

IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA BRESLAW,
Appellant,
vs.
PETER COOPER,
Respondent.

Case No.: 84072

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Eighth Judicial District Court
Case No.: A-21-837948-C

ANSWER TO PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities described in NRAP 26.1(a) who must be disclosed.

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STATEMENT REGARDING APPENDIX

Citations to Appellant’s Appendix are designated by [vol.] AA. [pp.]. Citations to Respondent’s Appendix are designated by [vol.] RA. [pp.].

I. REHEARING STANDARD OF REVIEW

Rehearing is appropriate when (1) the appellate court has overlooked or misapprehended a material fact in the record or a material question of law in the case; (2) the appellate court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case; or (3) as required to promote substantial justice. NRAP 40(c); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 609, 245 P.3d 1182, 1184 (2010). The matter for which rehearing is requested must be a “germane legal or factual matter.” *In re Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). Except in special circumstances, a petition for rehearing will be summarily denied if it does not seek to alter the initial disposition *or if it is defective*. *Whitehead v. Nev. Comm’n on Judicial Discipline*, 110 Nev. 380, 386, 873 P.2d 946, 950–51 (1994)(*emphasis added*). Additionally, “[o]n a petition for rehearing a petitioner may not reargue an issue already raised or raise a new issue not raised previously.” *Ducksworth v. State*, 114 Nev. 951, 966 P.2d 165, (1998).

II. OBJECTION TO APPELLANT’S IDENTIFICATION OF ERRORS

Appellant Breslaw’s first two errors relate to the Court of Appeals’ legal interpretation of well understood Supreme Court precedent taught in law schools for over 20 years. Contrary to Breslaw’s claim, torts committed over the internet are not new and there are no issues of first impression here. See generally, *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997)(“We have not yet considered when personal jurisdiction may be exercised in the context of cyberspace, but the Second and Sixth Circuits have had occasion to decide whether personal jurisdiction was properly exercised over defendants involved in transmissions over the Internet”). As Nevada state jurisdiction is coextensive with Federal due process pursuant to Nevada’s long arm statute, *see* NRS 14.065, there is ample 9th Circuit decisional authority regarding all issues raised by Breslaw’s appeal, as discussed in the affirmance.

A. BRESLAW’S FIRST CLAIMED ERROR PRESENTS A HYPOTHETICAL ABOUT DEFAMATION “INVOLVING” A NEVADA PUBLIC UNIVERSITY, WHICH ARE NOT FACTS OF HER CASE NOR A MATTER FOR WHICH SHE HAS STANDING TO COMPLAIN, APPEAL, OR BE HEARD ON REHEARING.

Breslaw’s first error poses a pure hypothetical to the Court, *paraphrasing*, ‘if defendant defamed UNLV on-line, could Nevada assert specific jurisdiction over him.’ This issue is not presented by the facts of Breslaw’s case. Breslaw’s issue with being identified as being a UNLV student was that it connected her online

persona with her actual life in the real world. At best, this is an argument regarding identification of Breslaw by connecting the email that *she was using to publicly post this information* as a former student of UNLV. It confers no authority on her to defend the honor of UNLV from the “allegation...that they jeopardized a faculty member’s safety.” App. Brief 3. As this was neither an issue of the case or anything Breslaw has standing to complain, this would be a purely advisory opinion. The court neither misapprehended nor overlooked any point of law or fact and therefore this does not form a basis for rehearing.

B. THE COURT OF APPEALS CONSIDERED AT LENGTH AND CORRECTLY INTERPRETED THE CALDER/WALDEN EFFECTS TEST IN LIGHT OF AXIOM FOODS

Breslaw next claims the court misapprehended “that *Walden v. Fiore* specified that the “reputation-based effects” of the libel were the “crux” of establishing personal jurisdiction in *Calder v. Jones*[.]” App. Brief on Rehearing, at 3. “The *crux* of *Calder* was that the reputation-based “effects” of the alleged libel connected the *defendants* to California, *not* just to the plaintiff.” *Walden v. Fiore*, 571 U.S. 277, 287, 134 S. Ct. 1115, 1123-24 (2014) (*emphases added*). Breslaw urges the literal interpretation that because *she* allegedly faced reputation-based effects in Nevada due to being a resident there, she is entitled to drag Respondent into court here. But, her literal interpretation ignores the fact that the Court’s reference to “effects” is mere shorthand for “the effects test” derived from

Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1984); *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017). Whereas, Breslaw interprets “effects” to refer to whatever repercussions *she* allegedly suffered, *Walden* reference was to “the effects test” which included consideration of the defendant’s contacts in the target forum, and finding in that case that “the reputational injury caused by the defendants’ story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens.” *Id.* at 287. Therefore, it was the quantum of intentional effort directed at the forum state to author, publish, and distribution an article printed in the *National Inquirer* in California in the 1980s, as opposed to the authorship of some posts on a Reddit channel that was accessed by at least Breslaw while living in Nevada, that was the difference between sufficient and insufficient minimum contacts to afford due process to the defendant. “Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant — not the convenience of plaintiffs or third parties.” *Walden*, *supra*, at 284 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 291-292 (1980)).

In applying the principles discussed in *Walden*, the Supreme Court noted “It is undisputed that no part of petitioner’s course of conduct occurred in Nevada.” At 288. And summarized, “Petitioner never traveled to, conducted activities within,

contacted anyone in, or sent anything or anyone to Nevada.” *Id.* Viewing the instant matter through the same “lens” discussed in *Walden* regarding “whether *defendant’s* actions connect him to the *forum*” *Id.* (emphases in original), the analysis is identical, as Respondent likewise never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. That repercussions may have been suffered by Breslaw in the forum state are irrelevant to finding jurisdiction where there was no attempt to direct those “effects” to the forum state by Respondent.

This accords with the Court of Appeals affirmance applying *Axiom Foods, Inc.*, *supra*, at 1069-70. Respondent’s publication was on the internet posting board, Reddit. There is neither evidence of attempts or intent to specifically publish in Nevada such that Respondent would have contacts with the forum state based on his own conduct, the standard set by *Walden*, as interpreted by *Axiom*, and amply discussed by the Court of Appeals in its decision. There is no indication that the lower court misapprehended or overlooked any authority or factors in applying the authorities and does not form a basis for rehearing.

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C. BRESLAW'S REQUEST FOR LEAVE TO AMEND HER COMPLAINT AFTER THE DISMISSAL WAS VACATED BECAUSE SHE FILED NOTICE OF APPEAL, WHICH SHE ASSIGNS AS THE COURT OF APPEAL'S ERROR FOR THE FIRST TIME IN HER MOTION FOR REHEARING.

Breslaw complains that the Court of Appeals failed to remand her matter to allow her to file an amended complaint. However, this is a procedural morass of Breslaw's own creation. The dispositive motion to dismiss was heard on January 4, 2022. [2 AA. 426.] At hearing, the motion was granted, and Respondent's counsel drafted and circulated an order, which Breslaw refused to approve. *Id.* The Minute Order generated by the court from the session specifically noted that the dismissal was "GRANTED WITHOUT PREJUDICE." [3 AA. 491]. The attorney drafted order was submitted and signed January 6, 2022 and notice of entry was served that day. [2 AA. 430.] However, between the time that the court issued the order on Odyssey and Defendant's service of notice of entry later that day, Breslaw filed her notice of appeal. [2 AA. 421.]

Thereafter, on January 10, 2022, Breslaw filed her Motion to Vacate Order of Dismissal/Motion to Stay Order of Dismissal. [2 AA. 431.] Various other motions were combined into a hearing on February 22, 2022, wherein the court noted that Breslaw had filed a notice of appeal on January 6, 2022 and the court was without jurisdiction until the appeal was resolved.

Accordingly, the dismissal was without prejudice, but before the court could hear or rule on Breslaw's motion for leave to amend, Breslaw had vitiated the court's jurisdiction to do so.

Likewise, Breslaw's failure to raise the issue with the Court of Appeals that the *trial court* had failed to provide her with leave to amend her complaint is fatal to the issue on her motion for rehearing. A party may not raise a new point for the first time on rehearing. *Stanfill v. State*, 99 Nev. 499, 665 P.2d 1146 (1983); *City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. 619, 331 P.3d 896 (2014).

Last, Breslaw's add-on point #4 refers to the Court of Appeals overlooking the fact of her communication with Reddit regarding her subpoena, yet she made no attempt to draw the Court's attention to the importance of that fact in her appeal. She cannot now decide which mole hill is a mountain for purposes of springing accusations that the Court of Appeals overlooked or misapprehended a material fact. This too is not an appropriate basis for rehearing.

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III. CONCLUSION

Breslaw has only her insistence that the Court of Appeals doesn't understand the word "effects" as support for her urged reversal of that court's affirmance of the order to dismiss. Her other points are raised either for the first time on rehearing or are speculative hypotheticals. The Court should deny Breslaw's motion for rehearing for failure to meet her burden to show that the Court of Appeals overlooked or misapprehended anything.

Dated this 31st day of October, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) and NRAP 28.1(e)(1)–(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a Times New Roman typeface of 14 points or more, and contains 2,430 words; or

☒ Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3)(1), which requires every assertion in the brief regarding matters in the record to be support by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of October, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I certify that I am an employee of RAICH LAW PLLC and that on October 31, 2022 I caused to be served via First Class mail with a courtesy copy sent via email a true copy of the **ANSWER TO PETITION FOR REHEARING** addressed to:

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RAICH LAW PLLC

/s/ Brian Schneider
Employee of RAICH LAW PLLC