

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MELINA CARTER, AN INDIVIDUAL;  
AND JAMES RETYCH, AN  
INDIVIDUAL,  
Appellants,  
vs.  
TODD BEAUMONT VANHORN; AN  
INDIVIDUAL; AND THE STATE OF  
NEVADA, DEPARTMENT OF  
TRANSPORTATION, A POLITICAL  
SUBDIVISION OF THE STATE OF  
NEVADA,  
Respondents.<sup>1</sup>

No. 79875-COA

**FILED**

APR 16 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Melina Carter and James Retych appeal from a district court order dismissing a complaint in a tort action. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

Carter and Retych (collectively referred to herein as Carter) sued respondent the State of Nevada Department of Transportation (NDOT) and one of its employees, respondent Todd Beaumont Vanhorn, asserting various tort claims. Respondents moved to dismiss, arguing among other things, that Carter's claims against NDOT failed because she did not comply with the service requirements set forth in NRS 41.031(2) for invoking Nevada's waiver of sovereign immunity. Moreover, respondents argued that Carter could not pursue her claims against Vanhorn if NDOT were dismissed from the case. *See* NRS 41.0337(1) (requiring the State to

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<sup>1</sup>We direct the clerk of the court to amend the caption for this case to conform to the caption on this order.

be named as a party when State employees are sued in tort). Carter filed an opposition to respondents' motion in which she only argued for an extension of time to effect service of process, and she separately moved for the same relief based on the arguments set forth in her opposition. Respondents, in turn, opposed Carter's request for an extension of time, arguing that the request was untimely and that she failed to establish good cause for the delay.

The district court agreed with respondents' arguments in support of dismissal, and because the court also concluded that Carter did not establish good cause for her failure to timely seek an extension of time to effect service of process, the court granted respondents' motion to dismiss and denied Carter's motion for an extension of time. This appeal followed.<sup>2</sup>

This court reviews a district court's order denying a motion for an extension of time to serve process for an abuse of discretion. See *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598, 245 P.3d 1198, 1202 (2010). A district court's dismissal for lack of subject matter jurisdiction is reviewed de novo. See *Craig v. Donnelly*, 135 Nev. 37, 39, 439 P.3d 413, 415 (Ct. App. 2019).

Beginning with the denial of the motion to extend the service period, on appeal, Carter argues that she established good cause for bringing an untimely motion for additional time to serve process and that the district court therefore should have proceeded to consider whether an extension was warranted. In evaluating whether a plaintiff established

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<sup>2</sup>Carter concedes that she cannot maintain her claims against Vanhorn absent NDOT's participation in the underlying proceeding. Thus, we limit our consideration of the issues presented to the propriety of the district court's decisions to deny Carter's motion for an extension of time and to dismiss her claims against NDOT.

good cause for bringing an untimely motion to extend the time to serve process, the district court must consider a non-exhaustive list of factors, including whether the defendant attempted to conceal that service was improper until after the deadline for serving process passed and whether the plaintiff was diligent in attempting to serve process. *See Saavedra-Sandoval*, 126 Nev. at 597, 245 P.3d at 1201 (referencing the non-exhaustive list of factors, previously set forth in *Scrimmer v. Eighth Judicial District Court*, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000), for the district court to consider when evaluating whether there was good cause for filing an untimely motion for an extension of time to serve process). Here, Carter contends that the district court incorrectly found that these factors favored respondents, and on that basis, she maintains that the court abused its discretion in concluding that she failed to establish good cause for seeking an untimely extension of time.

But we agree with the core rationale underlying the court's decision with respect to these factors, which was that NDOT's answer listed insufficient service of process as an affirmative defense, thereby placing Carter on notice that the sufficiency of service was at issue and triggering a duty to investigate the same, which she did not do until after the deadline for serving process or seeking an extension of time to do so had passed. Although Carter contends that NDOT's affirmative defense was insufficient to place her on notice or trigger any duty to investigate because it did not explain why service was defective, she has not directed this court's attention to any legal authority to support the proposition that such explanation is required. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider issues unsupported by cogent argument and citation to relevant legal

authority). Consequently, Carter failed to demonstrate that the district court abused its discretion by denying her motion for an extension of time to serve process. *See Saavedra-Sandoval*, 126 Nev. at 598, 245 P.3d at 1202.

Turning to the district court's dismissal of the underlying case, NRS 41.031(2) provides that, "[i]n an action against the State of Nevada, the summons and a copy of the complaint *must* be served upon" the Attorney General or a person designated by the Attorney General and the administrative head of the named agency. (Emphasis added). On appeal, Carter does not assert that she fully complied with the service requirements outlined in this statute. Instead, she challenges whether dismissal should follow from a plaintiff's failure to comply with the service requirements set forth in NRS 41.031(2), arguing that they are redundant and outdated and that dismissal on this basis runs counter to the policy favoring adjudication on the merits.

But the fact that Carter was required to serve her complaint in accordance with NRS 41.032(2) is made clear by the statute's use of the term "must." *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (stating that the term "must" is a synonym of the term "shall," and explaining that the term "shall" means the action is mandatory "unless the statute demands a different construction"). Moreover, it is well established that compliance with the provisions of NRS 41.031(2) is necessary in order to properly invoke the State's waiver of sovereign immunity, otherwise the district court must dismiss the action for lack of subject matter jurisdiction.<sup>3</sup> *See Craig*, 135 Nev. at 39-40, 439 P.3d at 415

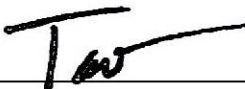
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<sup>3</sup>Because we are concerned here with the district court's subject matter jurisdiction, which is an issue that cannot be waived, *see Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002)

(setting forth this conclusion in the context of a failure to comply with the requirement that the State of Nevada be named as a party). Thus, Carter's argument that her failure to comply with these mandatory service requirements should be overlooked is without merit, and she therefore failed to demonstrate that the district court erred by dismissing her complaint on subject matter jurisdiction grounds. *See id.* at 39, 439 P.3d at 415. Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

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("[S]ubject matter jurisdiction cannot be waived and may be raised [by the parties] at any time, or *sua sponte* by a court of review."), we reject Carter's suggestion that NDOT waived any challenge to her redundancy and policy arguments, which she did not present below, by failing to address them on appeal.

<sup>4</sup>Insofar as Carter raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal

cc: Hon. Gary Fairman, District Judge  
Barbara W. Gallagher  
Attorney General/Carson City  
Attorney General/Transportation Division/Carson City  
White Pine County Clerk