IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHEY L. ANDREW,

Appellant,

vs.

SHARON COSTER; NEVADA DEPARTMENT OF CORRECTIONS; and THE STATE OF NEVADA,

Respondents,

Supreme Court No. 70836

APPELLANTS' REPLY BRIEF

Submitted by:
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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1, Appellant RICHIE L. ANDREW is an individual, non-governmental party.

2. Plaintiff was not represented by current counsel in matters before the District Court, and Plaintiff was proceeding pro se at that time.

3. The law firm of ROGERS, MASTRANGELO, CARVALHO & MITCHELL appeared as Pro Bono Appellate Counsel for Appellant on November 18, 2016.

DATED this 8th day of May, 2017.

ROGERS, MASTRANGELO,
CARVALHO & MITCHELL

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

ROUTING STATEMENT

Defendant's Routing Statement requests that this appeal be clustered with a pending appeal, *Peck v. Valley Hospital et al*, Case No. 68664. While the issues in *Peck* do not involve Plaintiff's additional allegation of common law Res Ipsa Loquitur, or a claim for deliberate indifference under the Eighth Amendment, Plaintiff has no objection to clustering this case with *Peck*. Plaintiff agrees with Defendant that clustering of these cases is warranted under this Court's Internal Operating Procedures Rule 2(c)(2) in order to ensure that they are resolved in a consistent manner and to avoid the possibility of inconsistent published decisions:

> (2) Clustering. Grouping or clustering cases enables the court to decide unrelated cases raising the same or similar issues in a consistent and efficient manner. To this end, when identifying issues, the screening attorneys shall also identify cases which present the same or similar issues, and make a recommendation to the chief justice to group or cluster those cases. The chief justice, with input from the screening attorneys, may identify the primary case of the group when appropriate.

However, Plaintiff also notes that the resolution of these cases still could be different, as even if the outcome of *Morrow v. Skolnik*, 126 Nev. 741, 367 P.3d 802 (2010) is followed, Plaintiff's complaint in the present case presents issues not directly raised in either *Morrow* or *Peck*, namely the availability of a cause of action for deliberate indifference to Plaintiff's medical needs, or a common law exception to Res Ipsa Loquitur.

II.

SUMMARY OF ARGUMENT

Plaintiff admits that there is long standing Nevada precedent concerning NRS 41A.071, which has denied relief to similarly situated pro se prisoners. However, these decisions are wrongly decided, given that application of NRS 41A.071 to these incarcerated individuals unfairly discriminates against them because of their incarceration and resultant inability to hire an expert witness to provide an affidavit of merit.

Even if the requirements of NRS 41A.071 apply to Plaintiff, the Complaint was improperly dismissed, as the complaint stated facts raising a cause of action for violation of the Eighth Amendment to the United States Constitution for cruel and unusual punishment and a "common knowledge" exception found under common law for res ipsa loquitur. The pro se complaint should have been read broadly by the trial court, and Defendants arguments concerning what the pro se Plaintiff "knew" when filing the complaint are irrelevant. The proper consideration is determining whether the Complaint set forth allegations sufficient to make out the elements of a right to relief.

III.

STANDARD OF REVIEW

This Court reviews a district court order granting a motion to dismiss de novo. *Zohar v. Zbiegien*, 130 Nev. Adv. Op. 74, 334 P.3d 402, 404–05 (2014). The motion to dismiss will be affirmed only where " 'it appears beyond a doubt

that the plaintiff could prove no set of facts ... [that] would entitle him [or her] to relief.' " *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 267 P.3d 771, 774 (2011).

Issues of statutory construction are likewise reviewed de novo. *Pub. Agency Comp. Trust v. Blake*, 127 Nev.863, 265 P.3d 694, 696 (2011). If a statute is clear on its face, this Court will not look beyond its plain language. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 11, 272 P.3d 134, 136 (2012).

Under NRCP 8(f), "[a]ll pleadings shall be so construed as to do substantial justice." *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 931 (2015). Pro se inmate civil rights cases are to be liberally interpreted. *Karim–Panahi v. Los Angeles Police Department*, 839 F.2d 621, 623 (9th Cir.1988); *Kinford v. Bannister*, 913 F. Supp. 2d 1010, 1015 (D. Nev. 2012).

IV.

ARGUMENT

A. Indigent Pro Se Prisoners are financially unable to comply with NRS 41A.071.

Defendants argue that NRS 41A.071 requires dismissal of the pro se Complaint filed without an affidavit of merit, because exempting prisoners from compliance with the statute would give them "special treatment". (See Respondents Answering Brief at page 19). While Plaintiff admits that there is law upholding the constitutionality of NRS 41A.071, and that the statutes has been applied to pro se prisoners, Defendant's construction of the law is violative of Plaintiff's constitutional rights, because indigent pro se prisoners have significant

difficulty in their ability to comply with the requirements. Practically, they have neither the funds, nor the access, to any medical expert, except for the physicians assigned to them. And in this particular case, Plaintiff's physician refused to discuss any of the facts of the potential malpractice, without a court order or other authorization. This authorization was impossible for Plaintiff to procure.

Applying NRS 41A. 071 to pro se indigent prisoners creates a unlawful barrier between them and access to the courts. Prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1494 (1977). See also *Houston v. Lack*, 487 U.S. 266, 275, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). (noting that inmates proceeding pro se are not in the "same shoes" as other citizens).

NRS 41A.071 operates to preclude the filing of meritorious actions by indigent incarcerated individuals. Pro se indigent incarcerated Plaintiffs normally do not have the practical access or sufficient funds to obtain an expert witness. This situation was certainly evident in the present case. Plaintiff told the trial court that he attempted to obtain an affidavit of merit but could not do so, that he has no access to any other expert, and that he could not afford to hire an expert, even if he was able to find an expert to review the case. (1 R.A. 28–29).

The expert affidavit requirement imposes an unconstitutional monetary and access barrier to Plaintiff's right to redress his injuries through the courts. See *Zeier v. Zimmer, Inc*, 152 P.3d 861 (Ok. 2006). As an incarcerated individual, Plaintiff simply did not have sufficient monetary means or access to experts to

obtain the required affidavits. (1 R.A. 28). Plaintiff's Affidavit in support of his motion for Waiver of NRS 41A.071, while admittedly procedurally impossible, does provide clear evidence he was financially unable to comply with the statute.

While Plaintiff acknowledges that *Morrow v. Skolnik*, 126 Nev. 741, 367 P.3d 802 (2010) held that pro se prisoners are bound by NRS 41A.071, this ruling would unfairly eliminate otherwise meritorious malpractice cases.[1] This is especially true in the present case, as Plaintiff's medical providers would not speak to him about the merits of the malpractice action absent court order or direction from the office of the Attorney General. (1 R.A. 28-29). Such employees have little incentive to advise their patients of the potential malpractice , as most if not all indigent prisoners are unable to satisfy the requirements of NRS 41A.071.

Application of NRS 41A.071 to bar Plaintiff's claims does not further the purpose of the statute or public policy. The provisions are not being used simply to deter "baseless and frivolous" claims. They are being used to eliminate meritorious actions by exulting form over substance.

However, even if *Morrow* is determine to be valid and applicable to this case, Plaintiff's complaint was still dismissed in error, as Res Ipsa Loquitur should have applied to his case, or Plaintiff should have been allowed to present a claim for deliberate indifference under *Estelle v. Gamble*, 97 S. Ct. 285, 291 (1976).

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[1] Unlike the present case, the Plaintiff in *Morrow* did not rely upon res ipsa loquitur or Constitutional violations in the appeal.

B. Plaintiff was not be required to produce an affidavit due to common law Res Ipsa Loquitur.

Plaintiff admits that the facts in this case do not raise a statutory res ipsa loquitur claim under NRS 41A.100. But, Plaintiff's argument on Res Ipsa has never been about exceptions under the statute. Instead, the res ipsa claim is one that was recognized by common law.

Plaintiff's complaint clearly alleged that the attending nurse, against the orders of the attending physician, Dr. Cunningham, removed the catheter, causing Plaintiff injuries and damages. (1 R.A. 45-53). By failing to follow direct orders from the attending physician, the allegations raised by Plaintiff are common law evidence of Res Ipsa Loquitor. See *Jackson v. Fauver*, 334 F. Supp. 2d 697, 743–44 (D.N.J. 2004):

> A reasonable jury would not need the assistance of an expert to conclude that CMS personnel were negligent when they allegedly failed both to provide these plaintiffs with medical care prescribed for them by their treating specialists and to follow the medical instructions of these specialists. "Common sense—the judgment imparted by human experience—would tell a layperson that medical personnel charged with caring" for an inmate with a serious medical need should provide this inmate his prescribed treatment in a timely fashion. (citation omitted). Thus, the common knowledge exception to the Affidavit of Merit Statute applies to these Plaintiffs' claims.

See also *Czarney v. Porter*, 853 N.E.2d 692, 698 (Ohio App. 2006):

> We agree that the discontinuation and administration of fluids is outside the realm of the knowledge and experience of average jurors, but the concept of following orders is not. When a physician gives an order and it is not followed by a nurse or the medical staff, expert testimony may not be required to explain that this may be negligent. The evidence in the instant case is clear that Dr. Korinek ordered that the decedent be monitored by a telemetry unit; however, there is no evidence of compliance with this order.
>
> A nurse's failure to follow a physician's order is within the common knowledge and experience of jurors. Therefore, expert testimony was not required to show that the nursing staff may have been negligent in failing to follow physician orders. However, it is the jury's responsibility to weigh the evidence and credibility of the witnesses and ultimately decide whether these failures contributed to or caused the injury.

See also *Hare v. Wendler*, 949 P.2d 1141 (Kan. 1997) (recognizing the common knowledge exception in medical malpractice cases); *Morgan v. Intermountain Health Care, Inc.*, 263 P.3d 405, 408 (Utah Ct. App. 2011) (same).

Although Plaintiff's pro se complaint alleged that the catheter was removed prematurely and in contravention of the orders from Plaintiff's physician, the trial court did not consider that these allegations could be evidence of common law res ipsa loquitur. The trial court should have read the pro se complaint broadly.

The Legislature is "presumed not to intend to overturn long-established principles of law" when enacting a statute. *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1112 (2016); citing *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1155–56 (2010) .This Court will not read a statute to abrogate the common law without clear legislative instruction to do so. *First Fin. Bank v. Lane*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1293 (2014); *W. Indies, Inc., v. First Nat. Bank of Nev.*, 67 Nev. 13, 32, 214 P.2d 144, 153 (1950). See also *Cunningham v. Washoe Cty.*, 66 Nev. 60, 65, 203 P.2d 611, 613 (1949) (requiring "the plainest and most necessary implication in the statute itself" for the modification of common law by statutory enactment "where such acts are not authorized by the express terms of the statute").See also *Runion v. State*, 116 Nev. 1041, 1047, 13 P.3d 52, 56 (2000):

> There is, however, a presumption that these statutes are consistent with the common law. See *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349–50 (1970) (statutory construction presumption that statutes are consistent with common law); see also *State v. Hamilton*, 33 Nev. 418, 426, 111 P. 1026, 1029 (1910) (common law prevails in Nevada except where abrogated).

The Answering Brief does not discuss the allegations of common law Res Ipsa, nor does the Answering Brief provide any authority for the proposition that this exception cannot exist under Nevada law. There is no reason why Plaintiff should not be allowed to raise a common law Res Ipsa Loquitur exception for medical malpractice cases.

Clearly, a lay juror will be competent to understand the potential risks inherent when a nurse disobeys the direct orders of the attending physician. Such facts will only be present in a limited number of circumstances, and recognition of this common law exception in Nevada will not open the floodgates of litigation. Only in circumstances where the attending staff disobey the direct instructions of the attending physician would the common law exception apply.

Though the requested exception is not specifically delineated in NRS 41A.100, the exception should nevertheless be adopted under the unique circumstances of this case, where the alleged Defendant acted in direct contravention of the attending physician's orders. Such allegations are clear evidence justifying the application of common law res ipsa loquitur, and the dismissal of Plaintiff's complaint should be reversed.

C. Plaintiff alleged a violation of his constitutional rights due to Defendant's Deliberate Indifference.

Defendant's answering brief admits that Plaintiff's complaint included allegations of "deliberate indifference" to his medical needs. (See Respondent's Answering Brief at page 8). However, Defendant contends that Plaintiff only "intended" to bring a medical malpractice action under NRS 41A.

Under NRCP 8(f), "[a]ll pleadings shall be so construed as to do substantial justice." See *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 931 (2015). See also *Kinford v. Bannister*, 913 F. Supp. 2d 1010, 1015 (D. Nev. 2012) ("The court will preliminarily examine the viability of such allegations, recognizing that pro se inmate civil rights cases are to be liberally interpreted."). Under NRCP 12(b)(5), the sole issue is whether a complaint states a claim for relief. See *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 845–46, 858 P.2d 1258, 1260 (1993):

> This court's "task is to determine whether ... the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." (Citation omitted). The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested.

Nevada is a notice-pleading jurisdiction and liberally construes pleadings to place into issue matter which is fairly noticed to the adverse party, NRCP 8(a); *Taylor v. State and Univ.*, 73 Nev. 151, 311 P.2d 733 (1957). A single count may allege alternative theories of recovery. NRCP 8(e)(2); *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978). See also *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 974 (Nev. App. 2015):

> [A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.") (internal quotation marks omitted); *Pittman v. Lower Court Counseling*, 110 Nev. 359, 365, 871 P.2d 953, 957 (1994) ("Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party."), overruled on other grounds by *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 1 P.3d 959 (2000). Thus, a plaintiff is entitled under NRCP 8 to set forth only general allegations in its complaint and yet be able to rely in trial upon specific evidentiary facts never mentioned anywhere in its pleadings.

Defendant's arguments of the pro se Plaintiff's "intent" is irrelevant. Plaintiff seeks redress for his alleged injuries, not slavish adherence to a particular theory of recovery. Plaintiff's Complaint provided adequate notice that Plaintiff considered the improper medical care he received amounted to a violation of his constitutional rights.

Plaintiff's complaint was submitted pro se. For all of the Defendant's arguments concerning Defendant's knowledge of law and his intent, Defendant cannot contest the truth that Plaintiff was not and is not a lawyer, and that the trial court was legally required to construe the complaint broadly.

Not only did Plaintiff allege that the actions of Defendant Coster were in deliberate indifference to his rights, he further alleged that the actions were in violation of his rights under the United States and Nevada Constitutions to be free from cruel and unusual punishment. These allegations are specific references to potential violations of the Eighth Amendment of these Constitutions. See *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000).

Defendants continue to ignore Plaintiffs allegations of constitutional violations, despite the fact that pro se complaints involving civil rights violations should be liberally interpreted. See *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010).

> [O]ur "obligation" remains, "where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir.1985) (en banc).

See also *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 595–96 (1972):

> Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

Plaintiff clearly presented allegations which, under the pro se liberal pleading standard, constituted a claim for deliberate indifference of his medical needs, as violations of the Eighth Amendment to the United States Constitution for cruel and unusual punishment. Defendant ignores the fact that Plaintiff specifically cited to *Estelle v. Gamble*, 97 S. Ct. 285, 291 (1976), that case establishing that deliberate indifference of a prisoner's medical needs violates his constitutional rights. Plaintiff's complain is entitled to afford him the benefit of any doubt. If the allegations in the complaint raised a constitutional claim, the trial court should have considered it before dismissing the complaint.

The trial court never discussed or even considered that Plaintiff may have a valid complaint under *Estelle*. Had the trial court read the Complaint broadly, as required under Nevada law, or even requested further briefing by the parties before dismissal of the entire complaint, this issue could have been properly resolved. Instead, the trial court failed to liberally interpret the complaint, and the fact that Plaintiff alleged "deliberate indifference" and cited to *Estelle* provides proof that Defendants were properly on notice of this potential claim.

The trial court's order found that Plaintiff "intended" to file only a medical malpractice action, in accordance with Defendant's motion. (1 R.A. 74-76). This

determination was in error.

Thus, even if this Court follows *Morrow,* the trial court should not have dismissed Plaintiff's claim of deliberate indifference under the prohibition of cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

V.

CONCLUSION

Plaintiff requests that the Dismissal of his Complaint be reversed and that Plaintiff be allowed to proceed on the merits of his claims.

DATED this 8th day of May, 2017.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a) (6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 11 Times New Roman 14 pt font. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c) it does not exceed 15 pages.

I hereby certify that I have read this Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of May, 2017.

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CERTIFICATE OF MAILING

The undersigned hereby confirms that on the 8 day of May, 2017, a true and correct copy of the foregoing OPENING BRIEF was served on the parties below:

X Via Electric Service [N.E.F.R. Rule 9]

____ Via Facsimile [E.D.C.R. 7.26(a)]

____ Via U.S. Mail [N.R.C.P.5(b)]

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