PHONG T. VU, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE CHUCK WELLER, DISTRICT JUDGE, RESPONDENTS, AND RICHARD A. GAMMICK, DISTRICT ATTORNEY, REAL PARTY IN INTEREST.

No. 65498

March 31, 2016 371 P.3d 1015

Original petition for a writ of mandamus challenging a district court order granting a petition to have petitioner involuntarily admitted to a mental health facility and directing transmission of the order to the Central Repository for Nevada Records of Criminal History.

The supreme court, PARRAGUIRRE, C.J., held that: (1) statute governing proceedings for involuntary civil commitment requires a district court to transmit an admission order to central repository at time the order is entered, and (2) clear and convincing evidence showed that individual was likely to harm himself, as required to support involuntary civil commitment.

Petition denied.

PICKERING, J., with whom SAITTA, J., agreed, dissented.

Jeremy T. Bosler, Public Defender, and *John Reese Petty* and *Kathleen M. O'Leary*, Chief Deputy Public Defenders, Washoe County, for Petitioner.

Christopher J. Hicks, District Attorney, and *Blaine E. Cartlidge*, Deputy District Attorney, Washoe County, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   Whether to consider a writ of mandamus petition is within the supreme court's discretion, and writ relief is generally available only when an adequate and speedy legal remedy does not otherwise exist. NRS 34.170.
3. MENTAL HEALTH.
   Statute governing proceedings for involuntary civil commitment requires a district court to transmit an admission order to central repository for Nevada Records of Criminal History at time the order is entered, rather than waiting until the order is final, at point which 30 days have elapsed without the admitted person being unconditionally released. NRS 433A.310(5).
4. CONSTITUTIONAL LAW; MENTAL HEALTH.
   Because an involuntary admission order to a mental health facility constitutes a deprivation of the admitted person's constitutionally protect-

ed liberty interest, mental health statute's clear and convincing evidentiary standard is meant to ensure that the district court does not wrongfully deprive a person of that liberty interest. U.S. CONST. amend. 14; NRS 433A.310(1)(b).

5. APPEAL AND ERROR.
When a district court's factual determinations must be supported by clear and convincing evidence, the supreme court reviews the record and decision with a degree of deference, seeking only to determine whether the evidence adduced at the hearing was sufficient to have convinced the deciding body that the issue to be determined had been shown by clear and convincing evidence.

6. MENTAL HEALTH.
Clear and convincing evidence showed that individual had a mental illness, and that because of that illness individual was likely to harm himself, as required to support involuntary civil commitment; uncontroverted evidence demonstrated that in the 30 days preceding mental health hearing, the individual's family called the police based on their concerns that he posed a physical threat to them, and resident doctor at mental health facility testified that the individual had confronted him in a manner that he perceived as physically threatening. NRS 433A.310(1)(b).

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

Under NRS 433A.310(1)(b), a district court may issue an order involuntarily admitting a person to a mental health facility if clear and convincing evidence demonstrates that the person "has a mental illness and, because of that illness, is likely to harm himself or herself or others if allowed his or her liberty." The district court's order "must be interlocutory and must not become final if, within 30 days after the involuntary admission, the person is unconditionally released." *Id.* "If the court issues an order involuntarily admitting a person . . . , the court shall . . . cause . . . a record of such order to be transmitted to the Central Repository for Nevada Records of Criminal History . . . ." NRS 433A.310(5).

At issue in this original proceeding is whether NRS 433A.310(5) requires a district court to transmit an admission order at the time it is entered or if, instead, the district court is prohibited from transmitting the order until it becomes final under NRS 433A.310(1)(b)—i.e., until 30 days have elapsed without the admitted person being unconditionally released. We conclude that NRS 433A.310(5)'s plain language requires a district court to transmit an admission order at the time it is entered. Thus, although the petitioner in the underlying proceedings was unconditionally released 12 days after the district court's involuntary admission order, the district court was required under NRS 433A.310(5) to transmit the order to the Central Repository. And because the district court reasonably determined that

clear and convincing evidence justified petitioner's involuntary admission, we deny petitioner's request for extraordinary writ relief.

FACTS

The Sparks Police Department responded to a call from petitioner Phong Vu's family in which the family requested assistance with Vu. According to the police report, Vu had threatened to murder his family, he was found with box cutters in his pocket, and he was muttering about murder while the police were present. The responding officers applied for the temporary emergency admission of Vu to a mental health facility, which was approved by a physician. Three days later, a psychiatrist filed a petition for court-ordered continued involuntary admission of Vu to a mental health facility. Based on her examination of Vu, the psychiatrist concluded that he had a mental illness and, as a result of that mental illness, there was an imminent risk that Vu was likely to harm himself or others if Vu were not involuntary admitted to a mental health facility.

Vu was appointed a public defender, and a hearing on the petition was held before the district court. At the hearing, the Washoe County District Attorney's Office, representing the State, called as witnesses a court-appointed psychiatrist and a court-appointed psychologist, both of whom had interviewed Vu. The District Attorney elicited testimony from the psychiatrist that Vu's family had called the police due to their concerns that Vu posed a threat to their safety. The psychiatrist also testified regarding an incident in which Vu, after having been admitted to a facility on an emergency basis, had approached a doctor in a manner that the doctor perceived as threatening, thereby prompting the doctor to seek intervention from other employees. The psychiatrist further testified that Vu was refusing to take an antipsychotic medication that had been prescribed to him. Summing up her opinion, the psychiatrist explained that although Vu had not committed any act in furtherance of a threat during the incidents with his family and the doctor,

> I believe that the perceptions that people have that he is threatening to them, as well as his inability to communicate in an organized fashion, put him at risk for his own safety and well-being that if somebody feels threatened by him, they may respond in a way that affects his well-being [because] they may feel as though they need to defend themselves against the threat, and they may not have a mental health tech or the Sparks Police Department [to intervene].

The District Attorney elicited similar testimony from the court-appointed psychologist, who summed up his opinion by stating, "I can't predict that anybody would assault [Vu], but I feel there's certainly a risk of that."

At the end of the hearing, the district court made the following findings:

> [I] can glean that there exists a reasonable probability that a serious bodily injury will occur if he's discharged soon because of the fact that that's how people have reacted to him in recent days. There's nothing to suggest that his behavior has been modified. . . . I find that within the last 30 days he's . . . had auditory hallucinations and . . . some of those are paranoid. He's carried weapons. It may reasonably be inferred from these acts that without the care, supervision and continued assistance of others, that he will be unable to satisfy his personal needs for self-protection and safety . . . unless admitted to a mental health facility and adequate treatment is provided.

Over defense counsel's objection, the district court directed the clerk of the court to forward a record of the involuntary admission order to the Central Repository for inclusion in the National Instant Criminal Background Check System (NICS).[1]

Twelve days after the district court's admission order was entered, Vu was unconditionally released from the mental health facility based on the determination of a team of evaluators that Vu no longer presented a clear and present danger of harm to himself or others. *See* NRS 433A.390(2). Thereafter, Vu filed this petition for a writ of mandamus, asking that this court direct the district court to recall from the Central Repository the previously transmitted record of Vu's involuntary admission. As a basis for the requested relief, Vu contends that (1) NRS 433A.310(5) did not authorize transmission of the involuntary admission order unless and until that order became final under NRS 433A.310(1); and (2) regardless, the district court's underlying determination that Vu should have been involuntarily admitted was not supported by sufficient evidence.

DISCUSSION

[Headnotes 1, 2]

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted);

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[1]Records transmitted to the Central Repository are "included in each appropriate database of [NICS]." NRS 179A.163(1). NICS, in turn, is a "nationwide electronic database that licensed firearms dealers can check, before selling a firearm to a person, to make sure that that person is not prohibited under state or federal law from possessing a firearm." Hearing on A.B. 46 Before the Assembly Judiciary Comm., 75th Leg. (Nev., February 20, 2009) (statement of Kerry Benson, Deputy Attorney General, providing an overview of NICS and the legislation that is currently codified in NRS 433A.310(5)).

see NRS 34.160. Whether to consider a writ petition is within this court's discretion, and writ relief is generally available only when "an adequate and speedy legal remedy" does not otherwise exist. *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59; *see* NRS 34.170.

Here, we agree with Vu that he does not have an adequate legal remedy other than to seek a writ of mandamus, as the district court's involuntary admission order never became final under NRS 433A.310(1)(b), meaning that Vu has no right to appeal that order. *See Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (recognizing that this court has jurisdiction to consider only those appeals that are authorized by a statute or court rule); *see also* NRAP 3A(b) (listing appealable orders). Additionally, the issue of whether NRS 433A.310(5) requires district courts to transmit involuntary admission orders to the Central Repository before those orders become final "presents an important issue of law that has relevance beyond the parties to the underlying litigation." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 578, 582, 331 P.3d 876, 878-79 (2014). Accordingly, we elect to entertain the petition.

The district court was required under NRS 433A.310(5) to transmit the involuntary admission order to the Central Repository even though the order had not become final

[Headnote 3]

Vu first contends that the district court improperly directed a record of the involuntary admission order to be transmitted to the Central Repository under NRS 433A.310(5), which instructs that "[i]f the court issues an order involuntarily admitting a person to a public or private mental health facility . . . , the court shall . . . cause . . . a record of such order to be transmitted to the Central Repository." In support of his argument, Vu relies on NRS 433A.310(1)(b)'s statement that an involuntary admission "order of the court must be interlocutory and must not become final if, within 30 days after the involuntary admission, the person is unconditionally released pursuant to NRS 433A.390." According to Vu, because NRS 433A.310's subsection 1(b) numerically precedes subsection 5, subsection 1(b)'s distinction between an interlocutory and final order applies to NRS 433A.310's remaining subsections, meaning that subsection 5's reference to the "order" to be transmitted to the Central Repository is necessarily restricted to only final orders.

We disagree with this proffered construction of the statute, as it goes beyond the statute's plain meaning. *See In re Candidacy of Hansen*, 118 Nev. 570, 572, 52 P.3d 938, 940 (2002) ("It is axiomatic that when words of a statute are plain and unambiguous, they will be given their plain meaning."). Subsection 5 plainly states that

"[*i*]*f* the court issues *an order* . . . , the court shall . . . cause . . . a record of *such order* to be transmitted to the Central Repository." NRS 433A.310(5) (emphases added). Nothing in this language contemplates that a district court must wait 30 days to see whether its order becomes final under subsection 1(b) before a record of the order can be transmitted to the Central Repository, and we decline to read a requirement into subsection 5 that the Legislature itself has not imposed.[2] *See Barrett v. Eighth Judicial Dist. Court*, 130 Nev. 613, 617-18, 331 P.3d 892, 895 (2014); *Hansen*, 118 Nev. at 573, 52 P.3d at 940; *Cirac v. Lander Cty.*, 95 Nev. 723, 729, 602 P.2d 1012, 1016 (1979).

To the extent that Vu suggests that this construction produces an absurd result in light of his unconditional release after 12 days, we disagree. The fact that Vu was unconditionally released after 12 days did not imply that the district court's involuntary admission findings were erroneous when that order was entered; Vu's release simply demonstrated that he was "*no longer* considered to present a clear and present danger of harm to himself . . . or others." NRS 433A.390(2)(a) (emphasis added). More importantly, we are unwilling to consider a construction of subsection 5 that might undermine the Legislature's attempt to comply with federal law, as subsection 5 was enacted in response to congressional legislation that incentivized states to cooperate in making NICS operate more efficiently and comprehensively. *See* Hearing on A.B. 46 Before the Assembly Judiciary Comm., 75th Leg. (Nev., February 20, 2009) (statement of Kerry Benson, Deputy Attorney General, explaining that the language of NRS 433A.310(5) was proposed in response to Congress's NICS Improvement Amendments Act of 2007, which requires states to adopt procedures to ensure that certain records are transmitted to NICS as a requisite for states maintaining their eligibility for certain federal funds); *cf. Holiday Retirement Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) (noting that "[i]t is the prerogative of the Legislature, not this court, to change or rewrite a statute"). Therefore, we conclude that NRS 433A.310(5)'s plain language required the district court to transmit a record of Vu's involuntary admission order to the Central Repository contemporaneously with the order's entry.

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[2]Our construction of subsection 5 is reinforced by the fact that the Legislature enacted subsection 5 long after it enacted the final sentence of subsection 1(b), *see* 2009 Nev. Stat., ch. 444, § 13, at 2491; 1989 Nev. Stat., ch. 748, § 19, at 1761, and did so without incorporating or otherwise referencing subsection 1's language, *see Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) ("We presume that the Legislature enacted the statute with full knowledge of existing statutes relating to the same subject." (internal quotations omitted)).

The district court reasonably determined that clear and convincing evidence showed that Vu was likely to harm himself

[Headnotes 4, 5]

Alternatively, Vu contends that the involuntary admission order should not have been transmitted to the Central Repository because the district court's determination that Vu should be involuntarily admitted was not supported by sufficient evidence. As explained, NRS 433A.310(1)(b) permits a district court to order the involuntary admission of a person to a mental health facility if "there is clear and convincing evidence that the person with respect to whom the hearing was held has a mental illness and, because of that illness, is likely to harm himself or herself or others if allowed his or her liberty." Because an involuntary admission order constitutes a deprivation of the admitted person's constitutionally protected liberty interest, NRS 433A.310(1)(b)'s "clear and convincing" evidentiary standard is meant to ensure that the district court does not wrongfully deprive a person of that liberty interest. *See Addington v. Texas*, 441 U.S. 418, 425-26 (1979). When a district court's factual determinations must be supported by clear and convincing evidence, "we review the record and decision with a degree of deference, seeking only to determine whether the evidence adduced at the hearing was sufficient to have convinced the deciding body that [the issue to be determined] had been shown by clear and convincing evidence." *Gilman v. Nev. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 274-75, 89 P.3d 1000, 1008 (2004) (quotation omitted), *disapproved on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 327 P.3d 487 (2014). In other words, despite the heightened evidentiary standard of proof that the district court in this case was required to employ, our review is limited to whether the district court reasonably could have determined that clear and convincing evidence showed that Vu was likely to harm himself. *Gilman*, 120 Nev. at 274-75, 89 P.3d at 1008; *see In Interest of R.N.*, 513 N.W.2d 370, 371 (N.D. 1994) (observing that although the clear and convincing standard of proof in an involuntary commitment proceeding requires a "more probing" standard of appellate review, that review still entails a level of deference to the trial court's factual determinations); *see also In re Michael H.*, 856 N.W.2d 603, 612, 616 (Wis. 2014) (same); *In re MH2009-002120*, 237 P.3d 637, 642-44 (Ariz. Ct. App. 2010) (same).

[Headnote 6]

Here, Vu and the District Attorney agree that Vu was correctly diagnosed with a mental illness. They also agree that NRS 433A.310(1)(b)'s "likely to harm himself or herself or others" standard must be established by showing that Vu fell within one of four

definitions set forth in NRS 433A.115(2) and (3).[3] They further agree that the definition that the district court found Vu to fall within was NRS 433A.115(2)(a), which provides that

> [a] person presents a clear and present danger of harm to himself or herself if, [(1)] within the immediately preceding 30 days, *the person has*, as a result of a mental illness . . . [*a*]*cted in a manner from which it may reasonably be inferred that*, without the care, supervision or continued assistance of others, *the person will be unable to satisfy his or her need for* nourishment, personal or medical care, shelter, *self-protection or safety*, and [(2)] if there exists a *reasonable probability that* the person's death, *serious bodily injury* or physical debilitation *will occur within the next following 30 days* unless he or she is admitted to a mental health facility . . . .

(Emphases added.) Vu and the District Attorney disagree, however, as to whether sufficient evidence supported the district court's conclusion that Vu fell within this definition.

Having considered the record generated at the involuntary admission hearing, we agree with the District Attorney that the opinions elicited from the court-appointed psychiatrist and psychologist reasonably supported the district court's conclusion that Vu fell within NRS 433A.115(2)(a)'s definition. In particular, the uncontroverted evidence demonstrated that in the 30 days preceding the hearing, Vu's family called the police based on their concerns that he posed a physical threat to them. Testimony was likewise elicited that Vu confronted a resident doctor at the mental health facility in a manner that the resident doctor perceived as physically threatening. Both the psychiatrist and the psychologist opined that, if Vu were to act in such a manner toward a person unfamiliar with his mental illness, there would be a risk that the person would act violently in self-defense. From this evidence, the district court could "reasonably [have] inferred that, without the care, supervision or continued assistance of others, [Vu would] be unable to satisfy his . . . need for . . . self-protection or safety." NRS 433A.115(2)(a).

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[3]The interplay between NRS 433A.310(1)(b) and NRS 433A.115 is not immediately apparent, particularly in light of NRS 433A.310(1)(b)'s "likely to harm" standard and NRS 433A.115's "clear and present danger" standard, discussed below. Nonetheless, it appears to have been the Legislature's intention that a person must fall within one of the four definitions set forth in NRS 433A.115(2) and (3) before that person may be involuntarily admitted by court order under NRS 433A.310(1)(b). *See* Hearing on S.B. 490 Before the Senate Comm. on Human Resources & Facilities, 65th Leg. (Nev., June 9, 1989) (statement of Holli Elder, Director of the Office of Protection and Advocacy, memorialized in exhibit C, explaining that what would become NRS 433A.115(2) and (3)'s definitions were "necessary to assure the consistent application and interpretation of criteria that determine the potential dangerousness of a mentally ill person for the purpose of involuntary admission").

From this same evidence, combined with the testimony that Vu had refused to take his prescribed antipsychotic medication while admitted on an emergency basis prior to the district court hearing, the district court also could have reasonably concluded that "there exist[ed] a reasonable probability that [Vu]'s . . . serious bodily injury . . . w[ould] occur within the next following 30 days unless he . . . [was] admitted to a mental health facility." *Id.* While Vu argues that no evidence showed that he had actually committed acts in furtherance of his threats or that someone had actually assaulted him in self-defense or that such an assault would actually rise to the level of inflicting serious bodily injury, this argument stretches NRS 433A.115(2)(a)'s use of the phrases "reasonably be inferred" and "reasonable probability" too far. The statute does not require *specific evidence* "that [Vu would] be unable to satisfy his . . . need for . . . self-protection or safety" and that "[Vu's] serious bodily injury [would] occur within the next following 30 days"; rather, it requires evidence to support the *reasonable inference* and *reasonable probability* of those concerns, which the District Attorney provided. Therefore, we conclude that the district court reasonably determined that Vu fell within NRS 433A.115(2)(a)'s definition and that, in turn, involuntary admission was appropriate under NRS 433A.310(1)(b)'s clear and convincing evidentiary standard.

CONCLUSION

NRS 433A.310(5) requires a district court to transmit an involuntary admission order to the Central Repository at the time the order is entered, meaning that the district court is not required to wait 30 days for the order to become final under NRS 433A.310(1)(b). Additionally, the district court reasonably determined that clear and convincing evidence showed that Vu, at the time of the hearing, had a mental illness and that because of that illness, Vu was likely to harm himself. We therefore deny Vu's petition for extraordinary writ relief.

HARDESTY, DOUGLAS, CHERRY, and GIBBONS, JJ., concur.

PICKERING, J., with whom SAITTA, J., agrees, dissenting:

The loss of liberty that occurs when an individual is involuntarily committed to a mental hospital is "massive." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). As a consequence, due process protections apply. *Addington v. Texas*, 441 U.S. 418, 425 (1979). Chief among those protections is a heightened burden of proof, meaning the State must prove its case for involuntary commitment by "greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." *Id.* at 432-33. The heightened standard of proof protects against an erroneous deprivation of liberty. It recognizes the fundamental truth that, "[a]t one time or another

every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." *Id.* at 426-27. "Obviously, . . . a few isolated instances of unusual conduct" are not a basis

> for compelled treatment and surely none for confinement. . . . Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

Id. at 427.

The State called two witnesses at Vu's involuntary commitment hearing, both doctors who had examined Vu and his mental health records. These doctors concluded that Vu did *not* pose a threat of harm *to third parties*, so his commitment could not be justified on that statutory basis. *See* NRS 433A.310(1)(b) (providing for involuntary commitment if there is "clear and convincing evidence that the person . . . is likely to harm . . . others if allowed his or her liberty"). The State therefore proceeded on the theory that Vu presented a sufficient risk of harm *to himself*, such that his commitment was justified on that alternative statutory basis. *See id.* (providing for involuntary commitment if there is "clear and convincing evidence that the person . . . is likely to harm himself or herself . . . if allowed his or her liberty"). This alternative theory required the State to prove, by clear and convincing evidence, that Vu could not meet his basic safety and self-protection needs without the care, supervision, or continued assistance of others, *and* that there existed a reasonable probability that Vu would face *death, serious bodily injury, or physical debilitation* in the following 30 days unless he was institutionalized. NRS 433A.115(2)(A); *see* NRS 433A.310(1)(b).

The uncontradicted evidence showed that Vu had a bank account with money in it, an apartment in which to stay, and the ability to feed and clothe himself. There was also no suggestion of suicidal ideation. From this it would seem to follow that Vu did not need to be committed to avoid death, serious bodily injury, or physical debilitation, but the State maintained otherwise. According to the State, Vu needed to be committed because, given his behavior and failure to take his medications, Vu might act threateningly toward third parties, provoking them to attack and injure him. Setting aside the tenuous nature of an opinion that members of the general public would likely assault Vu if he acted threateningly rather than seeking alternative help for themselves or Vu, *In re Doe*, 78 P.3d 341, 367 (Haw. Ct. App. 2003) (recognizing that erratic and offensive behavior is not uncommon on the streets of many larger cities, and

that it may be just as likely the urban residents would respond with compassion rather than anger and violence), the State identified only two instances of Vu ever acting threateningly. One instance was the reason for his emergency hold, when his family felt threatened by his behavior, and the other was during Vu's emergency intake where Vu—who stands 5′ 5″ tall and weighs under 100 pounds—reportedly "broadened his shoulders" when facing a resident doctor. So there was actually no evidence that Vu would act threateningly to people other than his family, who had already shown the ability to call the police if his threatening behavior escalated, or toward those at the facility holding him against his will. Also of note, neither Vu's family nor the resident doctor testified at the hearing, and the doctors who did testify indicated that Vu isolated himself from others, not that he acted aggressively toward them.

But more significantly, though the doctors generally opined that a stranger might harm Vu if Vu were released, the only testimony directed toward the *seriousness* of the harm Vu might face was Dr. Lewis's answer of "Yes" to the following question posed by the district attorney:

> You indicated that Mr. [Vu] meets criteria for basic needs, self-protection and safety. When you apply that basic need in your normal course every Wednesday and every time you testify, does that include the provision that there does exist a reasonable probability that his death, serious bodily injury or physical debilitation will occur within the next following 30 days unless he's admitted?

The State asked this question of Dr. Lewis on redirect examination, and it prompted an objection from Vu's counsel as being outside the scope of Dr. Lewis's cross-examination, to which the district court responded: "It certainly is but I'll allow the question." Shortly thereafter, during the State's closing argument, the district court interrupted and said that as to the reasonable probability of death, serious bodily injury, or physical debilitation prong:

> Apparently, you want me to glean that information, it only came out from you outside the scope of direct examination on your second doctor witness and I frankly don't understand why you don't ask that question. Why you don't look at the criteria and ask the questions.

In Vu's closing argument, his attorney asked whether the court had heard from Dr. Lewis "a single description of how that death was going to occur, what the serious bodily injury was going to be, why he thought it was going to occur in the next 30 days or even what that physical debilitation would be?" and the district court acknowledged "No, I didn't and I just talked to the District Attorney that I don't think that criteria was examined other than briefly and oddly."

Under NRS 433A.115(2)(a) and NRS 433A.310(1)(b), the State was required to prove, by clear and convincing evidence, that there existed a reasonable probability that Vu would face death, serious bodily injury, or physical debilitation in the following 30 days unless he was institutionalized. That NRS 433A.115(2)(a) requires a showing of a reasonable probability that the person would face the types of serious harm listed means that undoubtedly there is room for prediction and less than certainty as to whether the person actually will experience serious harm or exactly what shape it may take. But testimony that consists solely of a "Yes" to a disjointed leading question on redirect examination as to whether that doctor generally included in his basic needs analysis whether Vu would face serious harm, without any explanation as to why that doctor thought Vu would face such harm or any estimation of what such harm might entail, is insufficient evidence to convince a rational fact-finder, by clear and convincing evidence, that a reasonable probability existed that Vu would face death, serious bodily injury, or physical debilitation if not confined. *See In re Discipline of Drakulich*, 111 Nev. 1556, 1566-67, 908 P.2d 709, 715 (1995) (clear and convincing evidence must be "'so strong and cogent as to satisfy the mind and conscience of a common man. . . . It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.'" (quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890))).

Had the State proved its case, I would agree with the majority that Vu's involuntary commitment order was properly transmitted to Central Repository for Nevada Records of Criminal History under NRS 433A.310(5). Indeed, this is one of the stigmatizing consequences that justifies the high burden of proof the State must shoulder to obtain an involuntary commitment order. *See Addington*, 441 U.S. at 425-26 ("it is indisputable that involuntary commitment to a mental hospital" stigmatizes the individual and engenders both a "significant deprivation of liberty" and a host of "adverse social consequences"). But given the State's sparse and speculative evidence in this case, including the exceedingly summary testimony on the risk of harm Vu faced if not institutionalized, I would hold that Vu should not have been detained beyond the initial emergency hold. I thus would grant Vu a writ of mandamus directing the district court to vacate the admission order and to recall its report.

RICHARD A. HUNTER, AN INDIVIDUAL, APPELLANT, *v.*
WILLIAM GANG, AN INDIVIDUAL, RESPONDENT.

No. 59691

RICHARD A. HUNTER, AN INDIVIDUAL, APPELLANT, *v.*
WILLIAM GANG, AN INDIVIDUAL, RESPONDENT.

No. 63804

April 7, 2016 377 P.3d 448

Consolidated appeals from a final district court order dismissing appellant's complaint with prejudice for want of prosecution and a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Property owner brought action against adjoining property owner to quiet title and for adverse possession. The district court dismissed action for want of prosecution. Plaintiff appealed. The court of appeals, GIBBONS, C.J., held that dismissal of action for want of prosecution was not warranted.

Reversed in part, vacated in part, and remanded.

Greenberg Traurig, LLP, and *Mark E. Ferrario* and *Tami D. Cowden*, Las Vegas, for Appellant.

Marquis Aurbach Coffing and *Albert G. Marquis* and *Tye S. Hanseen*, Las Vegas, for Respondent.

1. PRETRIAL PROCEDURE.
   District courts have inherent authority to dismiss an action for want of prosecution, which is independent of any authority granted under statutes or court rules.
2. CONSTITUTIONAL LAW; COURTS.
   Inherent judicial powers stem from two sources: the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence.
3. CONSTITUTIONAL LAW.
   Under the separation of powers doctrine, the judiciary has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice.
4. PRETRIAL PROCEDURE.
   Courts may exercise their inherent authority under the separation of powers doctrine to dismiss an action for want of prosecution to prevent undue delays and to control their calendars.
5. PRETRIAL PROCEDURE.
   Because the inherent authority to dismiss an action for want of prosecution is incidental to the duties required for the administration of justice and the court's management of its day-to-day activities, no justification is required for the court to resort to this inherent authority.

6. Pretrial Procedure.
   A district court need not demonstrate that some specific circumstance exists before it may resort to its inherent authority to dismiss an action for want of prosecution.
7. Courts.
   Because of their very potency, a court's inherent powers must be exercised with restraint and discretion.
8. Pretrial Procedure.
   A district court may properly exercise its inherent authority to dismiss an action for want of prosecution before the two-year time period in the rule governing dismissal for want of prosecution has passed and without having to justify its use. NRCP 41(e).
9. Appeal and Error.
   An appellate court will not disturb the decision of the district court in dismissing an action for want of prosecution unless the district court grossly abused its discretion.
10. Pretrial Procedure.
    The element necessary to justify dismissal for failure to prosecute is lack of diligence on the part of the plaintiff, whether individually or through counsel.
11. Pretrial Procedure.
    The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination.
12. Pretrial Procedure.
    The plaintiff does not satisfy his duty to use diligence and to expedite his case to a final determination by merely filing a complaint.
13. Pretrial Procedure.
    The plaintiff must take action, after filing the complaint, to show that he is diligently prosecuting the case.
14. Pretrial Procedure.
    If the plaintiff fails to diligently pursue the case, the court does not abuse its discretion by invoking its inherent authority to dismiss the action.
15. Pretrial Procedure.
    A dismissal with prejudice is a harsh remedy to be utilized only in extreme situations; it must be weighed against the policy of law favoring the disposition of cases on their merits.
16. Pretrial Procedure.
    Because dismissal with prejudice is the most severe sanction that a court may apply, its use must be tempered by a careful exercise of judicial discretion.
17. Pretrial Procedure.
    While a dismissal under the rule governing dismissal for want of prosecution is presumed to be with prejudice, the district court has discretion to dismiss the action with or without prejudice. NRCP 41(e).
18. Pretrial Procedure.
    Because the law favors trial on the merits, dismissal with prejudice for failure to prosecute may not be warranted where such delay is justified by the circumstances of the case.
19. Pretrial Procedure.
    In determining whether to dismiss an action with prejudice for want of prosecution under its inherent authority, the district court should consider: (1) the underlying conduct of the parties, (2) whether the plaintiff offers adequate excuse for the delay, (3) whether the plaintiff's case lacks merit, (4) whether any subsequent action following dismissal would not be barred

by the applicable statute of limitations, and (5) any other relevant factors that may be pertinent to the court's consideration, such as the length and reasonableness of the delay.

20. Pretrial Procedure.
Each determination regarding whether to dismiss an action for want of prosecution under the court's inherent authority will require a case-by-case examination of appropriate factors.

21. Appeal and Error.
In considering whether to uphold a dismissal with prejudice by a district court entered pursuant to its inherent authority, the appellate court considers the same factors that are pertinent to the district court's exercise of discretion to dismiss an action with prejudice under the rule governing dismissal for want of prosecution and an appellate court's subsequent review of that decision. NRCP 41(e).

22. Trial.
Counsel's arguments are not evidence establishing the facts of the case.

23. Pretrial Procedure.
Dismissal with prejudice of action to quiet title and for adverse possession was not warranted for want of prosecution under court's inherent authority; both parties took actions suggesting that they believed settlement remained possible, and plaintiff had potentially valid claims for injunctive and declaratory relief based on theories of implied or prescriptive easement, irrevocable license, or agreed boundary by acquiescence.

24. Appeal and Error.
When reviewing the dismissal of an action for want of prosecution under the district court's inherent authority, in considering the conduct of the parties, the appellate court considers whether the parties behaved in accordance with a reasonable and good-faith belief that no court action was necessary.

25. Pretrial Procedure.
Plaintiff's alleged illness was not a factor that weighed against dismissal of case with prejudice under court's inherent authority for failure to prosecute; plaintiff's affidavit did not indicate when his ailments began to interfere with his ability to focus on litigation or when they would resolve to allow him to continue to pursue litigation, plaintiff's attorney could have taken legal action on plaintiff's behalf, and plaintiff's health problems had begun months before he initiated his lawsuit.

26. Pretrial Procedure.
A party seeking relief from dismissal where delay in prosecution is due to ill health or a medical condition should normally support its position by providing medical evidence proving hospitalization or disability to the court.

27. Pretrial Procedure.
If the party seeking relief from dismissal for want of prosecution alerts the court and the opposing party of a medical condition that results in a delay in prosecution, the party should keep the court and the opposing party apprised of the progress of the resolution of the medical condition.

28. Pretrial Procedure.
A district court may consider the merits of the action in exercising its discretion under the court's inherent authority to dismiss an action for want of prosecution.

29. Pretrial Procedure.
Not all dismissals for want of prosecution operate as an adjudication on the merits and thus a bar to a second suit against the same defendant on the same claim. NRCP 41(e).

30. Pretrial Procedure.
The district court has discretion to dismiss for want of prosecution with or without prejudice. NRCP 41(e).

31. Judgment; Pretrial Procedure.
Unless the district court states in its order that dismissal for want of prosecution is without prejudice, dismissal with prejudice is presumed and is res judicata and bars any other suit on the same claim. NRCP 41(e).

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Gibbons, C.J.:

These are consolidated appeals from a district court order dismissing an action with prejudice for want of prosecution and a post-judgment award of attorney fees and costs. Under the Nevada Rules of Civil Procedure and the court's inherent authority, a district court may dismiss an action for want of prosecution. NRCP 41(e); *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974). In this opinion, we address whether the district court abused its discretion in dismissing an action with prejudice for want of prosecution before the two-year time period in NRCP 41(e) expired and before the defendant filed an answer or other responsive pleading under NRCP 12. We also consider whether the district court erred in reaching its findings of fact on which it based its conclusions of law and whether the district court abused its discretion in awarding attorney fees and costs.

Our review of the record does not reveal any evidence to support the district court's findings of fact on which it based its conclusions of law and decision to dismiss the action with prejudice. As a result, we conclude that the district court abused its discretion in dismissing the action with prejudice. Accordingly, we reverse the district court's decision to dismiss the action with prejudice, vacate the subsequent order awarding attorney fees and costs, and remand the matter to the district court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

These consolidated appeals arise out of a property dispute between neighbors.[1] In 1980, appellant Richard Hunter acquired his property. To prevent flooding on his property caused by water run-

[1]We derive the following factual summary from the parties' pleadings, briefs, and arguments before this court and the district court. To the extent that any facts are in dispute, the positions of the parties relative to such facts are set forth herein.

off from an adjoining property, he sought his neighbor's permission to build a berm on her property. According to Hunter, the neighbor agreed, and in 1983, Hunter constructed the berm, which he asserts he continually maintained thereafter.

Around 2002, respondent William Gang acquired the same adjoining property with, according to Hunter, knowledge of the berm's existence. In 2009, Hunter attempted to sell his property, but was purportedly unsuccessful because of concerns raised by the potential buyer with regard to encroachments on Gang's property, including the berm. As a result, a dispute over the berm began, causing Hunter to initiate the lawsuit underlying this appeal.

Hunter's December 4, 2009, verified complaint asserted claims to quiet title and for adverse possession and sought injunctive and declaratory relief regarding the portion of Gang's property where Hunter built the berm. After Hunter filed the complaint, the parties met to discuss a possible settlement. During those negotiations, Hunter granted Gang an open extension of time to respond to the complaint. According to Gang, settlement negotiations then "broke down" in August 2010.

Despite this claimed lack of progress in settlement negotiations, Gang asserts that he continued to send settlement correspondence to Hunter through August 2011. Specifically, Gang claims he sent settlement correspondence to Hunter on four separate occasions between September and November 2010. In response to those four inquiries, Gang asserts Hunter's counsel responded once in November 2010, but the response indicated only that Hunter was traveling and that counsel would attempt to obtain an answer from him. Gang claims he did not receive any response thereafter, so he then sent an additional six settlement inquiries to Hunter between December 2010 and August 2011. Gang claims Hunter's counsel did not respond until August 2011, and then only indicated that counsel was on vacation and would not speak to Hunter until the following week. Gang maintains he did not receive any further correspondence from Hunter and, as a result, informed Hunter he would move for dismissal. Hunter disputes Gang's version of events, asserting that the parties were discussing settlement proposals, and Hunter was therefore operating under the impression that the parties would settle the case, up until the time Gang filed his motion to dismiss.

Gang moved to dismiss Hunter's action with prejudice for want of prosecution on August 11, 2011—20 months after Hunter filed his complaint. The two-page motion contained a short statement of facts, claiming settlement negotiations "broke down over a year ago and Hunter became unresponsive for extended periods of time." Gang further asserted that he had attempted frequent contact with Hunter but that Hunter had failed to "resolve the matter or move forward with litigation." Gang did not file an affidavit or declaration

to support his factual contentions.[2] Further, Gang did not identify the specific legal authority under which he sought dismissal. He did, however, cite to cases that identify the court's express authority under NRCP 41(e) to dismiss an action that a plaintiff has not brought to trial within two years, as well as cases discussing the court's inherent authority to dismiss an action for want of prosecution.

Hunter opposed the motion, arguing that dismissal was premature because the two-year time period in NRCP 41(e) had not passed. Alternatively, Hunter argued that if the district court considered entertaining the motion to dismiss, it should excuse any delay because he was having health issues. Specifically, Hunter explained that he had "been suffering from serious medical conditions that interfere[d] with his ability to focus on this litigation" and that his ailments "made it impossible for [him to] pursue th[e] matter until his health improve[d]." Hunter also attached an affidavit from his wife, which stated that since early 2009, Hunter had "been suffering from a series of health related problems, including heart problems, a series of mini strokes that resulted in the temporary loss of eyesight, pneumonia and . . . dangerously high blood pressure."

At the hearing on the motion to dismiss, Gang acknowledged that he was aware of Hunter's ill health[3] but noted that nearly two years had elapsed in the case and argued that Hunter was utilizing the lawsuit as leverage to pressure Gang into selling his property. Specifically, Gang asserted that Hunter wanted a portion of his property because a potential buyer had declined to purchase Hunter's property due to encroachments on Gang's property. Gang also alleged that Hunter had encroached onto another neighbor's property, as well as onto Gang's property again after he filed his complaint. Gang concluded his argument by requesting the district court to dismiss the case, at a minimum, without prejudice.

In response, Hunter argued that two years had not elapsed in the action and that Gang failed to cite a single case that supported a dismissal before two years. Hunter further emphasized his ill health and his counsel indicated that, because of Hunter's ill health, he had found it difficult to discuss the case with Hunter. Hunter explained that the sale with the potential buyer failed because Gang provided inaccurate information to the buyer regarding certain encroachments and asserted that he intended to amend his complaint accordingly. Hunter further questioned why Gang had not pursued any action to remove the alleged encroachments. Finally, Hunter asked the district court to permit the case to proceed and suggested a settlement conference in order to facilitate the process.

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[2]A party who files a pretrial motion involving factual contentions must file an affidavit or declaration with the motion to support those issues. *See* DCR 13(6); EDCR 2.21.

[3]It is unclear when or how Gang first became aware of Hunter's health problems.

The hearing lasted only nine minutes. The district court did not hear witness testimony or receive any evidence to supplement Hunter's verified complaint or his wife's affidavit, or to support Gang's otherwise unsupported assertions. The district court ultimately granted Gang's motion to dismiss with prejudice and directed Gang to prepare the findings of fact and conclusions of law.

Upon receiving the proposed order from Gang, Hunter refused to approve it because he claimed it contained unsupported findings of fact and conclusions of law, and essentially granted summary judgment. Nevertheless, Gang submitted the order, which the court signed, despite its lack of citation to legal authority and despite the fact that two years had not elapsed since Hunter filed his complaint. Hunter appealed the dismissal, which is pending before this court in Docket No. 59691.

Thereafter, Gang moved for attorney fees in the district court pursuant to NRS 18.010(2)(b), claiming that Hunter brought his claims without reasonable grounds or to harass, and for costs under NRS 18.020, as the prevailing party. The motion did not contain evidentiary support for Gang's substantive claims that Hunter brought the lawsuit without reasonable grounds or to harass,[4] and the district court did not conduct an evidentiary hearing. Nonetheless, the district court granted Gang's motion for attorney fees and costs in full. Hunter then appealed from that order, which is before us in Docket No. 63804, and the two appeals were subsequently consolidated.

ANALYSIS

The basis for the district court's dismissal with prejudice in this case was Hunter's purported failure to prosecute his action with diligence. The district court, however, did not specify the source of its authority when it granted Gang's motion to dismiss. Thus, to aid our analysis, we begin by discussing the applicable authorities under which the district court may dismiss an action for want of prosecution and the parties' arguments in relation to those authorities. After we determine the source of the district court's authority, we address whether the district court's findings of fact and the resulting dismissal of Hunter's action were proper.[5]

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[4]Gang supported his motion with his counsel's affidavit, but the affidavit only addressed the reasonableness of the fees under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Although Gang also attached an affidavit of counsel to his reply in support of a fees award, which set forth the dates on which Gang sent settlement correspondence to Hunter between September 2010 and August 2011, Gang provided this information in support of his request for costs and not as evidence that Hunter brought his claims without reasonable grounds or to harass.

[5]Since our decision on these issues is dispositive of this appeal, we do not directly consider Hunter's arguments regarding the award of attorney fees and costs.

Dismissal for want of prosecution

[Headnote 1]

Initially, we must identify the source of the district court's authority in dismissing the action. District courts in Nevada have two independent sources of authority under which they may dismiss an action for want of prosecution. First, district courts have express authority under NRCP 41(e), which permits dismissal whenever the plaintiff has failed to bring the action to trial within two years after the action is filed and requires dismissal if the plaintiff does not bring the action to trial within five years of filing the action. Second, Nevada district courts have inherent authority to dismiss an action for want of prosecution, which is "independent of any authority granted under statutes or court rules." *Moore*, 90 Nev. at 393, 528 P.2d at 1020.

Because the district court dismissed the underlying action before the two-year time period in NRCP 41(e) had passed, the district court could not have based the dismissal on its express authority.[6] Therefore, the district court must have dismissed Hunter's action under its second source of power, its inherent authority. Although the district court failed to specify that it dismissed the action pursuant to its inherent authority, under the circumstances of this case, inherent authority is the only possible justification for the district court's action.

Contrary to Hunter's argument that NRCP 41(e) limits the district court's inherent authority, the Nevada Supreme Court has held that the district court's inherent authority is not limited in this regard. *See Harris v. Harris*, 65 Nev. 342, 345-50, 196 P.2d 402, 403-06 (1948) (considering the court's inherent authority in light of a statute that was substantially the same as NRCP 41(e) and holding that the district court may exercise its inherent authority to dismiss an action for lack of prosecution before the statutory time period for dismissal has passed).

Hunter nevertheless argues that a district court's ability to resort to its inherent authority to dismiss an action for want of prosecution is restricted by *Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d

[6]District courts in the Eighth Judicial District also have express authority to dismiss an action for want of prosecution under local court rules. *See* EDCR 1.90(b)(2), (d)(1) (requiring that each department either dispose of or set for dismissal all civil cases not answered within 180 days of filing or those that have been pending longer than 12 months and in which no action has been taken for more than 6 months); EDCR 2.90(a) (giving the court authority to dismiss any civil action, on its own initiative and without prejudice, that has been pending for more than 12 months and in which no action has been taken for more than 6 months). Gang, however, did not argue that dismissal was proper under these rules, and thus, Gang has waived these arguments. Accordingly, we do not consider them. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

428 (2007), which Hunter argues permits a district court to exercise its inherent authority only in limited circumstances, such as when an established method fails or in an emergency situation. *See* 123 Nev. at 263, 163 P.3d at 441. Hunter thus argues that, because NRCP 41(e) provides the district court with an established method for dismissing an action for want of prosecution and because no emergency situation existed, the district court abused its discretion in resorting to its inherent authority and disregarding the time period in NRCP 41(e). Hunter's argument focuses only on *Halverson* and does not account for related caselaw regarding the court's ability to resort to its inherent authority.

In particular, in *City of Sparks v. Sparks Municipal Court*, 129 Nev. 348, 363, 302 P.3d 1118, 1129 (2013), the Nevada Supreme Court reviewed Nevada caselaw discussing inherent authority generally and concluded that a district court need not justify an exercise of inherent authority based on emergency circumstances or the failure of an established method "if [the] action falling under the court's inherent authority is part of the court's day-to-day functioning or regular management of its internal affairs." Rather, the court explained that a district court must justify an exercise of inherent authority only when "the court's need to exercise its inherent authority arises *outside* the court's regular management of its affairs." *Id*. (emphasis added). Thus, we continue our analysis with an overview of the sources of the court's inherent authority to determine whether the court's resort to its inherent authority in this case required justification before considering whether its use of that authority was an abuse of discretion.

[Headnotes 2-4]

"Inherent judicial powers stem from two sources: the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence." *Id*. at 362, 302 P.3d at 1128 (quoting *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000)). Under the separation of powers doctrine, the judiciary "has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice." *Goldberg v. Eighth Judicial Dist. Court*, 93 Nev. 614, 615-16, 572 P.2d 521, 522 (1977) (citations omitted). It follows, then, that courts may exercise their inherent authority under this doctrine to dismiss an action for want of prosecution "[t]o prevent undue delays and to control their calendars," *Moore*, 90 Nev. at 393, 528 P.2d at 1020, because such prevention and control is necessary for the courts to be able "to carry out the duties required for the administration of justice."[7] *Goldberg*, 93 Nev. at 615-16, 572 P.2d at 522.

[7]*See also Moore*, 90 Nev. at 395, 528 P.2d at 1021 (explaining that " '[t]he elimination of delay in the trial of cases and the prompt dispatch of court

[Headnotes 5-7]

Because the inherent authority to dismiss an action for want of prosecution is incidental to the duties required for the administration of justice and the court's management of its day-to-day activities, no justification is required for the court to resort to this inherent authority. *See Sparks*, 129 Nev. at 363-64, 302 P.3d at 1129. Accordingly, a district court need not demonstrate that some specific circumstance exists before it may resort to its inherent authority to dismiss an action for want of prosecution. *See generally Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 335 P.3d 199 (2014) (analyzing the district court's exercise of inherent authority to enter summary judgment sua sponte without delving into whether any of the circumstances set forth in *Halverson* existed). Nevertheless, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

[Headnote 8]

We remind courts that because inherent authority is not regulated by the Legislature or the people, it is more susceptible to misuse, and thus should be exercised sparingly. *See United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461 (4th Cir. 1993) (warning that inherent power "must be exercised with the greatest restraint and caution, and then only to the extent necessary"). Having concluded that a district court may properly exercise its inherent authority to dismiss an action for want of prosecution before the two-year time period in NRCP 41(e) has passed and without having to justify its use, we now turn to whether the district court abused its discretion in dismissing Hunter's action. *See Moore*, 90 Nev. at 393, 528 P.2d at 1020.

Abuse of discretion

Hunter contends that the district court abused its discretion in dismissing the action because Gang instigated the delay by requesting an extension of time to respond to the complaint and because any continued delay was due to Hunter's ill health. Gang responds that the district court did not abuse its discretion because Hunter failed to diligently pursue his claims after settlement negotiations deteriorated. We discuss the standards for dismissal for want of prosecution

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business are prerequisites to the proper administration of justice. These goals cannot be attained without the exercise by the courts of diligent supervision over their own dockets'" (quoting *Sweeney v. Anderson*, 129 F.2d 756, 758 (10th Cir. 1942))); *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (providing that the court's authority "to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). *Cf.* NRCP 1 (requiring that the rules of civil procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

in Nevada generally first, before specifically addressing whether the district court abused its discretion in dismissing Hunter's action with prejudice.

[Headnotes 9, 10]

This court will not disturb the decision of the district court in dismissing an action for want of prosecution unless the district court grossly abused its discretion. *Moore*, 90 Nev. at 395, 528 P.2d at 1021 (noting the gross abuse of discretion standard of review in a case that was dismissed with prejudice for want of prosecution); *see also Harris*, 65 Nev. at 350, 196 P.2d at 406 (recognizing the same standard of review for dismissal for want of prosecution but not specifying if the dismissal in that case was with or without prejudice). "The element necessary to justify dismissal for failure to prosecute is lack of diligence on the part of the plaintiff, whether individually or through counsel." *Moore*, 90 Nev. at 395, 528 P.2d at 1022.

[Headnotes 11, 12]

"The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination." *Id*. at 395, 528 P.2d at 1021 (internal quotation marks omitted). The plaintiff does not satisfy this duty, however, by merely filing a complaint. *See Raine v. Ennor*, 39 Nev. 365, 372, 158 P. 133, 134 (1916). This is because "'[t]he lack of diligence in prosecuting [a complaint] after it is brought leads to the same consequences as delay in bringing it.'" *Id*. (quoting *Streicher v. Murray*, 92 P. 36, 40 (Mont. 1907)). For example:

> Witnesses die or disappear, or the facts fade from memory. The positions of the parties change, or the subject of the controversy fluctuates in value. The right sought to be enforced becomes doubtful or uncertain, or it becomes impossible for the court to administer equity between the parties with any degree of certainty.

Id. (quoting *Streicher*, 92 P. at 40).

[Headnotes 13, 14]

Thus, the plaintiff must take action, after filing the complaint, to show that he is diligently prosecuting the case. *See id.* If the plaintiff fails to diligently pursue the case, the court does not abuse its discretion by invoking its inherent authority to dismiss the action. *See id.*; *Moore*, 90 Nev. at 395-96, 528 P.2d at 1021-22. Because the district court dismissed Hunter's complaint with prejudice, however, we expand our discussion to include Nevada caselaw regarding dismissals with prejudice.[8]

[8]We do not address whether a dismissal without prejudice, under the circumstances presented by this case, would have been a proper exercise of the district court's discretion because the parties have not argued this issue and

[Headnotes 15-18]

With respect to dismissals entered under the court's inherent authority, the Nevada Supreme Court has expressed that a "dismissal with prejudice is a harsh remedy to be utilized only in extreme situations." *Moore*, 90 Nev. at 393, 528 P.2d at 1021. "It must be weighed against the policy of law favoring the disposition of cases on their merits." *Id*. "Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a *careful* exercise of judicial discretion." *Id*. at 394, 528 P.2d at 1021 (alteration in original) (internal quotation marks omitted). While a dismissal under NRCP 41(e) is presumed to be with prejudice, *see Brent G. Theobald Constr., Inc. v. Richardson Constr., Inc.*, 122 Nev. 1163, 1167, 147 P.3d 238, 241 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008), the district court has discretion to dismiss the action with or without prejudice, *see Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993). "Because the law favors trial on the merits, however, dismissal with prejudice may not be warranted where such delay is justified by the circumstances of the case." *Home Sav. Ass'n*, 109 Nev. at 563, 854 P.2d at 854. Thus, cases that have analyzed a district court's authority to dismiss an action with prejudice, under either its express or inherent authority, suggest that the district court must take into account additional considerations, other than the lack of diligence.

The Nevada Supreme Court has not identified what circumstances justify dismissal with prejudice when the district court acts under its inherent authority, but it has identified several factors that the district court should consider when contemplating whether to dismiss an action with prejudice under the five-year provision of NRCP 41(e). Those factors include (1) "the underlying conduct of the parties," (2) "whether the plaintiff offers adequate excuse for the delay," (3) "whether the plaintiff's case lacks merit," and (4) "whether any subsequent action following dismissal would not be barred by the applicable statute of limitations." *Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 103, 158 P.3d 1008, 1012 (2007); *see also Home Sav. Ass'n*, 109 Nev. at 564, 854 P.2d at 854 (holding that district courts should consider the conduct of the parties, whether the underlying action has merit, and whether there was an adequate excuse for the delay in deciding whether to dismiss an action with prejudice under NRCP 41(e)'s mandatory dismissal provision).

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thus have not presented it on appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that an appellate court need not consider claims not cogently argued or supported by relevant authority).

We adopt these same factors here, as we find these cases instructive, especially in light of the fact that dismissals under NRCP 41(e) are permitted for the same reason that the court may dismiss an action under its inherent authority—for lack of diligence in the prosecution of an action. *See* NRCP 41(e) (allowing dismissal "for want of prosecution"); *Moore*, 90 Nev. at 393, 528 P.2d at 1020 ("Inherent in courts is the power to dismiss a case for failure to prosecute . . . ."); *cf. Volpert v. Papagna*, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969) (utilizing caselaw regarding a dismissal for want of prosecution under the court's inherent authority as guidance to determine whether the district court abused its discretion in dismissing a case for want of prosecution under NRCP 41(e)).

[Headnotes 19, 20]

Thus, in determining whether to dismiss an action with prejudice for want of prosecution under its inherent authority, the district court should consider the factors set forth above and any other relevant factors that may be pertinent to the court's consideration, such as the length and reasonableness of the delay. *See Monroe*, 123 Nev. at 103, 158 P.3d at 1012; *Home Sav. Ass'n*, 109 Nev. at 564, 854 P.2d at 854. We emphasize that not all of the factors may be pertinent to every decision to dismiss an action for want of prosecution entered under the court's inherent authority, and thus, each determination will require a case-by-case examination of appropriate factors. *See Monroe*, 123 Nev. at 103-04, 158 P.3d at 1012-13 (only considering the statute of limitations factor and concluding that the district court did not abuse its discretion in dismissing the complaint with prejudice because the statute of limitations on appellant's claims had already run when the order was entered, such that appellant could not file a new complaint even if the district court had dismissed the previous one without prejudice).

[Headnote 21]

Therefore, in considering whether to uphold a dismissal with prejudice by a district court entered pursuant to its inherent authority, we consider the same factors that are pertinent to the district court's exercise of discretion to dismiss an action with prejudice under NRCP 41(e) and an appellate court's subsequent review of that decision. Thus, we now consider the parties' underlying conduct, whether Hunter offered an adequate excuse for the delay, whether Hunter's claims lacked merit, and whether the statutes of limitation would have barred any subsequent action. *See id.* at 103, 158 P.3d at 1012. Because evaluating these factors requires us to review the district court's findings of fact and conclusions of law, we must first address Hunter's arguments regarding the propriety of those find-

ings and conclusions. Thereafter, we return to our discussion of the *Monroe* factors.

The findings and conclusions in the order

[Headnote 22]

Hunter argues that there is no evidence in the record to support the majority of the district court's findings of fact and conclusions of law based on those findings. This court defers to the district court's findings of fact and will not disturb them unless they are clearly erroneous or not supported by substantial evidence. *See Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. (quoting *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008)). Counsel's arguments are not evidence establishing the facts of the case. *See Nev. Ass'n Servs. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014). This court reviews the district court's legal conclusions de novo. *See Weddell*, 128 Nev. at 101, 271 P.3d at 748.

When the district court entered its order containing detailed findings of fact and conclusions of law, the only evidence it had received consisted of Hunter's verified complaint, *see Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 272, 44 P.3d 506, 513 (2002) (providing that a verified complaint is evidence), addressing only the berm, and Hunter's wife's affidavit, addressing only Hunter's health issues.[9] The district court, however, found that Hunter filed his complaint as leverage to pressure Gang into selling his property, that settlement negotiations broke down one year prior to when Gang filed his motion to dismiss, that Hunter had been unresponsive throughout the following year, that Hunter had staged a construction project on Gang's property during the pendency of the lawsuit, that Hunter's encroachments encompassed an area of 200 feet by 40 feet and included landscaping in addition to the berm, and that Hunter had previously encroached on Forest Service property—facts that neither Gang nor Hunter presented any evidence to support.

[Headnote 23]

Thus, having reviewed the record, we conclude that the evidence presented to the district court does not support nearly all of the court's factual findings, and no evidence was presented to sustain its conclusions that Hunter failed to timely prosecute his case and that Hunter's claims lacked merit. We now return to the discussion of the *Monroe* factors to determine whether the district court abused

[9]At the hearing on the motion to dismiss, neither party offered the court any additional evidence.

its discretion by dismissing Hunter's action with prejudice for want of prosecution.[10] *See Monroe*, 123 Nev. at 103, 158 P.3d at 1012.

The underlying conduct of the parties

[Headnote 24]

We review the conduct of the parties without deference to the district court's findings because, as discussed above, its findings are unsupported by any evidence. *See Weddell*, 128 Nev. at 101, 271 P.3d at 748. Instead, we look to the record to determine whether the underlying conduct of the parties weighs in favor of dismissal with prejudice. In considering the conduct of the parties, we consider whether the parties behaved in accordance with a reasonable and good-faith belief that no court action was necessary. *See Home Sav. Ass'n*, 109 Nev. at 564, 854 P.2d at 854.

Here, the parties entered into settlement negotiations after Hunter filed his complaint, and then Hunter granted Gang an extension of time to file an answer while the parties discussed settlement. Thus, during the time the parties discussed settlement, it seems reasonable that Hunter would not continue to pursue litigation, such as by withdrawing the open extension previously granted or by seeking default. *See id.* (concluding the appellant's inaction was reasonable because it believed its subsidiary corporation was actively asserting its interest in the district court).

The parties dispute whether settlement negotiations effectively concluded as a result of inaction or a lack of progress. Gang argues that settlement negotiations deteriorated in August 2010, and Hunter claims the parties continued to discuss settlement until Gang filed his motion to dismiss. Neither party presented any evidence to the district court to support their position before the district court entered its order of dismissal. Both parties' behavior, however, suggests that settlement negotiations were ongoing.

First, Hunter did not seek default or demand Gang to file an answer. Second, Gang continued to send settlement correspondence to Hunter after Gang claimed settlement negotiations had deteriorated and did not seek to further the case by filing an answer.[11] If set-

[10]We note at the outset that while the district court did not have the benefit of this opinion when entering its dismissal order, because the district court's order touched upon the facts that are pertinent to the decision of whether to dismiss with prejudice, the record shows that the district court may have considered them, even if not purposefully.

[11]We note that Hunter does not dispute that he had granted Gang an open-ended extension of time to file the answer. Thus, in the absence of any effort by Hunter to fix a time for Gang to file an answer, the law did not require Gang to take any action. *See Thran v. First Judicial Dist. Court*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963) ("The defendant is required only to meet the plaintiff step by step as the latter proceeds.").

tlement negotiations had deteriorated, Gang's sedentary approach is confusing, considering Gang requested, and Hunter granted, an extension of time to respond to the complaint only while the parties engaged in settlement negotiations, and the alleged encroachment would remain on Gang's property until he obtained affirmative court relief. *See id.* (concluding that the parties' conduct weighed in favor of reversing the dismissal with prejudice where the appellant's delay in proceeding with litigation was justifiable during respondent's appeal of another district court ruling because that appeal would determine the parties' rights). Therefore, because the parties' behavior in failing to take court action suggests that both parties believed settlement remained possible, we conclude this factor supports a determination that dismissal with prejudice was an abuse of discretion.

The adequacy of the excuse

[Headnote 25]

The district court found that Hunter failed to provide an adequate excuse for his lack of diligence. This court will defer to the district court's finding unless it is clearly erroneous or not supported by substantial evidence. *See Weddell*, 128 Nev. at 101, 271 P.3d at 748. Hunter argues that a series of medical conditions, including heart problems, mini-strokes, loss of eyesight, pneumonia, and high blood pressure interfered with his ability to focus on the litigation and that the district court should have considered this an adequate excuse for the delay in prosecuting his action. Gang argued that this was not an adequate excuse to justify the one-year delay.

As evidence, Hunter presented his wife's affidavit to the district court, which attested to Hunter's illness and its effect on Hunter's ability to focus on the litigation. Hunter's wife's affidavit, however, stated that Hunter had been suffering from ill health since early 2009, months before the litigation began. Neither Hunter nor his wife's affidavit indicated when his ailments began to interfere with his ability to focus on the litigation or when they would resolve to allow him to continue to pursue litigation. Therefore, even in light of Hunter's substantiated claim that his ill health caused the delay, we conclude sufficient evidence supports the district court's finding that Hunter's ill health was inadequate to excuse a 20-month period in which he failed to take any court action. *See Moore*, 90 Nev. at 395, 528 P.2d at 1021.

Moreover, even if adequate, Hunter's illness excuse would not necessarily extend to his attorney, who could have contacted opposing counsel, and if necessary, filed for default under NRCP 55 or taken other legal action. *See id.* at 395, 528 P.2d at 1022 (providing that counsel's lack of diligence is sufficient to justify dismissal for want of prosecution); *cf. Walls v. Brewster*, 112 Nev. 175, 178-79,

912 P.2d 261, 263 (1996) (recognizing that while an attorney's illness may be the basis for a claim of excusable neglect in failing to file an opposition, such excuse does not extend to cocounsel who could have filed the opposition).

On appeal, Hunter first relies on *Jarva v. United States*, 280 F.2d 892, 894-95 (9th Cir. 1960), to argue that a plaintiff's illness is sufficient to justify a delay in prosecution. The facts in *Jarva*, however, are distinguishable from the facts of this case. There, the United States Court of Appeals for the Ninth Circuit vacated an order of dismissal for lack of prosecution where the plaintiff's four-month hospitalization caused him to fail to file a certificate of readiness for trial in accordance with court practice. *Id*. In vacating the order, the Ninth Circuit explained that "during the time [the plaintiff] was hospitalized, it would seem grossly unfair to force him to trial during such a period unless the [defendant] was suffering some unusual prejudice at the time." *Id.*

Unlike the plaintiff in *Jarva*, who was hospitalized just before trial, Hunter began experiencing health problems in early 2009, months before he initiated his lawsuit. Further, the plaintiff's hospitalization in *Jarva* only prolonged the proceedings temporarily. *Id.* Here, the record gave no indication of when, if ever, Hunter would be healthy enough to continue litigation. In his opposition to Gang's motion to dismiss, Hunter merely indicated that his ailments "made it impossible for [him to] pursue this matter *until his health improves*." (Emphasis added.) Therefore, when we compare the timing and duration of the plaintiff's illness in *Jarva* with that of Hunter's, we conclude *Jarva* is sufficiently distinguishable, and thus does not guide our decision in the present case.[12]

We emphasize that we do not hold today that a plaintiff's prolonged illness is never an adequate excuse for a delay in prosecution, as the Nevada Supreme Court has previously found the illness of both a plaintiff and his wife to be adequate. *See In re McGregor*, 56 Nev. 407, 411, 48 P.2d 418, 420 (1935) (recognizing the plaintiff's illness and the prolonged sickness of his wife as adequate to excuse a delay in the proceedings based on information contained in the plaintiff's affidavit).

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[12]Similarly, we find Hunter's reliance on *Hevner v. Village East Towers, Inc.*, 293 F. App'x 56 (2d Cir. 2008), to argue that this court should vacate the district court's order if the district court failed to consider the plaintiff's disability helpful, but not determinative. There, the United States Court of Appeals for the Second Circuit concluded that because appellant's disability impaired her performance of many routine tasks, and because she was not represented by counsel, her delays did not warrant a dismissal of her complaint. *Id.* at 58. While this decision may serve as persuasive authority regarding whether Hunter's illness was an adequate excuse for the delay, it is not dispositive of the issues before this court.

[Headnotes 26, 27]

Under the circumstances here, however, Hunter made an insufficient showing that the delay was excusable due to his illness.[13] Therefore, this factor suggests that dismissal with prejudice was not an abuse of discretion.

The merit of the claims

[Headnote 28]

While a district court may "consider the merits of the action in exercising its discretion" to dismiss an action for want of prosecution, *Volpert*, 85 Nev. at 441, 456 P.2d at 850 (internal quotation marks omitted), the district court's order here does not indicate a basis for its conclusion that "Hunter's claims for quiet title, injunctive relief, adverse possession, and declaratory relief to attempt to obtain title to the Encroachment lack merit." We review these legal conclusions de novo. *See Weddell*, 128 Nev. at 101, 271 P.3d at 748.

It appears that the district court based its conclusion that Hunter's claims lacked merit on Gang's unsupported allegations of Hunter using the lawsuit as leverage to pressure him into selling his property and attempting "to amass property that is beyond his own boundaries." Indeed, at the hearing, the court said, "[w]ell, I just think there's more to it than he's sitting on his rights right now. I don't think he has a position and he's just filed a suit in hopes that something sticks if he throws it against the wall." But, as discussed above, the only evidence presented to the district court consisted of Hunter's verified complaint, *see Vaile*, 118 Nev. at 272, 44 P.3d at 513, and Hunter's wife's affidavit, neither of which contained information that could be viewed as substantial evidence supporting the district court's findings in this regard. *See Weddell*, 128 Nev. at 101, 271 P.3d at 748. Accordingly, this would be an improper basis for the court's conclusion that Hunter's claims lacked merit.

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[13]A party seeking relief from a delay in prosecution due to ill health or a medical condition should normally support its position by providing medical evidence proving hospitalization or disability to the court. *See Davis v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967) (noting that in filing a motion for continuance because of plaintiff's illness, counsel attached a doctor's letter stating that plaintiff "had been under the doctor's care since March 19 suffering from virus pneumonitis, was responding slowly to treatment and could not leave the area for the next seven to ten days," and concluding that dismissal was too harsh of a sanction based, in part, on that fact). Additionally, if the party alerts the court and the opposing party of a medical condition that results in delay, the party should keep the court and the opposing party apprised of the progress of the resolution of the medical condition. *See Smith v. Gold Dust Casino*, 526 F.3d 402, 403, 405 (8th Cir. 2008) (noting that in requesting a discovery extension, the plaintiff explained he was experiencing health problems related to, among other things, cardiac artery disease and continued to apprise the court of his health progress by informing it he would undergo heart surgery, and reversing the dismissal of the case, in part, on that basis).

[Headnotes 29-31]

On appeal, Gang argues that this court should affirm the district court's dismissal with prejudice because Hunter failed to pay or even plead the payment of property taxes on the property, which he argues is dispositive of the adverse possession claim. Hunter responds that the dismissal cannot be justified on the basis of a pleading deficiency because Gang did not move to dismiss under NRCP 12(b)(5). He further contends that the silence in the record regarding the payment of taxes does not warrant an assumption that he did not pay or tender property taxes and thus permit the conclusion that his claims lack merit on this basis. Even assuming Gang is correct and Hunter's failure to plead the payment of property taxes in accordance with NRS 40.090(1)[14] is dispositive of his adverse possession claim and the related quiet title claim,[15] that deficiency would not dispose of Hunter's claims for injunctive and declaratory relief based on the theories of an implied or prescriptive easement, irrevocable license, or an agreed boundary by acquiescence because the payment of taxes is not an element of those claims.[16] Therefore, this factor suggests the dismissal with prejudice was an abuse of discretion.[17]

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[14]NRS 40.090(1) specifically requires the party bringing an adverse possession action to assert in a verified complaint that he personally, or his predecessor in interest, has "paid all taxes of every kind levied or assessed and due against the property during the period of 5 years next preceding the filing of the complaint." *See also Potts v. Vokits*, 101 Nev. 90, 93, 692 P.2d 1304, 1306 (1985) ("[T]he payment of taxes is an absolute requirement for claiming land through adverse possession.").

[15]*See Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318-19, 302 P.3d 1103, 1106 (2013) (providing that "[a] plea to quiet title does not require any particular elements, but 'each party must plead and prove his or her own claim to the property in question' and a 'plaintiff's right to relief therefore depends on superiority of title'" (quoting *Yokeno v. Mafnas*, 973 F.2d 803, 808 (9th Cir. 1992))).

[16]Further, given the procedural posture at the time, Hunter could have sought leave to amend his complaint. *See* NRCP 15(a) (providing that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires"). *See also Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 291-92, 357 P.3d 966, 976 (Ct. App. 2015) (holding that the district court prematurely concluded that plaintiff's proposed amendment would be futile under NRCP 56 before a sufficient legal basis existed to warrant such a conclusion).

[17]We also clarify that, contrary to Gang's assertion during appellate oral argument, not all dismissals for want of prosecution operate as an adjudication on the merits and thus a bar to a second suit against the same defendant on the same claim. NRCP 41(e) states, in pertinent part: "A dismissal under this subdivision (e) is a bar to another action upon the same claim for relief against the same defendants *unless the court otherwise provides*." (Emphasis added.) Accordingly, "the district court has discretion under NRCP 41(e) to dismiss with or without prejudice." *Home Sav. Ass'n*, 109 Nev. at 563, 854 P.2d at 854. And,

Statutes of limitation

Because neither the record nor the parties' briefs include any information regarding the statutes of limitation applicable to Hunter's claims, we decline to attempt to assess whether the applicable statutes of limitation would have precluded a subsequent action following dismissal, and thus whether a dismissal with prejudice would have been appropriate on that basis. *See Monroe*, 123 Nev. at 103-04, 158 P.3d at 1013.

Accordingly, because we conclude the conduct of the parties and the merits of the action weigh against dismissal with prejudice, we conclude the district court abused its discretion in dismissing Hunter's action with prejudice. *See id.* at 102-03, 158 P.3d at 1012; *Home Sav. Ass'n*, 109 Nev. at 565, 854 P.2d at 854 (providing that "a district court should be more reluctant to dismiss with prejudice when the underlying action is meritorious"). In cases where the Nevada Supreme Court has affirmed the district court's dismissal of an action with prejudice prior to the NRCP 41(e) two-year period, such dismissal came after the plaintiff's failure to comply with a deadline or appear for trial. *See Walls*, 112 Nev. at 178-79, 912 P.2d at 262-63 (holding that dismissal with prejudice for want of prosecution before two years had passed was appropriate where plaintiff failed to complete arbitration within one year, as required by NAR 12(B), and failed to oppose defendant's motion to dismiss after receiving two extensions); *Moore*, 90 Nev. at 394-97, 528 P.2d at 1021-23 (affirming a dismissal with prejudice for lack of prosecution before two years had passed where plaintiffs and their attorneys, being aware of the date and place of the trial, failed to appear for trial or request a continuance). Neither situation, however, was the case here, nor was the situation even similar to those two cases.

CONCLUSION

In light of the foregoing, we conclude that the majority of the district court's findings of fact, on which it based its conclusions of law and decision to dismiss the action with prejudice, are unsupported by any evidence in the record. We further determine that the evidence that was presented does not support a finding that dismissal with prejudice was warranted. Accordingly, we conclude the district court abused its discretion[18] in dismissing Hunter's action with prejudice. Therefore, we reverse the district court's decision to dismiss the action with prejudice, vacate the order of attorney fees and costs

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"unless the district court states in its order that dismissal is without prejudice, dismissal with prejudice is presumed and is res judicata and bars any other suit on the same claim." *Theobald Constr.*, 122 Nev. at 1167, 147 P.3d at 241 (internal footnotes and quotation marks omitted).

[18]As defined in *Moore*, 90 Nev. at 395, 528 P.2d at 1021.

based on that dismissal, and remand the matter to the district court for further proceedings consistent with this opinion.[19]

TAO and SILVER, JJ., concur.

DEANGELO R. CARROLL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64757

April 7, 2016 371 P.3d 1023

Appeal from an amended judgment of conviction for conspiracy to commit murder and first-degree murder with a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The supreme court, CHERRY, J., held that: (1) it was not plain error for the district court to admit wire tape recordings since they were relevant to defendant's guilt and were not unfairly prejudicial; (2) statements of the club's managers on the wire recordings, that defendant made while assisting police, were admissible; (3) admission of coconspirators' statements did not violate defendant's right against self-incrimination; (4) defendant was in police custody, for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), when he gave his inculpatory statements; and (5) defendant's statement to police after he received the *Miranda* warnings should have been suppressed since police delayed recitation of the *Miranda* warnings until the defendant confessed to the crime.

Affirmed.

[Rehearing denied June 23, 2016]

[En banc reconsideration denied September 23, 2016]

Mario D. Valencia, Henderson, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Marc P. DiGiacomo* and *Jonathan E. VanBoskerck*, Chief Deputy District Attorneys, Clark County, for Respondent.

1. CRIMINAL LAW.

It was not plain error for the district court to admit wire tape recordings since they were relevant to murder defendant's intent and they were not unfairly prejudicial; defendant volunteered to wear recording device to

[19]We further deny each party's request for attorney fees on appeal, *see* NRAP 38(b) (allowing attorney fees to be awarded on appeal in certain circumstances), and Hunter's motion to strike Gang's notices of supplemental authorities.

corroborate his story and to get incriminating information from the other players, there was evidence on the tapes to support both defendant's position that this was never meant to be a killing and the State's position that it was, and jury heard the proper context for defendant's statements, namely that the tapes were made as part of the investigation. NRS 48.015, 48.035.

2. Criminal Law.
   Because defendant did not object to admission of wire tape recordings based on relevance or prejudice, the supreme court would review defendant's claim for plain error.
3. Criminal Law.
   Under the plain error standard, the supreme court only reverses a decision if the error affects the appellant's substantial rights.
4. Homicide.
   Because central issue of murder case was defendant's intent before and during the shooting, any evidence allowing the jurors to ascertain his intent was extremely probative.
5. Criminal Law.
   Wire recordings, containing murder defendant's statements, were not excludible as hearsay, absent indication the police directly instructed defendant what to say while defendant was wearing recording device to corroborate his story by speaking with club management, and because defendant's statements were not offered to prove their truth; State offered the statements to provide context to those of the club managers, and had the State offered defendant's statements for their truth, they would still be admissible as statements of a party, detectives only assisted defendant with general subject matter and it was defendant who decided what to say and how to say it, and defendant's recording device could not transmit live audio, so the detectives could not communicate with defendant while he recorded. NRS 51.035(3)(a).
6. Criminal Law.
   Because defendant did not object at trial based on hearsay, the supreme court would review for plain error whether wire recordings, containing defendant's statements, were inadmissible hearsay.
7. Criminal Law.
   Party's statement offered to provide context to another person's statement, rather than for its own truth, is not hearsay.
8. Criminal Law.
   Statements of the club's managers, on wire recordings that murder conspiracy defendant made while assisting police, were admissible; while defendant was speaking with managers, they believed they were still trying to avoid detection, and therefore, they were defendant's coconspirators, defendant did not make his withdrawal known to his coconspirators, and even if defendant had withdrawn from the conspiracy, the other members had not. NRS 51.035(3)(e).
9. Criminal Law.
   Furtherance of the conspiracy is not limited to the commission of the crime; it also applies to attempts to avoid detection.
10. Criminal Law.
    At the time a coconspirator's statement is made, the defendant need not be a member of the conspiracy. NRS 51.035(3)(e).
11. Criminal Law.
    While avoiding detection and arrest are in furtherance of a conspiracy, for purpose of determining admissibility of coconspirator statements, the conspiracy does not continue endlessly.

12. Criminal Law.
    Admission of coconspirators' statements did not violate defendant's right against self-incrimination because these statements did not force him to testify and both parties provided the proper context to the statements; defendant complained that the admission of the wire recordings of coconspirators' statements made it difficult in deciding whether to testify, but facing such a decision to testify did not violate defendant's constitutional rights, and defendant did not testify and was able to put the recordings in the proper context. U.S. Const. amend. 5.
13. Criminal Law.
    Defendant did not preserve self-incrimination issue for appeal because, when the district court admitted the wire recordings of coconspirators' statements, defendant did not object based on his right against self-incrimination, and although defendant did not preserve this issue for appeal, the supreme court would address it because it was a constitutional issue. U.S. Const. amend. 6.
14. Criminal Law.
    Totality of the circumstances is the primary consideration for determining voluntariness of defendant's statement.
15. Criminal Law.
    When determining if defendant's statement is voluntary, the trial court should consider factors such as the youth of the accused, lack of education or low intelligence, lack of any advice of constitutional rights, length of detention, repeated and prolonged nature of questioning, and use of physical punishment such as the deprivation of food or sleep.
16. Criminal Law.
    Trial courts should consider police deception in evaluating the voluntariness of a confession.
17. Criminal Law.
    Deception by police does not automatically render a confession involuntary.
18. Criminal Law.
    Police subterfuge is permissible if the methods used are not of a type reasonably likely to procure an untrue statement.
19. Criminal Law.
    Police did not coerce murder defendant's statement; police did not take advantage of defendant through his youth, a lengthy detention, repeated and prolonged questioning, or physical punishment, and detective did not observe any indicators during the interrogation that defendant was cognitively disabled, and while defendant might have misunderstood the detectives' statements as a promise of leniency, the promise of taking defendant home at the end of the interrogation and trying to prove his story were not impermissible falsehoods that would render defendant's statements involuntary.
20. Criminal Law.
    Trial court's custody and voluntariness determinations present mixed questions of law and fact subject to the supreme court's de novo review.
21. Criminal Law.
    When the trial court's determination that a defendant was not improperly induced to make the statement to police is supported by substantial evidence, such a finding will not be disturbed on appeal.
22. Criminal Law.
    District courts have a duty to enter a proper order with factual findings and legal conclusions when ruling on motions to suppress statements in order to facilitate appellate review.

23. Criminal Law.
Because of the suppression, the district court did not make any factual findings pertaining to the scene- and action-setting circumstances surrounding the interrogation, and therefore, the supreme court could not give deference to any such findings.

24. Criminal Law.
Miranda v. Arizona, 384 U.S. 436 (1966), warnings are required when a suspect is subjected to a custodial interrogation.

25. Criminal Law.
Defendant's statements made during a custodial interrogation may be admitted at trial only if *Miranda v. Arizona*, 384 U.S. 436 (1966), rights were administered and validly waived.

26. Criminal Law.
Defendant is "in custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966), if defendant has been formally arrested or his or her freedom has been restrained to the degree associated with a formal arrest so that a reasonable person would not feel free to leave.

27. Criminal Law.
Custody, for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), is determined by the totality of the circumstances, including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning.

28. Criminal Law.
Individual is not in custody for *Miranda v. Arizona*, 384 U.S. 436 (1966), purposes if the police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation.

29. Criminal Law.
Although murder defendant was not formally under arrest, he was in police custody, for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), when he gave his inculpatory statements; police drove defendant in an official police vehicle to the homicide office to conduct the interrogation, so defendant could not terminate interrogation unless the detectives agreed and gave him a ride home, detectives intimidated defendant by taking him to the homicide office instead of questioning him at more convenient location, and by seating defendant in small room furthest from the door and putting desk and two police detectives between him and the exit, defendant was physically precluded from leaving the room unless detectives allowed it, police did not allow defendant to use his telephone when he said he needed to make a call so he could confirm that he did not kill victim, and detectives did not tell defendant he was free to leave.

30. Criminal Law.
Objective indicia of arrest, for *Miranda v. Arizona*, 384 U.S. 436 (1966), purposes, include whether: (1) the suspect was told that the questioning was voluntary or that he was free to leave, (2) the suspect was not formally under arrest, (3) the suspect could move about freely during questioning, (4) the suspect voluntarily responded to questions, (5) the atmosphere of questioning was police-dominated, (6) the police used strong-arm tactics or deception during questioning, and (7) the police arrested the suspect at the termination of questioning.

31. Criminal Law.
Murder defendant's statement to police after he received the *Miranda v. Arizona*, 384 U.S. 436 (1966), warnings should have been suppressed since police delayed recitation of the *Miranda* warnings until the defendant confessed to the crime; midstream warnings did not properly advise defendant that he could terminate the interrogation despite his previous

inculpatory statements, defendant's post-warning statements were simply a repetition of his pre-warning statements, and although police recited *Miranda* warnings, defendant was just as dependent upon police to take him home and just as fearful he would go to jail after he received the warnings as he was before, and despite the short break in questioning, defendant was subjected to a single, continuous course of questioning during which the detectives chose to withhold *Miranda* warnings.

32. Criminal Law.
The district court's error in admitting murder defendant's unwarned statements was harmless, given that the court properly admitted other powerful evidence of defendant's guilt; even without his statements to police, the remaining evidence was sufficient to sustain conviction.

33. Conspiracy; Homicide.
Evidence was sufficient to support defendant's convictions for conspiracy to commit murder and murder with use of a deadly weapon; evidence supported a finding that defendant knew the order was to kill victim and that defendant recruited coconspirator so he did not have to kill victim himself.

34. Criminal Law.
One error cannot cumulate for purposes of cumulative error doctrine.

Before Parraguirre, C.J., Douglas and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

In this opinion, we focus on whether the district court erred when it admitted Deangelo Carroll's inculpatory statements to the police. Carroll was not advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and he claims he was subject to a custodial interrogation. The State of Nevada claims that *Miranda* warnings were not necessary because Carroll spoke with the police voluntarily. We conclude that the district court erred in denying Carroll's motion to suppress his statements to police because police subjected Carroll to a custodial interrogation without advising him of his *Miranda* rights. Nonetheless, we conclude that the error was harmless beyond a reasonable doubt, so we decline to reverse these convictions.

FACTS AND PROCEDURAL HISTORY

On May 19, 2005, police discovered Timothy J. Hadland's body on Northshore Road near Lake Mead. Along with Hadland's body, police found advertisements for the Palomino Club. Hadland was fired from his job at the Palomino Club a week before his death. Palomino Club management recruited Carroll to "knock[ ] off" Hadland because Hadland was spreading negative rumors about the club.

Carroll was also an employee at the Palomino Club. Carroll used the club's van to promote the club by handing out flyers to cab drivers and tourists. On the night of Hadland's murder, Carroll drove

the club's van with two other men, Rontae Zone and Jayson Taoipu, who occasionally assisted him. Carroll recruited Kenneth Counts for this assignment because Carroll knew Counts would "take care of" someone for money.

Carroll, Zone, Taoipu, and Counts went to an area near Lake Mead, and Carroll called Hadland. When Hadland noticed the Palomino Club's van, Hadland parked his car in front of the van and walked to the driver's side window where Carroll was sitting. As Hadland and Carroll talked, Counts exited the van through the side door, snuck around to the front, and fired two shots into Hadland's head. Counts then jumped back into the van and ordered Carroll to return to town.

Carroll drove directly to the Palomino Club and told club management what occurred. Louis Hidalgo, Jr., the general manager of the club, directed other employees to give Carroll $6,000 in cash to pay Counts. Carroll gave the money to Counts, who then left in a cab. The next morning, at Hidalgo's direction, Carroll bought new tires for the van and disposed of the old tires at two separate locations.

The evening after Hadland's murder, homicide detectives contacted Carroll at the Palomino Club, as Carroll's phone number was the last phone number on Hadland's phone. When the detectives asked to speak with Carroll, he agreed, and the detectives drove Carroll to the homicide office for questioning. Carroll sat in a small room at a table with his back to the wall, while the detectives sat between him and the exit. The detectives did not give Carroll *Miranda* warnings before questioning him, but they informed Carroll that he was speaking with them voluntarily. Eventually, Carroll implicated himself, Palomino Club management, and Counts in Hadland's murder.

Carroll then volunteered to wear a recording device to corroborate his story by speaking with the Palomino Club management. The detectives strategized with Carroll before he spoke with the management each time. The information on these recordings allowed the State to charge three members of Palomino Club management for their roles in Hadland's murder.

After the detectives finished obtaining information and evidence from Carroll, they arrested him. The State's information charged Carroll with conspiracy to commit murder and murder with use of a deadly weapon.

After seven days of trial, the jury returned a guilty verdict on all charges. The jury subsequently returned its penalty verdict and recommended a sentence of life with the possibility of parole. The district court ultimately sentenced Carroll to 36-120 months on the conspiracy conviction, life with the possibility of parole after 20 years for the first-degree murder conviction, and life with the possibility of parole after 20 years, consecutive, for the deadly weapon enhancement.

DISCUSSION

On appeal, Carroll argues that: (1) the wire recordings should not have been admitted against him at trial because they were not relevant, were prejudicial, consisted of inadmissible hearsay, and violated his right against self-incrimination; (2) the district court erred when it admitted his statements to the detectives because the detectives violated *Miranda* and coerced his statement; (3) there was insufficient evidence to support the convictions for conspiracy to commit murder, first-degree murder, and the deadly weapon enhancement; and (4) cumulative error warrants reversal.

Wire recordings

Whether the relevance of the recordings was substantially outweighed by unfair prejudice

[Headnote 1]

Carroll argues that the district court abused its discretion by admitting wire tape recordings because they were not relevant to his guilt or innocence and were unfairly prejudicial.[1] He explains he was playing a role fed to him by detectives, so a juror could not discern which statements Carroll fabricated and which statements the detectives fed him.

[Headnotes 2, 3]

Carroll did not object based on relevance or prejudice; thus, this court reviews for plain error. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). Under the plain error standard, this court only reverses a decision if the error affects the appellant's substantial rights. *Rimer v. State*, 131 Nev. 307, 332-33, 351 P.3d 697, 715 (2015).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Evidence that is not relevant is simply inadmissible. NRS 48.025. Even if relevant, evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035.

Here, Carroll's argument that the recordings were not relevant is without merit. Even under Carroll's account of the facts, the purpose of the recordings was to get the managers of the Palomino Club to corroborate Carroll's claim that he was supposed to beat up Hadland, not kill him. If the recordings accomplished exactly what Carroll wanted, they would have made it less probable that Carroll

[1]The State's argument that because Carroll referenced the recordings in his closing argument, he cannot attack their relevance now is unpersuasive. No defendant should be expected to ignore damning evidence against him even if he disagrees with its admissibility.

intended for Hadland to die. Unfortunately for Carroll, there was evidence on the tapes to support both his position that this was never meant to be a killing, and the State's position, that it was.

[Headnote 4]

Carroll's argument that the tapes' probative value was substantially outweighed by their unfairly prejudicial effect also fails. The central issue of this case was Carroll's intent before and during the shooting. Any evidence allowing the jurors to ascertain his intent is extremely probative. Further, the jury heard the proper context for Carroll's statements—that the tapes were made as part of the investigation, Carroll wore the wire to get incriminating information from the other players, and his statements were fabrications. Because the probative value was great, and the danger of unfair prejudice or confusion was mostly, if not completely, explained away, we conclude that the district court did not commit plain error when it admitted the tapes.

Because Carroll is unable to demonstrate plain error, we conclude that the district court did not plainly err when it admitted the recordings at trial. We so conclude because relevancy is a very broad standard and the tapes could prove Carroll's intent. Also, because Carroll's intent was the primary issue at trial, the probative value is not substantially outweighed by the unfairly prejudicial effect.

Whether Carroll's statements were inadmissible hearsay

[Headnote 5]

Carroll argues his statements on the recordings were not his own but those of a state actor. He further argues that it would be absurd for the police to feed a person lines, then use those lines against that person at trial. The issue before us is whether the wire recordings were inadmissible hearsay.

[Headnote 6]

Carroll did not object at trial based on hearsay, thus, this court reviews only for plain error. *Baltazar-Monterrosa*, 122 Nev. at 614, 137 P.3d at 1142.

[Headnote 7]

Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. NRS 51.035. Hearsay is generally inadmissible, unless there is a statutory exception. NRS 51.065(1). A party's own statement offered against that party is not hearsay. NRS 51.035(3)(a). Also, a party's statement offered to provide context to another person's statement, rather than for its own truth, is not hearsay. *Wade v. State*, 114 Nev. 914, 917-18, 966 P.2d 160, 162-63 (1998), *opinion modified on denial of reh'g*, 115 Nev. 290, 986 P.2d 438 (1999).

Carroll's argument that his statements were inadmissible hearsay is not supported by the evidence. The State offered the statements to provide context to those of the Palomino Club managers. Fur-

ther, had the State offered Carroll's statements for their truth, they would still be admissible as statements of a party pursuant to NRS 51.035(3)(a). Carroll claims the detectives told him what to say, but the evidence at his trial showed the detectives simply assisted with general subject matter; Carroll decided what to say and how to say it. Carroll's recording device could not transmit live audio, so the detectives could not communicate with Carroll while he recorded. Accordingly, we conclude that the wire recordings were admissible because there is no evidence before this court at this time indicating the police directly instructed Carroll what to say. We also conclude that the recordings were admissible because Carroll's statements were not offered to prove their truth.

Whether the statements of the managers of the Palomino Club were made in furtherance of the conspiracy

[Headnote 8]

Carroll argues the statements of the Palomino Club's managers on the wire recordings were not admissible because the statements were not made in furtherance of the conspiracy. Carroll further claims that because he withdrew from the conspiracy by acting as the State's agent, the statements were not made by coconspirators and were inadmissible.

[Headnotes 9, 10]

A statement made by a member of a conspiracy, made during the course of and in furtherance of the conspiracy and offered against another member of the conspiracy, is not hearsay. NRS 51.035(3)(e). Furtherance of the conspiracy is not limited to the commission of the crime; it also applies to attempts to avoid detection. *Holmes v. State*, 129 Nev. 567, 578, 306 P.3d 415, 422 (2013). At the time the statement is made, the defendant need not be a member of the conspiracy. *See McDowell v. State*, 103 Nev. 527, 529-30, 746 P.2d 149, 150 (1987) (stating that NRS 51.035(3)(e) requires "that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made." The statute "does not require the co-conspirator against whom the statement is offered to have been a member at the time the statement was made."); *see also United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (holding "that for withdrawal to limit a conspirator's liability and . . . his exposure to statements by co-conspirators, mere cessation of activity is not enough [ ];" the defendant must take affirmative steps by "either the making of a clean breast to the authorities, or communication of the abandonment in a manner calculated to reach co-conspirators" (internal quotations and citations omitted)).

[Headnote 11]

While avoiding detection and arrest are in furtherance of a conspiracy, the conspiracy does not continue endlessly. *State v. Davis*,

528 P.2d 117, 119 (Or. Ct. App. 1974). This court has not identified a bright-line test to determine when an act of concealment may be considered in furtherance of a conspiracy. In *Davis*, however, the Oregon Court of Appeals distinguished between:

> (1) those affirmative acts of concealment directly related to the substantive crime of a nature within the contemplation of the conspirators, and
>
> (2) those general acts of concealment, by silence or by reaction to police activity, which occur after the primary objectives of the conspiracy have been achieved and the acts directly in furtherance of those objectives have been performed.

Id. In considering this distinction, the Oregon court determined that disposing of evidence was still in furtherance of the conspiracy, but concealing evidence upon arrest was less definitive. *Id.*

Here, Carroll's argument that he was no longer a coconspirator is without merit. This court has ruled that the defendant need not be a member of the conspiracy at the time the statement was made, so long as the declarant was part of the conspiracy when the statement was made and the defendant was a part of the same conspiracy at some point. *See McDowell*, 103 Nev. at 529-30, 746 P.2d at 150. Although Carroll was assisting the police at the time of the wire recording, the Palomino Club managers believed they were still trying to avoid detection. Therefore, the district court did not err when it determined the managers were Carroll's coconspirators pursuant to NRS 51.035(3)(e). Moreover, Carroll did not make his withdrawal known to his coconspirators. Lastly, we cannot conclude that he truly made a "clean breast" to authorities because he told multiple stories to the detectives in order to minimize his culpability. *See Patel*, 879 F.2d at 294.

Carroll's argument that the statements were not made in furtherance of the conspiracy is likewise unsuccessful. Carroll cited *Davis*, but the Oregon Court of Appeals did not decide whether post-arrest statements were in furtherance of the conspiracy; thus, *Davis* does not help Carroll here. *Davis*, 528 P.2d at 119. Here, the managers made their statements prior to arrest. We conclude that these statements were admissible because even if Carroll had withdrawn from the conspiracy, the other members had not. Thus, the managers' statements were in furtherance of the conspiracy.

Whether the club managers' statements violated Carroll's right against self-incrimination

[Headnote 12]

Carroll argues the admission of the managers' statements violated his right against self-incrimination because he had to choose between forfeiting his right to explain the statements or his right to not

testify. Carroll concludes this violated his substantial rights because the State referenced his fabricated statements as proof that he intended to kill Hadland rather than to orchestrate a battery. We conclude Carroll's constitutional rights were not violated because these statements did not force him to testify and both parties provided the proper context to the statements.

[Headnote 13]

When the district court admitted the wire recordings, Carroll did not object based on his right against self-incrimination. Although Carroll did not preserve the self-incrimination issue for appeal, because it is a constitutional issue, we may address it. *See McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

Both the United States and Nevada Constitutions protect a defendant in a criminal action from being compelled to testify against himself. U.S. Const. amend. V, § 3; Nev. Const. art. 1, § 8.

Carroll complains that the admission of the wire recordings put him between the proverbial rock and a hard place in deciding whether to testify. However, the same may be said about essentially every incriminating piece of evidence the State offers in any criminal prosecution. Facing such a difficult decision to testify does not violate a defendant's constitutional rights. *See Dzul v. State*, 118 Nev. 681, 693, 56 P.3d 875, 883 (2002) ("[T]he Fifth Amendment does not insulate a defendant from all difficult choices that are presented during the course of criminal proceedings . . . ." (internal quotations omitted)). Because Carroll did not testify and was still able to put the recordings in the proper context, he fails to demonstrate that his constitutional right against self-incrimination was violated. Therefore, we conclude that the district court did not abuse its discretion when it admitted Carroll's or his coconspirators' statements from the wire recordings. *See McCullough*, 99 Nev. at 74, 657 P.2d at 1158; *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) ("We generally review a district court's evidentiary rulings for an abuse of discretion.").

Police interrogation

Whether police coerced Carroll's statement

Carroll asserts the police coerced his statement by promising him leniency if he implicated himself in Hadland's murder. The question for our consideration is whether the police promised Carroll leniency when they promised to take him home and, if so, whether this promise coerced his statement.

[Headnotes 14, 15]

" '[T]he totality of the circumstances' " is the primary consideration for determining voluntariness. *Blackburn v. Alabama*, 361

U.S. 199, 206 (1960) (quoting *Fikes v. Alabama*, 352 U.S. 191, 197 (1957)). This court has held that "[t]he question in each case is whether the defendant's will was overborne when he confessed." *Passama v. State*, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). The trial court should consider factors such as: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Id.*

[Headnotes 16-18]

Trial courts should also consider police deception in evaluating the voluntariness of a confession. *Sheriff, Washoe Cty. v. Bessey*, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996). Deception by police does not automatically render a confession involuntary. *Id.* at 325, 914 P.2d at 620. Police subterfuge is permissible if "the methods used are not of a type reasonably likely to procure an untrue statement." *Id.*

[Headnote 19]

In looking at the totality of the circumstances based on the *Passama* factors, we conclude that the police did not coerce Carroll's statement. Police did not take advantage of Carroll through his youth, a lengthy detention, repeated and prolonged questioning, or physical punishment. Thus, these factors weigh in the State's favor. As previously discussed, the police did not advise Carroll of his *Miranda* rights, which weighs in Carroll's favor. Evidence at trial revealed Carroll has below-average intelligence, but a detective testified that during the interrogation, he did not observe any indicators that Carroll was cognitively disabled. Therefore, this factor does not weigh for or against the State. Accordingly, the *Passama* factors do not show police overcame Carroll's will when they interrogated him.

The use of falsehoods during the interrogation also does not show police overcame Carroll's will. Carroll complains the police promised him leniency and that he would not go to jail. However, the record does not indicate any such promises. The police promised Carroll they would take him home at the conclusion of the interview, which they did. The police also promised Carroll they would attempt to prove his version of events was true, which they did by making the recordings with Carroll's coconspirators. While Carroll may have misunderstood the detectives' statements as a promise of leniency, the promise of taking Carroll home at the end of the interrogation and trying to prove his story were not impermissible falsehoods that would render Carroll's statements involuntary and entitle him to a new trial. *See id.* Accordingly, we conclude that the detectives' promises to take Carroll home did not constitute a promise of leniency and did not coerce his statement.

Whether Carroll was in custody for Miranda purposes

Carroll also claims that police violated his *Miranda* rights. The question presented is whether Carroll was in custody for purposes of *Miranda* and, if so, whether he properly received *Miranda* warnings.

[Headnotes 20, 21]

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). This court explained the manner in which it reviews these decisions:

> The proper inquiry requires a two-step analysis. The district court's purely historical factual findings pertaining to the "scene- and action-setting" circumstances surrounding an interrogation [are] entitled to deference and will be reviewed for clear error. However, the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo. . . .
>
> For this standard of review to function properly, "trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress."

Id. at 190-91, 111 P.3d at 694-95 (quoting *In re G.O.*, 727 N.E.2d 1003, 1010 (Ill. 2000)). "[W]here the trial court's determination that a defendant was not improperly induced to make the statement [to police] is supported by substantial evidence, . . . such a finding will not be disturbed on appeal." *Barren v. State*, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983).

[Headnotes 22, 23]

Initially, we take issue with the district court's failure to issue an order containing findings of fact and conclusions of law. *See Rosky*, 121 Nev. at 191, 111 P.3d at 695 (explaining that "trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress" (internal quotations omitted)). In the instant case, the district court denied Carroll's pretrial motion without making factual findings or conclusions of law. We again remind the district courts of their duty to enter a proper order with factual findings and legal conclusions when ruling on motions to suppress in order to facilitate appellate review. The trial court did not make any "factual findings pertaining to the 'scene- and action-setting' circumstances surrounding [the] interrogation," *see id.* at 190, 111 P.3d at 694, so we cannot give deference to any such findings.

[Headnotes 24-28]

Miranda warnings are "required when a suspect is subjected to a custodial interrogation." *Archanian v. State*, 122 Nev. 1019, 1038,

145 P.3d 1008, 1021 (2006). A defendant's statements made during a custodial interrogation may be admitted at trial only if *Miranda* rights were administered and validly waived. *Koger v. State*, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). A defendant is "in custody" under *Miranda* if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest so that a reasonable person would not feel free to leave." *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). Custody is determined by the totality of the circumstances, "including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning." *Id.* at 1081-82, 968 P.2d at 323. An individual is not in custody for *Miranda* purposes if the police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation. *Id.* at 1082, 968 P.2d at 323 (internal citations omitted).

Site of the interrogation

[Headnote 29]

First, the site of the interrogation indicates Carroll was in police custody when he gave his statement. A detective testified that although Carroll drove himself to the Palomino Club, the police drove Carroll in an official police vehicle to the homicide office to conduct the interrogation. The detective admitted they could have questioned Carroll at the Palomino Club where they found him, or at Carroll's residence, which was a short walk from the club, and still have been able to make an audio recording of the questioning. However, the detective stated the homicide office is a "more intimidating place to question a witness." The detective also testified that the interrogation room was small and had only one door. He explained that Carroll sat behind a desk with his back toward the wall furthest from the door. The detective also explained that he and another detective sat on the other side of the desk, closest to the door.

This environment suggests that Carroll was in custody. Police drove him to the homicide office for questioning, so Carroll could not terminate the interrogation or leave the homicide office unless the detectives agreed and gave him a ride home. Moreover, the detectives deliberately intimidated Carroll by taking him to the homicide office instead of questioning him at a more convenient location.

Additionally, the arrangement of the room suggests Carroll was in custody. By seating Carroll in a very small room, the furthest from the door, and putting a desk and two police detectives between him and the exit, Carroll was physically precluded from leaving the room unless the detectives stood, moved, and allowed him to leave. Accordingly, the site of the interrogation suggests Carroll was in custody at the time of the interrogation.

This case is distinguishable from *Silva v. State*, 113 Nev. 1365, 951 P.2d 591 (1997). In *Silva*, we relied upon *California v. Beheler*, 463 U.S. 1121, 1125 (1983), and concluded that questioning the suspect at a police station "does not automatically mean that he was in custody." *Silva*, 113 Nev. at 1370, 951 P.2d at 594. "Silva was questioned for approximately one to two hours and was allowed to speak with his sister when he requested." *Id.* at 1369, 951 P.2d at 594. We also noted that the record did not show that police withheld food or drink from Silva and that the police did not promise him anything. *Id.* Based on the totality of the circumstances, we concluded that the site of the interrogation did not create a custodial interrogation. *Id.* at 1370, 951 P.2d at 594.

Here, however, the circumstances are different. Police did not allow Carroll to use his telephone when he said he needed to make a call so he could confirm that he did not kill Hadland, and police actually took Carroll's telephone away from him. Police also told Carroll to "sit tight" and did not take him home when he said that he wanted to go home. The detectives also promised Carroll that they would confirm his claim that he did not murder Hadland and was acting under the direction of the Palomino Club management. Thus, we cannot reach the same conclusion we reached in *Silva*.

Objective indicia of arrest

[Headnote 30]

Objective indicia of arrest comprise the following:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1.

First, although the detectives testified that Carroll was not under arrest when they interrogated him and that Carroll was not handcuffed or in any way restrained, the objective indicia of arrest likewise indicate Carroll was in police custody when he gave his statement. The interrogating detectives did not tell Carroll he was free to leave. At the beginning of the interrogation, a detective informed Carroll he was not under arrest "right now" and noted that Carroll was speaking with him and another detective voluntarily. However, the record does not reflect that police informed Carroll he could refuse to speak with them or terminate the interrogation at any time

if he wished. Police did not provide Carroll with *Miranda* warnings until the interrogation was two-thirds finished and he implicated himself in Hadland's murder. Additionally, Carroll repeatedly informed the detectives that he wanted to go home before making implicating statements, but the detectives ignored his requests. Thus, this factor weighs in Carroll's favor.

Second, as previously indicated, police informed Carroll he was not under formal arrest when he was questioned. Thus, this factor weighs in the State's favor.

Third, as also indicated previously, the record shows the interrogation room was very small and likely prevented Carroll from moving freely when he was questioned. The room was arranged with one small table and three chairs. Also, there was only one door, and the detectives seated Carroll furthest from the door. He also could not leave the room without asking the detectives to move and allow him to leave. Additionally, detectives did not let Carroll outside the interrogation room; they instructed him to "sit tight." Thus, Carroll could not move about freely during questioning and this factor weighs in Carroll's favor.

Fourth, the transcript of Carroll's statement to police shows Carroll voluntarily responded to the detectives' questions, although he did not respond honestly until the detectives promised to protect him and take him home after the interrogation. Nevertheless, Carroll repeatedly voiced his apprehension in speaking candidly to the detectives. When a detective accused Carroll of not being honest with them, Carroll told the detective he did not want to get into trouble because he had a child at home. When another detective told Carroll they knew he was not telling them the whole story, Carroll told them he feared for his life and feared he could go to jail. Carroll also repeatedly asked if he would be allowed to go home and repeatedly said he wanted to go home, but detectives did not terminate the interview and take Carroll home. Thus, this factor weighs in Carroll's favor.

Fifth, the detectives dominated the atmosphere when they interrogated Carroll. Two detectives questioned Carroll throughout the interrogation; not one of the three questioning detectives ever spoke with Carroll alone. Additionally, when Carroll asked the detectives if he could make a telephone call to confirm his story, the detectives refused and took Carroll's phone from him. Similarly, the detectives transported Carroll to the homicide office, and they did not take him home when he expressed a desire to go home. Thus, this factor clearly and overwhelmingly weighs in Carroll's favor.

Sixth, a detective deceived Carroll when he claimed police obtained Carroll's cellular phone records indicating Carroll was near the scene of the crime when it occurred. The detectives did not tell Carroll any other blatant lies to secure his statement. Strong-arm

tactics, however, are evident throughout the interrogation. The detectives transported Carroll from his place of employment to the homicide office, instead of a more convenient or more comfortable location, questioned him in a small room, and took his phone from him. These tactics indicated custody.

The detectives also used the tactic of promising Carroll that they would take him home after the interrogation and prove his story about how Hadland was killed if he told them the truth. This tactic was successful. Prior to making this promise, Carroll did not incriminate himself in Hadland's murder. After the detective made this promise to Carroll, Carroll implicated himself in the murder. And detectives testified that the last detective to question Carroll intentionally used threatening interrogation techniques. Thus, this factor weighs in Carroll's favor.

Last, a detective testified that at the end of the interrogation, the detectives took Carroll home—he was not arrested at that time. Thus, this factor weighs in favor of the State.

In sum, only two of seven factors weigh in the State's favor, one factor does not weigh for or against the State, and four of the factors weigh in Carroll's favor. Accordingly, objective indicia of arrest suggest Carroll was in custody at the time of the interrogation.

Length and form of questioning

At 9:25 p.m., detectives questioned Carroll for approximately two and one-half hours, excluding breaks. The detectives met Carroll at the Palomino Club and took him from his place of employment and questioned him until almost midnight. Furthermore, a detective testified that one purpose of the breaks was to let Carroll "kind of go a little bit crazy." Moreover, a third detective joined the original two because the third detective was more aggressive than the first two detectives. Such a scenario belies the detective's trial testimony that they questioned Carroll as a witness, not a suspect. Had detectives truly questioned Carroll as a witness, they likely would have done so at a more convenient, less intimidating location, such as at the Palomino Club where they contacted him, or at his home, which was near the club, rather than the police station across town. And if the police had simply questioned Carroll as a witness and not as a suspect, the detectives would likely not have taken breaks to let Carroll's mind "go crazy" or found a need to use a third, more aggressive detective. Therefore, the length and form of questioning suggest Carroll was in custody at the time of the interrogation.

The detectives chose not to provide *Miranda* warnings until the last of the three detectives began questioning Carroll, which was after he had already made inculpatory statements. Although Carroll was not formally under arrest, he was in custody and should have received *Miranda* warnings. *See Archanian*, 122 Nev. at 1038, 145

P.3d at 1021-22. We therefore conclude that the district court erred by not suppressing Carroll's statements.

Post-Miranda statements

[Headnote 31]

We additionally conclude that Carroll's statement to police after he received the *Miranda* warnings should have been suppressed pursuant to the Supreme Court's holding in *Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004). In *Seibert*, like here, police delayed recitation of the *Miranda* warnings until the defendant confessed to the crime. *Id.* at 604-05. After the defendant confessed, police provided the requisite warnings and obtained a signed waiver of rights. *Id.* at 605. Police then re-questioned the defendant using the admissions she made before receiving the warnings. *Id.* The Court determined the midstream warnings "could [not] have served their purpose" and ruled the post-warning statements were inadmissible. *Id.* at 617. The Court explained the consideration a reviewing court must undertake in determining if post-warning statements are admissible:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 611-12.

The instant case is indistinguishable from *Seibert*. We conclude that the midstream warnings did not properly advise Carroll that he could terminate the interrogation despite his previous inculpatory statements. Carroll's post-warning statements were simply a repetition of his pre-warning statements. The detectives told him that they would take him home and that he would not go to jail if he told them the whole truth. Although police recited the *Miranda* warnings, Carroll was just as dependent upon police to take him home and just as fearful he would go to jail after he received the warnings as he was before. Despite the short break in questioning, Carroll was subjected to a single, continuous course of questioning during which the detectives chose to withhold the *Miranda* warnings. Therefore, the

district court should have suppressed Carroll's post-*Miranda* statement to police.

[Headnote 32]

However, we conclude that although the district court erred in admitting Carroll's statement into evidence at trial, the State has shown that the error was harmless. *See Boehm v. State*, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997) (applying harmless error analysis to a statement admitted at trial in violation of *Miranda*). Aside from Carroll's inculpatory statements to the police, the district court properly admitted other powerful evidence of his guilt. Thus, our review of the record convinces us that this error is harmless beyond a reasonable doubt.

Sufficiency of the evidence

[Headnote 33]

We have reviewed Carroll's argument that the State did not present sufficient evidence to convict him of conspiracy or murder because the State failed to show he intended for Counts to kill Hadland. We conclude that this argument is without merit. The evidence at trial supported a finding that Carroll knew the order was to kill Hadland and that Carroll recruited Counts so he did not have to kill Hadland himself. This is sufficient to convict on both charges. *See Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) ("A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator."), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004).

Cumulative error

[Headnote 34]

Lastly, Carroll argues that cumulative error denied him of a fair trial, even if the specific errors, standing alone, are insufficient for a new trial. We disagree. The sole error was the district court's denial of Carroll's motion to suppress his statement to police because police violated *Miranda*. We determined this error was harmless beyond a reasonable doubt, and one error cannot cumulate. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error.").

As we previously explained, the district court erred when it admitted Carroll's statement to police because Carroll was in custody for *Miranda* purposes and the police failed to provide *Miranda* warnings before Carroll made inculpatory statements. However, based on the overwhelming evidence establishing Carroll's involvement in Hadland's murder, we conclude the district court's error in admit-

ting Carroll's statement was harmless beyond a reasonable doubt. Even without his statements to police, the remaining evidence was sufficient to sustain his convictions.

Accordingly, we affirm the judgment of the district court.

PARRAGUIRRE, C.J., and DOUGLAS, J., concur.

WILLIAM POREMBA, APPELLANT, *v.* SOUTHERN NEVADA PAVING; AND S&C CLAIMS SERVICES, INC., RESPONDENTS.

No. 66888

April 7, 2016 369 P.3d 357

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Claimant, who was injured in a work-related motor vehicle accident and received a third-party settlement for his injuries, sought to reopen his workers' compensation claim for further medical benefits. After an evidentiary hearing, administrative appeals officer summarily granted workers' compensation insurer summary judgment after claimant admitted he spent settlement funds on expenses other than medical expenses. The district court denied claimant's petition for judicial review. Claimant appealed. The supreme court, CHERRY, J., held that: (1) Nevada law does not preclude settlement funds from being used to cover typical household expenses, and (2) appeals officer's failure to issue detailed findings of facts required remand.

Reversed and remanded with instructions.

[Rehearing denied May 26, 2016]

[En banc reconsideration granted September 23, 2016]

Dunkley Law and *Mark G. Losee* and *Matthew S. Dunkley*, Henderson, for Appellant.

Lewis Brisbois Bisgaard & Smith, LLP, and *Daniel L. Schwartz* and *Jeanne P. Bawa*, Las Vegas, for Respondents.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court's role in reviewing an administrative agency's decision is identical to that of the district court.
2. ADMINISTRATIVE LAW AND PROCEDURE.
   Although the supreme court defers to an agency's findings of fact, it reviews legal issues de novo, including matters of statutory interpretation.

3. Administrative Law and Procedure.
   The supreme court defers to an agency's interpretations of its governing statutes or regulations only if the interpretation is within the language of the statute.
4. Workers' Compensation.
   It is unquestionably the purpose of worker's compensation laws to provide economic assistance to persons who suffer disability or death as a result of their employment.
5. Workers' Compensation.
   The supreme court has a long-standing policy of liberally construing workers' compensation laws to protect workers and their families.
6. Workers' Compensation.
   Statute granting subrogation rights to a workers' compensation insurer against a claimant's recovery from a third-party tortfeasor allows a claimant to reopen claimant's workers' compensation claim after exhausting his or her settlement funds on nonmedical expenses. NRS 616C.215(2).
7. Workers' Compensation.
   Policy behind statute granting subrogation rights to a workers' compensation insurer against a claimant's recovery from a third-party tortfeasor is to prevent a double recovery; double recovery is characterized based not on the event necessitating the compensation, but on the nature of the compensation provided. NRS 616C.215(2).
8. Workers' Compensation.
   Appeals officer's failure to issue detailed findings of fact or conclusions of law as to whether workers' compensation claimant met statutory requirements to reopen his claim, and precluding claimant from introducing evidence supporting reopening his case when he admitted that he spent third-party settlement money on expenses beyond medical treatment required remand. NRS 233B.125, 616C.390.

Before Douglas, Cherry and Gibbons, JJ.

OPINION

By the Court, Cherry, J.:

NRS 616C.215(2)(a) provides that when an injured employee who receives workers' compensation also recovers damages from the responsible party, the amount of workers' compensation benefits must be reduced by the amount of the damages recovered. We held in *Employers Insurance Co. of Nevada v. Chandler*, 117 Nev. 421, 23 P.3d 255 (2001), that an insurer may refuse to pay additional funds via reopening a workers' compensation claim until the claimant demonstrates that he or she has exhausted any third-party settlement funds and that medical expenses are considered to be compensation that an insurer may withhold until the recovery amount has been exhausted.

In this appeal, we clarify that while a claimant *may* exhaust his or her settlement funds on medical benefits, he or she is not restricted

to using settlement funds on medical benefits. Although workers' compensation funds may only be spent on specific expenses, such as medical treatment, Nevada law does not preclude settlement funds from being used to cover typical household expenses.

FACTS AND PROCEDURAL HISTORY

Appellant William Poremba worked for respondent Southern Nevada Paving as a construction driver. On July 22, 2005, in the course of his duty, Poremba was driving a truck when another driver struck the truck with his backhoe. Poremba suffered injuries to his head, neck, back, and knee. Poremba filed a workers' compensation claim, which Southern Nevada Paving, through respondent S&C Claims (collectively S&C), accepted. S&C eventually closed the claim, sending Poremba a letter with instructions on how to reopen the claim should his condition worsen.

Poremba also sued the backhoe driver and his employer. That lawsuit was settled on July 30, 2009, for $63,500, with a significant amount of that settlement paid directly to cover health-care providers' liens. Poremba personally received $34,631.51. He spent approximately $14,000 of the money he received on additional medical treatment. Poremba claims to have spent the remaining settlement money on personal living expenses, such as mortgage payments and food for his family.

Poremba attempted to return to work, but he was unable to do so. Additionally, his doctors instructed him not to go back to work. On January 10, 2013, Poremba sought to reopen his claim, but S&C denied his request. Poremba administratively appealed, and S&C filed a motion for summary judgment, arguing that our decision in *Chandler* precluded Poremba from reopening his claim because he spent settlement funds on expenses other than medical costs. After an evidentiary hearing, an appeals officer summarily granted S&C summary judgment. Poremba petitioned the district court for judicial review. The district court denied the petition, and this appeal followed.

DISCUSSION

Poremba asserts that the appeals officer erred in granting summary judgment because, legally, he is not required to prove that he spent his excess recovery on medical expenses and because factual issues exist as to whether his injury had worsened, necessitating additional compensation. S&C argues that *Chandler* "clearly stands for" the proposition that a claimant who receives a third-party settlement may not spend any of that money on home loans or family expenses and reopen his or her workers' compensation claim when his or her medical situation changes. S&C argues that the point is

to prevent a double recovery, asserting that double recovery means simply to recover from two sources for the same injury. We disagree. Although *Chandler* requires a claimant to exhaust all settlement funds before seeking additional funds by reopening his or her workers' compensation claim, we never required that those settlement funds be spent solely on medical expenses. Workers' compensation is a limited-scope benefit while personal injury recoveries are designed not only to pay for medical bills, but to compensate for pain and suffering and provide for lost wages.

[Headnotes 1-5]

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Although we defer to an agency's findings of fact, we review legal issues de novo, including matters of statutory interpretation. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). We defer to an agency's interpretations of its governing statutes or regulations only if the interpretation "is within the language of the statute." *Id.* (internal quotations omitted). "It is unquestionably the purpose of worker's compensation laws 'to provide economic assistance to persons who suffer disability or death as a result of their employment.'" *Breen v. Caesars Palace*, 102 Nev. 79, 83, 715 P.2d 1070, 1072-73 (1986) (quoting *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 694, 709 P.2d 172, 175 (1985)). "This court has a long-standing policy of liberally construing these laws to protect workers and their families." *Id*. at 83, 715 P.2d at 1073 (quoting *State Indus. Ins. Sys.*, 101 Nev. at 694, 709 P.2d at 175).

Whether NRS 616C.215(2) allows a claimant to reopen his or her workers' compensation claim after exhausting his or her settlement funds on nonmedical expenses

Nevada law allows an insurer to claim an offset when the claimant receives money from a lawsuit against the party responsible for the injury. NRS 616C.215(2). In pertinent part, the statute provides as follows:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee . . . may take proceedings against that person to recover damages, but the amount of the compensation the injured employee . . . [is] entitled to receive pur-

> suant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, *must be reduced by the amount of the damages recovered* . . . .
>
> (b) If the injured employee . . . receive[s] compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer . . . has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of the employee's dependents to recover therefor.

Id. (emphasis added). On its face, this statute does not foreclose a claimant from pursuing reopening of his or her workers' compensation claim, but merely entitles the insurer to an offset based on the settlement the claimant received.

In 2001, this court held that an insurer may withhold payment of medical benefits until the claimant has exhausted any funds received from a third-party settlement. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. *Chandler* did not limit how the claimant may exhaust the settlement funds, despite S&C's assertions to the contrary. Accordingly, it is important to clarify *Chandler* and settle this issue moving forward. In *Chandler*, we held that "compensation," as specified in NRS 616C.215, included medical benefits. *Id*. We never ruled that wage replacement, or any other type of specific payments, were to be excluded. We concluded that Chandler had to exhaust his settlement proceeds, but we did not decide how he had to exhaust those proceeds. *Id*.[1]

[Headnote 6]

We conclude that it is prudent to clarify whether, according to *Chandler*, medical treatment is the only expense on which one is permitted to exhaust his or her settlement funds. We hold that it is not.

When a person is injured, he or she may sue the responsible party for payment to cover a variety of costs. Restatement (Second) of Torts § 924 (1979). While medical treatment is certainly among those costs, a plaintiff may also recover damages for lost wages if the defendant's actions prevented the plaintiff from working. *Id.* These lost wages, naturally, are meant to cover expenses that one's paycheck would normally cover, such as rent or mortgage, utilities, and groceries.

[Headnote 7]

S&C is correct that the policy behind NRS 616C.215 is to prevent a double recovery. *Chandler*, 117 Nev. at 426, 23 P.3d at 258.

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[1]In 2007, we again held that compensation, for the purposes of workers' compensation laws, includes medical benefits. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 177, 162 P.3d 148, 152 (2007). We did not limit the term "compensation" to medical benefits.

S&C, however, mischaracterizes double recovery. Double recovery is characterized based not on the event necessitating the compensation, but on the nature of the compensation provided. S&C cites to *Tobin v. Department of Labor & Industries*, 187 P.3d 780 (Wash. Ct. App. 2008), for the proposition that a claimant should not receive a double recovery as well. *Tobin*, however, explains that double recovery prevents the claimant from receiving compensation from the insurer and "retain[ing] the portion of damages which would include those same elements." 187 P.3d at 783 (internal quotations omitted). The *Tobin* court held that the insurer was only entitled to the portion of proceeds from the third-party suit that correlate to the benefits it provided as a worker's compensation insurer. *Id.* at 784. The *Tobin* court continued:

> [The insurer]'s position would give it an "unjustified windfall" at [the claimant]'s expense. Under [the insurer]'s interpretation, it would be entitled to share in damages for which it has not provided and will never pay compensation. We do not interpret these statutes to require such a fundamentally unjust result. [*The insurer*] *did not, and will never, compensate* [*the claimant*] *for his pain and suffering, therefore it cannot be "reimbursed" from funds designated to compensate him for his pain and suffering*.

Id. (internal citations omitted) (emphasis added).

A worker should not receive funds from two sources to pay for the same lost wages or the same medical treatment. The worker, however, should be permitted to use settlement funds for some medical treatment, or reasonable lost wages expenses, and use workers' compensation funds for other medical treatments.[2] Poremba was hurt in July 2005, has been unable to work since, and sought to reopen his claim in January 2013. This means that he only needed to spend approximately $384.79 per month for the 90 months between the accident and his attempt to reopen his claim to exhaust the $34,631.51 in funds. Poremba does not appear to be trying to achieve a windfall, but to be properly using the system designed to pay for his workplace injuries. To deny him the opportunity to use a system designed to protect injured workers because he used some of his settlement money to feed himself and his family is patently unjust and not supported by the statute.

Accordingly, we conclude that while S&C is entitled to an offset based on the settlement funds received, that offset must include any reasonable living expense for which the settlement funds were used. Whether the funds were used for reasonable living expenses is a

[2]The record is silent as to whether Poremba's third-party settlement was specifically allocated to cover medical expenses, pain and suffering, and/or lost wages or if it was simply a general lump sum.

factual determination best made by the hearing officer, or in this case, the appeals officer.

Because Poremba was not required to choose between reasonable living expenses, such as paying for housing and food for himself and his family, and seeking workers' compensation to pay for his medical treatment, we must reverse the district court's denial of judicial review and instruct the district court to remand to the appeals officer for further proceedings consistent with this opinion.

Whether the appeals officer erred when issuing a decision without detailed findings of fact and conclusions of law

Poremba argues that the district court erred when it found no improper procedure because Nevada statutes require the appeals officer's order to contain findings of fact and conclusions of law, and they were absent in the appeals officer's order. He further argues that without these findings, it is more difficult for a court to conduct a meaningful review. S&C does not refute Poremba's arguments, but merely suggests that if correct, the remedy would be a remand for a more detailed order. We agree that a more detailed order is required.

Without detailed factual findings and conclusions of law, this court cannot review the merits of an appeal; thus, administrative agencies are required to issue orders that contain factual findings and conclusions of law. NRS 233B.125. In pertinent part, the statute reads:

> A decision or order adverse to a party in a contested case *must* be in writing or stated in the record. . . . [A] final decision *must include findings of fact and conclusions of law, separately stated*. Findings of fact and decisions *must* be based upon substantial evidence. Findings of fact, if set forth in statutory language, *must* be accompanied by a concise and explicit statement of the underlying facts supporting the findings.[3]

Id. (emphases added). Each and every clause in this statute contains mandatory instruction for the appeals officer, leaving no room for discretion.

The requirements for a claimant to reopen a workers' compensation claim are contained within NRS 616C.390:

> 1. If an application to reopen a claim to increase or rearrange compensation is made in writing more than 1 year after the date on which the claim was closed, the insurer *shall* reopen the claim if:

[3]This statute was amended in 2015 and changed the standard from "substantial evidence" to "a preponderance of the evidence." 2015 Nev. Stat., ch. 160, § 7, at 708. This change does not affect this opinion.

> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
>
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and
>
> (c) The application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.

(Emphasis added.) The statute is silent as to funds that the claimant receives from any other source. *See id.*

[Headnote 8]

Here, not only did the appeals officer fail to issue detailed findings of fact or conclusions of law, the appeals officer precluded Poremba from introducing evidence supporting reopening his case when he admitted that he spent settlement money on expenses beyond medical treatment. This illustrates that the appeals officer had the same false impression of the law as do the insurers. Therefore, not only did the administrative agency err when it failed to comply with NRS 233B.125's mandate for detailed findings and conclusions, but because the appeals officer's misunderstanding of the law prevented Poremba from presenting the required evidence to reopen his claim, we are unable to review the facts in this appeal. Accordingly, we must reverse and remand for an evidentiary hearing and subsequent order containing detailed findings of fact and conclusions of law as to whether Poremba meets the requirements of NRS 616C.390, and if so, how much of an offset may S&C claim based on the amount of settlement funds that Poremba used on reasonable living expenses, including but not limited to medical treatment, housing, and food for himself and his family.

CONCLUSION[4]

Accordingly, the judgment of the district court is reversed, and we remand to the district court with instructions to remand to the appeals officer for a new hearing and determination, consistent with this opinion.

DOUGLAS and GIBBONS, JJ., concur.

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[4]Poremba argued that the appeals officer improperly revived S&C's motion for summary judgment. Because we conclude both that *Chandler* does not prevent a claimant from exhausting his or her third-party settlement funds on reasonable living expenses and that the appeals officer's order must contain detailed factual findings and conclusions of law, we decline to address this issue.

JERALD R. JACKSON, TRUSTEE OF THE JERALD R. JACKSON 1975 TRUST, AS AMENDED; AND IRENE M. WINDHOLZ, TRUSTEE OF THE IRENE M. WINDHOLZ TRUST DATED AUGUST 11, 1992, APPELLANTS, *v.* EDWARD H. GROENENDYKE, TRUSTEE OF THE GROENENDYKE FAMILY TRUST; AND THE NEVADA STATE ENGINEER, RESPONDENTS.

No. 67289

April 7, 2016 369 P.3d 362

Appeal from a district court decree determining vested water rights. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

Property owners filed exceptions to State Engineer's determination of spring water rights, and downstream owner filed supplement, which included request for access to upstream owners' property for purposes of repair and maintenance of waterway facilities. The district court concluded both upstream owners, downstream owner, and eastern properties had vested rights in water and granted downstream owner's request. Upstream owners appealed. The supreme court CHERRY, J., held that: (1) a district court in a water rights action may hear directly related claims that arise out of the same transaction or occurrence, (2) land access rights arose out of same transaction or occurrence as vested water rights, and (3) the district court's water rights determination was supported by substantial evidence.

Affirmed.

Woodburn and Wedge and *Gordon H. DePaoli*, Reno, for Appellants.

Adam Paul Laxalt, Attorney General, and *Bryan L. Stockton*, Senior Deputy Attorney General, Carson City, for Respondent the Nevada State Engineer.

Kaempfer Crowell and *Severin A. Carlson* and *Tara C. Zimmerman*, Reno, for Respondent Edward H. Groenendyke, Trustee of the Groenendyke Family Trust.

1. WATER LAW.
   In a water rights case, the district court must make its own findings and draw its own conclusions in an appeal of the State Engineer's final order. NRS 533.170, 533.185.
2. APPEAL AND ERROR.
   The supreme court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence.

3. Evidence.
   Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.
4. Appeal and Error.
   The supreme court accords deference to the point of view of the trial judge since the judge had the opportunity to weigh evidence and evaluate the credibility of witnesses, an opportunity foreclosed to the supreme court.
5. Appeal and Error.
   When reviewing questions of law, including issues of statutory interpretation, the supreme court applies de novo review.
6. Water Law.
   Upstream property owners waived for appeal their argument that downstream owner should have sought land access in water dispute in his initial exceptions to State Engineer's final order rather than seeking to file supplement, when owners failed to raise claim until reply brief on appeal.
7. Water Law.
   A district court in a water rights action may hear directly related claims, so long as those claims arise out of the same transaction or occurrence. NRS 533.170.
8. Limitation of Actions.
   The civil procedure rule regarding amendment of pleadings is to be liberally construed to allow relation back of the amended pleading where the opposing party will be put to no disadvantage. NRCP 15(c).
9. Limitation of Actions.
   When the original pleadings give fair notice of the fact situation giving rise to the new claim, the amendment to the pleadings relates back. NRCP 15(c).
10. Pleading.
    When there is no statutory authority preventing a district court from hearing related claims, the rules of civil procedure are intended to allow the court to reach the merits of claims, rather than dispose of claims on technical niceties. NRCP 15(c).
11. Water Law.
    Issue of downstream property owner's right to limited access to upstream owners' land to conduct reasonable maintenance and repairs arose out of same transaction or occurrence as vested water rights to spring water, and therefore, the district court had jurisdiction to consider issue on downstream owner's supplement to exceptions to State Engineer's determination of water rights; even though downstream owner's initial exceptions did not address land access, quest to assert water rights necessarily included reasonable action to ensure continued flow of that water, upstream owners responded to downstream owner's supplement, indicating lack of prejudice, and additional parties were not necessary for court to grant access to upstream owners' land. NRS 533.170.
12. Water Law.
    The district court's determination that eastern properties had vested water rights to spring water was supported by substantial evidence; natural channel of spring water flowed directly to eastern properties, water flowed through pipe to eastern properties, which was diverted and put to beneficial use by irrigating properties, and expert testimony and culture maps showing homogenous vegetation indicated that although water had been diverted towards upstream property by predecessors in interest, some water was allowed to continue along its more natural path to eastern properties. NRS 533.035.

13. Water Law.

Vested water rights are water rights that came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation.

Before Douglas, Cherry and Gibbons, JJ.

OPINION

By the Court, Cherry, J.:

The parties disputed who had rights to certain spring waters and the State Engineer adjudicated those rights, entering a final order of determination under NRS 533.160. The matter was then set for a hearing in district court as required by NRS 533.170. NRS 533.170 allows a party aggrieved or dissatisfied by the State Engineer's final determination to file a notice of exceptions in district court, setting forth the exceptions taken to that determination and the relief sought. In this appeal, we consider whether a party who timely files exceptions may later supplement those exceptions to include property access claims arising from its water rights. We hold that a party may so supplement. NRS 533.170(5) provides that proceedings on exceptions to the State Engineer's order of determination shall be held in accordance with the Nevada Rules of Civil Procedure, and those rules allow amended pleadings. Thus, the district court properly considered the notice of supplemental exceptions in affirming the State Engineer's order of determination, as modified, including respondent Edward H. Groenendyke's supplemental request that the district court's judgment and decree confirm Groenendyke's right of access to certain property for purposes of repairing and maintaining the facilities necessary to convey water, the rights to which were adjudicated in his favor by the State Engineer. Additionally, although Jackson challenges the district court's determination that the Green Acres properties had a vested water right to the waters from Spring A, we conclude that its findings were supported by substantial evidence in the record. We therefore affirm the district court's judgment and decree.

FACTS AND PROCEDURAL HISTORY

The rights implicated in this appeal pertain to water from an unnamed spring known as "Spring A." Spring A originates in California, but its water flows into Douglas County, Nevada. Spring A has been improved with pipes leading water south and east into Nevada with a valve that allows the water to either travel south towards Jerald Jackson and Irene Windholz's (collectively Jackson's) property and eventually to Edward Groenendyke's property, or east towards a set of properties known as the Green Acres properties.

Arising from a water determination action that dates back to 1987, the State Engineer issued a final order of determination of water rights in 2008. The parties affected were then allowed to file exceptions to the State Engineer's final order. Both Jackson and Groenendyke filed exceptions. Due to the sheer number of claims in this final order, the portion involving the Spring A water was not heard in the district court until November 30, 2012.

With no direct evidence regarding who installed the pipes to convey Spring A's water or when the installation took place, the district court observed aerial photography and geological maps. The court also heard testimony from the State Engineer's expert and Jackson's expert before concluding that the properties to the south (Jackson's and Groenendyke's properties) and the east (Green Acres) each had vested rights to the water from Spring A.

In September 2012, Groenendyke filed a supplement to his earlier filed exceptions. In that supplement, Groenendyke moved the district court to allow him access to Jackson's property for the limited purpose of repair and maintenance of facilities on the waterway because Jackson's land was upstream from his own. Although the issue of land access was not part of the State Engineer's final order, or either party's original exceptions, the district court granted Groenendyke's request.

DISCUSSION

On appeal, Jackson argues that (1) the district court was without jurisdiction to grant Groenendyke access to Jackson's property to maintain and repair the pipeline; (2) if so, Groenendyke's request for access to the property was untimely; and (3) the district court erred in finding that the Green Acres properties had a vested right to the Spring A water. We disagree. Pursuant to the Nevada Rules of Civil Procedure, a district court may allow a party to add a later claim when that later claim arises out of the same transaction or occurrence as the existing action. Because Groenendyke's supplemental exception, in which he asked the district court to order that he be allowed access to the pipeline located on Jackson's property, arises from the same dispute adjudicated by the State Engineer in its final order of determination, the district court had jurisdiction to consider Groenendyke's supplemental exception. Further, the district court's findings regarding Green Acres' vested water rights were not clearly erroneous, and they were based on substantial evidence.

Standard of review

[Headnote 1]

In a water rights case, the district court must make its own findings and draw its own conclusions in an appeal of the State Engineer's final order. *Scossa v. Church*, 43 Nev. 407, 410, 187 P. 1004,

1005 (1920); *see also* NRS 533.170; NRS 533.185. Appeals from the decree of the district court are taken to this court "in the same manner and with the same effect as in civil cases." NRS 533.200.

[Headnotes 2-4]

This court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). Substantial evidence is evidence that a "reasonable mind might accept as adequate to support a conclusion." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838, 335 P.3d 211, 214 (2014) (internal quotations omitted). This court accords "deference to the point of view of the trial judge since he had the opportunity to weigh evidence and evaluate the credibility of witnesses—an opportunity foreclosed to this court." *Harris v. Zee*, 87 Nev. 309, 311, 486 P.2d 490, 491-92 (1971).

[Headnote 5]

When reviewing questions of law, however, including issues of statutory interpretation, this court applies de novo review. *State, Dep't of Motor Vehicles v. Taylor-Caldwell*, 126 Nev. 132, 134, 229 P.3d 471, 472 (2010).

Groenendyke's access to Jackson's land

[Headnotes 6, 7]

Jackson argues that whether one party in a water rights dispute may enter onto another party's property to exercise vested water rights is not appropriate for adjudication under NRS Chapter 533.[1] Jackson argues that NRS 533.090-.200 do not expressly provide jurisdiction to adjudicate land entry claims. However, nothing in Chapter 533 prevents a court of general jurisdiction, such as a district court, from hearing related claims. Further, because NRS 533.170(5) requires that these proceedings accord as much as possible with the Nevada Rules of Civil Procedure, and those rules allow a district court to hear related claims arising out of the same transaction or occurrence, we conclude that a district court in a water rights

[1]Jackson also argues, for the first time in his reply brief, that even if the district court could grant land access, Groenendyke should have sought this relief in his initial exceptions to the State Engineer's final order rather than seeking to file a supplement to his exceptions after the deadline had passed. Because Jackson failed to raise this claim until his reply brief in this court, it is waived. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011); *see also Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 905, 313 P.3d 880, 887 n.6 (2013) ("Arguments not raised . . . in district court normally cannot be raised for the first time on appeal.").

action may hear directly related claims, so long as those claims arise out of the same transaction or occurrence.

[Headnotes 8-10]

NRS 533.170 sets procedures for filing exceptions to the State Engineer's final order of determination. NRS 533.170(5) provides that district court proceedings on the State Engineer's final order of determination shall be held in accordance with the Nevada Rules of Civil Procedure to the extent possible. The rules of civil procedure allow parties to amend their prior pleadings. NRCP 15(a). Amended pleadings arising out of the same transaction or occurrence set forth in the original pleadings may relate back to the date of the original filing. NRCP 15(c). "NRCP 15(c) is to be liberally construed to allow relation back of the amended pleading where the opposing party will be put to no disadvantage." *Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d 631, 634 (2011). When the original pleadings give "fair notice of the fact situation" giving rise to the new claim, it relates back. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556, 665 P.2d 1141, 1146 (1983). Where there is no statutory authority preventing a district court from hearing related claims, the rules of civil procedure are intended to allow the court to reach the merits of claims, rather than dispose of claims on "technical niceties." *Costello*, 127 Nev. at 441, 254 P.3d at 634. Thus, we conclude that NRS 533.170 allows additional related claims because amended pleadings accord with the Nevada Rules of Civil Procedure. So long as the new claim arises out of the same facts and circumstances of the original action, namely the determination of water rights, the district court has jurisdiction to consider those claims.

[Headnote 11]

Groenendyke timely filed his exceptions. Although the exceptions did not address land access for maintenance and repair on the pipe, they did concern vested rights to the water from Spring A, the same water that travels through the pipe in question. The issue of land access for pipe maintenance and repair arises from the same transaction or occurrence as the vested right to receive water from that pipe because the quest to assert water rights necessarily includes reasonable action to ensure the continued flow of that water. Jackson responded to Groenendyke's supplement when he filed his points and authorities opposing Groenendyke's motions. Therefore, Jackson has not been prejudiced by the district court's consideration of Groenendyke's motion for access in his supplement, and the requirements in NRCP 15(c) are satisfied. *See Costello*, 127 Nev. at 441, 254 P.3d at 634.

Jackson additionally argues that Groenendyke failed to add necessary parties because there are many pipe facilities that are not on

Jackson's property and, therefore, the district court was without jurisdiction to grant Groenendyke the access he sought. This argument is without merit. Groenendyke did not ask for access to the other properties, nor are the other property owners necessary to determine access to the facilities on Jackson's property. Although the district court was unable to grant access to other properties because the respective owners were not joined to this action, the district court had the necessary parties before it to grant access to Jackson's property.

We conclude that because the issue of repair arises out of the same transaction or occurrence as the vested water rights, the district court had jurisdiction to consider the issue of limited land access to conduct reasonable maintenance and repair. Accordingly, we affirm the district court's judgment and decree on this ground.

Green Acres' vested water rights

[Headnote 12]

Regarding the vested water rights themselves, the State Engineer determined that the Green Acres properties, along with both Jackson and Groenendyke, had vested water rights to the water from Spring A. Jackson and Groenendyke challenged this finding in their exceptions. The district court agreed with the State Engineer, finding that the Green Acres properties had a vested water right. Only Jackson challenges that finding on appeal.

Jackson argues that the district court relied only upon circumstantial evidence and that the circumstantial evidence does not support the district court's conclusion that Green Acres also diverted the water. He claims that the Green Acres properties receive their water from numerous other sources.[2] Having considered the arguments and appendix, we conclude that the district court's determination regarding Green Acres is supported by substantial evidence.

[Headnote 13]

In Nevada, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035. "The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states." *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). Vested water rights are "water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation." *Waters of Horse Springs v. State Eng'r*, 99 Nev. 776, 778, 671 P.2d 1131, 1132 (1983) (internal quotations omitted).

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[2]In this appeal, Jackson raised, for the first time, an issue of whether he has a prescriptive right to the water. Jackson withdrew this claim in his reply brief. Therefore, we will not consider it.

Here, the State Engineer made factual findings regarding the Green Acres properties' use of water from Spring A. First, the State Engineer found that the natural channel of Spring A water flowed directly to the Green Acres properties. The State Engineer also found that water flowed through the six-inch pipe to the Green Acres properties. The State Engineer concluded that the water which flows through the pipe and reaches the Green Acres properties was diverted and put to beneficial use, irrigating the Green Acres properties; therefore, the Green Acres properties had a vested right.

In its answering brief on appeal, the State Engineer argues that he and the district court relied upon expert testimony and culture maps showing homogenous vegetation to reach the conclusion that although water from Spring A had been diverted towards Jackson's property by his predecessors in interest, some was allowed to continue along its more natural path to the Green Acres properties. The district court, after visiting the site with the parties and holding a hearing with expert testimony, affirmed the State Engineer's conclusions.

Jackson seeks to have us reweigh the facts and conclude in his favor; however, the record supports that the district court's findings are not clearly erroneous and are based on substantial evidence, even if Jackson disagrees with the ultimate findings. We will not substitute our judgment for that of the district court unless the district court's findings were clearly erroneous, which they were not.

CONCLUSION

Accordingly, for the reasons set forth above, we order the judgment and decree of the district court affirmed.

DOUGLAS and GIBBONS, JJ., concur.