An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-319

Filed: 3 November 2015

Wake County, No. 14-CVS-2489

ROBERT ALLEN SARTORI, et al., Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF ADULT CORRECTION, et al., Defendants.

Appeal by Plaintiff from Order entered 28 August 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 24 September 2015.

Robert Allen Sartori, Plaintiff-Appellant, pro se.

No brief for Defendant-Appellees.

DILLON, Judge.

Robert Allen Sartori ("Plaintiff") is currently an inmate at Scotland Correctional Institution in Laurinburg, North Carolina. Plaintiff filed a civil complaint for injunctive and declaratory relief *pro se* and as an indigent *in forma pauperis* on behalf of himself and other similarly situated inmates. Accordingly, the trial court was required to determine whether the complaint was frivolous. N.C. Gen. Stat. § 1-110(b) (2007). The trial court determined that there was "no basis in law or

fact" to support Plaintiff's complaint and dismissed the complaint as frivolous. Plaintiff timely filed notice of appeal.

I. Standard of Review

This court reviews the trial court's determination regarding frivolity under N.C. Gen. Stat. § 1-110(b) for an abuse of discretion. *Gray v. Bryant*, 189 N.C. App. 527, 528, 658 S.E.2d 537, 538 (2008). After careful consideration, we find no abuse of discretion and affirm the trial court's order.

II. Analysis

Plaintiff's sole issue on appeal is whether the trial court erred in dismissing his complaint as frivolous. A complaint is frivolous if a proponent cannot present a rational argument based upon the evidence or the law in support of it. *Gray*, 189 N.C. App. at 528, 658 S.E.2d at 538. In determining whether a complaint is frivolous, the standard is not the same as in a ruling on a motion under 12(b)(6); rather, we look with a "'far more forgiving eye' in examining whether a claim rests on a meritless legal theory." *Id.*

In his proposed complaint, Plaintiff alleges that he has spent time in custody at Warren Correctional Institution ("Warren"), a medium custody facility in Manson, North Carolina; that the long-term lockup cells at Warren lack call buttons with which to summon assistance in case of a medical emergency; and that prison officials at Warren routinely fail to make rounds to monitor the inmates' well-being. Further,

Plaintiff alleged that these deficiencies constitute violations of the constitutional rights of the inmates at Warren, including rights under the Fifth, Eighth, and Fourteenth Amendments of the federal Constitution, and Article I, Section 18 of the North Carolina Constitution.

Plaintiff's central argument is supported solely by *LeMaire v. Maass*, 745 F. Supp. 623, 636 (1990), a case from the United States District Court for the District of Oregon. However, we note that this case was subsequently vacated and remanded by the 9th Circuit Court of Appeals. *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993) (holding that "either [call buttons or a requirement that the cell's solid outer door remain open would allow] an inmate to summon help and thus would be sufficient to remedy the violation, but *both* are not constitutionally mandated.").[1]

We are unable to conclude from Plaintiff's remaining contentions that the trial court abused its discretion. Accordingly, we affirm the trial court's order dismissing Plaintiff's complaint as frivolous.

NO ERROR.

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).

[1] Additionally, we note that the opinion cited by Plaintiff is neither binding precedent on this Court nor is it persuasive in light of the fact that it was subsequently overturned by the 9th Circuit Court of Appeals.