

IN THE SUPREME COURT OF THE STATE OF NEVADA

PYRAMID MASONRY, A LICENSED
CONTRACTOR, AND FRANK SOTERO,
Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE, AND THE HONORABLE
STEVEN P. ELLIOTT, DISTRICT
JUDGE,

Respondents,

and

WALTER SCOTT WIESE,
Real Party in Interest.

No. 40578

FILED

APR 18 2003

JANE ILLM BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges the district court's refusal to dismiss the underlying action under NRCP 41(e). We generally decline to consider writ petitions challenging orders denying motions to dismiss; however, we may deviate from this policy to consider a petition challenging an order denying a motion to dismiss under NRCP 41(e)'s mandatory dismissal rule, when no disputed factual issues exist and dismissal is clearly warranted.¹ Having reviewed the petition, answer

¹Smith v. District Court, 113 Nev. 1343, 1345 n.1, 950 P.2d 280, 281 n.1 (1997).

and supporting documents, we conclude that dismissal was not clearly warranted.

Under NRCP 41(e), if an action is not brought to trial within five years, the district court must dismiss it unless the parties agree to extend it.² This court has allowed the exclusion of only two periods from the five-year calculation: the time a medical malpractice case is pending before a screening panel and the time a case is stayed by district court order.³

Relying on Boren v. City of North Las Vegas,⁴ which established the court-ordered stay exclusion, the district court excluded from the rule's five-year period the time during which the real party in interest was prevented from bringing the case to trial by a court-ordered continuance and petitioner Sotero's poor health. The continuance order had vacated a timely trial setting on petitioners' ex parte motion and continued the matter until "such time as Mr. Sotero's treating physician determines Mr. Sotero's health has improved to the point where he can participate in a trial." Despite inquiries, petitioners never informed the court or opposing counsel that petitioner Sotero's health had improved.


²Morgan v. Las Vegas Sands, Inc., 118 Nev. ___, 43 P.3d 1036 (2002).

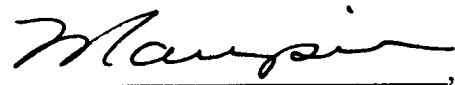
³Id.; Baker v. Noback, 112 Nev. 1106, 922 P.2d 1201 (1996); Boren v. City of North Las Vegas, 98 Nev. 5, 638 P.2d 404 (1982).


⁴98 Nev. 5, 638 P.2d 404 (1982).

The continuance was sufficiently in the nature of a stay that dismissal was not clearly warranted. Accordingly, we

ORDER the petition DENIED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Mirch & Mirch
Law Offices of Joe E. Colvin
Washoe District Court Clerk