IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO A. SALAS, an individual, Appellant, vs. CLARK COUNTY SCHOOL DISTRICT; VISION TECHNOLOGIES, INC., Respondents.	Case No. 83105

APPEALS

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

RESPONDENT VISION TECHNOLOGIES, INC.'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respondent Vision Technologies, Inc. converted to a Maryland limited liability company and its stock is wholly owned by HITT Holding Corporation, a privately held company out of Fairfax, VA, and there are no publicly traded companies that own any part of Vision Technologies, LLC.

Michelle D. Alarie, Esq. of the law firm of Armstrong Teasdale LLP represented Respondent Vision Technologies, Inc. in the underlying district court action and in this appeal.

Date: January 7, 2022

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I.

ADDITION TO STATEMENT OF JURISDICTION

Section 4 of Article 6 of the Nevada Constitution provides this Court with appellate jurisdiction in all civil cases arising in district courts. Pursuant to NRAP 3A(b)(1), an appeal may be taken from "[a] final judgment entered in an action or proceeding commenced in the court in which the judgment was rendered." A final judgment is one "that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). This Court has jurisdiction to review the district court's Order Granting (1) Defendant Vision Technologies, Inc.'s Motion to Dismiss, and (2) Defendant Clark County School District's Motion to Dismiss and Joinder, filed March 31, 2021, with the Notice of Entry of Order filed April 1, 2021, as it is a final appealable order under NRAP 3A(b)(1).

Appellant Mario Salas filed his Notice of Appeal on June 21, 2021, following the June 21, 2021, entry of the Notice of Entry of Order Denying Plaintiff's Motion to Reconsider Order Granting Defendants' Motions to Dismiss. Thus, this appeal was timely filed.

II.

ADDITION TO ROUTING STATEMENT

Respondent Vision Technologies, Inc. agrees that this appeal is presumptively assigned to the Court of Appeals (*see* NRAP 17(b)(5)) and does not involve any of the issues set forth in NRAP 17(a)(11) and (12) such that the Nevada Supreme Court should retain jurisdiction.

III.
ISSUES PRESENTED

Respondent Vision Technologies, Inc. ("Vision Technologies") offers the following five Issue Presented to clarify the issues identified within the Argument section of Appellant Mario Salas' ("Salas") Opening Brief.

1. The district court did not err when it dismissed Salas' personal injury claims against his employer, Vision Technologies, Inc. and statutory employer, Clark County School District ("CCSD"), because Salas failed to affirmatively plead that the exclusive remedy doctrine of the Nevada Industrial Insurance Act ("NIIA") did not apply to his alleged on-the-job injury.

2. The district court did not err when it concluded that the requirement in NRS 686B.636(1) that employers "provide and secure compensation under chapters 616A to 616D" means only that an employer must secure NIIA-compliant worker's compensation insurance to ensure that worker's compensation claims can be considered; and, therefore, the district court properly dismissed the Complaint because Salas failed to affirmatively plead that his employer did not have NIIA-compliant worker's compensation insurance coverage to invoke NRS 616B.636(1).

3. The district court did not err when it dismissed Salas' personal injury claims finding no exception to the exclusive remedy doctrine of the NIIA because the Complaint failed to allege that Vision Technologies and CCSD acted with the specific and deliberate intent to injure the employee, or to plead facts that show a deliberate intent to bring about the injury, such that Salas' on-the-job injury was an intentional tort and outside the purview of the NIIA.

4. The district court did not abuse its discretion when it denied Salas' motion for leave to amend because the allegations in the Complaint demonstrated that Salas' on-the-job injury was within the exclusive jurisdiction of the NIIA; therefore, amendment was futile.

5. The district court did not err when it found that CCSD was Salas' statutory employer for purposes of applying the exclusive remedy doctrine of the NIIA.

IV.

STATEMENT OF THE CASE

The underlying case arises out of an alleged on-the-job injury. Salas filed a personal injury lawsuit against his employer in an attempt to bypass Nevada's long-standing and well-established worker's compensation statutory scheme. The district court appropriately identified the pleading deficiencies in Salas' Complaint at the outset and correctly dismissed Salas' lawsuit. This Court should affirm dismissal in all respects.

This is an appeal of the district court's order granting Vision Technologies' and the CCSD's Motions to Dismiss pursuant to NRCP 12(b)(5). The district court properly determined that Salas' personal injury claims against his employer, Vision Technologies, and statutory employer, CCSD, were barred by the exclusive remedy doctrine of the NIIA. (APP107-109.) Specifically, Salas expressly alleged that he was injured at his workplace while in the course and scope of his employment for Vision Technologies. (APP108.) The district court correctly identified that Salas failed to allege facts to remove his on-the-job injury from the exclusive remedy of

worker's compensation. (APP107-108.) Salas' allegation that Vision Technologies and CCSD intentionally created a hazardous workplace and directed Salas to work therein without protective equipment was insufficient under Nevada law to make his on-the-job injury not accidental. (APP108.) Additionally, although Salas argued that his worker's compensation claim was denied and he was refused benefits, Salas failed to plead that his employer did not "provide and secure" NIIA-compliant worker's compensation insurance to allow him to maintain a lawsuit for damages against the employer under NRS 616B.636(1). (APP 108; APP226.) The proper vehicle to contest denial of a worker's compensation claim is the administrative appeal process under NRS 616C. (Id.)

V.

STATEMENT OF THE FACTS

On December 8, 2020, Salas filed a 31-page Complaint against his employer, Vision Technologies, as well as CCSD and various DOE/ROE defendants asserting claims for negligence, respondeat superior/negligent entrustment, hiring, supervision, and strict product liability all arising from an on-the-job injury Salas allegedly suffered on June 28, 2019. (APP 1-31, "Complaint", *generally*.) Only the negligence claim was asserted against Vision Technologies. (APP 5-14, Compl., at ¶¶ 15-39.)

On January 22, 2021, Vision Technologies filed a Motion to Dismiss on the basis that the exclusive remedy provision of NIIA, or more commonly known as worker's compensation, barred Salas' lawsuit entirely because Salas expressly admitted that Vision Technologies was his employer for all relevant times and that he was injured while acting in the course and scope of his employment. (APP 32-42;

APP 2 & 12-13, Compl., at ¶¶ 3, 33.) In particular, Salas admitted that he suffered an injury (rash on his arm) that he alleges was caused by other individuals working in the same area spraying compressed air to clean dusty computers, which thereby caused toxic dust and pollutants in his workplace to become airborne. (APP 6-13, Compl., at ¶¶ 18 – 33.) Salas' asserted that Vision Technologies created and/or knew of the dangerous condition of his workplace and that it was lacking ventilation, but still instructed Salas to work therein and failed to provide him with protective equipment. (APP 9-10, Compl., at ¶¶ 27-29.) However, under Nevada law, hazardous work conditions alone are not an exception to the exclusivity of worker's compensation. (APP 39.) Vision Technologies also argued that under *Conway v. Circus Casinos, Inc.*, 116 Nev. 870, 8 P.3d 837 (2000), an employee must do more than simply label an employer's conduct intentional to avoid the exclusive remedy doctrine, but instead must allege that the employer acted with the deliberate and specific intent to injure him or plead facts that show the deliberate intent to bring about his injury. (APP 39-40.) Salas did not make such allegations; therefore, dismissal was appropriate.

On January 28, 2021, CCSD also filed a Motion to Dismiss and Joinder, asserting many of the same arguments as Vision Technologies with respect to the exclusive remedy doctrine. (APP 43-52.) CCSD asserted that because the Complaint alleged that Vision Technologies was CCSD's subcontractor and Salas was injured on CCSD premises while working for Vision Technologies, CCSD was Salas statutory employer under the NIIA because an employee of a subcontractor "shall be deemed to be employees of the principal contractor." (APP 49.)

On February 2, 2021, Salas filed his Oppositions to both Motions to Dismiss and asked for leave to amend if his pleading was found deficient. (APP 53-69.) Salas generally argued that he should be permitted discovery on the issue of whether Vision Technologies intended to injure him. (APP 65-66.) Salas also argued that he submitted a claim for worker's compensation benefits to Vision Technologies, but the claim was denied. (APP 61.) Salas argued that claim denial amounted to Vision Technologies' failure to "provide and secure" benefits for Salas, and thus, allowed Salas to bring an action against his employer for damages under NRS 616B.636(1). (APP 61-63.) Salas attached two letters to the Opposition, both appearing to be from Sierra Nevada Administrators with dates of March 9, 2020, and June 22, 2020. (APP 71-72.) Although Salas argued at the district court level and in this appeal that he submitted a claim to Vision Technologies for worker's compensation benefits, there is nothing in the record to support that contention. (Id.) Salas also argued that CCSD was not his employer and thus not entitled to protections of the exclusive remedy doctrine of the NIIA. (APP 63-64).

On February 23, 2021, Vision Technologies filed its Reply in Support of Its Motion to Dismiss. (APP 233-242.) Vision Technologies argued among other things that NRS 616C provided an injured employee the right to an administrative appeal for contested worker's compensation claims. (APP 238.) Denial of a worker's compensation claim is not the equivalent of the employer failing to "provide and secure" compensation insurance for its employee under NRS 616B.636(1). (Id.) Moreover, in Nevada, to state a cause of action that avoids the NIIA's proscription against common law negligence actions, the injured employee must allege facts to

remove the claim from the purview of the NIIA, i.e., affirmatively allege that Vision Technologies did not have a NIIA-compliant policy of worker's compensation insurance in place at the time of the alleged on-the-job injury. (APP 238-239.)

On March 31, 2021, the district court entered its Order Grating (1) Defendant Vision Technologies, Inc.'s Motion to Dismiss, and (2) Defendant Clark County School District's Motion to Dismiss and Joinder ("Order Granting Dismissal"). (APP 105-110.) The district court accepted Salas' factual allegations and all reasonable inferences as true and did not consider items outside of the Complaint. (APP 108.) Ultimately, the district court held that Salas' on-the-job injury was subject to the exclusive remedy of Nevada's workers compensation statute and dismissed the Complaint against Vision Technologies and CCSD. (APP 108-109.) The district court held that Salas failed to allege an applicable exemption to the exclusive remedy doctrine, or more particularly, that Vision Technologies deliberately and specifically intended to injure Salas. (APP 108.) "Mere allegation that [Vision Technologies] was aware of the alleged hazardous conditions and failed to correct them or provide safety equipment is inadequate to [sic] overcome the NIIA exclusive remedy provision." (Id.)

The district court also rejected Salas' attempt to use his lawsuit to circumvent NIIA's statutory scheme. The district court held that Vision Technologies' alleged rejection of Salas' worker's compensation claim "is irrelevant to the issue at hand" because NRS 616C *et seq.* provides an appropriate administrative appeal procedure of the rejected claim. (Id.) The district court declined leave to amend on two basis: first, a copy of the proposed amended pleading was not attached to the request, and second,

amendment would be futile to overcome the exclusive remedy provision of the NIIA. (Id.)

The district court also held that under NRS 616A.210, CCSD is Salas statutory employer for purposes of the NIIA because Salas admitted that Vision Technologies was hired by CCSD for the work at CCSD's premises, which made CCSD the principal contractor. (APP 108.)

On April 27, 2021, Salas filed a Motion to Reconsider the Order Granting Dismissal. (APP 120-130.) Salas included a copy of a proposed amended pleading to support his request for leave to amend. (APP 128; APP 174-207). On May 11, 2021, Vision Technologies filed its Opposition to the Motion for Reconsideration. (APP 208-219.)

The district court entered its Order Denying Reconsideration on June 18, 2021. (APP 224-228.) The district court reaffirmed dismissal stating that Salas' argument "that the Nevada Industrial Act ("NIIA") in not an exclusive remedy for [Salas], cannot be accepted." (APP 226.) The district court rejected Salas' erroneous interpretation of NRS 616B.636(1) finding that it would improperly require employers "to pay out all NIIA claims" or face a private action for damages by the employees. (Id.) The district court correctly found that NRS 616B.636(1)'s "requirement is simply that [employers] secure a worker's compensation insurance to ensure that NIIA claims can be considered." (Id.) The district court also correctly found that Salas never pled or argued that Vision Technologies did not have NIIA-compliant coverage in place, only that Vision Technologies denied his worker's compensation claim and refused to pay benefits. (Id.) The district court further

concluded that for contested worker's compensation claims, "the proper vehicle would have been making an administrative appeal under NRS 616C," and, therefore, "the instant case bypassing the administrative appeal was incorrectly filed and thus, the dismissal was proper." (Id.)

The district court additionally reiterated that Salas' mere allegation that Vision Technologies and/or CCSD intentionally created a hazardous workplace "will not subject the employer to liability outside worker's compensation." (Id.) The district court explained that the "relevant inquiry is not the degree of negligence or even depravity on the part of the employer, but the narrower question of whether the specific action that injured the employee was an act intended to cause injury to the employee." (APP 227.) Even at the motion to dismiss stage, the employee "must provide facts in the complaint which shows the deliberate intent to bring about the injury." (Id.) The Complaint, and even Salas' proposed amended complaint, failed "to sufficiently show that Defendants' acts were done with specific intent to cause injury to [Salas]." (Id.) Amendment was therefore futile and dismissal was proper. (Id.)

Salas now appeals.

VI.

SUMMARY OF THE ARGUMENT

The district court correctly dismissed Salas' negligence claims against his employer, Vision Technologies, and statutory employer, CCSD, because the claim is

barred by the exclusive remedy doctrine of the NIIA. This Court should affirm the district court's Order Granting Dismissal in all respects.[1]

The exclusive remedy provision of the NIIA provides that "[t]he rights and remedies provided in chapters 616A to 616D, inclusive, of NRS for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive." NRS 616A.020(1). This Court has said that "employers who accept the [NIIA] and provide and secure compensation for injuries by accident sustained by an employee arising out of and in the course of employment are 'relieved from other liability for recovery of damages or other compensation for such personal injury.'" *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 164, 561 P.2d 450, 454 (1976) (internal citations omitted). The NIIA forbids suit by the injured employee against his employer because the "exclusive remedy" provision of the NIIA is exclusive in the sense that no other common law or statutory remedy under local law is possessed by the employee against his employer. *Id.*

There is no dispute that Salas alleges he was injured in the course and scope of his employment with Vision Technologies. The district court correctly applied Nevada law requiring that Salas affirmatively plead that the NIIA does not apply to his alleged on-the-job injury in order to maintain his private action for damages. Salas failed to do so in two clear ways.

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[1] CCSD will address the fifth and final issue presented of whether the district court correctly applied NRS 616A.210 to conclude that CCSD was Salas' statutory employer for purposes of the NIIA. Vision Technologies joins in that argument.

First, although NRS 616B.636(1) permits an employee to bring an action for damages against his employer if the employer fails to "provide and secure compensation under chapters 616A to 616D," Salas never pled that Vision Technologies failed to have a NIIA-compliant policy of worker's compensation insurance in place at the time of his on-the-job injury to invoke NRS 616B.636(1). (And, to be clear, Salas cannot do so.) Because Salas failed to affirmatively plead that the NIIA does not apply to his on-the-job injury, dismissal was proper.

Salas instead argued (in opposition to dismissal only) that he is entitled to maintain his suit under NRS 616B.636(1) because Vision Technologies denied his worker's compensation claim and refused him benefits. Salas misguidedly reasoned that because Vision Technologies denied his benefits claim, Vision Technologies failed to "provide and secure" worker's compensation benefits for him. Salas' interpretation is wrong. "Provide and secure" worker's compensation insurance for purposes of NRS 616B.636(1) means only that an employer enjoys the benefits of the exclusive remedy doctrine, or to be free from tort liability suits, if it obtains a NIIA-compliant policy of worker's compensation insurance for the benefit of its employees, not that the employer must accept and pay all worker's compensation claims submitted. Salas' interpretation renders superfluous whole portions of Nevada worker's compensation statutory scheme, including NRS 616C.295 *et seq.*, which provides an injured employee the right to appeal a contested worker's compensation claim. Under the present circumstances, Salas was not "free to pursue litigation," but should have engaged in the well-established administrative procedures for contested worker's compensation claims.

Second, in order to maintain an action against an employer for intentional injury (and not accidental injury within the purview of the NIIA), Salas was required to allege facts in the complaint showing Vision Technologies' deliberate and specific intent to injure him or plead facts that showed Vision Technologies deliberate intent to bring about the injury. Salas failed to make allegations rising to this level. Instead, Salas merely alleged that Vision Technologies created the hazardous workplace and/or knew of the hazardous workplace condition but still instructed Salas to work therein and failed to provide him with protective equipment. Under Nevada law, hazardous work conditions alone are not an exception to the exclusivity of worker's compensation. Furthermore, an employee must do more than simply label an employer's conduct intentional to avoid the exclusive remedy doctrine. The relevant inquiry is not the degree of negligence or even depravity on the part of the employer, but the narrower question of whether the employer's specific action that injured the employee was an act intended to cause the injury to that employee. Salas failed to affirmatively plead intentional injury to remove his on-the-job injury from the purview of the NIIA. Dismissal on this ground was proper.

The district court also did not abuse its discretion is denying leave to amend the Complaint. First, Salas failed to provide the district court with the proposed amended complaint thereby depriving the district court of the ability to evaluate the amended allegations. Second, after reviewing the proposed amended pleading offered for the first time on reconsideration, the district court reaffirmed that amendment would be futile because Salas was still not able to affirmatively plead the deliberate and specific

intent to injure him that is required to plead an intentional tort and remove Salas' on-the-job injury from the exclusive remedy of worker's compensation.

For these reasons, this Court should affirm the district court's Order Granting Dismissal in all respects.

VII.

ADDITION TO STANDARD OF REVIEW

An order granting a motion to dismiss is reviewed de novo. *See Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). The reviewing court rigorously reviews a decision to dismiss a complaint under NRCP 12(b)(5) on appeal, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. Legal conclusions are reviewed de novo. *Id.*

The denial of a motion to amend is reviewed for an abuse of discretion. See *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).

VIII.

ARGUMENT

A. The District Court Did Not Err When It Dismissed the Complaint on the Basis that the NIIA was the Exclusive Remedy for Salas' On-The-Job Injury and No Applicable Exception Was Sufficiently Pled.

The exclusive remedy provision of the NIIA provides that "[t]he rights and remedies provided in chapters 616A to 616D, inclusive, of NRS for an employee on account of an injury by accident sustained arising out of and in the course of the

employment shall be exclusive." NRS 616A.020(1). This provision is commonly referred to as the exclusive remedy doctrine. This Court has defined an employer's duties and liabilities for workplace injuries as follows:

> Employers who accept the (Nevada Industrial Insurance) Act and provide and secure compensation for injuries by accident sustained by an employee arising out of and in the course of employment are 'relieved from other liability for recovery of damages or other compensation for such personal injury . . .' NRS 616.270. This provision, of course, forbids suit by the injured employee against his employer. This "exclusive remedy" provision of the Act is exclusive in the sense that no other common law or statutory remedy under local law is possessed by the employee against his employer.

Outboard Marine Corp. v. Schupbach, 93 Nev. 158, 164, 561 P.2d 450, 454 (1976) (internal citations omitted).

For the reasons discussed more fully below, Salas' lawsuit is an improper attempt to circumvent the long-standing and exclusive remedy afforded employees for injuries sustained on-the-job provided through the NIIA. Salas cannot rely on NRS 616B.636(1) to maintain this action for damages and he failed to plead an intentional tort such that his on-the-job injury is outside the purview of the NIIA.

As a preliminary matter, the Complaint pleads the requirements of NRS 616A.020 thereby making Salas' on-the-job injury exclusively under the NIIA. Salas expressly alleges that Vision Technologies was his employer at all relevant times to this action, including on June 28, 2019, which was the date of his alleged injury. (APP 6, Compl. at ¶ 17.) Salas further alleges that on or about June 28, 2019, while he was working, or more specifically, "acting within the course of [Vision Technologies']

employment and scope of [Vision Technologies'] authority" (*id.*), he sustained injuries because individuals working near him were permitted to use compressed air to clean the dust out of used computers at his work site. (APP 12-13, Compl., at ¶¶ 33-34.) The Complaint pleads, rather than negates the exclusive remedy doctrine of the NIIA.[2]

1. The District Court Did Not Err When it Dismissed the Complaint Finding that Salas' Failed to Raise NRS 616B.636(1)'s Exception to the NIIA's Exclusive Jurisdiction for On-The-Job Injuries.

Salas cannot find support in NRS 616B.636(1) for his erroneous argument that he may maintain a private action for damages against his employer for personal injury sustained on the job because his employer denied his worker's compensation claim.[3]

NRS 616B.636(1) provides that "[i]f any employer within the provisions of NRS 616B.633 fails to provide and secure compensation under chapters 616A to 616D, inclusive, of NRS, any injured employee or the dependents of the employee may bring an action at law against the employer for damages as if those chapters did not apply."

By its plain language, the failure to "secure and provide compensation under chapters 616A to 616D, inclusive, of NRS" refers to an employer's complete failure to have NIIA-compliant workers' compensation coverage in place at all. *See* NRS 616B.636; *see also Flint v. Franktown Meadows, Inc.*, 449 P.3d 475, *2, n. 2 (Nev.

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[2] Moreover, Salas admits that worker's compensation is the proper avenue to address his on-the-job injury because he argued in opposition to dismissal that he "appropriately sought out" workers' compensation benefits from Vision Technologies. (APP 57, 71-72.)

[3] Although Salas argued at the district court level and now argues on appeal that he made a claim for worker's compensation benefits to Vision Technologies, the record does not support this contention. *See* APP 71-72.

Sept. 26, 2019) (unpublished disposition); *see also Antonini v. Hanna Industries*, 94 Nev. 12, 18, 573 P.2d 1184, 1188 (1978) *overruled on other grounds by Harris v. Rio Hotel & Casino, Inc.*, 117 Nev. 482, 2f P.3d 782 (2001) (interpreting "provide and secure compensation" under NRS 616.270 as "pay premium to the Nevada Industrial Insurance Fund"); *Cummings v. United Resort Hotels, Inc.*, 85 Nev. 23, 25-26, 449 P.2d 245, 247-48 (1969) (rejecting contention that non-compliance with NIIA reporting obligations constitutes a failure to provide and secure compensation). Salas offers no law supporting his interpretation that denial of a worker's compensation claim alone prompts NRS 616B.636(1)'s consequences.

Indeed, there is an entire statutory scheme within the NIIA, located at NRS 616C.295 *et seq.*, that sets forth an injured worker's rights and obligation with respect to contested worker's compensation claims, including the procedures and timeframe to appeal a wrongful claim denial or failure by the employer or insurer to timely respond to a claim.

Erroneously relying on Nevada's notice pleading rule, Salas argues that he was not required to affirmatively plead that the NIIA does not apply to his on-the-job injury. (Opening Brief, at 13.) In particular, Salas maintains that he was not required to allege that his worker's compensation claim was denied. (Id.) However, Salas argument misses the point.

Statutory immunity under the NIIA is an affirmative defense, which Vision Technologies and CCSD affirmatively pled by bringing their motion to dismiss. *See, e.g.*, *Flint v. Franktown Meadows, Inc.*, 449 P.3d 475, *2 (Nev. Sept. 26, 2019). As such, it is the employee's obligation and burden to allege that the NIIA does not apply

in order to maintain an action in court. *See id.* (citing *See McGinnis v. Consol. Casinos Corp.*, 94 Nev. 640, 642, 584 P.2d 702, 703 (1978) ("In order to state a cause of action which avoids the Nevada Industrial Insurance Act's proscription against common law negligence actions, an injured employee need only allege facts which would remove the claim from the purview of the Act." (citations omitted)).

In *Flint v. Franktown Meadows, Inc.*, this Court upheld dismissal of an employee's negligence and intentional tort claims because the employee failed to rebut the employer's claim of NIIA immunity on a motion to dismiss. 449 P.3d at *2 (unpublished disposition). In doing so, this Court reiterated that NIIA immunity is an affirmative defense, and that when facing a motion to dismiss on NIIA immunity grounds, it is the employee's obligation to allege that the NIIA does not apply in order to maintain an action in court. *Id.* This Court further elaborated that the employee could have met her burden by arguing that her employer failed to provide NIIA-compliant compensation insurance. *Id.*

Here, like the plaintiff in *Flint*, Salas failed to meet his burden to allege that the NIIA did not apply. Accepting all allegations as true, the Complaint asserted all facts necessary for Salas' personal injury claim to be within the scope of the NIAA, and therefore, his personal injury claim was barred by the exclusive remedy doctrine (i.e., employment relationship between Salas and Vision Technologies and injury suffered while in the course and scope of Salas' employment). Fatally, the Complaint did not affirmatively allege that Vision Technologies did not have a NIIA-compliant policy of workers' compensation insurance in place at the time of his injury. (And, to be clear, Salas cannot do so.) Whether Salas did or did not allege his worker's compensation

claim was denied is not the point. Salas failed to carry his clear burden to remove his common law negligence claim against Vision Technologies from the purview of the NIIA.[4]

For these reasons, dismissal of the Complaint was correct and the district court's Order Granting Dismissal should be affirmed on this ground.

2. The District Court Did Not Err in Dismissing the Complaint Because Salas Failed to Allege an Intentional Tort, or that Vision Technologies Acted with the Deliberate and Specific Intent to Injure Him, to Remove His On-The-Job Injury From the NIIA's Exclusive Jurisdiction.

Salas also failed to adequately plead an intentional tort.[5] Instead, he merely labeled his employer's conduct in creating a hazardous worksite as intentional. Such is insufficient to remove an on-the-job injury from the purview of the exclusive remedy provision of the NIIA.

The exclusive remedy provision of the NIIA provides the exclusive rights and remedies "for an employee on account of an injury by accident sustained out of and in the course and scope of the employment." NRS 616A.020(1). An injury is defined in relevant part, as "a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence." NRS

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[4] Because Salas cannot maintain the instant action under NRS 616B.636(1), Salas similarly cannot assert NRS 616B.636(3)'s presumption "that the injury to the employee was the result of the negligence of the employer and that such negligence was the proximate cause of the injury" in this improperly filed private action.

[5] Indeed, the Complaint pleads "Negligence as to All Defendants" and utilizes language like "negligently," "carelessly," "recklessly," and "grossly negligent" with respect to Vision Technologies' and CCSD's alleged conduct. (APP 5-14, Compl. at ¶¶ 15-39.)

616A.265(1); *see also Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 874, 8 P.3d 837, 839-40 (2000). NRS 616A.030 defines an accident as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Therefore, "[i]n order for an incident to qualify as an accident, the claimant must show the following three elements: (1) an unexpected or unforeseen event; (2) happening suddenly and violently; and (3) producing at the time, or within a reasonable time, objective symptoms of injury." *Conway*, 116 Nev. at 874, 8 P.3d at 840 *(citing Bullock v. Pinnacle Risk Mgmt.,* 113 Nev. 1385, 1389, 951 P.2d 1036, 1039 (1997)). Accidents are within the purview of the NIIA; intentional torts are not. *Id.*

This Court's decision in *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 8 P.3d 837 (2000) is instructive on the distinction between accidents versus intentional torts. There, employees of the Circus Circus Hotel in Reno filed suit against their employer for personal injury among other things after a number of the employees became sick from what they later learned was carbon monoxide gas accumulating in their basement worksite. *Id.* at 873, 8 P.3d at 838-39. The employees alleged that their employer knowingly permitted unsafe working conditions and intentionally did nothing to resolve it. *Id.* The district court ultimately granted the employer's motion to dismiss finding that the exclusive remedy doctrine of the NIIA barred the employees' tort claims against their employer, which ruling this Court affirmed. *Id.* at 873, 8 P.3d at 839.

In the face of the employees' claims that their employer intentionally exposed them to the noxious fumes, this Court expressed that an employee must do more than

simply label an employer's conduct intentional to avoid the exclusive remedy doctrine, but instead must allege that the employer acted with the deliberate and specific intent to injure the employee. *Id.* at 875, 8 P.3d. at 839 (relying on *Austin v. Johns-Manville Sales Corp.*, 508 F.Supp. 313, 317 (D.Maine 1981) ("Even if the alleged conduct goes beyond aggravated negligence, and includes elements as knowingly permitting a hazardous work condition to exist, . . . [or] willfully failing to furnish a safe work, . . . this still falls short of the kind of actual intention to injure that robs the injury of accidental character." (quoting 2A Arthur Larson & Lex K. Larson, *Workmen's Compensation Law* § 68.13 at 13-8, and cases cited in no. 11 (1976))).

Absent pleading that the employer deliberately and specifically intended to injure the employee through its conduct, an injury resulting from mere exposure to hazardous workplace conditions, like noxious fumes, even if known to the employer and the employer fails to correct, is still an "unexpected or unforeseen event" and thus an "accident" within the meaning of the NIIA. *Id.* at 874, 8 P.3d at 840; *see also see also King v. Penrod Drilling Co.,*652 F. Supp. 1331, 1334 (D. Nev. 1987); *Cerka v. Salt Lake County,* 988 F. Supp. 1420, 1421–1422 (D. Utah 1997) ("a showing of knowledge coupled with the substantial certainty that injury will result" is not enough to avoid the exclusive recovery provision of worker's compensation system); *Angle v. Alexander,* 328 Ark. 714, 945 S.W.2d 933, 935 (1997) ("before the employee is free to bring a tort action for damages against an employer, the facts must show the employer had a 'desire' to bring about the consequences of the acts or that the acts were premeditated with the specific intent to injure the employee").

This Court has stated that "[t]he relevant inquiry is not the degree of negligence or even depravity on the part of the employer, but the more narrow question of whether the specific action that injured the employee was an act intended to cause injury to the employee." *Conway*, 116 Nev. at 874, 8 P.3d at 840 (*citing Sanford v. Presto Mfg. Co.*, 92 N.M. 745, 594 P.2d 1202, 1203 (N.M. Ct. App. 1979). Moreover, on policy grounds, this Court stated, "[i]f an employee may exempt his or her claim from the exclusive remedy provision of the NIIA by merely pleading that the employer knew of a condition and failed to remedy it, then the workers' compensation system would be rendered meaningless." *Id.* at 875, 8 P.3d at 841.

Despite a 31-page Complaint, Salas merely alleges that his employers created a hazardous workplace and/or had knowledge of the hazardous workplace and instructed Salas to work therein without proper ventilation and protective equipment. (APP 6-12, Compl. at ¶¶ 18-31.) Indeed, Salas alleges his workplace was hazardous when individuals used compressed air to clean dust from old computers which then caused dust and pollutants to became airborne in the area where Salas was working. (APP 10-11, Compl. at ¶¶ 28-30.) Salas alleges those airborne particles ultimately caused him to suffer an injury. (APP 12, Compl. at ¶ 33.) The allegation that Salas' workplace constituted a dangerous and hazardous condition due to the build-up of dust and pollutants that could become airborne resembles the noxious fume environment in *Conway*. The employees' allegations in *Conway* fell short, and so do Salas' bare allegations because they lack the necessary allegation that Vision Technologies deliberately and specifically intended to injure Salas. Nothing within the Complaint

comes anywhere near alleging that Vision Technologies acted with a deliberate and specific intent to injury Salas.

Salas' injury was therefore an "unexpected and unforeseen event," which makes it an accident and brings it within the scope of the exclusive remedy doctrine of the NIIA.[6]

Salas may also not rely on allegations that his jobsite was maintained in an "unreasonably hazardous and dangerous condition." (APP 6-12, Compl., at ¶¶ 18-31.) Nevada does not recognize any exception to the exclusive remedy doctrine where the employee faces ultra-hazardous work conditions.

For example, in *Snow v. United States*, 479 F. Supp. 936 (D. Nev. 1979), an employee died from a fall while working as a driller assistant at the Nevada Test Site. The employee's estate filed suit against the employer claiming the working conditions at the Nevada Test Site were ultrahazardous in nature and arguing that the decedent's death was caused by the employer's failure to analyze and enforce numerous safety standards surrounding drilling work, including, without limitation, that the employee was provided little to no safety instruction and no safety equipment, and that the employer failed to repair dangerous conditions. 479 F. Supp. at 938 *(reversed in part on other grounds, United States v. Snow*, 671 F.2d 504 (9th Cir. 1981). The federal district court dismissed the claims against the employer finding that the statutory

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[6] Exposure to the airborne dust particles and pollutants that Salas alleges caused his injury (rash) are sufficiently similar to the noxious fumes and carbon monoxide sickness alleged in *Conway*. Thus Salas' exposure would also meet the "suddenly and violently" requirement for an accident as well as the requirement that it cause him injury "at the time, or within a reasonable time, objective symptoms of injury." *Conway*, 116 Nev. at 875-76, 8 P.3d at 841.

language of NRS 616 *et seq.* contained no exception for "accidents in the course of and arising out of employment which is ultrahazardous in nature." *Id.* at 940. In fact, the federal district court acknowledged that the only real effect that extra-hazardous work would have is on the employer's worker's compensation insurance premiums. *Id.*

As such, Salas failed to adequately plead an intentional tort; therefore the Complaint was correctly dismissed as barred by the exclusive remedy doctrine of the NIIA. The district court's Order Granting Dismissal should be affirmed on this ground.

B. The District Court Did Not Abuse Its Discretion When it Denied Leave to Amend Because Amendment Was Futile.

As a preliminary matter, Salas' request to amend was deficient because he failed to comply with Rule 2.30(a) of the Local Rules of the Eighth Judicial District Court, which requires that "[a] copy of a proposed amended pleading must be attached to any motion to amend pleadings." This deficiency deprived the district court of the ability to assess the sufficiency of the new allegations. Therefore, it cannot be said that the district court abused its discretion in denying Salas' request for leave to amend. *See Pletcher v. Boulevard Theater, LLC*, No. 66196, 66732, 132 Nev. 1018, 2016 WL 1567055, *2 (Apr. 15, 2016) (unpublished disposition) (finding no abuse of discretion in denying motion for leave to amend where copy of proposed amended complaint was not attached to the motion).

Nevertheless, when presented with Salas' proposed amended complaint on reconsideration, the district court properly found that Salas still could not "provide

sufficient information as to Defendants' intentional conduct." (APP 227.) The district court reviewed the entirety of the proposed amended pleading, noting that the "most notable change is in paragraph 17, wherein [Salas] alleges certain action by User Support Services, a division of Defendant CCSD." (Id.) Nonetheless the district court still concluded that "the changes still fail to sufficiently show that Defendants' acts were done with specific intent to cause injury to [Salas]." (Id.)

Moreover, Salas' allegations plainly demonstrated an accident, not an intentional tort. In particular, the Complaint alleges that the use of compressed air that caused the dust and pollutants to become airborne and ultimately injure Salas was for a legitimate purpose of cleaning old computers. (APP 10, Compl., at ¶ 30.) Under such facts, Salas simply cannot genuinely allege that Vision Technologies deliberately and specifically intended to injure him or singled him out for injury. As this Court said in *Conway*, the worker's compensation system would be rendered meaningless if employees could exempt their claims by merely pleading that the employer knew of a hazardous condition and failed to remedy it. *Id.* at 875, 8 P.3d at 841.

For these reason, the district court did not abuse its discretion but correctly denied Salas leave to amend as amendment would be futile. The district court's ruling should be affirmed on this ground.

IX.

CONCLUSION

For the foregoing reasons, Vision Technologies submits that the district court's Order Granting (1) Defendant Vision Technologies, Inc.'s Motion to Dismiss, and (2) Defendant Clark County School District's Motion to Dismiss and Joinder should be

affirmed in all respects. Specifically, the Complaint failed to affirmatively plead that the NIIA does not apply to Salas' alleged on-the-job injury such that he can maintain this action in district court. Salas failed to plead that Vision Technologies did not have NIIA-compliant insurance in place in order to invoke NRS 616B.636(1). Additionally, Salas failed to adequately plead an intentional tort by pleading that his employer deliberately and specifically intended to injure him. Last, the district court did not abuse its discretion in denying Salas' request for leave to amend his Complaint because amendment would have been ultimately futile.

Dated this 7th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the proposed brief complies with the formatting, the typeface, and type style requirements of NRAP 32(a)(4) - (6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman;

2. I further certify that the proposed brief complies with the page or type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 6,580 words.

3. Finally, I hereby certify that I have read the proposed 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 the proposed brief complies with all applicable Nevada Rules of Appellate Procedure in particular, NRAP 28(e)(1), which requires every assertion in the proposed brief regarding matters in the record to be supported by 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.

Date: January 7, 2022 By: */s/ Michelle D. Alarie*

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CERTIFICATE OF SERVICE

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

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