

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY MCDONNELL, WANDA
BLOHM, ED SHARP, PATRICIA
MANKINS, ALAN POPE, BOARD OF
TRUSTEES OF PAHRUMP
COMMUNITY HOSPITAL DISTRICT;
AND THE PAHRUMP COMMUNITY
HOSPITAL DISTRICT,
Petitioners,

vs.

THE FIFTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF NYE,
AND THE HONORABLE JOHN P.
DAVIS, DISTRICT JUDGE,
Respondents,
and
GEORGES TANNOURY, M.D.,
Real Party in Interest.

No. 39560

FILED

JUL 10 2002

[Signature]
JANET L. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER GRANTING PETITION FOR A WRIT OF PROHIBITION

This petition for a writ of mandamus or prohibition challenges the district court's denial of petitioners' peremptory challenge and its subsequent entry of a temporary restraining order on the real party in interest's ex parte application. Contemporaneously with the petition, petitioners moved for an emergency stay of the underlying proceedings. On May 1, 2002, we temporarily stayed the district court proceedings pending our receipt and consideration of any opposition to the motion, and we directed the real party in interest to answer the petition. We have

reviewed the petition, the answer and the documents appended to each, and we conclude that our intervention is warranted.

Petitioners are the Pahrump Community Hospital District and five of the seven members constituting its board of trustees (collectively, PCHD). The real party in interest, Dr. Georges Tannoury, is their former leasehold tenant. On Wednesday, April 17, 2002, Dr. Tannoury filed a complaint against PCHD, alleging breach of contract and discrimination, and seeking monetary and injunctive relief. Dr. Tannoury also filed an ex parte application for temporary restraining order (TRO) and order to show cause why a preliminary injunction should not be entered. The case was assigned to Judge Davis.

The next day, on Thursday, April 18, 2002, Judge Davis entered an order shortening time and set a hearing on the TRO for 10:00 a.m. Tuesday, April 23, 2002.

On Friday, April 19, 2002, chairman McDonnell, vice-chairman Sharp and secretary/clerk Pope received telephone calls from a person who identified herself as Betty Ham, a process server. Ham advised each of these board officers that she had papers to serve on them, but her fax machine was broken and she could not do so at that time. She further advised them that they needed to be in court at 10:00 a.m. on Tuesday, April 23, 2002. Ham did not disclose the nature of the papers to be served, or the parties, or the nature of the scheduled matter, and the board officers had not heard of any court proceedings.

At about 5:00 p.m. on Monday, April 22, 2002, the board officers were served with the summons, complaint, and ex parte application for temporary restraining order and order shortening time.

At 8:00 a.m. on Tuesday, April 23, 2002, as soon as the Nye County Clerk's office opened, vice-chairman Sharp filed a notice of peremptory challenge against Judge Davis. SCR 48.1(3) provides that a peremptory challenge shall be filed within 10 days after notification to the parties of a trial or hearing date, or not less than 3 days before the date set for the hearing of any contested pretrial matter, whichever occurs first.

At 10:00 a.m. on Tuesday, April 23, 2002, Judge Davis conducted a hearing on the peremptory challenge and ex parte application for restraining order. Neither PCHD nor its attorney appeared at the hearing or contested it. Judge Davis entered an order denying the peremptory challenge because it was not filed 3 days before the hearing set for the TRO, and Dr. Tannoury's counsel represented that the defendants had been given notice of the hearing. Judge Davis then entered a TRO and ordered PCHD to appear at 10:00 a.m. on Friday, May 3, 2002, to show cause why they should not be enjoined from continuing to solicit a tenant to occupy their medical facility and contracting with any potential occupant. Judge Davis also ordered PCHD to re-lease the premises at issue to Dr. Tannoury.

Judge Davis misinterpreted SCR 48.1(3). Under SCR 48.1(1) each party to a civil action pending in district court is entitled, as a matter of right, to one change of judge by peremptory challenge. SCR 48.1(3) provides that a peremptory challenge shall be filed within 10 days after notification to the parties of a trial or hearing date, or not less than 3 days before the date set for the hearing of any contested pretrial matter, whichever occurs first.

Here, PCHD filed the peremptory challenge within 10 days after notification of the hearing date on Dr. Tannoury's ex parte application for a TRO. The 3-day limit did not apply because the TRO hearing was not a contested matter. Although it could be anticipated that PCHD would be opposed to a TRO, it had not been given sufficient time or opportunity to contest Dr. Tannoury's ex parte application.

We have confirmed that SCR 48.1's time limitations are designed to prevent use of the rule to delay proceedings or to judge shop; therefore, the privilege is permanently forfeited if it is not exercised promptly, before contested proceedings have commenced.¹ Here, the peremptory challenge privilege could not have been exercised 3 days before the TRO hearing because the challengers were not yet parties to the action—they filed the challenge at the earliest possible opportunity. When PCHD filed the challenge, contested proceedings had not yet commenced.

We conclude that the peremptory challenge was timely and that it divested Judge Davis of jurisdiction to consider the application for restraining order and order to show cause why a preliminary injunction should not be entered. Because Judge Davis lacked jurisdiction to enter the orders granting the TRO and directing PCHD to show cause, those orders are void.

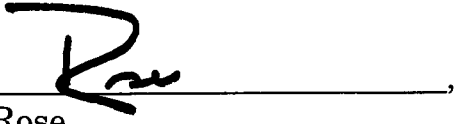
Accordingly, as Judge Davis lacks jurisdiction and petitioners lack a plain, speedy and adequate remedy at law, we conclude that a writ

¹Smith v. District Court, 107 Nev. 674, 677-78, 818 P.2d 849, 852 (1991).

of prohibition is warranted.² The clerk of this court shall issue a writ of prohibition preventing Judge Davis from presiding over this case. We vacate our order temporarily staying the district court proceedings so that the Nye County Clerk may immediately reassign Case No. CV17517 in accordance with SCR 48.1(2).

It is so ORDERED.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. John P. Davis, District Judge
Smith & Maurer
Jeffrey J. Whitehead
Nye County Clerk

²NRS 34.320; NRS 34.330.