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Summary of Carstarphen v. Milsner, 128 Nev. Adv. Op. No. 5

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CIVIL PROCEDURE – FIVE-YEAR PERIOD

Summary

Appeal from a district court order denying a motion for a preferential trial date in a corporation action.

Disposition/Outcome

The Court concluded that the district court abused its discretion in denying a motion for a preferential trial date because the Appellant brought it with over three months remaining in the five-year period. Moreover, the Appellant acted diligently in prosecuting the case. Accordingly, the Court reversed and remanded, granting Appellant three years from the date of filing the remittitur in district court to bring his case to trial.

Factual and Procedural History

NRCP 41(e) provides that a district court shall dismiss an action that is not brought to trial within five years of the date on which the plaintiff filed the action, subject to stipulation by the parties.

The parties met for a status conference in August 2007, with less than seven months remaining in the five-year period. During the status conference, they stipulated to vacate the October 2007 trial date and stay all discovery and motion practice in anticipation of a settlement. The district court rescheduled the trial date for May 2008, after the five-year period expiration date. The five-year period was unmentioned in both the conference and the district court order for the new trial date.

Afterward, Appellant was unable to obtain an agreement to extend the five-year period to the new trial date. In an attempt to preserve the case, Appellant filed two motions. The first motion requested the district court confirm that the status conference stayed the five-year period. The second motion asked the district court to grant a preferential trial date before the expiration of the five-year period. The district court denied the motion for preferential trial date without explanation. However, the court granted the motion staying the five-year period, concluding that the parties implicitly agreed to extend the five-year period by stipulating to a trial date past the expiration date.

In March 2008, shortly after the five-year period expired, Respondent moved to dismiss the action for failing to bring the case to trial in time, pursuant to NRCP 41(e). Respondent argued that no mention of the five-year period was made during the parties' status conference and, therefore, no stipulation was actually made. The district court granted the motion, finding its extension order based on an error of law, and dismissed the underlying case. This appeal followed.

¹ By Richard A. Andrews

Discussion

Justice Cherry wrote for the Court,² noting that the plain language of NRCP 41(e) requires a written stipulation to extend the expiration date of the five-year period. An oral stipulation may qualify as written, but it must be made in open court, approved by the judge, entered into the minutes, and expressly mention the five-year period.³ Furthermore, the Court previously held that “words and conduct, short of a written stipulation’ cannot estop a defendant from seeking dismissal prior to the five-year rule.”⁴ Thus, the district court should have rejected the motion to confirm an implied waiver of the five-year period rule from the outset.

The Court next turned its attention to the motion for a preferential trial date. The factors considered when evaluating such a motion are: (1) the time remaining in the five-year period when the motion is filed, and (2) the diligence of the moving party and his or her counsel in prosecuting the case.⁵ Applied to the case at hand, the Appellant filed the motion for a preferential trial date with more than three months remaining in the five-year period. Furthermore, Appellant diligently moved forward and actively pursued discovery. Finally, the record demonstrated that the underlying case “was never allowed to languish through prolonged periods of inactivity.” Thus, the district court should have granted the motion for a preferential trial date.

The Court subsequently considered how much time Appellant should have to bring the case to trial on remand by examining two cases on the issue. In the first, *McGinnis v. Consolidated Casinos Corp.*, the Court held that when a judgment entered before the end of trial is reversed on appeal, the parties, on remand, have three years from the date the remittitur is filed in district court to bring the case to trial.⁷ In the second case, *Rickard v. Montgomery Ward & Co.*, the Court used a different rule, namely, that the appellant should be given “a reasonable period of time to set and bring his case to trial.”⁸

Weighing the two cases, the Court favored the *McGinnis* rule because it provided the parties with certainty as to the remaining time to bring a case to trial. Furthermore, it offered more consistency because the *Rickard* rule of “a reasonable period” could vary based on jurisdiction as a result of the varied sizes of district courts’ dockets. Consequently, the Court overruled *Rickard* to the extent it is inconsistent with *McGinnis*’ conclusion.

Conclusion

District courts, in evaluating a motion for a preferential trial date to avoid expiration under NRCP 41(e), must look at how much time is remaining in the five-year period and the diligence of the moving party to bring the case to trial.

² Justice Cherry was joined by Chief Justice Saitta and Justices Douglas, Gibbons, Hardesty, and Parraguire. Justice Pickering dissented.

³ *Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099-1100 (1980).

⁴ *Thran v. District Court*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963).

⁵ *Monroe, Ltd. v. Central Telephone Co.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975).

⁷ 97 Nev. 31, 33, 623 P.2d 974, 975 (1981).

⁸ 120 Nev. 493, 499, 96 P.3d 743, 747 (2004).

Pursuant to the *McGinnis* rule, on remand, appellants have three years from the date they file the remittitur in district court to begin trial proceedings. Moreover, the Court overruled *Rickard* to the extent that is inconsistent with *McGinnis*.