IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER,
Appellant,
vs.
THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; DWIGHT NEVEN, WARDEN; JAMES DZURENDA, DIRECTOR; THE STATE OF NEVADA; AND JEREMY BEAN,
Respondents.

No. 74447-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Rickie Lamont Slaughter appeals from a district court order dismissing a civil rights action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Slaughter is currently lawfully incarcerated by the Nevada Department of Corrections (NDOC), and all relevant events occurred while he was an inmate at High Desert State Prison (HDSP).[1] Inmates within Slaughter's unit at HDSP became involved in a racially motivated fight and correctional officers placed his unit on lockdown for several days. After the lockdown was lifted, the correctional officers moved all of the inmates from the unit into a courtyard. Slaughter alleges that an unnamed correctional officer provoked the inmates into fighting, saying, "you guys might as well fight now and get it over with." Fighting ensued and in order to disperse the inmates, an unnamed correctional officer fired live birdshot rounds into the crowd to regain control over the inmates. Slaughter was struck by the birdshot and allegedly suffered severe injuries. Slaughter was cited, along

[1]We do not recount the facts except as necessary to our disposition.

with other inmates, and received several sanctions, including loss of 180 good-time credits, and was ordered to pay monetary restitution. He was also transferred to a maximum security prison for 832 days. Slaughter's role in the fighting is unclear, and despite counsel's statements during oral argument regarding Slaughter's involvement, we decline to speculate. Further, it is unnecessary to resolve this issue for our disposition of this appeal.

As a result of his injuries, Slaughter filed a complaint alleging constitutional violations under 42 U.S.C. § 1983 against the State of Nevada, NDOC, and various NDOC supervisors and corrections officers in their individual and official capacities (collectively "defendants"), as well as Doe Defendants and Roe Insurance Companies. Slaughter's initial complaint contained four counts of alleged constitutional violations and state tort claims. Count I alleged damages under § 1983 for alleged violations of Slaughter's Eighth Amendment rights based on alternative theories of deliberate indifference and civil conspiracy. Count II sought damages under § 1983 based on violations of Slaughter's Fourteenth Amendment rights of equal protection under the law. Count III sought damages under § 1983 for alleged deprivations of Slaughter's First Amendment rights, and Count IV incorporated Counts I-III against Roe Insurance companies. With respect to the Eighth Amendment, Slaughter alleged in his complaint that defendants failed to ensure his safety when defendants organized and instigated a racially motivated fight within Slaughter's unit, resulting in an unnamed correctional officer firing birdshot into the crowd that struck and severely injured Slaughter. Slaughter's complaint also alleged that defendants violated the Fourteenth Amendment by depriving him of due process by conspiring to prevent him from calling any witnesses at his disciplinary

hearing for his alleged involvement in the fight, which resulted in disciplinary action being taken against him.

Defendants moved to dismiss Slaughter's complaint under NRCP 12(b)(5), and Slaughter, in turn, moved for leave to amend his complaint pursuant to NRCP 15(a) and supplement his pleadings pursuant to NRCP 15(d). In compliance with EDCR 2.30, Slaughter attached a proposed amended complaint. The allegations contained in Count I of the proposed amended complaint remained substantially the same, however, Slaughter changed his state civil conspiracy claim to civil conspiracy arising under federal law and added separate negligence claims. Slaughter substantially changed Count II (identified as the supplemental pleading), seeking damages under § 1983 for procedural due process violations. Count III included the same allegations contained in Counts I and II against the Roe Insurance Companies and Count IV was omitted from the proposed amended complaint.

The district court granted in part and denied in part defendants' motion to dismiss, and granted Slaughter's motion to amend. The district court dismissed Count II of Slaughter's proposed amended complaint "as moot since Habeas was granted" and Count III for "failure to state a cause of action against the insurance companies." The district court ordered Slaughter to file his amended complaint, as permitted by the court, within ten days.

Slaughter filed an amended complaint, adding additional defendants and maintaining his due process cause of action after supplementing it with additional facts. Defendants once again moved to dismiss it under NRCP 12(b)(5), arguing that Counts II and III had been dismissed by the district court, and therefore, Slaughter should not be permitted to proceed on these counts. Defendants also argued that Slaughter

failed to properly allege a cause of action under § 1983 under Count I because Slaughter failed to plead that defendants *personally* violated his constitutional rights. The district court agreed, finding that Slaughter also failed to plead civil conspiracy because that had to be based on an intentional tort, and that he failed to properly plead his state court claims based in negligence because he failed to allege defendants proximately caused his injuries. Therefore, the district court, pursuant to NRCP 12(b)(5), granted defendants' motion to dismiss Slaughter's amended complaint.

On appeal, Slaughter contends that the district court erred by dismissing his case pursuant to NRCP 12(b)(5) because his complaint complied with NRCP 8(a)'s notice pleading requirement.[2] Specifically, Slaughter argues that he properly pled a § 1983 cause of action because defendants were personally involved by inciting or orchestrating the fight in the courtyard after lifting the lockdown, which resulted in his injuries. He also argues that the federal civil conspiracy need not be based on an underlying intentional tort and that he properly pled proximate cause. Slaughter further argues that he properly pled his due process and conspiracy claims based on the allegations that defendants prevented him from calling witnesses at his disciplinary hearing, and that his due process

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[2]On page 15 of his opening brief, Slaughter concedes that the district court properly dismissed Count III against Roe Insurance Companies. Slaughter also concedes the dismissal of the NDOC as an entity for purposes of § 1983. However, in the summary and conclusion sections of the same brief, he argues in a single sentence that the district court erred in dismissing Count III. To the extent he challenges the dismissal of Count III, the only argument he provides is supported by no case authority or cogent argument, and therefore we affirm the district court's dismissal of Claim III and the NDOC.

claim is not moot because he cannot receive compensatory damages in his habeas case.

We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). We also review the district court's legal conclusions de novo. *Id.* A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Id.* A plaintiff's complaint must contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." NRCP 8(a). Further, the complaint must "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). The district court may dismiss a complaint "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." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.[3] Moreover,

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[3]The concurrence discusses the differences in the standard of review for § 1983 actions depending on whether the case is filed in federal or state court. However, the parties agree that the proper standard by which to consider the sufficiency of Slaughter's state court pleading is in accordance with NRCP 12(b)(5), and this is procedural rule upon which defendants' moved for dismissal below. Although, at oral argument, defendants' counsel suggested that by applying the "plausibility" standard followed in federal court, versus NRCP 12(b)(5) jurisprudence, Slaughter's amended complaint remains deficient, and therefore, was properly dismissed, defendants' failed to argue this below or in their brief on appeal, thus we decline to entertain the argument. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the

when considering a pro se plaintiff's complaint alleging § 1983 violations, the district court must liberally interpret the allegations within that complaint by applying "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Claim I: Slaughter's Section 1983 Claim for Deliberate Indifference and Deprivation of his Eighth Amendment Rights, and Conspiracy and Negligence Claims

Section 1983 actions provide a mechanism for parties to obtain relief for violations of their federal rights in federal or state court. *Haywood v. Drown*, 556 U.S. 729, 731 (2009). "To establish a claim under § 1983, the plaintiff must prove that the conduct complained of: (1) was committed by a person acting under color of state law, and (2) deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 153, 42 P.3d 233, 241 (2002).

A review of Slaughter's Claim I of his Amended Complaint demonstrates that Slaughter seeks damages under § 1983 for defendants' deliberate indifference to his safety while in prison, thereby depriving him of his Eighth Amendment rights. As a preliminary matter, the parties appear to conflate two issues: whether the district court should have dismissed defendants Dwight Neven and Jeremy Bean under qualified immunity, and whether the district court should have dismissed Slaughter's complaint altogether because the complaint failed to allege each defendant's personal involvement. Because it is unclear whether the district court addressed

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jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

qualified immunity below, we decline to address it on appeal.[4] Instead, we address the substance of Slaughter's arguments under the Eighth Amendment.

Slaughter argues that the district court erred in dismissing Claim I of his amended complaint because, under § 1983, he properly alleged that the unnamed correctional officers were deliberately indifferent to his personal safety, thereby depriving him of his right to be free from cruel and unusual punishment. Slaughter alleges that defendants directly caused his injuries, and that the supervisors who authorized the lifting of the lockdown instigated the violence that ensued, which in turn permitted a guard to deploy birdshot to control the inmates and ultimately caused Slaughter's injuries. Defendants argue that Bean and Neven must be dismissed from the amended complaint because they were not *personally* involved—they did not know that the unnamed guard would discharge birdshot, did not order the unnamed guard to lift the lockdown or discharge birdshot, and were not present when the unnamed guard discharged the birdshot. Slaughter also argues that Bean and Neven conspired to deprive Slaughter of his right to be free from cruel and unusual punishment under the Eighth Amendment. Defendants counter by arguing that the conspiracy claim cannot stand because Slaughter failed to plead the violation of an intentional tort. We agree with Slaughter.

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[4]The record is unclear as to whether defendants raised a qualified immunity defense before the district court, or if the court addressed it. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983; *see also Butler v. Bayer*, 123 Nev. 450, 168 P.3d 1055 (2007) (stating that a defense of qualified immunity should be resolved at the earliest possible stage in litigation). Therefore, we need not consider it on appeal.

To evaluate Slaughter's § 1983 claim, we first address the scope of the Eighth Amendment. The "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Eighth Amendment prohibits the imposition of cruel and unusual punishment and "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). "To establish an Eighth Amendment violation, a plaintiff must satisfy 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 (9th Cir. 2014).

The Eighth Amendment's prohibition of cruel and unusual punishment imposes certain affirmative duties on prison officials, including taking reasonable measures to protect the safety of inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). For example, prison officials must "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care; and [prison officials] must take 'reasonable measures to guarantee the safety of inmates.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). These duties are "not to be taken lightly." *Farmer*, 511 U.S. at 851 (Blackmun, J., concurring); *see also Butler*, 123 Nev. at 459-63, 168 P.3d at 1062-64 (holding that prison officials have a specific duty to protect prisoners when they know of an impending attack).

Accordingly, we conclude that prison officials are liable for cruel and unusual punishment under the Eighth Amendment, "for acting with deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 825.

Meaning that, if a prison official "knows that inmates face a substantial risk of serious harm . . . and fails to take reasonable measures to abate it," the prison official may be held liable for his failure to do so." *Id.* (citation omitted). "The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health,' and it does not matter whether the risk comes from a single source or multiple sources." *Id.* at 843 (quoting *Helling v, McKinney*, 509 U.S. 25, 35 (1983)).

To demonstrate that a prison official was deliberately indifferent, the inmate must show that the prison official "[knew] of and disregard[ed] an excessive risk to [his or her] safety," meaning that the official is "both [ ] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference." *Farmer*, 511 U.S. at 837; *see also Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011) (concluding that a plaintiff alleging that his supervisor violated his Eighth Amendment rights must plead that the supervisor personally acted with deliberate indifference).[5]

Here, at the time of the events, Bean was a senior correctional officer at HDSP and Nevan was the warden. As prison officials, they each

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[5]We recognize that there is an argument whether or not Slaughter has sufficiently pled a claim of supervisory liability for deliberate indifference under § 1983 in accordance with *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Both parties also cite extensively to *Starr*, where an inmate sought to hold a sheriff liable for ongoing constitutional violations of his subordinate. *See Starr*, 652 F.3d at 1205-06. Here, although Bean and Neven at all relevant times were employed as supervisors, Slaughter is not alleging that they were deliberately indifferent to the conduct of their subordinates, but rather were deliberately indifferent to allegedly orchestrating a prison riot. Therefore, we need not reach the issue of whether they were deliberately indifferent in their supervisory roles.

had a duty under the Eighth Amendment to undertake reasonable measures to guarantee Slaughter's safety. The gravamen of Slaughter's amended complaint, as alleged, is that not only that Bean and Nevan knew of the substantial risk to Slaughter's safety and failed to take reasonable measures to abate it, but they also intentionally "orchestrated" the risk—the riot—in an effort to "instigate and identify violent prisoners." Finally, it does not matter that Slaughter's injuries were caused by a correctional officer instead of an inmate because the risk to safety can come from multiple sources. *See Farmer*, 511 U.S. at 843.

Thus, the district court erred when it dismissed Slaughter's amended complaint. Specifically, the district court found that Slaughter's amended complaint failed to allege that defendants were deliberately indifferent to Slaughter's safety. The district court further concluded that the amended complaint failed to allege that defendants Bean, Neven, and James Dzurenda, individually *and* as supervisors, *personally* violated Slaughter's alleged constitutional rights.

However, taking the facts in the light most favorable to Slaughter, we conclude that he has sufficiently pled a claim of deliberate indifference under § 1983. In addition to the foregoing allegations, Slaughter alleged several facts in his amended complaint supporting his claim that defendants failed to ensure and protect his safety when they "intentionally orchestrated dangerous gladiator-style conditions which were both forseeable [sic] and preventable." Slaughter alleged that defendants, including the supervisors, personally participated in Slaughter's alleged constitutional violations because they collectively decided to lift the lockdown when they knew that they would likely have to fire birdshot to regain control

of the inmates under HDSP policy.[6] Additional factual allegations in the pleading, which support Slaughter's § 1983 claim, include that Bean, Neven, and two Doe correctional officers were personally involved with the investigation of the earlier fight in Slaughter's unit, and were aware of the racial tensions within the unit. Nevertheless, defendants lifted the subsequent lockdown instead of keeping it in place for at least two weeks as required by HDSP policy, and without changing the demographics of the inmates. Slaughter, in his amended complaint, further alleged that these actions led to the foreseeable violence that subsequently occurred. Specifically, he alleged that defendants knew lifting the lockdown would result in a retaliatory "race-war" because the inmates in the unit were "openly hostile prisoners seeking retaliation." Additionally, to show each defendant's personal involvement, Slaughter alleged that, during a taped recording, Bean admitted, "We knew this was going to happen, that's why we opened it up, didn't you see me watching you guys earlier in the Unit."

In light of the foregoing, we need not confine our causation analysis to the unnamed correctional officer or officers who fired the birdshot as being the cause of Slaughter's injuries, as defendants urge us to do. Slaughter has sufficiently pleaded, but for the failure to ensure his safety by taking steps to have avoided the riot, his injuries caused by the birdshot

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[6]We note that federal cases in Nevada have held that an inmate may establish supervisor liability for an Eighth Amendment claim involving the use of birdshot, which was a standard HDSP policy. *See Olivas v. Nevada*, No. 2:14-cv-1801, 2018 WL 6205412 (D. Nev. Nov. 27, 2018); *Perez v. Nevada*, No. 2:15-cv-01572, 2016 WL 4744134 (D. Nev. Sept. 12, 2016); *Delosh v. Nev. Div. of Prisoners*, No. 2:14-cv-00632, 2016 WL 8732517 (D. Nev. Jan. 22, 2016).

would not have occurred.[7] In addition, as explained above, the risk of injury can come from multiple sources.

Finally, we briefly address Slaughter's alleged civil conspiracy claims under his first claim for relief. Defendants urge us to affirm dismissal of the conspiracy portion of his deliberate indifference claim. Under federal law, "[t]o state a claim for conspiracy to violate one's constitutional rights under section 1983, the plaintiff must state specific facts to support the existence of the claimed conspiracy." *Burns v. City of King*, 883 F.2d 819, 821 (9th Cir. 1989). The plaintiff must allege "an agreement or meeting of the minds to violate constitutional rights." *Crowe v. City of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (quotations omitted), and "[t]o be liable each person in the conspiracy need not know the exact details of the plan, but each participant in the conspiracy must at least share the common objective of the conspiracy." *Id.* (quoting *United Steelworks of Am. v. Phelps Dodge Corp.*, 865 F.2d 1530, 1541 (9th Cir. 1989) (en banc)).

In its order, the district court found that "Slaughter asserts that [Bean] and [Nevan] conspired to lift the lockdown and orchestrate race riots and to identify violent prisoners."[8] Pursuant to § 1983, these allegations are sufficient to allege defendants conspired to deprive Slaughter of his Eighth Amendment rights. The district court, however, misinterpreted Slaughter's

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[7]For the same reasons, we need not address the proximate cause issues raised by defendants related to Slaughter's negligence claims, and conclude that Slaughter's allegations concerning "causation" satisfy NRCP 12(b)(5)'s notice pleading requirements.

[8]We note that defendants prepared the district court's order. We also note that the underlying facts supporting Slaughter's deliberate indifference claim are sufficient to support a tenable civil conspiracy claim pursuant to notice pleading requirements.

civil conspiracy claim as arising under state law and dismissed it for failure to allege a violation of an intentional tort. As the claim arises under § 1983, it is sufficiently pled. *See Burns*, 883 F.2d at 821.

Thus, we conclude from our review of the record that Claim I of Slaughter's amended complaint survives NRCP 12(b)(5) scrutiny by giving defendants sufficient notice of the nature of the deliberate indifference and Eighth Amendment violations, including conspiracy, alleged against each of them, as well as the relief Slaughter seeks pursuant to § 1983. We also reverse the dismissal of the state law claims of negligence based on the sufficiency of the Slaughter's allegations concerning proximate cause.

Claim II: Slaughter's Due Process Claim and Conspiracy Claims

Slaughter argues that the district court erred by finding that his due process claim was moot because his habeas corpus case did not bar financial recovery for his loss of credit in this case. He also avers that he can recover compensatory damages for the unnecessary time defendants forced him to spend in maximum security.[9]

"[A] controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (internal citations omitted). "A moot case is one which seeks to determine an abstract question

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[9]We cannot consider the parties' additional arguments regarding Slaughter's federal § 1983 case because the parties failed to provide the federal complaint on appeal and did not raise these arguments before the district court. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (holding that this court cannot consider matters that do not properly appear in the appellate record).

which does not rest upon existing facts or rights." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981).

We conclude that the district court erred by dismissing Slaughter's due process claim as moot because Slaughter is not barred from recovering in his § 1983 case when another district court has considered the same factual and legal obligations in a simultaneously pending habeas case. To recover compensatory damages for an unlawful conviction or sentence under § 1983, the plaintiff must show he succeeded under the same allegations in a habeas corpus case. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) ("A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983."); *see also Day v. Zubel*, 112 Nev. 972, 978, 922 P.2d 536, 539 (1996) (applying *Heck* to a § 1983 claim brought in a Nevada state court). Here, Slaughter maintained that he sought to amend his compliant after succeeding in his habeas case because he could not receive financial compensation for defendants' violation of his due process rights in the habeas case. Therefore, the district court erred by dismissing Slaughter's due process claim in his Claim II as moot since he is claiming damages, which would not be permitted in the habeas case.

Slaughter also alleges that the district court erred in dismissing his conspiracy claims set forth in Claim II. Specifically, he argues that the district court incorrectly applied the state civil conspiracy standard to his alleged civil conspiracy claim under federal law. In response, defendants argue that Slaughter failed to allege both state and federal § 1983 conspiracy.

Here, viewing the facts in a light most favorable to Slaughter as required under our jurisprudence for dismissal, we conclude that his amended complaint sufficiently states a conspiracy claim under § 1983. *See Burns*, 883 F.2d at 821. Slaughter pleaded specific facts in his amended

complaint to support an alleged conspiracy, including the following: that defendants "agreed to impose a blanket-restriction that prevented [him] from being able to call any prisoners identified in the notice of charges . . . [and] knew that such violation would make it easier to convict [him] and subject him to extremely severe sanctions once convicted." Although Slaughter did not use terms such as "meeting of the minds" he arguably set forth sufficient facts to support his federal civil conspiracy case. *See Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) ("A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading."). We need not address whether Slaughter properly pled a conspiracy claim under state law as he concedes he is not alleging one. Thus, the district court erred by dismissing Slaughter's federal civil conspiracy claim pursuant to § 1983 as contained in Claim II.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J. , concurring:

I agree that, under the liberal pleading standards of NRCP 12(b)(5), Slaughter's complaint adequately pleads claims arising under state

tort law, as confusing and self-contradictory as those pleading allegations are. NRCP 12(b)(5) doesn't require much, and dismissal is warranted only when "it appears beyond a doubt that [the plaintiff] could prove no set of facts which, if true, would entitle [him] to relief," no matter how illogical or internally contradictory the allegations of the complaint are on their face. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

But Slaughter's federal conspiracy claims arising under 42 U.S.C. § 1983 present a slightly different and more complex question, because they touch on two issues that, unfortunately, the parties have not addressed in detail. I join in the principal order along with my colleagues, but write separately to offer some thoughts on these issues for possible guidance in future cases.

I.

The first issue relates to the correct law that governs this case. The Ninth Circuit has held that a complaint that alleges that prison officials either intentionally engineered, or negligently permitted, a prison riot to ensue by mixing volatile inmates together asserts a valid claim under 42 U.S.C. § 1983. In their briefs, both parties agree that the Ninth Circuit has said as much in cases like, for example, *Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001) (concluding that the complaint pled valid § 1983 claim when it "paint[ed] a gladiator-like scenario, in which prison guards are aware that placing inmates of different races in the yard at the same time presents a serious risk of violent outbreaks"). Normally, Nevada courts look to the Ninth Circuit on certain federal issues such as, for example, search-and-seizure issues under the Fourth Amendment, *see, e.g.*, *State v. Lloyd*, 129 Nev. 739, 745, 312 P.3d 467, 470 (2013), or interpreting the scope of the Due

Process Clause, *see, e.g.*, *Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009).

So, at first blush, it would seem that Ninth Circuit cases like *Robinson* must bind us. But initial appearances can be deceiving. The Supremacy Clause dictates that, when a state court adjudicates a claim arising from a federal statute, (as a claim under 42 U.S.C. § 1983 clearly is), it must follow federal substantive law interpreting that statute. *See* U.S. Const., art. VI, cl. 2 ("the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). But there exists considerable evidence that the text and original public understanding of the Supremacy Clause at the time of the founding required state courts to follow interpretations of only the U.S. Supreme Court, not necessarily that of lower federal courts. Indeed, the Constitution itself refers only to the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., art. III, sec. 1. This interpretation has been adopted by at least one Justice of the U.S. Supreme Court. "The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state [ ] court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Lockhart v. Fretwell*, 506 U.S. 364, 376 (Thomas, J., concurring) (citations omitted); *see* David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759, 771, 774 (1979).

This distinction may make a real difference in cases like this. The U.S. Supreme Court has held that courts have a duty to protect inmates

from foreseeable violence at the hands of other inmates if they know that the inmate faces substantial risk of serious harm and yet disregard that risk by failing to take reasonable measures to abate it. *See Farmer v. Brennan*, 511 U.S. 825 (1970). Under the original public understanding of the Supremacy Clause, we must follow *Farmer*. But we need not necessarily follow cases from lower courts like the Ninth Circuit because those cases are not binding, only persuasive, and then only as persuasive as cases from any other lower federal appellate or district court. *See Lockhart*, 506 U.S. at 376. Notably, other federal courts outside of the Ninth Circuit are much more mixed on what must be pleaded in order to state a claim based on violence at the hands of other inmates. *See, e.g., Quick v. Mann*, No. 05–7102, 2006 WL 637169 (10th Cir. Mar. 15, 2006) (concluding that the complaint did not plead cognizable claim for civil rights violation when plaintiff alleged that he was blind and had been housed with cellmates who had previously threatened him with violence). At least one lower federal court within the Ninth Circuit applied *Robinson* narrowly to exclude injuries caused by the lawful actions of guards (as opposed to other inmates) during riots, and as far as the Supremacy Clause is concerned that lower federal court is just as precedential (or non-precedential) as the Ninth Circuit itself. *See Jameson v. Rawers*, No. 1:03–cv–5593–LJO–MJS, 2011 WL 862739 (E.D. Cal. Mar. 9, 2011) (dismissing inmate's claim of Eighth Amendment violation alleging that guard shot him during lawful effort to control inmate riot).

In any event, the only clear law that we have is that the U.S. Supreme Court said essentially the same thing in *Farmer* that the Ninth Circuit did in *Robinson*: prison officials have some duty to protect inmates from foreseeable violence at the hands of other inmates. That brings me to the second point, which is that neither *Farmer* nor *Robinson* addresses a set of facts legally similar to Slaughter's claim. Fundamentally, Slaughter

doesn't allege that he was foreseeably injured by other inmates. Rather, he alleges something entirely different: that he was accidentally injured by guards employing legal efforts to stop an ongoing riot. Indeed, his complaint does not allege that the guard who injured him intentionally targeted him, but rather that he was "caught in the crossfire" during the riot-control efforts. That's not *Farmer*, or even *Robinson*, but something else entirely.

II.

That implicates the second question. The complaint in this case alleges a conspiracy claim that is, factually, extremely different from *Farmer* and other U.S. Supreme Court cases interpreting the scope of § 1983. Despite the factual novelty of the allegations, I don't disagree with my colleagues that they meet the loose standards of NRCP 12(b)(5) as the Nevada Supreme Court has defined that standard.

But, on the other hand, those allegations strike me as highly "implausible" under the federal pleading standard of *Twombly* and *Iqbal*. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). So the question becomes: do we apply the more liberal Nevada notice-pleading standard normally associated with NRCP 12(b)(5), under which there is no test of plausibility, or do we apply the standard of FRCP 12(b)(6) which includes the federal "plausibility" standard?

When a state court adjudicates a federal claim like § 1983, it must follow federal substantive law, but it can apply its own procedural rules. *See* U.S. Const., art. VI, cl. 2. "State courts as well as federal courts have jurisdiction over § 1983 cases" but "the elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 358, 375 (1990). Indeed, state courts cannot constitutionally refuse to apply substantive federal law to § 1983 claims even when filed in a state court. *Id.* at 367-71 ("The Supremacy Clause makes [federal] laws 'the

supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law . . . . The Supremacy Clause forbids state courts to dissociate themselves from federal law [in resolving § 1983 claims]"). *See generally* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation* § 4.03, at 275 (3d ed. 1991) (providing that federal law governs § 1983 actions filed in state court).

At first blush, one might assume that because NRCP 12(b)(5) is a rule of procedure, we must apply it rather than FRCP 12(b)(6). One could also note that, despite many opportunities, the Nevada Supreme Court has thus far declined to adopt the federal plausibility test of FRCP 12(b)(6) into NRCP 12(b)(5), despite NRCP 12(b)(5) being textually identical to FRCP 12(b)(6). See *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (stating that, in general, where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules). This refusal could be assumed to mean that Nevada courts should never apply the federal plausibility test.

But not so fast. Both NRCP 12(b)(5) and FRCP 12(b)(6) test the sufficiency of the pleadings of a complaint, meaning they test whether the allegations of a complaint sufficiently plead everything that the substantive law requires. What is required to be pleaded in order to make a claim sufficient is itself a matter of substantive, not only procedural, law. For example, the elements that must be included to plead a proper ERISA claim are determined not by the federal rules of civil procedure, but by the substantive ERISA statute. *See* 29 U.S.C. Ch. 18 et seq. In our state courts, the elements required to plead a breach of contract claim are not set forth in the NRCP, but rather in the substantive common law of contracts. *See Cain v. Price,* 134 Nev. 193, 195, 415 P.3d 25, 28 (2018). Beyond that, when a

complaint is dismissed under either NRCP 12(b)(5) or FRCP 12(b)(6), that dismissal is considered an adjudication on the merits to which the doctrines of claim preclusion and issue preclusion apply to bar future re-litigation of the same claim. *See* FRCP 41(b); NRCP 41(b). In contrast, dismissals on such grounds as lack of personal jurisdiction or failure to join an indispensable party under NRCP 19 are considered dismissals on purely procedural grounds that do not result in an adjudication on the merits entitled to any preclusive effect. *See* NRCP 41(b); *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1057-58, 194 P.3d 709, 715 (2008) (holding that a dismissal not based on lack of jurisdiction, improper venue, or failure to join a party "operates as an adjudication upon the merits").

The question here is this: if a complaint pleads facts supporting all of the technical elements of a claim under 42 U.S.C. § 1983, but those facts appear highly implausible, is that a defect of procedural compliance, or is it a deficiency in the substance of the allegations? At least one commentator has noted that the answer to this question isn't clear at all, and of the few state courts to have addressed it, those courts do not always agree on the answer or the reasons why. *See* Steven H. Steinglass, Section 1983 Litigation in State Courts§ 12:4 (2018).

To my knowledge, this question has never been addressed in Nevada. And the answer makes a big difference here (at least as to Slaughter's § 1983 claims, though not his state law tort claims). If we apply the liberal standard of NRCP 12(b)(5) to Slaughter's claim and ask only if the elements of a claim under § 1983 are pleaded no matter how implausibly they were pleaded, I agree that he has alleged all of the elements of a proper claim. But I have little doubt that had these same claims been filed in federal district court where FRCP 12(b)(6) includes a "plausibility" requirement that Nevada's NRCP 12(b)(5) does not, they would be quickly dismissed.

Here's why. Slaughter's complaint alleges that numerous officials in NDOC conspired to incite a race riot among inmates. So far, so good, as the Ninth Circuit has held that a claim predicted on something like this states a claim under 42 U.S.C. § 1983. *See Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001). Whether or not we accept *Robinson* as binding authority, the decision constitutes some evidence that this kind of claim is, at least up to this point, not going to considered totally "implausible" by every court that sees it. But the problem here is that, unlike *Farmer* and *Robinson*, Slaughter doesn't allege that he was injured by the rioting inmates. Had he done so, we'd at least be within the realm of plausibility, for if one accepts that the guards organized such a race riot, one can easily foresee the possibility that the riot may injure many inmates. It's *Robinson* virtually verbatim.

But Slaughter doesn't allege that he was injured by the rioting inmates, because he wasn't. Instead, he was injured by a guard who fired shotgun birdshot into a crowd of rioting inmates in an effort to try to control the riot, and some of the birdshot ricocheted and hit him. Governing NDOC policy permits the use of birdshot to stop inmate riots, so Slaughter runs into a sticking point: he can't allege that the guard fired birdshot at him illegally in violation of any law or NDOC policy. *See Perez v. Nev.*, No. 2:15–cv–01572–APG–CWH, 2016 WL 4744134 (D. Nev. Sept. 12, 2016). Indeed, he concedes that the guards didn't directly aim at him at all, but fired into a crowd of rioters and the birdshot pellets only hit him after ricocheting off of floors and walls (as he puts it in his complaint, he was "caught in the crossfire"). In order to make his claim fit, he concedes that the firing of the birdshot was fully consistent with law and prison policy, but nonetheless claims that his injury was pre-planned through a far more complicated and nefarious plot. In this alleged plot, the guards somehow knew that, unlike numerous other riots, this particular riot would inevitably spin so far out of

control that it could no longer be contained through non-lethal means, which would then force the guards to legally employ escalating force, such as birdshot, to quell the riot, knowing that the birdshot would ricochet perfectly and hit Slaughter just as planned. According to Slaughter, the whole riot was engineered as a ploy to provide the guards with an opportunity to legally shoot into the crowd with birdshot in a way that would cause it to ricochet around and injure (but yet not kill) him. For this plan to work, the guards must have stage-managed the other inmates to behave exactly as planned, like mindless marionettes: making them riot in a way that spiraled so far out of control that the guards would be legally authorized to use deadly force to contain it, but at the same time not so far out of control that Slaughter would be left standing anywhere else but in the perfect spot for a guard to accurately ricochet shotgun pellets into him. It's a stretch to call this sequence of events "foreseeable," when under traditional principles of tort law the actions of third parties who are not parties to the conspiracy (not to mention dozens of such third parties, as there are here) during a course of events is usually considered the very definition of "intervening" conduct that breaks any chain of causation. *See Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. 855, 863, 265 P.3d 688, 693 (2011) (affirming summary judgment in favor of innkeeper who had no way of knowing a criminal would commit a crime on the premises). Indeed, the danger of recognizing such claims too broadly is that they place prison officials in a no-win scenario: had prison officials acted to quell the alleged "race riot" by doing the obvious thing and separating inmates by race, "[a] policy of deliberate racial segregation of prisoners would raise serious questions under the equal protection clause of the Fourteenth Amendment." *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984).

Does this nonetheless plead a claim under 42 U.S.C. § 1983? Yes under NRCP 12(b)(5), if we accept that it was the nefarious revenge plan that Slaughter contends that it was, involving dozens of inmates and guards involved in escalating violence on the verge of running out of control yet somehow choreographed to perfection. Under NRCP 12(b)(5), we're required to believe that version of facts, because it's the version that Slaughter pleads. But I would conclude that under the standard of *Twombly* and *Iqbal*, the answer is no, and indeed this is the very kind of case for which the doctrine of "implausibility" was designed: one that meets liberal pleading requirements in a technical way but is extremely unlikely to go very far and likely will end up being little more than a waste of judicial resources.

There's an argument to be made that the "plausibility" requirement of *Twombly* and *Iqbal* is, at least in cases like this, a substantive requirement rather than a procedural one. If I am correct, then the proper outcome of this appeal should be dismissal of Slaughter's § 1983 claims. But although I'm personally inclined to believe the argument may be worthy of serious consideration, the question wasn't fully briefed by the parties as adequately as I think we'd need it to be (especially not by Slaughter, who appeared pro se in district court) before we tackle it head-on and issue an answer that binds not only Slaughter but all other inmates who might assert such claims in the future. At the very least, this may be an issue that ought to be explored in the future in an appropriate case. For the moment suffice it to say that I believe that Slaughter's § 1983 conspiracy claims likely fail to meet the plausibility requirements of federal law but to the extent that dismissal depends entirely upon state standards instead, and the question whether that state standard is all that's needed is one whose answer remains

unresolved for now, I join with my colleagues in allowing his claims to proceed.

_____, J.
Tao

cc: Hon. Ronald J. Israel, District Judge
Nicholas R. Shook
Attorney General/Las Vegas
Eighth District Court Clerk