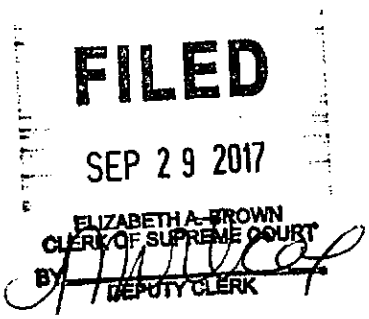
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MG&S ENTERPRISE, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, A FOREIGN CORPORATION; STEVE STILES, INDIVIDUALLY; AND INSURANCE SERVICES CORPORATION, INC., D/B/A STILES INSURANCE SERVICES,
Respondents.

No. 69622



ORDER OF AFFIRMANCE

MG&S Enterprise, LLC appeals from a final judgment in an insurance contract and tort action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.[1]

During the proceedings below, MG&S asserted multiple contractual and tort claims against Respondent Travelers Casualty Insurance Company of America, and Respondents Steve Stiles and Insurance Services Corporation, Inc. (collectively "the Stiles respondents").[2] MG&S contended that the insurance policy it purchased provided or should have provided $1.5 million in "blanket" business personal property coverage for both its warehouse and its showroom and that Travelers should have

[1]District Judge Adriana Escobar issued the order granting in part and denying in part the motion to dismiss that is addressed by this disposition. District Judge Linda Marie Bell issued the remaining orders that are the subject of this appeal.

[2]We do not recount the facts except as necessary to our disposition.

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covered MG&S' business interruption loss. Travelers claimed that MG&S' policy afforded only $200,000 in business personal property coverage for the warehouse and that MG&S failed to substantiate its business interruption loss. On appeal, MG&S challenges eight district court rulings that ultimately precluded MG&S from obtaining any relief against Travelers and limited its net recovery against the Stiles respondents. We conclude that none of MG&S' arguments is persuasive and therefore affirm the district court's judgment.

MG&S fails to establish that the district court erred in dismissing without prejudice part of the original complaint

The district court dismissed without prejudice certain claims against Travelers, concluding that the insurance policy provided only $200,000 in business personal property coverage for items in the warehouse. MG&S contends that the district court erred by rendering this decision before any discovery had been conducted. We disagree.

This court conducts a de novo review of a district court's ruling on a motion to dismiss. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Under that standard, all factual allegations in the complaint are deemed true and all inferences are drawn in favor of the nonmoving party. *See id.* Further, a "complaint should be dismissed only if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief." *See id.*

Here, the order of dismissal indicated that the district court relied upon an attachment to Travelers' motion to dismiss in order to

ascertain the terms of MG&S' policy.[3] Yet, MG&S does not acknowledge that attachment, and only implicitly suggests that the district court's consideration of it converted Travelers' motion into one seeking summary judgment. *See* NRCP 12(b). Accordingly, this court will not disturb the lower court's decision to consider the attachment in determining MG&S' coverage.[4] *See Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881

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[3]The dissent contends that the district court necessarily weighed evidence by considering the policy attached to Travelers' motion to dismiss. We disagree. The trial court can consider the four corners of an unambiguous contract as a matter of law without "weighing evidence." *See America First Fed. Credit Union v. Soro*, 131 Nev. ___, ___, 359 P.3d 105, 106 (2015) ("[C]ontract interpretation is a question of law . . . .") (quoting *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011)); *cf. Galardi v. Naples Polaris, LLC*, 129 Nev. ___, ___, 301 P.3d 364, 366 (2013).

[4]We note that a district court's consideration of documents that are not attached to a complaint does not necessarily convert a motion to dismiss into a motion for summary judgment. *See Baxter v. Dignity Health*, 131 Nev. ___, ___, 357 P.3d 927, 930 (2015). Under *Baxter*, a court may consider documents beyond the pleadings in reviewing a motion to dismiss if (1) the complaint refers to the document, (2) the document is central to the plaintiff's claim, and (3) no party questions the authenticity of the document. *See id.* Here, MG&S did refer to its insurance policy (although not the specific attachment provided by Travelers) and that policy was central to MG&S's claims. While MG&S alleged that certain defendants misrepresented what and how much the policy covered, it did not and does not contest the authenticity of the attachment Travelers included with its motion to dismiss. Thus, under *Baxter*, the district court properly considered the attachment without converting Travelers' motion to dismiss into a motion for summary judgment. *Baxter*, 131 Nev. at ___, 357 P.3d at 930.

Further, even if the district court's consideration of the attachment did convert Travelers' motion to dismiss into a motion for summary judgment, our conclusion would be the same. Because MG&S failed to

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P.2d 638, 644 (1994) ("We will not reverse an order or judgment unless error is affirmatively shown."); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued).

That attachment includes an endorsement providing that the business personal property coverage for the warehouse was $200,000. MG&S neither alleges that this endorsement is in any way ambiguous nor explains how the policy could nonetheless be construed to provide $1.5 million in blanket coverage for both the showroom and the warehouse. Thus, any extrinsic evidence that MG&S could have obtained through discovery would not have been admissible to interpret the policy.[5] *See Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281-83, 21 P.3d 16, 21-23 (2001) (holding that extrinsic evidence is generally not admissible to explain the meaning of a clear and unambiguous contract). Therefore, MG&S fails to demonstrate that the district court's ruling was erroneous. *See Schwartz*, 110 Nev. at 1051, 881 P.2d at 644.

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allege any genuine issues of material fact at any point in time concerning the extent of the coverage included in the express terms of the policy, we would find that summary judgment on these issues was appropriate here. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[5]Further, even if the motion should have been treated as one requesting summary judgment, the district court did not err in impliedly denying MG&S' generalized request for a continuance to conduct discovery. *See Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) ("[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact.").

MG&S does not show that the district court abused its discretion in denying its motion for leave to file a second amended complaint[6]

If NRCP 15(a)'s deadline for amending a pleading as a matter of course has expired, then "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *See* NRCP 15(a). Although the discovery of "unexpected and surprising evidence" may justify a request for leave to amend, "leave . . . need not be granted if the proposed amendment would be 'futile.'" *See Nutton v. Sunset Station, Inc.*, 131 Nev. ___, ___, ___, 357 P.3d 966, 970, 973 (Ct. App. 2015) (quoting *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993)). "A district court's decision not to grant leave to amend will not be disturbed absent an abuse of discretion." *See Allum*, 109 Nev. at 287, 849 P.2d at 302.

MG&S argues that the Stiles respondents' disclosure of an October 10, 2011 email that Stiles sent to a Travelers employee warranted the reinstatement of the claims against Travelers that had previously been dismissed without prejudice. Because we conclude that the district court properly dismissed these claims, we also conclude the district court did not err in denying MG&S's motion for leave to file a second amended complaint in order to re-allege these claims on the ground that such an amendment would be futile. *See Nutton*, 131 Nev. at ___, 357 P.3d at 973.

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[6]To the extent that MG&S also challenges the denial of its alternative motion to enlarge the time to request (among other things) the rehearing of the order granting in part Travelers' motion to dismiss, that claim fails because MG&S does not support it with relevant authority. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (noting that an appellate court need not consider claims that are not cogently argued and supported with relevant authority).

MG&S fails to demonstrate that the district court abused its discretion in granting Travelers' motion for a protective order

The district court granted Travelers' motion for a protective order barring MG&S from deposing a Travelers NRCP 30(b)(6) representative on topics related to underwriting. In support of this decision, the district court found that MG&S failed to notify Travelers by the deadline imposed by a stipulation & order of MG&S' intention to conduct an NRCP 30(b)(6) deposition on underwriting. MG&S fails to establish that this ruling was erroneous.

This court "will not disturb a district court's ruling regarding discovery unless the [district] court has clearly abused its discretion"—*i.e.*, that the court acted "arbitrarily or capriciously[.]" *See Okada v. Eighth Judicial Dist. Court*, 131 Nev. ___, ___, ___, 359 P.3d 1106, 1110, 1113 (2015) (quoting *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012)) (internal quotation marks omitted). Moreover, NRCP 26(c) provides that "[u]pon motion by a party[,] . . . and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense[.]"

MG&S asserts that it provided timely notice of its intent by asking underwriting-related questions during another deposition of a Travelers employee. This argument is unpersuasive.

First, the district court found that, later in the deposition, MG&S' counsel suggested that he had not yet decided whether to further pursue that line of inquiry. Second, since MG&S fails to address whether its violation of the notice requirement had any impact on the timely

prosecution of this case (*e.g.*, by delaying the resolution of the parties' dispute on the scope of discovery), we cannot conclude that the district court's decision was arbitrary or capricious. *Cf. Sofo v. Pan-Am. Life Ins. Co.*, 13 F.3d 239, 241-42 (7th Cir. 1994) (concluding that a district court did not abuse its discretion by granting a protective order that enforced the discovery cutoff); *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179-80 (9th Cir. 2008) (concluding that the failure to timely disclose a damages computation was not harmless because "[l]ater disclosure . . . would have most likely required the court to create a new briefing schedule and perhaps re-open discovery, rather than simply set a trial date").[7]

MG&S does not show that the district court abused its discretion in precluding MG&S from introducing evidence of lost profits or lost income

MG&S contends that the district court erred when it precluded MG&S from introducing evidence of lost profits or lost income. We disagree that the district court abused its discretion in reaching this determination. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. ___, ___, 396 P.3d 783, 787 (2017). Under NRCP 37(a), a party cannot rely upon any undisclosed evidence or witnesses unless it shows that there was a substantial justification for the failure to disclose or it shows the failure was harmless.

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[7]"Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules." *See Nutton*, 131 Nev. at ___ n.2, 357 P.3d at 970 n.2.

Furthermore, because of our resolution of this issue, we need not address the district court's alternative basis for granting Travelers' motion—*i.e.*, that MG&S had not yet challenged the lower court's ruling that the business personal property limit was $200,000.

Id. Here, MG&S contends that the failure to provide a lost profits or lost income computation was harmless because it produced documentation supporting its claim for lost profits or income damages. This argument fails because the documentation MG&S relies upon either did not comport with MG&S' computation of alleged damages or was served after the discovery cutoff.[8]

MG&S fails to establish that the district court erred in granting Travelers' motion for partial summary judgment on MG&S' declaratory relief claim

"Summary judgment is appropriate and 'shall be rendered forthwith' when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (quoting NRCP 56(c)). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* On appeal, a district court's order granting summary judgment is subject to de novo review. *Id.*

MG&S appears to raise three challenges to the district court's order: (1) the October 10, 2011 email created a genuine issue of material fact regarding the limit of the business personal property coverage; (2) there was a genuine issue of material fact as to whether the policy provided that the business personal property loss would be calculated based upon actual cash value or replacement cost value, and (3) there was a genuine issue of

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[8]Because of our resolution of this issue, we need not address the district court's alternative rationale for its order—*i.e.*, that "[MG&S'] assertions of lost profits and lost income [we]re too speculative in this instance."

material fact regarding whether MG&S substantiated its claim for business interruption loss. We find that these arguments are unpersuasive.

The first argument is unsuccessful because MG&S fails to provide any meaningful explanation of the significance of the October 10, 2011 email until its reply brief, and MG&S did not present that new theory in opposition to Travelers' motion. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3; *Old Aztec*, 97 Nev. at 52, 623 P.2d at 983. Further, MG&S does not challenge the district court's finding that under either the actual cash or the replacement cost method, the value of the lost inventory would exceed the $200,000 policy limit. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *see also Wood*, 121 Nev. at 736-37 n.44, 121 P.3d at 1034 n.44 (disregarding facts and inferences therefrom that were "irrelevant to the dispositive issue in [that] case"). Moreover, MG&S does not establish that an accountant's report created a genuine issue of material fact regarding whether MG&S substantiated its business interruption loss. In that report, the accountant concluded that he was "unable to calculate a [b]usiness [i]nterruption loss based on the documents provided[,]" and he cited several explanations for this conclusion. Therefore, we will not reverse the district court's order.

MG&S does not demonstrate that the district court erred in granting Travelers' motion for judgment as a matter of law

The district court granted Travelers' motion for judgment as a matter of law on MG&S' claim under NRS 686A.310, concluding that MG&S could not prove that it suffered damages as a result of Travelers' purported violations of that statute. MG&S apparently challenges this order on the

ground that it could prove it sustained damages of $313,724 in inventory loss and $38,008 in lost income or lost profits.

"Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party 'has failed to prove a sufficient issue for the jury,' so that his claim cannot be maintained under the controlling law." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (quoting NRCP 50(a)(1)). In ruling on a motion for judgment as a matter of law, "the district court must view the evidence and all inferences in favor of the nonmoving party." *See id.* Further, "the standard of appellate review for an order under . . . NRCP 50(a) . . . is de novo[.]" *See id.* at 223, 163 P.3d at 425.

First, MG&S fails to show that it could have recovered inventory loss damages because it does not contest the portion of the district court's order concluding that this loss exceeded the $200,000 business personal property limit that Travelers had already paid. Second, for the reasons discussed earlier in this order, NRCP 37(c)(1) permitted the district court to exclude evidence of lost income or lost profits. Thus, MG&S is not entitled to relief on this claim. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *Schwartz*, 110 Nev. at 1051, 881 P.2d at 644.

MG&S fails to prove that the district court erred in granting the Stiles respondents' motion for judgment as a matter of law

This court reviews a district court's decision to grant judgment as a matter of law de novo. *Nelson*, 123 Nev. at 223, 163 P.3d at 425. In reviewing the district court's order granting a motion for a judgment as a matter of law, this court must "view the evidence and all inferences in favor of the nonmoving party." *Id.* at 222-23, 163 P.3d at 424. To support a claim for intentional misrepresentation, a plaintiff must show the defendant (1)

made a false representation, (2) knowing (or that he should have known) was false or without sufficient foundation, and (3) with the intent to induce the plaintiff to rely on the claim to take or refuse to take some action. *See id.* at 225, 163 P.3d at 426.

MG&S claims that the district court erroneously granted judgment as a matter of law on its intentional misrepresentation claim because "[t]he issue of whether a party has met the elements of intentional misrepresentation is generally an issue of fact." We conclude that MG&S failed to provide any clear and convincing evidence that Stiles possessed the intent to induce MG&S's reliance. MG&S does not identify on appeal, and did not identify below, any evidence that Stiles intended to cause MG&S to rely on any misrepresentation when he described the extent of MG&S' business personal property coverage.[9] *See Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998) (holding that a plaintiff must prove by clear and convincing evidence "defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation"). In fact, MG&S provides no reason or cogent argument to show why Stiles would deliberately mislead it in this way when Stiles may have stood to lose an increased commission in so doing. Accordingly, we conclude the record reflects what the jury concluded: Stiles was only negligent. Therefore, we will not disturb this ruling. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *Schwartz*, 110 Nev. at 1051, 881 P.2d at 644.

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[9]This court does not address MG&S' argument that Stiles intentionally concealed the policy limit because MG&S raises it for the first time in a reply brief. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

MG&S does not show that the district court erred in awarding the Stiles respondents attorney fees and costs

MG&S challenges the district court's award of attorney fees and costs to the Stiles respondents on the ground that the underlying NRCP 68 offer of judgment was invalid.[10] This argument is meritless.

NRCP 68 provides that "[a]t any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." NRCP 68(a). Moreover, if the offer is not accepted and the offeree "fails to obtain a more favorable judgment . . . the offeree shall pay the offeror's post-offer costs, . . . and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer." *See* NRCP 68(e)-(f). Although an award of attorney fees and costs is typically reviewed for an abuse of discretion, this court conducts a de novo review of the lower court's interpretation of court rules. *See Logan v. Abe*, 131 Nev. ___, ___, ___, 350 P.3d 1139, 1141, 1143-44 (2015).

The district court correctly concluded that the September 4, 2015 offer of judgment was timely. First, the lower court did not err in counting backward from the first day of the presentation of evidence (*i.e.*, September 22, 2015). *See Schwartz*, 110 Nev. at 1048-49, 881

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[10]MG&S also asserts that the Stiles respondents' verified memorandum of costs did not provide any documentation supporting their request for costs. Nonetheless, MG&S does not address—let alone challenge—the district court's finding that the Stiles respondents provided sufficient documentation in their opposition to MG&S' motion to retax costs. Therefore, MG&S fails to establish that the award of costs should be reversed. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *Schwartz*, 110 Nev. at 1051, 881 P.2d at 644.

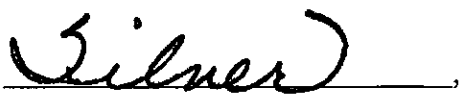
P.2d at 641-42 (holding that NRCP 68 requires that an offer of judgment be served at least 10 days before the date on which "the actual presentation of evidence commences"); *Palace Station Hotel & Casino v. Jones*, 115 Nev. 162, 167, 978 P.2d 323, 326 (1999) ("[T]he ten-day period set forth in NRCP 68 . . . requires counting backward from the day before the trial begins."). Second, the district court properly: (1) excluded September 22, 2015, from its calculation, and (2) included the date on which the offer of judgment was served. *See Palace Station*, 115 Nev. at 167, 978 P.2d at 326 ("[T]he date of the trial is excluded and the day of the offer is included."). Third, even excluding the intervening court holiday and weekends, this inquiry reveals that, for the purpose of NRCP 68, the offer of judgment was served 11 days before trial.[11]

[11]Since this analysis shows that the offer of judgment was timely, we need not consider whether the district court was permitted to include the court holiday and the weekends in its calculation. *See* NRCP 6(a) (providing that "intermediate Saturdays, Sundays, and non-judicial days shall [typically] be excluded in the computation" if the time period is "less than 11 days"); *Granite Constr. Co. v. Remote Energy Sols., LLC*, Docket Nos. 69618 & 69989, 2017 WL 2334516, at *3 (Order of Affirmance, May 25, 2017) ("[A]n offer of judgment must be served *more than* 10 days prior to trial under NRCP 68(a), therefore, the time allowed is *not less than* 11 days [for the purpose of NRCP 6(a)].").

Moreover, we have carefully considered MG&S' other arguments and conclude that they are unpersuasive.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



Silver, C.J.

Gibbons, J.

TAO, J., dissenting in part:

When MG&S's business was burglarized and $300,000 in inventory stolen, it filed a claim with its insurance company, Travelers. Travelers, however, paid only a portion of the loss. MG&S sued for (among other causes of action not relevant here) breach of contract and breach of the implied covenant of good faith and fair dealing/negligence, alleging that its policy entitled it to $1.5 million in blanket coverage. Travelers filed a motion to dismiss under NRCP 12(b)(5) which included a copy of what it alleged was the written insurance contract (though unaccompanied by any affidavit), which appeared to clearly state that MG&S was only covered for losses up to $200,000, not $1.5 million.

The question at hand is this: under the Nevada Rules of Civil Procedure (NRCP), when a complaint alleges one fact necessary to the plaintiff's claim, but the opposing party shows up with a document that appears to disprove that fact, what can a district court do to resolve that discrepancy at the pleading stage? Here, the district court dismissed the allegedly false claim under NRCP 12(b)(5), and my colleagues affirm. I respectfully dissent, for the reasons set forth below.

I.

I'll start with a note of sympathy for the district court and my colleagues. At first blush this may seem like the kind of case that warrants a quick and expeditious dismissal without requiring everyone to waste a lot of time and money only to achieve the same result months, perhaps years, later. It seems like just the kind of case that, in the federal system, the *Twombly/Iqbal* doctrine was created for—frivolous litigation that crowds the courts, drives up the cost of doing business for everyone, and enriches nobody but the lawyers while doing nothing to advance the concept of "justice." *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Hunters and military snipers boast of the "one-shot kill," and a lawsuit that requires a contract to say one thing when the text of the contract appears to say the exact opposite, seems like exactly the kind of lawsuit that deserves to die an early (and inexpensive) death.

But Nevada hasn't adopted the *Twombly/Iqbal* doctrine, at least not yet. As things stand, our rules of civil procedure take the opposite approach and are designed to be "rigorous" rather than discretionary, weeding out at the pleading stage only those cases in which it is clear "beyond a doubt" that the plaintiff has no hope of recovery. *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). As much as we may believe that we can easily predict how this case must end, we have to hold out the possibility that we may be wrong. At any rate, that's how our rules are designed, and often enough plaintiffs stumble across things in discovery that can make an initially weak case into a strong one (or the reverse). And in the end our job is to apply the law faithfully and neutrally even when we might not like the result every time. *See A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting)

("[A] judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels").

II.

Albert Einstein used to advise people to make things as simple as possible, but no simpler. Perhaps the simplest way to describe the district court's error is as follows: it weighed evidence to try to get at the truth of the initial pleadings at a time when the rules permitted it only to review them for completeness.

Motions to dismiss under NRCP 12(b)(5), motions for summary judgment under NRCP 56, and trials play different roles during the life of a case. A motion to dismiss under NRCP 12(b)(5) tests the sufficiency of the pleadings: whether the plaintiff has pled facts supporting all of the elements of at least one proper cause of action that is worth proceeding to discovery on. It has nothing to do with whether the allegations of the complaint are credible, supported by evidence, or ultimately true; it asks only whether all of the required allegations are there in a way that gives sufficient notice to the opposing party of the nature of the action. *See Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) ("[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought"). In legal terms, NRCP 12(b)(5) asks only whether the allegations of a complaint are sufficient, not whether they are true. *See RLP-Ferrell Street LLC v. Franklin American Mortgage Co.*, No. 2:13-CV-1470-RCJ-GWF, 2013 WL 6120047 at *3 (D. Nev. Nov. 19, 2013) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

Motions under NRCP 12(b)(5) are thus directed only to what's contained in the pleadings, not to what could be proved with evidence. Motions for summary judgment, on the other hand, are directed to what's contained in the evidence, but in only a very limited way. A summary judgment motion tests whether the evidence shows that any material factual issue in the case is sufficiently ("genuinely") disputed by the parties such that a trial is needed to sort out who's telling the truth. See NRCP 56. It has nothing to do with either the weight or the credibility of the evidence, only whether the evidence demonstrates that a factual dispute exists for a jury to resolve. *See Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001) ("[A] district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment"); *Sawyer v. Sugarless Shops Inc.*, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990) ("[D]ocumentary evidence must be construed in the light most favorable to the non-moving party. All of the non-movant's statements must be accepted as true and a district court may not pass on the credibility of affidavits" (internal citation omitted)).

If the plaintiff has pled a proper cause of action and a factual dispute exists, then the trial is the place where a jury decides which evidence to believe and how much weight to give to each piece of evidence presented.

Here, the complaint pled that the plaintiff was covered by a blanket insurance policy in the amount of $1.5 million. The district court concluded that this allegation was contradicted by the text of the insurance policy – and therefore factually untrue—and dismissed it. But in doing so, the district court engaged in a series of maneuvers all well beyond the scope of NRCP 12(b)(5): it treated the insurance policy as independent evidence

rather than as part of a pleading; treated it as authentic and admissible without requiring a sponsoring witness to lay any foundation for its authenticity or admissibility; concluded that it was credible and worth evidentiary weight; treated its contents as the final answer to the question presented without allowing the parties to cross-examine it or introduce any other evidence to the contrary (indeed, without even proceeding to discovery); concluded that the complaint was not truthful based upon that single piece of evidence; and, finally, concluded that any claims contradicted by the evidence should be dismissed.

But none of this is permitted by NRCP 12(b)(5). Quite to the contrary, every step of this analysis goes well beyond testing the sufficiency of the pleadings—which is all that NRCP 12(b)(5) does—to question whether the pleading allegations were proved by evidence—which has nothing whatsoever to do with NRCP 12(b)(5). The district court improperly employed the guise of NRCP 12(b)(5) to resolve the underlying merits of the dispute at the pleading stage of the litigation.

III.

Aside from being outside of the rules, I'm not even sure the district court's conclusion was the logical one to reach. The complaint alleges that MG&S was covered by $1.5 million in blanket insurance, while the insurance policy specified only $200,000 in coverage. Does this inconsistency between the complaint and the contract, by itself, mean the allegations of the complaint must be false or unprovable?

Not necessarily. When two things appear to contradict each other, there are three possible conclusions that can be inferred: one thing is untrue, or the other thing is untrue, or there is some way to reconcile the two things that might not be obvious right now but could become apparent

with more information. The district court jumped to one conclusion, but there's no reason why it should have preferred that one over the others. Furthermore, it was the wrong conclusion to reach at the pleading stage, when we're supposed to view the pleading in the light most favorable to the plaintiff and accept all of the plaintiff's allegations as true. *See Vacation Village,* 110 Nev. at 484, 874 P.2d at 746 ("All factual allegations of the complaint must be accepted as true"). That suggests to me that when a pleading allegation appears to contradict a document proffered by the defendant, we assume the allegation, not the document, is true. *See Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 471 (Vt. 2013) ("We assume that all factual allegations pleaded in the complaint are true . . . and assume that all contravening assertions in defendant's pleadings are false"); *Curtis v. Citibank, South Dakota, N.A.*, 261 P.3d 1059, 1061 (Mont. 2011) ("When considering a [Rule 12] motion, a court must assume that all of the well-pleaded factual assertions in the nonmovant's pleadings are true and that all contravening assertions in the movant's pleadings are false"). That's the opposite of what the district court did.

But let's assume that it's the document, and not the pleading, that's true (the exact opposite of what we're supposed to assume) and that there's no possible way to reconcile them together no matter how much discovery is conducted. Even then, the document disposes of MG&S's causes of action only if the insurance contract is the complete answer to entire case and there's no conceivable way the plaintiff could prove anything different. Dismissal is warranted only if it appears "beyond a doubt" that the plaintiff could prove no set of facts entitling it to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). That's a high threshold to impose on a document nakedly unaccompanied by

an affidavit and merely stapled to the back of a pleading motion, as the insurance contract was here.

The majority concludes that, because the document's authenticity wasn't challenged and it appears to be unambiguous on its face, there are no other questions one could ask about it. But what about these: is the document an integrated whole; is the version we have complete with no missing parts, riders, exhibits, or attachments not before us; has it ever been modified by the parties in any way by any other contemporaneous or subsequent agreements; is it totally incapable of being undermined by any formation defenses that might entitle the plaintiff to expectation damages; is there no possibility of fraud in the inducement or mistake having occurred even though the plaintiff specifically contends that it believes it purchased a policy for $1.5 million in coverage and the writing says something different?

Is it thus clear—right now, without needing any more facts added to the record and without needing to ask a single question of any party or witness—that all of these questions have been definitively answered "beyond a doubt" in favor of the respondent? If one believes the answer is yes, then affirmance is in order. But I don't think it is.

To isolate only one unanswered question out of many: MG&S's complaint doesn't overtly plead mistake. But it does allege that MG&S believed the policy provided $1.5 million in coverage. A plaintiff need not correctly identify or label his legal theories so long as the factual allegations support some right to relief under any possible theory, and this sounds a lot like there's another policy out there somewhere that we don't have a copy of, or else there was some kind of mistake (a million-dollar-plus one) committed by someone somewhere along the line. *Swartz v. Adams*, 93 Nev. 240, 245,

563 P.2d 74, 77 (1977) (Plaintiff's legal theory need not be correctly identified in the complaint). Whatever the truth may turn out to be, can we really say that we already know what the answer is "beyond a doubt"? Unlike the district court, I think not.

IV.

The majority concludes that no error occurred because, under *Baxter v. Dignity Health*, 131 Nev. ___, ___, 357 P.3d 927, 930 (2015), the district court can consider documents outside of the pleadings, but which were mentioned within them, to dispose of a motion to dismiss under NRCP 12(b)(5).

It's true that *Baxter* permits such things to be considered in assessing whether a complaint meets the standard of NRCP 12(b)(5). But that doesn't quite mean what the majority thinks it does. If a document existing outside of the four corners of the complaint is "integral" to the essence of the complaint, it can be considered in assessing what the complaint really alleges. *Baxter*, 131 Nev. at ___, 357 P.3d at 930. This isn't anything revolutionary or even novel. It's just Nevada's acceptance of the widely recognized general rule that "courts must consider the complaint in its entirety [including] in particular, documents incorporated into the complaint by reference." *Id.*, quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

But where the district court (and my colleagues) err is in this: it's one thing to consider documents outside of the complaint in order to determine what the complaint truly pleads as a whole under NRCP 12(b)(5). But it's quite another thing to use documents outside of the complaint to accomplish something that has nothing to do with NRCP 12(b)(5). *Baxter*

(and the long-established rule that it copies) is about identifying what the complaint fairly includes and what it doesn't. It's not about re-writing NRCP 12(b)(5) into an evidence-based motion instead of the pleading motion it's always been.

And, by the way, *Baxter* isn't even a case involving dismissal under NRCP 12(b)(5) for failure to properly plead a cause of action. Rather, it's a case involving dismissal under NRS 41A.071 for failure to supply an external expert affidavit in a medical malpractice case. This is no small difference: NRS 41A.071 requires the plaintiff to file external affidavits outside of the complaint itself, and requires courts to inquire whether the contents of the affidavit "support" the allegations contained in the complaint. Unlike NRS 41A.071, NRCP 12(b)(5) requires nothing like this.

In any event, *Baxter* allows integral exhibits and attachments to be considered as part of the plaintiff's pleadings. It doesn't say anything about allowing such exhibits to be used as extrinsic evidence to prove or disprove the underlying merits of the entire litigation and thereby adjudicate the entire case at the pleading stage without the need for discovery, witnesses, a summary judgment motion, trial—or even an answer to the complaint. Here, the district court treated the attachment (the insurance policy) not as part of MG&E's pleadings, but as evidence. It used that evidence to answer a question not asked by NRCP 12(b)(5) (whether the allegations of the complaint can be proved by evidence), while not answering the only question that NRCP 12(b)(5) does ask (merely whether the required allegations are all there). It didn't comply with Baxter or with NRCP 12(b)(5); it violated both of them.

V.

The respondent suggests that any error was harmless because the district court could have, sua sponte, converted the motion to dismiss into a motion for summary judgment to reach the same result. But it couldn't have, because a motion to dismiss cannot be converted into a motion for summary judgment unless and until the court gives notice that it intends to do so and affords the parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." NRCP 12(b). *See Renown Reg'l Med. Ctr. v. Second Jud. Dist. Ct.*, 130 Nev. ___, ___, 335 P.3d 199, 202 (2014) (noting that the power to grant summary judgment "is contingent upon giving the losing party notice that it must defend its claim [under NRCP 56] . . . we take this opportunity to reiterate that the defending party must be given notice and an opportunity to defend itself before a court may grant summary judgment sua sponte."); *Sierra Nevada Stagelines, Inc. v. Rossi*, 111 Nev. 360, 364, 892 P.2d 592, 595 (1995) (reversing grant of summary judgment when losing party was not given opportunity to submit affidavits: "a district court may not simply dispense with the adversary process when it senses the equities of the case are obvious."). Because the district court did not give advance notice or provide any such opportunity for re-briefing, it's wrong to treat the respondent's motion to dismiss as one that was properly converted into a summary judgment motion.

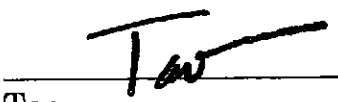
Furthermore, even considered as a complete and proper summary judgment motion (despite never having been briefed as one), the motion fails to meet the standards of NRCP 56 anyway. The document at issue was submitted as a naked exhibit to the respondent's motion to dismiss, unaccompanied by a supporting affidavit attesting to its

authenticity or otherwise demonstrating its admissibility under the rules of evidence. The majority suggests that authenticity was not challenged and therefore can be assumed away. But under NRCP 56 the appellant bore no burden to challenge authenticity when the moving party failed to first supply an affidavit. It's the party requesting summary judgment (assuming it was even requested when it actually wasn't) that bears the initial burden of proving its entitlement to summary judgment before the burden shifts to the opposing party to respond. *See Cuzze v. Univ. and Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (moving party must make initial showing of both an absence of genuinely disputed material facts as well as entitlement to judgment as a matter of law before burden shifts to opposing party). The party requesting summary judgment must first make its own prima facie case that the evidence it's trying to rely upon is admissible and entitles the party to judgment as a matter of law. *See* NRCP 56(e) (affidavits in support of or in opposition to summary judgment "shall set forth such facts as would be admissible in evidence"); *see also Collins v. Union Federal Savings & Loan Ass'n*, 99 Nev. 284, 301, 662 P.2d 610, 621 (1983) (requiring that evidence in support of or in opposition to summary judgment must be evidence that would be admissible at trial); *Schneider v. Continental Assurance Co.*, 110 Nev. 1270, 1274, 885 P.2d 572, 575 (1994) ("The district court thus erred in relying solely on inadmissible evidence to grant summary judgment"); *Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969) ("[E]vidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment"). Absent such a prima facie showing, the responding party (the appellant here) wasn't required to challenge anything at all before the district court

should have denied summary judgment (even if such a thing had actually been the subject of the motion and it had been briefed as such).

VI.

For all of these reasons, I would conclude that the district court erred in granting the respondent's motion to dismiss, and would reverse and remand for the two improperly dismissed claims to be fully litigated wherever they may lead.



_____, J.
Tao

cc: Hon. Linda Marie Bell, District Judge
Hon. Adriana Escobar, District Judge
Ara H. Shirinian, Settlement Judge
Bowen Law Offices
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