

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
LORI INMAN; TONI ANGELINI; AND
RENO POLICE DEPARTMENT,
Respondents.

No. 51297

FILED

APR 09 2010

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing a tort action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

The district court dismissed the underlying case as to respondents Toni Angelini and the Reno Police Department (RPD) on their motion for failure to effect timely service under NRCP 4(i). The complaint was dismissed as to respondent Lori Inman on her motion, which sought dismissal based on appellant Ferril Joseph Volpicelli's failure to state a claim under NRCP 12(b)(5). This appeal followed.

Dismissal of Angelini and the RPD

The record demonstrates that Volpicelli failed to serve his complaint upon Angelini and the RPD within the 120 days required by NRCP 4(i) and that he never requested an extension of time to effect

service on these parties. Accordingly, the district court properly dismissed Volpicelli's complaint as to Angelini and the RPD.¹ NRCP 4(i).

Dismissal of Inman

Because the district court considered matters outside the pleadings in ruling on Inman's motion to dismiss, we apply the summary judgment standard of review. NRCP 12(b); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994). We first address Volpicelli's due process argument before turning to his arguments regarding the dismissal of his individual claims.

Due process

To the extent that Volpicelli asserts that his due process rights were violated because the district court granted Inman's motion to dismiss on grounds not argued by Inman in her motion, but rather, raised sua sponte by the district court without giving Volpicelli reasonable notice or an opportunity to respond, we conclude that his argument lacks merit. Due process requires notice and an opportunity to be heard. See Barrett v. Baird, 111 Nev. 1496, 1512, 908 P.2d 689, 700 (1995), overruled on other grounds by Lioce v. Cohen, 124 Nev. 1, 174 P.3d 970 (2008). Although lacking in specifics, Inman's motion put Volpicelli on notice that,

¹NRCP 4(i) requires dismissal for failure to timely serve unless the party required to effect service moves to extend the time for serving and shows good cause for not serving within the 120-period. Because Volpicelli never sought to extend the time for effecting service, we need not consider whether good cause existed for his failure to effect service on Angelini and the RPD within the 120-day period. NRCP 4(i).

in opposing the motion, he would be required to explain why his claims did not fail to state a claim on which relief could be granted so that it was not subject to dismissal under NRC P 12(b)(5). Thus, we conclude that the district court did not violate Volpicelli's due process rights when it granted Inman's motion.

Remaining claims

Negligence and negligence per se

With regard to Volpicelli's negligence and negligence per se claims, the district court properly dismissed these claims on the basis that NRS 176.156, on which the claims were based, did not create a private cause of action. Without an express provision allowing for a private cause of action, the implication is that the Legislature did not intend to create a privately enforceable judicial remedy. Richardson Constr. v. Clark Cty. Sch. Dist., 123 Nev. 61, 65, 156 P.3d 21, 23 (2007). Nothing in NRS 176.156 expressly allows for a private cause of action to enforce the confidentiality of a presentence investigation report.

Intentional infliction of emotional distress

Turning to the district court's dismissal of Volpicelli's intentional infliction of emotional distress claim, we agree with the district court that the actions alleged in his complaint did not amount to extreme and outrageous conduct, which we have defined as being outside all possible bounds of decency or utterly intolerable in a civilized community. Maduike v. Agency Rent-A-Car, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998). Accordingly, the district court did not err in dismissing this claim.

Invasion of privacy by disclosure of private facts

To maintain an action for public disclosure of private facts, the plaintiff “must prove that a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities” and is “not of legitimate concern to the public.” Montesano v. Donrey Media Group, 99 Nev. 644, 649, 668 P.2d 1081, 1084-85 (1983). Here, the district court record does not contain a copy of Volpicelli’s presentence investigation report, making it impossible for us to evaluate whether the information contained in that document satisfies the requirements of this claim as Volpicelli alleged. Thus, because we presume that items not contained in the record on appeal support the district court’s conclusions, Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007), we discern no impropriety in the district court’s dismissal of this claim.

Invasion of privacy via intrusion

Volpicelli alleged that respondents intentionally intruded, physically or otherwise, upon his seclusion or solitude, in an offensive manner, by using their governmental positions as a means to illegally obtain confidential information. To the extent that Volpicelli intended this claim to imply to Inman, he failed to demonstrate the existence of any issues of material fact as to this claim because he makes no allegation that Inman was employed by the government and nothing in the record supports such a conclusion. Thus, the district court properly resolved that claim in Inman’s favor. Wood, 121 Nev. at 729, 121 P.3d at 1029.

Civil conspiracy

For civil conspiracy, a plaintiff must prove an explicit or tacit agreement between the alleged conspirators and the conduct of each

conspirator must in itself be tortious. Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1489, 970 P.2d 98, 112 (1998), holding limited on an unrelated issue by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001). Because Volpicelli did not allege that there was an explicit or tacit agreement between all respondents, we agree with the district court that Volpicelli failed to allege specific facts to show how he would be entitled to relief and conclude that this claim was properly dismissed.

Concert of action

This court has limited a cause of action for concert of action to agreements “to engage in conduct that is inherently dangerous or poses a substantial risk of harm to others,” as the purpose of this theory is to deter antisocial or dangerous behavior and its classic application has been in drag racing, where one driver is the cause-in-fact of a plaintiff’s injury and the fellow racer is also held liable. GES, 117 Nev. at 271, 21 P.3d at 15; see Dow Chemical, 114 Nev. at 1488, 970 P.2d at 111. As Volpicelli failed to allege that the parties had engaged in conduct that is inherently dangerous or poses a substantial risk of harm to others, the district court properly dismissed Volpicelli’s concert of action claim.

Aiding and abetting

Volpicelli’s aiding and abetting claim specifically alleged that all respondents used their governmental positions to acquire the presentencing report for Inman. The only respondents alleged to have governmental positions were Angelini and the RPD, who, as noted above, were properly dismissed under NRCP 4(i). Because Inman is not alleged to have held a governmental position and nothing in the record supports such a contention, to the extent that this claim was intended to apply

against Inman, we conclude that no genuine issues of material fact remained with regard to this claim against her, and it was properly resolved in her favor. Wood, 121 Nev. at 729, 121 P.3d at 1029.

Accordingly, in light of the analysis set forth above, we
ORDER the judgment of the district court AFFIRMED.²

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Ferrill Joseph Volpicelli
Lori Inman
Reno City Attorney
Washoe District Court Clerk

²To the extent that we affirm the dismissal of any of Volpicelli's claims on grounds different than those addressed by the district court, we note that this court will affirm a district court decision if it reached the right result, albeit for different reasons. Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987). Additionally, as Volpicelli did not challenge the dismissal of his cause of action for "breach of duty and failure to protect rights under the statute," we need not address the dismissal of that claim. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).