

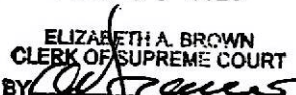
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BASIL HOWELL,
Appellant.

No. 79578-COA

FILED

DEC 30 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Basil Howell appeals from a final judgment in a tort action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Howell filed the underlying action asserting negligence against multiple named and fictitious defendants. In his complaint, Howell alleged that he was injured at a CrossFit event after sitting in a folding chair that immediately collapsed. He claimed that the “Defendants . . . so carelessly and negligently created, owned, controlled, inspected, and/or maintained the folding chair on the premises in an unstable and dangerous manner, thereby causing Plaintiff to sustain serious injuries and damages.” When Howell later took the NRCP 30(b)(6)¹ deposition of one of the named defendants (CrossFit Modulus, LLC), the designee revealed the identity of

¹The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Committee to Update and Revise the Nevada Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the prior versions of the rules were in effect at the time Howell filed his motion and the district court first ruled on it, we cite those versions herein.

an individual he observed taking the chair away from the premises after the subject incident occurred.

Just over one month later, and after failing to obtain a stipulation from CrossFit Modulus to allow Howell to amend his complaint, Howell filed a motion seeking leave to amend the complaint under NRCP 10(a) and NRCP 15(c) to add the newly revealed individual, his employer, and the employer's owner as parties and to have the amendment relate back to the original filing of the complaint in order to avoid application of the statute of limitations. CrossFit Modulus opposed the motion, and the matter proceeded to a hearing. The district court ultimately denied Howell's motion in a written order, which it later amended, concluding that Howell failed to satisfy two of the three requirements set forth in *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991), *abrogated on other grounds by Costello v. Casler*, 127 Nev. 436, 440 n.4, 254 P.3d 631, 634 n.4 (2011), for substituting named defendants in place of fictitious ones. The district court also concluded that NRCP 15(c) did not apply to Howell's request because he was seeking to add new parties—not new claims—and the rule only applies to requests to add new claims or defenses.

Howell later stipulated to dismiss one of the named defendants, and the district court granted summary judgment in favor of the remaining defendants, including CrossFit Modulus. Howell thereafter notified the court that he had accepted an offer of judgment from the remaining defendants, and he then stipulated to those defendants' dismissal with prejudice and initiated this appeal. The defendants filed a motion to dismiss the appeal, which the supreme court granted in part. *Howell v. CrossFit Modulus, LLC*, Docket No. 79578 (Order Dismissing Appeal in

Part, Removing Respondents, and Denying Request for Sanctions, February 27, 2020). The supreme court concluded that Howell was not aggrieved by the stipulated dismissal and, in light of Howell's assertion that he was not maintaining any claims against the defendants, removed them as respondents. *Id.* However, the court determined that Howell was entitled to challenge the district court's interlocutory order denying leave to amend, and it allowed this appeal to proceed with respect to that order. *Id.* The appeal was then transferred to this court.

On appeal, Howell contends that the district court should have granted his motion for leave to amend under both NRCP 10(a) and NRCP 15(c). Specifically, he contends that he satisfied all of the *Nurenberger* requirements, that the district court erred in concluding that NRCP 15(c) did not apply, and that he satisfied all of the requirements for leave to amend with relation back under that rule. We address each of these arguments in turn.

We review a district court order denying leave to amend a complaint for an abuse of discretion. *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013). Pursuant to NRCP 10(a), "[a] party whose name is not known may be designated by any name, and when the true name is discovered, the pleading may be amended accordingly." And our supreme court has held that

the effective utilization of Rule 10(a) requires: (1) pleading fictitious or doe defendants in the caption of the complaint; (2) pleading the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based; and (3) exercising reasonable diligence in

ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional.

Nurenberger, 107 Nev. at 881, 822 P.2d at 1106. The plaintiff must satisfy all three requirements in order to obtain an amendment that relates back to the original filing of the complaint. *Id.*

Here, the district court found that Howell failed to satisfy the second and third *Nurenberger* requirements. With respect to the second, the district court determined that Howell's complaint failed to clearly specify the connection between the intended defendants and the cause of action because it merely alleged that the doe and roe defendants were "responsible in some manner," and it failed to allege that they engaged in the same negligent conduct with respect to the folding chair as the named defendants. But the district court's conclusion on this point elevates form over substance, as Howell's complaint specifically provided that the fictitious defendants "caused damages proximately to Plaintiff *as herein alleged*" (emphasis added). And although the specific allegations later in the complaint referred directly to the named defendants and not the doe or roe defendants, the generic reference to "Defendants" therein—read together with the aforementioned provision regarding the doe and roe defendants—sufficiently conveys that Howell believed both the named and fictitious defendants may be liable for negligently maintaining the folding chair. *See Costello*, 127 Nev. at 441, 254 P.3d at 635 ("Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties."); *see also Droge v. AAAA Two Star Towing, Inc.*, 136 Nev., Adv. Op. 33, 468 P.3d 862, 878 (Ct. App. 2020) (acknowledging that pleadings must be liberally construed and are not dependent upon the use of precise legal terminology).

With respect to the third requirement, the district court determined that Howell had failed to exercise reasonable diligence in ascertaining the identity of the fictitious defendants because he waited more than one year after filing the complaint to conduct CrossFit Modulus's deposition and did not propound any written discovery. However, as Howell argued below and maintains on appeal, CrossFit Modulus's 30(b)(6) designee—its owner—knew the identity of the individual he observed carrying the chair away and failed to voluntarily disclose that individual's identity in discovery. See NRCP 16.1(a)(1)(A) (requiring parties to disclose—without awaiting a discovery request—the name of each individual likely to have discoverable information). And in light of this failure, it does not appear from the record before this court that Howell had any reason to believe that anyone other than the named defendants were in any way responsible for the folding chair's collapse after CrossFit Modulus made its mandatory disclosures. Accordingly, because it does not appear that the district court considered the impact of CrossFit Modulus's failure to disclose on this point, and in light of Howell promptly moving to amend upon learning of the other individual—as well as the district court's erroneous determination with respect to the second *Nurenberger* requirement discussed above—we conclude that the district court's decision on this issue was arbitrary and amounted to an abuse of discretion.² See *Holcomb*, 129 Nev. at 191, 300 P.3d at 130-31.

²As noted below, in resolving the issue in this manner, we do not intend to convey that the district court is required to grant Howell's request under NRCP 10(a) on remand; we conclude merely that the specific reasoning employed by the district court constituted an abuse of discretion. As an example of alternative grounds the district court may wish to consider

Turning to Howell's contention that the district court erred in concluding that the relation back provision of NRCP 15 did not apply to his request, we agree. The district court, citing *Nurenberger*, concluded that NRCP 15(c) has no application to situations where a plaintiff seeks to add or substitute parties under NRCP 10(a), as NRCP 15(c) applies only when seeking to add claims or defenses. *See* 107 Nev. at 882, 822 P.2d at 1106. But the supreme court later specifically disavowed that conclusion as dicta and held that "the relation back effect of NRCP 15(c) does apply to the addition or substitution of parties." *Costello*, 127 Nev. at 440 n.4, 254 P.3d at 634 n.4. And consistent with that holding, the advisory committee note to the current version of NRCP 15 acknowledges that "if a fictitious-party replacement does not meet the [what is now codified as] Rule 10(d) test, it may be treated as an amendment to add a party under Rule 15 if the standards in Rule 15 are met." NRCP 15 advisory committee's note to 2019 amendment. Accordingly, the district court erred when it concluded otherwise and declined to reach Howell's arguments with respect to NRCP 15. And although Howell contends on appeal that he is entitled to relief under that rule, because the district court did not reach the issue, we decline to do so in the first instance. *See Cranesbill*, 136 Nev. at 82, 459 P.3d at

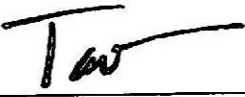
on remand, we note that the district court alluded to precedent in its order providing that the fictitious-defendant rule is limited to scenarios where the plaintiff knows the defendant's identity or description, just not his true name, and should not be applied to "situations where the plaintiff was ignorant not only of the defendant's name, but also of his identity or even his involvement." *Lunn v. Am. Maint. Corp.*, 96 Nev. 787, 790, 618 P.2d 343, 344-45 (1980). Despite noting the precedent, the district court did not address this issue, and we take no position on it. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (noting that "this court will not address issues that the district court did not directly resolve").

232; *Costello*, 127 Nev. at 440-41, 254 P.3d at 634 (setting forth the requirements for relief under NRCP 15(c)).

Thus, in light of the foregoing, we reverse the district court's order denying Howell leave to amend his complaint, and we remand this matter for further consideration consistent with this disposition. However, we take no position as to whether Howell is entitled to relief under NRCP 10 or NRCP 15, and we leave that determination to the district court's sound discretion on remand.

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Moss Berg Injury Lawyers
Claggett & Sykes Law Firm
Eighth District Court Clerk