IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT L. MENDENHALL, AN INDIVIDUAL; AND SUNRIDGE CORPORATION, A NEVADA CORPORATION,

Appellants,

vs.

RONALD TASSINARI, AN INDIVIDUAL; AND AMERICAN VANTAGE BROWNSTONE, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Respondents.

Case No.: 68053

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I. **<u>INTRODUCTION AND SUMMARY OF ARGUMENT</u>**

In their opening brief, Mendenhall and Sunridge presented four main arguments to reverse or vacate the District Court's dismissal order based upon: (1) the District Court's erroneous finding that Tassinari and AVB were supposedly privies to the Brownstone entities for purposes of claim preclusion; (2) the District Court's erroneous finding that Mendenhall and Sunridge, as defendants in the first lawsuit, could have made the same fraud claims that they alleged as plaintiffs in the second lawsuit; (3) the District Court's failure to determine that the fraud claims were not compulsory claims but permissive claims; and (4) the District Court's failure to consider that NRCP 60(b) authorizes an independent action based upon fraud. Based upon these arguments, Mendenhall and Sunridge asked this Court to either reverse or vacate the District Court's dismissal order.

In their answering brief, Tassinari and AVB argue that (1) it was proper for the District Court to make factual findings in a dismissal proceeding to decide that Tassinari and AVB were privies to the Brownstone entities for purposes of claim preclusion; (2) this Court should consider for the first time on appeal the distinct *Weddell v. Sharp*, 350 P.3d 80 (Nev. 2015) test for the privity analysis of claim preclusion; (3) Mendenhall and Sunridge could have made fraud claims, as defendants in the first lawsuit, even though these claims

were unknown to them until near the conclusion of the first lawsuit; and (4) Mendenhall and Sunridge had to actually cite to NRCP 60(b) to prosecute their second lawsuit as an independent action, alleging fraud claims against Tassinari and AVB.

In this reply brief, Mendenhall and Sunridge urge this Court to either reverse or vacate the District Court's dismissal order since (1) Tassinari and AVB cannot rely upon *Weddell* for the first time on appeal; (2) even if the Court considers *Weddell*, the noted exceptions to nonmutual claim preclusion are applicable to the instant case; (3) Tassinari and AVB cannot ignore Nevada law on privity in favor of inapposite, more stringent federal standards; (4) according to Nevada law, Tassinari and AVB are not privies to the Brownstone entities; (5) Tassinari and AVB fail to address and, thus, tacitly concede that the second lawsuit was not based upon the same causes of action; (6) the fraud claims asserted by Mendenhall and Sunridge in the second lawsuit could not have been brought in the first lawsuit; (7) the plain language of the offer of judgment issued to the Brownstone entities did not resolve any claims against Tassinari and AVB; and (8) alternatively, Mendenhall and Sunridge did not need to cite to NRCP 60(b) to take advantage of the "independent action" provision of this rule. Therefore, the Court should grant the requested relief by either reversing or vacating the District Court's dismissal order.

II. LEGAL ARGUMENT

A. TASSINARI AND AVB CANNOT RELY UPON *WEDDELL* FOR THE FIRST TIME ON APPEAL.

Tassinari and AVB cannot rely upon *Weddell* for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–984 (1981). Tassinari and AVB cite to the new standard for claim preclusion adopted in *Weddell* on approximately one-third of the pages of the answering brief. But, Tassinari and AVB never raised the *Weddell* standard in the District Court, nor did the District Court consider this standard in its dismissal order. JA 2:239–247. Thus, the Court should either apply the claim preclusion standard used by the District Court from *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008), or vacate the dismissal order to allow the District Court to apply the new claim preclusion test outlined in *Weddell*. *See Potter v. Potter*, 121 Nev. 613, 618–619, 119 P.3d 1246, 1250 (2005) (remanding a district court order where an improper legal standard was applied). However, since *Weddell* involves the significant issue of whether "the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit" and whether "the plaintiff can[] provide a 'good reason' for failing to include the new defendant in the previous action," this Court should not engage in appellate fact finding. *See Ryan's Express Transp.*

Servs. v. Amador Stage Lines, Inc., 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Instead, the Court should vacate the dismissal order with instructions for the District Court to consider the new *Weddell* standard, which would be subject to this Court's further review by any aggrieved party. Therefore, despite the heavy reliance that Tassinari and AVB place upon *Weddell*, the Court should choose not to consider this new standard for the first time on appeal.

B. EVEN IF THE COURT CONSIDERS *WEDDELL*, THE NOTED EXCEPTIONS TO NONMUTUAL CLAIM PRECLUSION ARE APPLICABLE TO THE INSTANT CASE.

Even if the Court considers *Weddell*, the noted exceptions to nonmutual claim preclusion are applicable to the instant case. Under *Weddell*, this Court modified the privity requirement in *Five Star*, 124 Nev. 1048, 194 P.3d 709 (2008), requiring (A) privity under *Five Star* when "the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit," but also (B) providing for non-mutual claim preclusion, when privity or the "same party" is not present but "the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a 'good reason' for not having done so." *Weddell*, 350 P.3d at 81.

Notably, the District Court was never presented with this inquiry and, so, never made any conclusions relevant to this modified privity standard. Yet, in *Weddell*, this Court recognized that the lack of necessary facts to bring suit presents "a good reason to justify appellant's second lawsuit." *Id.* at 85.

In the instant case, Mendenhall and Sunridge did not have the knowledge of facts giving rise to their fraud claims until after their offer of judgment had already been issued to the Brownstone entities. JA 2:127–167. Although Mendenhall and Sunridge attempted to assert fraud claims against Tassinari and AVB in the first lawsuit, the District Court never considered the proposed fraud claims because the Brownstone entities accepted the pending offer of judgment. JA 1:41–104. Tassinari and AVB cannot point to any place in the record when Mendenhall and Sunridge had prior knowledge of the facts for their fraud claims. *See Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998) ("When the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact."). Certainly, counsel's arguments that Mendenhall and Sunridge should have detected the fraud committed by Tassinari and AVB earlier do not constitute evidence. *See Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993) ("Arguments of counsel are not evidence and do not establish the facts of the case."). As such, the fraud claims that Mendenhall

and Sunridge alleged in the second lawsuit fall within the exception noted in *Weddell*, and it was error for the District Court to dismiss the complaint.

Mendenhall and Sunridge had other good reasons filing a second lawsuit, including:

(1) Their fraud claims did not accrue until the end of the case, and NRCP 11 required Mendenhall and Sunridge to allege these claims in good faith, with a legal and factual basis. *See* Appellants' Opening Brief ("AOB") 39, 44–47.

(2) The offer of judgment applied only to claims "against one another" under its clear language, meaning the claims between ***the parties to the first lawsuit***. AOB 44. In the first lawsuit, Judge Israel declined to decide the proposed motion to amend and did not clarify to whom the settlement applied. JA 1:109. Instead, Judge Israel indicated that Mendenhall and Sunridge would need to seek a remedy in "another lawsuit." JA 2:206–207. Accordingly, Mendenhall and Sunridge reasonably believed that the judgment was limited to the parties to the first lawsuit.

(3) The offer of judgment issued to the Brownstone entities was irrevocable, and Mendenhall and Sunridge had no opportunity to bring claims due to this statutory and legal barrier under NRCP 68, NRS 17.115, and *Nava v. Dist. Ct.*, 118 Nev. 396, 46 P.3d 60 (2002). AOB 40–42.

Therefore, if the Court considers *Weddell* for the first time on appeal, the Court should conclude that Mendenhall and Sunridge satisfy the noted exceptions to the nonmutual claim preclusion doctrine.

C. TASSINARI AND AVB CANNOT IGNORE NEVADA LAW ON PRIVITY IN FAVOR OF INAPPOSITE, MORE STRINGENT FEDERAL STANDARDS.

Tassinari and AVB cannot ignore Nevada law on privity in favor of inapposite, more stringent federal standards. In their answering brief, Tassinari and AVB focus on case law from outside of Nevada to analyze privity. Respondents' Answering Brief ("RAB") 22–26. Nevada has generally recognized two categories of privity. First, "parties are in privity if the party had acquired an interest in the subject matter affected by the judgment through…one of the parties, as by inheritance, succession, or purchase." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009). Second, Nevada has recognized privity under an "adequate representation analysis" adopted from the RESTATEMENT (SECOND) OF JUDGMENTS, § 41. *See Weddell*, 350 P.3d at 83 (citing *Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 917–918 (Nev. 2014)).

Rather than looking to Nevada law to apply these established definitions of privity, Tassinari and AVB, instead, refer to case law from federal courts and other states to argue that privity should be construed "far beyond its literal and

historic meaning" and should be treated as a "concept not readily susceptible of uniform definition." RAB 22. They examine various forms in which parties could be in privity, including if they are "sufficiently close," (RAB 23, citing *Clemmer v. Hartford Ins. Co*., 587 P.2d 1098, 1102 (Cal. 1978)); if they have "sufficient commonality of interest" (RAB 23, citing *Sparks Nugget, Inc. v. Commissioner of Internal Revenue*, 458 F.2d 632 (9th Cir. 1972)); and under a theory of "virtual representation" where a party can be said to have virtually represented a non-party in a prior case (RAB 23, citing *Irwin v. Mascott*, 370 F.3d 924, 929 (9th Cir. 2004); *U.S. v. Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980)). Nevada courts have specifically rejected some of these tests. For example, in *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 486, 215 P.3d 709, 721 (2009), this Court declined to apply the "virtual representation" analysis from *Irwin* in an issue-preclusion analysis and, instead, applied the "adequate representation analysis" from *Taylor v. Surgell*, 553 U.S. 880, 128 S.Ct. 2161, 2176 (2008).

Nevada courts apply federal law in determining whether a prior federal court judgment should be given preclusive effect in federal-question cases. *Garcia v. Prudential Ins. Co. of Am.*, 293 P.3d 869, 870 (Nev. 2013). However, this is not a federal-question case, and it has never been in federal court. Thus,

there is no reason to examine federal law in the instant case, particularly when there is already governing Nevada law.

Under Nevada law, for claim preclusion to apply, the analysis is clear. One required element is privity of the parties in the two cases, as defined by Nevada law under the "adequate representation analysis"; by an acquired interest of one of the parties, as by inheritance, succession or purchase (*see Bower*, 215 P.3d at 718; *Alcantara*, 321 P.3d at 917–918); or by nonmutual claim preclusion under the recent *Weddell* criteria.[1] *See Weddell*, 350 P.3d at 81–82. Under the proper Nevada tests, Tassinari and AVB cannot demonstrate privity for purposes of claim preclusion.

1. Corporate Officer Privity Under Federal Law Does Not Apply to Tassinari and the Brownstone Entities.

Tassinari and AVB argue in favor of the District Court's finding of privity between Tassinari and the Brownstone entities, focusing largely upon case law from other jurisdictions. Tassinari and AVB argue that a Ninth Circuit case, *Irwin*, 370 F.3d at 930, found "privity between [a] corporation and its primary corporate officer." RAB 26. The *Irwin* case was not specifically addressing "privity" but whether a non-party can be bound by litigation choices

[1] As outlined in Section II.B. of this reply brief, Tassinari and AVB do not satisfy the *Weddell* standard to satisfy privity.

made by his virtual representative and court orders in a prior suit involving the virtual representative. 370 F.3d at 929. In *Irwin*, the Ninth Circuit held that a debt collector corporation was the "virtual representative" of a corporate officer (a debt collector's vice president of operations who oversaw the content and mailing of debt collection letters) in a previous case brought under the Fair Debt Collection Practices Act. Tassinari is not similar to the vice president of operations in the *Irwin* case. In *Irwin*, the officer was "intimately involved" in the first lawsuit and gave several declarations and two depositions, and there was never an assertion that the officer's interests diverged from that of the named defendants in the first case. *Irwin*, 370 F.3d at 930–931.

Here, there is no evidence in the record that Tassinari substantially participated in or controlled the first lawsuit involving the Brownstone entities, beyond having his deposition taken. JA 2:135–152. There is also no evidence, other than the conclusory statements of counsel, that Tassinari's interests are the same as those of the Brownstone entities. *See Jain*, 109 Nev. at 475–476, 851 P.2d at 457 ("Arguments of counsel are not evidence and do not establish the facts of the case."). In addition, the executives deposed on behalf of the Brownstone entities made distinctions between the "corporate" office (AVB and Tassinari) and their own work. JA 1:72–73.

Moreover, the facts of this case are not similar to cases cited in the answering brief on privity between a corporation and individuals with ownership interest. *See, e.g., In re Gottheiner*, 703 F.2d 1136, 1139 (9th Cir. 1983) (controlling shareholder owned ***all stock*** and had complete control over the corporate entity and was in privity with corporation); *In re Shea's Will* (cited as *In re Rafferty*), 309 N.Y. 605, 617–618, 132 N.E.2d 864, 869 (1956) (stating that certain stockholders of a family corporation that participated in litigation and owned the entire corporation, "the corporation was the heirs, the heirs, the corporation"). There has been no showing that Tassinari had a similar role of ownership and complete control over the Brownstone entities. Thus, this foreign case law does not establish that Tassinari was in privity with the Brownstone entities.

2. Federal Law on Corporate Parent and Subsidiary Privity Similarly Does Not Establish Privity Between AVB and the Brownstone Entities.

Tassinari and AVB also claim that there is legal support for the District Court's finding of privity between the Brownstone entities and AVB, again focusing largely upon case law from other jurisdictions. For example, the facts of *In re Imperial Corporation of America*, 92 F.3d 1503, 1507–1508 (9th Cir. 1996) are not similar to the facts of the instant case. There, the court in a

second case held that a parent company, Imperial Corporation of America ("ICA"), and its subsidiary, Imperial Saving Association ("ISA"), were in privity. However, the judgment in the first case against ISA's officers and directors for mismanagement specifically included "all subsidiaries and affiliates" of the corporations as "Signatory Defendants" and also referred to the related entities, collectively with the parent, by a single name, "Imperial." *Id.* at 1508.

Similarly misplaced, Tassinari and AVB cite *In re Colonial Mortgage Bankers Corp. v. Lopez-Stubbe*, 342 F.3d 12 (1st Cir. 2003) for a finding of privity between a parent bank and its subsidiary. In that case, the plaintiffs in the two lawsuits were "treated as a single entity throughout the earlier litigation, and neither of them disputed that characterization." *Id.* at 17. Also, the parties' designations "Santander/Crefisa," "Crefisa," and "Santander" were used interchangeably and pervasively in the first action. *Id.*[2]

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[2] The answering brief also cites *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp*, 933 F.2d 724, 728 (9th Cir. 1991) for the notion that the case stands for res judicata involving a parent and subsidiary (RAB 25). But, this case did not involve claim preclusion but, instead, examined FRCP 41(a)(1), applying a test requiring privity or a "relationship between the dismissed party and the party seeking to claim the benefit of the bar." That rule requires the defendant seeking the enforcement of the bar to be "substantially the same." The answering brief also cites to *Airframe Systems, Inc. v. Raytheon Co.*, 601 F. 3d 9, 13 (1st Cir. 2010) regarding corporate privity between parents and subsidiaries. *Airframe Systems* lists one of the criteria for

The analysis of relevant facts by the federal courts in the cases cited by Tassinari and AVB (e.g., frequent interchangeable use of names, the representation of each other in the litigation, whether the parent and subsidiary signed as parties to the settlement, etc.) would be unnecessary if privity were deemed automatic by the existence of a parent/subsidiary relationship. The case law reflects that the federal courts do not find privity based on the parent/subsidiary relationship alone. Notably, the finding of privity between a parent and a subsidiary is not absolute or automatic. *See, e.g.*, *Hartsel Springs Ranch of Colorado, Inc. v. Bluegreen Corp.*, 296 F.3d 982, 987 (10th Cir. 2002) (concluding that the district court erred in finding privity between a subsidiary and corporate owner where the parent corporation's interests were not presented and protected by the subsidiary).

In the instant case, although AVB and the Brownstone entities have a parent/subsidiary relationship, they simply were not in privity. AVB and the Brownstone entities were never treated as the same party in the first action. The

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claim preclusion in the First Circuit as "the parties in the two suits are sufficiently identical or closely related." These standards are simply not the same as the requirements under Nevada law, being "closely related" or having a relationship does not establish privity in Nevada. *See Weddell*, 350 P.3d at 81 (describing "this court's previously used definition of privity" under *Bower*, 215 P.3d at 718, and the adoption of the RESTATEMENT definition in *Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 917–918 (Nev. 2014)).

names of the Brownstone entities and AVB were not used "interchangeably and pervasively" in the first case. Notably, the Brownstone entities' witnesses in the first case denied knowledge of the corporate office of AVB and distinguished themselves from "corporate." JA 1:73–74. Unlike the federal cases cited in the answering brief, the judgment from the first lawsuit did not specifically include all subsidiaries and affiliates, nor were the parties to the second lawsuit "signatories" to the settlement. JA 1:105–110; JA 2:239–247. Therefore, the corporate relationship between AVB and the Brownstone entities is insufficient for a finding of privity, and this Court should reverse the District Court's dismissal order.

D. ACCORDING TO NEVADA LAW, TASSINARI AND AVB ARE NOT PRIVIES TO THE BROWNSTONE ENTITIES.

According to Nevada law, Tassinari and AVB are not privies to the Brownstone entities. Under Nevada law, privity may be determined by acquiring an interest in the subject matter through inheritance, succession, or purchase (*Bower*, 125 Nev. at 481, 215 P.3d at 718) or by the "adequate representation" analysis, which is when a non-party is adequately represented by a party and is, therefore, bound by the judgment as though a party. *See Alcantara*, 321 P.3d at 917–918 (citing RESTATEMENT (SECOND) OF JUDGMENTS, § 41). The Brownstone entities distanced themselves from the

corporate office of AVB and confessed that they did not represent Tassinari. In her deposition, Anna Morrison from the Brownstone entities stated that she believed "the other investor was the Canadian group" but didn't know who signed the term sheet, and clarified American Vantage Companies did not sign the term sheet, but AVB did. JA 1:68–79. Similarly, the NRCP 30(b)(6) witness for the Brownstone entities, Robert Gross, said he did not know who signed the "investor signature" and believed someone in "corporate," possibly "Mr. Tassinari…who was in the corporate office" would know who signed the term sheet. JA 1:61, 72–73. Thus, the Brownstone entities did not provide adequate representation of Tassinari or AVB under the RESTATEMENT or the *Alcantara* privity tests. Therefore, when looking at the Nevada standards for privity, as opposed to the federal standards cited in the answering brief, the Court should conclude that Tassinari and AVB are not privies to the Brownstone entities.

E. TASSINARI AND AVB FAIL TO ADDRESS AND, THUS, TACITLY CONCEDE THAT THE SECOND LAWSUIT WAS NOT BASED UPON THE SAME CAUSES OF ACTION.

Tassinari and AVB fail to address and, thus, tacitly concede that the second lawsuit was not based upon the same causes of action. Despite their heavy reliance upon *Weddell* for the modified privity element of claim

preclusion, Tassinari and AVB fail to address the unchanged claim preclusion element of whether "the subsequent action is based on the same claims or any part of them." *Id.* at 86. Although Mendenhall and Sunridge raised this issue in their opening brief (AOB 31–35), Tassinari and AVB fail to address the argument. In order for claim preclusion to apply under Nevada law, the two sets of claims must be based on the same "cause of action." *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998). "The Nevada test for identical causes of action is whether the sets of facts essential to maintain the two suits are the same." *Clements v. Airport Auth.*, 69 F.3d 321, 328 n. 4 (9th Cir. 1995) (citing *In re Estate of Firsching*, 94 Nev. 252, 254–255, 578 P.2d 321, 322 (1978)); s*ee also Round Hill Gen. Improvement Dist. v. B-Neva, Inc.*, 96 Nev. 181, 183–184, 606 P.2d 176, 178 (1980) ("The true test of identity of 'causes of action,'…is the ***identity of the facts essential to their maintenance***…. The authorities agree that when the same evidence supports both the present and the former cause of action, the two causes of action are identical….") (emphasis added).

In their answering brief, Tassinari and AVB do not articulate how the defense of a breach of contract claim, brought by the Brownstone entities against Mendenhall and Sunridge, is based upon the same "cause of action" under Nevada law as a fraud claim made by Mendenhall and Sunridge against

Tassinari and AVB. NRAP 31(d)(2) discusses the application of a confession of error when a respondent fails to file an answering brief. However, Nevada case law extends this rule to respondents, such as Tassinari and AVB, that fail to respond to arguments in the answering brief. *See Bates v. Chronister*, 100 Nev. 675, 681–682, 691 P.2d 865, 870 (1984) (respondent confessed error by failing to respond to appellant's argument); *Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 361 (2010) (striking responsive argument raised for the first time at oral argument). Therefore, the Court should conclude, based upon the confession of error, that the causes of action in the first lawsuit and the second lawsuit were not the same for purposes of claim preclusion.

F. THE FRAUD CLAIMS ASSERTED BY MENDENHALL AND SUNRIDGE IN THE SECOND LAWSUIT COULD NOT HAVE BEEN BROUGHT IN THE FIRST LAWSUIT.

The fraud claims asserted by Mendenhall and Sunridge in the second lawsuit could not have been brought in the first lawsuit. In their answering brief, Tassinari and AVB offer their own conjecture in an attempt to satisfy the claim preclusion element, inquiring whether the claims from the second lawsuit could have been brought in the first lawsuit. Aside from the fact that counsel's arguments do not constitute evidence (*Jain*, 109 Nev. at 475–476, 851 P.2d at 457), this Court has recognized in *Weddell* that the lack of necessary facts to make a claim constitutes a "good reason to justify" a second lawsuit. *Id.* at 85.

Despite the answering brief's spurning of the reference to NRCP 11, this Court held in *Weddell* that the allegation of facts in an answer and counterclaim was deemed to have evidentiary support. *Id.* The opposite is also true. Mendenhall and Sunridge did not have facts upon which to base their fraud claims until they proposed an amendment to their answer in the first lawsuit to assert these claims. AA 1:41–96. Yet, Mendenhall and Sunridge never received leave to assert their fraud claims in the first lawsuit. So, there really was no way that Mendenhall and Sunridge could have asserted their fraud claims in the first lawsuit, and this Court should reverse the District Court's dismissal order.

1. Tassinari and AVB's Hypothetical Scenarios Do Not Change Mendenhall and Sunridge's Inability to Bring Their Fraud Claims in the First Lawsuit.

Instead of accepting the facts as reflected in the record, Tassinari and AVB argue hypothetical scenarios on what ***could have*** occurred rather than what actually did occur in the first lawsuit. For example, Tassinari and AVB argue that ***if*** the deposition of Robert Sim had been taken (assuming he actually exists), they offer conjecture as to what he would have said (RAB 16), attempting to add "facts" that are not in the record. Facts not established by evidence, not properly cited in the record on appeal, and exaggerated by counsel should not be considered. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993). Similarly, Tassinari and AVB reference

arguments of their own attorneys in hearings as claimed facts, which is contrary to law. *See Jain*, 109 Nev. at 475–476, 851 P.2d at 457. For example, attorney Harry Marquis, in a hearing transcript, stated, "The only reason he [Sim] didn't put more money in was because what did he need for the thing to go forward? He needed the dirt." AA 2:234. Accordingly, the bare conjecture offered by Tassinari and AVB's counsel does not change Mendenhall and Sunridge's inability to bring their fraud claims in the first lawsuit.

2. **Factual Issues Regarding Mendenhall and Sunridge's Inability to Bring Their Fraud Claims in the First Lawsuit Precluded the District Court's Dismissal Order.**

In their answering brief, Tassinari and AVB focus on the term sheet as related to both cases. The fact that the term sheet in the first lawsuit was also involved in the fraud claims in the second lawsuit does not mean that the fraud claims could have been brought in the first lawsuit, particularly where the Brownstone entities brought the breach of contract case against Mendenhall and Sunridge for failure to transfer land, and Mendenhall and Sunridge alleged fraud in the second lawsuit involving different parties and different actions. JA 1:1–10, 30–36. Notably, because the causes of action in the two lawsuits were different, as Tassinari and AVB concede, the possible overlap of some factual issues in two lawsuits does not mean that the causes of action are the same or that the causes of action in the second lawsuit could have been brought

in the first lawsuit. *Cf. Sparks Nugget* v. *Commissioner of Internal Revenue*, 458 F.2d 631 (9th Cir. 1972) (two successive cases examining the same legal issue: the tax implications related to rent paid for the use of slot machines); *In re Colonial Mortgage Bankers Corp. v. Lopez-Stubbe*, 342 F.3d 12 (1st Cir. 2003) (concluding that the causes of action asserted were "materially identical. The only difference is the identity of the parties seeking relief"); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235–1236 (1986) (finding that a homeowner who had previously filed an action against a bank was estopped from a separate case regarding RICO violations against bank officers where the second case would involve "***relitigating*** the facts" where the second case was "based on the same facts") (emphasis added).

In the instant case, Mendenhall and Sunridge filed a second lawsuit not to re-litigate facts, argue a "materially identical" cause of action, or apply the same facts to prove the same legal issue elements.[3] Mendenhall and Sunridge filed a second lawsuit to pursue their independent claims against Tassinari and AVB for fraudulently signing a term sheet purporting to represent the commitment of an investor. JA 1:1–10. These facts have not been litigated, nor

[3] Tassinari and AVB argue that the routing statement amount reflects that the damages are based on the first case. RAB 22. But, the routing statement amount is offered only for purposes of routing to the Supreme Court or to the Court of Appeals. *See* NRAP 28(a)(5).

could they have been litigated in the first case under the procedural posture of the case.

Importantly, whether Mendenhall and Sunridge knew, or should have known, of the facts giving rise to their fraud claims prior to Tassinari's deposition is a factual issue for the jury. *See Siragusa v. Brown*, 144 Nev. 1384, 1391, 971 P. 2d 801, 806 (1998); *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 374 (Ky. 2010). Tassinari and AVB argue that the signatures on the term sheet were not blurry and that Mendenhall and Sunridge should have known the "other investor" signature line was actually not signed by another investor (despite the conflicting representations regarding the existence of a supposed Robert Sim). *See* RAB 12–15. These are factual questions that this Court cannot evaluate on appeal. *See Ryan's Express Transp. Servs.*, 128 Nev. at 299, 279 P.3d at 172 ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Likewise, the District Court was without authority to weigh these factual issues in a dismissal proceeding. *See Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143, 145, 425 P.2d 599, 601 (1967) ("[T]he trial judge may not in granting summary judgment pass upon the credibility or weight of the opposing affidavits or evidence."). Further, Mendenhall and Sunridge submitted sworn affidavits, which are evidence and their complaint should not have been dismissed. *See*

10A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE, § 2727 (3d ed. 2011) ("[F]acts asserted by the party opposing the motion [for summary judgment], if supported by affidavits or other evidentiary material, are regarded as true."); *Emeldi v. University of Oregon*, 698 F.3d 715, 729 n. 8 (9th Cir. 2012) ("The dissent's insistence on corroborating testimony of others inserts into the law governing summary judgments a precondition that has never been recognized.").

Although the answering brief relies upon assertions of counsel to conclude that there are no factual issues, it also claims that no additional discovery should be allowed. For this position, Tassinari and AVB argue that Mendenhall and Sunridge have not satisfied the requirements of NRCP 56(f). However, it was only upon reviewing the language in the dismissal order that it became clear that the District Court was making findings of fact prior to any discovery. *See* JA 2:243–246. Under similar circumstances, this Court has recognized the right to discovery in dismissal proceedings. *See Slade v. Caesars Entm't Corp.*, 373 P.3d 74, 79 (Nev. 2016) (Pickering, J., dissenting) ("I would reverse the district court's order of dismissal and remand, so the facts can be developed in discovery and the case narrowed or resolved by summary judgment or trial."). Therefore, this Court should reverse since the District Court's dismissal order was premature due to the existence of factual issues.

3. ***Weddell* Does Not Resolve the Compulsory Versus Permissive Claims Inquiry.**

Tassinari and AVB largely ignore the legal arguments on compulsory versus permissive claims outlined in the opening brief. AOB 47–50. Instead, they claim that the entire issue is resolved by *Weddell*. In *Weddell*, this Court stated, "[T]he doctrine of nonmutual claim preclusion is designed to obtain finality and promote judicial economy in situations ***where the civil procedure rules governing noncompulsory joinder, permissive counterclaims, and permissive cross-claims fall short***." *Id.* at 84 (emphasis added). Yet, the District Court's dismissal order does not make any determination that these civil procedure rules have fallen short. JA 22:239–247. Thus, the general rule applies that "a claim must have matured before it will be subject to the compulsory counterclaim rule." *Bennett v. Fid. & Deposit Co. of Maryland*, 98 Nev. 449, 453, 652 P.2d 1178, 1181 (1982). And, when a claim has not matured and is, therefore, not a compulsory counterclaim, claim preclusion does not apply. *See Planning and Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210, 227 (2009) (stating that claim preclusion is not a bar to claims that arise after the initial complaint is filed because of "changed conditions and new facts which were not in existence at the time the action was filed"). Despite the contrary arguments in the answering brief, the compulsory

versus permissive distinction is good law because how can a party make a claim until it becomes ripe? Therefore, the Court should reverse the District Court's dismissal order. At a minimum, the Court should vacate the dismissal order for the District Court's failure to reach this analysis.

G. THE PLAIN LANGUAGE OF THE OFFER OF JUDGMENT ISSUED TO THE BROWNSTONE ENTITIES DID NOT RESOLVE ANY CLAIMS AGAINST TASSINARI AND AVB.

The plain language of the offer of judgment issued to the Brownstone entities did not resolve any claims against Tassinari and AVB. In their answering brief, Tassinari and AVB assert that an offer of judgment prevents parties "from re-litigating the claims resolved by the judgment." RAB 33–34. But, this is the very issue that Judge Israel refused to reach. JA 1:105–110. Tassinari and AVB quote what they call a "broad, all-inclusive" offer of judgment in the first lawsuit, which supposedly served to release any and all claims "as alleged, or that could have been alleged . . . as well as any related or potential claims that could be asserted in [the first lawsuit] against one another." RAB 34. Tassinari and AVB neglect the clear language in the offer of judgment: "against one another." JA 1:109. Tassinari and AVB also neglect the "could be asserted" language. Here, the claims in the second lawsuit were not "against one another" and could not be asserted. As such, the offer of judgment is not "all inclusive," as Tassinari and AVB argue. Comparing the

offer of judgment with contract principles, "a stranger to a contract can not claim its benefits in an action upon it." *Ferris v. Carson Water Co.*, 16 Nev. 44, 47 (1881); 17 C.J.S., CONTRACTS, § 485, 989 ("[A] tender by a stranger to the contract is invalid."). Since the offer of judgment issued to the Brownstone entities did not resolve any claims against Tassinari and AVB, it cannot stand as a bar to the second lawsuit. Additionally, the offer of judgment stood as a statutory bar, according to the irrevocable period, for Mendenhall and Sunridge to assert new claims against new parties after reaching finality. *Nava v. Dist. Ct.*, 118 Nev. 396, 46 P.3d 60 (2002).

H. MENDENHALL AND SUNRIDGE DID NOT NEED TO CITE NRCP 60(B) TO TAKE ADVANTAGE OF THE "INDEPENDENT ACTION" PROVISION OF THIS RULE.

Mendenhall and Sunridge did not need to cite NRCP 60(b) to take advantage of the "independent action" provision of this rule. If this Court determines that Mendenhall and Sunridge have demonstrated an exception to claim preclusion to reverse the District Court's dismissal order, the Court does not need to reach an analysis of the NRCP 60(b) independent action under *Bonnell v. Lawrence*, 282 P.3d 712 (Nev. 2012). Ironically, Tassinari and AVB urge this Court to not consider *Bonnell* and the NRCP 60(b) standard. Yet, just because the second lawsuit was an "independent action" based upon fraud does not mean that it had to cite NRCP 60(b) to take advantage of the standard

allowed by this rule. Additionally, "retroactivity is the default rule in civil cases." *Leavitt v. Siems*, 330 P.3d 1, 5 (2014).

Despite their waiver arguments, Tassinari and AVB present an answering brief replete with references to the modified *Weddell* standard, even though it was never raised or decided in the District Court. Thus, because the District Court failed to consider numerous issues, the proper remedy is to vacate the District Court's dismissal order. *See Potter*, 121 Nev. at 618–619, 119 P.3d at 1250 (remanding a district court order where an improper legal standard was applied).

In their opening brief, Mendenhall and Sunridge asked the Court to vacate the District Court's dismissal order and remand, as alternative relief to reversal. To demonstrate the satisfaction of the *Bonnell* standard, Mendenhall and Sunridge outlined (1) the timeliness of the second lawsuit; (2) their exhaustion of remedies in the first lawsuit; and (3) the substantive grounds for overcoming the judgment from the first lawsuit. AOB 53–59. In response, Tassinari and AVB dispute these points. However, since this Court is not a fact-finding body, the proper remedy is remand to allow the District Court to consider these points in the first instance. *See Ryan's Express Transp. Servs.*, 128 Nev. at 299, 279 P.3d at 172. Therefore, on this alternative basis,

Mendenhall and Sunridge respectfully request that this Court vacate the District Court's dismissal order, with instructions to apply the independent action standard under NRCP 60(b).

III. CONCLUSION

In summary, the Court should either reverse or vacate the District Court's dismissal order since (1) Tassinari and AVB cannot rely upon *Weddell* for the first time on appeal; (2) even if the Court considers *Weddell*, the noted exceptions to nonmutual claim preclusion are applicable to the instant case; (3) Tassinari and AVB cannot ignore Nevada law on privity in favor of inapposite, more stringent federal standards; (4) according to Nevada law, Tassinari and AVB are not privies to the Brownstone entities; (5) Tassinari and AVB fail to address and, thus, tacitly concede that the second lawsuit was not based upon the same causes of action; (6) the fraud claims asserted by Mendenhall and Sunridge in the second lawsuit could not have been brought in the first lawsuit; (7) the plain language of the offer of judgment issued to the Brownstone entities did not resolve any claims against Tassinari and AVB; and (8) alternatively, Mendenhall and Sunridge did not need to cite to NRCP 60(b) to take advantage of the "independent action" provision of this rule.

Therefore, the Court should grant the relief that Mendenhall and Sunridge have requested by either reversing or vacating the District Court's dismissal order.

Dated this 5th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 6,402 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not

in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 5th day of October, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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