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Reggio v. Eighth Jud. Dist. Ct., 139 Nev. Adv. Op. 4 (Mar. 9, 2023)

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CLARIFICATION OF PEREMPTORY WAIVERS IN CONSOLIDATED CASES

Summary

Where the first party of a consolidated case waives their right to a peremptory challenge under Supreme Court Rule (SCR) 48.1(5), the waiver applies to subsequent parties on the same side of the consolidation. While parties are still entitled to an additional peremptory challenge when their case is reassigned under SCR 48.1(9), this is only permitted when the first case is reassigned, not the second.

Background

In the first suit, assigned to the Honorable Nancy Allf, Betsy Whipple sued her family cattle farm Whipple Cattle Company (WCC) and other family members alleging misconduct in handling the business and its assets. Over a year later, Whipple filed an additional suit against different members of her family, the Reggios, alleging she purchased shares of WCC from them, but never received them. This second case was assigned to the Honorable Mark. R. Denton. Whipple then moved, and was granted the consolidation of the two cases, both assigned to Judge Allf. The Reggios filed a peremptory challenge against Judge Allf under SCR 48.1, which led to the case being transferred back to Judge Denton. Whipple moved to strike the peremptory challenge arguing it was barred under SCR 48.1.

The District Court struck down the Reggios' peremptory challenge on the grounds that they had waived this right in the first case by not filing the challenge before Judge Allf. As the two cases were consolidated, the court deemed the second case to be an extension of the first, the court determined the second case to be an extension of the first. Consequently, the district court found that the first case waiver applied to the Reggio's second case. The Reggios then petitioned for a writ of mandamus or prohibition, requesting the acceptance of their peremptory challenge.

Discussion

The District Court Correctly Determined Consolidated Cases Merge into a Single Action

The Reggios argued that when cases are consolidated, they do not merge into a single case, but rather the first and second cases retain their separate character, and subsequently the peremptory waiver from the first case should have no effect on their ability to file for such a waiver. Whipple countered by asserting that the consolidation of the two cases merged them into one, thereby causing the waiver from the initial party to apply to the Reggios.

SCR. 48.1(1) provides that each side of a civil case, whether single or consolidated, is permitted one peremptory challenge per action, with each action considered to have only two sides and allowing just one party on a given side to exercise the challenge.² Here, the Court determined that the rule dispenses with the Reggios' argument, explaining it is only possible for there to be two sides of a case, rather than separate characters on a single side. This determination is supported by the court's ruling in *Panko*, which held that when a second action

¹ By Theodore Milk.

² NEV. SUP. CT. R. 48.1(1).

is consolidated with the first under the same judge, the second action becomes part of the first.³ Thus, the two cases lose their separate characteristics and become one.

A Peremptory Challenge Waiver Extends to Parties on the Same Side of a Case

The Reggios argued that the first case's waiver of their peremptory challenge right does not apply against them. The Court previously addressed this same argument in *Gallen*, where the Court ruled that third-party defendants who were brought into a case did not have the right to file a peremptory challenge, due to the original defendants waiver of their peremptory challenge, holding that the first party waives another parties' right to a peremptory challenge when those parties are on the same side of the case.⁴ A holding which the Court additionally found is compelled by the express language of SCR 48.1(1). Therefore, the Court concluded that the district court did not err in barring the Reggios' subsequent peremptory challenge.

Under SCR 48.1(9), No Additional Peremptory Challenge for Cases Transferred to the First Case Judge After Consolidation

The Reggios next argue that SCR 48.1(9) permits an additional peremptory challenge because their second case was reassigned to a new Judge after consolidation. They contend the term "reassignment" should mean the transfer of a case from one judge to another. In response, Whipple argues that the transfer of the second case to the Judge hearing the first is not a reassignment because the second case is now a part of the first. Subsequently, asserting that reassignment under SCR 48.1(9) does not apply to the transfer from a consolidation.

SCR 48.1(9) permits a party with an additional peremptory challenge as a matter of right, even if the party previously used a challenge under SCR 48.1(1).⁵ SCR 48.1(1) describes an action, whether single or consolidated, to be treated as having only two sides.⁶ In interpreting the rule, the court determined such an action in SCR 48.1(9) to be the same under SCR 48.1(1). Thus, SCR 48.1(9) is not triggered when the second case is transferred upon consolidation. The transfer of a second case to the judge presiding over the first case does not constitute reassignment, because the second case is now part of the first, forfeiting its separate character.

Conclusion

The Court clarified three aspects of consolidated cases under SCR 48.1. First, the court made clear that consolidated cases only have two sides. Meaning that the second case becomes part of the first after consolidation. Second, if one side in a consolidated case waives their right to a peremptory challenge, the waiver bars subsequent peremptory challenges on the same side. Third, an "action" in the context of consolidated cases maintains the meaning found in SCR 48.1(1). Signifying that the transfer of a second case to the judge of the first case does not activate SCR 48.1(9) because the action remains before the same judge. Accordingly, the Court agreed with the district court, and denied the petition by the Reggios.

³ Panko v. Eighth Jud. Dist. Ct., 111 Nev. 1522, 902 P.2d 706 (1995).

⁴ Gallen v. Eighth Jud. Dis. Ct., 112 Nev. 209, 211, 911 P.2d 858, 859-60 (1996).

⁵ NEV. SUP. CT. R. 48.1(9).

⁶ NEV. SUP. CT. R. 48.1(1).