ANTONETTE PATUSH, Appellant, *v.*
LAS VEGAS BISTRO, LLC, Respondent.

No. 76062

ANTONETTE PATUSH, Appellant, *v.*
LAS VEGAS BISTRO, LLC, Respondent.

No. 76636

September 26, 2019 449 P.3d 467

Consolidated appeals from district court orders granting a motion to dismiss in a tort action and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Affirmed in part and reversed in part.

Kemp & Kemp and *James P. Kemp*, Las Vegas, for Appellant.

Clark Hill PLLC and *Deanna L. Forbush* and *Jeremy J. Thompson*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

In these appeals, we clarify the applicable limitations period for wrongful termination claims and resolve a challenge to a district court order awarding attorney fees.[1] In doing so, we conclude that claims for wrongful termination are subject to the limitations period prescribed by NRS 11.190(4)(e) for injuries or death caused by another person's wrongful act or neglect. Because the district court properly applied the two-year limitations period set forth in NRS 11.190(4)(e) when it granted respondent's motion to dismiss under NRCP 12(b)(5), we affirm its order of dismissal in Docket No. 76062. As we have not previously addressed the appropriate limitations period for a wrongful termination claim, this presented a matter of first impression, and the district court therefore should not have awarded attorney fees on the basis that appellant's claim was untimely filed and thus groundless under NRS 18.010(2)(b). Accordingly, we reverse its order awarding attorney fees in Docket No. 76636.

[1]We elect to consolidate these appeals for disposition. *See* NRAP 3(b).

FACTS AND PROCEDURAL HISTORY

This appeal arises from a former employee's wrongful termination claim against her former employer. Appellant Antonette Patush alleged that respondent Las Vegas Bistro terminated her employment in retaliation for a then-recent workers' compensation claim that Patush made for an injury that she suffered while at work. Patush was fired on July 3, 2014, and filed her complaint alleging wrongful termination on March 21, 2018. Las Vegas Bistro moved to dismiss the complaint, arguing that the two-year statute of limitations under NRS 11.190(4)(e) applied because wrongful termination is an action in tort and that the limitations period had therefore expired. The district court agreed that Patush's claims were time-barred and granted the motion to dismiss. The district court also awarded Las Vegas Bistro attorney fees and costs. This appeal followed.

DISCUSSION

On appeal, Patush argues that dismissal was improper because NRS 11.190(4)(e) should not have applied to her wrongful termination claim and that attorney fees were not warranted because her claim involved an issue of first impression. We rigorously review NRCP 12(b)(5) dismissals on appeal, presuming all factual allegations in the complaint as true and drawing all inferences in the complainant's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissal is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. Where the statute of limitations has run, dismissal is appropriate. *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011). Whether dismissal based on the two-year limitations period in NRS 11.190(4)(e) was warranted here presents a question of law that we review de novo. *See Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 769, 383 P.3d 257, 259 (2016) (reviewing judgment on the pleadings under NRCP 12(c) on statute of limitations grounds de novo). We review Patush's challenge to the district court's attorney fees award for an abuse of discretion. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 967, 194 P.3d 96, 106 (2008).

Wrongful termination statute of limitations

NRS 11.190(4)(e) provides a two-year limitations period for "an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another." Where a statute does not set forth an express limitations period for a particular cause of action, as is the case for wrongful termination, we consider analogous causes of action for which express limitations periods are available. *Perry*, 132 Nev. at 770-71, 383 P.3d at 260. This consid-

eration requires us to first determine the nature of a cause of action for wrongful termination. *See Stalk v. Mushkin*, 125 Nev. 21, 25, 199 P.3d 838, 841 (2009). A wrongful termination claim provides a former employee with a remedy where her employer has wronged her by terminating her employment in violation of public policy, such as by retaliating against the employee for exercising workers' compensation rights. *See Hansen v. Harrah's*, 100 Nev. 60, 63-65, 675 P.2d 394, 396-97 (1984). More broadly, the claim involves injury to a person by violating her rights to engage in certain behavior that is protected by public policy, such as seeking workers' compensation, performing jury duty, or refusing to violate the law. *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 212 (1991). Because a wrongful termination claim involves an injury to an ex-employee's personal rights caused by a wrongful act of another, we conclude that the claim is analogous to the cause of action described in NRS 11.190(4)(e) and that NRS 11.190(4)(e) therefore sets forth the relevant limitations period. As the district court applied this limitations period in concluding that Patush's complaint was time-barred, the district court did not err in this regard.

Our determination that the two-year period set forth in NRS 11.190(4)(e) applies to wrongful termination claims accords with our caselaw in an analogous context, analogous federal authority, and other jurisdictions' caselaw. Where we have previously addressed the appropriate limitations period for an employment discrimination claim, we have similarly applied a two-year limitations period for a different type of employment-rights suit. *Palmer v. State*, 106 Nev. 151, 153, 787 P.2d 803, 804 (1990); *see also Torre v. J.C. Penney Co.*, 916 F. Supp. 1029, 1030 (D. Nev. 1996) (taking *Palmer* for the proposition that a two-year limitations period applied to a wrongful termination claim). Where the Ninth Circuit has considered the Nevada limitations period for a claim alleging a civil rights violation, it too has concluded that NRS 11.190(4)(e) provided the appropriate term within which to seek relief for a different type of violation of personal rights. *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989). The Ninth Circuit upheld as well the use of the personal-injury limitations period for wrongful termination claims in applying Arizona law. *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (9th Cir. 1991). And the Fifth Circuit likewise held that the personal-injury limitations period provided the most analogous limitations period for a claim alleging wrongful termination for refusing to perform an illegal act. *Riddle v. Dyncorp Int'l Inc.*, 666 F.3d 940, 943 (5th Cir. 2012) (applying Texas law).

We are unpersuaded by Patush's arguments against applying the NRS 11.190(4)(e) limitations period. First, we reject Patush's argument that the "catch-all" provision in NRS 11.220 provides a four-year limitations period for wrongful termination claims because that provision does not apply where the court has found an analogous

cause of action with an express statute of limitations. *See* NRS 11.220 ("An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."); *Perry*, 132 Nev. at 773-74, 383 P.3d at 262 (applying the most closely analogous period rather than NRS 11.220). We next reject Patush's argument that the claim is more analogous to an action based on an unwritten contract. *See* NRS 11.190(2)(c) (providing a four-year limitations period for "[a]n action upon a contract, obligation or liability not founded upon an instrument in writing"). While a wrongful termination action arises out of the employee-employer special relationship, it does not require and is not based on an employment contract, whether written or not. *D'Angelo*, 107 Nev. at 712, 819 P.2d at 212. As we have discussed, the claim fundamentally seeks redress for a violation of personal rights protected by public policy, not of a contractual dispute. We also reject Patush's argument that NRS 11.190(4)(e) is void as unconstitutionally vague in violation of due process. NRS 11.190(4)(e) applies to "[a]n action to recover damages for injuries to a person . . . caused by the wrongful act . . . of another," which provides sufficient notice for a person of ordinary intelligence to understand what it applies to and specific standards to dissuade arbitrary enforcement. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 510, 217 P.3d 546, 551-52 (2009) (stating vagueness standard).

Attorney fees are not warranted under NRS 18.010(2)(b) for a legitimate issue of first impression

Lastly, Patush argues that her claim was not groundless so as to warrant an attorney fees award because resolution of the motion to dismiss required a decision on an issue of first impression. We agree, as we have not previously addressed the proper limitations period for wrongful termination claims.

The district court may award attorney fees to a prevailing party when it finds that the opposing party "brought or maintained [a claim] without reasonable ground[s]." NRS 18.010(2)(b). For these purposes, a claim is groundless if no credible evidence supports it. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995). Attorney fees are not appropriate where the underlying claim rested on novel and arguable issues, even if those issues were not resolved in the claimant's favor. *See Pub. Emps.' Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 136, 393 P.3d 673, 682 (2017); *see also Crestline Inv. Grp., Inc. v. Lewis*, 119 Nev. 365, 372, 75 P.3d 363, 368 (2003) (denying attorney fees in an appeal arising from a dispute resting on an issue of first impression), *superseded by statute on other grounds as stated in Yonker Constr., Inc. v. Hulme*, 126 Nev. 590, 592, 248 P.3d 313, 314 (2010). As Patush's claim rested on the novel and arguable contention that it was timely in light of the

limitations period stated in NRS 11.220, her claim was not brought without reasonable grounds. Accordingly, NRS 18.010(2)(b) attorney fees were not warranted. The district court therefore abused its discretion in awarding attorney fees. *See Gitter*, 133 Nev. at 136, 393 P.3d at 682.

Because Patush did not file her complaint alleging wrongful termination within the two-year limitations period set forth in NRS 11.190(4)(e), we affirm the district court's order in Docket No. 76062 dismissing the complaint as time-barred. However, as Patush's wrongful termination claim rested on a novel yet arguable construction of the limitations period, the district court should not have awarded attorney fees pursuant to NRS 18.010(2)(b), and we reverse the district court's order in Docket No. 76636 awarding attorney fees.

Gibbons, C.J., and Pickering, Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

RICHARD KILGORE, Appellant/Cross-Respondent, *v.*
ELENI KILGORE, Respondent/Cross-Appellant.

No. 73977

October 3, 2019 449 P.3d 843

Appeal and cross-appeal from orders resolving a motion to allocate omitted assets and modifying a divorce decree as it relates to PERS retirement benefits. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Affirmed.

Law Office of Betsy Allen and *Betsy Allen*, Las Vegas, for Appellant/Cross-Respondent.

Page Law Office and *Fred Page*, Las Vegas, for Respondent/Cross-Appellant.

Before the Supreme Court, Pickering, Parraguirre and Cadish, JJ.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we review the district court's distribution of community property upon Richard Kilgore and Eleni Kilgore's divorce. Specifically, we consider whether the district court abused its dis-

cretion or otherwise erred when it concluded that Eleni was entitled to her community property share of Richard's pension benefits even though Richard had not yet retired, reduced this amount to judgment, and ordered Richard to pay Eleni a monthly amount it deemed fair. We also consider whether the district court erred when it concluded that Richard's vacation and sick pay were omitted from the divorce decree and thereafter divided them equally between Richard and Eleni.

We hold that a district court has significant discretion when determining whether to grant or deny a non-employee spouse's request for pension payments before the employee spouse has retired and conclude that the district court did not abuse that discretion here. Further, the district court did not err in considering the omitted assets and dividing them equally between the parties.

FACTS

Richard Kilgore and Eleni Kilgore were married in December 1992. During their marriage, both worked for Clark County—Richard as a marshal and Eleni as a teacher—and received retirement benefits through the Nevada Public Employees' Retirement System (PERS). They divorced in March 2013, and the divorce decree provided for the division of each party's PERS benefits in accordance with applicable caselaw.[1] The decree did not address vacation or sick pay earned and accrued during the marriage.

In March 2015, Eleni moved the district court to compel Richard to begin paying her share of his PERS benefits because he had become eligible for retirement. She also requested a one-half interest in Richard's vacation and sick pay earned and accrued during their marriage, noting that such assets were omitted from the divorce decree. In June 2015, the court temporarily denied Eleni's request for payment because Richard had been terminated from his position as a marshal and earned no other income. The court also deferred resolving the vacation and sick pay issue.

Also in June 2015, the district court entered a qualified domestic relations order (QDRO) dividing Richard's PERS benefits and a QDRO dividing Eleni's PERS benefits. The QDRO dividing Richard's PERS benefits recognized Richard as the participant in PERS and Eleni as the alternate payee. It "assign[ed] to Eleni[ ] the right to receive a portion of the benefits payable to a plan Participant" "at the first possible date."

Richard was reinstated as a marshal in January 2016. Shortly thereafter, the district court ordered him to start paying Eleni $1,200 per month toward her share of his PERS benefits. Richard argued

[1]The divorce decree also resolved child custody, visitation, and support issues involving Richard's and Eleni's three minor children, none of which are disputed in this appeal.

that he planned to work until his PERS account reached full maturity and should not be obligated to pay until he retires. Over the course of 2016 and 2017, the court held a series of evidentiary hearings and status checks to resolve the dispute, and spent a significant amount of time reviewing Richard's financial situation.

In July 2017, the district court concluded that because Richard was eligible to retire in 2011, Eleni was entitled to her share of Richard's PERS benefits even though he had not yet retired. It acknowledged, however, that PERS would not pay Eleni anything until Richard retired. It therefore calculated the amount Richard owed to Eleni, retroactive to the date of Eleni's motion in March 2015, and reduced that sum to judgment, collectible by any lawful means. Having extensively reviewed Richard's financial situation, it ordered Richard to pay Eleni $350 per month toward the judgment, instead of the $2,455 per month it calculated Eleni would have received from PERS had Richard retired.[2] The district court also ordered Richard to pay Eleni for vacation and sick pay that he earned during their marriage.[3] Richard's timely appeal and Eleni's cross-appeal followed.

DISCUSSION

Richard challenges the district court's finding that Eleni is entitled to PERS benefits even though he has not yet retired. On cross-appeal, Eleni challenges the district court's reduction of monthly payments. Richard also challenges the district court's ruling on vacation and sick pay.

This appeal requires review of the district court's distribution of community property and its factual findings and conclusions of law. We review the district court's distribution of Richard's PERS benefits and vacation and sick pay deferentially for an abuse of discretion. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996). "This court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation." *Id.* Further, we review a district court's factual findings deferentially and will not set them aside unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Oga-*

[2]Specifically, the district court concluded, in part, as follows:

> For the relevant time period established at trial for the PERS retirement benefits in Richard's name that should have been paid to Eleni, the total accrued and owing to Eleni is $54,003.62 principal plus $2,572.14 of pre-judgment interest for a grand total of $56,575.76. Said amount is reduced to judgment and collectible by any lawful means. However, execution on Richard's paychecks is stayed and Richard shall pay Eleni $350.00 per month from January 2017 forward into her . . . bank account.

[3]The district court calculated that this amount was one-half of $8,635.70 minus taxes.

wa, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Conclusions of law, however, we review de novo. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003).

The district court's distribution of Richard's PERS benefits

Richard's primary argument on appeal is that the district court erred when it ordered him to begin paying Eleni PERS benefits even though he had not yet retired. He argues that an employee spouse who chooses to work past the date of first eligibility in order to maximize a PERS account should not be compelled to pay the non-employee spouse anything until retirement.

Eleni responds that Richard was first eligible to retire in 2011, and therefore the district court appropriately ordered Richard to start payment upon her request. Nonetheless, she argues on cross-appeal that the district court erred when it ordered Richard to pay her only $350 per month. She argues that, under the QDRO, she is entitled to the full amount of benefits she would have received from PERS had Richard retired. Finally, she argues that the district court's refusal to compel Richard to pay the full monthly amount of his PERS benefits amounts to an unequal distribution of property in violation of NRS 125.150(1)(b).

We have long held that "retirement benefits earned during the marriage are community property." *Walsh v. Walsh*, 103 Nev. 287, 288, 738 P.2d 117, 117 (1987). In *Gemma v. Gemma*, we clarified that "[t]his is so even though the retirement benefits are not vested." 105 Nev. 458, 461, 778 P.2d 429, 430 (1989). We therefore held that a non-employee spouse may elect to receive a community property share of pension benefits when the employee spouse is first eligible to retire, regardless of when the employee spouse chooses to retire. *Id.* at 464, 778 P.2d at 432 (upholding the district court's determination that the non-employee spouse was entitled to receive her interest in the employee spouse's retirement pension, even though he continued to work and his pension rights had not fully vested). We further held that because pension benefits are a community asset, an employee spouse should not be able to "defeat the non-employee spouse's interest in the community property by relying on a condition solely within the employee spouse's control," i.e., the retirement date. *Id.* at 463-64, 778 P.2d at 432 (quoting *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980)). Thus, under *Gemma*, a district court has discretion to order pension payments at the employee spouse's first eligibility for retirement, even if the employee spouse has not yet retired.

NRS 286.510 provides the date at which an employee spouse is first eligible to retire without suffering a reduction of benefits. First eligibility varies depending on an employee spouse's effective date of membership in PERS, profession, number of years served, and

age. Whether the employee spouse's PERS account has fully matured is not a factor provided in NRS 286.510 for determination of first eligibility.

In accordance with *Gemma* and NRS 286.510, the district court here determined that Richard, who served as a marshal for over 20 years, was first eligible to retire when he turned 50 years old in 2011, even though his PERS account had not reached full maturity. *See* NRS 286.510(2)(a) (A police officer or firefighter with at least 20 years of service is eligible to retire at age 50 with an unreduced pension.). It therefore concluded that Eleni was entitled to payment any time after 2011. In order to start receiving payment, *Henson v. Henson* requires that the non-employee spouse "file a motion in the district court requesting immediate payment of his or her portion of the employee spouse's pension benefits." 130 Nev. 814, 823, 334 P.3d 933, 939 (2014). Eleni filed a motion requesting payment in March 2015. Accordingly, the district court did not err when it concluded that Eleni was entitled to her community property share of Richard's PERS benefits dating back to March 2015.

The more difficult question, however, is whether the district court abused its discretion when it reduced the amount of PERS benefits owed to Eleni to judgment and ordered Richard to pay Eleni only $350 per month toward that judgment. To answer this question, we consider *Gemma* in light of NRS 125.155, which was enacted six years after *Gemma*'s publication.

NRS 125.155 governs the valuation and distribution of PERS benefits. It provides, in relevant part, as follows:

> The court *may*, in making a disposition of a pension or retirement benefit provided by the Public Employees' Retirement System or the Judicial Retirement Plan, order that the benefit not be paid before the date on which the participating party retires.

NRS 125.155(2) (emphasis added). By using permissive language, the Legislature unambiguously provided district courts with the discretion to deny a non-employee spouse's request for pension payments before the employee spouse's retirement.[4] Implicit in the power to deny a non-employee spouse's pension payments is the lesser power to reduce such payments. We therefore hold that while *Gemma* permits a district court to order pension payments at first

[4]Because NRS 125.155's meaning is clear from its plain language, we need not rely on its legislative history. *Loomis v. Whitehead*, 124 Nev. 65, 69, 183 P.3d 890, 892 (2008). We note, however, that the Legislature enacted NRS 125.155 to correct the assumption that *Gemma mandates* a district court to order public employees, specifically police officers and firefighters, to start pension payments upon first eligibility. Hearing on A.B. 292 before the Senate Judiciary Comm., 68th Leg. (Nev., June 26, 1995) (explaining the disparate treatment of police officers and firefighters under *Gemma* because of their early retirement eligibility and discussing the need for legislative clarity in light of *Gemma*).

eligibility, it does not mandate such an order. NRS 125.155 clarifies that a district court may deny or reduce such payments if the employee spouse has not yet retired.

Under this framework, a district court has discretion when determining how, and to what extent, to accommodate a non-employee spouse's request for pension payments before the employee spouse's retirement. We caution that NRS 125.155(2)'s broad grant of discretion is not unlimited. Overriding principles of equity and fairness govern a district court's exercise of discretion. *See, e.g.*, NRS 125.150(1)(b) (A court must make an equal disposition of community property except where "it deems just" upon finding "a compelling reason to" make an unequal disposition.). Further, *Gemma* and its progeny provide clear guidelines that a district court must follow when exercising that discretion. *See Gemma*, 105 Nev. at 459, 778 P.2d at 430 (requiring that a non-employee spouse wait until the employee spouse is first eligible to retire before requesting PERS benefits); *see also Henson*, 130 Nev. at 823, 334 P.3d at 939 (requiring a non-employee spouse to file a formal motion requesting immediate receipt of PERS benefits); *Sertic v. Sertic*, 111 Nev. 1192, 1194, 901 P.2d 148, 149 (1995) (affirming that a district court may order distribution of PERS benefits at, and not before, the employee spouse's first eligibility to retire).

With these holdings in mind, we conclude that the district court acted within its discretion when it reduced the sum that Richard owed Eleni to judgment and ordered Richard to pay a monthly amount it deemed fair. After determining that Eleni was entitled to her community property share of Richard's PERS benefits dating back to March 2015, the district court calculated the total amount owed to Eleni for past PERS payments. In accordance with established law, the court calculated that Eleni would have received $2,455 per month from PERS had Richard retired. It then determined that the outstanding amount owed to Eleni from March 2015 until early 2017, the date of the last proceeding on this matter, was $56,575.76. We discern no abuse of discretion or error in the district court's calculation.[5]

Next, having established that the amount owed to Eleni was $56,575.76, the district court reduced this amount to judgment, collectible by any lawful means. In similar contexts, we have affirmed that a district court has discretion to enter a judgment for support arrearages in a divorce proceeding. *See Libro v. Walls*, 103 Nev. 540, 541, 746 P.2d 632, 633 (1987) (holding that "[e]ntry of judgment for support arrearages under NRS 125.180 is discretionary"). We have also held that within that authority lies the discretion to schedule payments of the judgment "in any manner the district court

[5]Neither Richard nor Eleni challenge the district court's calculation of the community's share of PERS benefits.

deems proper under the circumstances." *Reed v. Reed*, 88 Nev. 329, 331, 497 P.2d 896, 897 (1972) (upholding the district court's order enforcing its judgment for child support arrearages at a rate not exceeding $50 per month).

Here, the district court held numerous hearings and status checks to ensure a fair arrangement under the circumstances of Richard's and Eleni's divorce. It extensively analyzed Richard's financial obligations, including $1,500 monthly child support payments to Eleni, as well as basic living expenses ranging from car insurance to the cost of yard maintenance. The district court found that if Richard were required to pay Eleni $2,455 per month in addition to his current obligations, he would be unable to afford basic living expenses and forced into early retirement, which it acknowledged is contrary to public policy. It also found that if this amount were garnished from Richard's paycheck, Richard would be left with less than half of his paycheck, which it acknowledged violates garnishment laws.

The district court calculated that Eleni, in contrast, enjoyed a net income, after expenses, of over $1,000 per month. Nonetheless, it determined that Eleni was entitled to her community property interest in Richard's PERS benefits. After balancing these competing interests, the court stayed any collection on the judgment from Richard's paycheck, and instead ordered Richard to pay Eleni a reduced rate of $350 per month toward the judgment. Because the district court based its distribution of community property on substantial evidence, which is extensively documented in the record, we conclude that it did not abuse its discretion. We further conclude that the court appropriately balanced the public policy and community property interests involved in this case and thus defer to its sound judgment.[6]

We recognize that by enforcing its judgment in this manner, the district court provided for the distribution of Richard's PERS benefits in a manner not expressly authorized in the QDRO.[7] Importantly, however, the district court "retain[ed] jurisdiction to enter such further orders as are necessary to enforce the award of benefits as specified [in the QDRO]." *See Gemma*, 105 Nev. at 462, 778 P.2d at 432 (holding that a court may modify or adjust division of pension benefits if it "specifically retains jurisdiction"). After closely analyzing Richard's expenses, the court determined that it was necessary

[6]We are therefore unpersuaded by Richard's argument that in exercising its discretion, the district court unfairly penalized Richard and deterred continued employment.

[7]The QDRO provides, in relevant part, that if Richard does not retire upon first eligibility, he must pay Eleni "the sum required by this Order, no later than the fifth day of each month," until PERS payments commence. It does not provide specific guidance as to how a district court should execute and enforce such payments, nor do statutes or caselaw.

to order payments on the judgment at a reduced monthly rate. In doing so, the district court did not modify Eleni's community property interest in Richard's PERS benefits, and she is still entitled to the full amount owed to her for the specified period. The district court thus accommodated Richard's current financial situation while ensuring that Eleni would eventually receive the full amount awarded to her in the judgment.[8] We conclude that this was necessary, fair, and equitable.

Accordingly, we hold that the district court did not abuse its discretion or err when it calculated the amount of PERS benefits owed to Eleni for the specified period, reduced that amount to judgment, and ordered Richard to pay Eleni a monthly amount it deemed fair.[9] We note, however, that the district court's order accounts for PERS benefits owed to Eleni only "[f]or the relevant time period established at trial," i.e., March 2015 until early 2017. To receive payment for PERS benefits owed after that period, Eleni will need to seek relief from the district court. We leave the ongoing distribution of Richard's PERS benefits to the district court, which expressly retained jurisdiction over this matter.

The district court's division of Richard's vacation and sick pay

Finally, Richard argues that the district court erred when, four years after the divorce decree, it equally divided the vacation and sick pay he earned and accrued during the marriage. He argues that because Eleni could have raised this issue at the time of the divorce, res judicata precluded division of this property. Richard also argues that vacation and sick pay are not community property because they amount to future wages, and are thus earned after divorce. We disagree.

Richard relies on *Doan v. Wilkerson*, 130 Nev. 449, 456, 327 P.3d 498, 503 (2014), in which this court barred an appellant from seeking division of a community asset that was mistakenly left out of the divorce decree, absent a showing of extraordinary circumstances justifying equitable relief. NRS 125.150(3), however, expressly

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[8]Because the order did not change Eleni's community property interest in Richard's PERS benefits, and because neither party disputed the district court's division of Richard's PERS benefits in the divorce decree, we are unpersuaded by Eleni's argument that the order resulted in the unequal distribution of community property.

[9]We are unpersuaded by Richard's remaining arguments. Specifically, we conclude that the district court did not abuse its discretion when it refused to offset Richard's payments with his future interest in Eleni's PERS benefits. Richard is not yet entitled to his share of Eleni's PERS benefits because Eleni is not eligible to retire under NRS 286.510 and *Gemma*. Therefore, any offset would be premature under existing law. We also decline Richard's invitation to expand our existing caselaw to require such an offset. Because district courts have broad discretion in divorce proceedings, we will not mandate such an offset and risk interfering with the district court's delicate balancing of interests.

abrogates our holding in *Doan*. *See* Hearing on A.B. 362 Before the Assembly Judiciary Comm., 78th Leg. (Nev., April 1, 2015) (acknowledging that in *Doan*, the court could not provide relief to the appellant for a mistakenly omitted asset, and explaining that Assembly Bill 362, now codified as NRS 125.150(3), was intended to provide such a remedy).

NRS 125.150(3) provides, in relevant part, as follows:

> A party may file a postjudgment motion in any action for divorce, annulment or separate maintenance to obtain adjudication of any community property or liability omitted from the decree or judgment as the result of fraud or mistake. A motion pursuant to this subsection must be filed within 3 years after the discovery by the aggrieved party of the facts constituting the fraud or mistake. The court has continuing jurisdiction to hear such a motion and shall equally divide the omitted community property or liability between the parties . . . .

Thus, under NRS 125.150(3), a party can seek adjudication of an asset mistakenly omitted from the divorce decree within three years of discovering the mistake.

Eleni moved the district court to adjudicate the vacation and sick pay as omitted assets in June 2015, roughly two years after the decree of divorce, arguing that they were omitted by mistake. At a hearing conducted in December 2016, Richard admitted that the parties did not discuss his vacation or sick pay during the divorce proceedings. Based on this and other trial testimony, the district court found that the vacation and sick pay were omitted assets under NRS 125.150(3) and concluded that Eleni was therefore entitled to file a post-judgment motion for distribution. Because the district court's findings are supported by substantial evidence and consistent with current law, we discern no abuse of discretion or error.

We further conclude that the district court did not abuse its discretion when it equally divided the vacation and sick pay earned and accrued during the marriage. Vacation and sick pay are forms of deferred compensation. If the work is performed during the marriage, compensation for that work belongs to the community. We find support for this conclusion in other community property jurisdictions. *See, e.g.*, *Suastez v. Plastic Dress-Up Co.*, 647 P.2d 122, 125 (Cal. 1982) ("This court, too, has adopted the view that vacation pay is simply a form of deferred compensation."); *Arnold v. Arnold*, 77 P.3d 285, 290 (N.M. Ct. App. 2003) ("[T]he district court properly determined Husband's unused vacation leave and unused sick leave to be community property and divisible upon divorce.").

Nonetheless, Richard argues that because he will ultimately receive payment for unused vacation and sick days after the marriage, it is his separate property. This argument belies the substantial body of caselaw that characterizes vacation and sick pay as deferred com-

pensation. *See Suastez*, 647 P.2d at 125 (listing cases). Moreover, it ignores the underlying presumption that benefits earned during a marriage are community property, regardless of when they are realized. *See Arnold*, 77 P.3d at 290 ("The essence of leave is that it is a benefit of employment and, whether considered a benefit in addition to salary, or somehow an aspect of salary, it has independent value.").

Therefore, we hold that vacation and sick pay earned and accrued during a marriage are community property and subject to equal division under NRS 125.150(1)(b). Thus, the district court did not abuse its discretion when it characterized Richard's vacation and sick pay earned and accrued during the marriage as omitted assets under NRS 125.150(3) and distributed them equally.

Accordingly, we affirm the district court's orders in all respects.

Pickering and Cadish, JJ., concur.

ARTEMIS EXPLORATION COMPANY, a Nevada Corporation; HAROLD WYATT; and MARY WYATT, Appellants, *v.* RUBY LAKE ESTATES HOMEOWNER'S ASSOCIATION, Respondent.

No. 75323

October 3, 2019 449 P.3d 1256

Appeal from a final judgment in a real property action. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Affirmed.

[Rehearing denied February 27, 2020]

[En banc reconsideration denied May 7, 2020]

Gerber Law Offices, LLP, and *Travis W. Gerber* and *Zachary A. Gerber*, Elko, for Appellants.

Leach Kern Gruchow Anderson Song and *Karen M. Ayarbe*, Reno, for Respondent.

Before the Supreme Court, Pickering, Parraguirre and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

In 1991, the Nevada Legislature adopted the Uniform Common-Interest Ownership Act, as codified in NRS Chapter 116. *See* 1991

Nev. Stat., ch. 245, §§ 1-128, at 535-79; NRS 116.001. NRS Chapter 116 defines what constitutes a "common-interest community," *see* NRS 116.021, and also authorizes the creation of a "unit-owners' association" to govern the common-interest community, *see* NRS 116.011; NRS 116.3101. As relevant to this appeal, a unit-owners' association is authorized to impose assessments on unit owners for the unit owners' association to maintain "common elements," which, generally speaking, comprise real estate within the common-interest community that is owned by the unit-owners' association but that benefits all unit owners. *See* NRS 116.017.

Appellants own property in Ruby Lake Estates (RLE), a neighborhood which was created in 1989. In the underlying declaratory relief action, they challenged respondent Ruby Lake Estates Homeowner's Association's (RLEHOA) authority to impose assessments on them. In particular, appellants argued that RLE was not a validly created "common-interest community" because the recorded Declaration that created RLE did not expressly state that RLE's residents would be responsible for paying assessments for the maintenance of common elements or other real estate aside from their individual units, which appellants contend is required under NRS 116.021. Alternatively, appellants contended that RLEHOA was not a validly created "unit-owners' association" because it was not organized until 2006, while NRS 116.3101 requires a unit-owners' association to be created before the first lot in the common-interest community is conveyed. The district court granted summary judgment for RLEHOA, thereby affirming RLEHOA's authority to impose assessments on appellants.

We agree with the district court's determination that RLEHOA is authorized to impose assessments. First, we conclude that RLE is a common-interest community within the meaning of NRS 116.021 because RLE's Declaration contained an implied payment obligation for the common elements and other real estate that appellants had notice of by virtue of the Declaration when they purchased their lots. Second, we conclude that NRS 116.3101(1) does not apply to common-interest communities formed before 1992 and that, consequently, RLEHOA did not need to be organized before the first lot in RLE was conveyed.

FACTS AND PROCEDURAL HISTORY

RLE is a rural subdivision in Elko County, Nevada. Developers Stephen and Mavis Wright (the Wrights) filed an official Plat Map for the community on September 15, 1989. The first sheet of the Plat Map reads in relevant part:

> At a regularly held meeting at the Board of Commissioners of Elko County, State of Nevada, held on the 5th day of July 1989, this Plat was approved as a Final Plat pursuant to NRS 278.380. *The Board does hereby reject on behalf of the public all streets*

> *or roadways for maintenance purposes and does hereby accept all streets and easements therein offered for utility, drainage, and access purposes only as dedicated for public use*.

(Emphasis added.)

Subsequently, the Wrights recorded the Declaration for the community on October 25, 1989.[1] As relevant here, the Declaration provided this:

> The real property affected hereby is subjected to the imposition of the covenants, conditions, restrictions and reservations specified herein to *provide for the development and maintenance of an aesthetically pleasing and harmonious community* of residential dwellings for the purpose of preserving a high quality of use and appearance and maintaining the value of each and every lot and parcel of said property.

(Emphasis added.) The Declaration further provided for the creation of an Architectural Review Committee (ARC)

> for the general purpose of providing for the maintenance of a *high standard of architectural design, color and landscaping harmony* and to preserve and enhance aesthetic qualities and *high standards of construction in the development and maintenance of the subdivision*.

(Emphases added.) The Plat Map was also attached to the recorded Declaration.

On December 15, 1989, the first lots in RLE were conveyed. Appellant Artemis Exploration Company acquired two lots in RLE, one in 1994 and one in 2010. Elizabeth Essington was the sole officer and director for Artemis Exploration Company. Mrs. Essington and her husband built their residential home on one of the lots Artemis Exploration Company owned in RLE. Appellants Harold and Mary Wyatt took title to a lot in RLE in 2001.

From 1997, after the last lot was sold by the developer, until 2006, an informal Ruby Lake Estates Landowners Association existed, and regularly levied and collected assessments from lot owners within RLE to maintain the roadways, fences, culverts, cattle guards, and entrance sign, and perform weed abatement within the community. Mr. Essington prepared a draft letter dated August 22, 2005, to the RLE lot owners, which he sent to Mr. Lee Perks as President of

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[1]NRS 116.037 defines "Declaration" as "any instruments, however denominated, that create a common-interest community, including any amendments to those instruments." The term is frequently used interchangeably with "Covenants, Conditions & Restrictions," or "CC&Rs." *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 753, 405 P.3d 641, 651 (2017).

the Landowners Association to review. In the letter, Mr. Essington wrote of "the need to revitalize the Ruby Lakes Estates property owners association," which could include "assur[ing] the aesthetic qualities of the subdivision" and "periodic road maintenance." He specifically wrote that he was "appealing to all of the property owners to take the time and interest now to help to revitalize the association and assist in making it function as it was intended," specifically seeking to organize the election of association officers.

RLEHOA was officially formed as an association in early 2006, 17 years after the first lot was conveyed. At an RLEHOA meeting held August 12, 2006, Mr. Essington seconded the motion to approve the bylaws for RLEHOA, which included a provision for annual assessments on the property owners for "maintenance, roads, fire protection, and other expenditures." On August 11, 2007, Mr. Essington was elected to the Board of the RLEHOA, and he submitted a Declaration of Certification as a Common-Interest Community Board Member to the Nevada Real Estate Division certifying that he had read and understood "the governing documents of the association and the provisions of Chapter 116 of Nevada Revised Statutes (NRS) and the Nevada Administrative Code (NAC)." As a member of the Board, Mr. Essington voted to levy assessments, and the Essingtons paid imposed assessments on behalf of Artemis.

Several years after RLEHOA was created, there was a dispute between Mrs. Essington and RLEHOA's ARC regarding the construction of a building in the subdivision. Over Mrs. Essington's objections, the RLEHOA Board and the ARC took the position that the structure was permitted. Thereafter, in response to the Board and the ARC's decision, Mrs. Essington stopped paying assessments on behalf of Artemis Exploration Company. Artemis Exploration Company then filed the underlying declaratory relief action against RLEHOA challenging RLEHOA's authority to impose assessments.[2]

The parties filed competing motions for summary judgment. The district court denied Artemis Exploration Company's motion and granted RLEHOA's motion. In particular, the district court found that RLE was a common-interest community because its Declaration sufficiently described RLE's common elements and alerted unit owners that they would be financially responsible for maintaining those elements. The district court also found that even though RLEHOA was not organized before conveyance of the first lot as required by NRS 116.3101, RLEHOA was nevertheless a validly created unit-owners' association because NRS 116.3101 should not apply retroactively. Following additional motion practice not rele-

[2]The parties initially participated in non-binding arbitration before the Nevada Real Estate Division. After the arbitrator ruled in RLEHOA's favor, Artemis Exploration Company instituted the underlying action.

vant to this appeal, the district court entered a final judgment consistent with its summary judgment determinations.[3]

DISCUSSION

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Costello v. Casler*, 127 Nev. 436, 439, 254 P.3d 631, 634 (2011). The district court's judgment in this case does not implicate any disputed facts, but instead raises issues of statutory construction, which we also review de novo. *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857, 265 P.3d 688, 690 (2011).

Appellants argue that the district court erred when it determined RLE was a common-interest community as defined under NRS 116.021 because RLE's Declaration includes neither a description of common elements, nor an obligation to pay for common elements. Alternatively, appellants argue that RLEHOA is not a valid unit-owners' association because it was not created before the first conveyance in RLE, thus violating NRS 116.3101(1). We disagree with these arguments and conclude that the district court properly found that (1) RLE is a common-interest community pursuant to NRS 116.021, and (2) NRS 116.3101(1) does not apply retroactively, such that RLEHOA is a validly created unit-owners' association.

RLEHOA is a common-interest community pursuant to NRS 116.021 because RLE's Declaration sufficiently gave notice to prospective unit owners that they would be financially liable for maintaining common elements

Our inquiry into whether RLE's Declaration meets NRS 116.021's definition of "common-interest community" begins with that statute's relevant language, which provides,

> "Common-interest community" means ***real estate*** *described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of* real estate taxes, insurance premiums, maintenance or improvement of, or services or other *expenses related to,* ***common elements,*** *other units* ***or other real estate*** described in that declaration.

[3]This case was initiated by Artemis Exploration Company against RLEHOA. After the district court granted summary judgment in favor of RLEHOA and against Artemis, the court ordered all other property owners within RLE to be joined. Other than the Wyatts and Artemis, all property owners failed to respond and defaults were entered against them. The Wyatts stipulated and agreed to be bound by the court's Order Granting RLEHOA's Motion for Summary Judgment and its Order Denying Artemis's Motion for Summary Judgment and any appeals related thereto.

NRS 116.021(1) (emphases added). Thus, the definition of "common-interest community" depends on the definitions of "common elements" and "real estate." NRS 116.017 defines "common elements" in relevant part as "any real estate within a planned community which is owned or leased by the association." And NRS 116.081 defines "real estate" as

> any leasehold or other estate or interest in, over or under land, including structures, fixtures and other improvements and interests that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. The term includes parcels with or without upper or lower boundaries and spaces that may be filled with air or water.

Reading the definitions together, we conclude that to qualify as a "common-interest community," the community's Declaration must describe "real estate" for which unit owners are financially responsible, which may include "structures, fixtures and other improvements and interests that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance." Commonly, this would be real estate that is "owned or leased by the association," i.e., "common elements," but not necessarily, as it could be "other real estate" described in a declaration.

While the definition of "common-interest community" is unwieldy, we conclude that RLE falls within that definition. As indicated, RLE's Declaration provided "for the development and maintenance of an aesthetically pleasing and harmonious community," and it established the ARC, whose responsibilities were to "maint[ain] . . . a high standard of architectural design, color and landscaping harmony and to preserve and enhance aesthetic qualities and high standards of construction in the development and maintenance of the subdivision." Even if these provisions could plausibly be interpreted as ensuring that each individual unit owner maintained only their own unit (a proposition with which we disagree), that interpretation is belied by the Plat Map, which was attached to the Declaration, and wherein the Elko County Board of Commissioners expressly "reject[ed] on behalf of the public all streets or roadways for maintenance purposes" but nevertheless "accept[ed] all streets and easements therein offered for utility, drainage, and access purposes only as dedicated for public use." The Plat Map also shows street monuments within the community. Reading the Declaration and Plat Map in conjunction, we conclude that the Declaration sufficiently describes "structures, fixtures and other improvements" (i.e., "real estate" under NRS 116.081) that, by virtue of the County Board disavowing any maintenance responsibility, necessarily implies that unit owners will be responsible for such maintenance.

Our conclusion is reinforced by NRS 116.2105, which provides an extensive list of information a declaration must contain but, conspicuously, does not require a declaration to expressly explain that unit owners may be subject to assessments or otherwise be financially responsible for maintaining common elements, and we do not read NRS 116.021 as imposing such a requirement. Indeed, the Restatement (Third) of Property (Servitudes) § 6.2 (2000), provides support for this conclusion. It states,

> There may be an implied obligation to contribute to the maintenance of commonly held property without regard to usage. An implied obligation may also be found where the declaration expressly creates an association for the purpose of managing common property or enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions.

Restatement (Third) of Property (Servitudes) § 6.2 cmt. a (2000). Consequently, we conclude that while RLE's Declaration does not expressly state an obligation to pay for common elements, other units, or real estate pursuant to NRS 116.021, the Plat Map (which is part of the Declaration pursuant to NRS 116.2109) does describe such real estate, giving rise to an implied payment obligation. *See, e.g., Evergreen Highlands Ass'n v. West*, 73 P.3d 1, 7 (Colo. 2003) (adopting the approach taken by a number of other states and the Restatement of Property (Servitudes) in holding that under Colorado's version of the Uniform Common-Interest Ownership Act, language in a declaration, plat, and other recorded documents may establish a common-interest community by implication with the association's concomitant implied authority to levy assessments on unit owners to pay for maintenance of the subdivision's common elements). Therefore, the district court was correct when it found that RLE met the statutory requirements of NRS 116.021, making it a common-interest community.[4]

RLEHOA is a valid unit-owners' association even though it was organized after RLE conveyed the first lot because NRS 116.3101(1) does not apply to pre-1992 common-interest communities

Appellants next contend that even if RLE is a valid common-interest community under NRS 116.021, RLEHOA is not a valid

[4]The language of NRS 116.021 quoted in the text is the current version following amendments adopted in 2009. While the parties dispute whether the broader pre-2009 version or this one applies here, we hold that RLE is a common-interest community under either version. The current language requires the declaration to describe the "real estate" but does not require it to specify the payment obligation. This is even clearer in this case because the provisions of NRS 116.2105 specifying the required contents of a declaration do not apply to pre-1992 communities like this one. NRS 116.1201(3)(b).

unit-owners' association because it was not organized in compliance with NRS 116.3101. That statute provides that "[a] unit-owners' association must be organized no later than the date the first unit in the common-interest community is conveyed." NRS 116.3101(1). According to appellants, because RLE conveyed the first unit in 1989 and RLEHOA was not formally organized until 2006, RLEHOA necessarily failed to comply with NRS 116.3101.

Appellants argue that the Legislature intended NRS 116.3101(1) to apply to pre-1992 common-interest communities because it did not include this provision in a list of provisions from which pre-1992 common-interest communities are exempt.[5] Further, they argue, if the provision does not apply, any community in the State formed before 1992 with a declaration could organize an HOA at any time, even if the declaration provides no notice to the lot owners. On the other hand, RLEHOA's position is that if NRS 116.3101(1) applies here, it leads to the absurd result that pre-1992 communities were required to comply with a statute which did not exist when they were created. We agree with RLEHOA's position.

In the context of deciding a statute's retroactive application, this court has stated that

> [i]n Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively, or it clearly, strongly, and imperatively appears from the act itself that the Legislature's intent cannot be implemented in any other fashion.

PEBP v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) (internal quotation marks omitted).

Here, appellants have not pointed to any legislative history or other authority, nor have we found any, to indicate "clearly, strongly, and imperatively" that the Legislature intended for NRS 116.3101(1) to apply to pre-1992 communities. While the Uniform Common-Interest Ownership Act commentary for this provision states that creating an HOA before the first lot is conveyed is important for notice purposes, the RLE Plat Map and Declaration, which were recorded together when the community was created, notified potential buyers that the community intended to maintain common elements for a variety of reasons. Moreover, appellants and other unit owners could not have relied on a yet-to-be enacted statute in deciding

[5]When the Uniform Common-Interest Ownership Act was first adopted in 1991 as NRS Chapter 116, *see* 1991 Nev. Stat., ch. 245, §§ 1-2, at 535, NRS Chapter 116 did not apply at all to pre-1992 communities. It was not until 1999 that such communities were made subject to this Act, *see* 1999 Nev. Stat., ch. 572, § 16.5, at 2999, but certain exceptions were adopted at that time, including the provision of NRS 116.1201(3)(b) stating that pre-1992 common-interest communities do not have to comply with NRS 116.2101 to NRS 116.2122. 1999 Nev. Stat., ch. 572, § 16, at 2998-99.

whether to purchase lots and build homes in the community. *Cf. PEBP*, 124 Nev. at 155, 179 P.3d at 554 (observing that fair notice, along with reasonable reliance and settled expectations, are guiding principles in deciding whether a statute applies retroactively).

While the Legislature did not state its intention as to whether NRS 116.3101(1) applies to pre-1992 communities, it did state that "[NRS Chapter 116] must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). The legislative history leading to the 1999 amendments to NRS Chapter 116 shows that the legislative purpose was to include more common-interest communities within the scope of the uniform law in order to protect a greater number of homeowners, because many pre-1992 communities that were previously excluded from NRS Chapter 116 had been "mismanaged with loosely written codes covenants and restrictions." *See* Hearing on S.B. 451 Before the Assembly Comm. on Judiciary, 70th Leg. (Nev., May 14, 1999) (Statement of Senator Schneider, who worked on developing the bill). In that regard, it would be absurd for the Legislature to decide in 1999 to impose NRS Chapter 116's requirements on pre-1992 communities but only if they knew, before 1992, that they would later be required to formally create the unit-owners' association before selling the first unit. *See S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (observing that in resolving statutory construction issues, this court's duty is to select a construction that is consistent with the Legislature's intent and the purpose of the legislation as a whole and that also avoids absurd or unreasonable results). Therefore, we conclude that the district court properly found that NRS 116.3101(1) does not apply to a pre-1992 community. Accordingly, we affirm.

Pickering and Parraguirre, JJ., concur.

NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE KATHLEEN E. DELANEY, District Judge, Respondents, and DENNIS E. RUSK, Real Party in Interest.

No. 76792

October 3, 2019 449 P.3d 1262

Original petition for a writ of prohibition challenging a district court order denying a motion to dismiss a petition for judicial review in a professional licensing matter.

Petition granted.

[Rehearing denied November 20, 2019]

[En banc reconsideration denied January 7, 2020]

Louis A. Ling, Reno, for Petitioner.

Nersesian & Sankiewicz and *Robert A. Nersesian*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

We grant this petition for a writ of prohibition to clarify that premature petitions for judicial review do not vest subject matter jurisdiction in the district court. A petition for judicial review may not precede the administrative agency decision it contests, and the agency decision must satisfy NRS 233B.125 in order to constitute a decision subject to judicial review. The underlying petition for judicial review was filed after the administrative agency stated its disposition on the record, but that utterance did not include findings of fact and conclusions of law with a concise and explicit statement of the underlying facts in support. The disposition that was stated on the record accordingly did not constitute a final decision for purposes of commencing the period set forth in NRS 233B.130(2)(d) in which an aggrieved party may seek judicial review. Consequently, because the underlying petition for judicial review was filed before the administrative agency's written order, which did constitute a final decision, the petition failed to comply with the relevant statutory

requirements. Accordingly, the petition did not vest jurisdiction in the district court. Dismissal is an appropriate remedy where the district court lacks jurisdiction. Because the district court incorrectly concluded that the agency's oral decision as stated on the record was subject to challenge by judicial review when it denied petitioner's motion to dismiss, we grant the petition for a writ of prohibition and direct the district court to grant petitioner's motion to dismiss.

FACTS AND PROCEDURAL HISTORY

Real party in interest Dennis Rusk was a licensed architect in Nevada. In 2011, the Nevada State Board of Architecture, Interior Design and Residential Design (Board) held a hearing on two complaints that alleged that Rusk's designs failed to include required fire-and-life-safety design elements. The Board concluded that Rusk violated Nevada law and ordered that Rusk pay a fine, pay the Board's fees and costs, complete certain courses while his registration as an architect was placed on probation, and submit to related conditions on these mandates. Rusk petitioned the district court for judicial review of the Board's decision, and the district court affirmed. Rusk appealed that affirmance to this court, and we dismissed the appeal for failure to timely file an opening brief. *Rusk v. Nev. State Bd. of Architecture, Interior Design & Residential Design*, Docket No. 61844 (Order Dismissing Appeal, July 30, 2013).

In 2016, Rusk moved to vacate the Board's disciplinary order in light of newly discovered evidence, and the Board denied Rusk's motion. The district court granted Rusk's subsequent petition for judicial review and remanded to the Board with a mandate to consider whether to vacate its 2011 disciplinary order in light of newly discovered evidence. On October 25, 2017, the Board held a hearing pursuant to the district court's mandate and unanimously passed an oral motion to deny Rusk relief and uphold the original disciplinary order. The Board stated its disposition on the record without discussing specific findings of fact or conclusions of law supporting its decision and announced that a written order would be forthcoming. On November 9, 2017, before the Board filed its written order, Rusk petitioned for judicial review of the Board's oral October 25 decision. On December 1, 2017, the Board issued its written order. On January 9, 2018, and without Rusk having supplemented his petition after the Board's December 1 order, the Board moved to dismiss Rusk's petition as jurisdictionally infirm. The district court denied the Board's motion, concluding that the Board's oral decision at the October 25 hearing was a sufficient basis for Rusk's petition for judicial review. The Board petitioned this court for a writ of prohibition to challenge the district court's order denying its motion to dismiss.

DISCUSSION

The Board petitions for a writ of prohibition, arguing that NRS 233B.130(2)(d) sets forth a mandatory jurisdictional requirement and that the district court did not have jurisdiction to consider Rusk's petition for judicial review because he did not file it in the 30-day period after the Board's written decision. Whether a district court may exercise jurisdiction over a premature petition for judicial review is a matter of first impression.

A writ of prohibition may issue when a district court acts without or in excess of its jurisdiction and the petitioner lacks a plain, speedy, and adequate remedy at law. NRS 34.320; NRS 34.330; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Whether a writ of prohibition will issue is within this court's sole discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851. Petitioners bear the burden of showing that this court's extraordinary intervention is warranted. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This case presents a jurisdictional issue of first impression and accordingly warrants consideration on the merits. *See Bd. of Review, Nev. Dep't of Emp't v. Second Judicial Dist. Court*, 133 Nev. 253, 255, 396 P.3d 795, 797 (2017).

An administrative agency's order must contain detailed findings of fact and conclusions of law to constitute a final decision for purposes of judicial review

Before considering the effect of a prematurely filed petition for judicial review, we must determine whether the Board's oral October 25, 2017, order constituted a final decision for purposes of NRS Chapter 233B.

We review matters of statutory interpretation de novo. *Liberty Mut. v. Thomasson*, 130 Nev. 27, 30, 317 P.3d 831, 833 (2014). Nevada's Administrative Procedure Act (NAPA), codified at NRS Chapter 233B, provides for judicial review of administrative decisions. *Id.* at 30, 317 P.3d at 834. NRS 233B.130(2)(d) requires a petition to be filed after service of an administrative agency's *final* decision. NRS 233B.125 provides that a final decision "must be in writing or stated in the record[,] . . . must include findings of fact and conclusions of law, . . . must be based upon a preponderance of the evidence[,] . . . [and] must be accompanied by a concise and explicit statement of the underlying facts supporting the findings." The final decision requirements ensure that the decision has sufficient detail to satisfy due process and permit judicial review. *State, Dep't of Commerce v. Hyt*, 96 Nev. 494, 496, 611 P.2d 1096, 1098 (1980).

The Board's statement of its disposition in the record lacked the requisite findings of fact and conclusions of law to constitute a final

decision pursuant to NRS 233B.125. At the conclusion of the October 25, 2017, hearing, one of the board members moved to uphold the Board's 2011 disciplinary order, the motion was seconded, the board members unanimously voted to affirm the 2011 order, and the chairman announced that a written order would be drafted and circulated. No further statement of the decision's basis or reasoning was made. A board member assented to Rusk's counsel that nothing would take effect and no limitations period would begin to run until the written order was produced.[1] As the Board's October 25 disposition as stated in the record summarily presented its ruling without any further legal or factual explanation, the October 25 disposition was not a final decision under NRS 233B.125 for purposes of commencing the NRS 233B.130(2)(d) filing period. *See Poremba v. S. Nev. Paving*, 133 Nev. 12, 14, 20, 388 P.3d 232, 235, 239 (2017) (concluding that an administrative appeals officer's summary disposition without detailed findings of fact or conclusions of law did not satisfy NRS 233B.125); *Dickinson v. Am. Med. Response*, 124 Nev. 460, 469, 186 P.3d 878, 884 (2008) (same). In contrast, the Board's December 1, 2017, written order contains a thorough explanation of the procedural history of this dispute, detailed findings of fact regarding Rusk's professional performance and whether the disputed evidence showed that Rusk met his professional standard of care, and the Board's legal conclusion after considering Rusk's new evidence that Rusk violated Nevada law with regard to his work on the projects, as alleged in the original disciplinary complaint. Accordingly, we conclude that the period for Rusk to file a petition for judicial review to challenge the Board's disposition did not begin to run with its October 25 oral decision but rather with its December 1 written order and that Rusk's November 9 petition for judicial review was prematurely filed.

Rusk's arguments to the contrary are unpersuasive. Rusk's argument that the October 25 oral order adopted the Board's original 2011 disciplinary order and thus incorporated the 2011 findings of fact and conclusions of law fails because the purpose of the 2017

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[1]The following colloquy between Rusk's counsel Robert Nersesian and board members took place:

> Mr. Mickey: . . . Motion carries. With that, I believe the next step is that we must draw up an order. So he if—I—I can't if you would get that please and we could go ahead and get the order crafted. Thank you.
>
> Mr. Nersesian: Thank you.
>
> Mr. Mickey: And we will adjourn.
>
> Mr. Nersesian: So I will get an order and nothing is effective and no time frames are running until I get the order?
>
> Ms. Long: That's correct.
>
> Mr. Nersesian: Okay.

hearing was to investigate whether newly discovered evidence provided cause to vacate the 2011 order. Accordingly, new findings of fact and conclusions of law were required to comply with the district court's mandate to the Board, and a petition for judicial review of the Board's 2017 disposition would need to challenge the basis for that 2017 disposition. Further, Rusk's reliance on *Commission on Human Rights & Opportunities v. Windsor Hall Rest Home*, 653 A.2d 181 (Conn. 1995), is misplaced because that decision is distinguishable. Unlike here, the administrative officer in *Windsor Hall* orally stated thorough factual findings and legal conclusions that supported the commission's decision, such that the basis for the decision was clear and adequate for judicial review. 653 A.2d at 183-84. The Board did not proffer findings and conclusions supporting and explaining its disposition until it produced the December 1 written order.

A prematurely filed petition for judicial review does not vest jurisdiction in the district court

We look to the statutory language of NRS 233B.130(2) to determine whether a prematurely filed petition for judicial review may be considered. Petitions for judicial review must name the agency and all parties of record to the administrative proceeding as respondents; be filed in the district court in Carson City, in the county where the petitioner resides, or in the county where the agency proceeding took place; be served on the Attorney General or a person designated by the Attorney General and on the person serving in the named agency's administrative head's office; and "[b]e filed within 30 days after service of the final decision of the agency." NRS 233B.130(2). Where a statute's meaning is unambiguous, we give effect to the plain meaning of its language. *Bd. of Review*, 133 Nev. at 255, 396 P.3d at 797. NRS 233B.130(2) plainly states that the petition must be filed *after* service of the final decision. Rusk filed his petition 22 days *before* the Board's order was filed, let alone served. A prematurely filed petition like Rusk's thus does not satisfy the NRS 233B.130(2) requirements. Rusk's argument that the provision creates a filing deadline, rather than a filing period, fails because the petition must be filed "within 30 days after," creating a period *within* which the relevant act must occur. We have held that the requirements to name the agency, file the petition in the proper venue, serve the petition on the Attorney General, and file the petition within 30 days of the decision are mandatory and jurisdictional. *Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm'r*, 134 Nev. 1, 4, 408 P.3d 156, 159 (2018); *see also Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) (requiring strict compli-

ance with statutory requirements for petitions for judicial review). Insofar as Rusk argues that he had to file his petition prematurely to avoid being procedurally barred had the Board's oral decision been a final decision, this contention does not excuse his failure to satisfy the procedural requirements of NRS 233B.130(2). Moreover, Rusk's counsel was explicitly told that the Board's decision would not take effect and the limitations period would not begin until the written order was produced. We conclude that a premature petition for judicial review does not satisfy the jurisdictional requirement to timely file the petition. Accordingly, Rusk's premature petition for judicial review did not vest jurisdiction in the district court.

CONCLUSION

Because the district court lacked jurisdiction over Rusk's petition for judicial review, we grant the Board's petition for extraordinary relief. The clerk of this court shall issue a writ of prohibition directing the district court to grant the Board's motion to dismiss Rusk's petition for judicial review for lack of jurisdiction.[2] In light of this opinion, we vacate the stay previously imposed by this court on October 12, 2018.

Hardesty and Silver, JJ., concur.

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[2]Rusk's reliance on *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 182 P.3d 764 (2008), is misplaced, as that case is distinguishable. That decision treated the date to file a memorandum of costs as creating a filing deadline, rather than a filing period, and thus permitted a prematurely filed memorandum. 124 Nev. at 278, 182 P.3d at 768. Unlike the statutory requirements here, however, a memorandum of costs is not jurisdictional, *Eberle v. State ex rel. Nell J. Redfield Tr.*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992), because the statute specifically permits the court to grant additional time, *see* NRS 18.110(1); *Adelson v. Harris*, 774 F.3d 803, 810 (2d Cir. 2014) (observing that Nevada statutes that permit the court to extend a time period are not jurisdictional). The court lacks such discretion as to a petition for judicial review, *Otto*, 128 Nev. at 434-35, 282 P.3d at 727, and thus *Las Vegas Fetish & Fantasy* is not instructive here.

VERNON NEWSON, JR., Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 75932

October 10, 2019 449 P.3d 1247

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with use of a deadly weapon, two counts of child abuse, neglect or endangerment, and ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied November 20, 2019]

[En banc reconsideration granted April 30, 2020][*]

Darin F. Imlay, Public Defender, and *William M. Waters*, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Silver, J.:

Vernon Newson and Anshanette McNeil were driving in a rented SUV on a freeway on-ramp when Newson turned and shot Anshanette, who was seated in the backseat next to the couple's infant son and Anshanette's toddler. Newson pulled the vehicle over to the side of the road, and Anshanette either fled or was pulled from the vehicle. Newson shot her additional times before driving off, leaving her behind. Newson drove the children to Anshanette's friend, reportedly telling her that Anshanette had "pushed me too far to where I can't take it no more." Newson fled to California, where he was apprehended. The State charged Newson with open murder. Although Newson did not testify at trial, defense counsel conceded in closing argument that Newson shot Anshanette, arguing Newson did so in a sudden heat of passion and that the killing was not premeditated. The district court declined to instruct the jury on voluntary manslaughter, concluding the evidence did not establish that offense. The jury convicted Newson of first-degree murder, two counts of child abuse, neglect or endangerment, and ownership or possession of a firearm by a prohibited person.

[*]**Reporter's Note:** En banc reconsideration was granted April 30, 2020. This panel opinion was withdrawn, and the en banc opinion, 136 Nev. 181, 462 P.3d 246 (2020), was issued in its place.

In this appeal, we primarily consider whether the district court abused its discretion by declining to instruct the jury on voluntary manslaughter. We conclude it did, as the circumstantial evidence strongly suggested the killing occurred in a sudden heat of passion upon provocation. We reiterate that district courts must instruct juries on the defendant's theory of the case where there is any evidence, no matter how weak, to support it. We therefore reverse the first-degree murder conviction and remand for a new trial on that charge. We reject Newson's remaining assertions of error and therefore affirm the judgment of conviction as to the other charges.

I.

Late one night, witnesses driving in Las Vegas on Lamb Boulevard near the I-15 heard rapid gunfire coming from a nearby freeway on-ramp. Looking in the direction of the gunfire, they observed an SUV on the on-ramp and thought they heard more than one car door slam before the SUV sped off. Persons who arrived at the scene shortly thereafter saw a badly injured woman lying on the road. She had been shot seven times: through her cheek and neck, chin and neck, chest, forearm, upper arm, and twice in the back. At least one of the shots—the one that entered through the victim's right cheek, exited her right neck, and reentered her right upper chest—was fired at a close range of six inches to two feet. Three of the shots were independently fatal, and the woman passed away shortly after the shooting. The victim had no shoes, and a cell phone damaged by a gunshot was on the ground a few feet away. Responding officers recovered six spent cartridges from the area, and the pavement showed evidence of fresh dents from bullet strikes. The toxicology report later showed that the victim had methamphetamine and its metabolite amphetamine, and hydrocodone and its metabolites in her system at the time of death.

Meanwhile, Zarharia Marshall was waiting at her residence for Anshanette McNeil to drop off Anshanette's infant son. Zarharia and Anshanette were close friends, and Zarharia often babysat for Anshanette. But Anshanette never arrived. Instead, Vernon Newson, Anshanette's boyfriend of three years and the infant's father, arrived in Anshanette's rental SUV to drop off the infant and, to Zarharia's surprise, Anshanette's two-year-old son.

As Newson exited the vehicle, bullets fell from his lap. Newson was acting frantic, irritated, and nervous. He struggled to extricate the infant's car seat from the SUV and, according to Zarharia, ordered the crying child "to shut up." Newson handed the car seat with the infant inside to Zarharia before retrieving a baby swing and diaper bag from the trunk. Newson went around the SUV to let the two-year-old out. The toddler looked frightened, and when

Zarharia asked him whether he was staying with her and whether he was going to cry, the toddler looked at her without answering and then ran into the house. Newson followed Zarharia and the children inside and kissed his infant son before asking to speak with Zarharia. Zarharia followed Newson outside and watched him pick up a bullet from the driveway and place it in a gun magazine. Zarharia also noticed Anshanette's shoes and purse in the back seat of the SUV. Zarharia testified that Newson retrieved the purse from the SUV, handed it to her, and asked her to tell his son that he always loved him. Zarharia asked Newson what had happened, and she testified that he responded, "you know, just know that mother fucker's pushed me too far to where I can't take it no more." Newson drove off.

Zarharia retrieved several of the bullets that had fallen onto her driveway and tried to call Anshanette, who did not answer. Zarharia took the infant out of his car seat to change his diaper and realized he had blood on his pants and that there was blood in the car seat as well. She called Anshanette's mother, who in turn called the police. Based on her description, detectives identified Anshanette as the shooting victim.

Police located and arrested Newson more than a week later in California. Newson's watch had Anshanette's blood on it, and he was carrying bullets of the same caliber and make as those used in the shooting. Police did not recover the murder weapon but did recover the SUV, which had been abandoned and still contained bloody clothing, a pair of flip-flops, a car seat, spent cartridges, and other items. Anshanette's blood was on the driver's side rear seat, seatbelt, door, and door handle, as well as on the steering wheel. Detectives also recovered six spent cartridges and one unfired round from the SUV, and those cartridges matched the cartridges recovered at the crime scene. The SUV had three bullet holes in the back seat, and there were bullet fragments in the vehicle.

The State charged Newson with murder with use of a deadly weapon, two counts of child abuse, neglect or endangerment, and ownership or possession of a firearm by a prohibited person. At trial, the State's theory of the case was that Newson was driving the SUV when he pulled the vehicle over to the side of the road, turned around, and shot Anshanette, who bled on the infant. Newson then exited the SUV, pulled Anshanette from the vehicle and threw her onto the road, stood over her, and shot her several additional times before climbing back into the SUV and driving off.

Newson did not testify at trial. However, Newson's counsel conceded that the evidence showed Newson shot Anshanette, but argued that the State's evidence fell short of proving first-degree murder. Newson's counsel contended that the circumstantial evidence

showed that Newson became angry while driving and shot Anshanette while his passions were inflamed. Newson's counsel further argued the evidence did not show that Newson ever exited the SUV. In support, Newson's counsel pointed to evidence surrounding the shooting and testimony that the couple argued constantly, including while driving. He also pointed to evidence that Anshanette had high levels of methamphetamine in her system at the time of the shooting, which an expert witness at trial agreed may have caused her to become unreasonable or threatening.

Pertinent here, Newson wished to have the jury instructed on voluntary manslaughter and his counsel proffered instructions to that end. The State argued that the instructions were not warranted because there was no evidence of any particular provocation that incited the killing. Newson's counsel countered that circumstantial evidence justified the instructions and that the State's provocation threshold would force Newson to testify and waive his Fifth Amendment right against self-incrimination. The district court agreed with the State that the evidence did not establish sufficient context to warrant the instructions. The court thereafter instructed the jury only as to first- and second-degree murder.

The jury convicted Newson of first-degree murder with use of a deadly weapon and the remaining charges. The district court sentenced him to an aggregate sentence of life with parole eligibility after 384 months. Newson appeals.

II.

Newson alleges error only as to the convictions for first-degree murder and child abuse, neglect and endangerment. We first consider whether the district court abused its discretion by refusing to instruct the jury on voluntary manslaughter.[1] We thereafter examine whether the State failed to adequately inform Newson of the child abuse, neglect or endangerment charges or prove the necessary elements of those charges.

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[1]Newson also contends the district court erred by declining to give his proffered instruction on two reasonable interpretations of the evidence and that the district court gave an inaccurate flight instruction. The district court was not required to give the proffered two reasonable interpretations of the evidence instruction because the jury was properly instructed on reasonable doubt. *See, e.g.*, *Bails v. State*, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976). We do not address the flight instruction, as Newson did not raise his appellate arguments below. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (holding that the defendant must object at trial to the same grounds he or she asserts on appeal); *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

A.

Newson first contends the district court erred by refusing to instruct the jury on his defense theory of voluntary manslaughter,[2] where that theory was supported by Newson's statement to Zarharia and by the circumstances of the crime. The State counters that the district court properly refused to instruct the jury on voluntary manslaughter because the evidence did not establish a provocation.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The failure to instruct the jury on a defendant's theory of the case that is supported by the evidence warrants reversal unless the error was harmless. *See Cortinas v. State*, 124 Nev. 1013, 1023-25, 195 P.3d 315, 322-23 (2008) (discussing when instructional error may be reviewed for harmlessness).

Existing case law treats voluntary manslaughter as a lesser-included offense of murder. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); *see Collins v.* State, 133 Nev. 717, 727 & n.1, 405 P.3d 657, 666 & n.1 (2017). Voluntary manslaughter involves "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." NRS 200.050(1). Moreover, the killing must result from a sudden, violent, irresistible passion that was "caused by a provocation apparently sufficient to make the passion irresistible." NRS 200.040(2); *see also* NRS 200.060.

We have frequently addressed the circumstances in which a trial judge should give voluntary manslaughter instructions at the request of a defendant charged with murder. *See, e.g.*, *Collins*, 133 Nev. at 727-28, 405 P.3d at 666-67; *Williams*, 99 Nev. at 531, 665 P.2d at 261. In the seminal case of *Williams v. State*, the defendant claimed the killing happened in a heat of passion after he and the victim engaged in a fistfight and the victim threw the defendant to the floor, but the trial court refused to give the defendant's proffered voluntary manslaughter instruction. 99 Nev. at 531-32, 665 P.2d at 261-62. In concluding that the district court erred, we reiterated that a criminal defendant "is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Id.* at 531, 665 P.2d at 261. Applying that rule, we explained that the defendant's theory of the altercation that led to the killing could support a voluntary manslaughter conviction because the victim's actions during the fight

[2]Because the parties did not brief the issue of whether the proffered voluntary manslaughter instructions were correct statements of law, we do not address it.

could be viewed as an attempt to seriously injure the defendant, providing sufficient provocation under NRS 200.050. *Id.* at 532, 665 P.2d at 261-62.

Conversely, in *Collins v. State*, we upheld the district court's decision not to give a voluntary manslaughter instruction where *no* evidence supported that charge. 133 Nev. at 728-29, 405 P.3d at 666. In that case, circumstantial evidence linked the defendant to the killing, including the defendant's and the victim's prior history and cell phone records on the day the victim disappeared, the defendant's possession of the victim's jewelry, the victim's blood and acrylic nail in the defendant's home, and the victim's blood in the trunk of an abandoned car. *Id.* at 718-19, 405 P.3d at 660-61. The defendant requested a voluntary manslaughter instruction based upon his remark to a third party that the defendant thought he should delete text messages between himself and the victim for fear that the police might use those messages to link him to the victim's disappearance. *Id.* at 728, 405 P.3d at 667. We concluded that "[t]he cryptic reference to a text-message exchange" in no way "suggest[ed] the irresistible heat of passion or extreme provocation required for voluntary manslaughter," warning that to give a lesser-included offense instruction where no facts supported the lesser offense could lead a jury to return a compromise verdict unsupported by the evidence. *Id.*

Here, it is undisputed that Newson killed Anshanette. The sole question is whether the evidence warranted a voluntary manslaughter instruction where there was no direct evidence of the events immediately preceding the killing and the defendant chose to invoke his constitutional Fifth Amendment right to remain silent. In declining to instruct the jury on voluntary manslaughter, the district court specifically concluded that Newson's statement, according to Zarharia—that Anshanette had "pushed [him] too far to where [he] can't take it no more"—demonstrated neither a sudden passion nor sufficient provocation for voluntary manslaughter because the statement lacked context as to when Newson was "pushed . . . too far." We disagree that this statement lacked adequate context under these circumstances and further disagree that the evidence taken as a whole does not support a voluntary manslaughter charge.

The State was not prohibited from arguing circumstantial evidence as a whole showed first-degree murder. Yet, Newson's counsel was prohibited from arguing Newson's theory regarding what crime the evidence showed. The record here shows abundant circumstantial evidence suggesting the killing was not planned and instead occurred in a sudden heat of passion. The circumstances of the killing itself suggest a sudden heat of passion. The shooting occurred in a rented SUV on a freeway on-ramp in a busy location, and witnesses heard rapid gunfire and at least one car door slam. Because Newson was in the driver's seat when he began shooting,

he would have had to point the gun directly behind him—quite possibly while still driving the SUV—in order to fire those first few shots at Anshanette. Moreover, two young children were present in the car, and the one next to Anshanette was Newson's own baby. Either child could have easily been hit by a stray bullet or casing, to say nothing of the danger presented by two adults fighting in a moving vehicle. Meanwhile, Anshanette's friend, Zarharia, was expecting Anshanette to arrive at any moment to drop off the infant and would be sure to miss Anshanette when she did not arrive with Newson. All told, it is difficult to imagine a more unlikely setting for a deliberate, planned killing.

Newson's behavior and demeanor immediately after the killing further suggest that it may have happened in the heat of passion. Notably, Zarharia testified that Newson was very agitated when he arrived at her residence to drop off the children. Bullets fell from his lap as he stepped out of the SUV. Anshanette's purse and shoes were still in the back seat, and yet Newson made no attempt to hide these from Zarharia, and in fact handed Zarharia Anshanette's purse. He also handed Zarharia the blood-stained baby carrier and proceeded to retrieve and load a bullet into the gun magazine while Zarharia looked on. He also openly blamed Anshanette for whatever had happened. These circumstantial facts suggest that Newson was still overwrought when he reached Zarharia's and that he was not taking any measures to conceal the evidence of the killing, such that a juror could infer that Newson had reacted in the heat of the moment when he killed Anshanette and had not planned to kill her.

Circumstantial evidence also suggests sufficient provocation. According to Zarharia, when she asked Newson what had happened, he responded that Anshanette had "pushed [him] too far to where [he] can't take it no more." This statement, viewed in light of the other evidence, supports an inference that Anshanette may have provoked Newson while they were driving to Zarharia's. The testimony that the couple fought frequently while driving, and the evidence that Anshanette was under the influence of methamphetamine that may have caused her to act unreasonably or even threateningly, further suggests the couple may have been fighting when Newson shot Anshanette. The physical evidence could provide some additional support for that view. At least one bullet—the shot that entered through Anshanette's right cheek, exited her right neck, and reentered her right upper chest—was fired at a very close range, possibly as close as six inches, which could suggest that Anshanette had moved out of her seat and had her upper body near Newson when he fired that shot. Newson's demeanor when he arrived at Zarharia's suggests that he had recently been enraged. Finally, Newson's statement came in response to Zarharia's question of "what happened," which implies Newson meant he was "pushed . . . too far" and simultane-

ously could not "take [Anshanette's pushing] no more" while driving to Zarharia's.

While this evidence is all circumstantial, likewise, so is the State's theory of how the killing occurred. We remind district courts "that a defendant is entitled to a jury instruction on his theory of the case, so long as there is evidence to support it, *regardless of whether the evidence is weak, inconsistent, believable, or incredible.*" *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010) (emphasis added). We conclude that the evidence could support a voluntary manslaughter verdict and the district court was therefore required to instruct the jury on voluntary manslaughter. Moreover, the State's case for first-degree murder was not strong, and we therefore are not convinced that the failure to instruct the jury on Newson's theory of the case was harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of conviction on first-degree murder and remand for a new trial on the murder charge. In light of our decision, we need not address Newson's remaining assertions of error as to that charge.

B.

Newson next contends the State violated his Sixth Amendment rights by failing to inform him of the specific child abuse or neglect charges against him and failed to prove abuse or neglect at trial. Newson did not raise the first argument below, so we need not address it.[3] *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). We therefore only consider whether the evidence supported the jury's verdict finding Newson guilty of two counts of child abuse, neglect or endangerment.

Evidence is sufficient to support a verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (internal quotations omitted). Under NRS 200.508(1), (4)(a), and (4)(d), the State could satisfy its burden of proof by showing that Newson placed the children in a situation where they may have suffered a physical injury. *See Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 451-52, 305 P.3d 898, 902-03 (2013) (explaining that the State may prove its case by demonstrating the defendant caused the child "to be placed in a situation where the child may

[3]The record belies Newson's first argument. The complaint and information charged Newson with child abuse, neglect or endangerment under NRS 200.508(1) by placing each of the two children "in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect" by shooting their mother, Anshanette, in close proximity to them.

suffer physical pain or mental suffering"). Based on the evidence presented, a rational juror could reasonably conclude that Newson exposed the children to physical danger by discharging a firearm several times in a vehicle with the children present and, in the infant's case, seated immediately adjacent to the victim. Accordingly, the evidence overwhelmingly supports this verdict.[4]

III.

A district court must instruct the jury on voluntary manslaughter when requested by the defense so long as it is supported by some evidence, even if that evidence is circumstantial. We conclude the district court erred by declining to instruct the jury on voluntary manslaughter here, where Newson's statement to the victim's friend, viewed in light of the other evidence adduced at trial, suggests the shooting occurred in a heat of passion after Newson was provoked, and the error was not harmless. We therefore reverse the judgment of conviction as to the murder charge, affirm the judgment of conviction as to the remaining charges, and remand for a new trial on the murder charge.

Hardesty and Stiglich, JJ., concur.

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[4]We disagree with Newson's argument that cumulative error warrants reversal. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *see also Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (addressing the test for cumulative error).