

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL KENNEDY HULL, JR.,  
Appellant  
vs.  
THE STATE OF NEVADA  
DEPARTMENT OF CORRECTIONS;  
SOUTHERN DESERT CORRECTIONAL  
CENTER; AND CHERYL FOSTER,  
Respondents.

No. 51022

**FILED**

OCT 01 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Yama  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Proper person appellant Michael Kennedy Hull, Jr., is an inmate at the Southern Desert Correctional Center (SDCC) who claims that in June 2007, he mailed a complaint, application for leave to proceed in forma pauperis, and an affidavit in support of his application through the prison system to the district court. The record shows that the application and affidavit were filed on July 5, 2007, although the affidavit also was stamped as being "received" in August.<sup>1</sup> According to the record, the order granting in forma pauperis status and the complaint were stamped as being "filed" on August 13, 2007.

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<sup>1</sup>The actual date is illegible.

Appellant's complaint sought damages for injuries he allegedly incurred as a result of respondents' alleged negligence in preventing or minimizing an assault upon him by other prisoners in the prison exercise yard on July 21, 2005. Without filing an answer, respondents Nevada Department of Corrections, SDCC and Sheryl Foster<sup>2</sup> filed a motion to dismiss on the basis that the complaint was filed after NRS 11.190(4)(e)'s two-year statute of limitations<sup>3</sup> and that the SDCC is not a proper defendant under NRS 41.031(2). Appellant opposed the motion, claiming that he had submitted the complaint contemporaneously with the affidavit and application for in forma pauperis status and that the clerk erred in not filing his complaint on July 5, 2007, but provided no affidavit or evidence in support thereof.

The district court held a hearing on the motion, with appellant participating by telephone. The court subsequently entered an order granting the motion to dismiss with prejudice, without providing any findings of fact. Appellant has timely appealed from the order.

On appeal, appellant reiterates the arguments he made to the district court. Respondents contend that they were unable to independently verify appellant's allegations of court clerk error in processing his documents and that appellant never moved under NRCP

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<sup>2</sup>The complaint alleges that Cheryl Foster is the prison warden. Respondents contend that the correct spelling of her name is Sheryl Foster.

<sup>3</sup>NRS 11.190(4)(e) provides a two-year statute of limitations for an action to recover damages for personal injuries caused by the wrongful act or neglect of another.

60(a) for the district court to correct clerical errors. Respondents also provided a copy of the district court's instructions for applications to proceed in forma pauperis.<sup>4</sup>

Under NRCP 12(b)(5), a motion to dismiss is subject to a rigorous standard of review, and this court will recognize all factual allegations in the complaint as true and draw all inferences in its favor.<sup>5</sup> A party's complaint may be "dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief."<sup>6</sup>

On its face, the file stamp on appellant's complaint provides that the complaint was filed on August 13, 2007, after the two-year statute of limitations for the personal injuries that appellant claims he sustained on July 21, 2005, had expired. Appellant failed to provide an affidavit or any other evidence, such as the prison's mail log or a mailing receipt, to

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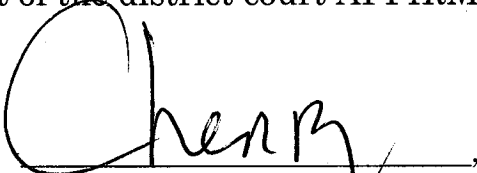
<sup>4</sup>While we take judicial notice of the instructions, we will not consider the July 18, 2008, affidavit of Martin I. Melendrez, which was not presented to the district court in making its determination. See NRS 47.130(2) (allowing a court to take judicial notice of facts generally known within the jurisdiction or readily verifiable from sources of indisputable accuracy); Ainsworth v. Combined Ins. Co., 105 Nev. 237, 267 n.20, 774 P.2d 1003, 1024 n.20 (1989) (taking judicial notice of the public record of district court proceedings), overruled on other grounds by Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 962 P.2d 596 (1998); Carson Ready Mix v. First National Bank, 97 Nev. 474, 635 P.2d 276 (1981) (refusing to consider an affidavit and document not appearing in the record on appeal).

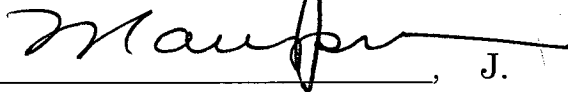
<sup>5</sup>Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. \_\_\_, \_\_\_, 181 P.3d 670, 672 (2008).


<sup>6</sup>Id. at \_\_\_, 181 P.3d at 672.

support his claim that the complaint was mailed at the same time as the in forma pauperis application and affidavit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>7</sup>

  
\_\_\_\_\_, J.  
Cherry

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

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Timothy C. Williams, District Judge  
Michael Kennedy Hull Jr.  
Attorney General Catherine Cortez Masto/Carson City  
Attorney General Catherine Cortez Masto/Las Vegas  
Eighth District Court Clerk

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<sup>7</sup>In light of this order, we conclude that our review of the requested transcripts is not necessary for the resolution of this appeal, therefore we deny appellant's request for transcripts.