

SUPREME COURT OF THE STATE OF MONTANA  
Case No. DA 21-0320

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THOMAS ALVARADO,

Plaintiff and Appellant,

v.

CORRECTIONAL CORPORATION OF  
AMERICA, et al.,

Defendants and Appellees.

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**APPELLEE'S ANSWER BRIEF**

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On Appeal from the Montana Ninth Judicial District Court, Toole County  
Cause No. DV 18-016, The Honorable Robert G. Olson Presiding

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## STATEMENT OF ISSUES

We restate the issue on appeal as follows:

1. Whether the district court properly exercised its discretion in dismissing Alvarado's complaint for egregious discovery abuses.

## STATEMENT OF THE CASE

Appellant, Thomas Alvarado ("Alvarado") is a federal inmate in the custody of the United States Marshals Service, who was held at Crossroads Correctional Center ("Crossroads") in Shelby, Montana. Crossroads is a private detention facility owned and managed by Appellee CoreCivic, formerly Corrections Corporation of America ("CoreCivic<sup>1</sup>"). While at Crossroads, Alvarado alleges that on November 3, 2013 he fell from the top bunk in his cell after attempting to remove blockage from the heating vent. Alvarado allegedly injured his left little finger and his left knee as a result of the fall. Alvarado claims he did not receive adequate medical treatment from CoreCivic while he was incarcerated at Crossroads from November 3, 2013 until he was transferred on November 12, 2013. The only issue before the district court was whether Alvarado received adequate medical care in the nine-day period he was at Crossroads following his alleged fall. However, the district court was unable to reach the merits of

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<sup>1</sup> While Alvarado identified other parties in the Complaint, only CoreCivic was served.

Alvarado's claim, because Alvarado committed egregious discovery abuses attempting to hide pre-existing injuries.

Alvarado first filed a complaint in federal court raising an Eighth Amendment violation. The federal court dismissed Alvarado's Eighth Amendment claim holding he had no cause of action under the Eighth Amendment to sue Crossroads as a federal prisoner. The federal court dismissed any state court claims without prejudice, allowing Alvarado to bring any state tort claim in state court.

Alvarado filed a complaint with the Ninth Judicial District Court, Toole County, on April 10, 2018. CoreCivic filed a motion to dismiss because Alvarado raised identical Eighth Amendment claims previously rejected by the federal court. The district court issued an order which granted in part and denied in part the motion to dismiss, essentially dismissing the Eighth Amendment claim, but allowing a negligence claim involving failure to provide adequate medical treatment, which is a claim Alvarado did not plead.

Through discovery, CoreCivic attempted to obtain information regarding any pre-existing injuries, and the extent and nature of Alvarado's alleged injuries. Alvarado stalled this process by failing to respond or to provide accurate information. Eventually, after delays and after the original trial date had passed, CoreCivic discovered that Alvarado's hand injury was clearly a pre-existing one.

CoreCivic filed a Motion for Sanction or in the Alternative, Motion to Compel Discovery on August 26, 2020, after numerous discovery violations. The district court granted the motion to compel, but at that time did not dismiss the complaint. On June 4, 2021, the district court issued an order of dismissal due to Alvarado's continual discovery violations and refusal to cooperate in the discovery process. Alvarado appeals the court's June 4, 2021 Order of Dismissal. Appellee Appx. #1.

## **STATEMENT OF FACTS**

### **Factual history**

Alvarado was housed at Crossroads from April 12, 2013 to May 9, 2013, then from May 30, 2013 to October 2, 2013, and last from October 23, 2013 to November 12, 2013. Dkt. #26. While in his cell, Alvarado alleged the heating vents were blocked with toilet paper, preventing heat from entering his unit. Dkt. #3. Though Alvarado's story has been less than consistent, he generally alleges that during the late evening of November 3, 2013, he woke up freezing and, in an attempt to remove the toilet paper from the heating vent, he climbed on the top bunk. Dkt. #3. Alvarado contends he fell from the top bunk and put his left hand out in front of him to break his fall, which caused the little finger on his left hand to break and caused bruising to his left knee. Dkt. #3. A Special Management Unit officer responded to the noise and alerted staff to notify medical services. Dkt. #3. Registered nurse Jennie Didier filled out an initial medical

exam in which she reported, “No deformity or discoloration to knees, hips, or legs; States pain in his hand is in his L[eft] little finger. Patient also has congenital and bilateral deformity to little finger. Bilat[eral] little fingers are curved and somewhat flexed at joints.” Appellee Appx. #2, p. 35. RN Didier’s report also included a note regarding Alvarado’s previous deformity to his left little finger and his orthopedic surgery to his left wrist. Appellee Appx. #2, p. 32.

CoreCivic policy allows inmates to file informal, formal, and emergency grievances. If the inmate asserts a grievable matter, the policy indicates that only qualified health services staff are authorized to provide responses to any questions, disputes, or complaints regarding medical care and treatment; a policy made aware to Alvarado by numerous prison personnel. Alvarado neither initiated nor completely exhausted any grievance procedure related to the alleged November 3, 2013 fall in his cell or any subsequent medical care provided through Crossroads. Rather, on November 3, 2013, Alvarado put in a kite with the Warden requesting to use a phone to call his family. The Warden promptly advised him the following day that if Alvarado’s attorney could get it approved, he would move him to General Population. Appellant Appx. #1 (Attachment 5).

On November 4, 2013, Physician’s Assistant Lori Gerstenberger, buddy-taped Alvarado’s left little finger to his left ring finger and prescribed him 600 milligrams of Ibuprofen two times a day. Appellee Appx. #2, p. 30. Alvarado

claims on November 5, 2013, he went to the medical department at Crossroads for an evaluation, in which the medical professional ordered x-rays to his left knee that were never taken. Dkt. #3, p. 4. He alleges that CoreCivic denied him over-the-counter pain relievers and other treatment for his pain from the time between the alleged fall, November 4, 2013, to before his transfer out of Crossroads, November 11, 2013. Dkt. #3.<sup>2</sup>

On November 12, 2013, Alvarado was transported to the Nevada Southern Detention Center in Pahrump, Nevada. Dkt. #1. Upon arrival, Alvarado received a health screening, in which he indicated his left little finger was swollen from falling from the top bunk a week prior. Appellee Appx. #2, p. 43.

Years later, in March 2017, the Bureau of Prisons Health Services conducted a health screening on Alvarado. Appellant Appx. #1 (Attachment 10). The assessment described that an MRI, taken on November 13, 2014, revealed degenerative joint disease and medial and lateral meniscal tears. Appellant Appx. #1 (Attachment 10). Again, in July 2014, Health Services transcribed another clinical report relating to Alvarado's November 2013 fall. Appellant Appx. #1

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<sup>2</sup> CoreCivic denies Alvarado's allegations are accurate, as pain medication and medical treatment were provided. See 8/8/16 Aff. Peter Molnar, attached as Appellee Appx. #7, which was filed in Alvarado's federal court action. Due to Alvarado's discovery abuses, the merits of his allegations were not reached by the state district court. Moreover, had Alvarado's inaccurate discovery responses have been discovered in federal court, appropriate sanctions would have been sought there also.

(Attachment 11). The administrative note stated x-rays were taken on December 13, 2013, and that Alvarado was prescribed Ibuprofen and advised to seek further orthopedic consultation. Appellant Appx. #1 (Attachment 11). No physician or other expert attributes causation for Alvarado's alleged injuries to Alvarado's alleged fall at Crossroads.

### **Procedural history**

On January 12, 2015, Alvarado filed a complaint with the United States District Court for the District of Montana, Great Falls Division, alleging Eighth Amendment claims relating to the November 3 fall. Appellee Appx. #3. Alvarado named the Warden at Crossroads, the Associate Warden, Mr. Shoop, and Ms. Yaskiw (now deceased) as the defendants to the federal complaint. Appellee Appx. #3. Crossroads moved for summary judgment on the merits as well as the legal argument that Alvarado had no federal cause of action available. Appellee Appx. #4. On December 18, 2017, the United States Magistrate Judge entered an Order and Findings and Recommendations stating the court dismissed Alvarado's complaint because he had no Eighth Amendment claim pursuant to *Minneci v. Pollard*, 565 U.S. 118, 132 S. Ct. 617 (2012) (holding prisoner cannot assert an Eighth Amendment *Bivens* claim for damages against private prison employees) and *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 122 S. Ct. 515 (2001) (holding no implied private right of action for damages against private entities that

engaged in alleged constitutional deprivations while acting under color of federal law). Appellee Appx. #5. On February 6, 2018, the federal court adopted the Magistrate Judge's findings and dismissed Alvarado's complaint under the Eighth Amendment and dismissed any state court claims without prejudice. Appellee Appx. #6.

On April 10, 2018, Alvarado filed a complaint with the Ninth Judicial District Court, Toole County. Dkt. #3. Alvarado again alleged an Eighth Amendment violation, stating: "the said Defendants above, deprived me of various constitutional Rights, by denying me medical treatment for my broken finger and for my left knee, under the Eighth Amended 42 U.S.C." *See* Dkt. #3, p. 1. Alvarado named additional defendants who were not a party in the federal court action, such as Marc Adams, Theresa Schnee, and E. Zabinsky; although he only served CoreCivic in the state court action. Dkt. #3. CoreCivic moved to dismiss Alvarado's complaint under the doctrines of res judicata and collateral estoppel for realleging his Eighth Amendment claim. Dkt. #19.1. On December 16, 2019, the district court issued an order granting in part and denying in part CoreCivic's motion. Dkt. #26. The district court rejected Alvarado's late attempt to add new defendants, and rejected Alvarado's Eighth Amendment claim as barred by a final judgment by the federal court, however, in construing his complaint very liberally,

it held Alvarado asserted a negligence claim for failure to provide adequate medical treatment. Dkt. #26, p. 5.

Between March 2020 and March 2021, Alvarado filed four motions to amend his complaint. Dkts. #35, 50, 64, 72. The district court denied all four motions due to Alvarado's failure to attach a proposed amended complaint. Dkts. #45, 54, 71, 78. During discovery, Alvarado repeatedly indicated to the court that he was on lockdown in a federal institution in Oregon due to Covid-19 and could not complete discovery. Dkt. #38. Because Alvarado had not completed discovery, in April 2020, CoreCivic requested an amended trial schedule so that Alvarado could complete discovery rather than seeking sanctions. Dkt. #39. Though Alvarado admittedly had not responded to discovery, he opposed the request to amend the trial schedule. Dkt. #42. On May 14, 2020 the district court amended the trial schedule in order to allow Alvarado to respond to discovery, but kept the March 15, 2021 trial date in place. Dkt. #43.

After repeated attempts to obtain Alvarado's medical records, on July 27, 2020, CoreCivic was finally able to obtain records from a medical provider in California Alvarado treated with prior to his incarceration in Montana. These records showed plainly that Alvarado's alleged hand injury was a pre-existing one, a fact he had never revealed in discovery though it would have been obvious to him.

On August 26, 2020, CoreCivic filed a Motion for Sanction or in the Alternative to Compel Discovery for Alvarado's failure to disclose his prior medical treatment. Dkt. #57. CoreCivic indicated it had pursued obtaining records itself and received medical records from Oak Valley Hospital in California, which stated Alvarado injured his left hand and little finger in 2009, predating the November 2013 fall, and that the injury from 2009 was the same injury Alvarado was claiming occurred at Crossroads. Dkt. #58, pp. 3-4.

The Oak Valley records showed quite plainly that Alvarado had omitted, purposefully, disclosure of prior injuries which are directly relevant to his claims in this action. Specifically, on July 7, 2009, Alvarado was involved in an accident where his left wrist/left little finger was noted as having deviated deformity and he was advised of the "imperativeness of seeing an orthopedist or see county ortho this wk." Dkt. #58 at pp. 77-78. A scan of Alvarado's left hand taken on July 7, 2009 notes that there is "deformity of the middle phalanx of the fifth digit that could conceivably be related to previous healed fracture. There is flaring of the base of the middle phalanx of the fifth digit, and there appear to be some degenerative changes in the PIP joint. There is marked abnormality of the carpus with probable fusion of the navicular and multangular bones and decrease in size of the lunate with fragmentation and erosion." Dkt. #58 at p. 85. These prior injuries to the very finger Alvarado complains was injured at Crossroads were

inexplicably not disclosed in response to discovery, even though this action had been pending for years in federal and then in the state district court. CoreCivic had specifically asked Alvarado to identify any pre-existing injuries. Dkt. #58 at p. 20 (Interrogatory No. 10).

Counsel for CoreCivic contacted Alvarado to inquire why he did not disclose these prior injuries in discovery. CoreCivic had already retained an orthopedic doctor who reviewed the information Alvarado provided and formed his opinion, which would now require additional review and expense. Alvarado's response was the incredible claim that "[t]heir (sic) was nothing wrong with my left before the accident," and not to worry because "it's all going to work out at our jury trial." *See* Aug. 7, 2020 Letter from Alvarado to Chad Adams, Dkt. #58 at pp. 87-88.

Subsequently, CoreCivic obtained Alvarado's medical records from the federal prison system. It was clear from a review of those records, that Alvarado had complained to his doctors there about a finger injury, claiming it was caused at Crossroads, but had also omitted telling them about the exact-same injury from 2009. *See* Dkt. #58 at pp. 100-102. Though Alvarado claimed crippling injuries and sought in excess of six-million dollars, his federal prison records showed that he worked out three days per week doing upper body exercises and two days a week lower body workout, doing crunches, squats, lunges and bar work, and that

he did not meet criteria for ibuprofen prescription, knee brace, wrist brace, or a lower bunk bed. *See id.* at p. 98.

CoreCivic also cited multiple instances in which Alvarado violated discovery requests including: failing to provide information regarding expert witnesses; failing to fully respond to the status of his alleged injuries; failing to provide medical records; failing to disclose proper injuries; failing to explain what treatment was obtained for the injuries to the alleged lawsuit; failing to provide any detail regarding a claim for future expenses; and failing to produce documents intended for use as exhibits and in court. Dkt. #58, pp. 10-11. The district court granted CoreCivic's motion to compel full discovery citing that Covid-19 and Alvarado's incarceration may have prevented him from completing discovery, but did not dismiss the complaint. Dkt. #62, p. 3.

Following the district court's order compelling discovery, without providing full and complete discovery responses, Alvarado let the court know that he was completed with his discovery responses on April 26, 2021. Dkt. #76. Alvarado also attempted to amend his complaint again, sent ex parte communications to the court, and filed a motion to ask the court for sanctions against CoreCivic for perjury. Dkt. #77. Alvarado did not cite to anything specifically in his motion, rather he attributed his failure to produce medical documents to his inability to

access the law library due to the lockdown and for CoreCivic's counsel's continuous misrepresentations about his past injuries and allegations. Dkt. #77.

On June 4, 2021, the district court issued an Order of Dismissal, stating it had been sympathetic and tolerant of Alvarado's delays in light of Covid-19 and due to his incarceration, however, it "would not tolerate false and/or misleading answers to discovery requests," in particular Alvarado's failure to disclose his prior knee and finger injuries. Dkt. #82, p. 2. The court found that it had been too lenient in allowing Alvarado's discovery abuses to continue. *Id.* The court determined the type of discovery abuse by Alvarado was "inexcusable" and "an attempt to deceived" which required the ultimate sanction of dismissal with prejudice. Dkt. #82.

Alvarado presently appeals from the order dismissing his state court complaint.

### **STANDARD OF REVIEW**

The Court's standard of review in discretionary trial court rulings is whether the district court abused its discretion. *Nystrom v. Melcher*, 262 Mont. 151, 864 P.2d 754 (1993) (citing *Steer Inc. v. Department of Revenue*, 245 Mont. 470, 475, 803 P.2d 601, 604 (1990)). The test for abuse of discretion is whether the court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Davis v. Davis*, 277 Mont. 188,

921 P.2d 275 (1996). The Court has consistently deferred to a district court's imposition of sanctions because "the trial judge is in the best position to know . . . which parties callously disregard the rights of their opponents and other litigants seeking their day in court. The trial judge is also in the best position to determine which sanction is the most appropriate." *Xu v. McLaughlin Research Institute for Biomedical Science, Inc.*, 2005 MT 209, ¶ 17, 328 Mont. 232, 119 P.3d 100 (citing *Smart v. Molinario*, 2004 MT 21, ¶ 8, 319 Mont. 335, 83 P.3d 1284).

### **SUMMARY OF THE ARGUMENT**

The district court properly exercised its discretion when it dismissed Alvarado's claims due to discovery violations. Alvarado made numerous discovery violations and abused the district court's leniency in light of Covid-19 and his incarceration. Alvarado's medical records, obtained by CoreCivic after much delay, describe past injuries and evaluations to his left hand and wrist, including his left little finger, and his left knee. These pre-existing injuries clearly resemble the injuries he alleges, without any expert testimony to support, were improperly treated by CoreCivic. Alvarado intentionally failed to disclose these pre-existing injuries in response to CoreCivic's discovery requests. The district court properly dismissed Alvarado's complaint as a sanction for significant discovery abuses.

## ARGUMENT

### **I. The district court properly exercised its discretion in dismissing Alvarado's claim for repeated discovery violations.**

The district court properly exercised its discretion when it dismissed Alvarado's claims against CoreCivic in response to repeated discovery violations, including Alvarado's failure to produce medical records and his failure to provide accurate and true responses to discovery requests. Additionally, Alvarado again asserts Eighth Amendment claims, which have previously been dismissed in federal court. Finally, Alvarado's claims were meritless even if sanctions had not been imposed as he presents no expert testimony to refute or prove otherwise that his alleged injuries were a result of prior injuries or degenerative properties.

#### **A. Initially, Alvarado cannot raise his Eighth Amendment claim on appeal due to res judicata and collateral estoppel.**

Foundationally, the Eighth Amendment to the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment and prohibits the infliction of "cruel and unusual punishments." U.S. Const. 8th amend. VIII. Article II, Section 22 of the Montana Constitution mirrors the Eighth Amendment. Mont. Const. art. II, § 22 ("... or cruel and unusual punishments inflicted."). The U.S. Supreme Court developed a two-part test to determine when a prison official's alleged deprivation of medical treatment violates the Eighth Amendment. *Wilson v. State*, 2010 MT 278, ¶ 30, 358 Mont. 438, 249 P.3d 28.

An inmate must demonstrate that “he suffered (1) a serious deprivation that results in the denial of the ‘minimal civilized measure of life’s necessities,’ and (2) that a prison official acted with deliberate indifference to the inmate’s health and safety.” *Wilson*, ¶ 30.

Res judicata bars relitigation of a claim once a final judgment has been entered. *Parini v. Missoula Co. High Sch.*, 284 Mont. 14, 23, 944 P.2d 199, 204 (1997). Res judicata applies when: “(1) the parties or their privies are the same; (2) the subject matter of the actions are the same; (3) the issues related to the subject matter are the same; (4) the capacities of the parties are the same in reference to the subject matter and issues between them.” *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 16, 331 Mont. 281, 130 P.3d 1267.

In Montana, collateral estoppel applies when: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred. *Baltrusch*, ¶ 18.

Alvarado cannot once again claim Eighth Amendment violations on appeal. The federal court previously dismissed any Constitutional Eighth Amendment claim on the merits, however, left available *state tort claims*. Alvarado in his

district court complaint asserted identical Eighth Amendment claims, stating, “[CoreCivic] deprived me of various constitutional Rights, by denying me medical treatment for my broken finger and my left knee[.]” Dkt. #3, p. 1. The court liberally construed Alvarado’s claims and concluded that “although Alvarado incorrectly cited this cause of action as a constitutional claim, the Court must construe the Complaint liberally and must find that the Complaint meets the requisite pleading standard to initiate a tort action.” Dkt. #26, p. 5. CoreCivic contends that the district court was too liberal in allowing Alvarado to proceed on a negligence claim Alvarado did not plead.

Nonetheless, both the doctrines of res judicata and collateral estoppel bar Alvarado from bringing his Eighth Amendment claims again on appeal. The federal court, in its final judgment, plainly dismissed Alvarado’s Eighth Amendment claims against CoreCivic. In his state court complaint, Alvarado did not assert a state tort claim as allowed by the federal court, but, instead, asserted an identical Eighth Amendment claim against CoreCivic. The district court denied Alvarado from presenting any Eighth Amendment claim against CoreCivic and, over the objection of CoreCivic, construed his complaint to raise a narrow tort action of medical negligence. Alvarado again asserts Eighth Amendment claims of cruel and unusual punishment against CoreCivic on appeal. Under these facts, res judicata bars Alvarado’s claims against CoreCivic.

Furthermore, collateral estoppel bars Alvarado's claims against CoreCivic. Alvarado raised an identical Eighth Amendment issue related to his November 2013 fall in district court and again on appeal. The issue regarding his Eighth Amendment claims was previously decided upon by the federal court in a final judgment. CoreCivic was a party to the federal action, the district court action, and now on appeal. And Alvarado was also afforded a full and fair opportunity to litigate issues which may be barred; although Alvarado's claims were dismissed under *Minecci* and *Correctional Services*, he was still afforded opportunity to litigate. For these reasons, collateral estoppel bars Alvarado's Eighth Amendment claims against CoreCivic.

**B. If the Court liberally construes Alvarado's claim against CoreCivic, Alvarado's repeated discovery violations nonetheless warranted dismissal with prejudice.**

Montana R. Civ. P. 37(b)(2)(A)(v), grants district court's the authority to dismiss an action or proceeding in whole or in part for a party's failure to obey an order to provide or permit discovery. Rule 26(g) provides that if a certification is made in violation of Rule 26(g), "the court, on motion or on its own, must impose an appropriate sanction upon the signer, the party on whose behalf the signer was acting, or both." The Court has held that if inaccurate, incomplete or untruthful discovery responses are made, the trial court has no discretion but to impose

sanctions on the offending party pursuant to Rule 26(g). *See Fjelstad v. State Through Dep't of Highways*, 267 Mont. 211, 226, 883 P.2d 106, 115 (1994).

For decades, this Court has taken a strong stance against discovery abuses. *See e.g., Owen v. F.A. Buttrey Co.*, 192 Mont. 274, 627 P.2d 1233 (1981); *Richardson v. State*, 2006 MT 43, 331 Mont. 231, 130 P.3d 634. In *Richardson*, the Court held, “. . . the imposition of sanctions for failure to comply with discovery procedures is regarded with favor. It is after all, a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires.” *Richardson*, ¶ 56 (citations omitted). In response, this Court set forth criteria to use in reviewing whether a sanction is an abuse of discretion, including: “(1) whether the consequences imposed by the sanctions relate to the extent and nature of the actual discovery abuse; (2) the extent of the prejudice to the opposing party which resulted from the discovery abuse; and (3) whether the court expressly warned the abusing party of the consequences.” *Xu*, ¶ 26.

Although the Court typically provides “wide latitude to pro se litigants in their attempts to comply with the technicalities of pleadings” the Court has repeatedly held that all litigants, including pro se litigants, *must adhere* to the procedural rules. *Xu*, ¶ 23 (citing *In re P.D.L.*, 2004 MT 346, ¶ 13, 324 Mont. 327, 102 P.3d 1225). This Court has observed that “sanctions for abuse of discovery

procedures are imposed in order to deter unresponsive parties in an action; it is the attitude of unresponsiveness to the judicial process, regardless of the intent behind that attitude, which warrants sanctions.” *Xu*, ¶ 24 (citing *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168, 1172 (1997)).

This Court has supported severe sanctions when a party fails to disclose relevant information in discovery that has a bearing on the nature and extent of the party’s injury/damages. For example, in *Jerome v. Pardis*, 240 Mont. 187, 783 P.2d 919 (1989), this Court affirmed a dismissal sanction for discovery abuses where a medical malpractice plaintiff failed to identify in her discovery responses some of her past medical providers and also failed to identify that she had filed a past insurance claim for her back problems. *Id.* at 921-923. The *Jerome* Court held that the plaintiff and her counsel’s signing of discovery, while at the same time failing to identify all past medical providers and claims, was (1) not consistent with the rules of discovery, (2) was interposed for any improper purpose, and (3) was unreasonable or unduly burdensome; violating Rule 26(g). *Id.* at 923. The Court held:

The responses attempted to mislead Pardis by concealing information material to his defense. The responses would create an unreasonable burden and increased expense to Pardis in re-deposing witnesses whose prior testimony was given without the benefit of the improperly withheld information. Finally, withholding of this information by the plaintiff is clearly not consistent with the rules and spirit of discovery.

Dismissal with prejudice is an appropriate sanction in this case.

*Id.*

In *Smart v. Molinario, supra*, this Court again upheld a dismissal sanction when a plaintiff alleging personal injury failed to disclose medical information which had a bearing on the plaintiff's claim for personal injury damages. *Id.* at ¶¶ 11, 14-15. The plaintiff failed to provide letters from his medical file, as well as names of two other doctors with which the plaintiff had consulted. *Id.* at ¶ 11. The Court held the plaintiff had engaged in dilatory tactics calculated to hide a weak case from the defendant. *Id.* at ¶ 14. In affirming the dismissal sanction, the Court held, “[Defendant] has a right to have this matter resolved. She has been prejudiced by having to deal with [Plaintiff's] dilatory tactics. Such tactics must not be rewarded.” *Id.*

Alvarado's discovery abuses likewise merit imposition of the dismissal sanction. Alvarado's medical records indicate the same finger injury from 2009 which he alleges for purposes of this case occurred on November 3, 2013 while at Crossroads. As the district court noted, CoreCivic procured Alvarado's medical records itself, which included an exam report from 2009 depicting an injury to his left hand. The 2009 report stated: “there is deformity of the middle phalanx of the fifth digit that could conceivably be related to previous healed fracture. There is flaring of the base of the middle phalanx of the fifth digit, and there appear to be

some degenerative changes in the PIP joint.” Appellee Appx. #2, p. 114. The medical evaluation recommended Alvarado seek “an orthopedist or see county ortho this wk.” Appellee Appx. #2, p. 107. This prior injury, to the same finger Alvarado alleges was injured while at Crossroads, was not disclosed during discovery despite compulsion by the district court and multiple discovery attempts by CoreCivic. Moreover, it is the type of injury that should have been obvious to Alvarado needed to be disclosed in response to discovery. Alvarado’s brazenness in concealing this information is displayed by the fact that even when confronted with his prior medical records, he still continues to deny any prior injury to his left hand.

The district court dismissed Alvarado’s claim against CoreCivic with prejudice and ultimately held it “cannot and will not tolerate false and/or misleading answers to discovery requests. Failing to disclose [Alvarado’s] prior knee and finger injuries is inexcusable.” Dkt. #82, p. 2. One of Alvarado’s many discovery violations stemmed from his answer to CoreCivic’s Interrogatory #10, which asked him if he had ever previously injured the finger or the knee that he was currently claiming were injured while in custody of CCA. Alvarado responded, stating: “Now I need surgery and a Mechanical because my knee was not put in a cast the of the injuries.” Dkt. #82, p. 1. Although the response was confusing, the district court took issue with Alvarado’s failure to disclose the 2009

medical records clearly depicting a previous injury to his left little finger. The district court additionally attributed Alvarado's failure to disclose his prior knee and finger injuries as inexcusable and one which required the ultimate sanction, dismissal.

The consequence imposed by the sanction—dismissal with prejudice—relates to the extent and nature of the discovery abuse due to Alvarado's repetitious discovery violations. The extent of the prejudice to CoreCivic was severe. Similar to the *Jerome* and *Smart* cases, Alvarado's failure to disclose relevant medical information has resulted in concealed information that is material to CoreCivic's defense. This case has been litigated with Alvarado since 2013, eight years ago. During that time, discovery has occurred in both the federal court and in this case. At no time did Alvarado disclose an obvious prior injury—the same injury—he complains of to his left hand. CoreCivic had already obtained and paid for expert witness review and obtained a favorable expert opinion. In light of CoreCivic's discovery of non-disclosed prior injuries, to proceed to trial CoreCivic would be required to have that opinion essentially re-done, at additional expense. CoreCivic has no doubt that supplemental expert opinions favor CoreCivic even more with this previously concealed information, however, the point is that information was hidden for nearly seven years by the Appellant. Requiring a re-do with this non-

disclosed evidence “create[s] an unreasonable burden and expense” for CoreCivic. *See Jerome*, 240 Mont. at 193, 783 P.2d at 923.

Moreover, Alvarado’s withholding of this information is clearly not consistent with the rules and spirit of discovery. Discovery is intended to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *Richardson*, ¶ 22 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986-87 (1958)). Alvarado’s failure to disclose relevant and material facts regarding damages merits the sanction of dismissal. Alvarado’s actions show that he clearly is not interested in litigating this case fairly with all relevant facts disclosed to the fact-finder. Any lesser sanction would be a reward to Alvarado for dilatory and abusive discovery tactics.

Additionally, Alvarado was expressly warned by the district court that although he is a pro se litigant, he was still required to complete discovery in accordance with the Montana Rules of Civil Procedure. Dkt. #62, p. 3. Thus, dismissal is an appropriate sanction and the district court properly exercised its discretion in dismissing Alvarado’s claims against CoreCivic following multiple discovery violations. The district court’s order dismissing Alvarado’s Complaint should be affirmed.

## **II. Alvarado's assertion that CoreCivic's delay in treatment caused permanent damage to him is without merit.**

Though the district court had not reached the issue yet, the patent weakness of Alvarado's case further supports dismissal. Alvarado failed to provide an expert to either refute or prove otherwise that his alleged injuries from November 2013 were not a result of the 2009 injury to his left hand or from the degenerative properties in his left knee.

The district court correctly noted that Alvarado's negligence claim against CoreCivic was limited, in that he alleged CoreCivic failed to get him medical treatment in a timely manner while at CoreCivic facilities. Dkt. #62 at pp. 3-4. Specifically, Alvarado claimed CoreCivic failed to provide pain medication and x-rays over approximately a week-long period while at Crossroads until Alvarado was transferred by the United States Marshals to another facility. Alvarado did not allege that CoreCivic was negligent in causing the accident or his injuries. The district court stated if he wished to obtain actual damages for an alleged delay in treatment, he would need to prove through expert testimony that the delay in treatment somehow worsened his injuries. *See id.*

It is well-settled Montana law that a plaintiff asserting negligence must prove each element of that claim: (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *See Beehler v. Eastern Radiological Assoc., P.C.*, 2012 MT 260, ¶ 18, 367 Mont. 21, 289 P.3d 131 (quoting *B.J. v. Shultz*, 2009 MT 245, ¶ 13, 351

Mont. 436, 214 P.3d 772; citing *Butler v. Domin*, 2000 MT 312, ¶ 21, 302 Mont. 452, 15 P.3d 1189). It also well-settled that a plaintiff asserting negligence in provision of medical care, such as Alvarado alleges in this case, “must generally produce expert medical testimony establishing the applicable standard of care and a subsequent departure from that standard.” *Beehler*, ¶ 18 (citing *Butler*, ¶ 21); see also *Estate of Nielsen v. Pardis*, 265 Mont. 470, 473, 878 P.2d 234, 235-36 (1994); *Dalton v. Kalispell Regional Hosp.*, 256 Mont. 243, 248, 846 P.2d 960, 963 (1993); *Montana Deaconess Hosp. v. Gratton*, 169 Mont. 185, 189, 545 P.2d 670, 672 (1976).

Alvarado asserted in his complaint that his injuries were directly from CoreCivic’s breach of duty to provide medical care. Dkt. #3, p.11. He also alleged he suffered from wanton infliction of pain as a result of the medical care, or alleged lack of such care, following his November 2013 fall and, as a result, will be a “cripple for life.” Dkt. #3, pp. 11-12. Such claims would require Alvarado to provide expert testimony to refute that the injury to his left little finger resulted from his November 2013 fall and not from the incident in 2009; furthermore, he would need expert testimony to refute that the degenerative joint disease, diagnosed in 2014, was not a likely cause for or did not contribute to the tenderness and swelling in his left knee reported after his November 2013 fall.

Alvarado failed to disclose any expert witness to support his claims. To the contrary, CoreCivic disclosed Dr. Michael Righetti's opinion that the alleged delay in medical care did not breach any standard of care, and did not affect Alvarado's alleged injuries. Dkt. #47. Moreover, Dr. Righetti reviewed the late-disclosed medical records CoreCivic obtained regarding Alvarado's pre-existing injuries. His opinion after reviewing those records was that "Alvarado did not sustain a fracture causing the deformity of his left small finger at the time of the alleged incident of November 3, 2013 . . . The deformities described in the medical record of November 2013 clearly were present in July of 2009, four years prior to the incident date." Dkt. #60 at p.4.

Thus, without expert testimony Alvarado cannot prevail on his negligence claim against CoreCivic alleging inadequate medical care.

### **CONCLUSION**

The district court properly exercised its discretion in dismissing Alvarado's claims against CoreCivic for discovery violations. Thus, this Court should affirm the district court's decision.

Dated this 16<sup>th</sup> day of November, 2021.

**BROWNING, KALECZYC, BERRY & HOVEN, P.C.**

By /s/ Hallee C. Frandsen

Chad E. Adams

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont. R. App. P., I certify that **Appellee's Answer Brief**, is double spaced, is a proportionately spaced 14-point Times New Roman typeface, and contains 6,006 words.

BROWNING, KALECZYC, BERRY & HOVEN. P.C.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of November, 2021, I mailed a true and correct copy of the above and foregoing **Appellee's Answer Brief**, by the United States Postal Services, postage prepaid, addressed to the following:

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## **CERTIFICATE OF SERVICE**

I, Hallee C. Frandsen, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-16-2021:

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