

**NOV 01 2007**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

JONATHAN CARTER,  
  
Plaintiff - Appellant,  
  
v.  
  
CLARK COUNTY; et al.,  
  
Defendants - Appellees.

No. 05-17201  
  
D.C. No. CV-04-00409-KJD  
  
MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Kent J. Dawson, District Judge, Presiding

Argued and Submitted October 18, 2007  
San Francisco, California

Before: ROTH\*\*, THOMAS, and CALLAHAN, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Jonathan Carter appeals the district court's order granting the Family and Child Treatment of Southern Nevada ("FACT") and Clark County's motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). We affirm the dismissal of Clark County, but reverse and remand the dismissal of FACT. Because the parties are familiar with the factual and procedural history, we will not recount it here.

Clark County asserts that Carter's claims are barred by Nevada's statute of limitations and that Clark County is entitled to absolute immunity. We affirm the district court's decision that Carter's claims are barred by the statute of limitations. Carter is unable to take advantage of Nevada's tolling exception embodied in the "discovery rule" because the uncontroverted evidence – namely the fact that he filed a Motion for Psychological Examination of Alleged Victim during the pendency of his criminal case – indicates that he knew or should have known about the purportedly withheld information regarding his sister's mental and/or emotional problems. See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 780 (9th Cir. 2002) (citing Siragusa v. Brown, 114 Nev. 1384, 1400-01, 971 P.2d 801 (1998)). Because we affirm on statute of limitations grounds, we will not address Clark County's absolute immunity claim.

In addition, we note that Carter has failed to assert a cognizable claim under § 1983. The Constitution does not require the disclosure of impeachment evidence prior to a guilty plea.<sup>1</sup> See United States v. Ruiz, 536 U.S. 622, 628-29, 633 (2002) (stating that “[w]hen a defendant pleads guilty he or she, of course, foregoes not only a fair trial, but also other accompanying constitutional guarantees”).

While we find that the district court’s dismissal of the claims against Clark County was proper, the same cannot be said of the dismissal of the claims against FACT. Although FACT’s failure to plead res judicata as an affirmative defense is not fatal to its claim because Carter did not suffer any prejudice, see Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001), we are unable to conclude that FACT may take advantage of Rule 41(a)(1)’s Two Dismissal Rule. The district court improperly relied upon the contract between FACT and the State Defendants in ruling on the Rule 12(b)(6) motion because the contract was presented outside of the pleadings. See Fed. R. Civ. P. 12(b)(6); Lee v. City of

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<sup>1</sup> We note that this court’s recent decision in Goldstein v. City of Long Beach, 481 F.3d 1170, 1176 (9th Cir. 2007), is not implicated since Carter pled guilty and therefore cannot assert that the prosecutor’s failure to disclose material impeachment evidence violated a constitutional right.

Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Treating the motion as a request for summary judgment pursuant to Federal Rule of Civil Procedure 56, the district court failed to provide the parties a “reasonable opportunity to present all material made pertinent” to a summary judgment motion. See Fed. R. Civ. P. 12(b).

The district court also erred in finding that as a matter of law FACT and the State Defendants are in privity for res judicata purposes. The contract between FACT and the State Defendants raises material questions as to whether the parties are “substantially the same.” See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev. Corp., 933 F.2d 724, 728 (9th Cir. 1991) (internal quotation marks omitted).

Accordingly, the district court’s order dismissing the claims against Clark County is **AFFIRMED** and the dismissal of the claims against FACT is **REVERSED and REMANDED**.