MATTHEW MORONEY, Appellant, *v.* BRUCE ARTHUR YOUNG, Respondent.

No. 82948

November 23, 2022 520 P.3d 358

Appeal from a district court order dismissing an amended complaint in a torts action. Fifth Judicial District Court, Esmeralda County; Kimberly A. Wanker, Judge.

Affirmed.

Bighorn Law and *Kimball Jones*, North Las Vegas, for Appellant.

DeLee Law Offices, LLC, and *Michael M. DeLee*, Amargosa Valley, for Respondent.

Before Parraguirre, C.J., Herndon, J., and Gibbons, Sr. J.[1]

OPINION

By the Court, Herndon, J.:

In this appeal, we address factors for the district court to consider when resolving a timely motion to extend the service period for a summons and complaint. Recently amended NRCP 4(e)(3) provides that if a plaintiff timely moves for an extension of time to serve the summons and complaint and demonstrates good cause for the requested extension, "the court must extend the service period and set a reasonable date by which service should be made." We have previously articulated the relevant factors to determine if a plaintiff has shown good cause for filing an *untimely* motion to extend the time for service of process, *see Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 245 P.3d 1198 (2010), and for extending the service period following such an untimely motion, *see Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000). We conclude that the same factors apply to timely motions to extend the service period to the extent that those factors bear on whether the plaintiff diligently attempted service and/or whether circumstances beyond the plaintiff's control resulted in the failure to timely serve. Applying those factors and other relevant considerations here, we affirm the district court's dismissal order.[2]

[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

[2]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

FACTUAL AND PROCEDURAL HISTORY

After a physical confrontation between the parties, appellant Matthew Moroney sued respondent Bruce Arthur Young and others, filing the complaint on the last day of the applicable limitations period. On the deadline for service of process under NRCP 4(e), Moroney moved to enlarge the time to serve Young, which the district court denied in a minute order following a hearing. Several months later, Moroney filed an amended complaint alleging a single claim against Young only. In response, Young filed a pro se answer and, after retaining counsel, moved to dismiss the amended complaint in part because the statute of limitations had expired and because Moroney had not timely served him. After conducting two hearings on Young's motion to dismiss, the district court granted the motion, relying on its earlier minute order and explicitly stating that it was not relying on Young's motion to dismiss. This appeal followed.[3]

DISCUSSION

NRCP 4(e) governs time limits for service of process, generally providing that "[t]he summons and complaint must be served upon a defendant no later than 120 days after the complaint is filed, unless the court grants an extension of time under this rule." NRCP 4(e)(1). And NRCP 4(e)(2) requires dismissal if the plaintiff fails to complete service "before the 120-day service period—or any extension thereof—expires." If a plaintiff moves to extend the time for service before the service deadline "and shows that good cause exists for granting an extension of the service period, the court must extend the service period and set a reasonable date by which service should be made." NRCP 4(e)(3). We review both the dismissal for failure to effect timely service of process and the district court's good cause determination for an abuse of discretion. *See Abreu v. Gilmer*, 115 Nev. 308, 312-13, 985 P.2d 746, 749 (1999) (reviewing dismissal for failure to effect timely service of process for an abuse of discretion); *Scrimer*, 116 Nev. at 513, 998 P.2d at 1193-94 (reviewing a good cause determination for an abuse of discretion).

Although we have not previously addressed what constitutes "good cause" that would trigger the district court's duty to extend the service period under current NRCP 4(e)(3), we have addressed good cause under previous versions of NRCP 4. In *Scrimer*, we analyzed former NRCP 4(i), the predecessor to Rule 4(e)(4) regarding untimely motions to extend the service period, which required the district court to dismiss based on untimely service "unless a plaintiff [could] show good cause why service was not made during the

[3]We reject Young's argument that we lack jurisdiction over this appeal, as Moroney timely appealed from the district court's dismissal order, which constitutes a final appealable judgment under NRAP 3A(b)(1).

120-day [service] period." 116 Nev. at 512, 998 P.2d at 1193. To guide district courts in assessing good cause, we outlined a number of relevant considerations, including "the plaintiff's diligence in attempting to serve the defendant," "the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed," "the lapse of time between the end of the 120-day period and the actual service of process," "the prejudice to the defendant caused by the plaintiff's delay in serving process," and "the running of the applicable statute of limitations." *Id.* at 516, 998 P.2d at 1195-96.

We again discussed good cause after the 2004 amendments to NRCP 4(i), which added a requirement that the district court consider a party's failure to move to enlarge the time for service within the service period "in determining good cause for an extension of time." *Saavedra-Sandoval*, 126 Nev. at 594, 245 P.3d at 1199 (quoting former NRCP 4(i)). In examining the amendments' effect on *Scrimer*'s "good cause" analysis, we concluded that the amendments "require[d] district courts to first consider if good cause exists for filing an untimely motion for enlargement of time" before considering if good cause existed for the enlargement itself. *Id.* To make the initial good cause assessment, we held that district courts should consider the *Scrimer* factors "that would impede the plaintiff's attempts at service and, in turn, could result in the filing of an untimely motion to enlarge the time to serve the defendant with process." *Id.* at 597, 245 P.3d at 1201. But we clarified that the factors were not exhaustive and district courts should consider other factors that "similarly relate to difficulties encountered by a party in attempting service that demonstrate good cause for filing a tardy motion." *Id.*

We amended our service rules again effective on March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522, at *3 (Nev. Dec. 31, 2018) (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules) ("[T]his amendment to the [NRCP] . . . shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). These amendments added the good cause consideration at issue here, where a party moves to extend the time for service *before* the service period expires. Under this rule, a district court must grant a timely motion to extend the service period if the plaintiff "shows that good cause exists for granting an extension." NRCP 4(e)(3).

In light of the foregoing, we must now consider what constitutes good cause to extend the service period when such a motion is filed within the service period. Moroney argues that reversal is warranted because he filed a timely motion that showed good cause for his failure to timely serve by presenting evidence that Young

evaded service. Moroney further contends that the district court should have, but did not, consider certain of the *Scrimer* factors in determining whether to extend the time for service. Young responds that dismissal was proper because Moroney failed to use reasonable diligence in attempting service.

We conclude that where a plaintiff timely moves for an extension of the service period under NRCP 4(e)(3), the district court must consider the *Scrimer* factors that relate to the plaintiff's diligence in attempting service, and to any circumstances beyond the plaintiff's control that may have resulted in the failure to timely serve the defendant. These factors include

> (1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, . . . and (10) any [previous] extensions of time for service granted by the district court.

116 Nev. at 516, 998 P.2d at 1196. And as stated in *Saavedra-Sandoval* regarding untimely motions, this list is not exhaustive, but any additional factors a district court considers should similarly focus on the plaintiff's diligence in attempting to serve defendants and/or whether the failure to effectuate service was due to reasons beyond the plaintiff's control. 126 Nev. at 597, 245 P.3d at 1201. Underlying these considerations is the objective behind Nevada's service rules, which is "to encourage litigants to promptly prosecute matters by properly serving the opposing party in a timely manner." *Id.* at 596, 245 P.3d at 1201.

Here, Moroney focuses on Young's alleged evasion of service and the applicable statute of limitations that would preclude refiling the action. As clarified by our ruling today, the statute of limitations is not a relevant factor for a timely motion to extend the service period, although it would be under *Scrimer* for an *untimely* motion. *See Scrimer*, 116 Nev. at 516, 998 P.2d at 1195-96 (listing the relevant factors and considerations). This is because, unlike after the service deadline expires, where prejudice to both parties are relevant factors, the focal point before the service deadline expires is whether the plaintiff has promptly prosecuted his or her case by attempting to timely serve the opposing party. And as to the alleged evasion, the record does not support Moroney's contention that Young deliberately evaded service. Indeed, as Moroney conceded below, Young lived in a remote area, and because it was costly to effectuate service, Moroney made only one service attempt. During this attempt—as set forth in Moroney's process server's affidavit attached to the motion—Moroney's process server went to the Esmeralda County Sheriff's Office for assistance locating Young's property but, for reasons unknown, did not have the sheriff's office

serve Young. Upon the process server's arrival at Young's property, "[a]n unidentified neighbor stated that [Young] was not home and would not be interested in receiving a court Summons." This statement, without more, does not sufficiently establish that Young was evading service. And despite the district court's indication at the hearing on the motion that it would consider additional evidence, Moroney provided no further evidence.

Additionally, the record supports the district court's finding that Moroney unreasonably delayed his service attempt. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) ("If the district court's findings are supported by substantial evidence, they will be upheld."). Notably, Moroney waited until the last day of the statute-of-limitations period to file suit and then waited until the service deadline to file his motion to extend the service period. Because the record supports the district court's findings and it considered the relevant factors at this stage, we conclude that it did not abuse its discretion by denying Moroney's motion to extend the service period. *Scrimer*, 116 Nev. at 513, 998 P.2d at 1193-94. Further, because Moroney did not serve Young within the time required under NRCP 4(e), it follows that the district court also did not abuse its discretion by dismissing the case.[4] *See* NRCP 4(e)(2); *Abreu*, 115 Nev. at 312-13, 985 P.2d at 749 (reviewing the dismissal for failure to effect timely service of process for abuse of discretion); *Scrimer*, 116 Nev. at 512-13, 998 P.2d at 1193 (explaining that dismissal is mandatory where the plaintiff fails to demonstrate that "there is a legitimate excuse for failing to serve within the 120 days").

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[4]The dismissal order states that the district court was "acting upon its own previously entered minute order and not relying upon" Young's motion to dismiss in "confirm[ing] the dismissal of the action." To the extent the district court erred by dismissing the action sua sponte without issuing an order to show cause, we nevertheless affirm because Moroney waived this argument by failing to raise it on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived). Additionally, because Young's motion to dismiss was premised, in part, on dismissal under NRCP 4(e)(2) for failure to timely serve, Moroney had notice of the possible dismissal under this rule and an opportunity to be heard on this issue at the dismissal hearings. *See* NRCP 4(e)(2), Advisory Committee Note—2019 Amendment ("Rule 4(e)(2) makes clear that, if the court acts on its own, it must issue an order to show cause giving the parties notice and an opportunity to be heard before dismissing an action for failure to make service."); *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons." (alteration in original) (quoting *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987))). We nevertheless caution district courts that absent similar circumstances, a district court must issue an order to show cause before sua sponte dismissing an action pursuant to NRCP 4(e)(2).

Because this issue is dispositive, we need not address the parties' remaining arguments.

CONCLUSION

Recently amended NRCP 4(e)(3) requires that a district court extend the service period where a plaintiff timely moves for an extension and demonstrates that good cause for an extension exists. We conclude that in determining whether the plaintiff has made a good cause showing for these purposes, the district court must apply the factors we articulated in *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 245 P.3d 1198 (2010), and *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000), to the extent that they bear on whether the plaintiff diligently attempted service and/or whether circumstances beyond the plaintiff's control resulted in the failure to timely serve. Applying those factors here, we affirm the district court's order.[5]

Parraguirre, C.J., and Gibbons, Sr. J., concur.

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[5]Although the notice of appeal includes Point Mining & Milling Consolidated, Inc., as a respondent, it appears that entity was never served, and both the amended complaint and the order dismissing the amended complaint do not name Point Mining as a defendant. Accordingly, the clerk of this court shall modify the caption on this court's docket consistent with the caption on this opinion.

FREEMAN EXPOSITIONS, LLC, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE VERONICA BARISICH, District Judge, Respondents, and JAMES ROUSHKOLB, Real Party in Interest.

No. 83172

December 1, 2022 520 P.3d 803

Original petition for a writ of mandamus challenging a district court order denying in part a motion to dismiss.

Petition granted in part and denied in part.

Jackson Lewis P.C. and *Lynne K. McChrystal* and *Paul T. Trimmer*, Las Vegas, for Petitioner.

Gabroy Law Offices and *Christian J. Gabroy*, Henderson, for Real Party in Interest.

Claggett & Sykes Law Firm and *Micah S. Echols, Joseph N. Mott*, and *Scott E. Lundy*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

Pursuant to the Nevada Constitution, the Legislature has enacted laws permitting the use of cannabis to treat certain medical conditions by qualifying patients. Nev. Const. art. 4, § 38; NRS Chapter 678C. The Legislature has additionally provided that employers "must attempt to make reasonable accommodations for the medical needs of" employees who use medical cannabis outside of the workplace while possessing a valid registry identification card, unless certain exceptions apply. NRS 678C.850(3).

As a matter of first impression, we are tasked with interpreting whether Nevada law provides employees who use medical cannabis with workplace protections. We observe that the Legislature has clearly distinguished between recreational and medical cannabis use in the employment context, and we conclude that NRS 678C.850(3) provides employees with a private right of action where an employer does not provide reasonable accommodations for the

[1]The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.

use of medical cannabis off-site and outside of working hours. As employees have a private right of action under NRS 678C.850, we conclude that employees lack a cause of action in circumstances such as these for tortious discharge or negligent hiring, training, or supervision. And we extend our recent decision in *Ceballos v. NP Palace, LLC*, 138 Nev. 625, 514 P.3d 1074 (2022), to hold that employees who use medical cannabis may not bring a claim against their employer under NRS 613.333.

Accordingly, the district court properly declined to dismiss real party in interest's claim under NRS 678C.850(3) but erred by not dismissing the claims for tortious discharge; unlawful employment practices under NRS 613.333; and negligent hiring, training, or supervision. Therefore, we grant in part and deny in part this petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

Real party in interest James Roushkolb accepted a journeyman position with petitioner Freeman Expositions, dispatched through a union. While Roushkolb was tearing down a convention exhibit with another employee, a large piece of plexiglass fell and shattered. Following the incident, Freeman Expositions required Roushkolb to take a drug test, and Roushkolb tested positive for cannabis. A collective bargaining agreement provision related to drug and alcohol use provided for zero tolerance, and Freeman Expositions terminated Roushkolb and sent the union a letter stating Roushkolb was no longer eligible for dispatch to Freeman Expositions worksites. At the time, Roushkolb held a valid medical cannabis registry identification card issued by the State of Nevada.

Roushkolb filed suit, asserting five claims against Freeman Expositions: (1) unlawful employment practices under NRS 613.333; (2) tortious discharge; (3) deceptive trade practices; (4) negligent hiring, training, and supervision; and (5) violation of the medical needs of an employee pursuant to NRS 678C.850(3).[2] Freeman Expositions moved to dismiss. The district court dismissed the claim for deceptive trade practices, allowing the others to proceed. Freeman Expositions petitioned for a writ of mandamus, seeking dismissal of the remaining claims. This court directed an answer from Roushkolb and allowed the Nevada Justice Association to appear as amicus curiae in support of Roushkolb.

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[2]After Roushkolb initiated his suit, the Legislature recodified NRS Chapter 453A as NRS Chapter 678C. *See generally* 2019 Nev. Stat., ch. 595, § 245, at 3896; 2019 Nev. Stat., ch. 595, § 83-171, at 3790-3834. While the parties discuss this claim under NRS Chapter 453A, the recodification did not substantially change the operative statutes at issue here, and we refer to the current codification.

DISCUSSION

A writ of mandamus may be issued by this court to compel the performance of an act that the law requires or to control a district court's arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This extraordinary relief may be available if a petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170. Whether to consider a writ petition is within this court's sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, this court will not consider a writ petition challenging an interlocutory order denying a motion to dismiss because an appeal from a final judgment is an adequate and speedy legal remedy. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558-59. "Nonetheless, we have indicated that we will consider petitions denying motions to dismiss when either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id.* at 197-98, 179 P.3d at 559; *see also Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (explaining that this court may entertain writ petitions challenging an order denying a motion to dismiss when "the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law").

Freeman Expositions and Roushkolb both argue that this court should clarify Nevada's laws regarding medical cannabis in the employment context. We agree. We recently decided related employment issues concerning adult recreational cannabis in *Ceballos*, but that case did not present the question of whether employers must accommodate employees using medical cannabis. Although we recognize that Freeman Expositions has a legal remedy, judicial economy would be served by clarifying the recurring issues of statewide importance presented in this petition.

The district court properly denied Freeman Expositions' motion to dismiss the claim under NRS 678C.850(3) but erred by not dismissing the claims for tortious discharge; violation of NRS 613.333; and negligent hiring, supervision, and training

"Statutory interpretation is a question of law that [this court] review[s] de novo, even in the context of a writ petition." *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. Pursuant to NRCP 12(b)(5), a court may dismiss a claim for "failure to state a claim upon which relief can be granted." A claim should be dismissed "only if it

appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief," treating its factual allegations as true and drawing all inferences in its favor. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Whether NRS 678C.850(3) provides a private right of action

Freeman Expositions argues that the district court should have dismissed Roushkolb's NRS 678C.850(3) claim alleging a violation of its duty to provide reasonable accommodations for his medical needs because NRS Chapter 678C does not provide a private right of action. Freeman Expositions also argues that Roushkolb did not request an accommodation for his use of medical cannabis. Roushkolb did not address the accommodation issue before this court but argued below that he had sought the accommodation of not being terminated for using medical cannabis outside of the workplace during nonworking hours. He also argued below that NRS 678C.850 would be nullified if no private right of action were allowed because no administrative agency is empowered to enforce this protection.

Under NRS 678C.850, an employer need not allow the medical use of cannabis in the workplace or "modify the job or working conditions of a person who engages in the medical use of cannabis that are based upon the reasonable business purposes of the employer." NRS 678C.850(2)-(3). Nevertheless, an

> employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of cannabis if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:
>
> (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or
>
> (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.

NRS 678C.850(3). The only employers exempted from this mandate are law enforcement agencies. NRS 678C.850(4). The statute does not expressly state that an employee has a private right of action should an employer not attempt to accommodate medical cannabis users. *See* NRS 678C.850.

Where a statute does not expressly provide a private right of action, it may nevertheless support an implied right of action if the Legislature intended that a private right of action may be implied. *Neville v. Eighth Judicial Dist. Court*, 133 Nev. 777, 781, 406 P.3d 499, 502 (2017). To determine the Legislature's intent, we consider "(1) whether the plaintiffs are of the class for whose special benefit

the statute was enacted; (2) whether the legislative history indicates any intention to create or deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme." *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958-59, 194 P.3d 96, 101 (2008) (cleaned up) (addressing factors set forth by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975)). These factors are not necessarily dispositive, as the critical factor is whether the Legislature intended to sanction a private right of action. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 20 (1979) (concluding that whether a private remedy exists ultimately rests with legislative intent).

Looking to the Legislature's intent, we conclude that NRS 678C.850 provides an implied private right of action. First, Roushkolb is indeed part of the class for whose benefit the statute was enacted because Roushkolb held a valid medical cannabis registry card and was an employee of Freeman Expositions who sought to use medical cannabis. *See generally* NRS Chapter 678C (concerning decriminalizing medical cannabis, the process for lawful use, and the regulation of medical cannabis production and sales, among other miscellaneous provisions). Second, reviewing the legislative history, the Legislature added subsection NRS 678C.850(3) in 2013 and did not express an intention to create or deny a private remedy under the statute. 2013 Nev. Stat., ch. 547, § 24.3, at 3726. The Legislature, however, explained that it modeled the statute on Arizona's medical cannabis statutes, Hearing on S.B. 374 Before the Assemb. Comm. on Judiciary, 77th Leg. (Nev., June 1, 2013), and a federal district court in Arizona concluded that the analogous Arizona law provided an implied cause of action because one was needed to implement the statutory directive, *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761, 775-76 (D. Ariz. 2019). *See* 73 Am. Jur. 2d *Statutes* § 79 (Aug. 2022 update) (recognizing that a court may give decisions of another state's courts great weight in construing statutes modeled after those of that other state). And third, we conclude that implying a private cause of action to enforce NRS 678C.850 is consistent with the underlying purposes of NRS Chapter 678C. The Legislature enacted NRS Chapter 678C to enforce the Nevada Constitution, *see* Nev. Const. art. 4, § 38(1), and to allow Nevadans who suffer from certain medical conditions to be able to obtain medical cannabis safely and conveniently, *see* NRS 678A.005(2). NRS Chapter 678C provides that the Division of Public and Behavioral Health of the Department of Health and Human Services is tasked with enforcing many provisions, but the chapter is silent as to enforcement regarding employment issues arising out of NRS 678C.850. Further, we find no other statute that provides medical cannabis users with a cause of action against an employer who violates the directive of NRS 678C.850(3). In light of

these considerations, we conclude that the Legislature intended to provide a private right of action to implement its mandate in NRS 678C.850(3).

Other jurisdictions have determined that similar statutes directing employers to accommodate employees using medical cannabis provide a private cause of action, even where the legislators did not include such a remedy in the statutory scheme. *Cf. City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC*, 129 Nev. 1, 9 n.4, 293 P.3d 860, 865 n.4 (2013) (looking to the decisions of other jurisdictions when confronting matters of first impression). As previously indicated, a federal district court in Arizona concluded that there was an implied private right of action in Arizona's medical cannabis antidiscrimination statute. *Whitmire*, 359 F. Supp. 3d at 781. That court specifically observed that the employee fell within the class sought to be protected by the statute, there was no indication of legislative intent to deny a remedy, and implying a private cause of action would give force to the public policy sought to be advanced by the statutory scheme. *Id.* In *Palmiter v. Commonwealth Health Systems, Inc.*, 260 A.3d 967 (Pa. Super. Ct. 2021), an intermediate Pennsylvania appellate court held that that state's legislature intended to provide an implied private cause of action for the employment-discrimination prohibition in the state's medical cannabis statutes. *Id.* at 975-76. Though the statutes did not state an explicit remedy, the court looked to "the mischief to be remedied, the object to be obtained, and the consequences of a particular interpretation" and concluded that a private right of action was implied to implement "a public policy designed to protect certified users of medical marijuana from employment discrimination and termination." *Id.* at 976-77. And a federal district court in Connecticut performed a comparable analysis and likewise concluded that that state's medical cannabis statute provided an implied private right of action. *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 338-40 (D. Conn. 2017). In line with these other jurisdictions, we find an implied right of action under NRS 678C.850, where an employer does not follow the Legislature's directive that an employer must attempt to accommodate an employee who uses medical cannabis, unless certain exceptions apply.[3] Accordingly, Freeman Expositions has not shown that writ relief is warranted to remedy the district court declining to dismiss this claim.

Tortious discharge claim

Freeman Expositions next argues the district court should have dismissed Roushkolb's claim for tortious discharge because

[3]We are not presented here with resolving what an employer must do to satisfy its obligation to "attempt to make reasonable accommodations for the medical needs of an employee who" uses medical cannabis.

an at-will employee can generally be terminated for any reason, unless the dismissal offends strong and compelling public policy, which Freeman Expositions asserts does not exist here.[4] Roushkolb counters that his tortious discharge claim was properly allowed to proceed because allowing an employer to terminate employees using medical cannabis outside of the workplace offends public policy. He asserts that employees will be forced to choose between employment or medical care if employees are denied the protections of Nevada's medical cannabis laws.

An employer commits tortious discharge if they terminate an employee for reasons that violate public policy. *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 212 (1991). "[T]ortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989). Where the Legislature has provided an employee with a statutory remedy, that remedy will be instructive as to whether the public policy at issue rises to the level of supporting a claim for tortious discharge. *Id.* This court has recognized three instances where an employer violated "strong and compelling public policy": (1) when an employee was terminated for refusing to engage in unlawful conduct, *Allum*, 114 Nev. 1313, 970 P.2d 1062; (2) when an employee was terminated for refusing to work in unreasonably dangerous conditions, *D'Angelo*, 107 Nev. 704, 819 P.2d 206; and (3) when an employee was terminated for filing a workers' compensation claim, *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984).[5] Conversely, this court has rejected other claims even though the employers allegedly violated public policy created by the Nevada Legislature. *See, e.g.*, *Chavez v. Sievers*, 118 Nev. 288, 293-94, 43 P.3d 1022, 1025-26 (2002) (declining to recognize a public policy exception to the at-will doctrine for a racial discrimination claim against a small employer not subject to Nevada anti-discrimination laws); *Sands Regent*, 105 Nev. at 439-40, 777

[4]Freeman Expositions' arguments based on the at-will doctrine are misplaced. While employees in Nevada are rebuttably presumed to be at-will and subject to termination "at any time and for any reason or no reason," *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 926-27, 899 P.2d 551, 553-54 (1995), we have recognized that "the type of employment—either at-will or by contract—is immaterial to a tortious discharge action," *Allum v. Valley Bank of Nev.*, 114 Nev. 1313, 1317, 970 P.2d 1062, 1064 (1998). Further, Roushkolb's employment was governed by a collective bargaining agreement that provided the employer the right to issue a disciplinary letter of no dispatch for cause.

[5]In dicta, we have also endorsed tortious discharge claims when employees were terminated for reporting an employer's illegal activities to the authorities and for performing jury duty. *Ceballos*, 138 Nev. at 629-30, 514 P.3d at 1078 (collecting cases).

P.2d at 899-900 (declining to allow an employee to recover under a tortious discharge theory for age discrimination).

Here, the use of medical cannabis distinguishes these facts from our recent analysis regarding an employee fired for using recreational cannabis. In *Ceballos*, we explained that the appellant did not have a claim for tortious discharge because in NRS 678D.510(1)(a), the Legislature expressly permitted employers to maintain and enact policies prohibiting or restricting their employees from using recreational cannabis. 138 Nev. at 630-31, 514 P.3d at 1079 (discussing NRS 678D.510(1)(a)). In contrast here, the Legislature has provided that employers, except law enforcement agencies, "must attempt to make reasonable accommodations" for employees who use medical cannabis outside of the workplace. *See* NRS 678C.850(3). Thus, while Nevada public policy supports safe and reasonable access to both medical and recreational cannabis, *see* NRS 678A.005(2)(a), (b), the Legislature provided specific protections for employees using medical cannabis that it did not for those using recreational cannabis. Public policy thus supports broader protections for medical cannabis.

Nevertheless, the Legislature set forth the means by which employers and employees should negotiate an employee's medical cannabis use by providing that employers must attempt to accommodate the employee. NRS 678C.850(3). The remedy it provided shows that medical cannabis users are protected in employment, but only to the extent that employers must *attempt* to accommodate their medical needs. This prohibition against employment discrimination is qualified and does not mandate a particular response by employers. Therefore, the public policy protected here is not so strong and compelling as to support a claim for tortious discharge, particularly where an employee may seek recourse through a private cause of action under NRS 678C.850(3). *See Noffsinger*, 273 F. Supp. 3d at 340-41 (concluding that Connecticut medical cannabis statutes implied a private right of action for employment discrimination and rejecting a public policy tort claim as precluded by the private right of action). Accordingly, we conclude that Freeman Expositions has shown that writ relief is warranted as to Roushkolb's tortious discharge claim.

Unlawful employment practices under NRS 613.333

Freeman Expositions next argues the district court should have dismissed Roushkolb's NRS 613.333 claim alleging unlawful employment practices because the statute does not protect an employee's use of medical cannabis. Roushkolb and amicus counter that NRS 613.333 protects medical cannabis users in employment contexts because medical cannabis is a lawful product in Nevada.

NRS 613.333 provides employment protections for the lawful use of products outside of the workplace. Pursuant to NRS 613.333(1),

> [i]t is an unlawful employment practice for an employer to . . . [d]ischarge . . . any employee . . . because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees.

An employee who is discharged in violation of this protection may bring a civil action against the employer. NRS 613.333(2).

In *Ceballos*, we interpreted NRS 613.333 and clarified that recreational cannabis use is not covered by this statute because cannabis possession remains illegal under the federal Controlled Substances Act. *Ceballos*, 138 Nev. at 627-29, 514 P.3d at 1077-78; *cf.* 21 U.S.C. § 844(a); 21 C.F.R. § 1308.11(d)(23). "Lawful use in this state" means lawful under all law applicable in Nevada, including state and federal laws.[6] *Ceballos*, 138 Nev. at 629, 514 P.3d at 1078. Because medical cannabis possession remains illegal under federal law, we extend our interpretation of NRS 613.333 to also apply to medical cannabis use. Therefore, we conclude that NRS 613.333 does not provide a basis for a claim that alleges employment discrimination for the use of medical cannabis as a product lawfully used outside of the workplace. Accordingly, Roushkolb could not state a claim on this basis, and Freeman Expositions has shown that writ relief is warranted as to Roushkolb's NRS 613.333 claim.

Negligent hiring, training, and supervision claim

Lastly, Freeman Expositions argues the district court erred by failing to dismiss Roushkolb's negligent hiring, training, and supervision claim because there is no duty for employers to train employees on medical cannabis laws and standards.[7] Roushkolb counters that Freeman Expositions was negligent because it did not properly train its employees on medical cannabis and workplace rights.[8]

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[6]We observe that Roushkolb's position would require NRS 613.333(1) to protect lawful use *under Nevada law*. *See Ceballos*, 138 Nev. at 629, 514 P.3d at 1078.

[7]Freeman Expositions also argues that NRS 613.330-.435 preempts negligence claims alleging unlawful employment practices. We need not reach whether medical cannabis use constitutes a "disability" within the meaning of NRS 613.330 because Roushkolb alleged negligence, not discrimination, in this claim.

[8]Roushkolb also argues that this negligence claim was based on workplace safety issues related to the initial incident. We agree with Freeman Expositions that such a workplace safety issue is preempted by the Nevada Industrial Insurance Act. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026,

"The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996) (internal quotation marks omitted). Beyond hiring, an employer also "has a duty to use reasonable care in the training, supervision, and retention of [its] employees to make sure the employees are fit for their positions." *Id.* at 1393, 930 P.2d at 99. To establish a claim for negligent hiring, training, retention, or supervision of employees, a plaintiff must show (1) a duty of care defendant owed the plaintiff; (2) breach of "that duty by hiring, training, retaining, and/or supervising an employee even though defendant knew, or should have known, of the employee's dangerous propensities; (3) the breach was the cause of plaintiff's injuries; and (4) damages." *Peterson v. Miranda*, 57 F. Supp. 3d 1271, 1280 (D. Nev. 2014).

Roushkolb alleged Freeman Expositions breached its duties "to not hire individuals with a propensity of committing unlawful acts against" him and to train and supervise its employees regarding medical cannabis laws and termination procedures.[9] Roushkolb did not allege that Freeman Expositions failed to properly screen employees it hired, that it failed to ensure that employees were suitable for their positions, or that it knew or should have known about an employee's dangerous propensities. A claim for negligent hiring, training, or supervision contemplates liability for an employer based on injuries caused by a negligently managed employee. *See* Restatement of Employment Law § 4.04 (Am. Law Inst. 2015) ("Except to the extent precluded by a workers'-compensation statute or other law, an employer is subject to liability for the harm caused an employee by negligence in selecting, retaining, or supervising employees or agents whose tortious acts resulted in the harm."). Insofar as Roushkolb alleges wrongful conduct, the wrong perpetrated, if any, lies in his being terminated for using medical cannabis. That is, it relates to the conduct of the employer, not another employee, and so does not support a claim for negligent hiring, training, or supervision. Accordingly, Roushkolb has failed to state a claim for negligent hiring, training, or supervision upon which relief may be granted. Therefore, Freeman Expositions has shown that writ relief is appropriate in this regard.

1031 (2005) (explaining that the Nevada Industrial Insurance Act "provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries arising out of and in the course of the employment" (internal quotation marks omitted)).

[9]To the extent that Roushkolb argues that Freeman Expositions owed him a duty to train other employees regarding medical cannabis law, he has not supported that contention with cogent argument or relevant authority, and we decline to address it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

CONCLUSION

The Legislature has enacted a statutory scheme permitting and regulating the use of medical cannabis. As part of these statutes, it has provided that employers generally "must attempt to make reasonable accommodations for the medical needs of" employees who use medical cannabis outside of the workplace. NRS 678C.850(3). Having considered the public policy that the Legislature sought to advance in the medical cannabis statutes, we conclude that NRS 678C.850(3) provides an employee with a private right of action where an employer does not attempt to provide reasonable accommodations for the use of medical cannabis off-site and outside of working hours. In light of the private right of action under NRS 678C.850 that an employee may exercise, we conclude that an employee may not assert a claim for tortious discharge for violating public policy concerning the use of medical cannabis. And we also conclude that an employee who uses medical cannabis may not bring a claim against an employer under NRS 613.333 and that the real party in interest here has failed to state a claim for negligent hiring, training, or supervision. We therefore conclude that the district court properly declined to dismiss real party in interest's claim under NRS 678C.850(3) but erred by not dismissing the claims for tortious discharge; unlawful employment practices under NRS 613.333; and negligent hiring, training, or supervision. Therefore, we grant mandamus relief in part and deny it in part, and we direct the clerk of this court to issue a writ of mandamus directing the district court to grant Freeman Expositions' motion to dismiss with respect to the claims for tortious discharge; unlawful employment practices under NRS 613.333; and negligent hiring, training, or supervision.

Parraguirre, C.J., and Hardesty, Cadish, Pickering, and Herndon, JJ., concur.

ERICH M. MARTIN, Appellant, *v.* RAINA L. MARTIN, Respondent.

No. 81810

ERICH M. MARTIN, Appellant, *v.* RAINA L. MARTIN, Respondent.

No. 82517

December 1, 2022 520 P.3d 813

Consolidated appeals from district court orders enforcing a divorce decree and awarding pendente lite attorney fees. Eighth Judicial District Court, Family Division, Clark County; Rebecca Burton, Judge.

Affirmed.

[Rehearing denied April 17, 2023]

Marquis Aurbach Coffing and *Chad F. Clement* and *Kathleen A. Wilde*, Las Vegas, for Appellant.

Willick Law Group and *Marshal S. Willick* and *Richard L. Crane*, Las Vegas, for Respondent.

Kainen Law Group and *Racheal H. Mastel*, Las Vegas, for Amicus Curiae American Academy of Matrimonial Lawyers.

Pecos Law Group and *Shann D. Winesett*, Henderson, for Amicus Curiae Family Law Section of the State Bar of Nevada.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

In this opinion, we consider whether an indemnification provision in a property settlement incident to a divorce decree is enforceable where a divorcing veteran agrees to reimburse his or her spouse should the veteran elect to receive military disability pay rather than retirement benefits. Electing disability pay requires a veteran to waive retirement benefits in a corresponding amount to prevent double-dipping. And so, where a state court divides military retirement pay between divorcing spouses as a community asset, this election diminishes the amount of retirement pay to be divided and thus each party's share. Federal law precludes state courts from

[1]The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.

dividing disability pay as community property in allocating each party's separate pay, and courts may not order the reimbursement of a nonveteran spouse to the extent of this diminution. We conclude, however, that state courts do not improperly divide disability pay when they enforce the terms of a negotiated property settlement as res judicata, even if the parties agreed on a reimbursement provision that the state court would lack authority to otherwise mandate. We also conclude that a court does not abuse its discretion by awarding pendente lite attorney fees under NRS 125.040 without analyzing the *Brunzell*[2] factors because those factors consider the quality of work already performed, in contrast to an NRS 125.040 attorney fee award, which is prospective in nature. Therefore, in this case, we affirm the orders of the district court.

FACTS AND PROCEDURAL HISTORY

Erich and Raina married in 2002 while Erich was serving in the military. They later separated, Erich filed a complaint for divorce, and the district court ordered mediation. Following mediation, the parties put the terms of their divorce agreements into a signed marital settlement agreement. According to the district court minutes, the next day, at the scheduled case management conference, Erich's counsel informed the district court that "the parties reached an agreement resolving all issues, and a Decree of Divorce is forthcoming."

The district court entered the divorce decree in November 2015. In relevant part, the decree allotted to Raina half of Erich's military retirement benefits and provided that Erich shall reimburse Raina for any reduction in that amount if he elects to receive disability pay instead of retirement pay. A year later, the court entered an order incident to the divorce decree to provide sufficient details to allow the Defense Finance and Accounting Service (DFAS) and the parties to correctly allocate Raina's percentage of the military retirement benefits in accordance with the divorce decree. The court specified that the order was intended to qualify under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2018). The order further provided that Erich shall pay Raina directly to make up any deficit created if he applies for disability pay.

Erich retired from the military in 2019, and Raina began receiving her agreed-upon share of Erich's retirement benefits from DFAS. The following year, DFAS informed Raina that she would no longer be receiving benefit payments from DFAS because Erich opted for full disability pay, waiving all retirement pay. Raina contacted Erich to inquire how she would receive payments from him, and Erich responded that he would not be paying her, claiming he was not required to do so under federal law.

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[2]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

Raina subsequently moved to enforce the divorce decree. Erich opposed, arguing that reimbursement for selecting disability pay is unenforceable under federal statute and United States Supreme Court precedent. Following a hearing, the district court issued an order enforcing the divorce decree. The district court determined that federal law did not "divest the parties of their right to contract" to the terms in the divorce decree requiring Erich to reimburse or indemnify Raina for any waiver of military retirement benefits resulting in a reduction of her payments. The district court also concluded that the decree was binding on the parties as res judicata. The district court accordingly granted Raina's motion to enforce the reimbursement provision of the divorce decree and ordered Erich to pay Raina monthly installments in the amount she would have been entitled to if Erich had not waived his retirement pay.

After Erich filed a notice of appeal, Raina moved for pendente lite attorney fees and costs for the appeal. Erich opposed, asserting that Raina could afford her own attorney fees. The district court granted Raina's request, although in a reduced amount, awarding $5000 in attorney fees.

Erich appealed both the order regarding enforcement of military retirement benefits and the order awarding pendente lite attorney fees, and the two appeals were consolidated for review. The court of appeals affirmed in part the order awarding attorney fees, reversed in part the district court order enforcing the divorce decree, and remanded. *Martin v. Martin*, Nos. 81810-COA & 82517-COA, 2021 WL 5370076 (Nev. Ct. App. Nov. 17, 2021) (Order Affirming in Part, Reversing in Part, and Remanding). Raina petitioned this court for review under NRAP 40B. We granted the petition and invited the participation of amici curiae. The American Academy of Matrimonial Lawyers (AAML) filed an amicus brief in support of Raina. The Family Law Section of the State Bar of Nevada joined AAML's brief.

DISCUSSION

Erich argues that the district court erred by enforcing the divorce decree and ordering indemnification because federal law, including 10 U.S.C. § 1408 (2018) and *Howell v. Howell*, 581 U.S. 214 (2017), preempts state courts from dividing military disability benefits. He argues that the United States Congress has directly and specifically legislated in the area of domestic relations regarding the division of veterans' benefits, preempting state law. Erich further argues that the district court's reliance on contract principles and res judicata was misplaced and did not permit the court to enforce the divorce decree.

In response, Raina argues that the district court appropriately ordered indemnification pursuant to the divorce decree. She asserts

that the district court correctly determined that res judicata applied because the parties negotiated and agreed to the terms of the divorce decree and that federal law did not preempt the court from enforcing the final, unappealed decree. She argues that *Howell* is distinguishable because contractual indemnification was never raised in *Howell* and asserts that the United States Supreme Court left open the possibility that parties may consider that a spouse could later waive retirement pay when drafting divorce terms.[3]

Howell *and* Mansell[4] *are distinguishable*

We review questions of law, including interpretation of caselaw, de novo. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014) (reviewing a district court's application of caselaw de novo); *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) ("Appellate issues involving a purely legal question are reviewed de novo."). Statutory construction likewise presents a question of law that we review de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). "[W]hen a statute's language is plain and its meaning clear, [we generally] apply that plain language." *Id.* at 403, 168 P.3d at 715.

Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982. *See* Pub. L. No. 97-252, §§ 1001-02, 96 Stat. 730-35 (1982) (codified at 10 U.S.C. § 1408 (2018)). Pursuant to 10 U.S.C. § 1408(c)(1), courts are authorized to treat veterans' "disposable retired pay" as community property upon divorce. "Disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled," less certain deductions. 10 U.S.C. § 1408(a)(4)(A). Disability benefits received involve "a waiver of retired pay" and are deducted from a veteran's "disposable retired pay" amount.[5] *See* 10 U.S.C. § 1408(a)(4)(A)(ii); *see also* 38 U.S.C. § 5305 (2012) (providing that military disability payments require a waiver of retired pay). Thus, where parties agree to a particular division of military retirement pay, waiving that pay in whole or part in favor of receiving disability benefits will reduce the share of military retirement pay that each party will receive.

[3]In its amicus brief, AAML argues that *Howell* does not preclude enforcement of indemnification provisions when the parties agreed to the terms in a marital settlement. AAML asserts that federal law does not preempt state courts from enforcing an agreed upon judgment, such as the divorce decree at issue here, when the purpose of the enforcement order is consistent with the intent of the parties. AAML provides examples of other jurisdictions that enforce indemnity clauses in agreements where one party has reduced his or her retirement pay amount in favor of disability benefits.

[4]*Mansell v. Mansell*, 490 U.S. 581 (1989).

[5]The United States Supreme Court has observed that "since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits." *Howell*, 581 U.S. at 216.

The Supreme Court has held "that the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989). While retirement pay may be a community asset subject to division by state courts, disability benefits are not. *Id.* at 588-89. The Court further clarified that a state court may not "subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver." *Howell*, 581 U.S. at 216. When the *Howell* parties divorced, the divorce decree treated the veteran husband's future military retirement pay as community property and awarded the nonveteran wife 50 percent of the retirement pay as separate property. *Id.* at 218-19. After the husband waived some military retirement pay for disability benefits, the wife sought to enforce the decree in state court, and the court ordered the husband to pay the 50-percent portion of the original retirement amount. *Id.* at 219. The Supreme Court reversed, concluding any reimbursement was a division of disability benefits by the state court, which federal law prohibits. *Id.* at 222-23. *Howell* and *Mansell* thus provide that federal law preempts state courts from treating disability benefits as community property that may be divided to reimburse a divorcing spouse for a lost or diminished share of retirement pay. *Howell*, 581 U.S. at 221; *Mansell*, 490 U.S. at 594-95.

Neither of those cases, however, involved the parties agreeing to an indemnification provision in the divorce decree property settlement. *See Howell*, 581 U.S. at 219 (involving a state court ordering husband to pay wife the original amount set out in the divorce decree after he waived some military retirement pay for disability benefits); *Mansell*, 490 U.S. at 586 (involving a state court declining to modify a divorce decree where the parties divided disability benefits as community property). The Alaska Supreme Court distinguished *Howell* on this basis, explaining that "[a]lthough *Howell* makes clear that state courts cannot simply order a military spouse who elects disability pay to reimburse or indemnify the other on a dollar for dollar basis, *Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement." *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022); *see also id.* (quoting a treatise on military divorce for the observation that "[i]t's one thing to argue about a judge's power to require . . . a duty to indemnify, but another matter entirely to require a litigant to perform what he has promised in a contract" (alteration and omission in original) (internal quotation marks omitted)).

The instant matter is thus distinguishable. Here, Raina and Erich expressly agreed while negotiating marital settlement terms, as

incorporated in the divorce decree, that "[s]hould Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." *Howell* and *Mansell* direct that state courts lack the authority to treat disability pay as community property and to divide it in a divorce disposition. They do not bar parties themselves from taking into account the possibility that one divorcing spouse may elect to receive disability compensation in the future and structuring the divorce decree accordingly.

Federal law does not preempt enforcement

In light of our conclusion that *Howell* and *Mansell* are distinguishable, we proceed to Erich's argument that Congress intended to preempt state law in this instance. The Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land. U.S. Const. art. VI, § 2; *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). The doctrine of federal preemption thus provides that federal law shall apply and preempt state law where Congress intended to preempt state law. *Id.* Preemption may be either express, by explicit statement in the federal statute, or implied, when Congress seeks to legislate over an entire subject or field or when state and federal statutes conflict. *Id.* at 371-75, 168 P.3d at 79-82. While state law typically controls in matters of family law including divorce, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), there have been some "instances where Congress has directly and specifically legislated in the area of domestic relations," *Mansell*, 490 U.S. at 587. We review questions of federal preemption de novo. *Nanopierce Techs.*, 123 Nev. at 370, 168 P.3d at 79. At the outset, we note that neither express preemption nor field preemption apply, as 10 U.S.C. § 1408 contains no specific bar against state enforcement of divorce decrees and as family law matters are typically issues of state law.

We further conclude that conflict preemption also does not apply. The Supreme Court has recognized that Congress, in enacting 10 U.S.C. § 1408, intended to preempt state courts from dividing disability benefits as community property. *Howell*, 581 U.S. at 220-21; *see also* 10 U.S.C. § 1408(c)(1) (providing when a court may treat disposable retired pay as separate or community property in accordance with the laws of its jurisdiction). The Court has observed that section 1408(c)(1) "limit[s] specifically and plainly the extent to which state courts may treat military retirement pay as community property." *Mansell*, 490 U.S. at 590. As discussed, however, that is not what the district court did in this instance. By its plain language, nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute in

this regard limits what divisions a state court may impose based on community property laws.

Neither *Howell* nor *Mansell* confronted the intersection of 10 U.S.C. § 1408 and such contractual issues, and the Court intimated that such contractual duties lay beyond the federal preemption in this regard, as *Mansell* observed that whether res judicata applies to a divorce decree in circumstances such as these is a matter for a state court to determine and over which the United States Supreme Court lacks jurisdiction. *See* 490 U.S. at 586 n.5. And indeed, the Supreme Court's treatment of *Mansell* after remand is instructive. Where *Mansell* reversed a state court order reopening a settlement and dividing military benefits as community property, *id.* at 586 n.5, 594-95, the state court on remand reached the same distribution of assets on res judicata grounds, as the parties also had stipulated to the division of gross retirement pay, and the Supreme Court denied certiorari from this amended disposition, *In re Marriage of Mansell*, 265 Cal. Rptr. 227, 233-34 (Ct. App. 1989), *cert. denied*, 498 U.S. 806 (1990). Similarly, this court has observed that "[a]lthough states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved." *Shelton v. Shelton*, 119 Nev. 492, 496, 78 P.3d 507, 509 (2003) (footnotes omitted). This aligns with the majority practice in state courts following *Mansell*. *Foster v. Foster*, 949 N.W.2d 102, 124 (Mich. 2020) (Viviano, J., concurring) (recognizing that "[a] strong majority of state court cases likewise hold that military benefits of all sorts can be divided under the law of res judicata" (alteration in original) (internal quotation marks omitted)). Accordingly, we conclude that federal law does not prevent Nevada courts from enforcing Raina and Erich's settled divorce decree. *Cf. Jones*, 505 P.3d at 230 (concluding that *Howell* does not prevent courts from enforcing indemnification provisions in negotiated property settlements).

Nevada law requires enforcement of the decree of divorce

As federal law does not preempt enforcement of the divorce decree, we turn to analysis under Nevada law. Erich argues the reimbursement provision of the divorce decree is unenforceable on contract grounds and that the district court erred by enforcing the decree through the doctrine of res judicata. In this regard, he contends this court should revisit *Shelton*, contending that the decision is incompatible with federal law concerning veterans' disability benefits.[6]

[6]Erich also argues the decree is unenforceable because he did not voluntarily sign the divorce decree. We decline to address this argument because we find no support in the record for Erich's claim that he opposed the division of

Divorce decrees that incorporate settlement agreements are interpreted under contract principles, *Shelton*, 119 Nev. at 497-98, 78 P.3d at 510, and are subject to our review de novo, *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). *See also Grisham v. Grisham*, 128 Nev. 679, 685, 289 P.3d 230, 234 (2012) (providing that an agreement between parties to resolve property issues pending divorce litigation is governed by general contract principles). An enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration." *May*, 121 Nev. at 672, 119 P.3d at 1257. "Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022).

Res judicata, or claim preclusion, applies when "[a] valid and final judgment on a claim precludes a second action on that claim or any part of it." *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994), *holding modified on other grounds by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998). This court applies a three-part test to determine whether res judicata applies: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (footnote omitted), *holding modified on other grounds by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). Generally, after parties settle or stipulate to a resolution, "a judgment entered by the court on consent of the parties" "is as valid and binding a judgment between the parties as if the matter had been fully tried, and bars a later action on the same claim or cause of action as the initial suit." *Willerton v. Bassham*, 111 Nev. 10, 16, 889 P.2d 823, 826 (1995). As *Mansell* acknowledges, res judicata as applied to divorce agreements is a state law issue. 490 U.S. at 586 n.5. The application of res judicata, or claim preclusion, is a question of law we review de novo. *Kuptz-Blinkinsop v. Blinkinsop*, 136 Nev. 360, 364, 466 P.3d 1271, 1275 (2020).

This court has held that state courts may enforce divorce decrees as res judicata even if those decrees involve distributions of military disability pay. *Shelton*, 119 Nev. at 496-97, 78 P.3d at 509-10. In *Shelton*, this court considered a divorce decree designating a veteran husband's military retirement pay and disability benefits as

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retirement pay and benefits, and Erich does not identify any supporting evidence. *See* NRAP 28(e)(1) (requiring citations to the record to support every assertion); *cf. Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating this court need not consider claims that a party does not cogently argue or support with relevant authority).

community property. *Id.* at 494, 78 P.3d at 508. The parties agreed that the husband would receive $500 as half of his retired pay and $174 in disability pay and that the wife would receive $577 as the other half of the retirement pay. *Id.* After the husband was deemed fully disabled, he waived his military retirement benefits and stopped paying the wife. *Id.* The wife moved to enforce the divorce decree and sought the agreed-upon $577. *Id.* This court concluded that the parties clearly contracted for the husband to pay the wife $577 each month and enforced that obligation as res judicata. *Id.* at 497-98, 78 P.3d at 510-11 (explaining that the parties agreeing to a payment of $577 a month was more specific than simply "one-half" and that this amount was more than the amount the husband would receive from just the military retirement-specific pay). The court determined that *Mansell* and its progeny did not preclude enforcing the husband's obligations pursuant to the divorce decree. *Id.* at 495-96, 78 P.3d at 509. It observed that the husband may satisfy his contractual obligations with whatever monies he wished, even if that involved using disability pay. *Id.* at 498, 78 P.3d at 510-11.

Here, Erich and Raina engaged in negotiations, which were reduced to a signed settlement agreement and incorporated into the divorce decree. This created a valid, unambiguous contract between the parties. The divorce decree provided that Erich would reimburse Raina in the event that her share of the retirement benefits was reduced by Erich's decision to accept military disability payments. This indemnification provision may be enforced through contract principles, consistent with *Shelton*'s embrace of contract law to govern a military disability indemnification provision in a divorce decree. The provision at issue is unambiguous and requires Erich to reimburse Raina for her share of any amount he elects to waive from his retirement pay.

We conclude that res judicata applies, and the obligations set forth in the decree cannot now be relitigated because Raina and Erich are the same parties in the matter, the divorce decree is a valid final judgment, and the action here enforces the original decree without modifying it or introducing matters that could not have been addressed initially. *Cf. Mansell*, 265 Cal. Rptr. at 229, 236-37 (precluding challenge to distribution of disability pay where husband stipulated to its inclusion in property settlement and declining to reopen and modify settlement); *In re Marriage of Weiser*, 475 P.3d 237, 246, 249, 252 (Wash. Ct. App. 2020) (affirming enforcement of divorce decree under res judicata where lower court enforced the original terms and did not modify its property disposition and rejecting argument that *Howell* barred distribution of military disability pay). Accordingly, we find no reason to depart from our decision in *Shelton*. And we therefore conclude the district court properly enforced the divorce decree under contract principles and res judicata.

The district court did not abuse its discretion in awarding pendente lite attorney fees

Erich argues that the district court abused its discretion by awarding Raina $5000 for pendente lite attorney fees. He contends the district court erred by not engaging in a *Brunzell*[7] analysis and that the court did not follow NRS 125.040. Raina argues that the district court properly awarded the attorney fees for the appeal pursuant to NRS 125.040 and *Griffith v. Gonzales-Alpizar*, 132 Nev. 392, 395, 373 P.3d 86, 89 (2016), because it was within the district court's discretion to award her these fees after the court found a significant income disparity between the two parties.

"In any suit for divorce the court may . . . require either party to pay moneys necessary . . . [t]o enable the other party to carry on or defend such suit." NRS 125.040(1)(c). The court must consider the financial situation of each party before making such an order. NRS 125.040(2). Even so, "a party need not show necessitous circumstances in order to receive an award of attorney fees under NRS 125.040." *Griffith*, 132 Nev. at 395, 373 P.3d at 89 (internal quotation marks omitted). Attorney fees awarded under NRS 125.040(1)(c) are "pendente lite" because they cover fees in an ongoing divorce suit. *See Pendente Lite*, *Black's Law Dictionary* (11th ed. 2019) ("During the proceeding or litigation; in a manner contingent on the outcome of litigation."). We review an award of pendente lite attorney fees for an abuse of discretion. *See Griffith*, 132 Nev. at 395, 373 P.3d at 89. "[A]n award of attorney fees in divorce proceedings will not be overturned on appeal unless there is an abuse of discretion by the district court." *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

After Erich filed the initial appeal, Raina moved for pendente lite attorney fees and costs, requesting the district court award her $20,000 to defend against the appeal. The court considered the financial circumstances of both parties and found that "Erich's income currently is about three times as high as Raina's income." The court highlighted that Raina's income had been reduced by COVID issues while Erich was still making his full-time income and that Raina would therefore be more financially impacted by the proceedings. At the same time, the court recognized that Raina's household expenses were reduced by her domestic partner but also noted that her domestic partner was not obligated to assist Raina in paying for these legal proceedings. After considering these circumstances, the court declined to award Raina all attorney fees sought

[7]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (providing four factors for courts to consider when determining the reasonable value of attorney fees: "the qualities of the advocate[,] . . . the character of the work[,] . . . the work actually performed[,] . . . [and] the result" (emphases omitted)).

and instead ordered Erich to contribute $5000 to Raina's pendente lite attorney fees.

We ascertain no abuse of discretion in this decision. The district court properly considered the financial circumstances of each of the parties before ordering attorney fees pursuant to NRS 125.040, and the record supports its findings as to the income disparity between the parties. Further, we conclude that the district court was not required to apply the *Brunzell* factors because *Brunzell* requires analysis of attorneys' services provided in the past. *See* 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). In contrast, here the district court was considering prospective appellate work to award attorney fees. *See Griffith*, 132 Nev. at 395, 373 P.3d at 88 (distinguishing a decision addressing attorney fees for a previous matter rather than a prospective appeal as was properly within the scope of NRS 125.040); *Levinson v. Levinson*, 74 Nev. 160, 161, 325 P.2d 771, 771 (1958) (observing that attorney fees awarded pursuant to NRS 125.040 contemplate prospective expenses and should not reflect the attorneys' work already performed or expenses already incurred). Therefore, we affirm the district court order awarding pendente lite attorney fees to Raina.

CONCLUSION

Under federal law, state courts may not treat disability pay as community property that may be divided in allocating the parties' separate property. This prohibition does not prevent state courts, however, from enforcing an indemnification provision in a negotiated property settlement as res judicata. As res judicata applies to the divorce decree at issue here, we conclude the district court properly ordered its enforcement. We further conclude that the award of pendente lite attorney fees does not require showing that the *Brunzell* factors are satisfied and that the district court did not abuse its discretion in awarding pendente lite attorney fees. We affirm.

Parraguirre, C.J., and Hardesty and Herndon, JJ., concur.

Cadish, J., with whom Pickering, J., agrees, concurring:

I agree with the majority that, under our state law principles of res judicata, or claim preclusion, Erich's challenge to the parties' divorce decree is barred, and I would affirm the district court decision on that basis. However, I write separately because I disagree that the *Howell* and *Mansell* cases are otherwise distinguishable or that the fact the parties here entered into a settlement agreement that was later incorporated into the divorce decree prevents the indemnification provision at issue from being preempted under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2018) (USFSPA).

In this case, during their underlying divorce proceedings, the parties reached a marital settlement agreement at a mediation that included provisions by which Erich and Raina would each receive their portion of Erich's military retirement when he retired, based on a calculation of the community property interest therein. It further stated, "Should [Erich] elect to accept military disability payments, [Erich] shall reimburse [Raina] for any amount her amount of his pension is reduced due to the disability status from what it otherwise would be." The divorce decree subsequently entered by the district court provided in pertinent part, "Raina shall be awarded the following[:] . . . One-half (1/2) of the marital interest in the [sic] Erich's military retirement . . . . Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." The section of the decree awarding property to Erich has a similar provision, including verbatim the last sentence requiring reimbursement by Erich for any reduction in Raina's share of the pension due to his acceptance of disability benefits. These provisions in the decree are contrary to federal law and preempted, under the USFSPA and decisions of the United States Supreme Court interpreting it.

In *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989), the Supreme Court held "that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." Then in *Howell v. Howell*, 581 U.S. 214, 222 (2017), the Supreme Court reiterated this holding, emphasizing that describing the order as just requiring the military spouse to "reimburse" or "indemnify" the nonmilitary spouse for a reduction in retirement pay as a result of such waiver does not change the outcome, as "[t]he difference is semantic and nothing more." The Court specifically noted that the indemnification there was a "dollar for dollar" payment of the "waived retirement pay." *Id.* In concluding this portion of its analysis, the Court stated, "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. *All such orders are thus pre-empted*." *Id.* (emphasis added).

The majority attempts to distinguish *Mansell* and *Howell* because those cases did not "involve[ ] the parties agreeing to an indemnification provision in the divorce decree property settlement." Maj. Op., *ante* at 790. The majority also says that these cases do not deal with the interplay between the USFSPA and "such contractual issues." *Id.* at 792. However, this ignores that the *Mansell* case did involve a divorce where the parties "entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including

that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 585-86. Several years later, Major Mansell asked to modify the divorce decree incorporating this provision to remove the requirement to share the disability portion of his retirement pay. *Id.* at 586. Although the decree provision at issue had been agreed to by the parties as part of their property settlement, the Court nevertheless held it was preempted by the USFSPA. *Id.* at 587-95.

Further, as discussed above, the Court made clear in *Howell* that calling it "indemnification" rather than a division of community property did not avoid the preemptive effect of the USFSPA. 581 U.S. at 222. The fact that the disability election came after the divorce decree was finalized, as in the instant case, also did not change that outcome. *Id.* at 218-22. The *Howell* Court thus acknowledged that, at the time of divorce, the parties may consider that the value of future military retirement pay may be less than expected should an election for disability pay be made, but simultaneously held that state courts may not account for this contingency by ordering reimbursement or indemnification if that occurs. *Id.* at 221-22. The Court held the following:

> [A] family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or . . . take account of reductions in value when it calculates or recalculates the need for spousal support.
>
> We need not and do not decide these matters, for here the state courts made clear that the original divorce decree divided the whole of John's military retirement pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. Consequently, the determination of the Supreme Court of Arizona must be reversed.

Id. at 222-23 (citations omitted).

Similarly, here, the provision of the divorce decree at issue discusses the division of the parties' assets and is in an entirely separate section than that covering spousal support, or alimony, as they are separate concepts under Nevada law. *See* NRS 125.150(1)(a) (providing for a permissible award of alimony); NRS 125.150(1)(b) (providing for an equal division of community property between parties to a divorce). The indemnification provision is not based on the factors appropriate for consideration in awarding spousal support, *see* NRS 125.150(9) (listing 11 nonexhaustive factors that must be considered in determining whether, and in what amount, to award alimony), but instead is designed to restore Raina's "lost portion" of Erich's military retirement pay, a community property asset. This is exactly what the Court has said is prohibited, and thus

a family court may not enter this type of divorce decree provision because it is preempted by federal law.

The majority asserts that "[b]y its plain language, nothing in [the USFSPA] addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce." Maj. Op., *ante* 791-92. But Raina here does not seek to enforce a private contract or assert a claim for breach of a contract; rather, as the majority notes, she "moved to enforce the divorce decree." *Id.* at 788. In response to her motion, "the district court issued an order enforcing the divorce decree." *Id.* Indeed, the majority's analysis of the applicability of res judicata principles acknowledges that this case involves enforcement of a "final judgment [that] is valid." *Id.* at 793 (quoting *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008)). Thus, the question is not whether a private contract can be enforced, but whether a court-entered judgment can be enforced. And the Supreme Court has made clear that such judgments are contrary to federal law and thus preempted, even when containing provisions agreed to by the parties. A state court cannot enter an order that is contrary to federal law—and would thus be preempted—simply because it is entered based on the parties' settlement agreement. *Mansell*, 490 U.S. at 587-95 (holding preempted enforcement of a divorce decree provision based on the parties' settlement requiring payment of half of the military spouse's retirement pay and any portion of the retirement pay waived to receive disability benefits). To the extent we held to the contrary in *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), it must be overruled in light of *Mansell* and *Howell*.[1] *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (discussing that a decision may be overturned if it has proven "badly reasoned" or "unworkable" (internal quotation marks omitted)); *Armenta-Carpio v. State*, 129 Nev. 531, 535-36, 306 P.3d 395, 398-99 (2013) (recognizing that precedent may be overturned based on clearly erroneous reasoning).

The majority incorrectly conflates the application of preemption principles to enforcement of the provision in the divorce decree and their application to res judicata or claim preclusion. While the *Mansell* Court recognized that the application of res judicata principles to the parties' divorce settlement was a matter of state law, 490 U.S. at 586 n.5, the ability to treat disability benefits as divisible even when based on a settlement agreement was entirely a matter of federal law since it was preempted by the USFSPA, *id.* at 594-95. As

[1]While *Shelton* also alluded to res judicata principles to support its decision, 119 Nev. at 496, 78 P.3d at 509 (holding that "states are not preempted from enforcing orders that are res judicata"), it provided no analysis of its application to that case. However, I agree that such principles would appear to be applicable in that case.

the Supreme Court of Michigan held in *Foster v. Foster*, while "the offset provision in the parties' consent judgment of divorce impermissibly divides defendant's military disability pay in violation of federal law," "the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle," and "a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified." No. 161892, 2022 WL 1020390, at *6-7 (Mich. Apr. 5, 2022) (quoting, in the last clause, *Pierson v. Pierson*, 88 N.W.2d 500, 504 (1958)). Similarly, under Nevada law, "[a] decree of divorce cannot be modified or set aside except as provided by rule or statute." *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980). Thus, while the indemnification provision in the divorce decree is an impermissible division of military disability pay in violation of federal law, I agree with the majority that Erich may not now collaterally attack the decree, which has become final. I thus concur in the majority's decision to affirm.

IN THE MATTER OF THE TRUST OF PAUL D. BURGAUER REVOCABLE LIVING TRUST.

STEVEN BURGAUER, A FORMER TRUSTEE OF PAUL D. BURGAUER MARITAL TRUST, APPELLANT, *v.* MARGARET BURGAUER; AND PREMIER TRUST, RESPONDENTS.

No. 80466

STEVEN BURGAUER, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TREVOR L. ATKIN, DISTRICT JUDGE, RESPONDENTS, AND MARGARET BURGAUER; AND PREMIER TRUST, REAL PARTIES IN INTEREST.

No. 82067

December 15, 2022 521 P.3d 1160

Consolidated appeal from a district court order granting a petition to distribute trust property (Docket No. 80466) and original petition for a writ of prohibition challenging a contempt order (Docket No. 82067). Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

Reversed and remanded with instructions (Docket No. 80466); petition granted (Docket No. 82067).

Howard & Howard Attorneys PLLC and *James A. Kohl* and *Gwen Rutar Mullins*, Las Vegas, for Appellant/Petitioner.

Edwards Law Firm and *Melissa A. Edwards*, Las Vegas, for Respondent/Real Party in Interest Premier Trust.

The Powell Law Firm and *Tom W. Stewart*, Las Vegas; *Hayes Wakayama* and *Liane K. Wakayama, Dale A. Hayes, Jr.*, and *Jeremy D. Holmes*, Las Vegas, for Respondent/Real Party in Interest Margaret Burgauer.

Before the Supreme Court, EN BANC.

OPINION

By the Court, CADISH, J.:

These matters concern whether the effects test announced in *Calder v. Jones*, 465 U.S. 783 (1984), applies when determining whether a court has specific personal jurisdiction over a nonresident trustee sued in a trust administration case. We conclude that the effects test applies so long as the underlying claims sound in

intentional tort, as they do here. Because the plaintiff in this case failed to provide prima facie evidence of the defendant trustee's minimum contacts with Nevada, and any injury the plaintiff suffered in Nevada was not caused by the trustee's contacts with Nevada, the district court erred in concluding that the trustee was subject to personal jurisdiction in Nevada. Accordingly, as to Docket No. 80466, we reverse the district court's jurisdiction order and remand to the district court to vacate all trust administration orders that, consistent with this opinion, require personal jurisdiction over the trustee and to dismiss the petition's claims against him. Because the district court lacks specific personal jurisdiction to hold the trustee in contempt, we grant the trustee's petition for a writ of prohibition in Docket No. 82067.

FACTS AND PROCEDURAL HISTORY

In 1987, Paul Burgauer created an estate plan that included the at-issue marital trust. Paul, an Illinois resident, was the settlor of the marital trust. Paul passed away in 2003. His and respondent Margaret Burgauer's son, appellant Steven Burgauer, became the trustee, while Margaret became the beneficiary.[1] Steven moved to Florida in 2012, and the marital trust purchased a home for Margaret in Florida in 2012. Several years later, Steven and Margaret's relationship began to deteriorate, and Margaret moved to Las Vegas to live with another son, James Burgauer. Steven sent an email addressed "Dear Mom" to "undisclosed-recipients," expressing his concern about Margaret's "impaired" judgment and "alcohol and gambling addiction[s]." Steven also claimed that Margaret gave large sums of money to James and effectively allowed James "to invade the Marital Trust illegally which is in exact contravention of [Paul's] intentions." Citing Margaret's spending habits, including, according to Steven, gambling losses and selling securities and incurring capital gains, Steven informed Margaret that he would not make any further distributions from the marital trust to Margaret's accounts and would instead have the trust directly pay Margaret's bills, while approving other individual expenditures on a case-by-case basis.

In January 2017, Margaret informed Steven that she had hired a moving team to remove her personal property from her Florida residence. Steven informed her that the house belonged to the marital trust, and thus his permission was required for anyone to enter the house. He requested a list of the items Margaret wanted removed as well as proof of liability coverage for the movers. In March 2017, the movers arrived but could not enter the house. Steven emailed Margaret, stating that he and his family "were away

[1]Paul's estate plan also created a residuary trust; however, the residuary trust is not the focus of this litigation, so we do not address it here.

on our ten-day-long family vacation" and that the "unannounced and unplanned visit . . . made it impossible . . . to accommodate your needs."

Also in March 2017, Margaret's attorney, Thomas Burnham, who is licensed in and maintains his office in Michigan, emailed Steven a "Revocation of Power of Attorney" form. Steven replied, identifying several issues he had with the form. He also requested that Burnham no longer communicate with him directly and instead contact specified law firms in either Florida or Illinois. Burnham then sent a letter to Steven's Florida attorney for the trust, Christopher Shipley, to discuss the trust documents. Burnham sent a subsequent letter to Shipley demanding that Steven distribute the net income of the marital trust and make all written disclosures to Margaret regarding the trust.

While this dispute was ongoing, Nevada Elder Protective Services received a report of potential elder abuse regarding Margaret, based on her signing "hundreds of blank checks." The report named James as a person of interest, but the name of the party who made the report was redacted.

In March 2018, Margaret filed the underlying petition requesting that the district court (1) assume jurisdiction over the trust, (2) remove Steven as a trustee, (3) appoint a successor trustee, (4) compel an accounting of the trust, (5) impose personal liability on Steven under NRS 165.148, (6) restore the monthly distributions and find Steven's amendments to the trust unenforceable, and (7) compel the production of all trust documents. As to her request to remove Steven as trustee and appoint a successor, Margaret cited "Steven's utter refusal to properly act as a fiduciary of the Marital Trust and his blatant breaches of his duties owed to [her]." She asserted that Steven had "failed to act as a fiduciary" to her because he "has put his personal financial interests above" hers. She also alleged that Steven had (1) defamed her by sending a disparaging and defamatory email to her friends and family, (2) fraudulently interfered with her personal investments, and (3) filed a false report of elder abuse with Nevada authorities. Margaret argued that the district court had jurisdiction over the marital trust under NRS 164.010, which provides that a district court has in rem jurisdiction over a trust domiciled in Nevada and that a trust is domiciled in Nevada "notwithstanding that the trustee neither resides nor conducts business in" Nevada if "[o]ne or more beneficiaries of the trust reside in" Nevada, which she did.

Steven sought dismissal of the petition for lack of personal jurisdiction. He contended that he lacked the minimum contacts necessary for the district court to exercise specific personal jurisdiction over him. Margaret opposed, citing NRS 164.010 and the fact that Steven did not show that another court had assumed

jurisdiction over the marital trust. She further asserted that the district court had specific personal jurisdiction over Steven because his tortious conduct satisfied the effects test adopted by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). Margaret contended Steven made sufficient contacts with Nevada by (1) breaching his fiduciary duty in "stripping Margaret of her trust distributions, refusing to provide an accounting, attempting to access Margaret's personal financial accounts without permission, and placing his financial interests above Margaret's"; (2) sending "defamatory statements regarding Margaret to those located within Nevada and other neighboring states"; (3) interfering with a private contract between Margaret and James; (4) attempting to defraud Margaret by filing a lawsuit against her in Illinois; (5) converting Margaret's personal property by locking her out of her Florida home; and (6) using a fraudulent power of attorney to interfere with Margaret's access to bank accounts.

Denying Steven's motion to dismiss, the district court concluded that "Nevada under the statute, specifically NRS 164.010(2)(e), has jurisdiction." It specified that in rem jurisdiction over the marital trust existed under NRS 164.010 because Margaret, as a beneficiary, resided in Nevada. Further, after confirming Steven as trustee even though Margaret never asked the district court to do so, the district court concluded it "thereby acquire[d] in personam jurisdiction over Steven." In exercising personal jurisdiction over Steven, the district court did not conduct a due process analysis.[2]

After concluding it had jurisdiction, the court temporarily removed Steven as trustee pending an evidentiary hearing and appointed respondent Premier Trust as the temporary trustee of the marital trust. The court also entered a temporary restraining order that prohibited Steven from selling or transferring Margaret's personal property or any of the marital trust's property. Steven appealed from the order temporarily removing him as trustee, and the court of appeals dismissed the appeal for lack of jurisdiction. *In re Paul D. Burgauer Revocable Living Tr.*, No. 78872-COA, 2020 WL 3447743, at *1 (Nev. Ct. App. June 23, 2020). However, the court of appeals "remind[ed] the district court that a determination as to whether Nevada courts can exercise personal jurisdiction over Steven requires the court to assess whether he has sufficient minimum contacts with Nevada." *Id.* at *2 n.2.

At a later hearing, the district court granted Premier Trust's petition to distribute the trust property on Margaret's behalf. Margaret

[2]Although the district court engaged in a due process analysis in determining Nevada had personal jurisdiction over Steven in a separate lawsuit between James and Steven regarding a different trust, that order is irrelevant to whether the court had specific personal jurisdiction over Steven in *this* case between Margaret and Steven. *See Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 513, 134 P.3d 710, 712-13 (2006) (observing that specific personal jurisdiction is case specific).

subsequently filed an ex parte application for an order to show cause, arguing that Steven should be held in contempt for violating the temporary restraining order. The district court granted the order to show cause and, for the first time, conducted a minimum contacts analysis. Applying the effects test, the district court agreed that Margaret presented sufficient evidence to show that Steven committed several intentional torts against Margaret, reasoning that he "purposefully directed his conduct toward Nevada and Margaret's causes of action [arose] from Steven's purposeful contact or activities in connection with Nevada," such that the court obtained specific personal jurisdiction over Steven. The court then held Steven in contempt for violating the temporary restraining order.

Steven appealed from the order granting the petition to distribute trust property and petitioned for a writ of prohibition as to the contempt order, which were consolidated. The court of appeals vacated the order distributing trust property, remanded the case to the district court to vacate all other orders, and granted the petition for a writ of prohibition, concluding that the district court lacked specific personal jurisdiction over Steven. *In re Paul D. Burgauer Revocable Living Tr.*, Nos. 80466-COA & 82067-COA, 2021 WL 4350573, at *8 (Nev. Ct. App. Sept. 23, 2021). We granted Margaret's petition for review of the court of appeals' decision to address application of personal jurisdiction principles in these circumstances.

DISCUSSION

The district court lacked specific personal jurisdiction over Steven

We review a determination of personal jurisdiction de novo. *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015). When a nonresident defendant challenges personal jurisdiction at the pleading stage, the plaintiff bears the burden of making a prima facie showing that personal jurisdiction is proper by "produc[ing] some evidence in support of all facts necessary for a finding of personal jurisdiction." *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 743-44 (1993).

As an initial matter, we recognize that NRS 164.010(5)(b) provides a statutory basis for exercising personal jurisdiction over a nonresident trustee under certain circumstances. However, "[t]he Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts" and requires that the nonresident has sufficient minimum contacts with the forum state. *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014). Thus, the district court may only exercise specific personal jurisdiction over a nonresident trustee under NRS 164.010(5)(b) if the statute's requirements are satisfied *and* the plaintiff meets her burden under the Due Process Clause's minimum contacts analysis. *See Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev.

874, 883, 878 P.2d 913, 919 (1994) ("Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, this court is obliged to construe the statute so that it does not violate the constitution."); *see also Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021) (reviewing questions of statutory interpretation de novo). There is no meaningful dispute as to NRS 164.010(5)(b)'s application here,[3] so the dispositive issue is whether Margaret met her burden to show Steven had sufficient minimum contacts with Nevada to allow relief to be granted against him.

"A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the Constitution of this state or the Constitution of the United States." NRS 14.065. Courts apply a three-part test to determine whether they may exercise specific personal jurisdiction over a defendant. *Catholic Diocese of Green Bay, Inc. v. John Doe 119*, 131 Nev. 246, 249, 349 P.3d 518, 520 (2015). First, the nonresident defendant must have purposefully availed himself of the privilege of acting in the forum state or purposefully directed his conduct to the forum state. *Id.* Second, the cause of action "'must arise out of or relate to the defendant's contacts' with the forum." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 592 U.S. 351, 359 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. 255, 262 (2017)). Third, the exercise of jurisdiction must be reasonable, meaning that it would not offend the traditional notions of "fair play and substantial justice." *Catholic Diocese*, 131 Nev. at 250, 349 P.3d at 520. Because the parties dispute whether purposeful availment or purposeful direction analysis applies to resolve the first factor of the minimum contacts analysis, we first address the proper analysis to apply in this case. We then turn to whether Margaret satisfied the minimum contacts analysis.

The effects test is applicable here to determine specific personal jurisdiction over a nonresident trustee because the underlying trust administration claims sound in intentional tort

The *Calder* effects test is used to analyze the purposeful direction prong of the minimum contacts analysis. *See, e.g.*, *Walden*, 571 U.S. at 286 (explaining that *Calder* "illustrates the application of" specific personal jurisdiction principles to intentional torts); *Eighteen Seventy, LP v. Jayson*, 32 F.4th 956, 967 (10th Cir. 2022) ("One

[3]While NRS 164.010(1) affords in rem jurisdiction over the trust, Margaret's claims in this case have centered on Steven's alleged misdeeds as trustee since its inception. Such claims, seeking relief against Steven personally, require personal jurisdiction over him, and the parties do not argue differently. *See In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922-23, 314 P.3d 941, 946 (2013) (holding, in a trust case, that in rem jurisdiction did not allow the court to impose personal judgments against parties absent personal jurisdiction over them).

way to conduct [the purposeful direction analysis] in tort cases is to consider the 'effects test' of *Calder*." (quoting *Grynberg v. Ivanhoe Energy, Inc.*, 490 F. App'x 86, 96 (10th Cir. 2012))); *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (explaining that the *Calder* effects test "is normally employed in purposeful direction cases"). Most courts applying the effects test have limited its application to tort cases. *See, e.g.*, *Tricarichi v. Coöperative Rabobank, U.A.*, 135 Nev. 87, 91, 440 P.3d 645, 650 (2019) ("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)." (emphasis added)); *see also Eighteen Seventy, LP*, 32 F.4th at 966-67 (applying the *Calder* effects test where the plaintiff asserted a tort claim); *Morningside Church, Inc. v. Rutledge*, 9 F.4th 615, 620 (8th Cir. 2021) ("Because [the plaintiffs'] claims sound in intentional tort, we evaluate specific jurisdiction by reference to the effects test." (internal quotation marks omitted)); *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 605 (9th Cir. 2018) (noting that "a purposeful availment analysis is 'most often used in suits sounding in contract,' whereas a purposeful direction analysis is 'most often used in suits sounding in tort'" (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004))). Courts usually focus on traditional purposeful availment in cases involving contract claims. *See, e.g.*, *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 979 (9th Cir. 2021) ("We generally focus our inquiry on purposeful availment when the underlying claims sound in contract . . . ."); *Niemi v. Lasshofer*, 770 F.3d 1331, 1348 (10th Cir. 2014) (explaining that courts use purposeful availment analysis to determine specific personal jurisdiction in contract cases).

A petition like Margaret's, seeking to remove a trustee for breach of fiduciary duties and a trust accounting and revision of the trust administration due to the trustee's breaches, generally sounds in intentional tort. *See Clark v. Lubritz*, 113 Nev. 1089, 1098, 944 P.2d 861, 866 (1997) (holding that "it is well established that when a fiduciary duty exists between the parties, and the conduct complained of constitutes a breach of that duty, the claim sounds in tort regardless of the contractual underpinnings" (quoting *Wash. Med. Ctr. v. Holle*, 573 A.2d 1269, 1284 n.24 (D.C. Ct. App. 1990))). In similar circumstances, other courts have looked to the defendant's purposeful direction as a measure to determine whether it has specific personal jurisdiction over the nonresident defendant by using the three-part *Calder* effects test.[4] *See Thomas*, 2015 WL

[4]Steven cites several cases for the proposition that courts use purposeful availment analysis when determining whether a state has specific personal jurisdiction over a nonresident trustee. While those cases used the phrase "purposeful availment," several of them applied the effects test to measure whether

12681311, at *4 (applying the effects test to determine whether the district court had specific personal jurisdiction over the nonresident defendant in a trust administration case); *Janney v. Janney*, No. 09-cv-00259-REB-KLM, 2009 WL 1537895, at *3 (D. Colo. June 1, 2009) (same); *Schneider v. Cate*, 405 F. Supp. 2d 1254, 1262 (D. Colo. 2005) (applying purposeful direction analysis to determine whether a district court had specific personal jurisdiction in a trust administration case); *Dreher*, 986 P.2d at 725 (applying purposeful direction analysis to determine whether a district court had specific personal jurisdiction over a nonresident trustee); 4A Wright & Miller, *Federal Practice and Procedure* § 1069.1 (4th ed. 2022 update) (explaining that "in determining whether there has been 'purposeful availment' of the forum state by the defendant, federal courts explicitly distinguish contract from tort actions" and stating that "[t]he effects test from *Calder v. Jones* is applied to determine purposeful direction"). Thus, the effects test governs our inquiry into whether Steven purposefully directed activities to Nevada, such that the district court had specific personal jurisdiction over Steven.[5]

Steven did not purposefully direct his activities toward Nevada

Steven contends that the district court erroneously focused on his contacts with Margaret, not his contacts with Nevada, in contravention of binding precedent. He argues that his contacts are insufficient and, thus, cannot satisfy the effects test. We agree.

Under the effects test, purposeful direction is satisfied when 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." *Tricarichi*, 135 Nev. at 91, 440 P.3d at 650 (quoting *Picot v. Weston*, 780 F.3d 1206, 1214

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the defendants *purposefully directed* acts to the forum state. *See, e.g.*, *Thomas v. Thomas*, No. SACV-14-1096-JLS (RNBx), 2015 WL 12681311, at *4 (C.D. Cal. May 8, 2015); *Janney*, 2009 WL 1537895, at *3; *Schneider*, 405 F. Supp. 2d at 1262; *Dreher v. Smithson*, 986 P.2d 721, 725 (Or. Ct. App. 1999) (using purposeful direction analysis to determine whether a district court had specific personal jurisdiction over a nonresident trustee). This may be because courts use the phrase "purposeful availment" as shorthand for the first prong of the minimum contacts analysis, despite the fact that the first prong is satisfied if the defendant either purposefully avails himself or herself of the privilege of the forum state's laws or purposefully directs his or her actions towards the forum state. *See Schwarzenegger*, 374 F.3d at 802 ("We often use the phrase 'purposeful availment,' in shorthand fashion, to include both purposeful availment and purposeful direction, but availment and direction are, in fact, two distinct concepts." (internal citations omitted)).

[5]We are not persuaded by Steven's argument that our decision in *In re Davis Family Heritage Trust* controls, such that jurisdiction is proper only if Steven purposefully availed himself of the privilege of acting in Nevada, because, unlike this case, the underlying claims in *Davis* did not sound in tort and the investment trust advisor defendant was not the trustee. 133 Nev. 190, 191-92, 394 P.3d 1203, 1205 (2017).

(9th Cir. 2015)). The plaintiff's contacts with the defendant and the forum are irrelevant. *Id.* at 92, 440 P.3d at 650; *see also Walden*, 571 U.S. at 284 ("We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State."). Instead, the inquiry "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.' " *Tricarichi*, 135 Nev. at 92, 440 P.3d at 650 (quoting *Walden*, 571 U.S. at 283-84). In other words, the court must "look[ ] to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there," and "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 571 U.S. at 285. The defendant can only be "haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id.* at 286 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

In *Walden*, the Supreme Court held that a Nevada court lacked specific personal jurisdiction over a Georgia TSA agent who seized cash from the plaintiffs at the Atlanta airport because the defendant agent lacked necessary minimum contacts with Nevada. *Id.* at 288. Since none of the defendant's intentional actions occurred in Nevada, his "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. The Supreme Court explained that "[t]he 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." *Id.* at 290. Because the plaintiffs would have felt the injury resulting from lack of access to their money anywhere they traveled, "the effects of [the defendant's] conduct on [the plaintiffs] are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction." *Id.* Moreover, the fact that the plaintiffs' Nevada attorney contacted the defendant in Georgia was insufficient because a third party's unilateral activity cannot create the defendant's contacts with the forum state. *Id.* at 291; *see also Catholic Diocese*, 131 Nev. at 251, 349 P.3d at 521 (finding no personal jurisdiction because a third party's "unilateral act of seeking employment . . . cannot create jurisdiction over a defendant").

Here, the district court erred when it concluded Steven had sufficient minimum contacts such that he was subject to the court's specific personal jurisdiction. First, some of the contacts Margaret relies on are either contacts between Steven and Margaret or a third party, or the contacts did not occur in Nevada. Specifically, Margaret

alleges that Steven sent "defamatory letters" about Margaret to various companies and government agencies in Nevada; however, Margaret pointed to a sole letter that Steven sent to Margaret's attorney in Michigan. The letter was from a Florida resident to a Michigan resident, and thus, the letter did not constitute a contact with Nevada. While the letter did include a "cc" notation indicating that it was sent to the Nevada Attorney General's Office, it appeared to do so because it alleged that (1) the notary who notarized some of Margaret's statements was not a valid notary, and (2) Margaret's attorney was under investigation by the State Bar of Nevada for the unauthorized practice of law in Nevada. Margaret also claims that Steven filed a false, unsubstantiated report with Nevada's Elder Protective Services; however, the report redacts the name of the individual who filed it, and the report only mentions Steven when Margaret stated that "she felt her son in Florida had made the allegations," to which the social worker "told [Margaret] that [the reporter] information was confidential." As the reporter's identity is unknown, the report is not prima facie evidence of a contact Steven made with Nevada. Margaret further contends that Steven made defamatory statements to her friends and family; however, she cites to her declaration, which does not state that Steven made any defamatory comments to others, and to an email Steven sent to "undisclosed-recipients" but addressed "Dear Mom." Assuming the email is defamatory, the record is unclear as to whom, other than Margaret, the email was sent, or whether any other recipients are Nevada residents. Thus, this email is insufficient to establish specific personal jurisdiction because there is no evidence that any recipient other than Margaret lived in Nevada, and the contact between Margaret and Steven is not a contact between Steven and Nevada for specific personal jurisdiction purposes. *Walden*, 571 U.S. at 285-86; *see also Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1299 (10th Cir. 1999) (finding no personal jurisdiction where the contacts "consisted of a limited number of faxes and other written communications concerning the account, along with a few wire transfers of funds"); *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 292 (1st Cir. 1999) ("[I]t is not enough to prove that a defendant agreed to act as the trustee of a trust that benefitted a resident of the forum state.").

Second, while Margaret's remaining contacts allege injuries that she felt in Nevada due to Steven's actions, such injuries are not sufficient under *Walden*. Specifically, Margaret contends that Steven converted over $600,000 from her and stopped making the required trust distributions. However, while Margaret may have felt the effects of those actions in Nevada while she was residing there, "mere injury to a forum resident is not a sufficient connection to the forum" because "[r]egardless of where a plaintiff lives or works, an

injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum [s]tate." *Walden*, 571 U.S. at 290; *see also Buskirk v. Buskirk*, 267 Cal. Rptr. 3d 655, 662 (Ct. App. 2020) (finding personal jurisdiction over an Idaho defendant in California because the defendant purposefully availed herself of California's benefits as a former "longtime California resident, a California property owner, a California trust creator and participant, and a California plaintiff"). Because she only felt the injury in Nevada due to her residence there and not due to any independent action that occurred in Nevada, these injuries are insufficient to impose specific personal jurisdiction. *See Walden*, 571 U.S. at 290 (concluding that the injury of not having access to funds while in Nevada "is not the sort of effect that is tethered to Nevada in any meaningful way," as plaintiffs failed to show that "anything independently occurred there"); *Tricarichi*, 135 Nev. at 94, 440 P.3d at 652 (concluding that the fact that Tricarichi suffered the injury while residing in Nevada is insufficient to warrant imposing specific personal jurisdiction because the defendant's acts were not connected to Nevada); *cf. Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (holding that a beneficiary's residence in the forum state alone is insufficient to impose specific personal jurisdiction over the nonresident trustee). Accordingly, the district court erred when it concluded that Steven had sufficient minimum contacts with Nevada to warrant imposing specific personal jurisdiction. As Steven lacked the necessary minimum contacts with Nevada, the district court lacked personal jurisdiction over Steven.[6] The court therefore also lacked jurisdiction to hold Steven in contempt for failing to abide by the court's trust administration orders.

CONCLUSION

The effects test applies to determine whether the nonresident trustee defendant purposefully directed his or her conduct towards Nevada when conducting the minimum contacts analysis for personal jurisdiction purposes when the underlying trust administration case sounds in intentional tort. Here, Margaret failed to provide prima facie evidence of Steven's minimum contacts with Nevada. Moreover, while Margaret suffered an injury in Nevada, the injury's location is fortuitous and not caused by any of Steven's actions in or aimed at the state of Nevada. Absent personal jurisdiction, the court cannot order relief against him. Accordingly, we reverse the district court's order in Docket No. 80466 concluding that it had specific personal jurisdiction and remand to the district court to evaluate the extent to which orders it entered must be

[6]In light of our conclusion, we need not address any of Steven's remaining arguments.

vacated in light of the lack of personal jurisdiction over Steven and to dismiss the petition's claims against Steven. Because the district court lacks personal jurisdiction over Steven, we grant Steven's petition in Docket No. 82067 and direct the clerk of this court to issue a writ of prohibition that instructs the district court to vacate the contempt order against him.[7]

PARRAGUIRRE, C.J., and HARDESTY, STIGLICH, PICKERING, and HERNDON, JJ., concur.

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[7]The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.

LAS VEGAS REVIEW-JOURNAL, Appellant, *v.* CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Respondent.

No. 82908

December 15, 2022 521 P.3d 1169

Appeal from a special order after final judgment awarding attorney fees and costs. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Affirmed in part, vacated in part, and remanded.

McLetchie Law and *Margaret A. McLetchie*, Las Vegas, for Appellant.

Marquis Aurbach Coffing and *Jacqueline V. Nichols* and *Craig R. Anderson*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

The Las Vegas Review-Journal (LVRJ) appeals from an order awarding it costs and attorney fees in proceedings under the Nevada Public Records Act (NPRA). The district court's award discounted the costs and fees the LVRJ requested by almost 40%. The LVRJ contends that the district court abused its discretion by imposing such a substantial discount without explaining its reasons for doing so. We agree. We therefore vacate and remand this matter to the district court to explain and, if appropriate, modify its award.

I.

A.

The NPRA requires governmental agencies to make their nonconfidential records available to the public on request. NRS 239.010. In 2017, the LVRJ asked the Clark County Office of the Coroner (the Coroner) to produce autopsy reports for the preceding five years for juveniles who died while under the supervision of the Clark County Department of Child and Family Services. When the Coroner refused, the LVRJ sued. *See* NRS 239.011(1) (affording a record requester the right to apply to the district court for an order compelling production). The district court ordered the Coroner to provide the LVRJ with the autopsy reports it had requested. It also awarded the LVRJ the roughly $32,000 in costs and fees it had incurred to

that point. *See* NRS 239.011(2) (providing that a prevailing record requester is entitled to recover costs and reasonable attorney fees).

The Coroner appealed both the record-production order and the order awarding costs and fees. It sought and obtained stays pending appeal of these orders. *See Clark Cty. Office of the Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. 174, 415 P.3d 16 (2018). After briefing and argument, this court affirmed in part, reversed in part, and vacated and remanded in part. *Clark Cty. Office of the Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020). On the merits, we rejected the Coroner's claims that the law categorically exempts juvenile autopsy reports from public inspection, *id*. at 50-54, 458 P.3d at 1054-56, and immunizes the Coroner from cost and fee awards in NPRA litigation, *id.* at 60-61, 458 P.3d at 1060-61. But we credited the Coroner's alternative argument that the district court did not adequately consider the juvenile decedents' privacy interests before ordering the reports produced without redaction and vacated and remanded for the district court to do so. *Id*. at 54-58, 458 P.3d at 1056-59. The remand made it "premature to conclude [the] LVRJ will ultimately prevail in its NPRA action," *id*. at 61, 458 P.3d at 1061, so we also vacated the $32,000 cost and fee award, *id.* at 62, 458 P.3d at 1062.

On remand, the district court conducted the further proceedings this court directed. It reviewed selected autopsy reports, considered the parties' supplemental briefs and arguments, and again ordered the Coroner to provide the LVRJ with unredacted copies of the juvenile autopsy reports. The district court rejected the Coroner's argument that the reports so far implicated the juvenile decedents' privacy interests that those interests outweighed the public's interest in learning the information the reports contained. It denied the Coroner's motion for a stay pending appeal of its second production order.

The Coroner appealed and moved this court for an emergency stay. We denied the Coroner's emergency motion and the petition for reconsideration that followed. Without a stay, the Coroner had no choice but to comply with the district court's production order, which it did on December 31, 2020. That same day, the Coroner filed a motion to voluntarily dismiss its second appeal as moot, "with each party to bear its own fees and costs pursuant to NRAP 42(b)." This court granted the motion to dismiss as unopposed. *See Clark Cty. Office of the Coroner/Med. Exam'r v. Las Vegas Review-Journal*, No. 82229, 2021 WL 118036 (Nev. Jan. 12, 2021) (Order Dismissing Appeal).

B.

In district court, the LVRJ timely filed the motion for costs and attorney fees underlying this appeal. It supported the motion with detailed billing records and an affidavit of counsel, describing her

firm, its expertise, and the going rate for NPRA work. The motion requested $3,581.48 in costs and $275,640 in attorney fees, for a total of $279,221.48. This sum comprised all the costs and fees the LVRJ had incurred in the case, including (in round numbers) the $32,000 spent to obtain the first production order and the $110,000 spent to oppose the Coroner's two appeals ($93,000 on the first appeal and $17,000 on the second). The remainder represents the costs and fees the LVRJ incurred on remand to obtain the second production order and preparing to enforce that order by contempt, if necessary, when the Coroner did not timely comply with it. In opposition, the Coroner mainly argued that the fees sought were unreasonable and that the LVRJ was not entitled to recover the costs and fees associated with the Coroner's two prior appeals. The district judge who had handled the case to that point retired, so the motion fell to his successor to decide.

The district court granted the LVRJ's motion in part. It found that the LVRJ prevailed in the litigation and that its fee application met each of the factors Nevada caselaw establishes for deciding the reasonableness of a fee request. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). But having made these findings, which seemingly supported an award of the full amount requested, the district court reduced the amount by $110,000, or nearly 40%, awarding $2,472 in costs and $167,200 in attorney fees, for a total of $169,672. When the LVRJ asked the judge to explain the reduction, he cited his years of experience "auditing bills for insurance companies" and stated that, after spending "about three and a half hours going through the bills [I] looked at certain issues and said, okay, is this an amount that I believe [it] should have been." The district judge added that the reduction "[h]as nothing to do with the quality of work . . . I think you guys are outstanding, both sides in this matter and it was a hard-fought case." The district court's written order did not elaborate further on the reasons for the reduction.

The LVRJ appealed; the Coroner did not cross-appeal.

II.

Our legal system generally requires parties to pay their own litigation expenses, including attorney fees, unless a statute, rule, or contract authorizes shifting them from one party to another. *Las Vegas Review-Journal v. City of Henderson*, 137 Nev. 766, 769, 500 P.3d 1271, 1276 (2021). The NPRA includes a fee-shifting statute, NRS 239.011(2) (2019), that is both one-sided and mandatory. By its terms, this statute *entitles* a prevailing record requester to recover costs and reasonable attorney fees:

> If the requester prevails, *the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding*

> from the governmental entity whose officer has custody of the book or record.

(emphasis added). It does not make reciprocal provision for the government to recover costs and fees from the requester, should the government prevail. In this way, NRS 239.011(2) incentivizes the government to honor public record requests outside of court, since the government must pay its own litigation expenses if it wins and both its own and its opponent's litigation expenses if it loses. *See Las Vegas Metro. Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 127-28, 460 P.3d 952, 957 (2020).

A record requester "prevails" for purposes of NRS 239.011(2) "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89, 343 P.3d 608, 615 (2015) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). By this measure, the LVRJ prevailed and is entitled to recover costs and fees in this case—the district court so held and the Coroner does not seriously contend otherwise. But to be recoverable, the fees must be "reasonable." NRS 239.011(2). They must also be for work the NPRA, as the statute authorizing their recovery, deems compensable, *see Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825, 830, 192 P.3d 730, 733, 736-37 (2008) (noting that a "district court may award attorney fees only if authorized by a rule, contract, or statute" and excluding fees for work beyond that the applicable statute covered), and they cannot be precluded by prior rulings in the case, *see Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000) (reversing order awarding fees disallowed in prior orders that established law of the case).

The LVRJ maintains that the costs and fees it incurred are reasonable and for work the NPRA deems compensable that are not barred by law of the case. The Coroner disagrees and argues that this court should defer to the district court and affirm the $110,000 discount it imposed.

A.

A district court enjoys wide discretion in determining what fees are reasonable to award. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). However, that discretion is not boundless. "When the district court makes its award, it must explain how it came up with the amount. The explanation need not be elaborate, but it must be comprehensible." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008); *see Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) (cautioning "the trial bench to provide written support . . . for awards of attorney's fees" because "[i]t is difficult at best for this court to review claims of error in the

award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards"). In other words, the district court should show its work and provide "a concise but clear explanation" of the reasoning behind its award amount. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (noting that this court will uphold an award of attorney fees where the district court "provides sufficient reasoning and findings in support of its ultimate determination").

The district court's order does not adequately explain the near 40% discount it imposed. Addressing reasonableness, the order correctly processes the LVRJ's fee application through the *Brunzell* factors. *See* 85 Nev. at 349, 455 P.2d at 33 (directing district courts, in determining a reasonable fee, to consider the quality of the advocate, the character of the work needed to be done, the work performed, and the result). It makes extensive written findings that each of the *Brunzell* factors supported awarding the LVRJ the fees it requested. But it then abruptly changes course, subtracting $110,000 from the $275,640 total sought. The order gives no explanation for the reduction except to state: "Based upon the Court's review of the documentation provided by [LVRJ] and the Court's experience in insurance litigation, the Court finds [LVRJ] is awarded $167,200 in attorneys' fees."

The Coroner argues that this court should defer to the district court and infer the findings needed to support the discount. As support, the Coroner quotes *Logan v. Abe*, 131 Nev. at 266, 350 P.3d at 1143—"the district court need only demonstrate that it considered the required [*Brunzell*] factors, and the award must be supported by substantial evidence." But the appellants in *Logan* sought to reverse, not augment, a fee award, *see id.*, and we affirmed the award, finding that it satisfied the *Brunzell* factors generally, without examining each specifically—based upon a record on appeal that omitted the billing records underlying the fee award being challenged, *id.* at 267, 350 P.3d at 1143. That is a far cry from this case, where the district court made specific findings that each *Brunzell* factor supported a full fee award, then discounted the amount requested by almost 40% without explaining why.

"Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected." *Moreno*, 534 F.3d at 1112. Such detail is needed for the prevailing party to object to—and this court to meaningfully review—the district court's decision. As an example, the Coroner argued in district court that the LVRJ did not prevail on the Coroner's first appeal given that this court vacated and remanded the first production order for further proceedings. *See Clark Cty. Office of the Coroner/Med. Exam'r*, 136 Nev. at 58,

458 P.3d at 1059. But if the district court credited this argument discounting the LVRJ's fee request, it erred—under NRS 239.011(2), a prevailing record requester is entitled to the fees incurred en route to victory, not just those incurred in the final round. *See Blackjack Bonding*, 131 Nev. at 89, 343 P.3d at 615. Or, if the district court discounted the fees requested because it believed the parties overworked the case, it would need also to determine the extent to which the work the LVRJ put into the case was driven by the need to overcome the roadblocks the Coroner interposed en route to the second production order—and address that the LVRJ achieved the first production order for $32,000 in costs and fees, a sum the original district judge deemed reasonable. Without specific reasons for the discount, in short, this court cannot determine whether the district court "asked and answered [the right] question, rather than some other." *Fox v. Vice*, 563 U.S. 826, 839 (2011). The district court has wide discretion in the matter of attorney fees "when, but only when, it calls the game by the right rules." *Id*.

B.

The Coroner alternatively defends the district court's $110,000 discount by arguing that, as written at the time pertinent to this appeal, NRS 239.011 did not authorize recovery of appellate fees. In this vein, the Coroner notes that the $110,000 discount roughly equals the amount the LVRJ spent defending the Coroner's two prior appeals in this case—$93,000 opposing the Coroner's appeal of the first production order and $17,000 opposing the Coroner's appeal of the second production order and its associated motion practice. Although the district court did not explain its $110,000 discount in terms of excluding assertedly nonrecoverable appellate fees, the Coroner speculates that this may have been its rationale. If not, the Coroner argues that the district court was right for the wrong reason in imposing the discount and should be affirmed on this basis. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 426 n.40, 132 P.3d 1022, 1033 n.40 (2006) ("[W]e will affirm the decision of the district court when it reaches the correct result, even if based on the wrong reason.").

In 2019, the Legislature amended NRS 239.011 to specifically authorize awarding reasonable attorney fees incurred by a requester defending an agency appeal in an NPRA case. 2019 Nev. Stat., ch. 612, § 7, at 4008. Before then, the statute did not speak to appellate fees. It simply provided that "[i]f the requester prevails, the requester is entitled to recover his or her . . . reasonable attorney's fees *in the proceeding* . . . ." 1993 Nev. Stat., ch. 393, § 2, at 1230 (emphasis added). Since this litigation began before the 2019 amendments took effect, the pre-amendment version applies. 2019 Nev. Stat., ch. 612, § 11, at 4008 ("The amendatory provisions of this act apply to all actions filed on or after October 1, 2019.").

A "proceeding" is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." *Proceeding*, Black's Law Dictionary (11th ed. 2019). The term includes "the taking of the appeal or writ of error." *Id.* (quoting Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3-4 (2d ed. 1899)). Accordingly, pursuant to NRS 239.011(2)'s text, a prevailing requester is "entitled to recover [its] costs and reasonable attorney fees" for all the acts and events between the time of commencement and the judgment in their favor, including acts and events on appeal. *S. Highlands Cmty. Ass'n v. San Florentine Ave. Tr.*, 132 Nev. 24, 27, 365 P.3d 503, 505 (2016) ("When a statute's language is clear and unambiguous, it must be given its plain meaning.").

The Coroner cites *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1356, 971 P.2d 383, 388 (1998), for the proposition that a fee statute's silence as to appellate fees signifies their exclusion. But this overstates *Berosini*, which interpreted a different statute, NRS 18.010 (1999), that limitedly authorizes a fee award "when the court finds that the claim, counterclaim, cross-claim, or third-party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party"—all trial court matters—and left it to NRAP 38 and this court to determine fees for frivolous appeals. *See In re Estate & Living Tr. of Miller*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009) (holding that the fee-shifting provisions in Nevada's offer-of-judgment statute and rule extend to fees incurred on and after appeal); *see also Las Vegas Metro. Police Dep't*, 136 Nev. at 126-27, 460 P.3d at 956 (interpreting the word "prevails" in NRS 239.011(2) broadly, consistent with the legislative policy declared in the NPRA); *Barney*, 124 Nev. at 825-28, 192 P.3d at 733-35 (interpreting the word "proceeding" in a statute authorizing attorney fees to include post-judgment matters, consistent with the perceived purpose of the fee statute). Nor are we persuaded by the Coroner's argument that the 2019 amendment adding subparagraph (3) to NRS 239.011 signified that before then, NRS 239.011(2) did not authorize appellate fees. The amendment can as easily be read to clarify as change the rule that NRS 239.011(2) authorizes recovery of appellate fees to record requesters who must defend an agency appeal.

C.

The Coroner separately argues for exclusion of the $17,000 in appellate fees that the LVRJ incurred defending the Coroner's appeal of the district court's second production order and opposing an emergency stay. This court dismissed that appeal based on the Coroner's unopposed NRAP 42(b) motion, in which the Coroner asked, and this court ordered, each party to bear its own fees and

costs. But this motion and order referred to fees potentially recoverable under NRAP 38 for a frivolous appeal, not fees statutorily recoverable in district court. *Cf. Breeden v. Eighth Judicial Dist. Court*, 131 Nev. 96, 98, 343 P.3d 1242, 1243 (2015) (holding that NRAP 42(b) does not authorize this court to condition voluntary dismissal on payment of appellate fees and costs unless NRAP 38 authorizes their recovery for a frivolous appeal). Because the dismissal order did not decide the availability of attorney fees under the NPRA, expressly or implicitly, it did not establish law of the case precluding the LVRJ's fee motion. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44-45, 223 P.3d 332, 334 (2010) (noting that law of the case "does not bar a district court from hearing and adjudicating issues not previously decided . . . and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal").

D.

The LVRJ asks us to vacate the district court's order and remand with instructions to award the full measure of fees and costs it requested. While the district court did not adequately explain the reduced fee award, it remains in the best position to make the fact-specific determination of what costs and fees are reasonable. *See Fox*, 563 U.S. at 838 (noting that there is hardly any "sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it"). This is true even though the district court judge came into this case after the judge who presided over it throughout retired. The burden of providing sufficiently specific objections to a winning party's fee request "can mostly be placed on the shoulders of the losing parties, who not only have the incentive but also the knowledge of the case" to point out instances where overbilling may have occurred. *See Moreno*, 534 F.3d at 1112. The authority the LVRJ cites where an appellate court has undertaken to decide a fee motion originally arose in a jurisdiction with rules licensing such proceedings, *ACLU of Wash. v. Blaine Sch. Dist. No. 503*, 975 P.2d 536, 544 (Wash. Ct. App. 1999) (citing Wash. R. App. P. 18.1), which Nevada does not have.

We therefore affirm the attorney fees and costs order in the amount thus far awarded but vacate so much of the order as discounts the fees and costs requested by the LVRJ and remand for the district court to make adequate and specific findings as to any additional reasonable fees and costs the LVRJ incurred and is entitled to recover in this case.

Parraguirre, C.J., and Hardesty, Stiglich, Cadish, and Herndon, JJ., concur.