

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY CEBALLOS,

APPELLANT,

v.

NP PALACE LLC d/b/a PALACE
STATION HOTEL & CASINO,

RESPONDENT.

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Eighth Judicial District Court Case No.:
A-20-823119-C

APPEAL

From the Eighth Judicial District Court, Department XIX
The Honorable Judge Bitá Yeager, District Judge

APPELLANT’S SUPPLEMENTAL BRIEF

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ATTORNEY’S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. No such corporations exist as would require disclosure under NRAP 26.1(a). These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated this 3rd day of March, 2022.

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JURISDICTIONAL STATEMENT PURSUANT TO NRAP 28(a)(4)

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), as this matter is an appeal from a final judgment as to Appellant Danny Ceballos and Respondent NP Palace LLC d/b/a Palace Station Hotel & Casino. The Notice of Entry of Order Granting Motion to Dismiss was filed on March 17, 2021, and Appellant filed his Notice of Appeal on April 15, 2021. Appellant's appeal is timely because it complies with NRAP 4(a)(1).

ROUTING STATEMENT

NRAP 28(a)(5) requires all Appellant's briefs to contain a routing statement "setting forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17 and citing the subparagraph(s) of the Rule under which the matter falls." NRAP 17(a)(11) specifically assigns "[m]atters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law" to the jurisdiction of the Supreme Court. Additionally, NRAP 17(a)(12) assigns "[m]atters raising a principal issue of statewide public importance..." to the jurisdiction of the Supreme Court.

Ceballos contends that the Supreme Court retains jurisdiction of the instant case because the issues are both a matter of first impression involving Nevada common law *and* a question of statewide public importance. Further, the issues raised in the present case do not fall within the categories where the Court of Appeals

has presumptive jurisdiction. Therefore, this matter and all associated briefing should be assigned to the Nevada Supreme Court.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the complaint states a claim for tortious discharge predicated on a violation of the right to privacy, and

(2) If not, whether remand to district court with directions to grant leave to amend is appropriate.

STATEMENT OF CASE
PROCEDURAL HISTORY

Ceballos submits that the procedural history provided in his Opening Brief is true and correct. As such, he incorporates it as fully set forth herein. Ceballos supplements that he timely files this Supplemental Brief at the request of the Court.

STATEMENT OF FACTS

Ceballos submits that the factual allegations provided in his Opening Brief are true and correct. As such, he incorporates them as fully set forth herein.

STANDARD OF REVIEW

Ceballos submits that the standard of review outlined in his Opening Brief is true and correct. As such, he incorporates it as fully set forth herein.

SUMMARY OF THE ARGUMENT

At the request of the Court, Ceballos brings two issues and the relevant briefing therein:

- (1) Whether the complaint states a claim for tortious discharge predicated on a violation of the right to privacy; and
- (2) If not, whether remand to district court with directions to grant leave to amend is appropriate.

In this Supplemental Brief, Ceballos argues that, under Nevada's liberal notice-pleading standard, he has sufficiently plead a claim for tortious discharge based on an invasion of privacy. Ceballos established his subjective, reasonable

expectation of privacy and that Palace Station's conduct was both an intentional intrusion *and* would be highly offensive to a reasonable person. Further, using the balancing test in *Hennessey*, Ceballos pleaded facts sufficient to show that Palace Station lacked an interest of reasonable suspicion strong enough to justify intruding on this right. Ceballos also sufficiently pleaded facts to support that his termination was in violation of Nevada public policy and that no adequate statutory remedy exists to properly award his damages. If the Court finds that more clarity is needed in pleading the tortious discharge claim, leave to amend should be granted because no deadline to amend has expired. In fact, no deadline to amend was issued because this case was dismissed at the outset of the case.

ARGUMENT

I. Nevada is a Notice Pleading Jurisdiction

Nevada is a notice pleading jurisdiction. *Western States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). The notice pleading standard requires plaintiffs to provide facts which support a legal theory, but it does not require them to correctly identify the legal theory relied upon. *Liston v. Las Vegas Metro. Police Dept.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (holding that constructive discharge claim should have been allowed at trial, even though not included in the Complaint). Here, notice is defined as the knowledge of facts which would naturally lead a person to make inquiry of everything which such injury

pursued in good faith would disclose. *Id.* at 1579, 723. Therefore, a plaintiff can still bring a claim that he did not specifically name in his complaint if they plead the facts required to support it.

II. Tortious Discharge in Violation of Public Policy

Nevada is an at-will employment state, but employers **are not** entitled to dismiss an employee for reasons which contravene public policy. *Russo v. Shac, LLC*, 2021 WL 5370814, at **6. An employer who does so is liable for the tortious discharge of its employee. A plaintiff bringing a claim of tortious discharge against his former employer must (1) establish that the defendant discharged him in contravention of the public policy of the state and (2) that a comprehensive statutory remedy does not already exist. *Western State Minerals Corp. v. Jones*, 107 Nev. 704, 718, 819 P.2d 206, 216 (1991). Nevada courts have explicitly and repeatedly held that an employee's at-will status is irrelevant to whether a tortious discharge claim may be maintained. *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1316-17, 970 P.2d 1062, 1064 (1998).

III. Violation of the Right to Privacy

A. Relevant Nevada Law

Nevada has long recognized the existence of the right to privacy in an effort to prevent the intrusion by others into one's private "space" or private affairs. *Anderson v. Ruppco Inc.*, 125 Nev. 1015, 2009 WL 1490992, at *3 (Nev. 2009); *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 631,

895 P.2d 1269, 1279 (overruled on other grounds). In *Montesano v. Donrey Media Group*, 99 Nev. 644, 668 P.2d 1081 (1983) (overruled on other grounds), the Supreme Court of Nevada officially adopted the Second Restatement of Torts § 652B formulation for invasion of privacy claims:

“...[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.”

Restatement (Second) of Torts § 652B.

The interference must be of the sort that a reasonable person would strongly object to and of a kind that would be highly offensive to an ordinary person. Restatement (Second) of Torts § 652B cmt. D. Under this formulation, a plaintiff must demonstrate (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable person. *People for the Ethical Treatment of Animals*, 111 Nev. at 630, 895 P.2d at 1279. In order for a plaintiff to establish an interest in seclusion or solitude protected by law, he must show that he had an actual expectation of such seclusion or solitude and that that expectation was objectively reasonable. *Id.*

1. Subjective Expectation of Privacy

A plaintiff's subjective expectation of privacy may be tested by considering the precautions he took to safeguard his privacy interests against those he may have reasonably taken. *See Kemp v. Block*, 607 F.Supp. 1262, 1264 (D. Nev. 1985). For

example, in *Kemp*, the plaintiff alleged that the defendant invaded his privacy when he tape-recorded an argument between the plaintiff and the parties' boss, Mr. Roy. 607 F.Supp. at 1263. The recording was ultimately played before other employees and during two personnel meetings regarding the plaintiff. *Id.* The argument in question took place in a small instrument shop where both parties worked. *Id.* The shop consisted of a singular room without any inner walls or partitions and measured only 29 square feet. *Id.* The court determined that, under these circumstances, the plaintiff had no subjective expectation of privacy. *Id.* at 1284. The plaintiff had argued in a loud voice, in a place where his coworkers had a right to be. *Id.* Beyond that, the plaintiff engaged in the argument in a small space without any inner structures to support an expectation of privacy. *Id.* The plaintiff was deemed to have knowingly exposed his coworkers, including the defendant, to this conversation and as such had no reasonable expectation of privacy.¹ *Id.*

2. Highly Offensive Conduct

The individual right to privacy is limited by the protection that must be accorded to the freedom of action and expression of those who threaten the seclusion of others. *People for Ethical Treatment of Animals*, 111 Nev. at 631, 895 P.2d at

¹ In *People for Ethical Treatment of Animals*, the Nevada Supreme Court also cited *Mclain v. Boise Cascade Corp.*, 533 P.2d 343 (Or. 1975). In *Mclain*, the court held that the plaintiff did not have a subjective expectation to privacy regarding activities which were done in a way that could have been observed by his neighbors or passersby. 533 P.2d at 346.

1279. For example, while an individual may personally feel offended by the act, it is not an invasion of privacy to photograph a person in a public place. *Id.* The question of what is highly offensive to a reasonable person is, in part, a question for the jury. *Id.* at 634, 1281. However, there is a “preliminary determination of offensiveness which must be made by the court in discerning the existence of a cause of action for intrusion.” *Id.* Courts should consider the degree of intrusion, the context of the intrusion, the conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy was invaded when determining whether a plaintiff has made a sufficient showing of invasion of right to privacy when determining whether an actor’s conduct would be considered highly offensive to a reasonable person. *Id.* at 1282.

B. Application in Nevada

1. *M & R Inv. Co. v. Mandarino*, 103 Nev. 711 (1987)

M & R Inv. is a case out of the Supreme Court of Nevada concerning claims of invasion of privacy made by a patron of the Dunes Hotel against the corporation which owned it. *See generally M & R Inv. Co.*, 103 Nev. 711. In September 1982, Mandarino, an admitted “card counter,” entered the Dunes Hotel and began playing blackjack. *Id.* at 713, 489. Mandarino was dressed in an obvious disguise in an attempt to hide his true identity because he knew that casinos banned identified card

counters from their property and distributed their photographs to other gaming establishments. *Id.* Mandarinino was nevertheless identified as a card counter, and an altercation ensued which eventually ended in his arrest by hotel security. *Id.* at 713-14, 489-90.

Mandarino contended that the hotel's subsequent actions, i.e., taking his photograph and distributing it to other gaming establishments, was an invasion of privacy. *Id.* at 718-9, 493. The Supreme Court of Nevada disagreed. *Id.* at 719, 493. This Court held that Mandarinino himself published the fact that he was a card counter by the very act of publicly counting cards at a blackjack table in a public gaming establishment. *Id.* Therefore, the fact he counted cards was not a private fact for which he could have a reasonable expectation of privacy. *Id.* Additionally, this Court held that "a twenty-two year old man, disguised in dark glasses, a false mustache and slicked down hair, who, by virtue of his skill at counting cards, wins a great deal of money in a short period of time, does not have a reasonable expectation that casino personnel will turn a blind eye to his presence and will not request that he identify himself." *Id.*

2. *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615 (1995)

In *People for Ethical Treatment of Animals*, this Court considered whether Berosini suffered an invasion of privacy when a third party entered the backstage area at the Stardust Hotel in order to record Berosini's interactions with the

orangutans that he used in his show. *See generally* 111 Nev. 615, 895 P.2d 1269. This Court held that there was no intrusion on any actual privacy expectation, seeing as his actions were audible and viewable by various third parties who were near the staging area. *Id.* at 635-36, 1283. Additionally, the video camera was deemed to not be highly offensive to a reasonable person because it was non-intrusive (i.e. use of video camera away from the animals), well-intentioned (i.e., intention to protect the animals from abuse), and the context justified the actions. *Id.*

C. Key Point of Nevada Law Regarding Invasion of Privacy

Nevada courts have clearly established an individual right to privacy through the common law. Nevada courts have consistently held that individuals do not have a reasonable expectation of privacy regarding conduct that can be easily perceived by others. *See generally* *M & R Inv. Co.*, 103 Nev. 711; *see also* *Kemp*, 607 F.Supp. 1262; *see also* *People for the Ethical Treatment of Animals*, 111 Nev. 615, 895 P.2d 1269. Courts compare the actions an individual claiming invasion of privacy took to ensure his privacy against those he could have taken when considering whether such expectation was reasonable. Additionally, whether an invasion of privacy is “highly offensive” is analyzed through the lens of several factors. *See* *People for the Ethical Treatment of Animals*, 111 Nev. at 630. This aids in balancing the interests of the public, the employer, and the employee.

D. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992)

1. Facts

This Court specifically directed the parties to *Hennessey v. Coastal Eagle Point Oil Co.*, a 1992 opinion from the Supreme Court of New Jersey. The case centers on an at-will employee (“Hennessey”) who worked for an oil company (“Coastal”) in an extremely safety-sensitive job. Coastal acquired the oil refinery where Hennessey worked in 1985 and promptly issued a written policy prohibiting the on-premises use of alcohol, drugs, or controlled substances. *Hennessey*, 129 N.J. at 86, 609 A.2d at 13. The policy further required that employees notify their supervisors of any drugs that might affect performance, that they may be drug tested at any time to determine compliance with the policy, and that noncompliance may result in termination. *Id.* In January 1986, Coastal discovered evidence of on-site marijuana use and initiated random urine testing. *Id.* Hennessey was randomly chosen, and his urine indicated marijuana and diazepam use, neither of which he indicated were for medical purposes. *Id.* at 87, 13. Coastal discharged Hennessey, and Hennessey thereafter brought this suit alleging, in part, invasion of privacy.

2. Supreme Court of New Jersey Analysis

The court’s analysis began by determining what constitutes public policy in the context of a tortious discharge claim. *Id.* at 89, 15. It established that the discharge must be in violation of “a clear mandate of public policy.” *Id.* The sources of such policy could come from legislative, administrative rules, judicial decisions,

regulations and correlated decisions, or constitutions. *Id.* at 90-2, 15-6. The *Hennessey* court completed a substantial analysis regarding whether New Jersey recognizes a right to privacy based on its constitution and ultimately concludes that it does. *Id.* at 98-9, 19. It is unnecessary to do the same here as it is well established that Nevada recognizes the individual's right to privacy. *Anderson*, 2009 WL 1490992, at *3.

Next, the court analyzed Hennessey's privacy claims, beginning with the assertion that the forced extraction of urine in the presence of an observer is extremely intrusive. *Hennessey, supra*, at 99, 19. The opinion states that more is needed than simply a breach of a clear mandate of public policy. *Id.* at 99, 20. The "clear mandate of public policy" at issue must also be shown to be, on balance, beneficial to the public. *Id.* at 100, 20. In *Hennessey*, the court had to balance the "clear mandate of public policy" supporting Hennessey's claim for tortious discharge based on invasion of privacy against the competing public interest in safety. *Id.* This followed the similar approach of other jurisdictions, wherein the competing interests of society, the employer, and the employee were balanced. *Id.* The opinion further states that courts considering tortious discharge claims in the context of drug testing use similar balancing tests. These courts have held that the termination of a private employee who failed a drug test can support a wrongful discharge claim, but the privacy interests of employees in safety-sensitive jobs must

lose out to the competing policy of safety². *Id.* The main emphasis of these decisions was that intrusions violating an employee's right to privacy are permissible if justified by a compelling interest, with the employer bearing the burden of proof. *Id.* at 101, 21.

The *Hennessey* court ultimately adopted these opinions, ruling that whether firing an employee for failing (or refusing to take) a random urine test violates a clear mandate of public policy depends on the nature of the employee's job. *Id.* at 102, 21. The public's interest in safety outweighs any individual right to privacy. *Id.* Specifically, the court stated:

“If the employee's duties are so fraught with hazard that his or her attempts to perform them while in a state of drug impairment would pose a threat to co-workers, to the workplace, or to the public at large, then the employer must prevail.”

Id. at 102, 21,

Hennessey worked in an extremely safety-sensitive position where the potential consequences of impairment-induced error included fires, explosions, human death or severe bodily injury, environmental damage, and property damage both to the public and the refinery. *Id.* at 103, 21. This position clearly constituted one wherein the interest of both the employer and the public in safety outweighed Hennessey's individual right to privacy.

² See *Luedtke*, 768 P.2d at 1136 & n. 12; see also *Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990); see also *Luck v. Southern Pacific Transportation Co.*, 218 Cal.App.3d 1, 267 Cal.Rptr. 618.

The *Hennessey* court also identified that a reasonable suspicion requirement balanced an employee's privacy interest when the employers needed to monitor and control drug use among its employees. *Id.* at 104, 22. The opinion cited cases regarding the testing of federal employees in safety-sensitive positions, the public sector, or in heavily regulated industries. *Id.* at 105, 22. For example, in *Fraternal Order of Police*, the court held that random drug testing of police officers would be inappropriate because there was no conclusive evidence of widespread drug use. *Id.* at 105, 23. Further, objective, less intrusive indications of drug use were determined adequate to identify those officers who used illegal drugs, such as absenteeism, deterioration of work habits, and chronic lateness. *Id.* at 106, 23. *Hennessey*, however, generally worked independently and observation to detect impairment was determined impractical. *Id.* Additionally, the immediate nature of the threat justified more immediate results.

The *Hennessey* court concluded that “the urgent need to ensure public safety renders urine testing a permissible method of preventing drug use among employees in safety-sensitive jobs.” *Id.* However, the court emphasized “the importance of protecting employee privacy.” *Id.*

E. *Hennessey* and Ceballos

As mentioned above, Nevada has a long recognized right to privacy that is guided by the Second Restatement of Torts. This simplifies the present analysis by

allowing Ceballos to wholly skip the question of whether his individual right to privacy exists under Nevada law. The next consideration, then, is whether the drug test that Ceballos was forcibly made to take and failed constituted an invasion of privacy. There is no question as to whether Ceballos had a subjective expectation of privacy - any marijuana use occurred within the privacy of his own home. Comp. at 4, ¶ 23. Ceballos did not engage in this lawful activity in any way which compromised his expectation of privacy, such as in public or in plain view of a window. *Compare with M & R Inv. Co.*, 103 Nev. 711; *also with Kemp*, 607 F.Supp. 1262; *also with People for the Ethical Treatment of Animals*, 111 Nev. 615, 895 P.2d 1269. Clearly, he had a subjective expectation that such use would not be intruded upon. The pertinent question is whether Defendant's actions would be considered highly offensive by a reasonable person. As instructed in *People for the Ethical Treatment of Animals*, Ceballos considers a side-by-side analysis with the inclusion of the following factors: (1) the degree of intrusion; (2) the context of the intrusion; (3) the conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives; (4) the setting into which the intruder intrudes; (5) and the expectations of those whose privacy was invaded when determining whether a plaintiff has made a sufficient showing of invasion of right to privacy. 111 Nev. at 98, 867 P.2d at 1282.

1. The Degree of Intrusion

Hennessey centers on a mandatory urine test taken in the presence of a supervisor. Ceballos readily submits that he was subjected to a mandatory saliva test, which is procedurally less intrusive than a urine test. Comp. at 3, ¶ 17. However, Ceballos is far less concerned with the procedural nature of the test than he is with the substantive results. Like a urine test, Ceballos's saliva-based drug test provided otherwise private information to his employer. Particularly, this test exposed Ceballos's engagement in **lawful** activities in the privacy of his own home while he was off duty. Comp. at 4, ¶ 21. This is incredibly invasive because "a home is a place in which a subjective expectation of privacy virtually always will be legitimate." *California v. Ciraolo*, 476 U.S. 207, 220, 106 S. Ct. 1809, 1816 (1986) (Powell, J. dissenting). Defendant essentially reached into Ceballos's home with no reasonable basis to do so and terminated him for engaging in lawful behavior. As such, this factor weighs in favor of Defendant's actions being highly offensive to a reasonable person.

2. The Context of the Intrusion

On June 25, 2020, Ceballos slipped and fell on a puddle of unidentified liquid which had been left on the floor of the employee cafeteria. Comp. at 2, ¶ 8 – 3, ¶ 12. He suffered the mildest of injuries and planned to go on about his day. Comp. at 3, ¶ 15. Defendant, however, had other plans. The response was wildly

disproportionate to the incident, with security and several levels of management arriving at the scene to question him. Comp. at 3, ¶ 15. Ceballos was then escorted to a different part of the casino, placed in a holding cell, and forced to take a drug and alcohol test. Comp. at 3, ¶¶ 15 – 17. Although immediate, the test results were withheld from Ceballos. Comp. at 3, ¶ 17. Similar to *Hennessey*, Ceballos was forced to provide saliva samples, in front of others, which produced information about private activities which his employer was not entitled to. As such, this factor weighs in favor of Defendant's actions being highly offensive to a reasonable person.

3. Conduct, Circumstances, and Motives

The lack of a reasonable basis to administer the drug test at issue is another extremely important factor for this Court to consider. In *Hennessey*, Coastal enforced random drug tests after it found evidence of on-sight marijuana use. As recognized by the Supreme Court of New Jersey, this action was both justified by Coastal's **extreme interest in safety** and by the fact that Coastal's **suspicion regarding drug use was reasonable based on the evidence** it had. Defendant had neither an extreme interest in safety nor reasonable suspicion of drug use based on actual evidence. Here, the forced drug test was the result of a minor fall caused by liquid that was negligently left on the floor of the employee cafeteria, an area with heavy foot traffic, without any kind of warning. Comp. at 3, ¶¶ 12 – 13. Ceballos's slip and fall was a foreseeable result of these circumstances. Even though Defendant

has a legitimate interest in maintaining a drug-free workplace, these can hardly be considered underlying circumstances which supported a reasonable suspicion of impairment and justified invading Ceballos's privacy. More realistically, it appears likely that Defendant was attempting to escape any negligence on their part related to the failure to provide notice of the slip hazard and found a convenient scapegoat in Ceballos's completely **lawful** activities.

Further, Ceballos experienced injuries so minor that he didn't even consider seeking medical attention. Comp. at 3, ¶ 15. These facts cannot possibly give rise to reasonable suspicion of impairment. Further, unlike in *Hennessey*, there was no competing public or employer interest so strong it justified violating Ceballos's right to privacy. Ceballos's position as a full-time card dealer was far from safety intensive. Comp. at 2, ¶¶ 6 – 7. There was no realistic threat of explosion or human death even if Ceballos had attempted to do his job while impaired.³ Beyond this, even if there was a competing public interest at play, there were certainly other, less intrusive ways to determine where Ceballos was under the influence of marijuana.

Unlike in *Hennessey*, it is far from unreasonable to suggest that a supervisor surveil Ceballos's work performance following the incident for signs of impairment while on the job if they were concerned that he was so impaired. This is similar to

³ Ceballos emphasizes that he at no point performed his job under the influence of marijuana.

the *Fair Policing* case cited in *Hennessey*, which ruled that there was no reasonable suspicion present to justify random drug testing of police officers because there was no evidence of such activities. Instead, the court held that objective factors should be used first to determine potential drug use, like the deterioration of work performance or chronic absenteeism. The court held this in relation to **police officers**, who are charged with protecting the public and armed to do so. Here, Ceballos was a reliable and capable card dealer whose responsibilities fall far short of protecting the public welfare. Comp. at 4, ¶¶ 24 – 25. Ceballos’s position easily allowed for observation, which Ceballos argues is a much less intrusive and more appropriate way to look for impairment under these facts.

Overall, this factor weighs in favor of finding Defendant’s actions to be highly offensive to a reasonable person.

4. The Setting Intruded Into

The setting which was intruded into is a key difference between *Hennessey* and the case at hand. In *Hennessey*, the urinalysis intruded into the employee’s off-duty conduct, but that conduct was patently unlawful, extremely dangerous given his job, and the intrusion was based on evidence of on-premises drug use. Here, Ceballos’s drug test intruded into off-duty conduct that is statutorily lawful and protected in the state of Nevada. Comp. at 4, ¶ 23. Essentially, the drug test intruded on Ceballos’s seclusion by forcing the reveal of private, off-duty conduct without

any justification to do so. This would be highly offensive to any reasonable person - an employer has no reason to delve into the personal, lawful activities of an employee which do not affect nor give any indication of affecting their job. As such, this factor weighs in favor of finding Defendant's conduct highly offensive to a reasonable person.

5. Ceballos's Expectation of Privacy

In *Hennessy*, the plaintiff had no reasonable expectation of privacy because his drug use blatantly put his coworkers, the public, the environment, and the property interests of his employer and others at risk. The plaintiff's conduct was also illegal, bringing into question the expectation of privacy under such circumstances. Here, Ceballos's lawful, off-duty use of marijuana did not place anyone or anything in danger. It occurred within the privacy of his personal home and only when there was enough time to ensure that it would **not** affect his job performance. Comp. at 4, ¶ 23. Given Ceballos's actions taken by both lawfully engaging in the activity and doing it in such a manner as to maintain his privacy, Ceballos had a reasonable subjective expectation of privacy. As such, this factor weighs in favor of finding Defendant's conduct highly offensive to a reasonable person.

6. Conclusion

These factors weigh heavily in favor of determining that Ceballos, at the very least, sufficiently plead facts to support that Defendants' intrusion into his privacy

was highly offensive and would be so to a reasonable person. The circumstances surrounding the forced testing did not give rise to a reasonable suspicion of drug impairment, nor was the test the least intrusive way to determine whether any such impairment was present. In fact, there was no reason for Defendant to suspect that Ceballos was under the influence of any substances at all - there is nothing suspicious about slipping in an unmarked puddle of clear liquid. There was no public safety concern involved. Finally, the test boldly intruded into Ceballos's private, lawful conduct inside of his home, where he had a reasonable, subjective expectation of privacy given the circumstances. Under these facts, the analysis clearly supports a finding that Defendants' conduct would be highly offensive to a reasonable person and, given Ceballos's reasonable expectation of privacy, supports a finding of invasion of privacy.

F. Overall Analysis

1. *Hennessey* Should be Given Substantial Weight in This Matter

Though New Jersey law is not binding here, it is highly instructive given the lack of law addressing this particular issue. Both New Jersey and Nevada recognize an individual right to privacy AND that said right is limited. However, *Hennessey* provides guidance on extending this right in the context of employee drug testing. The balancing test that *Hennessey* employs outlines a clear way to do this by considering the rights and interests of the Ceballos, the Defendant, and the legitimate

interests of the public. It does not force a change of law regarding Nevada's requirements for claims of invasion of privacy. Instead, it provides an easy way to balance an identified right to privacy with the other rights that must be considered. As such, Ceballos adamantly argues the balancing test and related principles outlined in *Hennessey* should be adopted by this Court.

2. Ceballos has Stated Sufficient Facts to Establish an Invasion of Privacy Claim

As discussed above, Ceballos has stated sufficient facts in his Complaint to establish a *prima facie* claim for invasion of privacy and make it past a motion to dismiss. Regarding the first prong, Defendant's conduct of forcing Ceballos to submit a drug test is a clear and obvious act of intentional intrusion. Comp. at 3, ¶¶ 16 – 17. Ceballos has also stated sufficient facts to establish the second prong, which demonstrates his legally protected interest in seclusion or solitude. Namely, any marijuana use occurred in the privacy of his home and was lawful, which justifies Ceballos's reasonable subjective interest in privacy. Comp. at 4, ¶ 23. Finally, the facts in Ceballos's Complaint establish that the context of the intrusion, circumstances surrounding the intrusion, the setting that was intruded on, and Ceballos's expectation of privacy strongly support that Defendant's conduct was highly offensive and would be so to a reasonable person. As such, Ceballos sufficiently plead the facts necessary to support a claim for invasion of privacy.

3. Ceballos Plead Sufficient Facts to Support a Claim of Tortious Discharge

Ceballos has also pleaded sufficient facts to support a claim of tortious discharge based on the invasion of his privacy. The first prong requires evidence of termination in contravention of public policy. Defendant admitted to Ceballos that he was fired as a direct result of the failed drug test, which was administered as a direct result of Ceballos's minor fall. Comp. at 4, ¶ 22. Under the above analysis, the drug test was a clear invasion of Ceballos's privacy and firing him because of his results went against Nevada's well-established right to privacy. Thus, the first prong of a tortious discharge claim is established in Ceballos's Complaint.

The second prong requires Ceballos to plead facts showing that no statutory remedy exists. Ceballos argues that, by successfully pleading facts supporting tortious discharge in violation of his right to privacy, he has also successfully plead facts sufficient to show that there is no adequate statutory remedy available to him because Nevada lacks a statutory remedy for invasion of privacy by intrusion onto one's seclusion or solitude.⁴ While tort damages may provide redress for part of Ceballos's injuries, they cannot provide complete relief. There are more than simple emotional damages or loss of pay damages are at play here. Ceballos is now subject

⁴ While *People for the Ethical Treatment of Animals* identifies a legal remedy for the appropriation of an individual's identity, Ceballos is unaware of any Nevada opinions which establish a statutory remedy for intrusion upon seclusion.

to the questions and biases of any potential future employers who see his termination for a failed drug test or his involvement in this litigation and choose not to offer him a position because of it. Under these facts, there is no statutory remedy available in the State of Nevada which would provide Ceballos with full redress for Defendant's conduct. As such, Ceballos pleaded sufficient facts to state a claim for tortious discharge.

IV. If the Court Finds that Ceballos Failed to Sufficiently Plead, Leave to Amend is Appropriate

Under Nevada Rules of Civil Procedure and common law, a complaint should not be dismissed unless it appears with certainty that the plaintiff could prove no set of facts that would entitle him or her to relief. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985). When a complaint can be amended to state a claim for relief, leave to amend is the preferred remedy over outright dismissal. *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 169–70, 400 P.2d 621, 624–25 (1965); *see also Yochum v. Davis*, 98 Nev. 484, 487–7, 653 P.2d 1215, 1217 (1982) (referencing Nevada's strong policy favoring resolution of disputes on their merits) (overruled on other grounds). Leave to amend should be freely given when justice requires unless there is an apparent or declared reason not to do so. *Nutton v. Sunset Station*, 131 Nev. 279, 284, 357 P.3d 966, 970 (2015); *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003). Such reasons include undue delay, bad faith, or dilatory motive on the part of the movant. *Id.*

If the Court holds that Plaintiff Danny Ceballos failed to adequately articulate a claim for tortious discharge grounded in an invasion of privacy, granting him leave to amend is the appropriate remedy. First, doing so would not impose any significant burden or prejudice on the Defendant. Defendant is a corporate entity with the resources to defend this litigation. There would be no more of a monetary or temporal burden placed on Defendant than would be in the course of normal litigation, especially as the case was dismissed at a very early stage. Additionally, there is no bad faith or dilatory motive on Ceballos's part in appealing these claims. Even if the Court finds that the claim at issue was not adequately pleaded, the facts which allows Ceballos to do so exist. As such, leave to amend would be appropriate.

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V. Conclusion

Without reasonable suspicion or justification, Defendant reached into the privacy of Ceballos's home, where he had a reasonable expectation of privacy, and punished him for engaging in lawful activities that in no way affected his job performance. This invasion, unlawful in Nevada, caused Ceballos's termination. Not only is Ceballos forced to pursue this litigation in hopes of making himself whole after being tortiously discharged, but he also faces a future in which obtaining new jobs and supporting his family will be increasingly difficult. Any potential new employer can easily deny him a job based on record of this failed drug test event though it should not have happened in the first place.

Dated this 3rd day of March, 2022.

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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 in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitation of NRAP 32(a)(7) because, including the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 point, or more, and complies with the type-volume limitation because the applicable portions consist of 6,113 words or fewer.

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FINALLY, I CERTIFY that I have read this Appellant's Supplemental 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 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 Procedures.

Dated this 3rd day of March, 2022.

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