IN THE SUPREME COURT OF THE STATE OF NEVADA

STEWART TITLE OF NEVADA AND DAVID W. CURTIS,
Appellants,
vs.
STANLEY AMES, M.D.; JENNIFER AVENA, M.D.; STEPHEN AVENA, D.D.S.; JOHN BARTON; MARGARET BARTON; MICHAEL CADILE; JOSEPH CAPERONIS; MARION CAPERONIS; MARISA CHANG; HUI WEN KAO; HSUI-YEH CHAN; CHUN HUA CHIU; KEN COHEN; LENORE COHEN; ELIZABETH LYN DONLEY; DAVID ERNST; HOWARD GREENSPON; RICKI GREENSPON; CHRISTIAN HANSEN; HERBERT HANSEN; JIUNN-NAN HO; ROY HOLLISTER; PAMELA HOLLISTER; TOM JONES; CONITA OPP JONES; DONALD KLEITZIEN, JR.; ROSALIE ASHNESS KLEITZIEN; DANIEL KOCH, JR.; DANIEL KOCH, SR.; KENNETH LAND; PATRICK LEE; KARLENE LEE; GERARD LOMBARDO; JOHN LOMBARDO; FRANCES LOMBARDO; VINCENT LOMBARDO; CARL MANTHEI; AL MCCOURT; MARIA MCCOURT; MICHAEL MILLER; BARBARA MILLER; KEVIN MORLEY; VICTOR HILL; STEPHEN PERRY; ILA PERRY; HELEN ROSS; MARY KATHRYN RUBINO; R & D INVESTMENTS, LTD., A NEVADA CORPORATION; GLEN SHAEFER; JUDY SHAEFER; DANIEL SHARPE; VIRGIL SLADE; MELL SLADE; MICHAEL STANCZYK; SHARON STANCZYK; TRUMAN STROMBERG; KAREN WILKES; JOHN YACKS;

No. 41621

FILED

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JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

07-20036

SHARLENE YACKS; CINDY YOCUM; WING T INVESTMENTS, A CALIFORNIA GENERAL PARTNERSHIP, EACH INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF ELKHORN "40," A NEVADA GENERAL PARTNERSHIP; HENRY BAERG; EVA BAERG; MAYBUSH, INC., A NEVADA CORPORATION; MCALLISTER RHODES; AND MARJORIE RHODES,
Respondents.

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from an amended district court judgment entered following a bench trial of a real property action. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

The parties are familiar with the facts and we do not recount them in the order except as is necessary for our disposition.

NRCP 41(e)

As a threshold issue, appellants Stewart Title of Nevada (Stewart Title) and David W. Curtis (Curtis) argue that the district court erred in failing to dismiss the underlying action because it was not brought to trial within five years as mandated under NRCP 41(e). Stewart Title argues that respondents failed to satisfy their burden to diligently bring the case to trial within five years and to justify their lack of diligence. Stewart Title and Curtis both argue that the district court's allowance of continued discovery and other pretrial matters after the initial trial commencement date demonstrate that trial did not commence in earnest before NRCP 41(e)'s prescriptive time frame, but rather merely to circumvent it.

NRCP 41(e) pertinently provides that any action not brought to trial within five years from date that it is filed "shall be dismissed,"[1] except when the parties have stipulated in writing that the time may be extended. NRCP 41(e)'s primary purpose is "to compel expeditious determinations of legitimate claims."[2] Plaintiffs, moreover, bear the responsibility to diligently bring a case to trial, avoiding an NRCP 41(e) dismissal.[3] With respect to satisfying NRCP 41(e)'s mandate, this court, in French Bouquet Flower Shoppe v. Hubert, approved a district court's swearing in of, and taking testimony from, one witness competent to testify to relevant facts, and subsequently continuing the trial.[4]

Specifically, in French Bouquet, this court noted without further explanation that "on numerous occasions . . . the swearing of a witness who gives testimony is sufficient to commence trial and thus toll the limitations period specified in NRCP 41(e)."[5] To support this

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[1]See Morgan v. Las Vegas Sands, Inc., 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002) (explaining that dismissal under NRCP 41(e) is mandatory if a plaintiff fails to bring her action to trial within five years after filing his or her complaint).

[2]Baker v. Noback, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996).

[3]Johnson v. Harber, 94 Nev. 524, 527, 582 P.2d 800, 801 (1978).

[4]106 Nev. 324, 325-26, 793 P.2d 835, 835-36 (1990) (citing Lipitt v. State of Nevada, 103 Nev. 412, 743 P.2d 108 (1987); Johann v. Aladdin Hotel Corp., 97 Nev. 80, 624 P.2d 493 (1981); Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980); Ad-Art, Inc. v. Denison, 94 Nev. 73, 574 P.2d 1016 (1978); Thran v. District Court, 79 Nev. 176, 380 P.2d 297 (1963)).

[5]Id. at 326, 793 P.2d at 836; see also Ad-Art, 94 Nev. at 74, 574 P.2d at 1017 (noting that an action may be brought to trial for the purposes of NRCP 41(e)'s five-year deadline by swearing in one witness who testifies).

statement, however, the French Bouquet court cited, among other cases, Lipitt v. State of Nevada, providing that "a litigant who obtains a trial date within the statutory period, appears for trial in good faith, argues motions and examines jurors" sufficiently commences trial and tolls the NRCP 41(e) limitations period.[6] The conclusion in French Bouquet, read in light of Lipitt's requirement of a "good faith appearance," indicates that although swearing a witness who testifies is generally sufficient to commence trial, the procedure must be undertaken in good faith to toll NRCP 41(e)'s limitations period. Indeed, the Lipitt court indicated that calling a witness solely to circumvent NRCP 41(e)'s limitation period "does not satisfy the spirit of our cases on what may constitute bringing a matter to trial."[7]

Based on the totality of the circumstances of this case, we are unable to conclude that the respondents did not act in good faith in bringing the matter to trial in September 1997. At that time, the district court took brief testimony from a receiver for the "Elkhorn 40" (E40) partnership. The receiver later testified extensively to his participation as an E40 partner and to his discovery that Value Properties International, Inc., a Nevada corporation (VPI), sold the parcel without E40's knowledge. Therefore, the receiver qualified as a witness with knowledge, even if he did not testify to such knowledge during his initial testimony. Our review of the record reveals no lack of diligence on behalf of the respondents in failing to bring the action to trial, but rather demonstrates that the

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[6]103 Nev. 412, 413, 743 P.2d 108, 109 (1987); see also Timm, 96 Nev. at 200, 606 P.2d at 531.

[7]Lipitt, 103 Nev. at 413-14, 743 P.2d at 109.

underlying proceedings were delayed myriad times by, among other things, various defendants' bankruptcies and the disqualification and resulting substitution of counsel. And in light of the quagmire of continuances in the district court, we cannot conclude that the district court's swearing and taking testimony from the E40 receiver for the purposes of commencing trial was not within the spirit of our cases on what may constitute bringing a matter to trial.[8]

Further, appellants fail to bring to our attention specific instances of delay attributable to the respondents. Instead, the record reflects that when respondents moved the district court to set a trial date in light of the impending October 1997 NRCP 41(e) five-year deadline and the advanced age of several respondents, Stewart Title opposed the motion. We conclude the district court commenced the trial within the deadline established under NRCP 41(e). The fact that the main part of the trial occurred later has no relevance. This interpretation comports with our long-standing rule favoring decisions on the merits.[9]

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[8]Before the previous district judge resigned and retired in 1996, the record reflects that the proceedings in this case were delayed in part because of the chronic and serious illness of that judge. After his appointment in 1996 to Department 11, then-Judge Douglas faced the daunting task of managing a significant backlog of both the criminal and civil dockets of this department in an effort to ensure that all litigants could have their days in court. Unfortunately, he did not have other case management tools and resources available to him, which are available to district judges today, such as an expanded senior judge program, civil overflow judges, and the ability of the chief judge to reassign cases from one department to another as convenience or necessity requires. See EDCR 1.30(b)(15).

[9]French Bouquet, 106 Nev. at 326, 793 P.2d at 836; Timm, 96 Nev. at 200, 606 P.2d at 531.

Slander of title by Stewart Title

Although the district court found Stewart Title liable on a variety of theories, we discuss only slander of title, as the judgment may be affirmed on this basis alone. This court will give deference to the district court's factual findings if they are not clearly wrong and are supported by substantial evidence.[10] Substantial evidence has been defined as evidence that "a reasonable mind might accept as adequate to support a conclusion."[11] We note, however, that the district court did not make a finding of fact to support its conclusion of law that Stewart Title slandered respondents' partnership's title to its property. Therefore, we must examine the record to determine if there is a sufficient basis for an implied finding of fact which supports the district court's conclusion of law that Stewart Title slandered respondents' partnership's title to its property.[12]

To maintain an action for slander of title, the plaintiff must establish the falsity of the words published, that the defendant published them with malice, and that the plaintiff sustained special pecuniary damages as a direct and natural result.[13] Malice requires a showing that the defendant knew of the statement's falsity, i.e. intended to publish a

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[10]See NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004); Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

[11]First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (internal quotation marks omitted).

[12]Hotel Last Frontier v. Frontier Prop., 79 Nev. 392, 397, 385 P.2d 776, 779 (1963).

[13]Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983).

false statement or acted in reckless disregard of its truth or falsity.[14] If the defendant has a reasonable belief in a published claim, no malice exists. The recording of a false document is a publication, and a deed of trust which should have been canceled is a false document.[15]

Evidence in the record before us shows that Stewart Title was aware of E40's interest in the land, as it had opened other escrow accounts involving E40 and the subject property. Indeed, the documents available in several escrow accounts with Stewart Title, including the PAR Investments, Inc. (PAR) escrow file, reveal E40's interest in the parcel and that E40 had never authorized any transaction divesting it of its entire interest in the parcel. These documents also indicate that E40 had never empowered the deed's signatory, Knoblock, to authorize such a transaction.

Nevertheless, Stewart Title, through an experienced escrow officer, Elizabeth Newstead, prepared a quitclaim deed and notarized Knoblock's signature on behalf of E40 purporting to transfer, for no consideration, E40's interest in the land at issue. That Knoblock lacked authority with respect to E40's land was apparent from at least two documents to which Stewart Title had access: (1) the list of E40 partners, which did not include Knoblock's name; and (2) the E40 partnership agreement requiring unanimous consent for its amendment, demonstrating that the document purporting to amend the partnership agreement to vest Knoblock with management authority, which failed to

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[14]Id.

[15]Summa Corp. v. Greenspun, 96 Nev. 247, 254, 607 P.2d 569, 573 (1980).

garner approval from all E40 partners, was invalid. Yet, Stewart Title recorded the deed, effectively disposing of E40's primary asset for nothing in return. According to expert witness testimony, Stewart Title should have confirmed the transaction with a verifiable E40 partner or should have ascertained Knoblock's authority by referring to or procuring the necessary documentation. Therefore, we conclude that there is sufficient evidence that a reasonable mind might accept as adequate to support a conclusion that the conduct of Stewart Title was more than a matter of simple negligence and that Stewart Title acted in reckless disregard of the quitclaim deed's truth or falsity by preparing, notarizing, and recording it without a reasonable belief that the deed was true. This facilitated the subsequent conveyance of E40's property to PAR by VPI.

Curtis's liability

Slander of title

The district court held Curtis liable on a number of claims: slander of title, misappropriation and conversion, legal malpractice, alter ego, violating the Deceptive Trade Practices Act, aiding and abetting others in securities violations, and breach of trust. Because we conclude that substantial evidence does not support the necessary elements of any of these claims, we necessarily reverse the judgment as to Curtis.

The district court determined that Curtis, too, slandered E40's title in the parcel at issue. Although the record is unclear, the district court's conclusion appears premised on any role that Curtis played in drafting the amendment to E40's partnership agreement, which purported to vest Knoblock with authority to transfer or encumber E40's parcel and his role in structuring VPI's legal and financial relationship to E40, to the extent this conduct facilitated E40's loss of its parcel.

But no substantial evidence exists to support the slander of title claim against Curtis. In particular, the parties have not specified exactly which false words underlie this claim against him, and our review of the record is unrevealing in this regard. Unlike Stewart Title, the record does not reveal whether Curtis published any documents, false or otherwise, that directly and naturally impaired respondents' partnership's interest in the parcel. The district court's conclusion, then, is not supported by substantial evidence and indeed appears to constitute plain error.[16]

Misappropriation and conversion

Curtis argues that the district court's finding that he committed misappropriation and conversion is not supported by substantial evidence. The district court apparently found that Curtis misappropriated and/or converted partnership funds.

"'Conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights.'"[17] Conversion requires only general, rather than wrongful, intent; therefore, good faith or lack of knowledge is irrelevant to whether one has committed conversion.[18]

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[16]See generally Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues sua sponte in order to prevent plain error is well established.").

[17]Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (quoting Wantz v. Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)).

[18]Id.

Here, the record does not include substantial evidence to support that Curtis exerted dominion over E40's personal property.[19] Even assuming that Curtis (1) advised VPI to commingle VPI and E40 funds, and/or (2) accepted funds from VPI for non-E40 business, the evidence does not demonstrate that VPI payments to Curtis involved appropriation of earmarked E40 funds.[20] Rather, the evidence shows that the payments came from a general company account. We therefore conclude that respondents' misappropriation and conversion claim against Curtis necessarily fails.

Legal malpractice

Curtis maintains that the district court erred in finding that he committed legal malpractice/professional negligence in allegedly representing E40. To establish a legal malpractice claim, one must prove, among other elements, the existence of an attorney-client relationship and that the attorney owed the client a duty "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake."[21] Circumstances may imply an attorney-client relationship when

> "(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's

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[19]Id. (noting that whether a conversion has happened is a question of fact).

[20]See Edlund v. Bounds, 842 S.W.2d 719, 727 (Tex. App. 1992).

[21]Day v. Zubel, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996). The other factors necessary to establish a legal malpractice claim are the following: breach of that duty, the breach proximately caused the client's damages, and loss or damage arising from the negligence. Id.

> professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."[22]

An attorney-client relationship, however, is not necessarily created by the payment of a fee.[23]

Here, no substantial evidence supports the district court's determination that an attorney-client relationship existed between Curtis and E40 by virtue of Curtis's representation of VPI.[24] Respondents fail to demonstrate that E40 affirmatively sought and obtained Curtis's advice or representation, which are necessary to establish an attorney-client relationship or to give rise to a duty of care. Moreover, many of the alleged acts of professional negligence involved advice to VPI and its principals concerning events and transactions that predated the advice by many months. In short, the record demonstrates that Curtis acted on behalf of VPI and its principals, not E40.

Alter ego

Curtis asserts that the district court erred in concluding that he was the alter ego of VPI. Although corporations must generally be treated as separate legal entities, we have recognized that the equitable remedy of "piercing the corporate veil" may be available when the corporation is apparently acting as the alter ego of a controlling

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[22]Todd v. State, 113 Nev. 18, 24, 931 P.2d 721, 725 (1997) (quoting DeVaux v. American Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983)).

[23]Id. at 24-25, 931 P.2d at 725.

[24]See, e.g., Clark County v. Sun State Properties, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003); Archuleta v. Hughes, 969 P.2d 409, 411 (Utah 1998).

individual.[25] The alter ego doctrine's purpose is to "do justice" whenever the corporate form's protections are being abused.[26]

We have previously explained that we will uphold a district court's determination on the alter ego doctrine if the determination is supported by substantial evidence.[27] Thus, our present task is to determine whether the district court's findings with respect to the alter ego claim mandated a contrary conclusion.

To establish liability under the alter ego doctrine, one must demonstrate the following:

> (1) the [business organization] must be influenced and governed by the person asserted to be its alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice.[28]

Based on these factors, we cannot conclude that the record contains substantial evidence to support the district court's conclusion that Curtis was VPI's alter ego, notwithstanding respondents' arguments to the contrary. Respondents contend that Curtis conceived of the land scheme associated with VPI and controlled VPI as its director and attorney. But

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[25]See, e.g., McCleary Cattle Co. v. Sewell, 73 Nev. 279, 317 P.2d 957 (1957).

[26]Polaris Industrial Corp. v. Kaplan, 103 Nev. 598, 603, 747 P.2d 884, 888 (1987).

[27]Lorenz v. Beltio, Ltd., 114 Nev. 795, 807, 963 P.2d 488, 496 (1998).

[28]Rowland v. Lepire, 99 Nev. 308, 316-17, 662 P.2d 1332, 1337 (1983).

Curtis's conception of the real estate investment scheme is irrelevant to an alter ego claim. Further, Curtis's roles as attorney and VPI director do not, without more, demonstrate that he exerted the substantial degree of control necessary to prevail on this claim. Consequently, these roles do not establish a "unity of interest and ownership" between himself and VPI.[29] The record thus does not include substantial evidence to support the district court's conclusion that Curtis was the alter ego of VPI, and respondents' arguments fail to overcome this insufficiency.

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[29]With respect to Curtis's liability for violating the Deceptive Trade Practices Act found in NRS Chapter 598, NRS 598.0915 through 598.0925 contain several multi-faceted definitions of "deceptive trade practice," none of which was shown to apply to the proceedings below. Consequently, the district court erred in imposing liability on Curtis with respect to these claims.

Similarly, with respect to aider and abettor liability, the record does not include substantial evidence showing that under NRS 90.660, Curtis purchased securities or otherwise aided and abetted others in securities violations. Consequently, liability on this claim necessarily fails as well.

Finally, with respect to the "breach of trust" claim, premised upon Curtis's alleged breach of his fiduciary duty to E40 for failing to return E40 partnership assets purportedly held in a trust of which he was trustee, the record includes no proof that the trust was ever served as a party to the action below. See NRCP 5(a) (requiring service of every pleading subsequent to the original complaint). Additionally, the evidence adduced at trial demonstrates that the only property ever conveyed to the trust was a $300 check from VPI, which was returned by Curtis. Consequently, no evidence shows that the trust held E40 partnership assets, and the district court erred in imposing liability based on this claim.

Evidentiary issues

Admission of documentary evidence

Stewart Title asserts that the district court committed reversible error when it admitted approximately 3,500 pages of exhibits without providing them an opportunity to object at trial. Both Stewart Title and Curtis failed, however, to timely submit written objections to the exhibits in any memoranda, including the second set of pretrial memoranda ordered by the district court to narrow the issues to be litigated. Although the district court initially permitted ad hoc objections to exhibits during trial, it eventually admitted all exhibits disclosed in respondents' pretrial memorandum, in large part because Stewart Title continually objected on a foundational basis to relatively straightforward documents.

EDCR 2.67(b)(5) provides that pretrial memoranda must include a list of all exhibits and that if no objection is made, "it will be presumed that counsel has no objection to the introduction into evidence of these exhibits." Additionally, the district court's discretion is broad with regard to the admissibility of evidence,[30] and appellants must demonstrate that the district court's error substantially affected their rights or altered the outcome.[31]

In light of Stewart Title's lack of timely written objection, of its lack of specificity in identifying documents it claims were improperly admitted, and its concomitant failure to demonstrate that its rights were

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[30]See State ex rel. Dep't Hwys. v. Nev. Aggregates, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976).

[31]See NRCP 61.

substantially affected, we conclude that the district court committed no abuse of discretion in admitting the disputed documents.[32]

Offset

Stewart Title argues that the district court erroneously awarded the parcel and its value to respondents, thereby resulting in a windfall and double recovery. It also argues that the district court erred in how it granted offsets to the judgment based on respondents' earlier settlement with PAR.[33]

Initially, we note that no double recovery occurred in this case because respondents' settlement with PAR quieted title to the parcel in PAR; therefore, respondents do not own both the parcel and the judgment.

With respect to the offsets against the judgment, Stewart Title indicates that when respondents settled with PAR for $250,000 during trial, the parcel was worth $1.6 million. From this, Stewart Title argues

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[32]Curtis also disputes the district court's evidentiary ruling. Although he claims that the district court had no discretion to order supplementary pretrial memoranda, we have previously explained that district courts have wide discretion in narrowing matters for trial, Jeep Corporation v. Murray, 101 Nev. 640, 646, 708 P.2d 297, 301 (1985), and the district court apparently ordered the second set of pretrial memoranda for this purpose. Further, the parties had approximately five months to submit the supplemental memoranda. And, although Curtis asserts that he timely submitted the first joint pretrial memorandum in 1994 and that the district court's sanction for his lack of timely submission was therefore unwarranted, the trial memorandum to which he refers bears no indication that he had any role in preparing or signing it and lacks objection by him to any exhibit. Therefore, the district court committed no abuse of discretion in preventing Curtis from objecting to the disputed documentary evidence at trial.

[33]As to Curtis, because we have determined that the judgment against him must be reversed, the issue of offset is moot.

that had respondents not settled with PAR for a fraction of the parcel's value, they would still own the property.[34] Therefore, Stewart Title argues, this court should permit an offset of the parcel's value at the time of trial—$1.6 million—against the $1.275 million judgment, plus interest, against it.

NRS 17.245(1)(a) concerns offsets for settlements and explains that a settlement with one defendant reduces the plaintiffs' claim against the other defendants by the amount of the settlement:

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

Stewart Title claims, in essence, that the settlement in this case operates independently from its effect on contribution—and thus from

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[34]Respondents' settlement with PAR for $250,000 was due to respondents' assumption that PAR had a high probability of success on a potential bona fide purchaser claim. Stewart Title asserts that PAR was not a bona fide purchaser because a title search would have revealed E40's recorded interest in the parcel. The transaction at issue, however, involved the transfer of title to the parcel from E40 to VPI by way of a quitclaim deed signed by Knoblock in her purported capacity as "partner." PAR would likely have had no way of knowing that Knoblock lacked the authority to authorize the transfer between E40 and VPI. Additionally, the record does not reflect any objection by Stewart Title to the motion for good faith settlement between respondents and PAR.

NRS 17.245(1)(a)—because it is a voluntary assignment of respondents' interest in the parcel for certain consideration. Despite the novelty of Stewart Title's argument, respondents' settlement with PAR in this case was meant to discharge any liability pertaining to PAR and fell firmly within the scope of NRS 17.245(1). The district court did not err in the manner in which it applied the offset, as it permitted Stewart Title to offset the judgment against it by the amount of the PAR settlement—$250,000.[35] The plain language of the statutory phrases, "any amount stipulated by the release" and "the consideration paid for it," contemplate the amount actually paid in the settlement, not the potential value of the underlying claim.[36]

CONCLUSION

Since we have previously endorsed the practice of swearing in and taking testimony from one witness to commence trial for NRCP 41(e) purposes, we perceive no abuse of the district court's discretion in doing so in this matter. Additionally, substantial evidence supports the district court's determination that Stewart Title slandered respondents' partnership's title in its property. We affirm the district court's judgment against Stewart Title on this basis.

With respect to Curtis, we reverse the district court's judgment as to him, because no substantial evidence supports the necessary elements of respondents' claims against him for which the

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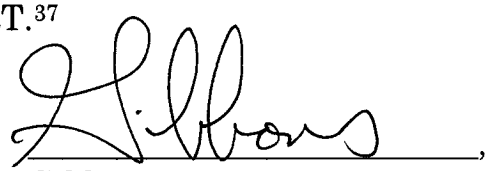
[35]The district court also permitted Stewart Title an offset based on the settlement reached with Jack Matthews in the amount of $65,000.

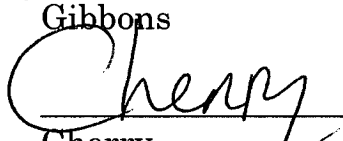
[36]We have considered the other arguments raised on appeal and conclude that they are without merit.

district court determined him liable. As regards Stewart Title's challenge to the admission of certain documentary evidence, we conclude that Stewart Title has failed to demonstrate that the district court abused its broad discretion in evidentiary matters. Finally, with respect to Stewart Title's contention that the district court erred in the manner in which it applied NRS 17.245 to offset respondents' judgment against it, we perceive no error—the district court, in accordance with that statute's plain language, offset the judgment by the amount of respondents' settlement. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.[37]



_____, J.
Gibbons



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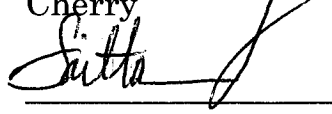
Cherry



_____, J.
Saitta

cc: Eighth Judicial District Court Dept. 11, District Judge
E. Paul Richitt Jr., Settlement Judge
David Curtis
Phillip M. Stone
Quon Bruce Christensen Law Firm
Eighth District Court Clerk

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[37]The Honorable Miriam Shearing, Senior Justice, participated in the decision of this matter under a general order of assignment entered July 6, 2007, in place of the Honorable Michael L. Douglas, Justice, who voluntarily recused himself from participation in the decision of this matter.

SHEARING, Sr.J., concurring:

I concur with the order of Justices Gibbons, Cherry and Saitta, but I write separately to discuss the dissent.

I believe that NRCP 41(e) is an excellent rule. Dismissing a case if it is not brought to trial within five years provides the incentive to plaintiffs' attorneys to not let cases languish. However, the same motivation does not necessarily exist for defense attorneys or for judges. We have had judges who have refused to set civil cases for various reasons or who have been ineffective managers of their calendars. As a result, we have had cases dismissed under NRCP 41(e), despite the diligent efforts of plaintiffs' attorneys. The parties, and particularly the plaintiffs, are at the mercy of such judges.

In the case of French Bouquet Flower Shoppe v. Hubert, this court recognized a procedure whereby a witness was sworn in and testified briefly within the five years, thus starting the trial, but then the trial was continued to a date beyond the five years.[1] I do not dispute that this procedure does not satisfy the spirit of the rule, which is to require completion of cases within five years. However, it does comply with the letter of the rule, and sometimes complying with the letter of the rule is the more just result. Cases should be decided on the merits whenever possible rather than be dismissed on procedural grounds. That is why I believe the procedure is appropriate in this case and why French Bouquet should not be overruled.

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[1]106 Nev. 324, 325-26, 793 P.2d 835, 835-36 (1990).

My understanding is that when the trial judge in this case was appointed, he inherited a plethora of cases that were ready for trial, but had not been set by his predecessor judge who had been ill. Particularly in an unusual situation like this, the French Bouquet procedure is appropriate. That procedure should not be used frequently, but it should be available when otherwise innocent parties would be prejudiced.

It is easy to say that the judge who is facing a dismissal of a case because of the five-year rule should just vacate the calendar and try the case. However, it is not so easy to do when the judge may have criminal trials which must be tried within sixty days or other civil trials which also face a five-year rule in addition to the steady stream of arraignments, sentencings and motions which must be processed. I believe it is essential to allow the procedure used in this case in those few cases when, through no fault of the parties, injustice would result.

Shearing Sr.J.

Shearing

MAUPIN, C.J., with whom, HARDESTY and PARRAGUIRRE, JJ., agree, concurring in part and dissenting in part:

I would reverse the judgment below against both appellants because the district court should have dismissed the action in its entirety under NRCP 41(e). In my view, French Bouquet Flower Shoppe v. Hubert[1] was wrongly decided and institutionally created a culture that essentially voided the rule when district courts found themselves unable to hear matters on their merits due to calendar congestion. Beyond that, assuming the continuing vitality of French Bouquet, that case provides no justification for the procedural gambit utilized in this instance to avoid the mandatory dismissal feature of NRCP 41(e). In fact, the French Bouquet court recognized, in citing Lipitt v. State of Nevada, that calling a witness solely to circumvent NRCP41(e)'s limitation period "does not satisfy the spirit of our cases on what may constitute bringing a case to trial."[2] If the district court felt the need to try this case to avoid an inequitable result under the rule, the court should have vacated its calendar and proceeded with the trial in earnest.[3]

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[1]106 Nev. 324, 793 P.2d 835 (1990).

[2]103 Nev. 412, 413-14, 743 P.2d 108, 109 (1987).

[3]I recognize and agree with much of what Senior Justice Shearing has said with regard to NRCP 41 (e). I would only note (1) that the French Bouquet procedure was not designed to allow dilatory parties relief from self-inflicted delays; (2) that none of the parties here, including the plaintiffs, were ready to proceed with the trial in earnest within the 5-year NRCP 41(e) prescriptive period; (3) that the trial court below had many months notice of the impending NRCP 41(e) problem to adjust its calendar

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With regard to the merits of this controversy, while I agree that the majority correctly reverses the judgment rendered below against appellant Curtis, I would likewise reverse as to appellant Stewart Title. First, I cannot agree that substantial evidence in the record supports the conclusion that Stewart Title acted maliciously or recklessly in preparing and recording, as directed, the deeds purporting to transfer the subject real estate. Second, the most liberal inference that can be drawn from the trial evidence is that Stewart Title operatives were merely negligent in the handling of this escrow. Third, under our recent decision in Mark Properties v. National Title Co.,[4] an escrow agent owes no duty in negligence to non-parties to an escrow transaction, has no duty to follow the instructions of a third party,[5] and need not investigate the circumstances of a particular sale in order to discover fraud.[6] Fourth, the

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. . . continued

if it wanted to avoid an unjust result under the rule; (4) that the evidence elicited from the single witness was of no substantive probative value; and (5) that substantial discovery and pre-trial procedures occurred after the original deadline in preparation for the true commencement of the actual trial, which did not begin until seven months later. In short, contrary to the majority's conclusion, the French Bouquet gambit did not involve a "good faith appearance for trial" as required under Lipitt.

[4]117 Nev. 941, 34 P.3d 587 (2001).

[5]Id. at 946, 34 P.3d at 591.

[6]Id.

trial court made no findings to that effect and rejected respondents' claims for exemplary damages.

In the absence of proof supporting the malice or recklessness element of a slander of title claim, and given that, at most, respondents made out a case of negligence against Stewart Title, Mark Properties compels reversal as a matter of law.

Accordingly, while I concur in the reversal of the judgment against appellant Curtis, I would likewise reverse the judgment against appellant Stewart Title.[7]

_____, C.J.
Maupin

We concur:

_____, J.
Hardesty

_____, J.
Parraguirre

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[7]Although I dissent from the majority, I would note that this lawsuit involves a paradigmatic predatory victimization of innocent investors by a group of malefactors who sought to join the ranks of the wealthy without resources, ethics, or ability. In this, a confluence of unscrupulousness and incompetence formed an unholy financial marriage that resulted in the destruction of a major real estate transaction. The primary offenders have, by way of bankruptcy or otherwise, managed to escape responsibility for their perfidy. That is the true miscarriage of justice here.