IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACY GORHAM DALLENBACH, NORMAN FOSTER, MYRON ROBERTSON, MARIA AMBRIZ, TOM CANUL, MARTIN CHAIDEZ, GUSTAVE L. GONNELLA, JOHN GUNWARDENA, ROBERT L. JAMISON, VICTOR MARTINEZ, BARRY MORRISON, PHILLIP M. PORTER, JOSE D. ROMERO, RON RONCAL, PAM SLACK, TERRY STEELSMITH, AND ALBERT TACKETT,
Appellants,
vs.
CLARK COUNTY,
Respondent.

No. 46007

FILED

SEP 14 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a negligence action pursuant to NRCP 41(e)'s five-year rule. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.[1]

Appellants filed their complaint on May 19, 2000. Trial was initially set for May 4, 2004, but was subsequently reset to October 4, 2004, after the parties stipulated to continue trial. In September 2004, appellants sought a second continuance and the parties stipulated to vacate the October 2004 trial date and reset trial for "not less than 120 days." The district court subsequently reset trial for October 3, 2005, more than four months beyond the May 19, 2005 expiration date of the NRCP 41(e) five-year period. After the five-year period had expired, respondent moved to dismiss the case pursuant to NRCP 41(e), and the district court granted the motion on August 23, 2005. This appeal followed.

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Appellants first attempt to cast blame on the district court for the case not coming to trial within the five-year period. They note that the second stipulation stated that trial should be reset for not less than 120 days from October 4, 2004, and did not provide an exact date for when the trial should take place. Thus, they contend that the district court, in exercising its discretion to set a new trial date, is responsible for setting trial for a date beyond the expiration of the five-year period. This argument lacks merit. The plaintiffs have the duty to use diligence at every stage of the proceedings to expedite their case to a final determination.[2] They must "carefully track the crucial procedural dates and . . . actively advance the case at all stages, a duty that may require the plaintiff[s] to take initiative and prod the district court when the case sits dormant."[3] We have repeatedly rejected arguments that a plaintiff's failure to timely bring the case to trial as required by NRCP 41(e) should be excused because the district court purportedly caused the delay.[4]

Appellants also maintain that the second stipulation was sufficient to extend the five-year period. The second stipulation, however, makes no mention of the NRCP 41(e) five-year period. It merely asks that the October 2004 trial date be vacated and requests that trial be reset "for

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[2]Thran v. District Court, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963).

[3]Allyn v. McDonald, 117 Nev. 907, 912, 34 P.3d 584, 587 (2001).

[4]See id. (affirming NRCP 41(e) dismissal where appellant argued that the district court's erroneous ruling on a res judicata issue caused the delay that pushed the case beyond the NRCP 41(e) period); Johnson v. Harber, 94 Nev. 524, 582 P.2d 800 (1998) (upholding five-year rule dismissal where the trial court reset the trial date three times sua sponte and plaintiff and his counsel knew of the court's action and remained silent).

not less than 120 days."[5] The situation here is analogous to that addressed by this court in Prostack v. Lowden.[6] In Prostack, this court held that where an oral stipulation to continue the trial was reached, but the stipulation was silent as to the expiration of the NRCP 41(e) five-year period, and the judge who heard the motion to continue the trial was not made aware of the potential NRCP 41(e) problem, the stipulation did not estop the defendants in the underlying case from asserting the NRCP 41(e) mandatory dismissal rule.[7]

In the instant case, as in Prostack, the parties' stipulations make no mention of the potential expiration of the five-year period. Moreover, appellants have not indicated that any effort was made to bring this issue to the attention of either the other parties to the case or the judge. Appellants admit they were aware that trial had been set for beyond the expiration of the five-year period and that they took no steps to

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[5]The first stipulation similarly does not appear to address NRCP 41(e) or otherwise extend the five-year period. We note, however, that the copy of this stipulation provided in appellants' appendix is incomplete, as it is missing its second page. "[M]issing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary." Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996). Appellants have the responsibility to ensure that the record on appeal contains the material to which exception is taken. Id. The two pages from this stipulation that appellants have provided make no mention of the potential expiration of the five-year period and appellants do not argue that this first stipulation contains language specifically addressing the five-year rule.

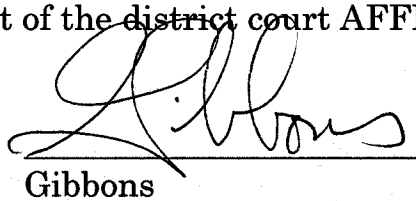
[6]96 Nev. 230, 606 P.2d 1099 (1980).

[7]Id.

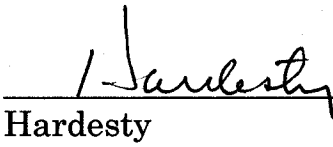
address that issue. Accordingly, we conclude that the stipulations did not extend the NRCP 41(e) five-year period.

As noted above, the complaint in the underlying case was filed on May 19, 2000. Appellants were therefore required to bring their case to trial by May 19, 2005. They failed to do so. As the stipulation between the parties was not sufficient to toll the five-year period, we conclude that the district court properly dismissed appellants' complaint pursuant to NRCP 41(e). We therefore

ORDER the judgment of the district court AFFIRMED.[7]



_____, J.
Gibbons



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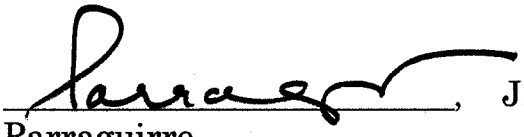

_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
William F. Buchanan, Settlement Judge
Kirk T. Kennedy
Michael K. Mansfield
Clark County Clerk

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[7]We have considered the remaining arguments made by appellants and conclude that they lack merit.