IN THE SUPREME COURT OF THE STATE OF NEVADA

GODWIN MADUKA, M.D.; LAS VEGAS PAIN INSTITUTE AND MEDICAL CENTER, LLC; AND GODWIN MADUKA, M.D., A PROFESSIONAL CORPORATION,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,
and
SHELLY ROMERO; AND JOHN ROMERO,
Real Parties in Interest.

No. 57299

FILED

SEP 19 2011

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss, brought pursuant to NRCP 41(e)'s five-year rule, in a tort action.

BACKGROUND

Under NRCP 41(e), "[a]ny action . . . shall be dismissed . . . on motion of any party . . . unless such action is brought to trial within 5 years after the plaintiff has filed the action, except where the parties have stipulated in writing that the time may be extended."

On April 27, 2005, real parties in interest Shelly and John Romero filed a complaint in the underlying case. On February 2, 2010, during a district court hearing regarding the case, the parties entered into

an oral stipulation regarding the NRCP 41(e) period. While no transcript apparently exists for this hearing, the district court minutes provide that "[the attorney for petitioners] stated that he will WAIVE the five year rule until the trial date of 7/12/10, COURT SO ORDERED." Thereafter, between the time that the oral stipulation was agreed to and the scheduled July trial date, the case was reassigned to four different judicial departments, based on the Eighth Judicial District's approach to case management. During the last reassignment, the July 12 trial date was also vacated. Specifically, a notice of department reassignment was filed, with a box checked noting that the reassignment was the result of a peremptory challenge to a district court judge. The notice also stated that "[a]ny trial date is vacated and will be reset by the new department."

The NRCP 41(e) five-year period passed without the matter being brought to trial. On August 30, 2010, the district court held another hearing regarding the case. Again, no transcript appears to exist from this hearing. Nevertheless, the district court minutes reflect that the district "COURT NOTED the Five Year Rule was previously waived [on] 02/01/10." The minutes make no mention of the limited nature of the February extension of the five-year period and provide no explanation of why the district court determined that the February stipulation was a waiver.

On September 13, 2010, petitioners' filed a motion to dismiss the case under NRCP 41(e). Real parties in interest opposed the motion, and petitioners filed a reply. The district court subsequently held a hearing on the motion, and, on November 5, 2010, entered an order denying petitioners' motion to dismiss. This petition followed, and, as

directed, an answer and reply have been filed. Thereafter, this court heard oral argument.

## DISCUSSION

### Availability of extraordinary relief

In cases in which there is no plain, speedy, and adequate legal remedy, extraordinary relief may be available. NRS 34.170; NRS 34.330. A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may issue to confine the district court to the proper exercise of its prescribed jurisdiction when the court has acted in excess of its jurisdiction. NRS 34.320. Mandamus and prohibition are extraordinary remedies, and it is within this court's discretion to determine if such petitions will be considered. Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991). This court has previously concluded that one situation in which it may exercise its discretion to consider a writ petition is when the dismissal of a case is required under NRCP 41(e). Smith v. District Court, 113 Nev. 1343, 1345 n.1, 950 P.2d 280, 281 n.1 (1997). Accordingly, we will consider this petition.

### The parties' arguments

Petitioners argue that NRCP 41(e)'s five-year rule to bring an action to trial is mandatory and that petitioners never waived the NRCP 41(e) rule, but instead only agreed to a limited extension of the five-year period, until July 12, 2010. Petitioners also argue that once that date passed without the case being brought to trial, the district court lost jurisdiction over the action.

In opposing the petition, real parties in interest argue that the NRCP 41(e) five-year period was waived by petitioners, as demonstrated by the February 2010 oral stipulation, and that petitioners' attempt to now argue that this waiver was merely limited or conditional, misstates the parties' actual understanding. Real parties in interest further note that the August 2010 district court minutes support their argument that the NRCP 41(e) period was completely waived. They alternatively argue that it was petitioners' actions that prevented the matter from being tried before July 12, 2010, because petitioners filed a peremptory challenge, which real parties in interest assert should be construed as an implied extension of any limited waiver of the NRCP 41(e) period. In their reply, petitioners dispute real parties in interest's arguments.

The parties' February 2010 stipulation

This court has previously recognized that limited extensions of the NRCP 41(e) period are permissible. See, e.g., Massey v. Sunrise Hospital, 102 Nev. 367, 368, 724 P.2d 208, 209 (1986) (noting that the parties had stipulated to, in the court's words, "waive" the NRCP 41(e) period until six months after the remittitur of an appeal); Johann v. Aladdin Hotel Corp., 97 Nev. 80, 81, 624 P.2d 493, 493-94 (1981) (acknowledging a limited written stipulation entered into between the parties extending the NRCP 41(e) period); see also NRCP 41(e) (providing that the five-year period "may be extended").

Under this authority, we conclude that the oral stipulation agreed to by the parties, and memorialized in the district court's February 2, 2010, minutes, validly extended the NRCP 41(e) period until July 12, 2010. See Prostack v. Lowden 96 Nev. 230, 231, 606 P.3d 1099, 1099-1100 (1980) (recognizing that "an oral stipulation, entered into in open court, approved by the judge, and spread upon the minutes, is the equivalent of a

written stipulation for the purposes of [NRCP 41(e)]"). We disagree with real parties in interest that the NRCP 41(e) period was completely waived by the parties' Prostack stipulation, because the district court's February 2010 minutes expressly notes that the NRCP 41(e) "waiver" is limited in nature, only extending the time to bring the case to trial until July 12, 2010. Thus, petitioners correctly argue that the stipulation was limited and not a complete waiver of the five-year rule.

The parties' limited extension was not subsequently modified

Real parties in interest contend that, even if the Prostack stipulation was limited in nature, the stipulation was later modified at the August 2010 district court hearing. In State, Division Child & Family Services v. District Court, 120 Nev. 445, 451-54, 92 P.3d 1239, 1243-45 (2004), this court set forth the parameters for determining when a district court's oral rulings are effective. Specifically, this court stated that "dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy" must be in writing and signed. Id. On the other hand, "oral court orders pertaining to case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain an advantage are valid and enforceable." Id. Here, the August 2010 district court minutes did not modify the parties' February 2010 Prostack stipulation because the minutes were not administrative in nature. State, Div. Child & Fam. Services, 120 Nev. at 451-54, 92 P.3d at 1243-45. Additionally, nothing in the record suggests that a stipulation to modify the parties' Prostack stipulation was otherwise entered. Thus, we conclude that there was no enforceable modification of the parties' limited Prostack stipulation. Accordingly, dismissal of the case under NRCP 41(e) was warranted.

Finally, we note that the procedures utilized by the Eighth Judicial District Court for the assignment and reassignment of cases have contributed to the loss of real parties in interest's opportunity to prosecute their case in the district court. This case was assigned and reassigned to a number of different judges over the course of its tortured history under the Eighth Judicial District's case management plan for medical malpractice cases. As demonstrated by this case, the application of these procedures utilized as part of this plan unduly restrict counsel's ability to address issues related to the expiration of the NRCP 41(e) period. Nevertheless, under the longstanding application of the rule and this court's caselaw, this court is left with little alternative but to apply the five-year rule and grant the petition. See Monroe v. Columbia Sunrise Hosp., 123 Nev. 96, 99-100, 158 P.3d 1008, 1010 (2007) (explaining that NRCP 41(e) "does not allow for examination of the equities of dismissal or protection of a plaintiff who is the victim of unfortunate circumstances"). Accordingly, for the reasons set forth above, because the district court was required to dismiss the case under NRCP 41(e),[1] we

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[1]To the extent that real parties in interest look to equities for relief and argue that petitioners' actions caused the NRCP 41(e) five-year period to run, or that their actions should be construed as an implied waiver of the rule, these arguments lack merit. Johnson v. Harber, 94 Nev. 524, 526, 582 P.2d 800, 801 (1978) (explaining that plaintiffs have the duty to ensure that their case has been brought to trial within the five-year period and that the courts will not undertake an examination of equities with regard to the running of the NRCP 41(e) period, even if plaintiffs are the victim of unfortunate circumstances); see also Allyn v. McDonald, 117 Nev. 907, 912, 34 P.3d 584, 587 (2001) (stating that NRCP 41(e) dismissals will generally be upheld "without regard to the plaintiff's reasons for allowing the mandatory period to lapse"); Thran v. District Court, 79 Nev.

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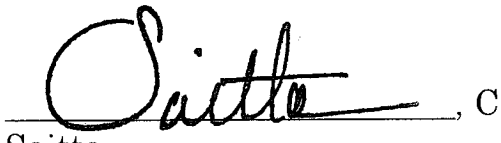
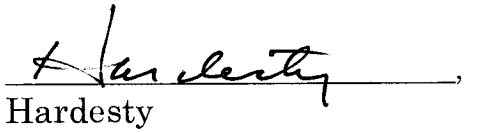
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order denying the motion to dismiss and instead enter an order dismissing the underlying action.[2]



Saitta, C.J.



Hardesty, J.

CHERRY, J., dissenting:

I believe that the NRCP 41(e) five-year rule simply no longer works in Clark County. Due process, under both the state and federal constitutions, demands that this court cannot in good conscience continue to shut the courthouse doors on parties who run afoul of the five-year rule due to judicial case management procedures beyond the parties' control.

The Eighth Judicial District's caseload is larger than any judicial district's caseload in the state, making the application of NRCP 41(e)'s five-year rule unworkable for litigants. The 2010 Annual Report of

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. . . *continued*
176, 181, 380 P.2d 297, 300 (1963) (stating in regard to NRCP 41(e) that "it is the plaintiff upon whom the duty rests to use diligence at every stage of the proceeding to expedite his case to a final determination") (internal quotation marks omitted).

[2]In light of our conclusion here, we deny petitioners' alternative request for a writ of prohibition. Real parties in interest's request for attorney fees, which was contained in their answer, is denied.

the Nevada Judiciary highlights the caseload discrepancies within this state. For Fiscal Year 2010, 2,513 nontraffic cases were filed in the First Judicial District (Carson City and Storey County), and 20,837 nontraffic cases were filed in the Second Judicial District (Washoe County). In Nevada's more rural areas, there were far fewer filings. For instance, in the Fifth Judicial District (Esmeralda, Mineral, and Nye Counties), only 3,287 nontraffic cases were filed. In stark contrast with the rest of the state, in the Eighth Judicial District (Clark County), 95,690 nontraffic cases were filed in Fiscal Year 2010. With delays caused by such overwhelming case numbers, it is common knowledge that litigants in Clark County simply cannot receive trial dates until they are already effectively running up against the back end of the NRCP 41(e) five-year period.

My colleagues miss the point in emphasizing this court's "longstanding" caselaw as leaving us with no option but to order dismissal of the case. This rule and caselaw has been rendered outdated by the numbers of annual filings faced in the Eighth Judicial District. Situations change and justice may require that this court re-examine its precedent from time-to-time. I fail to see the reason here for elevating longstanding tradition over real and increasingly pressing concerns.

And as if the challenges many Clark County litigants face from these annual filing numbers were not enough, the case management policies put in place by the Eighth Judicial District—specifically the constant recalendaring and reassignments across judicial departments—only further increase the likelihood of a dismissal pursuant to NRCP 41(e). The procedural history of this case, unfortunately, aptly illustrates the problems created by this system. As noted by the majority, in the period

between the parties' February 2010 oral stipulation and the July 2010 trial date, the case was reassigned to at least four different district court judges. Specifically, on June 7, 2010, approximately one month before the trial date, Judge Jackie Glass, to whom the case was assigned, indicated that she would be unable to hear the case, which resulted in the case being reassigned to Judge Elizabeth Gonzales. Shortly thereafter, Judge Gonzales decided that the case would again be reassigned, resulting in Judge Jessie Walsh becoming the presiding judge in the case. The case was subsequently reassigned a third time, to Judge Douglas Smith, following a peremptory challenge to Judge Walsh filed by petitioners. This last notice of reassignment included what appears to be stock form language stating that "[a]ny" trial date was being vacated.

Parties cannot actually bring a case to trial themselves; instead, they must rely on the cooperation of our district court judges. The frequent reshuffling of cases only increases the likelihood that mistakes will happen, as clearly occurred here, when real parties in interest's trial date was unthinkingly vacated by stock language accompanying yet another re-juggling of case assignments. This notice of reassignment, and not any overt action by real parties in interest, appears to be the cause of the NRCP 41(e) issues currently before this court. Every reassignment, of which there were too many here, only increases the likelihood of confusion and the possibility that a mistake will occur that leads to the running of the five-year rule. I see no reason for this court to endorse the

perpetuation of a system in which the parties are the ones punished by problematic policies of the court system.[3]

Finally, I question two of the majority's legal conclusions drawn from the facts of this case. First, I remain unconvinced that parties can conditionally waive the NRCP 41(e) period on a limited basis. While the decisions cited by the majority, Massey v. Sunrise Hospital, 102 Nev. 367, 724 P.2d 208 (1986); Johann v. Aladdin Hotel Corp., 97 Nev. 80, 624 P.2d 493 (1981), acknowledge, factually, limited extensions of the NRCP 41(e) five-year rule, I read no express approval of such arrangements in these opinions. Instead, I would only permit complete waivers of the NRCP 41(e) period. Such a construction of NRCP 41(e) would avoid any confusion regarding the length and nature of any waiver or extension of the rule. This reading would also eliminate the need for the parsing of district court minutes in order to divine what exactly the parties agreed to. Second, here, the February 2010 minute order that the majority construes as merely a limited extension of the five-year rule expressly uses the word "waive," rather than "extend." I would read the parties February 2010 oral stipulation as validly waiving, in its entirety, the applicability of the five-year rule to this case. See Prostack v. Lowden, 96 Nev. 230, 231, 606 P.3d 1099, 1099-1100 (1980) (recognizing that "an oral stipulation, entered into in open court, approved by the judge, and spread upon the minutes, is the equivalent of a written stipulation for the purposes of [NRCP 41(e)]").

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[3]Regardless, intervening in this case is premature. We should wait to review this issue within the context of an appeal from a final judgment, when there is a more complete record. Pan v. Dist. Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

I cannot agree with my colleagues' assessment that our hands are tied and that real parties in interest cannot have their day in court simply because their complaint was brought in the judicial district with the heaviest docket and a flawed case management system. Therefore, I respectfully dissent.

Cherry, J.
Cherry

cc: Hon. James M. Bixler, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Harris Law Office
Eighth District Court Clerk