single case for the purpose of the final judgment rule for appealability. *Sarge*, 134 Nev. at 866, 432 P.3d at 720. As a result, the appellant was not required to wait until the final judgment of both consolidated cases to appeal. *Id.* at 866-67, 432 P.3d at 720. Instead, as soon as the district court rendered a final judgment in one of the consolidated cases, that case became immediately appealable. *Id.*

Our analysis hinged on the ambiguity of former NRCP 42(a),[3] which provided, in relevant part, that "[w]hen actions involving a common

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[3]In 2019, this court amended NRCP 42. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018 (effective March 1, 2019)). The amendments did not substantively change the language discussed in *Sarge*. *See id.*

question of law or fact are pending before the court . . . it may order all the actions consolidated." *Id.* at 868, 432 P.3d at 721. We concluded that the term "consolidation" was ambiguous and therefore turned to the history of the rule to interpret it, because it "can mean that 'several actions are combined into one, lose their separate identities and become a single action' or that 'several actions are tried together but each retain their separate character.'" *Id.* at 868-69, 432 P.3d at 721 (quoting *Randall v. Salvation Army*, 100 Nev. 466, 470, 686 P.2d 241, 243 (1984)).

But here, the term "consolidation" is unambiguous. Unlike NRCP 42(a), SCR 48.1(1) does not use the term "consolidation" without indicating which definition of consolidation applies. By expressly stating that even a consolidated case has only two sides and allowing one peremptory challenge per side, SCR 48.1(1) clears up any ambiguity. If SCR 48.1(1) intended that upon consolidation each case retained its separate character, then a consolidated case would have a total of four sides, two sides for the first case and two sides for the second case. Because even a consolidated case has two sides, the former definition, that upon consolidation the "several actions are combined into one, lose their separate identities and become a single action" must apply. *Id.* at 868, 432 P.3d at 721.

Similarly, in *Wynn*, we dismissed an appeal because the appellant was not a party to the case she was appealing. *Wynn*, 2020 WL 3483757, at *2. There, the appellant filed a first case, which was consolidated with a second case in which the appellant was not a party and did not intervene. *Id.* at *1. The appellant sought to appeal the second case. *Id.* at *2. This court dismissed the appeal, concluding that the consolidation did not make the appellant a party to the second case. *Id.* In so holding,

we applied *Sarge*. *Id.* at *1-2. For the same reason stated above, *Sarge*'s analysis is inapplicable here, so the Reggios' argument based on *Wynn* is unconvincing. *Wynn* and *Sarge* establish that a different definition of consolidation exists, but that definition does not apply here because SCR 48.1(1)'s "two sides" language clarifies that when two cases are consolidated, they lose their separate character for purposes of peremptory challenges.

> *If one party on one side of a case waives their right to a peremptory challenge, that waiver applies to other parties on the same side of the case*

The Reggios next argue that the first case defendants' waiver of their right to a peremptory challenge does not apply against them. *Gallen* forecloses this argument. In *Gallen*, we held that a third-party defendant, who was brought into the case by the original defendant, did not have the right to file a peremptory challenge. 112 Nev. at 211, 213, 911 P.2d at 859, 860. We reasoned that the third-party defendant was on the "same side of the action" as the original plaintiff, who had already waived his right to a peremptory challenge. *Id.* at 213, 911 P.2d at 860. As a result, the third-party defendant's peremptory challenge was barred. *Id.*

Gallen stands for the principle that a party's waiver of their peremptory challenge also waives other parties' right to a peremptory challenge when those parties are on the same side of the case. *Cf. Switzer v. Superior Court*, 860 P.2d 1338, 1340 (Ariz. Ct. App. 1993) (interpreting Arizona's similar peremptory challenge provisions and holding that one party's waiver applies to all parties on the same side of an action). This result is also compelled by the express language of SCR 48.1(1). If one party on the same side of the litigation files a peremptory challenge against a judge, no other party on the same side may file one. SCR 48.1(1). Here, the

first-case defendants and the Reggios are on the same side of the consolidated case—the defendant's side—so the first-case defendants' waiver bars the Reggios' peremptory challenge.

The Reggios insist that *Gallen* is inapplicable because it does not address consolidation. We disagree. Under SCR 48.1(1), both single multiparty cases and consolidated cases are treated exactly the same: both cases have only two sides, and each side has a right to one peremptory challenge. SCR 48.1(5) also does not distinguish between a consolidated case and a single multiparty case. Instead, it simply says that "[a] notice of peremptory challenge may not be filed against any judge who has made any ruling on a contested matter . . . in the action." SCR 48.1(5). The fact that *Gallen* addressed waiver in a single multiparty case, but here we address consolidated cases, is immaterial because there is no reason to treat the cases differently. As a result, we conclude the district court did not err by determining that the first-case defendants' waiver of their peremptory challenge applied to the Reggios, the second-case defendants, to bar their peremptory challenge.

SCR 48.1(9) does not provide parties whose case is transferred, as result of consolidation, to the judge hearing the first case with an additional peremptory challenge

The Reggios next argue that SCR 48.1(9) permits an additional peremptory challenge because their case, the second case, was reassigned to Judge Allf after consolidation.[4] The Reggios request that we define

[4]To the extent the Reggios base this argument on *Tradewinds Building and Development, Inc. v. Eighth Judicial District Court*, No. 61796, 2013 WL 3896543 (Nev. July 23, 2013) (Order Granting Petition for Writ of Mandamus), their reliance is misplaced because that decision may not be cited. *See* NRAP 36(c)(2)-(3).

"reassignment" to mean the transfer of a case from one judge to another. Whipple counters that the second case became part of the first case upon consolidation. It follows, according to Whipple, that the transfer of the second case to the judge hearing the first case is not a reassignment because the second case is now part of the first case, which was already assigned to that judge. Put differently, the first case is only truly reassigned if the first case is transferred to a different judge for some nonconsolidation-related reason, such as a judge's retirement. Accordingly, Whipple asks this court to clarify that reassignment under SCR 48.1(9) does not refer to transfer as a result of consolidation.

We adopted SCR 48.1 in 1979, and we amended SCR 48.1 in 2009 to add subsection (9). *In re SCR 48.1 Regarding the Procedure for Change of Judge by Peremptory Challenge*, ADKT 434 (Petition, Apr. 13, 2009). We added subsection (9) in response to "elections, retirements and the anticipated addition of new district judge departments" because "it will become necessary for the district court clerks to reassign civil division and family division cases." *Id.* It furnishes a party with an additional peremptory challenge as a matter of right, even if the party previously exercised a peremptory challenge under SCR 48.1(1), "in the event that the *action* is reassigned for any reason other than the exercise of a peremptory challenge." SCR 48.1(9) (emphasis added).

The issue here is not the definition of reassign, but whether SCR 48.1(1)'s description of an "action," which is that "[e]ach action, whether single or consolidated, shall be treated as having only two sides," applies to an "action" under SCR 48.1(9). If SCR 48.1(1)'s understanding of an action applies to SCR 48.1(9), then upon consolidation the second case

becomes part of the first case. As a result, SCR 48.1(9) would not be triggered because the first case was not reassigned.

In light of our duty to interpret SCR 48.1 as a whole and each provision, to the extent possible, harmoniously, we interpret "an action" in SCR 48.1(9) to be the same as an "action" under SCR 48.1(1). *Orion*, 126 Nev. at 403. 245 P.3d at 531; *see also* Scalia & Garner, *supra*, at 170. Accordingly, SCR 48.1(9) is not triggered when the second case is transferred upon consolidation because the second case does not retain its separate character and becomes part of the first case. The same judge hears the first case before and after consolidation, so there has not been a reassignment. Thus, SCR 48.1(9) does not provide the second-case parties with an additional peremptory challenge. Although the district court did not address this issue, we conclude it reached the correct result—striking the Reggios' peremptory challenge—because SCR 48.1(9) does not provide them with an additional peremptory challenge. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

CONCLUSION

In this opinion, we clarify three aspects of SCR 48.1 as applied to consolidated cases. First, SCR 48.1(1) says that even consolidated cases have only two sides. This language necessarily means that when cases are consolidated, the second case becomes part of the first case. *Panko* confirmed this reading, and we reaffirm it here. Second, applying this understanding of consolidation and *Gallen*, if one side in consolidated cases waives their right to a peremptory challenge, that waiver bars any subsequent peremptory challenges from the same side. Third, an "action" in the context of consolidated cases under SCR 48.1(9) means the same

thing as an action in the context of consolidated cases under SCR 48.1(1). As a result, the focus is on whether the first case is reassigned to a different judge. The transfer of the second case to the judge hearing the first case as a result of consolidation does not trigger SCR 48.1(9) because the first case before and after consolidation remains before the same judge. Accordingly, we deny this petition.

_____, C.J.
Stiglich

We concur:

_____, J.
Herndon

_____, Sr. J.
Silver