Case No. 80637

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA EX REL. DEPARTMENT OF TAXATION,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

NEVADA WELLNESS CENTER, LLC,

Real Party in Interest.

REPLY IN SUPPORT OF EMERGENCY PETITION FOR WRIT OF MANDAMUS OR PROHIBITION UNDER NRAP 21(a)(6)

Respectfully submitted by:

AARON D. FORD
Nevada Attorney General
STEVE SHEVORSKI (Bar No. 8256)
Chief Litigation Counsel
KIEL B. IRELAND (Bar No. 15368C)
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for Petitioner
State of Nevada ex rel. Department of Taxation

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITY

I. Introduction

Nevada Rule of Civil Procedure 45 requires parties such as Real Party in Interest Nevada Wellness Center, LLC to use compulsory process to obtain discovery from nonparties. Nowhere in Nevada Wellness's answer does it challenge the Manpower former temporary workers' status as nonparties. Any party such as Nevada Wellness that seeks discovery from a nonparty must use the subpoena power. Nevada Wellness has not and does not explain why it failed to do so. Therefore, the district court's order compelling Petitioner Department of Taxation to seize, search and produce data from the personal cell phones of nonparties was in error and must be reversed.

To evade this straightforward logic, Nevada Wellness contends that the Department has "control" over the nonparty former workers' personal cell phones because they were at one time "agents" or "employees" of the Department. But, even accepting its description as correct (it isn't), there is no dispute that the nonparties were "former agents or employees." And, more importantly, even if they were current employees or agents, that would bring their status more fully in line with existing case law that mandates that a subpoena be used to obtain even a current employee's personal cell phone. *See Lalumiere v. Willow Springs Care,*

Inc., No. 1:16-cv-3133, 2017 WL 6943148, at *2 (E.D. Wash. Sept. 18, 2017); *accord Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013). Nevada Wellness cites no authority demonstrating that a party has the "control" over the private cell phones of former contractors or employees.

Nevada Wellness also claims that the Department has a right to data on the nonparty former workers' personal cell phones because of the contract between the Department and the entity employing the nonparties. But the nonparty former workers were not parties to that agreement. Nevada Wellness never explains how that agreement covers the personal devices of nonparties to the agreement. There is no language in that agreement permitting the Department to seize, search and produce data from private cell phones on demand.

This Court should reverse the district court's order.

II. Legal Argument

A. Nevada Wellness urges this Court to apply the wrong legal standard and improperly shifts its burden

Nevada Wellness contends that the order below must be affirmed unless the district court "manifestly abuse[d] its discretion or act[ed]

arbitrarily or capriciously." Answer 4.[1] In fact, "[t]his [C]ourt generally reviews discovery orders for an abuse of discretion" – no manifest abuse necessary. *Cain v. Price*, 134 Nev. 193, 198 (2018). As part of that review, the Court reviews de novo matters of statutory interpretation. *Id.* A district court abuses its discretion if it commits legal error or it applies the wrong standard. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589 (2010); *In re Halverson*, 123 Nev. 493, 510 (2007).

Along the same lines, Nevada Wellness concedes that "the propounding party usually has the burden to show that a given document is within the [responding] party's possession," but contends that the burden is on the State here. Answer 22 (quotation marks and emphasis omitted). According to Nevada Wellness, the burden is flipped because the contract between the State and an independent contractor called Manpower was "both necessary and in the best interests of the State." *Id.*

Nevada Wellness's burden shifting is improper because it is based on a law not involved in this case, the Nevada Public Records Act

[1] "Answer" citations refer to the "Answer by Real Party in Interest to Emergency Petition for Writ of Mandamus or Writ of Prohibition Under NRAP 21(a)(6)" filed by Nevada Wellness.

("NPRA"), NEV. REV. STAT. 239.001-.340. "The NPRA is intended to foster democratic principles" by "facilitat[ing] *public* access to information regarding government activities." *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142, 144 (2018) (emphasis added). For that reason, this Court applies a "presumption that public records must be disclosed to the public." *Id.* The burden then shifts to the government to rebut that presumption. *Id.*

Here, Nevada Wellness is not pursuing "public access" to "public records." It is seeking the contents of private citizens' personal cell phones for an advantage in private litigation between it, its competitors and the Department. The NPRA presumption does not apply here.

B. The Department does not have "possession, custody, or control" of the contents of the nonparty former workers' personal cell phones

Nevada Wellness concedes that the Department cannot be compelled to disclose documents that are not within the Department's "possession, custody or control." Answer 20. And Nevada Wellness does not argue that the cell phones' contents are within the Department's possession or custody. *Id.* It contends only that the Department has "control" over the contents because the Department "has a legal right to obtain the [contents]." *Id.* at 20-21.

1. As an initial matter, Nevada Wellness misconstrues the two cases at the center of this appeal, *Lalumiere v. Willow Springs Care, Inc.*, No. 1:16-cv-3133, 2017 WL 6943148 (E.D. Wash. Sept. 18, 2017), and *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974 (D. Kan. July 24, 2013). It argues that "the Department omit[ted] a key point from both cases: that a company has a right to personal cell phone information [(a)] if the information on the personal phone is relevant to the case (*Lalumiere*) or [(b)] if the company has a legal right to the information." Answer 21 (emphasis omitted).

a. The first assertion – that a company has a legal right to information on personal phones as long as the information is "relevant" – improperly conflates relevance and control. Relevance determines whether a document is discoverable in general; control (or possession or custody) determines *who* must produce or disclose the discoverable documents. *Compare* NEV. R. CIV. P. 16.1(a)(1)(ii), *with id.* R. 26(b)(1). If parties automatically had legal control over all relevant documents, no matter where, then the possession, custody or control limitation on the disclosure obligation would be meaningless. *See* NEV. R. CIV. P. 16(a)(1)(ii).

Nevada Wellness's use of *Lalumiere* on this point is incorrect. In that case the propounding party sought to obtain data from several individual defendants and a company. *See Lalumiere*, 2017 WL 6943148, at *2. The federal district court ruled that the *individual* defendants had control over the relevant data stored on *their own* personal phones, computers and email accounts. *Id.* ("An individual possesses and controls text messages sent or received via his or her personal phone, and emails sent or received via a personal email account on a personal computer or phone."). But when it came to the *company*, it could "not be compelled to disclose text messages from employees' personal phones" because it did not have control over "the text messages from the personal phones." *Id.*

The distinction drawn by the *Lalumiere* court maps perfectly onto this case. The Department has repeatedly pointed out that the issue presented here could be solved if Nevada Wellness would just subpoena the nonparty former workers under Nevada Rule of Civil Procedure 45. *See, e.g.*, Emergency Pet. 22-23.[2] That is because the nonparty former workers have possession, custody or control of their own personal phones.

[2] "Emergency Pet." citations refer to the Department's "Emergency Petition for Writ of Mandamus or Prohibition Under NRAP 21(a)(6)" filed in this appeal.

Lalumiere, 2017 WL 6943148, at *2. But like the company in *Lalumiere*, the Department cannot be compelled to disclose the contents of nonparties who did work for the Department. *See id.*

b. As to the second assertion – that information that a party has a "legal right" to obtain is within its control – the Department does not dispute that as a legal premise. But it does not help Nevada Wellness because the Department does not have a legal right to obtain the contents of the nonparty former workers' personal phones.

Nevada Wellness proposes two bases for the Department's supposed legal right to obtain the phones' contents: (1) the contract between the State and Manpower and (2) ordinary principles of agency. Neither basis is well founded.

The Manpower contract: The Manpower contract does not give the Department the legal right to seize the personal phones of Manpower's former workers. Nevada Wellness's only argument about the contract is that "Manpower specifically agreed that relevant records, including 'electronic, computer related or otherwise' were subject to 'inspection, examination, review, audit and copying' by the State 'at any reasonable time.'" Answer 22.

The problem is that, whatever Manpower agreed to, the nonparty former workers were not party to that agreement. Emergency Pet. 20-21. The contract may have given the Department the right to obtain some documents in *Manpower's* possession, but that is not what Nevada Wellness is seeking. In addition, as explained in the Department's emergency petition, the contents of workers' personal cell phones are not the "records" covered by the contract. *Id.*

Agency: Nevada Wellness spends a substantial portion of its answer arguing that the Department "[e]mployed" the nonparty former workers. Answer 22-24. That argument is in conflict with its concession that the former workers were "Manpower employees" hired and paid by Manpower, which was itself merely an independent contractor engaged by the Department. *See* Answer 2, 5, 23-24.

To the extent that Nevada Wellness is arguing merely that the nonparty former workers were "agents of the Department for purposes of the 2018 recreational marijuana application process," it does not explain how a principal-agent relationship would be relevant to the question of control. A real estate broker is an agent of a home buyer for purposes of buying a house, but that does not mean that the buyer has the legal right

to (without a subpoena) seize the broker's personal phone and download its contents.

In any case, even if the nonparty former workers had been directly employed by the Department, that would mean only that the facts of this case match the facts of *Lalumiere* and *Cotton*. *See Lalumiere*, 2017 WL 6943148, at *2; *Cotton*, 2013 WL 3819974, at *6. The truth is that the relationship between the Department and the nonparty former workers was more attenuated than that, because the Department did not directly employ them, but even on Nevada Wellness's version of events its argument fails.

2. Except for the flawed arguments laid out above, Nevada Wellness fails to respond to the Department's reasons for concluding that the contents of the nonparty former workers' personal phones are not within the Department's control. Most strikingly, it does not contest that a responding party cannot be compelled to seek documents from third parties "if compulsory process against the third parties is available to the party seeking the documents." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). Yet Nevada Wellness never explains why it has chosen not to use the compulsory process available to it – a

Rule 45 subpoena directed at the nonparty former workers – or why its decision not to issue a Rule 45 subpoena should not bar its efforts to compel the Department to do its discovery for it.

The closest Nevada Wellness comes is in a footnote, in which it argues that "requiring a Rule 45 subpoena would likely derail the April 20, 2020 trial date." Answer 17 n.14. There are three problems with that argument. First, it is purely speculative – Nevada Wellness has never subpoenaed the phone contents, so there is no way to know whether the nonparty former workers would object to a subpoena. Second, this issue is of Nevada Wellness's own making. It chose to pursue an improper mode of discovery; that choice should not excuse it from seeking discovery under the proper procedures now. And third, if the nonparty former workers do object, there is no reason why the objections could not be heard on an expedited timeline that concluded before the trial is set to begin.

Similarly, Nevada Wellness does not explain why the typical protections that shield nonparties in discovery do not attach to the nonparty former workers in this case. *See* Emergency Pet. 14-16. Nor does it explain why the principle that courts should avoid legal

interpretations that cause constitutional problems does not apply here. *See id.* at 16-18 (citing *Mangarella v. State*, 117 Nev. 130, 134-35 (2001)). While Nevada Wellness dismisses out of hand the nonparty former workers' privacy rights, its brief has no answer for the potential due-process problems created by the Department's seizing the workers' phones without adequate notice and a right to object. Those due-process problems, just as much as the invasion of privacy rights occasioned by the order below, are a basis for disapproving Nevada Wellness's interpretation of Nevada Rule of Civil Procedure 16.1. Nevada Wellness's lack of concern for the nonparty former workers' due-process rights is ironic considering that in this lawsuit it has asserted claims for relief based on the Department's alleged violations of procedural and substantive due process rights. App. 259-60.

C. Granting this petition is necessary to prevent irreparable harm

Nevada Wellness agrees that "cell phones contain a plethora of information that many would not want exposed." *See* Answer 25. But it nevertheless contends that the order below does not "[i]nfringe[ ]" the privacy interests implicated by the State's review and exposure of that

information. *Id.* at 24. Because of that, according to Nevada Wellness, no one will suffer irreparable harm. *Id.*

Nevada Wellness is wrong. The district court's order compelling the Department to invade the nonparty former workers' privacy will cause irreparable harm if not reversed by this Court on this petition.

1. Nevada Wellness asks "if this Court follows the Department's premise that discovery of cell phone information is a 'startling invasion of privacy' then what is to prevent the unscrupulous from using cell phones as vaults to hide electronic information?" Answer 24 (citation omitted). Nevada Wellness misrepresents the Department's position. It is not that parties are categorically barred from discovering information maintained on personal cell phones. It is that it is constitutionally problematic to order the State to seize and search private citizens' phones without proper procedural protections.

The answer to Nevada Wellness's question is that ordinary discovery procedures prevent the unscrupulous from using cell phones as vaults to hide electronic information. If there is discoverable information on the nonparty former workers' personal phones, then Nevada Wellness is entitled to seek it by way of a Rule 45 subpoena. The problem here is

not the location of the information, but Nevada Wellness's manner of trying to obtain it.

2. Nevada Wellness next attempts to distinguish the U.S. Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014). But even if *Riley*'s factual context was distinct, its holding as to the superlative privacy interests an individual has in the contents of his personal phone – and the corresponding invasiveness of a government seizure of those contents – applies here. *See* 573 U.S. at 391-97 (explaining that the government's searching a phone is more invasive than its "ransacking" an entire house would be). The Department's forcibly seizing and searching the nonparty former workers' phones (as the district court has ordered) would work the same invasion of privacy rights that the *Riley* Court considered so severe. That is irreparable harm. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

3. Finally, Nevada Wellness argues that "the Manpower employees may have [had] an expectation regarding their cell phone information, but the expectancy [was] not the same as in a criminal case." Answer 25. Nevada Wellness's attempt to minimize citizens' privacy interests in noncriminal cases contradicts the "well settled" principle that

"the Fourth Amendment's protection extends beyond the sphere of criminal investigations." *City of Ontario v. Quon*, 560 U.S. 746, 755 (2010).

Nevertheless, Nevada Wellness asserts that this case is different because "the Manpower employees gave up a certain level of privacy protection by using their cell phones for work purposes." Answer 25. Nevada Wellness bases that assertion on this Court's *Comstock* decision.

The first problem is that Nevada Wellness cites no evidence in the record – and the Department is not aware of any – that the nonparty former workers used their cell phones for work purposes. *See* Answer 25. Nevada Wellness seeks a profound intrusion on their privacy rights based on an unfounded factual allegation.

More generally, Nevada Wellness's proposition would lead to a troubling result. In essence, Nevada Wellness claims that by taking a job working for the government – even a temporary one – and sending a single work-related text message from his personal phone, a line-level worker gives the government the right to seize the phone and review all of its contents. *See* Answer 25. That cannot be right.

Comstock does not change Nevada Wellness's wrongness – it does not stand for the proposition that a former temporary line-level worker gives up all privacy rights in his personal phone. In *Comstock* the commissioners whose phones were at issue were themselves "governmental entities" subject to the NPRA, unlike the nonparty former workers here. 134 Nev. at 148. And there, the commissioners personally had been served with the NPRA request, unlike the nonparty former workers here, who have never been subpoenaed or provided adequate notice. *Id.* at 143. So that case is more analogous to a case where a party is subpoenaed to produce his own phone; it is different from this case where a government is being compelled to seize the phones of nonparty former workers.

Moreover, even though the commissioners had sought and obtained a position qualifying them as "governmental entities," this Court still held that they had not given up their privacy rights. Instead, it was up to the district court to consider the commissioners' privacy rights and the public's interest in disclosure. *See Comstock*, 134 Nev. at 143, 148 n.2. The nonparty former workers did not give up their privacy rights by taking a temporary job with Manpower either.

D. This Court has discretion to hold that the district court applied the wrong standard

1. Nevada Wellness does not dispute that the district court applied an obsolete version of Rule 16.1 in the order below. *See* Answer 18. But it contends that "[a]s the Department raises this issue for the first time on appeal, this Court's consideration of the issue is improper." *Id.*

Consideration is not improper because appellate courts have discretion to consider issues raised for the first time on appeal. *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007); *cf. Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 (2011) (holding that it is this Court's "prerogative to consider issues a party raise[d] in its reply brief, and [the Court] will address those issues if consideration of them is in the interests of justice"). Exercising that discretion is appropriate "when the issue presented is purely one of law" and "does not depend on the factual record developed below." *Aholelei*, 588 F.3d at 1147.

Here, the issue is one of pure law: did the district court apply a version of the Nevada Rules of Civil Procedure that was no longer operative? And it does not depend on the record, only on the date of the order below and the effective date of the amendment to the Rules.

Furthermore, there is no prejudice here because Nevada Wellness fully briefed the issue. *Singh v. Ashcroft*, 361 F.3d 1152, 1157 (9th Cir. 2004); *see* Answer 19-20.

2. Nevada Wellness also argues that "the Department's argument ignores that the old version of [Rule] 16.1 is not materially different than the new version and does not compel a different result than the result in the district court's order." Answer 19. Specifically, Nevada Wellness asserts that "even though the [R]ule changed, relevant discoverable information is, and has always been, required to be disclosed under Rule 16.1."

But the two versions are different because the old version required disclosure of *all* discoverable documents within the party's possession, custody or control. *See* NEV. R. CIV. P. 16.1(a)(1)(B) (2016) (repealed 2019). By contrast, the new Rule requires the disclosure of discoverable information only if the party "may use [it] to support its claims or defenses" or if it is "concerning the incident that gives rise to the lawsuit." NEV. R. CIV. P. 16.1(a)(1)(A)(ii) (current version).

The new version is therefore more limited than the old one. For one thing, if the drafters had wanted to maintain the obligation that parties

must disclose all discoverable information within their possessions, custody or control, they would not have changed the language of the Rule. *See Utter v. Casey*, 81 Nev. 268, 274 (1965). For another, the plain text of the new Rule does not cast such a broad net as the old Rule (as explained in the Department's emergency petition, the "concerning the incident" prong is intended to reach only documents related to personal injuries). Emergency Pet. 26-27.

As a result, if this Court does not wish to determine whether the phones' contents are within the Department's possession, custody and control, it should still grant the petition and remand the case so that the district court can apply the correct standard.

E. Nevada Wellness's proposed modifications to the order do not cure its deficiencies

Perhaps acknowledging the extent of the invasion of privacy rights contemplated by the order below, Nevada Wellness proposes that this Court modify the order in two ways. *See* Answer at 3. First, it suggests that "the Department's duty to produce [be] limited to production of only those [nonparty former workers'] cell phone records which relate to this case and/or relate to the 2018 recreational marijuana application process." *Id.* Second, it proposes to change the order "to permit the

Department to first preview the extraction reports from the [nonparty former workers'] phones and thereafter produce only relevant, discoverable information as prescribed by the [d]iscovery [c]ommissioner and as done previously by the Department relative to its present and former employees." *Id.*

As the Department explained in its emergency petition, though, "the *seizure* of the information of nonparty private citizens' information by the Department is itself a harm – the disclosure of that information to Nevada Wellness simply compounds the harm." Emergency Pet. 9-10. Nevada Wellness's proposal would not lift the Department's obligation to seize and search the nonparty former workers' phones. Indeed, it would force the Department to comb through the phones even more thoroughly to try to avoid the disclosure of irrelevant information. Under Fourth Amendment and due-process principles, that would still result in a substantial harm.

III. Conclusion

The order below is based on an erroneous view of the scope of legal control in the context of discovery. But its effect would be graver than just a discovery violation – it could lead to constitutional harm to private

citizens who are not party to this case. Nevada Wellness has never explained why it has chosen to eschew directing a subpoena to the nonparties, which would have avoided the interpretative and constitutional issues raised by this petition. This Court should grant this petition, correct the district court's abuse of discretion and clarify for Nevada Wellness and other litigants in this State that the proper procedure for obtaining documents from third parties is a Nevada Rule of Civil Procedure 45 subpoena.

Respectfully submitted March 6, 2020.

AARON D. FORD
Attorney General

By: */s/ Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel

CERTIFICATE OF COMPLIANCE

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 2010 in 14 pt. font and Century Schoolbook. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3,845 words. Finally, I hereby certify that I have read this appellate 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(e)(1), which requires every assertion in the brief regarding matters in the record to be supported 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 6th day of March, 2020.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 6th day of March, 2020.

I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

Theodore Parker, III, Esq.
Parker, Nelson & Associates, Chtd.
2460 Professional Ct., Ste. 200
Las Vegas, Nevada 89128
Attorneys for Real Party in Interest Nevada Wellness Center, LLC

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Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Honorable Elizabeth Gonzalez
Regional Justice Center
Department 11
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Attorney General