

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 68309
(Consolidated with Case Nos. 68265 and 68275)

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LAS VEGAS SANDS CORP., A NEVADA CORPORATION; SANDS
CHINA LTD., A CAYMAN ISLANDS CORPORATION; AND SHEEDEN
G. ADELSON, AN INDIVIDUAL,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK; AND , THE
HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

**ANSWER TO PETITION FOR WRIT OF PROHIBITION OR
MANDAMUS RE TRIAL SETTING ORDER**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

PISANELLI BICE PLLC and CAMPBELL & WILLIAMS are the only law firms whose partners or associates have or are expected to appear for Real Party in Interest Steven C. Jacobs.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION	1
A.	Sands China's convenient silence	1
B.	The District Court's New Trial Date	2
III.	REASONS THE WRIT SHOULD NOT ISSUE	2
A.	Trial Settings Do Not Warrant Writ Relief, Even Prompt Ones.	2
B.	The District Court Correctly Set a Prompt Trial Date	3
C.	Massey Should be Considered as Well	4
D.	This Matter Should Proceed to Trial Expeditiously	5
IV.	CONCLUSION	6
	CERTIFICATE OF COMPLIANCE	7
	CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases

<i>Baker v. Noback</i> , 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996).....	6
<i>Boren v. City of North Las Vegas</i> , 95 Nev. 5, 638 P.2d 404 (1982)	5
<i>Carstarphen v. Milsner</i> , 128 Nev. Adv. Op. 5, 270 P.3d 1251 (2012)	4, 5
<i>Close v. Second Jud. Dist. Ct.</i> , 73 Nev. 194, 314 P.2d 379 (1957).....	3
<i>Fulbright & Jaworski v. Eighth Jud. Dist. Ct.</i> , 131 Nev. Adv. Op. 5, 342 P.3d 997 (2015)	3
<i>Hidalgo v. Dist. Ct.</i> , 124 Nev. ---, ---, 184 P.3d 369 (2008)	3
<i>Massey v. Sunrise Hospital</i> ., 102 Nev. 367, 724 P.2d 208 (1986).....	5, 6
<i>Monroe, Ltd. v. Cent. Tel. Co., S. Nevada Div.</i> , 91 Nev. 450, 538 P.2d 152 (1975)	4
<i>Morgan v. Las Vegas Sands, Inc.</i> , 118 Nev. 315, 43 P.3d 1036 (2002)	5
<i>Sonia F. v. Dist. Ct.</i> , 125 Nev. 38, ---, 215 P.3d 705 (2009).....	3
<i>State ex rel. Hamilton v. Second Judicial Dist. Ct.</i> , 80 Nev. 158, 390 P.2d 37 (1964)	3
<i>Stephens Media, LLC v. Eighth Judicial Dist. Ct. of State ex rel. Cnty. of Clark</i> , 125 Nev. 849, 221 P.3d 1240 (2009)	3

Rules

NRCP 1	6
NRCP 41(e)	passim
NRCP 54(b)	5, 6

I. INTRODUCTION

Much of the relief Petitioners seek has been effectively granted by this Court's vacation of the October 2015 trial date and the District Court's subsequent entry of an amended scheduling order, setting the trial for June 27, 2016. Nonetheless, Real Party in Interest Steven C. Jacobs ("Jacobs") believes that it is imperative that this Court confirm tolling of the requirements of NRCP 41(e) beyond the current June 27, 2016 trial date. Jacobs' rights should not turn upon any vagaries, assumptions, or ambiguities. His request is simple: an unequivocal ruling, binding upon the Petitioners, that confirms that Jacobs' rights are preserved. As set forth below, both Jacobs and the District Court had ample reason to proceed with extreme caution.

II. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

A. Sands China's convenient silence.

Because this Court's order directing an answer effectively grants Petitioners all the relief they sought, Jacobs will not consume this Court's time with a recital of the full history as to how this action became eternally stuck. But, Jacobs does believe that it is important for this Court to understand the inconsistencies Petitioners have taken before the District Court on this point, intentionally being vague as to whether NRCP 41(e) was tolled, until it became opportune for them to say otherwise.

Well over a year ago (February 21, 2014), the District Court invited briefing as to Petitioners' views as to the potential tolling of NRCP 41(e). Jacobs' counsel was intimately familiar with the District Court's approach on that issue, because the same court made the same request in another action at that same time, which all those parties agreed to submit. But in this case, Sands China would not agree to briefing any position.

And, there is no denying why it declined to do so: it did not want to be on record conceding that any tolling had occurred. It wanted Jacobs and the District Court to have to operate under the threat that Sands China would later claim that no

1 tolling had in fact occurred. Indeed, the District has repeatedly observed how Sands
2 China declined to acknowledge any tolling. (1 App. 060 n.8; 2SA0304; 5SA1122;
3 9SA1875.)¹

4 It was not until after the District Court entered its jurisdictional findings,
5 thereby eliminating the ongoing merits stay, that Sands China then decided that it
6 would benefit from the District Court not setting a prompt trial date. Accordingly,
7 that is when it suddenly reversed course and now wanted to claim that tolling had
8 occurred (for 3 years). Thus, the blustering assault upon the District Court (and
9 Jacobs) as to the supposed absurdity of any concerns about the tolling of NRCP 41(e)
10 is highly improper. Sands China sought to keep the five-year rule in play until the
11 advantages of doing so no longer worked in its favor. Only then did it turn around
12 and claim that "obviously" tolling has occurred.

13 **B. The District Court's New Trial Date.**

14 In light of this Court's vacating of the October 14, 2015 trial date, the District
15 Court has issued an Amended Business Court Scheduling Order and 2nd Amended
16 Order Setting Civil Jury Trial on July 17, 2015. (9SA1922-30.) The District Court
17 set the discovery deadline for April 18, 2016 and re-set trial for June 27, 2016. (*Id.*)
18 By the April 2016 discovery cut off, Defendants will have had at least fifteen months
19 of merits discovery and years of delay.

20 **III. REASONS THE WRIT SHOULD NOT ISSUE**

21 **A. Trial Settings Do Not Warrant Writ Relief, Even Prompt Ones.**

22 Besides questions of mootness of the Petition, this Court generally does not
23 grant extraordinary writ relief to dictate trial dates. "The setting of trial dates, the
24 ordering of postponements for cause and other matters having to do with
25 arrangement of court calendars have always been considered as essentially within
26

27 ¹ For the Court's convenience, all citations to "SA" refer Jacobs' Supplemental
28 Appendix in Case Number 68265.

1 the discretion of the trial courts, and this court, in the absence of arbitrary action,
2 has never entered into, and is not now inclined to interfere with any arrangement of
3 district court calendars." *Close v. Second Jud. Dist. Ct.*, 73 Nev. 194, 196, 314 P.2d
4 379, 380 (1957); *see also State ex rel. Hamilton v. Second Judicial Dist. Ct.*, 80
5 Nev. 158, 159, 390 P.2d 37, 38 (1964) ("Matters concerning the arrangement of
6 court's calendars and the granting or denial of motions for continuances are almost
7 invariably held to be a matter for the exercise of the court's discretion and do not
8 raise any question of the court's jurisdiction.").

9 This Court has maintained that rule even when the trial setting is impacted
10 by NRCP 41(e)'s five year rule. *See Monroe, Ltd. v. Cent. Tel. Co., S. Nevada Div.*,
11 91 Nev. 450, 456, 538 P.2d 152, 156 (1975) (district court did not abuse its
12 discretion by denying motion for preferential trial setting to avoid dismissal under
13 NRCP 41(e)).

14 **B. The District Court Correctly Set A Prompt Trial Date.**

15 The District Court promptly set trial after the jurisdictional hearing based
16 upon concerns about the five year rule and the inconsistencies in Nevada caselaw
17 interpreting NRCP 41(e). (2 App 0182.) The District Court's apprehension was not
18 unfounded. Even this Court has recently acknowledged that its precedent
19 interpreting NRCP 41(e) has not always been clear. *See, e.g., Carstarphen v.*
20 *Milsner*, 128 Nev. Adv. Op. 5, 270 P.3d 1251, 1252 (2012) ("As this court's body
21 of jurisprudence contains competing lines of precedent with regard to the time a
22 plaintiff has to bring a case to trial . . . we take this opportunity to clarify our
23 precedent addressing this issue . . .").²

24 In *Carstarphen*, this Court elucidated the factors that a district court should
25 consider when setting trial to avoid dismissal pursuant to NRCP 41(e). 128 Nev.
26 Adv. Op. 5, 270 P.3d at 1252, 1254, 1256. The district court must consider "(1) the

27 ² Respectfully, Jacobs does not wish to be the victim of potential future
28 interpretations of NRCP 41(e) that could impact his rights.

1 time remaining in the five-year period when the motion is filed, and (2) the diligence
2 of the moving party and his or her counsel in prosecuting the case." *Id.* at 1256. This
3 Court specifically declined to adopt the California test advocated by the dissent
4 which included "prejudice to defendant of an accelerated trial date" as an additional
5 factor. *Compare id.* at 1254 *with id.* at 1259 (Pickering, J., dissenting).

6 Here, given the District Court's concerns over ambiguities as to whether the
7 stay effectively tolled the five-year rule – highlighted by Sands China's prior long-
8 standing refusal to acknowledge that tolling had occurred – the District Court
9 appropriately set trial before the earliest possible date that the five year rule could
10 expire. Jacobs most assuredly is not interested in Sands China securing more delay.

11 This Court has continually admonished that "[i]t is the obligation of the
12 plaintiff to ensure compliance with the NRCP 41(e) prescriptive period." *Morgan v.*
13 *Las Vegas Sands, Inc.*, 118 Nev. 315, 321, 43 P.3d 1036, 1040 (2002). Thus, Jacobs
14 was not, and should not be, required to incur risk or consent in Sands China's desire
15 for more delay of his day in court. Respectfully, the self-serving cries of having to
16 participate in accelerated discovery after having successfully delayed this action for
17 years should not serve as a basis for vacating a trial date. *Compare Carstarphen*,
18 270 P.3d at 1254 *with id.* at 1259 (Pickering, J., dissenting).

19 **C. Massey Should be Considered as Well.**

20 Petitioners' five year rule calculation relies exclusively on *Boren v. City of*
21 *North Las Vegas*, 95 Nev. 5, 6, 638 P.2d 404, 405 (1982) for the proposition that
22 "[a]ny period during which the parties are prevented from bringing an action to trial
23 by reason of a stay order shall not be computed in determining the five-year period
24 of Rule 41(e)." However, they do not address this Court's decision in *Massey v.*
25 *Sunrise Hospital.*, 102 Nev. 367, 724 P.2d 208 (1986).

26 In *Massey*, medical malpractice plaintiffs sued a hospital and a doctor. *Id.* at
27 368, 724 P.2d at 208. The doctor successfully moved to dismiss on statute of
28 limitations grounds and the judgment was certified as final under NRCP 54(b). *Id.*

1 Then, the plaintiffs appealed the doctor's dismissal to this Court. *Id.* at 368, 724
2 P.2d at 208-09. During the appeal, the hospital and the plaintiffs stipulated to stay
3 the underlying case until six months after the remittitur issued after the appeal. *Id.*
4 at 368, 724 P.2d at 209.

5 Eventually, this Court reversed the doctor's dismissal and the remittitur
6 issued. *Id.* at 368-69, 724 P.2d at 209. However, the remittitur was filed after the
7 five year rule expired and the hospital moved to dismiss under NRCP 41(e). *Id.* at
8 368-69, 724 P.2d at 209. The district court granted the motion and another appeal
9 ensued. *Id.* at 368-69, 724 P.2d at 209.

10 On appeal, this Court held that, when an appeal is taken pursuant to NRCP
11 54(b) as to less than all of multiple defendants, the plaintiff has an additional three
12 years to bring the case to trial against all defendants after the remittitur issues. *Id.*
13 at 371, 724 P.2d at 210 ("Therefore, where the claim involves multiple defendants
14 and the plaintiff chooses to exercise the right to an appeal, we hold the other
15 defendants likewise will be held to the 'three-year' rule.").

16 In this case, the defamation claim against Adelson was dismissed and Jacobs
17 took an appeal according NRCP 54(b). This Court reversed Adelson's dismissal and
18 the remittitur was filed on September 15, 2014. Petitioners do not address the
19 impact of *Massey* on this case, including as to Adelson.

20 **D. This Matter Should Proceed to Trial Expeditiously**

21 Regardless, contrary to Petitioners' assertions, the purpose of NRCP 41(e) is
22 not only to protect defendants from unending litigation. "The five-year rule is
23 intended to compel expeditious determinations of legitimate claims." *Baker v.*
24 *Noback*, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996). This purpose
25 undeniably includes protecting plaintiffs from endless delays.

26 The fact that there might be an additional period before the five-year rule
27 expires in this matter does not mean that it should not proceed to trial until the
28 deadline looms. At this point, Jacobs is entitled to an expeditious trial date. NRCP

1 1 ("[The Rules of Civil Procedure] shall be construed and administered to secure
2 the just, speedy, and inexpensive determination of every action."); *see also Foster*
3 *v. Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042 (2010) (prejudice from delay is
4 presumed).

5 **IV. CONCLUSION**

6 For all the reasons stated above, Petitioners' request for a writ of mandamus or
7 prohibition should be denied and this Court should confirm the date upon which
8 NRCP 41(e)'s five year rule expires.

9 DATED this 21st day of July, 2015.

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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because this brief has been prepared in a
5 proportionally spaced typeface using Office Word 2013 in size 14 font in
6 double-spaced Times New Roman. I further certify that I have read this brief and that
7 it complies with NRAP 21(d).

8 Finally, I hereby certify that to the best of my knowledge, information and
9 belief, it is not frivolous or interposed for any improper purpose. I further certify that
10 this brief complies with all applicable Nevada Rules of Appellate Procedure, in
11 particular NRAP 28(e)(1), which requires that every assertion in this brief regarding
12 matters in the record to be supported by appropriate references to the record on
13 appeal. I understand that I may be subject to sanctions in the event that the
14 accompanying brief is not in conformity with the requirements of the Nevada Rules
15 of Appellate Procedure.

16 DATED this 21st day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, and that on this 21st day of July, 2015, I electronically filed and served a true and correct copy of the above and foregoing **ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE TRIAL SETTING ORDER** properly addressed to the following:

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