

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTH BAY ASSOCIATION, A
NEVADA NON-PROFIT MUTUAL
BENEFIT CORPORATION; HOWARD
NALLEY, INDIVIDUALLY; WILLIAM
SMITH, INDIVIDUALLY; LOU ANN
CARLTON, INDIVIDUALLY; RAY
LECKINGER, INDIVIDUALLY; AND
DOLORES DUDEK, INDIVIDUALLY,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
MICHAEL L. DOUGLAS, DISTRICT
JUDGE,

Respondents,

and

SOUTH POINTE INDUSTRIES, A
NEVADA CORPORATION, AND G & T
CONSTRUCTION, INC.,
Real Parties in Interest.

No. 39655

FILED

AUG 16 2002

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This petition for a writ of mandamus challenges the district court's disqualification of Judge Sally Loehrer in the underlying construction defects case for a conflict of interest under NRS 1.230(2)(c). A petition for a writ of mandamus is the appropriate means for challenging a

disqualification decision,¹ and may issue to control an arbitrary or capricious exercise of discretion when, as here, petitioners have no plain, speedy and adequate remedy at law.² Because there was no basis for disqualification, the district court's decision was arbitrary and capricious. We conclude that writ relief is warranted.

As a preliminary matter, we decline to dismiss the writ petition for procedural deficiencies. Although petitioners' attorney's verification does not state why it is not made by a party, as it should,³ the attorney's office is in Reno and the parties and action are all in Clark County. Verification by a petitioner's attorney is permitted when the petitioner is absent from the county in which the attorney resides.⁴ And although petitioners did not serve the petition on all district court parties, as required by NRAP 21(a), the petition was served on all parties involved in the matter at issue. We note that the answer also was not served on all

¹See City of Sparks v. District Court 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996) (holding that mandamus is properly used to challenge a district court order denying a recusal motion); cf. Cronin v. District Court, 105 Nev. 635, 639 n.4, 781 P.2d 1150, 1152 n.4 (1989) (noting that mandamus is properly used to challenge a district court order disqualifying counsel).

²Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981); NRS 34.170.

³Thompson v. District Court, 100 Nev. 352, 353-54 n.1, 683 P.2d 17, 18-19 n.1 (1984) (citing Abell v. District Court, 58 Nev. 89, 71 P.2d 111 (1937), and NRS 15.010(1)).

⁴Id.

parties. Neither defect is fatal, and we prefer to address this petition on the merits.

Petitioners filed their complaint against South Pointe Industries and G & T Construction in September 2000, and the case was assigned to Judge Loehrer. South Pointe and G & T subsequently brought forty-five additional third-party defendants into the dispute, and the matter was set for a jury trial beginning April 15, 2002. In February 2002, however, South Pointe and G & T sought and obtained leave to amend their third-party complaint to, among other things, include a declaratory relief action against four insurance carriers, including Fireman's Fund Insurance Company, to resolve an insurance coverage dispute. South Pointe and G & T filed their amended third-party complaint on March 1, 2002, and Judge Loehrer ruled on several pre-trial motions, including various motions in limine.

On April 30, 2002, South Pointe and G & T moved to disqualify Judge Loehrer based upon an alleged conflict of interest between the judge and Fireman's Fund. South Pointe and G & T alleged that Judge Loehrer should recuse herself or be disqualified because she had appeared as counsel of record in 1985 for Fireman's Fund in an unrelated subrogation action, and remained counsel of record until she dismissed the case as a judge in 1993. South Pointe and G & T cited Nevada Code of Judicial Conduct Canon 3E(1)(b) as the primary authority for their disqualification argument, and cited NRS 1.230(2)(c) only as analogous supporting authority.

Petitioners opposed the disqualification motion, and Judge Loehrer filed an affidavit in which she stated unequivocally that she had no present recollection of the 1985 Fireman's Fund action and that she is not biased, prejudiced or unable to preside over the upcoming trial due to her prior representation of Fireman's Fund (seventeen years ago).

On May 6, 2002, Judge Michael Douglas held a hearing and entered an order granting the disqualification motion. Judge Douglas ordered "[t]hat Defendants' Motion to Disqualify Judge Sally Loehrer for Conflict of Interest is GRANTED under N.R.S. 1.230(2)(c)[.]"

Petitioners argue that the motion to disqualify was not timely under NRS 1.235, and that Judge Loehrer did not have a disqualifying implied bias under NRS 1.230(2)(c) because she was not counsel for any party in this particular action or proceeding.

South Pointe and G & T argue that NRS 1.235's time limits apply only when disqualification is based on "actual or implied bias or prejudice," not in cases such as this when disqualification is based on an "appearance of impropriety or conflict of interest." They further argue that disqualification was proper under NRS 1.230(2)(c) and Canon 3E(1)(b) because there was a clear appearance of impropriety.

As noted, however, Judge Douglas granted the motion solely under NRS 1.230(2)(c). NRS 1.230(2)(c) provides:

2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

.....

(c) When he has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(Emphasis added.) The method for challenging a judge under NRS 1.230(2)(c) is governed by NRS 1.235, which permits a party who seeks to disqualify a judge for actual or implied bias or prejudice to file an affidavit specifying the facts upon which the disqualification is sought, but limits the filing time. NRS 1.235(1) specifies that the affidavit must be filed:

(a) Not less than 20 days before the date set for trial or hearing of the case; or

(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

This court has imposed a “whichever occurs first” standard onto NRS 1.235(1) to ensure that “for cause” challenges are initiated before any adversarial proceedings take place.⁵ Thus, a party has only one window of opportunity within which to challenge a judge for cause: either twenty days before the date set for a trial or hearing of the case, or three days before the hearing of any pretrial matter, whichever occurs first.⁶

Here, because Judge Loehrer had ruled on numerous pretrial matters, the motion was not timely under NRS 1.235(1). And because she had not been counsel for Fireman’s Fund in the current action, but had only been the company’s counsel in a subrogation action seventeen years

⁵Valladares v. District Court, 112 Nev. 79, 83-84, 910 P.2d 256, 259-60 (1996).

⁶Id. at 84, 910 P.2d at 260.

earlier, disqualification was not warranted under NRS 1.230(2)(c). Judge Douglas's disqualification of Judge Loehrer on this basis was clearly erroneous.

Judge Douglas properly did not disqualify Judge Loehrer for an appearance of impropriety, because Canon 3E(1)(b) provides no basis for disqualification. Canon 3E(1)(b) provides that a judge shall disqualify herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which "the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." Here, however, Judge Loehrer did not serve as a lawyer in the matter in controversy and there was no allegation that any lawyer with whom she practiced law was involved in the matter in any capacity.

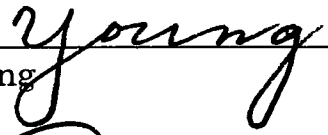
The Commentary to Canon 3E(1) explains that a judge is nevertheless disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Canon 3E(1) apply. When determining whether a judge's impartiality might reasonably be questioned, the judge's opinion that she can be fair and impartial must be given substantial weight.⁷ Here, no party has questioned Judge Loehrer's actual impartiality, the judge has stated

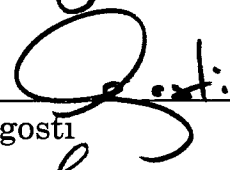
⁷Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997).

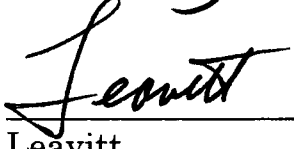
unequivocally that she is not biased or prejudiced and we perceive no reasonable basis for questioning her impartiality under the circumstances.

We conclude that the district court should not have disqualified Judge Loehrer. The clerk of this court shall issue a writ of mandamus directing Judge Douglas to vacate his order that disqualified Judge Loehrer and directed that the case be randomly reassigned.

It is so ORDERED.⁸


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Michael L. Douglas, District Judge
Hardy & Woodman
Parker Nelson & Arin, Chtd.
Rawlings Olson Cannon Gormley & Desruisseaux
Clark County Clerk

⁸We deny as moot petitioners' motion for expedited review.