IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 81764

JOHN BORGER and SHERRI BORGER,
Appellants

v.

POLARIS INDUSTRIES, INC.
Respondent

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

RESPONSE TO PETITION FOR EN BANC REVIEW

Debra L. Spinelli, Esq., Bar No. 9695
Jordan T. Smith, Esq., Bar No. 12097
Dustun H. Holmes, Esq., Bar No. 12776
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Attorneys for Respondent

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I. INTRODUCTION

The bar for obtaining en banc reconsideration is high. En banc reconsideration is "not favored" and available only in "limited circumstances." Under Rule 40A(a) of the Nevada Rules of Appellate Procedure, en banc reconsideration is appropriate only "when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." Appellants John and Sherri Borger do not make either showing here.

First, the Court's Order does not upset the uniformity of the Court's decisions or create a split of authority. In their attempt to show otherwise, Appellants seemingly contend that all evidentiary support for a district court's decision on a forum non conveniens motion must flow solely from an affidavit or else be ignored. The Court properly rejected this contention based upon controlling precedent, which allows courts to consider "other evidence to demonstrate how the witnesses would be inconvenienced." Rather than ensure uniformity, then, Appellants are asking the Court to break from existing precedent.

This is the precise opposite of what the first ground for en banc reconsideration requires.

Appellants also assert that the Court's opinion deviates from precedent both in its application of the "exceptional circumstances" requirement for dismissal on forum non conveniens grounds and in the level of deference given to Appellants' choice of forum. But they cite no Nevada precedent on these points. Moreover, Appellants' arguments are wrong: the Court's finding of exceptional circumstances fully comports with the applicable standard, and the Court explicitly declined to address the deference issue.

Second, the Court's Order does not implicate a "substantial" issue of any kind. The issue of whether a party may submit admissible evidence beyond an affidavit in pursuing dismissal on forum non conveniens grounds will rarely arise—most forum non conveniens motions are filed *before* discovery, when affidavits are the primary evidence available. This issue came up here only because the district court considered Respondent Polaris Industries, Inc.'s motion to dismiss for forum non conveniens *after* the parties had engaged in almost two years of discovery, such that Polaris could present other evidence in support of its motion.

In short, while Appellants' Petition highlights the Panel dissent, it fails to satisfy the narrow standards for obtaining en banc reconsideration. More than a single dissent is required for consideration by the full Court. Polaris thus requests that the Court deny the Petition.

II. ARGUMENT

Appellants fail to satisfy Rule 40A of the Nevada Rules of Appellate Procedure either procedurally or substantively. Under Rule 40A(c), "Matters presented in the briefs and oral arguments may not be reargued in the petition." The entirety of Appellants' Petition is simply a rehashing of their previous arguments. The Petition should be denied on this basis alone. Substantively, Appellants fail to demonstrate en banc review is appropriate under either of the "limited circumstances" set out in Rule 40A(a). Neither uniformity nor a substantial precedential issue is threatened and, thus, reconsideration by the full court is not warranted.

A. The Petition Does Not Demonstrate That Uniformity Is Threatened by the Court's Order.

The first ground for en banc review relates to the need to secure or maintain precedential uniformity. Appellants demonstrate no such need here.

i. The Petition Does Not Demonstrate That the Court Misapplied *Mountain View*.

Appellants argue that the Court's Order is at odds with *Mountain View Recreation, Inc. v. Imperial Commercial Cooking Equipment Co.*, 129 Nev. 413, 305 P.3d 881 (2013). This is not so.

In *Mountain View*, the Court held that a "specific factual showing" of witness hardship or inconvenience must be made in support of a forum non conveniens

motion. *Id.* at 419, 305 P.3d at 885. Because the record was "devoid of affidavits from either percipient or expert witnesses **or other evidence** to demonstrate how the witnesses would be inconvenienced," the Court held that the defendant did not make a sufficient factual showing to support its motion. *Id.* at 420, 305 P.3d at 885 (emphasis added).

Appellants *appear* to argue that *Mountain View* precluded the district court in this case from considering any evidence other than affidavits related to witness hardship or inconvenience. But *Mountain View* recognized that the Court should review affidavits "or other evidence." In fact, it expressly contemplates that a party may offer evidence "other" than affidavits in supporting a motion for forum non conveniens. The gravamen of the *Mountain View* decision is that actual admissible evidence—affidavits or otherwise—must be presented to secure dismissal on forum non conveniens grounds; unsupported assertions made by counsel will not suffice.

To be sure, in almost every case, the evidence offered to make a showing of forum non conveniens will consist only of affidavits, as this issue is most often addressed through a motion to dismiss prior to any discovery. This is the rare case where the issue was raised after the parties completed a significant amount of discovery, which allowed Polaris to offer other admissible evidence such as sworn deposition transcripts to support its forum non conveniens motion.

This evidence made clear that all of the events giving rise to Appellants' action occurred outside of Nevada. It also showed that nearly all of the material fact witnesses reside out of state, including: (a) law enforcement personnel who investigated the subject incident; (b) first responders who spoke with and treated Appellants after the subject incident; and (c) key employees of the off-road vehicle rental agency from whom Appellants rented the vehicle involved in the subject incident—employees who interacted with Appellants before and after the subject incident and provided safety instructions related to the subject vehicle. These out-of-state witnesses—unlike the witnesses at issue in *Mountain View*—all reside beyond the subpoena power of Nevada courts. *See Quinn v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 123 Nev. 25, 29, 410 P.3d 984, 987 (2018) ("NRAP 45(b)(2) restricts the service of a subpoena on a nonparty to 'any place within the state.'").

In other words, Polaris made the exact kind of "specific factual showing" required under the Court's decision in *Mountain View*, which appropriately led the district court to dismiss Appellants' action. The district court's conclusions on these issues are entitled to deference. *See, e.g., Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 304-05, 350 P.3d 392, 398 (2015) (finding that the district court did not abuse its discretion by concluding that the ease of bringing out-of-state witnesses and evidence to trial favored dismissal for forum non conveniens).

Although Appellants insist otherwise, they point to no Nevada precedent to support their narrow view of *Mountain View*'s evidentiary requirement. The Court's Order does not deviate in any way from existing precedent or create a conflict between decisions. Therefore, Appellants do not demonstrate any need to review this matter en banc to ensure uniformity of precedent.

ii. The Petition Does Not Demonstrate That the Court Misapplied the *Placer Dome* "Exceptional Circumstances" Standard.

Appellants next contend that the Court misapplied *Placer Dome*'s standard for the "exceptional circumstances" necessary to warrant dismissal on forum non conveniens grounds. In taking this position, Appellants do not so much as provide a cursory mention of the standard for en banc reconsideration under Nevada law. Nor do they offer much in the way of actual argument, choosing instead to primarily quote from the dissenting opinion.

Contrary to Appellants' superficial and largely unsupported contentions, the Court properly applied the "exceptional circumstances" standard when it held that the district court did not abuse its discretion in granting Polaris's motion to dismiss. Under Nevada law, when considering a motion to dismiss for forum non conveniens, if the court finds that an adequate alternative forum exists, "the court must then weigh public and private interest factors to determine whether dismissal is warranted." *Placer Dome,* 131 Nev. at 301, 350 P.3d at 396. Dismissal for forum

non conveniens is then appropriate "in exceptional circumstances when the factors weigh strongly in favor of another forum." *Id.*

In *Placer Dome,* the Court held that the public and private factors weighed strongly in favor of another forum. It did so because (1) the case lacked any genuine connection to Nevada, (2) another jurisdiction's laws would apply, (3) there was limited local interest in the case, (4) no parties or witnesses resided in Nevada, (5) material documents were located outside of Nevada, and (6) compulsory process would be available in the alternative forum. *Id.* at 302–05, 350 P.3d at 396-99.

Here, the district court found that each of these same public and private factors—plus some others, including that the subject vehicle was sold, rented, and driven in Arizona—existed. The district court therefore properly applied *Placer Dome* in determining that the relevant factors weighed heavily in favor of dismissal. The Court's opinion affirming this decision poses no threat to precedential uniformity.

iii. The Petition Does Not Demonstrate That the Court Afforded Appellants' Choice of Forum Lesser Deference.

Appellants also argue that the Court misapplied Nevada law by affording them "less favorable consideration" as out-of-state residents. This argument arises from a simple misreading of the Court's Order. Nowhere in the Court's Order does the Court hold that Appellants' choice of forum is entitled to less deference because it is not their forum of residence. In fact, the Court explicitly stated the opposite:

"[W]e 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." (Ex. A to Petition, Order of Affirmance, at 4 n.3.)

Appellants cannot demonstrate an issue for en banc reconsideration based on a mischaracterization—one that ignores the plain text of the Order. No threat to precedential uniformity can exist concerning the issue of deference because the Court specifically declined to create any precedent on the issue.

B. The Petition Does Not Demonstrate That the Panel's Decision Implicates a Substantial Precedential, Constitutional, or Public Policy Issue.

The second ground for obtaining en banc reconsideration requires a showing that the Court's Order implicates a "substantial precedential, constitutional, or public policy issue." Appellants maintain that the Court's Order satisfies this requirement because it "will affect every litigant facing a forum non conveniens motion in Nevada." (Petition at 2.) They offer no further explanation for this assertion.

In reality, the Court's Order will have minimal impact on Nevada's jurisprudence concerning forum non conveniens. This appeal arises from an atypical set of circumstances where the parties engaged in discovery prior to Polaris's motion for forum non conveniens, which allowed Polaris to offer **more** than just affidavits in support of the motion—including, in addition to an affidavit, testimony and documentary evidence for the Court to consider. Such "other evidence" is expressly

contemplated in *Mountain View* even though it is not often available at the motion to dismiss stage. Moreover, *Mountain View* does not stand for the proposition that the district court cannot consider additional admissible evidence when considering a motion for forum non conveniens. Consequently, the Court's Order will have minimal—rather than "substantial"—precedential impact in this respect.

Appellants do not articulate how the two other issues addressed in their Petition—relating to the *Placer Dome* standard and the level of deference due an out-of-state resident's forum choice—implicate a substantial issue of any kind. Again, the Court properly applied *Placer Dome* to the specific facts of this case. The correct application of precedent does not implicate any substantial interest warranting en banc reconsideration. And the Court made no decision on the issue of forum deference—it explicitly declined to address that issue. As a result, as it relates to these two issues, the Order establishes no precedent at all, much less substantially important precedent.

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III. CONCLUSION

For the reasons set forth above, Appellants' Petition fails to satisfy the requirements for en banc review under Rule 40A of the Nevada Rules of Appellate Procedure. Polaris respectfully asks that the Court deny the Petition.

DATED this 21st day of July 2022.

PISANELLI BICE PLLC

By: /s/ Jordan T. Smith
Debra L. Spinelli, Esq., Bar No. 9695
Jordan T. Smith, Esq., Bar No. 12097
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondent

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) as this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this brief and it complies with the page- or type-volume limitations of NRAP 40A(d) 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 approximately 2,002 words.

Finally, I hereby certify that 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 that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the

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

DATED this 21st day of July 2022.

PISANELLI BICE PLLC

By: /s/ Jordan T. Smith
Debra L. Spinelli, Esq., Bar No. 9695
Jordan T. Smith, Esq., Bar No. 12097
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of PISANELLI BICE PLLC and that, on the 21st day of July 2022, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **Response to Petition for En Banc Review** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex) to the following:

Chad A. Bowers, Esq.
CHAD A. BOWERS, LTD.
3202 West Charleston Blvd.
Las Vegas, NV 89102

Kyle Wayne Farrar, Esq.
KASTER, LYNCH, FARRAR & BALL, LLP
1117 Herkimer Strett
Houston, TX 77008

Attorneys for Appellants

/s/ Cinda Towne
An employee of PISANELLI BICE PLLC