

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY O. GARMONG,  
Appellant,


vs.

THE STATE OF NEVADA; THE THIRD  
JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA, IN AND FOR THE  
COUNTY OF LYON; AND THE  
HONORABLE LEON ABERASTURI,  
DISTRICT JUDGE,  
Respondents.

No. 80483-COA

FILED

JAN 08 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Gregory O. Garmong appeals from a district court's order dismissing his first amended complaint for lack of standing. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Prior to the instant action, Garmong filed a petition for a writ of prohibition or mandamus, challenging the Lyon County Board of Commissioners' issuance of a special use permit.<sup>1</sup> The permit allowed the Smith Valley Fire Protection District and Verizon Wireless to construct a cellular tower in Smith Valley. The district court denied the writ petition. In so doing, the district court concluded that "(1) Garmong's claims challenging the Lyon County Board of Commissioners' approval of the special use permit was time barred by NRS 278.0235; and (2) Smith Valley Fire District had the inherent authority to lease its land to Sacramento Valley Limited Partnership, d/b/a Verizon Wireless." *Garmong v. Lyon Cty. Bd. of Comm'rs*, Docket No. 74644 (Order of Affirmance, May 3, 2019). On appeal, the Nevada Supreme Court concluded that the district court had

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

reached the correct result, albeit for the wrong reason, and affirmed the district court's decision on the basis that Garmong lacked standing to bring the writ petition. *Id.*

Thereafter, Garmong filed a complaint against the State of Nevada, the Third Judicial District Court, and the Honorable Judge Leon Aberasturi, the judge who denied Garmong's initial writ petition (collectively, "respondents"). Garmong's complaint was filed in Judge Schlegelmilch's department, the only other department in the Third Judicial District Court. His complaint alleged respondents violated his due process and equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. § 1983, and article I, section 8(5) of the Nevada Constitution. Respondents separately filed motions to dismiss, arguing they were entitled to different forms of immunity, but the district court did not immediately entertain or rule on the motions.

Garmong then filed a declaration of grounds for judicial disqualification under NRS 1.235 (the "disqualification matter"), questioning Judge Schlegelmilch's impartiality because he was an "officer" of a party to the lawsuit—the Third Judicial District Court. Because there was no other judge available to preside over the disqualification matter, the district court transferred it to the supreme court. The supreme court denied Garmong's motion to disqualify Judge Schlegelmilch, concluding he failed to show disqualification was warranted pursuant to NRS 1.230. In the Matter of Third Judicial District Court Case No. 18-CV-00674 (Order Denying Declaration for Disqualification, May 17, 2019).

Thereafter, the district court decided to entertain respondents' motions to dismiss. In so doing, it ordered the parties to file supplemental

briefs regarding what impact, if any, the supreme court's order of affirmance in *Garmong v. Lyon Cty. Bd. of Comm'rs*, Docket No. 74644 (Order of Affirmance, May 3, 2019), had on the issue of standing in the present case. After considering the parties' briefs, the district court dismissed Garmong's first amended complaint ("FAC"), with prejudice, for lack of standing.

Garmong appeals from the district court's order dismissing his FAC for lack of standing. First, Garmong argues he can maintain his 42 U.S.C. § 1983 ("Section 1983") action against Judge Aberasturi because Judge Aberasturi is not entitled to judicial immunity. Second, Garmong avers he can maintain his Section 1983 action against the State of Nevada and the Third Judicial District Court because they are persons for purposes of a Section 1983 action and because the State of Nevada consented to be sued. We disagree and address his arguments in turn.<sup>2</sup>

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<sup>2</sup>Garmong raises other issues we can easily resolve. First, he argues the supreme court did not have subject matter jurisdiction to decide the disqualification matter. The supreme court previously denied Garmong's motion to disqualify, concluding Judge Schlegelmilch should not be disqualified pursuant to NRS 1.230. Thus, this ruling is the "law of the case" and we will not disturb it. See *Geissel v. Galbraith*, 105 Nev. 101, 103, 769 P.2d 1294, 1296 (1989).

Second, Garmong contends the district court violated his due process rights when it sua sponte dismissed his first amended complaint ("FAC") for lack of standing without providing him appropriate notice of its intention to dismiss and a hearing on the issue. However, because standing is a jurisdictional requirement, the district court may raise it sua sponte, and indeed, it may even be raised sua sponte for the first time on appeal. See *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). Moreover, in this case, Garmong was given notice: he admits on appeal that the district court ordered the parties to submit supplemental briefing on the issues of

First, Garmong argues Judge Aberasturi is not entitled to judicial immunity because he violated Garmong's civil rights in a case where the district court did not have subject matter jurisdiction. Further, he maintains Judge Aberasturi is not entitled to judicial immunity because that immunity cannot be asserted in an official capacity action under Section 1983. Lastly, Garmong avers he may bring a Section 1983 action against Judge Aberasturi in his individual capacity.

Whether a defendant is entitled to absolute immunity is a question of law that we review de novo. *Harrison v. Roitman*, 131 Nev. 915, 917, 362 P.3d 1138, 1139 (2015). Judicial immunity "provide[s] absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who [are] integral parts of the judicial process." *State v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 118 Nev. 609, 615, 55

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"standing and judicial notice," which it then considered before dismissing the FAC.

Third, Garmong maintains that the district court incorrectly applied the law in dismissing his FAC for lack of standing. However, Garmong failed to allege "an invasion of a judicially cognizable interest," and therefore the district court correctly determined that he lacked standing. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). Garmong's allegations in his FAC do not show respondents injured him in any concrete way; they merely take issue with actions of the district court that were adverse to Garmong. Further, Garmong cannot demonstrate that he suffered any harm arising out of the initial writ proceedings because, as the supreme court already concluded, he was not entitled to bring the initial writ in the first place. Garmong also argues the district court should have determined standing on a "claim-by-claim basis" and that the district court should have allowed him to amend his complaint to overcome deficiencies raised by the court before it dismissed his FAC for lack of standing. However, he fails to show which of his claims, even if evaluated "claim-by-claim," were supported by proper standing, or how any proposed amendment could have overcome the lack of standing.

P.3d 420, 424 (2002) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)). “Absolute immunity protects judicial officers from collateral attack and recognizes that appellate procedures are the appropriate method of correcting judicial error.” *Marvin v. Fitch*, 126 Nev. 168, 174, 232 P.3d 425, 429 (2010).

“Absolute immunity is a broad grant of” protection, shielding judges from civil damages and litigation, generally, in their individual capacities. *Second Judicial Dist. Court*, 118 Nev. at 615, 55 P.3d at 424; see also *Drake v. Lerud*, (Order Affirming in Part, Reversing in Part, and Remanding, November 14, 2013) (explaining a district court judge was entitled to judicial immunity in her individual capacity for performing judicial functions). Additionally, this court may apply absolute immunity even if a claimant accuses the district court “of acting maliciously and corruptly.” *Second Judicial Dist. Court*, 118 Nev. at 615, 55 P.3d at 424.

Further, Section 1983 allows a plaintiff to bring civil rights claims against any person who, under color of any statute, deprives him of any rights, privileges, or immunities secured by the United States Constitution. 42 U.S.C. § 1983. However, neither States nor State “officials acting in their official capacities are *persons*” for purposes of Section 1983 actions, and thus, a plaintiff cannot bring a Section 1983 action against a State or State official. *N. Nev. Ass’n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 114, 807 P.2d 728, 732 (1991) (emphasis added) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64-70 (1989)).

Here, the district court properly dismissed Garmong’s FAC because Judge Aberasturi is entitled to judicial immunity. Garmong’s allegations against Judge Aberasturi were based on judicial acts performed

in his capacity as a judicial officer.<sup>3</sup> Thus, Judge Aberasturi is entitled to judicial immunity.

Further, the district court appropriately dismissed Garmong's FAC because Judge Aberasturi is immune in his official capacity as he is not a person under Section 1983. The allegations in Garmong's FAC relate to actions Judge Aberasturi took in his official capacity.<sup>4</sup> Because Judge Aberasturi is a State official and acted in his official capacity, he is not a "person" for purposes of a Section 1983 action. Thus, Garmong may not maintain his Section 1983 action against Judge Aberasturi.

Second, Garmong contends his Section 1983 action does not fail against respondents because the State of Nevada and the Third Judicial District Court (the "Third District") chose to be treated as "natural persons." Garmong argues the State of Nevada statutorily waived its sovereign immunity and allowed itself to be treated as a "natural person" with the passage of NRS 41.031(1). Thus, he argues he can maintain his Section 1983 action.

Further, Garmong contends that the district court cannot dismiss his action based on the notion that the State of Nevada and the Third District are not "persons" for purposes of a Section 1983 action because this doctrine does not apply to suits seeking injunctive relief and suits brought under the Nevada Constitution.

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<sup>3</sup>Among other things, Garmong claimed the district court refused to rule on matters regarding subject matter jurisdiction, that it took "an advocacy position on behalf of the defendants," it refused to explain the actions it took, it covered up the defendants' misconduct, and Judge Aberasturi solicited and/or accepted payment from one of the defendants in the matter related to his Writ Petition.

<sup>4</sup>See *supra* note 3 and its accompanying text.

States are not “persons” for purposes of a Section 1983 action, and thus, a plaintiff cannot bring a Section 1983 action against a State. *N. Nev. Ass’n of Injured Workers*, 107 Nev. at 114, 807 P.2d at 732 (citing *Will*, 491 U.S. at 64-70). A plaintiff seeking money damages under Section 1983 from the State or an entity of the State effectively fails to assert an actionable claim. *Id.*; see also *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 605, 172 P.3d 131, 136 (2007) (holding a plaintiff cannot maintain a Section 1983 action against the State of Nevada or its entities). However, a plaintiff may bring a Section 1983 action against State officials for injunctive relief. *N. Nev. Ass’n of Injured Workers*, 107 Nev. at 115, 807 P.2d at 733 (citing *Will*, 491 U.S. at 71 n.10).

Here, the district court appropriately dismissed Garmong’s Section 1983 action against the State of Nevada and the Third District because the State and its agencies are immune from Section 1983 actions with regard to money damages. The State of Nevada is not a person for purposes of a Section 1983 action; the Third District, being a State entity, is also not a person for purposes of a Section 1983 action. Thus, Garmong may not bring a Section 1983 action against them seeking money damages.

Additionally, NRS 41.031 does not negate the State of Nevada’s immunity from a Section 1983 action. NRS 41.031 asserts that “[t]he State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural *persons* and corporations. . . .” NRS 41.031 (emphasis added). However, Nevada’s waiver of liability under NRS 41.031 does not apply to Section 1983 actions governed by federal law. And, for purposes of a Section 1983 action, the State of Nevada and the Third District are not natural “persons.” Therefore,

the district court appropriately dismissed Garmong's FAC as to his Section 1983 action against the State of Nevada and the Third District.

Further, despite being able to maintain a Section 1983 action against the State of Nevada for injunctive relief, the district court appropriately dismissed Garmong's FAC because Garmong failed to cogently argue his point. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n.38 (2006) (holding that this court need not consider claims that are not cogently argued or supported by relevant authority). His FAC seeks the district court to enjoin respondents from "depriving plaintiff and other persons of their Constitutional due process and equal protection rights." However, this allegation is exceedingly ambiguous because it does not explain what he wants the injunction to accomplish. On appeal, Garmong failed to cogently argue that a court can enjoin a State actor from depriving people of their due process rights without offering any more details.

Finally, Garmong failed to cogently argue and support with relevant authority his claim that the doctrine protecting the State of Nevada and the Third District against Section 1983 actions because they are not "persons" does not apply to suits brought under the Nevada Constitution. He devotes one sentence to this argument and does not support it with any relevant authority. Therefore, the district court appropriately dismissed Garmong's FAC.<sup>5</sup>

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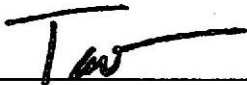
<sup>5</sup>Garmong also raises various other standing arguments we can summarily resolve. Garmong contends the district court's conclusion that he acquired no due process or equal protection rights because he lacked standing is wrong because those rights are inalienable, bestowed to all people within the United States. Further, Garmong impliedly argues that standing in a prior case is not necessary to have standing to pursue civil



For these reasons, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. John Schlegelmilch, District Judge  
Carl M. Hebert  
Attorney General/Carson City  
Attorney General/Las Vegas  
Third District Court Clerk

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rights claims. However, we will not consider these claims because Garmong fails to support them with relevant authority. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (holding that this court need not consider claims that are not cogently argued or supported by relevant authority). Garmong's use of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), and *Truax v. Corrigan*, 257 U.S. 312, 333 (1921), to support his arguments fails. Neither case supports the proposition that people within the United States are endowed with due process and equal protection rights even if they fail to show standing. Thus, Garmong fails to show any relevant authority that supports this argument. He also fails to do the same regarding his argument that standing in an underlying case is not necessary to have standing to pursue civil rights claims. Therefore, because Garmong fails to support these propositions with relevant authority, we will not consider these claims.