IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE M. FLOYD, *Appellant*, vs. **CARDINAL HEALTH, INC., ET AL.**, *Respondents*.	No.: **85826**	Electronically Filed Jul 10 2023 11:57 AM Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that there are no other law firms or attorneys that have appeared for Appellant in this case pursuant to NRAP 26.1(a). However, the following persons and entities described in NRAP 26.1(a) may have an interest in the outcome of this case:

1. The Clark County Public Defender's Office represented Mr. Floyd in his pretrial, trial, and direct appeal proceedings.

2. David M. Schieck represented Mr. Floyd during his initial state post-conviction proceedings.

3. The Federal Public Defender, District of Nevada has represented Mr. Floyd in all subsequent proceedings.

These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal.

/s/ Marian L. Massey
Marian L. Massey
Pro Bono Attorney of Record

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JURISDICTIONAL STATEMENT

This is an appeal from the District Court's November 8, 2022 order granting Respondent Nevada Department of Corrections' Motion for Reconsideration and dismissing Appellant's claims against NDOC. (R 347–53).[1] On November 28, 2022, Appellant filed a timely Notice of Appeal pursuant to Nevada Rule of Appellate Procedure ("NRAP") 4. (R 354–55). The District Court's order is appealable pursuant to NRAP 3A(b)(1) as it is a final judgment entered in the action commenced in the court where the judgment was rendered.

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(1) and NRAP 17(a)(11) as it involves both a death penalty inmate and several questions of first impression involving the application of Nevada common law regarding an inmate's ability to seek damages arising in tort law relating to the improper distribution of certain medications for use in his execution, to enforce

[1] Appellant cites to the Record on Appeal filed by the Clerk of the Court on January 13, 2023 as "R" throughout this Opening Brief as permitted by the Court's March 27, 2023 Order Reinstating Briefing.

pharmaceutical manufacturing companies' agreements prohibiting the distribution of their medications to state and federal prisons, and civil liability that may be assessed against NDOC for its actions to conceal the purchase and distribution of medications for use in Appellant's execution.

ISSUES PRESENTED

(1) Whether the District Court improperly dismissed Appellant's claims against Respondents with prejudice based upon jurisdictional defects arising from lack of standing.

(2) Whether the District Court improperly dismissed Appellant's negligent performance of an undertaking claim with prejudice against Cardinal Health without evaluating whether Cardinal Health owed Appellant a duty to use reasonable care under Section 324A of the Restatement (Second) of Torts when it undertook services to restrict distribution of medications for use in executions to NDOC.

(3) Whether the District Court improperly dismissed Appellant's breach of contract claim with prejudice when it concluded Appellant lacked standing as a third-party beneficiary of the Agreements between Cardinal Health and pharmaceutical drug manufacturers when it failed to evaluate Appellant's foreseeable reliance upon the Agreements.

(4) Whether the District Court improperly dismissed Appellant's claim against NDOC when it determined Appellant failed to plead any viable claims against NDOC.

INTRODUCTION

Nevada has been at the forefront of litigation involving the death penalty since 1921.[2] In 2018, Nevada took center stage in an ongoing battle between pharmaceutical drug manufacturers and the states that currently allow the death penalty when a pharmaceutical company intervened in the execution of Scott Dozier, a death row inmate.[3] The litigation came to a grinding halt following Mr. Dozier's "apparent suicide," leaving the door open for pharmaceutical manufacturers—and their third-party beneficiaries—to challenge the improper distribution of medications used for executions.[4]

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[2] *Glossip v. Gross*, 576 U.S. 863, 868, 135 S. Ct. 2726, 2732 (2015).

[3] *Nevada Judge Halts Execution After Objections From Drug Company*, PBS (July 11, 2018), https://www.pbs.org/newshour/nation/nevada-judge-halts-execution-after-objections-from-drug-company (last visited June 16, 2023).

[4] Steve Almasy & Madeline Holcombe, *Nevada Death Row Inmate Scott Dozier Dies of Apparent Suicide*, CNN (Jan. 6, 2019), https://www.cnn.com/2019/01/05/us/nevada-death-row-inmate-apparent-suicide/index.html (last visited June 16, 2023); *State v. Eighth Judicial Dist. Court,* 432 P.3d 758 (Nev. 2019) (unpublished) (dismissing writ petition and appeal as moot); *Nevada Agrees to Return Supply of Execution Drugs to Manufacturers*, AMERICAN BAR ASSOCIATION (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_represe

Three years later, it was discovered that NDOC was *once again* able to obtain restricted pharmaceutical medications for use in the execution of Appellant, Zane M. Floyd ("Appellant").[5] Although pharmaceutical manufacturers require their distributors to enact protocols to prevent the sale of certain medications to prisons, it was discovered that Respondent Cardinal Health, Inc. ("Cardinal Health") sold medications to NDOC for Appellant's execution. The proposed combination of medications identified by the NDOC for Appellant's execution has never been used for an execution, and creates an increased risk for the "botched" execution of Appellant resulting in extensive pain and suffering prior to his death.[6]

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ntation/project_press/2020/summer/nevada-to-return-execution-drugs/ (last visited June 16, 2023).

[5] Dana Gentry, *Company Demands Return of Drug "Surreptitiously" Obtained for Execution*, NEVADA CURRENT (June 25, 2021), https://www.nevadacurrent.com/blog/company-demands-return-of-drug-surreptitiously-obtained-for-execution/ (last visited June 16, 2023) (discussing the demand letter sent by Hikma Pharmaceuticals, Inc. to NDOC requesting the immediate return of the Ketamine that was improperly sold for the use in Appellant's execution).

[6] *See Floyd v. Daniels*, 2021 WL 2827291, 2021 U.S. Dist. LEXIS 125738, at *14 (D. Nev. 2021) (unpublished) (finding the combination of drugs to be used for Appellant's execution were untested); *see also* Nicholas Bogel-Burroughs, *Death Penalty Researchers Call 2022 the "Year of the Botched Execution,"* NEW YORK TIMES (Dec. 16, 2022)

Appellant commenced litigation to pursue novel claims arising in tort and contract law relating to Cardinal Health's distribution of certain medications to NDOC for use in Appellant's execution. The District Court ultimately dismissed each of Appellant's claims against Cardinal Health and NDOC with prejudice for failure to state a claim under Rule 12(b)(5).

The threshold issue on appeal is whether Appellant can prove "no set of facts" that would entitle him to relief against either Cardinal Health or NDOC. The extensive allegations in the Complaint and record on appeal demonstrate a factual basis for Appellant's claims, and each of Appellant's claims involve fact-specific inquiries that should be adjudicated by the trier of fact. Appellant's common law tort and contract claims should be reversed and remanded on that basis alone.

The District Court also relied upon incorrect legal standards for each of its determinations supporting dismissal, interweaving contract principles into the elements for tort claims and negligence-based duty requirements for contract claims. In doing so, the District Court abused

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https://www.nytimes.com/2022/12/16/us/death-penalty-botched-executions.html (last visited June 17, 2023).

its discretion and adopted new standards that do not comply with Nevada law. Given the extensive procedural and substantive errors contained in the District Court's orders, the improper dismissal of Appellant's claims against Cardinal Health and NDOC should be reversed and remanded with instructions for the court to apply the appropriate legal standards and to permit factual development on Appellant's claims.

FACTUAL BACKGROUND

I. PHARMACEUTICAL MANUFACTURERS' PUBLIC CAMPAIGN TO PROHIBIT USE OF THEIR PRODUCTS FOR EXECUTIONS.

Over the past two decades, pharmaceutical manufacturing companies have issued public statements condemning the use of their products for lethal injections as "inconsistent with our values and mission of improving lives and contrary to the intended label purpose of the products." (R 49–55). These companies have also expressed concern regarding the use of their products for "botched" lethal injection executions that have resulted in extensive pain and suffering prior to death. (R 12).

Beginning in 2013, at least three pharmaceutical manufacturing companies—Alvogen, Inc. ("Alvogen"), Sandoz Inc. ("Sandoz"), and Hikma Pharmaceuticals USA, Inc. ("Hikma") (collectively referred to as

the "Manufacturers")—implemented Controlled Distribution Programs (the "CDPs") with their distributors to restrict the sale of their products to prisons for use in executions. (R 37–41, 44).

Respondent Cardinal Health is a pharmaceutical distribution company that entered into Wholesale Service Agreements and CDPs with the Manufacturers (the "Agreements"). (R 12, 36–44, 46). In exchange, the Manufacturers agreed to pay a service fee to Cardinal Health for implementing the CDPs.[7] (R 38, 44).

Cardinal Health is the sole distributor of pharmaceutical drugs to Respondent NDOC. (R 133–35, 138, 224). Pharmaceutical drugs may be purchased through Cardinal Health's easy-to-use portal by typing in the name of the product. (R 228, 240). If a product is eligible for purchase, NDOC may order the product directly from Cardinal Health's portal similar to "ordering from Amazon." (R 229) If a product is ineligible or "blocked," NDOC may not purchase the product. (R 240–41).

Blocking is commonly used to restrict the distribution of

[7] The service fees for implementing the Agreements were significant. Cardinal Health's service fee for a single manufacturer—Sandoz—was up to $100,000 per year. (R 44).

pharmaceutical drugs used for lethal injections, and NDOC is aware of the Manufacturer's blocking policies.[8] (R 228). In fact, NDOC has been blocked from obtaining certain medications used to perform lethal injections for "years." (R 229–30). Prior to the use of Cardinal Health's portal, NDOC was required to complete an online survey specifying the reason for purchasing certain medications and blocked from purchasing medication for use in executions. (*See* R 231–33).

II. THE MANUFACTURERS' INTERVENTION IN THE SCHEDULED EXECUTION OF DEATH ROW INMATE SCOTT DOZIER.

Nevada made national news in 2018 when the Manufacturers initiated litigation against NDOC seeking to recover their products and prevent the lethal injection of Scott Dozier. (R 13–15, 33–34). Prior to commencing litigation, the Manufacturers each sent correspondence to NDOC and officials of the State of Nevada requesting the return of medications that had been improperly distributed to NDOC for the execution of Mr. Dozier. (R 14–15). NDOC refused to return the medications. (R 14–15).

[8] Linda Fox, the former Director of the Pharmacy for NDOC, testified: "Manufacturers block the purchase of their drugs to prisons if they think it's going to be used as a lethal injection drug." (R 228).

Alvogen, a manufacturer of Midazolam, commenced litigation in July of 2018 alleging that its products were improperly obtained under false pretenses for the execution of Mr. Dozier and sought a preliminary injunction commanding the NDOC to immediately return its medication (the "*Alvogen* Litigation"). (*See* R 15). Sandoz, the manufacturer of Cisatricuriam, and Hikma, the manufacturer of Ketamine, Fentanyl, and Alfentanil, intervened in the lawsuit and demanded return of their products. (R 15).

During the pendency of the *Alvogen* Litigation, portions of the CPDs and Agreements between the Manufacturers and Cardinal Health were included in the record and publicly disseminated. (*See* R 36–47). The litigation ultimately halted Mr. Dozier's scheduled execution, and NDOC ultimately returned the expired medications to the Manufacturers. (R 15).

III. THE ANTICIPATED EXECUTION OF APPELLANT & HIS CLAIMS AGAINST THE NDOC AND ITS SOLE DISTRIBUTOR OF LETHAL INJECTION PRODUCTS, CARDINAL HEALTH.

On March 26, 2021, Appellant's execution was announced to the

public.[9] (R 16). On May 25, 2021, NDOC ordered Ketamine—a product it intended to use for the execution of Appellant—through the Cardinal Health portal. (R 224, 228, 239).

On or around June 9, 2021, NDOC produced its Execution Manual, which contained a list of the lethal injection products that would be used in the execution of Appellant and required the Director of NDOC to notify Appellant in writing if there are any changes to the protocol. (R 16, 62–63). According to the Execution Manual's protocol, Appellant would be administered some combination of the following medications: Fentanyl or Alfentinal, Ketamine, Cis-atracurium, and Potassium Chloride or Potassium Acetate. (*See* R 12, 63–65). NDOC has been "blocked" from purchasing these products from Cardinal Health's portal. (R 229–30).

On November 9, 2021, Appellant commenced litigation against Respondents Cardinal Health and NDOC asserting claims for breach of contract, negligent performance of an undertaking, false pretenses,

[9] Although not alleged in the Complaint, a federal court in Nevada concluded that the Director of NDOC "knew as early as the first week in April if not sooner the drugs that would likely be included in the [execution] protocol, but the NDOC Defendants chose not to share this information with [Appellant] Floyd." *Floyd*, 2021 WL 2827291, 2021 U.S. Dist. LEXIS 125738, at *5-6.

declaratory relief, and injunctive relief.[10] (R 1–69). NDOC filed an Answer to the Complaint on February 28, 2022. (R 131–41). In its Answer, NDOC affirmed that it purchased the drugs for Appellant's execution through Cardinal Health's portal, its purchase of the drugs was "not subject to any limitation on NDOC's ability to purchase the drugs, as evidenced by NDOC's ability to purchase the drugs." (R 133).

On July 13, 2023, the District Court dismissed Appellant's claims against Cardinal Health for failure to state a claim under Rule 12(b)(5). (R 280–86). The District Court concluded the allegations in the Complaint were sufficient to demonstrate Appellant was a third-party beneficiary of the Agreements, and the Agreements expressed an intent to benefit Appellant. (R 283). However, the District Court determined Appellant failed to allege that he "acted or refrained from acting in a manner in reliance upon the [Agreements]" and it was "quite impossible" for Appellant to demonstrate his reliance upon the Agreements. (R 283–84).

The District Court further concluded that Appellant failed to

[10] Appellant initially named the Manufacturers as defendants in the Complaint, but voluntarily dismissed the Manufacturers without prejudice on March 7, 2022. (R 160).

adequately plead a cause of action for negligent performance of an undertaking based upon Appellant's failure to allege "a duty owed to him, or a duty that he is entitled to enforce," and he was not a third-party beneficiary with standing to enforce the claim. (R 284–85). The District Court also dismissed Appellant's declaratory relief and injunctive relief claims because Appellant "has no standing to bring his claims, and has not properly alleged essential elements, he has not shown a likelihood of success on the merits." (R 285).

On July 13, 2022, the District Court also denied NDOC's motion for judgment on the pleadings pursuant to NRCP 12(c) based upon its denial of each allegation relating to Appellant's false pretenses claim. (R 287–89). NDOC filed a motion for reconsideration of its motion for judgment on the pleadings, which was granted by the District Court on November 8, 2022. (R 347–52). Relying upon NRCP 12(b)(5), the District Court concluded Appellant failed to state a claim because it was unclear whether the tort of false pretenses exists under Nevada law. (R 350–51). The District Court further concluded that and even if such a tort was recognized, Appellant "cannot prove NDOC owed a duty to him, NDOC made any representations to him; NDOC intended to defraud him; that

he relied upon NDOC's representations; or that he *has* suffered any damages," and because Appellant "has no standing to bring this claim."[11] (R 351) (emphasis in original). The District Court further held:

> Denying NDOC's motion for reconsideration is appropriate, and mandated by the current law. ***However, such a ruling would only delay the inevitable and waste valuable limited judicial resources***. NDOC would next file a motion for summary judgment admitting Plaintiff's factual allegations and/or arguing that he could not prove his allegations, and in either event, he lacks standing to bring the action. ***The motion would be granted***.

(R 351–52) (emphasis added). This appeal follows.

[11] The District Court dismissed this claim against both Cardinal Health and the NDOC despite allegations in the Complaint demonstrating this claim was solely asserted against the NDOC. (R 285, 347–52).

SUMMARY OF ARGUMENT

The District Court misapplied the appropriate legal standard for each of Appellant's claims against Respondents. First, dismissals based upon jurisdictional defects such as standing must be dismissed *without prejudice* under NRCP 41(b). Because the District Court's dismissal with prejudice of Appellant's claims against both Cardinal Health and NDOC hinge upon its finding that Appellant lacks standing to enforce his claims, the dismissals should have been without prejudice and with leave to amend. *See infra*, Argument, Part II.

Second, Nevada has recognized that a duty to use reasonable care may be established if a party undertakes performance that it knows or reasonably should know is intended to protect a third party under Section 324A of the Restatement (Second) of Torts. Such a duty does not rely upon a contractual arrangement, instead the duty arises when a party commences performance of the undertaking. The District Court erred when it applied an incorrect legal standard and determined Appellant was unable to demonstrate Cardinal Health owed him a duty that he was "entitled to enforce" because he was not a third-party beneficiary of the Agreements. Application of the correct legal standard warrants reversal

of the District Court's order. *See infra*, Argument, Part III.

Third, Nevada law allows a third-party beneficiary to enforce a contract's terms if the contract expresses a clear intent to benefit the third party and the third-party beneficiary's reliance upon the contract is foreseeable. Rather than determine whether Appellant's reliance upon the Agreements he seeks to enforce was foreseeable, the District Court's order solely focuses upon whether Appellant may plausibly demonstrate he relied upon the contracts. The District Court's failure to evaluate the foreseeability of Appellant's reliance upon the contracts applied an incorrect legal standard, warranting reversal of its order dismissing Appellant's breach of contract claim. *See infra*, Argument, Part IV.

Fourth, Appellant plausibly alleged several claims against NDOC under NRCP 8, including aiding and abetting Cardinal Health's breach of duty to Appellant and fraudulent concealment. Because Appellant set forth sufficient facts to satisfy the requirements of notice pleading relating to his claims, the District Court's order dismissing Appellant's claim against NDOC for false pretenses should be reversed and remanded. *See infra*, Argument, Part V.

ARGUMENT

I. STANDARD OF REVIEW.

A district court's decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). Dismissing a complaint is only appropriate "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.

Although questions of law are reviewed *de novo*, this Court may reverse a district court's decision if the court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact."[12] *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., Ltd. Liab. Co.*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). The application

[12] *See SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993) ("Questions of law are reviewed de novo"); *Sadler v. PacifiCare of Nev., Inc.*, 130 Nev. 990, 993–94, 340 P.3d 1264, 1266–67 (2014) (discussing Rule 12(c) motions); *R.J. Reynolds Tobacco Co. v. Eighth Judicial Dist. Court*, 514 P.3d 425, 429 (Nev. 2022) (discussing motions for reconsideration).

of an incorrect legal standard is an abuse of discretion not entitled to deference. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505–06 (2007); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) ("[D]eference is not owed to legal error"). A court's application of an incorrect legal standard affecting a party's rights cannot be considered harmless error. *Bergmann v. Boyce*, 109 Nev. 670, 677–78, 856 P.2d 560, 565 (1993), *superseded by statute on other grounds as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017).

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED APPELLANT'S CLAIMS AGAINST RESPONDENTS WITH PREJUDICE FOR JURISDICTIONAL DEFECTS RELATING TO STANDING.

If a court dismisses an action for lack of jurisdiction, the dismissal must be without prejudice. NRCP 41(b); *see Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1057, 194 P.3d 709, 715 (2008). Standing is a "jurisdictional mandate," thus cases that are dismissed based upon lack of standing must be dismissed without prejudice.[13] *Smaellie v. City of*

[13] This approach has been adopted by a majority of courts. *Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir. 1995) ("If a plaintiff lacks standing to bring a matter before a court, the court lacks jurisdiction to decide the merits of the underlying case"); *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 175–76 (2d Cir. 2021) (affirming dismissal of complaint for

Mesquite, 133 Nev. 1075, 393 P.3d 660 (2017) (unpublished) (collecting cases); *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017) ("Dismissals for lack of subject-matter jurisdiction . . . must be without prejudice, because a lack of jurisdiction deprives the dismissing court of any power to adjudicate the merits of the case").

Here, the District Court erred when it dismissed each of Appellant's claims with prejudice for lack of standing as a third-party beneficiary of the Agreements. (R 284–85, 351–52). As discussed in further detail below, the District Court improperly concluded Appellant lacked standing as a third-party beneficiary under the Agreements and dismissed both of Appellant's claims against Cardinal Health for breach of contract, negligent performance of an undertaking, declaratory relief, and injunctive relief with prejudice and without leave to amend. (R 283–86). The District Court also erred when it concluded Appellant lacked "standing to bring [his] claim" against NDOC, and dismissed his false pretenses claim with prejudice and without leave to amend. (R 350–52). Assuming the Appellant was unable to establish standing, which

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lack of standing without prejudice); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006); *Cty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 463–65 (8th Cir. 2004).

Appellant does not concede, the District Court lacked subject matter jurisdiction to adjudicate his claims and was unable to reach the merits of the case.

As a result, the District Court erred when it dismissed Appellant's claims against Cardinal Health and NDOC with prejudice based upon jurisdictional defects arising from Appellant's lack of standing, and its orders should be "corrected to a dismissal without prejudice" permitting leave to amend. *Brereton*, 434 F.3d at 1216; *see* NRCP 15(a)(2).

III. THE DISTRICT COURT ERRED WHEN IT DISMISSED APPELLANT'S CLAIM FOR NEGLIGENT PERFORMANCE OF AN UNDERTAKING BASED UPON THIRD-PARTY BENEFICIARY PRINCIPLES.

A. Under the Correct Legal Standard, Appellant Pleaded Sufficient Facts to Demonstrate Cardinal Health Negligently Undertook a Duty to Prevent the Distribution of Lethal Injection Products to NDOC.

Nevada follows the Restatement (Second) of Torts' definition of Liability to Third Person for Negligent Performance of an Undertaking:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm . . .[14]

[14] *See Wright v. Schum*, 105 Nev. 611, 615, 781 P.2d 1142, 1144

To plead a viable claim for negligent performance of an undertaking, a party must allege: (1) the defendant gratuitously or for consideration undertook services that the defendant knew or reasonably should have known were for the protection of the plaintiff, (2) the defendant failed to exercise reasonable care in the performance of the services, and (3) the failure to exercise reasonable care increased the risk of harm to plaintiff. [15] *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1492–93, 970 P.2d 98, 114 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001).

Rather than apply the correct legal standard to assess whether Cardinal Health owed Appellant a duty to use reasonable care under

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(1989) (adopting Restatement (Second) of Torts § 324A (1979) [hereinafter "Section 324A"]); *see also Wiseman v. Hallahan*, 113 Nev. 1266, 1270, 945 P.2d 945, 947–48 (1997) (adopting the definition of Negligent Performance of an Undertaking to Render Services contained in Restatement (Second) of Torts § 323 (1977)); *see also* Restatement (3d) of Torts: Physical & Emotional Harm § 43 (2012) (modifying Section 324A).

[15] *See also Artiglio v. Corning Inc.,* 18 Cal. 4th 604, 614, 76 Cal. Rptr. 2d 479, 484, 957 P.2d 1313, 1318 (1998) ("Recovery on section 324A's negligent undertaking theory thus requires proof of each of the well-known elements of any negligence cause of action, viz, duty, breach of duty, proximate cause and damages") (citations omitted).

Section 324A, the District Court concluded Appellant has not properly alleged a "*duty to him*, or a duty that he is entitled to enforce," and Appellant is not a third-party beneficiary. (R 284–85) (emphasis in original). This ruling was erroneous for several reasons: (1) it misapplied the appropriate legal standard for assessing whether a party owes a duty under Section 324A; (2) it improperly included third-party beneficiary principles arising under contract law to assess tort liability; and (3) the claim should have been dismissed *without prejudice* if it was based upon Appellant's lack of standing.

1. Appellant Pleaded Plausible Facts Demonstrating Cardinal Health Undertook a Duty to Protect Appellant.

Section 324A provides that a party who "undertakes services on behalf of another assumes a duty to use due care," and the undertaking "creates a duty that would not otherwise exist." [16] *Mahlum*, 114 Nev. at 1492–93, 970 P.2d at 114 (quoting *In re Silicone Gel Products Liability Litigation*, 887 F. Supp. 1455, 1460 (N.D. Ala. 1995)). Thus, a duty to use reasonable care under Section 324A arises once a party undertakes an obligation to perform services that reasonably should have been

[16] *See also* Restatement (3d) Torts § 43, cmt. d ("When an actor creates a risk of harm, a duty of reasonable care exists").

recognized as necessary to prevent harm to third parties.[17] *See id.* Although "the 'precise nature and extent' of [an alleged Section 324A] duty 'is a question of law . . . the nature and extent of the act undertaken, [presents] a question of fact.'" *Id.* at 1475, 970 P.2d at 103.

Appellant pleaded plausible facts to demonstrate Cardinal Health assumed a duty to use reasonable care because it undertook services to restrict the distribution of medications used for executions that Cardinal Health knew or reasonably should have known was necessary to protect Appellant. (R 14–19). Cardinal Health was paid by the Manufacturers to implement protocols to prevent the distribution of lethal injection

[17] Courts throughout the country have concluded a duty attaches when a party "specifically has undertaken to perform the task that he or she is charged with having performed negligently." *Grogan v. Uggla*, 535 S.W.3d 864, 874 (Tenn. 2017) (quoting *Patentas v. U.S.*, 687 F.2d 707 (3rd Cir. 1982)); *Artiglio*, 18 Cal. 4th at 614–15, 76 Cal. Rptr. 2d at 484, 957 P.2d at 1318 (quoting *Blessing v. United States*, 447 F. Supp. 1160, 1188–89 (E.D. Pa. 1978) (finding that for liability to be imposed, the party "must specifically have undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully"); *Derosia v. Liberty Mut. Ins. Co.*, 155 Vt. 178, 187, 583 A.2d 881, 886 (Vt. 1990) ("In order for such a duty to arise, one does not have to assume the entire responsibility of another party"); *King v. Nat'l Spa & Pool Inst.*, 570 So. 2d 612, 615 (Ala. 1990) ("The ultimate test of a duty to use [due] care is found in the foreseeability that harm may result if care is not exercised") (citations omitted).

drugs, which included a "blocking" system precluding NDOC from purchasing certain medicines from the Manufacturers. (R 12–15, 228–30, 239–41). Thus, once it implemented the protocols and "blocking" system, Cardinal Health assumed a duty to use reasonable care in its undertaking to provide services that were intended to protect Appellant.

Cardinal Health knew or reasonably should have known the CDPs were intended to protect Appellant because the protocols were enacted to prevent the distribution of medications to prisons for use in lethal injections. (R 12–15, 36–44, 228–30, 239–41). Thus, it was reasonably foreseeable that Appellant, a death row inmate sentenced to execution by lethal injection, would be harmed by Cardinal Health's failure to exercise reasonable care with respect to the distribution of medicines used for executions to NDOC. (R 12–15). Accordingly, once Cardinal Health took affirmative steps to prevent the distribution of lethal injection products to NDOC, it undertook a duty to use reasonable care in the performance of that service.

Presuming the allegations in the Complaint as true, Appellant pleaded plausible allegations demonstrating Cardinal Health owed him a duty under Section 324A, and any determination regarding the nature

and extent of that duty is a question of fact that should be submitted to a jury.[18]

2. Cardinal Health Negligently Undertook Its Duty to Appellant By Failing to Implement Appropriate Protocols to Restrict Distribution of Lethal Injection Products to NDOC and Increasing the Risk to Appellant.

Once a party takes affirmative steps in furtherance of an undertaking under Section 324A, liability may arise if the party's failure to exercise reasonable care increased the risk of harm to the third party.[19] *See Mahlum,* 114 Nev. at 1503–04, 970 P.2d at 121. Once services commence, a party is required to "fully complete [its] course of conduct"

[18] *Mahlum*, 114 Nev. at 1493, 970 P.2d at 114 (concluding jury was allowed to consider the nature and scope of the Section 324A undertaking "so that its concomitant duty, if any, could be determined" by the court); *see* Restatement (3d) Torts § 42 cmt. g ("When reasonable minds can differ about whether the risk or negligence was within the scope of the undertaking, it is a question of fact for the factfinder"); *Artiglio*, 18 Cal. 4th at 615, 76 Cal. Rptr. 2d at 484–85, 957 P.2d at 1318–19 ("[I]f the record can support competing inferences, or if the facts are not yet sufficiently developed, "'an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits'") (citations omitted).

[19] *See Wright*, 105 Nev. at 618–19, 781 P.2d at 1146–47 (concluding landlord's knowledge of the dog's aggressive tendencies, oral agreement with the tenants and owners of the dog to always keep the dog in the house or on a chain, failure to enforce the oral agreement, and subsequent attack of a minor by the dog may warrant liability based upon the landlord's negligent performance of the undertaking).

or, if the undertaking is discontinued, undertake measures to protect the third party. *Id.* at 1498, 970 P.2d at 118. An increased risk of harm involves "the invasion of any legally protected interest of another," and does not necessarily require a party to establish a "present physical injury." *Sadler*, 130 Nev. at 999–1000, 340 P.3d at 1270 (quoting Restatement (Second) of Torts § 7(1) (1965)) (emphasis in original); *Lerner Shops v. Marin*, 83 Nev. 75, 79, 423 P.2d 398, 401 (1967) (addressing injuries arising from mental suffering and future pain and suffering).

Here, the focus of the inquiry is whether Cardinal Health's failure to exercise reasonable care to prevent the distribution of medicines used for lethal injections to NDOC increased the risk of harm to Appellant. *See Mahlum*, 114 Nev. at 1498, 970 P.2d at 118. The allegations in Appellant's Complaint taken as true satisfy this inquiry.

First, Appellant plausibly alleged that Cardinal Health failed to use reasonable care when it distributed the Manufacturers' medications to NDOC for the execution of Appellant, which increased the risk of harm to Appellant. (R 12–15). Although Cardinal Health implemented certain protocols to prohibit the distribution of particular medicines to NDOC—

including a "blocking" system to preclude distribution of certain medications to NDOC—Appellant has pleaded facts demonstrating Cardinal Health's protocols were inadequate. (R 12–19, 133–35, 137–38, 228–30, 239). For the second time in approximately three years, Cardinal Health allowed NDOC to purchase the Manufacturers' products for use in an execution. (R 12–15, 239, 133–35, 137–38, 228–30, 239). Given Cardinal Health had actual knowledge of its inadequate "blocking" procedures following the *Alvogen* Litigation, Appellant's allegations that Cardinal Health's repeated failure to implement appropriate "blocking" procedures to prevent the distribution of lethal injection medications to NDOC for Appellant's execution plausibly allege a breach of the duty to use reasonable care.

Second, Appellant also plausibly alleged that Cardinal Health's failure to use reasonable care increased the risk of a "botched execution" and harm to Appellant. (R 12). NDOC's Execution Manual contains a new combination of medications that will be used for the first time during the execution of Appellant, which increases the risk of a "botched execution." (R 16). Appellant also faces "imminent injury and death" as a result of Cardinal Health's actions, including psychological injuries and

significant pain and suffering immediately preceding Appellant's death. (R 19).

Accordingly, construing the allegations in the Complaint as true, Appellant plausibly alleged facts establishing Cardinal Health negligently undertook its duty to perform services by allowing NDOC to obtain the Manufacturers' medications for use in Appellant's execution, which has increased the risk of harm to Appellant.

B. The District Court Erred When It Applied Contract Principles to Appellant's Tort Claim for Negligent Performance of an Undertaking.

Instead of applying Section 324A, the District Court dismissed Appellant's negligent performance of an undertaking claim on the basis that Appellant was not entitled to enforce a duty against Cardinal Health because he was not a third-party beneficiary of the Agreements. (R 284–85). Although the terms of the Agreements may be relevant to determine the scope of Cardinal Health's undertaking, liability for negligent performance of an undertaking does not require Appellant to demonstrate a contractual agreement between the parties or standing as

a third-party beneficiary.[20] *See Wright*, 105 Nev. at 615, 781 P.2d at 1144.

The District Court erred when it concluded Appellant's lack of standing to enforce the Agreements precluded Cardinal Health's liability under Section 324A rather than applying the correct legal standard. (R 284–85). Appellant was not required to demonstrate standing as a third-party beneficiary to plausibly allege Cardinal Health owed him a duty, instead he needed to plead facts establishing Cardinal Health undertook services that it knew or reasonably should have known were for the protection of Appellant. *See id*. As a result, the District Court abused its discretion when it applied an incorrect legal standard, warranting reversal of the order dismissing Appellant's Section 324A claim against

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[20] A comment to the modified version of Section 324A in the Restatement (Third) of Torts is instructive:

> *h. Relationship to contractual duties*. The duty imposed by this Section is independent of any contractual obligations. The duty of reasonable care imposed by this Section protects against physical or emotional harm and exists regardless of whether there is a contract, whether a claim for breach of contract is available, or whether the plaintiff is a third-party beneficiary of the contract. The terms of a contract may be relevant to the existence and scope of an undertaking, but they do not determine whether a duty exists.

Restatement (3d) Torts § 43, cmt h.

Cardinal Health.

Finally, even assuming the Court concludes Appellant failed to plead plausible facts demonstrating the elements of his Section 324A claim against Cardinal Health, the District Court's dismissal due to lack of standing should have been without prejudice and with leave to amend. *See supra*, Legal Argument, Part II.

IV. THE DISTRICT COURT IMPROPERLY CONCLUDED APPELLANT, A DEATH ROW INMATE, FAILED TO ALLEGE PLAUSIBLE FACTS DEMONSTRATING HE IS AN INTENDED THIRD-PARTY BENEFICIARY OF AGREEMENTS PRECLUDING DISTRIBUTION OF SUBSTANCES UTILIZED FOR LETHAL INJECTIONS IN PRISONS.

A. Dismissal Was Inappropriate Because Appellant Sufficiently Pleaded Facts Demonstrating He Is an Intended Third-Party Beneficiary of the Agreements.

In Nevada, to assert standing to enforce a contract as a third-party beneficiary, "there must clearly appear a promissory intent to benefit the third party . . . and ultimately it must be shown that the third party's reliance thereon is foreseeable." *Elizabeth E. v. ADT Sec. Sys. West Inc.*, 108 Nev. 889, 894, 839 P.2d 1308, 1311 (1992) (quoting *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 13.2d 819, 824–25 (1977)). The first prong of the third-party beneficiary status test focuses upon whether there is a clear intent to benefit the third party by evaluating "the parties' intent,

gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Canofora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 559, 604–05 (2005); *see Olson v. Iacometti*, 91 Nev. 241, 245–46, 533 P.2d 1360, 1363–64 (1975).

The second prong of the third-party beneficiary status test focuses upon whether the third-party beneficiary's reliance upon the agreement is foreseeable. *Lear v. Bishop*, 86 Nev. 709, 714, 476 P.2d 18, 22 (1970). Foreseeable reliance upon an agreement may be demonstrated by showing that a party knew or reasonably should have known that a third party would have relied upon the agreement. *See Elizabeth E.*, 108 Nev. at 894, 839 P.2d at 1311. Foreseeability is typically an issue of fact for the jury to decide. *See Basile v. Union Plaza Hotel & Casino*, 110 Nev. 1382, 1382, 887 P.2d 273, 275 (1994) (citing *Elko Enterprises, Inc. v. Broyles*, 105 Nev. 562, 566, 779 P.2d 961, 964 (1989)).

Here, the Complaint sets forth sufficient facts to satisfy both prongs of the third-party beneficiary test. (R 12–15). Indeed, the District Court conceded this this point when it determined that Appellant "specifically alleged that he is a third-party beneficiary of the [A]greements," which is "sufficient to avoid dismissal at this stage of the litigation." (R 283–84).

The District Court also properly concluded that Appellant pleaded sufficient facts to demonstrate the Agreements indicated a clear intent to benefit Appellant. (R 283). However, the District Court erred when it determined that it was "quite impossible" for the Appellant to "even allege his reliance" upon the Agreements between Cardinal Health and the Manufacturers. (R 284). The District Court ignored a critical element of the two-prong test—the *foreseeability* of Appellant's reliance upon the Agreements—and instead focused solely upon whether Appellant relied upon the Agreements. *Id*.

Appellant's Complaint alleges extensive facts demonstrating his reliance upon the Agreements was foreseeable. (R 12–18). First, at the time the Manufacturers entered into the CDPs with Cardinal Health, each of the Manufacturers had already released public statements condemning the misuse of their medicines for use in lethal injections and asserting the companies intended to establish protocols to restrict the distribution of those products to prisons. (R 12–15, 17–18, 49–59). The public assurances from the Manufacturers regarding their intent to restrict lethal injection medications coupled with the express wording contained in the CDPs plausibly placed Appellant on notice of the

Agreements, and his reliance upon those Agreements was foreseeable. *See id*.

Moreover, the Manufacturers' intervention in the execution of Mr. Dozier likewise made it reasonably foreseeable for Appellant to rely upon the Agreements. (R 12–15). The Manufacturers' successful intervention in the execution of Mr. Dozier seeking recovery of their medications plausibly demonstrates Appellant's reliance upon the Agreements for his execution was foreseeable. *Id*. Further, the Manufacturers' public statements, correspondence to Nevada officials and disseminated to the media, and publicly-filed portions of their Agreements with Cardinal Health provided Appellant with notice of the Agreements and an understanding of the parties' intent. (R 12–15). These factual assertions taken as true plausibly demonstrate an intent to benefit prisoners facing execution by lethal injection and Appellant's reliance upon those Agreements was reasonably foreseeable to Cardinal Health. *See id*.

As a result, the District Court erred when it determined Appellant failed to plausibly plead facts sufficient to demonstrate that he is a third-party beneficiary of the Agreements between the Manufacturers and Cardinal Health, and dismissed Appellant's breach of contract claim

against Cardinal Health.

B. Appellant Plausibly Alleged Facts Demonstrating He Has Standing to Pursue Declaratory Relief Regarding His Status Under the Agreements.

Any person whose "rights, status or other legal relations" are affected by a contract may obtain a declaration from a Nevada court regarding any question of construction or validity arising under the contract. NRS 30.040(1); *Nat'l Ass'n of Mut. Ins. Cos. v. State Dep't of Bus. & Indus.,* 524 P.3d 470, 477 (Nev. 2023). "Declaratory relief actions under NRS 30.040 require a plaintiff to demonstrate a 'legally protectible interest,' . . . or injury-in-fact." *Nat'l Ass'n of Mut. Ins. Cos.,* 524 P.3d at 477 (quotations and citations omitted).

The District Court erred when it dismissed Appellant's declaratory relief claim based upon its determination that Appellant lacked standing as a third-party beneficiary under the Agreements, failed to allege essential elements of his claims, and has "not shown a likelihood of success upon the merits." (R 285). First, Appellant does not need to show a "likelihood of success upon the merits" to succeed upon his request for declaratory relief. *Compare* NRS 30.040(1) (discussing declaratory relief actions) *with* NRS 33.010 (discussing preliminary injunctions). Second,

Appellant plausibly pleaded facts showing that he has a legally protectable interest as an intended third-party beneficiary of the Agreements and thus has standing to enforce the Agreements. *See supra*, Argument, Part III(b). Third, Appellant has demonstrated an injury-in-fact involving his forthcoming execution by lethal injection and the potential for a botched execution warranting declaratory relief. (R 12, 18–19).

Accordingly, the District Court's order dismissing Appellant cause of action for declaratory relief should be reversed and remanded for a determination regarding whether Appellant, as an alleged third-party beneficiary of the Agreements, may enforce the Agreements and demand the return of the Manufacturers' products from the NDOC.[21]

[21] The District Court did not reach this issue or determine whether Appellant, as a third-party beneficiary of the Agreements, may seek recovery of the Manufacturers' products.

V. THE DISTRICT COURT ERRED WHEN IT CONCLUDED DISMISSAL OF APPELLANT'S FALSE PRETENSES CLAIM AGAINST NDOC "WOULD ONLY DELAY THE INEVITABLE" RATHER THAN APPLYING THE APPROPRIATE LEGAL STANDARD.

A. Applying the Correct Legal Standard, Reconsideration of the NDOC's Motion for Judgment on the Pleadings Should Have Been Denied.

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth Ass'n*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citations omitted). Reconsideration of a motion is limited to the "very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling."[22] *Moore v. Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

The District Court abused its discretion when it concluded reconsideration of the NDOC's motion for judgment on the pleadings was inappropriate and denial of the motion was "mandated by the current

[22] *See 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) ("[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law").

law," but nevertheless granted the motion because "such a ruling would only delay the inevitable and waste valuable limited judicial resources." (R 350–52). In reaching this determination, the District Court misapplied the appropriate legal standard for evaluating a motion to reconsider and granted the motion without new evidence, new issues of fact or law supporting a contrary ruling, or a clearly erroneous decision by the District Court. *Labarbera v. Wynn Las Vegas, Ltd. Liab. Co.*, 134 Nev. 393, 398, 422 P.3d 138, 142 (2018) (remanding order excluding evidence based upon the court's failure to apply the correct standard to determine the admissibility of the evidence).

Instead, the District Court appears to have applied NRCP 12(b)(5) by concluding Appellant failed to state a claim upon which relief may be granted. (R 350–52). However, because the District Court considered matters outside of the Complaint—including NDOC's Answer, the documents attached to the Complaint, and the exhibits attached to the moving papers—the District Court should have applied NRCP 56. *Witherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 307–08, 167 P.3d 408, 409 (2007) (reviewing dismissal orders for matters falling outside of the pleadings in a NRCP 12(b)(5) motion to dismiss "as though it were an

order granting summary judgment"). Indeed, if the District Court applied NRCP 56, the motion should have been denied because there is evidence raising issues of material fact regarding NDOC's deceit and concealment of its purpose for purchasing the medications to be used for Appellant's execution from the Manufacturers, Cardinal Health, and Appellant. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see supra*, Legal Argument, Part III(b).[23]

The District Court also abused its discretion when it rendered an advisory opinion regarding its determination that a motion for summary judgment would be successful. *See* NEV. CONST. ART. 6, § 4.[24] No motion for summary judgment was pending before the District Court concluded that the presumptively forthcoming NDOC motion for summary judgment "would be granted" because Appellant "lacked standing to

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[23] *See* NRS 51.035(3); *compare* NDOC's Answer to Complaint (R 131–40) (asserting NDOC had unrestricted ability to obtain medications) *with* Testimony of Linda Fox (R 229) (testifying NDOC was blocked from acquiring medications for Appellant's execution).

[24] *Echeverria v. State*, 495 P.3d 471, 475 (Nev. 2021) (finding courts lack "the constitutional power to render advisory opinions"); *Personhood Nev. v. Bristol*, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010) (declining to address "a potential future initiative [that] would be speculative and lead to an improper advisory opinion").

bring the action." (R 351–52). The District Court's ruling did not rest upon a current controversy between the parties, and instead relied upon a hypothetical future motion. *See id.* This ruling constitutes an improper advisory opinion warranting reversal and remand of the District Court's NDOC Order.

B. Appellant Plausibly Alleged Facts Placing NDOC on Notice of His Claims.

NRCP 8(a) requires a pleading to contain a short, plain statement of the claim demonstrating the pleader is entitled to relief, "but does not require the legal theory relied upon to be correctly identified." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). Although Nevada has not adopted the "'less stringent' pro se standard used in federal courts," the notice-pleading standard does not require a plaintiff to identify a specific legal theory or use "precise legalese" to provide notice to the defending party of the plaintiff's claims. *Harris v. State*, 510 P.3d 802, 807 (Nev. 2022) (citations omitted).

Similar to the plaintiff in *Liston*, Appellant pleaded extensive factual allegations that placed NDOC on notice of Appellant's claims.[25]

[25] In *Liston*, the Court held that the allegations in the complaint, the plaintiff's deposition testimony, and responses to written discovery

(R 10–20). The allegations in the Complaint, documents submitted in support of the Complaint, and testimony provided in support of Appellant's moving papers support at least two plausible legal theories against NDOC: (1) civil aiding and abetting, and (2) fraudulent concealment. *See id*. Accordingly, the District Court erred when it dismissed Appellant's claim against NDOC with prejudice and without leave to amend.

1. NDOC Aided and Abetted Cardinal Health's Breach of Duty to Appellant Arising Under Section 324A.

In Nevada, liability for civil aiding and abetting attaches "if the defendant substantially assists or encourages another's conduct in breaching a duty to a third person." *Mahlum*, 114 Nev. at 1490, 970 P.2d at 112 (citing Restatement (Second) of Torts, § 876 (1979) [hereinafter "Section 876"]). To adequately plead a claim under Section 876, Appellant must allege: (1) Cardinal Health breached a duty that harmed the Appellant; (2) NDOC "was aware of its role in promoting [the breach] at the time it provided assistance," and (3) NDOC "knowingly and substantially assisted" Cardinal Health in committing the breach. *Tai-*

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demonstrated the plaintiff "repeatedly set forth facts" supporting a legal theory for constructive discharge. 111 Nev. at 1578, 908 P.2d at 723.

Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1093 (D. Nev. 2012).

According to the Complaint and testimony of NDOC's former Director of the Pharmacy, NDOC was aware of Cardinal Health's obligations to the Manufacturers and Appellant to implement procedures and protocols to "block" the distribution of certain medications for use in lethal injections. (R 16–19, 228). Despite this knowledge, NDOC failed to disclose its intent to use the Manufacturers' products for the execution of Appellant and subsequent purchase of those medications from Cardinal Health for that purpose. (R 19). NDOC encouraged and assisted Cardinal Health in breaching its duties to Appellant under Section 324A by obtaining the medications in violations of those duties. *Id*. Construing the facts in Complaint as true and drawing all reasonable inferences in favor of Appellant, Appellant plausibly alleged facts demonstrating a claim for aiding and abetting against NDOC. (R 12, 19).

2. NDOC Fraudulently Concealed Information from Appellant, Cardinal Health, and the Manufacturers.

The District Court erred when it determined Appellant failed to state a claim upon which relief may be granted because: (1) it is unclear whether a claim for false pretenses exists in Nevada; and (2) Appellant

"cannot prove NDOC owed him a duty;[26] NDOC made any representations to him; NDOC intended to defraud him; that he relied on NDOC's representations; or that he *has* suffered damages." (R 351) (emphasis in original). Neither determination warrants dismissal of Appellant's claims against NDOC.

First, a claim for false pretenses has been recognized as involving "representation of some fact or circumstance which is not true and is calculated to mislead," may be implied from conduct, or may consist of the concealment or non-disclosure of material facts where there is a duty to disclose. *Bright v. Sheriff*, 90 Nev. 168, 170, 521 P.2d 371, 373 (1974). Although the District Court determined that a tort for injuries arising

[26] The District Court's generalized conclusion that NDOC does not owe any duty to Appellant is inconsistent with common law principles, and the cases addressing the duties owed to inmates. *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007) (addressing a duty to use reasonable care to prevent intentional harm to prison inmates); *Whitley v. Albers*, 475 U.S. 312, 320, 106 S. Ct. 1078, 1084 (1986) ("[P]rison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the obligation to take reasonable measures to guarantee the safety of the inmates themselves"); *Cochrane v. Kopko*, 975 A.2d 1203, 1206 (Pa. Cmwlth. 2009) (finding "inmates are analogous to invitees for purposes of determining the duty of care owed by prison officials"); *T.S. v. Twentieth Century Fox TV*, 334 F.R.D. 518, 537–38 (N.D. Ill. 2020) ("One fiduciary duty that a guardian owes to his ward is the duty of care") (citations omitted).

from false pretenses has not been recognized by this Court, the mere fact that a court "has not previously recognized a cause of action will not warrant reversal where that claim is well grounded in the common law." *Mahlum*, 114 Nev. at 1487 n.5, 970 P.2d at 111 n.5 (citing NRS 1.030). Indeed, "false pretenses" is a term that implies "elements that the common law has defined" involving fraud and misrepresentation, and has been applied to situations involving one party's false representations to induce the other party to act and causing harm the other party.[27] *Field v. Mans*, 516 U.S. 59, 69, 116 S. Ct. 437, 443 (1995). Accordingly, the District Court's conclusion that a common law claim for false pretenses does appear to exist in Nevada should not form the basis for dismissal of the claim under Rule 12(b)(5).

Second, contrary to the District Court's ruling, Appellant plausibly alleged a claim for fraudulent concealment against the NDOC. *Leigh-*

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[27] *Durland v. United States*, 161 U.S. 306, 312, 16 S. Ct. 508, 511 (1896) (requiring a "misrepresentation as to some existing fact and not a mere promise as to the future" to constitute false pretenses); *Cossu v. Jefferson Pilot Sec. Corp. (In re Cossu)*, 410 F.3d 591, 596 (9th Cir. 2005) (discussing elements of establishing false pretenses in bankruptcy proceedings); *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446–47, 956 P.2d 1382, 1386 (1998) (identifying elements for fraudulent misrepresentation claim).

Pink v. Rio Props., LLC, 512 P.3d 322, 325–26 (Nev. 2022) (identifying elements for fraudulent concealment claim); *Rocker v. KPMG LLP*, 122 Nev. 1185, 1193, 148 P.3d 703, 708 (2006) (applying a relaxed pleading standard to fraud claims under certain circumstances). There is evidence in the record demonstrating NDOC was aware of the Agreements between the Manufacturers and Cardinal Health to "block" the distribution of certain medications to NDOC, and NDOC withheld publication of the Execution Manual until *after* it was able to purchase lethal injection medications—including the purchase of Ketamine in May of 2021—from Cardinal Health for use in the execution of Appellant.[28] (R 61–70, 228–29, 239). NDOC withheld publication of the Execution Manual despite being was under an obligation to inform Appellant of the medications it intended to use during his execution.[29] (*See* R 62). Without this information, Appellant was unable to challenge the

[28] *Floyd*, 2021 WL 2827291, 2021 U.S. Dist. LEXIS 125738, at *5–6 ("Director Daniels knew as early as the first week in April [2021] if not sooner the drugs that would likely be included in the protocol, but the NDOC Defendants chose not to share this information with Floyd").

[29] NDOC, in its capacity as a pharmacist purchasing medications, was also under an obligation to inform Cardinal Health, the NDOC's pharmacy, and potentially Appellant of its purpose for ordering the medicines. *See* NAC 639.478.

acquisition of the medicine expected to be used for his execution and NDOC was able to acquire of the medicine without objection from Appellant, the Manufacturers, or Cardinal Health. (R 228). As a result, Appellant has suffered damages including emotional distress and potential excessive pain and suffering prior to death arising from a "botched" execution. (R 19).

Finally, whether a party has properly alleged the elements of a tort action arising in fraud, deceit, or misrepresentation involves a factual question for the trier of fact. *Epperson v. Roloff*, 102 Nev. 206, 210–11, 719 P.2d 799, 802 (1986). Accordingly, the District Court erred when it dismissed Appellant's false pretenses claim for failure to state a claim rather than submitting the question to the jury.

VI. THE DISTRICT COURT'S DENIAL OF INJUNCTIVE RELIEF SHOULD BE REVERSED AND REMANDED.

"A preliminary injunction is available if an applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *Dangberg Holdings Nev., L.L.C. v. Douglas Cty.*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999) (citing *Pickett v. Comanche Construction, Inc.*, 108

Nev. 422, 426, 836 P.2d 42, 44 (1992); NRS 33.010). Although a district court has discretion to decide whether to grant a preliminary injunction, a court abuses its discretion by applying an erroneous legal standard. *Boulder Oaks Cmty. Ass'n*, 125 Nev. at 403, 215 P.3d at 31.

In the event the Court reverses and remands the claims against Cardinal Health and NDOC, the District Court's order denying injunctive relief should also be reversed and remanded for a determination of the likelihood of success upon the merits of Appellant's claims. *See* NRS 33.010. The District Court did not reach the question of whether Appellant, as a third-party beneficiary of the Agreements, may seek an injunction against NDOC for the return of medicines that were obtained for his execution. (R 285).

VII. CONCLUSION.

Based on the foregoing, this Court should reverse and remand the District Court's orders dismissing Appellant's claims against Cardinal Health and NDOC with instructions to apply the correct legal standards to each of Appellant's claims.

DATED this 10th day of July, 2023.

/s/ Marian L. Massey, Esq.
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or cause unnecessary delay or needlessly increase the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby further certify that Appellant's Opening Brief complies with the typeface and type style requirements of NRCP 32(a)(4)–(6) because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2016 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because it contains

approximately 9,471 words.

Respectfully submitted this 10th day of July, 2023.

/s/ Marian L. Massey, Esq.
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On July 10th, 2023, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was served on the following by United States Mail, first class, and by the Nevada Supreme Court Electronic Filing System:

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