

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN PHILLIP BONHAM,

Appellant/Cross-Respondent,

vs.

STATE OF NEVADA ex rel.
NEVADA DEPARTMENT OF
CORRECTIONS, CHARLES
DANIELS, TIM GARRETT, and
CARTER POTTER,

Respondents/Cross-Appellants.

Supreme Court No. 86217
District Court No.: A208201
Clerk of Supreme Court

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**RESPONDENTS/CROSS-APPELLANTS'
REPLY BRIEF IN SUPPORT OF CROSS APPEAL**

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Respondents/Cross-Appellants

*State of Nevada ex rel. Nevada Department of Corrections, Charles
Daniels, Tim Garrett, and Carter Potter*

I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS	1
II.	TABLE OF AUTHORITIES.....	2
III.	SUMMARY OF ARGUMENT.....	4
IV.	ARGUMENT	5
	A. Bonham Concedes that District Court’s Judgment In Favor of Bonham Should Be Reversed Because the District Court Held an Improper Evidentiary Hearing	5
	B. The District Court Erred when Entering Judgment in Favor of Bonham in the Amount of \$9.00 Because the Amounts Deducted from Bonham’s Inmate Account Were Proper.....	6
V.	CONCLUSION.....	11
VI.	CERTIFICATE OF COMPLIANCE.....	12
	CERTIFICATE OF SERVICE.....	14

II. TABLE OF AUTHORITIES

CASES

<i>Barmettler v. Reno Air, Inc.</i> , 114 Nev. 441, 956 P.2d 1382 (1998)	10
<i>Berry v. State</i> , 131 Nev. 957, 363 P.3d 1148 (2015)	6
<i>Buzz Stew, LLC v. City of N. Las Vegas</i> , 124 Nev. 224, 181 P.3d 670 (2008)	10
<i>Chorzempa v. Dep't of Corr.</i> , 136 Nev. 793, 477 P.3d 369, 2020 WL 7663475 (2020)	6
<i>Fausto v. Sanchez-Flores</i> , 137 Nev. 113, 482 P.3d 677 (2021)	5
<i>Laird v. State Pub. Emps. Ret. Bd.</i> , 98 Nev. 42, 639 P.2d 1171 (1982)	6
<i>Perkins v. Barnes</i> , 3 Nev. 557, 1867 WL 2080 (1867)	6
<i>Rocker v. KPMG LLP</i> , 122 Nev. 1185, 148 P.3d 703 (2006)	10, 11
<i>Wantz v. Redfield</i> , 74 Nev. 196, 326 P.2d 413 (1958)	9

STATUTES

NRS 41.031	9
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RULES

Nev. R. App. P. 28	12
Nev. R. App. P. 32	12

REGULATIONS

NDOC AR 258	9
NDOC AR 258.05.....	4, 7, 8

III. SUMMARY OF ARGUMENT

Bonham does not dispute that the Nevada Court of Appeals remand order was limited to considering whether Bonham “present[ed] a state law claim” and “whether there was evidence in the record to support such claims.” 3-ROA-529-30, COA Order at 6-7. The district court erred by not limiting its review to the parameters established by the Nevada Court of Appeals. The district court did not limit its review to the evidence in the record, as briefed in Defendant’s motion to dismiss. Instead, the district court held an evidentiary hearing, which is not permitted when considering a dispositive motion.

Even if the district court were permitted to hold an evidentiary hearing, it would make no difference. Bonham has not and cannot state a claim under Nevada law because all deductions to his inmate account were proper. Bonham does not dispute that NDOC properly deducted \$120.00, from the \$150.00 deposited in his inmate account, pursuant to NDOC AR 258.05, which provides caps for repayment of costs previously incurred by NDOC on behalf of Bonham. The additional \$16.00 deducted from his inmate account, which Bonham challenges in his complaint, is not subject to NDOC AR 258.05, because those deductions were not for repayment of expenses NDOC previously incurred, but were for postage and copy costs that Bonham was actually authorizing and incurring. Because the deductions from his inmate

account were proper, Bonham's state law claims, to the extent any exist, have no merit. Accordingly, the district court should have dismissed Bonham's Nevada law claims, or in the alternative granted Defendants' motion for summary judgment. This Court should therefore reverse the district court's judgment in favor of Bonham, and remand with instruction that the district court dismiss Bonham's complaint, or in the alternative grant Defendants' motion for summary judgment on any and all Nevada law claims that may be alleged in Bonham's complaint.

IV. ARGUMENT

A. Bonham Concedes that District Court's Judgment In Favor of Bonham Should Be Reversed Because the District Court Held an Improper Evidentiary Hearing

Bonham admits that holding an evidentiary hearing was improper, especially when Defendants had not yet answered Bonham's complaint. *See* Bonham's Answering Brief at 8:4-5. On remand, the district court was to determine whether Bonham's complaint would survive a Defendants' motion to dismiss, which alternatively requested summary judgment. 3-ROA-529, COA Order at 6. Holding an evidentiary hearing on a motion to dismiss or a motion for summary judgment was improper. *See Fausto v. Sanchez-Flores*, 137 Nev. 113, 114, 482 P.3d 677, 679, (2021), (holding that when a district court considers matters outside pleadings, a motion to dismiss "must be treated as one for summary judgment"); *Berry v. State*, 131 Nev. 957,

968, 363 P.3d 1148, 1156 (2015) (recognizing that conducting an evidentiary hearing on a motion for summary judgment would be improper). Accordingly, Bonham concedes that the district court's judgment in his favor should be reversed on that ground alone.

B. The District Court Erred when Entering Judgment in Favor of Bonham in the Amount of \$9.00 Because the Amounts Deducted from Bonham's Inmate Account Were Proper

Bonham does not dispute that \$120.00 was properly deducted from the \$150.00 deposited by Linda Conry on January 8, 2020, at 7:00:23 am.¹ See 1-ROA-3-4, Complaint at 3:7-13, 4:1-4; see also 2-ROA-255-56, MTD Ex. A; 3-ROA-607-08, Pl. Ex. Bonham, however, appears to continue to wrongly insist that copy and postage costs he authorized and incurred after January 8, 2020, at 7:00:23 am, through March 26, 2020, should not have been deducted. See Bonham's Answering Brief at

¹ In addition to deduction from the \$150.00 deposited by Linda Conry, Bonham adds claim about deductions from other deposits. See Bonham Answering Brief at 5:22 – 6:26. These other deposits or deductions have nothing to do with Bonham's complaint. See 1-ROA-1-6. Accordingly, those allegations are not properly before this Court. See *Chorzempa v. Dep't of Corr.*, 136 Nev. 793, 477 P.3d 369, 2020 WL 7663475, at *2 n.3 (2020) (declining to consider "claim [that] was not alleged in [plaintiff's] complaint") citing *Laird v. State Pub. Emps. Ret. Bd.*, 98 Nev. 42, 46, 639 P.2d 1171, 1173 (1982) (refusing to consider a claim made for the first time on appeal); see also *Perkins v. Barnes*, 3 Nev. 557, 565, 1867 WL 2080, at *5 (1867) (holding "every complaint must contain the facts constituting the cause of action").

5:9-16; *see also* 1-ROA-3-4, Complaint at 3:7-13, 4:1-9; 2-ROA-255-56, MTD Ex. A; 3-ROA-607-08, Pl. Ex. Bonham still does not dispute that he voluntarily authorized these postal and copy costs. *See* Bonham's Answering Brief at 5:9-11; *see also* 1-ROA-1-6, Complaint; 2-ROA-333, MTD Ex. C.

Bonham, however, continues to mistakenly asserts that only 50% of the \$150.00 deposited could be deducted for copy and postage costs, under NRS 209.246 and NDOC AR 258.05. *See* Bonham Answering Brief at 4:6-1, 6:21-23, 8:8-14, 12:16-19; 13:19-23; *see also* 1-ROA-3-4, Complaint at 3:21-24, 4:1-2.

Contrary to Bonham's insinuations, NRS 209.246 does not cap the amount that an inmate must pay out of a deposit for copy and postage costs. NRS 209.246(3) (emphasis added), however, expressly permits the NDOC Director, with approval of the Board, to "establish by regulation criteria for a reasonable deduction from money credited to the account of an offender to . . . [r]epay the costs incurred by the Department on behalf of the offender for [p]ostage" and for "[p]hotocopying." NDOC AR 258.05(1) permits deduction "from any money deposited in an inmate's individual Trust Account from any source other than wages" of "50% for costs incurred by the Department on behalf of the inmate per NRS 209.246." 2-ROA-314, NDOC AR 258.05. Bonham does not dispute that NDOC AR 258.05 was

properly enacted pursuant to NRS 209.246. Under the plain language of NDOC AR 258.05(1), the 50% cap applies only to repayment costs that had already been “incurred by” NDOC, not to the subsequent costs for postage and copies that the inmate may authorize in the future.

Bonham does not dispute that his complaint acknowledges that each challenged charges to his inmate account occurred after the \$150.00 deposit (1-ROA-4, Complaint at 4:5-9), and therefore were not repayment for costs incurred by NDOC, but were simply postage and copy costs that Bonham was authorizing and incurring. 2-ROA-333, MTD Ex. C. These charges, therefore, are not subject to the 50% cap of NDOC AR 258.05(1) as alleged by Bonham in his complaint, and therefore were properly deducted from Bonham’s inmate account.

Contrary to Bonham’s argument, Brass slips signed when money is available in his account is not a debt. Bonham Answering Brief at 5:9-11. Writing brass slips, like writing checks on a bank, are authorizations for deductions from the inmate’s account. *See* NDOC Glossary (defining “Brass Slip” as the “Inmate Account Transaction Request Form, DOC-509, by which inmates can access their individual trust account in the Prisoners Personal Property Fund”). Brass slips only becomes a debt, or “costs incurred” by NDOC, when the inmate does not have sufficient funds in his account to cover the brass slip. Only these “costs incurred” by NDOC are subject to the 50% cap.

Because the amounts deducted from Bonham's inmate account were proper, the district court's judgment in favor of Bonham against NDOC in the amount of \$9.00 was in error. 4-ROA-910, 913, Judgment at 1:20-21, 4:2-5.

As all deductions were proper, Bonham's complaint fails to state a claim under Nevada law. Bonham does not dispute that NRS 41.0322 provides that except after exhausting administrative remedies, a "person who is or was in the custody of the Department of Corrections may not proceed with any action against the Department or any of its agents, former officers, employees or contractors to recover compensation for the loss of the person's personal property, property damage, personal injuries or any other claim arising out of a tort pursuant to NRS 41.031." As already set forth, however, Bonham did not lose any personal property as all deductions from his inmate account were proper. "Moreover, an act, to be a conversion, must be essentially tortious; a conversion imports an unlawful act, or an act which cannot be justified or excused in law." See *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958). Bonham's allegation that NDOC did not follow NDOC AR 258 fails to meet the elements of conversion. Bonham has not alleged facts showing that NDOC committed an unlawful act because the charges to Bonham's inmate account were not prohibited by NDOC AR 258, but were indisputably

authorized and incurred by Bonham. *See* 2-ROA-333; MTD Ex. C. The individual Defendants certainly cannot be held liable because the Court of Appeal already determined that they “were not involved in managing the funds in Bonham’s inmate account.” 3-ROA-526. Order at 3. Accordingly, Bonham has not and cannot allege a claim of theft or conversion.

Bonham also cannot establish fraud. *See* Bonham Answering Brief at 4:11 – 5:8. In *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446–47, 956 P.2d 1382, 1386 (1998), this Court held that a Plaintiff must establish “each and every element of his fraudulent misrepresentation claim” as follows: “(1) A false representation made by the defendant; (2) defendant’s knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.” Additionally, pursuant to Nev. R. Civ. P. 9(b), Bonham “must state with particularity the circumstances constituting fraud or mistake” in his complaint. In *Rocker v. KPMG LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 708 (2006), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008), the Nevada Supreme Court held that to “plead with particularity, plaintiffs must include in their

complaint averments to the time, the place, the identity of the parties involved, and the nature of the fraud.” The Court reasoned that when plaintiff “does not inform [defendant] of any specific dates or time frames, or specify where . . . statements . . . were concealed or misleading . . . practices were used,” then “the most [defendant] could aver is that it has not done anything wrong” and therefore plaintiffs “complaint does not meet the NRCP 9(b) particularity requirements.” *Rocker*, 122 Nev. at 1192, 148 P.3d at 708.

Bonham points to no allegations in his complaint where any individual Defendant made any representation to him all, much less state with particularity facts establishing all of the elements for a claim of fraud. Accordingly, Bonham has not and cannot allege a claim of fraud.

As Bonham’s complaint has not and cannot allege a claim under Nevada law, the district court erred in failing to dismiss Bonham’s complaint, or in the alternative erred by not granting summary judgment in favor of Defendants.

V. CONCLUSION

For the reasons set forth above, this Court should uphold Defendants’ Cross Appeal, and reverse the district court’s order granting a \$9.00 judgment against Defendants. The Court should remand with instruction that the district court dismiss Bonham’s

complaint, or in the alternative grant Defendants' motion for summary judgment on any and all Nevada law claims that may be alleged in Bonham's complaint.

VI. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, font size 14-point, Century Schoolbook.

I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 1744 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 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.

Respectfully submitted November 27, 2023.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on November 27, 2023, I served true and correct copy of the foregoing **RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF IN SUPPORT OF CROSS APPEAL** by First-Class U.S. Mail, postage prepaid, addressed to the following:

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