

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW JAMES,  
Appellant,

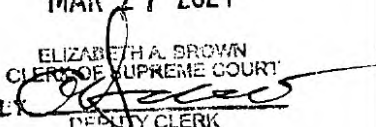
vs.

THI OF NEVADA AT CHEYENNE, LLC,  
D/B/A COLLEGE PARK  
REHABILITATION CENTER 2856  
EAST CHEYENNE AVE. NORTH LAS  
VEGAS, NV 89030  
Respondent.

No. 85864

FILED

MAR 27 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a final judgment in an action under the Nevada False Claims Act. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Andrew James brought two qui tam causes of actions under NRS 357.040(1)(a) and (b) of the Nevada False Claims Act (NFCA) against College Park Rehab, alleging that since 2012, College Park Rehab has submitted Nevada Medicaid claims after having falsely certified that its facilities comply with all building and electrical code regulations. Applying the federal test found in *Universal Health Services, Inc. v. United States ex rel. Escobar (Escobar)*, 579 U.S. 176 (2016), the district court dismissed James's complaint for failure to state a claim upon which relief may be granted.

This court reviews de novo an order dismissing a complaint for failure to state a claim under NRCP 12(b)(5). *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 672 (2008). The court presumes the complaint's factual allegations are true and draws all inferences in favor of the plaintiff. *Id.* Dismissal is proper when "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the

plaintiff] to relief.” *Id.* Nevertheless, the “allegations must be legally sufficient to constitute the elements” of the action. *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 872 (2013) (quoting *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009)).

#### *The Nevada False Claims Act*

The NFCA is modeled after the federal False Claims Act (FCA) and allows whistleblowers to bring actions alongside or in place of the government to reclaim or “claw back” money from parties who submitted fraudulent claims for government funds. *See Int’l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). Under the NFCA, a defendant who, “with or without specific intent to defraud,” submits one or more of several types of false claims to “the State or a political subdivision” is liable to return disbursed funds plus damages and penalties. *See* NRS 357.040. Two types of false claims are at issue in this case. First, NRS 357.040(1)(a) imposes liability on a defendant who “[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval.” Second, NRS 357.040(1)(b) makes a defendant liable who “[k]nowingly makes or uses, or causes to be made or used, a false record or statement that is material to a false or fraudulent claim.”

One theory of NFCA liability is the implied false certification theory. Under that theory, a defendant who does not expressly certify compliance with a material contractual, regulatory, or statutory requirement may nevertheless be held liable if the defendant implicitly represented compliance with those material requirements by submitting the claim. *Escobar*, 579 U.S. at 180-81. Here, James brought both of his causes of action under an implied false certification theory of liability.

*The district court did not err by dismissing James's NRS 357.040(1)(a) cause of action because it does not satisfy the Escobar test*

As noted, the Legislature modeled the NFCA after the FCA. The *Escobar* two-pronged liability test for implied-false-certification-theory actions thus applies to James's NRS 357.040(1)(a) cause of action. *Int'l Game Tech. Inc., v. Second Jud. Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d 1088, 1103 ("When the Legislature adopts a statute substantially similar to a federal statute, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts.") (internal quotations and citations omitted).

The first prong of the *Escobar* test requires that "the claim does not merely request payment, but also makes specific representations about the goods or services provided." 579 U.S. at 190. Circuit courts interpret this prong to require that the claimant's representations about the specific good or service be in the actual request for payment itself. *See, e.g., United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016).

James alleged that College Park Rehab was "submitting false certifications to the Government and has made payment requests to the Government for services pursuant to the Nevada Medicaid program that were paid by the Government because of, *inter alia*, the fraudulently certified information regarding the Facility." The complaint includes specific allegations about the equipment.<sup>1</sup>

Reading the complaint as a whole, and drawing all inferences in James's favor, James alleges that College Park Rehab submitted requests

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<sup>1</sup>James also argues that the district court dismissal referenced only two specific paragraphs of his complaint, but because this court reviews the entire record *de novo*, whether the district court considered the complaint as a whole or only the referenced paragraphs is not consequential.

for payment to Nevada Medicaid; that College Park Rehab was not compliant with CMS regulations; and that College Park Rehab made impliedly false representations about its suitability as a health care hospital to Nevada Medicaid in its enrollments. Even so, James fails to meet the first *Escobar* prong, because he does not allege that College Park Rehab made impliedly false representations about its suitability as a health care hospital to Nevada Medicaid *in its requests for payment*. James does not appear to have asked the district court for leave to amend, and if he did so, that is not on appeal. That leaves this court with an omitted necessary material allegation. Because failure to meet a single part of *Escobar* requires dismissal, this court affirms the district court's dismissal of James's NRS 357.040(1)(a) cause of action. 579 U.S. at 190.

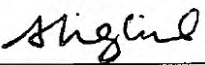
*The district court did not err by dismissing James's NRS 357.040(1)(b) cause of action as a matter of law*

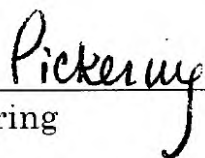
The district court dismissed James's NRS 357.040(1)(b) cause of action, concluding that it was "irreconcilable with an implied false certification theory, because the statute inherently requires a false statement to be made in connection with a claim for payment to the government." The NFCA language is functionally identical to the FCA language. *Compare* NRS 357.040(1)(b) *with* 31 U.S.C. § 3729(a)(1)(B). Because claims under NRS 357.040(1)(b) require the plaintiff to show the existence of an actual "false record or statement," the district court properly followed the federal authority concluding that an implied false certification theory is incompatible with that statutory language. *See, e.g., United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168 (10th Cir. 2010).

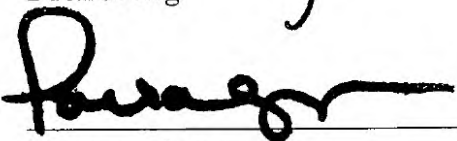
If James alleged that College Park Rehab submitted an affirmatively false record or statement, as NRS 357.040(1)(b) requires, he

could have brought his complaint under an express false certification theory. But because James asserted an implied false certification theory, he cannot bring a claim under NRS 357.040(1)(b). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Stiglich

  
\_\_\_\_\_, J.  
Pickering

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

cc: Hon. Adriana Escobar, District Judge  
Persi J. Mishel, Settlement Judge  
Law Offices of Michael P. Balaban  
Henrichsen Law Group, PLLC  
Sklar Williams PLLC  
Eighth District Court Clerk