

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELEANOR SCHROEPFER, FOR THE  
ELEANOR SCHROEPFER FAMILY TRUST,  
AND FOR TEHA, INC., A NEVADA  
CORPORATION; LEON FORT, FOR  
HIMSELF, AND FOR INFINITE BALANCE  
CORPORATION, A NEVADA CORPORATION;  
AND GEORGE GREEN,

Appellants,

vs.

PHOENIX INSTITUTE FOR RESEARCH AND  
EDUCATION, LTD., A NEVADA  
CORPORATION,

Respondent.

No. 35899

**FILED**

**SEP 10 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing an action pursuant to the five-year rule contained in NRCP 41(e). On appeal, appellants argue that the three-year extension period in NRCP 41(e) is applicable because an appeal from an order granting a change of venue was taken to this court. In disposing of the appeal, this court did not issue its order of remand until January 15, 1999; the remittitur was not issued until February 9, 1999. Therefore, appellants argue that they had until February 9, 2002, to bring the action to trial. We conclude that appellants' argument lacks merit. Accordingly, we affirm the district court's order of dismissal.

Pursuant to NRCP 41(e), the district court has discretion to dismiss an action "whenever plaintiff has failed for two years after action is filed to bring such action to trial." But when an action has been pending without trial for

five years, NRCP 41(e) dismissal is mandatory.<sup>1</sup> This is commonly referred to as the "five-year rule." The purpose of the five-year rule is "to compel an expeditious determination of legitimate claims."<sup>2</sup>

An action commences when the plaintiff files a complaint, and the five-year period for bringing the action to trial begins to run at that time.<sup>3</sup> Accordingly, absent a written stipulation, if the action is not brought to trial within five years after the date the complaint is filed, dismissal is mandatory.<sup>4</sup>

In this case, appellants filed their complaint on December 19, 1994. Although the complaint was amended on three occasions, the correct date to begin calculation of the five-year period under NRCP 41(e) remains December 19, 1994.<sup>5</sup>

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<sup>1</sup>NRCP 41(e), in pertinent part, provides as follows:

Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended.

<sup>2</sup>C.R. Fedrick, Inc. v. Nevada Tax Comm'n, 98 Nev. 387, 389, 649 P.2d 1372, 1374 (1982).

<sup>3</sup>See United Ass'n of Journeymen v. Manson, 105 Nev. 816, 820, 783 P.2d 955, 957 (1989) ("[A]n action includes the original claim and any crossclaims, counterclaims, and third-party claims.").

<sup>4</sup>See Ad-Art, Inc. v. Denison, 94 Nev. 73, 74, 574 P.2d 1016, 1017 (1978) ("NRCP 41(e) is clear and unequivocal: any action not brought to trial within five years must, upon proper motion, be dismissed."); Bank of Nevada v. Friedman, 86 Nev. 747, 751, 476 P.2d 172, 175 (1970) (stating that when a case is not brought to trial within five years, the only exception to mandatory dismissal is a written stipulation).

<sup>5</sup>See Baker v. Noback, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996) (stating that the filing of an amended complaint

*continued on next page . . .*

Furthermore, appellants do not assert that the parties stipulated in writing to extend the five-year period. Therefore, in the absence of a written stipulation, we conclude that dismissal under NRCP 41(e) was proper because the case was not brought to trial before December 19, 1999.

With respect to appellants' argument concerning the three-year extension period, NRCP 41(e), in pertinent part, states as follows:

When 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 on motion of any party after due notice to the parties, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court.

The question presented is whether the three-year extension period is applicable when an appeal is taken from an order changing venue.

We conclude that the language "[w]hen in an action after judgment" in NRCP 41(e) refers to appeals taken after a final judgment, in contrast to appeals from interlocutory orders such as orders changing venue. A final judgment is "one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post judgment issues such as attorney's fees and costs."<sup>6</sup> Accordingly, when an appeal of a final judgment has been taken, and that judgment is reversed and remanded for a new trial, a plaintiff must be afforded an additional three

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. . . continued

is irrelevant to the calculation of the five-year period under NRCP 41(e)).

<sup>6</sup>Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

years to bring the action to trial.<sup>7</sup> In this case, however, the appeal from the venue order was not taken after a final judgment. Therefore, appellants are not entitled to an additional three years to bring the action to trial.

Additionally, we conclude that appellants are not entitled to exclude the time consumed by the appeal from the order changing venue from the five-year mandatory dismissal period because appellants never sought a stay of proceedings while the change of venue matter was pending in this court. If appellants had sought a stay of proceedings, then the five-year period would have been tolled.<sup>8</sup> In the absence of a court-ordered stay, the five-year limitation period of NRCP 41(e) continues to run.

Based upon the foregoing, we conclude that the district court did not err in dismissing appellants' action pursuant to NRCP 41(e) because the action had not been brought to trial within five years after the complaint was filed. Further, we conclude that the three-year extension period contained in NRCP 41(e) does not apply to this case because such an extension is only applicable when an appeal is taken after final judgment and the matter is reversed and remanded for trial. Because the order changing venue was entered before judgment, and was not tantamount to a final judgment,

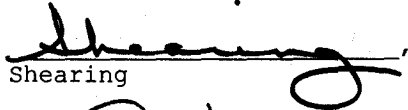
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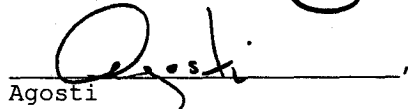
<sup>7</sup>See Massey v. Sunrise Hospital 102 Nev. 367, 370, 724 P.2d 208, 210 (1986) (stating that when a district court grants summary judgment, appellant is entitled to a three-year extension period in which to bring the case to trial if this court reverses the judgment and remands the matter for trial).

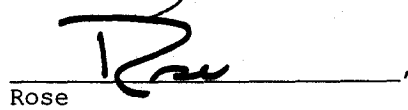
<sup>8</sup>See NRAP 3A(b)(4); Boren v. City of North Las Vegas, 98 Nev. 5, 6, 638 P.2d 404, 405 (1982) (holding that the time during which the parties are prevented from bringing an action to trial by reason of a court-ordered stay is not included in determining the five-year period under NRCP 41(e)); accord Baker, 112 Nev. at 1110, 922 P.2d at 1203.

appellants are not entitled to the three-year extension period. Accordingly, we

ORDER the district court's order of dismissal  
AFFIRMED.

  
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Shearing J.

  
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Agosti J.

  
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Rose J.

cc: Hon. Michael P. Gibbons, District Judge  
David Horton  
George W. Abbott  
Bradley Paul Elley  
Douglas County Clerk