NO. 81764

IN THE SUPREME COURT OF NEVADA

JOHN BORGER and SHERRI BORGER

Appellants

v.

POLARIS INDUSTRIES, INC.

Respondent

On Appeal from the Eighth Judicial District
Clark County, Nevada, Dept. No. XXV
No. A-17-751896-C

APPELLANTS' PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a). These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and listing any publicly held company that owns 10% or more of the party's stock or states that there is no such corporation: **There is no such corporation.**

2. The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear in this Court: **Chad A. Bowers, LTD. and Kaster, Lynch, Farrar & Ball, LLP.**

3. If any litigant is using a pseudonym, the statement must disclose the litigant's true name: **None.**

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TO THE HONORABLE SUPREME COURT OF NEVADA:

Appellants John and Sherri Borger, pursuant to NRAP 40, files this Petition for Rehearing respectfully requesting that this Court conduct a rehearing of the attached March 16, 2022 Order of Affirmance from a panel of the Supreme Court.

INTRODUCTION

Plaintiffs, injured while operating an off-road vehicle on vacation, brought a negligence suit against Nevada-based Sandbar Powersports, LLC, the renters of the vehicle, and a product liability suit against Polaris, Inc., the manufacturer of the vehicle. For nearly two years, Plaintiffs had been pursuing their claims and conducting merits discovery. Yet when they settled with the Nevada-based defendant near the completion of discovery, Polaris filed a forum non conveniens motion.

As discussed in Justice Hardesty's dissent, Polaris' motion was fatally defective, lacking the evidence required by this Court's decision in *Mountain View Recreation, Inc. v. Imperial Commercial Cooking Equip. Co.*, 129 Nev. 413, 419, 305 P.3d 881, 885 (2013) (requiring specific allegations of hardship by affidavits to properly evaluate the private interest factors). Nonetheless, the Trial Court granted the motion, and a divided panel of this Court upheld the dismissal. In doing so, the majority opinion not only dispensed with the

evidentiary rigor required by *Mountain View,* but it also adopted "an entirely new standard in Nevada regarding deference to a plaintiffs forum choice, devoid of analysis." (*See* Ex. 1, Order of Affirmance, p. 9) (Hardesty, J., dissenting).

Due to these issues with the majority opinion, rehearing is appropriate because the opinion "has overlooked or misapprehended...a material question of law in the case," and it has "overlooked, misapplied or failed to consider a...decision directly controlling a dispositive issue in the case." NRAP 40(c)(2). Rehearing is especially appropriate given the precedential implications of the decision, as the outcome of this appeal will affect every litigant in Nevada facing a forum non conveniens motion.

QUESTIONS PRESENTED

1. Is the requirement of specific affidavits in *Mountain View* a mere formality that may be ignored?

2. Can "exceptional circumstances" be found under *Placer Dome* when there is nothing in the record showing inconvenience?

3. Is an out-of-state plaintiff entitled to less deference in their forum choice?

ARGUMENT

I. Justice Hardesty's Dissent is Compelling and Invites Rehearing.

A. The Majority Opinion Ignored the Standards in *Mountain View.*

Justice Hardesty begins his dissent by describing the foundational evidentiary standards for a forum non conveniens motion:

> Further, "[a] motion ... based on forum non conveniens must be supported by *affidavits* so that the district court can assess whether there are any factors present that would establish such exceptional circumstances." *Mountain View Recreation, Inc. v. Imperial Commercial Cooking Equip.* Co., 129 Nev. 413, 419, 305 P.3d 881, 885 (2013) (emphasis added). "General allegations regarding inconvenience or hardship are insufficient because [a] specific factual showing must be made." *Id.* (alteration in original) (internal quotation marks omitted). And we have opined that a party's or its employees' convenience is irrelevant when considering such motions. *Id.* at 419 n.4, 305 P.3d at 885 n.4 (citing, among others, *Said v. Strong Mem'l Hosp.* , 680 N.Y.S.2d 785, 786 (App. Div. 1998)).

(*See* Ex. 1, p. 6). Justice Hardesty explained that Polaris' motion did not meet these standards: "It is undisputed that the affidavit supporting Polaris's motion to dismiss did not address the hardships or convenience of its witnesses, or exceptional circumstances to warrant dismissal, as required under *Mountain View.*" (*Id.,* p. 7). Justice Hardesty correctly noted that the

majority opinion "dismisses this issue," and it did so "without analysis." (*Id.*, p. 7).

By dismissing the evidentiary requirement, the majority affirmed a dismissal "without more specific allegations of hardship." (*Id.*). As Justice Hardesty protested, "this is not what *Mountain View* requires!" (*Id.*). By "minimiz[ing] this requirement," the majority opinion opens the door for speculative dismissals based on "any minimal showing" instead of the required "exceptional circumstances." (*Id.*, p. 8). Justice Hardesty correctly concluded that "disregarding the affidavit requirement in the framework, or adding an entirely new standard concerning a plaintiff's preference, constitutes an abuse of [the Trial Court's] discretion." (*Id.*, p. 6). If this Court intends that a Trial Court may dispense with the requirement for an affidavit and make subjective judgment calls about what inconveniences the circumstances of the litigation *might* present, then this Court should state as much explicitly and expressly overrule *Mountain View.* Yet such a result would invite "the type of speculation that this court was trying to avoid in *Mountain View* when it required an affidavit." (*Id.*, p. 8).

B. The Majority Opinion Misapplied the Standard for Exceptional Circumstances under *Placer Dome.*

When deciding a forum non conveniens motion, a court must "weigh public and private interest factors to determine whether dismissal is warranted." *Provincial Gov't of Marinduque v. Placer Dome, Inc.,* 131 Nev. 296, 301, 350 P.3d 392, 396 (2015). Dismissal is only warranted if the trial court finds "exceptional circumstances" when weighing those factors. *Id.* Here, Justice Hardesty observed that even ignoring the absence of affidavit testimony on inconvenience, there is nothing to support "exceptional circumstances." There was "no evidence in the record, beyond Polaris's counsel's statements, to demonstrate that the Sandbar employees and the first responders are unwilling to travel to Nevada." (*Id.,* p. 8). Similarly, "Polaris was present and participated in the depositions of the Sandbar employees in Nevada during the one year and three months before it brought the motion to dismiss for forum non conveniens." (*Id.*).

Courts from other jurisdictions have held the private interest factor is neutral when "neither Plaintiffs nor Defendants identify specific unwilling witnesses by name." *Leighty v. Stone Truck Line Inc.,* 3:19-CV-2615-L, 2020 WL 85152, at *2 (N.D. Tex. Jan. 6, 2020); *see also Pinnacle Label, Inc. v. Spinnaker Coating, LLC,* 2009 WL 3805798, at *10 (N.D. Tex. Nov. 12, 2009) (Fitzwater,

C.J.) (concluding this factor is neutral when movant "does not identify in its motion, however, any non-party witnesses who are unwilling to testify without being subpoenaed."); *Weimer v. Gen. Motors LLC,* 4:16-CV-02023-AGF, 2017 WL 3458370, at *5 (E.D. Mo. Aug. 11, 2017) ("Although GM LLC has argued in its motion that relevant non-party witnesses likely reside in the Northern District of Texas and would be inconvenienced if this action were maintained in the Eastern District of Missouri, GM LLC has not submitted any evidence to identify even a single one of these witnesses."); *Maritz Inc. v. C/Base, Inc.*, No. 4:06-CV-761 CAS, 2007 WL 6893019, at *12 (E.D. Mo. Feb. 7, 2007) (noting "[t]here is no indication who the potentially unwilling witnesses are, or whether they could be made available by deposition," and denying motion when movant "made no showing that any particular witness or essential witness will refuse to come to Missouri voluntarily, making compulsory process necessary"). Likewise, Nevada cases distinguish between unwilling and willing witnesses, noting that "additional factors include the availability of compulsory process for *unwilling* witnesses, [and] the cost of obtaining testimony from *willing* witnesses." *Eaton,* 96 Nev. at 774 (emphasis added). Polaris never made any showing with respect to unwilling witnesses nor any costs for obtaining willing witnesses.

Nor can this Court conclude, in the absence of any evidence, that a Nevada corporation will find it inconvenient to produce witnesses for a Nevada trial. And with respect to the first responders, there is likewise no evidence they are unwilling to testify or would suffer inconvenience. Nor did Polaris ever address the convenience of the medical witnesses residing in Nevada who will provide the most crucial testimony regarding Ms. Borger's treatment. As opposed to the Arizona first responders, who merely stabilized Ms. Borger's condition, the Nevada health care providers have far greater knowledge about Ms. Borger's injuries, treatment, and long-term prognosis.[1] In sum, without affidavit evidence, the Court is forced to speculate about these various circumstances. Here, much like in *Mountain View,* "[t]he record is devoid of affidavits from either percipient or expert witnesses or other evidence to demonstrate how the witnesses would be inconvenienced." *Mountain View Rec.,* 129 Nev. at 419.

C. Appellants' Forum Choice was Entitled to the Same Deference as Nevada Residents.

The Trial Court found that "the [Borgers'] choice of forum is entitled to lesser deference because it is not the [Borgers'] residence." (*Id.,* p. 8-9). Likewise, the majority opinion notes that "[t]he Borgers do not reside in

[1] Puzzlingly, the majority dismisses Ms. Borger's treatment at UMC as "not the subject of this dispute." (Ex. 1, p. 5). Yet Ms. Borger's post-accident treatment is likely to be the subject of far greater dispute than the emergency aid provided at the scene of the accident.

Nevada," and it afforded them less favorable consideration on that basis. (*Id.*, p. 4). Yet Justice Hardesty noted that this Court has "never made a distinction between a plaintiff who resides within the state versus one who resides outside of the state. And why would we?" (*Id.*, p. 9). Justice Hardesty explained that the Borgers' choice of Nevada was the only available forum at the inception of the lawsuit, and he noted that "the majority failed to provide any reasoning as to why a plaintiff should be entitled to lesser deference, after correctly filing a lawsuit in a proper forum, just because the plaintiff does not live in that forum." (*Id.*, p. 9). Indeed, in *Placer Dome,* this Court cited the Second Circuit's decision in *Pollux Holding,* which noted that lowered deference is only appropriate because a non-citizen is not "entitled to access American courts on the same terms as American citizens." *Pollux Holding Ltd. v. Chase Manhattan Bank,* 329 F.3d 64, 73 (2nd Cir. 2003).

The Second Circuit also discussed the issue in *Iragorri,* in which it examined "a fact pattern not directly addressed by the Supreme Court: a United States resident plaintiff's suit in a U.S. district other than that in which the plaintiff resides." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001). The court held that a U.S. resident is entitled to enhanced deference over a foreign litigant, and that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law

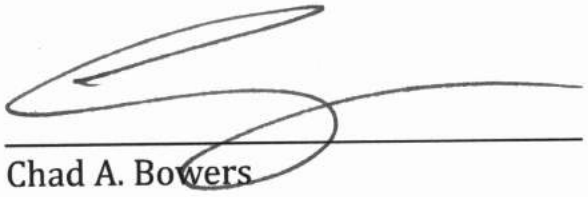
recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." Id. at 71-72. As the First Circuit also explained, "[t]he deference accorded the plaintiff's choice of forum is enhanced...when the plaintiff is an American citizen who has selected an available American forum." *Mercier v. Sheraton Intern., Inc.*, 981 F.2d 1345, 1355 (1st Cir. 1992). Yet the Trial Court did not give the Borgers any "enhanced deference." Instead, its order afforded them less deference. As such, Justice Hardesty noted that "[t]he district court made an erroneous conclusion of law, which requires reversal." (*Id.*).

CONCLUSION

The District Court erred because Polaris did not provide the required evidence and could not show "exceptional circumstances strongly supporting another forum." *Mountain View,* 129 Nev. At 413. In upholding the decision, the majority opinion retreated from the standards in *Mountain View* while also ignoring the Trial Court's erroneous refusal to afford Appellants the same level of deference to their forum choice as Nevada residents. Because this decision poses issues of statewide importance which may affect countless future lawsuits, and because the majority opinion misapplied controlling authority on dispositive issues of law, the Borgers pray this Court grants rehearing and

reverses the dismissal.

DATED this 31st day of March, 2022



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ATTORNEY CERTIFICATE

Undersigned counsel certifies that:

1. This Reply 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Cambria in size 14-point font.

2. I further certify that this Petition complies with the type-volume limitations of NRAP 40 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 1,926 words.

3. Finally, I certify that I have read this Petition and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I understand that I may be subject to sanctions in the event that the accompanying Petition is not in compliance.

DATED this 31st day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2022, Appellants' Petition for Rehearing was electronically filed with the Clerk of the Nevada Supreme Court and served electronically on all parties.

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EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN BORGER; AND SHERRI BORGER,
Appellants,
vs.
POLARIS INDUSTRIES, INC.,
Respondent.

No. 81764

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a products liability action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellants John and Sherri Borger (collectively, "the Borgers") appeal from a district court order dismissing their products liability action for forum non conveniens. In October 2016, while vacationing at Lake Havasu, Arizona, Sherri Borger was severely injured in an off-road vehicle accident.[1] The Borgers, who lived in Minnesota at the time of the accident, had rented the off-road vehicle shortly before the accident from Sandbar Powersports, LLC, a Nevada company operating in Arizona. While the family was driving in the vehicle, it rolled, pinning Sherri's right arm above the elbow and nearly severing it. Lake Havasu's fire department and emergency medical services, the Lake Havasu police department, and the Mohave County Sheriff's Office all responded to the accident. Sherri was initially flown to Havasu Regional Medical Center in Arizona and then transferred that same day to University Medical Center (UMC) in Las Vegas, where her arm was amputated.

[1]We recount the facts only as necessary for our disposition.

The vehicle was designed, tested, and manufactured in Minnesota by Polaris Industries, Inc., a Minnesota company, who sold it to an Arizona dealership. Sandbar's vehicle rental agreement, which the Borgers signed, stated that the agreement and any disputes arising from it would be governed by Arizona law.

In March 2017, the Borgers sued Sandbar in Nevada, and Sandbar filed a counterclaim. In November 2017, the Borgers amended the complaint to include claims against Polaris for product liability design and marketing defects, breach of warranty, and negligent design and marketing. Sandbar thereafter reached a settlement agreement with the Borgers, and in January 2019, Polaris moved to dismiss for forum non conveniens. Polaris argued that because Sandbar had settled, the Borger's case was entirely about the vehicle's design and manufacture. Polaris pointed out that it had not yet produced any documents, nor had any of its representatives been deposed or expert discovery conducted. Polaris argued that the case no longer had connections to Nevada and explained that it would be difficult to compel key witnesses to testify unless trial proceeded in Arizona.

The district court granted Polaris's motion to dismiss for forum non conveniens. The Borgers appeal.

NRS 13.050 allows a court, upon a party's motion, to move the trial's location when doing so would be convenient for the witnesses and promote the ends of justice. In deciding a motion to dismiss for forum non conveniens, the court must consider three factors: (1) "the level of deference owed to the plaintiff's forum choice," (2) "whether an adequate alternative forum exists," and (3) whether dismissal is warranted given public and

private interest factors.[2] *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 300-01, 350 P.3d 392, 396 (2015) (internal quotation marks omitted). Dismissal is appropriate where exceptional circumstances exist and the factors "weigh strongly in favor of another forum." *Id.* at 301, 350 P.3d at 396 (internal quotation marks omitted). We review a district court's order dismissing an action for forum non conveniens for an abuse of discretion. *Id.* at 300, 350 P.3d at 395-96. An abuse of discretion occurs where the decision is "arbitrary, fanciful, or unreasonable, or where no reasonable [person] would take the view adopted by the trial court." *Imperial Credit v. Eighth Judicial Dist. Court*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014) (alternation in original) (internal quotation marks omitted)).

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[2]A party must also support a motion for dismissal based on forum non conveniens with affidavits so that the district court can assess whether extraordinary circumstances exist. *Mountain View Recreation, Inc. v. Imperial Commercial Cooking Equip. Co.*, 129 Nev. 413, 419, 305 P.3d 881, 885 (2013). Here, Polaris submitted an affidavit stating that the product at issue was designed, tested, and manufactured in Minnesota; all employees with relevant information and documents are in Minnesota; and the vehicle was sold to an Arizona dealership. The motion to dismiss also included excerpts from transcripts of sworn depositions and other apparently admissible evidence. We therefore conclude that the district court had sufficient information here to determine that dismissal was appropriate.

The dissent points out that the affidavit does not directly address the hardships or convenience of its witnesses, and this is a true observation. However, the district court could reasonably conclude that the evidence strongly favored litigation in Arizona even without more specific allegations of hardship. After all, the district court has to engage with numerous "public and private interest factors." *Placer Dome*, 131 Nev. at, 302-305, 350 P.3d at 397-98.

We conclude the district court did not abuse its discretion under these facts. Although the Borger's choice of forum is entitled to deference,[3] the other two *Placer Dome* factors weigh heavily in favor of dismissal here.[4] The Borgers did not include claims against Polaris until over eight months after they filed their initial complaint and over a year after the accident, and the record shows that minimal, if any, discovery has been conducted as to the specific claims against Polaris.[5] The Borgers do not reside in Nevada and the record suggests that none of the key witnesses reside in Nevada. We determine the following to be persuasive: (1) the vehicle was designed, tested, and manufactured in Minnesota; (2) the vehicle was sold to an Arizona dealership, the Borgers rented the vehicle in Arizona and agreed Arizona law would control in the event of any dispute; (3) the accident occurred in Arizona; (4) the first responders were from Arizona; and (5) Sherri was initially treated at an Arizona hospital. Therefore, all of the witnesses testifying to the accident's immediate aftermath, as well as to the vehicle's design, testing, manufacture, and upkeep, reside outside Nevada.[6]

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[3]While we have never held that a plaintiff's Nevada forum choice is entitled to less deference when the plaintiffs are not Nevada residents, and we do not resolve that point here, we note that we have held a foreign plaintiff's choice of forum inside the United States is entitled to less deference. *Placer Dome*, 131 Nev. at 301, 350 P.3d at 396.

[4]The Borgers conceded below that Arizona is an appropriate alternative forum.

[5]Moreover, the district court ordered that discovery produced during the Nevada case may be used in the re-filed case and that Polaris is to waive formal service of process requirements for the re-filed case.

[6]We recognize Polaris could have compelled first responders in Arizona to submit to a deposition in Arizona for the Nevada case. *See Quinn v. Eighth Judicial Dist. Court*, 134 Nev. 25, 29-30, 410 P.3d 984, 987-88

continued on next page . . .

Sherri's treatment at UMC is not the subject of this dispute, and because Sandbar has been dismissed from the case, the case no longer has ties to Nevada.[7] Arizona is therefore an adequate alternative forum for the case, and both public and private interests weigh in favor of dismissal, whereas nothing remains to tie the case to Nevada, there are substantial ties to Arizona, and Arizona is a convenient forum for the accident's witnesses. In this complex product liability case that will undoubtedly require extensive testimony and many expert witnesses, we cannot say the district court's decision was arbitrary, fanciful, or unreasonable.[8] *See Imperial Credit*, 130 Nev. at 563, 331 P.3d at 866. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Stiglich

_____, J.
Silver

(2018). Under the facts of this particular case, however, witness convenience strongly favors an Arizona forum.

[7]Notably too, the parties can subpoena certified records from UMC should the case proceed in Arizona. *See* NRS 53.100-.200 (Nevada's version of the Uniform Interstate Depositions and Discovery Act). To the extent the Borgers argue the settlement is not grounds for a forum non conveniens motion, we note the settlement is one of multiple factors demonstrating extraordinary circumstances favoring dismissal here.

[8]As neither NRS 13.050 nor *Placer Dome* impose a time restriction on a party's ability to bring a motion for forum non conveniens, we disagree with the Borgers' argument that the motion here was untimely, particularly where Polaris had only been in the action for a little over a year at the time it made the motion, and little, if any, discovery relevant to the complex product liability claims against Polaris has been conducted.

HARDESTY, J., dissenting:

"Dismissal for forum non conveniens is appropriate only in *exceptional circumstances* when the factors weigh strongly in favor of another forum." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 301, 350 P.3d 392, 396 (2015) (emphasis added) (internal quotation marks omitted). Further, "[a] motion . . . based on forum non conveniens must be supported by *affidavits* so that the district court can assess whether there are any factors present that would establish such exceptional circumstances." *Mountain View Recreation, Inc. v. Imperial Commercial Cooking Equip. Co.*, 129 Nev. 413, 419, 305 P.3d 881, 885 (2013) (emphasis added). "General allegations regarding inconvenience or hardship are insufficient because [a] specific factual showing must be made." *Id.* (alteration in original) (internal quotation marks omitted). And we have opined that a party's or its employees' convenience is irrelevant when considering such motions. *Id.* at 419 n.4, 305 P.3d at 885 n.4 (citing, among others, *Said v. Strong Mem'l Hosp.*, 680 N.Y.S.2d 785, 786 (App. Div. 1998)).

This court has established a clear framework to determine whether a case shall be dismissed for forum non conveniens. We review a district court's application of the framework for an abuse of discretion, *Placer Dome*, 131 Nev. at 300, 350 P.3d at 395-96, and disregarding the affidavit requirement in the framework, or adding an entirely new standard concerning a plaintiff's preference, constitutes an abuse of that discretion. For these reasons, I respectfully dissent.

NRS 13.050(2)(c) provides that "[t]he court may, on motion or stipulation, change the place of the proceeding . . . [w]hen the convenience of the witnesses and the ends of justice would be promoted by the change." We have established a three-part test for district courts to consider "[w]hen

deciding a motion to dismiss for forum non conveniens." *Placer Dome*, 131 Nev. at 300-01, 350 P.3d at 396. First, the "court must . . . determine the level of deference owed to the plaintiff's forum choice." *Id.* at 300, 350 P.3d at 396. Second, "a district court must determine whether an adequate alternative forum exists." *Id.* at 301, 350 P.3d at 396 (internal quotation marks omitted). And third, "[i]f an adequate alternative forum does exist, the court must then weigh public and private interest factors to determine whether dismissal is warranted." *Id.*

In the first instance, Polaris has not met the evidentiary burden necessary for the district court to decide its motion to dismiss for forum non conveniens. It is undisputed that the affidavit supporting Polaris's motion to dismiss did not address the hardships or convenience of its witnesses, or *exceptional circumstances* to warrant dismissal, as required under *Mountain View*. *See Mountain View*, 129 Nev. at 419, 305 P.3d at 885. Instead, Polaris argues that the affidavit requirement "is a matter of form over substance," and that "the record already contained most of the facts speaking to Nevada's three-part test." Similarly, the majority also dismisses this issue by concluding, without analysis, that "the district court could reasonably conclude that the evidence strongly favored litigation in Arizona even without more specific allegations of hardship." Majority, *ante* at 3 n.2. But this is not what *Mountain View* requires! *Mountain View* clearly requires an affidavit be attached to a forum non conveniens motion to dismiss that demonstrates specific instances of inconvenience or hardship. 129 Nev. at 419, 305 P.3d at 885.

The only affidavit that Polaris provided was from Blake Anderson, a "Senior Project Engineer" at Polaris. Anderson merely attested generally to the facts contained in the motion to dismiss, the headquarter location of Polaris, the model of off-road vehicle involved, and where the

vehicle was manufactured and sold. Anderson did not attest as to why Arizona is more convenient. The fact that Polaris is located out of state is of no consequence, because both the chosen forum and the alternative forum are not Polaris's headquarters. Polaris will have to travel to the west coast regardless. Further, there is no evidence in the record, beyond Polaris's counsel's statements, to demonstrate that the Sandbar employees and the first responders are unwilling to travel to Nevada. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (explaining that "[a]rguments of counsel . . . are not evidence and do not establish the facts of the case" (internal quotation marks omitted)). In fact, to the contrary, Polaris was present and participated in the depositions of the Sandbar employees in Nevada during the one year and three months before it brought the motion to dismiss for forum non conveniens.

This is the type of speculation that this court was trying to avoid in *Mountain View* when it required an affidavit and stated that "[g]eneral allegations regarding inconvenience or hardship are insufficient." 129 Nev. at 419, 305 P.3d at 885. The majority, like the district court, minimize this requirement and instead change the standard for forum non conveniens motions, allowing any minimal showing to dismiss a case, rather than "exceptional circumstances." *Placer Dome*, 131 Nev. at 301, 350 P.3d at 396 (internal quotation marks omitted). The lack of a proper affidavit under *Mountain View* alone requires reversal.

Lastly, the majority completely disregards the district court's erroneous application of the three-part *Placer Dome* test. The first requirement in *Placer Dome* is that a district court "must . . . determine the level of deference owed to the plaintiff's forum choice." 131 Nev. at 300, 350 P.3d at 396. Here, the district court found that "the [Borgers'] choice of forum is entitled to lesser deference because it is not the [Borgers']

residence." This court has held that a "plaintiff's choice of forum is entitled to great deference, but a foreign plaintiff's choice of a United States forum is entitled to less deference." *Placer Dome*, 131 Nev. at 301, 350 P.3d at 396. However, we have never made a distinction between a plaintiff who resides within the state versus one who resides outside of the state. And why would we? At the inception of this lawsuit, Nevada was the only place that the Borgers could properly bring suit against Sandbar because it is a Nevada-based LLC. Polaris and the majority fail to provide any reasoning as to why a plaintiff should be entitled to lesser deference, after correctly filing a lawsuit in a proper forum, just because the plaintiff does not live in that forum. By ignoring the district court's conclusion, the majority is adopting an entirely new standard in Nevada regarding deference to a plaintiff's forum choice, devoid of analysis. The district court made an erroneous conclusion of law, which requires reversal. *See Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003) (reviewing questions of law de novo).

Accordingly, for the foregoing reasons, I respectfully dissent.

Hardesty, J.

cc: Hon. Kathleen E. Delaney, District Judge
Stephen E. Haberfeld, Settlement Judge
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Sgro & Roger
Faegre Drinker Biddle & Reath, LLP
Eighth District Court Clerk