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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 STEVEN L. DELOSH,

8 Plaintiff,

9 v.

10 STATE OF NEVADA et al.,

11 Defendants.
12

Case No. 2:14-cv-632-APG-GWF

Order

13 **I. MOTION FOR RELIEF FROM SCREENING ORDER**

14 On June 5, 2014, this Court issued a screening order dismissing the complaint in
15 its entirety with prejudice. (Dkt. #9 at 4). This Court dismissed the case based on the
16 expiration of the two-year statute of limitations. (*Id.*). This Court found that Plaintiff had
17 filed his original complaint in state court on February 14, 2014, but that the statute of
18 limitations for his claims had expired on January 28, 2014. (*Id.* at 3-4). The Clerk of the
19 Court entered a judgment in the case on June 5, 2014. (Dkt. #10).

20 On June 30, 2014, Plaintiff, counseled, filed a motion for relief from screening
21 order pursuant to Federal Rule of Civil Procedure 60. (Dkt. #11). Plaintiff argues that
22 the statute of limitations was tolled in this case pursuant to federal law and admits that
23 he “mistakenly did not include a statement regarding the statute of limitations” in his
24 complaint. (*Id.* at 4-6). Plaintiff asserts that the statute of limitations period was tolled
25 while he completed the mandatory exhaustion process. (*Id.* at 2). Plaintiff alleges that
26 the statute of limitations was tolled from July 19, 2012 through November 16, 2012
27 while he exhausted the grievance process and that his claim expired on May 28, 2014.
28 (*Id.* at 2-3).

Pursuant to Rule 60(b), a court may relieve a party from a final judgment for any reason that justifies relief. Fed. R. Civ. P. 60(b)(6). In Nevada, the personal injury statute of limitations is two years. See *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (citing Nev. Rev. Stat. § 11.190(4)(c), (e)); see *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (holding that federal courts borrow state statutes of limitations for personal injury actions in § 1983 suits because § 1983 contains no specific statute of limitations). “A statute of limitations begins to run on the date on which the plaintiff’s claim ‘accrues.’” *Pouncil v. Tilton*, 704 F.3d 568, 573 (9th Cir. 2012). “Federal law determines when a cause of action for a [s]ection 1983 claim accrues and, hence, when the statute of limitations begins to run.” *Id.* “Under federal law, a claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action.” *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000). However, the Ninth Circuit has held that “the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process.” *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005).

The Court grants Plaintiff’s motion for relief from judgment and reopens this case. The Court finds that, in light of the motion for relief, Plaintiff timely filed his complaint because the statute of limitations was tolled while Plaintiff exhausted the grievance process. The Court now screens Plaintiff’s complaint.

II. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under color of state law. See *West v.*

1 *Atkins*, 487 U.S. 42, 48 (1988).

2 In addition to the screening requirements under § 1915A, pursuant to the Prison
3 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the
4 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a
5 claim on which relief may be granted, or seeks monetary relief against a defendant who
6 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for
7 failure to state a claim upon which relief can be granted is provided for in Federal Rule
8 of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when
9 reviewing the adequacy of a complaint or an amended complaint. When a court
10 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
11 complaint with directions as to curing its deficiencies, unless it is clear from the face of
12 the complaint that the deficiencies could not be cured by amendment. *See Cato v.*
13 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

14 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See*
15 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for
16 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of
17 facts in support of the claim that would entitle him or her to relief. *See Morley v. Walker*,
18 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true
19 all allegations of material fact stated in the complaint, and the court construes them in
20 the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957
21 (9th Cir. 1996). While the standard under Rule 12(b)(6) does not require detailed
22 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell*
23 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the
24 elements of a cause of action is insufficient. *Id.*

25 Additionally, a reviewing court should "begin by identifying pleadings [allegations]
26 that, because they are no more than mere conclusions, are not entitled to the
27 assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "While legal
28 conclusions can provide the framework of a complaint, they must be supported with

1 factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court
2 should assume their veracity and then determine whether they plausibly give rise to an
3 entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for
4 relief . . . [is] a context-specific task that requires the reviewing court to draw on its
5 judicial experience and common sense.” *Id.*

6 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
7 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
8 includes claims based on legal conclusions that are untenable (e.g., claims against
9 defendants who are immune from suit or claims of infringement of a legal interest which
10 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
11 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28
12 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

13 **III. SCREENING OF COMPLAINT**

14 In the complaint, Plaintiff, counseled, sues multiple defendants for events that
15 took place while Plaintiff was incarcerated at High Desert State Prison (“HDSP”). (Dkt.
16 #1-2 at 3). Plaintiff sues Defendants High Desert State Prison, State of Nevada, State
17 of Nevada Division of Prisoners, the NDOC, Brian Sandoval, Ross Miller, Catherine
18 Cortez Masto, James Greg Cox, Robert Bannister, Dwight Neven, Dr. Gregory Martin,
19 Dr. Gary Graham, Nurse Mary Eaton, Dr. Romeo Aranas, Correctional Officer Michael
20 Ramos, and Correctional Officer Moye. (*Id.* at 3-5). Plaintiff alleges six counts and
21 seeks monetary damages, attorney’s fees, and costs. (*Id.* at 15-16). Plaintiff filed his
22 complaint in state court on February 14, 2014. (*Id.* at 2).

23 The complaint alleges the following: On January 28, 2012, Plaintiff was sitting
24 down to eat dinner in the chow hall at HDSP when two other inmates began fighting
25 approximately 20 to 30 yards away from him. (*Id.* at 7). Moye yelled to the gun tower to
26 “shoot them . . . shoot them.” (*Id.*). All of the inmates immediately laid down on the
27 floor after the correctional officers began shooting. (*Id.*). Ramos “began carelessly and
28 erratically shooting throughout the chow hall firing at the masses of inmates instead of

1 at the two involved in the altercation.” (*Id.*). Ramos fired at the inmates who were lying
2 on the ground. (*Id.*) Plaintiff was struck by several bullets and still has some of the
3 bullets embedded into his body today. (*Id.*). Plaintiff suffers “great pain” in his body as
4 a result of the embedded bullets. (*Id.*).

5 **A. Count I**

6 In Count I, Plaintiff alleges Eighth and Fourteenth Amendment violations. (Dkt.
7 #1-2 at 7). Plaintiff alleges that “defendants” used excessive force and refused to
8 provide him with prompt medical care during and after the shooting. (*Id.* at 7-8).
9 Plaintiff does not provide any more details for these allegations but instead makes
10 conclusory statements that “Defendants acted deliberately indifferent in the failure to
11 provide medical treatment to [Plaintiff] by not immediately seeking medical treatment for
12 his injury and afterwards,” “Defendants delayed medical care caused needless pain to
13 [Plaintiff],” and “Defendants denied [Plaintiff’s] reasonable request for medical
14 treatment, even though the officials knew that the denial of treatment would expose
15 [Plaintiff] to a substantial risk of pain and/or permanent injury.” (*Id.* at 8). Plaintiff also
16 alleges that HDSP “lacks the most basic elements of an adequate prison health care
17 system.” (*Id.* at 10). Plaintiff alleges that defendants have a “grossly barbaric policy
18 and procedures of firing live rounds at inmates in concrete rooms and crowds.” (*Id.* at
19 11).

20 When a prison official stands accused of using excessive physical force in
21 violation of the cruel and unusual punishment clause of the Eighth Amendment, the
22 question turns on whether force was applied in a good-faith effort to maintain or restore
23 discipline, or maliciously and sadistically for the purpose of causing harm. *Hudson v.*
24 *McMillian*, 503 U.S. 1, 6-7 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 320-21
25 (1986)). In determining whether the use of force was wanton and unnecessary, it may
26 also be proper to consider factors such as the need for application of force, the
27 relationship between that need and the amount of force used, the threat reasonably
28 perceived by the responsible officials, and any efforts made to temper the severity of a

1 forceful response. *Hudson*, 503 U.S. at 7. Although an inmate need not have suffered
2 serious injury to bring an excessive force claim against a prison official, the Eighth
3 Amendment's prohibition on cruel and unusual punishments necessarily excludes from
4 constitutional recognition *de minimis* uses of physical force. *Id.* at 9-10.

5 The Court finds that Plaintiff states a colorable claim for excessive force.
6 Although prison officials initiated the shooting as an effort to restore discipline among
7 the two fighting inmates, Plaintiff's allegation that Ramos's erratic shooting at the rest of
8 the inmate population supports his claim that the shooting may have been done for the
9 purpose of causing harm. As such, this claim shall proceed against Moye and Ramos.

10 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
11 and "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity,
12 and decency.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates
13 the Eighth Amendment when he acts with "deliberate indifference" to the serious
14 medical needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "To
15 establish an Eighth Amendment violation, a plaintiff must satisfy both an objective
16 standard—that the deprivation was serious enough to constitute cruel and unusual
17 punishment—and a subjective standard—deliberate indifference." *Snow v. McDaniel*,
18 681 F.3d 978, 985 (9th Cir. 2012).

19 To establish the first prong, "the plaintiff must show a serious medical need by
20 demonstrating that failure to treat a prisoner's condition could result in further significant
21 injury or the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091,
22 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
23 prong, a plaintiff must show "(a) a purposeful act or failure to respond to a prisoner's
24 pain or possible medical need and (b) harm caused by the indifference." *Id.*
25 "Indifference may appear when prison officials deny, delay or intentionally interfere with
26 medical treatment, or it may be shown by the way in which prison physicians provide
27 medical care." *Id.* (internal quotations omitted). When a prisoner alleges that delay of
28 medical treatment evinces deliberate indifference, the prisoner must show that the delay

1 led to further injury. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d
2 404, 407 (9th Cir. 1985) (holding that "mere delay of surgery, without more, is
3 insufficient to state a claim of deliberate medical indifference").

4 The Court finds that Plaintiff fails to state a colorable Eighth Amendment claim for
5 deliberate indifference to medical needs. Plaintiff's complaint does not provide any
6 factual allegations about the medical treatment that took place during or after the
7 shooting. As such, the Court is unable to evaluate whether Plaintiff states sufficient
8 facts to state a claim for such a violation. Rather, Plaintiff fills the complaint with
9 conclusory allegations that prison officials were deliberately indifferent to Plaintiff's
10 medical needs. The Court dismisses this portion of the claim but grants leave to
11 amend.

12 **B. Counts II, III, IV, and V**

13 In Count II, Plaintiff alleges negligence against "defendants" for failing to provide
14 a safe environment for the inmates by firing live ammunition rounds into a crowded
15 room. (Dkt. #1-2 at 12). In Count III, Plaintiff alleges negligent hiring, training, retention,
16 and supervision because the "defendants" had the duty to properly and adequately hire,
17 train, and retain, and supervise its personnel under their control. (*Id.* at 13). In Count
18 IV, Plaintiff alleges gross negligence against "defendants." (*Id.* at 14). In Count V,
19 Plaintiff alleges assault and battery against "defendants." (*Id.*).

20 The Court finds that Plaintiff's state law claims only provide conclusions and
21 labels for each of the claims. The complaint only provides factual allegations as to
22 Moye's and Ramos's actions regarding the incident(s) at hand. The complaint does not
23 provide factual allegations as to any of the other defendants but instead refers to the
24 defendants collectively in each of the state law claims. The Court dismisses the state
25 law claims with leave to amend.

26 **C. Count VI**

27 In Count VI, Plaintiff alleges respondeat superior. (Dkt. #1-2 at 15). The Court
28 dismisses this claim with prejudice, as amendment would be futile. A defendant is liable

1 under 42 U.S.C. § 1983 “only upon a showing of personal participation by the
2 defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A supervisor is only
3 liable for constitutional violations of his subordinates if the supervisor participated in or
4 directed the violations, or knew of the violations and failed to act to prevent them. There
5 is no respondeat superior liability under [§]1983.” *Id.*; *see also Ashcroft v. Iqbal*, 556
6 U.S. 662, 676 (2009) (holding that “[b]ecause vicarious liability is inapplicable to *Bivens*
7 and § 1983 suits, a plaintiff must plead that each Government-official defendant,
8 through the official’s own individual actions, has violated the Constitution”).

9 **D. Leave to Amend**

10 Plaintiff is granted leave to file an amended complaint to cure the deficiencies of
11 the complaint. If Plaintiff chooses to file an amended complaint he is advised that an
12 amended complaint supersedes any previous complaint and, thus, the amended
13 complaint must be complete in itself. *See Hal Roach Studios, Inc. v. Richard Feiner &*
14 *Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was
15 named in the original complaint is irrelevant; an amended pleading supersedes the
16 original”); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding
17 that for claims dismissed with prejudice, a plaintiff is not required to reallege such claims
18 in a subsequent amended complaint to preserve them for appeal). Plaintiff’s amended
19 complaint must contain all claims, defendants, and factual allegations that Plaintiff
20 wishes to pursue in this lawsuit.

21 The Court notes that if Plaintiff chooses to file an amended complaint curing the
22 deficiencies of his complaint as outlined in this order, Plaintiff shall file the amended
23 complaint within 30 days from the date of entry of this order. If Plaintiff chooses not to
24 file an amended complaint curing the stated deficiencies of his complaint, this action will
25 only proceed on the excessive force claim against Defendants Moye and Ramos.

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1 **IV. CONCLUSION**

2 For the foregoing reasons,

3 **IT IS ORDERED** that Plaintiff's motion for relief (Dkt. # 11) is granted. The Clerk
4 of the Court shall reopen this case.

5 **IT IS FURTHER ORDERED** that Count I, alleging excessive force and deliberate
6 indifference, shall proceed in part and is dismissed in part with leave to amend. The
7 excessive force portion of the claim shall proceed against Defendants Moye and
8 Ramos. The deliberate indifference claim is dismissed with leave to amend.

9 **IT IS FURTHER ORDERED** that Count II, alleging negligence, is dismissed with
10 leave to amend.

11 **IT IS FURTHER ORDERED** that Count III, alleging negligent hiring, training,
12 retention, and supervision, is dismissed with leave to amend.


13 **IT IS FURTHER ORDERED** that Count IV, alleging gross negligence, is
14 dismissed with leave to amend.

15 **IT IS FURTHER ORDERED** that Count V, alleging assault and battery, is
16 dismissed with leave to amend.

17 **IT IS FURTHER ORDERED** that Count VI, alleging respondeat superior, is
18 dismissed with prejudice as amendment would be futile.

19 **IT IS FURTHER ORDERED** that Plaintiff shall file his amended complaint within
20 30 days from the date of this order. If Plaintiff chooses not to file an amended
21 complaint, this case shall proceed against Defendants Moye and Ramos for excessive
22 force only.

23 Dated: July 3, 2014.

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25 
26 United States District Judge
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