

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37305

DARRELL EUGENE McCABE,	)	2011 Unpublished Opinion No. 538
	)	
Plaintiff-Appellant,	)	Filed: June 29, 2011
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
OLIVIA CRAVEN, Executive Director,	)	THIS IS AN UNPUBLISHED
Idaho Commission of Pardons and Parole,	)	OPINION AND SHALL NOT
individually, and in her official capacity;	)	BE CITED AS AUTHORITY
CAROLEE J. KELLY, Administrator of	)	
Records, Idaho State Department of	)	
Correction, individually, and in her official	)	
capacity; unknown JOHN and JANE DOES,	)	
members of the Idaho State Board of	)	
Correction/Idaho State Department of	)	
Correction, individually, and in their official	)	
capacities,	)	
	)	
Defendants-Respondents.	)	
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Order dismissing complaint for civil rights claims, affirmed.

Darrell Eugene McCabe, St. Anthony, pro se appellant.

Andrew C. Brassey of Brassey, Wetherell & Crawford, LLP, Boise, for respondent.

MELANSON, Judge

Darrell Eugene McCabe appeals from the district court’s dismissal of his civil rights claims under 42 U.S.C. § 1983 against Olivia Craven, Carolee J. Kelly, and John and Jane Doe (the Defendants). Specifically, McCabe asserts that the district court erred by granting the Defendants’ motion for summary judgment. For the reasons set forth below, we affirm.

I.

## FACTS AND PROCEDURE

McCabe's complaint alleges that he was wrongfully imprisoned when he was incarcerated for a longer period than provided in an order of commitment. In Case No. 96-2117, McCabe pleaded guilty to driving while under the influence and was placed on probation. While on probation, McCabe was convicted of possession of a controlled substance in Case No. 97-720. The district court retained jurisdiction in both cases and ordered McCabe to complete the rider program. After completion of the rider, McCabe was again placed on probation. McCabe committed another probation violation and the district court ordered execution of McCabe's sentences in both cases on April 20, 1998. In Case No. 96-2117, McCabe was given credit for time served.

While incarcerated, McCabe filed a motion for reconciliation of the credit for time served in Case No. 97-720. In response to McCabe's motion, a Twin Falls County district judge issued an order on May 4, 1999, which stated in pertinent part:

Mr. McCabe asserts that the Court incorrectly calculated the days for which he is entitled to credit for time served based on the fact that he was not released on his own recognizance on March 21, 1997, in CR 97-720.

The Court has reviewed the taped transcript of Mr. McCabe's March 21, 1997 hearing before Honorable Kevin Cassidy and confirmed that Mr. McCabe was released on his own recognizance during that hearing. *He remained in custody on a probation violation in CR 96-2117, not as a result of the charge in CR 97-720. Additionally, the Court notes that pursuant to I.C. § 18-309, as well as State v. Hernandez, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1989), Mr. McCabe is not entitled to credit for more time than he has actually been in confinement. The Court has already given Mr. McCabe credit for the time served from March 21, 1997, through June 17, 1997 on CR 96-2117, and as such he would not be entitled to additional credit for those same days even if he had not been released on his own recognizance, which he was.*

The Court has held two separate hearings on the issue of the appropriate number of days to which Mr. McCabe is entitled to credit for time served. On April 19, 1999, the Court determined that Mr. McCabe was entitled to a total of 209 days credit for time served in Case No. CR 96-2117 and Case No. CR 97-720.

THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Court, having sentenced [McCabe] to concurrent sentences in CR 97-720 and CR 96-2117, finds Mr. McCabe is entitled to receive a total of 209 days jail credit for time served prior to sentencing;

(emphasis added).

According to the affidavit of defendant Carolee Kelly (Kelly), an employee of the Idaho Department of Correction (the Department), on or about May 11, 1999, McCabe contacted the sentencing staff at the Department, inquiring about his sentence in Case No. 97-720. Kelly received McCabe's inquiry and contacted the district judge<sup>1</sup> who issued the order by telephone to discuss McCabe's concern.<sup>2</sup> According to Kelly, the district judge told her that the credit for time served would only apply to McCabe's sentence in Case No. 96-2117. Kelly avers that she then made a notation on a copy of the May 4, 1999, order indicating zero days credit for time served on Case No. 97-720 "per judge."

On February 20, 2003, the district judge, in response to another inquiry from McCabe regarding the calculation for credit for time served in Case No. 97-720, sent a letter to McCabe, which quoted from the May 4, 1999, order and stated:

The above language from the Order makes it clear that you are entitled to receive a total of 209 days jail credit for time served prior to sentencing in Case Nos. CR 97-720 and CR 96-2117. I hope this resolves any confusion you or the Department of Corrections may have.

According to Kelly's affidavit, once the Department received a copy of this letter, another employee of the Department spoke with the district judge by telephone and the judge stated that he had made an error and to give McCabe the same credit in both cases. According to Kelly's affidavit, she then contacted the judge by telephone and verified that the judge wanted the credit applied in both cases. In light of the letter, McCabe was immediately released from prison.

McCabe filed a complaint alleging that the Defendants violated his civil rights under 42 U.S.C. § 1983.<sup>3</sup> The Defendants filed a motion for summary judgment, asserting that there was no genuine issue of material fact to be litigated and that they were entitled to judgment as a

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<sup>1</sup> Not the same district judge who presided in this case.

<sup>2</sup> The inconsistency between the italicized portion of the order and the district court's apparent grant of credit for time served in both cases may explain the reason for Kelly's telephone call.

<sup>3</sup> McCabe's first complaint was filed in 2005 and was dismissed by the district court as being untimely. McCabe appealed and the Idaho Supreme Court reversed in *McCabe v. Craven*, 145 Idaho 954, 188 P.3d 896 (2008). The case was remanded and McCabe filed his first amended complaint in the district court on November 19, 2008.

matter of law. In response to the Defendants' motion, McCabe argued that Kelly improperly altered the district court's May 4, 1999, order. After a hearing, the district court granted the Defendants' motion for summary judgment. McCabe appeals.

## II.

### STANDARD OF REVIEW

Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The grant of summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). No disputed fact is "material" unless it relates to an issue disclosed by the pleadings. *Harms Mem'l Hosp. v. Morton*, 112 Idaho 129, 131, 730 P.2d 1049, 1051 (Ct. App. 1986). Circumstantial evidence, however, can create a genuine issue of material fact. *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion for summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991); *Doe*, 110 Idaho at 470, 716 P.2d at 1242. Where no genuine issue of material fact remains, we take up the summary judgment analysis as to whether the movant is entitled to judgment as a matter of law. *Zumwalt v. Stephan, Balleisen, & Slavin*, 113 Idaho 822, 824, 748 P.2d 406, 408 (Ct. App. 1987).

## III.

### ANALYSIS

The Defendants asserted in their motion for summary judgment that there was no genuine issue of material fact to be litigated and that they were entitled to judgment as a matter of law.

Specifically, the Defendants argued that the allegations against them were based on the doctrine of *respondeat superior*, which was not recognized by 42 U.S.C. § 1983. Further, the Defendants claimed that the principle of qualified immunity barred McCabe's claims. In support of their motion, the Defendants included Kelly's affidavit, which indicated that, after receiving an inquiry from McCabe regarding the amount of credit for time served in Case No. 97-720, she called the district court to discuss the matter. Kelly averred that the district court informed her that credit for time served would only apply to McCabe's sentence in Case No. 96-2117. Kelly explained that she then made handwritten notations on the May 4, 1999, order, which reflected the district court's comments.<sup>4</sup> After her conversation with the district court, she informed McCabe that his motion to the district court had been denied.

In support of their motion, the Defendants also attached a copy of the May 4, 1999, order with Kelly's handwritten notations and a copy of the district court's February 20, 2003, letter to McCabe, which indicated that he was due credit for time served in both cases. In addition, the Defendants provided an excerpt from McCabe's deposition, during which McCabe revealed that his claim against Kelly was that she "committed fraud" by altering court documents and that his claim against Craven stemmed from her lack of supervision of Kelly.

McCabe's response to the Defendants' motion for summary judgment argued that Kelly improperly altered the district court's order. McCabe also contended that Kelly was not acting within the course and scope of her employment and that she failed to produce any documentation to demonstrate that a phone call between Kelly and the district court actually took place. He also alleged that he possessed a liberty interest in being discharged on February 27, 2002, and was therefore falsely imprisoned from that date until his release on March 7, 2003. McCabe did not address the issues of *respondeat superior* or qualified immunity. However, he included the details of his eventual release in a document from the Commission of Pardons and Parole and also included correspondence he received from the Idaho State Law Library denying his requests for legal materials. He did not include any affidavits or other supporting materials with his response to the Defendants' motion for summary judgment.

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<sup>4</sup> Kelly's affidavit refers to the May 4, 1999, order as the May 11, 1999, order. This appears to be a mistake, since the order with the handwritten notations is file stamped and signed by the district court on May 4, 1999.

The facts of this case were not in dispute below. As mentioned above, McCabe's main contention in his complaint was that Kelly improperly altered the district court's May 4, 1999, order when she made handwritten notes on her copy of the order. Indeed, in Kelly's affidavit, she admitted to making the handwritten notations. In his response to the Defendants' motion, McCabe failed to articulate how such handwritten notes altered the court's order, except to claim that the May 4, 1999, order was the "property of the state of Idaho." In response to a motion for summary judgment, the nonmoving party cannot rest upon mere allegations and must set forth specific facts that show a genuine issue for trial. I.R.C.P. 56(e). The showing of a mere scintilla of evidence will be insufficient to meet the nonmoving party's burden to demonstrate a genuine issue of fact for trial. *Edwards*, 111 Idaho at 853, 727 P.2d at 1281. Further, summary judgment will be granted if the evidence in opposition to the motion is merely colorable or is not significantly probative. *Nelson v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990).

On appeal, McCabe asserts that Kelly could not have made handwritten notes on the district court's order in May 1999, because the date stamp on the order indicates that it was not received by the Department's central records office until July 1999. As a result, he argues, Kelly's affidavit explaining the circumstances surrounding her phone call with the district court lacks credibility and should not have been relied upon by the district court in granting summary judgment. This argument is without merit. Kelly's affidavit says that on May 11, 1999, McCabe wrote to the sentencing staff inquiring about his Case No. 97-720; it does not say when she contacted the district judge. Additionally, there is no evidence in the record indicating that Kelly could not have received this copy of the order before it was received by central records. The contradictions in the affidavit posited by McCabe do not exist. McCabe offered no evidence below to challenge Kelly's affidavit. Rather, he stated generally in his response to the Defendants' motion for summary judgment that Kelly improperly altered the district court's order, but did not provide any argument or evidence in support of that proposition. McCabe's response mostly consisted of the Defendants' answers to interrogatories and lacked analysis or citation to relevant authority. Therefore, the evidence in the Kelly affidavit is undisputed.

Further, McCabe has failed to include a transcript of the hearing on the motion for summary judgment and, as such, we are unable to determine whether McCabe challenged Kelly's affidavit at the hearing or whether the district court addressed it. It is the responsibility

of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997). In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *Id.* Thus, in the absence of a complete record, we hold that summary judgment was proper. McCabe also argues that the district court improperly weighed the credibility of Kelly when making its summary judgment determination. The district court provided its reasoning for granting the Defendants' motion for summary judgment on the record at the conclusion of the motion hearing. Again, we are unable to review the district court's reasoning and its consideration of Kelly's affidavit because McCabe has failed to provide a copy of the hearing transcript on appeal. As such, we decline to address this argument further.

In addition, McCabe cites to Department policies, arguing that Kelly acted outside the scope of her authority when she contacted the district court by telephone, instead of in writing. However, McCabe failed to raise this argument or include copies of the Department policies in his response to Defendants' motion for summary judgment below. Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). McCabe asks this Court to consider his status as a pro se incarcerated litigant for his failure to raise certain arguments below. However, pro se litigants are held to the same standards as those litigants represented by counsel. *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990). Pro se litigants are not excused from abiding by procedural rules simply because they are appearing pro se and may not be aware of the applicable rules. *Id.*

Finally, the Defendants request attorney fees under I.C. § 12-121. An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). Because we conclude that the district court properly granted the Defendants' motion for summary judgment, the Defendants are the prevailing parties on appeal. However, we cannot conclude that McCabe brought this appeal frivolously. For this reason, we deny the Defendants' request for an award of attorney fees on appeal.

**IV.**  
**CONCLUSION**

McCabe has failed to demonstrate that the district court erred by granting the Defendants' motion for summary judgment. Accordingly, the district court's order dismissing McCabe's claims with prejudice is affirmed. Costs, but not attorney fees, are awarded to the respondents on appeal.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**