

1 Case Number 10197

2 Department 1

3
4
5
6 IN THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF LANDER

8
9
10 MICHAEL MARKING
11 and
12 ELIZABETH FLEMING,
13 Plaintiffs

OPPOSITION TO MOTION TO DISMISS

14 vs.

15
16 AUSTIN ROPING CLUB
17 Defendant

18
19
20
21 COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs,
22 and hereby submit their OPPOSITION TO MOTION TO DISMISS.

23
24 WHEREAS

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

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

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

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

36 (3) The tolling of the five-year period makes Defendant's Motion untimely, as NRCP
37 41(e) does not now, and will not for at least four more years, apply to this case.

38 The aforementioned is not an argument based on hardship, or on the equities, or on
39 other such things, which Nevada disallows for NRCP 41(e); it is a mandatory situation, as
40 Nevada does not view this as a matter of the Court's discretion, but rather as a consequence of
41 a sensible application of the rules when they conflict with the fundamental mandate of NRCP
42 41(e). (MEMORANDUM OF POINTS & AUTHORITIES, pg. 8).

43
44 **MOREOVER**

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

53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78

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.

Michael Marking, Plaintiff
e-mail *marking@tatanka.com*

Elizabeth Fleming, Plaintiff
e-mail *ryuuz@tatanka.com*

79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104

both at Post Office Box 190, Austin,
Nevada 89310

CONTENTS

MEMORANDUM OF POINTS & AUTHORITIES	Page 5
Undecided pre-trial motions, some unopposed, prevent the litigants from prosecuting this case	Page 5
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	Page 6
Tolling is a consequence of the application of equitable principles to what would otherwise be an unfair application of the rules	Page 8
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)	Page 10
Dismissal would be in breach of the canons of judicial conduct	Page 11
Regarding this Court's calendar and workload...	Page 13
Summary of this document	Page 16
CERTIFICATE OF SERVICE	Page 17
Copy of docket sheet as of 2012.10.10	Exhibit OMD-1

MEMORANDUM OF POINTS & AUTHORITIES

105
106
107 **1. Undecided pre-trial motions, some unopposed, prevent the litigants from**
108 **prosecuting this case.** This case was filed in February 2012. Shortly thereafter, various pre-
109 trial motions were submitted, some unopposed, but this Court has not decided any motions
110 since April 2012. These motions include ones relating to joinder of parties and amendment of
111 the complaint, and without knowing the parties and having a proper complaint, this case
112 cannot properly proceed.

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

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

131 ask Plaintiffs to proceed without the joinder of Lander County, or at least a decision whether
132 such joinder is appropriate. Although it is mentioned elsewhere, we note that the acts of the
133 Commissioners share a common set of facts and circumstances with those of the Austin
134 Roping Club, which makes joinder mandatory. Accordingly, the five-year period of Rule
135 41(e) is properly tolled.

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

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

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

149
150 **7. Nevada has consistently held that the five year period of NRCP 41(e) is tolled**
151 **when litigants are unable, as a consequence of the statutes, rules, conflicting cases, or**
152 **procedural error, to proceed with litigation of a case.** Plaintiffs searched for the phrase
153 “NRCP 41(e)”, and found 103 cases. A few were unpublished, so we ignored those, but all of
154 the rest were consistent with the proposition that an inability to prosecute or to litigate, based
155 on the action of rules, statutes, or (in one instance) procedural error, tolled the five-year time
156 period of NRCP 41(e). In this section, we describe and illustrate the main categories which

157 trigger the tolling.

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

169 **9.** The most commonly cited kind of stay is that imposed by Federal bankruptcy law,
170 which automatically stays state actions during the pendency of a bankruptcy case. The case
171 which establishes this principle is *Rickard v. Montgomery Ward & Co., Incorporated*, 96 P.3d
172 743, 120 Nev. 493 (Nev. 09/02/2004), although it is affirmed in subsequent cases.

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

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

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

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

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

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

195
196 **15. Tolling is a consequence of the application of equitable principles to what**
197 **would otherwise be an unfair application of the rules.** The tolling of the five-year period is
198 not a consequence of equitable considerations outside of the litigation process itself: Nevada
199 consistently denies exceptions for personal hardship, sickness, and other such situations. In its
200 own words, it rejects allowing the district court to create exceptions based on what it calls an
201 examination of the “equities”. On the other hand, when the litigation process itself creates an
202 inequitable situation, then the Nevada Supreme Court requires flexibility.

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

209 §108(c). While this thirty-day period may be appropriate for taking other action in the case
210 that had been stayed, it is not appropriate when the duty to bring a case to trial is concerned.
211 [...] Finally, given that so little of the five-year prescriptive period remains even after Rickard
212 is given the benefit of tolling, we fail to see how Rickard will be able to calendar and bring
213 his case to trial within sufficient time. Therefore, for equitable reasons,^{*fn17} we instruct the
214 district court to give Rickard a reasonable period of time to set and bring his case to trial,
215 provided Rickard acts expeditiously.” (*Rickard*, ¶¶36..38) Footnote 17 is: “See *Carcione v.*
216 *Clark*, 96 Nev. 808, 811, 618 P.2d 346, 348 (1980) (noting that ‘[e]quity regards as done
217 what in good conscience ought to be done’).” In other words, even after allowing for tolling
218 of NRCP 41(e), Nevada instructed the district court to allow additional time for equitable
219 reasons. (The reasoning in the case is complex but mostly unrelated to the question at hand,
220 so we do not quote it at length. If our conclusions are not clear, we invite this Court itself to
221 refer to Nevada’s Opinion in *Rickard*.)

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

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

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

236
237 **19. Dismissal under NRCP 41(e), or for any other reason, would be a denial of**
238 **Constitutionally protected due process rights; such rights supersede the applicability of**
239 **NRCP 41(e).** The basic requirements of due process in any context are notice, an opportunity
240 to be heard, and a decision by a neutral decision maker. The rules are structured so that these
241 principles apply step by step in the litigation process: at each step, all three are required. In
242 civil matters, there is no bright line regarding the time within which a court, tribunal, panel,
243 or other deliberative body must act, although it is expected that judges and other personnel
244 must act as expeditiously as they reasonably and practically can.

245 **20.** At this point in this case, we have a failure by Judge Wagner to follow the rules
246 regarding time to submit an opposition to a motion, but the unopposed pre-trial MOTION FOR
247 ADDITIONAL FINDINGS OR TO VOID OR MODIFY ORDER provides a way to correct that. We have a
248 delay in proceeding with the litigation, caused by this Court's failure to rule on several
249 motions, some unopposed, but with the tolling provided by Nevada's interpretation of Rule
250 41(e), no intolerable harm will arise from that. Plaintiffs have pleaded no special time
251 requirements and have not asked that any step of the process be hurried, or that time
252 anywhere be shortened.

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

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

259 **23.** "The purpose of NRCP 41(e) is to compel an expeditious determination of
260 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.

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

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

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

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

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

Caption	Docket Number	Undecided Items
<i>Marking v. Austin Roping Club</i> (this case)	10197	Several undecided motions, some unopposed, from summer 2012 (almost 5 years ago)
<i>Marking and Fleming v. Gallegos</i>	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)
<i>Marking v. Lander County</i>	(not yet assigned)	Complaint submitted August 2012, but not yet filed by clerk; see ensuing discussion (almost 5 years ago)

326
327 **31.** The complaint in *Marking v. Lander County*, along with an application for leave
328 to proceed in forma pauperis, two certificates of service, a motion for leave to proceed in
329 forma pauperis, an order for signature, and a summons, was filed with the Clerk in August
330 2012. According to deputy clerk Mary Anna Gray, Judge Wagner was, as of several months
331 later, “still deciding” the motion. That is apparently how it remains: still undecided after five
332 years. She was instructed by Judge Wagner not to docket the complaint until a decision was
333 made, so there still is no docket number.

334 **32.** There appear to be problems in the Clerk’s office, as well. Exhibit OMD-1 is a
335 copy of the docket sheet (“Case Summary”) in this case, obtained from Ms Gray in October
336 2012 after a conversation with one of Plaintiffs inquiring about the status of this case and also
337 about the status of *Marking v. Lander County*. (She had no docket sheet for *Marking v.*
338 *Lander County*, having been instructed not to docket it.) Documents appear out-of-order, and

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

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

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

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

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

365 part.

366 **37.** There are two points to the above.

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

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

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

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

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

394
395 **42. Summary of this document.** In this OPPOSITION TO MOTION TO DISMISS, Plaintiffs
396 have shown that undecided motions in this and in another matter have prevented them from
397 prosecuting this case, and that, based on the Nevada Supreme Court’s consistent holdings,
398 such court-created and law-created barriers to litigation toll the running of the five-year
399 period described in Rule 41(e). This vitiates Defendant’s arguments, and requires that this
400 Court deny their MOTION TO DISMISS.

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

406 **44.** We ask, once again, that this Court deny Defendant’s Motion.

417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442

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*)