**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MARIO A. SALAS, an individual,

Appellant,

vs.

CLARK COUNTY SCHOOL DISTRICT; VISION TECHNOLOGIES, INC.,

Respondents.

Case No. 83105



**APPEALS**

from the Eighth Judicial District Court, Clark County
the Honorable Veronica M. Barisich
District Court Case No. A-20-826012-C

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# RESPONDENT VISION TECHNOLOGIES, INC.'S APPENDIX (VOLUME 1)

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# INDEX TO RESPONDENT'S APPENDIX

## CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 7th day of January, 2022, I caused service of a true and correct copy of the forgoing **RESPONDENT VISION TECHNOLOGIES, INC.'S APPENDIX (VOLUME 1)** pursuant to the Supreme Court Electronic Filing System, and by first class United States mail, postage prepaid, Las Vegas, to the following:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MARIO A. SALAS, an individual,<br><br>Plaintiff,<br><br>vs.<br><br>CLARK COUNTY SCHOOL DISTRICT; VISION TECHNOLOGIES, INC., a Foreign Corporation; DOE SCHOOL DISTRICT EMPLOYEES I through X,· DOE INFORMATION TECHNOLOGY SUPPORT EMPLOYEES I through X; DOE OWNERS I through X; DOE MANUFACTURER EMPLOYEE, I through X; DOE DESIGNER EMPLOYEE, I through X; ROE INFORMATION TECHNOLOGY SUPPORT COMPANIES XI through XX; ROE OWNERS XI through XX; ROE EMPLOYERS XI through XX; ROE DESIGNER, XI through XX; ROE MANUFACTURER, Xl through XX; DOES XXI through XXV; and ROE CORPORATIONS, X:XV through XXX, inclusive, jointly and severally,<br><br>Defendants. | Case No. A-20-826012-C<br><br>Dept. No. 5<br><br>**DEFENDANT VISION TECHNOLOGIES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** |

Defendant, Vision Technologies, Inc. ("VTI"), by and though its counsel, Armstrong Teasdale LLP, hereby submits this Reply in support of its Motion to Dismiss the Complaint filed by Plaintiff Mario Salas ("Plaintiff"). This Reply is made and based upon Nev. R. Civ. P. 12(b)(5) and Nevada Industrial Insurance Act, the attached Memorandum of Points and Authorities, and the pleading and papers already on file in this matter.

Dated this 23rd day of February, 2021.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Notwithstanding Plaintiff's hyperbole and attacks on VTI, at its core, Plaintiff's lawsuit is an improper attempt to circumvent the long-standing and exclusive remedy afforded employees for injuries sustained on-the-job provided through the Nevada Industrial Insurance Act ("NIIA"), or more commonly known as workers' compensation benefits. To the extent Plaintiff was injured on-the-job, Plaintiff has a statutory remedy against his employer, *but that remedy cannot be achieved against VTI by way of this lawsuit.* As such, this action must be dismissed based on the exclusive remedy doctrine of the NIIA.

Plaintiff acknowledges that workers' compensation is the appropriate avenue to pursue his remedy. In fact, the Opposition admits that Plaintiff made a claim for workers' compensation benefits related to his alleged on-the-job injury, stating that he "appropriately sought out" such benefits. (Opp., at 5:11-12.) Plaintiff also alleges that his benefits claim was denied. (Id.) However, even if the claim for benefits was made and thereafter denied, a claim denial entitles Plaintiff to pursue an administrative appeal before a Hearing Officer under N.R.S. § 616C.315 *et seq.*, ***not to immediately file a lawsuit in court.*** Plaintiff cannot rely on N.R.S. § 616B.363 to justify his lawsuit by mischaracterizing the alleged claim denial as a failure by VTI to "provide and secure" workers' compensation insurance for its employees.

Moreover, Plaintiff is simply wrong that VTI's Motion to Dismiss must be converted to a summary judgment motion. Plaintiff misapprehends the law and VTI's arguments with respect to Nev. R. Civ. P. 12(b)(5) standard and the exclusive remedy doctrine. The Motion to Dismiss relies *exclusively* on Plaintiff's allegations in the Complaint to support application of the exclusive remedy

doctrine to this action. In particular, the Complaint expressly alleges that VTI was Plaintiff's employer at the time of the injury, that the injury was sustained in the course and scope of Plaintiff's employment, *but the Complaint silent with respect to any allegation or facts that VTI deliberately and specifically intended to injure Plaintiff such that the injury is removed from the scope of workers' compensation remedy because it is no longer an accident.* Plaintiff even acknowledges that he has no information that VTI deliberately and specifically intended to injure Plaintiff. *See* Jones Declaration (within Opposition), at ¶¶ 4 – 5 ("[d]evelopment of this issue will help illuminate whether [VTI] intentionally harmed Plaintiff, harmed Plaintiff through gross negligence, or harmed Plaintiff merely through neglect."). Thus, any proposed amendment intending to make that allegation is without a factual basis and subject to Nev. R. Civ. P. 11.[1] It is *Plaintiff's burden* to allege facts sufficient to remove his on-the-job injury from the purview of the exclusive remedy provision of the NIIA. Plaintiff failed to do so, therefore, dismissal is appropriate at this time.

Last, Plaintiff's constitutional challenge to the exclusive remedy doctrine of the NIIA falls flat. The Nevada Supreme Court has consistently upheld and enforced the exclusive remedy provisions, and this Court should similarly do so.

Because the NIIA provides the exclusive remedy for Plaintiff's on-the-job injury, this tort action against Plaintiff's employer must be dismissed with prejudice.

## II. LEGAL ARGUMENT

### A. Conversion of VTI's Motion to Dismiss to a Motion for Summary Judgment is Not Necessary, and Therefore, Nev. R. Civ. P. 56(d) Relief is Not Appropriate.

Rather than address the arguments in the Motion to Dismiss head on, the bulk of Plaintiff's Opposition is spent arguing that VTI's Motion to Dismiss under Nev. R. Civ. P. 12(b)(5) should be converted to a summary judgment motion. Plaintiff incorrectly argues that the motion relies upon facts outside of the four corners of the Complaint, or specifically, that VTI is affirmatively contending that it did not intend to injure Plaintiff so that Plaintiff's injury is covered by workers'

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[1] Furthermore, Plaintiff's assertion in the Opposition that his co-worker, Andrew Soley, suffered a "severe asthma attack that kept him out of work for several days" because of similar exposure to airborne dust calls into serious question whether Plaintiff *genuinely* believes that he was singled out or targeted by VTI.

compensation. (Opp., at p. 8 and Section D, generally.) Plaintiff argues that he needs discovery on this "affirmative" contention to determine whether or not VTI singled him out for injury. (Id.) However, Plaintiff misapprehends VTI's argument, and in fact, has it flipped. VTI's Motion to Dismiss relies exclusively on the allegations in the Complaint, and based upon those allegations alone (which VTI accepts as true for purposes of this Motion to Dismiss), the Complaint fails to adequately plead around the exclusive remedy doctrine with respect to Plaintiff's on-the-job injury. As such, dismissal of VTI from this action is appropriate as a matter of law. As described more fully below, conversion to summary judgment and additional discovery is not necessary.

The Motion to Dismiss is based on *Plaintiff's* failure to factually allege that VTI acted with deliberate and specific intent to injure him or to provide facts in the Complaint that show the deliberate intent to bring about the injury. *See Conway v. Circus Circus*, 116 Nev. 870, 874, 8 P.3d 837, 840 (2000) ("Simply labeling an employer's conduct as intentional . . . will not subject the employer to liability outside workers' compensation. The relevant inquiry is not the degree of negligence or even depravity on the part of the employer, but the more narrow question of whether the specific action that injured the employee was an act intended to cause injury to the employee."); *see also King v. Penrod Drilling Co.,*652 F. Supp. 1331, 1334 (D. Nev. 1987); *Cerka v. Salt Lake County,* 988 F. Supp. 1420, 1421–1422 (D. Utah 1997) ("a showing of knowledge coupled with the substantial certainty that injury will result" is not enough to avoid the exclusive recovery provision of worker's compensation system); *Angle v. Alexander,* 328 Ark. 714, 945 S.W.2d 933, 935 (1997) ("the facts must show the employer had a 'desire' to bring about the consequences of the acts or that the acts were premeditated with the specific intent to injure the employee"); *Austin v. Johns–Manville Sales Corp.,* 508 F. Supp. 313, 317 (D. Maine 1981) ("Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, ... [or] willfully failing to furnish a safe place to work, ... this still falls short of the kind of actual intention to injure that robs the injury of accidental character.") (quoting 2A Arthur Larson & Lex K. Larson, *Workmen's Compensation Law* § 68.13 at 13–8, and cases cited in n. 11 (1976)); *Martinkowski v. Carborundum Co.,* 108 Misc.2d 184, 437 N.Y.S.2d 237, 238 (1981) ("mere knowledge and appreciation of a risk is not the same as the intent to cause injury").

Furthermore, in *Flint v. Franktown Meadows, Inc.*, 449 P.3d 475 (Nev. Sept. 26, 2019), the Nevada Supreme Court again upheld dismissal of tort claims on a motion to dismiss based on the exclusive remedy doctrine because that *plaintiff failed to specifically plead* that her employer "deliberately and specifically intended to injure [her]" but instead only generally alleged the employer conduct was "extreme and outrageous and either intentional or reckless." *Id.* at *3 (unpublished disposition) (internal quotations omitted).

Noticeably absent from the Complaint is any allegation that VTI acted with deliberate and specific intent to injure Plaintiff or *facts* showing VTI's deliberate intent to bring about Plaintiff's alleged injury. Instead, the Complaint speaks of VTI's general "negligence and carelessness." (Compl., at ¶¶ 15, 33-36.)

Plaintiff ignores *Conway v. Circus Circus*, which bears a strikingly similarity to this case. Therein, the Nevada Supreme Court affirmed the district court's dismissal of a complaint under Nev. R. Civ. P. 12(b)(5) based on the exclusive remedy doctrine. *See* 116 Nev. at 874, 8 P.3d at 840. Like Plaintiff's allegations, the employees in *Circus Circus* alleged that their employer knowingly required them to work in an environment with unreasonably high levels of carbon monoxide gas and noxious odors and intentionally did nothing to remedy it (even after knowledge of the injuries). *See id.* at 875, 8 P.3d at 840-41. The Nevada Supreme Court held that allegations of exposure to noxious fumes causing injury, even if known to the employer and the employer fails to correct, is still an "accident" within the meaning of the NIIA. *Id.* at 874, 8 P.3d at 840. Moreover, on policy grounds, the Court stated, "[i]f an employee may exempt his or her claim from the exclusive remedy provision of the NIIA by merely pleading that the employer knew of a condition and failed to remedy it, then the workers' compensation system would be rendered meaningless." *Id.* at 875, 8 P.3d at 841.

Accordingly, this Court should not convert VTI's Motion to Dismiss into one for summary judgment. Because Plaintiff failed to adequately plead around the exclusive remedy doctrine with respect to his on-the-job injury, VTI's Motion to Dismiss must be granted.

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**B. To the Extent Plaintiff's Claim for Worker's Compensation Benefits Was Improperly Denied, Plaintiff is Entitled to Pursue an Appeal Under NRS 636C.315 *et seq.*, Not File This Lawsuit Against VTI.**

Plaintiff also argues that this lawsuit is justified under N.R.S. § 616B.636. Plaintiff alleges he made a claim for worker compensation benefits, which VTI improperly denied,[2] and therefore, because VTI failed to "pay benefits," Plaintiff is entitled to bring a tort claim against VTI as if the workers' compensation statute did not apply and to have a presumption of negligence attach. *See* Opp., at Section B, generally; *see also,* N.R.S. § 616B.636(1)-(3). In making this argument, Plaintiff misapprehends N.R.S. § 616B.636 by wrongfully arguing that an allegedly improper claim denial is the equivalent of VTI failing to "secure and provide" worker's compensation insurance coverage for its employees. However, the failure to "secure and provide" insurance contemplated under NRS 616B.636(1) is an employer's complete failure to have NIIA-compliant workers' compensation coverage in place at all. *See* NRS 616B.636; *see also Flint*, 449 P.3d at *2, n. 2; *Cardiello v. Venus Group, Inc.*, 129 Nev. 1102, * 1 (Nev. Nov. 14, 2013) (unpublished disposition) (Nevada's workers' compensation statutes do not give rise to a private cause of action for merely failing to carry workers' compensation insurance, however, but instead allow an injured employee to pursue a common-law claim against the employer for personal injuries suffered on the job.) On the other hand, N.R.S. § 616C.315 *et seq.* provides an injured employee the right to appeal an improper claim denial. As such, N.R.S. § 616B.636 has no place in this discussion.

Moreover, statutory immunity under the NIIA is an affirmative defense, which VTI affirmatively pled by bringing its Motion to Dismiss. *See, e.g., Flint*, 449 P.3d at *2. As such, it is Plaintiff's obligation to allege that the NIIA does not apply in order to maintain his action in court. *See id.* (citing *See McGinnis v. Consol. Casinos Corp.*, 94 Nev. 640, 642, 584 P.2d 702, 703 1(1978) ("In order to state a cause of action which avoids the Nevada Industrial Insurance Act's proscription against common law negligence actions, an injured employee need only allege facts which would remove the claim from the purview of the Act." (citations omitted)). The Complaint

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2 VTI has no knowledge of Plaintiff making a worker's compensation claim, and as a result, did not deny any workers' compensation. In addition, the documents attached to the Plaintiff's Opposition as "evidence" of Plaintiff's workers' compensation claim and/or claim denial relate to CCSD only. This fact, however, in no way alters exclusivity of the NIIA to Plaintiff's on-the-job injury.

does not affirmatively allege that VTI did not have a policy of workers' compensation insurance in place at the time of his injury (nor does it even allege that Plaintiff made a claim to VTI for worker's compensation benefits). Plaintiff has failed to carry his burden to remove this common law negligence claim against VTI from the purview of the NIIA.[3]

Accordingly, the Motion to Dismiss must be granted.

**C. The Exclusive Remedy Provision Within the Nevada Industrial Insurance Act is Constitutional.**

Plaintiff next asks this Court to declare the exclusive remedy provision of the NIIA unconstitutional because it takes away Plaintiff's right to a trial by jury without providing adequate compensation. Such an argument ignores decades of Nevada Supreme Court precedent upholding and enforcing the exclusive remedy provision of the NIIA. *See, e.g., Circus Circus*, 116 Nev. at 874, 8 P.3d at 840 (2000); *Flint*, 449 P.3d at *2. Moreover, in *Snow v. United States*, 479 F. Supp. 936 (D. Nev. 1973), a court in the District of Nevada already overruled a similar constitutional challenge to the NIIA's exclusive remedy provision. In *Snow*, the NIIA's exclusive remedy provision precluded a wrongful death action by a survivor, who was the decedent's mother, even though the NIIA did not permit the decedent's mother to collect death benefits because she was not dependent on the decedent at the time of death. *Id.* at 941-43. The district court expressed concern with the disparity created by the NIIA (i.e., simply because the death occurred in the workplace, a statutory survivor had to prove dependency on the decedent to recover NIIA death benefits, but would not have had to prove dependency to recover in a wrongful death/survivor action). *Id.* at 941. Ultimately however the district court joined a number of its sister courts across the country in holding that the various public policies that gave rise to workers' compensation statutes make this disparity constitutional. *Id.* at 944.

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[3] To the extent Plaintiff seeks to make this argument now, VTI states that it had a policy of workers' compensation insurance in place on June 28, 2019, issued by The Hanover Insurance Group under Policy No. W2QD908944 for the policy period 6/1/2019 to 6/1/2020.

To be clear, the NIIA provides Plaintiff's exclusive remedy. Plaintiff is not without a remedy as he contends.[4] And, to the extent Plaintiff's benefits claim was improperly denied, Plaintiff has appeal rights under NRS 616C.315 *et seq.*

**III. AMENDMENT MUST BE DENIED AS FUTILE.**

Plaintiff also asks this Court for leave to amend his Complaint should the Court grant this Motion to Dismiss arguing that he should be allowed to re-plead with more specificity. As a preliminary matter, the motion to amend should be summarily denied because Plaintiff failed to comply with Rule 2.30(a) of the Local Rules of the Eighth Judicial District Court, which requires that "[a] copy of a proposed amended pleading must be attached to any motion to amend pleadings." This requirement cannot be overlooked as it allows the court to assess whether amendment would be futile in the first instance.

Notwithstanding the procedural deficiency, based on Plaintiff's current allegations and statements to date as discussed above, Plaintiff will not be able to plead adequate allegations and facts to remove Plaintiff's on-the-job injury from the auspices of the NIIA's exclusive remedy provision. Indeed, Plaintiff already admitted that he filed a worker's compensation claim, thereby acknowledging this injury falls within the NIIA. In addition, VTI's alleged liability rests on allegations that (1) VTI directed Plaintiff and other employees to work in an allegedly known hazardous worksite; and (2) VTI neither directly created the hazardous worksite nor instructed/directed the use of compressed air (which was for a legitimate purpose) that caused the dust/pollutants to become airborne and ultimately injure Plaintiff. Under those facts, Plaintiff's simply cannot genuinely believe that VTI deliberately and specifically intended to injure Plaintiff and/or singled him out for injury. As the Nevada Supreme Court said in *Circus Circus*, the workers' compensation system would be rendered meaningless if an employee may exempt his or her claim by merely pleading that the employer knew of a hazardous condition and failed to remedy it. *Id.* at 875, 8 P.3d at 841.

Accordingly, leave to amend must be denied because amendment would be futile.

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[4] And, if Plaintiff is correct that CCSD is not his statutory employer, then Plaintiff may be able to recover against CCSD.

## IV. CONCLUSION

For the reasons set forth in its Motion to Dismiss and above, VTI respectfully requests that this Court grant its Motion to Dismiss and dismiss the claims asserted against VTI with prejudice on the grounds that Plaintiff's negligence claim against his employer arising from an alleged on-the-job injury is barred by the exclusive remedy doctrine of the NIIA, or N.R.S. § 616A.020. Moreover, leave to amend should be denied as futile.

Dated this 23rd day of February, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of February, 2021 the foregoing was served to the parties below as follows:

☒ via electronic service through Odyssey pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 to:

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