IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE EGGLESTON,

Appellant,

v.

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

Respondent.

Electronically Filed
Feb 09 2021 04:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 80838

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 JUDGE

APPELLANT'S REPLY BRIEF

Emily McFarling, Esq.
Nevada Bar Number 8567
Kimber Laux, Esq.
Nevada Bar Number 15263
McFarling Law Group
6230 W. Desert Inn Road, Las Vegas, NV 89146
Phone: (702) 565-4335; Fax: (702) 732-9385
eservice@mcfarlinglaw.com

Attorney for Appellant, Steve Eggleston

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III. STATEMENT OF THE FACTS

A complete statement of the facts relevant to this case is contained in Appellant's Opening Brief. The relevant facts pleaded by Appellant in his Opening Brief are apparently not in dispute.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Nevada Supreme Court reviews an order granting an NRCP 12(b)(5) motion to dismiss de novo. The standard of review applicable to this appeal is not in dispute.

B. THERE IS NO SEPARATE ARGUMENT TO APPEAL THE ORDER DENYING RECONSIDERATION

Respondents argue that because there was not a separate argument relating to the denial of the motion to reconsider, the appeal of that order cannot be considered. The arguments for reversal of the underlying orders and the denial of the reconsideration of those underlying orders are the same. As such, they did not need to be separately addressed in the opening brief and Appellant has not waived the appeal of the order denying reconsideration.

To raise an issue on appeal, a litigant must have properly preserved the issue in the district court[1].

[1] Peke Res., Inc. v. Fifth Jud. Dist. Ct., 113 Nev. 1062, 1068 n.5, 944 P.2d 843, 848 n.5 (1997).

One purpose of a motion to reconsider is to ensure that all issues are preserved for appeal. In this case the moving papers for the motion to reconsider sufficiently preserved all issues in this appeal. There is no separate issue in the decision on the motion to reconsider. As such, no issues relating to the motion to reconsider or decision thereon were waived by not being separately addressed in the opening brief.

C. 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 U.S. Supreme Court held in 1963 that exhaustion is not a prerequisite to an action under § 1983, a position from which the Court has not deviated since.[2]

Respondent makes several arguments supporting an exhaustion requirement for appeals of agency determinations and goes to great lengths to describe the process for judicial review, but in so doing, Respondent ignores the simple fact that this is not an appeal of an agency determination. Appellant sued in the district court under Section 1983 of Title 42 of the U.S. Code for the state's deprivation of his civil rights.

Respondent argues that Appellant's claims must fail under *Patsy v. Board of Regents* because *Patsy* involved only § 1983 claims, where the Appellant here pled and appeals both state and federal claims. This argument is unsupported by any legal

[2] Patsy v. Bd. of Regents, 457 U.S. 496, 500-01, 102 S. Ct. 2557, 2560 (1982).

authority in Respondent's Answering Brief and is wholly unpersuasive, as Appellant only relies on *Patsy* with respect to the dismissal of his *federal* § 1983 claim. Appellant does not ask this Court to apply the Supreme Court's holding in *Patsy* regarding exhaustion to his state claims. Nothing in *Patsy* suggests that the Supreme Court would have ruled differently if the Appellant had appealed state claims as well.

Next, Respondent argues that Appellant ignores "well-established" exceptions to *Patsy* in his Opening Brief. In support of this argument, Respondent cites to *Zinermon v. Burch*, a 1990 decision in which the U.S. Supreme Court held that where post-deprivation remedies are available, pre-deprivation procedures are not always required to be provided to an individual whose right to life, liberty, and property was violated by the state.[3]

In *Zinermon*, the respondent sued a state hospital and several members of its staff under § 1983, alleging the State of Florida had deprived him of his right to liberty without due process of law by admitting him to the hospital as a "voluntary" mental patient when he was incompetent to consent to his admission there.[4] The appeal, initiated by the Defendants in that case, focused on whether the state could escape liability under § 1983 where the deprivation was random and unauthorized,

[3] Zinermon v. Burch, 494 U.S. 113, 114, 110 S. Ct. 975, 977 (1990).
[4] Zinermon v. Burch, 494 U.S. 113, 114-15, 110 S. Ct. 975, 977 (1990).

and whether the state was required to provide pre-deprivation process when Respondent had post-deprivation remedies available to him in tort. The Supreme Court held that post-deprivation remedies did not suffice to protect the respondent's right to liberty because the deprivation was predictable, pre-deprivation process was possible, and the deprivation was not random or unauthorized.[5]

Here, Respondent misconstrues the basis of Appellant's argument on appeal. Appellant does not argue that the State of Nevada should have provided him with an administrative hearing prior to its removal of his children. Rather, he argues that the process provided by the state – no matter whether the "fair hearing" is held prior to or after the deprivation – is inadequate to protect his right to parent his children.

In fact, the Court in *Zinermon* did not even address exhaustion, except to say that overlapping state remedies "are generally irrelevant to the question of the existence of a cause of action under 42 USCS 1983, since the federal remedy provided by 1983 is supplementary to the state remedy."[6] The Court concluded therefore, that a plaintiff may bring a § 1983 action for an unlawful search and seizure, for example, despite the fact that the search and seizure violated the state's constitution or statutes, and despite the fact that there are post-deprivation, common-law remedies for trespass and conversion.[7] As such, a party is not even required to

[5] *Id.*
[6] *Id.* at 150.
[7] *Id.*

pursue state legal remedies, let alone exhaust state administrative procedures, before he may allege a violation under § 1983 of his Fourteenth Amendment right to due process.

Here, Appellant's argument is not that he should have been offered pre-deprivation due process. Rather, Appellant argues is that the process offered by the State of Nevada – a "fair hearing" under NRS 432B, the only possible remedy from which is removal of the deprived party from a Central Registry – is inadequate to protect his constitutional right to raise his children. The Supreme Court in *Zinermon* noted expressly that the broader questions of what procedural safeguards are required by the Due Process Clause (there, in the context of an admission to a mental hospital), and whether the state's statutes met these constitutional requirements were not presented. Accordingly, *Zinermon* does not address Appellant's argument that the state's processes are inadequate, nor does Respondent's Answering Brief.

Next, Respondent argues that Appellant's claims are not ripe or justiciable because he did not participate in the "fair hearing" offered to him, therefore there was no final decision to appeal. Appellant is not appealing the fair hearing decision in this case. Respondent further touts the public policy behind the exhaustion doctrine, urging that the exhaustion requirement allows a state agency to correct its mistakes, promotes efficiency, conserves judicial resources, and allows agency to make a complete factual record before judicial review. However, even if this case

did concern Appellant's petition for judicial review and not a federal § 1983 claim, each of these arguments ignores the legal authority cited in Respondent's own Brief providing definitively that a party is not required to bring claims before an administrative board that the board could not possibly have resolved.[8] The administrative board could not have resolved any of the issues in this case. And this case does not ask to resolve the issue pending for administrative review – removal of the substantiation from the registry.

Respondent next argues under *Benson v. State Engineer* that a proceeding is not futile merely because the relief offered is not preferable or ideal. The Appellant in *Benson* sought redress for the state's cancellation of the water appropriation permit she had inherited from her parents along with their farm.[9] After she learned that the best outcome from an administrative review would be the State Engineer's rescinding the cancellation and assigning to her permit an appropriation date of 2013, the Appellant in *Benson* filed a Petition for Judicial Review under Nevada law, alleging that the permit would be useless to obtain water for her farm. The Nevada Supreme Court held in *Benson* that a petitioner seeking judicial review of

[8] Benson v. State Eng'r, 131 Nev. 772, 777, 358 P.3d 221, 225 (2015) ("[W]hen the facts of a particular case prove that [a state] agency is statutorily precluded from granting a party any relief at all, administrative proceedings are futile.").
[9] Benson v. State Eng'r, 131 Nev. 772, 774, 358 P.3d 221, 222-23 (2015).

an administrative decision must exhaust the administrative review process available unless she can show that the review process would provide "no relief at all." [10]

First, this argument again ignores the U.S. Supreme Court's holding that exhaustion of administrative or state remedies is not a prerequisite for a civil rights claim brought pursuant to § 1983. It further mischaracterizes Appellant's claim as a request for judicial review of a state agency determination when in fact Appellant alleges a due process violation under federal law. Therefore, *Benson* does not apply to Appellant's § 1983 claim.

Second, again, the best possible outcome for Appellant under NRS 432B.317 is that the hearing officer rejects the substantiation of the report and "the agency which provides child welfare services shall not place the person's name in the Central Registry."[11] There is no decision by the hearing officer that would reunite Appellant with his children after the state took them from him and allowed a maternal relative to obtain a temporary guardianship and remove the children from the State. The conduct that Appellant alleges violated his constitutional rights is not simply the decision of the Department of Family Services to substantiate the finding of abuse/neglect against him, as Respondent suggests; rather, the conduct violating his right to parent his children was that of Ms. Stuart who, acting in her role as a

[10] *Id.* at 225.
[11] NRS 432B.317.

state agent, removed Appellant's children from his home and caused him to sign guardianship over to a maternal relative under coercion and duress.

In sum, Respondent mischaracterizes Appellant's underlying claims as a petition for judicial review, therefore none of Respondent's legal arguments apply to the issues here. Respondent attempts to analogize several Nevada Supreme Court cases regarding the exhaustion doctrine, administrative procedure, and petitions for judicial review with the facts of this case. However, as set forth in detail in his Opening Brief, Respondent's legal issues – civil torts and the state's violation of his due process rights pursuant to § 1983 – are separate and distinct from a petition for judicial review of an administrative decision, therefore he was not required to exhaust administrative remedies prior to filing suit.

D. 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.

Respondent argues inexplicably that Appellant failed to list his tort claims in his Opening Brief. A plain reading of his Opening Brief indicates that he sued the state and Ms. Stuart in tort alleging intentional infliction of emotional distress and defamation, libel, and slander.[12] All of those are intentional tort claims and are the claims referred to as Plaintiff's state law tort claims in Appellant's opening brief.

[12] Appellant's Opening Brief 14-16, 43.

Respondent alleges that a person is required to exhaust administrative remedies prior to bringing tort claims in district court. The cases on point regarding the exhaustion doctrine in Nevada only require "complete exhaustion" where the statute at issue so requires. For example, in *Lopez v. Nev. Dep't of Corr.*, the Nevada Supreme Court held that an inmate was required to exhaust the Department of Corrections' inmate grievance procedure prior to filing his tort action alleging negligence against the State.[13] This is so not merely because of the jurisprudence of administrative law and the exhaustion doctrine, but because NRS 41.0322 governing actions by persons in custody of the NDOC expressly requires exhaustion.[14]

Similarly, in *Palmer v. State*, the Nevada Supreme Court held that exhaustion is generally required in employment discrimination cases because exhaustion and administrative remedies were provided explicitly in NRS 613.420 (now provided under NRS 613.405).[15]

Unlike the inmate in *Lopez* and the employee in *Palmer*, does not have an avenue for reprieve under NRS 432B.317, because his tort claims center on the

[13] Lopez v. Nev. Dep't of Corr., No. 54174, 2011 Nev. Unpub. LEXIS 1264, at *4-5 (Feb. 3, 2011).
[14] *Id.* ("Exhaustion 'is particularly important in relation to **state corrections systems** because it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'…As such, construing NRS 41.0322 to require complete exhaustion of administrative remedies fits within the general scheme of our well-established administrative jurisprudence, whereas Lopez's interpretation **would turn NRS 41.0322 'into a largely useless appendage**.'")(Internal citations omitted); NRS 41.0322(1) ("A person who is or was in the custody of the Department of Corrections may not proceed with any action against the Department or any of its agents, former officers, employees or contractors to recover compensation for the loss of the person's personal property, property damage, personal injuries or any other claim arising out of a tort pursuant to NRS 41.031 unless the person has exhausted the person's administrative remedies provided by NRS 209.243….").
[15] Palmer v. State, 106 Nev. 151, 153-54, 787 P.2d 803, 805 (1990).

state's removal of his children from his care and the state's coercing him into signing guardianship over to a nonparent under threat that he would never see his children again if he did not. He does not claim tortious conduct for the state's substantiation of maltreatment/abuse/neglect. NRS 432B.317 provides administrative processes for persons pursuing "an administrative appeal of the substantiation of the report and the agency's intention to place the person's name in the Central Registry."[16] The statute does not provide an administrative appeal process for the removal of Appellant's children from his care and from the state, therefore Appellant is not required to 1) exhaust administrative processes that would result in reversal of the substantiation or removal of his name from the Central Registry or 2) show that these administrative processes would be futile.

E. 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.

Respondents Clark County and Georgina Stuart do not dispute the facts and arguments against the Callahans. The Callahans did not file an answering brief by the extended deadline.

[16] NRS 432B.317(1).

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

The U.S. Supreme Court has held that neither states nor their officials acting in their official capacities are persons under 42 U.S.C.S. § 1983 and therefore neither may be sued in state courts under the federal civil rights statutes.[17] However, the Nevada Supreme Court held in *Northern Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.* that claims – including for punitive relief – are available against officials acting in an individual capacity.[18] The Tenth Circuit Court of Appeals held in *Burke vs. Regalado* that an individual can be sued in his municipal/official capacity as well as in his individual capacity.[19]

Moreover, NRS 41.032 provides qualified immunity to state agencies in the performance of discretionary acts, however, discretionary-act immunity is waived on appeal unless it is affirmatively pleaded, tried by consent, or otherwise litigated in a matter in district court.[20]

Respondent alleges that Appellant failed to list Ms. Stuart as a Defendant in her individual capacity, therefore Respondent Stuart is not subject to punitive damages. However, the Nevada Supreme Court in *N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.* held that "[t]he style of the caption of a Complaint is

[17] N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys., 107 Nev. 108, 110, 807 P.2d 728, 729 (1991) (citing Will v. Michigan Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311-12 (1989)).
[18] *Id.* at 732.
[19] *See generally*, Burke v. Regalado, 935 F.3d 960 (10th Cir. 2019).
[20] City of Boulder City v. Boulder Excavating, Inc., 124 Nev. 749, 754-55, 191 P.3d 1175, 1178 (2008).

not determinative as to whether a state official has been sued in his or her official or individual capacity," and the court should look to the substance of the allegations to determine if the alleged conduct was within the scope of the official's capacities.[21]

Indeed, in *Scheuer v. Rhodes*, the U.S. Supreme Court reversed the district court's dismissal of complaints alleging § 1983 violations against state officials for the death of students killed at Kent State University after carefully scrutinizing the language of the complaints and concluding that "the allegations contained therein described acts by the defendants that were either outside the scope of their authority or engaged in 'in an arbitrary manner, grossly abusing the lawful powers of office.'"[22] *Harlow v. Fitzgerald,* a U.S. Supreme Court decision overruling *Scheuer* in part, makes qualified immunity available only to officials whose conduct conforms to a standard of "objective legal reasonableness."

Here, like in *Scheuer*, Appellant has alleged sufficient facts to show that Ms. Stuart should be held liable in an individual capacity for her removal of Appellant's children from his home and for coercing him into signing over guardianship to a nonparent under threat that he would never see his children again. That he did not use the words "in her individual capacity" in the caption of his First Amended Complaint is not dispositive under *N. Nev. Ass'n of Injured Workers v. Nev. State*

[21] N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys., 107 Nev. 108, 110, 807 P.2d 728, 729, n. 13 (1991).
[22] Scheuer v. Rhodes, 416 U.S. 232, 235, 94 S. Ct. 1683, 1686 (1974) (overruled on other grounds).

Indus. Ins. Sys. Moreover, Ms. Stuart cannot claim qualified immunity, as her conduct did not conform to a standard of objective legal reasonableness when she led Appellant to believe his family was to participate in a pilot program for families in need and was instead offered the options of signing guardianship over to a nonparent or never see his children again.

Accordingly, Ms. Stuart is liable under the relevant Nevada law for punitive damages, and Appellants claim for the same should not have been dismissed.

V. CONCLUSION

For these reasons, the District Court's Orders filed September 7, 2018 and February 6, 2020 should be reversed and Appellant should be allowed to proceed with all claims against Defendants in District Court.

DATED this 9th day of February, 2021.

MCFARLING LAW GROUP

/s/Emily McFarling

Emily McFarling, Esq.
Nevada Bar Number 8567
Kimber Laux, Esq.
Nevada Bar Number 15263
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
Attorneys for Appellant,
Steve Eggleston

VI. 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 4,015 words; or

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

☒ Does not exceed 40 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 9th day of February, 2021.

MCFARLING LAW GROUP

/s/Emily McFarling

Emily McFarling, Esq.
Nevada Bar Number 8567
Kimber Laux, Esq.
Nevada Bar Number 15263
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
Attorneys for Appellant,
Steve Eggleston

VII. CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 9th day of February, 2021, I served a true and correct copy of this Appellant's Reply Brief as follows:

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

Brian Callahan
300 Ashley Dr.
New York, IL 60451
Respondent in Proper Person

Lisa Callahan
300 Ashley Dr.
New York, IL 60451
Respondent in Proper Person

☒ via the Supreme Court's electronic filing and service system (eFlex):

OLSON CANNON GORMLEY &
STOBERSKI
Felicia Galati, Esq.
Attorneys for Respondents,
Georgina Stuart and Clark County

/s/Alex Aguilar
Alex Aguilar