

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE EGGLESTON,

Appellant,

v.

GEORGINA STUART; CLARK
COUNTY, NEVADA, LISA
CALLAHAN; AND BRIAN
CALLAHAN,

Respondent.

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**APPEAL FROM ORDER DISMISSING CIVIL RIGHTS ACTION AND
ORDER DENYING MOTION FOR RECONSIDERATION**

Eighth Judicial District Court of the State of Nevada
In and for the County of Clark
THE HONORABLE DOUGLAS E. SMITH AND
THE HONORABLE CRISTINA D. SILVA
DISTRICT COURT JUDGES

APPELLANT'S OPENING BRIEF

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I. NRAP 26.1 DISCLOSURE

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 so that the judges of this court may evaluate possible disqualification or recusal.

Appellant, Steve Eggleston, is an individual. There are no corporations in this case. Mr. Eggleston represented himself in the district court proceedings and in the administrative Fair Hearing proceedings before the Clark County Department of Family Services related to this appeal, with the exception of the initial filing of the Request for Administrative Appeal of the Child Protective Services Substantiation at issue.

Emily McFarling, Esq., Nevada Bar No. 8567, of McFarling Law Group, represents Mr. Eggleston in this appeal and represented Appellant in filing the request for administrative appeal of a Child Protective Services Substantiation.

District Attorney Steve Wolfson and Ofelia Monje, Deputy District Attorney, represented Georgina Stuart and Clark County, Nevada, in the district court proceedings, from the beginning of the case until June 21, 2018.

Felicia Galati, Esq., Nevada Bar No. 7341, and James R. Olson, Esq., Nevada Bar No. 00116, of Olson Cannon Gormley & Stoberski, substituted in as counsel for Georgina Stuart and Clark County, Nevada, on June 21, 2018, in the district court

proceedings and remain counsel of record. Attorney Galati also represents said parties in this appeal. Attorneys Peter Angulo and Maria Parlade appeared in the district court on the County and Stuart's behalf on certain proceedings.

Brian and Lisa Callahan did not appear in the district court proceedings and remain in proper person in this appeal.

DATED this 26th day of October, 2020.

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IV. JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to NRAP 3A(b)(1), which permits a party to appeal from “[a] final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.” The final order appealed from is an Order entered on September 7, 2018. R. at 2:331-337. The notice of entry of order was filed on September 10, 2018. R. at 2:338-347. Appellant timely filed a Motion for Reconsideration on September 20, 2018. R. at 2:357-408. On February 26, 2020, the Court entered an Order Denying Plaintiff’s Motion for Reconsideration. R. at 4:773-780, 792-799. The notice of entry of order was also filed on February 26, 2020. R. at 4:781-791, 800-810. Appellant timely filed a notice of appeal on March 16, 2020, appealing from both orders referenced herein. R. at 4:811-813.

V. ROUTING STATEMENT

This case should not be assigned to the Nevada Court of Appeals because it does not involve an issue presumptively assigned to the Nevada Court of Appeals under NRAP 17(b).

STATEMENT OF THE ISSUES

- A. Whether the district court erred as a matter of law by dismissing Plaintiff’s § 1983 civil rights claims for failure to exhaust administrative remedies through the “Fair Hearing” process.

- B. Whether the district court erred in dismissing Plaintiff's state law tort claims against Clark County and Georgina Stuart for failure to exhaust administrative remedies through the "Fair Hearing" process.
- C. Whether the district court erred in dismissing Plaintiff's state law tort claims against Lisa and Brian Callahan for failure to exhaust administrative remedies through the "Fair Hearing" process.
- D. Whether the district court erred in dismissing the individual Clark County Departments of Family Services and Child Support Services as defendants.
- E. Whether the district court erred in dismissing punitive damages as to Defendants Clark County and Georgina Stuart.

VI. STATEMENT OF THE CASE

This appeal arises from a district court's Order granting a Motion to Dismiss a civil lawsuit and an Order denying the Motion for Reconsideration of that order. R. at 331-337; 4:773-780.

This is a civil rights action alleging abduction, conspiracy to abduct, and aiding and abetting in the abduction Plaintiff Steve Eggleston's (hereinafter "Steve") two minor sons, in violation of 42 U.S.C. § 1983, as well as torts for Intentional Infliction of Emotional Distress, Defamation, Libel, and Slander. R. at 1:169.

Defendants Clark County and Georgina Stuart (hereinafter, "Stuart") filed a Motion to Dismiss on June 9, 2017. R. at 1:74. The court granted that motion on July

31, 2017 and 1) dismissed punitive damages as to Defendants Clark County and Georgina Stuart; 2) dismissed Defendant Clark County; and 3) dismissed the Second Cause of Action, but granted leave for Steve to file a First Amended Complaint within 10 days and directed the Defendants to file an Answer. R. at 1:78.

On August 10, 2017, Steve timely filed his First Amended Complaint for a civil rights and torts action against the Clark County Department of Family Services, Stuart, an employee of Department of Family Services, Lisa and Brian Callahan and Doe Defendants. R. at 1:87-113. Clark County and Stuart filed an Answer. R. at 1:114-121. The Callahans were served with the Summons and First Amended Complaint. R. at 1:66-67. However, they did not appear in the district court action and Steve was anticipating requesting Entry of Default. R. at 1:169.

The civil action stemmed from a CPS investigation in 2014 conducted by Stuart. R. at 1:88. Stuart, accompanied by the police, arrived at Steve's home and told Steve to sign temporary guardianship of the children over to Defendant Lisa Callahan, or the police would immediately take the children into custody. R. at 1:93-94. Steve signed the temporary guardianship document under coercion and duress, and the Callahans took the children from Nevada. R. at 1:95.

In 2015, the Department of Family Services made an administrative finding of child maltreatment against Steve and he requested a Fair Hearing on or appeal of that decision. R. at 1:203.

On July 24, 2018, Clark County and Stuart filed a second Motion to Dismiss the civil case on the basis that Steve failed to exhaust his administrative remedies, specifically, that he had not attended a Fair Hearing in the administrative appeal proceeding. R. at 1:804. Steve opposed Defendants' Motion to Dismiss arguing that a Section 1983 civil rights action does not require exhaustion of administrative remedies, and intentional tort claims made against government entities and government employees cannot require pre-conditions to filing. R. at 2:225-226. Nevertheless, in an Order entered September 7, 2018, the Court granted Defendants' Motion and dismissed all causes of action against all defendants. R. at 2:331-337.

Steve timely filed a Motion to Reconsider on September 20, 2018. R. at 2:357-408. The Court denied said Motion on December 30, 2020, and the order was entered on February 26, 2020. R. at 4:773-780. Steve now appeals these orders. R. at 4:811-813.

VII. STATEMENT OF THE FACTS

The allegations in Steve's Complaint involve interactions between him and Defendants in late December 2014 to early January 2015. R. at 1:74.

The Parties' Background

Steve resided in Clark County, Nevada and is the natural father of two minor children (hereinafter the "minor children" or the "boys"), who at the time the First Amended Complaint was filed, were 5 and 6 years old, respectively. R. at 1:87.

Laura Battistella (hereinafter “Battistella”), not a party to the district court matter, is the natural mother of the boys, as well as the natural mother of four children from her previous marriage (collectively, the “Rodriguez children”), of which two were pre-teens and two were teenagers. R. at 1:88. Steve, Battistella and all the children lived in Clark County, Nevada, until the oldest Rodriguez child left for college. *Id.*

Lisa and Brian Callahan live in Chicago, Illinois. *Id.* Lisa Callahan (hereinafter “Lisa”) is Battistella’s sister. R. at 1:91.

DFS Investigation & Temporary Guardianship

In early December 2014 one of the teenage Rodriguez children called 911 to report Battistella had spoken words of suicidal ideation. R. at 1:88. Battistella was taken to an emergency mental healthcare facility for suicide watch. *Id.* Stuart, an employee of Clark County Department of Family Services, arrived at Steve’s home purportedly to conduct an investigation which appeared to Steve as a routine follow-up visit. R. at 1:87-88.

On or about December 24, 2014, Stuart interviewed Steve and there was no indication that the children were in any danger, that there had been any abuse or neglect, or that Steve was being investigated for abuse or neglect. R. at 1:88. Battistella was released from the mental facility that day and Stuart returned to Steve’s home. Steve signed a document appointing him and the oldest Rodriguez child as guardians of the children. R. at 1:89. Prior to leaving, Stuart asked Steve to

take a baseline Drug and Alcohol test in the next few days, indicating it was part of the protocol. Steve's test results showed he was negative for alcohol and drugs. *Id.*

Stuart returned to Steve's home on several occasions. *Id.* She recommended the family join a "brand new program" that was funding situations similar to the Eggleston-Battistella family, as the program would help accomplish the well-being of the family. R. at 1:90. Steve and Battistella agreed to join the program. *Id.* Soon thereafter, Stuart 1) informed Steve that he and Battistella were approved for the program, 2) returned with a team of professionals that would be working with them, and 3) confirmed that they were the first family to kick the program off. *Id.*

Stuart scheduled Steve, Battistella, and all the children to start the program on January 6, 2015. R. at 1:91. Over the holidays, Lisa Callahan arrived from the Chicago area, purportedly to assist the family in their time of need by helping watch the children and supporting her sister. *Id.*

On January 16, 2015, at about 1:00 p.m., Steve and Battistella were at their home waiting anxiously for Stuart to arrive with her team to kick off the new program and help keep their family together. R. at 1:93. However, Stuart showed up with the police and said to Steve:

"Either you sign temporary guardianship of all the children over to Lisa *right now* or the police are taking your children into custody *right now* and you will *never* see them again." R. at 1:93-94.

Battistella started screaming and crying and ran to the backyard, and one of the policemen followed while another blocked the exit with his hand on his pistol indicating he was prepared to draw and use it at a moment's notice. R. at 1:94. Meanwhile Steve asked Stuart what happened to the program to which she replied that her supervisor had overridden her decision at the last moment. *Id.*

As Battistella screamed in the background, Stuart and at least one of the police officers repeatedly threatened Steve with the immediate removal of his children if he did not sign guardianship over to Lisa "now." *Id.* Notwithstanding the authorities' intimidating him, Steve excused himself to call his attorney who then spoke to Stuart. Stuart represented to Steve's attorney that if he signed the temporary guardianship papers to allow time to get Battistella into a resident treatment program, the boys would be returned to him in several days. R. at 1:95.

Steve pulled Lisa aside into his home office to discuss the potential temporary guardianship and expressly informed her that he was signing under coercion and duress and that she had no permission to remove the boys from their home, the county, or the State of Nevada. *Id.* Lisa stated she understood. *Id.* Soon thereafter, Steve and Battistella, accompanied by Lisa, signed a previously-prepared temporary guardianship form in order to prevent the police from removing the children. *Id.* Lisa then took the boys from the home. *Id.*

Battistella left and never returned to the family home. *Id.*

Several weeks later, Steve's attorney spoke to Stuart by phone regarding the status of her investigation and return of the boys. R. at 1:96. Among other things, Stuart represented that she had no objection to Steve resuming immediate custody of the boys, and expressly confirmed that no report of abuse or neglect would be issued against Steve, stating expressly that the "file would soon be closed." *Id.*

After speaking to Stuart, the undersigned served the Callahans with a notice of objection to the abduction of the boys and expressly revoked any temporary guardianship. R. at 1:96. The Callahans did not return the boys. Aside from one short visit surrounding a court hearing, Steve has not seen his children since January 2015. R. at 1:98.

The Callahans' Guardianship Case & Steve's Custody Action

Despite assuring Steve that the minor children would not be removed from the county or the State of Nevada, Lisa, along with Brian Callahan (hereinafter "Brian"), removed the boys from the state and hid them in Indiana (or the greater Chicago area), neither contacting Steve nor disclosing the whereabouts or condition of the boys to him. R. at 1:95-96.

Unbeknown to Steve and without disclosing Steve's express revocation of the guardianship consent, the Callahans filed for guardianship of the boys in Illinois, representing that Steve and Battistella had consented to Lisa's temporary guardianship and that she had custody of the children with the approval, consent,

and blessing of Stuart and Clark County. R. at 1:98. The Callahans further represented that the temporary guardianship was legal and valid, and that Stuart and Clark County had determined Steve to be an unfit parent. *Id.* The Callahans did not name Steve as a party to the case, nor did they notify him or serve him with any case-related documents. *Id.* Meanwhile, Steve filed a paternity and child custody action in Clark County and obtained an Order confirming paternity, determining he was a fit father, and awarding him full legal and physical custody of the boys. *Id.*, R. at 2:391-396.

Steve, through counsel, promptly served that Custody Order on the Callahans and repeatedly demanded the return of the boys. R. at 1:98. However, said demand was ignored and the boys were never returned. *Id.*

Steve learned that there was a hearing scheduled in Will County, Illinois, in the Callahans' guardianship case from Battistella, who was informed of the same by one of her minor children during a Mother's Day visit in 2015. *Id.*

From the time the boys were abducted on or about January 6, 2015, Steve has been allowed to see them only once, for about 30 minutes, at the hearing in Will County, Illinois. *Id.*

Though the Callahans allowed Steve occasional weekly phone calls with the boys beginning in the summer of 2015, Steve was cut off from communicating with

them in January 2016 without justification or any explanation of any kind. R. at 1:99. Steve has not heard from, talked to, or seen his sons since that time. *Id.*

Fair Hearing Proceeding

On February 2, 2015, the Clark County Department of Family Services (hereinafter “DFS”) made a finding of child maltreatment against Steve, and on February 12, 2015, Steve requested an appeal of that decision. R. at 1:203. On August 27, 2015, DFS/the Appeals Unit Manager issued a Finding of Substantiation upholding the substantiated finding of physical injury neglect – 14 N plausible risk of physical injury against Steve as to four (4) minor children. *Id.* On September 9, 2015, Steve requested a Fair Hearing or appeal of that decision. *Id.* Steve did not hear from the County for well over a year. R. at 2:365.

DFS scheduled the hearing on Steve’s appeal for August 1, 2017 at Steve’s request. R. at 1:203-204. The hearing was rescheduled for September 6, 2017. R. at 204. On August 2, 2017, Steve requested a continuance of the Hearing. *Id.* On August 18, 2017, DFS advised Steve that the Hearing was reset for October 24, 2017. *Id.*

On October 4, 2017, Steve requested a second continuance of the Hearing. *Id.* On October 16, 2017, DFS agreed to a continuance and DFS asked Steve to advise when he could appear for the hearing so that it could be rescheduled. *Id.* On July 19, 2018, not having heard from Steve in nine (9) months, DFS notified Steve of a new

Fair Hearing date set for September 11, 2018. *Id.* On July 20, 2018, Steve requested a third continuance of the Hearing, indicating he would be in Washington, D.C. on September 11, 2018. *Id.* The Fair Hearing had not occurred at the time that the civil case was dismissed. *Id.*

Procedural History

On December 30, 2016, Steve filed a Complaint alleging 1) a Civil Rights Violation pursuant to 42 U.S.C. § 1982, against only the Clark County Defendants and unknown Doe Defendants; 2) a Civil Rights Violation of 42 U.S.C. § 1982 based on Conspiracy and/or Aiding and Abetting, against all named Defendants and unknown Doe Defendants; 3) Intentional Infliction of Emotional Distress against all named Defendants and unknown Doe Defendants; and 4) Libel and Slander against all named Defendants (except Brian Callahan) and unknown Doe Defendant. R. at 1:73-74.

On April 24, 2017, Clark County, NV was served with the Summons and Complaint. R. at 1:31.

On April 25, 2017, Georgina Stuart was served with the Summons and Complaint. R. at 1:32.

On April 28, 2017, Lisa and Brian Callahan were served with the Summons and Complaint. R. at 1:29-30.

On June 9, 2017, Defendants Clark County and Stuart filed a Motion to Dismiss requesting: dismissal as to Defendants Department of Family Services and Defendant Child Support Services since they are merely individual Clark County departments; dismissal of Steve's second cause of action as it was not plead with the required specificity; dismissal of any damages related to the minor children, as they were not named Plaintiffs in the instant matter; and dismissal of any punitive damages against Clark County and Georgina Stuart. R. at 1:34.

On June 19, 2017, Steve filed an Opposition to Defendants' Motion. R. at 1:53-66.

On June 30, 2017, Defendants filed a Reply and had no objection to Steve's request for leave to amend Complaint. R. at 1:69.

On July 11, 2017, the Court held a hearing on the County and Stuart's Motion to Dismiss and based its decision on the pleadings submitted by the parties. R. at 1:73.

On July 31, 2017, the Court entered Findings of Fact, Conclusions of Law, and Order Granting Defendants Clark County and Stuart's Motion to Dismiss filed on July 9, 2017. R. at 1:73-78. The Court dismissed the Second Cause of Action in its entirety and granted leave for Steve to amend the Complaint to adequately plead his Second Cause of Action within ten (10) days from the filing of the Notice of

Entry of Order. R. at 1:86. The Court also dismissed Defendant Clark County and Steve's request for punitive damages against Clark County and Stuart. R. at 1:86.

On August 1, 2017, a Notice of Entry of Order of Findings of Fact, Conclusions of Law and Order Granting Clark County and Georgina Stuart's Motion to Dismiss was entered. R. at 1:79-86.

On August 10, 2017, Steve filed his First Amended Complaint against Georgina Stuart, an employee of Clark County Department of Family Services; Clark County, Nevada; Lisa Callahan; Brian Callahan; and Doe Defendants. R. 1:87-113.

Steve pleaded a Civil Rights – Violation of 42 U.S.C. § 1983 against Stuart, Clark County and Doe Defendants, in his First Cause of Action. R. at 1:99.

In support of his first cause of action, Steve alleged that Clark County and Stuart failed to disclose and explain any allegations or reports of child abuse or neglect to him, and/or alleged failure to protect, thereby depriving him of notice and any fair opportunity to respond and provide convincing, irrefutable evidence that he was a fit parent, in addition to the evidence thereof already in their custody. R. at 1:100.

Moreover, he alleged, on information and belief, Clark County and Stuart employed a known, unconstitutional method of coercing parents into signing over temporary custody to third parties when removing the children was not warranted or

justified, so as to cover their tracks and accomplish unconstitutionally and illegally what could not be accomplished constitutionally and legally. R. at 1:103.

Steve also alleged that he was denied his fundamental, constitutional right of parenthood and fatherhood; was irreparably damaged by the deprivation of raising his sons and sharing their love and joy; experienced extreme and severe pain, suffering, and bodily injury; suffered extreme and severe emotional distress; incurred substantial financial losses and injuries; and suffered such other injury and damages according to proof but which exceed the jurisdictional minimum of this court. R. at 1:103-104.

As his Second Cause of Action against all named and Doe defendants, Steve pleaded a Civil Rights claim for Conspiracy, Aiding and Abetting Violation of 42 U.S.C. § 1983. R. at 1:104.

Steve alleged on information and belief that Stuart, Clark County, Lisa and Brian Callahan, and Doe Defendants conspired, agreed among themselves, assisted, aided, and/or abetted each other in causing, carrying out, implementing, and/or accomplishing, by wrongful deed, fraud, cover-up and/or otherwise, the allegations of wrongdoing and omission alleged in the First Cause of Action, including but not limited to execution of an “Ambush Plan,” the engagement of policemen armed with weapons, the use and preparation of the aforesaid temporary custody/guardianship forms, the making of threats, the telling of lies and misrepresentations, and the

unlawful removal of the boys from Clark County and the State of Nevada over his presumed objection. R. at 1:105-106.

Moreover, Steve alleged that the boys were abducted, removed from Steve's custody, and taken from the State as previously alleged, and he was not given notice of or provided a prompt due process hearing as required by Nevada law, the Nevada Constitution, federal civil rights and other laws, and the federal Constitution. R. at 1:106.

Steve also alleged that he was defamed, branded, and deemed unfit as a parent for his sons despite being found fit and awarded full legal and physical custody of his sons by a Nevada District Court judge. R. at 1:107.

In his third cause of action against all named and Doe defendants, Steve pleaded an Intentional Infliction of Emotional Distress claim. *Id.*

In support of this claim, Steve alleged that the conduct, actions and omissions of Defendants, and each of them, were and are outside all possible bounds of human decency; were and are utterly intolerable in a free, democratic and civilized community; were and are extreme and outrageous conduct committed with the intention of, or with reckless disregard for, inflicting extreme and severe mental emotional distress on Steve and the boys, which behavior actually and/or proximately caused Steve to suffer injuries and damages. R. at 1:108.

As his fourth cause of action Steve pleaded a claim for Defamation, Libel & Slander against all named defendants, except Brian, and Doe Defendants. *Id.*

He alleged on information and belief that Clark County, Stuart, and Does 25-50, inclusive, on specific dates known to them within the last two years, made verbal and written statements of and concerning him, specifically, (a) that he was an unfit parent; (b) that he had neglected the Eggleston boys and other children; (c) that he had abused the Eggleston boys and other children; and (d) that he had failed to protect the Eggleston boys from the actions of others, including specifically, their mother. R. at 1:109.

Moreover, he alleged on information and belief that Lisa and Does 45-75, inclusive, on specific dates known to them within the last two years, made verbal statements of and concerning him as previously stated. *Id.*

The aforesaid statements were false and known to be false by each of the charged defendants, were published to third parties who understood them to be of and concerning Steve and who understood them to be derogatory of his character. *Id.*

Accordingly, Steve requested the following relief:

1. Compensatory damages in the sum of \$10,000,000.00 or according to proof (and as circumscribed by the Court's order and Nevada law);
2. Damage to Plaintiff's reputation in the sum of \$10,000,000.00 or according to proof (and as circumscribed by the Court's order and Nevada law);

3. Punitive damages in the sum of \$50,000,000.00 or according to proof (and as circumscribed by the Court's order and Nevada law); [and]
4. Interlocutory and Permanent Injunctive relief...

R. at 1:110.

On August 24, 2017, Defendants Clark County and Stuart filed an Answer to the First Amended Complaint wherein they admitted the following:

- 1) Stuart returned to the family home and had Steve and other family member sign a Present Danger Plan. R. at 1:115.
- 2) Stuart asked Steve to take a drug test. *Id.*
- 3) Stuart returned to the family home on several occasions after Battistella's release from the hospital and recommended to the family a new program, and Steve did express a desire to move with the Eggleston boys. R. at 1:116.
- 4) Steve and Battistella advised Stuart they did want to participate in the program and scheduled a meeting or appointment on or about January 6, 2015. *Id.*
- 5) Clark County has substantiated allegations of abuse and/or neglect pursuant to NRS 432B.020 and/or 432B.140 against Steve. R. at 1:117.

Clark County and Stuart asserted twenty-two (22) affirmative defenses. R. at 1:118-120. Defendants asserted failure to state a claim as their first affirmative defense. R. at 1:118. Among other affirmative defenses, they asserted failure to

exhaust administrative remedies before filing suit, including giving notice to the Answering Defendants as required by NRS 41.0366(2). R. at 1:119.

Steve and Attorney Ofelia Monje, on behalf of Stuart and Clark County, attended an early case conference on March 22, 2018. R. at 1:169.

On April 12, 2018, Steve filed a Joint Case Conference Report (hereinafter “JCCR”). R. at 1:168-189.

In said report, Steve included various DFS employees, including Paula Hammack, Assistant Director DFS, in his list of proposed witnesses. R. at 1:177. His description of potential testimony for all sixty-nine (69) witnesses reads as follows:

“All of these witnesses are expected to testify as to their knowledge of the incident, plaintiff’s damages, the failure of any government agency anywhere to seek to unify or reunify the family, address Laura’s post-partum depression or related illness, or plaintiff’s general capability or particular capability in raising his sons.”

R. at 1:180-181.

Clark County and Stuart listed Brian and Lisa Callahan, among others, on their proposed witness list. R. at 1:82. Moreover, they listed the following Clark County employees as potential witnesses: Stuart; Peggy Johnson, Legal Assistant II; Lisa Gibson, Family Services Supervisor; and Lisa McKay, Family Services Manager. R. at 1:83.

Clark County and Stuart's description of potential testimony is as follows: "As Clark County employees the preceding witnesses are expected to testify to the details of the incident that is the subject of this litigation." R. at 1:184.

The parties listed various documents provided. Steve's list included DFS hearing exhibits, and Clark County and Stuart's list of documents included the following: Request for Appeal, dated February 12, 2015; Receipt of Request for Appeal; Finding of Substantiation with Attachment; Request for Fair Hearing; and Notification of Fair Hearing. R. at 1:173-176.

The parties formulated a discovery plan. R. at 1:184-186. Moreover, the parties agreed to close discovery on April 1, 2019, and file dispositive motions on or before May 1, 2019. R. at 1:187.

On May 14, 2018, a Scheduling Order was entered confirming the dates agreed upon by the parties in the JCCR. R. at 1:192-194.

On May 17, 2018, the matter was set to be tried by a jury on a five-week stack to begin on July 1, 2019, at 9:30 a.m., with a Calendar Call on June 18, 2019, at 8:00 a.m. R. at 1:195-196.

On June 21, 2018, a Substitution of Attorney was filed substituting Felicia Galati, Esq. as attorney of record for Clark County and Stuart in place and stead of Steve Wolfson, Esq. R. at 1:197-200.

On July 24, 2018, Clark County and Stuart filed a Motion to Dismiss pursuant to NRCP 12(b)(5) and NRS 432B.317, for Plaintiff's failure to exhaust his administrative remedies. R. at 1:201. Defendants argued that the action should be dismissed because Steve had an appeal pending before Clark County Department of Family Services regarding the Agency's decision dated August 27, 2015 upholding the substantiated finding of physical injury neglect – 14N plausible risk of physical injury against Steve as to the minor children. R. at 1:202.

Moreover, they argued that the motion should be treated as a motion for summary judgment. R. at 1:205-206. In support of said motion, Clark County and Stuart attached an Affidavit of Authentication signed by Paula Hammack, Assistant Director of DFS. R. at 1:209-2011. This affidavit is not made on personal knowledge and there is no statement that the affiant is competent to testify on the matters stated therein. *Id.*

On August 7, 2018, Steve opposed the Motion to Dismiss. R. at 1:225-240, 2:241-246. He argued that a 42 U.S.C. § 1983 civil rights claim does not require exhaustion of administrative remedies; intentional tort claims made against government entities and government employees cannot require pre-conditions to filing; the Motion to Dismiss relied extensively on extrinsic "evidence" whose authenticity is unestablished and highly disputed as official public records and other

wise; substantial additional discovery remained to be done and there was a genuine dispute of material fact on the “facts” asserted. R. at 1:226.

On August 21, 2018, Defendants filed a Reply to the Opposition, reiterating “the only issue before this Court is whether Plaintiff has failed to exhaust his administrative remedies.” R. at 2:248.

Defendants alleged that their Motion had adequate support based on the Affidavit of Paula Hammack. R. at 2:253. In addition, they alleged that Ms. Hammack is the Assistant Director of DFS and, as such, she has knowledge of what is going on at DFS, can attest to any pending matters at DFS, and can authenticate any related documents, including regarding Steve’s pending Fair Hearing. *Id.* However, the Reply was supported by an Affidavit of Devon Butts, a Family Services Supervisor in the Legal Unity of DFS. R. at 2:263-265. Ms. Butts’ affidavit is not made on personal knowledge and there is no statement that she is competent to testify on matters stated. *Id.*

Hearing on Defendants’ Motion to Dismiss

On August 28, 2020, the Court conducted a hearing on the Motion to Dismiss, with Attorneys Peter Angulo and Maria Parlade appearing for the defendants and Steve appearing in proper person. R. at 3:492.

The court was not aware that Steve's Complaint pleaded a cause of action pursuant to 42 U.S.C. § 1983, and Mr. Angulo argued a procedural due process issue that had never been raised in the defendants' pleadings:

"MR. ANGULO: ...The position of the motion to dismiss is that through the evidence that's been established, there's been a failure to exhaust administrative remedies at this point. There's a pending Fair Hearing on the finding of physical abuse, neglect –

THE COURT: That's by DFS?

MR. ANGULO: And so the case law that's been given to the Court suggests that in the – when there's an administrative procedure like that, that has to – that procedure has to be completed before you can bring a lawsuit, you know, before it can come before the Court. Mr. Eggleston argued that 1983 part of his claim doesn't require an exhaustion of administrative remedies. **However, in reading the Complaint**, it is a procedural due process violation that's being sought. And the Supreme Court has indicated that when -- what's at issue with the constitutional violation is the Fourteenth Amendment procedural due process claim, then you have to go through the procedure before you have – before the claim has its fulfillment. And so therefore in this case until he finishes the Fair Hearing...Until that process is gone through and adjudicated findings made, his claim is unripe to be brought, both for the federal claim and for the state law claims...

THE COURT: What do you mean federal claim? I'm not doing any federal anything.

MR. ANGULO: -- the first Amended Complaint has a constitutional 1983 section to –

THE COURT: So – oh, so you're not telling me he's filed in the federal court?

MR. ANGULO: No, I'm telling you that that's before the court in his Complaint.

THE COURT: Okay. I thought there were two suits going here."

R. at 3:432-495 (emphasis added).

In response to this, Steve argued that the motion was untimely and pointed out that Clark County and Stuart filed a motion to dismiss in response to his original complaint, which the court partly granted. R. at 3:496-497. He then filed an Amended Complaint to which the District Attorney's Office, representing the County, filed an Answer. Steve argued that the District Attorney's Office did not raise this issue at that time and for that reason alone the Court should deny the motion. *Id.*

Additionally, Steve argued that the controlling case law provides there is no exhaustion of state law remedies required for a 42 U.S.C. § 1983 action. *Id.*

Upon the court's inquiry, Steve argued that the Fair Hearing cannot provide him any remedy at all, for example, damages cannot be awarded nor can the custody of the minor children be affected. R. at 3:496-497.

Upon the court's inquiry, discussion ensued regarding jurisdiction in Nevada. R. at 3:499-501.

Upon the court's inquiry, Steve and Mr. Angulo informed the court that Stuart works for the State of Nevada and she is one of the Defendants in the case. R. at 501-502.

Once jurisdiction and Stuart's identity were clarified for the court, Steve continued arguing that the Fair Hearing would not impact anything, specifically as

to whether his substantive due process rights had been violated. R. at 3:502. He also argued that the defendants had delayed discovery then suddenly filed a motion when they knew that the Fair Hearing is not relevant to this case. *Id.*

The court inquired whether Steve must appear at the DFS hearing, to which he replied he does not have to and has not decided whether he will do so. *Id.* The court further inquired: “Well, if it doesn’t affect you, I guess you don’t have to. So really your only beef is 1983.” *Id.* Steve indicated he also has actions for defamation, intentional infliction of emotional stress, and conspiracy against Stuart and the Callahans. *Id.*

Steve further argued that Defendants did not meet their legal burden because the declarations they relied on were made by a person not listed on their NRCP 16.1 witness list or admitted witnesses list and who was not involved in the Fair Hearing letters. R. at 3:504-505.

Steve further argued that even if Clark County and Stuart’s motion had been properly pled as and were treated as a summary judgment motion, it would still be denied because the evidence the movants submitted did not satisfy their legal burden. R. at 3:508.

Mr. Angulo argued that the motion was timely because it can be filed at any time after the pleadings are closed. R. at 3:509. Moreover, Ms. Hammock, whose affidavit was attached to the Motion to Dismiss, was disclosed by Steve as a witness

in his NRCP 16.1 production in April 2018, so **“it’s not like there’s a surprise here.** This is his own witness. He’s identified her at least as a witness in this case.” *Id.* (emphasis added).

Furthermore, the Fair Hearing’s purpose is to see whether there was substantive evidence to support the finding of physical abuse and neglect which warranted removal of the children. R. at 3:510. Thus, the administrative hearing would render the defamation claim moot. *Id.*

The court became confused after Steve emphasized that he is pursuing his 42 U.S.C. 1983 claim as both a substantive and procedural due process claim, not exclusively as a procedural due process claim. R. at 3:512. Steve clarified that the procedure is that the defendants conspired to help other family members kidnap the children without keeping them in the system. *Id.* He further clarified that the Fair Hearing has no bearing on any of his claims because the defendants claim they never took custody of the children, therefore they never removed them from Steve. *Id.*

The court did not address Steve’s argument, instead ending the hearing by advising Steve:

“When attorneys¹ and judges get in trouble they don’t represent themselves because they’re too close to the argument...And they’ll argue things that emotionally I think you’re probably right, but technically, I – I’m going to look at the pleadings and I’ll have a decision.” R. at 3:513.

///

¹ Steve has a law degree but is not an attorney licensed to practice law.

Dismissal and Reconsideration

The court issued its decision on September 7, 2018, at 8:00 a.m.: “The Court’s ruling is as set forth in the Order on Clark County and Georgia (sic) Stuart’s Motion to Dismiss filed on September 7, 2018.” R. at 4:823.

On September 7, 2018, at 4:22 p.m. the Court entered an Order on Clark County and Georgina Stuart’s Motion to Dismiss, which dismissed the entire action without prejudice until the Fair Hearing is concluded. R. at 2:331-337.

In reference to Steve’s argument that the motion was untimely, the order states:

“Although this Motion was brought initially under NRCP 12(b)(5), it is, in essence, an NRCP 12(c) motion. The difference between the two is simply one of timing. The standard of proof and consideration for ruling on the Motions are identical and, therefore, Plaintiff’s argument that this Motion is untimely is not well taken....”

R. at 2:335.

In reference to Steve’s request for additional time to conduct discovery, the order states that he failed to comply with NRCP 56(f) by not providing the appropriate affidavit. *Id.*

In reference to Steve’s argument regarding Ms. Hammack’s affidavit, the Order states “her identity has been known to Plaintiff since [April 2018] and there is no unfair or undue **surprise** in utilizing an affidavit from this witness....” R. at 2:336 (emphasis added).

The Court concluded that the litigation is not only premature, but that the Court believes there is a basis for administrative abstention under *Buford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Id.*

On September 10, 2018, a Notice of Entry of Order was filed. R. at 2:338-347.

On September 20, 2018, Steve filed a Motion to Reconsider said order arguing, among other things, that he was presenting new law and facts not previously considered by the court. R. at 2:357-408. Steve highlighted that the Appeal notice that accompanied the Substantiation Letter specifically states that if a finding of child abuse or neglect is reversed, all reference to the perpetrator's identity will be removed from the Central Registry; no other remedy was provided. R. at 2:363.

Additionally, Steve challenged the motion for summary judgment as it did not comply with FRCP 56. R. at 2:368.

On October 8, 2018, Clark County and Stuart opposed Steve's Motion. R. at 2:409-423. On August 21, 2020, Steve filed a Reply. R. at 2:247-330.

Hearing on Motion to Reconsider

On December 10, 2019, the court held a hearing on Steve's Motion to Reconsider, before the Honorable Cristina D. Silva, with Attorneys Felicia Galati and Peter Angulo appearing for Defendants and Steve appearing in proper person. 1 AA000012-32.

The court noted that it had reviewed the motion and the opposition. 1 AA000014. However, the court did not understand the issues, as she asked the parties confirm that Steve believes he was denied the right to a Fair Hearing. *Id.* While Ms. Galati attempted to clarify the issue, Steve ended up clarifying that the Fair Hearing is not the one that has to do with the separation of the children, which is his only basis in this action. 1 AA000014-16. He reiterated he was entitled by law to a hearing within seventy-two (72) hours of the children being taken by the state. 1 AA000016. Ms. Galati stated he was not entitled to that hearing because the children were not removed. 1 AA000017.

Once again, Steve told the court there is no administrative remedy here, but the court suggested examples such as revoking the guardianship consent. 1 AA000019. Steve clarified again that there should have been a hearing within seventy-two (72) hours of the children being removed absent emergency grounds to do so. *Id.*

Ms. Galati argued Steve filed this lawsuit to obtain discovery he would not have otherwise been entitled to under the Fair Hearing, but Steve denied that. 1 AA000020. Again, he reiterated that the Fair Hearing only prevents his name from being listed in the registry and since he does not know whether that happened, Steve asked: “So why would I sue on it?” *Id.*

The court began to lose track of the issues. 1 AA000020. Discussion ensued regarding the guardianship consent and the custody decree. 1 AA000020-23. The court assumed there was a change in circumstance that prompted removal of the children and Steve denied that. 1 AA000023. Ms. Galati clarified for the court that one has nothing to do with the other and offered to frame the issues the best she could. 1 AA000023.

After Ms. Galati summarized the relevant events, how the Callahans fit into this action, and Steve's administrative appeal and hearing continuances and laid out her argument on the motion to reconsider, the court replied: "Well, there was a remittitur issued in February in this case." 1 AA000024. Ms. Galati clarified that that was a premature appeal Steve filed in this case, not the administrative appeal at issue. Id. The court acknowledged that it understood. 1 AA000025. Further arguments ensued and the court took the matter under submission. 1 AA000025-29.

Steve inquired whether the court would address in its decision whether the Callahans should not have been dismissed, as they were not there and the order had dismissed his claims against them, yet the defendants' motion did not mention them. 1 AA000030-31. Before the court could answer Steve's question, Ms. Galati advised the court, as an officer of the court, that the Amended Complaint had been served beyond the 120 days. 1 AA000031-32. Steve argued that he had hired a process server to properly serve the Complaint and there was an affidavit on file. Moreover,

he noted that Clark County and Stuart had not raised this argument before, so the court could not address it. 1 AA000031.

On February 26, 2020, the court entered an order denying Steve's Motion for Reconsideration because he failed to meet his burden of establishing that the Order granting Defendants' Motion to Dismiss was clearly erroneous. R. at 4:792-799. The Notice of Entry of Order was filed the same day. R. at 4:800-810.

This appeal follows.

VIII. SUMMARY OF ARGUMENT

The exhaustion of administrative remedies doctrine does not generally apply in 42 U.S.C. § 1983 or intentional tort claims and should not be applied where there is no adequate remedy available through the administrator procedures. Even when a party files a § 1983 claim with a due process violation claim, he should not be required to exhaust administrative remedies if the administrative agency does not have jurisdiction over the due process claim or where the administrative forum is not the proper forum.

Under Nevada law, an individual may challenge child abuse and neglect findings to avoid being placed in the Central Registry, and judicial review is available if that individual requests a re-hearing. However, said agency does not have jurisdiction over due process claims and cannot compensate the individual for damages.

Here, Steve filed § 1983 and intentional tort claims, however the district court dismissed the claims because he had not participated in a Fair Hearing before the administrative agency. In so doing, the court failed to consider that 1) Clark County and Stuart's Motion to Dismiss was improper and 2) the Fair Hearing process does not provide an adequate remedy for Steve such that he should have to exhaust it prior to filing the instant case.

In addition, the court erred in dismissing claims against the Callahans and failed to set forth findings as to the dismissal of the claims against them. These defendants did not appear in the case or file a Motion to Dismiss, and the claims against them are unrelated to the Fair Hearing or the claims made against the other defendants.

Because the district court improperly applied the exhaustion of administrative remedies doctrine, granted a motion that was not properly filed, and dismissed claims against defendants who failed to appear, the district court's order should be reversed.

IX. ARGUMENT

A. STANDARD OF REVIEW

The Nevada Supreme Court reviews an order granting an NRCP 12(b)(5) motion to dismiss de novo.² The Court presumes that all alleged facts in the Complaint are true and draw all inferences in favor of the complainant.³ “Dismissing a complaint 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.’”⁴ All legal conclusions the district court reaches to dismiss a claim pursuant to NRCP 12(b)(5) are reviewed de novo.⁵

B. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY DISMISSING PLAINTIFF’S 42 U.S.C. § 1983 CIVIL RIGHTS CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES THROUGH THE “FAIR HEARING” PROCESS.

The district court’s order dismissing Steve’s § 1983 claims should be reversed because a party is not required to exhaust administrative remedies prior to filing a § 1983 claim. Moreover, even if parties are required to exhaust administrative remedies for certain types of claims, the “Fair Hearing” provided for by NRS 432B.317 does not provide an adequate remedy and therefore should not have been required to be completed in this case in order for Steve to pursue his §1983 claims.

1. Steve is not required to exhaust administrative remedies.

² *Benko v. Quality Loan Serv. Corp.*, 135 Nev. 483, 486, 454 P.3d 1263, 1266 (2019) (citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

The U.S. Supreme Court has long held that exhaustion of state judicial or administrative remedies is not required in most federal §1983 claims.⁶

In *Patsy v. Board of Regents of the State of Florida*, Petitioner Georgia Patsy sought declaratory and injunctive relief or, in the alternative, damages in an employment case claiming that Respondent Board of Regents rejected her for multiple employment positions solely on the basis of her race and sex.⁷ The U.S. District Court granted the Board of Regents' Motion to Dismiss Patsy's claims, which alleged that Patsy had not exhausted the state administrative remedies available to her.⁸ The Supreme Court held that exhaustion of administrative remedies is not a prerequisite to a federal claim arising under § 1983.⁹ This has been the Supreme Court's position for nearly sixty (60) years.¹⁰ Indeed, the U.S. Supreme Court has not required the exhaustion of administrative *or* state judicial remedies for federal claims premised on § 1983 in recognition of the "paramount role Congress has assigned to the federal courts to protect constitutional rights." *Id.*¹¹

⁶ *Patsy v. Bd. of Regents of State of Fla.*, 102 S. Ct. 2557 (1982).

⁷ *Id.* at 496, 500.

⁸ *Id.* at 500.

⁹ *Id.*

¹⁰ *Id.* at 500 ("Beginning with *McNeese v. Board of Education*, 373 U.S. 668, 671–673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies.").

¹¹ *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452 (1974)).

Here, like the Petitioner in *Patsy* sought damages from the Florida Board of Regents, Steve filed his § 1983 claim against Clark County and Stuart seeking damages. Also similar to the U.S. District Court in *Patsy*, the district court here granted Clark County and Stuart’s second motion to dismiss Steve’s claims because Steve had not exhausted his administrative remedies, specifically the “Fair Hearing” provided for by NRS 432B.317 and the policy of the Division of Child and Family Services.

Pursuant to *Patsy*, Steve is not required to exhaust administrative remedies, nor is the district court permitted to requires that the Fair Hearing process be completed prior to considering his request for damages from Defendants. Accordingly, the court erred in dismissing Steve’s § 1983 claim on the basis that he had not exhausted the state administrative remedies available to him.

2. There is no “procedural carve-out” for § 1983 claims that requires administrative exhaustion.

The District Court’s dismissal of Steve’s § 1983 claims should be reversed and remanded because he was not required to exhaust his administrative remedies and there was no carve out for § 1983 claims.

Defendants argued before the district court that there is a general “carve-out” barring § 1983 procedural due process claims for failure to exhaust administrative remedies. Defendants failed to cite any legal authority supporting that contention. R.

at 3:494. Persuaded by Defendants’ baseless argument, the district court erroneously concluded that:

“[i]n the unique case of a Procedural Due Process claim, the litigant asserting a property or liberty interest violation without due process must first exhaust state remedies...”

R. at 2:334.

The district court relied on three cases: *Morgan v. Gonzalez*, 495 F. 3d 1048, 1090 n.2 (9th Cir. 2007); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004); and *Rathjen v. Litchfield*, 878 F.2d 836, 839-40 (5th Cir. 1989).

In *Morgan*, Petitioner Paul Durham-Morgan contended that the government violated his rights when it attempted to remove him from the U.S. for a felony conviction despite having earlier agreed not to deport him in exchange for his cooperation in a federal drug prosecution.¹² The government argued the court lacked jurisdiction over Morgan’s due process and equitable estoppel claims because he had not raised the claims before the immigration judge or the Board of Immigration Appeals, and therefore the claim was not exhausted.¹³

The Ninth Circuit Court of Appeals noted that Morgan had not raised the issues before the administrative agencies for good reason: the Board of Immigration Appeals “has no power to grant relief on estoppel or substantive due process claims,

¹² *Morgan*, at 1091.

¹³ *Id.*, at 1090.

and accordingly, we have never required petitioners to exhaust claims of this nature before the agency.”¹⁴

Similarly, here, the administrative agency that processes Fair Hearings – the Department of Child and Family Services – does not have jurisdiction to decide due process claims and could not grant relief related to such claims. Thus, the Ninth Circuit’s decision in *Morgan v. Gonzales* supports Steve’s position that there is no administrative exhaustion requirement for § 1983 claims arising from due process violations.

The facts in *Barron* (a Ninth Circuit decision predating *Morgan*) are inapposite to the facts in the instant case. The petitioners in *Barron*, two Mexican natives who had immigrated to the U.S. illegally, alleged that the government violated their due process rights when it held a removal hearing without their counsel’s presence. *Barron* at 676. Notably, many of the cases and statutes referenced in this case are superseded or overruled. More importantly, the Court in *Barron* relied extensively on the congressionally mandated exhaustion requirement in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

¹⁴ *Id.* at 1089-1090 (citing *Padilla–Padilla v. Gonzales*, 463 F.3d 972, 977 (9th Cir.2006); *Wang v. Reno*, 81 F.3d 808, 814 (9th Cir.1996)).

(“IIRIRA”). *Id.* at 677. The Court held that “[g]enerally, ‘[w]here Congress specifically mandates’ it, exhaustion is not merely appropriate, but ‘required.’”¹⁵

In *Barron*, the Ninth Circuit reasoned that the petitioners’ due process claims were procedural in nature, therefore the petitioners were required to have raised the issue before the INS or BIA. Because the due process claim involved a “mere procedural error” which was never presented to the appropriate administrative agencies, the court found that it lacked subject matter jurisdiction over the error. *Id.* at 678.

Here, unlike Petitioners in *Barron*, Steve alleged *substantive* due process violations. R. at 3:502. Moreover, this case is not an appeal from an administrative decision, and the administrative forum at issue would not be an appropriate one to address a due process violation. The administrative forum here – the Department of Child and Family Services – provides only one remedy pursuant to NRS 432B.317(5)(b):

“If the hearing officer in a hearing that is held pursuant to this section: [r]ejects the substantiation of the report, the agency which provides child welfare services shall not place the person’s name in the Central Registry pursuant to NRS 432B.310.”

Accordingly, even if the fair hearing were held and Steve prevailed at the hearing, his only remedy would be to not have his name placed on the Central

¹⁵ *Barron*, 358 F.3d at 677 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992)).

Registry. This is in stark contrast to the administrative agencies in *Barron*, the INS and BIA, who had the authority to remove or halt removal of the immigrant Petitioners. The *Barron* facts are not analogous to the facts here, and the Court in *Barron* relied on a federal statute requiring administrative exhaustion to reach its decision, therefore the same standard cannot apply in the present case. For this reason, the district court should not have relied on this case.

The third case the district court relied upon is *Rathjen*.¹⁶ In *Rathjen*, a city employee, Dr. Rathjen, sued the City of Houston for violating her due process rights after she was demoted and received a 10 percent pay decrease without a hearing. The Fifth Circuit Court of Appeals in *Rathjen* denied Rathjen's appeal, finding that Rathjen herself admitted she could have pursued a formal grievance against the City of Houston through the City Civil Service Commission. The Court reasoned that, because Dr. Rathjen had a readily accessible administrative remedy as soon as she believed that she was wrongfully demoted, her appeal fell within the purview of *Hudson v. Palmer*: "The evident purpose behind the City's employee grievance procedures is to facilitate prompt remedies for perceived injustices or unfairness."¹⁷ To the extent that Rathjen's supervisor had engaged in "random, unauthorized acts"

¹⁶ *Rathjen*, 878 F.2d at 839- 40.

¹⁷ *Id.* at 840 (citing *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

contrary to city personnel guidelines, Dr. Rathjen had an adequate post-deprivation remedy. *Id.* at 839-40 (emphasis added).

The Fifth Circuit's holding in *Rathjen* supports Steve's position because the district court's order concedes that the first hearing offered to Plaintiff was August 1, 2017, twenty (20) months after his sons were abducted with County complicity. Thus, the Fair Hearing offered to him hardly provided a "prompt remedy," even if the Fair Hearing Officer could award custody and damages, which it cannot. *Patsy* is the controlling case here. Therefore, the "procedural carve-out" argument provides no support for the district court's Order, and Steve was not required to exhaust administrative remedies before initiating this appeal.

3. Steve did not request judicial review under 432B.317

The District Court erroneously required exhaustion of the 432B.317 Fair Hearing remedy, despite the fact that Steve's claims did not include the remedies available after a Fair Hearing decision.

NRS 432B.317(7) provides that "[t]he decision of a hearing officer that is held pursuant to this section is a final decision for the purposes of judicial review."

The District Court found that NRS 432B.317 requires the Fair Hearing process be completed prior to any judicial review. R. at 2:333. However, Steve's claims in the District Court case do not constitute judicial review of a Fair Hearing decision under NRS 432B.317. Steve's District Court claims arise from violations

pursuant to Section 1983 of the U.S. Code and intentional tort claims, not judicial review of an administrative decision under NRS 432B.317.

Judicial review as specified in NRS 233B.130 is intended for re-hearing purposes. Had Steve skipped the Fair Hearing and filed a Petition under NRS 233B.130, then the defendants' motion would have been proper because the Fair Hearing had not concluded, but that is not the case here. Therefore, the court erred in finding that NRS 432B.317 requires exhaustion of state administrative remedies for the purposes of a § 1983 claim.

4. The Motion to Dismiss was improper because it failed to comply with Rule 56.

Defendants filed a Motion to Dismiss pursuant to NRCP 12(b)(5), however, the district court treated it as a Motion for Summary Judgment pursuant to NRCP 12(c). R. at 2:335. While the court has discretion to treat a 12(b)(5) motion as a 12(c) motion, the motion must comply with NRCP 56.

The Motion to Dismiss relied on an affidavit of Ms. Hammack. This affidavit did not comply with NRCP 56 because it was not made on personal knowledge and there is no statement that the affiant is competent to testify on matters stated. R. at 1:209-2011.

NRCP 56(c)(4) states:

“An Affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out the facts that would be

admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.”

Defendants argue that Ms. Hammack has knowledge of what is going at DFS and can attest to any pending matters and can authenticate any related documents. R. at 2:253. However, Defendants did not submit an amended affidavit with the requisite declarations of the affiant’s personal knowledge and competency. Rather, they supported these allegations with the affidavit of Devon Butts. R. at 2:263-265. Ms. Butts’s affidavit was not made on personal knowledge and did not indicate that she is competent to testify on the matters stated therein. *Id.*

The court rejected Steve’s argument that Ms. Hammack’s affidavit cannot be utilized because she was not disclosed by Defendants and there is no unfair or undue surprise in utilizing her affidavit because he disclosed her as his witness. R. at 2:336. Indeed, Steve disclosed Ms. Hammack and many other witnesses, but the disclosure itself cannot alone satisfy the requirements in NRCP 56. Under the Rule, Ms. Hammack must declare she has personal knowledge and is competent to testify as to those specific facts in the underlying Motion. Ms. Hammack does not have personal knowledge as to the specific facts pled in the Motion and is not competent to testify to them in court merely by virtue of her being employed at DFS.

Moreover, Steve provided a generic, blanket description of witness testimony for all his witnesses, including Ms. Hammack. R. at 1:180-181. He did not assert that Ms. Hammack has personal knowledge of the specific facts she included in her

affidavit. Because Ms. Hammack's affidavit was not based upon her personal knowledge and she did not declare that she is competent to testify on the matters discussed in Defendants' motion, the motion did not comply with NRCP 56. As such, the District Court's order granting Defendants' Motion to Dismiss should be reversed.

C. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S STATE LAW TORT CLAIMS AGAINST CLARK COUNTY AND GEORGINA STUART FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES THROUGH THE "FAIR HEARING" PROCESS.

The district court erred in dismissing the state law tort claims against Clark County and Georgina Stuart based on the exhaustion of administrative remedies doctrine because exhaustion of administrative remedies is not a prerequisite to filing intentional tort cases.

Under the Nevada Administrative Procedure Act, party to an administrative proceeding who is aggrieved by a final decision in a contested case is entitled to judicial review of the decision.¹⁸ Generally, where appeals processes are provided within an agency, "only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute."¹⁹ However, "[a]ny preliminary, procedural or intermediate act or ruling by an agency in a

¹⁸ NRS 233B.130(1).

¹⁹ *Id.*

contested case is reviewable *if review of the final decision of the agency would not provide an adequate remedy.*”²⁰

NRS 432B.317 governs the so-called “Fair Hearing” process for CAPTA Registry reporting. Under NRS 432B.317, the Fair Hearing is only an appeal to challenge the child abuse/neglect substantiation. If after a Fair Hearing is held the hearing officer rejects the substantiation of the challenged report, “the agency which provides child welfare services shall not place the person’s name in the Central Registry....”²¹ Thus, the sole remedy available to an appellant in such a administrative process is to have the appellant’s name removed from the CAPTA Central Registry.

Steve filed claims for intentional infliction of emotional stress and conspiracy against Stuart, not only a 42 U.S.C. §1983 claim. R. at 3:504. The Fair Hearing process has nothing to do with the intentional torts alleged. The District Court dismissed these state law tort claims on the basis that they are predicated on the substantiated findings by DFS and therefore, they are premature. R. at 2:336. The Fair Hearing and the tort claims arise from the same chain of events, however they run parallel when it comes to the legal processes for addressing them. The Fair

²⁰ *Id.* (emphasis added).

²¹ NRS 432B.317(5)(b).

Hearing only offers one remedy: that the name of the party challenging a DFS determination be removed from the Central Registry. R. at 2:363.

The result of the Fair Hearing will not affect Steve's intentional tort claims.²² Therefore, the court erred in dismissing the tort claims against County and Stuart for Steve's failure to exhaust administrative remedies.

D. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S STATE LAW TORT CLAIMS AGAINST LISA AND BRIAN CALLAHAN, FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES THROUGH THE "FAIR HEARING" PROCESS.

The district court erred in dismissing Steve's state law tort claims against the Callahans because 1) a request for dismissal was not before the court, 2) the court failed to include findings in the final order of dismissal, and 3) the Fair Hearing would not provide Steve with a remedy against the Callahans.

1. The Callahans had not appeared or requested dismissal and the issue of dismissing the Callahans was not before the Court.

Pursuant to NRCP 41, an action may be dismissed in one of two ways. First, an action can be dismissed voluntarily by the Plaintiff if she notices dismissal of her Complaint before the opposing party answers or by the parties by way of

²² Defendants even contradicted themselves on this issue. First, they said the Fair Hearing would moot these claims because it would clarify whether the removal was warranted, but at another hearing said there was no removal. R. at 3:510, 1 AA000017.

stipulation.²³ The action can also be dismissed involuntarily upon motion by the defendant: “If the plaintiff fails to comply with these rules or a court order, a defendant may move to dismiss the action or any claim *against the defendant*.”²⁴ The rule does not provide defendants to an action involving multiple parties with the ability to move to dismiss other parties.

The court dismissed the claims against the Callahans, yet the Callahans did not even appear in the case, despite having been properly served. R. 2:331-337. At no point did the Callahans file a Motion to Dismiss, and the attorneys representing the other defendants to this case do not represent the Callahans and cannot move to dismiss the action on the Callahans’ behalf. 1 AA000030-32.

2. The District Court did not include any basis the dismissal of the claims against the Callahans and there is no appropriate basis

A defendant can move the court to dismiss an action “[i]f the plaintiff fails to comply with [the Rules of Civil Procedure] or a court order.”²⁵

It is unclear why the district court dismissed Steve’s tort claims against the Callahans because the court did not include findings in its order. This is presumably because the issues involving the Callahans were not briefed by anyone. The only basis for the dismissal here is the exhaustion of administrative remedies. R. at 2:337.

²³ NRCP 41(a).

²⁴ NRCP 41(b) (emphasis added).

²⁵ NRCP 41(b).

The dismissal of claims against the Callahans should be reversed and remanded because the District Court provided no basis for the dismissal and, as Steve has complied with the rules of procedure and the district court's orders, there is no appropriate basis for the dismissal.

3. The Fair Hearing process does not provide Steve any remedy against the Callahans

The only basis for dismissal of any Defendants cited by the District Court is the exhaustion of administrative remedies. This basis cannot apply to dismissal of any claim against the Callahans because a Fair Hearing provides Steve no remedy against the Callahans.

NRS 432B.317 governs the so-called "Fair Hearing" process for Child Abuse Prevention and Treatment Act (hereinafter "CAPTA") Registry reporting. Under NRS 432B.317, the Fair Hearing is only an appeal to challenge the child abuse/neglect substantiation made by a state agency. The Callahans are private parties, not employees of the state, therefore there is no administrative process Steve could have exhausted as to his claims against them. Moreover, the sole remedy in such an administrative process is to have Steve's name removed from the CAPTA Central Registry. Therefore, this could not possibly be a remedy available to him against the Callahans.

Plaintiff's alleged torts are unrelated to any plausible policy objective that might invoke an exception and certainly none have any application to the Callahan

defendants. Therefore, the district court's order dismissing tort claims against the Callahans should be reversed.

F. THE DISTRICT COURT ERRED IN DISMISSING PUNITIVE DAMAGES AS TO DEFENDANT, GEORGINA STUART.

The district court erred in dismissing punitive damages as to Stuart because Steve is entitled to punitive damages associated with his 42 U.S.C. § 1983 claim against her.

The court dismissed punitive damages as to Stuart in its Order entered July 31, 2017. R. at 1:73-78. Though this order is not independently appealable, it is subject to review upon an appeal from the final judgment. *Consolidated Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

Section 1983 civil rights claims are designed to compensate and deter constitutional violations by state and local government officials such as CPS agents. In *Burke v. Regalado*, the 10th Circuit Court of Appeals affirmed a jury award of \$10 million in compensatory damages against two individual sheriffs and \$250,000 against one in his individual supervisory capacity. 935 F.3d 960, 980, 1059 (10th Cir. 2019).

Burke is in line with the leading U.S. Supreme Court decision on the subject, *Smith v. Wade*, which held that punitive damages are available against individual defendants in Section 1983 actions. 461 U.S. 30, 103 S. Ct. 1625, 75 L.Ed.2d 632

(1983). *See also Basista v. Weir*, 340 F.2d 74 (1965) (even if no actual damages shown).

Accordingly, the district court erred in dismissing punitive damages against Stuart who, if Plaintiff's allegations are true, would certainly be subject to them under federal civil rights jurisprudence.

X. CONCLUSION

For these reasons, the district court's Orders filed September 7, 2018, and February 26, 2020, should be reversed and Appellant should be allowed to proceed with all claims against all Defendants in District Court.

DATED this 26th day of October, 2020.

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XI. CERTIFICATE OF COMPLIANCE

1. 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 Microsoft Word–Office 365 Business in font type Times New Roman size 14.

2. 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 is either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 10,508 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

☐ Does not exceed ____ pages.

3. 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

DATED this 26th day of October, 2020.

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XII. CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 26th day of October, 2020, I served a true and correct copy of this Appellant's Opening Brief as follows:

☒ by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

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