IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ABDUL HOWARD, AN INDIVIDUAL,
Appellant,
vs.
SLETTEN CONSTRUCTION OF NEVADA, INC.,
Respondent.

No. 78548-COA

FILED

FEB 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Abdul Howard appeals from a district court order granting a motion to dismiss and for summary judgment in a civil rights and/or tort action. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Howard—who is incarcerated—filed the underlying action against respondent Sletten Construction of Nevada, Inc. (Sletten), alleging primarily that he was exposed to asbestos while Sletten performed renovation work on the seventh floor of the Clark County Detention Center (CCDC). In his complaint, Howard pleaded his claims largely in constitutional terms, alleging that Sletten's failure to prevent his exposure to asbestos amounted to cruel and unusual punishment under the Eighth Amendment. Sletten ultimately moved for dismissal of Howard's complaint for failure to state a claim under NRCP 12(b)(5)[1] or, alternatively, for

[1]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the amendments do not affect our disposition, we cite the current version of the rules herein.

summary judgment. The district court dismissed Howard's complaint to the extent it asserted an Eighth Amendment violation, reasoning that Sletten could not be liable under such a theory because it was not a state actor. The district court also granted summary judgment to the extent Howard's claims were based on his alleged exposure to asbestos, concluding that Howard failed to set forth admissible evidence to rebut an inspection report produced by Sletten demonstrating that there was no asbestos present on the seventh floor of CCDC at a time prior to when Howard alleges he was exposed. This appeal followed.

We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Our review is rigorous, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissal under NRCP 12(b)(5) is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. Similarly, we review a district court's order granting summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

As an initial matter, we note that Howard presents arguments on appeal related to claims he brought against numerous other defendants

that never appeared in this action. For instance, he contends that the district court ignored evidence that he had served those defendants with process and that it should have granted his motions for default judgment against them after they failed to answer the complaint or otherwise appear in the action. However, the record on appeal does not reflect that those defendants were ever properly served, as the only evidence of such service is a "Motion to Inform Court of Defendants Served" that Howard filed in the district court, supported by a general declaration as to the truth of the motion, listing names and addresses of the defendants followed by the word, "served." There is no evidence indicating who supposedly served those defendants, how they were served, or when they were served. *See* NRCP 4(c)(3) (requiring that process be served by the sheriff or any nonparty who is 18 or more years old), (d)(1) (requiring proof of service by affidavit from the process server stating the date, place, and manner of service). Accordingly, it appears those defendants were never made parties to this action, and we therefore decline to consider any arguments pertaining to them. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action).

Turning to Howard's arguments on appeal with respect to Sletten, we note that he does not challenge the dismissal of his constitutional claims against Sletten on grounds that it was not a state actor. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). And even if he did, the district court was correct to dismiss those claims. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41

(1982) (noting that the acts of "private corporations whose business depends primarily on contracts to [perform work] for the government . . . do not become acts of the government by reason of their significant or even total engagement in performing public contracts"); *White v. Cooper*, 55 F. Supp. 2d 848, 859-60 (N.D. Ill. 1999) (concluding that a construction company performing renovations at a correctional facility was not a state actor subject to liability for violations of the Eighth Amendment).

With respect to the district court's grant of summary judgment, Howard argues that the district court should not have granted Sletten's motion because the court had a duty to first obtain video footage from CCDC that Howard contends would have proven his claims. But it is the duty of the parties in a civil action—not the court—to obtain relevant discovery. *See* NRCP 26(a) ("[A]ny party who has complied with [initial disclosure rules] may obtain discovery by any means permitted by these rules.").

Howard also contends that he presented sufficient evidence to demonstrate a genuine dispute of material fact: namely, an affidavit from a fellow inmate stating that he observed signs that said "workers removing asbestos" when he was booked into CCDC. Sletten argued below that the signs constituted inadmissible hearsay, and in its order granting Sletten's motion, the district court concluded that Howard failed to rebut with admissible evidence the inspection report produced by Sletten demonstrating that there was no asbestos present on the relevant floor of CCDC. We agree with the district court that the contents of the signs were inadmissible hearsay, as Howard offered them to prove the truth of the matters asserted and failed to show that any exception or exemption to the hearsay rule applied. *See* NRS 51.035 (defining "[h]earsay" as "a statement offered in evidence to prove the truth of the matter asserted unless" an

exception or exemption applies); *Mishler v. McNally*, 102 Nev. 625, 628, 730 P.2d 432, 434-35 (1986) (recognizing that a writing can constitute inadmissible hearsay); *see also M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (reviewing a district court's evidentiary rulings for an abuse of discretion).

We note that even if the contents of the signs were not inadmissible hearsay, Howard nevertheless failed to make any allegations or point to evidence supporting his claim of damages resulting from the alleged exposure to asbestos. In his complaint, he alleged merely that he might develop cancer at some point in the future, and he vaguely stated that he suffers from headaches and nosebleeds without alleging that these conditions were actually or proximately caused by asbestos exposure. *See Clark Cty. Sch. Dist. v. Payo*, 133 Nev. 626, 636, 403 P.3d 1270, 1279 (2017) (noting that a plaintiff asserting negligence must establish damages actually and proximately caused by the defendant's breach of a duty owed to the plaintiff); *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009) (noting that "a defendant is entitled to summary judgment if the defendant is able to show that one of the elements of the plaintiff's prima facie case is clearly lacking as a matter of law" (internal quotation marks omitted)). Moreover, the radiology reports that Howard attached to his own complaint clearly indicate that medical professionals that have examined him have not found any evidence of asbestos exposure, and he has not pointed to any other evidence to the contrary. Thus, the district court properly granted summary judgment in favor of Sletten to the extent Howard asserted tort claims based upon his alleged exposure to asbestos.

Finally, we reject Howard's argument that the district court was biased against him because the judge had also presided over Howard's

criminal matter. Howard failed to seek disqualification of Judge Johnson below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (noting that issues not raised in the trial court will not be considered on appeal). Moreover, in the absence of any other evidence of bias, "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification [on grounds of personal bias]." *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988).

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
Abdul Howard
Morris Law Group
Eighth District Court Clerk

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[2]To the extent Howard raises additional arguments not expressly addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.