MICHAEL A. TRICARICHI, Appellant, *v.* COÖPERATIEVE RABOBANK, U.A.; UTRECHT-AMERICA FINANCE CO.; and SEYFARTH SHAW LLP, Respondents.

No. 73175

May 2, 2019 440 P.3d 645

Appeal from district court orders, certified as final pursuant to NRCP 54(b), dismissing tort claims for lack of personal jurisdiction. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

**Affirmed.**

*Hutchison & Steffen, LLC*, and *Michael K. Wall, Mark A. Hutchison*, and *Todd W. Prall*, Las Vegas; *Sperling & Slater* and *Thomas D. Brooks* and *Scott F. Hessell*, Chicago, Illinois, for Appellant.

*Lewis Roca Rothgerber Christie LLP* and *Dan R. Waite*, Las Vegas; *Hughes Hubbard & Reed LLP* and *Chris Paparella*, New York, New York, for Respondents Coöperatieve Rabobank, U.A., and Utrecht-America Finance Co.

*Morris Law Group* and *Steve L. Morris, Akke Levin*, and *Ryan M. Lower*, Las Vegas, for Respondent Seyfarth Shaw LLP.

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

## OPINION

By the Court, Silver, J.:

In this appeal, we address specific personal jurisdiction and whether to adopt the conspiracy-based theory of personal jurisdiction. In the underlying case, Michael Tricarichi sued respondents for luring him into an intermediary or "Midco" tax shelter scheme that left him liable as a transferee for a $21.2 million federal tax deficiency and penalty. The district court dismissed Tricarichi's fraud, conspiracy, and racketeering claims for lack of personal jurisdiction over respondents, and concluded that *Walden v. Fiore*, 571 U.S. 277 (2014), overruled *Davis v. Eighth Judicial District Court*, 97 Nev. 332, 629 P.2d 1209 (1981), to the extent *Davis* supported a conspiracy-based theory of personal jurisdiction.

First, as to specific personal jurisdiction, we conclude that neither sufficient minimum contacts nor conspiratorial acts targeted at Tricarichi support jurisdiction in Nevada. Tricarichi did not identify a link between the acts or conduct underlying his tort claims and Nevada, and because Tricarichi's injury does not connect respon-

dents' actions to Nevada in a jurisdictionally significant way, the district court correctly determined that respondents lacked minimal contacts with Nevada to satisfy due process and support personal jurisdiction. Second, we clarify that *Walden* did not overrule *Davis* and that Nevada's long-arm statute encompasses a conspiracy-based theory of personal jurisdiction, which we adopt herein as a basis on which specific jurisdiction may lie. However, we conclude Tricarichi fails to establish personal jurisdiction under that theory because the complaint does not allege conspiratorial acts sufficient to establish the requisite minimum contacts with Nevada. We therefore affirm the district court's orders.

## *FACTS AND PROCEDURAL HISTORY*

Appellant Michael Tricarichi was the president and sole shareholder of Westside Cellular, Inc., an Ohio C corporation. Relevant here, when Westside dissolved, it realized roughly $40 million from a settlement agreement in a civil lawsuit. Under the C corporate tax structure, Westside's proceeds were taxable both to Westside at the corporate level and, after distribution, to Tricarichi at the shareholder level.

Fortrend International, LLC, a now defunct San Francisco-based "Midco" promoter, proposed Tricarichi engage in an intermediary transaction tax shelter known as a "Midco transaction" in order to avoid double taxation. Midco transactions are structured to provide the seller with the benefits of a stock sale and the buyer with the benefits of the asset purchase while avoiding the gain tax liability by claiming certain tax attributes—such as losses—that would allow the party to absorb the liability were the tax attributes legitimate. *Salus Mundi Found. v. C.I.R.*, 776 F.3d 1010, 1013 (9th Cir. 2014). In 2001, the IRS determined that Midco transactions were improper tax avoidance schemes, for which fictional losses would be disallowed and corporate tax liability assessed. *See Tricarichi v. C.I.R.*, 110 T.C.M. (CCH) 370 (T.C. 2015). Thus, if the IRS determines that the attributes of the Midco are artificial, the tax liability created by the built-in gain on the sold assets remains due. *Salus Mundi Found.*, 776 F.3d at 1013.

Fortrend began negotiating with Tricarichi around March 2003 for the purchase of Tricarichi's Westside stock. At that time, Tricarichi resided in Ohio, but moved to Nevada in May 2003. In July 2003, Fortrend's affiliate intermediary, Nob Hill, Inc., sent Tricarichi a letter of intent to purchase his Westside stock. In August 2003, Fortrend contacted respondent Coöperatieve Rabobank, U.A., to request a short-term loan to Nob Hill to finance the Westside stock purchase. Westside would then repay the loan once the stock purchased closed. Rabobank, which is organized under Dutch law and has its principal place of business in the Netherlands, also has principal branches in Utrecht, Netherlands, and New York, New York.

To facilitate the funds transfer, Westside opened an escrow account with Rabobank. The account documents list Tricarichi's Nevada address.[1]

On September 9, 2003, Tricarichi sold all of his Westside stock to Nob Hill for $34.6 million. Rabobank's wholly owned subsidiary, respondent Utrecht-America Finance Co., a Delaware corporation with its principal place of business in New York, New York, thereafter made a short-term loan to Nob Hill in New York for $2.9 million for the purchase of Westside.[2] Nob Hill then transferred those proceeds, along with the remainder of the purchase price, from its Rabobank account to Tricarichi's Rabobank account. Tricarichi thereafter transferred the funds to another bank account he controlled in New York. Nob Hill repaid Utrecht the $2.9 million with Westside's funds, and Rabobank received a $150,000 fee from Nob Hill. Nob Hill thereby acquired Tricarichi's Westside stock.

Tricarichi resigned from Westside. Nob Hill represented to Tricarichi that Westside's tax liability for 2003 would be satisfied and further agreed to indemnify Tricarichi against Westside's tax liability. Nob Hill also warranted that it did not intend to cause Westside to engage in an IRS reportable transaction.

Consistent with the way Midco transactions operate, Nob Hill quickly merged into Westside. At that point, roughly $5.2 million remained in Westside's account. According to Tricarichi, Fortrend transferred the funds to its affiliates over the next few months rather than using those funds to facilitate Nob Hill's debt-collection business.

After Nob Hill purchased Westside's stock, Nob Hill's sole shareholder, Millennium Recovery Fund, LLC,[3] contributed a portion of debt to Westside with a purported tax basis of about $43 million. Westside then wrote off the debt as uncollectable and used it to claim a bad debt tax deduction of roughly $42.5 million, thereby offsetting the settlement income and claiming it had no income tax liability for 2003. Similarly, Millennium previously planned to acquire a distressed Japanese debt for $137,000 and claim a $314 million basis for it. In that case,[4] respondent Seyfarth Shaw LLP, a Chicago, Illinois, law firm, advised Nob Hill's president, John McNabola, that this high tax basis was appropriate.[5] Seyfarth has offices in ten United States locations but none in Nevada and is not registered to

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[1]Tricarichi alleges that Rabobank required that he open Rabobank accounts for escrow and closing.

[2]Another Fortrend affiliate loaned Nob Hill the remainder of the $34.6 million purchase price.

[3]Millennium is another Fortrend affiliate, formed in the Cayman Islands.

[4]The legal opinion letter was addressed and limited to McNabola at Millennium in Dublin, Ireland.

[5]Graham Taylor, who was a partner at Seyfarth, wrote the letter and later pleaded guilty to conspiring to commit tax fraud.

do business in Nevada. None of Seyfarth's attorneys have practiced in Nevada in connection with any matter involving Tricarichi.

The IRS audited Westside's 2003 tax return and disallowed roughly $42.5 million in bad debt deductions and over $1.65 million claimed deductions for legal and professional fees. Westside did not pay the resulting tax deficiency of $15,186,570 and penalties of $6,012,777, as it had no assets. Thus, the IRS determined that Tricarichi had transferee liability. Tricarichi petitioned for review in the U.S. Tax Court. That court determined that the Westside stock transfer was an improper Midco transaction, Tricarichi had constructive knowledge that Fortrend intended to employ an illegal tax shelter, and Tricarichi was liable for the tax deficiency and penalties plus interest. *See Tricarichi v. C.I.R.*, 110 T.C.M. (CCH) 370 (T.C. 2015).

Tricarichi filed the underlying complaint against respondents Rabobank, Utrecht, and Seyfarth, asserting claims for aiding and abetting fraud, civil conspiracy, and violation of Nevada's racketeering statute (NRS 207.400(1)). Tricarichi also asserted a claim for unjust enrichment against Rabobank and Utrecht.[6] Seyfarth, Rabobank, and Utrecht filed motions to dismiss the complaint for lack of personal jurisdiction.

Relying on *Walden v. Fiore*, 571 U.S. 277 (2014), the district court granted the motions, finding that Tricarichi had not shown conduct by respondents in Nevada or directed at Nevada that would enable the court to exercise personal jurisdiction. The district court also concluded that appellant's reliance on *Davis v. Eighth Judicial District Court*, 97 Nev. 332, 629 P.2d 1209 (1981), for a conspiracy-based theory of personal jurisdiction was misplaced because *Walden* overruled *Davis.* And, even though Tricarichi alleged Rabobank and Utrecht knew he was a Nevada resident when they contacted him about opening certain accounts and transferring funds, the court found Tricarichi's claims did not arise from those contacts.[7] Tricarichi appeals.

## *DISCUSSION*

When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of demonstrating that Nevada's long-arm statute grants jurisdiction over the defendants and that the exercise of that jurisdiction comports with the principles of due process. *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 131 Nev. 30, 36, 342 P.3d 997, 1001 (2015) (citing NRS 14.065). When, as here, the litigation is in the pleading or motion stage, the plaintiff need only make a "prima facie showing of personal jurisdiction."

[6]The complaint also asserted claims against PricewaterhouseCoopers, LLP, and Graham Taylor, but those claims were not addressed in the dismissal orders, and neither of those defendants are parties to this appeal.

[7]The court certified the orders as final under NRCP 54(b).

*Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 744 (1993) (internal quotation marks omitted). The court may consider evidence presented through affidavits and must accept properly supported proffers as true and resolve factual disputes in the plaintiff's favor. *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 374, 328 P.3d 1152, 1156 (2014). Due process requires that "a nonresident defendant must have sufficient minimum contacts with the forum state so that subjecting the defendant to the state's jurisdiction will not offend traditional notions of fair play and substantial justice." *Fulbright*, 131 Nev. at 36, 342 P.3d at 1001 (internal quotation marks omitted).

Tricarichi challenges the district court's conclusions that (1) he failed to make a prima facie showing that Rabobank and Utrecht's contacts with Nevada are sufficient for specific personal jurisdiction;[8] and (2) Rabobank, Utrecht, and Seyfarth's participation in a conspiracy aimed at him in Nevada does not provide an alternative basis for personal jurisdiction. Reviewing the district court's decisions de novo, *see Dogra v. Liles*, 129 Nev. 932, 936, 314 P.3d 952, 955 (2013), we consider each of these bases for personal jurisdiction in turn.

*Specific personal jurisdiction*

"[S]pecific jurisdiction is proper only where the cause of action arises from the defendant's contacts with the forum." *Fulbright*, 131 Nev. at 37, 342 P.3d at 1002 (internal quotation marks omitted). In evaluating specific personal jurisdiction, courts consider two factors: (1) whether the defendant purposefully availed itself of the privilege of acting in the forum state or purposefully directed its conduct towards the forum state, and (2) whether the cause of action arose from the defendant's purposeful contact or activities in connection with the forum state, such that it is reasonable to exercise personal jurisdiction. *Dogra*, 129 Nev. at 937, 314 P.3d at 955; *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 513, 134 P.3d 710, 712-13 (2006).

In analyzing whether specific personal jurisdiction exists in a tort action, courts apply the "effects test" derived from *Calder v. Jones*, 465 U.S. 783 (1984), which considers whether the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Picot v. Weston*, 780 F.3d 1206, 1213-14 (9th Cir. 2015) (internal quotation marks and citations omitted).[9]

[8]Tricarichi agrees that general jurisdiction is not at issue.

[9]Thus, in tort actions, some courts focus solely on whether the defendant's tortious conduct was purposefully directed towards the forum state rather than whether the defendant purposefully availed itself of the laws of the forum state. *See Picot*, 780 F.3d at 1212 ("For claims sounding in tort, we . . . look to evidence that the defendant has directed his actions at the forum state . . . ."); *Dogra*, 129

Thus, the plaintiff's contacts with the defendant and the forum are not the proper focus of jurisdictional analysis; instead, the effects inquiry and the question of minimum contacts focuses on the relationship between the defendant, the forum, and the litigation, and "the defendant's suit-related conduct," which "must create a substantial connection with the forum." *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014).

In *Walden*, the Supreme Court reviewed whether Nevada could exercise personal jurisdiction over a Georgia police officer who seized money belonging to two airline passengers at a Georgia airport and helped draft a probable cause affidavit for the forfeiture. *Id.* at 279-81. The passengers, residents of California and Nevada, filed a tort action against the police officer in Nevada district court. *Id.* at 280-81. The Supreme Court determined that the lower court improperly shifted the focus of the effects of the alleged tort and the minimum contacts analysis from the defendant's contacts with *the forum state* to defendant's contacts with *plaintiffs*. *Id.* at 288-89. The Court emphasized that, "[f]irst, the relationship must arise out of contacts that the 'defendant *himself* ' creates with the forum State," *id.* at 284 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)), and second, the "minimum contacts analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there," *id.* at 285 (internal quotation marks omitted).

Applying that analysis to the facts, the Court held that the defendant's "actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections." *Id.* at 289. Plaintiffs' claim that Nevada had jurisdiction because defendant's tortious conduct injured plaintiffs while they resided in Nevada likewise failed, as the Court observed that the injury (lack of access to seized funds) "is not the sort of effect that is tethered to Nevada in any meaningful way." *Id.* at 290. While defendant's conduct of seizing funds in Georgia had an effect on the plaintiff in Nevada, that effect did not result from anything that independently occurred in Nevada and therefore was not a proper basis for jurisdiction. *Id.*

*Respondents did not purposefully direct activities at Nevada*

The first factor of specific personal jurisdiction requires that respondents purposefully availed themselves of the privilege of acting

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Nev. at 937, 314 P.3d at 955 (providing that specific personal jurisdiction can be based either on purposeful availment or on purposefully directed conduct). *But see Planning Grp. of Scottsdale, LLC v. Lake Mathews Mineral Props., Ltd.*, 246 P.3d 343, 348-49 (Ariz. 2011) (rejecting a rigid distinction between purposeful availment and purposefully directed conduct when analyzing specific personal jurisdiction issues). Because we conclude that there is no personal jurisdiction under either basis, we need not address this distinction further.

in Nevada or that their acts were expressly aimed at Nevada and caused harm that they knew was likely to be suffered in Nevada. *Dogra*, 129 Nev. at 937, 314 P.3d at 955; *Arbella*, 122 Nev. at 513, 134 P.3d at 712-13; *Picot*, 780 F.3d at 1213-14 (providing that specific personal jurisdiction in tort actions should focus on conduct the defendant purposefully directs at the forum state). Tricarichi contends that he made a prima facie showing that Rabobank and Utrecht directed their actions at him in Nevada. He points to Nob Hill's loan request to Rabobank and Rabobank's request that he open individual and escrow accounts at Rabobank because the documents associated with the opening of the accounts and closing of the loan reflect his Nevada address. We disagree.

First, Rabobank and Utrecht's services occurred in New York where the accounts were opened and the loan proceeds transferred. Tricarichi identifies communications he made to Rabobank and Utrecht, including his resignation, wire transfer instruction, and account opening documents, but does not dispute that those documents were actually sent from a San Francisco fax number. Rabobank's receipt of account documents and a loan request showing Tricarichi's Nevada address, by themselves, are incidental to activities that made up the Midco transaction, i.e., the loan, stock purchase, and transfer of money through an intermediary, all of which took place outside of Nevada. Thus, we are not persuaded that this evidence shows purposeful availment or express aiming such that would meet the first factor of personal jurisdiction.[10] *See Walden*, 571 U.S. at 286 (explaining that due process requires that jurisdiction be based on a defendant's "own affiliation with the State," and it is "insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts' or on the 'unilateral activity' of a plaintiff" (quoting *Burger King*, 471 U.S. at 475)); *Fulbright*, 131 Nev. at 40-41, 342 P.3d at 1002-04 (holding that a Texas law firm's representation of a Nevada resident on a Texas-based matter, combined with communications with the client in Nevada incidental to that representation, was insufficient evidence to make a prima facie showing of specific personal jurisdiction where the firm did not solicit the client's business and the representation dealt with a Texas matter).

Second, merely suffering injury while residing in the forum is likewise insufficient. "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."

[10]Tricarichi also relies on *Peccole v. Eighth Judicial District Court*, which concluded that Nevada had jurisdiction over nonresident defendants because they purposefully directed their activities at Nevada through their agent, who contacted plaintiffs in Nevada to solicit the sale of defendants' Colorado property. 111 Nev. 968, 971, 899 P.2d 568, 570 (1995). *Peccole* is distinguishable because here, Rabobank and Utrecht did not reach out to Tricarichi in Nevada and solicit his participation in the Midco transaction.

*Walden*, 571 U.S. at 290. To illustrate how the effects inquiry works, *Walden* pointed to the facts in *Calder*, wherein a California actress sued a reporter and editor for defamation based on an article written and published in a Florida newspaper. *Id.* at 286-87 (citing *Calder*, 465 U.S. at 788). *Calder* held that California had jurisdiction not because the actress suffered injury there, but because the tortious conduct occurred in California, where the reporter had gathered the information from sources in California about the actress's activities in California and the article was widely circulated in California. *Id.* at 287.

Here, Tricarichi claims he suffered injury while residing in Nevada, but because Rabobank and Utrecht's acts were not connected to Nevada, that injury is insufficient to establish minimum contacts. *Id.* at 289 (rejecting approach to minimum contacts analysis that grounds personal jurisdiction based on defendant's knowledge of plaintiff's connections to the forum combined with plaintiff suffering foreseeable harm there because it "impermissibly allows a plaintiff's contacts with the defendant and the forum to drive the jurisdictional analysis").

*Tricarichi's claims do not arise from respondents' activities in connection with Nevada*

The second factor of specific personal jurisdiction requires that the claims arise from respondents' activities in connection with Nevada. *Fulbright*, 131 Nev. at 38, 342 P.3d at 1002; *see also Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). In addressing the second factor, we have stated "the claims must have a specific and direct relationship or be intimately related to the forum contacts." *Arbella*, 122 Nev. at 515-16, 134 P.3d at 714 (internal quotations omitted). Here, the only alleged Nevada contact is that Rabobank and Utrecht knew that Tricarichi used a Nevada address because he provided it on bank account opening and loan closing documents. Rabobank and Utrecht's knowledge in that regard does not have a specific and direct relationship to the Midco transaction on which Tricarichi grounds his tort claims. The Midco transaction required the transfer of money through Rabobank accounts in New York and the purchase of Tricarichi's shares in an Ohio Corporation made possible through Utrecht's loan in New York. The fact that account opening and loan documents listed Tricarichi's Nevada address is inconsequential to that transaction. *See Walden*, 571 U.S. at 289-90; *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (rejecting the lower court's conclusion that personal jurisdiction existed because the nonresident defendant knew the plaintiff was an Indiana company and could foresee that its misleading emails and sales would harm the plaintiff in Indiana); *Fastpath, Inc. v. Arbela*

*Techs. Corp.*, 760 F.3d 816, 823 (8th Cir. 2014) (holding that even if the defendant solicited an agreement knowing the plaintiff was an Iowa corporation, that knowledge could not create the required minimum contacts under *Walden*).

Although Tricarichi relies on cases decided after *Walden* that found personal jurisdiction based on the effects test, those cases are distinguishable because they addressed defendants' activities with the forum that gave rise to the plaintiffs' claims. *See, e.g.*, *Rilley v. MoneyMutual, LLC*, 884 N.W.2d 321, 328-29 (Minn. 2016) (finding personal jurisdiction over a finance company that emailed over 1,000 Minnesota residents to solicit payday loans and distinguishing *Walden* on the facts because the contacts were not random or fortuitous). Such activity is missing here. Thus, because Tricarichi did not identify any jurisdictionally significant conduct by Rabobank and Utrecht showing necessary minimum contacts with Nevada, the district court properly granted respondents' motion to dismiss for lack of specific personal jurisdiction.[11]

*Conspiracy theory jurisdiction*

As an alternative basis for personal jurisdiction over Rabobank and Utrecht, and as the sole basis for jurisdiction over Seyfarth, Tricarichi asserts that respondents' participation in a conspiracy that targeted, defrauded, and injured a Nevada resident subjects them to Nevada jurisdiction. Rabobank, Utrecht, and Seyfarth disagree, arguing that Nevada has not adopted a conspiracy theory of personal jurisdiction and *Walden* precludes jurisdiction based on participation in an out-of-state conspiracy.

A conspiracy theory of personal jurisdiction provides that a nonresident defendant who lacks sufficient minimum contacts with the forum may be subject to personal jurisdiction based on a co-conspirator's contacts with the forum. *See Gibbs v. PrimeLending*, 381 S.W.3d 829, 834 (Ark. 2011). To support jurisdiction based on conspiracy theory and satisfy due process, a plaintiff must show (1) an agreement to conspire, (2) the acts of co-conspirators are sufficient to meet minimum contacts with the forum, and (3) the co-conspirators reasonably expected at the time of entering into the con-

[11]Tricarichi also contends that personal jurisdiction is reasonable. But, because minimum contacts are lacking, jurisdiction in Nevada is inconsistent with fair play and substantial justice. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *cf. Peccole*, 111 Nev. at 971, 899 P.2d at 570 (analyzing whether exercising jurisdiction over defendant who had sufficient minimum contacts with Nevada was reasonable); *Trump*, 109 Nev. at 700, 857 P.2d at 749 (observing that if plaintiff establishes that defendant purposefully availed itself of the privilege of acting in Nevada and the cause of action arose from defendant's Nevada activities, the burden shifts to defendant to set forth a compelling case that jurisdiction would still be unreasonable).

spiracy that they would be subject to jurisdiction in the forum state. *See id.* at 832; *Mackey v. Compass Mktg., Inc.*, 892 A.2d 479, 489 (Md. 2006). Courts that have applied the theory have observed that "[t]he underlying rationale for exercising personal jurisdiction on the basis of conspiracy is that, because co-conspirators are deemed to be each other's agents, the contacts that one co-conspirator made with a forum while acting in furtherance of the conspiracy may be attributed for jurisdictional purposes to the other co-conspirators." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *29 (S.D.N.Y. Oct. 20, 2015); *Mackey*, 892 A.2d at 483-84 (noting that courts have routinely drawn on the substantive law of agency as justification for exercising jurisdiction over nonresident defendants and that conspiracy theory jurisdiction is an analogous concept).

We conclude that Nevada's long-arm statute encompasses a conspiracy theory of personal jurisdiction. *See* NRS 14.065(1) (personal jurisdiction is proper "on any basis not inconsistent with" the Nevada or United States Constitutions). Although respondents correctly note that we have not expressly adopted the theory, our decision in *Davis v. Eighth Judicial District Court* recognizes that theory. 97 Nev. 332, 334, 338-39, 629 P.2d 1209, 1211, 1213 (1981), *superseded by rule on other grounds, as recognized in Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 653-56, 6 P.3d 982, 983-85 (2000). There, we concluded it was reasonable to require nonresident defendants who allegedly engaged in a conspiracy to seize control of a Nevada estate "to appear and defend their activities in Nevada where the alleged injuries occurred." *Id.*

The district court below agreed with respondents that *Walden* overruled *Davis*. But, while *Walden* readdressed *Calder*'s effects test and narrowed its application, *Walden* did not involve a conspiracy or discuss co-conspirator-based jurisdiction. We therefore conclude that *Davis* is distinguishable and *Walden*'s holding does not overrule *Davis*. Accordingly, conspiracy allegations may provide a basis for specific personal jurisdiction when the acts of co-conspirators are sufficient to meet minimum contacts with Nevada and the co-conspirators reasonably expected *at the time of entering into the conspiracy* that their actions would have consequences in Nevada.[12] *Cf. Davis*, 97 Nev. at 334, 338-39, 629 P.2d at 1211, 1213.

*Davis* did not articulate a specific test for conspiracy theory personal jurisdiction or discuss the acts of co-conspirators attributed to others. However, the *Davis* facts suggest a three-factor test. Notably,

[12]While some courts have expressed doubt as to whether conspiracy theory personal jurisdiction applies post-*Walden*, we conclude that because co-conspirators are deemed each other's agents, contacts co-conspirators make in Nevada "while acting in furtherance of the conspiracy may be attributed for jurisdictional purposes to the other co-conspirators." *See In re LIBOR-Based Fin. Instruments*, 2015 WL 6243526, at *29.

the defendants in *Davis* were a group of aides, physicians, attorneys, and business associates who "had attended [to] the late [Howard] Hughes during the last years of his life"; and allegedly "conspired to seize control of the Hughes' empire for their own financial gain by taking advantage of the trust and confidence Hughes had placed in them," causing "injury to [plaintiff's] property located in Nevada." 97 Nev. at 334, 338, 629 P.2d at 1211, 1213. Thus, the alleged conspiracy was directed at Hughes in Nevada where his property and business interests were located, and the co-conspirators included physicians and others who actually attended to him there, and thus had the necessary minimum contacts and reasonable expectation that their actions would lead to consequences in Nevada such that they could be subject to Nevada jurisdiction. These key facts outlined in *Davis* therefore support jurisdiction over nonresident co-conspirators where: (1) there is a conspiracy, (2) the acts of co-conspirators meet minimum contacts with the forum, and (3) the co-conspirators could have reasonably expected at the time of entering into the conspiracy that their actions would have consequences in the forum state. *See Gibbs*, 381 S.W.3d at 832 (addressing these factors).

Applying the theory here, however, we conclude that it does not support jurisdiction, as Tricarichi failed to make a prima facie showing of pertinent co-conspirator jurisdictional facts. Tricarichi alleges that Rabobank and Utrecht earned fees by financing other Midco transactions and financed the Westside transaction knowing it was illegal. Further, he claims that in 2001, two years before the Westside transaction, Seyfarth issued an opinion letter to Fortrend-affiliate Millennium supporting an improper debt scheme that Fortrend relied on in contributing and writing off Japanese debt. Tricarichi believes that this 2001 opinion letter was relied on when Westside claimed a deduction on its 2003 tax return. He further contends that in March 2003, respondents joined together to induce him to engage in the Westside Midco transaction to his detriment.

Assuming, *arguendo*, these allegations establish the first prong of the test,[13] Tricarichi has not identified any co-conspirator acts that meet the minimum contacts requirement to satisfy the second prong of the test. Instead, he points to the original and amended letters of intent to purchase Westside stock sent in July and August 2003 by Fortrend-affiliate Nob Hill[14] to his address in Nevada. These two contacts, however, did not involve the initial solicitation for his par-

[13]We decline to consider Rabobank and Utrecht's argument that Tricarichi is collaterally estopped from re-litigating the U.S. Tax Court's determination that he knew or should have known that the Midco transaction was a tax fraud, as it was not raised in district court as a basis for dismissal on personal jurisdiction grounds. *See City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. 1, 7 n.2, 293 P.3d 860, 864 n.2 (2013).

[14]Neither Fortrend nor Nob Hill were named as defendants.

ticipation in the Midco transaction, as his complaint alleges that negotiations with Fortrend began in March or April 2003, well before his move to Nevada. Thus, the timing of the letters of intent does not support Tricarichi's contention that co-conspirator respondents directed their acts at Nevada, as the letters reflecting his Nevada address were incidental to initial solicitation negotiations occurring elsewhere and do not satisfy the constitutional minimum contacts requirement. *Walden*, 571 U.S. at 289 (explaining that jurisdictional analysis that attributes plaintiff's forum connections to defendant "obscures the reality that none of [the] challenged conduct had anything to do with Nevada itself").

Jurisdiction based on a conspiracy theory also fails on the third prong of the test because Tricarichi's allegations do not support that co-conspirator respondents reasonably expected at the time of entering into the conspiracy that their actions would have consequences in Nevada. *See Gibbs*, 381 S.W.3d at 832. The Midco transaction on which the conspiracy is centered concerned an Ohio corporation transferring funds to New York. Thus, we conclude that the district court properly dismissed the claims against respondents as to a conspiracy theory of personal jurisdiction.[15]

## *CONCLUSION*

We clarify that under Nevada's long-arm statute and in line with *Davis v. Eighth Judicial District Court*, 97 Nev. 332, 629 P.2d 1209 (1981), a party may demonstrate personal jurisdiction under the conspiracy-based theory. We conclude here, however, that Tricarichi fails to demonstrate personal jurisdiction under either specific jurisdiction or under the conspiracy-based theory for personal jurisdiction. Tricarichi does not identify a jurisdictionally significant link between respondents and Nevada, and Tricarichi's injury, without more, is not a sufficient connection to Nevada. Tricarichi also fails to allege conspiratorial acts sufficient to meet minimum contacts with Nevada. Moreover, Tricarichi failed to demonstrate that respondents

[15]Tricarichi alternatively argues that the district court abused its discretion by denying his motion for jurisdictional discovery. In light of the record here, the district court was within its discretion to conclude that jurisdictional discovery was unlikely to lead to evidence establishing jurisdiction. Tricarichi failed to make a prima facie case that Rabobank, Utrecht, and Seyfarth had sufficient minimum contacts with Nevada under either a specific or conspiracy theory of personal jurisdiction, and in denying his request for jurisdictional discovery, the district court noted that Tricarichi already had the benefit of discovery from Rabobank and Utrecht in the tax court proceeding before he filed his complaint here. We perceive no abuse of discretion in that determination. *See Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (reviewing the district court's discovery decisions for an abuse of discretion); *Viega GmbH*, 130 Nev. at 382, 328 P.3d at 1160 (explaining jurisdictional discovery is not warranted where plaintiffs fail to allege facts that would indicate that Nevada courts might have jurisdiction over defendants).

reasonably expected their actions to have consequences in Nevada at the time of entering into the alleged conspiracy. Therefore, the district court properly determined that it did not have jurisdiction over Rabobank, Utrecht, and Seyfarth, and we affirm the orders.

Hardesty and Stiglich, JJ., concur.

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THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS, Appellant, *v.* BRIAN LUDWICK, an Individual, Respondent.

No. 73277

May 2, 2019 440 P.3d 43

Appeal from a district court order denying a petition for judicial review in an employment matter. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

**Reversed and remanded.**

*Aaron D. Ford*, Attorney General, and *Michelle Di Silvestro Alanis*, Deputy Attorney General, Carson City, for Appellant.

*Law Office of Daniel Marks* and *Daniel Marks* and *Adam Levine*, Las Vegas, for Respondent.

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

## OPINION

By the Court, Silver, J.:

After appellant Nevada Department of Corrections (NDOC) terminated respondent Brian Ludwick's employment for a first-time offense, Ludwick was reinstated by a hearing officer on administrative appeal. At issue is whether the hearing officer erred in finding that NDOC's decision to terminate was improper. We hold that the hearing officer erred by relying, even if only in part, on a regulation that the State Personnel Commission (Commission) had not approved as statutorily required. The hearing officer also did not properly consider, as addressed in our recent opinion *O'Keefe v. State, Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018),[1] whether Ludwick's actions constituted violations of the valid regu-

[1]We recognize that the parties, the hearing officer, and the district court did not have the benefit of the *O'Keefe* opinion when addressing these issues.

lations NDOC charged him with violating and, if so, whether those violations warranted termination as a first-time disciplinary measure. Accordingly, we reverse the district court's denial of NDOC's petition for judicial review and remand for proceedings consistent with this opinion.

## *FACTS AND PROCEDURAL HISTORY*

Ludwick worked for NDOC as a correctional officer. During his employment, he qualified for leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 (2012), due to hypertension. In the more than two years Ludwick worked for NDOC, he had no disciplinary history.

On the day of the incident for which Ludwick was terminated, Ludwick was assigned to Unit 1 at the correctional facility. Unit 1 houses inmates returning from solitary confinement and tends to have more violent incidents than any other unit. The mandated minimum staffing for Unit 1 at the time was two officers, but three officers were assigned to Unit 1 on that day. During his shift, Ludwick attempted to contact his supervisor to inform him that he was not feeling well, but could not get ahold of him. Ludwick then left Unit 1, without prior permission, to speak to his supervisor in person. Although the parties dispute the specifics of the conversation that ensued, Ludwick ultimately left work on FMLA leave. The supervisor subsequently generated a report stating that Ludwick neglected his duty and abandoned his post without authorization when he left Unit 1.

After an internal investigation into the supervisor's report, NDOC charged Ludwick with violating NAC 284.650(1) (activity incompatible with employee's conditions of employment), NAC 284.650(3) (violating or endangering the security of the institution), NAC 284.650(7) (inexcusable neglect of duty), and NDOC's Administrative Regulation (AR) 339.05.15 (neglect of duty—leaving an assigned post while on duty without authorization of a supervisor). NDOC initially recommended a five-day suspension but ultimately decided to terminate Ludwick for consistency purposes, as other employees who had violated AR 339 were terminated.

Ludwick administratively challenged NDOC's decision and, following a hearing, the hearing officer overturned the termination. The hearing officer agreed with NDOC that "Ludwick engaged in inexcusable neglect by leaving his post without the prior permission of a supervisor." The hearing officer found that termination of employment, however, was too harsh a penalty, as Ludwick had no prior discipline and no incidents arose in Unit 1 after Ludwick left. The hearing officer also disagreed with NDOC's argument that Ludwick's leaving Unit 1 without prior approval constituted a serious security risk, as the minimum staffing requirements for the unit were

still met and no one was assigned to replace Ludwick in Unit 1 after he left for the day. Finding that "some discipline" was still required because Ludwick "in fact violate[d] a very important safety and security policy by leaving his post without prior authorization from a supervisor," the hearing officer ordered that Ludwick be suspended for not more than 30 days. The district court denied NDOC's subsequent petition for judicial review and this appeal followed.

## *DISCUSSION*

"When reviewing a district court's denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court." *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (quoting *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010)). Thus, pursuant to Nevada's Administrative Procedure Act (NAPA), we review the hearing officer's decision to determine whether it is clearly erroneous, arbitrary or capricious, or affected by an error of law. NRS 233B.135(3). In doing so, we review questions of law de novo but "defer[ ] to [a hearing officer's] interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Taylor*, 129 Nev. at 930, 314 P.3d at 951 (quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008)).

### *The hearing officer's review of NDOC's decision to terminate*

Initially, the parties present arguments regarding the deference the hearing officer owed to NDOC's decisions. We recently addressed that issue in *O'Keefe v. State, Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018), and concluded that the hearing officer conducts a de novo review of "whether the employee *in fact* committed the charged violation." *Id.* at 758, 431 P.3d at 355. And, when reviewing an agency's decision that termination will serve the good of the public service, the hearing officer is to employ a deferential standard. *See id.* at 758-60, 431 P.3d at 355-56 (overruling *Dredge v. State, Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989), *State, Department of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296 (1995), and their progeny to the extent they "suggest that the hearing officer decides de novo whether the employee's termination serves the good of the public service" (internal quotation marks omitted)). *O'Keefe* did not directly address, however, whether the hearing officer owes deference to an employer's decision that a violation is so serious that it warrants termination for a first-time offense when the agency does not have a published regulation to that effect in place. *See id.* at 759, 431 P.3d at 356 (providing that when a published regulation prescribes termination for a first-time offense, "then that violation is necessarily 'serious' as a matter of law").

Examining *O'Keefe*'s reasoning for its limited overruling of *Dredge* and *Jackson* demonstrates that, even when there is no published regulation in place, the hearing officer should give deference to an employer's decision that a violation is so serious it warrants termination for a first-time offense. *O'Keefe* explained that while those previous cases emphasized the need for deference to the employer when security concerns were implicated, the cases "did not create a broad rule that deference is generally not owed unless there are security concerns." *Id. O'Keefe* then recognized that a hearing officer generally owes deference "as to whether the agency's termination decision was reasonable and with just cause." *Id.* (citing NRS 284.390(1), (7)). Because the determination of whether a violation is so serious that it warrants termination for a first-time offense is part of the hearing officer's consideration of whether the agency's decision to terminate was reasonable and with just cause, *O'Keefe* mandates that the hearing officer defer to the employer's decision. *See id.*

*The hearing officer erred by relying on an invalid regulation in reviewing the termination decision*

A hearing officer's review of an agency's decision to terminate an employee as a first-time disciplinary measure requires a three-step process. *Id.* (citing NRS 284.390(1)). "First, the hearing officer reviews de novo whether the employee in fact committed the alleged violation." *Id.* (citing NAC 284.798). The hearing officer next "determines whether that violation is a 'serious violation[ ] of law or regulations' such that the 'severe measure[ ]' of termination is available as a first-time disciplinary action." *Id.* (alterations in original) (quoting NRS 284.383(1)). "If the agency's published regulations prescribe termination as an appropriate level of discipline for a first-time offense, then that violation is necessarily 'serious' as a matter of law." *Id.* (quoting NRS 284.383(1) and citing NAC 284.646(1)). A violation is also "serious" as a matter of law if the agency has a policy that prescribes termination as an appropriate level of discipline for a first-time offense. *See id.*; *see also* NAC 284.646(1)(a). Where no such regulation or policy is in place, the hearing officer applies a deferential standard of review to an agency's determination that "[t]he seriousness of the offense or condition warrants such dismissal." NAC 284.646(1)(b); *see O'Keefe*, 134 Nev. at 759, 431 P.3d at 356. "Third and last, the hearing officer applies a deferential standard of review to the agency's determination that termination will serve 'the good of the public service.'" *O'Keefe*, 134 Nev. at 759, 431 P.3d at 356 (quoting NRS 284.385(1)(a)).

All of the violations listed in Ludwick's specificity of charges were based on the fact that he left Unit 1 without prior permission from his supervisor. Ludwick does not dispute that he left the unit

without permission except to argue that he had implied permission to leave under the FMLA. We disagree, as 29 C.F.R. § 825.303(c) (2018) provides that "[w]hen the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances," and Ludwick did not demonstrate any unusual circumstances in this case. The question then becomes whether Ludwick leaving the unit without prior permission constitutes a violation of the NAC provisions and AR 339 as listed in the specificity of charges.

Addressing AR 339.05.15[2] first, the hearing officer determined that this regulation had to be approved by the Commission to be of any disciplinary effect. On appeal, NDOC asserts that the plain language in another statute, NRS 209.111, allows the Board of State Prison Commissioners (Board) to adopt administrative regulations regarding the labor of employees without the approval of the Commission and that AR 339 is therefore valid because it was approved by the Board.[3] We agree with Ludwick and the hearing officer, however, that the fact that the Commission never approved AR 339 makes it invalid and of no legal effect for purposes of employee discipline.

NRS 284.383(1) provides that the Commission must adopt, by regulation, "a system for administering disciplinary measures against a state employee." That system is set forth in NAC 284.638-.6563. The Commission also adopted NAC 284.742(1), which directs agencies to identify prohibited activities and possible violations and penalties and explain the discipline process for classified employees. Under that regulation, the agencies' policy must receive approval from the Commission:

> Each appointing authority shall determine, *subject to the approval of the Commission*, those specific activities which, for employees under its jurisdiction, are prohibited as inconsistent, incompatible or in conflict with their duties as employees. The appointing authority shall identify those activities in the policy established by the appointing authority pursuant to NRS 284.383.

(Emphasis added.) *See also* NRS 284.383(3) ("An appointing authority shall provide each permanent classified employee of the ap-

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[2]The parties agree that the relevant version of AR 339.05.15 provided that a corrections officer leaving an assigned post without permission constituted inexcusable neglect of duty.

[3]NDOC also contends that it is exempted from the NAPA's statutes regarding the adoption of regulations. While the NAPA exempts NDOC from certain of its procedures, *see* NRS 233B.039(1)(b), NDOC is not exempt from the procedures regarding the adoption of regulations governing state personnel. *See* NRS 284.013 (exempting only certain state entities from NRS Chapter 284).

pointing authority with a copy of a policy *approved by the Commission* that explains prohibited acts, possible violations and penalties and a fair and equitable process for taking disciplinary action against such an employee." (emphasis added)). The foregoing law clearly demonstrates that the Commission's approval was required for any administrative regulation regarding an employee's discipline to have any force and effect.

We agree with the hearing officer that NDOC provided no evidence showing that the Commission approved AR 339. NDOC's argument that NRS 209.111 allows the Board to bypass the Commission's approval fails. Although that statute states that the Board "has full control of all . . . labor" of the NDOC, it is referring to inmate labor, rather than the governance of NDOC employees. *See State v. Hobart*, 13 Nev. 419, 420 (1878) (addressing the precursor to NRS 209.111, which specifically referred to "prison labor"); Hearing on S.B. 116 Before the Sen. Finance Comm., 59th Leg. (Nev., Feb. 28, 1977) (statement of Charles L. Wolff, Warden, Nevada State Prison) (explaining that the bill was intended to provide more effective educational and vocational training to inmates "so they are prepared to be placed effectively back into the community and earn a livelihood" without any mention of employee discipline). And, because the regulation was never approved by the Commission, the hearing officer correctly determined that it was invalid and could not form a basis for terminating Ludwick.

Despite the hearing officer's correct determination that AR 339 was invalid, the officer still relied on the regulation in order to understand "the expectations and duties as it relates to correctional officers being at their assigned post" and to determine whether Ludwick's actions constituted an inexcusable neglect of duty under NAC 284.650(7) and justified termination for the first offense. This is a clear error of law warranting remand—because the regulation is invalid, the hearing officer should not have relied on it for any purpose related to the disciplinary charges in this case. *See* NRS 233B.135(3)(d). On remand, the hearing officer must address whether Ludwick's actions of leaving his post without prior permission constitutes violations of the *valid* NAC provisions listed in his specificity of charges without any reliance on AR 339. And, if the hearing officer finds that Ludwick violated the relevant NAC provisions, the officer must then apply the remaining two steps outlined in *O'Keefe* to determine whether those violations warranted terminating Ludwick as a first-time disciplinary action. *See* 134 Nev. at 759, 431 P.3d at 356.

## *CONCLUSION*

Because the hearing officer committed legal error in relying on an invalid regulation to set aside Ludwick's termination, we reverse

the district court's denial of NDOC's petition for judicial review. We therefore remand this matter to the district court so that it may grant NDOC's petition and remand the case to the hearing officer for further proceedings consistent with this opinion.

Hardesty and Stiglich, JJ., concur.

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SIERRA PACIFIC INDUSTRIES, Appellant, *v.* TIM WILSON, P.E., in His Capacity as NEVADA STATE ENGINEER; DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION, an Agency of the State of Nevada; and IWS BASIN, LLC, a Nevada Limited Liability Company, Respondents.

No. 73933

May 2, 2019 440 P.3d 37

Appeal from a district court order denying a petition for judicial review in a water rights matter. Second Judicial District Court, Washoe County; William A. Maddox, Senior Judge.

**Reversed and remanded with instructions.**

[Rehearing denied June 14, 2019]

*McDonald Carano LLP* and *Debbie Leonard*, Reno, for Appellant.

*Aaron Ford*, Attorney General, and *Tori N. Sundheim*, Deputy Attorney General, Carson City, for Respondents Tim Wilson as State Engineer and Division of Water Resources, Department of Conservation.

*Brownstein Hyatt Farber Schreck, LLP*, and *Bradley J. Herrema* and *Arthur A. Zorio*, Reno, for Respondent IWS Basin, LLC.

Before the Supreme Court, Gibbons, C.J., Hardesty and Pickering, JJ.

## OPINION

By the Court, Hardesty, J.:

Intermountain Water Supply, Ltd.,[1] holds water rights permits to transmit water to Lemmon Valley for municipal use and was granted

[1]Richard L. Elmore, as counsel for Intermountain, filed an answering brief and participated in oral argument before this court. After briefing and oral

an extension of time by the State Engineer in which to apply the water to beneficial use. Appellant Sierra Pacific Industries argues that the extension impermissibly allowed Intermountain to speculate the water, as Intermountain had no intention to put the water to beneficial use itself but was instead seeking a third-party buyer of the permits to perfect the water appropriation. We consider whether Nevada's policy mandating beneficial use of water requires application of the anti-speculation doctrine to requests for extensions of time such that a permittee who is not planning to use the water must show evidence of its formal relationship with a third party who will be using the water in its place. Based on Nevada's ongoing requirement that a permittee show reasonable diligence to apply the water to beneficial use, we conclude that the anti-speculation doctrine applies to requests for extensions of time.

Intermountain submitted an affidavit claiming the existence of an "[o]ption [a]greement" with two unidentified "worldwide engineering and construction firms" and an agreement that, as described, does not comport with the place of use specified in the permits, as evidence of its reasonable diligence to support its extension request. We adopt Colorado's ruling in *Front Range Resources, LLC v. Colorado Ground Water Commission*, 415 P.3d 807, 813 (Colo. 2018)—that a generic option contract does not save an applicant from the anti-speculation doctrine—and conclude that the State Engineer abused his discretion in determining, on this scant record, that Intermountain's averred option agreements satisfied the anti-speculation doctrine. Without the averred option agreements, the record does not contain sufficient detail to demonstrate reasonable diligence under NRS 533.380(3)-(4) and our decision in *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1057, 944 P.2d 835, 841 (1997). Accordingly, we reverse and remand so the State Engineer can reevaluate the extension in light of these authorities.

## *FACTS AND PROCEDURAL HISTORY*

In 2002, the State Engineer granted respondent Intermountain Water Supply, Ltd., three water rights permits in the Dry Valley Hydrographic Basin (the Basin). The three permits were for a transmission pipeline to deliver water to Lemmon Valley, Nevada, for municipal purposes. In its application for the first permit, Intermountain estimated that the project would be completed in five years and that the water would be put to beneficial use in ten years. Over time, the State Engineer granted Intermountain five additional permits,

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argument, Intermountain filed a motion informing this court that it transferred all of its rights, title, and interest in the water rights at issue to IWS Basin, LLC, and requesting that IWS be substituted as a respondent in place of Intermountain, which we granted. However, because Intermountain was the original permit holder and is referred to as such in the parties' briefs, we continue to refer to Intermountain as the respondent in this opinion.

modifying the points of diversion in the original permits, but maintaining the same place of use: Lemmon Valley.

Intermountain has since applied for and received numerous extensions pursuant to NRS 533.380 to extend the time of construction and to put the water to beneficial use. In its first application for an extension of time (filed in 2005), Intermountain stated that it had delayed the project because of issues involving endangered species on the land. Intermountain sought subsequent extensions based on economic conditions. Since 2011, Intermountain has requested extensions because it was seeking a buyer for its water rights.

Appellant Sierra Pacific Industries (SPI) owns ranching and farming operations in the Basin and the surrounding area, and seeks cancellation of Intermountain's permits so that it can acquire the water rights to expand its irrigation and agricultural development. In 2015, anticipating another request for an extension by Intermountain, SPI pre-filed an objection to Intermountain's applications, arguing, among other things, that Intermountain did not have good cause to request an extension and Intermountain was engaging in water speculation. In 2016, Intermountain filed applications for extensions of time in which it again indicated that it was seeking a buyer for its rights. At the time of these applications, Intermountain had not yet constructed the pipeline or sold its water rights.

The State Engineer granted Intermountain's 2016 applications for extensions of time, concluding that Intermountain had demonstrated good faith and reasonable diligence in perfecting the appropriation. The State Engineer relied on a sworn affidavit by Robert Marshall, one of the Intermountain pipeline managers, who stated that Intermountain had entered into option contracts with an unidentified engineering firm and a separate, also unidentified construction firm, had negotiated a contract with a public utility company to distribute water to its customers (but in Cold Springs, not Lemmon Valley), and was negotiating with home developers. Intermountain did not submit the alleged option agreements or Cold Springs utility contract, though it did submit an expense sheet and invoices, which Marshall outlined in the affidavit. Marshall attested to Intermountain having spent $3,000,000 over the life of the project and that it had incurred total expenses of $23,300.39 in the previous year "in moving the project forward" and responding "to the vexatio[us] litigation" from SPI's challenges to its permits' extensions. The State Engineer rejected SPI's claim that Intermountain was speculating the water, finding that Intermountain's sworn affidavit demonstrated that it had secured contractual agreements with firms, a public utility company, and developers, and the anti-speculation doctrine did not limit the alienability of water rights. SPI filed a petition for judicial review of the State Engineer's decision, which the district court denied. SPI now appeals that decision.

*DISCUSSION*

This case presents the question of how the anti-speculation doctrine affects a water permittee who obtained water rights permits for beneficial use by a third party and who seeks an extension of time under NRS 533.380 to perfect those water rights. We must decide whether the anti-speculation doctrine applies to extension requests such that the permittee must have a formal relationship with the third party who will be putting the water to beneficial use and, if so, whether Intermountain provided sufficient evidence to show that it had such a relationship to merit an extension of its water permits.

*Standard of review*

Whether the anti-speculation doctrine applies to extensions of time is a question of law that we review de novo. *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010) (stating that this court "review[s] purely legal questions without deference to the State Engineer's ruling"). The State Engineer's ruling on a question of law is persuasive, but not entitled to deference. *Id*. We review the State Engineer's factual findings for an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *Bacher v. Office of the State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006). "[S]ubstantial evidence [is] that which a reasonable mind might accept as adequate to support a conclusion." *Id*. (internal citation and quotation marks omitted); *see also* NRS 233B.135(4).

*Legal background and statutory requirements for an extension of time*

In Nevada, "[t]he water of all sources of water supply within the boundaries of the State . . . belongs to the public." NRS 533.025. "[E]ven those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use." *Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842. We have explained that "[t]he concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states." *Id*. Accordingly, pursuant to NRS 533.395(1), the holder of a permit to appropriate water must proceed "in good faith and with reasonable diligence to perfect the appropriation" or face cancellation of the permit by the State Engineer. *Id*.

If the permittee is unable to complete construction of the work or put the water to beneficial use within the specified time, the permittee may request an extension of time pursuant to NRS 533.380(3).

Upon "good cause shown," the State Engineer may "grant any number of extensions of time" to allow the permittee to complete construction work or apply the water to beneficial use. NRS 533.380(3). To obtain an extension, the permittee must submit "proof and evidence [that shows he or she] is proceeding in good faith and with reasonable diligence to perfect the application." NRS 533.380(3)(b) (2013); 2013 Nev. Stat., ch. 147, § 2.4, at 502.[2] "[T]he measure of reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances." NRS 533.380(6). In addition, when the permit provides water rights for municipal use, as is the case here, the State Engineer must consider additional factors set forth in NRS 533.380(4) before granting the application for an extension of time. A permit holder's failure to present this evidence "is prima facie evidence that the [permit] holder is not proceeding in good faith and with reasonable diligence." NRS 533.380(3).

*Background on the anti-speculation doctrine*

The anti-speculation doctrine "precludes speculative water right acquisitions without a showing of beneficial use." *Bacher*, 122 Nev. at 1119, 146 P.3d at 799. In *Bacher*, we addressed the situation where a permittee applicant applies for a permit for an interbasin water transfer under NRS 533.370 but does not intend to put the appropriated water to beneficial use itself. *Id.* We explained that a permittee is statutorily required to show that the water will be put to beneficial use and must justify "the need to import the water from another basin." NRS 533.370(6). We also explained that the permittee could satisfy these requirements by demonstrating a third party's need and intent to put the water to beneficial use in its place. *Bacher*, 122 Nev. at 1116-19, 146 P.3d at 797-99. However, to ensure that the permittee is not merely speculating on water, we adopted Colorado's requirement that the permittee show "an agency or contractual relationship with the party intending to put the water to beneficial use" and specify the intended beneficial use of the appropriation. *Id.* at 1119-20, 146 P.3d at 799 (citing *Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 173 n.11 (Colo. 1988)). Where "the purported appropriator does not intend to put water to use for its own benefit and has no contractual or agency relationship with one who does," the appropriator cannot demonstrate beneficial use and is therefore barred by the anti-speculation doctrine from maintaining the water permits. *Id.* at 1119, 146 P.3d at 799 (internal

[2]All references are to the 2013 statutes, unless stated otherwise, as those were in effect at the time the complaint was filed and at the time the State Engineer granted the permits at issue.

quotation marks omitted). In this manner, the anti-speculation doctrine limits "an entity's ability to demonstrate beneficial use when it [does] not have definite plans to put water to beneficial use or a contractual relationship with an entity that ha[s] such plans." *Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. 770, 777, 191 P.3d 1189, 1194 (2008).

Though *Bacher* involved an original application for a permit under NRS 533.370, whereas this matter involves an application for an extension of time on an existing permit under NRS 533.380, the same policies for applying the anti-speculation doctrine to an original application for a permit are also present in an application for an extension of time. Both applications require the applicant to show efforts to "apply the water to the intended beneficial use with reasonable diligence." *Bacher*, 122 Nev. at 1119-20, 146 P.3d at 799; *compare* NRS 533.370, *with* NRS 533.380. As we explained in *Bacher*, an applicant who only speculates on the use of water cannot satisfy "the beneficial use requirement that is so fundamental to our State's water law jurisprudence." 122 Nev. at 1119, 146 P.3d at 799. Thus, the concerns underlying the anti-speculation doctrine are not limited to the original permit application process; rather, a permittee has an ongoing duty to put the water to beneficial use with reasonable diligence throughout the water permitting process. *See* NRS 533.380(3); NRS 533.395(1). And it is clear from the language of NRS 533.380(3) as well as its legislative history that the requirement that permittees show reasonable diligence in appropriating water rights for permit extensions is to protect against speculation. *See* Hearing on A.B. 624 Before the Assembly Government Affairs Comm., 67th Leg. (Nev., May 27, 1993); *id*., Exhibit C.

As such, we conclude that the formal-relationship requirement adopted in *Bacher* also applies when a permittee requests an extension of time under NRS 533.380. Thus, when a permittee's rights are based on water appropriation by a third party, the permittee must show a formal relationship with the third party in order to satisfy NRS 533.380's ongoing requirement that the permittee demonstrate reasonable diligence to apply the water to beneficial use. *See Bacher*, 122 Nev. at 1120, 146 P.3d at 799. And because NRS 533.380(3) specifically requires a permittee to provide evidence of its efforts to put the water to beneficial use with each request for an extension of time, we conclude that the anti-speculation doctrine applies to each extension request. In applying for an extension of time, the permittee must submit proof and evidence of the third-party relationship. *Desert Irrigation*, 113 Nev. at 1057, 944 P.2d at 841 (stating that "[a] mere statement of intent to put water to beneficial use, uncorroborated with any actual evidence, after nearly twenty years of nonuse is insufficient to justify a sixteenth . . . extension"). Thus, under NRS 533.380(3)(b), Intermountain was required to present evidence of these contracts and negotiations in the present extension request.

*The anti-speculation doctrine requires that a permittee show actual evidence of its formal relationship with a third party who will perfect the water right*

With this framework in mind, we now consider whether the State Engineer properly applied the anti-speculation doctrine in this case. The State Engineer concluded that the formal-relationship requirement we adopted in *Bacher* did not apply to Intermountain's initial permit request because the requirement was not in place when the State Engineer issued the initial permits (between 2002 and 2006). For the instant extension request, the State Engineer seemed to conclude that the anti-speculation doctrine applied and that Intermountain's affidavit attesting that it had "entered into an [o]ption [a]greement with two world-wide engineering and construction firms, experienced in water systems development" was sufficient evidence of Intermountain's reasonable diligence to perfect the water rights. We are not convinced that the State Engineer properly applied the anti-speculation doctrine to the option agreements. The Colorado Supreme Court's opinion in *Front Range*, 415 P.3d at 813, is instructive on this point. The *Front Range* court held that an option contract, while specifically naming an end-user, was too abstract to overcome the anti-speculation doctrine because the end-user could elect to purchase the water rights in full, in part, or not at all, which made the option contract too speculative. *See id*. We agree and adopt the reasoning of the *Front Range* court.

Intermountain did not provide substantial evidence of its option agreements with third parties to allay the concerns over its speculative use. The affidavit did not identify the firms it had "entered into an [o]ption [a]greement with," other than by stating that one was in Chicago, Illinois, and the other in Tel Aviv, Israel. It also did not state how these agreements related to the Intermountain pipeline project, and there is no evidence that Intermountain obtained an end-user. It is not possible to ascertain a formal contractual relationship from the mere mention in an affidavit of an option contract, especially when the third parties are unidentified and there is no description of how the third parties will perfect the appropriation. *See id.* The State Engineer's evident conclusion that Intermountain was not violating the anti-speculation doctrine because its principal claimed in an affidavit that Intermountain had entered into unproduced option agreements was an error under *Front Range*, because a generic option contract, without more, does not avoid the anti-speculation doctrine. *See Bacher*, 122 Nev. at 1120, 146 P.3d at 799 (requiring an agency or contractual relationship with the party committed to put the water to beneficial use); *see also Front Range*, 415 P.3d at 813 (holding that a generic option agreement was too speculative to overcome the anti-speculation doctrine); *Desert Irrigation*, 113 Nev. at 1057, 944 P.2d at 841 (requiring "actual evidence" of reasonable diligence to approve an extension request).

*The remainder of Intermountain's affidavit attesting to uncorroborated negotiations with third parties and a contract with a utility to use the water in Cold Springs does not allow us to affirm*

Additionally, Intermountain attested that "[a]n agreement ha[d] been reached," which it was in the process of signing, with Utilities, Inc., "[a] utility company[,] to distribute Intermountain's water to its present and future customers in the Cold Springs area of Washoe County." Intermountain also stated that it "had numerous meetings" with developers of a construction project for 10,000 homes in Reno and that it expected to have "agreements in hand within three to four months." These allegations, without more, do not allow us to affirm the State Engineer's decision to grant Intermountain's extension request. Reference to negotiations with unspecified developers does not show concrete evidence of progress towards beneficial use or identify how the third parties would place the water to beneficial use in Intermountain's project area, which the permits designate as Lemmon Valley. This is particularly concerning because, in the order granting the extensions, it appears that the State Engineer impliedly allowed Intermountain to develop its project in areas beyond the designated area in the permits. We have reviewed all of the permit applications and the permits call for a place of use specifically in Lemmon Valley. We also reviewed the State Engineer's 2015 extension, which unambiguously indicates that "[t]he area to be served is Lemmon Valley."

Accordingly, we reverse and remand to the district court with instructions to remand to the State Engineer to determine whether the uncorroborated third-party agreements existed and to allow Intermountain to submit evidence of the agreements in support of its request.[3] On remand to the State Engineer, he must also more fully explain his basis for granting extensions for use in Cold Springs rather than in Lemmon Valley, as specified in the permits.

Gibbons, C.J., and Pickering, J., concur.

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[3]Given our disposition, we do not reach the issue of whether the rest of the State Engineer's order was supported by substantial evidence. We also decline to reach Intermountain's law-of-the-case, issue-preclusion, and waiver arguments in the first instance. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not address issues that are not cogently argued and supported by relevant authority).

CITY OF RENO, Appellant, *v.* JODY YTURBIDE, Respondent.

No. 73971

May 2, 2019 440 P.3d 32

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

**Affirmed.**

[Rehearing denied June 26, 2019]

*McDonald Carano LLP* and *Timothy E. Rowe* and *Lisa M. Wiltshire Alstead*, Reno, for Appellant.

*Hutchison & Steffen, LLC*, and *Jason D. Guinasso*, Reno, for Respondent.

*Kemp & Kemp* and *James P. Kemp*, Las Vegas; *The Law Firm of Herb Santos, Jr.*, and *Herb J. Santos, Jr.*, Reno, for Amicus Curiae Nevada Justice Association.

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

## OPINION

By the Court, Parraguirre, J.:

This workers' compensation matter raises an issue pertaining to an injured employee's entitlement to a lump-sum payment for a permanent partial disability (PPD) award. Under NRS 616C.495 and NAC 616C.498, an injured employee may elect to receive a lump-sum payment for a PPD award. However, if the employee's PPD rating exceeds a 25-percent whole person impairment (WPI), the employee may only elect to receive a lump-sum payment for up to 25 percent of the rating, and for anything exceeding that 25 percent, the employee must receive payments in installments. This appeal requires us to decide whether a workers' compensation insurer can reduce the 25-percent lump-sum-payment limit for an employee's PPD award when that employee has already received a lump-sum payment for a previous PPD award. We conclude that there is no legal basis to justify such a reduction, and we are unwilling to read any such justification into Nevada's statutory workers' compensation scheme when the statutory scheme is otherwise silent on the issue. Accordingly, the appeals officer correctly rejected appellant's position, and we affirm the district court's denial of appellant's petition for judicial review.

*FACTS AND PROCEDURAL HISTORY*

Respondent Jody Yturbide worked as a public safety dispatcher for appellant City of Reno (the City), during which time she received three separate PPD awards.[1] As a result of a 2008 industrial injury to her wrist, Yturbide received a 5-percent WPI rating and elected to obtain a lump-sum PPD payment. In 2011, Yturbide suffered another industrial injury, this time to her elbow, and received a 2-percent WPI rating, for which she elected to obtain another lump-sum PPD payment. Finally, in 2014, Yturbide suffered an industrial injury to her back, for which she received a 33-percent WPI rating.

With respect to Yturbide's third PPD payment, the City disputed the extent to which Yturbide was entitled to a third lump-sum payment. Relying on NRS 616C.495(1)(d) (2007) and NAC 616C.498 (1996), the City offered Yturbide an 18-percent lump-sum payment, based on the City's belief that the statute and regulation permitted the City to deduct Yturbide's previous two PPD lump-sum payments.[2] Specifically, under the versions of the statute and regulation in effect at the time of Yturbide's injury to her back, NRS 616C.495(1)(d) provided that "[a]ny claimant injured on or after July 1, 1995, may elect to receive his or her compensation in a lump sum in accordance with regulations adopted by the Administrator [of the Division of Industrial Relations of the Department of Business and Industry]." NRS 616C.495(1)(d) (2007). In turn, the Administrator promulgated NAC 616C.498, which provided that

> [a]n employee injured on or after July 1, 1995, who incurs *a permanent partial disability that . . . [e]xceeds 25 percent* may elect to receive his compensation in a lump sum equal to the present value of an award for a disability of 25 percent. *If the injured employee elects to receive compensation in a lump sum pursuant to this subsection, the insurer shall pay in installments*

[1]The City is self-insured, meaning it provides its own workers' compensation coverage, as is permitted by NRS 616B.615.

[2]This opinion addresses the versions of NRS 616C.495(1)(d) and NAC 616C.498 that were in effect at the time of Yturbide's third injury. *See* NRS 616C.425(1) ("The amount of compensation and benefits . . . must be determined as of the date of the accident or injury . . . ."). Although NRS 616C.495(1)(d) was amended in 2017 to expressly include NAC 616C.498's language that is at issue in this case, *see* 2017 Nev. Stat., ch. 216, § 9, at 1167, there is no indication that the amendment was intended to accomplish anything other than to codify the provisions of the regulation. *See* Hearing on A.B. 458 Before the Assembly Commerce & Labor Comm., 79th Leg. (Nev., March 29, 2017); *see also* Hearing on A.B. 458 Before the Senate Commerce, Labor & Energy Comm., 79th Leg. (Nev., May 17, 2017). After it was codified in NRS 616C.495, NAC 616C.498 was repealed. *See* Legislative Counsel Bureau File No. R127-17 (effective Jan. 30, 2019).

> *to the injured employee that portion of the injured employee's disability in excess of 25 percent*.

NAC 616C.498(2) (1996) (emphases added).

According to the City, because NRS 616C.495(1)(d) and NAC 616C.498 provided a 25-percent lump-sum-payment limit, and because Yturbide had already obtained two previous lump-sum PPD payments totaling 7-percent WPI, the City was permitted to subtract Yturbide's previous lump-sum PPD payments from the 25-percent limit. Thus, according to the City, Yturbide was entitled only to an 18-percent lump-sum payment for her back injury, with the remaining 15 percent to be paid in installments.

Yturbide appealed this determination concerning her third PPD award by requesting a hearing before the Department of Administration Hearings Division. Following a hearing, the hearing officer found that, pursuant to NAC 616C.498, the City had erred in its 18-percent lump-sum calculation, and further found that Yturbide was entitled to a 25-percent lump-sum payment, with the remaining 8 percent to be paid in installments. The City then appealed the hearing officer's decision and requested a hearing before the Department of Administration Appeals Office. An appeals officer affirmed the hearing officer's decision, concluding, among other things, that NAC 616C.498 did not support the City's position that it was entitled to reduce Yturbide's lump-sum payment for her third PPD award based on Yturbide having already received lump-sum payments for previous PPD awards. The City then petitioned the district court for judicial review of the appeals officer's decision. The district court affirmed the appeals officer's decision, thereby denying the City's petition. This appeal followed.

## *DISCUSSION*

On appeal from a district court order denying a petition for judicial review, this court reviews an appeals officer's decision in the same manner that the district court reviews the decision. *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). Here, the sole issue pertains to the construction of NAC 616C.498, which is an issue of law that this court reviews de novo. *See Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993) ("The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate."); *see also Silver State Elec. Supply Co. v. State, Dep't of Taxation*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007) ("Statutory construction rules also apply to administrative regulations."). "Where the language of the statute is plain and unambiguous . . . , a court should not add to

or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports." *See Maxwell*, 109 Nev. at 330, 849 P.2d at 269 (internal quotation marks omitted).

Having considered the City's arguments, we conclude that the appeals officer correctly determined that NAC 616C.498 does not permit a workers' compensation insurer to use a previous PPD award that was paid in a lump sum to reduce the 25-percent lump-sum-payment limit when the employee suffers a subsequent industrial injury and obtains a subsequent PPD award. The City contends that NAC 616C.498 permits an insurer to deduct previous PPD awards when those awards were paid in a lump sum because NAC 616C.498 does not prohibit an insurer from doing so, but in our view, NAC 616C.498's silence on the issue means that the regulation is not pertinent to the issue whatsoever. *See Maxwell*, 109 Nev. at 330, 849 P.2d at 269. If anything, NAC 616C.498's references to "*a* permanent partial disability that . . . [e]xceeds 25 percent" and "that portion of *the injured employee's disability* in excess of 25 percent" (emphases added) suggest that the 25-percent limit applies on a disability-by-disability basis and not as an aggregate cap for all disabilities an employee may have throughout his or her working career. *See Maxwell*, 109 Nev. at 330, 849 P.2d at 269.

The City alternatively contends that NRS 616C.495(1)(e)[3] or NRS 616C.490(9) require NAC 616C.498 to be construed in a manner that would permit a workers' compensation insurer to deduct previous PPD awards when computing the amount of a lump-sum payment for a subsequent PPD award. We disagree. NRS 616C.495(1)(e) simply prohibits an employee with multiple injuries from having a combined WPI rating of above 100 percent, which is a common-sense proposition and is not the case here. *Cf.* Hearing on S.B. 232 Before the Senate Commerce, Labor & Energy Comm., 78th Leg. (Nev., March 13, 2015) (explaining the purpose of what would become NRS 616C.495(1)(e)); Hearing on S.B. 232 Before the Assembly Commerce & Labor Comm., 78th Leg. (Nev., May 6, 2015) (same). And NRS 616C.490(9) merely provides that

> if there is a previous disability, . . . the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.

By its terms, NRS 616C.490(9) requires previous WPI ratings to be subtracted from an employee's entire WPI when arriving at the WPI

[3]Subsection (1)(e) did not exist at the time of Yturbide's third injury. *See* 2015 Nev. Stat., ch. 240, § 3, at 1142 (enacting subsection (1)(e)). It has since been moved to subsection (1)(g). *See* 2017 Nev. Stat., ch. 216, § 9, at 1168.

rating for a subsequent injury. Had NRS 616C.490(9) been properly applied in this case, the physician that conducted Yturbide's WPI rating for her third injury should have determined her entire WPI rating and then deducted the two previous WPI ratings (i.e., 5 and 2 percent) from the total WPI rating.[4] The statute says nothing about using lump-sum payments related to previous PPD awards as a justification for reducing the lump-sum payment an employee is otherwise entitled to for a subsequent PPD award. Nor has the City identified any legislative history to suggest that, in enacting NRS 616C.495(1)(e) or NRS 616C.490(9), it was the Legislature's roundabout intent to permit workers' compensation insurers to deduct previous PPD awards paid in a lump sum to reduce the 25-percent lump-sum-payment limit under NAC 616C.498. *See Maxwell*, 109 Nev. at 330, 849 P.2d at 269.

The City next contends that *Eads v. State Industrial Insurance System*, 109 Nev. 733, 857 P.2d 13 (1993), supports its position, but again, we disagree. In *Eads*, an employee sustained a work-related injury and was given a 19-percent PPD award, which the employee accepted in a lump-sum payment. 109 Nev. at 734, 857 P.2d at 14. The employee subsequently reopened his claim because the same injury required additional treatment, and he received a 16-percent PPD award over and above the original award. *Id.* at 734-35, 857 P.2d at 14. At the time, a since-repealed statute (NRS 616.607(1)(c)) provided that

> [a]ny claimant . . . who incurs a disability that exceeds 25 percent may elect to receive his compensation in a lump sum equal to the present value of an award for a disability of 25 percent. If the claimant elects to receive compensation pursuant to this paragraph, the insurer shall pay in installments to the claimant that portion of the claimant's disability in excess of 25 percent.[5]

*Eads*, 109 Nev. at 735 n.1, 857 P.2d at 15 n.1.

On appeal, this court addressed whether the employee could seek the entire subsequent 16-percent PPD award in a lump-sum payment, or whether the 16-percent PPD award needed to be combined with the previous 19-percent PPD award, such that the employee could only receive an additional 6-percent lump-sum payment before reaching the statute's 25-percent limit. This court concluded that the statute's 25-percent limit unambiguously applied to "*a disability*" and that, consequently, "where . . . an injured worker's case is reopened for further treatment and evaluation of the original

[4]Although the rating physician did not actually follow NRS 616C.490(9) in this case, failure to follow the statute does not change the meaning of the statute.

[5]Notably, the relevant language in this statute is substantively identical to the language in NAC 616C.498.

disability, NRS 616.607(1)(c) applies to the combined disability allowance and limits any lump sum payments to a total of twenty-five percent." *Id.* at 735-36, 857 P.2d at 15.

We are not persuaded that *Eads* has any bearing on whether NAC 616C.498 permits a workers' compensation insurer to reduce the 25-percent limit based on a previous PPD award paid in a lump sum that an employee received for a *different* disability. If anything, *Eads* supports the proposition that NAC 616C.498's 25-percent limit should be applied on a disability-by-disability basis. Put simply, the City has not provided this court with any statutory, regulatory, or common-law authority to support its position that previous PPD awards that were paid in a lump sum can be used to reduce NAC 616C.498's 25-percent lump-sum limit for a subsequent PPD award related to a different disability. While we are cognizant of the City's public-policy arguments, those arguments are better directed to the Legislature, which, as of yet, has not enacted legislation pertaining to the issue presented in this case. Accordingly, the appeals officer correctly determined that Yturbide is entitled to a lump-sum payment for the first 25 percent of her most recent WPI rating and PPD award, with the remaining 8 percent to be paid in installments. We therefore affirm the district court's denial of the City's petition for judicial review.

Pickering and Cadish, JJ., concur.

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TERRENCE KARYIAN BOWSER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71516

May 16, 2019 441 P.3d 540

Appeal from a judgment of conviction, pursuant to a jury verdict, of voluntary manslaughter with use of a deadly weapon; discharging firearm out of a motor vehicle; and discharging firearm into structure, vehicle, aircraft or watercraft. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

**Affirmed.**

Stiglich, J., dissented in part.

*Resch Law, PLLC*, dba *Conviction Solutions*, and *Jamie J. Resch*, Las Vegas, for Appellant.

*Aaron Ford*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jacob J. Villani, Ryan J. MacDonald*, and *Charles W. Thoman*, Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, EN BANC.[1]

## OPINION

By the Court, HARDESTY, J.:

Appellant Terrence Bowser successfully appealed his first conviction and received a new trial and sentencing hearing before a new district court judge. After the second trial, the judge imposed a longer sentence on some of the counts than had the original trial judge, which Bowser claims is a due process violation. In *Holbrook v. State*, 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974), we recognized that a presumption of vindictiveness arises where a judge imposes a more severe sentence after a new trial. The sole issue before us is whether this presumption of vindictiveness applies here, such that the imposition of this new sentence violated Bowser's due process rights. We hold that the presumption of vindictiveness does not apply when a different judge imposed the more severe sentence. Accordingly, we affirm the judgment of conviction.

### *FACTS AND PROCEDURAL HISTORY*

Following his first trial, Bowser was convicted of six counts: first-degree murder with the use of a deadly weapon (count 2), discharging a firearm out of a vehicle (count 4), discharging a firearm at or into a structure or vehicle (count 6), and three additional conspiracy charges. Bowser was sentenced to life in prison with the possibility of parole after 40 years. Specifically, the district court sentenced him to two consecutive terms of life with the possibility of parole after 20 years on the murder charge (count 2), 24 to 60 months on count 4, and 12 to 60 months on count 6, to run concurrent.

Bowser appealed, and we reversed the judgment of conviction and remanded for a new trial because the bailiff improperly presented evidence to the jury. On remand, Bowser was tried again on the same 6 counts, but with a different district court judge presiding. This time, he was convicted of voluntary manslaughter with a deadly weapon (count 2) instead of first-degree murder. He was also convicted of the two discharging-a-firearm charges (counts 4 and 6), but was acquitted of the three conspiracy charges. The district court conducting the retrial sentenced him to 2 consecutive terms of 48 to 120 months on count 2, 48 to 120 months on count 4 to run consecutive to count 2, and 28 to 72 months on count 6 to run concurrent to count 4. His new total sentence was 30 years in prison with a minimum of 12 years for parole eligibility. In imposing the sentences, the district court stated that it took into account the evidence at trial,

[1]THE HONORABLE ELISSA F. CADISH and THE HONORABLE ABBI SILVER, Justices, did not participate in the decision of this matter.

the jury verdict, the information in the presentence investigation report, the defense's mitigation arguments, and all of the information about what had happened since the previous trial. The district court provided no other explanation for the new sentence.

Bowser appealed from the newly entered judgment of conviction, arguing that the sentences imposed for the discharging-a-firearm counts violated due process because they were harsher than the original sentences. The case was transferred to the court of appeals. In a split decision, the court of appeals affirmed Bowser's sentence. Bowser petitioned for review under NRAP 40B, which we granted.

## *DISCUSSION*

Though district courts generally have significant discretion in sentencing, *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009), their sentencing decision must not be influenced by vindictiveness against the defendant, *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794, 798 (1989). A harsher sentence after a defendant successfully appeals his conviction presents a concern that the increase in sentence was motivated by vindictiveness on the part of the sentencing judge for the defendant's exercise of his right to appeal.[2] In *Pearce*, the United States Supreme Court explained, "Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. at 725. And, because "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.* To ensure the absence of vindictiveness as the reason for the harsher sentence, the Supreme Court announced in *Pearce* a presumption of vindictiveness that applies whenever a judge imposes a more severe sentence after a new trial. *Id.* at 726; *see also Wasman v. United States*, 468 U.S. 559, 564-65 (1984). The presumption may only be overcome if the reasons for the more severe sentence affirmatively appear in the record and are "based upon objective information concerning identifiable conduct on the part of the defendant." *Pearce*, 395 U.S. at 726. In *Holbrook*, we applied this presumption of vindictiveness to conclude that a harsher sentence could not be imposed following a new trial where the record

[2]An increase in sentence following a new trial does not violate double jeopardy principles. *See Pearce*, 395 U.S. at 720-21 (explaining that double jeopardy is not implicated where a defendant successfully appeals his conviction, has a new trial, and receives a higher sentence because "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean").

did not show identifiable conduct by the defendant that would justify a more severe sentence. 90 Nev. at 98, 518 P.2d at 1244.

Bowser, relying on *Holbrook*, contends that the district court's failure to justify the harsher sentence on the record violated his due process rights. The State, on the other hand, urges this court to revisit and limit the holding of *Holbrook* in light of more recent Supreme Court jurisprudence clarifying the presumption of vindictiveness.

Before addressing these arguments, however, we must first determine whether the sentence Bowser received on retrial is harsher than his original sentence, so as to trigger due process concerns. Bowser's aggregate total sentence on retrial decreased from the original aggregate sentence, but the individual sentences on the discharging-a-firearm counts increased in length and were also changed to run consecutive rather than concurrent. Thus, whether his sentence was increased depends on whether we look at the aggregate sentence or the individual sentence on each count. The Supreme Court's jurisprudence on the presumption of vindictiveness does not direct a particular approach for determining whether the new sentence is greater.

We recognize that a majority of courts apply an aggregate approach to determine whether the new sentence is more severe than the original sentence. *See People v. Johnson*, 363 P.3d 169, 177-78 (Colo. 2015); *State v. Hudson*, 748 S.E.2d 910, 911 (Ga. 2013). Under the aggregate approach, if the new aggregate total sentence is not greater than the original aggregate total sentence, then no presumption of vindictiveness applies. The rationale for this approach is that judges, in imposing sentences in cases where multiple counts stem from a single course of conduct, "typically craft sentences on the various counts as part of an overall sentencing scheme," but when "that scheme unravels due to elimination of some of the original counts, the judge should be given a wide berth to fashion a new sentence that accurately reflects the gravity of the crimes for which the defendant is being resentenced." *Hudson*, 748 S.E.2d at 913.

Though we appreciate the logic of the aggregate approach, we choose to adopt the count-by-count method, which means looking at each individual count to determine whether the new sentence on that count is greater in length than the original sentence or has been run consecutive whereas the original sentence was concurrent. This is consistent with our approach in determining whether a resentencing violates double jeopardy principles. *See Wilson v. State*, 123 Nev. 587, 591-93, 170 P.3d 975, 977-79 (2007) (rejecting the aggregate sentencing analysis used in federal courts, and instead assessing the sentence on each count separately). Moreover, we believe that this count-by-count approach best effectuates the objectives of the vindictiveness presumption: to deter actual vindictiveness by a sentencing authority and to "avoid a chilling effect on defendants exercising

their right to appeal." *Johnson*, 363 P.3d at 181. To illustrate why, we need only consider the sentences in this case.

Bowser was charged with open murder in count 2. Following his first trial, he was convicted on count 2 of first-degree murder with the use of a deadly weapon, a category A felony, for which he was sentenced to a total of life with parole eligibility after 40 years. After his second trial, he was convicted on count 2 of the lesser offense of voluntary manslaughter with the use of a deadly weapon, a category B felony, for which he received the maximum sentence allowable by statute, 20 years with parole eligibility after 8 years. His new aggregate sentence was 30 years with parole eligibility after 12 years. Thus, under the aggregate approach, the presumption of vindictiveness would not apply because his new aggregate was not more severe than the original. But, given that his original sentence on count 2 alone was life in prison, it was not possible for his new aggregate sentence to be harsher, even if he had received consecutive maximum sentences on all counts. Yet, this does not preclude the possibility of judicial vindictiveness, meaning such vindictiveness could evade review under the aggregate approach. Thus, we apply the count-by-count method. Because Bowser's sentence on each of the discharging-a-firearm counts (counts 4 and 6) increased and the new sentence on count 4 was run consecutive whereas originally it was concurrent, we conclude that his new sentence was more severe than his original sentence for due process purposes.

Having concluded that Bowser's sentence after retrial was more severe, we now turn to whether the presumption of vindictiveness applies here where there were two different sentencing judges. Since *Pearce* was decided, the Supreme Court has made clear that the presumption "do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial." *Texas v. McCullough*, 475 U.S. 134, 138 (1986). The Supreme Court explained in *McCullough* that "the evil the [*Pearce*] Court sought to prevent" was not the imposition of "enlarged sentences after a new trial," but rather, the "vindictiveness of a sentencing judge." *Id*. Thus, the presumption only applies when there is a "reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Alabama v. Smith*, 490 U.S. 794, 799 (1989) (internal quotation marks and citation omitted). "Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness." *Id.* at 799-800.

The Supreme Court has declined to apply the *Pearce* presumption where the sentences have not been imposed by the same judge or jury. For example, in *Colten v. Kentucky*, the Court refused to apply the presumption to a higher sentence arising from Kentucky's two-tier system, which allowed the defendant who was convicted and sentenced in an inferior court to appeal and receive a de novo

trial in a superior court. 407 U.S. 104, 116-17 (1972). The Court explained that there was no inherent vindictiveness stemming from a higher sentence imposed by a different court because the superior court was not being "asked to do over what it thought it had already done correctly." *Id.* The Court recognized that when there are different sentencers involved, "[it] may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." *Id*. at 117.

Likewise, in *Chaffin v. Stynchcombe*, the Court declined to apply the presumption of vindictiveness to a higher sentence when it was imposed on retrial by a different jury, noting that "the jury, unlike [a] judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication." 412 U.S. 17, 26-28 (1973). And, in *McCullough*, the Court held the presumption to be inapplicable where a judge imposed a higher sentence on retrial than was imposed by a jury in the first trial, because it would be too speculative given that "different sentencers assessed the varying sentences," and thus, a "sentence 'increase' cannot truly be said to have taken place." 475 U.S. at 139-40. Furthermore, though *McCullough* involved a jury imposing the first sentence and a judge imposing the second, the Court strongly indicated that the same logic would apply where two different judges imposed the sentences. *Id.* at 140-41 n.3 (noting that while it appeared that *Pearce* involved two different judges, the *Pearce* decision did not focus on that and the Court declined to read *Pearce* as governing where different sentencing judges are involved).

Based on *Pearce*'s progeny and the concerns underlying the presumption of vindictiveness, we conclude that the presumption does not apply where a different judge imposes a higher sentence after retrial than the first judge. Under these circumstances, the likelihood of vindictiveness is de minimis, as there is no reason to presume that the second judge had a personal stake in the outcome of the first trial or sentencing, or a motivation to retaliate for a successful appeal.[3] We recognize that judges generally have broad discretion in sentencing, and different sentences imposed by different judges merely

[3]Though the dissent places heavy emphasis on the possibility that a second judge might be infected by institutional prejudices when resentencing a defendant after a successful appeal, we view such a position as too speculative to present a likelihood of vindictiveness. *See United States v. Anderson*, 440 F.3d 1013, 1016-17 (8th Cir. 2006) ("To apply a presumption of vindictiveness in such circumstances—where the second sentencer had no personal stake in the prior proceedings—would require an inference of institutionalized hostility toward the exercise of appellate rights or a collusive arrangement between judges to have one exact vindication for another. There is no evidence to suggest such a lack of professionalism among judges, and we are unwilling to make such inferences on the present facts.").

reflect this discretion. Thus, because a different judge presided over Bowser's second trial and sentencing, due process does not require a presumption of vindictiveness.[4]

Accordingly, we affirm the judgment of conviction.

GIBBONS, C.J., and PICKERING and PARRAGUIRRE, JJ., concur.

STIGLICH, J., concurring in part and dissenting in part:

I concur with the majority's adoption of a count-by-count method to determine whether a subsequent sentence is harsher than the sentence originally imposed. And therefore I agree with the majority that Bowser's second sentence "was more severe than his original sentence for due process purposes." Majority opinion *ante* at 122. However, I disagree with the majority's adoption of a bright line rule that a presumption of vindictiveness "does not apply where a different judge imposes a higher sentence after retrial than the first judge," Majority opinion *ante* at 123, and thus I respectfully dissent.

As noted by the majority, it is not the concern of an enhanced sentence on remand that requires the presumption of vindictiveness; it is the concern that a defendant will be punished for exercising the right to appeal or collateral review and that the fear of such punishment will deter defendants from lawfully attacking a conviction. *See Alabama v. Smith*, 490 U.S. 794, 798-99 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 724-25 (1969), *overruled in part by Smith*, 490 U.S. 794. "[D]ue process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725. Thus, the Supreme Court adopted a prophylactic rule for "whenever a judge imposes a more severe sentence upon a defendant after a new trial"—the sentencing judge must articulate the reasons for the higher sentence. *Id*. at 726. Absent such articulation, a rebuttable presumption of vindictiveness applies. *Smith*, 490 U.S. at 798-99.

While the Supreme Court has subsequently clarified that the presumption of vindictiveness will not apply in every case where a defendant receives a harsher sentence after retrial, *see* Majority opinion *ante* at 122-24, it also has not unequivocally decided whether the presumption should apply when two different judges in the same court issue the sentences, *see Texas v. McCullough*, 475 U.S. 134,

[4]Bowser does not argue that the sentence on retrial was the result of actual vindictiveness or reliance on impalpable or highly suspect evidence. *See Alabama*, 490 U.S. at 801-03 (providing that where the presumption of vindictiveness does not apply, the burden is on the defendant to prove actual vindictiveness); *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (refraining from interfering with a sentence within statutory guidelines where the defendant does not demonstrate prejudice from the district court's reliance on impalpable or highly suspect evidence).

140 n.3 (1986).[1] And I disagree with the majority that a different sentencing judge creates merely a "de minimis" likelihood of vindictiveness. Majority opinion *ante* at 123.

As the Supreme Court of Oregon noted, "[t]he fact that a different judge imposes an increased sentence does not eliminate [vindictiveness] concerns or the possibility that institutional prejudices might infect a trial judge's resentencing of a defendant after a successful appeal." *State v. Sierra*, 399 P.3d 987, 1000 (Or. 2017) (internal quotation marks omitted). Indeed, the Supreme Court appears to have recognized the possibility of institutional concerns in *Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973), when it remarked that a "jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." While a jury is not likely to be sensitive to the institutional pressures of disincentivizing meritless appeals, "another judge operating within the same system as the original judge likely will have that knowledge and understandably could be sensitive to those interests." *Sierra*, 399 P.3d at 1000.

With the possibility that institutional concerns might affect judges operating in the same court and with the underlying objective of *Pearce* being "to assure the absence of [vindictive sentencing] motivation," 395 U.S. at 726, I cannot agree with the majority's bright line rule that the presence of a different judge eliminates the presumption of vindictiveness. I would instead adopt a rule that the presumption of vindictiveness is inapplicable where there are different sentencing judges only if the second sentencer states objective, nonvindictive reasons for imposing the greater sentence. This requirement has been adopted by a number of federal circuit courts and the Supreme Court of Oregon. *See United States v. Rodriguez*, 602 F.3d 346, 358-59 (5th Cir. 2010) (collecting cases); *Sierra*, 399 P.3d at 999-1000; *cf. McCullough*, 475 U.S. at 140 ("[T]he second sentencer provide[d] an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more[,] particularly since trial judges must be accorded broad discretion in sentencing.") Moreover, the added condition I would impose is consistent with our holding in *Holbrook*, which states that when a harsher sentence "is imposed after a new trial the reasons for doing so must affirmatively appear." *Holbrook v. State*, 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974).

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[1]Even had the Supreme Court ruled on this issue, concluding that the presumption does not apply where there are two different sentencing judges within the same court, that fact would not preclude this court from concluding that the Nevada Constitution requires otherwise. *See Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007) ("[S]tates are free to provide additional constitutional protections beyond those provided by the United States Constitution.").

Creating a record of a logical, nonvindictive reason for imposing a harsher sentence does not do violence to *Holbrook*, *Pearce*, or *Pearce*'s progeny. Instead, it helps to ensure that a defendant is not punished at resentencing after exercising the right to appeal or collateral review, a goal squarely in line with the above-mentioned precedent. Accordingly, I would apply the presumption of vindictiveness to this matter, as the record contains no objective, nonvindictive justification for the harsher sentences, and modify the sentences for counts 4 and 6 to the terms originally imposed, pursuant to *Holbrook*.

Respectfully, I dissent.