N THE SUPREME COURT OF THE STATE OF NEVADA

ANYA S. DUKE,
Appellant,
vs.
ROGER M. SIMON, M.D.; AND RETINA CONSULTANTS OF NEVADA, A NEVADA CORPORATION,
Respondents.

No. 48263

FILED

JUL 03 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing appellant's case under NRCP 41(e). Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

On May 6, 2003, we reversed a previous dismissal of appellant's medical malpractice action and remanded the matter to the district court for further proceedings. Rehearing was denied on June 18, 2003, and the remittitur issued on July 15, 2003. The remittitur was filed in the district court on July 21, 2003. On February 3, 2004, the district court granted appellant's motion "to stay [the] entire proceedings." Based on our review of the record, it appears that the stay instituted by that order was not lifted until November 9, 2004, when the district court entered an order terminating "any stay presently imposed on this case."[1]

On August 30, 2006, respondents moved the district court to dismiss the underlying case based on appellant's failure to bring her case to trial within the NRCP 41(e) period. Appellant opposed the motion. On

[1]Although appellant contends that no stay was in place at the time the November 9 order was entered, the record belies this argument.

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October 5, 2006, the district court granted the motion and dismissed the case. This appeal followed.[2] On appeal, appellant challenges the dismissal of her case and the interlocutory orders denying her request for the disqualification or recusal of Judge Kenneth C. Cory and her request for reconsideration of that order.

Denial of appellant's motion to disqualify or recuse Judge Cory

Disqualification or recusal is appropriate when a judge's impartiality might reasonably be questioned.[3] The party seeking disqualification or recusal bears the burden to demonstrate that disqualification or recusal is warranted and speculation is not sufficient.[4] Here, appellant has not articulated any grounds for disqualification or recusal, except that Judge Cory ruled against her on some issues. This is insufficient to warrant either disqualification or recusal.[5] Accordingly, we

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[2]After the appeal was filed, the district court granted respondents' request for attorney fees and costs. Appellant has not appealed that order; accordingly we lack jurisdiction to consider the award. See Rust v. Clark Cty. School District, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) (noting that "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court"). Inasmuch as we are reversing the district court's dismissal order on which the award of fees and costs was based, however, the district court may wish to reconsider the award.

[3]PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 436, 894 P.2d 337, 340 (1995), overruled in part on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005).

[4]Id. at 437, 894 P.2d at 341.

[5]In re Petition to Recall Dunleavy, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988). But see Liteky v. U.S., 510 U.S. 540, 555-56 (1994) (noting that only in a rare, extreme case would a judge's rulings or impressions formed while presiding over a trial be grounds for

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conclude that appellant's motion for disqualification or recusal and her motion for reconsideration of the denial of that motion were properly denied.

Dismissal under NRCP 41(e)'s three-year rule

NRCP 41(e) provides that "[w]hen in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial . . . the action must be dismissed by the trial court . . . unless brought to trial within 3 years from the date upon which remittitur is filed by the clerk of the trial court." As noted above, the previous dismissal of appellant's case was reversed by an order entered on May 6, 2003. The remittitur for that order was filed in the district court on July 21, 2003. Absent an extension of the NRCP 41(e) period, appellant was therefore required to bring her case to trial by July 21, 2006.

In Boren v. City of North Las Vegas,[6] this court held that "[a]ny period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining" the period in which a case must be brought to trial pursuant to NRCP 41(e).[7] As noted above, the district court granted appellant's request for a stay on February 3, 2004. That stay apparently remained in force until November 9, 2004, a period of 280 days. Under Boren, the 280

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disqualification). We conclude that the actions at issue here do not rise to the extreme level necessary for disqualification under Liteky.

[6]98 Nev. 5, 638 P.2d 404 (1982).

[7]Id. at 6, 638 P.2d at 405.

days in which the stay was in effect are not included in calculating the NRCP 41(e) period. Thus, appellant was not required to bring her case to trial until April 27, 2007, and the district court erred in dismissing appellant's case. We therefore reverse the October 5, 2006, order dismissing appellant's case and we remand this matter to the district court. Because the district court dismissed the case on October 5, 2006, 76 days after July 21, 2006, 204 days remain in the NRCP 41(e) 3-year period. Accordingly, once the remittitur for this decision has been issued by this court and filed in the district court, appellant shall have 204 days from the date the remittitur is filed in the district court to bring her case to trial.[8]

We note that, although the responsibility for bringing a case to trial within the NRCP 41(e) period lies solely with the plaintiff,[9] the underlying action has, like this appeal, been plagued by the filing of numerous unnecessary and voluminous pleadings and motions by both appellant and respondents. The resolution of the underlying proceedings has likewise been hindered by the repeated reassignment of this case to different departments of the district court. We strongly encourage both

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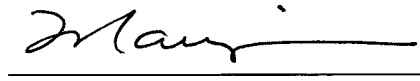
[8]As illustrated in Rickard v. Montgomery Ward & Co., 120 Nev. 493, 96 P.3d 743 (2004), when a dismissal pursuant to NRCP 41(e) is reversed on appeal, the plaintiff does not have an additional three years to bring his or her case to trial under NRCP 41(e).

[9]Allyn v. McDonald, 117 Nev. 907, 912, 34 P.3d 584, 587 (2001) (noting that plaintiffs have the duty to track crucial procedural dates and to actively advance their case at all stages, and that, "except in very limited circumstances, we uphold NRCP 41(e) dismissals without regard to the plaintiffs' reasons for allowing the mandatory period to lapse").

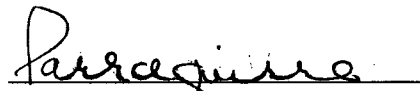
parties and the district court to ensure that this case is brought to a final resolution within the 204 days remaining in the NRCP 41(e) period.[10]

It is so ORDERED.[11]

, C.J.
Gibbons



, J.
Maupin



, J.
Parraguirre

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[10]If the district court's calendar is completely unable to accommodate the trial of this case within the remaining 204 days, it should ensure that appellant is given a reasonable time beyond that period to bring her case to trial. See Rickard, 120 Nev. 493, 96 P.3d 743.

[11]Having considered appellant's remaining arguments, we conclude that they lack merit. We further conclude that the arguments raised in support of the disqualification of Justice Ronald Parraguirre do not warrant his recusal, and thus appellant's request for his recusal is denied. Moreover, we deny as moot appellant's remaining requests for disqualification, as none of the remaining challenged justices participated in this decision. We also deny as moot appellant's motion for a stay. Additionally, we have determined that our review of the transcripts requested by appellant is not necessary for our resolution of this appeal. We therefore deny appellant's request for transcripts. Finally, we deny the requests for sanctions made by both appellant and respondents, the parties' requests to strike various documents filed in this court, and appellant's request to remove respondents' counsel from the underlying case.

cc: Hon. Kenneth C. Cory, District Judge
Anya S. Duke
Alverson Taylor Mortensen & Sanders
Eighth District Court Clerk