

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCIS JAMES JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA  
DEPARTMENT OF CORRECTIONS;  
AND MIKE BYRNE,  
Respondents.

No. 76304-COA

FILED

NOV 25 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Francis James Johnson appeals from a district court order dismissing his complaint for failure to comply with NRCP 16.1. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

On May 3, 2017, Johnson, an inmate at Ely State Prison, commenced an action pursuant to 42 U.S.C. § 1983 (2012).<sup>1</sup> Johnson filed the action in pro se naming as defendants the State of Nevada ex rel. the Nevada Department of Corrections (NDOC), and Ely State Prison's assistant warden Mike Byrne.<sup>2</sup>

---

<sup>1</sup>We do not recount the facts except as necessary for our disposition.

<sup>2</sup>Although the district court previously dismissed NDOC as a party from the case, NDOC nevertheless jointly filed with Byrne the motion to dismiss for Johnson's failure to comply with NRCP 16.1 and, therefore, is a respondent on appeal. However, the district court's order dismissing Johnson's case pursuant to NRCP 16.1 should have solely applied to Byrne, as he was the *only* party to have answered. Specifically, NRCP 16.1 only required Johnson to conduct an early case conference with Byrne—not NDOC. To the extent that the district court dismissed NDOC for Johnson's failure to conduct an early case conference with NDOC, this was in error. See NRCP 16.1(e)(1). We would also note that the district court's order indicating that the State had filed an answer is incorrect. Nevertheless, these errors are harmless since the district court, before deciding

On August 3, the State and NDOC filed a motion to dismiss Johnson's complaint pursuant to NRCP 12(b)(5) (first motion to dismiss).<sup>3</sup> On August 5, Byrne filed a separate motion to dismiss (second motion to dismiss) based on service issues pursuant to NRCP 12(b)(4) and NRCP 4(i). On September 25, Byrne withdrew his separate motion to dismiss and filed an answer.

On October 19, Johnson was transferred from Ely State Prison to High Desert State Prison. On October 25, Johnson's deadline to set an early case conference with Byrne, who was the first and only answering party, expired pursuant to NRCP 16.1(b).

On February 16, 2018, Johnson filed a request for a status check due to his perceived lack of progress in his case. On or about March 26, the 180-day deadline under NRCP 16.1 for Johnson to hold early case conference with Byrne expired, without Johnson holding an early case conference with Byrne.

On March 28, the district court made a ruling on the first motion to dismiss, dismissing the State and NDOC as defendants under NRCP 12(b)(5). On April 2, Johnson filed a motion to appoint counsel,

---

defendants' motion to dismiss pursuant to NRCP 16.1, had already dismissed the State as well as NDOC on other grounds, which Johnson has not appealed. Therefore, while the district court's order on appeal appears to dismiss other defendants in addition to Byrne, our order only applies to Byrne.

<sup>3</sup>The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). All orders in this case were entered before March 1, 2019. Accordingly, we cite to the prior version of the NRCP herein.

explaining that since his transfer to High Desert State Prison, he had been denied access to the courts, and was actively denied access to the law library research materials. As a result, Johnson argues that he could not understand the district court's March 28 order dismissing the State and NDOC.

On April 5, NDOC (despite having been dismissed) and Byrne jointly filed a motion to dismiss Johnson's case under NRCP 16.1(e) (third motion to dismiss). On April 18, Johnson filed an opposition to the third motion to dismiss, once again explaining that since his transfer to High Desert State Prison, he had been denied access to the courts, was refused access to the prison's legal research materials, and as a result, did not understand what was required of him under NRCP 16.1.<sup>4</sup> On April 20, Johnson alleges he regained access to the prison's law library and legal research materials.<sup>5</sup>

On April 25, Johnson filed a motion for clarification questioning which parties remained in the case. In his motion, he included a number of rule and statutory references.

---

<sup>4</sup>It should be noted that Johnson, in his affidavit attached to his opposition to the motion to dismiss filed on April 18, but signed on April 9, stated that his "description of events are true and correct" and that he was "denied access to the court."

<sup>5</sup>At oral argument, Byrne suggested that Johnson might in fact have had access to the prison library for a longer period of time, notwithstanding his representations. Nevertheless, Johnson's allegations contained in multiple pleadings that, during the time he was required to comply with NRCP 16.1, he did not have access to the prison law library and legal resources were uncontroverted by Byrne below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

On April 26, the deadline for Byrne to file a reply in support of the third motion to dismiss for Johnson's failure to comply with NRCP 16.1 elapsed. On May 14, Byrne filed a motion for enlargement of time to reply in support of the third motion to dismiss.

On May 25, Johnson opposed the motion for enlargement of time, whereupon Johnson for the third time explained to the district court that from October 19, 2017, to April 20, 2018, he had been denied access to the courts, was refused access to the prison's legal research materials and, as a result, did not understand what was required of him under NRCP 16.1.

On June 1, 2018, Johnson filed a motion for sanctions against Deputy Attorney General Erin Albright (counsel for the defendants below) for failure to file a timely reply in support of the third motion to dismiss. On June 8, ten weeks after the original deadline, the State and Byrne filed a reply in support of their third motion to dismiss.

On June 21, the district court entered its final order denying Johnson's motion to appoint counsel; granting the State's and Byrne's motion for enlargement of time to file a reply; granting the State's and Byrne's third motion to dismiss; declining to rule on Johnson's motion for sanctions; and granting Johnson's motion for clarification.<sup>6</sup> In its order granting dismissal of Johnson's case under NRCP 16.1, the district court found that "Johnson has not provided any reason he could not schedule a NRCP 16.1(b) case management conference, nor has he opposed the State's

---

<sup>6</sup>In granting Johnson's motion for clarification, the district court explained: "There remains for this Court's consideration *the State's* motion to dismiss . . . . The court agrees with Johnson that there [was] only one motion to dismiss before the court, it being the *defendants'* motion to dismiss filed April 5, 2018." (Emphases added.) Thus, the only remaining motion to dismiss was based on Johnson's failure to comply with NRCP 16.1.

motion to dismiss with any legal or factual support for his failure to comply with NRCPC 16.1(b),” and further rejected Johnson’s argument that he lacked access to the law library because “on April 25, 2018 . . . Johnson filed a motion for clarification replete with NRS and U.S.C. citations and also filed a motion for sanctions under rule 11 complete with points and authorities.” This appeal followed.

On appeal, Johnson argues that the district court “ignored the practical hurdles” he encountered in pursuing his rights. Specifically, Johnson argues that the district court abused its discretion by failing to properly consider “the nonexhaustive” list of factors in *Arnold v. Kip*, 123 Nev. 410, 415-16, 168 P.3d 1050, 1053 (2007), when deciding whether or not to grant him an extension of time to conduct the early case conference. Further, Johnson argues that the timing of High Desert State Prison’s actions in denying him access to the prison’s law library and legal resources constitute “compelling and extraordinary” circumstances justifying an extension of time beyond 180 days to conduct the conference.

Byrne, without controverting Johnson’s argument that he was denied access, argues that “Johnson failed to demonstrate why he had or had not attempted to set a case conference” and “failed to demonstrate any cause as to why he should be excused from NRCPC 16.1(b) requirements.” Further, in keeping with the district court’s order, Byrne points out that in spite of Johnson’s argument that he did not have access to legal resources, his motion for clarification (filed on or about April 25) was replete with NRS and USC citations and his motion for sanctions under Rule 11 (filed on or about June 1) was complete with points and authorities. Thus, Byrne argues that Johnson’s motions filed in April and June support that the prison library was not to blame for Johnson’s failure to comply with NRCPC

16.1, and that he “failed to demonstrate cause why he should be excused from NRCP 16.1(b) requirements.” We disagree.

We review the district court’s decision to dismiss a case under NRCP 16.1(e) for an abuse of discretion. *Arnold*, 123 Nev. at 414, 168 P.3d at 1052. A district court abuses its discretion when it “bases its decision on a clearly erroneous factual determination or it disregards controlling law.” *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) [hereinafter *MB America*] (internal citation omitted).

NRCP 16.1(b)(1) requires a plaintiff to hold an early case conference, where the parties must “meet in person to confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case,” and to make discovery disclosures and develop a discovery plan pursuant to NRCP 16.1(a)(1) and (b)(2). The early case conference must be held within 30 days after a defendant has served an answer to the complaint. NRCP 16.1(b)(1). “Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a date more than 180 days after an answer is served by the defendant in question.” *Id.* Further, NRCP 16.1(e)(1) permits a district court to dismiss a case *without prejudice* for failure to satisfy the 180-day deadline to conduct an early case conference as required by NRCP 16.1(b)(1), “unless there are compelling and extraordinary circumstances for a continuance beyond this period.” *Dornbach v. Tenth Judicial Dist. Court*, 130 Nev. 305, 310, 324 P.3d 369, 373 (2014).

The enforcement provisions of NRCP 16.1 “recognize judicial commitment to the proposition that justice delayed is justice denied.” *Dougan v. Gustaveson*, 108 Nev. 517, 523, 835 P.2d 795, 799 (1992) (internal

quotation marks omitted), *abrogated on other grounds by Arnold*, 123 Nev. at 415, 168 P.3d at 1053. Nevertheless, we “are mindful that occasionally an overly strict application of a rule—especially when coupled with ultimate sanctions—will defeat the very ends of justice that the rules are designed to promote.” *Id.*

Further, “[t]he district court’s consideration of a motion to dismiss without prejudice should address factors that promote the purpose of the rule, rather than factors that focus on the consequences to the plaintiff resulting from his or her failure to comply with the rule.” *Arnold*, 123 Nev. at 416, 168 P.3d at 1053-54. To that end, the *Arnold* factors provide district courts with the framework in which to determine whether or not dismissal of a case is appropriate under NRCP 16.1(e). These factors include (1) “the length of the delay,” (2) “whether the defendant induced or caused the delay,” (3) “whether the delay has otherwise impeded the timely prosecution of the case,” (4) “general considerations of case management,” and (5) “whether the plaintiff has provided good cause for the delay.” *Arnold*, 123 Nev. at 415-16, 168 P.3d at 1053.

In this case, Byrne filed his answer to Johnson’s complaint on September 25, 2017. Under NRCP 16.1(b), Johnson had thirty days, until October 25, to hold an early case conference with Byrne. Six days before that deadline, on October 19, Johnson—who was allegedly without knowledge of the early case conference requirement in NRCP 16.1(b)—was transferred from Ely State Prison to High Desert State Prison. Likewise, under NRCP 16.1(e), Johnson had 180 days, or until March 26, 2018, to hold an early case conference with Byrne or face dismissal of his case. However, Johnson alleges that he did not gain access to legal research materials at High Desert State Prison in order to comply with NRCP 16.1(b), until

sometime in April, *after* the 180-day deadline to comply with the rule under NRCP 16.1(e) had passed.<sup>7</sup> Notably, Byrne neither disputed these allegations below, nor countered them on appeal.

It is well-established that prisoners have a right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 350-51 (1996) (recognizing that the right of access to the courts is “well-established” and “fundamental” (internal citations omitted)). To demonstrate a denial of access to the courts, “[an incarcerated plaintiff] might show . . . that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known.” *Id.* at 351. Here, without access to legal resources Johnson may not have been able to understand and comply with the requirements of NRCP 16.1.<sup>8</sup> *See Lewis*, 518 U.S. at 351. This may have been further exacerbated by the number of motions to dismiss that were filed, the district court’s own delays in ruling on those motions, as well as certain inconsistencies in the district court’s rulings. Indeed, Johnson’s lack

---

<sup>7</sup>It is unclear exactly when in April Johnson regained access to the prison’s law library, but it appears that he did not have access during the relevant time period—on or before March 26—to comply with NRCP 16.1. The fact that he may have had access to library materials in April is not controlling. Further, the motions he filed on April 25 and June 1, are not dispositive in determining his access during the relevant time period. Johnson also consistently declared that he did not have access to the library until April, and his position is uncontroverted below. *See supra* note 4 & 5.

<sup>8</sup>We recognize that litigants are not excused from following the rules simply because they are proceeding in pro se. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 258-59 (2018); NRCP 16.1(g) (providing that parties proceeding in pro se must comply with NRCP 16.1). Moreover, in ordinary circumstances, the fact that a pro se litigant is incarcerated is no exception to this rule.



of understanding is further supported by his own conduct of filing a motion in April seeking clarification of the district court's orders.

Although the district court's order placed great weight on Johnson's two motions that contained legal authority, both of these motions were filed *after* Johnson's period to comply with NRCP 16.1 had expired. Therefore, the district court failed to consider the relevant time period in which Johnson stated that he was denied access to the law library and legal resources. Accordingly, we conclude that the district court abused its discretion in relying upon an incorrect factual determination to determine whether Johnson had demonstrated good cause under *Arnold*, or "compelling and extraordinary circumstances" under NRCP 16.1. *See MB America*, 132 Nev. at 88, 367 P.3d at 1292.


Thus, in keeping with the purpose of NRCP 16.1, the district court should have considered any lack of access from the date Byrne's answer was served, up to and including March 26, 2018 (the last day to conduct the early case conference) when determining whether good cause existed under *Arnold* for Johnson's delay in complying with the rule.

Additionally, we further conclude that in accordance with NRCP 16.1, the district court should have considered whether the timing of Johnson's lack of access to the law library and legal resources constituted "compelling and extraordinary circumstances" justifying an extension of time to conduct an early case conference beyond 180 days. *See* NRCP 16.1(b) and (e). *See generally* Brian R. Means, *Postconviction Remedies*, § 25:46 (2020) ("Examples of government action that can constitute [] extraordinary circumstances include the following: the complete confiscation of the petitioner's legal materials just weeks before a filing deadline; [or] the petitioner's denial of access to legal files when he was

temporarily transferred from prison to another district . . . ." (footnote and internal quotation marks omitted)). Thus, we remand to the district court for further consideration. *See Dornbach*, 130 Nev. at 311-12, 324 P.3d at 373-74. Accordingly, we

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

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Gary Fairman, District Judge  
Garman Turner Gordon  
Attorney General/Las Vegas  
Barbara Buckley  
Snell & Wilmer/Kelly H. Dove  
Anne R. Traum  
White Pine County Clerk