IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE EGGLESTON, Plaintiff, vs. GEORGINA STUART; CLARK COUNTY, NEVADA; LISA CALLAHAN; AND BRIAN CALLAHAN, Respondents.	**Supreme Court No.: 80838** District Court Case No.: A748919

RESPONDENTS CLARK COUNTY AND GEORGINA STUART'S

ANSWERING BRIEF

FELICIA GALATI, ESQ.
OLSON CANNON GORMLEY & STOBERSKI
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012
Attorneys for Respondents
CLARK COUNTY and GEORGINA STUART

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2. Whether the district court properly granted Defendants' motion to dismiss for a failure to exhaust administrative remedies.

3. Whether the district court properly denied Plaintiff's motion for reconsideration.

4. Whether the district court properly dismissed Defendants Department of Family Services and Child Support Services.

5. Whether the district court properly dismissed Plaintiff's punitive damages claim against Defendant Georgina Stuart.

II. STATEMENT OF THE CASE[1]

This action arises out of Defendants' investigation regarding reported maltreatment/abuse/neglect of four children. Plaintiff is the father of two of those children, and the other two children resided in the family home. ROA 1:88. Following investigation, there were two findings of child maltreatment/abuse/ neglect made against Plaintiff – the first on 2/2/15 (ROA 1:210; 2:263 and 332); and the second a Substantiation thereof made on 8/27/15. ROA 1:210; 2:263, 267-86 and

[1] Defendants' counsel does not represent the Callahans and makes no argument regarding them.

332. Plaintiff appealed those findings through the administrative process. The administrative Fair Hearing on the second appeal was pending at the relevant time, including because of Plaintiff's repeated requests to delay the Fair Hearing and his refusal to confirm a date for the Fair Hearing. Thus, the administrative process had not been exhausted.

On 12/30/16, while a date for the administrative hearing was pending, Plaintiff filed the complaint in the underlying district court action. ROA 1:1-22. On 8/10/17, Plaintiff filed the First Amended Complaint (FAC) alleging two 42 U.S.C. § 1983[2]; intentional infliction of emotional distress (IIED); and defamation, libel and slander claims – all arising out of the same facts and circumstances. ROA 1:99-110. The facts and circumstances as pled in the Fourth Cause of Action state:

> (Defamation, Libel & Slander…
>
> 43. On information and belief, **Defendants CLARK COUNTY, GEORGINA STUART…made verbal and written statements of and concerning Plaintiff**:
>
> **(a) That he was an unfit parent;**
>
> **(b) That he had neglected the Eggleston boys and other children;**
>
> **(c) That he had abused the Eggleston boys and other children; and**
>
> **(d) That he had failed to protect the Eggleston boys from the actions of others, including, specifically, their mother...**

[2] Plaintiff incorrectly refers to § 1982, but he has no such claims. See Opening Brief, p. 11.

> 48. On information and belief, **as a legal and proximate result of the foregoing, Plaintiff was denied his fundamental, constitutional right of parenthood and fatherhood, has been irreparably damaged…**

ROA 1:108-10 (emphasis added). Plaintiff seeks the following relief:

> 4. Interlocutory and Permanent Injunctive relief, including but not limited to…
>
> f. **Revising the appeals process for review of abuse reports to bring them in compliance with the procedural and substantive due process rights of the parents, custodians and children involved**, including the requirement of due diligence in collecting and analyzing evidence or the lack thereof;
>
> g. **Banning any further child removal in Nevada County by Defendants GEORGINA STUART and/or CLARK COUNTY until constitutional, lawful and proper procedural due process, substantial due process and fair processes are put in place for the investigation of alleged child abuse and neglect, . . .the issuance of abuse and neglect reports, and the timely appeal and/or challenge thereof…**

ROA 1:110-11 (emphasis added).

Defendants' first motion to dismiss was granted on 7/31/2017, dismissing Defendants Clark County Department of Family Services (DFS) and Child Support Services (CSS[3]) as non-suable entities; and dismissing punitive damages claims against Defendants Clark County and Georgina Stuart, who is sued solely in her official capacity as a Clark County employee. ROA 1:73-78. On 9/7/18, the district court properly granted Defendants' second motion to dismiss, without prejudice,

[3] Child Protective Services ("CPS") as Plaintiff refers to it. See, e.g., ROA 1:1-3, etc.

due to Plaintiff's failure to exhaust administrative remedies based to the pending Fair Hearing. ROA 2:331-37. Plaintiff filed a motion for reconsideration, which was denied by the district court on 2/26/2020 finding that Plaintiff failed to meet his burden of establishing that the district court's decision granting the motion to dismiss was clearly erroneous because Plaintiff had not exhausted his administrative remedies through the Fair Hearing process, and Plaintiff failed to present any new facts or law. ROA 4:773-80.

At the time of this briefing, Respondents' Motion to Disqualify Plaintiff's counsel Emily McFarling, Esq., is pending before this Court. Respondents request this Court rule on that Motion prior to considering the appellate briefs, allowing any oral argument and/or issuing a decision on the appeal. Attorney McFarling is a necessary witness in this appeal, including based on the FAC, underlying papers and her reference to herself as "counsel" in the Opening Brief.[4] ROA 1:94-98, 168 180; 2:245-46, 274, 286, 328-29 and 390-98.

III. STATEMENT OF THE FACTS

Defendants opened a child maltreatment/abuse/neglect investigation regarding the four children after a child called 911 in or about December 2014 reporting their mother – Laura Battistella – had spoken words of suicidal ideation. ROA 1:88. On 1/6/15, Battistella and Plaintiff signed a temporary guardianship

[4] See, Opening Brief, e.g., pp. i and 9.

granting the Callahan Defendants temporary guardianship of the children, after Plaintiff received the advice of his attorney, Emily McFarling, and after speaking with Defendant Lisa Callahan, as alleged in the FAC:

> (g) Notwithstanding the authorities intimidating him, Plaintiff excused himself to his home office, where he was able to reach his attorney, Emily McFarling, Esq., on his mobile, and then insist that Defendant GEORGINA STUART talk to her, which she did. On information and belief, during this conversation, Defendant GEORGINA STUART expressly represented to Attorney McFarling that, if Plaintiff signed the temporary guardianship papers, so as to allow time to get Battistella out of the house and into a resident treatment program, the [children] would be returned to him in several days.
>
> (h) Though under coercion and duress, Plaintiff pulled Defendant LISA CALLAHAN aside to his home office to discuss the potential temporary guardianship. At that time, Plaintiff expressly informed Defendant LISA CALLAHAN that he was signing under coercion and duress and that she had no permission to remove the [children] – not from the Family Home, not from the County and not from the State of Nevada. She stated she understood.

ROA 1:95. On that same day, **the Callahans removed the children from Nevada**. ROA 1:95-96. On 2/2/15, Attorney McFarling filed a complaint for paternity, custody, and child support on behalf of Plaintiff even though the children were no longer in Nevada. ROA 1:95-96 and 2:391-96. On 3/30/15, the Callahans commenced a guardianship action in Will County, Illinois. ROA 1:98 and 244. On 6/29/15, Plaintiff obtained a Nevada decree of custody regarding the children. ROA 2:391-96.

Parallel to the foregoing, Defendants conducted their maltreatment/abuse/

neglect investigation as required by statute. NRS 432B.300 provides in part:

> If an agency which provides child welfare services determines that an investigation of a report concerning the possible abuse or neglect of a child is warranted pursuant to NRS 432B.260, the agency shall determine, without limitation …
>
> 6. Whether the report concerning the possible abuse or neglect of a child is substantiated or unsubstantiated.

NRS 432B.315 provides:

> If an agency which provides child welfare services determines pursuant to NRS 432B.300 that a report made pursuant to NRS 432B.220 is substantiated, the agency shall provide written notification to the person responsible for the child's welfare who is named in the report as allegedly causing the abuse or neglect of the child which includes statements indicating that:
>
> 1. The report which was made against the person has been substantiated and the agency which provides child welfare services intends to place the person's name in the Central Registry pursuant to NRS 432B.310; and
>
> 2. The person may request an administrative appeal of the substantiation of the report and the agency's intention to place the person's name in the Central Registry by submitting a written request to the agency which provides child welfare services within the time required pursuant to NRS 432B.317.

It is undisputed[5] that:

(1) on 2/2/15, Clark County Department of Family Services (DFS) made a finding of child maltreatment against Plaintiff – ROA 1:210; 2:263 and 332;

(2) on 2/12/15, Plaintiff requested an appeal of the substantiated finding in care of Attorney McFarling – ROA 1: 210; 2: 263, 274 and 332;

[5] NRS 51.035(3)(a).

(3) on 8/27/15, DFS issued a Finding of Substantiation upholding the substantiated finding of physical injury neglect – 14 N plausible risk of physical injury against Plaintiff as to the four minor children – ROA 1:210; 2:263, 267-72, 276-84 and 332;

(4) on 9/9/15, Plaintiff requested a Fair Hearing or appeal of that decision in care of Attorney McFarling – ROA 1: 210; 2: 263 and 286; and

(5) on 8/28/18, at the time the motion to dismiss hearing and for some time thereafter, the Fair Hearing had not occurred. ROA 1:211; 2:265 and 3:497-99.

Accordingly, on 9/7/18, the district court properly granted Defendants' second motion to dismiss and dismissed this action without prejudice due to Plaintiff's failure to exhaust administrative remedies based on the pending Fair Hearing. ROA 2:331-37.

IV. SUMMARY OF THE ARGUMENT

The district court properly granted Defendants' first motion to dismiss – dismissing DFS and CSS/CPS and the punitive damages claims against Stuart because they are not suable entities. The district court properly granted Defendants' second motion to dismiss because Plaintiff failed to exhaust his administrative remedies. The district court properly denied Plaintiff's motion for reconsideration because Plaintiff failed to meet his burden of establishing that the district court's decision was clearly erroneous and failed to present any new facts or law supporting

reconsideration. This Court also should affirm the dismissals based on a lack of subject matter jurisdiction because Plaintiff's sole and exclusive remedy is judicial review.

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review is *de novo*. This Court can affirm a district court decision on any ground supported by the record, including if it reached the right result, albeit for a different reason. Saavedra-Sandoval v. Wal-Mart Stores, Inc., 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010). Arguments raised by Plaintiff for the first time on appeal need not be considered by this Court. Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997). Plaintiff's argument without citation to the Record, any authority and/or without providing any related argument or analysis also cannot be considered. NRAP 28(a)(4) and 28(e)(1); Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973); Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 161, 252 P.3d 668, 671–72 n. 3 (2011) ("Issues not in an appellant's opening brief are deemed waived.") citing Bongiovi v. Sullivan, 122 Nev. 556, 570 n. 5, 138 P.3d 433, 444 n. 5 (2006); NRAP 28(a)(8). Also, "a point not urged in the trial court...is deemed to have been waived and will not be considered on appeal." Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983

(1981). The same is true as to argument that is inconsistent with that actually raised before the district court.

B. APPELLANT WAIVED PARTS OF HIS APPEAL

Plaintiff has not made any argument regarding the following and has thereby waived and/or abandoned these appeals and, therefore, this Court should affirm the related district court decisions because they are not erroneous, are supported by law and their consideration is not in the interests of justice:

(1) the appeal of the 7/31/17 order dismissing all claims against named DFS and CSS/CPS, which are not suable entities – ROA 1:1, 75-76 and 78; NRS 41.031(1)-(2); Dunn v. Clark Cty. Dist. Attorney's Office, 2017 WL 6049192, at *1 (Nev. App. Nov. 27, 2017) citing Wayment v. Holmes, 112 Nev. 232, 237-38, 912 P.2d 816, 819 (1996) ("The State of Nevada has not waived immunity on behalf of its departments of political subdivisions... "); and

(2) the appeal of the 2/26/2020 order denying Plaintiff's motion for reconsideration of the order granting the motion to dismiss because Plaintiff failed to meet his burden of presenting any new facts or law. ROA 4:773-80; NRAP 28(a)(10)(A); Martinez v. Glassman, 128 Nev. 916, 381 P.3d 637 (2012); Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (this court need not consider arguments not cogently made or not supported by citations to salient authority).

Plaintiff may not correct waiver of the foregoing by addressing them in a reply brief. NRAP 28(c) (a reply brief "must be limited to answering any new matter set forth in the opposing brief"); McDaniels v. State, 2019 WL 3231011, at *1–2 (Nev. App.) ("Because these arguments were not raised in…[the] opening brief, we do not consider them."); Browning v. State, 120 Nev. 347, 368 n.53, 91 P.3d 39, 54 n.53 (2004). To allow Plaintiff to make argument in reply would severely prejudice Defendants because it would deprive them of the right and opportunity to respond thereto.

C. THE DISTRICT COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS BASED ON PLAINTIFFS FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

1. Plaintiff Is Required To Exhaust Administrative Remedies

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law." Woodford v. Ngo, 548 U.S. 81, 88 (2006) quoting McKart v. United States, 395 U.S. 185, 193 (1969); First Am. Title Co. v. State of Nevada, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975). The exhaustion doctrine generally requires a person to exhaust all available administrative remedies before proceeding in the district court, "and failure to do so renders the controversy nonjusticiable." Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007); Antinoro v. Nevada Comm'n on Ethics, 2019 WL 2252865, at *2–3 (Nev. App.) "Exhaustion of administrative remedies serves two main purposes: (1)

exhaustion protects administrative agency authority by giving an agency an opportunity to correct its own mistakes before it is haled into court and it discourages disregard of the agency's procedure; and (2) exhaustion promotes efficiency and conserves judicial resources, so its purpose is valuable and requiring exhaustion of administrative remedies often resolves disputes without the need for judicial involvement. Allstate Ins. Co., 123 Nev. at 571–72; Lopez v. Nevada Dep't of Corr., 127 Nev. 1156, 373 P.3d 937, 2011 WL 378902 at *1 quoting Woodford, 548 U.S. at 89; First Am. Title Co., supra. "The 'exhaustion doctrine' is sound judicial policy. If administrative remedies are pursued to their fullest, judicial intervention may become unnecessary." First Am. Title Co., supra.

While the doctrine was once couched in terms of subject matter jurisdiction, this Court has since made it clear that the failure to exhaust administrative remedies results in the controversy being unripe for review and renders it nonjusticiable. Allstate Ins. Co., supra.

> Although the question of ripeness closely resembles the question of standing, **ripeness focuses on the timing of the action rather than on the party bringing the action**....The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review.
>
> **A primary focus in such cases has been the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy.** Alleged harm that is speculative or hypothetical is insufficient: **an existing controversy must be present**. While harm

> need not already have been suffered, it must be probable for the issue to be ripe for judicial review.

Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 887–88, 141 P.3d 1224, 1230–31 (2006) quoting Matter of T.R., 119 Nev. 646, 651, 80 P.3d 1276, 1279–80 (2003) (footnotes omitted).

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. See FTC v. Standard Oil Co., 449 U.S. 232, 243, 101 S.Ct. 488, 495… (1980); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 908 (CA3 1982). See generally, 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3532.6 (1984). While the policies underlying the two concepts often overlap, **the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. Patsy concerned the latter, not the former.**

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 192–93, 105 S. Ct. 3108, 3119–20 (1985) (emphasis added).[6] Thus, the holding in Patsy addressed the principle of exhaustion of administrative remedies – not the requirement that a litigant must be aggrieved from a final decision that inflicts an actual, concrete injury. Id. at 193, 3120. Only a final decision is ripe for review.

[6] Overruled on other grounds by Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162, 2169 (2019)

Id. at 186, 3116. In Williamson, the court held the jury verdict could not be upheld because respondent's claim was premature because it had not yet obtained a final decision regarding the application of the ordinance and regulations to its property and effect on the property's value, nor had it used the procedures the state provided for obtaining just compensation and, therefore, the claim was not ripe. Id. at 173-74, 187, 190-91, 200, 3110, 3117-19 and 3123-24.

Relying on Patsy, Plaintiff argues he does not have to exhaust his administrative remedies because he alleges § 1983 claims. Plaintiff's argument fails for a multitude of reasons. First, Plaintiff's FAC alleges both federal and state law claims. There is no doubt Plaintiff has to exhaust his administrative remedies pertaining to the state law claims, and Patsy – involving only § 1983 claims – is not applicable. Plaintiff cites no authority to the contrary. Second, Plaintiff argues that DFS – the administrative agency that processes Fair Hearings – does not have jurisdiction to decide "due process" claims and could not grant relief related to such claims without citation to any authority. Therefore, the argument cannot be considered.[7] NRAP 28(a)(10)(A). Furthermore, procedural due process was afforded to Plaintiff through notice of the abuse/neglect finding and the Substantiation thereof along with the right to appeal both determinations through to the Fair Hearing process, both of which he pursued. NRS 432B.315 and 432B.317; ROA 1:210;

[7] See Opening Brief, p. 36.

2:263, 267-72, 276-84, 286-70 (stating "to afford you a right to due process, which is the right to receive notice of an adverse determination against you and give you an opportunity to response in an orderly proceeding.") and 332.

Third, Plaintiff's argument – that there is no "procedural carve out" for §1983 claims – ignores well-established law that there are exceptions to Patsy. For example:

> **[a] § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law**. Parratt [v. Taylor], 451 U.S. [527], at 537, 101 S.Ct., at 1913[8]; Carey v. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050 (1978)…**The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.**

Zinermon v. Burch, 494 U.S. 113, 125–26, 110 S. Ct. 975, 983 (1990) (overruled on other grounds) (emphasis in original and added). While due process requires a person have an opportunity to be heard before a State deprives him of a

[8] Overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330-31, 106 S. Ct. 662, 664 (1986).

constitutionally protected interest in liberty (Parratt, 451 U.S. at 540), a pre-deprivation hearing is not always required or where post-deprivation remedies provided by state law or the common law are available. Id. at 537–41; Ingraham v. Wright, 430 U.S. 651, 672–77 (1977). In other words, the State may cure a procedural deprivation by providing a later procedural remedy. It is only when the State refuses to provide a process sufficient to remedy the procedural deprivation that a constitutional violation actionable under § 1983 arises. Also, a state post-deprivation remedy may be adequate even though it does not provide relief identical to that available under § 1983. Hudson v. Palmer, 468 U.S. 517, 531 n. 11 (1984).

Here, Plaintiff alleges a procedural due process claim. ROA 1:106-07. Nevada law provides a due process opportunity to be heard and an adequate remedial procedure for relief regarding any related issues through various administrative appeals and judicial review. See, e.g., NRS 432B.300, 432B.315 and 233B.130 (Administrative Procedures Act (APA)). Plaintiff admits he twice sought due process via appeals, the last of which was pending at the time this action was dismissed. ROA 1: 209-11 and 2: 263, 273-74, 286 and 332. Therefore, Patsy is not determinative, and Plaintiff's claims were not ripe or justiciable.

Fourth, Plaintiff had not received a "final" decision at the time of dismissal. Pursuant to NRS 432B.317(1), Plaintiff requested an administrative appeal, or Fair Hearing of the Substantiation of the report, which was pending at the time the motion

to dismiss was granted. ROA 2:286; 3:497-99, 501-08 and 512. Under NRS 432B.317(7), "[t]he decision of a hearing officer in a hearing that is held pursuant to this section is a final decision for the purposes of judicial review." Given there was no final decision, the district court properly dismissed Plaintiff's action.

In Antinoro, this Court recently considered NRS 233B.130(1) and NRS 281A.790(8) in reviewing dismissal of a petition for judicial review and determined that the plain and unambiguous language of the relevant statutes demonstrates that a party's right to judicial review of a final decision in a contested case vests immediately and is not contingent upon seeking rehearing or reconsideration. 2019 WL 2252865, at *2. **Nothing in NRS 233B.130(4) says that a party must petition for rehearing or reconsideration to maintain his or her entitlement to judicial review; in fact, it says that "[i]f [such a] petition is granted, the subsequent order" – not the original agency decision – "shall be deemed the final order for the purpose of judicial review."** Id. at *3. **This means that** if a party's petition for rehearing or reconsideration is denied, or **if the party simply chooses not to file such a petition, the final order for purposes of judicial review remains the agency's original decision.** Id. Accordingly, when NRS 233B.130(4) states that "[a] petition for rehearing or reconsideration must be filed within 15 days after the date of service of the final decision," it imposes a mandatory duty only upon parties

who choose to file such a petition, leaving intact the entitlement to judicial review that vests when an administrative decision in a contested case becomes final. Id.

Here, **NRS 432B.317 and NRS 233B.130 are determinative**. Plaintiff filed an appeal seeking a Fair Hearing under NRS 432B.317(1). ROA 2:286. Under NRS 432B.317(7), "The decision of a hearing officer in a hearing that is held pursuant to this section is a final decision for the purposes of judicial review." That hearing had not occurred by the time the district court dismissed this action. Therefore, Plaintiff had not exhausted his administrative remedies and the prior decision or Substantiation was not final for judicial review and/or any other judicial action. See also NRS 233B.130(1)(b) and (6) ("The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies."); 2:276-84.

Fifth and more importantly, as in Lopez, exhaustion is particularly important in relation to State child welfare services because it is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures (see, e.g., NRS 432, 432B, etc.), than the mandated administration of Nevada's child welfare systems. 2011 WL 378902 at *2 citing Woodford, 548 U.S. at 94. The State of Nevada has a "strong…interest in protecting children." In re Parental Rights as to N.D.O., 121 Nev. 379, 383, 115 P.3d 223, 225 (2005). Both state (see, e.g., NRS 424, 432B, and related Nevada

Administrative Codes) and federal statutes (see, e.g., Child Abuse and Prevention Act) require the State to establish, administer, etc., various child welfare services and programs for the benefit of children in this State. As such, construing NRS 432B.317 to require complete exhaustion of administrative remedies fits within the general scheme of our well-established administrative jurisprudence whereas Plaintiff's interpretation would turn NRS 432B.317 "into a largely useless appendage." Lopez, supra citing Woodford, 548 U.S. at 93.

DFS established a review process providing administrative means to fairly address abuse/neglect findings and concerns as required by NRS 432B.315 and 432B.317, thereby ensuring aggrieved parties' due process rights. The Administration procedure regarding substantiations of abuse/neglect reports includes one informal, and two formal levels of review (Fair Hearing and judicial review). NRS 432B.315, 432B.317 and 233B.130. DFS substantiated the report concerning Plaintiff and the children, notified Plaintiff of that and of his right to request an administrative appeal, as required by NRS 432B.315, and Plaintiff elected to pursue a Fair Hearing on the advice of Attorney McFarling. ROA 2:286. At the heart of Plaintiff's appeal is his pursuit, through the process provided by state law, of a reversal of the Substantiation of abuse/neglect. The administrative appeal and judicial review process both provide a remedy for that.

Sixth, Plaintiff's bald argument – that the Fair Hearing did not provide a "prompt remedy" because the first hearing offered to him was 8/1/17 – without any analysis, discussion and/or citation to any authority defining what "prompt" means aside from pulling that phrase out of Rathjen v. Litchfield, 878 F.2d 836, 840 (5th Cir. 1989) – need not be considered. NRAP 28(a)(10)(A). Even if this Court considers it, Rathjen simply states that "the evident purpose behind the City's employee grievance procedures is to facilitate prompt remedies for perceived injustices or unfairness." Id. Rathjen held that the employee had an adequate post-deprivation remedy (grievance procedure) and the court found it could not hold she was deprived of a constitutional right to procedural due process because she failed to resort to the city's administrative grievance procedure for a remedy. Id. at 840-41. As such, Rathjen does not support Plaintiff's argument, and supports the district court's order dismissing this action. Also, delay alone is not ordinarily sufficient to show that exhausting other remedies is futile. Johnson v. Gila River Indian Cmty., 174 F.3d 1032, 1036 (9th Cir. 1999).

Furthermore, Plaintiff disingenuously attempts to paint a picture that DFS alone – not he – delayed the Fair Hearing. Plaintiff omits to advise this Court of his own active role in delaying the Fair Hearing, including by requesting three continuances over a 5-month period, which DFS granted thereby acknowledging his due process rights. Further Plaintiff failed for over 9 months, to respond to

Defendants' requests that he provide his future availability for a Fair Hearing date given the number of continuances he requested. ROA 1:222-24 and 2:262-313.

There are sufficient additional facts relevant to the setting of the Fair Hearing in the Record, including establishing that Plaintiff did not want the Fair Hearing to proceed until after the district court action was substantively decided as follows. The 8/1/17 hearing was not the first Fair Hearing date scheduled in this matter – although DFS incorrectly referred to it as "originally scheduled" for that date in correspondence. ROA 2:304. Rather, **the 8/1/17 hearing was scheduled at Plaintiff's request.** Initially, DFS was advised that Plaintiff was considering retaining other counsel and, as such, delayed the setting of the Fair Hearing to allow him to do so, which unfortunately is not in the Record. Then, by letter dated 3/8/17, after DFS learned Plaintiff was not retaining said counsel, DFS advised Plaintiff the Fair Hearing was being set and offered Plaintiff 4/18/17 or 8/1/17. ROA 372-73. On 3/24/17, Plaintiff advised DFS that he was selecting 8/1/17 for the Fair Hearing date. ROA 2:288. Plaintiff could have had the 4/18/17 hearing date – which was over 3 ½ months earlier – but he chose the 8/1/17 hearing date, which DFS scheduled as Plaintiff requested. ROA 2:288. On 5/19/17, DFS advised Plaintiff the Fair Hearing had to be reset and asked Plaintiff to provide July, August and September dates. Id. On 5/26/17, DFS corresponded with Plaintiff confirming:

> **On or about March 24, 2017, you requested our Appeals Unit to schedule your hearing for August 1, 2017 however, our fair hearing officers are not available on August 1st.** This will not affect your "reservation of your rights" as **you** have indicated in your **e-mail dated March 20, 2017.**
>
> Be advised that Fair Hearings are scheduled on Tuesday and Wednesdays; and appellants are not provided with the opportunity to select their Fair Hearing date; rather, the date is selected based on the Fair Hearing Officer availability. As such, your Fair Hearing will be rescheduled around the Fair Hearing Officer's availability. **We are affording you the courtesy of selecting from the following prospective Fair Hearing dates**: August 15, 2017, August 16, 2017, August 22, 2017, August 29, 2017, August 30, 2017, September 6, 2017, September 12, 2017, September 13, 2017, September 19, 2017, September 20, 2017 and September 27, 2017.
>
> If we do not hear from you by June 8, 2017, we will schedule your Fair Hearing for the next available date, which is August 15, 2017.

ROA 2: 288 (emphasis added). Prior to 6/9/17, Plaintiff chose 9/6/17, despite being offered five earlier August 2017 dates. ROA 2:288 and 290. On 8/2/2017, 39 days later, Plaintiff requested the <u>first</u> continuance of the Fair Hearing. ROA 2:293. On 8/11/17, DFS corresponded with Plaintiff indicating it would obtain another date based on the Fair Hearing Officer's availability. ROA 2:292-3. On 8/18/17, DFS advised Plaintiff that the Fair Hearing was set for 10/24/17. ROA 2:295. On 10/4/17, just 20 days before the Fair Hearing, **Plaintiff requested the <u>second</u> continuance of the Fair Hearing until after this action was decided** because British Immigration kept his passport pending his Visa Application. ROA 2:297 and 300-01. He advised DFS:

> "I send this email in relation to the upcoming DFS Appeals hearing… **I am formally requesting that this hearing be continued until after the resolution of the civil rights lawsuit currently pending in Clark County District Court**…"

ROA 2:297 and 300 (emphasis added). On 10/16/17, DFS advised Plaintiff it granted his request for a continuance and asked him to advise when he would be able to leave the country. ROA 2:297. On 7/19/18, not having heard from Plaintiff for 9 months, DFS notified him of the new Fair Hearing date set for 9/11/18. ROA 2:264 and 304. On 7/20/18, the following day, Plaintiff requested a third continuance of the Fair Hearing, indicating he would be in Washington, D.C., on 9/11/18. ROA 2:307. On 7/31/18, DFS corresponded with Plaintiff reminding him that the 10/24/17 Fair Hearing was set for 9/11/18, but continued at his request, and reminding him that DFS asked him to advise when he could appear for a Fair Hearing so it could be rescheduled, but Plaintiff failed and/or refused to provide any dates. ROA 2:264 and 311. On 8/17/18, DFS again corresponded with Plaintiff and reiterated what was in its prior 7/31/18 correspondence to him again reminding him that the 10/24/17 Fair Hearing was set for 9/11/18, but continued at his request, and reminding Plaintiff that DFS asked him to advise when he could appear for a Fair Hearing so it could be rescheduled, and again he failed and/or refused to provide any dates. ROA 2:264-65 and 313. As of the filing of the Reply on the motion to dismiss, Plaintiff had not provided a date to DFS on which the Fair Hearing could proceed. ROA 2:265. Ten months had passed since DFS agreed to Plaintiff's second request

for continuance of the 10/24/17 Fair Hearing. Notwithstanding DFS' multiple requests for Plaintiff to provide DFS with a date upon which a Fair Hearing could be rescheduled, after he told DFS that British Immigration had his passport suggesting he could not leave the country, Plaintiff failed and/or refused to do so. Thus, Plaintiff requested three continuances of the Fair Hearing and actively refused to provide dates, thereby accounting for a large part of the delay – from 8/1/17 to 10/19/2020, the date the Fair Hearing occurred. Based on all the above, there is no doubt Plaintiff wanted to delay the Fair Hearing.

It could be said that Plaintiff thwarted the process and/or rendered it useless by repeatedly postponing it as he jockeyed in this action to try to gain some advantage. There is no doubt some delay is attributable to the fact that Plaintiff originally lived in in Las Vegas, and later chose to move to England while this matter was pending, which made his appearance at the Fair Hearing problematic. As of at least 12/30/16, the date Plaintiff filed his district court complaint, he was living in England. ROA 1:1. On 10/4/17, Plaintiff advised DFS that British Immigration had his passport pending his Visa Application and requested a continuance. ROA 2:297. This Court should not reward Plaintiff's clear delay tactics by condoning the above. Based upon all the above, Plaintiff cannot legitimately argue he was prejudiced by any delay.

Seventh, in any case, a final decision was necessary; and applying the exhaustion doctrine gives the agency an opportunity to correct its own mistakes, if any, before it is haled into court; discourages disregard of the agency's procedure; promotes efficiency; conserves judicial resources; and allows the agency to make a complete factual record and apply its expertise before any judicial review See, e.g., Deja Vu Showgirls v. State, Dep't of Tax., 130 Nev. 719, 726, 334 P.3d 392, 397 (2014); McKart, 395 U.S. at 205–06, 89 S. Ct. at 1669 (1969) ("…this Court has often emphasized that the expertise of the responsible agency is entitled to great deference in matters of statutory construction, see, e.g., Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801…(1965), thus refuting any contention that questions of law are somehow beyond the expertise of the agency and do not give rise to the considerations which underlie the exhaustion doctrine.") Based on all the above, the district court properly dismissed all Plaintiff's claims.

Eighth, Plaintiff's attempt to distinguish the cases the district court relied on fails. Morgan v. Gonzales, 495 F.3d 1084, 1090 n.2 (9th Cir. 2007), and Barron v. Ashcroft, 358 F.3d 674, 678 (9th Cir. 2004), both establish that in a procedural due process claim case, a litigant asserting a liberty interest violation without due process must first exhaust state remedies before filing suit. "No denial of procedural due process occurs where a person has failed to utilize the state procedures available to

him." Rathjen v. Litchfield, 878 F.2d 836, 839-40 (5th Cir. 1989).[9] Plaintiff cites no contradictory authority. Plaintiff's argument that Morgan held the BIA had no power to grant relief on substantive due process claims ignores the fact that Plaintiff has "procedural due process" claims requiring exhaustion. ROA 1:106-07 and 3:511-12. Plaintiff cannot allege a procedural due process claim where he fails to use the procedures available to him. Furthermore, Morgan establishes "**[t]he exception to the rule that constitutional claims need not be exhausted before the agency are claims of denial of procedural due process…, which must be raised before the BIA because the agency does have the power to adjudicate procedural due process claims.**" Id. (emphasis added) citing Sun v. Ashcroft, 370 F.3d 932, 944 n. 18 (9th Cir. 2004). Plaintiff alleges procedural due process claims and the administrative statutory process affords due process rights. ROA 2:286-302; NRS 432B.315.

Ninth, this Court recently confirmed the exhaustion requirement in Benson v. State Eng'r, 131 Nev. 772, 777–80, 358 P.3d 221, 224–27 (2015). "Ordinarily, before

[9] "…other circuits have refused to entertain procedural due process claims of employees who did not avail themselves of administrative hearing procedures. Riggins v. Bd. of Regents, 790 F.2d 707, 711–12 (8th Cir.1986); Dwyer v. Regan, 777 F.2d 825, 834–35 (2d Cir.1985), modified on other grounds, 793 F.2d 457 (2d Cir.1986); Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir.) cert. denied, 459 U.S. 1017, 103 S.Ct. 379; Correa v. Nampa School Dist. No. 131, 645 F.2d 814, 817 (9th Cir.1981)."

availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies." Id. at 777 citing Malecon Tobacco, LLC, v. State ex rel. Dep't of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 475–76 (2002). While this Court held that exhaustion is not required when administrative proceedings are "vain and futile," that is not the case here. Id. "[B]are assertions of futility are insufficient to bring a claim within the futility exception, which is designed to avoid the need to pursue an administrative review that is demonstrably doomed to fail." Id. at 779-80 n. 6, citing Diaz v. United Agric. Emp. Welfare Benefit Plan & Trust, 50 F.3d 1478, 1485 (9th Cir.1995). In Benson, the appellant asserted administrative review was futile because she could only receive a permit with a 2013 priority date, which would still not allow her to appropriate any water and would thus amount to nothing more than a piece of paper, and that administrative review would not have offered her any relief. Id. at 778. This Court disagreed that a water permit with an appropriation date of 2013 would afford appellant no remedy at all. Id. at 778-79. Although a water permit with a 2013 appropriation date effectively placed Benson near the end of the line to appropriate water, this was a form of relief. Id. at 779. This Court recognized that it was not the remedy Benson preferred, but it does not consider administrative proceedings to be futile solely because the statute prevents the petitioner from receiving her ideal remedy through administrative proceedings. Id. Thus, **this Court held that when a statute**

authorizes an administrative agency to provide a party with a remedy, even when that remedy is not the remedy the party prefers, the doctrine of futility does not apply and excuse the party from complying with the statute's exhaustion requirement and the party must exhaust all available administrative remedies before seeking judicial review. Id. **This Court recognized that by requiring a petitioner to prove that the administrative review process would provide "no relief at all," its holding defined Nevada's futility more narrowly than the federal courts' definitions, which focus on the adequacy of the remedy.** Id. This stricter standard would provide the district court with a fully developed record and administrative decision, including factual findings by an administrative body with expertise on water appropriation and put the district court in a better position, acting in an appellate capacity, to determine issues such as whether a party has proved adequate grounds for having a permit restored with its original appropriation date. Id. at 780 citing Malecon Tobacco, 118 Nev. at 840–41, 59 P.3d at 476 (noting that administrative agencies are generally in the best position to make factual determinations). The stricter standard would provide the State with the opportunity to correct its mistakes and protect or conserve judicial resources. Id. Also, district courts should not entertain a petition for equitable relief, which Plaintiff seeks here, based upon a party's unproven supposition that the remedy at law is inadequate. Id. at 782; ROA 1:110. Thereafter, this Court held:

> **[t]he right to petition for judicial review of an administrative decision constitutes an adequate remedy**. Howell v. Ricci, 124 Nev. 1222, 1229, 197 P.3d 1044, 1049 (2008) (citing Kay v. Nunez, 122 Nev. 1100, 1104-05, 146 P.3d 801, 805 (2006). **Further, the right to appeal is generally considered an adequate remedy**. Pan v. Dist. Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). As noted above, administrative proceedings are not futile solely because the party is likely to lose, or might not receive its ideal remedy. Benson,…358 P.3d at 226. Moreover, a remedy does not fail to be adequate just because pursuing it through the ordinary course of law is more time consuming…Cty. Of Washoe v. City of Reno, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961)…Additionally, NRS 233B.135(3)(b) states the district court may remand, affirm, or set aside the final agency decision if the decision is in excess of the statutory authority of the agency.

Reno Dodge Sales, Inc. v. State of Nevada Dep't of Motor Vehicles, 2016 WL 3213593, at *4 (Nev. App.) (emphasis added) (affirming the dismissal of a petition for judicial review).

Thus, Plaintiff's argument that the Fair Hearing cannot provide him any remedy at all rings hollow. The issue is not whether the Fair Hearing will award him his ideal and/or preferred relief. Plaintiff appealed the Substantiation of abuse/ neglect seeking relief therefrom through a Fair Hearing pursuant to NRS 432B.317(1) on the advice of Attorney McFarling. The Fair Hearing provides relief because it is an appeal. Reno Dodge, supra. Also, Plaintiff may seek judicial review of the Fair Hearing determination subject to any appropriate challenge thereof. NRS 233B.130 **(**Judicial review, etc.) provides:

1. **Any party who is**:

> (a) Identified as a party of record by an agency in an administrative proceeding; and
>
> (b) **Aggrieved by a final decision** in a contested case, is entitled to judicial review of the decision. **Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy…**
>
> 6. **The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies.**

(Emphasis added.) Although administrative review would not provide some of the relief Plaintiff seeks, it could provide a form of relief that Plaintiff wanted – a reversal of the Substantiation of abuse/neglect, which is all that is required under Benson. This Court does not consider administrative proceedings to be futile solely because the statute prevents the petitioner from receiving his or her ideal remedy through administrative proceedings. Therefore, the doctrine of futility does not apply and/or excuse Plaintiff from complying with the Statute's and this Court's case law regarding the exhaustion requirement and Plaintiff must exhaust all available administrative remedies before seeking judicial review. This strict standard is necessary in cases under NRS Chapter 432B and 233B because of the unique nature of child protection cases and issues. Id. This stricter standard also would provide the district court with a fully developed record and administrative decision, including

factual findings by an administrative body with undisputed and unparalleled expertise on child protection, which will place the district court in a better position, acting in an appellate capacity, to determine issues such as whether a party has proved adequate grounds for the Substantiation of abuse/neglect. Administrative agencies – like DFS – are generally in the best position to make factual determinations. The stricter standard also would provide the State with the opportunity to correct its mistakes, if any, and protect or conserve judicial resources, which could be relevant to pending Illinois guardianship action. Therefore, Plaintiff has failed to meet his burden of establishing that the administrative review process would provide "no relief at all."

While Plaintiff makes much of the Fair Hearing not being an adequate remedy, he clearly sought it to obtain a rejection of the Substantiation that results in a person's name being placed in the Central Registry. NRS 432B.317(5)(b). The State of Nevada established the Central Registry for the Collection of Information Concerning the Abuse or Neglect of a Child. NRS 432.100(1). The Central Registry contains information of any substantiated report of child abuse or neglect, which information may be released to certain agencies and/or person. NRS 432.100(2)-(4). Plaintiff's pursuit of this action while the Fair Hearing was pending and seeking a court ruling before the Fair Hearing is held establishes his choice to pursue the remedy afforded by the Statute. Also, the pending Illinois guardianship action

regarding the minors might be another reason Plaintiff pursued the Fair Hearing and would not abandon it because any decision regarding a finding as to Plaintiff's abuse/neglect of the minors could impact his custody and/or visitation relating to those very children. Therefore, Plaintiff's argument that the Fair Hearing provides no remedy is not credible and/or belied by his and Attorney McFarling's words and actions. Finally, Plaintiff's argument that the Fair Hearing cannot affect the custody of the children has no merit.[10] He cannot get such an award in this action either. NRS 124A *et seq.*; ROA 2:391-96.

Based on all the above, the district court properly dismissed Plaintiff's claims. Assuming *arguendo*, that the district court should not have dismissed Plaintiff's § 1983 claims, which Defendants vigorously dispute, at the end of the day, the dismissal was without prejudice and Plaintiff could refile his claim(s) after he has exhausted his administrative remedies, and all his claims can be determined at one time subject to any applicable law, or he could pursue judicial review. Judicial efficiency and conservation of judicial resources support this outcome given all claims are based on the same alleged facts and circumstances.

2. Plaintiff's Exclusive Remedy Is Judicial Review

Plaintiff argues the district court erred in finding that NRS 432B.317 requires the Fair Hearing process be completed prior to any judicial review. ROA 2:333. NRS

[10] See Opening Brief, p. 23.

432B.317 pertains to "Administrative appeal of substantiated report…." Plaintiff filed his appeal seeking a Fair Hearing pursuant to NRS 432B.317(1). As such, the remaining provisions of the Statute apply. The district court properly found as a fact that "NRS 432B.317[(7)] requires the conclusion of a Fair Hearing before any judicial review can take place," which was not the pivotal determination it made Id. Rather, the district court properly dismissed this action for Plaintiff's failure to exhaust his pending administrative remedy – the Fair Hearing appeal he requested – which barred all his claims for the reasons stated above. The district court did not conclude this action was one for judicial review under the APA. NRS 233B.130. Indeed, there is no mention of the APA or NRS 233B.130 in the order. ROA 2:331-37. The district court properly determined the matters at issue were nonjusticiable and there had not been a final decision on the administrative appeal, which is the highest level of decision within the agency appellate process that Plaintiff requested. NRS 432B.317(7).

In addition, this Court can dismiss this appeal for a lack of subject matter jurisdiction. A party may raise subject matter jurisdiction at any time, and a reviewing court can raise it *sua sponte*. Swan v. Swan, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). A party seeking judicial review of an administrative decision must strictly comply with statutory requirements for a reviewing court to have jurisdiction over the matter. Kame v. Emp't Sec. Dep't, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).

A reviewing court must dismiss an appeal for a party's noncompliance with statutory requirements, as those requirements are mandatory. Id.

Here, Plaintiff's exclusive remedy as to the final Fair Hearing decision entered after dismissal is judicial review. NRS 233B.130(1)(b)(6) provides "The provisions of this chapter are the exclusive means of judicial review of, **or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies**." (Emphasis added). Whether a party must file a petition for judicial review when challenging a decision by an administrative agency that denies the relief requested is a question of statutory construction and requires this Court to consider here how the APA and NRS 432B.317 relate. Deja Vu Showgirls[11], 130 Nev. at 714, 334 P.3d at 389.

> In enacting the APA, the Legislature stated that the chapter's purpose is "to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies...and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter." NRS 233B.020(1).

Id. DFS is not exempted from the APA's purview. NRS 233B.039.

> In line with its purpose, the APA provides that a party aggrieved by a final agency decision in a contested case who is identified as a party of record by an agency in an administrative proceeding is entitled to review of that decision by filing a **petition for judicial review** in the appropriate court. See NRS 233B.130(1)-(2). Moreover, **the APA**

[11] Affirming district court's decision to dismiss a civil complaint based on lack of subject matter jurisdiction because NRS Chapter 233B's sole remedy is a petition for judicial review.

> **states that its provisions "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [NRS Chapter 233B] applies.**" NRS 233B.130(6).

Id. at 714-15, 389.

It is undisputed that Plaintiff is a party of record aggrieved by a final agency decision in a contested case, and that a decision of DFS is a final decision for the purposes of judicial review. NRS 432B.317(7). Id. at 715, 389. Pursuant to Deja Vu Showgirls, supra, this Court should construe NRS 432B.317(7) and NRS 233B.130(6) to mean that all final decision(s) of DFS – here a decision on the Fair Hearing appeal – is subject to the provisions of NRS 233B.130(6) and its plain language indicating that "**the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies."** Absent explicit legislative direction to the contrary, the APA's procedures, including the requirement to file a petition for judicial review, apply to all final DFS decisions, including those addressing a Fair Hearing. NRS 233B.020; NRS 233B.130(6). Defendants are not aware of any applicable contrary legislative directions contained in NRS 432B.300 to 432B.317. Therefore, Plaintiff's sole and exclusive remedy is judicial review under NRS 233B.130, subject to any constitutional issues or other challenges. Plaintiff apparently agrees with this because, on 11/17/2020, he filed a petition for judicial review in Carson City, Nevada. Therefore, this Court should affirm the district court's dismissal with

prejudice because judicial review is Plaintiff's exclusive remedy. NRS 233B.130(6) and 233B.135(3)(a).

3. **The District Court Properly Determined Plaintiff Failed To Meet His Rule 56(f) Burden**

The district court properly granted Defendants' "motion to dismiss." ROA 2:335-36. Although the district court referred to both Rule 12(b)(5) and 12(c), it did not indicate the motion was granted under Rule 12(c) nor did it indicate that matters outside the pleadings were considered and, therefore, it did not treat the motion as one for summary judgment. ROA 2:335. The critical facts supporting the motion to dismiss and establishing Plaintiff's failure to exhaust his administrative remedies are undisputed – i.e. his request for a Fair Hearing and the pendency of that Hearing at the time of dismissal – including as admitted by Plaintiff, Attorney McFarling and/or as party admissions. NRS 51.035(3)(a); ROA 1:239-240; 2:274, 286, 292-93, 297, 300-01, 307-11, 315-30; and 3:497-99, 501-08 and 512. Plaintiff has never disputed that he, through Attorney McFarling, requested the Fair Hearing and that it was pending. Id. His sole argument was and is that the Fair Hearing does not provide the remedy he wants. As such, dismissal was appropriate.

Assuming *arguendo* that the district court did consider matters outside the pleadings and treated the motion as a Rule 12(c) motion, the district court properly denied Plaintiff's Rule 56(f) request to do discovery because Plaintiff failed to meet

his burden thereunder by failing to "show…by affidavit or declaration that, for specified reasons… [he] cannot present facts essential to justify its opposition," which required him to identify what additional discovery he wanted to undertake and what he expected that discovery to yield that would generate genuine issues of material fact to defeat summary judgment. Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978) (affirming summary judgment and dismissal of the complaint with prejudice where Plaintiff made no attempt to identify in his affidavit what facts might be obtained that were essential to justify his opposition); Francis v. Wynn Las Vegas, 127 Nev. 657, 669, 262 P.3d 705, 714 (2011). "Where…a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified." Bakerink, supra citing Willmar Poultry Co. v. Morton-Norwich Products, 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915, 96 S.Ct. 1116 (1975). Also, if the further discovery would be futile, the motion should be denied. Feliciano v. Am. W. Homes, Inc., 128 Nev. 895, 381 P.3d 611, 2012 WL 3079106, *2, n. 5. Plaintiff neither submitted an affidavit indicating what discovery he wanted to do and how that was essential to justify the opposition to the motion, nor did he otherwise provide that information in his opposition. Therefore, the district court had no authority to consider, speculate about and/or grant Plaintiff's unarticulated Rule 56(f) request and properly denied it. Furthermore, any discovery on this issue was futile because it would not change

the undisputed fact that Plaintiff requested the Fair Hearing and conceded it was pending at the time of dismissal, thus establishing he failed to exhaust his administrative remedies. Accordingly, the request properly was denied. ROA 2:335.

Furthermore, Plaintiff's newly raised issue with the Affidavit of Paula Hammack not being made on personal knowledge cannot be considered. His sole issue with the Affidavit before the district court was that Paula Hammack was not listed as a witness and/or custodian of records in the Joint Case Conference Report or the Rule 16.1 disclosures. ROA 2:227. As indicated in her Affidavit and other DFS papers sent to Plaintiff throughout the underlying process, Ms. Hammack was the Assistant Director of DFS and, as such, had knowledge of DFS operations and events, could attest to any pending matters at DFS, and could authenticate any related documents, including regarding Plaintiff's pending Fair Hearing. ROA 2:276, 288, 290, 295 and 304. Furthermore, testimony of a custodian of records is unnecessary when the record's authenticity and use in the regular course of business are demonstrated. Matter of Discipline of Ahmad, 451 P.3d 542, 2019 WL 5858226, at *1 (Nev. 2019) citing Hankins v. Adm'r Of Veteran's Affairs, 92 Nev. 578, 579-80, 555 P.2d 483, 484 (1976); NRS 51.135; 432B.190(1). Most importantly, Plaintiff did not dispute he requested the Fair Hearing and that it was pending – which is all that is needed to support the dismissal – and/or the truth or accuracy of the relevant

papers. He only argued the administrative process did not provide his preferred remedy.

Plaintiff further argued "[m]y communications have been with other individuals, including…Ms. Devon Butts…" ROA 1:240. Accordingly, Defendants obtained an affidavit from Ms. Butts and thereby remedied any purported evidentiary shortcomings, which Defendants dispute existed. There is no doubt Ms. Butts had personal knowledge of the interactions with Plaintiff since she sent, received and/or responded to the related communications and identified the exhibits in her Affidavit (ROA 2:263-65) thereby establishing that: (1) on 5/19/17, DFS advised Plaintiff the Fair Hearing had to be reset and asked Plaintiff to provide July, August and September dates (ROA 2:288 – referring to Ms. Butts' email to Plaintiff); (2) prior to 6/9/17, Plaintiff chose 9/6/17, despite being offered five earlier August 2017 dates (ROA 2:288 and 290 – Ms. Butt's letter to Plaintiff); (3) on 8/2/2017, Plaintiff requested the first continuance of the Fair Hearing (ROA 2:293 – Plaintiff's email to Ms. Butts); (4) on 8/11/17, DFS corresponded with Plaintiff indicating it would obtain another date based on the Fair Hearing Officer's availability (ROA 2:292-93 – Ms. Butt's email to Plaintiff); (5) on 8/18/17, DFS advised Plaintiff that the Fair Hearing was set for 10/24/17 (ROA 2:295); (6) on 10/4/17, Plaintiff requested the second continuance of the Fair Hearing until after

this action was decided because British Immigration kept his passport pending his Visa Application (ROA 2:297 and 300-01). Plaintiff further advised DFS:

> "I send this email in relation to the upcoming DFS Appeals hearing… **I am formally requesting that this hearing be continued until after the resolution of the civil rights lawsuit currently pending in Clark County District Court**…"

(ROA 2:297 and 300 (emphasis added)); (7) on 10/16/17, DFS advised Plaintiff it granted his request for a continuance and asked him to advise when he would be able to leave the country (ROA 2:297 – Ms. Butts' email to Plaintiff); (8) on 7/19/18, not having heard from Plaintiff for 9 months, DFS notified him of a new Fair Hearing date set for 9/11/18 (ROA 2:304-05 – Ms. Butts' letter to Plaintiff); (9) on 7/20/18, Plaintiff requested the third continuance of the Fair Hearing, indicating he would be in Washington, D.C. on 9/11/18 (ROA 2:307); (10) on 7/31/18, DFS corresponded with Plaintiff reminding him that the 10/24/17 Fair Hearing previously set for 9/11/18, had been continued at his request, and reminding him that DFS asked him to advise when he could appear for a Fair Hearing so it could be rescheduled, but Plaintiff failed and/or refused to provide any dates (ROA 2:311 – Ms. Butt's email to Plaintiff); (11) on 8/17/18, DFS again corresponded with Plaintiff and reiterated what was in its prior 7/31/18 correspondence again reminding him that the 10/24/17 Fair Hearing previously set for 9/11/18 had been continued at his request, and reminding Plaintiff that DFS asked him to advise when he could

appear for a Fair Hearing so it could be rescheduled, and again he failed and/or refused to provide any dates (ROA 2:313 – Ms. Butts' email to Plaintiff). As of the filing of the Reply on the motion to dismiss, Plaintiff had not provided a date to DFS on which the Fair Hearing could proceed. ROA 2:265. Therefore, there was evidence to support the dismissal – including Plaintiff's statements and admissions – and a complete absence of evidence to support Plaintiff's request for discovery under Rule 56(f).

D. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S INTENTIONAL TORT CLAIMS

Plaintiff argues the district court improperly dismissed his "intentional torts" (without identifying them) relying on NRS 233B.130(1) which provides, "…Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy." Plaintiff only alleges one intentional tort – his IIED claim. ROA 1:107-08. Plaintiff cites no case law supporting his argument that no exhaustion is required as to intentional tort claims and makes no argument and/or cites no authority as to what an "adequate remedy" means. NRAP 28(a)(4) and 28(e)(1); NRAP 28(a)(4) and 28(e)(1). As such, this argument fails. Furthermore, the Fair Hearing is an appeal and Plaintiff had the right to petition for judicial review under NRS 233B.130 – both of which are adequate remedies. Reno Dodge, supra. Also, Plaintiff

failed to establish that the Fair Hearing would provide "no relief at all" as required under Nevada's more narrow futility case law. Benson, supra. Therefore, the doctrine of futility does not apply. Plaintiff's § 1983 claim arguments fail for the reasons indicated above. See, Section C, supra. Finally, Plaintiff's argument that his claims have nothing to do with the Fair Hearing also fails for the reasons indicated above, including relating to the fact that he alleges facts in his defamation claim and requests relief based on based on maltreatment/abuse/neglect findings. See, pp. 2-3, supra.

E. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S PUNITIVE DAMAGES CLAIM

Plaintiff argues the district court only erred in dismissing punitive damages as to his § 1983 claims against Defendant Stuart.[12] As such, Plaintiff concedes the district court properly dismissed punitive damages against Defendants on all state law claims. ROA 1:78. However, the FAC does not clearly state in what capacity – individual and/or official – he is suing Stuart. Rather, it alleges the following which indicates the claims are brought against Stuart in her official capacity:

> 2. At all relevant times, unless otherwise alleged, Defendant **GEORGINA STUART was an individual employed by Defendant CLARK COUNTY, NEVADA, serving as a Senior Family Services Specialist with the CLARK COUNTY DEPARTMENT OF FAMILY SERVICES, CHILD SUPPORT SERVICES DIVISION**…

[12] See Opening Brief, pp. 47-48.

> 28. On information and belief, at all times relevant to this Cause of Action, Defendant CLARK COUNTY exercised power possessed by virtue of state law and Defendant GEORGINA STUART, as an employee of Defendant CLARK COUNTY, acted under color of state law.
>
> 29 …at all times relevant to this Cause of Action, **the conduct alleged herein by Defendant CLARK COUNTY and Defendant GEORGINA STUART resulted from actions taken on the part of a government entity that implemented or executed a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or the result of the entity's custom, the custom and policy being a moving force behind the deprivation of Plaintiffs rights, damages and request for relief alleged herein**…

ROA 1: 87 and 99 (emphasis added). Therefore, the FAC does not allege an "individual" capacity claim against Stuart.

"A suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself." Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) citing McRorie v. Shimoda, 795 F.2d 780, 783 (9th Cir.1986). Punitive damages cannot be imposed against Clark County since it is well-settled that a municipality is immune from punitive damages. City of Newport v. Fact Concerts. Inc., 453 U.S. 247, 267, 101 S. Ct. 2748 (1981). Clark County also is immune from punitive damages with respect to the Plaintiff's state law claims. NRS 41.035(1). Because a suit against Stuart in her official capacity is essentially a suit against Clark County itself, Stuart, as sued in her official capacity, is immune from an award of punitive damages. Larez, supra; Aguilar v. Kuloloia,

2007 WL 2891503, at *16 (D. Nev.), both citing Mitchell v. Dupnik, 75 F.3d 517, 527 (9th Cir. 1996).

Plaintiff's reliance on Burke v. Regalado, 935 F.3d 960 (10th Cir. 2019) is misplaced.[13] The award in Burke was "$250,000 in punitive damages against Sheriff Glanz in his **individual** supervisory **capacity**" against whom the plaintiff alleged an "individual capacity" claim. Id. at 960 and 980 (emphasis added). Plaintiff did not allege any such claims against Stuart. Therefore, the district court properly dismissed the punitive damages as to Stuart.

VI. CONCLUSION

This Court should affirm both district court dismissal orders because the district court properly dismissed: (1) DFS and CSS/CPS as non-suable entities; (2) Plaintiff's punitive damages because they are barred by NRS 41.035(1) and because they relate to official capacity claims; (3) Plaintiff's entire action for Plaintiff's

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[13] See Opening Brief, p. 47.

failure to exhaust his administrative remedies relating to the undisputed pending Fair Hearing; and (4) Plaintiff's entire action because his exclusive remedy is judicial review under NRS 233.300(6).

RESPECTFULLY SUBMITTED this 8th day of January, 2021.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Felicia Galati
FELICIA GALATI, ESQ.
Nevada Bar No. 7341
9950 W. Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Respondents
GEORGINA STUART and CLARK COUNTY, NEVADA

NRAP 28.2 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 2010 in Times New Roman, size 14 font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)&(C) because it does not contain more than 14,000 words.

3. Finally, I hereby certify that I have read this appellate 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, including 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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of January, 2021.

OLSON CANNON GORMLEY
& STOBERSKI

/s/ Felicia Galati
FELICIA GALATI, ESQ.
Nevada Bar No. 7341
9950 W. Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Respondents
CLARK COUNTY and GEORGINA STUART

CERTIFICATE OF SERVICE

On the 8th day of January, 2021, the undersigned, an employee of Olson Cannon Gormley & Stoberski, hereby served a true copy of **GEORGINA STUART AND CLARK COUNTY'S ANSWERING BRIEF** to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order (Administrative Order 14-2) effective June 1, 2014, and or emailed/mailed:

Emily McFarling, Esq.
MCFARLING LAW GROUP
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
Attorney for Plaintiff, Steve Eggleston

/s/ Erika Parker

_____

An Employee of Olson Cannon Gormley& Stoberksi