

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUES ACHIARDI; DONALD L. ARNOLD; DEBRA K. D'AMATO; BLANCHE M. GLAESER; DUANE GOSH, TRUSTEE OF THE GOSH FAMILY TRUST; JAMES P. HAUSMANN AND ANN L. HAUSMANN, INDIVIDUALLY; WERNER H. JOCKELLE AND JULIE JOCKELLE, INDIVIDUALLY; THOMAS P. KENNEDY AND PATTI A. KENNEDY, INDIVIDUALLY; TERRY GIBSON AND PEGGY GIBSON, INDIVIDUALLY; BRANT HOLLAND AND ESTER HOLLAND, INDIVIDUALLY; KATHY DEPORRA AND FRANK DEPORRA, INDIVIDUALLY; ROSEMARY LAURENT, INDIVIDUALLY; CATHERINE MCCLINTOCK, INDIVIDUALLY; AND JACK R. WHITEHORN AND MARY R. WHITEHORN, INDIVIDUALLY,  
Appellants,

vs.

WESTPARK ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A WESTPARK LLC; AND WESTPARK OWNERS' ASSOCIATION, A NEVADA CORPORATION,  
Respondents.

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WESTPARK ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A WESTPARK LLC; AND WESTPARK OWNERS' ASSOCIATION, A NEVADA

No. 39309

FILED

DEC 03 2004

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Reade*  
CHIEF DEPUTY CLERK

CORPORATION,  
Cross-Appellants,

vs.

JACQUES ACHIARDI; DONALD L.  
ARNOLD; DEBRA K. D'AMATO;  
BLANCHE M. GLAESER; DUANE  
GOSH, TRUSTEE OF THE GOSH  
FAMILY TRUST; ANN L. HAUSMANN,  
INDIVIDUALLY; WERNER H.  
JOCKELLE AND JULIE JOCKELLE,  
INDIVIDUALLY; THOMAS P.  
KENNEDY AND PATTI A. KENNEDY,  
INDIVIDUALLY; BETTY M. MANGAN;  
HERSKEL SHAKERACHI; ROBERT G.  
STROUD AND JENNIE M. STROUD,  
INDIVIDUALLY; AND TERRY GIBSON  
AND PEGGY GIBSON,  
INDIVIDUALLY,  
Cross-Respondents.

#### ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court order dismissing appellants' complaint under NRCP 41(e) without prejudice. Eighth Judicial District Court, Clark County; James C. Mahan, Judge.

NRCP 41(e) requires that an action be brought to trial within five years from the date the complaint was filed. Appellants argue that their prior counsel had a verbal agreement with respondents' counsel to extend the five-year period. At the hearing on respondents' motion to dismiss under NRCP 41(e), respondents' counsel denied any such agreement. The district court concluded that even if a verbal agreement

existed, it could not waive NRCP 41(e)'s requirements.<sup>1</sup> Accordingly, the district court properly dismissed appellants' complaint.

Cross-appellants argue that the action should have been dismissed with prejudice, rather than without prejudice. We note that cross-appellants failed to request dismissal with prejudice in their district court papers, and so the argument is waived.<sup>2</sup> Moreover, a district court has discretion under NRCP 41(e) to dismiss a case with or without prejudice.<sup>3</sup> "Unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution, its decision will not be disturbed on appeal."<sup>4</sup> Thus, even if we were to consider cross-appellants' argument, we are not persuaded that the district court abused its discretion in this case.

Finally, cross-appellants argue that this court should sanction appellants Jack and Mary Whitehorn under Eighth Judicial District Court Rule 7.60(b). Cross-appellants assert that the Whitehorn's conduct in the district court unreasonably increased their costs. EDCR 7.60 is a district

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<sup>1</sup>See Ad-Art, Inc. v. Denison, 94 Nev. 73, 74, 574 P.2d 1016, 1017 (1978) ("NRCP 41(e) is clear and unequivocal: any action not brought to trial within five years must, upon proper motion, be dismissed."); Bank of Nevada v. Friedman, 86 Nev. 747, 751, 476 P.2d 172, 175 (1970) (stating that when a case is not brought to trial within five years, the only exception to mandatory dismissal is a written stipulation).

<sup>2</sup>See Hampe v. Foote, 118 Nev. 405, 409 n. 10, 47 P.3d 438, 440 n. 10 (2002).

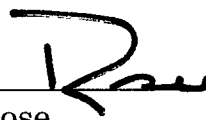
<sup>3</sup>See Home Sav. Ass'n v. Aetna Cas. & Surety, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).


<sup>4</sup>Von Zehner v. Truck Ins. Exch., 99 Nev. 152, 156, 659 P.2d 879, 882 (1983).

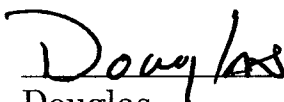
court rule that does not apply to this court. We further note that cross-appellants did not request sanctions in the district court and did not request an award of attorney fees in their motion to dismiss. Accordingly, any request for sanctions for district court conduct has been waived.<sup>5</sup> Cross-appellants further assert that the Whitehorns pursued this appeal knowing that it was frivolous, but do not cite NRAP 38 or any other authority in support of their request. The Whitehorns argue that their actions were taken in good faith and do not warrant sanctions. Although appellants' appeal lacks merit, we decline to impose any monetary sanctions.

Accordingly, we affirm the district court's order in its entirety and deny cross-appellants' request for sanctions.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

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<sup>5</sup>See Hampe, 118 Nev. at 409 n. 10, 47 P.3d at 440 n. 10.

cc: Eighth Judicial District Court Dept. 12, District Judge  
Frank dePorra  
Kathy dePorra  
James P. Hausmann  
Brant Holland  
Ester Holland  
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Jack R. Whitehorn  
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Debra K. D'Amato  
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Clark County Clerk