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IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. HUNTER, an individual, Appellant, vs. WILLIAM GANG, an individual, Appellee.	Case No.: 59691 Appeal from the Eighth Judicial District Court, The Honorable Douglas E. Smith Presiding.

RESPONDENT'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES

Appellee, William Gang ("Gang"), hereby supplements his answering brief pursuant to NRAP 31(e). The authority referenced below applies to Gang's Answering Brief and related arguments at pages 27-44 (Sections VI.C-G.), and more specifically page 28 of the Answering Brief.

A. APPLICABLE NEVADA AUTHORITY.

Scapecchi v. Harold's Club, 78 Nev. 290, 297, 371 P.2d 815, 818-19 (1962). In this case, the Appellant complained that the lower court passed on

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the motions for summary judgment before acting on his requests for admissions and before answers to the interrogatories were furnished. Id. This Court held that "any right of the appellant to require compliance with such requests prior to the hearing of the motions to dismiss was waived by appellant's failure to object to the hearing of the motions while such matters were pending." Id. (highlight added).

Johnson v. Johnson, 90 Nev. 270, 271-72, 524 P.2d 544, 545 (1974). In this case a divorce decree awarded the mother custody of children, provided for their support, and ordered the father to pay for college for each child. Id. The mother moved the lower court to compel payment for the college expenses of the oldest child who was already attending college. Id. The mother supported the motion with letters from deans of the college and with the child's written statement of expenses. Id. At the hearing on the motion, no objection was made to the letters and statement. Id. The court entered judgment against the father for the expenses. Id. On appeal, the father asserted for the first time that the lower court had no right to consider the letters or statement. Id. In affirming the lower court, this Court held "The objection comes too late. His acquiescence below waived any right to later complain." Id. (highlight added) (citing Grouse Cr. Ranches v. Budget Financial Corp., 87 Nev. 419, 425, 488 P.2d 917 (1971); Scapecchi v. Harold's Club, 78 Nev. 290, 297, 371 P.2d 815 (1962).

Grouse Cr. Ranches v. Budget Fin. Corp., 87 Nev. 419, 425, 488 P.2d 917, 921 (1971). In this case, Grouse Creek argued that a motion to alter,

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amend and modify findings of fact, conclusions of law, and judgment failed to specify with sufficient particularity the grounds on which relief was sought. Id. Based on this position, Grouse Creek urged that the post-judgment proceedings were defective. Id. This Court held that Grouse Creek "failed to object to the motion on the basis of this asserted defect and, indeed, engaged in lengthy argument at the . . . hearing relative to [the] grounds for the motion. Thus, it waived the objection." Id. (highlight added) (citing King v. Mordowanec, 46 F.R.D. 474, 477 (D.R.I.1969); cf. Schy v. Susquehanna Corporation, 419 F.2d 1112 (7th Cir. 1970)).

City of Boulder City v. Boulder Excavating, Inc., 124 Nev. 749, 191 P.3d 1175 (2008). At a minimum, the following is applicable from this case:

> Here, despite Boulder City's failure to affirmatively plead the defense of discretionary-act immunity, the district court sua sponte tried the issue when it determined that Hansen was not liable for his discretionary acts, and the parties did not object to the district court's grant of discretionary-act immunity to Hansen. Accordingly, we conclude the issue was tried by consent. Further, once the parties failed to object, and thereby tried the issue by consent, the district court was free to sua sponte dismiss Hansen on the basis of discretionary immunity. Accordingly, it is appropriate for us to review the qualified immunity issue on appeal. As we have previously indicated, [t]he application of sovereign immunity under NRS Chapter 41 presents mixed questions of law and fact. This court reviews conclusions of law, such as those entailing statutory construction, de novo. This court will not disturb a lower court's findings of fact if supported by substantial evidence.

City of Boulder City v. Boulder Excavating, Inc., 124 Nev. 749, 191 P.3d 1175 (2008) (internal quotations omitted) (highlight added).

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B. APPLICABLE AUTHORITY FROM OTHER JURISDICTIONS.

Hargrove v. Gerill Corp., 464 N.E.2d 1226, 1229-30 (1984). At a minimum, the following is applicable from this case:

> Generally, a party desiring to preserve a question for review must make appropriate objection in the court below and the failure to object to preserve a question for review constitutes a waiver. (*Vee See Construction Co., Inc. v. Luckett* (1981), 102 Ill.App.3d 444, 58 Ill.Dec. 149, 430 N.E.2d 91.) More particularly, where it is contended that the procedure of the trial court is in error, the failure to object to such procedure in the trial court precludes its review. (*Redmond v. Central Community Hospital* (1978), 65 Ill.App.3d 669, 21 Ill.Dec. 801, 382 N.E.2d 95.) Also, failure to object at any time before the trial court to the form or substance of a motion to dismiss bars an appellant from raising that issue for the first time on appeal as grounds for reversal. (*Thornton v. Williams* (1980), 89 Ill.App.3d 544, 45 Ill.Dec. 24, 412 N.E.2d 157.) Here, plaintiffs failed to raise sufficient objection before the trial court to any of the three aspects of the dismissal procedure which they now challenge.
>
> With regard to the lack of notice, plaintiffs' counsel observed that there had been improper notice, but indicated a willingness to go ahead with the hearing that day. The trial court's order contained the specific finding that plaintiffs' attorney agreed to a hearing instanter despite the 24-hour notice.
>
> With regard to the fact that the motion was addressed to and was granted by Judge Teschner even though this case had been assigned to Judge Scidmore, again plaintiffs' attorney noted the assignment of this case and then expressed a willingness to go forward with the hearing if Judge Teschner agreed. Judge Teschner in his order specifically reassigned the case to himself, as chief judge of the division, for the hearing instanter. Questions concerning the propriety of a particular judge's hearing a case cannot be raised for the first time in the appellate court. *O'Brien v. Eustice* (1939), 298 Ill.App. 510, 19 N.E.2d 137.
>
> With regard to the basis of the motion to dismiss differing from the basis of the order of dismissal, counsel for plaintiffs raised no objection despite ample opportunity to do so. Plaintiffs' counsel remained silent both when opposing counsel raised the argument at

> the hearing that the complaint failed to state a cause of action and when the trial court indicated that its dismissal order was based, at least in part, upon that same argument. Attorney King's remarks at the September 6, 1983, hearing, even if they could be construed as an objection to the basis of the court's dismissal order, were made after the complaint was dismissed and the notice of appeal had been filed. That was too late to be considered a timely objection. *See Coleman v. Hinsdale Emergency Medical Corp.* (1982), 108 Ill.App.3d 525, 531, 64 Ill.Dec. 91, 96, 439 N.E.2d 20, 25.
>
> *Premier Electrical Construction Co. v. LaSalle National Bank* (1983), 115 Ill.App.3d 638, 71 Ill.Dec. 481, 450 N.E.2d 1360, upon which plaintiffs rely, is distinguishable in that the plaintiff in that case initially raised its objections to the trial court's procedure before the trial court itself, rather than raising the objections for the first time on appeal. We hold that plaintiffs have not properly preserved this issue for review.

Hargrove v. Gerill Corp., 464 N.E.2d 1226, 1229-30 (1984) (highlight added).

Jacobs v. Abbott Laboratories, 572 N.E.2d 1231, 1232-33 (1991). At a minimum, the following is applicable from this case:

> On appeal, plaintiff first argues that the trial court erred in ruling that because his pleading named no defendant it was fatally defective and could not be cured. Plaintiff maintains that this argument was not advanced by either defendant in their motions to dismiss, although it was argued during the hearing on the motions. The trial court reasoned that while such an argument was not specifically stated in the motions to dismiss, it was a logical extension of the arguments contained therein and was in fact argued by the parties. We agree. In his motion to dismiss, Dr. Chen alleges that he is not named as a defendant in plaintiff's complaint, only as a respondent in discovery, and that allegations of negligence and prayers for monetary damages cannot be directed against a respondent in discovery. At the hearing on the motion, he argued that section 2-402 operates only where there is a named defendant, that because he is not named as a defendant the statute does not authorize a recovery against him, and that it should be dismissed because it names no defendant. Further, not only did plaintiff fail to object to this argument at the hearing on the motions to dismiss, he responded to the argument at length, thereby waiving this argument for purposes of appeal. *See Hargrove v. Gerill Corp.* (1984), 124 Ill.App.3d 924, 929-30, 80 Ill.Dec. 243, 246-47, 464 N.E.2d 1226, 1229-30.

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Jacobs v. Abbott Laboratories, 572 N.E.2d 1231, 1232-33 (1991) (highlight added).

Naylor v. Metro. St. Ry. Co., 66 Kan. 407 (1903). At a minimum, the following is applicable from this case:

> Again, it is argued in support of the ruling that the trial court was not advised at the time of the ruling upon the challenge that plaintiff was in fact a citizen and resident of the state of Missouri. From the above quoted colloquy between counsel and the court, we are of a contrary opinion. True, at the time the challenge was made, no one had testified that plaintiff was a resident of Missouri, but counsel trying the case were officers of the court, acting in the discharge of their duties, under their oath of office. In response to the direct inquiry made by the court, counsel for plaintiff, in his professional conduct of the case, upon his professional honor, stated "there was no question as to the nonresidence of plaintiff, and that he resided in the state of Missouri." There being nothing to the contrary, after such positive statement of counsel it cannot be thought there would remain in the mind of the court a doubt as to the fact inquired of by the court, or that the court was longer in doubt as to the fact of plaintiff's residence in Missouri, and for this reason overruled the challenge. Courts must rely upon professional statements of counsel so made, and counsel must so conduct themselves that the courts will and may rely upon such statements."

Naylor v. Metro. St. Ry. Co., 66 Kan. 407 (1903) (highlight added).

In re Blessen H., 877 A.2d 161, 172 (2005) aff'd, 392 Md. 684 (2006). At a minimum, the following is applicable from this case:

> When the parent is represented by counsel, the court may rely upon the representations of the parent's counsel, taken with the knowledge and apparent acquiescence of the [parent]. *Hersch*, 317 Md. at 208, 562 A.2d 1254, that the parent desires to waive a contested hearing."

In re Blessen H., 877 A.2d 161, 172 (2005) aff'd, 392 Md. 684 (2006) (highlight added).

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State v. Harmon, 1997 ND 233, ¶¶ 12-13, 575 N.W.2d 635, 639 (1997) (citing In Interest of J.B., 410 N.W.2d 530, 532 (N.D.1987)). At a minimum, the following is applicable from this case:

> In regards to a motion regarding counsel, the Court quoted itself stating:
>
> A request for newly appointed counsel should be examined with the rights and interest of the respondent in mind, tempered by consideration of judicial economy. The court should inquire on the record into the reasons for the complaints about counsel. The court may rely upon assertions of counsel because an attorney is an officer of the court whose declarations to the court 'are virtually made under oath.

State v. Harmon, 1997 ND 233, ¶ 12 (highlight added) (citing In Interest of J.B., 410 N.W.2d 530, 532 (N.D.1987)).

Dated this 14th day of September, 2015.

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CERTIFICATE OF MAILING

I hereby certify that on the 15th day of September, 2015, I served a copy of the foregoing **RESPONDENT'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES** upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

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and that there is a regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Nancy Knilans
An employee of Marquis Aurbach Coffing

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