IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MARION, AN INDIVIDUAL,
Appellant,
vs.
TALECRIS RESOURCES PLASMA CENTER, A CORPORATION,
Respondent.

No. 63018

FILED

FEB 27 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

The district court dismissed appellant Roy Marion's pro se complaint with prejudice, from which order Marion appeals. The gravamen of Marion's complaint is that he suffered compensable injuries and loss when employees of respondent Talecris Resources Plasma Center negligently informed Marion that he was HIV positive after he donated blood at the facility, when he in fact was not.

Marion was incarcerated at the time Talecris filed and served its motion to dismiss. While EDCR 2.20(e) affords the district court discretion to treat a party's failure to file a timely opposition to a motion as consent to the motion's grant, *see King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162 (2005) (opposition 24 days late), a pro se "litigant who is incarcerated stands in a position very different from all other litigants." *Kellogg v. Journal Commc'ns.*, 108 Nev. 474, 477, 835 P.2d 12, 13 (1992). Marion's written opposition to Talecris's motion to dismiss was filed on April 2, 2013, and the certificate of service attached to the opposition indicates that he gave his opposition to the correctional facility for mailing on March 26, 2013. While this was four days past the opposition's March

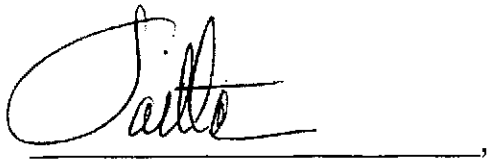
22, 2013 due date, the district court did not enter a minute order granting the motion to dismiss until March 27, 2013, and did not enter the written order dismissing the case until April 8, 2013, after Marion's opposition was received and filed. Finally, Marion's written opposition was filed before the scheduled April 10, 2013 hearing date.

Marion's delay in opposing the motion to dismiss did not affect or prolong the proceedings on the motion to dismiss, *compare Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (upholding order granting a motion as consented-to where the party disadvantaged by the order had received multiple extensions to file an opposition without doing so and offered a flimsy excuse for his default), or prejudice Talecris. *See State, Dep't of Motor Vehicles & Pub. Safety v. Moss*, 106 Nev. 866, 868, 802 P.2d 627, 628 (1990) (noting that an untimely opposition did not prejudice the moving party and holding that the district court abused its discretion in treating the opposing party's untimeliness as an admission). Under the unique circumstances of this case, and especially given that the opposition was on file before the order dismissing the case with prejudice was signed, the district abused its discretion in deeming Marion's delayed filing as an admission and consent to the dismissal with prejudice of his suit.

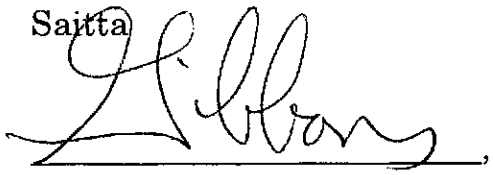
Instead, the district court should have addressed the merits of the motion based on the complaint and the late-filed opposition. *Id.* ("Dismissal is a severe sanction which should not be lightly ordered. Policy strongly favors deciding cases on their merits."). Though the minutes and written order note EDCR 2.23(c), which allows a district court judge to consider a motion "on its merits at any[ ]time with or without oral argument," it is unclear to this court whether the district

court did address the merits. And on this record, accepting all allegations in Marion's pro se complaint as true, and drawing all reasonable inferences in his favor, this court cannot say that Marion could not allege and prove a set of facts that would entitle him to relief. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (pro se pleadings are to be liberally construed); *Jacobs v. Adelson*, 130 Nev. ___, ___, 325 P.3d 1282, 1285 (2014) (stating Nevada's liberal motion to dismiss standard). Even if the district court determined that Marion's allegations failed to state a legally cognizable claim, it should not have dismissed his complaint *with prejudice* but, rather, should have afforded him the opportunity to amend his complaint. NRCP 15(a) ("[L]eave [to amend] shall be freely given when justice so requires."); *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1021 (1974) ("[D]ismissal with prejudice is a harsh remedy to be utilized only in extreme situations . . . [and] must be tempered by a careful exercise of judicial discretion."). Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Saitta



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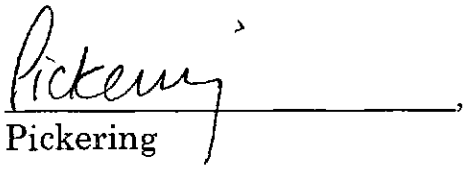

_____, J.
Pickering

cc: District Judge, Department 15
Lewis Roca Rothgerber LLP/Reno
The Amin Law Group, Ltd.
Eighth District Court Clerk