

THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA CHECKER CAB CORPORATION, A
NEVADA CORPORATION; AND WILLEHADO
GUZMAN,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF CLARK, AND THE
HONORABLE MICHAEL L. DOUGLAS,
DISTRICT JUDGE,

Respondents,

and

DONALD CORBISEZ,

Real Party in Interest.

No. 36965

FILED

JUL 13 2001

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying the petitioners' motion to dismiss a complaint filed by the real party in interest for failure to bring the case to trial within five years.

On August 18, 1995, Donald Corbisez filed a complaint against Nevada Checker Cab Corporation ("Checker Cab") and Willehado Guzman (collectively "the petitioners"). He alleged that Guzman, while driving for Checker Cab, struck him as he stepped onto a crosswalk in Las Vegas.

The jury trial was initially scheduled for June 16, 1998, but the parties stipulated to vacate the trial date and reset it for June 8, 1999.

According to the petitioners, on March 19, 1999, Corbisez requested that the parties participate in mediation. The petitioners claim that Corbisez's offer to mediate was conditioned upon petitioners' agreement to continue the June 8, 1999, trial date. The petitioners agreed to the proposal,

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and on March 31, 1999, the parties stipulated to continue the June 8, 1999, trial date, and further stipulated to allow the district court to schedule a new trial date. The district court scheduled a new trial date of October 3, 2000.

On August 18, 2000, five years after the complaint was filed, the petitioners filed a motion to dismiss the complaint pursuant to NRCP 41(e), for want of prosecution. Corbisez opposed the motion, arguing that because the petitioners had prepared and signed the stipulation to vacate and reset the trial date, the petitioners had waived the mandatory provisions of NRCP 41(e).

Although the district court did not find that the parties intended to waive the mandatory provisions of NRCP 41(e), it denied the motion. The district court implied a waiver of the NRCP 41(e) requirement by the petitioners, stating that it would be unjust to enforce the rule in this case because another department had erroneously set the trial outside of the five year period.

We have determined that a petition for a writ of mandamus is the appropriate vehicle to challenge a district court's denial of a motion to dismiss for failing to bring a claim to trial within five years as required by NRCP 41(e).¹

The petitioners argue that the district court erred as a matter of law in denying their motion to dismiss and, thus, that the writ is appropriate. We agree.

Pursuant to NRCP 41(e), a court must dismiss an action "unless such action is brought to trial within five years after the plaintiff has filed his action." In Thran v. District Court, we held that the district court has no discretion to deny the motion to dismiss. "NRCP 41(e) is

¹Thran v. District Court, 79 Nev. 176, 380 P.2d 297 (1963).

clear and unambiguous and requires no construction other than its own language."² The rule provides only one exception: the parties may stipulate in writing to extend the time period.³

Corbisez asks us to construe the parties' stipulation to vacate the trial date as a stipulation to waive the requirement of trial within five years of the filing of the complaint. We addressed a similar request in Prostack v. Lowden.⁴

In Prostack, the trial was initially set within the five year period.⁵ Shortly before trial was to begin, the plaintiff notified the defendant that a previously undisclosed witness would be called to testify at trial. In response, the defendant moved to continue the trial date.⁶ Without opposition, the district court rescheduled the trial to commence outside the five year period. Approximately three weeks after the five year period expired, the defendant moved for dismissal pursuant to NRCP 41(e). The district court granted the motion and dismissed the case.⁷

In Prostack, we were asked to construe the defendant's stipulation to vacate the trial date as a stipulation to extend the five year period.⁸ We declined because the stipulation was silent as to NRCP 41(e).⁹ Further, we noted that it is the plaintiff's duty to bring the case to trial within the five year period. Had the plaintiff

²Id. at 181, 380 P.2d at 300.

³NRCP 41(e).

⁴96 Nev. 230, 606 P.2d 1099 (1980).

⁵Id. at 230, 606 P.2d at 1099.

⁶Id. at 231, 606 P.2d at 1099.

⁷Id.

⁸Id.

⁹Id. at 231, 606 P.2d at 1100.

informed the district court in a timely manner, it could have resolved the situation.¹⁰ For instance, the district court might have made an effort to schedule the trial date within the five year period or conditioned the continuance upon the defendant's stipulation to extend the period.

Likewise, here, Corbisez wants this court to construe the stipulation to vacate and continue the trial as an agreement to extend NRC 41(e)'s five year limitation. However, like the stipulation in Prostack, the instant stipulation mentions neither the five year period nor NRC 41(e). Also, as was the case in Prostack, there is no evidence that NRC 41(e) was discussed when the district court vacated and rescheduled the trial date. We therefore decline to construe the stipulation as an agreement to extend the rule's mandatory provision.

Corbisez next contends that the district court is to blame for erroneously scheduling the trial outside of the deadline. That being the case, Corbisez argues that it is unjust to dismiss his case.¹¹ We have previously ruled on this contention as well.

¹⁰Id.

¹¹Corbisez cites three California cases for the proposition that when the district court erroneously sets a trial date outside the five years provided by NRC 41(e), dismissal is not mandatory. These cases are: Biondi v. Braham, 267 Cal. Rptr. 365 (Ct. App. 1990), Salas v. Sears, Roebuck & Co., 721 P.2d 590 (Cal. 1986), and Weeks v. Roberts, 442 P.2d 361 (Cal. 1968).

We conclude that Corbisez misreads these cases. The primary issue in these cases was whether the trial court abused its discretion by denying the plaintiff's motion to specially set the trial date, in order to avoid dismissal under California's version of the five year rule. These cases do not hold that the trial court has discretion to dismiss under California's five year rule. Here, Corbisez did not ask the district court to schedule the trial within the five year period. In fact, it does not appear that the issue was brought to the court's attention at all. Thus, the California cases do not apply.

In Johnson v. Harber,¹² the district court scheduled trial to begin within the proper time period. Realizing that it had erroneously set the matter for its short-trial calendar, the court sua sponte reset the trial on a stacked calendar, also to begin within the five year period. The court, on its own motion, continued the case two additional times and eventually scheduled the trial to begin after five years had passed. The district court then dismissed the case under NRCP 41(e).¹³

While recognizing that the plaintiff may be "the victim of unfortunate circumstances," we concluded that NRCP 41(e) mandates dismissal when the plaintiff fails to bring a claim to trial within five years.¹⁴ We reasoned that because the duty to ensure that a claim is timely brought to trial rests solely with the plaintiff, the district court's sua sponte rescheduling does not protect the claim from an NRCP 41(e) motion to dismiss. "[R]ule 41, as written and construed, does not contemplate an examination of the equities. Any other construction would destroy the mandatory 5-year dismissal rule and make the determination a matter of trial court discretion."¹⁵

The instant case falls squarely within our holding in Johnson. Approximately one year prior to the time for mandatory dismissal, the district court in this case set the trial date outside the period. Corbisez is charged with the responsibility to know of the requirements of NRCP 41(e) and

¹²94 Nev. 524, 582 P.2d 800 (1978).

¹³Id. at 525, 582 P.2d at 800.


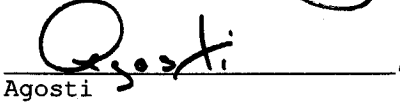

¹⁴Id. at 526, 582 P.2d at 801 (citing Meredith v. Arden, 92 Nev. 620, 555 P.2d 1241 (1976)).

¹⁵Id. at 526, 582 P.2d at 801 (quoting Great W. Land & Cattle v. District Ct., 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970)).

to know the applicable deadline in his case. He failed to present the problem with the June 8, 1999, trial date to the court's attention until after expiration of five years. Because dismissal pursuant to NRCP 41(e) is mandatory rather than discretionary, the district court erred in denying the motion to dismiss.

A writ of mandamus is available to compel the performance of an act that the law requires.¹⁶ Here, the district court is required, under NRCP 41(e), to dismiss the underlying case. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus compelling the district court to dismiss the complaint in Case. No. A349521.

It is so ORDERED.

 Shearing	J.
 Agosti	J.
 Rose	J.

cc: Hon. Michael L. Douglas, District Judge
Kirby R. Wells & Associates
Jason A. Awad & Associates
Clark County Clerk

¹⁶NRS 34.160