IN THE SUPREME COURT OF THE STATE OF NEVADA

C.R. HOMES, INC., A NEVADA CORPORATION,
Petitioner,
vs.
THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE, AND THE HONORABLE JOSEPH T. BONAVENTURE, DISTRICT JUDGE,
Respondents,
and
JANET GAYLER; HARRY BRADLEY; AND ANTILLO PANOZZO,
Real Parties in Interest.

No. 55151

FILED

SEP 22 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

This is an original petition for a writ of mandamus or prohibition challenging district court orders denying dismissal of a construction defect action under NRCP 41(e) and denying reconsideration of the refusal to dismiss. Fifth Judicial District Court, Nye County; Joseph T. Bonaventure, Judge.

This writ petition arises out of a construction defect claim, originally filed in Clark County in February 2004, which the plaintiffs re-filed in Nye County in August 2004 without dismissing the original case, and then expanded to include additional plaintiffs, seeking class action status. The real party in interest, Janet Gayler, joined the Nye County suit as a plaintiff in December 2006. The district court severed Gayler's claim in October 2007.

NRCP 41(e) requires that an action be brought to trial within five years of its filing. In July 2009, the district court held a proceeding meant to satisfy the five-year requirement of NRCP 41(e), assuming that August 2004 was the date to use in calculating the five-year rule. In that proceeding, the district court selected a jury, called Gayler for brief questioning, and continued the case until further notice. The petitioner, C.R. Homes, argued that the proceeding was not a trial in good faith for purposes of NRCP 41(e), but the district court rejected that argument. Subsequently, C.R. Homes discovered the February 2004 filing and moved for reconsideration, arguing that the July 2009 proceeding did not satisfy NRCP 41(e) because the five-year period had already run by the time it was convened. The district court denied the motion, and C.R. Homes petitioned this court for writ of mandamus or prohibition. For the reasons detailed below, we deny the writ petition.

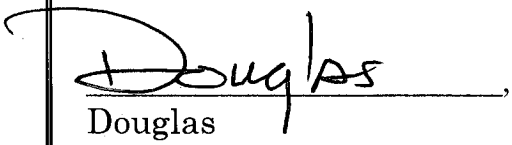
Both mandamus and prohibition are extraordinary remedies, and whether a petition for extraordinary relief will be considered is solely within this court's discretion. See Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). This court will only consider writ petitions challenging a district court denial of a motion to dismiss when: "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 578-79, 97 P.3d 1132, 1134 (2004) (internal quotation marks omitted).

We have held that swearing in and questioning one witness with knowledge of facts relevant to the case can satisfy NRCP 41(e).

French Bouquet Flower Shoppe v. Hubert, 106 Nev. 324, 326, 793 P.2d 835, 836 (1990). Therefore, the district court had authority under the law of this court to convene such a hearing and deem it sufficient to satisfy NRCP 41(e).

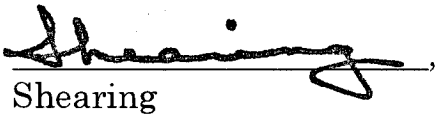
Gayler joined the class action, not the original February 2004 suit, and should not be held to a filing date for a case she did not join. Additionally, the record is not clear as to whether the February 2004 complaint was or could have been dismissed without prejudice. Thus, we accept, as the district court did, the August 2004 Nye County filing as the starting point for NRCP 41(e). The jury was sworn in and Gayler called as a witness within five years of that date. Thus, the district court appropriately followed this court's current law in deeming this procedure sufficient and we see no need to clarify this area of law. Accordingly, we deny the petition.

It is so ORDERED.[1]

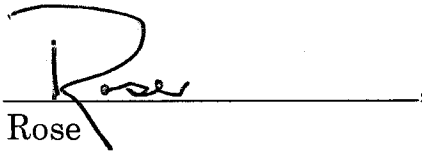


_____, J.
Douglas

_____, J.
Gibbons



_____, Sr.J.
Shearing



_____, Sr.J.
Rose

[1]The Honorable Miriam Shearing, Senior Justice, and the Honorable Robert E. Rose, Senior Justice, were appointed by the court to sit in the places of the Honorable Michael A. Cherry, Justice, and the Honorable Nancy M. Saitta, Justice, respectively, who voluntarily recused themselves from participation in the decision of this matter. Nev. Const. art. 6, § 19; SCR 10.

PICKERING, J., with whom HARDESTY and PARRAGUIRRE, JJ., agree, dissenting:

I would grant the writ petition and address the policy arguments appellant presents. Although calling one witness to testify can amount to bringing an action to trial for purposes of NRCP 41(e), Ad-Art, Inc. v. Denison, 94 Nev. 73, 74, 574 P.2d 1016, 1017 (1978), the proceeding must be a good faith effort at a trial, not a sham. Lipitt v. State, 103 Nev. 412, 413, 743 P.2d 108, 109 (1987).

The district court cut off Ms. Gayler's examination when it turned to substance, stating that the substantive issues would be reserved "for the actual trial." This frames the core question–how can a case be brought to trial in good faith when even the district court judge recognizes that the proceeding over which he is presiding is not a real trial?

It is one thing to call a witness to give substantive testimony in a bench-tried case, then continue the proceeding so it can be completed later. It is another to summon jurors and then, after a witness appears and gives perfunctory testimony, to tell the jury to return home since the "actual trial" will occur later. The ABA recognizes that a jury's time is valuable and should not be wasted. American Jury Project, American Bar Association Principles for Juries and Jury Trials, Principle 2(C) (2005) ("The time required of persons called for jury service should be the shortest period consistent with the needs of justice.").

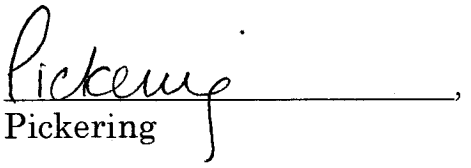
Here, the jury must have been mystified as to the purpose of their public service. They were told they might be called back some time in the indefinite future but that, until then, they could not "read, watch, or listen to any report or of [sic] commentary in the trial or any person connected with this trial, any means of information including without limitation, newspapers, television, radio, internet, radio, [sic] and [to not]

form or express any opinion on any subject connected with the trial until the case is finally submitted." This leaves eight citizens (maybe more, if there were alternates) waiting and wondering if they will ever be called back to trial, possibly concerned that while going about their day to day lives they may be exposed to news coverage or other information that may bias them against the case. This imposition on citizens otherwise outside the judicial process does not seem justified. If the problem is the need for a way around NRCP 41(e)'s absolute five-year deadline, I submit it would be preferable to amend the rule and to provide an escape valve based on equitable concerns that might justify its suspension in particular cases, than to accomplish this by a sham proceeding, particularly in jury trials. See Moran v. Superior Court, 673 P.2d 216, 221 (Cal. 1983) (holding that exceptions to the 5-year rule, eventually codified at Cal. Code Civ. Pro. section 583.340(c), prioritize reality over an artificial and arbitrary deadline).

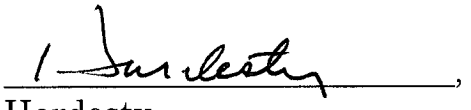
Also troubling is the lack of standards to govern which lawyers and litigants can avail themselves of the procedure followed in this case and which cannot. This court has consistently held that if an action is not brought to trial within five years, dismissal is required and no balancing of equities is allowed. See Monroe v. Columbia Sunrise Hosp., 123 Nev. 96, 99-100, 158 P.3d 1008, 1010 (2007); Johnson v. Harber, 94 Nev. 524, 527, 582 P.2d 800, 801 (1978). But the district court has seemingly untrammeled discretion whether to hold a perfunctory proceeding like the one that occurred in this case to satisfy NRCP 41(e). This defeats the purpose of the mandatory five-year rule if the district court can decide to extend the courtesy of a quick proceeding to satisfy NRCP 41(e) to one litigant but not another. It also defies accountability as to which litigants

may excuse their delays by resort to this procedure and which may not; there are no real standards, other than the willingness of the particular district court judge.

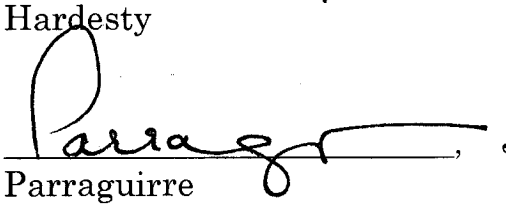
For the above reasons, I would grant the writ petition and, therefore, respectfully dissent from its denial.



_____, J.
Pickering



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, Senior Judge
Lemons, Grundy & Eisenberg
Tuverson & McBride
Pursiano Barry Lavelle Bruce Hassin, LLP
Nye County Clerk