IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY JOSEPH HARRIS,

Appellant,

v.

STATE OF NEVADA, ET AL.,

Respondents.

No.: 81430

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE TREVOR ATKIN
DISTRICT COURT CASE NO.: A-19-805689-C

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

Appellant Anthony Joseph Harris is an individual. In the proceedings below, Harris represented himself pro se. Holland & Hart LLP is the only law firm to represent Harris before this Court. Harris has been represented by Joshua M. Halen, Esq., and Matthew B. Hippler, Esq., of Holland & Hart LLP before this Court.

DATED this 15th day of October, 2021

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s/ *Joshua M. Halen*

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

RULES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Respondents/Defendants' Answering Brief smacks of a "pay no attention to that man behind the curtain" attitude. What is behind the curtain that Respondents seek to distract from is the District Court's strict and unwarranted application of NRCP 8(a) and 12(b)(5), especially when construing a pro se complaint; the District Court's erroneous decision to dismiss Plaintiff/Appellant Anthony Joseph Harris's ("Harris") Complaint with prejudice and without even a discussion of whether amendment would be futile; and the District Court's failure to abide by NRCP 4.2(d)(6)'s command to provide Harris additional time to complete service on the State Defendants,[1] among other issues raised in the Opening Brief. Instead, Respondents want this Court to focus on the fact that Harris is incarcerated and, as a pro se litigant, failed to meet Respondents' overly technical interpretation of the Nevada Rules of Civil Procedure. To do this, Respondents raise improper arguments for the first time on appeal, mischaracterize aspects of the record and Harris's arguments in the Opening Brief, and either dodge arguments raised by Harris or offer conclusory responses.

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[1] The State Defendants are Respondents/Defendants Michael Miner, Romeo Aranas, Jeremy Dean, Julie Matousek, Mr. Faliszek, Mrs. Ennis, Naphcare, Inc., Bob Faulkauer, N Peret, G. Worthy, G. Martin, G. Bryan, Jane Doe 1, and James Tulman.

For example, Respondents' Answering Brief spends an inordinate amount of time questioning, for the first time, whether Harris's extreme chest pains that he suffered for seven months before receiving any medical attention for while helplessly sitting in prison were serious enough to state a claim under the Eighth Amendment to the U.S. Constitution. Not only is such an argument tone deaf to the plight of an incarcerated individual, but it is procedurally improper to be raised in an Answering Brief. Respondent/Defendant Warden Brian Williams ("Warden Williams") made no arguments questioning the objective seriousness of Harris's medical condition before the District Court and in fact conceded that Harris suffered from a serious medical condition. Thus, any arguments premised on this contention cannot be raised for the first time before this Court. Furthermore, the District Court made no findings that amending Harris's Complaint would be futile because his medical condition was not serious, and as such, it is improper speculation for Warden Williams to make any arguments to the contrary. Additionally, Warden Williams concedes that the granting of qualified immunity was improper and does not dispute that a state official's liability under 42 U.S.C. § 1983 may be established by receiving an inmate's grievance.

In addition, the State Defendants fail to meaningfully respond to Harris's arguments regarding the District Court's improper application of NRCP 4.2(d)(6) and 4(e). The State Defendants do not address NRCP 4.2(d)(6)'s command that a

district court "must" provide additional time to complete the dual service requirements of NRCP 4.2 if one of the recipients have been served. Instead, the State Defendants argue that Harris seeks a waiver of the dual service requirements, which is untrue. Further, the State Defendants' speculate that amendment of Harris's Complaint would have been futile, thus no extension of time to complete service was needed. This argument again was not raised before the District Court, and regardless, is a misstatement of the law. Whether a defendant or its counsel think amendment may be futile is not an enumerated reason for denying additional time to complete service where good cause exists.

As established in Harris's Opening Brief, the District Court erred as a matter of law in dismissing his Complaint with prejudice and in granting Warden Williams's qualified immunity. Additionally, the District Court erred in its construction of NRCP 4(e) and 4.2(d)(6) and further abused its discretion in dismissing Harris's Complaint pursuant to NRCP 4(e)(2). Accordingly, Harris requests that this Court reverse and remand the District Court's Orders Granting Warden Williams's Motion to Dismiss and the State Defendants' Motion to Dismiss.

FACTUAL BACKGROUND

Harris's Opening Brief provided a thorough recitation of the factual background in this matter to provide the Court with the necessary detail for this

appeal. (Opening Br. at 5-8.) However, several statements made by Respondents are either not supported by the record or are contrary to the record.

Respondents claim that "Harris alleges that he suffered from 'extreme chest pains' on three occasions between late December of 2018 and March 27, 2019." (Answering Br. at 7.) This contention is incorrect. Harris's Complaint was dated October 30, 2019. (Vol. 1, App. 26.) In the Complaint, Harris offered that he had been suffering extreme chest pains starting in December 2018, and that he continued to suffer extreme chest pains as of the filling of his Complaint. (Vol. 1, App. 18.)

Additionally, Respondents argue that "Harris does not indicate that he suffered or continues to suffer from symptoms of cardiac distress. 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 of legs." (Answering Br. at 8.) While an inmate is not required to shown signs of cardiac distress to get medical attention in prison or to state an Eighth Amendment claim, and Harris's continued chest pains that he suffered between dismissal of his Complaint and the filing of the Opening Brief are not part of the District Court record, Harris's Complaint does provide more than "legal boilerplate" of his extreme chest pains. (Answering Br. at 8.) In addition to alleging that he suffered extreme chest pains from December 2018 through the

filing of the Complaint, Harris offered that "[o]n March 27, 2019, [Harris] had suffered such extreme chest pains, that they actually brought him to his knees, and in front of a different pill call nurse [Defendant] James Tolman." (Vol. 1, App. 19.) Further, Harris offered that the "extreme chest pains have caused him to be [laid] up in bed and could [of] caused him to: (1) have a stroke; (2) have a heart attack; or (3) die." (Vol. 1, App. 23.) As described, Harris provided more information in his Complaint regarding his extreme chest pains than Respondents acknowledged.

ARGUMENT

A. The majority of Respondents' Answering Brief contains improper arguments raised for the first time on appeal.

Warden Williams argues at length that Harris's extreme chest pains were not serious and that any amendment by Harris to state an Eighth Amendment deliberate indifference claim under 42 U.S.C. § 1983 would have been futile. Warden Williams argues that "[i]t is questionable whether [Harris] had demonstrated a serious medical need…" and that "[u]nder the circumstances, one can only speculate as to the nature of his medical condition and/or whether it was 'serious.'" (Answering Br. at 9.) Further, Warden Williams argues that "[t]he gist of Harris's 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." (Answering Br. at 21 (emphasis in original).) Warden Williams argues, for the first time, that Harris did not allege sufficient facts to

establish the objective prong of a deliberate indifference claim, *i.e.*, that Harris's extreme chest pains did not constitute a serious medical need. *See Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) ("To meet the objective element of the standard, a plaintiff must demonstrate the existence of a serious medical need.") (citation omitted).

While Warden Williams's contention that extreme chest pains do not constitute a serious medical need is incorrect, it is indisputable that Warden Williams failed to raise any arguments regarding the objective seriousness of Harris's extreme chest pains before the District Court and that any arguments to the contrary are waived and cannot be considered before this Court. This Court has consistently stated that "[i]t is well established that arguments raised for the first time on appeal need not be considered by this [C]ourt." *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997). This basic premise of appellate procedure holds true whether the new arguments made on appeal are in support of a motion to dismiss or a motion for summary judgment. *See Montesano v. Donrey Media Grp.*, 99 Nev. 644, 650 n.5, 668 P.2d 1081, 1085 n.5 (1983) (declining to consider argument raised for first time on appeal in case reviewing dismissal under NRCP 12(b)(5)); *Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277, 285 (2005) (declining to consider argument raised for the first time on appeal in a matter reviewing granting of summary judgment).

In this case, Warden Williams filed his Motion to Dismiss based on NRCP 12(b)(5), and he argued that Harris's Complaint failed to state a § 1983 claim for deliberate indifference to an inmate's serious medical needs as the Complaint "lack[ed] allegations that, if accepted as true, establish Warden Williams personally participated in, or was somehow indirectly responsible for the alleged constitutional violation." (Vol. 1, App. 33; *see also* Vol. 1, App. 30-37.) Further, Warden Williams's Motion argued that "there are no allegations in the Complaint to suggest Warden Williams was on actual or constructive notice Harris was suffering from a serious medical condition." (Vol. 1, App. 34.) Accordingly, before the District Court, Warden Williams argued only that Harris failed to provide sufficient facts to establish Warden Williams's personal participation in Harris's constitutional deprivation or that Warden Williams was deliberately indifferent to Harris's medical needs, *i.e.* that Warden Williams was aware of Harris's serious medical condition and ignored his requests for help. (Vol. 1, App. 30-37 (Mot. to Dismiss); Vol. 1, App. 88-95 (Reply in Support of Mot. to Dismiss).) Additionally, Warden Williams argued that the alleged lack of facts establishing his personal participation and that he knew of or ignored Harris's requests for medical treatment entitled him to qualified immunity. (Vol. 1, App. 34-36.)

Warden Williams raised no arguments that Harris's extreme chest pains that he suffered between December 2018 and at least October 30, 2019, did not

constitute a serious medical need. Thus, "Warden Williams conceded that Harris had suffered serious medical needs when he had extreme chest pains." (Opening Br. at 25-26 (citing Vol. 1, App. 30-37.).) Warden Williams's arguments that Harris's extreme chest pains were minor or that his extreme chest pains did not meet the objective prong of a deliberate indifference claim were not raised below and cannot now be raised before this Court.

Furthermore, Warden Williams now argues that dismissal with prejudice by the District Court was proper as Harris's extreme chest pains were not serious enough and that amendment would be futile. (Answering Br. at 21.) However, such arguments were similarly not raised before the District Court and cannot be argued here. Before the District Court, Warden Williams argued that he was entitled to dismissal with prejudice on the grounds of qualified immunity, which did not rely on any arguments that extreme chest pains suffered by an inmate for at least seven months did not meet the objective prong of a deliberate indifference claim. (Vol. 1, App. 30-37 (Mot. to Dismiss); Vol. 1, App. 88-95 (Reply in Support of Mot. to Dismiss).) Importantly, and as will be discussed below, Harris's arguments that the Complaint and subsequent motions established that Harris could allege Warden Williams's personal participation via amendment.

In addition to Warden Williams making new arguments before this Court, the State Defendants also make new arguments to support the District Court's

granting of their Motion to Dismiss pursuant to NRCP 4. The State Defendants argue that "Harris's complaint fails for the same reasons that it fails in relation to Warden Williams. Harris complaint' [*sic*] fails to state a cause of action against any of the named defendants." (Answering Br. at 23.) Further, the State Defendants argue that it is clear they would have prevailed in this case and that "allowing Harris to proceed with additional attempts at service, followed by leave to amend, would have been futile." (Answering Br. at 24.)

Simply put, these arguments by the State Defendants in their Answering Brief were not made before the District Court. Before the District Court, the State Defendants argued that Harris was subject to the dual service requirements of NRCP 4.2(d) and that "the Complaint must be dismissed pursuant to NRCP 4(e)(2) because [Harris] did not properly serve any of the remaining Defendants within the 120-day service period or move the Court for an enlargement of time to effectuate service." (Vol. 2, App. 289.) The State Defendants made no arguments that Harris failed to state an Eighth Amendment claim against them or that amendment would be futile, and those arguments are waived pursuant to the case cited above. (Vol. 2, App. 285-92 (State Defs.' Mot. to Dismiss); Vol. 3, App. 594-97 (State Defs.' Reply in Support of Mot. to Dismiss).)

Finally, Respondents, on whose behalf it is unclear, argue that Harris has waived any claim that he may have had against Jane Doe Defendants. (Answering

Br. at 24-25.) Respondents argue that Harris failed to identify either of the two named Jane Doe Defendants and failed to take any efforts before filing this lawsuit to identify the Defendants, and therefore, any claims against these defendants are waived and must be dismissed. (Answering Br. at 24-25.) First, Harris identified one of the two Jane Doe Defendants before the District Court, John Doe 1, James Tulman. (Vol. 1, App. 7, 19.) Additionally, Respondents made no arguments before the District Court that Harris failed to or should have identified the remaining Jane Doe without any discovery, thus this argument too is waived.

B. Warden Williams's arguments in support of dismissal are improperly raised and are contradicted by the record.

1. *Harris's Complaint as drafted provided sufficient information to put Warden Williams on notice of his Eighth Amendment claim, especially in light of his pro se status.*

As detailed in the Opening Brief, the District Court erred in granting Warden Williams's Motion to Dismiss, dismissing Harris's Complaint with prejudice, and granting Warden Williams qualified immunity. (Opening Brief at 23-43.) Regarding the District Court's granting of the Motion Dismiss, Harris's Complaint alleged that he had suffered extreme chest pains for seven months, meeting the objective prong of a deliberate indifference claim. (Vol. 1, App. 10, 18, 21.) Further, Harris's Complaint alleged that Warden Williams was the warden and official at High Desert State Prison ("HDSP") and that his "civil rights were violated at the hands of all Named Defendants, as a result of both their deliberate

indifference and their intentional interference with [Harris's] serious medical needs[,]" meeting the subjective prong. (Vol. 1, App. 10, 18, 21.)

Constructing Harris's Complaint liberally as a pro se plaintiff[2] and accepting all facts and taking all inferences in Harris's favor,[3] as well as considering Nevada's notice pleading standards,[4] Harris's Complaint stated an Eighth Amendment claim against Warden Williams. Thus, the District Court erred in essentially holding that Harris's Complaint failed to state a claim, as Harris allegedly failed to specifically name Warden Williams's exact role in the deprivation of his civil rights and include all facts and all possible ways that Warden Williams was involved in the violation of his Eighth Amendment rights.

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[2] *Hebbe v. Piller*, 627 F.3d 338, 342 (9th Cir. 2010) (explaining that federal courts construe pro so pleadings, especially civil rights cases, liberally and to afford plaintiff the benefit of any doubt).

[3] *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (This Court "rigorously review[s] [, de novo,] a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff[']s favor to determine whether the allegations are sufficient to state a claim for relief…. A complaint should be dismissed for failure to state a claim '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.'") (quoting *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)).

[4] *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 108 n.8, 294 P.3d 427, 433 n.8 (2013) ("Nevada is a notice-pleading jurisdiction where courts liberally construe pleadings so long as claims are fairly noticed to the adverse party.") (citation omitted).

Warden Williams responds to this argument by simply claiming that Harris's 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 Eight Amendment." (Answering Br. at 15.) Contrary to this contention, Harris's Complaint offers that he had suffered extreme chest pains starting in December 2018, and that he had failed to receive medical attention until July 2019 when he was taken to a cardiologist, and that each of the Defendants knew of his extreme chest pains and were involved in the denial of Harris seeking medical attention.

To prevail on an Eighth Amendment claim for deliberate indifference to an inmate's serious medical needs, the plaintiff must meet "both an objective standard – that the deprivation was serious enough to constitute cruel and unusual punishment – and a subjective standard – deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014). Thus, Harris's Complaint provided sufficient information given Nevada's notice pleading requirements to state a claim for deliberate indifference against Warden Williams, especially considering his pro se status.

Disregarding Nevada's notice pleading standards, Warden Williams argues that "[a]s 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. Iqbaql*, 556 U.S. 662 (2009)." (Answering Br. at 3.)[5] Warden Williams's arguments for this Court to retroactively adopt *Iqbal* and *Twombly*'s plausibility standard only for inmate civil rights cases as a way to limit such cases is baseless and would not impact Harris's Complaint.[6] First, Nevada has repeatedly rejected adopting the plausibility standard articulated by the U.S. Supreme Court in *Iqbal* and *Twombly*. *See* NRCP 12(b)(5) advisory committee's note to 2019 amendment; *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 18 n.2, 293 P.3d 869, 871 n.2 (2013) (noting that this Court has not adopted the federal plausibility standard).[7] Second, even after the adoption of *Iqbal* and *Twombly*, federal courts review pro se civil rights case liberally, affording plaintiffs the benefit of any doubt. *See, e.g.*,

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[5] It is extremely unsettling that instead of addressing problems in the prison system suffered by inmates, Respondents seek to raise higher the walls around the courthouse by creating greater procedural hurdles to prevent inmates from even getting in the courthouse door to address their issues. With this appeal, Harris is only seeking the opportunity to establish his case, and to date, he has been prevented from doing so.

[6] This argument too was not made before the District Court.

[7] As opposed to the federal plausibility standard, this Court has not rejected the notion that pro se pleadings are to be liberally constructed and that any and all doubts should be resolved in a pro se's favor.

Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,'… and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,'") (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *Hebbe*, 627 F.3d at 342. Thus, whether this Court adopted *Iqbal* and *Twombly* has no impact on Harris's Complaint as he provided sufficient information to put Warden Williams on notice of his Eighth Amendment deliberate indifference claim under Nevada's adopted standards.

Next, Warden Williams, as well as the other Respondents, argue at length that Harris's extreme chest pains that he suffered for seven months before seeing a cardiologist were not objectively serious and that he failed to state a claim for deliberate indifference. Warden Williams argues that "it is not readily apparent that Harris had a serious medical need simply because he complained of chest pains…" and that "[i]t is unknown why Harris experienced chest pains." (Answering Br. at 16.) In addition to impermissibly making this argument for the first time before this Court, this argument lacks merit, especially at the motion to dismiss stage.

As discussed above, an Eighth Amendment claim for deliberate indifference requires a plaintiff to meet the objective element of the standard, which requires a plaintiff to "demonstrate the existence of a serious medical need." *Colwell*, 763 F.3d at 1066 (citing *Estelle*, 429 U.S. at 104). "Such a need exists if failure to treat

the injury or condition 'could result in further significant injury' or cause 'the unnecessary and wanton infliction of pain.'" *Colwell*, 763 F.3d at 1066 (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). "Indications that a plaintiff has a serious medical need include the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Colwell*, 763 F.3d at 1066 (quotation marks and citation omitted); *see also Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) ("A medical need is serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.").[8]

Harris's allegations of his extreme chest pain that he suffered between December 2018 and July 2019 before seeing a medical professional, are clearly sufficient to establish the objective element of a deliberate indifference claim. According to the Complaint, which must be accepted as true, Harris was suffering extreme pain and failed to receive medical attention for his condition. Additionally, the extreme chest pains caused Harris to be laid up in his bed for days at a time,

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[8] The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency…[,]" thus, what constitutes a "serious medical need" is inherently objective and subject to reasonableness standards. *Estelle*, 429 U.S. at 102 (quotation marks and citation omitted).

limiting his normal activities and could have resulted in further injury. Warden Williams's speculation about the cause of Harris's extreme chest pains, is just that and is not adequate grounds for dismissal.

Further, Warden Williams argues that because Harris apparently did not show signs of cardiac distress, he did not suffer a serious medical need, but a person does not need to be showing cardiac distress before receiving medical attention. "The government has an 'obligation to provide medical care for those whom it is punishing by incarceration,' and failure to meet that obligation can constitute an Eighth Amendment violation cognizable under § 1983." *Colwell*, 763 F.3d at 1066 (quoting *Estelle*, 429 U.S. at 103-05). An inmate need only plead that they had a serious medical need, which is established if the failure to treat the injury or condition "could result in further significant injury" or cause "the unnecessary and wanton infliction of pain." *Jett*, 439 F.3d at 1096. Harris was suffering extreme chest pains, which could have resulted in further injury, and he was denied medical treatment for seven months, which, accepted as true as it must be at this stage, amounts to deliberate indifference. *See Colwell*, 763 F.3d at 1066.

Warden Williams's arguments that Harris's extreme chest pains do not constitute a serious medical condition are without merit at the motion to dismiss stage. A reasonable doctor or patient is more than likely to find that a person suffering extreme chest pains for seven months without being provided medical

attention constitutes a serious medical need to which medical attention was necessary. Given the objective standard, whether Harris was suffering a serious medical need is one left for a jury, not for a court to decide on a motion to dismiss absent clear and obvious contrary indications. *See Cooper v. Casey*, 97 F.3d 914, 917 (7th Cir. 1996) (holding that "whether the plaintiffs were in sufficient pain to entitle them to pain medication within the first 48 hours after the beating… was an issue for the jury."); *Cf. Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075-76 (9th Cir. 2013) ("The objective question of whether a prison officer's actions have exposed an inmate to a substantial risk of serious harm is a question of fact, and as such must be decided by a jury if there is any room for doubt." (citations omitted). Warden Williams's Brief attempts to apply a summary judgment standard based only on his speculative arguments regarding Harris's pain and suffering. Harris was not required to prove his case at the Motion to Dismiss stage, and Warden Williams's speculative arguments are improper and must be rejected.

Finally, Warden Williams argues that Harris did not suffer a serious medical need as prison staff did not immediately treat Harris for his extreme chest pains. As argued by Warden Williams, he offers that "[p]rison medical professionals must necessarily have some discretion to evaluate an inmate's complaints based on objective signs of distress." (Answering Brief at 9.) Contrary to Warden

Williams's arguments, courts have explained that, "[i]n deciding whether there has been deliberate indifference to an inmate's serious medical needs, we need not defer to the judgment of prison doctors or administrators." *Colwell*, 763 F.3d at 1066 (quotation marks and citation omitted). This standard makes inherent sense. A court should not rely only on the judgment of a prison administrator after being accused of denying, delaying, or ignoring treatment, but should evaluate all factors in reviewing the decision to determine whether there was deliberate indifference to the inmate's serious medical needs. Prison officials' failure to provide medical services cannot be used as an excuse to justify their deliberate indifference. Here, Harris has alleged that he was denied medical treatment for his extreme chest pains by state actors who were aware of his condition and failed to act, which is more than enough to survive a motion to dismiss.

Accordingly, Harris's Complaint provided sufficient factual allegations, which must be accepted as true, to establish both prongs of a deliberate indifference claim, and the District Court's dismissal was made in error. Warden Williams's arguments that Harris's extreme chest pains were not serious are misplaced and fail at the motion to dismiss stage as a reasonable jury could find that extreme chest pains constitute a serious medical need. Further, Warden Williams offers no arguments to counter Harris's contention that all defendants,

including Warden Williams, were aware of his chest pains and were responsible for providing him treatment.

2. ***Warden Williams's conclusory arguments in support of dismissal with prejudice are unsupported by the record.***

As detailed in the Opening Brief, the District Court erred in dismissing Harris's Complaint with prejudice and in not providing at least one chance to cure any deficiencies. (Opening Br. 29-34.) Warden Williams does not discuss or dispute any of the federal case law provided by Harris in the Opening Brief supporting the position that "[i]t is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (citation omitted). Warden Williams argues that Harris did not suffer a serious medical need and that amendment would have been futile. (Answering Brief at 10.) The District Court made no such findings in dismissing Harris's Complaint. The District Court did not discuss whether Harris's extreme chest pains constituted a serious medical need or not, nor did the District Court discuss futility of amendment. (Vol. 2, App. 268-74.) Warden Williams's speculation that the District Court may have later dismissed the Complaint for failing to allege a serious medical need is likely incorrect, but it also cannot support the District Court's dismissal.

Additionally, Warden Williams states in conclusory fashion, "[i]t 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." (Answering Br. at 21.) Warden Williams's contention ignores Harris's Opening Brief, as well as Harris's Opposition to the Motion to Dismiss and his Motion for Reconsideration, all of which are included in the record.

Harris opposed Warden Williams's Motion to Dismiss, in part, by arguing that Warden Williams was aware of his extreme chest pains as he filed a first level grievance detailing his extreme chest pains and that Warden Williams was required to review, investigate, and respond to the first level grievance. (Vol. 1, App. 43.) Because Warden Williams was required to review the first level grievance, he was personally aware of Harris's ongoing medical condition and failed to take any action to protect Harris, thus making him liable for a claim of deliberate indifference under the Eighth Amendment to the U.S. Constitution. (Vol. 1, App. 43-44.) Further, Harris asserted that in the third quarter of 2019, "Warden Williams was in the chapel and this matter was brought to his attention, once it was mentioned about being ready to file in court he cut the conversation and said 'oh that's it! I can't talk to you anymore…,'" establishing that Warden Williams was aware of his situation. (Vol. 1, App. 43.) Thus, Harris offered more than sufficient

information to establish that Warden Williams was deliberately indifferent to his serious medical needs.

Additionally, Harris filed a Motion for Reconsideration on May 8, 2020, requesting that the District Court either remove the "with prejudice" designation or permit him leave to amend. (Vol. 2, App. 258-63.) Harris argued that the District Court overlooked his request in his Opposition to Warden Williams's Motion to Dismiss for leave to file an amended complaint to allege additional facts to support his claims against Warden Williams, and to assert additional claims that were omitted from the Complaint. (Vol. 2, App. 259.)

Contrary to Warden Williams's arguments, Harris did offer further factual support "to make a direct connection between Warden Williams and [his] alleged constitutional injury." Furthermore, Warden Williams does not dispute that "[f]acts raised for the first time in plaintiff's opposition papers should be considered by the court in determining whether to grant leave to amend or to dismiss the complaint with or without prejudice." *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (citation omitted). The District Court made no futility analysis in dismissing Harris's Complaint with prejudice, and did not consider Harris's further factual proofs that were more than sufficient to establish Warden Williams's deliberate indifference to Harris's serious medical needs and his personal participation in the

deprivation of Harris's civil rights. (Vol. 2, App. 268-74.) Accordingly, this Court must reverse the District Court's dismissal of Harris's Complaint with prejudice.

3. ***Warden Williams admits that the District Court erroneously granted him qualified immunity.***

Warden Williams concedes that the District Court erred in granting qualified immunity in its Order granting his Motion to Dismiss. Warden Williams states, "[i]t was premature for the District Court to address qualified immunity within the context of a motion to dismiss." (Answering Br. at 22.) Harris agrees that the District Court's consideration of qualified immunity at the motion to dismiss stage, especially in these circumstances, was premature and warrants reversal.

While Warden Williams concedes that the granting of qualified immunity was improper, he fails to address Harris's arguments that a prison official may be found to be deliberately indifferent to an inmate's serious medical needs in receiving an inmate's grievance alleging an ongoing medical harm. (Opening Br. at 34-43.) As detailed in the Opening Brief, a prison official shows deliberate indifference to an inmate's serious medical needs if the official "knowingly fail[s] to respond to an inmate's request for help." *Jett*, 439 F.3d at 1098 (citation omitted).

Harris alleged that he filed a first level grievance complaining of his extreme chest pains and his failure to receive medical attention. As detailed in Nevada Department of Corrections Administrative Regulation 740, Warden Williams was

responsible to review, investigate, and respond to Harris's first level grievance. AR 740.09(1). Harris's allegations thus establish that Warden Williams was aware of Harris's extreme chest pains before seeing a medical professional and Warden Williams took no actions to assist Harris, despite his knowledge of his pain and suffering. These allegations are more than sufficient to state a § 1983 claim premised on deliberate indifference to an inmate's serious medical needs and to defeat qualified immunity. Accordingly, the District Court erred in granting Warden Williams qualified immunity and reversal is warranted.

C. The District Court erred in dismissing Harris's Complaint under NRCP 4.

1. *The District Court erred by incorrectly construing NRCP 4.2(d)(6).*

Harris's Opening Brief provides that a District Court "must allow a party a reasonable time to cure its failure" to complete service when one of the two entities are served under NRCP 4.2(d)(2). (Opening Br. at 43-49; *see also* NRCP 4.2(d)(6).) The State Defendants do not dispute that Harris served the Nevada Attorney General's Office with the summons and Complaint on December 13, 2018, thus satisfying NRCP 4.2(d)(2)(A). (Vol. 1, App. 205-218.) Accordingly, under NRCP 4.2(d)(6), the District Court was required to provide Harris additional time to complete service of the State Defendants before dismissal and erroneously held that it was bound to dismiss the State Defendants under NRCP 4(e)(2).

The State Defendants argue that "NRCP 4.2(d)(6) specifically directs the trial courts to enlarge the time for effectuating dual service pursuant [*sic*] NRCP 4.2(d)(2) when circumstances warrant an enlargement." (Answering Br. at 22.) The State Defendants fail to acknowledge that those "circumstances," as directed by NRCP 4.2(d)(6), are when a plaintiff has completed service on one of the two entities under NRCP 4.2(d)(2). In this case, those "circumstances" were present when Harris served the Nevada Attorney General with the summons and Complaint, as required by NRCP 4.2(d)(2)(A). The State Defendants ignore the plain text of NRCP 4.2(d)(6) and state that "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." Based on NRCP 4.2(d)(6), the District Court was required to provide Harris additional time to complete service and Harris was not required to move for an extension of time. Further, the District Court was not bound by the time constraints of NRCP 4(e), and the District Court erred in disregarding NRCP 4.2(d)(6) and dismissing Harris's Complaint without providing him additional time to complete service.

2. *The State Defendants' NRCP 12(b)(5) arguments premised on speculation are insufficient to deny Harris additional time to complete service.*

If the Court determines that Harris was not entitled to an automatic extension of time to serve the State Defendants after completing service on the Nevada Attorney General, the District Court abused its discretion in not permitting Harris additional time to complete service under NRCP 4(e)(4). Harris detailed in his Opposition to the State Defendants' Motion to Dismiss that he was under the impression that he completed service, but also requested additional time to complete service if that service was not effective. (Vol. 3, App. 568-71.) The circumstances outlined by this Court in *Scrimer v. Eighth Judicial District Court*, 116 Nev. 507, 516, 998 P.2d 1190, 1196 (2000), were met by Harris as he served the Nevada Attorney General's Office with the summons and Complaint on December 13, 2019, 44 days after filing the Complaint. (Vol. 1, App. 205-18.) Additionally, the State Defendants waited until June 3, 2020, to file their Motion to Dismiss, three months after the expiration of the 120-day limit, six months after the Nevada Attorney General's Office was served (Vol. 2, App. 285-92), and four months after Harris filed his Notice of Motion of Service (Vol. 1, App. 47). Finally, the State Defendants would not suffer prejudice if an extension of time was given, as the Attorney General's Office was served with the Complaint in December 2019 (Vol. 1, App. 205-18), and had appeared on behalf of Warden

Williams in January 2020. (*See also* Opening Br. at 52.) The District Court reviewed none of the *Scrimer* factors in granting the State Defendants' Motion to Dismiss and failed to even acknowledge Harris's request for additional time to complete service. (Vol. 3, App. 636-42.)

The State Defendants refute none of these points in their Answering Brief. (Answering Br. at 22-24.) Instead, the State Defendants argue that Harris's Complaint failed to state an Eighth Amendment deliberate indifference claim against them, that Harris failed to timely move for an extension to complete service, and that "[h]ad 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." (Answering Br. at 23.)

The State Defendants' arguments that Harris was not entitled to additional time as it is "probable that Harris could not plead facts to satisfy the objective test for establishing his claims…" is without merit. As discussed above, the State Defendants made no arguments, under NRCP 12(b)(5) or any other procedural mechanism, that Harris failed to state a deliberate indifference claim against them. The State Defendants simply moved for dismissal as they claimed Harris failed to complete service on both the Nevada Attorney General and the State Defendants or their authorized agent within 120-days of the Complaint being filed. (Vol. 2, App. 285-92.) For the State Defendants to now raise arguments more suitable for a

motion for summary judgment is improper. The District Court made no findings that Harris was not entitled to additional time to complete the second prong of the dual service requirement because Harris failed to state a claim against the State Defendants or that any possible amendment by Harris would have been futile. (Vol. 3, App. 636-42.)

More importantly, this Court, in *Scrimer* or any other case, has not listed as potential factors in determining whether to grant additional time to complete service the defendant's belief that plaintiff failed to state a claim, the defendant's belief that amendment would be futile, or the defendant's belief that they will ultimately prevail at trial. 116 Nev. at 516, 998 P.2d at 1195-96. However, this is all the State Defendants offer to rationalize the District Court's refusal to consider or permit Harris additional time to complete service. (Answering Br. at 22-24.) If these were the factors district courts were required to consider, all defendants would prevail on a NRCP 4(e)(2) motion. Further, NRCP 12(g)(1) prohibits the State Defendants from raising NRCP 12(b)(5) arguments in their Motion to Dismiss brought under NRCP 4(e)(2), foreclosing the State Defendants' arguments. *See* NRCP 12(g)(1) ("A motion under this rule may be joined with any other motion allowed by this rule."). The rules prohibit the State Defendants from combining a NRCP 4(e)(2) motion with a NRCP 12(b)(5) motion. If the State Defendants believed that Harris failed to state an Eighth Amendment claim, the

proper mechanism was for them to file a NRCP 12(b)(5) motion, not to raise such arguments for the first time on appeal.

The District Court's failure to consider and grant Harris's request for additional time to complete service under NRCP 4(e)(4) was an abuse of discretion and warrants reversal and remand.

D. Harris has not waived any claims against Jane Doe Defendant.

Respondents argue that Harris has waived any claims against Jane Doe Defendants because he failed to name Jane Doe Defendant and failed to raise any arguments in his Opening Brief regarding Jane Doe Defendant. (Answering Br. at 24-25.) Harris raised no issues regarding Jane Doe Defendant because Respondents failed to raise any arguments regarding Jane Doe Defendant before the District Court and the District Court did not make any findings regarding any arguments concerning any Jane Doe Defendant. For Respondents to raise these arguments for the first time on appeal is again improper.

The District Court made no findings that Harris failed to exercise reasonable diligence in attempting to name and locate Jane Doe Defendant, nor did the District Court hold that Jane Doe Defendant received notice of the action within 120-days of the Complaint being filed, and that it will not be prejudiced in defending on the merits. *See Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 294, 255 P.3d 238, 243 (2011); NRCP 15(c)(2)(A). Further, Respondents'

speculation that Harris could have simply conducted discovery before filing suit or could have used the prison grievance system to identify an employee who refused to treat him and did not have a name tag on during their job duties is simply unrealistic.

As the District Court made no findings regarding Jane Doe Defendant or Harris's efforts in attempting to locate and name Jane Doe Defendant and no arguments were raised by Respondents below, this Court should reject any arguments that Harris waived his claims against Jane Doe Defendant.

CONCLUSION

Appellant Anthony Joseph Harris respectfully requests that this Court reverse both the District Court's Order granting Warden Williams's Motion to Dismiss with prejudice, including the granting of qualified immunity, and the District Court's Order granting the State Defendants' Motion to Dismiss. This case should be reversed and remanded with instructions consistent with the arguments raised herein.

RESPECTFULLY SUBMITTED this 15th day of October, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 6,906 words.

Finally, I hereby certify that I have read this 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 15th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Holland & Hart LLP, and that on October 15, 2021, I electronically filed and served through the Nevada Supreme Court's E-Filing System (Eflex) a true and correct copy of the above and foregoing, addressed to the following:

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