

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ANTHONY JOSEPH HARRIS,

Appellant,

v.

STATE OF NEVADA, et al.,

Respondents.

On Appeal from the Eighth Judicial District Court of the State of
Nevada in and for the County of Clark
No. A-19-805689-C

RESPONDENTS' ANSWERING BRIEF

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I. STATEMENT OF JURISDICTION

Appellant Anthony Joseph Harris (Harris), an inmate in the custody of the Nevada Department of Corrections, filed suit in Nevada’s Eighth Judicial District Court (District Court) against twenty-two Nevada state public officials and employees, including several past and current elected officials. 1 ROA 6–26.¹ Harris indicated that his suit was intended to vindicate a multitude of statutory, constitutional, and common law rights, including rights guaranteed by the Eighth Amendment to the U.S. Constitution. *Id.* Harris’ complaint is reasonably construed as invoking 42 U.S.C. § 1983. Harris’ claims under § 1983 are the only claims at issue in this appeal. Br. at 2–3.²

The District Court had concurrent jurisdiction with that of the federal courts to address Harris’ claims under section 1983. *See Felder v. Casey*, 487 U.S. 131, 139 (1988). The District Court correctly dismissed, on jurisdictional grounds, Harris’ claims against the State and individual defendants named in their official capacities. *See Alden v. Maine*, 527 U.S. 706, 733 (1999); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 66–70 (1989). Those claims were dismissed on April

¹ Citations to the trial court record are to the Record on Appeal, filed December 1, 2020. Numerals to the left of the abbreviation “ROA” indicate the volume number, while numerals to the right of the abbreviation indicate the page number(s).

² Citations to Appellant’s Opening Brief, filed August 5, 2021, are abbreviated “Br.”.

27, 2020, and May 29, 2020, and they are not at issue in this appeal. 1 ROA 169–174; 2 ROA 268–275.

At issue here are Harris’ claims against the defendants whom he named in their individual capacities, other than the past and current elected officials. As to Harris’ claims against individual defendants other than past and current elected officials, the District Court dismissed those claims with prejudice, one on substantive grounds and the others on procedural grounds. 2 ROA 268–275; 3 ROA 626–633. Having dismissed all claims with prejudice, the District Court rendered a final decision that is subject to appellate review pursuant to article 6, § 4 of the Nevada Constitution, and Rule 3A(b)(1) of the Nevada Rules of Appellate Procedure (NRAP).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it raises as a principal issue a question of first impression involving the U.S. Constitution, *see* NRAP 17(11), and it raises as a principal issue a question of statewide public importance, *see* NRAP 17(12). More specifically, it raises a question whether an inmate’s conclusory allegations of misconduct by prison officials suffice to state a claim for an alleged constitutional injury when those allegations make no discernable connection between the alleged constitutional injury and the supposed misconduct of named individual defendants.

Harris' complaint tests the boundaries of Nevada notice pleading standards as set forth at Rule 8 of the Nevada Rules of Civil Procedure (NRCP). As inmate civil rights litigation becomes increasingly prevalent in Nevada's court system, it becomes ever more important to define these boundaries with a degree of objective precision, much like the federal courts have defined the boundaries of Rule 8 of the Federal Rules of Civil Procedure. *See, e.g., Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Here, the question is how to apply NRCP 8 in the context of a claim that requires the plaintiff to plead misconduct that meets the "deliberate indifference" standard. The federal courts regularly apply this standard in determining whether an inmate has been subjected to cruel and unusual punishment for lack of appropriate health care or medical treatment. In Nevada's courts, as in the federal judicial system, an inmate who alleges deliberate indifference to a serious medical need is required to plead enough facts to put prison administrators and others on notice of the reasons why they are named as defendants. Harris did not do that.

III. STATEMENT OF THE ISSUES

Issue No. 1

In his complaint, Harris alleges in conclusory terms that prison officials were deliberately indifferent to his serious medical needs, thus depriving him of rights guaranteed by the Eighth Amendment. To maintain a cause of action under 42

U.S.C. § 1983 for alleged violations of the Eighth Amendment, must Harris articulate a discernable connection between alleged medical neglect and identifiable conduct that suggests a breach by individual defendants of the deliberate indifference standard?

Issue No. 2

On appeal, Harris raises several procedural issues, arguing that the District Court abused its discretion when it: (1) dismissed Harris' complaint with prejudice and/or refused to grant Harris leave to amend his complaint; (2) refused to waive the dual service requirements of Rule 4.2(d)(2) of the Nevada Rules of Civil Procedure (NRCP); and/or (3) refused to extend the time for Harris to serve his complaint in the manner required by Rule 4(e) and Rule 4.2(d)(2). Was the District Court required to remedy Harris' procedural mistakes even though it would have been futile for Harris to proceed with his claims?

Issue No. 3

Harris has made no effort to identify Jane Doe defendants who allegedly had a direct connection to his supposed constitutional injury. Assuming there is merit to Harris' claims against Jane Doe defendants, has Harris waived the right to pursue those claims because he (i) failed to request an extension of time for serving Jane Doe defendants, (ii) failed to make a reasonable effort to identify them, and/or (iii) failed to raise the issue on appeal?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 4, 2019, Harris filed a civil rights complaint pursuant to 42 U.S.C. § 1983. 1 ROA 6–26. At different times and for different reasons, the District Court dismissed Harris’ claims as they pertained to different defendants. In his complaint, Harris named virtually every Nevada state official who might conceivably have had an abstract responsibility for the management or delivery of prison health care. *Id.* at 7–13. Named defendants included past and current governors and attorneys general, the current secretary of state, and numerous administrators within the Nevada Department of Corrections. *Ibid.*

On April 27, 2020, the District Court dismissed Harris’ claims against past and current governors and attorneys general, and the current secretary of state. *Id.* at 169–174. The District Court dismissed these elected officials from the case because they had no discernable connection to Harris’ alleged constitutional injury. *Ibid.* This specific decision by the District Court is not at issue on appeal. Br. at 2–3.

On May 29, 2020, the District Court dismissed Harris’ claims against Warden Brian Williams, Sr., an administrator with the Nevada Department of Corrections. 2 ROA at 268–74. The District Court dismissed Harris’ claims against Williams because Harris’ alleged constitutional injury had no discernable connection to Williams. On appeal, Harris alleges that Williams played a role in reviewing and/or

acting upon a grievance submitted by Harris sometime after he complained to unidentified prison nurses about his alleged chest pains. Br. at 11–17. In his complaint, Harris does not describe the contents of the grievance. 1 ROA at 19–20. On appeal, however, Harris argues that he filed a grievance “detailing his chest pains”—thus allegedly putting Williams on notice that Harris had suffered from chest pains at some point in the past. Br. at 11. The District Court’s decision to dismiss Williams from the case is the focal point of Harris’ appeal. Br. at 11–17.

On July 10, 2020, the District Court dismissed Harris’ complaint as it pertained to the remaining defendants. 3 ROA 636–642. The named defendants were an arbitrary collection of prison administrators and prison health care professionals. 1 ROA 9–13. The District Court dismissed Harris’ claims against these defendants because Harris did not serve them with his complaint prior to the expiration of the 120-period described in NRCP 4(e). Within that period, Harris caused copies of his complaint to be served upon the Office of the Attorney General, as required by NRCP 4.2(d)(2)(A), but Harris did not also serve the individual defendants as required by NRCP 4.2(d)(2)(B). Br. at 45.

Harris argues that the District Court should have waived the personal service requirement of NRCP 4.2(d)(2)(B) to the extent that service is time-limited by NRCP 4(e). Br. at 45–49. Alternatively, Harris argues that the District Court should have *sua sponte* extended the 120-day period within which Harris was required to

personally serve his complaint upon the individual defendants. Br. at 49–52. On appeal, Harris does not explain how these individual defendants are connected to Harris’ alleged constitutional injury. Presumably, they played a role in reviewing his grievances, or they were generally responsible for the delivery of prison health care. 1 ROA 9–13.

On appeal, Harris fails to explain why he made no effort to identify, through discovery or otherwise, the Jane Doe defendants to whom he allegedly complained of chest pains. According to Harris, he interacted with these “pill call nurses” during the last week of December 2018, on January 6, 2019, and on March 27, 2019. 1 ROA 18–19. Although these unidentified defendants have direct (albeit tenuous) connection to Harris’ alleged constitutional injury, Harris has opted to pursue other defendants with no discernable connection to Harris’ alleged constitutional injury. Br. at 23–52. The District Court was well within its discretion to rebuff Harris’ scattershot approach to this section 1983 litigation.

B. SUBSTANCE OF THE COMPLAINT

Harris alleges that he suffered from “extreme chest pains” on three occasions between late December of 2018 and March 27, 2019. 1 ROA 18–19. He claims that he reported his alleged chest pains to “pill call nurses” whom he is unable to identify. *Ibid.* Prison officials made an appointment for Harris to visit a cardiologist at the Nevada Heart and Vascular Center. *Id.* at 20. Due to an error concerning the date of

his appointment, Harris was not seen by a cardiologist when he was initially transported to the Nevada Heart of Vascular Center on June 14, 2019. *Ibid.* Harris was subsequently examined by a cardiologist on July 23, 2019, and October 4, 2019. *Id.* at 20–21.

Harris filed his complaint on November 4, 2019. *Id.* at 6. Harris’ complaint consists largely of legal boilerplate. *Id.* at 6–18. Harris does not describe the outcome of his visits to the cardiologist in July and October of 2019. Other than his alleged chest pains, Harris does not indicate that he suffered or continues to suffer from symptoms of cardiac distress. For example, Harris does not allege that he suffers or suffered from shortness of breath, swelling, numbness, fatigue, fainting, dizziness, nausea, clammy skin, profuse sweating, or tingling sensations in the arms or legs. Harris seeks compensation because he allegedly experienced chest pains and was not promptly referred to a cardiologist. Harris’ alleged injury consists of his subjective sensations as opposed to physical damage to his heart.

Harris states he made a series of grievances that were denied by prison officials. *Id.* at 19–21. In his complaint, Harris does not describe the contents of his grievances or the reasons why they were denied. In a pleading filed on February 19, 2020, Harris claims that he tried without success to discuss a grievance with a prison official while that prison official was “in the chapel”. *Id.* at 43. Harris did not provide additional details concerning the nature of his grievance or the reasons why

it was denied. As of June 8, 2020, Harris had made no effort to identify the nurses who allegedly ignored his complaints about chest pains. *See* 3 ROA 575–82. As with his complaint, Harris’ appeal focuses exclusively upon the unspecified conduct of prison administrators and others who had little or no interaction with Harris. Br. at 23–43.

V. SUMMARY OF ARGUMENT

Harris’ complaint consists primarily of canned legal statements and unsubstantiated conclusions of law. It is questionable whether he has demonstrated a serious medical need. According to his factual allegations, Harris suffered three episodes of chest pain over a period of 3 months. Assuming this is true, it is not necessarily indicative of cardiac distress. It could, for example, be indicative of anxiety, indigestion, or mild pulmonary infection. Although Harris admittedly visited a cardiologist in July and October of 2019, he does not disclose the outcome of these visits. Consequently, he seeks compensation for his subjective sensations of pain, as opposed to a physical injury. Under the circumstances, one can only speculate as to the nature of his medical condition and/or whether it is “serious”. Physicians are a scarce resource. Prison medical professionals must necessarily have some discretion to evaluate an inmate’s complaints based on objective signs of distress. Harris has failed to identify the only persons with an opportunity to evaluate Harris for objective signs of distress. Ironically, Harris has identified virtually every

other prison administrator and health care worker who might conceivably have had an attenuated connection to the nurses whom he fails to identify.

Given the lack of reasonable detail concerning Harris' alleged serious medical need, it can scarcely be argued that prison administrators were deliberately indifferent to that alleged need. As a practical matter, Harris seeks to hold prison officials liable for his alleged chest pains on a theory of vicarious liability. However, there is no vicarious liability under 42 U.S.C. § 1983. At a minimum, Harris must articulate facts from which one could reasonably infer that prison administrators were deliberately indifferent to Harris' alleged pain. Factual allegations supporting an inference of possible negligence do not suffice. As drafted, Harris' complaint does not put any named defendant on notice of the basis of his claim for compensation under 42 U.S.C. § 1983.

Finally, it is a virtual certainty that Harris would be unable to amend his complaint to state a cause of action under 42 U.S.C. § 1983. Although he alleges that Jane Doe defendants had a reasonably direct connection to his alleged constitutional injury—insofar as they allegedly ignored his complaints of pain—he made no effort to identify them through pre-litigation investigation, discovery, or otherwise. Harris certainly could have sought an extension of time in which to serve the Jane Doe defendants and then used that time to identify them. Instead, Harris focused his lawsuit on prison administrators with no connection to Harris' alleged

constitutional injury. Harris essentially argues that the named individual defendants in this case may be held vicariously liable for the acts or omissions of Jane Doe defendants. Under the circumstances, the District Court was within its discretion to dismiss Harris' complaint with prejudice.

VI. ARGUMENT

A. APPLICABLE LEGAL STANDARDS

1. CIVIL RIGHTS CLAIMS UNDER 42 U.S.C. § 1983

Section 1983 aims “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). This provision of federal statute “provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights.” *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). Therefore, it “serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes.” *Crompton v. Melnik*, 947 F.2d 1418, 1420 (9th Cir. 1991).

Claims under section 1983 require that a plaintiff allege the violation of a federally protected right by a person or official acting under the color of state law. Additionally, to prevail on a section 1983 claim, the plaintiff must establish each of the elements required to prove an infringement of the underlying

constitutional or statutory right. Here, Harris alleges a violation of his rights under the Eighth Amendment based upon alleged deliberate indifference to a serious medical need.

2. EIGHTH AMENDMENT DELIBERATE INDIFFERENCE TEST

Harris has filed section 1983 claims premised upon an alleged violation of his rights under the Eighth Amendment, namely acts of deliberate indifference to his alleged serious medical needs. Harris' factual allegations arguably describe a common law cause of action in tort, but they do not put defendants on reasonable notice of the factual basis for a cause of action under section 1983.

The distinction between a claim under the common law and a claim under section 1983 is important because the plaintiff's burden in a section 1983 action is significantly higher in comparison to the burden of proving negligence. *See Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). If Harris' complaint is construed liberally, with all inferences drawn in his favor, he has arguably stated a negligence claim under Nevada's notice pleading standards. *See Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) ("Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party"). However, it is doubtful that Harris could prove causation or damages as required by common law principles applicable to claims of negligence. *See, e.g., Turner v. Mandalay Sports Entertainment, LLC*, 124 Nev.

213, 217, 180 P.3d 1172, 1175 (2008) (holding that causation and damages are elements of a claim for negligence).

Not surprisingly, then, Harris has alleged a deprivation of his rights under the Eighth Amendment. This type of claim does not require proof of an alleged physical injury because untreated pain may be compensable under section 1983 if it is “chronic and substantial” or “significantly affects an individual’s daily activities”. *See Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *McGuckin v. Smith*, 974 P.2d 1050, 1059–60 (9th Cir. 1992)). An inmate’s subjective complaints of pain are often a factor in lawsuits alleging deliberate indifference to a serious medical need. *See, e.g., Brown v. Dzurenda*, __Nev.__, 464 P.3d 1051 (Ct. App. 2020, unpublished) (addressing allegations that delay in treatment for glaucoma resulted in the worsening of symptoms and additional pain and suffering); *Pierce v. Skolnik*, 551 Fed.Appx. 907, 909 (9th Cir. 2014) (addressing allegations that prison officials neglected to provide treatment for back pain); *Collins v. Macarthur*, 2006 WL 1966728, *6 (D. Nev. 2002) (addressing allegations that prison physicians failed to adequately treat back pain).

However, Harris has failed to demonstrate through his complaint that any named defendant was deliberately indifferent to his alleged pain. Harris does not indicate what if anything prison officials and health care professionals should have done to relieve Harris’ alleged chest pain prior to his July 2019 visit to the

cardiologist. To their credit, prison officials arranged for Harris to visit a cardiologist within a reasonable time after he allegedly experienced his third episode of chest pain in March of 2019. As noted above, it is questionable whether Harris even had a serious medical need. Further, generalized allegations of negligence do not suffice to maintain a claim for deliberate indifference under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

The Eighth Amendment prohibits punishments which “involve the unnecessary and wanton infliction of pain.” *Id.* at 104. While “cruel and unusual conditions” are not prohibited under the Eighth Amendment, “cruel and unusual punishments” are prohibited. *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994). The U.S. Supreme Court has succinctly explained the distinction between “conditions” and “punishments” as follows:

An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation But an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837–38.

A prison official cannot be found liable for deliberate indifference to a serious medical need under the Eighth Amendment unless the official knows of a significant

risk to an inmate's health or safety and disregards the serious risk to the inmate's health or safety. *See id.* at 837.

To be successful in his claims, Harris must ultimately prove that he had a "serious medical need", that "failure to treat [his] condition could result in further significant injury or the 'unnecessary and wanton infliction of pain'", and that prison officials were deliberately indifferent toward Harris' alleged need for medical treatment. *Jett v. Penner*, 429 F.3d 1091, 1096 (9th Cir. 2006). "Deliberate indifference is a high legal standard." *See Toguchi*, 391 F.3d at 1060. In fact, a plaintiff does not meet the high standard even when the plaintiff has established gross negligence or medical malpractice. *Ibid.* When considering whether this high standard has been met, a trial court must scrutinize the particular facts and looks for substantial indifference in the individual case, indicating more than mere negligence or isolated occurrences of neglect. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (citation omitted).

Granted, Harris was not required to prove his case in response to a motion to dismiss. However, his complaint does not indicate that he could prove his claims even if he had the opportunity. More importantly, Harris' complaint does not put any of the named defendants on reasonable notice of the acts or omissions that allegedly subjected Harris to cruel and unusual punishment in violation of his rights under the Eighth Amendment.

As a preliminary matter, it is not readily apparent that Harris had a serious medical need simply because he complained of chest pains. There are many reasons why a person may experience chest pains. It is unknown why Harris experienced chest pains. He alleges only that he suffered from such pains on three occasions between December 2018 and March 2019 but was forced to wait until July 2019 to visit a cardiologist. The story ends there. There are no facts in the complaint from which one could reasonably infer that prison administrators and other named defendants were aware that Harris required immediate medical attention or that they had the means to relieve his alleged pain pending his visit to the cardiologist.

3. PERSONAL PARTICIPATION

In addition to demonstrating deliberate indifference, Harris must ascribe such indifference to an individual, not an institution. He must ascribe deliberate indifference to an individual because 42 U.S.C. § 1983 is the vehicle by which he attempts to vindicate his alleged rights in this case. *See Gonzaga University v. Doe*, 536 U.S. 237, 285 (2002) (stating that section 1983 provides a mechanism for enforcing individual rights secured by the Constitution and laws of the United States). “There are two elements to a section 1983 claim: (1) the conduct complained of must have been under color of state law and (2) the conduct must have subjected the plaintiff to a deprivation of constitutional rights.” *Jones v. Cmty. Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984).

As a prerequisite to any recovery under section 1983, a plaintiff must prove that individual defendants, as opposed to a state governmental institution, deprived him of a right secured by the U.S. Constitution or the laws of the United States. *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985). Liability under section 1983 arises only upon a showing of personal participation by the defendant. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A person deprives another “of a constitutional right, within the meaning of section 1983, if he [or she] does an affirmative act, participates in another’s affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which [the plaintiff complains].” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Consequently, a plaintiff cannot establish a claim under section 1983 by making a loose connection between an alleged institutional failure and individual defendants who could conceivably be held vicariously liable for a common law tort. *See Iqbal*, 566 U.S. at 676. (“[O]ne must plead that each Government-official defendant, through his own individual actions, has violated the Constitution.”). Here, Harris does not allege facts from which one could reasonably infer that prison administrators and other named defendants knew that Harris required immediate medical attention and consciously failed to act. At best, Harris has alleged facts from which one could infer that some prison administrators may have known that he complained of chest pains at some point in the past. Quite reasonably, prison administrators and/or

medical professionals arranged for Harris to visit a cardiologist in July of 2019. Anyone who has ever visited a medical specialist will recognize that Harris' wait time was not unusual.

4. NEVADA'S NOTICE PLEADING STANDARD

Rule 8(a) of the Nevada Rules of Civil Procedure requires a plaintiff to set forth the facts that fit within a theory of liability, but it does not require that the theory be correctly identified. *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (citation omitted). A plaintiff who fails to use "precise legalese" in describing his grievance, but who sets forth the facts which support his complaint satisfies Nevada's notice pleading requirement. *Id.* When reviewing whether a plaintiff has sufficiently set forth facts to assert a claim for relief, the court must accept all factual allegations of the complaint as true and draw every reasonable inference in the plaintiff's favor. *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (citation omitted).

Rule 12(b)(5) of the Nevada Rules of Civil Procedure permits a defendant to move for the dismissal of a claim if the pleading fails to state a claim upon which relief may be granted. A motion to dismiss for failure to state a claim should be granted when "it appears beyond a doubt that [the plaintiff] could prove no set of facts which, if true, would entitle [the plaintiff] to relief." *Id.* (quoting *Buzz Stew*,

L.L.C. v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)). The allegations of a complaint are insufficient to assert a claim for relief when the allegations fail to give fair notice of the nature and basis of a legally sufficient claim and the relief requested. *See Vacation Village Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (citation omitted). Here, Harris’ factual allegations do not give fair notice of the basis of a legally sufficient claim under 42 U.S.C. § 1983.

B. LEGAL ANALYSIS

1. HARRIS’ COMPLAINT DOES NOT STATE AN ASCERTAINABLE CLAIM FOR DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED.

The District Court correctly dismissed Harris’ claims against Warden Brian Williams. 2 ROA 268–74. Williams is a prison administrator. Harris alleges he made a grievance that Harris was required by administrative regulation to review and/or investigate. Br. at 7–8. Presumably, this grievance put Williams on notice that Harris’ had allegedly complained of chest pains to prison medical staff. Harris’ complaint, however, does not put Williams on notice of the factual basis for Harris’ claim that Williams subjected Harris to cruel and unusual punishment.

As a preliminary matter, Harris’ complaint does not put Williams on notice that Harris had a serious medical need at any point between December 2018, when Harris allegedly had his first episode of chest pains, and July 2019, when Harris met with a cardiologist. Whether an inmate has been subjected to cruel and unusual

punishment involves an objective test and a subjective test. In short, the relevant inquiry includes “both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.” *Colwell*, 763 F.3d at 1066 (citation and internal quotation omitted).

“To meet the objective element of the standard, a plaintiff must demonstrate the existence of a serious medical need.” *Ibid.* “Moreover, a delay in medical care only constitutes an Eighth Amendment violation where the plaintiff can show the delay resulted in substantial harm.” *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (citation and quotation omitted). For purposes of notice pleading, an objective reference to a serious medical need might involve a brief description of a physical injury or condition such as a traumatic head wound, verifiable loss of consciousness, or a stab wound. *See, e.g., Scalia v. County of Kern*, 358 F. Supp.3d 1064, 1076 (E.D. Cal. 2018); *Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 540 (6th Cir. 2008); *Wright v. Sprayberry*, 817 Fed.Appx. 725, 730 (11th Cir. 2020).

As discussed above, Harris alleges only that he experienced chest pains. Other than his alleged chest pains, Harris reports no symptoms of cardiac distress: no shortness of breath, no swelling, no numbness, no fatigue, no fainting, no dizziness, no nausea, no clammy skin, no profuse sweating, and no tingling sensations in the arms or legs. Harris says nothing about the outcome of his visits to

a cardiologist, and he does not suggest that prison officials could or should have done something to relieve his pain prior to his first visit to the cardiologist. The gist of Harris' lawsuit is that he must be compensated because prison officials were inattentive to his *complaints* about chest pains, not that they were inattentive to his serious medical need. The District Court properly dismissed Harris' claims against Warden Williams. It was appropriate for the District Court to dismiss those claims with prejudice because Harris at no point indicated that he was prepared to offer additional facts to make a direct connection between Warden Williams and Harris' alleged constitutional injury.

Given the absence of factual detail in Harris' complaint, it is difficult to conclude that Harris ever suffered from a serious medical condition. And more importantly, with respect to the subjective standard, it is virtually impossible to conclude that prison administrators knew Harris suffered from a serious medical condition requiring immediate medical attention. Liberally construed, Harris' complaint might put someone on notice that Harris is angry or frustrated with prison administrators because of their inattention to his complaints about chest pains. But it certainly does not put anyone on notice, much less prison administrators, of the facts upon which Harris bases his claims under 42 U.S.C. § 1983. The District Court

properly dismissed Harris’ claims against Williams on the ground that Harris failed to state a cognizable claim against Williams.³

2. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO REMEDY HARRIS’ PROCEDURAL MISTAKES.

Perhaps the District Court could have allowed Harris more time to serve his complaint in the manner required by NRCP 4.2(d)(2). Indeed, there is no reason to believe that a plaintiff’s failure to timely file a motion to enlarge Rule 4(e)’s 120-day service period creates a jurisdictional bar to further proceedings. *See, e.g., Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 598, 245 P.2d 1198, 1202 (2010) (recognizing that a plaintiff may, upon a showing of good cause, be relieved of the obligation to timely file a motion for enlargement). Further, NRCP 4.2(d)(6) specifically directs the trial courts to enlarge the time for effectuating dual service pursuant NRCP 4.2(d)(2) when circumstances warrant an enlargement. The plain text of NRCP 4.2(d)(6) makes it clear that the “dual service requirement” is intended

³ The District Court dismissed Harris’ complaint on various grounds, including on grounds of qualified immunity. 2 ROA 272–73. Qualified immunity must be raised as an affirmative defense. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). It was premature for the District Court to address qualified immunity within the context of a motion to dismiss. In other words, a plaintiff has no burden to plead facts that negate qualified immunity. *See id.* As a practical matter, however, the deliberate indifference standard incorporates principles of qualified immunity. If a plaintiff cannot plead facts demonstrating an ability to meet the deliberate indifference standard, the action will necessarily fail under the qualified immunity doctrine.

to protect the State's taxpayers against default judgments; it is not intended to be used by the State's attorneys as a sword against *pro per* litigants.⁴

However, this does not mean that the District Court should have allowed Harris more time to serve his complaint. Harris did not timely request an extension of the time for serving his complaint. Further, as it pertains to the named defendants other than Warden Brian Williams, Harris' complaint fails for the same reasons that it fails in relation to Warden Williams. Harris complaint' fails to state a cause of action against any of the named defendants. Had Harris timely moved for an extension of the 120-day service period, he would have simply delayed the inevitable dismissal of his claims on substantive grounds.

Harris does not allege facts from which any of the named defendants could reasonably infer that Harris had a serious medical need at any time during the period described in the complaint. And Harris makes no factual connections between the named defendants and his alleged constitutional injury. Even if he were given an opportunity to amend his complaint, it is probable that Harris could not plead facts to satisfy the objective test for establishing his claims. And it is a virtual certainty

⁴ The same can be said of the dual service requirement set forth at NRS 41.031(2). This Court's recent decision indicates that NRS 41.031(2) does not apply to actions filed against state employees in their individual capacities. *See Craig v. Donnelly*, 135 Nev. 37, 439 P.3d 413 (2019). However, the 2019 amendments to NRCP explicitly expanded the dual service requirement to encompass actions filed against current and former state employees in their individual capacities. *See NRCP 4.2(d)(2)*.

that he could not plead facts to meet the subjective test for establishing his claims. Simply stated, Harris bases his claims against the named defendants on a theory of vicarious liability. Such a theory of liability is not cognizable under 42 U.S.C. § 1983.

Therefore, allowing Harris to proceed with additional attempts at service, followed by leave to amend his complaint, would have been futile. “[L]eave to amend should not be granted if the proposed amendment would be futile.” *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013) (quoting *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993)). The District Court appropriately terminated further trial court proceedings in this case. There was no abuse of discretion.

3. HARRIS HAS WAIVED ANY CLAIM THAT HE MAY HAVE HAD AGAINST JANE DOE DEFENDANTS.

In fairness, Harris has arguably stated cognizable claims under 42 U.S.C. § 1983 against Jane Doe defendants. While it is highly unlikely that he could prove his claims at trial, the factual allegations in his complaint are sufficiently detailed to put a person on notice of the reasons why he is suing Jane Doe defendants. In this regard, Harris alleges that when he complained to Jane Doe defendants about his chest pains, they ignored him. Given Harris’ failure to disclose other relevant details about his alleged cardiac distress, his allegations against Jane Doe defendants do not ring true. Nonetheless, Harris would have been entitled to pursue his claims against

Jane Doe defendants had he exercised reasonable diligence to discover their identities.

For example, Harris could have sought an extension of time to identify and serve Jane Doe defendants. Better yet, he could have investigated their identities before he filed his lawsuit. He could have used the prison grievance system to obtain information about them. He could have conducted some minimal discovery before he served his complaint upon twenty-two individual defendants with no connection to his alleged constitutional injury.

Indeed, there are many things that Harris could have done to identify Jane Doe defendants before the District Court dismissed the remainder of Harris' claims in July 2020. Generally, a plaintiff must exercise reasonable diligence in ascertaining the identity of a defendant or potentially lose the claim against that defendant to the statute of limitations. *See, e.g., Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 294–95, 255 P.3d 238, 243–44 (2011). But Harris did nothing to identify Jane Doe defendants between late December 2018 and July 2020. And now, on appeal, he says nothing about the merits of his complaint as it pertains to Jane Doe defendants. Accordingly, Harris has waived any claim that he may have had against Jane Doe defendants. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) (“Issues not raised in an appellant's opening brief are deemed waived.”).

VI. CONCLUSION

Aside from his allegations against Jane Doe defendants, Harris makes no connection between the named defendants and his alleged constitutional injury. Although Harris is entitled to leeway in pleading his claims pursuant NRCP 8, he must articulate some relevant facts. He must investigate his allegations before he files them. He must adhere to rules of court and rules of procedure just like a represented litigant. He must timely request leave to amend. He must timely request extensions. And he must serve his complaint and summons in the manner required by applicable rules of civil procedure. Moreover, Harris “cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements.” *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.2d 255, 259 (2018). The District Court properly disposed of all Harris’ claims by dismissing them with prejudice.

Respectfully submitted this 15th day of September 2021.

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CERTIFICATE OF COMPLIANCE

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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 15th day of September 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on September 15, 2021.

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