

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. MULLINS, AN INDIVIDUAL;
AND CAROLYN MULLINS, AN
INDIVIDUAL,
Appellants,
vs.
ROBERT J. CLAEYS,
Respondent.

No. 43407

FILED

OCT 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *JMB*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a personal injury complaint.¹ Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellants sued respondent for negligence following a car accident. In August 2003, appellants' attorney was informed that respondent had died, and appellants petitioned to name Miguel Galvez as the special administrator for respondent's estate. Respondent's attorney filed and served a suggestion of death upon the record on November 21, 2003.

On March 29, 2004, respondent filed a motion to dismiss under NRCP 25(a)(1), arguing that, because appellants had failed to file a motion for substitution of parties within 90 days after notice of

¹We have determined that oral argument is not warranted in this appeal. See NRAP 34(f)(1).

respondent's death was served, dismissal was required. In opposition, appellants argued that the court had "equitable jurisdiction" to deny the motion. Appellants explained that dismissal would preclude them from refileing the case because the limitations period had expired, and they asserted that their attorney's medical problems presented an extraordinary circumstance, which should not be held against them. The district court granted respondent's motion and dismissed the complaint without prejudice.

On appeal, appellants argue that, just prior to November 21, 2003, when the suggestion of death notice was served, their attorney was out of his office on medical leave and was not aware of the notice until he returned to the office four months later. They assert that this case does not involve surprise or unfair advantage against respondent or his estate because, throughout these proceedings, respondent's attorney was aware that appellants' complaint remained pending. Appellants maintain that strict application of NRCP 25(a)(1), under these facts, would work a hardship upon them. Finally, appellants assert that, because NRCP 15(a), which governs amendments to pleadings, indicates that leave to amend should be freely granted when justice so requires, they should have been allowed to substitute Galvez in place of respondent as a form of amendment to their complaint.

Respondent asserts that NRCP 25(a)(1) mandated dismissal here and that there is no authority to support deviating from that rule's unequivocal language. Further, pointing out that appellants' attorney had known about respondent's death since August 2003 and had filed two requests to exempt the action from mandatory arbitration during the time frame when he purportedly was on medical leave, respondent maintains

that, even if equitable principles could apply to waive NRCP 25(a)(1)'s mandatory language, appellants' attorney's failure to file a motion to substitute parties should not have been excused. Regardless, respondent contends, an attorney who becomes ill has a duty to prevent avoidable disadvantage to his clients. Finally, respondent argues that NRCP 15(a) amendment principles are inapplicable here.


This court has explained that, although a trial on the merits is favored over mechanically applying rules, NRCP 25(a)(1)'s clear language mandates that, unless a motion for substitution is made within ninety days after a death is suggested upon the record, the action "shall be dismissed as to the deceased party."² Consequently, when appellants made no substitution within ninety days of November 21, 2003, the district court was obligated to dismiss their complaint.

Further, although, appellants argue that equitable principles should preclude dismissal of their action, the record demonstrates that their attorney was aware of respondent's death as early as August 2003, and, while their attorney may have had medical issues, he was able to file in the district court two separate requests to exempt the underlying case from the mandatory arbitration program during the ninety-day period while he was on leave, thus demonstrating that he was able to perform work on the case. Moreover, appellants have not cited any authority that would support deviating from NRCP 25(a)(1)'s mandatory language directing dismissal if no motion to substitute is filed within ninety days

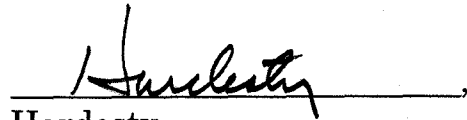
²NRCP 25(a)(1); see also Wharton v. City of Mesquite, 113 Nev. 796, 798, 942 P.2d 155, 157 (1997).

following a suggestion of death. Accordingly, we affirm the district court's order.


It is so ORDERED.



Gibbons J.



Hardesty J.



Parraguirre J.

cc: Hon. Lee A. Gates, District Judge
William C. Turner, Settlement Judge
Kirk T. Kennedy
Law Office of Vicki L. Driscoll
Katherine M. Peck
Clark County Clerk