

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAY FOX,  
Appellant,

vs.

THE STATE OF NEVADA EX REL ITS  
DEPARTMENT OF CORRECTIONS;  
CHARLES MCBURNEY,  
INDIVIDUALLY; AND ADAM  
WATSON, INDIVIDUALLY,  
Respondents.

No. 54137

**FILED**

**JAN 18 2011**

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

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Kay Fox is the personal representative of Terry Alan Fox, who was a correctional officer for respondent Nevada Department of Corrections (NDOC) at the High Desert State Prison. On March 8, 2005, while at work, Terry was found in a prison tower with a lacerated lower lip, his speech was slurred and incoherent, and he sounded groggy. Rather than being given immediate attention by the prison's medical staff, he was taken by the Nevada Highway Patrol to a hospital for medical treatment. At the hospital, Terry was subjected to a substance abuse test, as two months earlier, he had been found in a disoriented state in the prison parking lot. Although the drug test results were negative, Terry was found by the treating physician to be medically unfit for work and was subsequently placed on paid administrative leave by NDOC. After being released by the treating physician to return to work, Terry later suffered additional serious injuries when he lost consciousness and

fell at home. Terry alleges that his loss of consciousness in both instances was caused either by an electrolyte imbalance or a grand mal epileptic seizure.

Thereafter, Terry filed a district court complaint against respondents. In his complaint, Terry alleged that because he was denied immediate medical treatment by the prison medical staff and was instead arrested, treated as a drug offender, and placed on administrative leave, during which he fell at home and suffered additional injuries, he was rendered disabled and unable to resume his career. Respondents moved for, and were granted, summary judgment. This appeal followed.<sup>1</sup>

On appeal, appellant challenges the district court's summary judgment on all claims for relief based on alleged violations of his constitutional and civil rights, false arrest, negligence, defamation, and intentional infliction of emotional distress.

As an initial matter, we dismiss this appeal as to NDOC because it was dismissed with prejudice from the underlying action without objection by appellant. We now turn to Terry's arguments with regard to the remaining parties.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The pleadings and other proof must be construed in a light most favorable to the nonmoving party. Id. But once the movant has properly supported the summary judgment motion, the nonmoving party

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<sup>1</sup>After the appeal was filed, Terry died and appellant Kay Fox, Terry's wife, was substituted as the appellant in this appeal.

may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid summary judgment. Id. at 732, 121 P.3d at 1031; NRCP 56(e). Our de novo review of the record in this case shows that there are no issues of material fact that warrant reversal. Wood, 121 Nev. at 729, 121 P.3d at 1029.

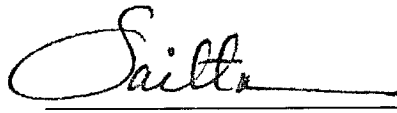
The undisputed facts establish that Terry was taken to a hospital for a determination of whether he was sick or under the influence of alcohol or drugs. Appellant's unsupported assertion on appeal that "[b]y simply asking for an outside opinion, [respondent Adam] Watson could have allowed [Terry] to prevent the next seizure and perhaps saved him from permanent disability" is speculative and does not meet appellant's burden of demonstrating the existence of a genuine issue of fact for trial. Id. at 732, 121 P.3d at 1031. The record further shows that Terry voluntarily consented to the substance abuse testing, which was a condition of his employment, and that he was not detained or transported against his will, thereby defeating appellant's claims concerning an unreasonable seizure under the Fourth Amendment and false arrest. See Lerner Shops v. Marin, 83 Nev. 75, 78, 423 P.2d 398, 400 (1967) (defining false imprisonment as a restraint of liberty without any sufficient cause or legal authority, and noting that submission to mere verbal direction, unaccompanied by force or threats of any character, generally does not constitute false imprisonment).

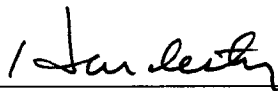
Furthermore, we conclude that respondents Charles McBurney and Watson are entitled to qualified immunity as a matter of law because any decisions to subject Terry to substance abuse testing were made pursuant to NDOC's regulations and were based on considerations

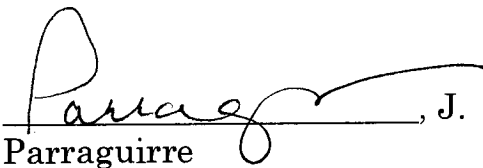
of public safety and prison security. NRS 41.032(2); see Butler v. Bayer, 123 Nev. 450, 466, 168 P.3d 1055, 1066 (2007) (explaining that correctional officers' acts are entitled to discretionary-function immunity under NRS 41.032(2) if they (1) involve an element of judgment or choice; and (2) are based on considerations of social, economic, or political policy) (citing Martinez v. Maruszczak, 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007)).

Accordingly, we conclude that the district court did not err in granting McBurney and Watson summary judgment, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. David Wall, District Judge  
Leonard I. Gang, Settlement Judge  
James Andre Boles  
Attorney General/Las Vegas  
Eighth District Court Clerk