Case Number 10197

Department 1

IN THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

MICHAEL MARKING and ELIZABETH FLEMING, Plaintiffs *vs.* AUSTIN ROPING CLUB Defendant	OPPOSITION TO MOTION TO DISMISS

COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs, and hereby submit their OPPOSITION TO MOTION TO DISMISS.

WHEREAS

Defendant Austin Roping Club ("Club") on 28 March 2017 submitted its MOTION TO DISMISS, based on NRCP 41(e); and

Defendant's argument is insufficient, basically as follows (but explained more fully in the MEMORANDUM OF POINTS & AUTHORITIES):

(1) Litigants are unable to prosecute this case because this Court has failed to rule on some essential pre-trial motions, submitted five years ago (MEMORANDUM OF POINTS & AUTHORITIES, pg. 5); and

(2) Nevada has consistently held that the five year period of NRCP 41(e) is tolled when litigants are unable, as a consequence of the statutes, rules, conflicting cases, or procedural error, to proceed with litigation of a case (MEMORANDUM OF POINTS & AUTHORITIES, pg. 6); and

(3) The tolling of the five-year period makes Defendant's Motion untimely, as NRCP 41(e) does not now, and will not for at least four more years, apply to this case.

The aforementioned is not an argument based on hardship, or on the equities, or on other such things, which Nevada disallows for NRCP 41(e); it is a mandatory situation, as Nevada does not view this as a matter of the Court's discretion, but rather as a consequence of a sensible application of the rules when they conflict with the fundamental mandate of NRCP 41(e). (MEMORANDUM OF POINTS & AUTHORITIES, pg. 8).

MOREOVER

(4) Dismissing this case would be a denial of essential due process rights, and would violate the Canons of Judicial Ethics; the Constitutional requirements of due process rights would supersede the requirements of any rule such as NRCP 41(e) applied to dismiss the case (although Plaintiffs maintain that Nevada, in recognizing the tolling of the five year period, has made an appropriate allowance for the requirements of due process) (MEMORANDUM OF POINTS & AUTHORITIES, pg. 10 and pg. 11).

THEREFORE

Plaintiffs hereby request that this Court deny Defendant's MOTION TO DISMISS.

IN SUPPORT OF THIS OPPOSITION TO MOTION TO DISMISS, Plaintiffs have attached their MEMORANDUM OF POINTS & AUTHORITIES and their Exhibits.

ADDITIONALLY, Plaintiffs note that, in this matter and in others, this Court seems to be plagued by a substantial backlog of undecided issues. We offer some observations, below, at page 13.

DATED this Friday, 14 April 2017.

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both at Post Office Box 190, Austin,

Nevada 89310

Contents

Memorandum of Points & Authorities

1. Undecided pre-trial motions, some unopposed, prevent the litigants from prosecuting this case. This case was filed in February 2012. Shortly thereafter, various pre-trial motions were submitted, some unopposed, but this Court has not decided any motions since April 2012. These motions include ones relating to joinder of parties and amendment of the complaint, and without knowing the parties and having a proper complaint, this case cannot properly proceed.

2. Although not perhaps the best opinion to illustrate this, we choose *Baker v. Noback* (Nev. No. 26845, 08/30/96) because it specifically demonstrates the tolling of the five year period of NRCP 41(e). Baker pursued a medical malpractice action against a medical imaging group and three doctors, including Noback (a doctor). NRS 41A requires a screening before a panel before proceeding with a malpractice claim, but the group itself was not subject to the screening requirement. This created several problems, not least of which, until the panel completed its screening, Baker did not know who, ultimately, would be the defendants. Because of the delay, Baker was unable to prosecute and the case was dismissed on a NRCP 41(e) motion. Nevada reversed the district court's decision, on two grounds: (1) because litigation was blocked, the time period for a 41(e) motion was tolled; and (2) because it was unfair for Baker to be required to proceed without knowing the defendants, the time period was tolled. "[...] The plaintiff must wait until the panel has rendered its decision before proceeding against the defendants who were brought before the panel. [...] Under these circumstances, it would be <u>doubly unfair</u> to include the time during which the complaint against Dr. Noback was pending before the panel in computing the five-year period under Rule 41(e)." (*Baker*, ¶29, emphasis added)

3. There is currently before this Court, in this matter, an unopposed motion to join the Lander County Commissioners as additional defendants. As in Baker, it would be unfair to

ask Plaintiffs to proceed without the joinder of Lander County, or at least a decision whether such joinder is appropriate. Although it is mentioned elsewhere, we note that the acts of the Commissioners share a common set of facts and circumstances with those of the Austin Roping Club, which makes joinder mandatory. Accordingly, the five-year period of Rule 41(e) is properly tolled.

4. The motion for joinder is not the only bar to proceeding. This Court ruled on a motion for a more definite statement of the Complaint, without waiting for the time allowed by DCR for Plaintiffs to reply; there is also pending an additional MOTION FOR ADDITIONAL FINDINGS OR TO VOID OR MODIFY ORDER regarding that premature decision. As that motion for additional findings or to vacate shows, case law refers to a motion for a more definite statement as a "pre-trial" motion. If there is an undecided (and unopposed) pre-trial motion, how is it possible for the parties to proceed to trial? By failing to rule on pre-trial motions, this Court makes it impossible to move forward.

5. There are other motions as well, including an opposed motion by Defendant to strike the Complaint entirely. Again, how are the parties to move forward without deciding such a motion?

6. Therefore, it is clear that Plaintiffs are precluded from prosecuting this case and bringing it to trial until disposition of these pre-trial motions.

7. Nevada has consistently held that the five year period of NRCP 41(e) is tolled when litigants are unable, as a consequence of the statutes, rules, conflicting cases, or procedural error, to proceed with litigation of a case. Plaintiffs searched for the phrase "NRCP 41(e)", and found 103 cases. A few were unpublished, so we ignored those, but all of the rest were consistent with the proposition that an inability to prosecute or to litigate, based on the action of rules, statutes, or (in one instance) procedural error, tolled the five-year time period of NRCP 41(e). In this section, we describe and illustrate the main categories which

trigger the tolling.

8. The most commonly cited exception is based on a stay of action. If an action is stayed by court order, then Nevada holds that the five-year clock does not run during this time. This is commonly called the "Boren rule", from *Boren v. City of North Las Vegas*, 98 Nev. 5, 638 P.2d 404 (Nev. 1/6/1982). The reasoning is simple: "For a court to prohibit the parties from going to trial and then to dismiss their action for failure to bring it to trial is so obviously unfair and unjust as to be unarguable." (at ¶10) Furthermore, it is not required that the parties exhibit any level of diligence in removing the obstruction: "Appellants [...] contend that the city as plaintiff had some kind of duty of diligence in seeking vacation of the stay order. The city did move to have the stay order vacated and this was opposed by appellant. We consider this immaterial, however, for we would be hard-pressed to formulate a rule describing the degree of diligence required under such circumstances." (at ¶12)

9. The most commonly cited kind of stay is that imposed by Federal bankruptcy law, which automatically stays state actions during the pendancy of a bankruptcy case. The case which establishes this principle is *Rickard v. Montgomery Ward & Co., Incorporated*, 96 P.3d 743, 120 Nev. 493 (Nev. 09/02/2004), although it is affirmed in subsequent cases.

10. Nevada also consistently upholds tolling the NRCP 41(e) clock when litigation is delayed by the requirement to present a malpractice claim to a screening panel before proceeding.

11. Procedural delays also stop the clock. We submit that the current situation with undecided pre-trial motions is most closely related to this category: this Court has not cleared its calendar, much of which presumably was inherited from Judge Wagner, to move forward with this case, creating a procedural barrier to litigation. We cite two relevant opinions:

12. In *Hodges v. Kotecki*, 88 Nev. 447, 499 P.2d 354 (Nev. 7/25/1972), Nevada said: "It is evident that in the circumstances disclosed by this record, until the new general administratrix was appointed, the wrongful death claimants did not have a viable defendant to

whom claims could be presented, against whom an action could be instituted and proceed, and upon whom service of process could be had. The 5-year mandatory dismissal requirement of NRCP 41(e) does not touch this situation."

13. And Nevada recently wrote, in *Moore v. State*, 68882 (Nev. 01/07/2016), "Here, dismissal would mean automatically ruling against Moore for a procedural violation, one he did not commit. Even if there was any delay attributable to Moore, our precedent prohibits dismissal under NRCP 41(e)." Read closely, the Nevada Supreme Court feels that there is a "precedent" (their words) prohibiting an NRCP 41(e) dismissal when there is a procedural delay.

14. We emphasize again that, nowhere in the 103 cases referencing "NRCP 41(e)", (excluding unpublished cases, which were not examined), did we find any exceptions to this principle, that procedural delays do not count against the Rule 41(e) time period.

15. Tolling is a consequence of the application of equitable principles to what would otherwise be an unfair application of the rules. The tolling of the five-year period is not a consequence of equitable considerations outside of the litigation process itself: Nevada consistently denies exceptions for personal hardship, sickness, and other such situations. In its own words, it rejects allowing the district court to create exceptions based on what it calls an examination of the "equities". On the other hand, when the litigation process itself creates an inequitable situation, then the Nevada Supreme Court requires flexibility.

16. This latter principle is illustrated in the discussion found in the *Rickard* opinion (referring to provisions of the Federal bankruptcy code): "[...] When the district court initially considered Ward's motion to dismiss, the district court denied Ward's motion, in part, because the district court found the thirty-day period under [11 U.S.C.] §108(c)(2) 'unworkable.' We agree. In today's legal system, crowded court calendars can make it impractical, if not impossible, for a case to be brought to trial within the thirty-day time period prescribed by

§108(c). While this thirty-day period may be appropriate for taking other action in the case that had been stayed, it is not appropriate when the duty to bring a case to trial is concerned. [...] Finally, given that so little of the five-year prescriptive period remains even after Rickard is given the benefit of tolling, we fail to see how Rickard will be able to calendar and bring his case to trial within sufficient time. Therefore, for equitable reasons,*fn17 we instruct the district court to give Rickard a reasonable period of time to set and bring his case to trial, provided Rickard acts expeditiously." (*Rickard*, ¶¶36..38) Footnote 17 is: "See *Carcione v. Clark*, 96 Nev. 808, 811, 618 P.2d 346, 348 (1980) (noting that '[e]quity regards as done what in good conscience ought to be done')." In other words, <u>even after allowing for tolling of NRCP 41(e), Nevada instructed the district court to allow additional time for equitable reasons</u>. (The reasoning in the case is complex but mostly unrelated to the question at hand, so we do not quote it at length. If our conclusions are not clear, we invite this Court itself to refer to Nevada's Opinion in *Rickard*.)

17. To summarize, while Nevada rejects circumvention of Rule 41(e) for equitable reasons for factors (such as hardship, difficulty with attorneys, and so on), it recognizes the court's obligation to provide equitable relief from unfair situations created by the rules and other aspects of the litigation environment itself, and sees tolling of the Rule 41(e) time period (and other flexibility) as a way to resolve the sometimes conflicting requirements imposed on litigation by laws and other factors beyond control of the litigants.

18. There is no visible mechanism in NRCP or DCR or statutes to get this Court to rule on the undecided pre-trial motions: it is unlikely that Plaintiffs will prevail where statutes and ethics canons and court rules have not. (We have refrained from seeking a writ, having assumed that this Court is very busy and that is the reason for the delay.) It appears from case law that the only way to rectify an inappropriate dismissal under Rule 41(e) is to appeal, something we cannot do until the case might be improperly dismissed. This has been a situation occasioned by this Court and beyond control of Plaintiffs, and Plaintiffs are for that

reason entitled in this instance to the tolling allowed by the Nevada Supreme Court.

19. Dismissal under NRCP 41(e), or for any other reason, would be a denial of Constitutionally protected due process rights; such rights supersede the applicability of NRCP 41(e). The basic requirements of due process in any context are notice, an opportunity to be heard, and a decision by a neutral decision maker. The rules are structured so that these principles apply step by step in the litigation process: at each step, all three are required. In civil matters, there is no bright line regarding the time within which a court, tribunal, panel, or other deliberative body must act, although it is expected that judges and other personnel must act as expeditiously as they reasonably and practically can.

20. At this point in this case, we have a failure by Judge Wagner to follow the rules regarding time to submit an opposition to a motion, but the unopposed pre-trial MOTION FOR ADDITIONAL FINDINGS OR TO VOID OR MODIFY ORDER provides a way to correct that. We have a delay in proceeding with the litigation, caused by this Court's failure to rule on several motions, some unopposed, but with the tolling provided by Nevada's interpretation of Rule 41(e), no intolerable harm will arise from that. Plaintiffs have pleaded no special time requirements and have not asked that any step of the process be hurried, or that time anywhere be shortened.

21. In other words, there are procedures available to correct the errors up to this point.

22. However, were the case to be dismissed at this time, those corrective procedures would become unavailable. Moreover, if the case were to be dismissed, Plaintiffs would never have had their opportunity to be heard, and would have been denied their right to a decision by a neutral decision maker. In other words, dismissal would deny Plaintiffs of two of their three fundamental due process rights.

23. "The purpose of NRCP 41(e) is to compel an expeditious determination of legitimate claims." (*C.R. Fedrick, Inc. v. Nevada Tax Comm'n*, 98 Nev. 387, 649 P.2d 1372

(Nev. 8/27/1982)) When, however, the use of the rule itself renders expeditious determination impossible (in the present case, the forum for determination has been effectively unavailable for five years due to undecided motions), then the rule has no legitimate purpose, and it is a fundamental principle of jurisprudence that there must be a legitimate reason for rules, statutes, and laws.

24. While we believe that the Nevada Supreme Court, in carving out the mechanism of tolling the five-year period imposed by 41(e), has effectively balanced the need for expeditious determination against the interests of the parties and the court system, should this Court reject the applicability of that mechanism, then some different way must be found to provide due process rights to Plaintiffs (and to Defendant, as well).

25. The ultimate effect of Rule 41(e) without the tolling mechanism, in situations where prosecution is impossible, is a complete denial of due process rights. While it is reasonable to say that the courts cannot be responsible for all the possible hardships and equities and difficult situations which may be beyond the control of the court itself – which makes some time mandatory time limit a reasonable proposition – there remains room to require of the court, which is tasked with providing those due process rights, that it do its own job without creating a situation where the court's own rules create an insurmountable barrier to litigation. If it is impossible to prosecute a case under the rules, then the rules are wrong; specifically, the Rule 41(e) requirement for mandatory dismissal is unconstitutional. We note that any judge or hearing officer in the land, from administrative tribunals to justices of the peace all the way up to U.S. Supreme Court justices, can determine that a rule or law, in the circumstances before him or her, might be void as unconstitutional. Indeed, any such judge or hearing officer is so obligated, if that is the situation. We are all bound by the Constitution.

26. Dismissal would be in breach of the canons of judicial conduct. This Court has not had time in five years to rule on several important motions, some of which are unopposed.

If it were to find the time to decide and to grant the Motion to Dismiss, then it will have found the time to dismiss this case, but not to preside over it as is required by Nevada's Code of Judicial Conduct (NCJC).

27. NCJC 2.7 requires that "A judge shall hear and decide matters assigned to the judge [...]". Plaintiffs have assumed that the delays in deciding the motions are due to this Court's workload and possible shortage of resources. It would be disrespectful of this Court for Plaintiffs to assume otherwise. We expect that "our day in court" will arrive, and that we will receive a fair hearing and decision. Except for some calls to the the Clerk's office to inquire regarding status, we have refrained from pestering this Court, seeking a writ to compel speedier action, and so on. As we noted above, procedural due process does not require (at least in this civil context) any specific timetable for action.

28. However, if this Court were to grant this motion, then it will have failed in its duty to hear and to decide this case. How could it have the time and resources to decide a new motion, when it has, at least in this matter, a five year backlog?

29. Surely this Court has long been aware of the requirements of NRCP 41(e): the Rule has been around (though in different forms) since 1943. If this Court were to believe that tolling did not apply, while it is clear even merely from looking at the docket sheet that there are undecided motions, then this Court had an obligation to seek the resources necessary to enable litigation of this dispute. (NCJC 2.5, Comment 2) Were those resources unavailable, then at the very least it ought to have warned the parties. ("Hey, guys, I'm not going to get to this... may I suggest some alternatives?")

30. Regarding this Court's calendar and workload... The delays in this Court's response to the undecided motions in this case correlate to the same problem in other matters known to Plaintiffs. To illustrate:

Caption	Docket Number	Undecided Items
Marking v. Austin Roping Club (this case)	10197	Several undecided motions, some unopposed, from summer 2012 (almost 5 years ago)
Marking and Fleming v. Gallegos	CV10597 and CV10598	(an appeal from denial of an post-trial motion in Austin Justice Court) no action whatsoever on an appeal filed in November 2015 (1½ years ago)
Marking v. Lander County	(not yet assigned)	Complaint submitted August 2012, but not yet filed by clerk; see ensuing discussion (almost 5 years ago)

31. The complaint in *Marking v. Lander County*, along with an application for leave to proceed in forma pauperis, two certificates of service, a motion for leave to proceed in forma pauperis, an order for signature, and a summons, was filed with the Clerk in August 2012. According to deputy clerk Mary Anna Gray, Judge Wagner was, as of several months later, "still deciding" the motion. That is apparently how it remains: still undecided after five years. She was instructed by Judge Wagner not to docket the complaint until a decision was made, so there still is no docket number.

32. There appear to be problems in the Clerk's office, as well. Exhibit OMD-1 is a copy of the docket sheet ("Case Summary") in this case, obtained from Ms Gray in October 2012 after a conversation with one of Plaintiffs inquiring about the status of this case and also about the status of *Marking v. Lander County*. (She had no docket sheet for *Marking v. Lander County*, having been instructed not to docket it.) Documents appear out-of-order, and

at least one document (the OPPOSITION TO MOTION TO STRIKE COMPLAINT) appears twice (in April, and again in August). That doubly-listed document is Plaintiffs', and we know there was only one. We have no idea how it came to be listed twice. Obviously, the dates cannot all be right.

33. Something is grievously wrong when a complaint (and five other documents) are missing from the Clerk's system after five years.

34. Judge Wagner, to put it bluntly, was dishonest and biased, and he sometimes acted as if the rules which applied to others did not apply to him. He had previously, wrongly, instructed the Clerk not to file a document: an appeal from this Court in a different matter; he had to be nudged by a petition for writ of mandamus to allow the filing. Yet he knew better: a few months earlier, he had ordered the clerk of the Austin court to file an appeal when the Austin clerk had been instructed not to do so by Judge Dory in Austin. Judge Wagner, in his order, had explained that it was the clerk's ministerial duty to file any documents brought to her, yet in an almost identical situation he ordered his own clerk not to file the appeal from his own decision. Then he apparently removed a document from the record, which sabotaged the appeal: even though the designation of record in the appeal to the Supreme Court specified that all the record was to be included, without the removed document – mentioned elsewhere in the record – the Supreme Court said it was unable to decide the case.

35. It seems that he may have done the same thing with *Marking v. Lander County*, except, having learned his lesson, he did not outright instruct his clerk never to file it, but simply to wait for a decision on the motion. Five years on, we are still waiting.

36. It was mentioned above that he decided a motion in this case without allowing the requisite time for opposition. He also, with several briefs which had arguments in alternative (specifically allowed by the rules), would pick a weak argument, rule based on that argument, and completely ignore the other arguments. In this way he routinely denied due process rights, the rights to be heard and to have a decision by a neutral decision maker. He was not stupid, clearly, so his repeated use of this tactic strongly implies bias and poor ethics on his

part.

37. There are two points to the above.

38. The first is that failure of this Court to decide on the motion to file *Marking v. Lander County* is likely to impact this case, because the two share a common set of facts and circumstances and rightly ought to be tried together. It will not be sufficient to dust off the record from the instant case and to decide the undisposed motions. It will also be necessary to make a few decisions regarding *Marking v. Lander County* to remove the known blocks to prosecution of this case; most importantly, to decide if the two cases should be tried together.

39. The second point is to acknowledge that the current judge, the Hon. Jim Shirley, may have inherited a damaged system, with incomplete, missing, and inaccurate records, from his predecessor. The current judge may not even be aware that he has undecided motions from five years ago, or that motions submitted for decision might not even be found in the Clerk's system. We don't know what a judge does when he or she goes to work, how he finds out what he's supposed to do that day. But if he's relying on the Clerk and her system to tell him, he may not know what's going on or what has happened in the past.

40. Nevertheless, the judge is responsible for supervising the county clerk in her responsibilities as clerk of the court, so the previous arguments about judicially-caused delay tolling the time requirements of NRCP 41(e) remain valid.

41. We also suggest a modification of the Clerk's procedures, which this Court apparently interprets as "decide first, file later"; we suggest that it be changed to become "file first, then decide". The current "decide first..." procedure, as illustrated above in the previous appeal in a different matter, and also as illustrated in the matter of *Marking v. Lander County*, is contrary to the principle enunciated by the Nevada Supreme Court that the Clerk's duty is ministerial and that the clerk should file <u>all</u> documents presented, without waiting for a decision by the judge as to whether it is proper to file each document. The "decide first..." principle also makes it easer for corrupt judges to bury an unwanted appeal or other action by

round-filing it, and it introduces a level of micro-management of the Clerk by the Court that only serves to increase the workload of everyone: the Clerk, the judge, and the litigants themselves.

42. Summary of this document. In this OPPOSITION TO MOTION TO DISMISS, Plaintiffs have shown that undecided motions in this and in another matter have prevented them from prosecuting this case, and that, based on the Nevada Supreme Court's consistent holdings, such court-created and law-created barriers to litigation toll the running of the five-year period described in Rule 41(e). This vitiates Defendant's arguments, and requires that this Court deny their MOTION TO DISMISS.

43. In addition, Plaintiffs have commented on the many-year backlogs they have experienced in this matter, perhaps, in the process, bringing to the attention of the Hon. Jim Shirley some facts of which he might not have been aware. We also suggest that the interests of everyone might, if the rules allow, be furthered by changing the procedures by which the Clerk accepts documents for filing.

44. We ask, once again, that this Court deny Defendant's Motion.

Certificate of Service

I hereby certify under penalties of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage prepaid, at Austin, Nevada, addressed as follows:

Brett K. South; 9498 Double R Boulevard, Suite A; Reno, Nevada 89521

Dated Friday, 14 April 2017.

_____

Michael Marking

Affirmation (Pursuant to NRS 239B.030)

I hereby affirm that the preceding document filed in the above-described manner does not contain the social security number of any person.

Dated Friday, 14 April 2017.

_____

Michael Marking

(Plaintiffs' electronic document name: *mfvarc_oppos_motion_dismiss_20170412a)*