

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES  
GROSJEAN,

Appellants,

vs.

THE STATE OF NEVADA/NEVADA  
GAMING CONTROL BOARD;  
RODERICK O'NEAL; AND CHARLES  
POINTON,  
Respondents.

No. 40216

FILED

NOV 15 2004

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

ORDER OF AFFIRMANCE<sup>1</sup>

Appeal from a district court order, certified as final under NRCP 54(b), dismissing appellants' complaint against certain parties. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

We rigorously review an NRCP 12(b)(5) order of dismissal for failure to state a claim upon which relief can be granted, "as this court must construe the pleadings liberally[,] . . . accept all factual allegations in the complaint as true . . . [and] draw every fair inference in favor of the non-moving party."<sup>2</sup> A complaint will not be so dismissed unless it

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<sup>1</sup>The Honorable Robert E. Rose, Justice, voluntarily recused himself from participation in the decision of this matter. The Honorable Andrew J. Puccinelli, Judge of the Fourth Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron E. Leavitt, Justice. Nev. Const. art. 6, § 4. The Honorable Archie E. Blake, Judge of the Third Judicial District Court, was designated by the Governor to sit in place of the Honorable A. William Maupin, Justice. Nev. Const. art. 6, § 4.

<sup>2</sup>Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (citation omitted).

appears beyond a reasonable doubt “that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.”<sup>3</sup>

Based on our review of appellants’ complaint, we conclude that the actions of Gaming Control Board Agents O’Neal and Pointon were not so sufficiently egregious as to strip them of the qualified immunity that they are entitled to under statute.<sup>4</sup> NRS 41.032(2) grants qualified immunity to state officials who, in the discharge of their duties, exercise discretion, whether or not that discretion is abused.<sup>5</sup> The record reveals

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<sup>3</sup>Id. (quoting Simpson v. Mars Inc., 113 Nev. 188, 190, 929 P.2d 966, 967 (1997)).


<sup>4</sup>Although appellants also purport to challenge the district court’s order denying their motion to amend the complaint, we lack jurisdiction to consider this order. On May 9, 2002, the district court entered an order dismissing appellants’ claims against the Gaming Control Board and Agents O’Neal and Pointon. In response, appellants moved alternatively for reconsideration, to amend their complaint, or for NRCP 54(b) certification. The district court denied reconsideration of its order of dismissal, reiterating that causes of action against the Board and agents had been dismissed; the court then denied in part and granted in part leave to amend the complaint, and granted NRCP 54(b) certification. Although it certified this second order as final under NRCP 54(b), Rule 54(b) only allows a court to “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties.” Consequently, the district court could certify as final, the order dismissing the Board and Agents O’Neal and Pointon; its denial of appellants’ motion to amend, however, was not susceptible to NRCP 54(b) certification. Consequently, we lack jurisdiction to review the district court’s order denying reconsideration. See, e.g., Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (recognizing that district court does not have power to transform an interlocutory order that does not come within NRCP 54(b) into a “final judgment”).

<sup>5</sup>See Ortega v. Reyna, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998).

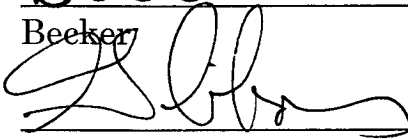
that Agents O'Neal and Pointon used their judgment to question appellants regarding their activities and ultimately decided to arrest them. The agents were conducting an investigation; their actions were inherently discretionary.<sup>6</sup> Accordingly, we conclude that the agents are immune from liability as to the claims set forth in the original complaint. Accordingly, we

ORDER the district court order AFFIRMED.


 \_\_\_\_\_, C.J.  
Shearing

 \_\_\_\_\_, J.  
Agosti

 \_\_\_\_\_, J.  
Becker

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

 \_\_\_\_\_, J.  
Douglas

 \_\_\_\_\_, D.J.  
Puccinelli

 \_\_\_\_\_, D.J.  
Blake

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<sup>6</sup>Foster v. Washoe County, 114 Nev. 936, 941-42, 964 P.2d 788, 792 (1998).

cc: Hon. Lee A. Gates, District Judge  
Nersesian & Sankiewicz  
Attorney General Brian Sandoval/Gaming Division/Las Vegas  
Clark County Clerk