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Okada v. Eighth Judicial Dist. Court, 134 Nev. Adv. Op. 2 (Jan. 11, 2018) (en banc)

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Okada v. Eighth Judicial Dist. Court,
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GAMING LAW: STATUTORY INTERPRETATION

Summary

The Court determined that application of NRS § 463.120(6), as enacted in 2017 through Senate Bill 376, which protects certain information and data provided to the gaming authorities, does not apply to information requested before the effective date of the statute. From the plain language of the act that the privilege applies to "any request made on or after the effective date of this act," the Court concluded that the privilege applies prospectively only and does not apply to any request made before the effective date of this act.

Background

The writ petition arose from litigation between real party in interest Wynn Resorts, Limited, and petitioners Kazuo Okada, Aruze USA, Inc., and Universal Entertainment Corporation (collectively the "Okada Parties), pertaining to the removal of Okada from Wynn Resorts' board of directors and the forced redemption of his ownership in stock of Wynn resorts in February 2012. The board of directors decided to redeem all of the stock shares owned by Okada based on a report of an investigation into Okada's alleged misconduct. Following this, Wynn Resorts filed a complaint against the Okada Parties for declaratory belief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. The Okada Parties filed counterclaims seeking declaratory relief and a permanent injunction rescinding the redemption of the stock and alleged claims for breach of contract, breach of Wynn Resort's articles of incorporation, and various other tort-based causes of action.

In August 2014, the Okada Parties served on Wynn Resorts a request for production of documents concerning communications by Wynn Resorts with the Nevada Gaming Control Board (NGCB) about Okada to show Wynn Resorts' justification for the redemption was false. In February 2016, the Okada Parties deposed Wynn Resorts' director Robert Miller and sought details regarding the communications he had with the NGCB but Miller's counsel claimed the information was privileged and instructed Miller not to provide specifics about the communications. Miller's deposition was not completed, and in September 2017, the Okada Parties filed a motion to compel Miller's testimony and for production of documents regarding Miller's pre-redemption communications with the NGCB.

In opposition, Wynn Resorts claimed the discovery was protected by the "absolute privilege" in NRS 463.120(6), which grants licensees and applicants the privilege to refuse to disclose any information or data communicated to the NGCB in connection with its regulatory, investigative, or enforcement authority. The Okada Parties argued the privilege did not apply because the requests for testimony and documents had been made over a year before the statute's effective date of June 12, 2017, and the statute was not retroactive. The district court held a hearing on the motion to compel by the Okada Parties and denied it, determining that NRS 463.120(6) applied to the motion to compel because the motion was being heard after the effective date of the statute, and that the documents and testimony were confidential and privileged. The Okada Parties

[1] By Paloma M. Guerrero.

then filed this petition challenging the district court's order denying the motion to compel discovery.

Discussion

Consideration of a writ petition may be appropriate "when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition."[2] Discretion has been exercised before to review a discovery order where the district court failed to apply a privilege and required the production of privileged information.[3] This petition presents the opposite situation—the challenged order applied a privilege to prevent the disclosure of allegedly privileged information. Nevertheless, the Court concluded the circumstances of this case warranted a departure from usual policy because the discovery inquiries were made early in the litigation and were "reasonably calculated to lead to the discovery of admissible evidence"[4] on an important issue in this case. The consideration of the writ petition is necessary so that the discovery dispute may be addressed in a timely manner and this petition presents the Court with the first opportunity to consider the application of NRS 463.120(6) which could potentially affect litigants statewide.

Where a statute is clear on its face, the Court must give effect to the plain language without resorting to rules of statutory construction.[5] The gaming privilege codified in NRS 463.120(6) reads:

> Notwithstanding any other provision of state law, if any applicant or licensee provides or communicates any information and data to an agent or employee of the Board of Commission in connection with its regulatory, investigative or enforcement authority:
> (a) All such information and data are confidential and privileged and the confidentiality and privilege are not waived if the information and data are shared or have been shared with an authorized agent of any agency of the United States Government, any state or any political subdivision of a state or the government of any foreign country in connection with its regulatory, investigative, or enforcement authority, regardless of whether such information and data are shared or have been shared either before or after being provided or communicated to an agent or employee of the Board or Commission; and
> (b) The applicant or licensee has privilege to refuse to disclose, and to prevent any other person or governmental agent, employee or agency from disclosing, the privileged information and data.[6]

Though not included in the codified statute, language in Section 2 of SB 376 expressly provides that the privilege is to be applied prospectively from the act's effective date:

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[2] Nev. Yellow Cab Corp. v Eighth Judicial Dist. Court, 132 Nev. Adv. Op. 77, 383 P.3d 246, 248 (2016).
[3] *See, e.g.*, Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court, 127 Nev. 167, 171–72, 252 P.3d 676, 679 (2011).
[4] NEV. R. CIV. P. 26(b)(1).
[5] Jones v. Nev. State Bd. Of Med. Exam'rs, 131 Nev. Adv. Op. 4, 342 P.3d 50, 52 (2015).
[6] NEV. REV. STAT. § 463.120(6) (2017).

> The confidentiality and privilege set forth in the amendatory provisions of this act *apply to any request made on or after the effective date of this act* to obtain any information or data, as defined in section 1.4 of this act, that is or has been provided or communicated by an applicant or licensee to an agent or employee of the Nevada Gaming Control Board or the Nevada Gaming Commission in connection with its regulatory, investigative or enforcement authority.[7]

The parties' disagreement lies in their definition of the meaning of "any request." The Okada Parties interpretation includes any discovery request while the Wynn Resorts argues "any request" means any attempt to obtain privileged information which would bar the September 2017 motion to compel by Okada Parties.

The Court looked at dictionary definitions and the common understanding of discovery requests to understand the word "request" to include a request for discovery as the Okada Parties made. Wynn Resorts argues the sole "request" at issue is the motion to compel discovery which was filed after the effective date of NRS 463.120(6). The Court rejected Wynn Resorts' assertion because a motion to compel discovery is not a separate, independent "request but an application to the court for an order compelling cooperation with a preexisting "request."

Conclusion

A plain language interpretation of NRS. 463.120(6) makes it clear the gaming privilege does not apply to information that was requested through discovery before the statute's effective date of June 12, 2017. Thus, Okeda Parties request through discovery is not barred by the privilege invoked in NRS. 463.120(6). So, the Court granted the writ petition and directed the court clerk to issue a writ of mandamus instructing the district court to set aside the order denying the motion to compel testimony and documents relating to NGCB communications.

[7] 2017 Nev. Stat., ch. 567, § 2, at 4066 (emphasis added by the Court).