

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY R. SCHMIDT,  
Appellant,  
vs.  
WASHOE COUNTY; RITA LENCIONI;  
AND ROBERT MCCAFFERTY,  
Respondents.

No. 51439

**FILED**

SEP 08 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion to dismiss an action concerning an NRS Chapter 239 public records request, and from a district court order denying a motion for a new trial. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

FACTS

On November 14, 2007, appellant Gary R. Schmidt orally requested, from respondent Washoe County, copies of the resumes and related documents pertaining to all applicants seeking a position on Washoe County's Board of Equalization. After not receiving the documents, on November 30, 2007, Schmidt filed a complaint against Washoe County and respondents Rita Lencioni and Robert McCafferty (Washoe County employees) (collectively, "Washoe County"), alleging that Washoe County had repeatedly denied his requests for the documents and that its actions were a "continuation of a pattern and practice of denials of public records to [Schmidt] over the past decade." Schmidt sought damages and attorney fees and costs for filing the action. He also sought declaratory and injunctive relief, requesting access to the public records and that Washoe County be prevented from violating his due process rights in the future.

Washoe County filed a motion to dismiss Schmidt's complaint under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. In the motion, Washoe County pointed out that the November 14 request was orally made over the telephone and argued that Schmidt's complaint failed to state a viable claim for relief because he was provided with the requested documents at some point before the December 11, 2007, meeting at which the applicants were considered. Washoe County maintained that at the time Schmidt initially made his request, the deadline for submitting applications had not yet passed, and that Schmidt was granted access to the information at the same time it was given to the Board of County Commissioners and made public.

Schmidt opposed Washoe County's motion to dismiss and filed a motion for summary judgment. In that filing, he conceded that the November 14 request was orally made, but he nonetheless argued that because the documents were not provided to him until December 10, 2007, Washoe County had violated NRS 239.0107 (addressing requests for inspecting or copying public records) by failing to make the records available to him within five days of his initial request.

Washoe County filed a reply in support of its motion to dismiss and an opposition to Schmidt's motion for summary judgment. It maintained, in relevant part, that the public records law was not violated because Schmidt's requests were orally made, and under NRS 239.0107, the five-day response period applied only to written, not oral, requests.

The district court agreed with Washoe County's position and granted its motion to dismiss. Specifically, the court noted that Schmidt had orally requested the documents and determined that NRS 239.0107(1)'s five-day response period explicitly applied only to written

requests for public records. After granting the motion to dismiss, the court denied as moot Schmidt's summary judgment motion. Schmidt's subsequent NRCP 52(b) motion to amend the court's findings, NRCP 59 motion for new trial, and motion for reconsideration were also denied. This timely appeal followed.<sup>1</sup>

On appeal, Schmidt challenges the district court's dismissal order, arguing that nothing under the public records law mandates that requests for documents must be made in writing and that Washoe County violated the law by refusing to accommodate Schmidt's public records request. Schmidt contends that the district court's determination that NRS 239.0107(1) does not apply to oral requests violates the express language of NRS 239.0107(2), because that provision states that the guidelines addressing written requests should not be construed to prohibit oral requests.

#### DISCUSSION

We rigorously review a district court order dismissing a complaint under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. \_\_\_, \_\_\_, 181 P.3d 670, 672 (2008). Accordingly, this court will treat all factual allegations in Schmidt's complaint as true and draw all inferences in his favor. See id. Schmidt's complaint was properly dismissed if it

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<sup>1</sup>We have considered Washoe County's jurisdictional argument that this appeal should be dismissed as untimely because Schmidt's tolling motions were (1) more properly considered motions for reconsideration, which do not toll the appeal period, and (2) meritless. We conclude that this appeal is properly before us. See NRAP 4(a)(4). Therefore, we decline to dismiss this appeal.

appears beyond a doubt that he could prove no set of facts, which, if true, would entitle him to relief. See id. Questions of law are reviewed de novo. Id.

Having reviewed the parties' briefs and supporting documents, we conclude that the district court did not err in dismissing Schmidt's complaint. First, it is undisputed that Schmidt received the documents that he requested. His claim that Washoe County violated the public records law by refusing to accommodate his public records request is wholly without merit. When Schmidt made his requests, the deadline for submitting applications had not yet passed. It was reasonable for Schmidt to be provided with the documents when they were made public and given to the Board of County Commissioners, which was to review them.

Second, NRS 239.0107(1) applies only to written requests. NRS 239.0107(1) states as follows:

Not later than the end of the fifth business day after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a written request from a person to inspect or copy the public book or record, a governmental entity shall do one of the following, as applicable.

Here, Schmidt made no written request for the documents effective to trigger the five-day deadline.<sup>2</sup> Although Schmidt evidently believes that

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<sup>2</sup>Schmidt admitted in his opposition to Washoe County's motion to dismiss that his public records requests were oral, not written. He now argues that his oral requests were effective to trigger the NRS 239.0107 five-day period because they were reduced to writing when Washoe County responded in a letter. This argument is without merit, as nothing in NRS 239.0107 supports the notion that an oral request may be converted into a written request by the actions of a county employee.

the documents were not given to him in a timely manner, nothing in NRS 239.0107 or any other provision of Nevada's public records law creates a duty for the governmental entity to comply with oral requests within a certain time frame. While NRS 239.0107(2) explains that oral requests are not precluded, it does not subject such requests to the five-day response period set forth in NRS 239.0107(1). Therefore, based on his complaint and subsequent filings, Schmidt could prove no set of facts entitling him to relief, and the district court did not err in granting Washoe County's motion to dismiss.<sup>3</sup>

Finally, we conclude that the district court did not abuse its discretion when it denied Schmidt's motion for new a trial. The new trial motion was based on Schmidt's assertion that, even though his opposition raised NRS 239.0107, he was not afforded an opportunity to address the NRS 239.0107(1) five-day-response issue considered by the district court in dismissing his complaint, because he first indicated that his public records request was oral in his opposition to Washoe County's motion to dismiss, which led to Washoe County's argument in reply that NRS 239.0107(1) was inapplicable. But Schmidt himself raised the issue, and given our above conclusion regarding NRS 239.0107's application and Schmidt's failure to show that dismissal for failure to state a claim was

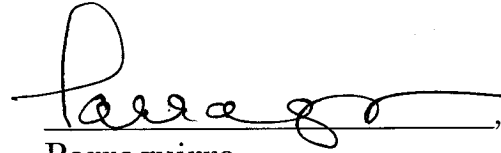
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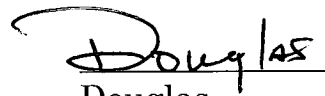
<sup>3</sup>In light of this order, Schmidt's arguments with respect to the denial of his summary judgment motion are moot and need not be considered. Moreover, orders denying motions for reconsideration or to alter or amend are not appealable. Alvis v. State, Gaming Control Bd., 99 Nev. 184, 186, 660 P.2d 980, 981 (1983); Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995), superseded by statute as stated in RTTC Communications v. Saratoga Flier, 121 Nev. 34, 110 P.3d 24 (2005).


improper, we conclude that Schmidt has failed to demonstrate that the court committed reversible error in denying his motion for a new trial.

Accordingly, we

ORDER the judgment and order of the district court  
AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Brent T. Adams, District Judge  
Glade L. Hall  
Washoe County District Attorney Richard A. Gammick/  
Civil Division  
Washoe District Court Clerk