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### Mack v. Williams, 138 Nev. Adv. Op. 86 (Dec. 29, 2022)

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*Mack v. Williams*, 138 Nev. Adv. Op. 86 (Dec. 29, 2022)<sup>1</sup>

**A PRIVATE RIGHT OF ACTION EXISTS TO VINDICATE VIOLATIONS OF ARTICLE 1 SECTION 18 OF THE NEVADA CONSTITUTION AND QUALIFIED IMMUNITY CANNOT BE USED AS A DEFENSE.**

**Summary**

To determine if a private right of action exists for a violation of a self-executing provision of the Nevada Constitution, the court applies a three-step test. First, the court asks whether the language and history of the constitutional provision established an indication of intent to provide or withhold the requested remedy. If answered negatively, the court then considers whether the several factors set forth in § 874A of the Restatement (Second) of Torts favors the requested remedy. Third, the Court considers if any special factors counsel hesitation in the recognition of monetary damages.

In this case the Nevada Supreme Court held that a private right of action for money damages exists to vindicate violations of search-and-seizure rights under Article 1, Section 18 of the Nevada Constitution. Additionally, the Court held that qualified immunity cannot be used as a defense to claims under the same constitutional provision.

**Background**

Appellant Sonjia Mack visited an inmate at High Desert State Prison. While there Mack alleges that respondents Arthur Emling and Myra Laurian, officers at the prison, escorted her to an administrative building and conducted a strip search which produced no contraband. After the search Mack alleges that respondents interrogated her regarding her alleged possession of contraband and knowledge of ongoing crimes. Shortly thereafter, Mack was indefinitely suspended from visiting the prison absent written permission from the Warden of the prison or the then-Director of the Nevada Department of Corrections (NDOC).

As a result of the incident, Mack filed a civil-rights action against respondents asserting violations of her federal and state constitutional rights. Relevant to the questions considered by the Court, Mack asserted that respondents violated her right to procedural due process under the Nevada Constitution Article 1, Section 8 and her right against unreasonable searches and seizures under Article 1, Section 18. Respondents moved for summary judgement on all claims and the U.S. District Court denied summary judgement on both claims based on state law.

**Discussion**

***We elect to reframe and answer some of the certified questions***

The court initially accepted four certified questions:

- 1) Is there a private right of action under the Nevada Constitution, Article 1, Section 8?
- 2) Is there a private right of action under the Nevada Constitution, Article 1, Section 18?
- 3) If there is a private right of action, what immunities, if any, can a state-actor defendant raise as a defense?
- 4) If there is a private right of action, what remedies are available to a plaintiff for these claims?

The issue considered by the court here is whether it should answer all four certified questions as posed above. The court cites NRAP 5, which gives them discretion to answer questions of Nevada law certified by federal courts when there is no controlling authority and

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<sup>1</sup> By John Bolliger.

such questions involve determinative matters of the case before the certifying court.<sup>2</sup> In regard to the first factor about controlling authority, the Court could not find any controlling authority on a private plaintiff's ability to enforce Article 1, Section 8 nor Article 1, section 18 of the Nevada Constitution. Regarding the second factor, the Court found that unlike the search and seizure claim, the certification order from the lower court had little information about the procedural due process claim and is therefore not determinative of the case. The court reasoned that the certification order did not identify a claimed interest in a protected liberty derived from any prison regulations, nor did the order describe any process adopted by state actors which denied Mack due process. The Court also highlights that the respondents only raised a defense of qualified immunity in their pleadings while asserting no other immunity.

Thus, the issue of whether the defense of qualified immunity is available to a plaintiff as a defense to these claims is the only determinative question before the court regarding the immunities available to a state-actor defendant. Finally, the court also highlights that Mack's remaining state law claims seek only retrospective monetary relief. Therefore, the only determinative question regarding a plaintiff's available remedies is whether monetary relief is available to a plaintiff for violations of the rights asserted.

Accordingly, the court rephrased the certified questions as follows:

- 1) Is there a private right of action for retrospective monetary relief under the Nevada Constitution, Article 1, Section 18?
- 2) If there is a private right of action, can a state actor defendant raise qualified immunity as a defense?

***Certified Question 1: The Nevada Constitution Article 1, Section 18 contains an implied private right of action for retrospective monetary relief***

The issue considered in this certified question is whether Article 1, Section 18 of the Nevada Constitution, which protects against unreasonable searches and seizures, has a private right of action. Mack argued that the mere articulation of a right in the Nevada Constitution establishes a private right of action. NDOC parties argued that neither the Nevada Constitution nor the Nevada Legislature had authorized monetary relief by a private right of action thus foreclosing the possibility of a private right of action.

The court begins its analysis by citing precedent in which the Court had characterized prohibitory provisions in the Nevada Constitution as self-executing.<sup>3</sup> Self-executing provisions, the Court elaborates, give rise to a cause of action regardless of any legislative action or lack of action.<sup>4</sup> The Court highlights that Section 18 is prohibitory because it imposes a limitation on the state's power to act as opposed to an affirmative obligation on the state. Since Section 18 is prohibitory, it is therefore self-executing and thus contains a private right of action.

The Court recognized that just because a private right of action exists, it does not necessarily follow that monetary relief is available.<sup>5</sup> The Court explains that it is not bound to follow federal cases which interpret the U.S. Constitution and is free to interpret the Nevada

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<sup>2</sup> NEV. R. APP. P. 5(a).

<sup>3</sup> See *Wren v. Dixon*, 40 Nev. 170, 194, 196, 161 (1916) (quoting, in part, *Davis v. Burke*, 179 U.S. 399, 403 (1900)); *Wilson v. Koontz*, 76 Nev. 33, 36–37, 38–39 (1960).

<sup>4</sup> *Jensen v. Cunningham*, 250 P.3d 465, 481–82 (Utah 2011) (citation omitted).

<sup>5</sup> See *Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996).

Constitution, even though the language in both documents may be the same.<sup>6</sup> Instead of following the interpretation of the federal constitution, the Court chose to adopt the case-by-case framework described in *Katzberg* to determine whether to recognize a damages action for violations of an at-issue self-executing constitutional provision.<sup>7</sup> The first *Katzberg* factor is to look to the language and history of the constitutional provision to determine if there was an affirmative intent to either authorize or withhold a damages action to remedy a violation. If there is such an intent, the Court will enforce it either way. Absent affirmative intent, the Court applies the second factor which can be found in Section 874A of the Restatement (Second) of Torts which reads:

a provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation the court may provide such remedy if 1) it is in furtherance of the purpose of the [provision] and 2) is needed to assure the effectiveness of the provision.<sup>8</sup>

Finally, the Court applies a third factor to be considered: whether any special factors counsel hesitation in recognizing a damages action.

***Article 1, Section 18 of the Nevada Constitution neither establishes nor precludes a private right of action for monetary relief for violations of its guarantees***

The issue considered here is whether the Nevada constitution establishes or precludes a private right of action for monetary relief for violation of the guarantees therein. NDOC parties argue that in the absence of language providing for a right of action for monetary relief in the Nevada Constitution, such relief is foreclosed. The Court finds that nowhere in the Nevada Constitution does it expressly provide or foreclose a right of action for monetary damages. The Court however rejects NDOC's argument and reasons that unlike enforcing statutory rights, the Court retains the authority to vindicate rights guaranteed by the constitution absent legislative action.<sup>9</sup> Such authority includes the power to create a private right of action which seeks monetary damages. Since the Court finds no affirmative indication of intent to either authorize or preclude a damages action, it then moves on to the second *Katzberg* prong.

***Applying the constitutional-tort analysis embodied in the Restatement favors monetary relief as an available remedy to vindicate rights guaranteed by the Nevada Constitution Article 1, Section 18***

The issue considered here is whether the analysis found in Section 874A of the Restatement (Second) of Torts favors monetary relief as a remedy for violations of Article 1, Section 18 of the Nevada Constitution. The factor test the Court considered here is 1) whether monetary relief would be in furtherance of the purpose of the provision and 2) if monetary relief is needed to ensure the effectiveness of the provision.<sup>10</sup> The Restatement also lists several factors to consider in applying that analysis that the Court mentions: 1) the nature of the legislative provision; 2) the adequacy of existing remedies; 3) the extent to which a tort action supplements or interferes with existing remedies and enforcement; 4) the significance of the purpose of the

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<sup>6</sup> See *State v. Bayard*, 71 P.3d 498, 502 (Nev. 2003) (citation omitted); see also *California v. Greenwood*, 486 U.S. 35, 43 (1988).

<sup>7</sup> *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 342–43, 350 (Cal. 2002).

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS § 874A (AM. L. INST. 1979).

<sup>9</sup> *Bauserman v. Unemployment Ins. Agency*, No. 160813, 2022 WL 2965921, at 6 (Mich. July 26, 2022); See also NEV. CONST. art. 6, § 1 (vesting judicial power of the state in our courts).

<sup>10</sup> RESTATEMENT (SECOND) OF TORTS § 874A (AM. L. INST. 1979).

provision; 5) the extent of the change in tort law; and 6) the burden on the judiciary.<sup>11</sup> However, the Court recognizes that judicial discretion must be used when applying these factors.

In considering the two-prong test, the Court first looked to possible alternatives other than monetary relief. The Court highlights that no other meaningful remedy has been crafted to remedy a violation of Article 1, Section 18. The Court points out that even if there was an existing remedy, an injunctive or declaratory relief will rarely suffice to remedy a past wrong. Here, NDOC argued that state tort law provides a meaningful redress to constitutional infringements. However, the Court rejected the commonality of state tort law and constitutional protections because a state actor's obligation under a state constitution exceeds far beyond an individual's obligation to another citizen. Considering all the factors listed above, the Court found that none of them disfavored a damages remedy. Finding that the second prong of the *Katzberg* test is met, the Court then moves on to the third prong.

***No special factors lead us to hesitate in recognizing a damages action to enforce Article 1, Section 18 of the Nevada Constitution***

The issue here is whether any special factors counsel any hesitation in recognizing damage actions. The Court describes these factors as non-exhaustive but include: 1) deference to legislative judgement; 2) avoidance of adverse policy consequences; 3) considerations of governmental fiscal policy; 4) practical issues of proof; 5) and the competence of courts to assess particular types of damages.<sup>12</sup> The Court found that none of these factors disfavor creating a damages action for remedying violations of Article 1, Section 18 of the Nevada Constitution. The Court reasoned that first, there is no legislative judgement to consider here. Second, there can be no adverse policy consequence because creating a private action for money damages will not impose any new limitations on government conduct that do not already exist. Third, a private right of action for money damages does not implicate legislative fiscal policy because the legislature has already waived the State's sovereign immunity. Fourth and fifth, a damages action for retrospective harm presents no issues beyond what the judiciary handles every day.

Thus, the court answers the first rephrased certified question in the affirmative: a private right of action for retrospective monetary relief exists under the Nevada Constitution Article 1, Section 18.

***Certified Question 2: Qualified immunity is not a defense to an implied private right of action for retrospective monetary relief under the Nevada Constitution Article 1, Section 18***

The issue presented here is whether qualified immunity may be used as a defense to a private action for retrospective monetary relief under the Nevada Constitution Article 1, Section 18. Mack argues that qualified immunity may not be used because it is a federal doctrine which deals only with clearly established federal law. NDOC argues that the Court should adopt qualified immunity as a defense to mitigate costs.

The Court agrees with Mack and holds that qualified immunity is not available as a defense to a private action for retrospective monetary relief under the Nevada Constitution Article 1, Section 18. The Court reasoned that qualified immunity does not protect government

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<sup>11</sup> RESTATEMENT (SECOND) OF TORTS § 874A cmt. b. (AM. L. INST. 1979).

<sup>12</sup> See *Katzberg*, 58 P.3d at 350.

officials from liability under state law.<sup>13</sup> In contrast to the authority to create a damages action, the Court highlights that only the legislature retains the power to waive sovereign immunity.<sup>14</sup> The Court highlights that the Nevada Legislature did so with no qualified immunity exception. The Court writes that absent a state-law equivalent of qualified immunity supplied by the legislature, such a defense cannot be supplied by the judiciary.

Thus, the Court answers the second rephrased question in the negative: qualified immunity is not a defense to a private damages action under Article 1, Section 18.

## **Conclusion**

In the opinion, the Court found that Article 1, Section 18 of the Nevada Constitution did not establish an indication of intent to either provide or withhold a private action for monetary damages. Second, the Court found that none of the factors laid out in § 874 of the Restatement (Second) of Torts disfavored monetary relief for a violation of Article 1, Section 18. Third, the Court found that no special factors counseled hesitation in recognizing monetary damages for violations of Article 1, Section 18.. Finally, the Court held that qualified immunity may not be used as a defense in a private action alleging violation of Article 1, Section 18 because qualified immunity does not apply to state law.

Appellant Sonja Mack asserted that respondents violated her right to procedural due process under the Nevada Constitution Article 1, Section 18 and her right against unreasonable searches and seizures under Article 1, Section 18. While the decision did not consider the procedural due process question, the Court did find that Mack may sue respondents for retrospective monetary damages for the alleged violation of her rights under Article 1, Section 18 of the Nevada Constitution. Additionally, the Court held that respondents may not use qualified immunity as a defense in that suit.

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<sup>13</sup> *E.g.*, *Johnson v. Bay Area Rapid, Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013); *Jenkins v. City of New York*, 478 F.3d 76, 86 (2d Cir. 2007); *Samuel v. Holmes*, 138 F.3d 173, 179 (5th Cir. 1998); *Andreu v. Sapp*, 919 F.2d 637, 640 (11th Cir. 1990).

<sup>14</sup> *Echeverria v. State*, 495 P.3d 471, 476 (2021).