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FILED

JUN 24 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY J. J. J. J.
CHIEF DEPUTY CLERK

June 23, 2020

Via Email

Elizabeth A. Brown
Clerk of the Supreme Court
201 South Carson St.
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nvscclerk@nvcourts.nv.gov

Re: NRCP 41(e) Repeal

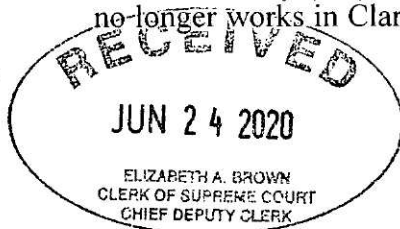
Dear Ms. Brown:

We write in support of the repeal of NRCP 41(e). Nevada has a strong public policy of hearing cases on the merits. Yochum v. Davis, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982). NRCP 41(e) is in conflict with that rule and can result in harsh consequences for plaintiffs even when delays are beyond their control.

NRCP 41(e) places the burden solely on the plaintiff to bring a case to trial within five years. Requiring dismissal presumes that any case not brought to trial within five years must be due to a lack of diligence on the part of the plaintiff. The Rule ignores the fact that there is a defendant who can cause delay. There is no similar penalty for a defendant who delays a case being prosecuted and it is the plaintiff who suffers where a defendant causes delay.

More importantly, the Rule also ignores that many delays in cases are due to the courts' overwhelming dockets. In the Eighth Judicial District, cases generally get placed on a five-week stack with numerous other cases. It is rare that a case gets tried on the first stack on which it is set, even if the parties are ready for trial. We have had cases continued where the next available stack is a year later, and this was before Covid-19 delayed civil jury trials.

Repeal of the Rule due to its flaws is not a new concept. In 2011, in a dissenting opinion in Maduka v. Eighth Judicial Dist. Court, 2011 Nev. Unpub. LEXIS 1703 (Sept. 19, 2011), Justice Michael Cherry (ret.) advocated for the repeal of NRCP 41(e) because "the five-year rule simply no longer works in Clark County." Id. at *10. Justice Cherry referred to the 2010 Annual Report



20-23461

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of the Nevada Judiciary, which noted that 95,690 non-traffic cases were filed in the Eighth Judicial District in 2010. Id. Justice Cherry argued that in many cases it is the number of cases that leads to delays, not the litigants, and that many cases do not receive trial dates until they are effectively running up against the back end of the five-year period. Id. at *11.

Fast forward to 2020, and the problem has not gotten any better—even without Covid-19 delays. According to the 2019 Annual Report of the Nevada Judiciary, 102,780 non-traffic cases were filed in the Eighth Judicial District Court. Plaintiffs have no control over the courts' dockets, or the number of cases filed. Yet it is plaintiffs who are penalized if the courts' docket delays a case and a proper stipulation is not entered.

Some opponents of repeal may point to the fact that Rule 41(e) allows for stipulations to extend the time to bring a case to trial. But stipulations do not solve the problem in situations where delays are not due to the fault of the plaintiff. Instead, cases can be dismissed for a technical violation of failing to enter a proper stipulation rather than failing to prosecute the case. Rule 41(e) is designed to promote efficient and diligent prosecution of cases. But, in situations beyond a plaintiff's control the Rule seemingly mandates dismissal due to a technical violation of not entering a proper stipulation rather than a failure to prosecute. We are in support of repeal of the Rule to prevent dismissal where delays are outside the control of the plaintiff.

Sincerely,

Timothy A. Mott

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