LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, *v.* LAS VEGAS REVIEW-JOURNAL, Respondent.

No. 78967

December 31, 2020 478 P.3d 383

Appeal from a district court order, certified as final under NRCP 54(b), granting in part a petition for a writ of mandamus regarding disclosure of public records. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Reversed and remanded.

Marquis Aurbach Coffing and *Nicholas D. Crosby* and *Jacqueline V. Nichols*, Las Vegas, for Appellant.

McLetchie Law and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

In this appeal, we consider the scope of our recent opinion in *Clark County School District v. Las Vegas Review-Journal* (*CCSD*), 134 Nev. 700, 429 P.3d 313 (2018). In *CCSD*, we adopted a burden-shifting test to help courts determine whether information that implicates individual privacy interests is subject to disclosure under the Nevada Public Records Act (NPRA). *Id.* at 708, 429 P.3d at 320. We held that when a government agency first shows that disclosure implicates a nontrivial privacy interest, the requester must then show that the information sought is likely to further a significant public interest. *Id.* at 707-08, 429 P.3d at 320 (citing *Cameranesi v. U.S. Dep't of Def.*, 856 F.3d 626, 637 (9th Cir. 2017)).

We decided *CCSD* in the context of a sensitive investigative report, and certain language in that opinion could be read as limiting the case's application to such reports. Today, we clarify that *CCSD* is not so limited. Courts should apply the test adopted in *CCSD* whenever the government asserts a nontrivial privacy interest. In the instant case, appellant Las Vegas Metropolitan Police Department (Metro) demonstrated that its officers have a nontrivial privacy interest in their unit assignments. The district court erred in determining they did not. We therefore reverse and remand for consideration of the second step of the *CCSD* test, that is, whether disclosure of the unit assignments is likely to advance a significant public interest.

FACTS AND PROCEDURAL HISTORY

Respondent Las Vegas Review-Journal (Review-Journal) is Nevada's largest newspaper. In order to fulfill its important function of investigative journalism, the Review-Journal has frequently requested government records, including records that the government has sought to keep confidential.[1] In early 2017, the Review-Journal was investigating how Metro handles sex-trafficking cases. To that end, the Review-Journal submitted an NPRA request for all of Metro's sex-trafficking case files, solicitation and trespass arrest reports, and officers' names, badge numbers, and unit assignments from 2014 through 2016.[2]

Metro provided the Review-Journal with many of the requested records, including all officers' names and badge numbers. However, Metro refused to disclose its officers' unit assignments.[3]

The Review-Journal petitioned the district court for a writ of mandamus directing Metro to provide the requested records in their entirety. Metro objected on numerous grounds. As relevant here, Metro argued that it could not disclose officers' unit assignments because such information would reveal the identities of undercover officers. After a hearing, the district court ordered discovery and meet-and-confer efforts by the parties.[4] The Review-Journal subsequently narrowed its request to include only patrol officer unit assignments, thereby excluding undercover officers.[5] Metro asserted, however, that disclosing any unit assignments—even those of patrol officers—would undermine officer safety and reveal covert officers' identities via the process of elimination.[6]

---

[1]*See, e.g.*, *Clark Cty. Coroner's Office v. Las Vegas Review-Journal* (*Coroner's Office*), 136 Nev. 44, 458 P.3d 1048 (2020); *CCSD*, 134 Nev. 700, 429 P.3d 313; *Las Vegas Review-Journal v. Eighth Judicial Dist. Court*, 134 Nev. 40, 412 P.3d 23 (2018); *DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000).

[2]Thereafter, the Review-Journal also requested unit assignments from 2017. The district court deferred ruling on this additional request and it is not at issue in this appeal.

[3]On appeal, the Review-Journal argues that Metro waived any objections to disclosure by failing to cite appropriate legal authority within the five-day time limit set by NRS 239.0107(1)(d). Such arguments have since been rejected by this court in *Republican Attorneys General Ass'n v. Las Vegas Metropolitan Police Dep't*, 136 Nev. 28, 31-33, 458 P.3d 328, 331-33 (2020), and *Coroner's Office*, 136 Nev. at 48-50, 458 P.3d at 1053-54.

[4]Metro petitioned this court for emergency relief from the discovery order. We denied the petition. *Las Vegas Metro. Police Dep't v. Eighth Judicial Dist. Court*, Docket No. 76848 (Order Denying Petition, Jan. 14, 2019).

[5]The Review-Journal continued to request other records, such as arrest reports. These records are not at issue in this appeal.

[6]While the case was pending, this court decided *CCSD*. Metro subsequently filed supplemental briefing, arguing that the officer safety concerns which it has already raised were a privacy interest that *CCSD* protected.

In support of its position, Metro provided declarations by Joseph Lombardo, Sheriff of Clark County and Metro's chief law enforcement officer, and Steve Grammas, President of the Police Protective Association. Both Lombardo and Grammas attested that disclosing patrol officer unit assignments would compromise officer safety by revealing where specific officers worked. Further, they attested that disclosing patrol officer unit assignments could reveal names and locations of officers assigned to covert operations.

After another hearing, the district court granted the Review-Journal's petition in part. In doing so, the court first applied the broad balancing test set forth in *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011). The district court concluded that Metro failed to demonstrate that its interest in nondisclosure clearly outweighed the strong presumption of public access. Specifically, the court reasoned that Lombardo's and Grammas' declarations, even if believed, were too speculative to satisfy Metro's burden. Next, the district court applied the *CCSD* framework and determined that Metro's evidence did not show that the requested records implicate any cognizable privacy interest because Metro's officers are public employees who necessarily interact with the public and the community. The court also determined that the declarations were too speculative to show that disclosing unit assignments would reveal the identities of undercover officers. Accordingly, the district court ordered Metro to disclose patrol officer unit assignments from 2014 through 2016. Metro now appeals.

DISCUSSION

Under the NPRA, government-generated records are presumptively open to public inspection. *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. This presumption may be rebutted either by an explicit statutory provision making a particular type of record confidential or, under *Gibbons*, by a "broad balancing of the interests involved," where the government must prove that "its interest in nondisclosure clearly outweighs the public's interest in access." *Id.* In *CCSD*, this court adopted a different burden-shifting test for nontrivial privacy claims asserted in response to public records requests, in which any such privacy interest is weighed against the requester's demonstration of a significant public interest in disclosure. 134 Nev. at 708, 429 P.3d at 320.

Here, Metro argues that the district court erred by failing to recognize that Metro's unit assignments implicate a nontrivial privacy interest under *CCSD.* In response, the Review-Journal argues that the *CCSD* test only applies to investigative reports. Further, in the Review-Journal's view, the district court's analysis should have ended when it concluded, under *Gibbons*, that the interest in nondisclosure did not clearly outweigh the public's right to access. Al-

ternatively, the Review-Journal argues that even if the *CCSD* test applies here, the district court did not abuse its discretion by determining that Metro failed to show the existence of a nontrivial privacy interest.

Standard of review

"We review a district court's grant or denial of a writ petition for an abuse of discretion. However, we review the district court's interpretation of caselaw and statutory language de novo." *Las Vegas Metro. Police Dep't v. Blackjack Bonding*, 131 Nev. 80, 85, 343 P.3d 608, 612 (2015) (internal citation omitted). "Whether a legally recognized privacy interest is present in a given case is a question of law," *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 657 (Cal. 1994), which we review de novo, *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

Whether the *CCSD* test applies in this case concerns the interpretation of the NPRA and our NPRA jurisprudence and, therefore, is subject to our plenary review. *See Blackjack Bonding*, 131 Nev. at 85, 343 P.3d at 612. Similarly, the district court's determination that the officers lacked a nontrivial privacy interest is a conclusion of law to which we owe no deference. *See Hill*, 865 P.2d at 657; *City of Reno*, 119 Nev. at 58, 63 P.3d at 1148.[7]

The CCSD framework applies whenever a personal privacy interest may warrant redaction

In *CCSD*, the Review-Journal requested records related to the Clark County School District's (CCSD's) investigation of allegations of sexual harassment and other inappropriate behavior. *CCSD*, 134 Nev. at 701, 429 P.3d at 315-16. CCSD provided an initial batch of responsive documents, redacting not only the names of alleged victims, but also of administrators, principals, supervisors, and schools. *Id.* at 701-02, 429 P.3d at 316. While the Review-Journal agreed that victims' names could be redacted, it argued that CCSD's redactions "went too far." *Id.* In the ensuing litigation, CCSD took the position that it "complied with the principles encouraging disclosure" and did not need to release additional information. *Id.* at 702, 429 P.3d at 316. The district court disagreed and ordered CCSD to release all responsive documents, redacting only the names of victims, students, or support staff. *Id.* at 702, 429 P.3d at 316-17.

[7]We disagree with the Review-Journal's contention that the district court's order involves fact-finding, which we should only review for an abuse of discretion. The district court did not find that Lombardo's and Grammas' declarations were not credible as a factual matter. Rather, it determined that, even accepting their averments as true, they failed to establish a nontrivial privacy interest. Thus, the Review-Journal conflates the threshold legal question of whether information implicates a nontrivial privacy interest with the ultimate question of whether the information is subject to disclosure.

On appeal, we affirmed in part and reversed in part. First, we affirmed "[t]hat part of the district court's order requiring CCSD to disclose the documents," holding the district court did not abuse its discretion under *Gibbons*' broad balancing test. *Id.* at 706-07, 429 P.3d at 319. We explained that "complete nondisclosure" was inappropriate where redaction would address the relevant privacy concerns. *Id.* Turning to the appropriate scope of those redactions, we recognized that Nevada law has "established protection of personal privacy interests" and "protects personal privacy interests from unrestrained disclosure under the NPRA." *Id.* at 708, 429 P.3d at 320.

We then adopted a two-part burden-shifting test used by federal courts to "facilitate[ ] a court's balancing of nontrivial privacy interests against public disclosure." *Id.* (citing *Cameranesi*, 856 F.3d at 637). Under that test, the government must establish that disclosure would intrude on a personal privacy interest that is nontrivial or that rises above the de minimis level. *Id.* at 707, 429 P.3d at 320. Upon such a showing, the burden shifts to the requesting party to show that disclosure is likely to advance a significant public interest. *Id.* at 707-08, 429 P.3d at 320.

Applying this test, we noted that the district court failed to consider the privacy interests of "teachers or witnesses who may face stigma or backlash for coming forward or being part of the investigation." *Id.* at 709, 429 P.3d at 321. We therefore remanded for the district court to consider those privacy interests. *Id.*

The Review-Journal urges this court to apply *CCSD* narrowly and to limit its use to investigative reports. We disagree that *CCSD* should be cabined to its particular facts in this way. As noted, the *CCSD* test is grounded in Nevada's "established protection of personal privacy interests." *Id.* at 708, 429 P.3d at 320. Such interests arise in various contexts. For instance, in *Cameranesi*, the court recognized that personnel and medical files may be shielded from public disclosure to prevent an unwarranted invasion of personal privacy. 856 F.3d at 637 (applying 5 U.S.C. § 552(b)(6)).

In *CCSD*, we observed that although the *Cameranesi* court interpreted a federal statute, Nevada law similarly recognizes privacy rights in "a laundry list of areas." 134 Nev. at 708, 429 P.3d at 320. Therefore, we conclude that it would be incongruous to restrict the *CCSD* test to investigative reports. Indeed, as the United States Supreme Court has aptly stated, by "requir[ing] the person requesting the information to establish a sufficient reason for the disclosure," courts "give practical meaning" to privacy interests. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). In sum, while *CCSD* addressed investigative reports, it did not foreclose the application of the test we adopted therein to other types of records containing private information.

Accordingly, we hold that the district court did not err by applying the *CCSD* test to determine whether to disclose the unit assign-

ments. Consequently, the district court properly considered whether Metro had demonstrated that the unit assignments implicated a nontrivial personal privacy interest. However, we clarify that the district court was not required to apply the *Gibbons* balancing test to the unit assignments. Although both *Gibbons* and *CCSD* are balancing tests, *CCSD* supplies a refined framework to analyze privacy claims. *CCSD*, 134 Nev. at 709, 429 P.3d at 321. In contrast, *Gibbons* applies to claims against disclosure that are unrelated to personal privacy.

Metro demonstrated the existence of a nontrivial privacy interest

Having determined that the *CCSD* test applies to the privacy claim asserted here, we now turn to whether Metro established that disclosure of unit assignments implicated its officers' nontrivial privacy interests. To be "nontrivial," the asserted privacy interest must be more than de minimis, but is *not* required to be "*substantial*." *Cameranesi*, 856 F.3d at 641-42 (emphasis in original).

Although this court has not previously had the occasion to address the privacy interests asserted here, ample persuasive authority shows that "[t]he avoidance of harassment is a cognizable privacy interest." *Cameranesi*, 856 F.3d at 639 (alteration in original) (quoting *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026 (9th Cir. 2008)). The Ninth Circuit Court of Appeals has explained that the invasion of privacy need not be a certainty or have occurred in the past to justify nondisclosure. *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. Ctrs. for Disease Control & Prevention*, 929 F.3d 1079, 1091-92 (9th Cir. 2019). Like these courts, we conclude that the government should not be forced to wait for a serious harm from an unwarranted intrusion of personal privacy to occur in order to justify nondisclosure.[8]

Courts have consistently shielded information about the location and identities of government employees when disclosure could subject those employees to harassment. *Forest Service Employees* is instructive. At issue there were the identities of federal employees who had responded to a wildfire that killed two firefighters. 524 F.3d at 1022. The Ninth Circuit explained that "individuals do not waive all privacy interests . . . simply by taking an oath of public office." *Id.* at 1025 (alteration in original) (quoting *Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001)). Further, "the employees possessed privacy interests in avoiding the embarrass-

[8]Although the Review-Journal argues that, under *Gibbons*, Metro cannot use hypothetical concerns to justify nondisclosure, we emphasize that the *CCSD* test is distinct from the inquiry under *Gibbons*. Moreover, the government would surely not meet its burden, even under *CCSD*, by merely asserting a speculative or implausible harm. But real risks should not be discounted as "hypothetical" merely because they have not crystallized into actual harm.

ment, shame, stigma, and harassment that would arise from their public association with the incident." *Id.* at 1026 (internal quotation marks omitted).

Likewise, in *Civil Beat Law Center*, the Ninth Circuit held that employees of the Centers for Disease Control (CDC) had a nontrivial privacy interest in their names and contact information. 929 F.3d at 1092. There, the requester sought information related to the inspection of a laboratory that handled dangerous biological agents. *Id.* at 1090-91. Even though a directory of the employees in the inspection agency was already publicly available, the court held that the "additional location-specific risk" from releasing information regarding the laboratory inspection was sufficient "to meet the low, 'nontrivial' privacy interest threshold." *Id.* at 1092.

Law enforcement officers in particular have a privacy interest in maintaining their anonymity and the confidentiality of their work assignments where disclosure poses a risk of harassment, endangerment, or similar harm. *See, e.g.*, *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1198 (10th Cir. 2011); *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir. 1995); *Adionser v. Dep't of Justice*, 811 F. Supp. 2d 284, 299 (D.D.C. 2011); *Matter of Ruberti, Girvin & Ferlazzo v. N.Y. State Div. of State Police*, 641 N.Y.S.2d 411, 415 (App. Div. 1996).

Guided by the foregoing principles, we conclude that Metro's officers have a nontrivial privacy interest in their unit assignments. Crucially, although the district court suggested otherwise, the officers did not surrender their privacy interests by swearing an oath of public office. Metro's evidence established the real possibility that disclosure of the unit assignments could subject officers to harassment and retaliation. Moreover, these risks were pronounced because the unit assignments reveal the locations of officers. While we emphasize that location-specific information about a public employee is not automatically confidential, it can heighten the risk of harassment and other harm and thereby establish a nontrivial privacy interest.

The Review-Journal invites us to follow *King County v. Sheehan*, 57 P.3d 307 (Wash. Ct. App. 2002), but that case is readily distinguishable. There, the court held that there was no privacy interest in the names of certain police officers that were "released on a regular basis." *Id.* at 318. It specifically rejected the argument that "public identification could lead to harassment and danger in [the officers'] personal lives." *Id.* at 317. However, the court noted the distinction between names and "employee identification numbers," because release of the latter could lead to "impermissible invasions of privacy." *Id.* (quoting *Tacoma Pub. Library v. Woessner*, 951 P.2d 357, 365 (Wash. Ct. App. 1998)).

Here, in contrast, Metro has *already* released not only its officers' names, but also their badge numbers. Metro is only objecting to disclosure of its officers' unit assignments. That information is not released on a regular basis and could lead to invasions of privacy even if the disclosure of names alone would not. Therefore, we hold that the district court erred in determining that Metro failed to establish that its officers have a nontrivial privacy interest in their unit assignments.

This determination does not end the inquiry. On remand, the district court should consider whether the Review-Journal can meet its burden under prong two of *CCSD*—that is, whether the information sought is likely to advance a significant public interest.

CONCLUSION

We hold that the framework we adopted in *CCSD* is one of general application and not limited to investigative reports. When the government seeks to withhold specific information on the basis of a privacy interest, the district court must first determine whether disclosure implicates a nontrivial privacy interest. In doing so, the court should consider the risks of harassment or other harm, though the government need not prove that such harms are certain to occur. Here, because the district court erred in determining that Metro's officers lack a nontrivial privacy interest in their unit assignments, we reverse and remand for further proceedings consistent with this opinion.

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

SCOTT VINH DUONG, M.D.; ANNIE LYNN PENACO DUONG, M.D.; and DUONG ANESTHESIA, PLLC, Appellants, *v.* FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., Respondent.

No. 79460

December 31, 2020 478 P.3d 380

Appeal from a district court order partially granting a motion for a preliminary injunction based on a noncompetition agreement. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Affirmed.

[Rehearing denied February 12, 2021]

[En banc reconsideration denied March 29, 2021]

Howard & Howard Attorneys PLLC and *Jonathan W. Fountain, Martin A. Little, Ryan T. O'Malley*, and *William A. Gonzalez, II*, Las Vegas, for Appellants.

Dickinson Wright PLLC and *Michael N. Feder* and *Gabriel A. Blumberg*, Las Vegas, for Respondent.

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

OPINION

By the Court, Cadish, J.:

The issue in this appeal is whether the district court may blue-pencil an otherwise unenforceable noncompetition agreement pursuant to a provision therein allowing court modification to redeem unreasonably restrictive clauses. In *Golden Road Motor Inn, Inc. v. Islam*, 132 Nev. 476, 488, 376 P.3d 151, 159 (2016), we held that district courts cannot, on their own, blue-pencil a noncompetition agreement to remove unreasonably restrictive, and thus unenforceable, aspects without addressing whether they may do so when a noncompetition agreement contains an express blue-penciling provision, like the agreement here. We hold that *Golden Road* does not prohibit a district court from blue-penciling an unreasonable noncompetition agreement if the agreement itself allows for it. We therefore affirm the district court's order granting a preliminary injunction based on the blue-penciled noncompetition agreement.

FACTS AND PROCEDURAL HISTORY

Appellants Scott and Annie Duong are anesthesiologists working in Clark County, Nevada. They initially worked for Premier Anesthesia Consultants. When Premier Anesthesia Consultants merged with U.S. Anesthesia Partners, the Duongs worked under respondent Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. (Fielden Hanson). In 2016, shortly after the merger, Fielden Hanson required the Duongs to sign an employment contract if they wished to continue their employment. The agreement had a noncompetition clause that prohibited the Duongs from working at several facilities. The agreement also contained a blue-penciling provision providing that, if any provision is found to be unreasonable by a court, "any such portion shall nevertheless be enforceable to the extent such court shall deem reasonable, and, in such event, it is the parties' intention . . . and request that the court reform such portion in order to make it enforceable." The Duongs signed the agreement. Two years

later, the Duongs quit working for Fielden Hanson and began providing anesthesiology services to surgeons in Clark County.

Fielden Hanson filed a complaint to enforce the agreement and a motion for preliminary injunction, alleging that the Duongs violated the noncompetition agreement. The Duongs opposed, arguing that the noncompetition agreement was unreasonable and thus wholly unenforceable under *Golden Road*. They further argued that NRS 613.195(5), which requires a court to revise an unreasonably restrictive covenant to the extent necessary to enforce it, did not apply because it did not become effective until after they entered into the noncompetition agreement. The district court found that the noncompetition agreement was overbroad and that NRS 613.195(5) applied. Accordingly, it blue-penciled the noncompetition agreement and granted the preliminary injunction to enforce the revised agreement. The Duongs appeal, arguing that, under *Golden Road*, the district court could not blue-pencil a noncompetition agreement entered into before NRS 613.195(5)'s June 3, 2017, effective date.[1]

DISCUSSION

We review a decision to grant a preliminary injunction for an abuse of discretion. *Labor Comm'r v. Littlefield*, 123 Nev. 35, 38, 153 P.3d 26, 28 (2007). We will "only reverse the district court's decision when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (internal quotation marks omitted).

This appeal is not moot

As a preliminary matter, we conclude that this appeal is not moot even though the preliminary injunction has since expired. Generally, we will not decide moot cases. *NCAA v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). A case is moot if it "seeks to determine an abstract question which does not rest upon existing facts or rights." *Id.* A case is not moot if our ruling would affect the parties' legal rights. *Boulet v. City of Las Vegas*, 96 Nev. 611, 613, 614 P.2d 8, 9 (1980) (explaining that this court decides appeals only when doing so affects the legal rights of the parties). In the underlying action, Fielden Hanson seeks damages for the Duongs' alleged violations of the blue-penciled noncompetition agreement. Thus, whether the district court had the authority to blue-pencil the noncompetition agreement affects the parties' legal rights, as it determines if Fielden

[1]The Duongs do not challenge the reasonableness of the blue-penciled noncompetition agreement. Similarly, Fielden Hanson does not challenge the district court's conclusion that the original noncompetition agreement was unreasonably broad. Accordingly, the narrow question before us is whether the district court had the authority to blue-pencil the noncompetition agreement once it concluded the agreement was unreasonably broad.

Hanson has a legal basis to seek damages. Accordingly, we address the legal issue at hand.

The district court had the authority to blue-pencil the unreasonable noncompetition agreement

The Duongs argue that, under *Golden Road*, the district court could not blue-pencil the noncompetition agreement once it determined the agreement was unreasonably broad. However, the Duongs' reliance on *Golden Road* is misplaced. *Golden Road* merely held that a district court cannot, on its own, blue-pencil an unreasonable noncompetition agreement. 132 Nev. at 488, 376 P.3d at 159. It did not prohibit courts from blue-penciling an unreasonable noncompetition agreement pursuant to the parties' agreement.

In *Golden Road*, we acknowledged that "[c]ourts are not empowered to make private agreements." *Id.* In so doing, we quoted the Arkansas Supreme Court, which addressed the blue-pencil doctrine, stating, "[w]e are firmly convinced that parties are not entitled to make an agreement, as these litigants have tried to do, that they will be bound by whatever contracts the court may make for them at some time in the future." *Id.* (quoting *Rector-Phillips-Morse, Inc. v. Vroman*, 489 S.W.2d 1, 4 (Ark. 1973) (alteration in original)). However, the noncompetition agreement at issue in *Golden Road* did not include a provision authorizing the court to blue-pencil the agreement if deemed unreasonable. 132 Nev. at 479, 376 P.3d at 153. Accordingly, that statement is dictum. *See St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009) (holding that a court's statement is dictum when "it is unnecessary to a determination of the questions involved") (internal quotation marks omitted)). It therefore does not provide a basis for invalidating the agreement's blue-penciling provision.[2] *See id.* ("Dictum is not controlling."). Because the noncompetition agreement here had a blue-penciling provision, we conclude that the district court did not abuse its discretion by blue-penciling the noncompetition agreement and enforcing the revised agreement.[3] *See Hannam v.*

[2]Further, the conclusion following that statement in *Golden Road* is that courts should not be in the business of making private agreements for parties, as that is not within the "judicial province." 132 Nev. at 488, 376 P.3d at 159. That conclusion does not, on its face, prevent the parties from making such an agreement themselves.

[3]After we held in *Golden Road* that a district court did not have the inherent authority to blue-pencil an unreasonable noncompetition agreement, the Legislature enacted NRS 613.195(5), which requires district courts to blue-pencil unreasonable noncompetition agreements and enforce the revised agreement. 2017 Nev. Stat., ch. 324, § 1, at 1861. However, NRS 613.195 did not take effect until June 3, 2017. While the Duongs argue the statute does not apply retroactively, we decline to address the retroactivity issue, since our holding that blue-penciling provisions within a noncompetition agreement are enforceable is dispositive.

Brown, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons." (internal quotation marks omitted)). Accordingly, we affirm the district court's order granting the preliminary injunction.

Parraguirre and Hardesty, JJ., concur.

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation, Appellant, *v.* ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C., aka ANDREW MILLER CASH, M.D., P.C.; and DESERT INSTITUTE OF SPINE CARE, LLC, a Nevada Limited Liability Company, Respondents.

No. 78572

December 31, 2020 478 P.3d 362

Appeal from a district court summary judgment, certified as final under NRCP 54(b), on a complaint for contribution arising from a tort action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Reversed and remanded.

[Rehearing denied February 16, 2021]

Barron & Pruitt, LLP, and *David Barron* and *John D. Barron*, North Las Vegas; *Lewis Roca Rothgerber Christie LLP* and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas, for Appellant.

McBride Hall and *Robert C. McBride* and *Heather S. Hall*, Las Vegas, for Respondents.

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

OPINION

By the Court, Stiglich, J.:

When a tortfeasor settles with the plaintiff, may the tortfeasor then assert a claim for contribution against a doctor who allegedly caused new injuries in treating the original injury? We hold that the right of contribution exists when two parties are jointly or severally liable for the same injury. Whether the parties are joint or successive tortfeasors is not material, so long as both parties are liable for the

injury for which contribution is sought. Because appellant Republic Silver State Disposal and respondent Dr. Andrew Cash were jointly or severally liable for the injuries Cash allegedly caused and Republic settled those claims, Republic may pursue an action for contribution against Cash. That Cash was not a defendant in the original suit that Republic settled does not impair Republic's right to seek contribution. Accordingly, the district court erred when it granted summary judgment on the ground that contribution is not available when the parties are successive tortfeasors, and we reverse.

FACTS AND PROCEDURAL HISTORY

Marie Gonzales was injured in an accident involving a truck driven by Republic's employee. Dr. Cash treated her original injury and allegedly caused further injuries. Although Gonzales sued Republic and its employee, she did not sue Cash or any other medical providers, and Republic did not file a third-party complaint. Gonzales and Republic settled Gonzales's claims for $2 million. The settlement agreement expressly discharged Gonzales's claims against her medical providers and reserved Republic's rights under the Uniform Contribution Among Tortfeasors Act (UCATA), 12 U.L.A. 201 (2008), *see* NRS 17.225-.305.

Within one year of settling the claims, Republic sued Cash, his company, and Desert Institute of Spine Care, LLC, for contribution.[1] Republic alleged that Cash committed malpractice and caused Gonzales new and different injuries from those sustained in the accident. Republic argued that it was entitled to seek contribution from Cash because the settlement discharged Gonzales's claims against him and imposed liabilities on Republic in excess of its equitable share. Cash argued that, pursuant to Republic's allegation of new and different injuries, he was a successive tortfeasor rather than a joint tortfeasor and that no right of contribution exists among successive tortfeasors.

The district court concluded that contribution was not available between successive tortfeasors and granted summary judgment to Cash. The district court also held that the settlement agreement extinguished the defendants' liability. Republic appeals.

DISCUSSION

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment under NRCP 56(c) was appropriate if the pleadings and other evidence on file, viewed in a light most favorable to Republic, demonstrated that Cash was entitled to judg-

[1]Republic raised other claims, which the district court dismissed, and sued other medical providers, who are no longer parties to this appeal.

ment as a matter of law and that no genuine issue of material fact remained in dispute. *Id.* We review questions of law de novo. *Saylor v. Arcotta*, 126 Nev. 92, 95, 225 P.3d 1276, 1278 (2010).

"Contribution is a creature of statute" under Nevada law. *Doctors Co. v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004). Nevada has adopted the UCATA. *Russ v. Gen. Motors Corp.*, 111 Nev. 1431, 1436, 906 P.2d 718, 721 (1995). Under the UCATA, "where two or more persons become jointly or severally liable in tort for the same injury[,] . . . there is a right of contribution among them." NRS 17.225(1). Contribution permits "a tortfeasor who has paid more than his or her equitable share of the common liability" to recover the excess from a second tortfeasor, up to the amount of the second tortfeasor's "equitable share of the entire liability." NRS 17.225(2). A tortfeasor who settles with a claimant may recover contribution from another tortfeasor only if the settlement extinguishes the second tortfeasor's liability. NRS 17.225(3). Finally, a settling "tortfeasor's right of contribution is barred unless the tortfeasor has . . . [a]greed while action is pending against him or her to discharge the common liability and has within 1 year after the agreement paid the liability and commenced an action for contribution." NRS 17.285(4)(b).

A right of contribution is present where there is an injury for which two persons are jointly or severally liable, regardless of whether the tortious conduct may be characterized as successive. This court has repeatedly permitted contribution claims by original tortfeasors against doctors who subsequently negligently treat the original injury. *See, e.g.*, *Pack v. LaTourette*, 128 Nev. 264, 269, 277 P.3d 1246, 1249 (2012); *Saylor*, 126 Nev. at 96, 225 P.3d at 1279. Other states have likewise upheld a right of contribution among successive tortfeasors under similar circumstances. *See Lutz v. Boltz*, 100 A.2d 647, 648 (Del. Super. Ct. 1953) ("[I]t is joint or several *liability*, rather than joint or concurring *negligence*, which determines the right of contribution."); *Lujan v. Healthsouth Rehab. Corp.*, 902 P.2d 1025, 1030 (N.M. 1995) ("Negligent treatment is thus a successive tort for which the original tortfeasor is jointly liable . . . . Although an original tortfeasor may be held liable for plaintiff's entire harm, a medical care provider who negligently aggravates the plaintiff's initial injuries is not jointly and severally liable for the entire harm, but is liable only for the additional harm caused by the negligent treatment." (citation omitted)); *Shadden v. Valley View Hosp.*, 915 P.2d 364, 368 (Okla. 1996) ("[T]he physician and original wrongdoer caused a 'single' injury, and were, therefore, jointly liable to the victim. This is so even though the physician can be said to be a successive tortfeasor, rather than a joint or concurrent one." (citation omitted)). While a right of contribution would not be present if a successive tortfeasor produced a *completely* independent injury, such is not the case here. *Cf. Gen. Accident Ins. Co. of*

Am. v. Schoendorf & Sorgi, 549 N.W.2d 429, 431-32 (Wis. 1996) (distinguishing successive tortfeasors who were each solely liable for distinct injuries from "more common tort situations, such as a physical injury caused by one party which is then aggravated by a second party (malpractice by a treating doctor, for example)").

Republic argues that Cash was subject to a claim for contribution as a joint tortfeasor. We agree. "[I]t is well-settled law that the original tortfeasor is liable for the malpractice of the attending physicians." *Hansen v. Collett*, 79 Nev. 159, 165, 380 P.2d 301, 304 (1963); *see also* Restatement (Second) of Torts § 457 (Am. Law Inst. 1965). Subsequent medical providers, however, are not relieved of liability thereby for their own actions. Instead, both the original tortfeasor and the physicians are liable for injuries caused by malpractice and are "joint tortfeasors in this regard." *See Pack*, 128 Nev. at 269, 277 P.3d at 1249. This court has permitted suits to go forward where an allegedly negligent driver, who faced liability both for the original accident and any subsequent medical malpractice, impleaded the doctor who caused the subsequent injuries on a theory of contribution. *Id.*; *Saylor*, 126 Nev. at 96, 225 P.3d at 1279. Here, Republic, as the original tortfeasor, was liable for Cash's malpractice in treating Gonzales's original injury. Cash was liable to Republic to the extent of the common liability in excess of Republic's equitable share of the liability. *See* NRS 17.225(1), (2). Accordingly, the district court erred in concluding that Cash was not subject to a right of contribution because he and Republic were successive tortfeasors.[2]

The disposition of Gonzales's claims by settlement between Republic and Gonzales does not impair the right of contribution in a subsequent suit by Republic against Cash. The UCATA expressly recognizes that a right of contribution can arise from a settlement between the injured plaintiff and one tortfeasor, so long as the settlement extinguishes the other tortfeasor's liability for the original tort. *Doctors Co.*, 120 Nev. at 652, 98 P.3d at 687; *see* NRS 17.225(3). The settlement agreement here plainly stated that it discharged any claims Gonzales may have against a medical provider in this instance and thus extinguished Cash's liability to Gonzales. *See* NRS 17.225(3). Finally, Republic commenced its action for contribution within one year of the settlement. *See* NRS 17.285(4)(b). Viewing

[2]Cash's argument that joint liability cannot arise out of injuries that occur at different places and times is similarly mistaken. Cash misplaces his reliance on *Discount Tire Co. of Nevada, Inc. v. Fisher Sand & Gravel Co.*, Docket No. 69103 (Order of Affirmance, Apr. 14, 2017). *Discount Tire* was an unpublished order that noted that its parties were joint and not successive tortfeasors in the context of an equitable indemnity claim. *Cf.* NRAP 36(c)(2) (providing that unpublished dispositions are not controlling in unrelated cases). Equitable indemnity is not at issue here, *see Pack*, 128 Nev. at 268, 277 P.3d at 1249, and *Discount Tire* did not hold that contribution may not lie between successive tortfeasors.

the evidence in the light most favorable to Republic, Republic was entitled to seek contribution, and the district court therefore erred in granting summary judgment to Cash on Republic's contribution claim.[3]

CONCLUSION

The district court granted summary judgment on the grounds that Cash and Republic were successive and not joint tortfeasors and that a contribution claim may not lie between successive tortfeasors. This was error. The right of contribution exists when two or more parties are jointly or severally liable for the same injury and one pays more than its equitable share. Whether the tortfeasors are "joint" or "successive" is not material. Republic may seek contribution from Cash. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

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

ERIC THOMAS MESI, Appellant, *v.* VANESSA MARIE MESI, aka VANESSA MARIE REYNOLDS, Respondent.

No. 79137

December 31, 2020 478 P.3d 366

Appeal from a district court order dismissing a divorce action on comity grounds. Eighth Judicial District Court, Clark County; Rhonda Kay Forsberg, Judge.

Reversed and remanded with instructions.

Bailey Kennedy and *Stephanie J. Glantz* and *Dennis L. Kennedy*, Las Vegas, for Appellant.

---

[3]Cash argues that the district court's order may stand because Gonzales equitably subrogated her claims to Republic, such that Republic would be limited by NRS 41A.035 (limiting the amount of noneconomic damages that may be awarded for professional negligence) and NRS 42.021 (governing collateral benefit evidence in professional negligence actions). Even assuming that Gonzales subrogated her claims, Cash does not cogently argue that summary judgment is warranted on this basis. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). And even if NRS 41A.035 or NRS 42.021 apply, neither supports upholding the order granting summary judgment against Republic. Further, Cash's claims that any damages ought to be limited by NRS 41A.035 and that he ought to be permitted to proffer collateral benefit evidence pursuant to NRS 42.021 are not ripe, since at this stage in the proceedings, no damages have been awarded and no evidence has been excluded. *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006) (explaining that a claim is not ripe when the alleged harm is speculative or hypothetical).

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *A. Jill Guingcangco*, Las Vegas, for Respondent.

Before the Supreme Court, GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

This case arises from a contested divorce action, in which both spouses sought to litigate in their respective "home court." The wife filed first in California, and the husband filed second in Nevada. The husband argued before both courts that California lacked jurisdiction. The Nevada district court judge personally called the California superior court judge, discussed the case with the California judge, verified in the call that the California case was filed first, and dismissed the Nevada case. Neither party was present or represented during the call. The husband appealed.

We hold that the district court erred by dismissing the case immediately after the phone call without providing the parties an opportunity to respond. Further, under the first-to-file rule, the district court should have stayed the action, not dismissed it. Absent special circumstances, the first-to-file rule requires deference to the first court's jurisdiction, but deference does not always mean dismissal. The second court can also defer by staying the action, which better serves the rule's goal of efficiency when a party disputes the first court's jurisdiction. Accordingly, we reverse the order of dismissal and remand this matter to the district court with instructions to enter a stay.

BACKGROUND

Eric and Vanessa Mesi married in Nevada in 2005. While married, the couple spent time in both Nevada and California, sometimes together and sometimes apart. In late 2018, they moved together from California to Las Vegas. But Vanessa did not stay long: one month later, she returned to California without Eric. In January 2019, Vanessa filed for divorce in the California Superior Court in San Jose. Two months later, Eric filed for divorce in Las Vegas. Both parties proceeded pro se in the trial courts.

Eric moved to dismiss the California suit for lack of jurisdiction. He argued that Vanessa's California residency was broken up by the month she spent in Nevada and that she therefore failed to satisfy California's six-month residency requirement for divorce. Cal. Fam. Code § 2320(a) (West 2020). The California court has not ruled on this motion.

Vanessa moved to dismiss the Nevada suit under the first-to-file rule. She provided the case number and filing date of her California

suit. The Nevada district court promptly notified Eric that it intended to "set up a conference call with the California court to properly address this matter." Eric opposed Vanessa's motion to dismiss. Although his opposition contained substantial irrelevant material, it clearly argued that the California court lacked jurisdiction and that the case should therefore proceed in Nevada.

The Nevada district court held a phone conference with the California court. Neither Eric nor Vanessa was present. The California court confirmed that Vanessa indeed had a suit pending in California and that she had filed it in January. The California court also noted that Eric had objected to the California court's jurisdiction. On the phone, the Nevada court decided that the first-to-file rule applied and that it would defer jurisdiction to California by dismissing the case.

Immediately after the phone conference, the district court dismissed the action. Eric appealed.

DISCUSSION

Procedural due process

We first consider Eric's contention that the district court deprived him of due process by holding an ex parte conversation with the California superior court judge and by dismissing the action immediately thereafter. A deprivation of due process is of constitutional dimension, and "[t]his court applies a de novo standard of review to constitutional challenges." *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

"Due process is satisfied where interested parties are given an 'opportunity to be heard at a meaningful time and in a meaningful manner.'" *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 377, 240 P.3d 1033, 1041 (2010) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). When a district court rules on a dispositive motion, the district court must therefore provide a meaningful opportunity to be heard. Ordinarily, this takes the form of a live hearing, but in some cases the parties may be "afforded sufficient opportunity to present their case through affidavits and supporting documents." *See id.* at 378, 240 P.3d at 1041; *cf. Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 83 (2d Cir. 2018) ("Hearing from the parties either in person *or on the papers* is typically an essential component of the inquiry into whether to decline to exercise . . . jurisdiction . . . ." (emphasis added)).

Vanessa's motion to dismiss included a signed declaration stating that she had filed a petition for divorce in California in January.[1] This was competent evidence. *See* NRS 53.045. Eric opposed the

[1]After the district court issued its minute order dismissing the case, Vanessa supplemented her evidence with a duplicate (not a certified copy) of the California complaint.

motion and did not demand a live hearing. Eric was fully notified that the court was considering dismissing his suit. Accordingly, if the district court had simply considered the record and held that the undisputed evidence showed that Vanessa filed first, it might have satisfied due process, as both parties had an opportunity to be heard "on the papers." *See Catzin*, 899 F.3d at 83.[2]

But the district court did *not* rely solely on the evidence before it. Instead, the court contacted the California judge outside the parties' presence and made a decision based on that judge's word. In doing so, the district court conducted its own investigation and rested its decision on matters beyond the record. This was improper.[3] *See City of Reno v. Harris*, 111 Nev. 672, 678, 895 P.2d 663, 667 (1995) ("A court's consideration of matters outside the record, obtained by independent investigation, generally constitutes error."), *modified on other grounds by Cty. of Clark v. Doumani*, 114 Nev. 46, 53 n.2, 952 P.2d 13, 17 n.2 (1998). And because the district court relied on the telephone call in resolving the dispute, it deprived Eric of an opportunity to be heard "at a meaningful time and in a meaningful manner" and thereby violated his right to due process. *See J.D. Constr.*, 126 Nev. at 377, 240 P.3d at 1041 (internal quotation marks omitted); *Sw. Gas Corp. v. Pub. Serv. Comm'n of Nev.*, 92 Nev. 48, 59-60, 546 P.2d 219, 226 (1976) (observing that consideration of matters outside the record is inconsistent with the requirement of providing notice and an opportunity to be heard).

Nevertheless, it is not immediately obvious that this error requires reversal. "[T]he court must disregard all errors and defects that do not affect any party's substantial rights." NRCP 61. An error affects substantial rights if "but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). Vanessa argues that the due process violation is necessarily harmless because the first-to-file rule required dismissal, no matter how the court learned of the first-filed suit. This court has not had the opportunity to address the first-to-file rule in a published opinion, but the rule has arisen with some frequency in our unpublished orders.[4] Accordingly, we take this opportunity to review the rule and its purposes.

---

[2]This case does not present us with the opportunity to determine exactly when a live hearing is required.

[3]We note that the district court's written order referred to the telephone call as a "UCCJEA Conference," but this was erroneous. Although the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) expressly authorizes courts to communicate with each other regarding certain child custody determinations, *see* NRS 125A.275, Eric and Vanessa have no children together.

[4]*See Tonopah Solar Energy, LLC v. Fifth Judicial Dist. Court*, Docket No. 78256 (Order Denying in Part and Granting in Part Petition for Writ of Prohibition or Mandamus, May 29, 2020); *Galindo-Milan v. Hammer*, Docket No. 74068 (Order of Affirmance, Apr. 12, 2019); *Anders v. Anders*, Docket No. 71266-COA (Order of Affirmance, Dec. 14, 2017).

Overview of the first-to-file rule

The first-to-file rule is a "generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). Although the doctrine was originally developed in federal court, state courts have applied it as well. *E.g.*, *Wamsley v. Nodak Mut. Ins. Co.*, 178 P.3d 102, 110 (Mont. 2008). The rule is grounded in principles of efficiency and "[w]ise judicial administration." *Pacesetter*, 678 F.2d at 95 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952) (alteration in original)). Courts have consistently emphasized that the rule is equitable in nature, that it must not be applied mechanically, and that "an ample degree of discretion . . . must be left to the lower courts." *Id.* (quoting *Kerotest*, 342 U.S. at 183-84).

The Ninth Circuit set forth a three-step test for the rule in *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622 (9th Cir. 1991), which we now adopt. First, does the rule apply in the first instance? *See Alltrade*, 946 F.2d at 625-27. If so, is there some equitable reason not to apply the rule? *See id.* at 627-28. Finally, if the rule applies, should the second-filed suit be dismissed or merely stayed? *See id.* at 628-29.

Application of the first-to-file rule

In order for the rule to apply in the first instance, the parties and issues in the two suits must be substantially the same, even if not strictly identical. *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). The court should also consider the suits' "chronology." *See Alltrade*, 946 F.2d at 625. Where there are two suits between the same two parties over the same subject matter, ordinarily, the second court should defer to the first. Certainly, the first-to-file rule applied here, as there was no doubt that Eric's and Vanessa's suits were between the same parties and over the same subject matter, and that Vanessa was the first to file her action.

We next consider whether "equitable concerns militate against application of the rule." *See Alltrade*, 946 F.2d at 627-28. The first suit should have priority unless "special circumstances" weigh in favor of the second suit. *William Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177, 178 (2d Cir. 1969). We emphasize that the district court should not embroil itself in a mini-trial regarding the propriety of the two forums. For example, if a party believes that the first court is deeply inconvenient, such that the doctrine of forum non conveniens applies, that "argument should be addressed to the court in the first-filed action." *Pacesetter*, 678 F.2d at 96.

Although federal courts have identified "anticipatory suit[s]" and "forum shopping" as reasons not to defer to the first-filed suit, *see*

Alltrade, 946 F.2d at 628, we think those concerns too should be addressed to the first court. After all, "[g]enerally, a plaintiff's choice of forum is entitled to great deference." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 301, 350 P.3d 392, 396 (2015). If the first court was indeed chosen solely as an egregious act of forum shopping, then the first court should ordinarily be trusted to dismiss the action. *Cf. Kerotest*, 342 U.S. at 185 (rejecting an attitude of distrust in the discretion of the court). Conversely, if the first court declines to dismiss the action, then the parties should litigate there. Here, we conclude that Eric's claim that California lacked jurisdiction did not amount to "special circumstances" justifying an exception, as he was bound to address that argument to the California court.

Accordingly, under the first two steps of the *Alltrade* analysis, we conclude that the first-to-file rule did apply in this case. Even absent the constitutional error, no "different result might reasonably have been reached." *See Wyeth*, 126 Nev. at 465, 244 P.3d at 778. Therefore, that error was harmless.

Nevertheless, under *Alltrade*'s third step, we hold that the district court abused its discretion by dismissing the suit. *See Pacesetter*, 678 F.2d at 95 (stating that a district court's application of the first-to-file rule is reviewed for an abuse of discretion). "[W]here the first-filed action presents a likelihood of dismissal, the second-filed suit should be stayed, rather than dismissed." *Alltrade*, 946 F.2d at 629. This rule applies when a motion to dismiss is pending in the first-filed action. *See id.*

This is consistent with the rule's purpose of promoting judicial efficiency. *See id.* at 625. Although efficiency is normally "best served when motions to stay proceedings are discouraged," *see Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 649, 289 P.3d 201, 210 (2012) (internal quotation marks omitted), the situation is different when a court has already decided to defer jurisdiction and is only choosing whether to stay or dismiss. *Cf. id.* at 649 n.5, 289 P.3d at 210 n.5 (noting that "courts occasionally find a stay will in fact promote judicial efficiency"). If the first-filed suit is dismissed, the second court's stay can be lifted and the action can proceed without the need for a wasteful new filing.[5] *See Alltrade*, 946 F.2d at 629. Conversely, if the first court determines that it does have jurisdiction, the second action can be dismissed without difficulty. *See id.*

Here, the district court ought to have deferred to California by staying Eric's suit, not by dismissing it. The district court was aware

[5]Staying the action may also prevent inequitable results if a statute of limitations applies. *See Alltrade*, 946 F.2d at 629 ("Granted, the statute of limitations problems may not be serious . . . . But why take chances? It is simpler just to stay the second suit." (alteration in original) (quoting *Asset Allocation & Mgmt. Co. v. W. Emp'rs Ins. Co.*, 892 F.2d 566, 571 (7th Cir. 1989))).

that Eric had moved to dismiss the California case on the grounds that Vanessa failed to satisfy California's residency requirement. Given the confused state of the facts, Eric's argument was not obviously frivolous. We emphasize that the district court was not required to decide whether Eric's argument was ultimately meritorious. Though it may turn out that California has jurisdiction and the Nevada action will have to be dismissed, the question of the first court's jurisdiction "should be addressed to the court in the first-filed action." *See Pacesetter*, 678 F.2d at 96. The factual and legal questions regarding Vanessa's residency must be *decided* in California. Their *existence*, however, ought to have "counsel[ed] against outright dismissal" of the Nevada action. *See Alltrade*, 946 F.2d at 629.

CONCLUSION

We hold that, generally, a district court may not independently investigate facts in a pending matter by communicating ex parte with another court without giving the parties an opportunity to respond. We further hold that, where the same action is filed in two courts and a party contests the first court's jurisdiction, the second court should ordinarily stay the action, to permit the first court to decide the issue of its own jurisdiction. A stay gives appropriate deference to the first court, while ensuring a more efficient transition back to the second court should the first court turn out to lack jurisdiction. District courts have equitable authority to treat unusual cases differently, but no special circumstances are present here.

Accordingly, we reverse the district court's order of dismissal and remand with instructions to enter a stay. Either party may move to lift the stay and to either proceed with or dismiss the action, as appropriate, based on subsequent decisions of the California court.[6]

Gibbons and Silver, JJ., concur.

---

[6]The parties both represented at oral argument that the California court has not yet issued any judgment that would make this case moot.

IN THE MATTER OF THE ESTATE OF ELLA E. HORST REVOCABLE TRUST, UAD 05/21/1991.

BRIAN HOLIDAY, APPELLANT, *v.* PATRICIA L. HORST, TRUSTEE OF THE ELLA E. HORST REVOCABLE TRUST, UAD 05/21/1991; AND ELLA E. HORST REVOCABLE TRUST, UAD 05/21/1991, RESPONDENTS.

No. 77964

December 31, 2020 478 P.3d 861

Appeal from a district court order granting a petition to confirm a trust. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

Howard & Howard Attorneys PLLC and *Thomas W. Davis, II*, and *Gwen Rutar Mullins*, Las Vegas, for Appellant.

Crest Key, Prof., LLC, and *Kirk D. Kaplan*, Las Vegas; *Law Office of S. Don Bennion* and *S. Don Bennion*, Las Vegas, for Respondents.

Before the Supreme Court, PARRAGUIRRE, HARDESTY and CADISH, JJ.

OPINION

By the Court, CADISH, J.:

In this appeal, we consider what a trustee must include in a notice to beneficiaries under NRS 164.021 to trigger the 120-day limitation period for challenging the validity of a trust. Following the settlor's death, respondent Patricia L. Horst, acting in her capacity as trustee of the Ella E. Horst Revocable Trust, sent notice of irrevocability to the Trust's beneficiaries pursuant to NRS 164.021. The notice included copies of the original Trust and the first three amendments thereto, and none of the beneficiaries filed an objection to the notice. Approximately 16 months later, Patricia petitioned the district court to confirm a purported fourth amendment to the Trust. Appellant Brian Holiday, a residual beneficiary of the Trust, filed an objection, alleging that the second, third, and purported fourth amendments were the product of undue influence. The district court confirmed the original Trust and the first three amendments thereto, concluding that Holiday's objection to the second and third amendments was time-barred under NRS 164.021(4), which provides a window of 120 days from service of the notice of irrevocability for bringing an action to challenge a trust's validity.

We hold that the district court erred in concluding that Holiday's objection to the second and third amendments to the Trust was

time-barred. NRS 164.021(2)(c) requires a trustee's notice to beneficiaries to include "[a]ny provision of the trust instrument which pertains to the beneficiary." We conclude that, in this context, the term "any" means "all." Therefore, to trigger the 120-day limitation period under NRS 164.021(4), the trustee's notice must include *all* trust provisions pertaining to the beneficiary. In this case, Patricia's initial notice to beneficiaries did not trigger the 120-day limitation period because it did not include the purported fourth amendment, which is a provision of the trust instrument that pertained to Holiday as a trust beneficiary. Holiday's objection is therefore timely, and he may challenge the validity of the second and third amendments. Accordingly, we reverse the district court's order and remand the matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The Trust's settlor, Ella E. Horst, established the Trust to benefit her children and grandchildren. Originally, the Trust provided a specific gift of $20,000 to one of her grandchildren, Patricia, with the remainder divided amongst Ella's two children. Ella executed the first amendment to the Trust to reflect the death of her daughter and to add specific gifts of real property and automobiles to her son, Holiday.

Eventually, Ella moved to Las Vegas and began living with Patricia. Shortly thereafter, Ella, through the Trust, bought a home (Home) with Patricia and Patricia's partner. The Trust paid 50 percent of the purchase price in cash, retaining a 50-percent interest in the Home. A few years later, Ella executed the second amendment to the Trust, which annulled Patricia's $20,000 specific gift, provided Patricia with a specific gift of the Trust's interest in the Home, and named Patricia successor trustee. The following year, Ella executed the third amendment to the Trust, which provided an additional specific gift of real property to Patricia. Years later, Patricia's partner conveyed her 25-percent interest in the Home to the Trust. Ella then purportedly executed the fourth amendment to the Trust, adding a specific gift of the Trust's recently acquired 25-percent interest in the Home to Patricia.

The Trust became irrevocable upon the death of Ella, and Patricia accepted her appointment as successor trustee. On January 27, 2017, pursuant to NRS 164.021(1), she served notice to beneficiaries, heirs, and interested persons regarding the Trust's irrevocability. The notice included the full text of the original Trust and the first three amendments thereto but did not include the purported fourth amendment. None of the residuary beneficiaries timely objected pursuant to the notice.

In May 2018, Patricia petitioned the district court to, among other requests, confirm the purported fourth amendment as a valid amendment to the Trust. She sent notice to all Trust beneficiaries on May 18, 2018. Holiday filed an objection to the petition on July 16,

2018, arguing that the purported fourth amendment was not a valid amendment to the Trust and that the second and third amendments were the product of undue influence. Ultimately, the district court concluded that NRS 164.021(4) barred Holiday's objection to the second and third amendments because he filed it more than 120 days after Patricia served the initial notice of the Trust's irrevocability, in which she included the first three amendments. However, the district court concluded that Holiday's objection to the purported fourth amendment was timely and permitted discovery.[1] Holiday appeals.

DISCUSSION

The question before us is whether Patricia's initial notice to the beneficiaries complied with NRS 164.021(2)(c), thereby triggering the 120-day limitation under NRS 164.021(4) and precluding Holiday's challenge to the second and third amendments to the Trust. We review questions of statutory interpretation de novo. *In re Estate of Black*, 132 Nev. 73, 75, 367 P.3d 416, 417 (2016). When construing statutes, we give the statute's language "its plain meaning if it is clear and unambiguous." *Id*. However, if the plain language of "a statute is subject to more than one reasonable interpretation, then [the statute] is ambiguous," and we may consider "reason and public policy" to discern the Legislature's intent. *In re Contrevo*, 123 Nev. 20, 23, 153 P.3d 652, 653-54 (2007).

NRS 164.021(2)(c) is ambiguous

NRS 164.021 governs the process for a trustee to provide notice to beneficiaries once a trust becomes irrevocable. The notice must contain certain information:

> (a) The identity of the settlor of the trust and the date of execution of the trust instrument;
>
> (b) The name, mailing address and telephone number of any trustee of the trust;
>
> (c) Any provision of the trust instrument which pertains to the beneficiary or notice that the heir or interested person is not a beneficiary under the trust;
>
> (d) Any information required to be included in the notice expressly provided by the trust instrument; and
>
> (e) A statement set forth in a separate paragraph, in 12-point boldface type or an equivalent type which states: "You may not bring an action to contest the trust more than 120 days from the date this notice is served upon you."

NRS 164.021(2). A beneficiary has 120 days from service of such notice to contest the validity of the trust. NRS 164.021(4). Here, the

[1]The proceedings regarding the purported fourth amendment are pending in district court, and this appeal only relates to the district court's order regarding the second and third amendments.

parties dispute the meaning of NRS 164.021(2)(c), which requires the notice to include "[a]ny provision of the trust instrument" that pertains to a beneficiary.

Holiday argues that "any" in NRS 164.021(2)(c) means "all." Therefore, Holiday contends that Patricia's initial notice did not trigger the 120-day limitation period because it did not include the purported fourth amendment, which is a trust provision pertaining to him. Patricia argues that the statute uses discretionary terms, stating that the trustee "may" provide notice, and by using the term "any," the Legislature intended to give a trustee the discretion to select which provisions should be included with the notice to beneficiaries. Patricia asserts that Nevada's notice statute is voluntary and optional, unlike other states, such as California, which has a mandatory notice statute. Accordingly, she contends that NRS 164.021 contemplates the trustee sending more than one notice, and Holiday's challenge to the second and third amendments to the Trust are time-barred under NRS 164.021(4) because Holiday objected more than 120 days after her initial notice to beneficiaries.

"Any," as it appears in NRS 164.021(2)(c), is an adjective that modifies the noun "provision." *Merriam-Webster's Collegiate Dictionary* defines the adjective form of "any" as (1) "one or some indiscriminately of whatever kind," (2) "one, some, or all indiscriminately or whatever quantity," or (3) "unmeasured or unlimited in amount, number, or extent." *Any*, *Merriam-Webster's Collegiate Dictionary* 56 (11th ed. 2014). Therefore, the dictionary contemplates both parties' proffered definitions of "any." Furthermore, both parties' proffered constructions are plausible, as neither is absurd or unreasonable on its face. Accordingly, "any" in NRS 164.021(2)(c) is ambiguous. *In re Contrevo*, 123 Nev. at 23, 153 P.3d at 653-54; *cf. Castaneda v. State*, 132 Nev. 434, 438, 373 P.3d 108, 111 (2016) (holding in the criminal context that "[t]he word 'any' has multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all" (internal quotation marks omitted)); *Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1073 (Pa. 2018) (holding that the term "any" is ambiguous).

The term "any" in NRS 164.021(2)(c) means "all"

When construing procedural statutes, courts generally ascribe the same meaning to "[i]dentical words used in different parts of the same . . . statute." 3A Shambie Singer, *Sutherland Statutes and Statutory Construction* § 67:2 (8th ed. 2019 update); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (noting that "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning"); *see also In re Orpheus Tr.*, 124 Nev. 170, 175, 179 P.3d 562, 565 (2008) (addressing the rules of statutory construction, under which

we may consider legislative history, multiple legislative provisions as a whole, and public policy to resolve an ambiguity). Here, the Legislature used the term "any" multiple times in NRS 164.021(2). Specifically, the term "any" appears in NRS 164.021(2)(b), (c), and (d). Construing subsection c, the provision at issue here, we presume that the Legislature intended "any" to have the same meaning throughout NRS 164.021(2).

Under NRS 164.021(2)(d),[2] a trustee's notice to beneficiaries must include "[a]ny information required to be included in the notice *expressly provided by the trust instrument*." (Emphasis added.) If a trust instrument expressly requires a trustee to include specific information in the notice to beneficiaries, then the trustee has no discretion to determine what to include and what to omit. Rather, the trustee must comply with the terms of the trust instrument and send *all* the required information. Because the term "any" in NRS 164.021(2)(d) means "all," the rules of statutory construction support construing the term "any" in NRS 164.021(2)(c) to mean "all."

Similarly, "[t]he word 'any' in a [procedural] statute usually means 'any and all.'" 3A Shambie Singer, *Sutherland Statutes and Statutory Construction* § 67:2 (8th ed. 2019 update); *see also Cook v. Wilkie*, 908 F.3d 813, 818 (Fed. Cir. 2018) (recognizing that "[w]hen coupled with a singular noun in an affirmative context, 'any' typically refer[s] to a member of a particular group or class without distinction or limitation and impl[ies] *every* member of the class or group" (second and third alterations in original) (internal quotation marks omitted)). The term "any" under NRS 164.021(2)(c) modifies a singular noun and is used in an affirmative context. Accordingly, this approach also indicates the Legislature intended the term "any" under NRS 164.021(2)(c) to mean "all."

Our review of NRS 164.021's legislative history also supports construing the term "any" to mean "all." The State Bar of Nevada's Trust and Estate Section drafted the bill that became NRS 164.021. Hearing on S.B. 287 Before the Senate Judiciary Comm., 75th Leg. (Nev., Mar. 24, 2009). Mr. Matthew Gray with the Trust and Estate Section testified that the bill was aimed at "expedit[ing] the process of [ ] trust administration."[3] *Id*. The Trust and Estate Section also drafted the bill that led to NRS 164.021's amendment. Hearing on S.B. 221 Before the Senate Judiciary Comm., 76th Leg. (Nev.,

[2]The Legislature's use of the term "any" in NRS 164.021(2)(b) is also susceptible to both of the parties' proffered constructions, and therefore analyzing that provision is not useful in terms of discerning legislative intent with regard to NRS 164.021(2)(c).

[3]We have previously relied upon testimony by proponents of a bill appearing before a legislative committee to construe an ambiguous statute. *See Clark County v. S. Nev. Health Dist.*, 128 Nev. 651, 659-60, 289 P.3d 212, 217-18 (2012) (relying upon the testimony of a county intergovernmental relations director, a policy analyst for the Legislative Counsel Bureau, and a State Assembly member to construe NRS 439.365).

Mar. 21, 2011). Mr. Mark Solomon with the Trust and Estate Section testified that the proposed amendments were aimed at "moderniz[ing] Nevada's trust and estate law" by "mak[ing] it more efficient, user-friendly and competitive with other states seeking to attract trust business." *Id*. Mr. Layne Rushforth, also representing the Trust and Estate Section, testified "that once a trust becomes irrevocable, a trustee can give the beneficiaries notice at any time. There would be 120 days to file *a contest*. The whole purpose of this *is to not have trust contests arise years after the fact*." Hearing on S.B. 221 Before the Assembly Judiciary Comm., 76th Leg. (Nev., May 2, 2011) (emphases added).

Patricia is correct that a trustee has the discretion whether to send notice to beneficiaries in order to trigger the 120-day limitation period and cut off all challenges to the trust. However, we reject her contention that NRS 164.021's legislative history suggests that a trustee also has the discretion to confirm trust instruments in a piecemeal fashion.[4] Such a construction would not promote the Legislature's desire for efficiency because it could allow for multiple contests to various trust provisions. Such a construction would not promote judicial economy and could increase the costs of trust administration due to successive contests. Holiday's proffered construction of NRS 164.021(2)(c) is consistent with the Legislature's intent because it requires a trustee to include every trust provision that pertains to a beneficiary within the notice. This, in turn, facilitates a single deadline for trust contests, as the beneficiaries will have all the information they need to review terms of the trust and decide whether they wish to litigate. Thus, consistent with the rules of statutory construction, we conclude that "any" in NRS 164.021(2)(c) means "all."

NRS 164.021(2)(c) requires strict compliance

We now turn to whether NRS 164.021(2)(c) requires strict or substantial compliance. Generally, "'time and manner' requirements are strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements." *Leven v. Frey*, 123 Nev. 399, 408, 168 P.3d 712, 718 (2007). Here, NRS 164.021(2)(c)'s requirement that a trustee include all trust provisions that are pertinent to a beneficiary in the statutory notice is a form and content requirement for which substantial compliance may be sufficient. Thus, to determine whether substantial compliance is sufficient here, "we examine whether the purpose of the statute . . . can be adequately

[4]Testifying in support of the bill that led to NRS 164.021's enactment, Mr. Gray stated that the drafters of the bill included "a finite time limit for . . . interested parties to contest a provision of the trust." Hearing on S.B. 287 Before the Senate Judiciary Comm., 75th Leg. (Nev., Mar. 24, 2009). Patricia contends that Mr. Gray's use of the words "a provision" implies that a trustee may confirm trust instruments in a piecemeal manner. We reject Patricia's selective reading of the legislative history, as it places undue weight on two words while seemingly ignoring the broader context of the testimony.

served in a manner other than by technical compliance with the statutory . . . language." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011).

In *Leyva*, the respondent failed to comply with NRS 107.086 (providing, among other things, disclosure rules for the Foreclosure Mediation Program and sanctions for noncompliance) because "it did not provide written assignments of the deed of trust and mortgage note" to participate in the Foreclosure Mediation Program. 127 Nev. at 475, 255 P.3d at 1278. The respondent argued that it substantially complied with the statute and, therefore, was not subject to sanctions. *Id*. We rejected that argument, first observing that the controlling statute used mandatory language to describe the obligation of the respondent. *Id*. at 476, 255 P.3d at 1279. Second, we noted that the legislative intent behind the mandatory language was "to ensure that whoever is foreclosing actually owns the note and has authority to modify the loan." *Id*. (internal quotation marks omitted). Accordingly, we concluded that NRS 107.086 required strict compliance. *Id*.

Here, NRS 164.021(2) uses mandatory language to describe the obligation of a trustee when he or she provides notice to beneficiaries. NRS 164.021(2) ("The notice provided by the trustee must contain . . . ."). Furthermore, the legislative history of NRS 164.021 suggests that the Legislature desired an expedited and efficient system for trust administration. Because only a complete disclosure of all provisions of a trust instrument pertaining to a beneficiary will further the Legislature's goals and give a beneficiary all the information he or she needs to decide whether to contest a trust, we hold that NRS 164.021(2)(c) requires strict compliance.

Holiday's challenge to the second and third amendments was timely

Patricia's initial notice to beneficiaries did not include the purported fourth amendment to the Trust. Therefore, we hold that it did not trigger the 120-day limitation period under NRS 164.021(4). However, Patricia's second notice to beneficiaries included the purported fourth amendment, thereby triggering the 120-day limitation period. Holiday filed his objection to the second and third amendments within this limitation period. Accordingly, we hold that the district court erred when it determined that Holiday's challenge was time-barred under NRS 164.021(4).[5]

CONCLUSION

NRS 164.021(2)(c) requires a trustee's notice to beneficiaries to include "[a]ny provision of the trust instrument which pertains to the beneficiary." After employing tools of statutory construction, we conclude that the term "any" in this context means "all." Because

[5]Because we are resolving this appeal on these grounds, we decline to address the parties' remaining arguments.

only complete disclosure of all pertinent trust provisions will promote the statute's goals and adequately inform beneficiaries, we also hold that NRS 164.021(2)(c) is subject to strict compliance. Patricia failed to include the purported fourth amendment to the Trust in her initial disclosure to beneficiaries and therefore did not strictly comply with NRS 164.021(2)(c). Accordingly, this initial disclosure did not trigger the 120-day deadline for challenging the validity of the trust. Holiday's challenge to the second and third amendments to the Trust, which was filed within 120 days of complete disclosure, was thus timely. We therefore reverse the district court's order to the extent it concluded that Holiday was time-barred from challenging the second and third amendments to the Trust, and we remand for further proceedings consistent with this opinion.

Parraguirre and Hardesty, JJ., concur.

ASSOCIATED RISK MANAGEMENT, INC., Appellant, *v.* MANUEL IBANEZ, Respondent.

No. 80480

December 31, 2020 478 P.3d 372

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

Affirmed.

Law Offices of David Benavidez and *David H. Benavidez*, Henderson, for Appellant.

Bertoldo Baker Carter & Smith and *Javier A. Arguello*, Las Vegas, for Respondent.

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

OPINION[1]

By the Court, Stiglich, J.:

Twenty years ago, we held that the federal Immigration Reform and Control Act (IRCA) preempts Nevada's workers' compensation laws that would otherwise provide undocumented aliens with

[1]We originally resolved this appeal in an unpublished order of affirmance. Respondent moved to publish the order as an opinion. *Cf.* NRAP 36(f). We granted that motion by order entered December 24, 2020, and we accordingly issue this opinion in place of our November 23, 2020, unpublished order.

employment within the boundaries of the United States. *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 448-50, 25 P.3d 175, 178-79 (2001). We further held that, as a matter of state law, undocumented aliens were not entitled to vocational training that would "only be available . . . because of [the worker's] undocumented status." *Id.* at 450-53, 25 P.3d at 179-81. However, we affirmed an award of permanent partial disability benefits to an undocumented alien. *Id.* at 456-57, 25 P.3d at 183. These monetary benefits, paid by the insurer, do not conflict with federal law or undermine the Legislature's intent. In this appeal, we reaffirm that undocumented aliens who are injured while working for a Nevada employer may be eligible for monetary disability benefits.

BACKGROUND

Respondent Manuel Ibanez is an undocumented Nevadan. In 2014, while working as a carpenter for High Point Construction, a Nevada employer, he sustained severe injuries when a falling two-by-four struck him in the head, shoulder, and back. He was treated for these injuries over the next several years, which included multiple surgeries. Even after these surgeries, he continued to suffer both physical pain and mental trauma related to the accident.

Ibanez's injuries proved debilitating, and so he applied for permanent total disability (PTD) status in June 2018. Appellant Associated Risk Management (ARM), High Point's insurance administrator, denied this request. It determined that Ibanez's disability was only temporary and that he would be able to return to light duty. Further, it determined that Ibanez would be employable if he were eligible to work in the United States.

Ibanez sought review of ARM's determinations pursuant to NRS 616C.320. The hearing officer initially affirmed ARM's denial of benefits, but the appeals officer reversed, granting Ibanez PTD status pursuant to the "odd-lot doctrine." This established doctrine permits a finding of PTD when a worker, "while not altogether incapacitated for work, [is] so handicapped that [the worker] will not be employed regularly in any well-known branch of the labor market." *Nev. Indus. Comm'n v. Hildebrand*, 100 Nev. 47, 51, 675 P.2d 401, 404 (1984) (quoting 2 A. Larson, *The Law of Workmen's Compensation*, § 57.51 (1981)); *see* NRS 616C.435(2). The appeals officer relied on Ibanez's well-documented physical impairment traceable to the 2014 accident and subsequent surgeries, which documentation included written opinions by Ibanez's treating physicians. Further, the appeals officer found that Ibanez's lack of a valid work visa was "not relevant" to the determination of PTD status.

ARM petitioned for judicial review. When the district court denied review, ARM appealed to this court. On appeal, ARM argues that the appeals officer committed legal error by granting PTD to an undocumented alien.

DISCUSSION

Standard of review

"When reviewing a district court's order denying a petition for judicial review of an agency decision, we engage in the same analysis as the district court: 'we evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion.' We defer to an agency's findings of fact that are supported by substantial evidence and will 'not reweigh the evidence or revisit an appeals officer's credibility determination.' . . . However, questions of law are reviewed de novo." *City of Las Vegas v. Lawson*, 126 Nev. 567, 571, 245 P.3d 1175, 1178 (2010) (quoting *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008)) (internal citations omitted). Unlike pure legal questions, "the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." *State Indus. Ins. Sys. v. Montoya*, 109 Nev. 1029, 1031-32, 862 P.2d 1197, 1199 (1993) (internal quotation marks omitted).

The appeals officer did not commit legal error

Relying on our opinion in *Tarango*, ARM argues that IRCA preempts Nevada's workers' compensation statutes whenever an undocumented alien is involved and that the appeals officer therefore erred by granting Ibanez PTD benefits. Reviewing this question of law de novo, *see Lawson*, 126 Nev. at 571, 245 P.3d at 1178, we conclude that IRCA does not preempt an award of monetary benefits to an undocumented alien.

Nevada's industrial insurance system covers "every person in the service of an employer . . . whether lawfully or unlawfully employed," including "[a]liens." NRS 616A.105(1). "When a statute is clear and unambiguous, this court will 'give effect to the plain and ordinary meaning of the words.'" *Reif ex rel. Reif v. Aries Consultants, Inc.*, 135 Nev. 389, 391, 449 P.3d 1253, 1255 (2019) (quoting *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010)). NRS 616A.105(1) could hardly be clearer, and so we concluded in *Tarango* that "Nevada's workers' compensation laws apply to all injured workers within the state, regardless of immigration status." *Tarango*, 117 Nev. at 448, 25 P.3d at 178. Accordingly, the issue in *Tarango* was "not whether [an undocumented alien] can receive workers' compensation under our laws . . . [but] whether an injured undocumented worker's access extends to the full depths of the workers' compensation scheme." *Id.* Specifically, we examined the conflict between federal law and the statutory priorities for returning an injured employee to work.

Under our workers' compensation statute, an insurer is directed to prioritize returning an injured worker to similar employment if

possible and to vocational training if not. *See* NRS 616C.530. At the same time, federal law positively prohibits any employer from knowingly employing an undocumented alien. *Tarango*, 117 Nev. at 450, 25 P.3d at 179 (citing 8 U.S.C. § 1324a). We could not "require[ ] the employer to knowingly violate the IRCA and incur substantial penalties." *Id.* at 453, 25 P.3d at 180. Instead, we concluded that "IRCA preempts Nevada's workers' compensation scheme in so far as it provides undocumented aliens with employment within the boundaries of the United States." *Id.* at 456, 25 P.3d at 183; *cf. Renfroe v. Lakeview Loan Servicing, LLC*, 133 Nev. 358, 360, 398 P.3d 904, 906 (2017) (explaining that a state law is preempted if "compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives") (quoting *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 372, 168 P.3d 73, 80 (2007)).[2]

We then turned to vocational training, as opposed to employment. We concluded that even if the provision of vocational training was not technically preempted, such training would be contrary to the legislative intent, in light of our conclusion that a return to employment was preempted. It would make no sense to "allow[ ] an undocumented worker to skip through the priority scheme" to undertake "training [which] would only be available . . . because of [the worker's] undocumented status." *Tarango*, 117 Nev. at 453, 25 P.3d at 181.

Our opinion in *Tarango* clearly held that undocumented workers cannot obtain reemployment or vocational training pursuant to NRS 616C.530. But our opinion did not bar "compensatory benefits which award monetary relief." *Id.* at 448, 25 P.3d at 178. Far from holding those benefits preempted, we expressly affirmed an award of such benefits. *Id.* at 456-57, 25 P.3d at 183. That result was, and is, sound. IRCA makes it unlawful to knowingly employ an undocumented alien, but IRCA says nothing about paying an undocumented alien benefits that compensate for an injury. Therefore, there is no conflict with federal law when an insurer pays compensatory benefits. Furthermore, those benefits are not only available because of the worker's undocumented status; they are available to any worker, lawfully or unlawfully employed, "who is injured by accident arising out of and in the course of employment." *See* NRS 616C.440(1).

---

[2]A state law may also be preempted if "congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field." *Renfroe*, 133 Nev. at 360, 398 P.3d at 906. In *Tarango*, we discussed Congress's "plenary power" over aliens, but we did not hold that Congress had preempted states from providing *any* benefits to aliens. *See Tarango*, 117 Nev. at 448-49, 25 P.3d at 178-79; *cf. Asylum Co. v. D.C. Dep't of Emp't Servs.*, 10 A.3d 619, 631 (D.C. 2010) (holding that IRCA does not preempt the field of workers' compensation schemes).

Accordingly, we hold that undocumented aliens are not precluded from receiving disability benefits under Nevada's workers' compensation laws.

The appeals officer's decision was based on substantial evidence

ARM also argues that the appeals officer misapprehended the facts and that Ibanez is not in fact permanently and totally disabled. We decline to disturb the appeals officer's evaluation of the evidence. Although the record contained some evidence that might have tended to show Ibanez could work light duty, the appeals officer based his decision on other substantial evidence in the record, including professional medical evaluations. He specifically noted "the credible reporting of Dr. Cestkowski," who had opined, after a physical examination, that Ibanez was permanently disabled. We do not reweigh the evidence or revisit credibility determinations. *Lawson*, 126 Nev. at 571, 245 P.3d at 1178. Accordingly, the appeals officer's conclusion was not clear error or an abuse of discretion. Even if ARM's view of the evidence might have been a permissible one, the agency evaluated the evidence differently and came to a different conclusion. That conclusion, which is "closely related to the agency's view of the facts, [is] entitled to deference." *Montoya*, 109 Nev. at 1031-32, 862 P.2d at 1199.

CONCLUSION

Nevada's workers' compensation statute clearly and unambiguously protects every person in the service of an employer, whether lawfully or unlawfully employed, including aliens. Although federal law prohibits employers from knowingly employing an undocumented alien, it does not prohibit insurers from compensating undocumented aliens for injuries they sustain while working. Accordingly, we affirm the judgment of the district court.

Gibbons and Silver, JJ., concur.