

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NEVADA TRADING COMPANY, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Appellant,  
vs.  
DONALD E. KARPEL; THE LAW FIRM  
OF ZELNER & KARPEL; AND THE  
GLOBAL BAILEY GROUP II, A  
CALIFORNIA CORPORATION,  
Respondents.

No. 75317-COA

**FILED**

DEC 18 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Yocum  
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

Nevada Trading Company, LLC, appeals from a district court order granting respondents' motion to dismiss for lack of personal jurisdiction pursuant to NRCP 12(b)(2). Eighth Judicial District Court, Clark County; Linda Marie Bell, Chief Judge.

In February 2017, Nevada Trading, a Nevada limited liability company, and respondent Global Baily Group II, a California corporation, entered into a short-term investment agreement.<sup>1</sup> At the time of the agreement's formation, Global was represented by respondent Donald E. Karpel, a California attorney with an interest in the California-based law firm, respondent Zelner & Karpel. Neither Karpel nor Zelner & Karpel has offices, employees, or property in Nevada. Nor is Karpel licensed to practice law in Nevada. Karpel, however, was admitted pro hac vice in a separate matter at the time of the events related to this action.

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

According to the terms of the investment agreement, Nevada Trading was to send, via wire transfer, \$40,000 to Global. Specifically, the \$40,000 was to be wired to Karpel's trust account in California and then forwarded to Global for investment as contemplated by contract. After eight days, Global would either return the \$40,000, or, if the investment was successful, pay Nevada Trading a sum of \$200,000. Prior to the transfer, Karpel received an email from Nevada Trading's attorney that included two attachments: one was the executed contract between Nevada Trading and Global; and the other was a letter with additional instruction for handling the \$40,000, directing Karpel to hold the money in trust and refrain from distributing the funds to Global. Nevertheless, after Karpel confirmed receipt of the email, Nevada Trading wired the \$40,000 to his trust account, and Karpel subsequently released the money to Global. Global never returned the \$40,000, nor did it pay Nevada Trading the \$200,000 contemplated in the contract.

As a result, Nevada Trading filed a complaint in Nevada against Global, Karpel, and Karpel & Zelner, alleging, among other things, breach of contract and fraud. Global, Karpel, and Karpel & Zelner moved the district court to dismiss the complaint for lack of personal jurisdiction, arguing they lacked sufficient minimum contacts with Nevada. After a hearing on the motion, the district court issued a written order granting the motion and dismissing the claims *with prejudice*.

Although Nevada Trading posits numerous arguments on appeal, this case presents two dispositive legal questions: (1) whether the district court erred when it determined that Nevada Trading failed to make

a prima facie showing of personal jurisdiction as to all respondents;<sup>2</sup> and (2) whether the district court erred when it dismissed Nevada Trading's claims with prejudice as to both. We conclude that the district court did not err as to the former but did err as to the latter.

*Jurisdiction over nonresident defendants*

"This court reviews de novo a district court's determination of personal jurisdiction," *Fulbright & Jaworski v. Eighth Judicial Dist. Court*, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015), but defers to the district court's findings of fact if they are supported by substantial evidence. *Catholic Diocese, Green Bay v. John Doe 119*, 131 Nev. 246, 249, 349 P.3d 518, 520 (2015).

When a nonresident defendant challenges personal jurisdiction, plaintiffs may meet their burden of establishing jurisdiction in one of two ways. *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993). Under the first method, which was used in this case, "the plaintiff has the burden of introducing competent evidence of essential facts which establish a prima facie showing that personal jurisdiction exists" and ultimately must prove jurisdiction by a preponderance of the evidence at trial. *Id.* (internal quotation marks omitted). The plaintiff, however, is

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<sup>2</sup>We recognize that Global failed to file an answering brief in this matter. Nevertheless, because there are multiple parties, and because Nevada Trading did not move this court to treat Global's failure to answer as a confession of error, we decline to do so now and therefore address the merits of the appeal. *Rhode Island v. Prins*, 96 Nev. 565, 613 P.2d 408 (1980) (explaining that this court may treat a respondent's failure to file an answering brief as a confession of error); *see also* NRAP 31(d)(2). Nevertheless, for purposes of this appeal, we focus on whether the district court properly determined whether it had personal jurisdiction over Karpel and Karpel & Zelner.

required to go beyond the pleadings and “may not simply rely on the allegations of the complaint to establish personal jurisdiction.” *Id.* at 693, 857 P.2d at 744. As a result, “the trial court hears the pretrial jurisdictional motion based on affidavits, depositions, and other discovery materials.” *Id.*; see also *Tricarichi v. Coop. Rabobank, U.A.*, 135 Nev., Adv. Op. 11, 440 P.3d 645, 649 (2019).<sup>3</sup>

“The Due Process Clause of the Fourteenth Amendment constrains a State’s authority to bind a nonresident defendant to a judgment of its courts.” *Walden v. Fiore*, 571 U.S. 277, 283 (2014). In order for a Nevada court to exercise personal jurisdiction over a nonresident defendant, a plaintiff must show that Nevada’s long-arm statute, NRS 14.065, has been satisfied, and that the exercise of jurisdiction does not offend due process. *Catholic Diocese*, 131 Nev. at 249, 349 P.3d at 520. Since Nevada’s long-arm statute reaches the limits of due process established by the United States Constitution, the analysis is the same for both. *Id.*; see also *Baker v. Eighth Judicial Dist. Court*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000). The requirements of due process are satisfied if the nonresident defendant’s contacts with the forum are sufficient to acquire either (1) general personal jurisdiction, or (2) specific personal jurisdiction, and the exercise of jurisdiction over the nonresident defendant would be reasonable. *Fulbright*, 131 Nev. at 36, 342 P.3d at 1001.

Thus, to defeat respondents’ motion to dismiss, Nevada Trading was required to make a prima facie showing of either general or specific

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<sup>3</sup>Under the second method, the district court holds a full evidentiary hearing, and “the plaintiff must prove personal jurisdiction by a preponderance of the evidence or face dismissal of his or her claim.” *Trump*, 109 Nev. at 693, 857 P.2d at 744.



jurisdiction by “produc[ing] some evidence in support of all facts necessary for a finding of personal jurisdiction.” *Trump*, 109 Nev. at 692, 857 P.2d at 744. Although the district court’s order addressed both general and specific jurisdiction and concluded that neither existed, Nevada Trading’s arguments on appeal speak to specific jurisdiction. Therefore, we do not address general jurisdiction.<sup>4</sup>

*Nevada Trading has not made a prima facie showing of specific personal jurisdiction*

Nevada Trading argues that it made a prima facie showing of specific personal jurisdiction as to Global and Karpel.<sup>5</sup> Specifically, Nevada Trading argues that it presented a prima facie case for specific personal jurisdiction because it pleaded that Global and Karpel conspired to defraud Nevada Trading. Furthermore, Nevada Trading contends that the district court erred when it failed to consider that Karpel was admitted pro hac vice (in an unrelated matter) when it conducted its jurisdictional analysis.

A court has specific personal jurisdiction over a nonresident defendant if the defendant has certain “minimum contacts” with the forum

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<sup>4</sup>To the extent that Nevada Trading suggests general personal jurisdiction is appropriate, we find this argument unpersuasive, as nothing in the record indicates that any of the respondents had adequate contacts with Nevada to render them “at home.” *See, e.g., Fulbright*, 131 Nev. at 36, 342 P.3d at 1002 (explaining that a court may exercise general jurisdiction over a nonresident defendant when the defendant’s contacts with the forum state are “so continuous and systematic as to render [the defendant] essentially at home in the forum State” (alteration in original) (internal quotation marks omitted)). Specifically, there’s no evidence that the respondents have offices in Nevada, conduct substantial business here, or have any long term contacts with the forum.

<sup>5</sup>Nevada Trading’s claims against Karpel & Zelner are based on a theory of vicarious liability. Therefore, Nevada Trading contends, Karpel’s liability, if any, must be imputed to Karpel & Zelner.

and “maintenance of the suit [would] not offend traditional notions of fair play and substantial justice.” *Baker*, 116 Nev. at 532, 999 P.2d at 1023 (internal quotation marks omitted). To determine whether a court may exercise specific jurisdiction, this court utilizes a three-part test. *Catholic Diocese*, 131 Nev. at 249-50, 349 P.3d at 520. A court may exercise specific jurisdiction over a nonresident defendant where (1) the defendant purposefully and affirmatively directs his conduct toward the forum, thus creating “minimum contacts”; (2) the plaintiff’s claims arise from the defendant’s contact with the forum; and (3) exercise of the court’s jurisdiction would be reasonable. *See id.*

The minimum contacts inquiry “focuses on the relationship among the defendant, the forum, and the litigation.” *Walden*, 571 U.S. at 284 (internal quotation marks omitted). Thus, “the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.* Two factors are particularly relevant in minimum contacts analysis. “First, the relationship must arise out of contacts that the ‘defendant *himself* creates with the forum State.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). And second, the analysis “looks to the defendant’s contacts with the forum State itself, *not* the defendant’s contacts with persons who reside there.” *Walden*, 571 U.S. at 285 (emphasis added). Accordingly, “the plaintiff cannot be the only link between the defendant and the forum.” *Id.*

When analyzing whether specific personal jurisdiction exists in a tort action, this court applies the “effects test.” *Tricarichi*, 135 Nev., Adv. Op. 11, 440 P.3d at 650 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). Nonetheless, the same minimum contacts principles remain applicable. *Walden*, 571 U.S. at 286. In other words, the “effects test” does *not* consider the plaintiff’s contacts with the forum state; instead, the inquiry focuses on

the defendant's relationship with the forum. *Id.* Specifically, the test "considers whether the defendant (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Tricarichi*, 135 Nev., Adv. Op. 11, 440 P.3d at 650 (quoting *Picot v. Weston*, 780 F.3d 1206, 1213-14 (9th Cir. 2015) (internal quotation marks omitted)).

Moreover, in *Tricarichi*, the supreme court recognized that "Nevada's long-arm statute [also] encompasses a conspiracy theory of personal jurisdiction." 135 Nev., Adv. Op. 11, 440 P.3d at 653. To satisfy due process under a conspiracy theory of personal jurisdiction, however, a plaintiff must show "(1) there is a conspiracy, (2) the acts of co-conspirators meet *minimum contacts* with the forum, and (3) the co-conspirators could have reasonably expected at the time of entering into the conspiracy that their actions would have consequences in the forum state." *Id.* at 654 (emphasis added). Therefore, regardless of the legal theory undergirding the causes of action, the plaintiff always bears the burden of establishing minimum contacts, and that inquiry "focuses on the relationship between the defendant, the forum, and the litigation, and the defendant's suit-related conduct, which must create a substantial connection with the forum." *Id.* at 650 (internal quotation marks omitted).

After reviewing the record, we conclude that Nevada Trading has failed to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction. In support of its *prima facie* showing, Nevada Trading presented various exhibits, including (1) a copy of the executed contract between Global and Nevada Trading (dated February 2017); (2) a February 2017 email from Nevada Trading's attorney to Karpel with Karpel's reply; (3) Nevada Trading's bank statements from February 2017; (4) a wire transfer receipt, showing the transfer of the



\$40,000 in February 2017; (5) an April 2017 email from Karpel to Nevada Trading's attorney; and (6) a May 2017 reply email from Karpel to Nevada Trading's counsel.

Although superficially this evidence may appear robust, none of it is sufficient to support a finding of personal jurisdiction because it fails to establish minimum contacts. For instance, the contract does not indicate, nor even suggest, who solicited whom or provide any information about the contract's formation. The February 2017 email was sent from Nevada Trading's attorney (who was in Nevada), to Karpel (who was in California). That email directed Karpel to "confirm receipt of this e-mail" and included as attachments the executed contract and wire transfer instructions. The record indicates that Karpel replied, "Email received," approximately 20 minutes later. This, however, is the type of unilateral activity that the Supreme Court has held to be insufficient to justify an assertion of jurisdiction, as "the plaintiff cannot be the only link between the defendant and the forum." *Walden*, 571 U.S. at 285; *see also Tricarichi*, 135 Nev., Adv. Op. 11, 440 P.3d at 650 ("[T]he plaintiff's contacts with the defendant and the forum *are not the proper focus* of jurisdictional analysis." (emphasis added)); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

Likewise, the bank statements and the wire transfer receipt are equally deficient because they show only that Nevada Trading wired money to Karpel's trust account in California, not that Karpel and/or Global reached into Nevada and directed their conduct toward Nevada Trading and Nevada in general. Additionally, the April 2017 and May 2017 emails are



also of little help to Nevada Trading. Although the April 2017 email was sent from Karpel to Nevada Trading's counsel, it occurred after the events that gave rise to the causes of action in Nevada Trading's complaint. Thus, this contact (to the extent that it is one) does not support a finding of specific personal jurisdiction because the contact did not bring about the underlying claims, nor does it create a substantial connection with the forum. *Catholic Diocese*, 131 Nev. at 249, 349 P.3d at 520. Furthermore, similar to the February 2017 email, the May 2017 email was a reply from Karpel to Nevada Trading's attorney. In other words, Nevada Trading emailed Karpel and he responded. That Karpel responded from California to an email sent from Nevada by a Nevada resident is insufficient to establish "minimum contacts." *See, e.g., Walden*, 571 U.S. at 284 ("[T]he relationship must arise out of contacts that the defendant *himself* creates with the forum State." (internal quotation marks omitted)).

Nevada Trading also relies heavily on the allegations in its complaint as evidence that it made a prima facie showing of personal jurisdiction. But this reliance conflates the analysis required for a NRCP 12(b)(5) motion to dismiss (failure to state a claim) with the analysis required for a NRCP 12(b)(2) motion to dismiss (lack of personal jurisdiction). When considering a motion to dismiss for failure to state a claim under NRCP 12(b)(5), courts accept the allegations in the plaintiff's complaint as true. *See, e.g., Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). However, when considering a motion to dismiss for lack of personal jurisdiction, the plaintiff is required to go beyond the pleadings and proffer some competent evidence supporting a finding of personal jurisdiction. *Trump*, 109 Nev. at 693, 857 P.2d at 744 (explaining that the plaintiff "may *not* simply rely on the allegations of the complaint to establish personal jurisdiction" (emphasis added)). Here, as

discussed above, Nevada Trading failed to proffer competent evidence establishing personal jurisdiction. Therefore, Nevada Trading's reliance on the allegations in its complaint to establish personal jurisdiction is misplaced.

Finally, Nevada Trading also contends that the district court erred when it failed to consider Karpel's pro hac vice admission (in an unrelated matter) in conducting its jurisdictional analysis. Specifically, Nevada Trading argues that Karpel consented to the jurisdiction of Nevada courts when he was admitted pro hac vice under Supreme Court Rule 42(4)(j)-(k). We disagree.

First, Nevada Trading cites no authority (binding or otherwise) in support of this argument. Thus, Nevada Trading has not met its appellate burden. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that it is appellant's responsibility to present relevant authority in support of his or her appellate concerns). Second, an attorney's maintenance of a law license in a particular state does not in and of itself support that state's exercise of personal jurisdiction over that attorney. *Cf. Worthington v. Small*, 46 F. Supp. 2d 1126, 1130 (D. Kan. 1999) (providing that a Missouri attorney's possession of a Kansas law license did not create minimum contacts with Kansas); *Crea v. Busby*, 55 Cal. Rptr. 2d 513, 515-16 (Ct. App. 1996) (holding the exercise of personal jurisdiction over a nonresident defendant who possessed a California law license was inappropriate absent a sufficient showing of minimum contacts); *see also Santos v. Sacks*, 697 F. Supp. 275, 281-82 (E.D. La. 1988) (concluding that membership in the Florida bar does not, of itself, establish the minimum contacts required by due process to confer personal jurisdiction over a nonresident defendant). And third, Karpel was admitted pro hac vice on an unrelated matter; therefore, his

admission is irrelevant to the instant appeal. Accordingly, we find this argument unpersuasive.

In sum, we conclude that Nevada Trading has failed to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction. Moreover, we conclude that in this case Karpel's pro hac vice admission is irrelevant to the jurisdictional analysis.<sup>6</sup>

*The district court erred when it dismissed Nevada Trading's claims with prejudice*

Nevada Trading argues that the district court erred when it ordered the case dismissed with prejudice. Specifically, Nevada Trading argues that a dismissal with prejudice is an adjudication on the merits, and that the district court "should have confined its dismissal" to the jurisdictional issue. We agree.

Pursuant to NRCP 41(b), a dismissal for lack of jurisdiction, which includes a motion to dismiss under Rule 12(b)(2), does not operate as an adjudication on the merits.<sup>7</sup> *See also Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 623 n.2 (5th Cir. 1999) (providing dismissal pursuant to federal Rule 12(b)(2) is not with prejudice); *Kendall v. Overseas Dev. Corp.*, 700 F.2d 536, 539 (9th Cir. 1983) ("[A] dismissal for lack of *in personam* jurisdiction

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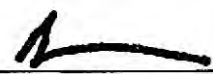
<sup>6</sup>Utilizing the same jurisdictional analysis, we also conclude that jurisdiction is lacking over Karpel & Zelner.

<sup>7</sup>The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Here, the notice of entry was filed on February 6, 2018. Therefore, the prior version of the rule is applicable to this appeal. We note, however, that the new version of the rule is substantively the same.

is not *res judicata* as to the merits of the claim.”). This is so because personal and subject matter jurisdiction are essential elements of a court’s jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999). Thus, if a court lacks either, it is powerless to reach the merits of the case. *Id.*

Here, the district court concluded that it could not exercise jurisdiction over Global or Karpel and dismissed “Nevada Trading’s Complaint. . . pursuant to NRCP 12(b)(2) with prejudice.” But, by rule, a dismissal for lack of jurisdiction cannot operate as an adjudication on the merits and thus must necessarily be without prejudice. *See* NRCP 41(b). Therefore, the district erred when it dismissed Nevada Trading’s claims with prejudice.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to strike the “with prejudice” language from its dismissal order.

	 _____, C.J.	
	Gibbons	
 _____, J.		 _____, J.
Tao		Bulla

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<sup>8</sup>We have carefully considered all of Nevada Trading’s other arguments on appeal and conclude that they are either irrelevant to our disposition or without merit.



cc: Hon. Linda Marie Bell, Chief Judge  
Singer & Larsen P.C.  
Lagomarsino Law  
Ganz & Hauf/Las Vegas  
Eighth District Court Clerk