IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 86559
District Court Case No. CV22-02015

David McNeely and 5 Alpha Industries, LLC,
Petitioners,

v.

The Second Judicial District Court, State of Nevada, Washoe County, and the Honorable David A. Hardy, District Court Judge, Dept. 15
Respondents,

and

Hillary Schieve; Vaughn Hartung; and John Doe
Real Parties in Interest.

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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INTRODUCTION

The writ petition showed that confidential information shared between private investigators and clients that falls within the scope of NRS 648.200, including the identity of a client, warrants further protection than that provided by the guardrails of relevancy and proportionality. The petition further showed that the identity of the Confidential Client at issue qualifies as a trade secret under Nevada law justifying provisional protection under NRS 49.325 and NRS 600A.070. By concluding to the contrary, the district court erred.

In response, Real Parties in Interest Hillary Schieve and Vaughn Hartung ("Respondents") do not oppose that the writ petition should be entertained on the merits. Instead, they argue that the district court got it right by affirming the discovery commissioner's recommendation.

Respondents prop their arguments up on self-serving characterizations of the allegations and law underlying the merits of this action. Yet when that rhetoric is stripped away and the focus is put back on what the legal test should be, the privacy and confidentiality expectations inherent in and critical to the private investigator-client relationship and the policy considerations underlying the industry justify the relief sought by the writ petition.

The relief requested by the writ petition would not foreclose a plaintiff's right to potentially assert claims against a tortfeasor or obstruct the interests of justice.

The petition recognizes that the information at issue *may* ultimately be discoverable. The petition merely seeks to impose a standard that does not allow a plaintiff to trample the expectations of privacy and confidentiality inherent in and critical to the private investigator-client relationship based on the mere filing of a complaint that can survive Nevada's liberal motion to dismiss standard. Said another way, the information should not be "had for the mere asking." *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994).

ARGUMENT

A. Respondents Do Not Dispute That The Writ Petition Should Be Entertained On The Merits.

The writ petition explained that the circumstances warrant consideration on the merits. (*See* WP at 8-9).[1] Respondents do not substantively suggest otherwise. (*See* AP at 6-7). For the reasons stated in the writ petition, the McNeely Defendants respectfully request that the Court exercise its discretion to consider the petition on the merits.

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[1] "WP" refers to the Petition for Writ of Prohibition or Mandamus submitted by Petitioners David McNeely and 5 Alpha Industries, LLC (collectively "McNeely Defendants"). "AP" refers to the Answer to Petition for Writ of Prohibition or Mandamus filed by Respondents.

B. Information Within The Scope Of NRS 648.200 Warrants Protection Beyond That Afforded It By NRCP 26(b).

The writ petition showed that information within the scope of NRS 648.200 should be discoverable subject to a heightened showing or balancing test, consistent with how this Court has treated other non-privileged information that implicated special privacy and confidentiality concerns, such as personal financial information.

In response, Respondents raise several arguments why such a test should not be adopted, or, alternatively, if it is, why this Court should apply it in the first instance and determine that disclosure is appropriate at this time. Respondents' arguments are unavailing.

1. Respondents first emphasize that there is no private investigator-client privilege in Nevada. (*See* AP at 13). Yet the writ petition did not hide from this fact. It recognized the same and analogized to cases where the Court imposed a heightened showing on the discovery of information that likewise was not subject to a privilege. Notably, Respondents do not attempt to distinguish the reasoning of those cases from the circumstances presented here.

2. Respondents argue that "NRS 648.200 was intended to protect against misconduct by private investigators, not to effect an injustice by shielding their clients." (AP at 14). This argument is a red herring. The writ petition did not argue that NRS 648.200 statutorily demanded a heightened showing for discoverability. The writ petition argued that the expectations created by NRS 648.200 for

information that falls within its scope combined with the commonsense reality that a client hiring a private investigator expects confidentiality and policy considerations underlying the industry warrants adoption of the "some factual basis" standard from *Hetter* or a balancing test. (*See* WP at 13-17). Indeed, the statute makes it "unlawful" for a private investigator to "divulge to anyone, except as he or she may be so required by law to do, any information acquired by him or her except at the direction of the employer or client for whom the information was obtained." NRS 648.200(1). Thus, while the statute may serve to "protect against misconduct," it also creates the confidentiality and privacy expectations at issue. In the cases analogized to in the writ petition, there also was no statute that demanded application of a heightened showing; but the Court found it was appropriate regardless. So too here.

None of the three cases cited by Respondents undermine this conclusion. Respondents point to *DeChant*, *Bryant*, and *Flynn*. (*See* AP at 14-16). But the issue in *DeChant* was merely whether the district court erred by concluding that NRS 648.200 created an absolute privilege to information within its scope. 116 Nev. at 920, 10 P.3d at 109. This Court said no—a holding that would go undisturbed by the relief requested in the writ petition. *Id.* In *Bryant*, the Court merely found that a private investigator violated NRS 648.200 by providing confidential information within its scope to a non-client. *Bryant v. Priv. Investigators' Licensing Bd.*, 92 Nev. 278, 280, 549 P.2d 327, 328 (1976). This holding has no impact on the relief

requested. And in *Flynn*, the California court merely stated with respect to a similarly worded statute that it was "inconceivable" that the "Legislature intended to enact a privilege whereby the licensee could refuse to identify a client or employer thereby potentially shielding the employer from any responsibility or liability" without doing so "by explicit language." *Flynn v. Superior Ct.*, 67 Cal. Rptr. 2d 491, 494 (Cal. App. 1997). Here, however, McNeely Defendants are not arguing for such an absolute privilege.

3. Respondents also proclaim that "[a]s Nevada does not have a private investigator privilege *and* the Supreme Court expressly held in *DeChant* that such information could be disclosed in litigation, it would be entirely unreasonable for the industry to expect confidentiality." (AP at 19). This argument falls flat in the face of the language of NRS 648.200 and commonsense. Nevada also does not have a tax return privilege and such information can be ordered disclosed in litigation. Still, the Court recognized that such financial information should not be "had for the mere asking." *Hetter*, 110 Nev. at 520, 874 P.2d at 766. The confidentiality expectations intrinsic to and necessary for the private investigator-client relationship cannot be swept away so easily.

4. Respondents appear to contend that the proportionality requirement of NRCP 26(b)(1) serves the same purpose as the "some factual basis" test from *Hetter* or a balancing test and that it would be "counterproductive" to impose either. (*See*

AP at 17). The proportionality test of Rule 26(b)(1), however, does not serve the same purpose. By its plain terms, proportionality looks to whether the discovery is appropriate from an expense and burden standpoint. If relevant, the disclosure of a client's identity, a mere name, would always satisfy the proportionality test.

5. Respondents make a slippery slope argument. They claim that "[w]hen important information is not privileged, it should be disclosed without burdensome balancing analysis, otherwise every profession or business could claim a similar requirement." (AP at 17). The same could be said for the heightened standard imposed on discovery of financial information, as compared to other types of information. Further, undersigned is not aware of any other profession that does not have a statutory privilege, such as lawyers, accountants, psychologists, doctors, counselors, social workers, clergy, or journalist, *see* NRS Chapter 49, that feature the same confidentiality and privacy considerations as the private investigator-client relationship and is subject to a statute that makes disclosure of information divulged within that relationship "unlawful." To the extent one exists, it too should likely be afforded the same heightened showing. The vague slippery slope to which Respondents cling should be of no concern.

6. Respondents also argue that the "general rule is that identity of an attorney's clients is not a matter within the attorney-client privilege." (AP at 17) (citation omitted). While true, Respondents ignore that, regardless of privilege, the identity

of an attorney's client is confidential information under NRPC 1.6(a). *See* Am Bar Ass'n Formal Op. 480, at 2 (Mar. 6, 2018) ("Even client identity is protected under Model Rule 1.6."). They further ignore that privilege applies to client identity where "a client's identity is sufficiently intertwined with the client's confidences," or where disclosing the name of the client "would reveal its motive in seeking representation." *See Cause of Action Inst. v. U.S. Dep't of Just.*, 330 F. Supp. 3d 336, 350 (D.D.C. 2018) (collecting cases). Here, the identity of a client that hires a private investigator falls within that reasoning as much as the identity of a client that hires an attorney. To be clear, the contention is not that a privilege applies to the identity of a client that hires a private investigator, but that the circumstances of retention warrant confidentiality in the same manner that would warrant confidentiality in the context of an attorney-client relationship. The general rule relied on by Respondents does not help their argument.

7. Lastly, Respondents ask that this Court decide in the first instance whether the McNeely Defendants have provided the Court "with any basis to find that their interest in concealing the identity of one of their clients outweighs the interests of Respondents in knowing the identity of a party that wronged them." (AP at 18). The Court should not engage in this analysis. Rather, McNeely Defendants respectfully submit that the Court should impose a heightened standard, as requested in the writ petition, and then remand the matter back to the district court to apply that standard

based on the information available before the writ petition was filed and that has developed since.

In sum, despite the arguments raised by Respondents, the bottom-line conclusion from the writ petition holds true. "The artful pleading of claims that can survive Nevada's liberal notice pleading standard and a showing of relevance and proportionality should not be all that is required to justify such discovery, particularly in a pre-discovery procedural posture, as is the case here." (WP at 19).

C. The Identity Of The Confidential Client Warrants Protection As A Trade Secret.

The writ petition showed that the district court's conclusion that the identity of the Confidential Client *cannot* qualify as a trade secret was erroneous because the identity of the Confidential Client can and does qualify as a trade secret under Nevada law. (*See* WP at 19-25). The petition further showed that the district court abused its discretion by concluding that provisional protection for the trade secret would "work an injustice" because it would "create unfettered immunity," explaining that only absolute protection could conceivably lead to such a result and the McNeely Defendants' never requested the same. (*See id.* at 25-28).

In response, Respondents point out that the existence of a trade secret "'is a question for the finder of fact.'" (AP at 20) (citing *Frantz v. Johnson,* 116 Nev. 455, 466, 999 P.2d 351, 358 (2000)). But the district court's conclusion that the "identity of a private investigator's single client" cannot fit within the definition of a trade

secret is not a factual conclusion entitled to deference. (1-PA-226). It would be different if the conclusion was that the identity of a private investigator's single client can fit, but that this client identity does not. But that is not what is at issue.

As to whether the identity can qualify as a trade secret, Respondents appear to focus their attention on the first of the two criteria for determining whether information qualifies as a trade secret, namely whether the information "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public." NRS 600A.030(5)(a)(1).

Respondents first challenge the premise of the argument in the petition, contending that "the identity of a private investigator's client is [not] confidential in Nevada." (AP at 19). As explained above, it is. But, regardless, as it relates to the test for trade secret protection, there is no question that the identity at issue here is confidential in that it is "not [ ] readily ascertainable by proper means by the public." 600A.030(5)(a)(1).

Respondents also point to case law which provides that client lists generally only qualify for trade secret protection if they were the product of great expense and effort. (*See* AP at 20). But, as explained in the writ petition, there is no such absolute limitation imposed by NRS 600A.030(5). In fact, this Court has previously recognized that a single client can fit within the definition of a trade secret,

depending on the secrecy. (*See* WP at 21) (citing *Finkel v. Cashman Pro., Inc.*, 128 Nev. 68, 75, n. 2, 270 P.3d 1259, 1264, n. 2 (2012)).

Moreover, the reasoning of those cases is inapposite to the nature of the "independent economic value" at issue here. In those cases, the independent economic value derived from a company having a secret list of customers to whom they can sell or market their product that another company does not have. Here, the independent economic value derives from a private investigator being able to maintain the secrecy of the identity of a client, so as to keep that client relationship and form others; not from an anti-recruitment perspective, but from a performance and satisfying expectations perspective. Clients hire certain professional private investigators for that reason, as opposed to hiring another private investigator or just a person willing to do the same work.

Respondents argue that McNeely Defendants' independent economic value argument is wrong because a Court has authority to order any private investigator to disclose the identity of their clients equally "resulting in no competitive advantage." (AP at 21-22). But the same could be said in other contexts. A court also has authority to order any hedge fund, search engine, or food company to disclose their secret trading algorithm, secret search algorithm, or secret recipe—the thing that makes their customers and clients select them. But a Court's ability to do so does

not defeat the independent economic value those companies obtain from that information not being readily ascertainable by proper means by the public.

Lastly, Respondents argue that McNeely Defendants cannot "totally shield their client from liability by invoking trade secret protection." (AP at 22). But McNeely Defendants did not request such relief. The petition requested that the district court be ordered to consider what form of provisional relief would best serve the interests of justice, consistent with NRS 49.325 and NRS 600A.070. The provisional relief *could* result in non-disclosure. For instance, if disclosure is delayed for targeted initial discovery, which then shows that Respondents' claims fail as a matter of law with or without the identity of the Confidential Client, non-disclosure could result. But the trade secret protection would not necessarily result in non-disclosure, just as is the case with any trade secret that is relevant to litigation.

D. The Standard Of Review Should Be Corrected And Clarified.

The district court's decision to apply a "clearly erroneous" standard of review instead of a "clearly erroneous or contrary to law" standard or an abuse of discretion standard is pertinent. McNeely Defendants candidly recognize that this is not a case where the district court explicitly found that it disagreed with, for example, the discovery commissioner's interpretation of a case or statute, but that it concluded that it could not reverse the same because the interpretation was not clearly erroneous. The issue is not that clean. Nevertheless, the deference does seem to have

crept into the district court's review of the pure legal issues raised in the objection. (*See* 1-PA-227) ("This Court *cannot* conclude Commissioner Ayer's recommendation is *clearly erroneous*; similarly, this Court does not have a "definite and firm conviction that a mistake was made.") (emphasis added).

This was not a case of the phrase "contrary to law" being merely "omitted," as Respondents suggest. (AP at 11). The proper standard of review was a point of discussion at the hearing. (*See* Supplement to Petitioner's Appendix at 254-60). And as depicted above, the district court reemphasized the standard it applied in the order. (1-PA-227). The district court rightly wanted to be able to rely on decisions made by the discovery commissioner—a position with which the McNeely Defendants and Respondents agree. But respectfully that deference can only go so far.

For these reasons combined with the recurring and elusive nature of this issue—under what standard does a district court review a discovery commissioner's recommendation—correction and clarification would be appropriate.

E. The Amicus Brief Submitted In Support Of Respondents Should Have No Impact On the Issues.

Following Respondents' Answering Brief, Amicus Curiae Rost C. Olsen submitted a Motion for Leave to File Amicus Brief. Petitioner John Doe opposed the motion. McNeely Defendants agree that the motion should not be granted for the reasons set forth by John Doe.

To the extent that the Court entertains the Amicus Brief, its hyperbolic arguments are misplaced. The amicus curiae is concerned that a decision may erode his rights as a public employee. But the imposition of a "some factual basis" heightened showing or balancing test for the discovery of information within the scope of NRS 648.200 would not erode his rights. Likewise, the conclusion that the identity of the Confidential Client can and does constitute a trade secret under Nevada law and warrants provisional protection consistent with the interests of justice also would not erode his rights.

CONCLUSION

For the foregoing reasons, the McNeely Defendants respectfully request that the Court grant the writ petition and issue the requested writ of prohibition or mandamus.

DATED: August 4, 2023

/s/ Ryan T. Gormley
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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: August 4, 2023

/s/ Ryan T. Gormley
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-sized font Times New Roman.

2. I further certify that this petition complies with the type-volume limitations of NRAP 21(d) because it contains 3,010 words.

3. I further certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(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: August 4, 2023

/s/ Ryan T. Gormley
Attorney for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on August 4, 2023, I served the foregoing **Reply in Support of Petition for Writ of Prohibition or Mandamus** on the parties in said case by U.S. Mail, first-class postage prepaid, as follows:

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