IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIO A. SALAS, AN INDIVIDUAL,
Appellant,
vs.
CLARK COUNTY SCHOOL DISTRICT; AND VISION TECHNOLOGIES, INC., A FOREIGN CORPORATION,
Respondents.

No. 83105-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Mario A. Salas appeals from a district court order dismissing his complaint without leave to amend in a tort action.[1] Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

Respondent Vision Technologies, Inc. (VTI) employed Salas as a network engineer.[2] VTI contracted with respondent Clark County School District (CCSD) to provide information technology services. In June 2019, VTI directed Salas to provide those services for CCSD at a CCSD property. On the same day, CCSD directed its employees to clean dust out of old computers using cans of compressed air that purportedly created dangerous working conditions. As a result of the dangerous working conditions, Salas allegedly suffered multiple injuries.

One of these injuries was a rash, which became infected and caused Salas to develop sepsis. Afterward, Salas's condition deteriorated. He developed pneumonia which led to a collapsed lung. Then he contracted pulmonary methicillin-resistant staphylococcus aureus, and was placed in a

[1]The Honorable Bonnie A. Bulla, Judge, did not participate in the decision of this matter.

[2]We recount the facts as stated in Salas's complaint.

medically induced coma and intubated for 12 days. As a result of these complications, Salas lost 60 pounds and could not walk without the assistance of a cane for a month. Salas then filed a workers' compensation claim with Sierra Nevada Administrators,[3] which was denied and apparently not administratively appealed.

Salas then filed a complaint against VTI and CCSD in district court. As to VTI, Salas alleged negligence. As to CCSD, Salas alleged (1) negligence, (2) respondeat superior and (3) negligent entrustment, hiring, training, and supervision.[4] VTI and CCSD each filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to NRCP 12(b)(5).

Salas opposed the motions and requested leave to amend his complaint. However, Salas did not attach a copy of his proposed amended complaint to his opposition. The district court granted the motions to dismiss. The court found that both VTI and CCSD were Salas's employers for purposes of the Nevada Industrial Insurance Act (NIIA) and, therefore, the NIIA provided the exclusive remedy for Salas's claims. The district court also denied Salas's request for leave to amend his complaint because Salas

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[3]We infer from the record that Sierra Nevada Administrators was CCSD's industrial insurance provider at the time because its denial of Salas's claim only mentions CCSD's responsibility not VTI's.

[4]Salas also alleged various causes of action against numerous Doe and Roe defendants including CCSD employees and the designers and manufacturers of the compressed air canisters allegedly used by CCSD's employees. These claims were dismissed by the district court pursuant to NRCP 54(b). Salas does not challenge the dismissal of these claims on appeal. Therefore, we need not address them. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

failed to attach a copy of his proposed pleading to his request and because the amendment would have been futile.

Salas filed a motion to reconsider and attached a copy of his proposed amended complaint to it. The district court denied the motion to reconsider largely on the same grounds as the motion to dismiss. Salas now appeals.

The district court did not err in dismissing Salas's claims against VTI

We review a district court's ruling on a defendant's motion to dismiss for failure to state a claim upon which relief can be granted de novo, treating all alleged facts in the complaint as true and drawing all necessary inferences in favor of the moving party. *Fausto v. Sanchez-Flores*, 137 Nev. 113, 114, 482 P.3d 677, 679 (2021) (citing *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 227-28, 181 P.3d 670, 672 (2008)). A complaint may only be dismissed under NRCP 12(b)(5) if it appears beyond a doubt that no set of facts could be proven that would entitle a plaintiff to relief. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Further, Nevada is a notice-pleading jurisdiction, so a complaint need only set forth facts sufficient to demonstrate the necessary elements of a claim for relief so that the defending parties have "adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 308-09, 468 P.3d 862, 878-79 (Ct. App. 2020) (discussing Nevada's liberal notice pleading standard).

On appeal, Salas argues that the district court erred in dismissing his claims against VTI because the NIIA is not the exclusive remedy for his claims. He asserts that he adequately pleaded the intentional nature of VTI's actions and therefore his claims fall outside the NIIA's

purview.[5] VTI counters that Salas admitted in his own complaint that he was its employee and was acting within the scope of his employment when he was injured—bringing him squarely within the exclusive remedy doctrine.

Generally, "[t]he NIIA provides the *exclusive remedy* for employees injured on the job, and an employer is immune from suit by an employee for injuries arising out of and in the course of the employment." *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (emphasis added) (internal quotation marks omitted); *see also* NRS 616A.020; NRS 616B.612(4). However, employers "do not enjoy immunity, under the exclusive remedy provision of workers' compensation statutes, from liability for their intentional torts." *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 874, 8 P.3d 837, 840 (2000) (internal quotation marks omitted) (holding that in order to avoid the exclusive remedy doctrine, injured employees must allege that their employer "deliberately and specifically intended to injure them"). Therefore, to survive the motion to dismiss, Salas bore the burden of alleging facts that would take his claim outside the scope of the NIIA's exclusive remedy doctrine. *McGinnis v. Consol. Casinos Corp.*, 94 Nev. 640, 642, 584 P.2d 702, 703 (1978).

Here, Salas was injured in the course of his employment with VTI—he conceded as much in his complaint. Salas failed to plead that VTI

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[5]Salas alternatively argues that the earlier denial of his claim for workers' compensation means that VTI failed to "provide and secure compensation" for his injuries such that the exclusive remedy doctrine does not bar his action against VTI. This argument is not cogently made, however, and lacks the support of any relevant legal authority. Therefore, we do not consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an argument that is not cogently presented or lacks the support of relevant authority).

committed an intentional tort in either his original complaint or proposed amended complaint.[6] Additionally, VTI properly pleaded the affirmative defense of statutory immunity under the NIIA in its motion to dismiss. Salas failed to allege that VTI *deliberately and specifically* intended to injure him.[7] Therefore, the exclusive remedy doctrine applies, and the district court did not err in dismissing his claim against VTI.[8]

The district court erred in its analysis of whether CCSD was Salas's statutory employer

Salas argues that the district court erred in finding that CCSD was his statutory employer under the NIIA. He reasons that under NRS

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[6]Indeed, the only cause of action that Salas brought against VTI in his original complaint was for negligence. While his proposed amended complaint purported to add a cause of action against VTI for strict products liability, the proposed amended complaint was properly denied, as discussed below. Regardless, neither of these causes of action are generally considered an intentional tort. *See Tort, Black's Law Dictionary* (11th ed. 2019) (defining an intentional tort as "[a] tort committed by someone acting with general or specific intent [including] battery, false imprisonment, and trespass to land"; defining a negligent tort as "[a] tort committed by failure to observe the standard of care required by law under the circumstances").

[7]Salas urges this court to interpret the phrase "[a]ctively created hazards to [appellant]" in his complaint as an allegation that VTI's acts were intentional. He provides no legal support, however, for the proposition that this phrase equates to deliberate and specific intent to cause injury. *Cf. Conway*, 116 Nev. at 875, 8 P.3d at 840. Therefore, we need not consider his argument further. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

[8]Although Salas argues that the district court violated Nevada's notice pleading standard by requiring him to plead "information which would combat a potential affirmative defense," a plaintiff bears the burden of alleging that the NIIA does not apply to the instant case. *See McGinnis*, 94 Nev. at 642, 584 P.2d at 703. If a plaintiff cannot allege such facts, then dismissal is proper. *Id.* Because Salas failed to allege that the NIIA did not apply to VTI, dismissal was proper.

616B.603,[9] CCSD and VTI are independent enterprises from one another and, therefore, the employees of one cannot be considered the employees of the other. According to Salas, the work VTI normally performs—information technology support—is different from the work CCSD performs—educating children. Therefore, he claims, the two organizations are independent enterprises. Salas points to the "normal work test" articulated in *Meers v.*

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[9]NRS 616B.603 states:

> 1. A person is not an employer for the purposes of chapters 616A to 616D, inclusive, of NRS if:
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> (a) The person enters into a contract with another person or business which is an independent enterprise; and
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> (b) The person is not in the same trade, business, profession or occupation as the independent enterprise.
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> 2. As used in this section, "independent enterprise" means a person who holds himself or herself out as being engaged in a separate business and:
>
> (a) Holds a business or occupational license in his or her own name; or
>
> (b) Owns, rents or leases property used in furtherance of the business.
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> 3. The provisions of this section do not apply to:
>
> (a) A principal contractor who is licensed pursuant to chapter 624 of NRS.
>
> (b) A real estate broker who has a broker-salesperson or salesperson associated with the real estate broker pursuant to NRS 645.520.
>
> 4. The Administrator may adopt such regulations as are necessary to carry out the provisions of this section.

Haughton Elevator, 101 Nev. 283, 701 P.2d 1006 (1985), and *Lipps v. Southern Nevada Paving*, 116 Nev. 497, 998 P.2d 1183 (2000), as support for his contention that the exclusive remedy doctrine does not extend to CCSD here. CCSD counters that Salas was its statutory employee under the plain language of NRS 616A.210(1), which includes "subcontractors, independent contractors and the employees of either" in its definition of "employee."

In *Meers*, the Nevada Supreme Court adopted the normal work test to determine whether the type of work a subcontractor performs entitles an employer to NIIA immunity. 101 Nev. at 286, 701 P.2d at 1007. Specifically, the test "is whether that indispensable activity is, in that business, *normally* carried on through employees rather than independent contractors." *Id.* As the Nevada Supreme Court observed in *Lipps*, NRS 616B.603 codified this test. 116 Nev. at 500, 998 P.2d at 1185.

Below, Salas correctly argued that the normal work test is controlling as it relates to CCSD and Salas. However, the district court did not apply the normal work test and instead summarily concluded that CCSD was Salas's statutory employer. This oversight necessitates reversal of this part of the district court's order and a remand with instructions to apply the "normal work" test. *See State Indus. Ins. Sys. v. Ortega Concrete Pumping, Inc.*, 113 Nev. 1359, 1364, 951 P.2d 1033, 1036 (1997) (reversing an order granting summary judgment because the district court failed to apply the *Meers* test). Accordingly, we reverse the district court's order, in part, and remand for further proceedings.

The district court did not abuse its discretion in denying Salas's request to amend

Salas argues that the district court abused its discretion when it denied his request to amend his complaint. Salas acknowledges that requests to amend should not be granted if made in bad faith or with dilatory motive, or if doing so would be futile or cause an undue delay. According to

Salas, however, amendment of his complaint would not have been futile because he could have made allegations that would have enabled him to survive the motions to dismiss.

VTI and CCSD counter that Salas neglected to follow EDCR 2.30(a) by failing to attach his amended complaint to his request to amend and thus the district court was within its discretion to deny his request. They also point out that the court nevertheless reviewed the proposed amendment and found that it contained insufficient changes to "show that [respondents'] acts were done with specific intent to cause injury to [Salas]." Therefore, VTI and CCSD argue, the amendment would have been futile.

We review a district court's ruling on requests to amend a complaint for abuse of discretion. *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 131 (2013). Generally, leave to amend should be "freely given" absent "undue delay, bad faith or dilatory motives on the part of the movant." *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (quoting NRCP 15(a)); *see Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973). However, where a local rule requires the attachment of a proposed amended complaint to a request for leave to amend, it is within the district court's discretion to deny the request based on the party's failure to attach the proposed pleading. *See Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009).

Here, the district court did not abuse its discretion in denying Salas's motion for leave to amend his complaint because he failed to comply with EDCR 2.30(a), which required that he attach a copy of his proposed amendment to his request. Salas offers no argument as to why the district court's adherence to EDCR 2.30(a) was an abuse of the court's discretion. Indeed, Salas effectively concedes this point by failing to address it in either

his opening brief or his reply brief.[10] *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position"). Accordingly we,

ORDER the judgment of the district court AFFIRMED in part, REVERSED in part, AND REMAND for further proceedings consistent with this this order. Upon remand, the district court is instructed to apply the normal work test to determine whether CCSD was the statutory employer of Salas, provided the facts necessary to do so are available at this stage of the proceedings.[11]

_____, C.J.
Gibbons

TAO, J., concurring:

I concur in the judgment.

_____, J.
Tao

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[10]We do not reach the issue of futility as it is not necessary for our disposition. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that we need not address issues that are unnecessary to resolve the case at bar).

[11]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Veronica Barisich, District Judge
Bighorn Law/Las Vegas
Clark County School District Office of The General Counsel
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Eighth District Court Clerk