

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: COORDINATED
BREAST IMPLANT
LITIGATION.

No. 39443

GLENDA WILSON,
Appellant,

vs.

AMERICAN HEYER-SCHULTE
CORPORATION, F/K/A HEYER-
SCHULTE CORPORATION, A
DELAWARE CORPORATION;
AMERICAN HOSPITAL SUPPLY
CORPORATION, A DELAWARE
CORPORATION; BAXTER
HEALTHCARE CORPORATION,
A DELAWARE CORPORATION;
AND BAXTER INTERNATIONAL
INC., A DELAWARE
CORPORATION,
Respondents.

FILED

DEC 01 2004

JANETTE M. FLOCM
CLERK OF SUPREME COURT

BY *J. Robison*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing appellant's claim for failure to bring her case to trial within five years, in violation of NRCP 41(e). Eighth Judicial District Court, Clark County; Norman C. Robison, Senior Judge.

Appellant was one of several plaintiffs in an original complaint filed on January 15, 1997, seeking damages related to breast implants. On August 26, 1997, the district court entered a case

management order for all cases pending as part of the Coordinated Breast Implant Litigation. This order dismissed all multiple-plaintiff complaints, including appellant's, and directed the district court clerk to re-file each plaintiff's case separately. Each plaintiff was then directed to file a document, referred to by the district court as a "supplement" to the original complaint, in which each plaintiff adopted the master complaint for the Coordinated Breast Implant Litigation. Each re-filed case was assigned a new case number, and the clerk was directed to stamp these "supplemental" complaints with both the date the "supplements" were filed and the date the respective plaintiff's original complaint had been filed. The district court stated that the earlier of the two filing dates would be recognized as the "applicable filing date." As directed by the district court, appellant filed a "supplement" to her original complaint on September 24, 1997.

On November 2, 2001, appellant requested a trial date from the district court, and the district court set the trial to begin on May 7, 2002. As set by the district court, the first day of trial would have taken place over five years and three months after appellant's original complaint was filed, but less than five years after appellant filed the so-called "supplement" to her original complaint. The Baxter respondents subsequently filed a motion to dismiss under NRCP 41(e) based on the fact that appellant had not brought her case to trial within five years. The district court granted the motion to dismiss, and this appeal followed.

Under NRCP 41(e), a district court is required to dismiss any case that has not been brought to trial within five years. This court has held that "dismissal pursuant to NRCP 41(e) for failure to bring to trial a

claim within five years of filing the complaint is mandatory,” even in cases where the plaintiff is the victim of “unfortunate circumstances.”¹ Moreover, this court has historically been extremely strict in its application of the five-year requirement.²

Although appellant’s original complaint was filed on January 15, 1997, the district court dismissed that complaint and directed appellant to file a “supplement” to her complaint in its August 26, 1997 case management order. In light of the district court’s decision to dismiss appellant’s original complaint, it appears that this so-called “supplement” is actually an entirely new complaint. Although the district court referred to this document as a “supplement” to the original complaint in its case management order, the original complaint was dismissed and thus could not be supplemented.³

Additionally, while this court has held that the filing of an amended complaint is irrelevant to the calculation of the five-year period under NRCP 41(e) as the action commences when the original complaint is filed,⁴ this holding does not apply to this appeal, as the “supplement” cannot be considered an amended complaint. The district court dismissed

¹Johnson v. Harber, 94 Nev. 524, 526, 582 P.2d 800, 801 (1978).

²See id.

³See Nev. Central v. District Court, 21 Nev 409, 412, 32 P. 673, 673 (1893) (noting that the dismissal of a case is a final judgment).

⁴Baker v. Nobak, 112 Nev 1106, 1110, 922 P.2d 1201, 1203 (1996); Johnson, 94 Nev. at 527, 582 P.2d at 801-02 (quoting Volpert v. Papagna, 85 Nev. 437, 440, 456 P.2d 848, 849-50 (1969)).

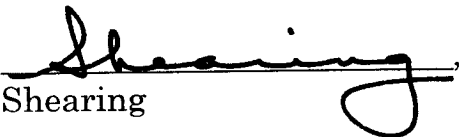
the original complaint without prejudice and directed appellant to file the “supplement.” This “supplement” was assigned a separate case number from the original complaint, an action consistent with the filing of a new complaint.

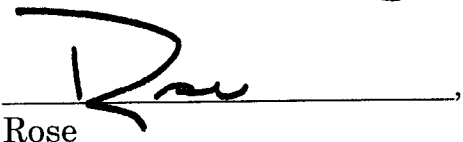
Respondents’ argument that the January 15, 1997 date is the correct filing date for NRCP 41(e) purposes relies almost entirely on the language of the district court’s case management order. The fact that the case management order states that the dismissal of appellant’s complaint was “for administrative purposes only” does not, however, change the impact of the dismissal of appellant’s complaint.

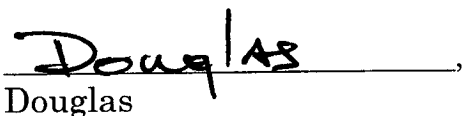
Appellant’s “supplement” was filed on September 24, 1997. As this pleading was actually an entirely new complaint, the applicable start date for the five-year period in which appellant had to bring her case to trial under NRCP 41(e) was September 24, 1997. The district court had set the trial to begin on May 7, 2002, which was less than five years from the date appellant filed this new complaint. Therefore, the NRAP 41(e) five-year period had not yet elapsed when the district court dismissed appellant’s case and, had the case gone to trial as planned, would not have elapsed before the start of the trial. We thus conclude that the district court erred in dismissing appellant’s case. Accordingly, we reverse the district court’s order and remand this matter to the district court for proceedings consistent with this order. Additionally, in light of this court’s

decision in Rickard v. Montgomery Ward & Co.,⁵ we instruct the district court to give appellant a reasonable period of time to set and bring her case to trial, provided appellant acts expeditiously.

It is so ORDERED.⁶


_____, C.J.
Shearing


_____, J.
Rose


_____, J.
Douglas

cc: Hon. Norman C. Robison, Senior Judge
Lionel Sawyer & Collins/Las Vegas
Glenda Wilson
Clark County Clerk

⁵120 Nev. ___, ___, 96 P.3d 743, 747 (2004).

⁶We deny as moot appellant's June 24, 2002 motion to proceed in proper person. Although appellant was not granted permission to file papers with this court in proper person, see NRAP 46(b), we have considered the documents provided by appellant. Additionally, we deny appellant's May 22, 2002 motion to supplement the record, as the requested documents were not necessary for the consideration of this appeal.