ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLUB VISTA FINANCIAL SERVICES, L.L.C., a Nevada Limited Liability Company; THARALDSON MOTELS II, INC., a North Dakota corporation, and GARY D. THARALDSON,

Petitioners,

Case No. 57641

vs.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,

Respondents,

and

SCOTT FINANCIAL CORPORATION, a North Dakota corporation; BRADLEY J. SCOTT; BANK OF OKLAHOMA, N.A., a national bank; GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation; ASPHALT PRODUCTS CORPORATION D/B/A APCO CONSTRUCTION, a Nevada corporation,

Real Parties in Interest

FILED

JAN 28 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Petitioners hereby petition this court for a writ of mandamus or prohibition, compelling the respondent district court to vacate its order of January 21, 2011, in Case Number A579963-B (*Club Vista et al v. Scott Financial et al*). The challenged order allows defense counsel in a civil action to take the depositions of Petitioners' (plaintiffs) trial attorneys regarding the allegations in the complaint. This petition is based upon the ground that the district court's order was without any factual or legal basis, thereby constituting a manifest abuse of discretion. This petition is also based upon the ground that Petitioners do not have a plain, speedy and adequate remedy in the ordinary course of law.

I

Statement of Issue

This petition presents the court with an opportunity to decide an important issue of first impression, with broad, statewide importance: whether one party can take the depositions of another party's trial attorneys in a pending civil lawsuit, and if so, the circumstances under which such depositions should be allowed.

II

Statement of Facts

A. The underlying lawsuit

Petitioners are the plaintiffs in a civil lawsuit arising out of a complex financial transaction involving construction of a project known as ManhattanWest, in Las Vegas. The real parties in interest are the defendants in the action, and they will be referred to as Defendants in this petition.

Defendants were co-lead lenders in a 29-lender participation loan of $100 million relating to the project. 1 P.App. 116. Petitioners participated in the loan transaction and/or gave unlimited guarantees on the loan. 1 P.App. 116-17. The loan documents contained important pre-funding conditions, which constituted conditions precedent to any money being advanced to the borrowers on the loan. 1 P.App. 116-17. One important condition was the requirement that the borrower have a minimum of $60 million in qualified, bona fide pre-sales. *Id.*

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Defendants had the obligation to verify that this pre-funding condition precedent was satisfied before any money could be advanced on the loan. *Id.*

Petitioners contend that the borrower, who was the developer of the project, created bogus pre-sale transactions purporting to satisfy the $60 million pre-sale condition. 1 P.App. 117-18; 2 P.App. 160. For example, the developer/borrower purported to enter into bona fide arms-length sales or lease transactions with various individuals and entities, but these individuals and entities were actually the developer/borrower's family members and affiliates; and these bogus pre-sale transactions were never really intended to close upon completion of the project. 2 P.App. 161-65. Petitioners contend that these bogus pre-sale transactions, which constituted the bulk of the purported $60 million transactions for the pre-sale condition, were merely facades created by the developer/borrower. *Id.* In other words, the transactions were created for the appearance of satisfying the $60 million pre-sales threshold, but the transactions were not bona fide and should not have been considered in determining whether the $60 million threshold was satisfied prior to funding the loan. 2 P.App. 161-68.

After the developer/borrower submitted the bogus pre-sale transactions totaling more than $60 million, Defendants signed off and approved advances of funds under the loan, even though, if they had acted appropriately and with due diligence, they would have known that many of the conditions precedent in the loan agreement were not satisfied. 1 P.App. 117. As a result of Defendants' approval of advances without verifying the accuracy of the pre-sale transactions, more than $80 million was advanced on the loan. *Id.*

In the fall of 2008, the developer/borrower was in default, and construction was halted. 1 P.App. 117. Because Petitioners were participants and/or guarantors on the loan, Petitioners retained the law firm of Morrill & Aronson to investigate the situation, to provide legal advice, and to file a lawsuit, if appropriate. *Id.* These activities were undertaken by attorneys K. Layne Morrill and Martin A. Aronson of the firm, which is located in Phoenix, Arizona. Attorneys Morrill and Aronson obtained local counsel for Petitioners in Clark County, and they filed a complaint on January 13, 2009. 1 P.App. 117. A First Amended Complaint was filed on July 1, 2009, and it is the operative complaint at the present time. 1 P.App. 1.

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In their lawsuit, Petitioners contend that Defendants breached their obligation to verify the developer/borrower's performance of the pre-sale condition before authorizing any funds to be disbursed on the loan. Petitioners have asserted claims against Defendants for fraud, misrepresentation, breach of fiduciary duty, negligence, aiding and abetting, securities fraud, breach of contract, and other wrongdoing arising out of the loan transaction. 1 P.App. 1-56.

B. Discovery

This is a large, complex case, with extensive and intense discovery. Petitioners' initial disclosures, pursuant to NRCP 16.1, identified 69 potential witnesses and provided copies of 524 documents consisting of more than 4,000 pages. 3 P.App. 461-506. Petitioners also produced several thousand pages of additional documents in subsequent disclosures. 3 P.App. 520. As part of discovery, Defendants served Petitioners with a set of contention interrogatories, which Petitioners answered. 2 P.App. 272-311. These interrogatories sought "in detail all material facts" supporting the numerous allegations of the First Amended Complaint, and Petitioners answered the contention interrogatories by identifying the detailed facts supporting Petitioners' allegations. *Id.*

Discovery also included more than 50 days of depositions of at least 25 parties and non-parties in eight states, and production of more than one million pages of documents (produced by the parties and subpoenaed from more than 50 non-parties). 1 P.App. 118. There were also ten expert reports disclosed by the parties (five on each side). *Id.*

Additionally, both sides believed discovery was sufficient to justify motions for summary judgment. For example, Petitioners moved for partial summary judgment on the issue of pre-sale conditions. 2 P.App. 157. Defendants filed a 21-page opposition, never contending that discovery was insufficient or that additional evidence was needed for Defendants' response on the merits of Petitioners' claims. 2 P.App. 196-216. Defendants also filed their own counter-motion for summary judgment, again never suggesting that discovery was insufficient or that further evidence was necessary on the merits of Petitioners' claims or on the defenses asserted by Defendants. 2 P.App. 217-22.

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C. Defendants' attempts to take depositions of Petitioners' trial attorneys

The 15-day trial in this case is scheduled for March 8, 2011. 1 P.App. 118. The discovery cutoff was November 15, 2010. *Id.* Shortly before the discovery cutoff, defense counsel informed attorneys Morrill and Aronson (Petitioners' trial attorneys) that he wanted to take their depositions, to find out their knowledge of facts alleged in the complaint. 1 P.App. 152-53. Attorneys Morrill and Aronson are Arizona residents, but they were admitted pro hac vice in Nevada for this case; yet Defendants did not seek the depositions in Nevada or through process in the Nevada action. Instead, in mid-October of 2010, Defendants filed an action in Maricopa County, Arizona, to obtain Arizona deposition subpoenas for attorneys Morrill and Aronson. 1 P.App. 127. Defendants also served a Notice of Deposition in the Maricopa County action, scheduling the attorney depositions to take place in Phoenix on November 11 and 12, 2010 (five days before the discovery cutoff in the Nevada action). 1 P.App. 135-36, 47-48.

As expressly indicated in the subpoenas that Defendants obtained from the Maricopa County court, any person served with such a subpoena has the right to file an objection in the Arizona court, pursuant to the Arizona Rules of Civil Procedure. 1 P.App. 128-29. After being served with the Arizona subpoenas, attorneys Morrill and Aronson asserted an objection by filing a motion to quash the subpoenas, or for a protective order. 1 P.App. 113. They contended that all relevant documents (more than one million pages) had already been produced in the litigation; that numerous percipient witnesses had already been deposed; and that ten expert reports had been served (five on each side), with expert depositions scheduled at that time. 1 P.App. 118. Petitioners argued that defense counsel's true purpose in taking the depositions of attorneys Morrill and Aronson was to pry into what Plaintiffs' attorneys have learned about the case, and to obtain privileged information. 1 P.App. 118-19. Petitioners pointed out that attorneys Morrill and Aronson were not involved in the underlying loan transactions; that they were not percipient witnesses to any of the relevant events leading to the lawsuit; and that their knowledge of facts in the case was obtained solely through their investigations and from information obtained from their clients. 1 P.App. 118-12.

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The Maricopa County Superior Court held a hearing on November 19, 2010, at which the judge granted the motion to quash and/or for a protective order. 2 P.App. 231, 268. After the Arizona court quashed the deposition subpoenas, Defendants brought the matter to the attention of the Special Master assigned to this case in Clark County, who issued a recommendation for an order compelling attorneys Morrill and Aronson to be deposed. 1 P.App. 81. Specifically, the Special Master recommended that Petitioners' attorneys may be deposed "regarding factual issues that are at issue in this lawsuit, including all factual issues referenced in the Plaintiffs' Complaint." 1 P.App. 84, lines 20-21. Petitioners objected to the Special Master's recommendation (1 P.App. 58), and Defendants filed a response. 3 P.App. 334. On January 21, 2011, the district court issued an order overruling petitioners' objections and affirming the Special Master's recommendations. 3 P.App. 563. The district court's order allows defense counsel to take the depositions of attorneys Morrill and Aronson, and the order allows the depositions to delve into "factual issues going to the basis of Plaintiffs' case." 3 P.App. 565, lines 3-4.[1]

III

Argument

A. Writ relief is the appropriate remedy in this case

1. Mandamus and prohibition

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *Borger v. District Court,* 120 Nev. 1021, 1025, 102 P.3d 600,

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[1]Petitioners are the plaintiffs below. Attorneys Morrill and Aronson made a special appearance to file objections to the Special Master's recommendation. 1 P.App. 58. The Special Master's recommendation, however, was not directed to the attorneys; it was directed to the plaintiffs, as parties in the action. 1 P.App. 83 (Special Master's recommendation states: "These Special Master Recommendations, however, are directed to the Plaintiffs to produce factual witnesses [the attorneys] under the Plaintiffs' control." Emphasis added.) The Special Master's recommendations were approved by the district court. Therefore, the plaintiffs themselves are the targets of the rulings at issue here; the plaintiffs are the parties aggrieved by the rulings; and the plaintiffs are the appropriate petitioners in this writ proceeding.

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603 (2004); NRS 34.160; see also *Lewis v. Smart,* 96 Nev. 846, 619 P.2d 1212 (1980) (mandamus is available when respondent has mandatory duty to perform specific act). Mandamus is appropriate where a petition raises important legal issues that are likely to be the subject of litigation within the Nevada district court system. *Borger,* 120 Nev. at 1025-26.

A writ of prohibition is available when proceedings are without or in excess of the jurisdiction of the tribunal. *State v. District Court (Anzalone),* 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320.

Writ relief is available where (1) no factual dispute exists, and the district court is obligated to take certain action, or (2) an important issue of law needs clarification, and considerations of sound judicial economy and administration militate in favor of granting the petition. *Beazer Homes Nevada, Inc. v. District Court,* 120 Nev. 575, 579, 97 P.3d 1132 (2004). This court will also exercise its discretion to entertain a writ petition where an important issue of law needs to be decided, and where circumstances indicate an urgency or strong necessity. *Civil Service Comm'n v. District Court,* 118 Nev. 186, 188-89, 42 P.3d 268 (2002).

Extraordinary relief is available where the petitioner has no plain, speedy and adequate remedy in the ordinary course of law. *State v. District Court,* 116 Nev. 953, 957, 11 P.3d 1209 (2000). In the present case, there is no right to an immediate appeal from the district court's order authorizing the attorney depositions. NRAP 3A. In such a case, the question becomes whether an appeal from the final judgment will be an adequate remedy. This question was answered in *Schlatter v. District Court,* 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977), which involved a challenge to a discovery order requiring disclosure of medical records. The *Schlatter* court held that writ relief was available, because an appeal from a final judgment would not be an adequate remedy at law. Specifically, the court held that the disclosure of the medical records would be "irretrievable once made," and the plaintiff would be effectively deprived of any remedy if she were required to disclose the information and then contest the validity of the order in a later direct appeal. *Id.* at 193.

Similarly, in *Wardleigh v. District Court,* 111 Nev. 345, 891 P.2d 1180 (1995), the district court authorized the defendants to take the deposition of the plaintiffs' former attorney

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in a prior related lawsuit. The plaintiffs filed a writ petition, in which the plaintiffs challenged the order and asserted privileges and confidentiality. This court held: "Writ relief is an available remedy, where, as here, petitioners have no plain, speedy and adequate remedy at law other than to petition this court." 111 Nev. at 350, 891 P.2d at 1183. The court further explained: "If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." 111 Nev. at 350-51, 891 P.2d at 1183-84.

2. Writ relief is appropriate in this case

All of these considerations weigh heavily in favor of this court exercising its discretion to accept the writ petition in the present case. There are no factual disputes involving the issue presented in this petition. Petitioners contend that the district court erred, as a matter of law, by authorizing the depositions of Petitioners' two trial attorneys. This situation is identical to *Wardleigh*, because the testimony sought in the attorney depositions will be irretrievable, and Petitioners will have no effective remedy in a later appeal.

Furthermore, this court's opinion in *Wardleigh* did not answer the question presented here. The *Wardleigh* court issued a writ of prohibition, preventing the defendants in that case from taking the deposition of the plaintiffs' former attorney in a prior related lawsuit. Although the issue in *Wardleigh* was similar to the present case, *Wardleigh* did not involve a party's attempt to take the depositions of the opposing party's trial attorneys in the very case in which the depositions are being sought, i.e., in the pending case. Further, *Wardleigh* did not analyze state and federal case law consistently disapproving depositions of opposing counsel, except in extremely rare circumstances.

Accordingly, this writ petition provides the court with an opportunity to determine and clarify the circumstances in which one party in a lawsuit may take the deposition of the opposing party's attorney in a pending case. This court's decision will have significant precedential impact throughout the state. Virtually every civil lawsuit is subject to the possibility that one side will attempt to take the deposition of the other side's attorney. District courts and litigants need guidance from this court on how this situation should be handled.

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Accordingly, Petitioners respectfully contend that this case fully satisfies all of the considerations for acceptance of the petition and for issuance of an extraordinary writ.

B. The district court erred by authorizing the attorney depositions

1. Extraordinary circumstances do not exist for the attorney depositions

Courts throughout the United States have consistently recognized that depositions of attorneys of record in pending cases should be allowed only sparingly. Such depositions have a clear chilling effect on attorneys' practices and on attorney-client communications. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

This court's only decision on this topic was *Wardleigh, supra,* in which an attorney represented the plaintiffs in a construction defect lawsuit. The lawsuit was dismissed, but the plaintiffs filed a subsequent lawsuit, through a different attorney, involving the same construction defects as the first lawsuit. One of the issues in the subsequent lawsuit was whether the statute of limitations had expired. Defense counsel sought to compel the deposition of the plaintiffs' prior attorney, concerning facts relevant to the statute of limitations defense.

The district court ruled that the defendants could take the plaintiffs' former attorney's deposition. The plaintiffs filed a writ petition, challenging the discovery order and asserting protection under the work-product rule.

This court first held that writ relief was appropriate, for the reasons discussed earlier in this petition (primarily the fact that the testimony would result in irretrievable loss of confidentiality and privileges). As to the merits of the plaintiffs' work-product claim, the *Wardleigh* court held that the work-product doctrine protects an attorney's mental impressions, conclusions and legal theories concerning the litigation, as reflected in many tangible or intangible ways. 111 Nev. at 357, 891 P.2d at 1188. The court held that the former attorney's legal files and deposition testimony "do fall under the doctrine to the extent that either source of discovery reflects the mental impressions, conclusions, opinions, or legal theories of the attorneys." 111 Nev. at 358, 891 P.2d at 1188. "It is thus clear that no blanket right to the legal files and unbridled depositional testimony of attorney Lattin exists." *Id.*

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The court then held that before the defendants would be allowed to take a deposition of the plaintiffs' former attorney, the defendants were required to demonstrate a substantial need and undue hardship, "burdens they have not satisfied." *Id.* The defendants also needed to show "that they cannot obtain the documents or tangible evidence, or the substantial equivalent thereof, without undue hardship." *Id.* Because other sources were available for the information regarding the statute of limitations, the *Wardleigh* court held that the attorney's deposition should not have been allowed. The court concluded by observing: "The mental impressions, conclusions, opinions, and legal theories of counsel concerning the litigation are not discoverable under any circumstances." 111 Nev. at 359, 891 P.2d 1189 (emphasis added). Thus, the court issued a writ of prohibition, thereby prohibiting the attorney's deposition. *Id.*

The leading case in other jurisdictions on the issue of trial attorney depositions is *Shelton v. American Motors Corp.,* 805 F.2d 1323 (8th Cir. 1986), which involved a personal injury claim against an automobile manufacturer. The plaintiffs sought to take the deposition of an attorney in the manufacturer's litigation department. Deposition questions primarily concerned the existence or nonexistence of various documents regarding the automobile. The district court ruled that the attorney's deposition and the questions were proper, and the district court imposed sanctions for the attorney's refusal to answer the questions. The manufacturer appealed.

In a well-reasoned and widely cited opinion, the Eighth Circuit reversed, holding that the attorney's deposition should not have been allowed. The court first noted that attempts to take depositions of opposing counsel had become increasingly popular in recent years, but the practice should be viewed as "a negative development in the area of litigation." *Id.* at 1327. The court observed that a party's task in preparing for trial would be much easier if the party could simply depose opposing counsel, and thereby attempt to identify information that opposing counsel decided was relevant and important to legal theories and strategy. *Id.* This practice "has long been discouraged," because taking the deposition of opposing counsel "disrupts the adversarial system and lowers the standards of the profession." *Id.* The practice also detracts from the quality of client representation, with a chilling effect that is obvious. *Id.*

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The *Shelton* court established three factors to be considered in determining whether an attorney's deposition should be allowed: (1) no other means exists to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. *Id.* at 1327. As will be discussed in more detail below, all three factors weigh heavily against the attorney depositions in the present case.

Shelton was followed in *Johnson v. Couturier,* 261 F.R.D. 188 (E.D. Cal. 2009), where the defendant sought to compel the deposition of the plaintiffs' attorney. The defendant claimed that the plaintiffs' interrogatory responses were insufficient, and that a deposition relating to plaintiffs' counsel's pre-filing investigation should be allowed. In rejecting the deposition, the court observed that the case at hand was the sort of case where the plaintiff would be personally unaware of the details of the defendant's alleged wrongdoing. *Id.* at 191. Such cases include complex commercial litigation, where the plaintiff is unaware of facts, and where the plaintiff's attorney conducts a pre-litigation investigation. *Id.* The court held that even if the opposing party is equivocal in answering questions at a deposition, the party's truthfulness at the deposition can be proven or disproven through pertinent documents, without the necessity of the party's attorney deposition. *Id.* at 193. The court also noted that the plaintiffs had provided all documents in their possession, and any information which their attorney could provide would most likely be cumulative. *Id.* As the court held, "the primary sources of information, again, are the documents themselves." *Id.*

The *Johnson* court also recognized a wholly independent danger in allowing the deposition of a party's trial attorney. Once the attorney is deposed, the other side might assert that the attorney is an important witness for trial. Then, disqualification of the deposed attorney might be necessary. This would disrupt the attorney-client relationship, requiring the litigation to start from scratch, and creating a manifest injustice. *Id.*

The deposition of trial counsel "provides a unique opportunity for harassment; it disrupts the opposing attorney's preparation for trial, and could ultimately lead to disqualification of opposing counsel if the attorney is called as a trial witness." *Marco Island Partners v. Oak*

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Development Corp., 117 F.R.D. 418, 420 (N.D. Ill. 1987). Courts look with disfavor on attempts to depose opposing counsel, because such depositions are "disruptive of the adversarial process and harmful to the standards of the legal profession and entail a high risk of implicating opinion work product." *Caterpillar Inc. v. Friedemann,* 164 F.R.D. 76, 78 (D. Oregon 1995). The deposition of an opposing attorney is particularly inappropriate where the attorney lacked any involvement in the underlying transaction, and where the attorney's knowledge of the transaction would have been obtained through second-hand sources. *Taylor Machine Works, Inc. v. Pioneer Distribution Inc.*, 2006 W.L. 1686140 (C.D. Ill. 2006).

Deposing an opponent's attorney is "a drastic measure." *M&R Amusements Corp. v. Blair,* 142 F.R.D. 304, 305 (N.D. Ill. 1992). Deposing an opponent's attorney "not only creates a side-show and diverts attention from the merits of the case, its use also has a strong potential for abuse." *Id.* Thus, an attempt to to depose an opponent's attorney "is viewed with a jaundiced eye and is infrequently improper." *Id.*

It is noteworthy that Defendants' 22-page district court brief, which asserts their position that they should be allowed to take the attorney depositions, failed to cite a single case, from any state or federal jurisdiction, in which a court allowed a party to take the deposition of the opposing party's trial attorney. 3 P.App. 334-54.

2. Applications of these standards in the present case

In the present case, Defendants attempted to justify the attorney depositions by contending that the attorneys have knowledge of the facts contained in the complaint. 1 P.App. 153. In making this contention, Defendants relied on deposition testimony of various witnesses, including parties and their agents, who testified that they did not have personal knowledge of certain facts alleged in the complaint, and that the attorneys "had knowledge of virtually all of the facts contained in the complaint." *Id.* Defendants also argued that these witnesses "deferred to their attorneys" when asked about the factual allegations of the complaint. *Id.*

For example, Petitioner Gary Tharaldson is a plaintiff who was deposed for seven days regarding his knowledge of specific allegations in the complaint. 1 P.App. 66. Defense counsel has conceded that he deposed the witness "in a painstaking way," regarding the allegations of

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the complaint (which is 57 pages long, and which contains 311 paragraphs). 2 P.App. 246. Mr. Tharaldson occasionally indicated that he did not have personal knowledge regarding certain factual allegations in the complaint; he indicated that his attorneys made decisions regarding the allegations of the complaint; and he essentially deferred to his attorneys regarding the allegations in the complaint. 3 P.App. 339-43. Defendants relied on this testimony in seeking the depositions of Petitioners' attorneys, contending that "the only people with knowledge of the factual basis for plaintiffs' claims are the attorneys who concocted them." 3 P.App. 338, lines 11-12. Based upon the witness testimony allegedly deferring to the attorneys regarding the factual bases for the complaint, Defendants argued that "the only way to discover the factual bases for Plaintiffs' claims is to ask Plaintiffs' counsel." 3 P.App. 339, lines 21-22.

Defendants' contentions were baseless, yet the district court appears to have accepted the contentions. Deposing Petitioners' attorneys was certainly not the only way in which Defendants could discover the factual bases for the complaint. Other discovery devices had already generated this information. For example, Defendants already served extensive contention interrogatories. Petitioners answered the interrogatories, providing detailed information regarding the factual bases for all of the claims in the complaint. 2 P.App. 275-311. Additionally, Petitioners disclosed dozens of witnesses and thousands of documents, as indicated above. In fact, more than 1 million pages of documents have been disclosed by the parties and non-parties. It is also noteworthy that when Defendants opposed Petitioners' motion for summary judgment, and when Defendants filed their own counter-motion for summary judgment, Defendants had no problem understanding the factual bases for the complaint.

Defendants' contention, in short, is that a plaintiff's lack of personal knowledge regarding allegations in a complaint justifies a deposition of the plaintiff's attorney. Defendants' contention, if accepted by this court, would lead to truly absurd results. There are many cases in which plaintiffs lack personal knowledge about allegations in their attorney-drafted complaints. For example, many head-injury plaintiffs have no recollection of an accident. In wrongful death cases the decedent's heirs and personal representatives frequently have no personal knowledge whatsoever regarding many allegations in the complaint. And in

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professional malpractice cases, the plaintiffs often have no knowledge regarding allegations dealing with professional standards of care and causation. In all of these examples the plaintiffs would truthfully testify, at their depositions, that they have no personal knowledge regarding various allegations in their complaints; and they would rightfully defer to their attorneys, who drafted the complaints. Under Defendants' theory in the present case, all of the plaintiffs' attorneys in these examples would be vulnerable to having their depositions taken. No court in any jurisdiction has approved such a broad and absurd result.

Attorneys Morrill and Aronson are not percipient witnesses to any relevant events alleged in the complaint. They are the trial attorneys, who were consulted after the loan transaction, and who would have drafted the complaint based upon their pre-filing investigation, which would typically include client interviews, other interviews, reviewing documents, researching factual and legal issues, and otherwise evaluating the case, formulating theories and preparing the allegations of the complaint. The only involvement of attorneys Morrill and Aronson -- other than their involvement in discovery and trial preparation -- was obtaining evidence, sifting through documents, hiring experts, and analyzing the case. 3 P.App. 365, line 25, through 366, line 2.

Defendants' ulterior motives for seeking the depositions are obvious. On the eve of trial, Defendants want a strategic advantage by prying into the thought processes of Petitioners' attorneys, to find out how the attorneys have analyzed and evaluated various evidence, and to obtain the mental impressions of Petitioners' attorneys. If the depositions proceed, Defendants will probably also seek to disqualify attorneys Morrill and Aronson, asserting that these attorneys will be witnesses at trial. The dangers associated with such a strategy are recognized in the cases discussed above.

a. The first *Shelton* factor

Under the *Shelton* analysis, the attorney depositions in the present case cannot be allowed. The first *Shelton* factor is whether other means exist to obtain the information. In the present case, Defendants have already obtained the information through responses to contention interrogatories, which specifically dealt with the evidence supporting claims in the complaint.

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The information has also been disclosed in the thousands of documents that have been produced in discovery, and through the testimony of dozens of witnesses. Evidence supporting allegations of the complaint was also highlighted and detailed in Petitioners' expert reports. 3 P.App. 365, lines 20-24.

b. The second *Shelton* factor

The second *Shelton* factor is whether the information sought is relevant and non-privileged. Attorneys Morrill and Aronson are not percipient witnesses to the loan transactions, and they have no personal knowledge of the underlying facts in this case. Their knowledge was gathered from other sources. Thus, they have no relevant information to add.

Additionally, the information Defendants are seeking is protected by the work-product rule. As this court recognized in *Wardleigh,* an attorney's mental impressions, conclusions and theories concerning litigation are protected and "are not discoverable under any circumstances." *Wardleigh,* 111 Nev. at 359, 891 P.2d 1189.

In the district court, Defendants argued that they are not seeking information regarding any mental impressions or thought processes of attorneys Morrill and Aronson, but rather, they are only seeking the "facts" within the attorneys' knowledge. 3 P.App. 348, line 24, through 349, line 3. The Special Master and the district court seem to have accepted this nuanced argument. The Special Master ruled that attorneys Morrill and Aronson may be deposed "regarding the factual issues that were utilized to draft the Complaint." 1 P.App. 84, lines 1-3. The Special Master concluded that attorneys Morrill and Aronson "may be deposed regarding factual issues that are at issue in this lawsuit, including all factual issues referenced in the Plaintiffs' Complaint." 1 P.App. 84, lines 20-21. The district court accepted the Special Master's recommendation, and the district court ruled that the attorneys may be deposed "on factual issues going to the basis of Plaintiffs' case." 3 P.App. 565, lines 3-4.

Even a simple inquiry regarding the attorney's basis for an allegation in a complaint can provide valuable insight to the opposing party regarding the attorney's mental impressions and thought process. This question was thoroughly addressed in *Shelton,* where the plaintiffs sought deposition testimony from an in-house attorney for the defendant car manufacturer. Deposition

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questions merely concerned the existence or non-existence of various documents regarding the vehicle in question. The attorney witness had engaged in the process of compiling documents from among voluminous files, in preparation for the litigation. The plaintiff argued that the deposition merely sought information concerning facts and documents, but the defendant argued that the attorney's acknowledgment of the existence of certain documents would reflect her judgment as an attorney in identifying, examining and selecting documents from voluminous files. 805 F.2d at 1328. The defendant therefore argued that requiring the attorney to testify that she was aware that documents exist concerning a certain issue was tantamount to requiring her to reveal her legal theories and opinions concerning that issue.

The Eighth Circuit agreed. *Id.* The court acknowledged: "In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research." *Id.* at 1329. The attorney's selective review of the defendant's numerous documents was based upon her professional judgment regarding the issues and defenses in the case, and "this mental selective process reflects [the attorney's] legal theories and thought processes, which are protected as work product." *Id.* The court also held that any recollection the attorney may have of the existence of documents would likely be limited to those documents she selected as important to her legal theories; thus, contrary to the plaintiffs' argument, the questions required more than merely acknowledging the existence of documents. *Id.* Even the attorney's mere acknowledgment of the existence of documents would necessarily reveal her mental selective process, because it would reveal the fact that a document was important enough for her to remember. *Id.* Thus, "the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product." *Id.*

In the present case, it would be virtually impossible for Morrill and Aronson to testify regarding "the facts" that formed the basis of the allegations of the complaint they drafted, without revealing their mental impressions and thought processes, including impressions regarding the extent to which they weighed and evaluated evidence. This is precisely what the work-product doctrine is designed to protect.

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c. The third *Shelton* factor

The third *Shelton* factor is whether the information is crucial to the preparation of the case. Here, Defendants cannot argue, in good faith, that the information they seek from attorneys Morrill and Aronson is crucial to their preparation of the defense. As mentioned above, such information was certainly not crucial to Defendants' opposition to Petitioners' motion for summary judgment, or to Defendants' own counter-motion for summary judgment. Nor did Defendants deem the depositions important until virtually the eve of the discovery cutoff. Defendants already have more than one million documents and dozens of witnesses for preparation of their case. Deposition testimony by Petitioners' attorneys can hardly be deemed "crucial" to the defense case.[2]

In evaluating this factor, the court should also consider the tremendous disruption that the attorney depositions will have -- and are probably intended to have -- on Petitioners' work on pending motions for summary judgment and on preparation for the upcoming trial in March. If the depositions are allowed to proceed, both of Petitioners' trial attorneys will need to spend huge amounts of time and effort preparing for the depositions and attending the depositions. As indicated above, defense counsel spent seven full days taking the deposition of a single witness (Petitioner Gary Tharaldson). Defense counsel conceded that he took the deposition "in a painstaking way" regarding the numerous allegations in the 57-page complaint. 2 P.App. 246. The Special Master's recommendation, which the district court approved, now allows defense counsel to depose Petitioners' trial attorneys regarding "all factual issues referenced in the Plaintiffs' Complaint." 1 P.App. 84 (emphasis added). There is little doubt that defense counsel will attempt to be just as painstaking and comprehensive for the attorney depositions

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[2]If the defendant in a lawsuit truly believes there is no evidence to support a complaint--based on all of the written discovery and the depositions of percipient and expert witnesses--the correct remedy for the defendant is a motion for summary judgment. Defense counsel in the present case essentially conceded this point at the hearing in Arizona. 2 P.App. 244-45, 21-22. And Petitioners' counsel also agreed. 2 P.App. 267. No law supports the idea that a deposition of the plaintiff's attorney is an appropriate method for a defendant to determine the factual bases for the complaint, and to find out what evidence exits in support of the complaint.

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as he was for Mr. Tharaldson's deposition, thereby causing major disruptions for attorneys Morrill and Aronson.

3. Defendants' other arguments do not justify the attorney depositions

In supporting their attempt to depose attorney Morrill, Defendants argued in the district court that "Plaintiffs have formally and repeatedly designated attorney Morrill as a percipient witness from the inception of the case." 3 P.App. 343, lines 21-22. As support for this statement, Defendants cited to Petitioners' initial Rule 16.1 disclosure and Petitioners' supplemental 16.1 disclosure. 3 P.App. 343, lines 27-28. Although it is correct that Petitioners' initial 16.1 disclosure did identify attorney Morrill, the supplemental disclosure clearly and unequivocally stated: "Plaintiffs do not believe Mr. Morrill has any discoverable information relevant to this lawsuit." 3 P.App. 514, line 27 (emphasis added). The supplemental disclosure went on to state that any knowledge Mr. Morrill has about the case is protected by the attorney/client and/or work-product privileges, and that although Mr. Morrill may have information regarding negotiations concerning the subject of other loans, "that subject is not relevant to this lawsuit." 3 P.App. 514, line 28, through 515, line 3. And Petitioners have made very clear that Mr. Morrill will not be called by Petitioners as a witness at trial. 1 P.App. 75, lines 8-9. Accordingly, the 16.1 disclosures do not justify the extremely invasive and disruptive attorney depositions.

Defendants' district court papers also sought to justify the attorney depositions by contending that attorney Morrill somehow attempted to intimidate witnesses or pressure witnesses into giving certain testimony. 3 P.App. 351-53. Yet there was no suggestion in Defendants' papers that any witnesses actually did testify in a manner that was influenced by attorneys Morrill or Aronson. Therefore, any attorney conversations with the witnesses are wholly irrelevant, and Defendants' attempt to use the alleged conversations only serves as a smear tactic designed to impugn the attorneys and thereby impugn Petitioners. Defendants' district court papers did not provide even a whisper of legal authority suggesting that the alleged

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attempted (but unsuccessful) pressure on witnesses somehow justifies the attorney depositions that Defendants are seeking.

4. The Arizona court's decision cannot be disregarded

Defendants invoked the jurisdiction of Arizona courts for the purpose of taking depositions of attorneys Morrill and Aronson. Specifically, Defendants filed an action in Arizona state court, seeking issuance of Arizona subpoenas for the depositions. 1 P.App. 127. Defendants also served a Notice of Deposition in the Arizona action, for the attorney depositions to take place in Arizona. 1 P.App. 135-36.

The subpoenas Defendants obtained from the Arizona court expressly indicated that the person served with the subpoena had the right to file an objection in the Arizona court, pursuant to the Arizona Rules of Civil Procedure. 1 P.App. 128-29. In other words, this was the procedure Defendants contemplated when they filed the Arizona action and obtained the Arizona subpoenas. Once attorneys Morrill and Aronson were served with the Arizona subpoenas, Petitioners followed the appropriate Arizona procedures and filed the motion to quash the subpoenas, or for a protective order. 1 P.App. 113. After considering extensive briefing and lengthy oral argument, the Arizona court issued an order quashing the subpoenas. 2 P.App. 231, 268.

When the attorney deposition issue got back to Nevada, the only real pending question was whether the Arizona subpoenas were appropriately quashed. The Nevada Special Master issued a recommendation purporting to recognize the Arizona court's order quashing the subpoenas. 1 P.App. 83, lines 9-13. The Special Master indicated that "appropriate respect is given" to the Arizona court. 1 P.App. 84, line 4. Nevertheless, the Special Master then ignored the Arizona court's order, giving it no weight whatsoever. *Id.* The Special Master determined that attorneys Morrill and Aronson had submitted themselves to Nevada jurisdiction by virtue of their participation in this lawsuit, and therefore, the Nevada court was not bound by the Arizona court's decision. 1 P.App. 83-84.

The district court approved and adopted the Special Master's recommendation. The district judge expressly recognized that the issue involving the attorney depositions was well

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briefed and extensively argued to the judge in the Arizona court. 3 P.App. 564, lines 2-3. Yet the district court found that the Arizona decision could essentially be disregarded. 3 P.App. 564-65.

Arizona courts have jurisdiction and authority to quash subpoenas issued by those courts, and to enter protective orders to prevent depositions from going forward. See *Ariz. R. Civ. Proc.* 30(h) and 45(c). Defendants invoked the Arizona court's jurisdiction by filing the action in that state, by obtaining the Arizona subpoenas, and by serving attorneys Morrill and Aronson with the subpoenas and with the Arizona Notice of Depositions. Defendants then opposed the motion to quash or for a protective order, but the Arizona court ruled against Defendants and granted the motion to quash. Defendants did not appeal the Arizona judge's ruling.

The Full Faith and Credit clause requires Nevada courts to respect the rulings and judgments of sister state courts. *Mason v. Cuisenaire,* 122 Nev. 43, 47, 128 P.3d 446, 448 (2006). Principles of comity also require Nevada courts to give deference to the order issued by the Arizona court. *Mianecki v. District Court,* 99 Nev. 93, 98, 658 P.2d 422, 424-45 (1983) (comity is a principle whereby courts of one jurisdiction give effect to laws and judicial decisions of another jurisdiction, out of deference and respect).

Additionally, principles of estoppel and issue preclusion should have prevented Defendants from re-litigating the issue. A party may not re-litigate issues that were already litigated in other forums or proceedings. See *Kahn v. Morse & Mowbray*, 121 Nev. 464, 474-75, 117 P.3d 227, 234-35 (2005). Issue preclusion bars re-litigation of an issue where the issue was decided in prior litigation, the ruling was on the merits and became final, the party against whom the prior order is asserted was a party in the prior litigation, and the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). In the present case, all four factors are satisfied. Therefore, Defendants should have been precluded from re-litigating the issue that was decided by the Arizona court.

The district court and the Special Master rejected the Arizona court's decision, reasoning that attorneys Morrill and Aronson had submitted to the jurisdiction of the Nevada courts, primarily due to their representation of Petitioners in this Nevada case. Although attorneys

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Morrill and Aronson may have submitted to jurisdiction of Nevada courts with regard to rules of professionalism and attorney conduct, they did not submit to Nevada's jurisdiction as non-party witnesses. Indeed, this was implicitly recognized by Defendants, who sought the assistance of Arizona courts for the depositions, and who invoked Arizona jurisdiction for the depositions.

In their district court papers, Defendants accused Petitioners' attorneys of filing their motion to quash "in a new forum" for the purpose of creating "an artificial urgency for the Arizona Court, which had no familiarity with the facts of this case. . . ." 3 P.App. 344, lines 12-14. Defendants argued that Petitioners should not have started "with a clean slate in Arizona." *Id.* at lines 16-17. Defendants further argued that "Plaintiffs' counsel picked Arizona, for the purpose of avoiding the depositions." *Id.* at line 18 (emphasis added). In actuality, it was Defendants who went to the Arizona court, filed papers in that state, paid a filing fee, and obtained Arizona Court process (subpoenas and notices of depositions) to compel attorneys Morrill and Aronson to attend depositions in Arizona. There was simply no basis for Defendants' suggestion that Petitioners and their attorneys were somehow forum shopping to obtain a sympathetic ear in Arizona.

Accordingly, the Arizona court was the appropriate court to determine whether the Arizona subpoenas and deposition notices should be quashed. The district court erred by disregarding the Arizona court's valid and unappealed decision.[3]

IV

Conclusion

Defendants are attempting to take the depositions of Petitioners' trial attorneys, not for any legitimate purpose, and not because the deposition testimony is necessary for the defense.

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[3]In the Nevada district court proceedings, Defendants relied on a portion of the Arizona hearing transcript, in which the judge indicated that although he was granting the motion to quash, he did not intend to suggest how the Nevada Special Master should eventually rule. Despite the judge's comment, the undisputed fact remains that the Arizona judge quashed the Arizona subpoenas, and Defendants did not appeal the Arizona judge's order. Instead, they asked the Nevada judge to ignore the Arizona order.

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Instead, Defendants seek the depositions for purely tactical reasons, to gain valuable insight into the thought processes and mental impressions of Petitioners' trial attorneys. There is no legal basis or justification for the depositions under any standard of review and under any case law on this issue. Accordingly, a writ should issue ordering the district court to vacate its order of January 21, 2011.

DATED: Jan. 28, 2011

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VERIFICATION

State of Nevada)
) ss.
County of Washoe)

Robert L. Eisenberg, being first duly sworn, deposes and says:

That he is a member of the law firm of Lemons, Grundy & Eisenberg, attorneys for Petitioner in the above-entitled Petition; he has obtained and reviewed copies of district court papers relating to this case, and he is familiar with the facts and circumstances set forth in those papers and in the Petition; and that he knows the contents thereof to be true, based on the information he has received, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

This verification is made pursuant to NRS 15.010.

Robert L. Eisenberg
ROBERT L. EISENBERG

Subscribed and sworn to before me
on the following date: 1/28/11

Vicki Shapiro Bielecki
Notary Public

VICKI SHAPIRO BIELECKI
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 97-2671-2 - Expires July 15, 2013

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Cooksey, Toolen, Gage, Duffy, Woog and that on this 28 day of January 2011, I am causing to be hand delivered, true copy of the emergency motion for stay, the foregoing petition for writ, and all three volumes of the appendix, including a disk of the appendix, to:

Honorable Mark R. Denton
Department 13
Eighth Judicial District Court
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Las Vegas, Nevada 89155

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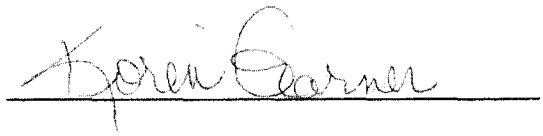

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