

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ANGELO DRAKE,
Appellant,

vs.

THE BOARD OF COMMISSIONERS OF
WASHOE COUNTY (A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA), ITS AGENTS, SERVANTS,
EMPLOYEES, ASSIGNEES, PAST AND
PRESENT,
Respondent.

No. 38394

FILED

FEB 11 2002

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

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order granting respondent's motion for summary judgment on all of appellant's claims.

On April 9, 2001, appellant filed in the district court a civil rights action against respondent Board of Commissioners of Washoe County, alleging various constitutional violations that arose between October 12, 1998, and June 3, 2000. On May 23, 2001, respondent moved the district court under NRCP 12(b)(5) to dismiss the complaint for failure to state a claim upon which relief can be granted. Moreover, respondent requested that the district court treat the motion as a motion for summary judgment, since it asked the court to consider matters outside the pleadings. Appellant opposed the motion and later contended that he did

not receive notice that the district court was treating respondent's NRCP 12(b)(5) motion as a motion for summary judgment.

If matters outside the pleadings are presented to and not excluded by the district court, a motion to dismiss for failure to state a claim upon which relief can be granted "shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."¹ Thus, a district court must treat a motion to dismiss as one for summary judgment "[w]here materials outside of the pleadings are presented to and considered by the district court."² Here, respondent attached five exhibits to its motion to dismiss. In appellant's opposition to respondent's motion to dismiss, he specifically addressed each contention raised by respondent in its motion. Moreover, appellant's opposition had twenty-nine exhibits attached in support of his contentions. Also in his "traverse reply," appellant again addressed the contentions raised by respondent. Thus, the district court concluded that that appellant was "aware of and had every opportunity to comply with the summary judgment standard set forth under NRCP 56 in opposing the [respondent's] motion for summary judgment." The record establishes

¹NRCP 12(b).

²Thompson v. City of North Las Vegas, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992).

that in making its decision on the motion to dismiss, the district court considered evidence outside the pleadings, and that appellant was given a reasonable opportunity to present all material pertinent to the motion. Accordingly, we conclude that the district court properly treated and disposed of respondent's motion to dismiss as a summary judgment motion.

Under NRCP 56(c), summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.³ "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."⁴ A summary judgment is reviewed de novo.⁵

Having reviewed the record, we conclude that the district court did not err in granting respondent's motion for summary judgment,

³See Butler v. Bogdanovich, 101 Nev. 449, 705 P.2d 662 (1985).


⁴Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

⁵Dermody v. City of Reno, 113 Nev. 207, 931 P.2d 1354 (1997); see also SIIS v. United Exposition Services Co., 109 Nev. 28, 846 P.2d 294 (1993) (summarizing authority for the conclusion that matters of law are reviewed de novo).


as respondent demonstrated that it is entitled to judgment in its favor.⁶

Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷

 J.

 J.

 J.

⁶See Polk County v. Dodson, 454 U.S. 312, 317-18 (1981) (holding that "a person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'" (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978) (concluding that a local government may not be sued under 42 U.S.C. § 1983 on the theory of respondeat superior for an alleged wrong caused solely by its employees or agents); McCoy v. San Francisco, City & County, 14 F.3d 28, 30 (9th Cir. 1994) (recognizing that the decision constituting the discriminatory act, not the consequences of the act, triggers a statute of limitations period); Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986) (noting that while state law prescribes the limitation period, the time of accrual of a section 1983 cause of action is governed by federal law).

⁷In light of this order, we deny appellant's September 5, 2001 motion for leave to file a proper person opening brief and reply, or in the alternative for the appointment of counsel.

cc: Hon. Steven P. Elliott, District Judge
Washoe County District Attorney
Michael Angelo Drake
Washoe County Clerk