

Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.,
123 Nev. Adv. Op. No. 55 (Dec. 13, 2007)¹

**CIVIL PROCEDURE – SUMMARY JUDGMENT
STANDARDS/ATTORNEY FEES UNDER 42 U.S.C. § 1988**

Summary

Appeal of a district court order granting summary judgment to respondent in a tort action and a post-judgment order awarding attorney fees and costs.

Disposition/Outcome

Affirmed. Appellants failed to provide, in the record, any opposition to the summary judgment motion or to the respondents' attorney fees motion.

Factual and Procedural History

Appellants, employed as police officers by the University of Nevada, Las Vegas (UNLV), filed claims against UNLV and the Community College System of Nevada (UCCSN) for "civil rights violations under 42 U.S.C. § 1983, invasion of privacy/false light, defamation, intentional infliction of emotional distress and negligence."²

The district court granted the respondents' motion for summary judgment and awarded the respondents attorney fees under 42 U.S.C. § 1988 and costs. Appellants appealed both orders.

Discussion

Standard of Review for Summary Judgment

The Nevada Supreme Court reviews de novo an order granting summary judgment.³ Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law."⁴ Initially, the party moving for summary judgments bears the burden of production in showing that no genuine issue of material fact exists.⁵ However, once the moving party has made a successful showing, the burden of production shifts to the nonmoving party to show a genuine

¹ By Kathy Cleere.

² *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev*, 123 Nev. Adv. Op. No. 55 (Dec. 13, 2007) (several incidents involving the three police officers' handling of UNLV and UCCSN students, and the resulting media coverage that led to the claims).

³ *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

⁴ *Id.* at 731, 121 P.3d at 1031.

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

issue of material fact does exist.⁶ If the moving party bears the burden of persuasion at trial, that party must “present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence.”⁷ However, if the nonmoving party bears the burden of persuasion at trial, the moving party may satisfy the burden of production by “either (1) submitting evidence that negates an essential element of the nonmoving party’s claims,⁸ or (2) ‘pointing out . . . that there is an absence of evidence to support the nonmoving party’s case.’”⁹ To defeat summary judgment when the nonmoving party bears the burden of persuasion, this party must introduce, by affidavit or other admissible evidence, specific facts showing a genuine issue of material fact.¹⁰

In the current case, appellants had the burden of persuasion at trial. In moving for summary judgment, the respondents properly showed that the appellants’ claim contained no genuine issue of material fact. Thus, the burden of production shifted to the appellants to introduce specific facts showing a genuine issue of material fact.

However, the appellants failed to include in the record on appeal their opposition to the respondents’ motion for summary judgment.¹¹ The Nevada Supreme Court cannot consider matters not included in the record on appeal.¹² Additionally, NRAP 30(b)(3) provides that “any other portions of the record essential to determination of issues raised in appellants’ appeal” shall be included in the appellants’ appendix.¹³ The Court necessarily presumes that any missing portions of the record support the district court’s decision.¹⁴ The documents that were included in the appendix did not have any context because the opposition to the summary judgment was not included.¹⁵ Additionally, the appellants failed to respond after the respondents’ noted the missing information in their answering brief.¹⁶ Therefore, this Court affirmed the district court’s order granting summary judgment because appellants failed to introduce specific facts showing a genuine issue of material fact.

⁶ *Id.* at 331 (Brennan, J., dissenting) (rejecting the majority’s application of the summary judgment rule to the facts at hand, but not its explanation of the rule); *Wood v. Safeway, Inc.* 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005); *Maine v. Steward*, 109 Nev. 721, 726-27, 857 P.2d 755, 758-59 (1993).

⁷ *Cuzze*, 123 Nev. Adv. Op. No. 55 citing NRCP 56(a), (e).

⁸ *Id.* (citing *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting)) (agreeing with the majority’s analysis of the summary judgment standard but clarifying what is required of a party seeking summary judgment on the ground that the nonmoving party cannot prove its case).

⁹ *Id.* (citing *Celotex*, 477 U.S. at 326 (majority opinion)).

¹⁰ *Wood*, 121 Nev. at 732, 121 P.3d at 1031.

¹¹ Appellants also did not include respondents’ summary judgment motion, reply to appellants’ opposition, respondents’ motion for attorney fees and costs, and appellants’ opposition and reply to the motion for attorney fees and costs. Respondents filed an appendix including respondents’ summary judgment motion and respondents’ motion for attorney fees and costs, but not the appellants’ oppositions to these motions.

¹² *Carson Ready Mix v. First Nat’l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981); *cf. Nevada Gold & Casinos v. American Heritage*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005) (concluding that this court could consider relevant uncontested facts outside of the record on appeal in determining whether appellants had waived their appeal).

¹³ *Prabhu v. Levine*, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996).

¹⁴ *Id.*

¹⁵ The appendix included answers to interrogatories and a copy of a Las Vegas Review-Journal article.

¹⁶ NRAP 30(b)(4) allows (but does not require) a respondent to include any documents in the respondents’ appendix that “should have been but were not included in the appellant’s appendix.” The respondent in this case chose not to include the summary judgment opposition, thus mitigating any sanctions against the appellants.

Attorney Fees under 42 U.S.C. §1988

Reasonable attorney fees are available to prevailing 42 U.S.C § 1983 defendants under 42 U.S.C. § 1988(b), at the court's discretion, when the plaintiff's claim is "meritless in the sense that it is groundless or without foundation."¹⁷ The Eleventh Amendment does not apply to § 1983 claims filed in state court because it protects a state from federal court actions, not state court actions.¹⁸ In this case, the district court incorrectly applied the Eleventh Amendment and determined the respondents, state entities, were immune from the § 1983 state court claim.

However, the district court properly determined that the respondents were not "persons" under § 1983,¹⁹ but state entities.²⁰ The respondents cannot be sued under § 1983.²¹ Therefore, the district court had a valid legal basis to find that § 1988 attorney fees were available to the respondents because the appellants' claim was without foundation.

The Supreme Court has developed the "lodestar" figure to determine the award of attorney fees.²² This figure denotes the number of reasonable attorney hours multiplied by a reasonable hourly rate.²³ This figure may be adjusted appropriately under certain circumstances.²⁴ In this case, the Court could not meaningfully review the district court for error because the appellants failed to include their opposition to the respondents' motion for attorney fees and costs. However, the Court determined, for purposes of future guidance, the district court properly calculated the lodestar amount of \$21,500, using \$250 per hour as a reasonable hourly rate and adjusting.²⁵ The Court found that the district court did not abuse its discretion in determining the § 1988 award of attorney fees.

Conclusion

The Nevada Supreme Court concluded the appellants' failure to include in the record their opposition to respondents' motion for summary judgment and to respondents' motion for § 1988 attorney fees required affirmation of the district court's order granting summary judgment and attorney fee awards. Without the oppositions, the appellants provided no evidence rebutting

¹⁷ Hughes v. Rowe, 449 U.S. 5, 14 (1980).

¹⁸ Pittman v. Lower Court Counseling, 110 Nev. 359, 362-63, 871 P.2d 953, 955 (1994) (citing Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989)), *overruled on other grounds* by Nunez v. City of North Las Vegas, 116 Nev. 535, 1 P.3d 959 (2000).

¹⁹ *Id.* at 363, 871 P.2d at 956 (citing Northern Nev. Ass'n Injured Workers v. SIIS, 107 Nev. 108,807 P.2d 728 (1991)); Will, 491 U.S. at 64 (explaining that the statutory term "person" does not include the sovereign).

²⁰ Simonian v. Univ. & Cmty. Coll. Sys., 122 Nev. 187, 194, 128 P.3d 1057, 1061 (2006); *see also* Johnson v. U. Nev., 596 F. Supp. 175, 177-78 (D. Nev. 1984).

²¹ *Pittman*, 110 Nev. at 363, 871 P.2d at 956.

²² Burlington v. Dague, 505 U.S. 557 (1992).

²³ *Id.*

²⁴ Blum v. Stenson, 465 U.S. 886, 888 (1984).

²⁵ This Court determined it was not required to consider the Deputy Attorney General for the Nevada Attorney General's Office affidavit stating that other State of Nevada defendants in the related federal court litigation charged state agencies approximately \$91 per hour because reasonable attorney fees must "be calculated according to the prevailing market rates in the relevant community," considering the fees charged by "lawyers of reasonably comparable skill, experience, and reputation," not based on a lawyer's position as a government attorney. *Id.* at 895, 896 n.11.

While the district court relied on the factors realized in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975) in making adjustments to the lodestar figure, it did not rely on a factor recently disavowed by the United States Supreme Court. *See* Davis v. City and County of San Francisco, 976 F.2d 1536, 1546 n.4 (9th Cir. 1992) (the fixed or contingent nature of the attorney fee).

the respondents' claim that no genuine issue of material fact existed or to the respondents' motion for attorney fees. The Court must rely solely on the evidence in record. Therefore, the Court must affirm the district court's order granting summary judgment and attorney fees.