

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS ROBERTS,
Appellant,
vs.
BRUCE HARKREADER; AND ROBERT
LEGRAND,
Respondents.

No. 69680

FILED

SEP 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Thomas Roberts appeals from a district court order granting a motion to dismiss for failure to comply with NRCP 16.1.¹ Eleventh Judicial District Court, Pershing County; Michael Montero, Judge.

On appeal, Roberts asserts that the district court erred in dismissing his case on the ground that he did not hold a timely early case conference. Nonetheless, he waived his challenges to the district court's order because he did not assert them during the proceedings below. See *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)) (“[T]he general rule [is] that ‘[a] point not urged

¹The record demonstrates that respondent Correctional Officer Alvarez did not appear in the underlying action and he is therefore not a proper party to this appeal. See *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (providing that “in Nevada, a person or entity is not a party within the meaning of NRAP 3A(a) unless that person or entity has been served with process, appeared in the court below *and* has been named as a party of record in the trial court”). As a result, the clerk of the court shall amend the caption for this case to conform to the caption on this order.

in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”).

Furthermore, even if the waiver rule does not operate as an absolute bar to Roberts’ claims, those claims would still fail because he does not attempt to satisfy the plain-error standard of review. *See Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345-46 & n.2, 793 P.2d 839, 842-43 & n.2 (1990) (applying the plain-error standard to an appellant’s unpreserved claim that the district court erred in granting summary judgment); *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued and supported with relevant authority). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Tao

GIBBONS, J., concurring:

I agree with my colleagues that the district court’s decision should be affirmed because Roberts failed to show an adequate basis for reversal. The district court dismissed his complaint without prejudice for

²We note that *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 989 P.2d 870 (1999), does not compel a different outcome because addressing Roberts’ claims would not further “the interests of judicial economy.” *See id.* at 365 n.9, 989 P.2d at 877-78 n.9.

failing to hold a timely early case conference and for failing to oppose the motion to dismiss. See DCR 13(3). Further, Roberts has not shown plain error as the majority correctly explains. For that reason, I join the majority's order resolving this case.

I write separately simply to explain that, had this court decided to reach the merits of Roberts' appeal, reversal and remand may have been warranted. I also write separately because this case presents issues of public importance and further explanation may help to increase judicial efficiency. See NRCP 1 ("These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

The version of NRCP 16.1(e)(1) in effect during the proceedings below provided that a district court may dismiss a case without prejudice if the plaintiff failed to hold an early case conference within 180 days of a defendant's appearance, "unless there [we]re compelling and extraordinary circumstances for a continuance beyond this period."³ NRCP 16.1(e)(1) (2015). NRCP 16.1(e)(1) provides district courts with the discretion to dismiss cases for failure to satisfy the 180-day deadline. *Dornbach v. Tenth Judicial Dist. Court*, 130 Nev. ___, ___, 324 P.3d 369, 373 (2014). Although a district court is not required to evaluate any particular factors when exercising this discretion, its "consideration of a motion to dismiss without prejudice should address factors that promote the purpose of the rule," which is "the prosecution of litigation within adequate timelines." See


³NRCP 16.1(e)(1) now provides that the deadline for an early case conference is 180 days after "service of an answer by a defendant[.]" See Supreme Court of Nev., Order Amending Nev. Rules of Civil Procedure Rule 16.1 and Supplement to Drafter's Note, ADKT 0511 (May 6, 2016).

Arnold v. Kip, 123 Nev. 410, 415-16, 168 P.3d 1050, 1053 (2007); *Dornbach*, 130 Nev. at ___, 324 P.3d at 373-74.

Here, respondents appeared by filing an NRCP 12(b)(5) motion to dismiss Roberts' complaint. The district court denied that motion more than two years later. Even though this procedural reality was readily apparent and it likely postponed the filing of any answer to the complaint, *see* NRCP 12(a), the district court's order does not address the effects that its delay may have had on this action. Had the district court actually considered the delay, it may have found that the lack of a timely ruling significantly impacted the parties' ability to discuss their claims and defenses, confer on the possibility of settlement, and develop a discovery plan, and that the purpose of NRCP 16.1(e)(1) was therefore not served by a dismissal. *See* NRCP 16.1(b)(1) (2015) (providing the scope of an early case conference); *see also Dornbach*, 130 Nev. at ___, 324 P.3d at 374 ("It was entirely reasonable for [the plaintiff] to want a ruling on [the defendants'] motion [to dismiss] prior to holding the conference in order to maximize the conference's utility.").

Under these circumstances, the absence of findings in the district court's order on this point hinders our ability to determine whether the district court properly exercised its discretion. *See Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) ("Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation."). Therefore, if we reversed the district court's order of dismissal and remanded the case to the district court to consider the effect of its delay, along with any other facts that the court deemed relevant, the

result may have been different.⁴ Nonetheless, I concur because this court need not excuse Roberts' failure to request an early case conference or his failure to respond in the district court to the motion to dismiss. Additionally, he did not demonstrate plain error on appeal.


Gibbons J.

cc: Hon. Michael Montero, District Judge
Doyle Law Office, PLLC
Attorney General/Carson City
Attorney General/Las Vegas
Pershing County Clerk

⁴For instance, the district court may have chosen to consider whether the respondents contributed to Roberts' failure to conduct an early case conference when they stated that they would not respond to Roberts' partial motion for summary judgment until their NRCP 12(b)(5) motion to dismiss had been resolved.