

Case No. 75050-COA

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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TEDDIE C. CRAIG

Appellant,

v.

DR. DONNELLY; NURSE BALLANTYNE; NURSE NANCY; NURSE  
DONNELLY; AND SGT. CHAPPY,

Respondents.

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ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR THE  
COUNTY OF PERSHING  
CASE No. PI-16-1044

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**RESPONDENTS' ANSWERING BRIEF**

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Respectfully submitted by:

AARON D. FORD

Attorney General

FRANK A. TODDRE II (Nevada Bar No. 11474)

Senior Deputy Attorney General

Office of the Attorney General

555 E. Washington Ave., Ste. 3900

Las Vegas, NV 89101

(702) 486-3149 (phone)

(702) 486-3773 (fax)

ftoddre@ag.nv.gov

*Attorneys for Respondents*

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

**FILED**

JAN 15 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

19-02231

Respondents, the Nevada Department of Corrections (NDOC), Diane Ballantyne, William Donnelly, Russelle Donnelly, and Nancy Marvel (NDOC Employees), by and through their counsel, Aaron D. Ford, Nevada Attorney General, and Frank A. Toddre II, Senior Deputy Attorney General, and in response to Appellant Teddie Craig's (Craig) Informal Brief<sup>1</sup> (Opening Brief), hereby provide this ten (10) page response as instructed by this Court on December 14, 2018.<sup>2</sup>

### INTRODUCTION

The NDOC and NDOC Employees are shielded from this action by the doctrine of sovereign immunity. The district court never had subject matter jurisdiction based upon Craig's failure to properly name the State and NDOC. Craig's failure to invoke a waiver of sovereign immunity deprived the lower court of jurisdiction. Although Craig did attempt to cure his errors, the Nevada Rules of Civil Procedure, and ample case law, suggest a mandatory dismissal for lack of jurisdiction. A party may contest subject matter jurisdiction at any time, and it is appropriate for a lower court to resolve these procedural matters as early as practicable. Craig never provided any argument on the record that would exempt this matter from the sovereign immunity doctrine. The law is clear that Craig's Complaint is legally deficient from the outset. This Court must affirm because the district court did not err in its decision.

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<sup>1</sup> Doc. 18-09020, filed 3/13/18.

<sup>2</sup> *Order Directing Response*, Doc. 18-908861, filed 12/14/18.

## I. JURISDICTIONAL STATEMENT<sup>3</sup>

Craig filed his Notice of Appeal on February 5, 2018,<sup>4</sup> appealing the district court's January 23, 2018 *Order Granting Defendants' Motion to Dismiss* (Order).<sup>5</sup> This Court has jurisdiction, because the Order disposed of Craig's claim in its entirety. Craig's Notice of Appeal was timely filed within thirty (30) days of the Order.

## II. STATEMENT OF THE ISSUES PRESENTED

1) Whether the district court appropriately dismissed Craig's Complaint in its entirety based under NRCP 12(b)(1) and 12(h)(3) based upon the court's lack of jurisdiction?

2) Whether the district court erred by denying Craig's NRCP 12(f) motion to strike, which appeared to be an attempt to cure the deficiencies of his Complaint?

3) Whether Craig's Complaint was fatally flawed under NRS 41.0337(2) for failing to name the State or appropriate political subdivision of the NDOC as a named party defendant?

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<sup>3</sup> The NDOC Employees have not included a Routing Statement in this brief, because the Supreme Court has already determined that this case should be decided by this Court. *See* Doc. 18-21725, filed 06/07/18.

<sup>4</sup> ROA 150-151. "ROA" refers to the Record on Appeal. Please note that the NDOC Employees were not provided a copy of the ROA, but that the page references have been obtained based on the Index to the ROA, and therefore apologize in advance should there be any errors between the page references contained in the Index and the ROA itself.

<sup>5</sup> ROA 136-141.

### III. STATEMENT OF FACTS<sup>6</sup>

#### A. Relevant Procedural History and Statement of Facts

Craig filed his 42 U.S.C. § 1983 civil rights action<sup>7</sup> alleging general violations of first, eighth, and fourteenth amendment rights..<sup>8</sup> Craig's Complaint names Dr. Donnelly, Nurse Ballantyne, Nurse Nancy, Nurse Donnelly, and Sgt. Chappy in their individual capacities, and demands a jury trial with "additional jurisdiction NRS 41.031 and NRS 41.032 state tort claims."<sup>9</sup> Notably the caption does not name the State of Nevada nor the NDOC.<sup>10</sup> The NDOC filed an Answer denying the allegations and setting forth their affirmative defenses.<sup>11</sup>

The NDOC filed its Motion to Dismiss, primarily setting forth that Nevada as a state, and the NDOC as an arm of the state, are shielded from the Complaint under sovereign immunity, and that Craig's failure to invoke a waiver of immunity deprived the district court of subject matter jurisdiction.<sup>12</sup>

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<sup>6</sup> The Order sets forth a detailed summary of the undisputed facts of this case. *See* ROA 136-141. Craig has not alleged any error on the part of the District Court with regard to the factual summary provided in its Order. *See, e.g.*, Opening Brief.

<sup>7</sup> ROA 6-47, Civil Rights Complaint.

<sup>8</sup> ROA 6-8. The alleged violations all occurred at Lovelock Correctional Center (LCC) from January 9, 2016-January 12, 2016.

<sup>9</sup> ROA 7-8, parties' recitation.

<sup>10</sup> ROA 6, caption.

<sup>11</sup> ROA 58-63.

<sup>12</sup> ROA 79-82, Motion to Dismiss. *See specifically* ROA 80, Argument.

Craig responded with a “Motion to Strike NRS 41.031 Pursuant to NRCP 12(f).”<sup>13</sup> Craig asked the district court to strike NRS 41.031, ostensibly to give the lower court complete jurisdiction under 42 U.S.C. § 1983.<sup>14</sup> The motion did not have any points in authorities in support, nor did it include provide a legal basis to strike a Nevada Revised Statute. In the opposition brief, Craig states generally that he is trying to sue the named NDOC officials in their individual capacities under § 1983, and requests the court withdraw NRS 41.031 from the action.<sup>15</sup> Additionally, Craig claimed that the NDOC is not a person under §1983 and “deny any claims as the State of Nevada or NDOC. Plaintiff only claim the named defendants in their individual capacity under the color of state law.”<sup>16</sup>

The NDOC did not oppose the Motion to Strike but filed a motion to stay all items until the Court ruled upon the motion to dismiss.<sup>17</sup> The district court issued a decision, after Craig submitted a request for submission on January 12, 2017.<sup>18</sup>

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<sup>13</sup> ROA 105-112. The motion to strike appears to contain an opposition brief to the motion to dismiss, however the two presumed pleadings are not delineated from each to any appreciable degree.

<sup>14</sup> ROA 105.

<sup>15</sup> ROA 110.

<sup>16</sup> ROA 108. The cited statement is an exact quote of p.3 of the motion to strike.

<sup>17</sup> ROA 113-117.

<sup>18</sup> ROA 128-129.

## **B. The Court Grants NDOC's Motion to Dismiss.**

The district court dismissed the Complaint because Craig failed to take the necessary steps to invoke the sovereign immunity waiver under statute.<sup>19</sup> The district court recognized that Craig appears to try to correct his Complaint by way of the motion to strike but found these attempts to be insufficient:

Nevertheless, in Plaintiff's Motion to Strike NRS 41.031 he attempts to correct the jurisdictional problem created by not properly naming the state. However Plaintiff's attempts fall short. Similarly, in his opposition motion, Plaintiff tries to fix the defect by stating that his claims only related to the "named Defendants in their individual capacity under the color of State law." Therefore, Plaintiff's claims clearly relate to alleged tortious conduct by State employees in the course and scope of their employment. Plaintiff failed to name the State of Nevada as a Defendant.... Nevada law provides that "[n]o tort action may be brought against a person who is named as a defendant in the action solely because of an alleged act or omission relating to the public duties...unless the State or appropriate political subdivision is named a party defendant..." NRS 41.0337(2) Plaintiff cannot simply get around state law by "striking" jurisdiction under statutes supplying the correct procedures to invoke a waiver of sovereign immunity. <sup>[20]</sup>

The district court further found that Craig failed to provide any arguments that "would exempt this matter from the sovereign immunity doctrine and lack of subject matter jurisdiction. The facts are clear and

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<sup>19</sup> ROA 136-141, Order p.3.

<sup>20</sup> ROA 136-141, Order p. 4.

the law is clear.”<sup>21</sup> The district court found NRS 41.0337(2) required Craig to name the State of Nevada for any tort claims because the Defendants were acting within the scope of their employment for the NDOC and the State of Nevada.<sup>22</sup>

#### IV. STANDARD OF REVIEW

The primary issue presented by this appeal concerns subject matter jurisdiction, which the district court determined was lacking based on NRS 41.0337(2). When decided on pleadings alone, “[s]ubject matter jurisdiction [presents] a question of law subject to de novo review.”<sup>23</sup> “[Q]uestions of statutory interpretation” also receive de novo review.<sup>24</sup>

Alternatively, a district court order granting a motion to dismiss “is rigorously reviewed.”<sup>25</sup> To survive dismissal, a complaint must contain some “set of facts, which, if true, would entitle [the plaintiff] to relief.”<sup>26</sup> The appellate court considers all factual assertions in the complaint to be

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The Order granting the motion to dismiss also denied all outstanding motions as moot.

<sup>23</sup> *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

<sup>24</sup> *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012).

<sup>25</sup> *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634-35, 137 P.2d 1171, 1180.

<sup>26</sup> *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

true and draws all reasonable inferences in favor of the plaintiff.<sup>27</sup> This court applies de novo review to district court's legal determinations.<sup>28</sup>

## V. LEGAL ARGUMENT

### A. The District Court Lacked Subject Matter Jurisdiction

#### 1. Legal Standard

The NDOC motion to dismiss was brought pursuant to NRCP 12(b)(1) for lack of subject matter jurisdiction and dismissed under NRCP 12(h)(3). “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.”<sup>29</sup> The “[l]ack of subject matter jurisdiction can be raised at any time during the proceedings and is not waivable.”<sup>30</sup>

The Legislature of the State of Nevada has waived [sovereign] immunity on a limited basis. In order to invoke a waiver of sovereign immunity, an “action must be brought in the name of the State of Nevada on relation of the particular department . . . of the State whose actions are the basis for the suit.”<sup>31</sup> The State of Nevada must be named as a

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<sup>27</sup> *Shoen*, 122 Nev. at 635, 137 P.3d at 1180.

<sup>28</sup> *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672. The NDOC contends that the sole issue on appeal is the subject matter jurisdiction, in the event that the Court looks beyond this issue into legal interpretation of NRS 41, the undersigned suggests the “rigorous review” standard is appropriate.

<sup>29</sup> NRCP 12(h)(3) (emphasis added). Cf. NRCP 12(b)(1) (regarding motions to dismiss for “lack of jurisdiction over the subject matter”); *Mainor v. Nault*, 120 Nev. 750, 761 n.9, 101 P.3d 308, 315 n.9 (2004).

<sup>30</sup> *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990).

<sup>31</sup> NRS 41.031(2).



party defendant in actions against officers or employees of the State.<sup>32</sup> Failure by a plaintiff to invoke a waiver of sovereign immunity deprives a court of subject matter jurisdiction.<sup>33</sup>

## **2. Craig Failed to Comply with NRS 41.031(2)**

At the threshold, Craig faced the bar of sovereign immunity because the State of Nevada and the NDOC did not waive its immunity from suit as conferred by statute. Craig's complaint failed to name the "State of Nevada, ex rel. Nevada Department of Corrections" as a defendant. He failed to cure this deficiency. The District Court lacked the subject matter to hear the complaint based upon failure to comply with NRS 41.031(2).<sup>34</sup> Under the doctrine of sovereign immunity, generally, the state and its political subdivisions enjoy blanket immunity from tort liability, which immunity has been waived only on a limited basis.<sup>35</sup>

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<sup>32</sup> NRS 41.0337.

<sup>33</sup> See *Jiminez v. State*, 98 Nev. 204, 205, 644 P.2d 1023, 1024 (1982) (assuming that failure to name the State of Nevada as a defendant under NRS 41.031 deprived the trial court of subject matter jurisdiction).

<sup>34</sup> *Kille v. Jenkins*, 2015 WL 4068438 at \*1 (unpublished opinion); *Allen v. Aranas*, No. 15 TRT 00018 1B (1st J.D.C. Nev. Oct. 8, 2015) (order dismissing complaint ("Under NRS 41.031(2) an action against the State, its agents or employees must be brought in the name of the State of Nevada. Plaintiff failed to name the State of Nevada as a party in his complaint therefore this Court lacks subject matter jurisdiction, and this matter should be dismissed under NRCP 12(b)(1).")).

<sup>35</sup> *Clark County School Dist. V. Richardson Const., Inc.*, 123 Nev. 382, 168 P.3d 87 (2007).

## **B. Craig May Not Cure the Procedural Deficiencies by a Motion to Strike NRS 41**

Rule 12(f) is very limited in scope. Courts have an inherent “traditional power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”<sup>36</sup> This Court has judicial discretion to take necessary action to correct or sanction improperly filed documents to achieve the orderly and expeditious disposition of cases and to avoid calendar congestion. Such action can include striking procedurally defective briefs or other improperly filed papers.<sup>37</sup> Such briefs have been referred to as “fugitive” documents.<sup>38</sup> Further, pursuant to NRCP 12(f), “any redundant, immaterial, impertinent, or scandalous matter” may be stricken from a pleading.

Whether Craig is attempting to ask the lower court to strike the entirety of NRS 41.031 or if Craig is attempting to withdraw tort claims pursuant to NRS 41.031, this is not the proper use of 12(f) and it is not the correct way to cure the inherent deficiencies of his complaint. Generally, the NRCP 12(f) motions are used to strike improper pleadings such as sur-replies, untimely motions, or rogue discovery documents. No matter what Craig is trying to do in the lower court, NRCP 12(f) is not the procedural mechanism to amend or cure a deficiency in the complaint.

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<sup>36</sup> *In re Lavender*, 180 F.3d 1114, 1118 (9th Cir. 1999) citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

<sup>37</sup> See e.g., *Lavender*, 180 F.3d at 1118; *Chambers*, 501 U.S. at 43.

<sup>38</sup> See *Craig v. Harrah*, 65 Nev. 294, 311, 195 P.2d 688, 695 (1948).

The NDOC filed a motion to dismiss for lack of subject matter jurisdiction, Craig failed to oppose it on a legal or factual ground. Nor did he attempt to amend the complaint to cure this deficiency.<sup>39</sup> This court should affirm judgment for the NDOC because Craig has failed to provide any legal reasons why the district court had subject matter jurisdiction and why dismissal was not appropriate.

## VI. CONCLUSION

While strict, the law is clear in Nevada that if a court (appellate or district court level) does not have subject matter jurisdiction, a case cannot go move forward. Respondents were shielded from this suit under the doctrine of sovereign immunity pursuant to NRS 41.031(2). Craig did nothing to overcome this legal blockade. Accordingly, this Court must affirm the district court's dismissal.

RESPECTFULLY SUBMITTED this 10th day of January, 2019.

AARON D. FORD  
Attorney General

By: 

Frank A. Toddre II (Bar No. 11474)  
Senior Deputy Attorney General  
*Attorneys for Respondent*

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<sup>39</sup> In setting forth this illustrative idea, the undersigned does not concede that amending a complaint would necessarily cure the defects a sovereign immunity motion; the example is exegetical of a more appropriate legal mechanism to cure a naming defect.

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Century Schoolbook.

I further certify that this brief complies with the page-volume limitations of this Court's March 15, 2018 Order, excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

Finally, I hereby certify that I have read this appellate 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 conformity with the requirements of the Nevada Rules of Appellate Procedure.

AARON D. FORD  
Attorney General

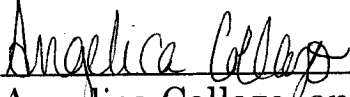
By: 

Frank A. Toddre II (Bar No. 11474)  
Senior Deputy Attorney General  
*Attorneys for the Respondents*

## CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that, on the 11th day of January, 2019, service of the **RESPONDENTS' ANSWERING BRIEF** was made this date by depositing a true and correct copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed follows:

Teddie Craig, #62269  
Northern Nevada Correctional Center  
P.O. Box 7000  
Carson City, NV 89702

  
\_\_\_\_\_  
Angelica Collazo, an employee of  
The Office of the Attorney General