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

Respectfully, I dissent.

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WILLIAM P. CASTILLO, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 73465

May 30, 2019 442 P.3d 558

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

**Affirmed.**

[Rehearing denied September 6, 2019]

*Rene L. Valladares*, Federal Public Defender, and *Ellesse D. Henderson, Bradley D. Levenson, Tiffany L. Nocon*, and *David Anthony*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

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

Before the Supreme Court, En Banc.

## OPINION

By the Court, Stiglich, J.:

Appellant William Castillo, who was sentenced to death in 1996, filed a procedurally barred postconviction petition for a writ of habeas corpus asserting that he was entitled to a new penalty hearing. He claimed he demonstrated good cause and prejudice to excuse the procedural bars based on *Hurst v. Florida*, 577 U.S. ___,

136 S. Ct. 616 (2016). He specifically argued that *Hurst* did two things: (1) it established that the weighing component of Nevada's death penalty procedures is a "fact" that must be proven beyond a reasonable doubt, and (2) it clarified that *all* eligibility determinations, regardless of whether they are factual, are subject to the beyond-a-reasonable-doubt standard. We recently rejected the first argument, *Jeremias v. State*, 134 Nev. 46, 58-59, 412 P.3d 43, 53, *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018), and in doing so, we reaffirmed our prior decisions that a defendant is death-eligible in Nevada once the State proves beyond a reasonable doubt the elements of first-degree murder and at least one statutory aggravating circumstance, *Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015). We previously rejected the second argument that the beyond-a-reasonable-doubt standard does not apply to the weighing of aggravating and mitigating circumstances in *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011). Castillo fails to demonstrate that these prior decisions were incorrect or that *Hurst* compels us to reach a different result. Thus, he fails to demonstrate good cause to excuse the procedural bars, and the district court correctly denied his petition.

*FACTS AND PROCEDURAL HISTORY*

Castillo bludgeoned an elderly woman to death in 1995 and was sentenced to death. After this court affirmed the judgment of conviction on direct appeal, *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998), Castillo filed a postconviction petition for a writ of habeas corpus, which was denied. Later, he filed a second postconviction petition for a writ of habeas corpus, which was also denied. In 2017, he filed the postconviction petition at issue here, his third petition filed in state court. Because the 2017 petition was not filed within one year after the remittitur issued from his direct appeal and because Castillo had previously sought postconviction relief, the district court denied it as untimely, *see* NRS 34.726, successive, *see* NRS 34.810(2), abusive, *see id*., and barred by laches, *see* NRS 34.800(2), concluding that Castillo failed to demonstrate good cause and prejudice to excuse the various procedural bars. This appeal followed.

*DISCUSSION*

Under Nevada law, a petitioner cannot relitigate his sentence decades after his conviction by continually filing postconviction petitions unless he provides a legal reason that excuses both the delay in filing and the failure to raise the asserted errors earlier, and further shows that the asserted errors worked to his "actual and substan-

tial disadvantage." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). Castillo argues that he demonstrated good cause and prejudice because the United States Supreme Court's decision in *Hurst* provided him with new and meritorious claims for relief that were not available earlier. *See Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006). To resolve this contention, we must determine whether his interpretation of *Hurst* has merit, which we undertake de novo. *See Huebler*, 128 Nev. at 197, 275 P.3d at 95.

*The holding in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016)*

In *Hurst*, the United States Supreme Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's death penalty statutes. The Florida statutes created a system where the jury considered evidence of aggravating and mitigating circumstances and then recommended to the judge whether to impose a death sentence. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 620. Under that system, the judge made the ultimate decision whether to impose a death sentence, including her own determination whether any aggravating and mitigating circumstances existed. *Id*. The Court held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance," violated the Sixth Amendment. *Id*. at ___, 136 S. Ct. at 624.

We considered *Hurst*'s impact on our death penalty system in *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018). The appellant in that case argued that *Hurst* established, for the first time, that "where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reasonable doubt." *Id*. at 57-58, 412 P.3d at 53. And pointing to language in some of this court's prior decisions stating that a defendant is not death-eligible unless a jury concludes both that there are aggravating circumstances and that any mitigating circumstances do not outweigh those aggravating circumstances, he argued that he was entitled to a new penalty hearing because the jury was not properly instructed on the burden of proof. *Id*. at 58, 412 P.3d at 53. We disagreed for two main reasons. First, we held that the appellant was taking language in *Hurst* out of context and the decision did not announce new law relevant in Nevada. *Id*. at 58, 412 P.3d at 53-54. Second, we explained that while some of this court's prior decisions described the weighing of aggravating and mitigating circumstances as part of the death-eligibility determination, we had reiterated in *Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015), that a defendant is death-eligible once the State proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance. *Jeremias*, 134 Nev. at 59, 412 P.3d at 54.

*Hurst did not redefine the word "fact"*

Castillo first argues that *Hurst* does more than merely analyze Florida's death penalty procedures in light of *Apprendi* and *Ring*. Pointing to language in *Hurst* describing the outcome of the weighing determination in Florida as a fact and suggesting it was a critical finding necessary to increase the defendant's sentence, Castillo asserts that *Hurst* establishes that whenever a State conditions death-eligibility on the weighing of aggravating and mitigating circumstances, the outcome of that weighing is a fact subject to the burden of proof beyond a reasonable doubt. We do not agree. As we indicated in *Jeremias*, a close reading of *Hurst* shows that the few references to the weighing component of Florida law as a factual finding involved quotations from the Florida statute. 134 Nev. at 58, 412 P.3d at 53-54. Our conclusion that *Hurst* broke no new ground in this area is consistent with that of "[m]ost federal and state courts," *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018) (footnotes omitted), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. March 13, 2019) (No. 18-8415), and Castillo fails to demonstrate that it was incorrect.

*The beyond-a-reasonable-doubt standard only applies to facts*

Castillo also raises a new argument that we have not previously considered: he suggests that *Hurst* eliminated the distinction between factual findings and other determinations for purposes of applying *Apprendi* in the context of capital sentencing. He contends that, under *Hurst*, regardless of whether the jury is being asked to make a factual finding, a moral determination, or something else altogether, if its decision makes a defendant death-eligible, it is an element of the capital offense and therefore must be alleged in the charging document, submitted to a jury, and proven beyond a reasonable doubt. Nothing in *Hurst* can be read to support this assertion. Like *Apprendi* and *Ring*, *Hurst* clearly limits its reach to *facts* that expose a defendant to a higher sentence. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 619 (holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each *fact* necessary to impose a sentence of death" (emphasis added)); *accord Ring*, 536 U.S. at 589 (holding that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any *fact* on which the legislature conditions an increase in their maximum punishment" (emphasis added)); *Apprendi*, 530 U.S. at 490 (holding that "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added)). Indeed, to support his argument that *Hurst* extends the *Apprendi* rule to all determinations, regardless of whether they involve fact-finding, Castillo circles back to the same

mischaracterized language in *Hurst* discussed above, which uses the word "fact" when quoting the Florida statute. We find no credence in the assertion that the Court's scattered references to the language in Florida's statute were intended to broaden the reach of *Apprendi* and *Ring* by obliterating the distinction between factual findings and moral choices regarding the weight to ascribe to a factual finding. *See generally In re Winship*, 397 U.S. 358, 363 (1970) (discussing the genesis of the burden of proof beyond a reasonable doubt and its role in reducing the risk of convictions resting on factual error). Castillo fails to demonstrate that *Hurst* announced a new rule relevant to the weighing component of Nevada's death penalty statutes.

*The weighing determination is not part of death-eligibility*

Even if *Hurst* announced the new rule Castillo advances, we reiterate that it would have no impact because the weighing of aggravating and mitigating circumstances is not part of death-eligibility under our statutory scheme. *See Lisle*, 131 Nev. at 365-66, 351 P.3d at 732. In Nevada, the facts that expose a defendant to a death sentence, and therefore render him death-eligible for the purposes of *Apprendi* and *Ring*, are the elements of first-degree murder and any statutory aggravating circumstance.[1] *Jeremias*, 134 Nev. at 59, 412 P.3d at 54; *Lisle*, 131 Nev. at 365-66, 351 P.3d at 732. Although the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances, NRS 175.554(3); NRS 200.030(4)(a), that provision guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed, *Apprendi*, 530 U.S. at 481 (acknowledging that, at common law, a sentencer always had the discretion to "tak[e] into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"), and checks the unfettered exercise of that discretion, *see generally Gregg v. Georgia*, 428 U.S. 153, 220-21 (1976) (White, J., concurring) (indicating that systems of capital punishment that give the sentencer unguided discretion are cruel and unusual).

## *CONCLUSION*

Because Castillo's arguments regarding *Hurst* lack merit, he fails to demonstrate good cause and prejudice to excuse the various procedural bars precluding him from challenging his sentence at this late date. We therefore conclude that the district court did not err

[1]We reject Castillo's argument that he should be permitted to take advantage of the apparent confusion caused by our prior lack of precision when using the term "eligibility." As Castillo himself points out, "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494.

by denying Castillo's postconviction petition for a writ of habeas corpus and affirm.[2]

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

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RYAN MATTHEW LIPSITZ, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 72057

June 6, 2019 442 P.3d 138

Appeal from a judgment of conviction, pursuant to a guilty verdict, of indecent exposure, two counts of sexual assault, attempted sexual assault, battery with the intent to commit sexual assault, open or gross lewdness, and sexually motivated coercion. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

**Affirmed in part, reversed in part, and remanded with instructions.**

[Rehearing denied June 25, 2019]

*Terrence M. Jackson*, Las Vegas, for Appellant.

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

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

## OPINION

By the Court, Hardesty, J.:

Appellant Ryan Matthew Lipsitz was convicted of seven sexually related counts, including sexual assault and attempted sexual assault. He argues that the district court erred when it allowed the

[2]Castillo also argues that *Hurst* establishes that the practice of appellate reweighing of aggravating and mitigating circumstances is unconstitutional. Setting aside the fact that *Hurst* says nothing on this issue, the Supreme Court has permitted appellate reweighing. *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990). The Court has not overruled *Clemons* and therefore it remains good law. *See Bosse v. Oklahoma*, 580 U.S. ___, ___, 137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998))).

victim to testify by two-way audiovisual transmission, which violated his rights under the Confrontation Clause of the Sixth Amendment. We take this opportunity to adopt the test set forth in *Maryland v. Craig*, 497 U.S. 836, 850 (1990), to determine whether a witness's testimony at trial via two-way audiovisual transmission violates a defendant's right to confrontation. Under *Craig*, two-way video testimony may be admitted at trial in lieu of physical, in-court testimony only if (1) it "is necessary to further an important public policy," and (2) "the reliability of the testimony is otherwise assured." 497 U.S. at 850. Applying this test here, we conclude that the district court did not abuse its discretion in allowing the victim, who was admitted to an out-of-state residential treatment center, to testify by two-way audiovisual transmission at trial. First, the use of the audiovisual procedure was necessary to protect the victim's well-being, an important public policy goal, while also ensuring that the defendant was provided a speedy trial. And second, the audiovisual transmission procedure, as set forth in Supreme Court Rules Part IX-A(B), adequately ensured the reliability of the testimony, as it allowed Lipsitz to cross-examine the victim and the jury could hear and observe the victim.

Lipsitz also argues that the district court abused its discretion in proceeding to trial after the State expressed concerns about his competency. Based on the record before us, we conclude that the district court did not abuse its discretion in proceeding to trial without holding a competency hearing.

Finally, Lipsitz argues that the district court erred in convicting him of both sexual assault and attempted sexual assault because they were based on the same underlying conduct. The State concedes this point and we agree. The State should have charged these counts in the alternative, but did not. The district court then compounded the error by convicting Lipsitz of both counts. As there was insufficient evidence for the sexual-assault conviction (count 2), we reverse that part of the judgment of conviction. We uphold the remaining convictions.

## *FACTS AND PROCEDURAL BACKGROUND*

Lipsitz trespassed into a residential treatment facility, where he sexually assaulted the victim, an 18-year-old patient seeking treatment for substance abuse and trauma related to her experience as a victim of sex trafficking. On the morning in question, the victim fell asleep while reading in the recreation room around 4 a.m. Approximately one hour later, the victim awoke to find Lipsitz, whom she had never seen before, standing at the end of the couch. Lipsitz exposed himself and forced the victim to have sex with him. Lipsitz then attempted to force the victim to perform fellatio on him, but her mouth was closed. And when he failed, he became upset, mumbled something under his breath, and walked away. Another patient and

several staff members at the treatment center saw Lipsitz exiting the treatment center through the front gate. He was nearby the center when police officers found him.

Lipsitz was indicted and subsequently invoked his right to a speedy trial. The State moved to allow the victim to testify via simultaneous audiovisual transmission because she was unavailable as a witness for trial. Lipsitz opposed this motion, arguing that it was essential for the victim to be physically present at trial as the case "rises and falls on the victim's credibility." The district court granted the State's motion, reasoning that the victim was unavailable as a witness for trial because she was a patient at an out-of-state treatment center. Moreover, the district court noted that Lipsitz invoked his right to a speedy trial, and he refused to agree to a continuance of the trial for her to be released from the facility. Therefore, the only way she could testify on the dates set for trial was by alternative means: deposition or audiovisual transmission.

During the same hearing, the State informed the district court that Lipsitz had been referred to competency court in a separate case pending in a different department. The district court asked Lipsitz's attorneys whether they had any concerns about his competency; they denied any concerns and urged the district court to proceed to trial. The district court engaged in a lengthy canvas of Lipsitz. At the conclusion of the hearing, the district court stated that it had no basis to doubt Lipsitz's competency because he "seem[ed] to have a clear understanding in terms of the facts [and] his discussion with his attorneys." The next day, the court reconsidered Lipsitz's competency after a sidebar with counsel. Lipsitz stated that he was unaware that he had been referred for a competency evaluation in the other case. The district court canvassed him again to ensure that he understood the charges and that he was able to communicate with and assist his attorneys in his defense. Satisfied with Lipsitz's responses, the district court proceeded to trial.

On the first day of trial, Lipsitz refused to change into a suit, which prompted the court to question his competency again. The district court asked him if he understood that remaining in his jail clothes might prejudice the jury against him, to which he responded "yes." Eventually, Lipsitz agreed to put on a suit. The district court asked Lipsitz's counsel whether they still had no concerns about his competency. Lipsitz's counsel confirmed that they had no concerns and would inform the district court if that changed during the trial. The district court noted for the record that Lipsitz appeared competent.

After the district court impaneled the jury, Lipsitz engaged in an increasingly obstinate exchange with the district court, rebuking the justice system because the district court had allowed the victim to testify by audiovisual transmission and rebuffing his counsel. The district court explained that the use of audiovisual transmission

would allow Lipsitz to confront the victim at trial. The court also explained that the victim had submitted "sufficient documentation that she medically cannot appear . . . . So I mean if we're going forward today, we're going to be going forward with audio/video technology." The court further explained that it approved the use of audiovisual transmission for the victim's testimony, in part, because Lipsitz had invoked his right to a speedy trial.

This angered Lipsitz. It appeared that he misunderstood how the audiovisual technology worked; he thought that the victim's testimony was a prerecording from YouTube. Lipsitz reasserted his lack of confidence in the judge and the trial proceedings. He then waived his right to appear at trial, and the district court ordered his removal from the courtroom.

At trial, the jury heard testimony from several witnesses: the victim who described the sexual assault in detail; several staff members and another patient from the treatment center who saw Lipsitz in and around the building; the sexual assault nurse examiner who treated the victim after the sexual assault; forensic scientists who processed DNA collections from both the victim and Lipsitz; and the police officers who responded to the scene and arrested Lipsitz. The DNA testing revealed Lipsitz's saliva on the victim's mandible, neck, and chest. There was no evidence of sperm or semen from the victim's vaginal and external genitalia and no sperm on Lipsitz's penis or hands. There was also no DNA from the victim on Lipsitz's hands.

After the six-day trial, the jury returned a guilty verdict on all counts except for one count of sexual assault. The district court sentenced Lipsitz to an aggregate sentence of 20 years to life.

## *DISCUSSION*

Lipsitz argues that reversal is warranted because (1) the district court abused its discretion in not suspending proceedings after the State raised concerns about Lipsitz's competency to stand trial; (2) the district court erred in allowing the victim to testify via simultaneous audiovisual transmission from the Florida treatment center where she was a patient, depriving Lipsitz of his Sixth Amendment right under the Confrontation Clause; and (3) the district court erred by convicting Lipsitz of both sexual assault (count 2) and attempted sexual assault (count 3) when the charges stemmed from the same incident.

### *The district court did not abuse its discretion in proceeding to trial after the State expressed concerns about Lipsitz's competency*

Lipsitz argues that the district court was required to halt the trial proceedings and order a competency evaluation after the State expressed concerns about Lipsitz's competency. We review a district court's refusal to order a competency evaluation for an abuse of dis-

cretion. *Olivares v. State*, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008).

The Due Process Clause of the Fourteenth Amendment provides that a criminal defendant may not be prosecuted if he or she lacks competence to stand trial. *Id*. at 1147, 195 P.3d at 868. An incompetent defendant is one who lacks "the present ability to understand either the nature of the criminal charges against him or the nature and purpose of the court proceedings, or is not able to aid and assist his counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding." *Id*.; *see also* NRS 178.400(2)(a)-(c). "[I]f doubt arises as to the competence of the defendant, the court shall suspend the proceedings . . . until the question of competence is determined." NRS 178.405(1). "Whether such a doubt is raised is within the discretion of the trial court," *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983), but when the district court receives "substantial evidence that the defendant may not be competent to stand trial," the court must hold a formal competency hearing, *Olivares*, 124 Nev. at 1148, 195 P.3d at 868 (internal quotation marks omitted).

Our review of the record demonstrates that the district court did not abuse its discretion in proceeding to trial because substantial evidence showed that Lipsitz was competent for trial. The district court conducted an independent assessment of Lipsitz's competency, canvassing him and his counsel, who assured the district court that Lipsitz was competent and requested to proceed to trial.[1] The court relied on defense counsel's assurances, its own interactions with Lipsitz, and his responses to the court's canvass in arriving at its determination that a competency hearing was not warranted. Lipsitz's behavior, while obstinate, did not show a lack of understanding or inability to aid in his defense. Rather, the record shows that Lipsitz was unwilling to aid in his defense. Lipsitz became frustrated because he was not privy to the grand jury proceedings, he was dissatisfied with his public defenders, and he was angry that the victim would be testifying through audiovisual transmission instead of appearing in person. On this record, we cannot conclude that the district court abused its discretion when it proceeded to trial after canvassing Lipsitz and concluding that there was not enough evidence to create doubt as to his competency. *See Olivares*, 124 Nev.

[1]The State informed the district court that Lipsitz had been referred to competency court in another department, but there is nothing in the record confirming that the other department made a competency determination. We note that NRS 178.405(2) requires that once a department suspends proceedings pending a competency hearing, it must provide written notice to all other departments. Nothing in the record shows that the other department actually suspended its proceedings or provided written notice to the district court that Lipsitz was not competent, and the parties did not make any argument on this point.

at 1148, 195 P.3d at 868; *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113.

*Allowing the victim to testify via simultaneous audiovisual transmission, pursuant to the procedure set forth in Nevada Supreme Court Rules Part IX-A(B), did not violate Lipsitz's rights under the Confrontation Clause*

Lipsitz contends that it was a violation of his rights under the Confrontation Clause for the district court to allow the victim to testify by two-way audiovisual transmission and that the district court forced him to choose between his right to a speedy trial and his right to confront his accuser. Whether an evidentiary ruling violated the defendant's rights under the Confrontation Clause is a question of law we review de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009).

The Sixth Amendment's Confrontation Clause provides criminal defendants the right to confront the "witnesses against [them]" and to cross-examine such witnesses who "bear testimony" against them. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal quotation marks and citation omitted). The elements that comprise the right of confrontation, i.e., "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact," ensure "the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990). However, the right to a witness's physical presence at trial is not absolute. As the United States Supreme Court explained in *Craig*, "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," but that preference "must occasionally give way to considerations of public policy and the necessities of the case." *Id*. at 849 (internal quotation marks and citation omitted). The Supreme Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850. At issue in *Craig* was a state statute that allowed child witnesses to testify via a one-way closed-circuit television in child abuse cases. The Supreme Court concluded that the use of the one-way closed-circuit television procedure did not violate the defendant's right to confrontation because (1) it was necessary to further the State's interest in protecting the child victim from emotional trauma that the child would suffer by having to testify in the defendant's presence, and (2) the procedure adequately preserved the other elements of confrontation, thereby providing indicia of reliability. *Id.* at 851-57. The Supreme Court emphasized that the procedure could be used only after the trial

court hears evidence and makes a case-specific finding that the procedure is "necessary to further an important state interest." *Id.* at 852-55.

*Craig* involved one-way video transmission and did not answer whether the same standard would apply to two-way video transmission, whereby the defendant and the victim can see and hear each other simultaneously. *See Wrotten v. New York*, 560 U.S. 959, 959 (2010) (explaining that whether the use of two-way video transmission violated a defendant's rights was an important question that was "not obviously answered by *Maryland v. Craig*"). Nonetheless, many other jurisdictions that have addressed this issue have allowed the use of two-way transmission only where the *Craig* standard is met. *See, e.g.*, *United States v. Carter*, 907 F.3d 1199, 1206 (9th Cir. 2018); *United States v. Yates*, 438 F.3d 1307, 1313-17 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005); *State v. Rogerson*, 855 N.W.2d 495, 504-06 (Iowa 2014); *White v. State*, 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015). We likewise agree that the requirements articulated in *Craig* apply to two-way audiovisual transmission.

Applying the *Craig* test to the two-way technology used here, we conclude that the district court did not abuse its discretion in allowing the victim to testify by audiovisual transmission. First, the district court made the requisite finding of necessity. There is no dispute that the victim in this case was a patient at a residential drug treatment facility in Florida, and the victim's doctor opined that she "w[ould] not be available for a number of months." Admission into a treatment center for a prolonged period is a legitimate basis for the district court to find that a witness is medically unavailable to appear at trial. *Cf. Horn v. Quarterman*, 508 F.3d 306, 317-18 (5th Cir. 2007) (allowing two-way video testimony of a witness too ill to travel); *United States v. Gigante*, 166 F.3d 75, 81-82 (2d Cir. 1999) (same); *People v. Wrotten*, 923 N.E.2d 1099, 1101, 1103 (N.Y. 2009) (same). Additionally, Lipsitz's insistence on a speedy trial and his refusal to continue the trial until the victim was released from the treatment facility contributed to the district court's decision to grant the State's motion to allow the victim to testify remotely at trial. The district court explained that because Lipsitz had invoked "his right to go to trial next week, then it seem[ed] . . . that [the victim] is essentially unavailable, which would allow for either a deposition to be taken of the witness or use in this case of the audiovisual technology." Thus, absent this form of technology, the victim could not have appeared for the trial scheduled the following week. As a result, we conclude that use of the technology under these circumstances furthered the important public policy of protecting the victim's well-being while also protecting the defendant's right to a speedy trial while ensuring that criminal cases are resolved promptly.

Second, the use of two-way audiovisual transmission, as set forth in Nevada Supreme Court Rules Part IX-A(B), provides indicia of reliability by satisfying the elements of confrontation enunciated in *Craig*. It allows the witness to swear under oath, the defendant can cross-examine the witness, and the court and jury have the ability to observe the witness's demeanor and judge her credibility. The victim-witness here complied with these elements. She swore to tell the truth, the defense cross-examined her, and the judge and jury had an opportunity to observe her demeanor and judge her credibility. The district court noted for the record that the video worked better than in-court testimony because the jury was better able to observe her demeanor, she answered all the questions, the audio was clear, both parties had a chance to question her, and there was nothing to preclude the defendant from testing her credibility. The technology sufficiently provided Lipsitz an opportunity to confront the victim.

Accordingly, we conclude that the district court did not abuse its discretion in allowing the victim to testify by two-way audiovisual transmission. The technology allowed Lipsitz to confront the victim when she would have otherwise been unavailable, public policy supports the use of this technology to protect a victim's well-being while also ensuring that a defendant has a speedy trial, and the procedure for this modern technology satisfies the elements of confrontation.

*Lipsitz's conviction for both sexual assault and attempted sexual assault based on the same conduct was error, and there was insufficient evidence to uphold the sexual assault charge*

Lipsitz argues that the district court erred in adjudicating him of both sexual assault (count 2) and attempted sexual assault (count 3) because both charges stemmed from a single act—touching his penis to the victim's closed mouth—and he could not be convicted of both attempting and completing the same act. Lipsitz argues that we should vacate the sexual assault charge because there was no penetration and the conduct therefore amounted only to an attempted sexual assault. The State concedes that both convictions cannot stand. It contends that the conviction for sexual assault is valid because the definition of sexual assault by fellatio, as presented to the jury in jury instructions, allowed a touching to be sufficient for assault if there is "oral stimulation of the penis for sexual satisfaction." We agree that both convictions cannot stand as they were based on the same underlying conduct. The State should have charged counts 2 and 3 in the alternative, but it failed to do so. Accordingly, we review to determine whether there was sufficient evidence to support a conviction for the greater of the two charges, sexual assault. Under a sufficiency of evidence standard of review, we must determine "whether, after viewing the evidence in the light most favorable to

the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

NRS 200.366(1)(a) defines sexual assault as "subject[ing] another person to sexual penetration." NRS 200.364(9), as relevant here, defines "'[s]exual penetration'" as "fellatio, or any intrusion, however slight, of any part of a person's body." Further, "to prove attempted sexual assault, the prosecution must establish that (1) [the defendant] intended to commit sexual assault; (2) [the defendant] performed some act toward the commission of the crime; and (3) [the defendant] failed to consummate its commission." *Van Bell v. State*, 105 Nev. 352, 354, 775 P.2d 1273, 1274 (1989) (citing NRS 193.330); *see also Crawford v. State*, 107 Nev. 345, 351, 811 P.2d 67, 71 (1991) (explaining that the element requiring that the actor fail to complete the crime in an attempt crime precludes the conviction for the completed crime for the same conduct). Thus, for the sexual assault conviction to stand, there must have been sufficient evidence that Lipsitz consummated the act of fellatio.

In *Maes v. Sheriff*, we explained that fellatio does not require penetration. 94 Nev. 715, 716, 582 P.2d 793, 794 (1978). Instead, fellatio is "the practice of obtaining sexual satisfaction by oral stimulation of the penis." *Id.* (quoting *Webster's Third New International Dictionary* (Unabridged, 1968)). In *Maes*, this court concluded that the State met its burden of proving that the defendant sexually assaulted the victim by licking the victim's penis because there was oral stimulation, despite the absence of an intrusion. *Id.*

Here, the victim testified that there was no penetration: "His penis touched the tip of my mouth but my mouth was not open." And when asked how many times Lipsitz's penis touched her lips, the victim responded, "[j]ust once." A single touching of the defendant's penis to the victim's closed lips is insufficient to demonstrate oral stimulation of the penis and does not meet the definition of fellatio. *See id*. Instead, it is an attempted and failed sexual assault. *Crawford*, 107 Nev. at 351, 811 P.2d at 71. Therefore, we conclude that there was insufficient evidence to sustain the conviction for sexual assault, and we vacate the conviction for sexual assault (count 2) and remand the case to the district court with instructions to amend the judgment of conviction consistent with this opinion.[2]

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[2]We have considered Lipsitz's other claims of error and conclude that they lack merit. While he argues that there was insufficient evidence to convict him on all other counts, he fails to challenge a specific count and articulate how there was insufficient evidence to support a conviction. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). As to his constitutional challenge to NRS 50.700—the statutory prohibition on court-ordered psychological evaluations of victims

*CONCLUSION*

Based on the foregoing, we conclude that the district court did not abuse its discretion in proceeding to trial after canvassing Lipsitz and his counsel and determining that there was no doubt as to his competency. The court likewise did not abuse its discretion in allowing the victim to testify via two-way audiovisual transmission because this technology satisfied the Confrontation Clause's requirements, as stated in *Maryland v. Craig*, 497 U.S. 836, 850 (1990). We further conclude that Lipsitz could not be convicted of both sexual assault and attempted sexual assault for the same act, and there was insufficient evidence to support the conviction for sexual assault (count 2). Accordingly, we reverse Lipsitz's conviction for count 2 and remand this matter to the district court with instructions to amend the judgment of conviction consistent with this opinion. We affirm Lipsitz's judgment of conviction on all other grounds.

Stiglich and Silver, JJ., concur.

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THE ORIGINAL ROOFING COMPANY, LLC, Appellant, *v.* CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA, Respondent.

No. 74048

June 6, 2019 442 P.3d 146

Appeal from a district court order granting a petition for judicial review in which respondent challenged a Nevada Occupational Safety and Health Administration Review Board's decision to overturn a workplace safety citation on the basis that appellant employer lacked knowledge of the violative conduct at issue. Eighth Judicial District Court, Clark County; James Crockett, Judge.

**Reversed.**

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of sexual assault—the record shows that Lipsitz never sought an examination, a point he concedes on appeal. He cannot therefore argue that the district court erred in denying him the examination. Nor does he argue that the district court erred in failing to sua sponte order an evaluation. Accordingly, we conclude that he has waived this claim on appeal, and we decline to reach its merits. *See Blankenship v. State*, 132 Nev. 500, 505 n.2, 375 P.3d 407, 411 n.2 (2016) ("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." (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981))). Finally, as to his claim that the cumulative effect of errors at trial warrants reversal, we have found only one error—his conviction for sexual assault (count 2)—and thus there are no errors to cumulate.

*Marquis Aurbach Coffing* and *Thomas W. Stewart, Micah S. Echols*, and *Adele V. Karoum*, Las Vegas, for Appellant.

*State of Nevada Department of Business and Industry, Division of Industrial Relations*, and *Salli Ortiz*, Carson City, for Respondent.

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

## OPINION

By the Court, Stiglich, J.:

When an employer challenges a citation issued for a workplace safety violation, Nevada's Occupational Safety and Health Administration bears the burden of establishing, as part of its prima facie case, all of the essential elements of the charged violation, including that the employer had actual or constructive knowledge of the violative conduct. A supervisor's knowledge that his or her own work practices violated safety laws (or the supervisor's knowledge that employees under his or her supervision were not complying with such laws) will not be imputed to the employer unless the supervisor's violative conduct was foreseeable. Because respondent did not demonstrate the employer's actual knowledge of the violative conduct or that the supervisor's violative conduct was foreseeable under the circumstances presented, we conclude the Review Board properly overturned the citation for lack of employer knowledge. We therefore reverse the district court's order granting judicial review.

### *BACKGROUND*

In July 2015, a Compliance Safety and Health Officer for Nevada Occupational Safety and Health Administration (NOSHA) conducted a safety inspection at a jobsite in Henderson, Nevada. The inspector noted that an employee and a supervisor for appellant, The Original Roofing Company, LLC (TORC), were working on a steep roof without fall protection as required by federal regulation. *See* 29 C.F.R. § 1926.501(b)(11) (requiring all employees to use fall protection equipment when "on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels").[1] Both the employee and the supervisor told the inspector that they received training from TORC on fall protection and knew they were required to use it on the steep roof on which they were working. Both men admitted they disregarded their training because they found it easier to accomplish their work without using the fall protection equipment.

[1]Generally, federal Occupational Safety and Health Administration (OSHA) standards are deemed to be Nevada occupational safety and health standards. NRS 618.295(8).

The inspector imputed knowledge to TORC that its employees were not utilizing fall protection because TORC's supervisor knew of, and engaged in, the violative conduct. NOSHA issued a citation against TORC for one violation of 29 C.F.R. 1926.501(b)(11).[2] TORC contested the citation in a letter to NOSHA, and respondent, the Chief Administrative Officer of NOSHA, then filed a complaint with the Nevada Occupational Safety and Health Review Board (Review Board).

The Review Board held a hearing on the complaint and entered a written order, in which it concluded that respondent failed to demonstrate a violation of OSHA law. Specifically, the Review Board found that while the supervisor here ignored his training to undertake a task in violation of known safety regulations and allowed the employee under his supervision to do the same, respondent did not demonstrate that TORC knew of the violative conduct at issue. The Review Board concluded the supervisor's knowledge of his own violative conduct could not be imputed to TORC because respondent failed to demonstrate that the conduct was foreseeable in light of the evidence submitted by TORC pertaining to the company's efforts to ensure compliance with OSHA laws.[3]

Respondent petitioned the district court for judicial review of the Review Board's order. The district court granted the petition and reversed the order, holding that the Review Board lacked sufficient evidence to support its factual findings and legal conclusions. TORC appealed.

## *DISCUSSION*

Our role in reviewing an administrative agency's decision is identical to that of the district court—we review the agency's decision for clear error or an arbitrary and capricious abuse of discretion and will overturn the agency's factual findings only if they are not supported by substantial evidence. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). An agency's fact-based conclusions of law are entitled to deference when supported by substantial evidence; however, purely legal questions are reviewed de novo. *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev.

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[2]The violation was classified as "repeat-serious" because TORC had been previously cited for similar violations in January 2012 and July 2013 (committed by different supervisors and employees than those in the underlying violation) and serious injuries are likely to result from falls. *See* NRS 618.625(2) (outlining a serious violation of OSHA law).

[3]The Review Board also concluded that even if respondent had shown that TORC violated an OSHA law, TORC established the affirmative defense of unpreventable employee misconduct. Because we agree with the Review Board's conclusion that respondent failed to present a prima facie case for an OSHA violation, we need not reach this issue.

355, 362, 184 P.3d 378, 383-84 (2008). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *City Plan Dev., Inc. v. State, Office of Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005).

Pursuant to NAC 618.788, the Chief Administrative Officer of NOSHA carries the burden of proof in demonstrating a violation of OSHA law by establishing: (1) the applicability of the OSHA regulation; (2) noncompliance with the OSHA regulation; (3) employee exposure to a hazardous condition; and (4) the employer's actual or constructive knowledge of the violative conduct. *See Atl. Battery Co.*, 16 BNA OSHC 2131, 2135 (No. 90-1747, 1994). The parties agree respondent established the first three elements of a prima facie violation of OSHA law in that 29 C.F.R. 1926.501(b)(11) applied to TORC's roofing activities; the employee and the supervisor violated the regulation by failing to utilize fall protection; and the failure to utilize fall protection exposed TORC employees to a hazardous condition. Respondent never alleged TORC had actual knowledge of the violative conduct at issue. Thus, whether TORC had constructive knowledge of this violative conduct remains for this court's review.

Employer knowledge is established by demonstrating "that the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 86-692, 1992) (discussing federal OSHA criteria). Generally, an employer is imputed with a supervisor's knowledge of deviations from OSHA's safety rules to encourage employers to exercise reasonable diligence to ensure OSHA compliance by their employees. *See Adm'r of Div. of Occupational Safety & Health v. Pabco Gypsum*, 105 Nev. 371, 373, 775 P.2d 701, 702-03 (1989). An employer's exercise of reasonable diligence includes the obligation to anticipate potential hazardous conditions, take measures to prevent those conditions, and to inspect worksites. *See Pride Oil Well Serv.*, 15 BNA OSHC at 1814. Imputing knowledge to an employer through a supervisor is inappropriate, however, when the record does not demonstrate that the employer could have foreseen the supervisor's violative conduct. *See* NRS 618.625(2) (providing that "serious violations" exist when there is substantial probability that death or serious physical harm could result from practices used in the workplace "unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation").

To hold an employer absolutely liable in all circumstances without regard for that employer's efforts to comply with OSHA's regulations would amount to strict liability and discourage OSHA compliance efforts. *See, e.g.*, *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 399 (4th Cir. 1979). As a number of federal appellate

courts have observed, employer knowledge of a workplace safety violation must be actual or constructive and may not be demonstrated vicariously simply by establishing a supervisor engaged in the violative conduct. *See ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013); *W.G. Yates & Sons Constr. Co. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 608-09 (5th Cir. 2006); *Pa. Power & Light Co. v. Occupational Safety & Health Review Comm'n*, 737 F.2d 350, 354 (3d Cir. 1984); *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155, 157-58 (10th Cir. 1980); *Ocean Elec. Corp.*, 594 F.2d at 401. We agree with those decisions and hold an employer's knowledge of violative conduct must be established "not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor." *ComTran Grp., Inc.*, 722 F.3d at 1316. In doing so, we recognize that such constructive knowledge could be based on any number of factors that evidence that the employer failed to enforce adequate safety standards. Ultimately, however, "a supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *W.G. Yates*, 459 F.3d at 608-09.

In light of the evidence presented at its hearing, substantial evidence supports the Review Board's fact-based legal conclusions regarding the lack of foreseeability of the supervisor's violation and TORC's efforts to comply with OSHA's safety regulations. *See Milko*, 124 Nev. at 362, 184 P.3d at 383-84. Specifically, TORC presented evidence of the company's efforts to comply with OSHA regulations and build its safety practices to address past violations and foster a culture of safety, including that it (1) spent roughly $170,000 on safety programs after its two previous citations, including the creation of a training facility equipped with a mock roof used to demonstrate to employees how to properly anchor their fall protection; (2) used a fall protection agreement form, requiring employees to acknowledge the TORC's safety policy; (3) had superintendents visit jobsites daily to check for safe practices and complete corresponding inspection forms, which were tied to an incentive program; (4) held meetings to review safety practices; (5) conducted safety audits; and (6) issued written notices to employees who violated safety rules and immediately scheduled those employees for retraining. The record thus supports the Review Board's findings that TORC exercised reasonable diligence to ensure safety compliance by implementing a safety program, making fall protection equipment readily available, holding training meet-

ings, requiring employee acknowledgment of policies, adopting an incentive program tying bonuses to following safety protocols, disciplining noncompliant employees, and by having superintendents conduct field audits and site inspections. *See Pride Oil Well Serv.*, 15 BNA OSHC at 1814. The Review Board properly rejected respondent's argument that TORC had constructive knowledge of the violative conduct given TORC's citations for similar violations in 2012 and 2013 that showed TORC that this was a problem. While the Review Board incorrectly found respondent did not offer any evidence that TORC previously employed foremen who did not enforce fall protection requirements, the record shows that TORC's previous violations involved different foremen. We agree with TORC that it was not foreseeable that *this* foreman would not enforce fall protection safety requirements because TORC made significant safety improvements to prevent conduct like that of the previous violations after those citations.

Accordingly, the Review Board did not abuse its discretion in overturning the citation, as substantial evidence supports its conclusion that NOSHA failed to demonstrate TORC's knowledge of the violative conduct at issue. *See Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Therefore, the district court erred in reversing the Review Board's decision.

In accordance with the foregoing analysis, we reverse the district court's order granting judicial review.

Hardesty and Silver, JJ., concur.

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ROSE, LLC, a Nevada Limited Liability Company, Appellant, *v.* TREASURE ISLAND, LLC, a Nevada Limited Liability Company, Respondent.

No. 71941-COA

June 6, 2019 445 P.3d 860

Appeal from a judgment following a bench trial in a contract action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

**Affirmed.**

*Lewis Roca Rothgerber Christie LLP* and *Abraham G. Smith, Daniel F. Polsenberg*, and *Joel D. Henriod*, Las Vegas, for Appellant.

*Hutchison & Steffen, LLC*, and *Michael K. Wall* and *Mark Hutchison*, Las Vegas; *Fennemore Craig, P.C.*, and *Patrick J. Sheehan* and *Steven M. Silva*, Las Vegas, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., TAO and BULLA,[1] JJ.

## OPINION

By the Court, TAO, J.:

In this appeal arising from the alleged breach of a commercial lease, we explore two legal questions not fully developed in Nevada law: (1) when a written lease is otherwise silent, whether the allegedly defaulting party is entitled to "strict" or merely "substantial" compliance with the notice requirements set forth in the lease for declaring the party in default, and (2) whether, under the circumstances of this case, a subtenant becomes a necessary party under Rule 19 of the Nevada Rules of Civil Procedure[2] (NRCP) to an action for breach of contract between the landlord and the prime tenant.

These questions arise from a lease between landlord Treasure Island, LLC, and its prime tenant, Rose, LLC, for space inside of Treasure Island's hotel/casino that was subleased to a third party, Señor Frog's (a subsidiary of a Mexican company called Operadora Andersons, hereinafter collectively referred to as Señor Frog's), and used to operate a restaurant. Treasure Island alleged that Rose failed to make timely rent payments and declared the lease in default, triggering the instant lawsuit. In addressing the two questions before us, we note that a clear majority of states requires landlords to strictly comply with any contractual notice provisions when declaring a lease in default, but nonetheless we conclude that any failure to do so is excused when the allegedly defaulting party receives actual notice of the default despite any noncompliance. We also conclude that, under the particular circumstances of this case, Señor Frog's was not a necessary party to the litigation under NRCP 19.

### *FACTUAL AND PROCEDURAL HISTORY*

Treasure Island and Rose entered into a 10-year lease (with options to renew for another 20 years) for space inside of Treasure Island's Las Vegas Strip hotel/casino that was turned into a Señor Frog's bar and restaurant. The lease provided for both monthly rent and quarterly percentage rent and required that notices under the

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[1]Subsequent to the oral argument held in this matter, THE HONORABLE BONNIE BULLA was appointed to the Nevada Court of Appeals. JUDGE BULLA has listened to the audio recording of oral argument and considered all arguments and briefs in participating in this matter.

[2]NRCP 19 was amended effective March 1, 2019, but the recent changes do not affect any issue raised in this appeal. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). We cite the text of the new rule herein.

lease be sent to Susan Markusch (an officer of Rose), with a copy to Señor Frog's. The lease provided that, upon the giving of any notice of default, Rose would be given 10 days to cure any alleged breach of the lease.

The parties subsequently revised the lease a number of times through mutual agreement. At issue here is the fifth revision to the lease, which the parties negotiated primarily to reflect a change in the relationship between Rose and Señor Frog's, converting what had been a partnership between them into a sublease with Rose as the principal tenant and Señor Frog's as the subtenant. The fifth amendment introduced a new provision "for the benefit of Señor Frog's" as a subtenant, updated Rose's "notice address," and added Señor Frog's and Señor Frog's counsel to the list of those required to receive copies of any notices given under the lease. Although the amendment required notice to be given to Señor Frog's, by its terms the text of the amendment did not grant Señor Frog's any right to intervene to cure a default by Rose after receiving such notice.

Approximately one year later, Rose failed to make its quarterly percentage rent payment on time. Treasure Island's in-house counsel sent a notice regarding the missed payment to Rose's president, also cc'ing Rose's in-house counsel via email. Treasure Island did not deliver separate notice to either Susan Markusch or Señor Frog's. After Rose failed to cure the default within the 10-day period set forth in the lease, Treasure Island's counsel sent a notice-of-termination letter to Rose's president and to Señor Frog's. In response to this letter, Señor Frog's attorney sent an email to Treasure Island asserting that the termination letter

> was sent to my client for notice . . . purposes only under section 11 of the fifth amendment to the lease agreement [and] my client, Señor Frog's, is not affected by default by Rose LLC as to prime tenant. As we further discussed, [Rose] is disputing the default. You have confirmed with me that [Treasure Island] does not plan on taking any action until the dispute with [Rose] is resolved, whether by court action or settlement between the parties. None of this will impact adversely on my client, which will be permitted to continue its subtenancy.

Thereafter, Treasure Island sued Rose alleging breach of the lease agreement and seeking declaratory relief. Rose counterclaimed, alleging breach of contract and breach of the implied covenant of good faith and fair dealing, and seeking a declaratory judgment. The district court conducted a bench trial during which the president of Señor Frog's testified as a witness and expressed no concern that Señor Frog's was not a participant in the lawsuit. Ultimately, the district court entered judgment in favor of Treasure Island, declaring that it properly terminated the lease. Rose now appeals.

*ANALYSIS*

On appeal, Rose challenges the district court's judgment on two grounds. First, it argues that the district court erred in declaring the lease terminated because Treasure Island failed to give proper notice of the default. Second, it argues that the judgment is void because a necessary party, namely Señor Frog's, was not joined in the action in violation of NRCP 19.

*Termination of the lease*

The parties do not dispute that Rose missed the quarterly rent payment in question. They also do not dispute that, after Treasure Island sent notice of the missed rent payment to Rose, Rose failed to pay within 10 days. Nonetheless, Rose argues that Treasure Island failed to comply with the notice requirements specifically agreed upon by the parties and recited in the fifth amendment and, therefore, the notice of default was legally ineffective, rendering the notice of termination ineffective. In response, Treasure Island concedes that its notice failed to strictly comply with the terms of the fifth amendment, but it argues that it substantially complied with those terms and that, in any event, the district court found that Rose received actual notice.

The Nevada Supreme Court has not yet addressed whether, under Nevada law, a party declaring another party in contractual default must comply strictly with the notice requirements set forth in the contract, or whether it need only substantially comply with those requirements, especially when the defaulting party has received actual notice. While Nevada law is silent, a review of other jurisdictions reveals that a clear majority of states that have addressed the question holds that a party declaring default must strictly comply with any and all contractual notice requirements. These courts reason that "equity abhors forfeitures of valuable leasehold interests," *Metro. Transp. Auth. v. Cosmopolitan Aviation Corp.*, 471 N.Y.S.2d 872, 873 (App. Div. 1984), and forfeiture is a result "so harsh[ that] the law requires that every prescribed requirement be met unless waived by agreement of the parties," *Boyd v. Boone Mgmt., Inc.*, 676 S.W.2d 24, 26-27 (Mo. Ct. App. 1984). *See Tiller v. YW Hous. Partners, Ltd.*, 5 So. 3d 623, 629 (Ala. Civ. App. 2008); *Berry v. Crawford*, 373 S.W.2d 129, 131 (Ark. 1963); *Boston LLC v. Juarez*, 199 Cal. Rptr. 3d 452, 460 (Ct. App. 2016) (citing Cal. Civ. Code § 1442 (West 2007)); *Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1160 (D.C. 1985); *Wood v. Ensworth*, 430 So. 2d 617, 618 (Fla. Dist. Ct. App. 1983); *Preferred Real Estate Equities, Inc. v. Hous. Sys., Inc.*, 548 S.E.2d 646, 648 (Ga. Ct. App. 2001); *Tage II Corp. v. Ducas (U.S.) Realty Corp.*, 461 N.E.2d 1222, 1225 (Mass. App. Ct. 1984); *ARE-100/800/801 Capitola, LLC v. Triangle Labs., Inc.*, 550 S.E.2d 31, 35 (N.C. Ct. App. 2001); *Keller v. Bolding*, 678 N.W.2d

578, 584 (N.D. 2004); *Elizabethtown Lodge No. 596, Loyal Order of Moose v. Ellis*, 137 A.2d 286, 290 (Pa. 1958); *Litchfield Co. of S.C., Inc. v. Kiriakides*, 349 S.E.2d 344, 347 (S.C. Ct. App. 1986); *Vinson Minerals, Ltd. v. XTO Energy, Inc.*, 335 S.W.3d 344, 354 (Tex. App. 2010); *Grow v. Marwick Dev., Inc.*, 621 P.2d 1249, 1251 (Utah 1980); *Vt. Small Bus. Dev. Corp. v. Fifth Son Corp.*, 67 A.3d 241, 245 (Vt. 2013); *Tacoma Rescue Mission v. Stewart*, 228 P.3d 1289, 1291 (Wash. Ct. App. 2010); *see also Tatewosian v. McLellan*, 80 A.2d 879, 880 (R.I. 1951) (cited in *Turks Head Realty Tr. v. Shearson Lehman Hutton, Inc.*, 736 F. Supp. 422, 428 (D.R.I. 1990) for the proposition that notice provisions are literally construed); *cf. In re Kapiolani Blvd. Lands, Inc.*, 563 P.2d 390, 391 (Haw. 1977) (noting that covenants in a lease upon "the breach of which a forfeiture is claimed . . . must be strictly construed"); *Davis v. Wickline*, 135 S.E.2d 812, 814 (Va. 1964) ("[A] breach of covenant [in a lease] to sustain forfeiture is construed strictly against forfeiture.").

A minority of states, on the other hand, concludes that mere substantial compliance with contractual notice terms is sufficient. *See Kimmel v. Cockrell*, 317 N.E.2d 449, 451 (Ind. Ct. App. 1974) (finding notice sufficient when it "substantially complie[d] with the terms of the lease"); *First Nat'l Bank of Commerce v. DiRosa*, 545 So. 2d 692, 694 (La. Ct. App. 1989); *Equity Props. & Dev. Co. v. Entinger*, No. 188302, 1996 WL 33347540, at *2 (Mich. Ct. App. Dec. 27, 1996) (citing *Gordon v. Great Lakes Bowling Corp.*, 171 N.W.2d 225 (Mich. Ct. App. 1969)); *Hil-Roc Condo. Unit Owners Ass'n v. HWC Realty, Inc.*, No. 87344, 2006 WL 2627553, at *3 (Ohio Ct. App. Sep. 14, 2006) (citing *McGowan v. DM Grp. IX*, 455 N.E.2d 1052 (Ohio Ct. App. 1982)).

Although the majority approach seems the better one, we need not decide which of these lines of cases to follow because an additional wrinkle exists here: in this case, the district court specifically found that, notwithstanding Treasure Island's failure to strictly comply with the contractual notice requirements, Rose received actual notice anyway. A number of states that require strict compliance with notice requirements nonetheless recognize that, if a defaulting party received actual notice anyway despite some failure of strict compliance, then the failure resulted in no prejudice and therefore no breach to complain about. *See Jefferson Garden Assocs. v. Greene*, 520 A.2d 173, 183-84 (Conn. 1987); *Thompson v. Fairchild*, 468 P.2d 316, 318-19 (Idaho 1970); *Vole, Inc. v. Georgacopoulos*, 538 N.E.2d 205, 210-11 (Ill. App. Ct. 1989). These courts reason that "[s]trict construction does not . . . require ritualistic compliance with [notice requirements]." *Greene*, 520 A.2d at 183. Instead, the notice of termination "must reflect the purpose that the notices were meant to serve." *Id.* Thus, when actual notice is received and the defaulting party is fully aware of the problem, how the notice was

sent becomes immaterial. *See Thompson*, 468 P.2d at 319 (noting that whether formal requirements regarding notice were complied with is immaterial where it is clear that notice was in fact received); *Vole*, 538 N.E.2d at 210 (noting that provisions requiring a particular form of notice are only meant to ensure delivery). Whether the legal standard is characterized as "strict" or "substantial" compliance, the point is to ensure that the defaulting party actually receives the information to which it is entitled, not to penalize the noticing party for minor technical failures that caused no prejudice to any other party.

Because the district court found, as a factual matter, that Rose received actual notice of the default, for our purposes it matters little that Treasure Island failed to technically comply with the notice requirements agreed upon in the fifth amendment. Rose knew what it was entitled to know: that the quarterly rent payment had not been received in a timely manner, and consequently the notice of default was valid notwithstanding any failure of strict compliance. When the missing rent was not paid despite the giving of actual notice, Treasure Island became entitled to terminate the contract.

*Whether Señor Frog's is a necessary party under NRCP 19*

Quite apart from the notice issue, Rose argues that the judgment cannot stand because Treasure Island and the district court failed to join Señor Frog's as a necessary party under NRCP 19. Rose contends that Señor Frog's was a necessary party because it was a third-party beneficiary to the prime lease and also because Treasure Island sought a declaratory judgment that the lease was terminated, which would have affected Señor Frog's contractual rights under the sublease. Treasure Island counters that Rose is precluded from asserting this argument because it failed to raise it below and Señor Frog's was not a necessary party in any event because it was not a party or a third-party beneficiary to the lease and any declaratory judgment would not affect any possible claim Señor Frog's may possess.

Generally speaking, the absence of an allegedly necessary party may be raised in one of two ways: it may be raised by the necessary party itself, or it may be raised by someone other than the allegedly necessary party (such as another party or the court). These two methods involve different procedures and deadlines. If an allegedly necessary party believes it has an interest in a pending action, it may seek to intervene in the action. *See* NRCP 24. On the other hand, if another party already present in the action desires to raise the issue on behalf of a missing party, it can do so by filing either a motion to dismiss the action pursuant to NRCP 12(b)(6), a motion for judgment on the pleadings pursuant to NRCP 12(h)(2) (which can be filed before trial or during trial), or a motion seeking to join

the missing party under NRCP 19. Always, the substantive test for determining whether the absent party is necessary is governed by NRCP 19.

Here, Señor Frog's never made any effort to intervene in this action in order to protect its own interests. Quite to the contrary, upon learning of the termination, counsel for Señor Frog's emailed Treasure Island to state that Señor Frog's "is not affected by [the] default" and "[n]one of this will impact [it] adversely," thereby effectively disclaiming any interest in participating in the litigation. Therefore, the question raised in this appeal is not whether Señor Frog's may now intervene (something that it stated in writing that it did not want to do), but rather whether an existing party (Rose) may now seek to have the judgment reversed due to Señor Frog's absence notwithstanding its lack of interest in being joined. This question, in turn, has two components: whether the absence of Señor Frog's can still be raised at this stage of the litigation and, if the answer to that is yes, whether Señor Frog's is a necessary party as defined by NRCP 19.

*A. Whether Rose has waived its right to challenge the absence of Señor Frog's*

Treasure Island argues that Rose's challenge to the absence of Señor Frog's has been waived because nobody ever raised it below, citing a number of federal cases for the proposition that Rule 19 defects must first be asserted in district court or they are waived on appeal.

NRCP 19 is virtually identical to its federal counterpart and Nevada generally follows federal law when its procedural rules are similar. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (noting that where the NRCP parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for the appellate courts in applying the Nevada rules). However, the Nevada Supreme Court does not follow federal law when it comes to whether a challenge to the absence of a necessary party under Rule 19 may be waived.

In most federal courts, a challenge by one of the current parties asserting the absence of a necessary party is waived on appeal if not first raised before the district court through either an immediate motion to dismiss under FRCP 12(b)(7) filed at the pleading stage, or a subsequent motion under FRCP 12(h)(2) filed before the end of trial. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Mid-Continent Cas. Co.*, 518 F.2d 292, 294 (10th Cir. 1975); *Capital Fire Ins. Co. of Cal. v. Langhorne*, 146 F.2d 237, 242-43 (8th Cir. 1945); *but see Marvin v. Pflueger*, 280 P.3d 88, 98 (Haw. 2012) (noting that some federal courts question whether such a challenge can be waived).

This approach is designed to prevent any party from using Rule 19 as something of an "ambush" tactic when the party knows that an absent party has not been joined but tactically chooses not to bring the matter to the court's attention until after it loses and then raises it belatedly for the first time on appeal in order to engineer a reversal on grounds it knew existed all along but purposely hid. *See Judwin Props., Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 434 (5th Cir. 1992) (finding "no authority for the offensive use of Rule 19 which would allow a plaintiff to negate an adverse ruling because of its own failure to join all indispensable parties"); *cf. Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 483 (D.C. Cir. 1996) (concluding that an appellant's conscious, tactical decision not to join a party at the beginning of the action militated against finding that the party was indispensable); *Arnold v. BLaST Intermediate Unit 17*, 843 F.2d 122, 125 n.6 (3d Cir. 1988) (applying the principle of laches to bar a Rule 19 argument where "[respondent] itself failed to join [a necessary party] despite ample opportunity"). However, this approach achieves this goal at the cost of accepting the risk of occasional piecemeal litigation separately initiated by the absent party.

Here, Treasure Island notes that Rose failed to challenge the absence of Señor Frog's below. Unlike federal courts, however, the Nevada Supreme Court has held that under NRCP 19 such challenges are not waivable and may be raised for the first time on appeal. *See Blaine Equip. Co. v. State, Purchasing Div.*, 122 Nev. 860, 864-66, 138 P.3d 820, 822-23 (2006); *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 395-96, 594 P.2d 1159, 1163 (1979); *Robinson v. Kind*, 23 Nev. 330, 338, 47 P. 1, 3-4 (1896).

The Nevada Supreme Court thus appears to prioritize slightly different policy interests than does the federal judiciary: avoiding the possibility of piecemeal litigation by permitting courts to attempt to join all necessary parties with any potential claim no matter when the question is raised. *See Tarkanian*, 95 Nev. at 397, 594 P.2d at 1164 ("A major objective of [NRCP 19(a)] is to have a final and complete determination of the controversy, not to determine issues piecemeal . . . .") (second alteration in original) (internal quotation marks omitted). However, it achieves this goal at the cost of potentially permitting parties to use Rule 19 as a tactical maneuver to engineer reversals by strategically waiting to see what the trial verdict is before asserting the issue for the first time on appeal. *See id.* at 396, 594 P.2d at 1163-64 (noting that a party should have been joined in the action because its ability to protect its interests would be impaired and further litigation of the controversy was likely absent joinder); *Young Inv. Co. v. Reno Club, Inc.*, 66 Nev. 216, 222, 208 P.2d 297, 300 (1949) (noting that the purpose of joining necessary parties "is to have a final and complete determination of a controversy, not to determine issues piecemeal but to avoid a multiplicity of suits").

Treasure Island asserts that, here, the risk of piecemeal litigation is nonexistent and the possibility of waste is high because Señor Frog's has expressed no interest in participating in the litigation despite having been involved in certain parts of it. Thus, it argues that all of the conditions for a waiver of Rule 19 are present and nothing useful will be achieved through a reversal other than to relitigate the trial, adding a new party that, as a practical matter, has no desire to be involved.

That may be so; there is evidence in the record suggesting that Treasure Island may be correct about Señor Frog's lack of interest, as the company's president testified during the trial as a witness, yet expressed no interest in intervening and displayed no distress that his company had been omitted from the action. More, after learning that the lease had been terminated, counsel for Señor Frog's expressly notified Treasure Island by email that it "is not affected by [Rose's] default" and "[n]one of this will impact adversely" Señor Frog's, which comes vanishingly close to an express written disclaimer of any interest that Señor Frog's might otherwise have possessed in the litigation. But even with that evidence, Nevada's interpretation of NRCP 19 prohibits a conclusion that Rose has legally waived its right to challenge the absence of Señor Frog's.

The next question is whether Señor Frog's is a necessary party under NRCP 19.

*B. Whether Señor Frog's is a necessary party under NRCP 19*

Under NRCP 19, a party is necessary if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

NRCP 19(a)(1). To feasibly join a party, that party must be subject to service of process and joinder must not deprive the district court of subject matter jurisdiction. *Id.* A party is considered indispensable "only when joinder of that party is not feasible." *Blaine*, 122 Nev. at 864 n.6, 138 P.3d at 822 n.6.

Whether a party is necessary does not depend upon broad labels or general classifications, but rather comprises a highly fact-specific inquiry. Rule 19 "calls for courts to make pragmatic, practical judgments that are heavily influenced by the facts of each case." *Bacardi*

*Int'l Ltd. v. V. Suarez & Co.*, 719 F.3d 1, 9 (1st Cir. 2013) (citing 7 Charles Alan Wright et al., *Federal Practice & Procedure* § 1604 (3d ed. 2001)). "There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a)." *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1356 (10th Cir. 1987) (quoting 7 Charles Alan Wright et al., *Federal Practice & Procedure* § 1604 (2d ed. 1986)).

Although Rule 19 "provides for joinder of necessary parties, it does not [itself] create a cause of action against them." *Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999). Before a party may be joined under Rule 19, it "must have [its own cause of action against another party or] a cause of action against it." *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989).

Thus, in applying NRCP 19, we must first determine whether Señor Frog's has a legally valid claim against someone already in the litigation and/or whether someone already in the litigation has a legally valid claim against it. The answer to that question depends partly upon what legal relationship Señor Frog's bears to the other parties. Treasure Island argues that Señor Frog's is nothing more than a mere subtenant. If Treasure Island is correct and Señor Frog's is only that, then the only claim it could possess would be against Rose. But Rose argues that Señor Frog's is not merely a subtenant but also a third-party beneficiary to the principal lease, and it therefore possesses claims against both Treasure Island and Rose.

### *C. Whether Señor Frog's is merely a subtenant or is also a third-party beneficiary to the principal lease*

Rose argues that Señor Frog's is not merely a subtenant, but rather something more: a third-party beneficiary to the lease between Treasure Island and Rose. A subtenant normally possesses a claim only against the prime tenant but not against the landlord, because subtenants generally have no rights vis-à-vis a prime lessor merely by virtue of the sublease because there exists no direct relationship of privity between the subtenant and the landlord. *See, e.g.*, *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 85, 807 P.2d 208, 212 (1991) (noting that landlords have no privity of contract or estate with subtenants and thus must rely upon prime tenants to maintain subleases). In contrast, a third-party beneficiary of a lease has privity with the landlord and therefore would possess a claim not only against the prime tenant but also against the landlord arising from the principal contract. *See Mercury Cas. Co. v. Maloney*, 6 Cal. Rptr. 3d. 647, 649 (Ct. App. 2003) ("[A] third party beneficiary's rights under [a] contract are not based on the existence of an actual contractual relationship between the [promisor and the third party beneficiary] but on the law's recognition that the acts of the contracting

parties . . . established privity between the promisor and the third party beneficiary . . . .” (emphasis omitted)); *see also Wells v. Bank of Nev.*, 90 Nev. 192, 197, 522 P.2d 1014, 1017 (1974) (“Absent evidence of a third party beneficiary status, an assignment of contract rights or a delegation of contract duties, [individuals have no] rights, duties or obligations under [an] agreement.”). Because a third-party beneficiary’s right to enforce a contractual promise depends upon the continued validity of the contract itself, *see Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 77 Cal. Rptr. 2d 479, 489 (Ct. App. 1998), the beneficiary may be a necessary party to an action threatening rescission of the contract. *See Jordan v. Paul Fin., LLC*, 644 F. Supp. 2d 1156, 1172 (N.D. Cal. 2009) (“All parties to a contract and others having a substantial interest in it should be joined in an action to rescind or set aside the contract.” (internal quotation marks omitted)).

A person or entity is a third-party beneficiary to a contract, even without signing it, when (1) there “clearly appear[s] a promissory intent to benefit the third party” and (2) “the third party’s reliance thereon [wa]s foreseeable.” *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977); *cf.* Restatement (Second) of Contracts § 302 (Am. Law Inst. 1979) (stating that third-party beneficiary status exists where (1) the recognition of the beneficiary’s right to performance is “appropriate to effectuate the intention of the parties [to a contact],” and (2) either the performance “will satisfy an obligation of the promisee to pay money to the beneficiary” or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance”). Whether a party is an intended third-party beneficiary “depends on the parties’ intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered.” *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 605 (2005) (internal quotation marks omitted).

Here, the fifth amendment expressly states that the new notice provisions were “for the benefit” of Señor Frog’s. Rose focuses principally upon this language, arguing that it evidences the clear intention that Señor Frog’s be a third-party beneficiary. But viewed as a whole, a fair reading of the lease indicates that it was not the intention of Treasure Island and Rose to treat Señor Frog’s as both a subtenant under one contract (the sublease) and also simultaneously a third-party beneficiary with independent rights under another contract (the prime lease).

As a threshold matter, it’s far from clear that Rose can properly defend its own default by asserting that the nondefaulting party failed to give notice to a supposed third-party beneficiary other than Rose; that argument belongs to the third-party beneficiary, not to Rose. That aside, although the fifth amendment provides for notice to Señor Frog’s, it does not provide Señor Frog’s with any right,

in response to such notice, to cure a default triggered by any other party. Accordingly, the failure to give notice by itself would give Señor Frog's no independent cause of action against either Treasure Island or Rose that would meet the requirements of NRCP 19. *Cf. Vision Aviation, LLC v. Airport Auth. for Airport Dist. No. 1 of Calcasieu Par.*, 33 So. 3d 423, 426-28 (La. Ct. App. 2010) (holding that a mortgagee of leased property was a third-party beneficiary of the lease—and therefore a necessary party to an action threatening its termination—because it provided the mortgagee a right to cure the lessee's default). Without such a right to cure, a serious question exists as to whether the notice provision is in any way material to the lease as a whole.

Structurally, the relationship encapsulated by the lease was a commercial transaction in which everybody hoped to make money, and in order to do so Señor Frog's had to hold up its end of the bargain and operate a profitable restaurant and pay rent regularly and on time. If it failed to do so, then under the terms of the sublease Rose could evict it and find a higher-paying subtenant instead. The overarching design of the agreement hardly evinces an intention that if Señor Frog's was evicted from the premises for breaching the sublease, it would somehow still retain rights under the prime lease between Treasure Island and Rose even after Rose found another subtenant to take its place. Indeed, the very fact that Rose could unilaterally evict Señor Frog's from the premises for nonperformance without the agreement or knowledge of Treasure Island demonstrates that the primary lease was not intended to exist just for the benefit of Señor Frog's. To the contrary, neither Treasure Island nor Rose signed the primary lease only to benefit Señor Frog's for its own sake regardless of how its restaurant performed or whether or not Señor Frog's complied with the sublease. The situation at hand does not meet the legal definition of a third-party beneficiary, and Señor Frog's is therefore a mere subtenant and not a third-party beneficiary of the primary lease.

*D. Whether Señor Frog's, as a subtenant, was a necessary party*

As a subtenant, Señor Frog's has a relationship of privity with Rose but not with Treasure Island. The next question is whether that is enough to make Señor Frog's a necessary party.

NRCP 19 asks whether complete relief can be accorded to all current parties without the absent party and/or whether the absent party "claims an interest" in the action. How we analyze these two inquiries depends upon how the question of necessity came before us. Had the question of Señor Frog's absence been raised by Señor Frog's itself through an attempt to intervene in the action, we would start by analyzing the scope of the interest it claims to have in the

action. *See* NRCP 24(a)(2). Had Señor Frog's sought intervention, an argument could perhaps be made that it is indeed a necessary party to an action between the landlord and the prime tenant because "when a prime lease falls, so does the sublease." *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 430 (2d Cir. 1987) (internal quotation marks omitted); *see Syufy Enters., L.P. v. City of Oakland*, 128 Cal. Rptr. 2d. 808, 818 (Ct. App. 2002) ("rejection of a . . . master lease effectively terminates an attached sublease as well, thus extinguishing the subtenant's right to possession of the premises"). On the other hand, however, because a sublease cannot exist without a prime lease, Rose's interest in defending the prime lease means that in many cases it likely could adequately defend Señor Frog's interest in the sublease. *Cf.* NRCP 24(a)(2) (providing that intervention of right is unavailable where "existing parties adequately represent [the would-be intervener's] interest").

But when the question of an absent party's necessity is raised by a party other than the missing one, that inquiry becomes less critical. This is especially so when, as here, the absent party knows about the action but has made no effort to intervene, because its lack of interest suggests that in truth it may not really fear impairment of its rights. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (9th Cir. 1983) (declining to order joinder of an entity that knew of the action yet "never asserted a formal interest in either the subject matter of th[e] action or the action itself" and instead opted to "observe[ ] a neutral and disinterested posture"). Moreover, as a practical matter, when an absent party chooses not to intervene, its absence frequently deprives courts of the very information most essential to determining whether the party does or does not possess a valid interest in the litigation. "It is the absent party that must claim an interest," and another party's attempt to assert a nonparty's interest "falls outside the language of the rule." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir. 1996) (internal quotation marks omitted). Accordingly, when the question of necessity is raised by another party already present in the action rather than by the missing party itself, Rule 19 focuses principally upon whether complete relief can be accorded among the parties already present.

"Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 796, 312 P.3d 484, 490 (2013) (quoting *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996)). "[T]he court must decide if complete relief is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party." *Id.* (alteration in original) (emphasis omitted) (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)).

To answer this inquiry, we look to the nature of "the pleadings as they appear at the time of the proposed joinder." *Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1124 (2d Cir. 1990) (quoting 7 Charles Alan Wright et al., *Federal Practice & Procedure* § 1604 (2d ed. 1986)). Moreover, completeness is measured by the claims and defenses already asserted in the litigation rather than hypothetical claims or defenses that other parties could have raised but did not; under Rule 19, parties "are not required to anticipate [the opposing party's claims] and join all parties that may be necessary for the [opposing party]'s benefit." *Halpern v. Rosenbloom*, 459 F. Supp. 1346, 1354 (S.D.N.Y. 1978). In contract disputes, "[c]ontroversies arising under an agreement properly are to be determined and settled by parties to the agreement or their assigns, that is, by those who have legal rights or duties thereunder." *Wells*, 90 Nev. at 197, 522 P.2d at 1017.

In this case, Treasure Island could, and did, obtain complete relief despite the absence of Señor Frog's. Treasure Island sought termination of the prime lease based upon Rose's default, relief that the district court granted. Conversely, Rose sought a declaration nullifying the termination of the lease, relief that the district court denied. The presence or absence of Señor Frog's in the litigation through its own sublease played no role in the district court's decision regarding whether Rose defaulted in its obligations under the prime lease. Señor Frog's appears legally irrelevant to any claim that Treasure Island and Rose asserted against each other, and Señor Frog's said as much in its own email indicating that it "is not affected" by Rose's default.

Unlike Treasure Island, Rose has a relationship of privity with Señor Frog's. But it is Rose, not Señor Frog's, who is accused of breaching the lease, and it is Treasure Island, not Señor Frog's, who is accused of wrongfully terminating the lease. As far as we know, Señor Frog's has done nothing wrong that would create a claim against it by anyone. Rose therefore appears to have no claim it could assert against Señor Frog's. If evicted, Señor Frog's may have a claim against Rose, but Rose does not argue that it possesses any claim against Señor Frog's; Rose's only claims are against Treasure Island.

Consequently, complete relief can be accorded to both Treasure Island and Rose without needing to join Señor Frog's. Nothing about the disposition of the action in favor of Treasure Island impairs the ability of Señor Frog's to seek relief against Rose or leaves either Treasure Island or Rose subject to double, multiple, or otherwise inconsistent obligations. Señor Frog's is therefore not a necessary party under NRCP 19.

It's possible that Rose may be the target of separate litigation brought by Señor Frog's under the sublease. But even if that is true,

that would not subject Rose to any judgment inconsistent with the relief granted through this litigation. If Rose defaulted on its prime lease (as the district court concluded), then it likely also breached its obligations toward Señor Frog's under the sublease. Those are two independent breaches of two different contracts, and neither is inconsistent with the other. Adjudicating Rose liable for both breaches would result in multiple judgments against Rose, but not judgments that are in any way inconsistent with each other.

Moreover, even if some inconsistency could arise, that is Rose's own fault. In this appeal, it is Rose who seeks to overturn the judgment by arguing the absence of Señor Frog's. But the only likely claim that could involve Señor Frog's in any way would be a claim by Señor Frog's against Rose for breach of the sublease. Thus, the only party in this action that could suffer from multiple actions from the failure to join Señor Frog's is Rose, a problem that Rose itself could have easily rectified by simply joining Señor Frog's. Rose was the only party that had any incentive to do so, because it was the only party that could have been the target of any claim by Señor Frog's.

Yet Rose never mentioned this potential problem until raising it for the first time in this appeal. Rose effectively seeks to overturn a judgment based upon the absence of a party that only it had any reason to join. This raises the possibility that, in reality, Rose may not be all that concerned about any threat of piecemeal litigation from Señor Frog's for, if it was, one would think that it would have done everything it could to protect itself from the outset from every claim it feared might be filed.[3] *Cf. Northrop Corp.*, 705 F.2d at 1044.

The ultimate goal of NRCP 19 is to promote efficiency and conserve judicial resources by reducing duplicative and piecemeal litigation and avoiding potentially inconsistent outcomes. *See Univ. of*

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[3]Rose's inaction appears especially telling when it was intimately familiar with Señor Frog's personnel, business operations, and how to contact them, because the two businesses started off as partners under the original lease and only later (by the time of the fifth amendment) converted their relationship into the more distant status of subtenancy. Under these circumstances, waiting to raise this issue until so late in the day conveys the impression that Rose is trying to benefit from its own trial decision and thereby obtain reversal based upon something resembling invited error.

> The doctrine of "invited error" embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit. It has been held that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it. In most cases application of the doctrine has been based on affirmative conduct inducing the action complained of, but occasionally a failure to act has been referred to.

*Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 Am. Jur. 2d *Appeal and Error* § 713 (1962)).

*Nev. v. Tarkanian*, 95 Nev. 389, 397, 594 P.2d 1159, 1164 (1979). That goal is poorly served if a party is allowed to make a tactical decision to refrain from timely bringing a known defect in the trial to the court's attention that it then uses on appeal to try to force the court to conduct the same trial twice. Quite to the contrary, allowing a party to procure reversal based upon the absence of an entity that only it had any reason to join would set the dangerous precedent of permitting litigants to reduce trials to mere practice runs by manufacturing a "win-win" situation under which it either prevails at trial or has an easy Plan B for appeal if it loses. That can hardly have been the intention of the framers of NRCP 19.

In this case, both Treasure Island and Rose can procure complete relief in their claims against each other without joining Señor Frog's. But even if Rose suffered some detriment from not having Señor Frog's in the litigation, it bears responsibility for the situation. Whatever Rose's subjective intent might have been in failing to join Señor Frog's (whether it resulted from mere oversight or a tactical plan), its inaction created the very problem that it now argues compromised the verdict below. And even to the extent Señor Frog's suffered any prejudice arising from the termination of the agreement, its lack of interest in participating in this lawsuit indicates that it was willing to live with whatever prejudice it may have suffered. Consequently, Señor Frog's is not a necessary party and Rose is not entitled to relief.[4]

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[4]In their briefing and during oral argument, the parties did not explicitly address NRS 30.130, which identifies who must be joined in an action seeking only declaratory relief. Under that statute, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." When a relevant party is not so joined, the district court should allow the plaintiff to amend his or her complaint to join the party or it should "effectuate[ ] the amendment *sua sponte*." *Crowley v. Duffrin*, 109 Nev. 597, 603, 855 P.2d 536, 540 (1993). In *Crowley*, the supreme court remanded the case for the district court to join parties required to be joined under NRS 30.130 and then enter a declaratory judgment. *Id.* at 606, 855 P.2d at 542. In this case, however, we do not think it necessary to remand for the district court to join Señor Frog's in that manner for the following reasons. As an initial matter, the Uniform Declaratory Judgments Act "is directed only to those who enjoy *a legal interest in the agreement under scrutiny*." *Wells v. Bank of Nev.*, 90 Nev. 192, 197-98, 522 P.2d 1014, 1017-18 (1974) (emphasis added). Here, because Señor Frog's was not a party or third-party beneficiary to the agreement between Treasure Island and Rose, it had no legal interest in that agreement. *See Wells*, 90 Nev. at 197, 522 P.2d at 1017 (concluding that because the appellants were not parties, third-party beneficiaries, assignees, or delegees with respect to the underlying agreement, they had no rights, duties, or obligations under it, and therefore, could not challenge it via a declaratory-judgment action). As a subtenant, its only interest derived from Rose's interest. *See Gasser v. Jet Craft Ltd.*, 87 Nev. 376, 382, 487 P.2d 346, 350 (1971) (noting that a "sublease" is generally defined as a lease "executed by

*CONCLUSION*

For the foregoing reasons, we conclude that Rose suffered no prejudice as it received actual notice of the default, and we conclude that, under the circumstances of this case, Señor Frog's was not a necessary party under NRCP 19 whose absence from the litigation compels reversal, and we therefore affirm.[5]

Gibbons, C.J., and Bulla, J., concur.

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TAE-SI KIM, an Individual; and JIN-SUNG HONG, an Individual, Appellants, *v.* DICKINSON WRIGHT, PLLC, a Nevada Professional Limited Liability Company; JODI DONETTA LOWRY, ESQ., an Individual; JONATHAN M.A. SALLS, ESQ., an Individual; ERIC DOBBERSTEIN, ESQ., an Individual; and MICHAEL G. VARTANIAN, ESQ., an Individual; Respondents.

No. 74803

June 13, 2019 442 P.3d 1070

Appeal from a district court order granting a motion to dismiss in a legal malpractice action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

**Reversed and remanded.**

[Rehearing denied September 6, 2019]

*Brandon L. Phillips*, Attorney at Law, PLLC, and *Brandon L. Phillips*, Las Vegas, for Appellants.

*Morris Law Group* and *Steve L. Morris* and *Ryan M. Lower*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.[1]

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the lessee of an estate to a third person, conveying the same estate for a shorter term than that for which the lessee holds it" (internal quotation marks omitted)); *see also In re J.T. Moran Fin. Corp.*, 124 B.R. 924, 925 (Bankr. S.D.N.Y. 1991) ("The creation of a sublease depends upon the continuing viability of a prime lease, so that the rejection of the prime lease also results in the rejection of the sublease."). Thus, Señor Frog's was not a party that needed to be joined under NRS 30.130. Accordingly, when Rose's interest was validly extinguished (because it is a party to this case), so too was the subordinate sublease, regardless of Señor Frog's absence.

[5]We have carefully considered all of Rose's other arguments on appeal and conclude that they are without merit.

[1]The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

## OPINION

By the Court, Silver, J.:

This case allows us to clarify the interplay between Nevada's litigation malpractice tolling rule and 28 U.S.C. § 1367(d) (2012), a federal tolling statute, on a legal malpractice claim. We first address the application of § 1367(d), which tolls the statute of limitations for a state-law claim joined with a federal claim under supplemental jurisdiction while the state-law claim is pending in federal court, *and* for at least 30 days after the state-law claim's dismissal from federal court. We clarify that § 1367(d) distinguishes between an "action" and a "claim," and thus, the state-law claim's dismissal is sufficient to end the federal tolling period. Finally, we reaffirm our prior holdings that the litigation malpractice tolling rule[2] does not apply to non-adversarial proceedings.

Because 28 U.S.C. § 1367(d) tolled claims brought by appellants Tae-Si Kim and Jin-Sung Hong (collectively, Kim) only until the claims were dismissed, we hold that the district court erred by finding that Kim's claims against Charles M. Damus, Esq., were tolled until the remaining claims in the federal action were also dismissed. Furthermore, because the litigation malpractice tolling rule does not apply to the claims against Damus, Kim's claims against Damus potentially became barred by the statute of limitations during respondents' representation of Kim. Since the litigation malpractice tolling rule does apply to the claims against respondents, we further hold that the district court erred by finding that Kim's claims against respondents were timed-barred by Nevada's statute of limitations for legal malpractice claims.

### *FACTS AND PROCEDURAL HISTORY*

Kim hired Damus to handle a real property dispute in December 2008. Damus failed to file a complaint to protect Kim's interest in the property, and the property was foreclosed on. Kim fired Damus in September 2009. One month prior to firing Damus, Kim hired the law firm of Gibson Lowry Burris LLP (the Gibson firm) to also pursue claims related to the property dispute. Under the Gibson firm's representation, Kim filed a complaint regarding the property in Nevada's federal district court. Kim later amended the complaint on March 2, 2010, to include claims against Damus for legal malpractice, negligent undertaking to perform services, and unjust enrichment for his failure to file a complaint stopping the foreclo-

[2]While the parties refer to the tolling rule as the "litigation tolling rule," our caselaw consistently calls it the "litigation malpractice tolling rule." *See Branch Banking & Tr. Co. v. Gerrard*, 134 Nev. 871, 872-73, 432 P.3d 736, 738 (2018). Accordingly, we use the latter term throughout this opinion.

sure of the property. During this time, respondent Dickinson Wright, PLLC, absorbed the Gibson firm. Damus filed a motion to dismiss the claims against him for lack of subject matter jurisdiction, which the federal court granted on December 6, 2010.

Kim entered into an amended and restated legal services agreement with Dickinson Wright, during which time Kim's federal action was still ongoing. More than three years later, Kim emailed a Dickinson Wright attorney asking whether the Gibson firm had previously filed Kim's malpractice claims against Damus in state court. The attorney responded that the Gibson firm had not filed a state action against Damus, that Dickinson Wright would not do so because it was terminating its representation of Kim, and that Kim should contact other counsel if they wished to pursue such claims. The federal district court dismissed the remaining federal claims with prejudice on September 4, 2015.

Kim filed a malpractice complaint in state court against Dickinson Wright on June 12, 2017. Kim argued that Dickinson Wright failed to sue Damus in state court and thereafter allowed the statute of limitations on those claims to run. Kim argued that 28 U.S.C. § 1367(d) only tolled the claims against Damus until the federal court dismissed the claims and, therefore, the statute ran during the firm's representation. Kim also argued that Nevada's litigation malpractice tolling rule did not apply to the claims against Damus, such that those claims are now barred, but it did apply to toll the claim against Dickinson Wright during the federal litigation, and therefore, the claim against Dickinson Wright was not time-barred. Conversely, Dickinson Wright argued that § 1367(d) and Nevada's litigation malpractice tolling rule tolled Kim's claims against Damus until the federal action ended and, therefore, Kim had plenty of time to sue the attorney but let the statute of limitations run. Further, Dickinson Wright argued that Kim's malpractice claim against it was time-barred.

The district court granted the motion to dismiss, finding that (1) 28 U.S.C § 1367(d) tolled the statute of limitations on any state action against Damus until September 4, 2015, when the federal action was dismissed, so Kim could have brought suit then as advised by Dickinson Wright;[3] (2) under Nevada's litigation malpractice tolling rule, Kim's legal malpractice claim against Damus did not accrue until the end of the federal action when damages were certain; and (3) Kim's claim against Dickinson Wright was time-barred under NRS 11.207.[4] Kim appealed.

[3]The district court found that Dickinson Wright informed Kim of the tolling statute in the July 2015 email, which Kim does not dispute on appeal.

[4]The district court also found that Dickinson Wright's exercise of professional judgment was not actionable. We decline to address that finding on appeal—except to note that Nevada does not currently recognize the attorney judgment

*DISCUSSION*

We rigorously review an order granting an NRCP 12(b)(5) motion to dismiss, recognizing all factual allegations in the complaint as true and drawing all inferences in the plaintiffs' favor, and reviewing all legal conclusions de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). "A complaint should only be dismissed for failure to state a claim if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1283 (2017) (internal quotation marks omitted).

I.

Kim first argues that 28 U.S.C. § 1367(d) does not apply to the claims against Damus, and thus, the statute of limitations ran on those claims during Dickinson Wright's representation.[5] Conversely, Dickinson Wright argues that § 1367(d) "stop[s] the clock," *Artis v. District of Columbia*, 583 U.S. ___, ___, 138 S. Ct. 594, 598 (2018), on a state-law claim's statute of limitations once it is filed in federal court, and that the clock does not begin to run until the entire federal action is dismissed, even if the state-law claim is dismissed earlier in the litigation.

We review statutory construction issues de novo. *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013). In doing so, we will apply a statute's plain language "and construe the statute according to its fair meaning." *Id.*

28 U.S.C. § 1367(d) states the following:

> The period of limitations for any claim asserted under [supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after

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rule—as Kim did not oppose this argument in their opposition to Dickinson Wright's motion to dismiss and because they do not cogently argue it on appeal. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider arguments not adequately briefed, supported by relevant authority, or cogently argued); *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."). Additionally, the district court also denied reconsideration in this case; however, because we reverse and remand, we need not reach this issue here.

[5]While Kim focuses on the litigation malpractice tolling rule in the opening brief and does not address the federal statute until the reply brief, we analyze this issue "in the interests of justice," *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011), and in consideration of our policy of resolving cases on the merits whenever possible, *Huckabay Props., Inc. v. NC Auto Parts, LLC*, 130 Nev. 196, 203, 322 P.3d 429, 433 (2014) (explaining that this court prefers to decide cases on the merits).

> the dismissal of the claim under [supplemental jurisdiction], shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

The statute's plain language distinguishes between the word "claim" and "action" in the phrase "any other claim in the same action." 28 U.S.C. § 1367(d). Thus, § 1367(d)'s language makes clear that it does not toll the relevant statute of limitations while the *action* is pending, but instead only tolls the relevant statute of limitations "while the [state-law] *claim* is pending." *Id.* (emphasis added). A federal court's dismissal of a state-law claim, rather than dismissal of an entire action, therefore, triggers the running of the relevant statute of limitations. *See* 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 46:1 (7th ed. 2014) (providing that courts consider a statute's "natural and ordinary signification and if there is no ambiguity or obscurity in its language, there will usually be no need to look elsewhere to ascertain intent" (internal quotation marks omitted)).

Further, the United States Supreme Court has explained that § 1367(d) tolls the statute of limitations period while a supplemental *claim* is pending in federal court, *see Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 459 (2003), and in another case that "it suspends the statute of limitations [both] while the *claim* is pending in federal court and for 30 days postdismissal," *Artis*, 583 U.S. at ___, 138 S. Ct. at 603 (emphasis added). Neither case provides that the statute of limitations on a dismissed state-law claim is tolled while the entire *action* is pending. Therefore, we conclude that, pursuant to § 1367(d), the statute of limitations for a state-law claim filed in federal court stops running only while the claim is pending in federal court and for 30 days after the state-law claim's dismissal.

Kim fired Damus in September 2009 and then filed the claims in federal court against Damus under supplemental jurisdiction on March 2, 2010, and the federal court dismissed these claims on December 6, 2010. Pursuant to 28 U.S.C. § 1367(d), the statute of limitations for Kim's claims against Damus was tolled only from March 2, 2010, until December 6, 2010, plus 30 days. Thereafter, the statute of limitations began running again. Accordingly, the district court erred by finding that the relevant statute of limitations was tolled until September 4, 2015, the date the federal court dismissed the remainder of Kim's federal action.

## II.

Next, Kim argues that the district court erred by finding that the litigation malpractice tolling rule applied to the claims against Damus because there was no underlying suit on which to base the tolling. Kim further argues that the rule applies to the claim against

Dickinson Wright, and therefore, the district court erred in concluding that the claim was time-barred. Conversely, Dickinson Wright argues that, under *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. 632, 333 P.3d 229 (2014), and *Semenza v. Nevada Medical Liability Insurance Co.*, 104 Nev. 666, 765 P.2d 184 (1988), Kim's malpractice claim against Damus could not be filed until damages were certain, which would occur when the federal action ended. Furthermore, Dickinson Wright argues that Kim's legal malpractice claim against it is time-barred under NRS 11.207(1).

NRS 11.207(1) provides the limitations period for legal malpractice claims:

> An action against an attorney . . . to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.

Nevada has adopted a special tolling rule, however, for when the malpractice is alleged to have occurred during an attorney's representation of a client in active litigation, aptly named the litigation malpractice tolling rule. *Branch Banking*, 134 Nev. at 873, 432 P.3d at 738 ("As its name suggests, the litigation malpractice tolling rule applies to malpractice committed by a lawyer while representing a client in a lawsuit."). Thus, the tolling rule does not apply to non-adversarial or transactional representation, and it does not apply before the attorney files a complaint. *See Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. 547, 552, 306 P.3d 406, 409-10 (2013). Instead, the litigation malpractice tolling rule applies to the two-year discovery rule, serving to toll a malpractice claim's statute of limitations until the underlying litigation is resolved and damages are certain. *Branch Banking*, 134 Nev. at 873-75, 432 P.3d at 738-40 (discussing that the rule's purpose is to ensure that plaintiffs do not prematurely file malpractice claims because, if a party appeals from the final order of a case wherein the malpractice was alleged to occur, any resulting damages may be reduced or resolved by the appellate court's decision); *Brady*, 130 Nev. at 642, 333 P.3d at 235 ("When the litigation in which the malpractice occurred continues to progress, the material facts that pertain to the damages still evolve as the acts of the offending attorney may increase, decrease, or eliminate the damages that the malpractice caused.").

Here, Kim fired Damus before they filed a complaint, and so Damus did not represent Kim in an adversarial proceeding. Therefore, the litigation malpractice tolling rule does not apply to Kim's claims against Damus, and the district court erred in that conclusion. Be-

cause the district court's dismissal order was based in part on this erroneous conclusion, we must reverse and remand this case to the district court for it to determine whether Kim's malpractice claims against Dickinson Wright are still subject to dismissal in light of the fact that Kim's claims against Damus possibly became time-barred under NRS 11.207(1) while Dickinson Wright was representing Kim, unless the claim against Dickinson Wright itself is time-barred.

The litigation malpractice tolling rule *does* apply to Kim's claim against Dickinson Wright. The firm represented Kim in an adversarial proceeding—the federal action—and allegedly committed legal malpractice during those proceedings by failing to file in state court legal malpractice claims against Damus before the statute of limitations expired.[6] Regardless of when Kim discovered the alleged malpractice, the malpractice claim was tolled until the end of those federal proceedings, pursuant to the litigation malpractice tolling rule. *See Branch Banking*, 134 Nev. at 873, 432 P.3d at 738. Unlike the federal statute, which distinguishes between claims and actions, the Nevada litigation malpractice tolling rule does not. The federal action ended, and the statute of limitations began running, on September 4, 2015, and, at the earliest, the statute of limitations would have run two years later in September 2017. Kim filed the state claim against Dickinson Wright on June 12, 2017, within either the two-year or four-year statutory period for legal malpractice claims. Therefore, we conclude that Kim's district court case was not time-barred, and the district court erred in dismissing the case on that basis.

## *CONCLUSION*

28 U.S.C. § 1367(d) tolls the statute of limitations for a state-law claim filed in federal court under supplemental jurisdiction while the state-law *claim* is pending in federal court and for at least 30 days after the state-law claim's *dismissal*, regardless of the continuation or dismissal of other claims in that action. Thus, the federal court's dismissal of Kim's state-law claims against Damus is what triggered the relevant statute of limitations to continue running, and the district court's conclusion that the statute of limitations did not continue running until the entire federal action was dismissed was erroneous. Furthermore, the district court erred in concluding that the litigation malpractice tolling rule applied to Kim's claims against Damus—Damus never represented Kim in an adversarial proceeding, and the tolling rule therefore does not apply. Based on these conclusions, the statute of limitations for Kim's claims against Damus may have lapsed during Dickinson Wright's representation

[6]Dickinson Wright does not dispute that Kim had valid claims for legal malpractice against Damus.

of Kim, supporting Kim's malpractice claim against Dickinson Wright. Finally, we hold that Nevada's litigation malpractice tolling rule applies to Kim's malpractice claim against Dickinson Wright and, therefore, the district court erred in concluding that Kim's claim was time-barred by NRS 11.207(1). Accordingly, we reverse the district court's order of dismissal and remand for further proceedings on Kim's claim consistent with this opinion.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, STIGLICH, and CADISH, JJ., concur.