

***Arnold v. Kip*, 123 Nev. Adv. Op. No. 41 (October 11, 2007)<sup>1</sup>**

**CIVIL PROCEDURE – DISMISSAL UNDER NRCP 16.1(e)(2)**

**Summary**

Appeal from a district court order dismissing a medical malpractice action.

**Disposition/Outcome**

Affirmed the district court’s order dismissing the medical malpractice action because of a failure to timely file under NRCP 16.1(e)(2).

**Factual and Procedural History**

Paul and Elizabeth Arnold filed a medical malpractice claim against Phelps C. Kip, M.D. in July 2003, for allegedly negligent surgery on Paul’s spine nearly two years earlier. They served him with a summons and complaint, and Dr. Kip timely filed an answer denying liability, after which the parties conducted an early case conference under NRCP 16.1(e)(1).

On August 6, 2004, Dr. Kip moved to dismiss the action without prejudice because the Arnolds had failed to file a case conference report within 240 days of service of summons and complaint, pursuant to NRCP 16.1(e)(2). Because he had been served with a summons and complaint on November 24, 2003, Dr. Kip argued that the deadline for filing the case conference report had expired in late July, 2004, and the Arnolds’ lack of explanation for their lapse in filing amounted to a failure to facilitate discovery.

The Arnolds argued that their claim should not be dismissed because their failure to timely file was inadvertent; they had made all oral disclosures required under NRCP 16.1(a) at the early case conference; Dr. Kip had not asked about the filing prior to his motion to dismiss, and Dr. Kip had received a copy of the case conference report on August 17, 2004.

On September 30, 2004, the district court granted Dr. Kip’s motion, dismissing the case without prejudice. The court distinguished the case from *Dougan v. Gustaveson*,<sup>2</sup> in which the court said it would be unduly harsh to dismiss the case when the defendants had been given an open extension to file their answers. Here, however, Dr. Kip had neither requested nor received a time extension and therefore had not caused the discovery delay. The Arnolds also had not explained their delay in filing. Quoting *Dougan*, the district court said that lengthy delays inhibit the “timely and efficient processing of cases,” a goal of NRCP 16.1(e)(2).<sup>3</sup> Therefore, although courts generally seek to decide a case on its merits, the Arnolds’ noncompliance warranted dismissal. The Arnolds moved for reconsideration and offered a new excuse and argument for failure to file the report. The district court denied the motion, and the Arnolds appealed.

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<sup>1</sup> By Barbara McDonald

<sup>2</sup> 108 Nev. 517, 522, 835 P.2d 795, 799 (Nev. 1992), *abrogated in part on other grounds by* Scrimmer v. Dist. Court, 116 Nev. 507, 998 P.2d 1190 (Nev. 2000).

<sup>3</sup> *Id.* at 523.

## **Discussion**

### **Abuse of Discretion**

The Arnolds argued that the lower court had abused its discretion in granting Dr. Kip's motion to dismiss, but the court found the assertion without merit. The court had not previously articulated the standard for reviewing orders granting motions to dismiss under NRC 16.1(e)(2). However, the court noted its prior holding that sanctions for pretrial conference noncompliance under NRC 16(f) were within the district court's discretion.<sup>4</sup> The court accordingly announced that it would apply the abuse of discretion standard in reviewing the district court's order for a motion to dismiss under NRC 16.1(e)(2).

The Arnolds argued that the lower court had abused its discretion because under *Dougan*,<sup>5</sup> the dismissal of their claims was an overly harsh sanction for their failure to timely file their report. They argued, although the 2004 version of NRC 16.1(e)(2) allowed a district court to dismiss an action without prejudice *sua sponte* or upon the defendant's motion if the plaintiff failed to file a case conference report within 240 days after service of summons and complaint upon the defendant,<sup>6</sup> Dr. Kip suffered no prejudice due to the late filing.

However, the court distinguished the case from *Dougan*, where the appellant had not timely filed a case conference report only after the respondent had been granted an open extension of time to file answers.<sup>7</sup> In *Dougan*, it would have been "fruitless" to proceed with a case conference because matters were not yet at issue, the answers having been filed well after the passing of the case conference deadline.<sup>8</sup> Because the delay had been made to accommodate the respondent's request, the respondents did not claim that they suffered prejudice.<sup>9</sup> The *Dougan* court narrowed its holding, noting that an "overly strict application of the rule" would be against the interests of justice.<sup>10</sup>

Here, the court ruled that generally, the party moving for dismissal under NRC 16.1(e)(2) need not show prejudice, and the district court need not consider whether the delay in case conference filing has resulted in prejudice to the defendant. Without such a ruling, plaintiffs would have been able to exceed the deadline for filing a case conference report whenever the defendant could not show prejudice.

The court also set forth a factors test under which the district court could use its discretion to determine whether to dismiss an action without prejudice for plaintiff's failure to comply with NRC 16.1(e)(2). The non-exhaustive list included the length of the delay; whether the defendant induced or caused the delay; whether prosecution of the case was impeded by the delay; considerations of case management, such as compliance with scheduling orders or trial dates; and whether the plaintiff had good cause for delay.

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<sup>4</sup> City of Sparks v. Dist. Ct., 112 Nev. 952, 955, 920 P. 2d 1014, 1016 (Nev. 1996).

<sup>5</sup> 108 Nev. 517, 835 P.2d 795 (Nev. 1992).

<sup>6</sup> NRC 16.1(e)(2) was amended in 2005 to require the plaintiff to file a case conference report within 240 days after an appearance by the defendant.

<sup>7</sup> 108 Nev. 522, 835 P.2d 799 (Nev. 1992).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

The court also held that the district court is not required to consider whether the expiration of the statute of limitations would prevent the plaintiff from pursuing his claim after an NRCP 16.1(e)(2) dismissal. The district court should not consider the consequences to the plaintiff but instead consider the purpose of NRCP 16.1(e)(2), which is to promote timeliness of prosecution and to permit sanctions for failure to comply with the rule.

### Motion for reconsideration

The Arnolds filed a motion for reconsideration, arguing that the district court applied an incorrect standard in allowing dismissal and should have instead looked to other factors. However, the court noted that the district court had considered the Arnolds' motion and denied it on its merits.

The court considered whether it could, in deciding the appeal, consider arguments made for the first time on reconsideration. The court held that it could do so, given two requirements: 1) the reconsideration order and motion were properly part of the record on appeal from the final judgment, and 2) the district court elected to consider the motion on its merits. In reaching its conclusion, the court first noted that prior cases provided unclear guidance. In *Las Vegas Police Protective Ass'n v. Dist. Court*,<sup>11</sup> the justices considered the arguments without discussion. In *Rico v. Rodriguez*,<sup>12</sup> the court stated that the arguments must be part of the record on appeal to be considered. Furthermore, while *Ross v. Carson Construction*,<sup>13</sup> and *NOLM, LLC v. County of Clark*,<sup>14</sup> both held that the court need not but may consider the arguments, the arguments were considered in *Ross*, but not in *NOLM*.

Therefore, the court looked to the particulars of the instant case and held that if the reconsideration order and motion are a proper part of the record on appeal after the district court considered the motion on its merits, then the court was permitted to consider the arguments from the reconsideration motion during appeal. Here, the Arnolds filed the motion for reconsideration pursuant to District Court Rule (DCR) 13(7), permitting the filing without leave of the court. Under Washoe District Court Rule 12(8), which incorporated DCR 13(7) and provided deadlines for reconsideration, the district court considered the Arnolds' motion for reconsideration and denied it upon its merits. The denial was entered before the Arnolds' notice of appeal and thus the reconsideration motion and order were properly part of the appeal. The notice was timely filed under NRAP 4(a)(1), which required filing thirty days after the service of the dismissal order's entry. Therefore, the court could consider the arguments.

The court next considered the Arnolds' argument that the expiration of the statute of limitations meant that the district court's dismissal without prejudice was effectively dismissal with prejudice. However, the court found that the district court dismissed the claim without prejudice under NRCP 16.1(e)(2) and was not obligated to consider the effect of the statute of limitations. Therefore, contrary to the Arnolds' argument, it was

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<sup>11</sup> 122 Nev. 230, 236-38, 130 P.3d 182, 187-88 (Nev. 2006).

<sup>12</sup> 121 Nev. 695, 700 n. 1, 120 P.3d 812, 815-16 n. 1 (Nev. 2005).

<sup>13</sup> 106 Nev. 885, 887, 803 P.2d 657, 658 (Nev. 1990).

<sup>14</sup> 120 Nev. 736, 745, 100 P.3d 658, 664 (Nev. 2004).

not appropriate to apply *Young v. Johnny Rieiro Bldg.*,<sup>15</sup> where the court held that, although it normally reviewed discovery sanctions under an abuse of discretion standard, it applied a heightened standard when the sanction was dismissed with prejudice. The sanctions in *Young* were imposed under NRCP 37,<sup>16</sup> for failure to make disclosures or to cooperate during discovery, and they were made as an express order of dismissal with prejudice.<sup>17</sup> Here, the district court dismissed without prejudice, therefore, the heightened standard was not appropriate.

### Conclusion

The court held that the district court does not abuse its discretion in dismissing an action under NRCP 16.1(e)(2) for a plaintiff's failure to timely file a case conference report without prejudice, after the plaintiff fails to give any reason for the untimely filing. A district court considering dismissal under NRCP 16.1(e)(2) is not required to apply a heightened standard of review or assess the factors from *Young*, which only apply to cases in which dismissal with prejudice occurs. The district court should consider the rule's purpose – to promote the timely prosecution of litigation.

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<sup>15</sup> 106 Nev. 88, 92, 787 P.2d 777, 779 (Nev. 1990).

<sup>16</sup> *Id.* at 92, 787 P. 2d at 779 (noting that the district court's judgment of sanctions was supported by NRCP 37(b)(2)).

<sup>17</sup> *Id.* at 91, 787 P.2d at 778.