IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE M. FLOYD, *Appellant*, vs. **CARDINAL HEALTH, INC., ET AL.**, *Respondents*.	Electronically Filed Sep 22 2023 12:19 PM Elizabeth A. Brown Clerk of Supreme Court Supreme Court Case No.: **85826** District Court Case No.: **CV21101111**

APPELLANT'S REPLY 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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INTRODUCTION

Cardinal Health describes this case as involving a "business arrangement" between certain pharmaceutical manufacturers, their distributor (Cardinal Health), and the pharmaceutical purchaser (NDOC).[1] In so stating, Cardinal Health acknowledges the unavoidable fact that the actions taken by the Manufacturers, Cardinal Health, and NDOC impact the ultimate recipient of the pharmaceutical medications: Appellant. The duties owed to Appellant arising under contract and tort law flow directly from this "business arrangement," and establish Appellant's standing to pursue damages resulting from the arrangement.

Appellant appealed two orders from the District Court dismissing his contract and common law tort claims against Respondents. Cardinal Health urges the Court to adopt new requirements for establishing a plaintiff's third-party beneficiary status and a defendant's duty to use reasonable care in the performance of an undertaking. None of the additional requirements—including a third-party beneficiary's "actual

[1] In this Reply Brief, Appellant utilizes the same capitalized terms designated in his Opening Brief to refer to parties and concepts. The briefs submitted on behalf of each Respondent are cited as "CH Ans. Br." and "NDOC Ans. Br."

and foreseeable" reliance upon a contract, or demonstrating the contractual purpose, "additional undertaking," and a specific intent to protect Appellant to establish tort duties—exist under Nevada law, the common law, or the laws of other jurisdictions. The District Court erred when it imposed these additional requirements, thus this Court should reverse the order dismissing Cardinal Health.

NDOC urges this Court to disregard the record on appeal and view the allegations of Appellant's Complaint in a vacuum by applying Rule 12(b)(5) rather than Rule 56. Given the extensive issues of material fact raised by the denials contained in NDOC's Answer, the evidence attached to the moving papers containing testimony of NDOC officers, and the contrary conclusions reached by the District Court, application of Rule 12(b)(5) is inappropriate. Nevertheless, because Appellant has alleged and identified disputes of material fact regarding his false pretenses claim, the District Court's order should be reversed and remanded.

In sum, Appellant respectfully requests that the District Court's orders dismissing Respondents should be reversed in their entirety and remanded for further proceedings.

ARGUMENT

I. THE DISTRICT COURT'S DISMISSALS FOR LACK OF STANDING SHOULD BE WITHOUT PREJUDICE.

A party's standing to bring claims "affects the district court's jurisdiction over [the] matter, and accordingly this court's jurisdiction," and must be addressed before considering challenges to a district court's orders. *Cotter ex rel. Reading Int'l, Inc. v. Kane*, 473 P.3d 451, 456 (Nev. 2020). Although Nevada courts do not require a litigant to demonstrate a "case or controversy" to establish standing, litigants must demonstrate an "injury-in-fact, redressability, and causation." *Nat'l Ass'n of Mut. Ins. Cos. v. State Dep't of Bus. & Indus.*, 524 P.3d 470, 476 (Nev. 2023); *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) ("Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief"). "Standing is a question of law that is reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

There is a split of authority regarding whether standing is a "part of subject matter jurisdiction" similar to the "case or controversy" requirement contained in Article III of the United States Constitution (the majority approach), or a separate legal principle that does not

implicate a court's subject matter jurisdiction (the minority approach). *See Superpumper, Inc. v. Leonard*, 495 P.3d 101, 106 n.2 (Nev. 2021) (declining to address whether standing and subject matter jurisdiction are separate legal principles);[2] CH Ans. Br. 41–42; NDOC Ans. Br. 17–25. Regardless of a jurisdiction's stance upon whether standing is an aspect of subject matter jurisdiction, courts agree that standing implicates a party's right to relief in court and thus a court's jurisdiction to adjudicate the party's claims. *Compare Herrick v. Paulsen (In re Herrick)*, 21 Neb. App. 971, 980, 846 N.W.2d 301, 310 (2014) (concluding the court may not reach the "merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial

[2] Nevada cases addressing whether standing is a component of subject matter jurisdiction have applied both the majority and minority approaches. *See Nat'l Ass'n of Mut. Ins. Cos.*, 524 P.3d at 476 ("[O]ur caselaw generally requires the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing" to establish standing); *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011); *Brunk v. Eighth Judicial Dist. Court*, 135 Nev. 620, 449 P.3d 1270 (2019) (unpublished)); *Smaellie v. City of Mesquite*, 133 Nev. 1075, 393 P.3d 660 (2017) (unpublished); *but see City of Henderson v. Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006). Ultimately, neither the majority nor minority approach represent a significant deviation from the legal principle at issue in this case: a litigant's inability to demonstrate standing under state law deprives a court of jurisdiction to adjudicate an actual judiciable controversy.

determination" under the majority approach) *with ACLU of N.M. v. City of Albuquerque*, 188 P.3d 1222, 1233 (N.M. 2008) (refusing to confer standing and to "reach the merits of this case" under the minority approach).

In Nevada, whether lack of jurisdiction is characterized as part of subject matter jurisdiction or involves "prudential" or "justiciability" concerns, without jurisdiction, a district court cannot reach the merits of the claims. *See Nat'l Ass'n of Mut. Ins. Cos.*, 524 P.3d at 480 ("While a party must demonstrate standing for each individual claim, a court's standing analysis should not reach the merits of a case"); *but see* NDOC Ans. Br. 17–25. Dismissals for lack of standing are typically without prejudice.[3] *See Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001) ("[A] dismissal without prejudice is not a final adjudication on the merits"). Thus, if standing is not properly alleged in a complaint, but the factual allegations taken as true with inferences drawn in favor of the plaintiff *plausibly allege* standing to pursue such

[3] *See, e.g., Linthicum v. Rudi*, 122 Nev. 1452, 1454, 148 P.3d 746, 748 (2006); *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 569, 170 P.3d 989, 992 (2007); *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 669, 765 P.2d 184, 186 (1988).

claims, dismissal should be without prejudice.[4]

None of the cases cited by Respondents demonstrate that a party's failure to plead facts establishing standing, the dismissal must be with prejudice and thus an adjudication upon the merits of the claims. NDOC Ans. Br. 17–20; CH Ans. Br. 43. Cardinal Health cites cases involving dismissals with prejudice where courts relied upon the express wording in the contract to determine the intent of the parties, which is an issue the District Court did not adjudicate because the operative Agreements were not attached to the Complaint.[5] CH Ans. Br. 43. NDOC relies upon cases involving a shareholder's standing to pursue derivative claims on

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[4] *See Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 645, 137 P.3d 1171, 1187 (2006), *disavowed on other grounds by Chur v. Eighth Judicial Dist. Court*, 458 P.3d 336, 340 (Nev. 2020) (concluding that once a party has alleged "sufficient particularized facts" to establish standing, a court may later conduct an evidentiary hearing to determine whether the party actually has standing).

[5] *See, e.g., Balsam v. Tucows Inc.*, 627 F.3d 1158, 1163 (9th Cir. 2010) (concluding the "No Third Party Beneficiaries" clause unambiguously manifested an intent to not benefit third parties); *Whatley v. Ohio Nat'l Life Ins. Co.*, 851 F. App'x 910, 914 (11th Cir. 2021) (unpublished) (concluding the language of the contracts did not reflect an intent to benefit the plaintiff); *Bucher & Christian Consulting, Inc. v. Novitex Enter. Sols.*, 2015 WL 5210668, 2015 U.S. Dist. LEXIS 118378, at *39 (S.D. Ind. May 22, 2015) (unpublished); *Marque Medicos Fullerton, LLC v. Zurich Am. Ins. Co.*, 416 Ill. Dec. 190, 205, 83 N.E.3d 1027, 1042 (Ill. App. 1st 2017).

behalf of a corporation and an organization's representational standing, which do not demonstrate a death-row inmate is precluded from asserting claims against the NDOC for injuries he sustained and will sustain arising from NDOC's conduct.[6] NDOC Ans. Br. 17–20. These cases, taken together, demonstrate the District Court erred when it concluded Appellant lacked standing to pursue claims against the Respondents—a jurisdictional defect—but nevertheless adjudicated the claims upon the merits by dismissing them with prejudice.

Accordingly, the orders dismissing his claims against Respondents based upon lack of standing should be reversed and remanded to the District Court with instructions to dismiss the claims *without prejudice*.[7]

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[6] *Shoen*, 122 Nev. at 634, 137 P.3d at 1180 (reversing dismissal of shareholder derivative lawsuit with prejudice); *Nat'l Ass'n of Mut. Ins. Cos.*, 524 P.3d at 476 (addressing association's representational standing to challenge regulations on behalf of insurance carriers); *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 732, 291 P.3d 128, 134 (2012) (addressing common-interest community association's standing to assert claims on behalf of members under Rule 17(a)); *but see Arguello*, 127 Nev. at 368, 252 P.3d at 208 ("The inquiry into whether a party is a real party in interest [under Rule 17(a)] overlaps with the question of standing").

[7] Cardinal Health presents extensive arguments regarding the futility of a motion for leave to amend that were not raised below and should be adjudicated by the District Court. CH Ans. Br. 38–43; R 280–86, 305–11, 347–52; *see Laird v. State Pub. Emps. Ret. Bd.,* 98 Nev. 42,

II. ACCEPTING THE ALLEGATIONS IN THE COMPLAINT AS TRUE, APPELLANT PLEADED SUFFICIENT FACTS TO DEMONSTRATE STANDING AS AN INTENDED THIRD-PARTY BENEFICIARY OF THE AGREEMENTS.

A. The Complaint Alleges Extensive Facts Demonstrating an Intent to Benefit Appellant under the Agreements.

To demonstrate standing to enforce a contract as a third-party beneficiary, a plaintiff must show a clear intent to benefit the third party "gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604–05 (2005) (citations omitted). Nevada requires litigants to plead sufficient allegations to provide "fair notice" of the claims, damages, and relief sought. NRCP 8; *Vacation Vill. v. Hitachi Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). Dismissals of a complaint are rigorously reviewed de novo with all facts alleged in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Buzz Stew*, 124 Nev. at 227–28, 181 P.3d at 672.

Appellant's Complaint alleged the elements of a breach of contract claim, and placed Cardinal Health on notice that Appellant sought to

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46, 639 P.2d 1171, 1173 (1982) (declining to entertain issues raised for the first time on appeal); *see generally* NRCP 15(a) and 16(b)(1).

enforce the Agreements as an intended third-party beneficiary. *See* R 16–19 (alleging elements of breach of contract claim); *see* R 18 ("FLOYD was a nonincidental, third party beneficiary"); *but see* CH Ans. Br. 11, 19, 20. Taken as true, Appellant alleged a plausible claim for breach of contract and the district court's order dismissing Cardinal Health should be reversed.

Contrary to the assertions of Cardinal Health, Appellant was not required to attach copies of the operative Agreements to the Complaint to ascertain the "parties' intent." R 14–15, 17, 36–47; CH Ans. Br. 19–21.[8] In fact, the opposite is true, if the pleadings do not contain copies of the operative contracts, a court typically cannot consider those documents . *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). Given the operative Agreements were not attached to the Complaint, the court did not err when it failed to consider

[8] Appellant does not possess copies of the Agreements. The documents attached to the Complaint contain excerpts of agreements between Cardinal Health and the Manufacturers regarding the medications identified for the execution of Mr. Dozier in the *Alvogen* Litigation. R 36–47. NDOC subsequently changed the medications it intended to use in Appellant's execution, and the allegations in the Complaint assert that contracts between Cardinal Health, the Manufacturers, and NDOC regarding the medications selected for use in Appellant's execution evidence an intent to benefit Appellant. R 14–19.

the language of such Agreements to determine the intent of the parties. R 283–84 (noting that any evidence demonstrating the parties' intent is "not before the court on a Motion to Dismiss"); *but see* CH Ans. Br. 19–21 (relying upon the *Alvogen* Litigation contracts).

Further, Appellant alleged extensive facts demonstrating the Agreements evidenced a clear intention to benefit Appellant. R 13–19;[9] *but see* CH Ans. Br. 5, n.3 (asserting such allegations do not exist in the Complaint). Thus, the District Court properly concluded the allegations regarding the intention to benefit Appellant were sufficient to avoid dismissal. R 283–84.

B. The Complaint Alleges Extensive Facts Evidencing Appellant's Foreseeable Reliance Upon the Agreements.

In Nevada, the "foreseeable reliance" prong of the third-party beneficiary test draws its roots from the equitable doctrine of promissory

[9] In particular, Appellant alleged the Manufacturers produce the medications identified in the Execution Manual that are expected to be used during his execution, Cardinal Health distributes those medications to NDOC subject to the Agreements, Appellant is a third-party beneficiary of those Agreements, Cardinal Health breached its obligations under the Agreements by distributing products to NDOC for use in Appellant's execution, causing Appellant to suffer imminent injury and a botched execution. R 16–19; *see* R 17 at ¶ 33 (alleging the Agreements precluded the sale of certain products "to state institutions intended for lethal injections, including the Products at issue here").

estoppel. *See Lipshie v. Tracy Inv. Co.*, 93 Nev. at 379, 566 P.2d at 824–25 (1977) (citing *Lear v. Bishop*, 86 Nev. 709, 476 P.2d 18 (1970)). In *Lear*, the Nevada Supreme Court applied the doctrine of promissory estoppel to third-party beneficiaries because intended beneficiaries "should similarity be protected if [their] reliance was likewise foreseeable." 86 Nev. at 714, 476 P.2d at 22. However, neither *Lipshie* nor *Lear* require a third-party beneficiary to establish actual reliance upon the contract to receive its benefits. *See id.*; *Lipshie*, 93 Nev. at 379, 566 P.2d at 824–25; *but see* CH Ans. Br. 15–18.

1. Actual and Detrimental Reliance Are Not Necessary to Establish Standing as a Third-Party Beneficiary Under Nevada Law.

The equitable doctrine of promissory estoppel differs significantly from contract law governing third party beneficiaries of a contract. *See Dynalectric Co. of Nev., Inc. v. Clark & Sullivan Constructors, Inc.,* 127 Nev. 480, 484–85, 255 P.3d 286, 289 (2011) ("[T]he doctrine of promissory estoppel is conceptually distinct from traditional contract principles").

Establishing "reliance" in the context of promissory estoppel serves a different purpose than establishing "reliance" by a third-party beneficiary. *Am. Sav. & Loan Ass'n v. Stanton-Cudahy Lumber Co.*, 85

Nev. 350, 354, 455 P.2d 39, 41 (1969). Under the doctrine of promissory estoppel, reliance operates as a gap-filler to demonstrate a quasi-contract was formed "where traditional consideration is lacking." *Id.*; *see also Dynalectric Co.*, 127 Nev. at 487, 255 P.3d at 291 (finding actions taken in reliance upon a promise may also demonstrate a party's entitlement to damages). Thus, to establish the existence of a binding promise, a party seeking promissory estoppel must demonstrate actual and foreseeable reliance upon the quasi-contract.

By contrast, actual reliance by a third-party beneficiary upon the contract is unnecessary to establish consideration or damages because the contract has already been formed by the other parties. *See Gibbs v. Giles*, 96 Nev. 243, 246, 607 P.2d 118, 120 (1980); Restat (2d) Contracts § 302(1)(b) (1981); *id.* at § 311 cmt. h (noting that a beneficiary may "rely in ways difficult or impossible to prove").[10] Instead, the focus is upon whether it would be reasonable for the third-party beneficiary to rely "on the promise as manifesting an intention to confer a right on him." Restat (2d) Contracts § 302 cmt. d; *id.* at § 311 cmt. g ("In the absence of some

[10] Nevada generally follows the Restatement (Second) of Contracts. *See NOLM, Ltd. Liab. Co. v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 661 (2004).

contrary indication, an intended beneficiary is justified in relying on the promise"). Thus, a third-party beneficiary's reliance determines whether a contracting party may be liable to a third-party beneficiary: if a third-party beneficiary's reliance is not foreseeable, the beneficiary may be incidental rather than intended. *See id*. at § 302.[11] As a result, actual reliance is not an element that must be established for a third-party beneficiary to seek enforcement of a contract.

Taking a life insurance beneficiary as an illustrative example, the beneficiary is not required to show actual reliance upon the policy before the benefits are triggered upon the policyholder's death. *See* Restat (2d) Contracts § 302 cmt. c. Although the beneficiary was not required to sign

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[11] Illustration 10 to comment d of Section 302 is instructive:

> A, the operator of a chicken processing and fertilizer plant, contracts with B, a municipality, to use B's sewage system. With the purpose of preventing harm to landowners downstream from its system, B obtains from A a promise to remove specified types of waste from its deposits into the system. C, a downstream landowner, is an intended beneficiary. . .

Restat (2d) Contracts, § 302 illus. 10 (demonstrating liability analysis focuses upon whether it was reasonably foreseeable for A, the contracting party, that C would benefit from the contract rather than C's actual reliance upon the contract).

or acknowledge the policy, take any action upon the policy, and may have been unaware of the policy, the life insurance company may nevertheless be required to pay the policy to the beneficiary. *See id.* Under those circumstances, the policyholder promised payment to the beneficiary upon death, the life insurance company was aware of the beneficiary, the beneficiary's reliance upon the policy was foreseeable, thus the third-party beneficiary may be entitled to benefit from the policy. *See Canfora*, 121 Nev. at 779, 121 P.3d at 605 (concluding wife was third-party beneficiary of husband's health insurance plan and bound to its terms).

Applying Nevada law and the common law principles enunciated in the Restatement (Second) of Contracts, the "reliance" prong of the third-party beneficiary test does not require "both actual reliance, *and* that the reliance was foreseeable" as asserted by Cardinal Health. CH Ans. Br. 15. Thus, the District Court erred when it required Appellant to demonstrate actual reliance upon the Agreements. CH Ans. Br. 17–19.

2. Appellant Alleged Actual and Foreseeable Reliance Upon the Agreements to Establish Standing as a Third-Party Beneficiary Under Nevada Law.

Alternatively, in the event this Court concludes a third-party beneficiary must demonstrate both actual and foreseeable reliance to

establish standing as a third-party beneficiary, Appellant alleged plausible facts demonstrating actual reliance upon the Agreements and that his reliance was foreseeable under the circumstances. R 12–19. Drawing all inferences in favor of Appellant, the allegations demonstrate Appellant relied upon the Agreements when he initiated the instant litigation seeking declaratory relief and injunctive relief to compel NDOC to return the lethal injection products procured for his execution, and his reliance was foreseeable based upon the language of the Agreements and the Manufacturers' previous intervention in the execution of Mr. Dozier. R 12–18, 49–59; *see Alpark Distrib. v. Poole*, 95 Nev. 605, 608, 600 P.2d 229, 231 (1979) (finding reliance does not necessarily require a showing of financial or pecuniary loss). Appellant alleged sufficient facts to demonstrate he is an intended third-party beneficiary with standing to enforce the Agreements, thus, reversal is appropriate.

III. APPELLANT ALLEGED FACTS DEMONSTRATING EACH OF THE ELEMENTS OF A CLAIM FOR NEGLIGENT PERFORMANCE OF AN UNDERTAKING AGAINST CARDINAL HEALTH.

A. Cardinal Health Owed Appellant a Duty to Use Reasonable Care.

1. Cardinal Health Assumed a Duty to Use Reasonable Care When It Implemented Protocols and "Blocking" Procedures to Restrict the Distribution of Lethal Injection Medications to NDOC.

Nevada imposes a duty to use reasonable care upon a defendant that undertakes an obligation to perform services that should be recognized as necessary to prevent harm to third parties. *See Wright v. Schum*, 105 Nev. 611, 615, 781 P.2d 1142, 1144 (1989); Restat (3d) Torts: Liability for Physical and Emotional Harm § 43 (2012). Whether a duty exists is a question of law that is reviewed de novo by examining the "nature and scope" of the undertaking, and dismissal of a complaint is rigorously reviewed by accepting all of the allegations in the complaint as true.[12]

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[12] *See Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1493, 970 P.2d 98, 114 (1998) ("[T]he jury was required to consider the nature and scope of [the defendant's] undertaking so that its concomitant duty, if any, could be determined") (citing *Smith v. State*, 921 P.2d 632, 634–35 (Alaska 1996)) ("Where reasonable people could differ over the nature and extent of the act undertaken, summary judgment is inappropriate, since the scope of the assumed duty will vary depending on the inferences drawn from the facts"); *Buzz Stew*, 124 Nev. at 227–28, 181 P.3d at 672.

Similar to the landlord in *Wright* and the silicone breast implant company in *Dow Chemical*, Appellant alleged Cardinal Health undertook a duty to use reasonable care when it took affirmative steps to prevent the distribution of lethal injection products to NDOC—including implementing a "blocking system," tracking orders of certain medications, informing the Manufacturers about certain purchases, and restricting the distribution of certain products—to protect third parties from harm including Appellant. R 17–19, R 228–30, 239–41. These affirmative steps demonstrate Cardinal Health assumed a duty to use reasonable care in its performance of the undertaking to restrict the distribution of lethal injection products to NDOC. *See also* Op. Br. 22–25. Any determination regarding the *scope* of that duty should be left to the trier of fact. *Dow Chem. Co.*, 114 Nev. at 1493, 970 P.2d at 114.

2. Cardinal Health's Duty to Use Reasonable Care Exists Separately from Its Contractual Obligations.

Cardinal Health raises several arguments suggesting the duty to use reasonable care "necessarily implicates an assessment of the purpose of the contract" and requires Appellant to demonstrate Cardinal Health "undertook an additional, affirmative undertaking with the intent to protect [Appellant]." CH Ans. Br. 24, 29. However, Nevada law does not

require Appellant to demonstrate the purpose of the undertaking outlined in the contract, an "additional" undertaking, or a specific intent to benefit Appellant.[13]

First, liability for failure to use reasonable care during the performance of an undertaking does not require a court to determine whether a contract exists, the purpose of the contract, or interpret the language of the contract. *See Wright*, 105 Nev. 611, 781 P.2d 1142; *PetSmart, Inc. v. Eighth Jud. Dist. Ct.*, 499 P.3d 1182, 1187 (Nev. 2021). In *Dow Chemical*, the Court determined that the language of certain agreements did not establish the existence of a duty to use reasonable care, instead such evidence raises a question of fact regarding the "nature and scope" of the undertaking. *Dow Chem. Co.*, 114 Nev. at 1475, 1493–98, 970 P.2d at 103, 114–17. The language in the contract does not establish the duty arising under tort law. *See id.* at 1498, 970 P.2d at 117.

[13] Cardinal Health's arguments illustrate an apparent confusion surrounding a party's duties arising under a contract, and its separate duties arising under common law tort principles. Nevada has always treated such duties as separate inquiries. *See Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (discussing differences between a duty arising under a contract and common law tort duties).

Second, although not addressed by Cardinal Health, Section 43 of the Restatement (Third) of Torts ("Section 43"), which modified and replaced Section 324A of the Restatement (Second) of Torts, clarified that the duty to use reasonable care "is independent of any contractual obligations," is intended to protect against physical and emotional harm, and "exists regardless of whether there is a contract." Restat (3d) Torts § 43 cmt. h; Op. Br. 29. Courts in other jurisdictions have similarly concluded that a duty to use reasonable care arises when a defendant undertakes services that the defendant foreseeably knew or should have known were for the protection of third parties, and not due to the obligations contained in the contract.[14] Thus, litigants do not need to establish an "additional" undertaking occurred.

Third, Appellant is not required to demonstrate Cardinal Health undertook its duty with a specific intent to protect Appellant. CH Ans.

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[14] *See, e.g., Bloom v. Casella Constr., Inc.,* 172 N.H. 625, 630, 232 A.3d 357, 362 (N.H. 2019); *Jenkins v. Best*, 250 S.W.3d 680, 694-95 (Ky. Ct. App. 2007); *Gazo v. City of Stamford*, 255 Conn. 245, 253, 765 A.2d 505, 510 (Conn. 2001); *King v. National Spa & Pool Inst.*, 570 So. 2d 612, 618 (Ala. 1990); *Prof'l Sports v. Gillette Sec.*, 159 Ariz. 218, 222, 766 P.2d 91, 95 (Ariz. Ct. App. 1988); *Gold Mills, Inc. v. Orbit Processing Corp.*, 121 N.J. Super. 370, 297 A.2d 203 (N.J. 1972); *Thompson v. Bohlken*, 312 N.W.2d 501, 507 (Iowa 1981).

Br. 25–26, 29–34. A defendant's duty to use reasonable care during the performance of an undertaking is owed "to the world," thus, there is no requirement that Appellant demonstrate Cardinal Health specifically intended to protect him. *Wright*, 105 Nev. at 617, 781 P.2d at 1145; *see Dow Chem. Co.*, 114 Nev. at 1498, 970 P.2d at 118 (finding defendant owed duty to protect customers); *see also* Restat (3d) Torts, § 43 cmt. f ("The actor need not know who the third person is who is subject to risk"). Nevada law also does not require Appellant to demonstrate that Cardinal Health undertook a duty with respect to the specific product that caused Appellant's harm. *Dow Chem. Co.*, 114 Nev. at 1492, 970 P.2d at 114 (rejecting argument that a plaintiff must demonstrate the defendant "undertook a duty with respect to the specific product . . . that caused [plaintiff's] harm"). Thus, there is no requirement that Appellant demonstrate Cardinal Health specifically intended to benefit him. *See id.* at 1484, 970 P.2d at 109.

B. Issues of Breach, Causation, and Injuries Should be Adjudicated by the Trier of Fact.

Cardinal Health does not appear to dispute that if a duty to use reasonable care arose, it breached that duty. *See* CH Ans. Br. 23–34. Instead, Cardinal Health argues that Appellant "cannot show causation

and [physical] injury," thus his claim fails as a matter of law. *Id.* at 27–29. However, "causation is generally an issue of fact for the jury to resolve." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 665 (1998). Nevertheless, construing Appellant's allegations that Cardinal Health's distribution of the Manufacturers' products to NDOC for use in his execution resulted in "injury" and Appellant faces "imminent injury and death" as true, Appellant has plausibly pleaded facts demonstrating causation and injury warranting reversal of the District Court's order dismissing Appellant's claim for negligent performance of an undertaking. R 19.

Rather than focusing upon the allegations in the Complaint, Cardinal Health argues that Appellant must demonstrate an "actual physical injury" to prevail on a claim for negligent performance of an undertaking. CH Ans. Br. 27–28. However, Section 43 no longer requires a party to demonstrate "actual physical harm."[15] *See* Restat (3d) Torts §

[15] Section 43 provides, in pertinent part, as follows:

> An actor who undertakes to render services to another and who knows or should know that the services will *reduce the risk of physical harm* to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if: (a) the failure to exercise reasonable care

43 cmt h. The focus of the inquiry is not whether the plaintiff has alleged an "actual physical injury," but whether it is reasonably foreseeable that the defendant's conduct increased the risk of harm to the plaintiff. *See id*. This inquiry models the common law rule originally articulated by Justice Cardozo.[16]

Appellant alleged extensive facts demonstrating Cardinal Health owed him a duty to use reasonable care, breached that duty, the breach proximately caused him to suffer injuries, and thus he has alleged standing to pursue a "judiciable controversy" against Cardinal Health. R 15–19. Accordingly, the District Court's order dismissing Appellant's negligent performance of an undertaking claim should be reversed.

> *increases the risk of harm* beyond that which existed without the undertaking . . .

Restat (3d) Torts, § 43.

[16] *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (N.Y. 1922) ("It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully if he acts at all"); *see King*, 570 So. at 614 (suggesting the common law principle contained in Section 324A of the Restatement (Second) of Torts was derived from *Glanzer*).

V. ISSUES OF MATERIAL FACT WARRANT REVERSAL OF APPELLANT'S CLAIM FOR FALSE PRETENSES AGAINST NDOC.

A. NDOC Confessed the District Court's Error by Failing to Address Arguments Raised in Appellant's Opening Brief.

Failure to address or respond to an argument raised in an answering brief may be viewed as a confession of error. *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (collecting cases). The Ninth Circuit has similarly concluded that a respondent waives any argument that it fails to raise in an answering brief. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc). Application 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).

NDOC confessed the errors of the District Court and waived its arguments with respect to a number of issues raised in Appellant's Opening Brief. *See* NDOC Ans. Br. 25–34. *First*, NDOC urges the Court to strictly review the allegations in the Complaint and apply Rule 12(b)(5), rather than Rule 56, despite extensive issues of material fact

raised in the pleadings and moving papers.[17] *Compare* Op. Br. 36–39 *with* NDOC Ans. Br. 25–34. The Court cannot unwind the record once issues of material fact have been raised in a motion for judgment on the pleadings. NRCP 12(d); *Tahoe Vill. Homeowners Ass'n v. Douglas Cty.*, 106 Nev. 660, 661, 799 P.2d 556, 557 (1990).

Second, NDOC also fails to reconcile how the District Court could conclude that denial of the motion for reconsideration is "appropriate and mandated by the current law," but then conclude reconsideration is appropriate based upon an unfiled motion for summary judgment that "would be granted." *See generally* NDOC Ans. Br.; Op. Br. 36–38; R 351–52.

Third, NDOC fails to address any of the arguments raised by

[17] In the record below and in his Opening Brief, Appellant identifies extensive factual disputes precluding summary judgment. R 10–68 (alleging factual allegations in the Complaint that must be taken as true under Rule 12(b)(5)), R 131–41 (alleging NDOC's answers to the allegations in the Complaint), R 131–41 (addressing the disputes of material fact precluding judgment upon the pleadings based upon NDOC's answers to the allegations in the Complaint), R 222–41 (containing testimony of NDOC's former Director of Pharmacy evidencing dates NDOC became aware of the drugs it intended to use for Appellant's execution, its decision to purchase those medications before publishing the Execution Manual to avoid being "blocked" by Cardinal Health, and the subsequent "blocking" of the medications); *see also* Op. Br. 38–45.

Appellant demonstrating NDOC's duty to disclose, or the injuries he sustained and will sustain injuries as a result of NDOC's conduct. *See* Op. Br. at 39–45. Although NDOC argues the allegations in the Complaint only establish injuries that may be suffered by Cardinal Health, that is simply untrue. NDOC Ans. Br. 20; *but see* R 19 ("NDOC has announced plans to utilize Products it obtained by false pretenses to execute FLOYD, resulting in injury").

By failing to address these issues, NDOC confesses that the District Court erred when it applied Rule 12(b)(5) rather than Rule 56, granted reconsideration of the motion for judgment on the pleadings by evaluating the merits of an unfiled motion for summary judgment, and dismissed Appellant's claims against NDOC for lack of standing. Application of incorrect legal standards warrant reversal of the order dismissing NDOC.

B. The District Court Erred When it Granted Reconsideration of the Motion for Judgment on the Pleadings.

1. <u>False Pretenses Is a Common Law Tort That May Be Recognized By The Nevada Supreme Court</u>.

The United States Supreme Court has recognized that "false pretenses" implies "elements that the common law has defined," and has

been applied to situations involving one party's false acts or omissions to induce the other party to act and causing harm. *See Field v. Mans*, 516 U.S. 59, 69, 116 S. Ct. 437, 443 (1995); NRS 1.030 (applying common law to Nevada courts). The law regarding "false pretenses" and "false representations" are synonymous, except that "fraud based on false representations involves spoken or written misrepresentations, whereas false pretenses focuses on conduct intended to give rise to a false impression." *In re Permann*, 174 B.R. 129, 132–33 (Bankr. D. Idaho 1994); *Bright v. Sheriff, Washoe Cty.*, 90 Nev. 168, 170, 521 P.2d 371, 373 (1974) ("A false pretense may be defined as a representation of some fact or circumstance which is not true and is calculated to mislead"). Nevada has repeatedly recognized common law torts arising from fraudulent conduct, concealment, and deceit. *Epperson v. Roloff*, 102 Nev. 206, 213, 719 P.2d 799, 804 (1986); *Dow Chem. Co.,* 114 Nev. at 1487 n.5, 970 P.2d at 111 n.5 (finding the 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").

Here, Appellant alleged extensive facts demonstrating a common law cause of action for concealment of NDOC's conduct to obtain the

medications for use in his execution under false pretenses. R 14–19, 61–70; *see also* R 228–29, 239; *Tahoe Vill. Homeowners Ass'n*, 106 Nev. at 662 n.1, 799 P.2d at 558 n.1 (finding a district court's failure to recognize a viable cause of action constituted plain error warranting reversal). Applying the standard enunciated by the District Court, Appellant alleged sufficient facts demonstrating NDOC owed him a duty to disclose the medications that would be used for his execution,[18] concealed the procurement of the medications for use in his execution with an intention to defraud Appellant (and others), Appellant would have acted differently

[18] A duty to disclose may arise to ensure the parties are on equal footing with each other. *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634-35, 855 P.2d 549, 553 (1993) (imposing duty "to speak in order that the party with whom he is dealing may be placed on an equal footing with him"); *Epperson*, 102 Nev. at 213, 719 P.2d at 804 (finding there is a duty to disclose where the "defendant alone has knowledge of material facts which are not accessible to the plaintiff"); *Villalon v. Bowen*, 70 Nev. 456, 467–68, 273 P.2d 409, 414–15 ("[E]ven in absence of a fiduciary or confidential relationship and where the parties are dealing at arm's length, an obligation to speak can arise from the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party"); *see generally* NAC 639.478 (restricting medications to prisons absent a practitioner's order); *see also* R 62 ("The Director will provide the condemned inmate with written notice of the drug or drug combination that will be used for the execution"); *see also* Op. Br. 42, n.26; *but see* NDOC Ans. Br. 30–31 (characterizing relationship as "arms-length business transaction").

if he had been aware of the concealed procurement of the medications through court action or otherwise, and Appellant suffered injuries as a result of the conduct. *See* R 14–19, 61–70, 228–29, 239; *see also* R 351 (identifying elements of false pretenses claim).

Given the extensive factual allegations and issues of material fact regarding Appellant's false pretenses claim, the District Court erred when it granted reconsideration of the motion for judgment on the pleadings.

2. Appellant Has Not Alleged a Private Right of Action Under NRS 205.380.

NDOC raises several arguments suggesting Appellant cannot plead a cause of action arising under NRS 205.380. NDOC Ans. Br. 34–40. To avoid any confusion, Appellant concedes he does not assert NRS 205.380 created a private right of action for false pretenses. Instead, Appellant's claim arises from common law principles involving fraud, concealment, and deceit that have been recognized as torts by Nevada courts. *Epperson*, 102 Nev. at 210–11, 719 P.2d at 802.

However, even if the Court is inclined to adopt NRS 205.380's elements to demonstrate a civil claim for false pretenses, Appellant has plausibly alleged facts and produced evidence demonstrating his

entitlement to relief. *See* NDOC Ans. Br. 38–41. An intent to defraud may be inferred by NDOC's concealment of the medications it intended to utilize for Appellant's execution, surreptitious procurement of the medications after its decision to execute Appellant, and concealment of the Execution Manual until after the medications were purchased.[19] R 14–19, 61–70, 228–29, 239. The concealment of the medications precluded Appellant (and others) from pursuing actions to prevent the distribution of the medicine to NDOC and significantly increased the difficulty for Appellant (or others) to retrieve the medications from NDOC prior to his execution, which adequately alleges the representation/ concealment and reliance elements. R 16–19 (discussing *Alvogen* Litigation). Appellant also alleges that he has been defrauded

[19] Rule 9(b) requires fraud-based claims to be pleaded with specificity. Although NDOC argues the allegations in the Complaint fail to meet the heightened pleading standard, the evidence in the record demonstrates otherwise. *See* NDOC Ans. Br. 26–29. Appellant's forthcoming execution was announced on March 26, 2021, then on May 25, 2021, NDOC obtained additional medications for use in his execution from Cardinal Health, and then on June 9, 2021, NDOC produced its Execution Manual identifying the new list of medications that would be used for Appellant's execution. R 16, 62–63, 224, 228, 239; *see G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1222, 1239 (D. Nev. 2006) (concluding allegations in the complaint were sufficient to allege false pretenses tort under Rule 9(b)).

by NDOC's conduct, which will lead to a botched execution and significant pain and suffering to Appellant immediately prior to his death. R 19. The allegations and evidence in the record are sufficient to allege a claim for false pretenses under NRS 205.380.

3. Appellant Did Not Waive His Claims for Civil Aiding and Abetting or Fraudulent Concealment.

Although new issues raised for the first time will not be entertained during an appeal, pleadings must be liberally construed to determine whether the facts placed the defendant on "adequate notice of the nature of the claim and relief sought." *Harris v. State*, 510 P.3d 802, 807 (Nev. 2022) (quoting *W. States Constr., Inc. v. Michoff,* 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992)).

In the event the Court concludes the District Court applied the correct legal standards and no "false pretenses" claim exists under Nevada law, the allegations in the Complaint plausibly placed NDOC on notice of common law claims for civil aiding and abetting or fraudulent concealment of NDOC's purchase of the medicines for use in Appellant's execution. Op. Br. 39–45.[20]

[20] NDOC's Answering Brief contains extensive descriptions of Appellant's criminal history that do not appear to be relevant for

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

In the event the Court reverses and remands the claims against Cardinal Health and/or NDOC, the District Court's order denying declaratory and injunctive relief should also be reversed and remanded for a determination of whether Appellant may seek declaratory or injunctive relief against Respondents for the return of medicines that were obtained for his execution. R 285. Any determination regarding justiciability or mootness of such relief should be evaluated by the District Court, rather than an adjudication by this Court raised for the first time on appeal. *Laird,* 98 Nev. at 46, 639 P.2d at 1173; *but see* CH Ans. Br. 37 (requesting the Court to take judicial notice of another court's finding that the products NDOC purchased from Cardinal Health for use in Appellant's execution "have now expired").

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purposes of Appellant's civil claims or proportionate to the needs of the case. *See* NDOC Ans. Br. 10–13, 21, 25, 32–33, 44; NRCP 26(b); NRS 48.035; *see generally* NRS 48.045. Although Appellant concedes he is a death-row inmate subject to Nevada's death penalty, the focus of his claim for injuries against NDOC relates to the likelihood that the new series of medications expected to be used in his execution will cause a "botched" execution. R 19.

VII. CONCLUSION.

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

DATED this 22nd day of September, 2023.

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

I hereby certify that I have read the Appellant's Reply 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 reply 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 Reply 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 6,972 words.

Respectfully submitted this 22nd day of September, 2023.

/s/ Marian L. Massey, Esq.
Marian L. Massey
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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 September 22nd, 2023, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served by the Nevada Supreme Court Electronic Filing System:

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