

Scholarly Commons @ UNLV Law

Nevada Supreme Court Summaries

Law Journals

5-14-2020

Venetian Casino v. Eighth Jud. Dist. Ct. (Sekera), 136 Nev. Adv. Op. 26 (May 14, 2020)

Brendon N. Brandão

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.

CIVIL PROCEDURE: DISCOVERY – PROPORTIONALITY, RELEVANCY

Summary

The Nevada Court of Appeals determined that the recent amendments to the Nevada Rules of Civil Procedure require district courts to consider proportionality in addition to relevancy when determining the scope of discovery under NRCP 26(b)(1). The Court also provided a framework for district courts to use when determining whether a protective order should be issued for good cause under NRCP 26(c)(1).

Background

Plaintiff Joyce Sekera allegedly slipped and fell on the Venetian Casino Resort’s marble flooring and was seriously injured. Sekera requested on discovery that the Venetian produce incident reports relating to other slip and falls for the three years preceding her injury. In response, the Venetian provided 64 incident reports that disclosed the date, time, and circumstances of each incident but redacted the personal information of injured parties. Sekera insisted on receiving the unredacted reports in order to support her claim that it was foreseeable that future patrons could slip and fall and that the Venetian was on notice of a dangerous condition. Further, Sekera wanted to contact potential witnesses to gather information to show that she was not comparatively negligent. Sekera’s counsel disseminated all 64 redacted reports to other plaintiffs’ counsel in different slip and fall cases who were engaged in litigation against the Venetian.

The Venetian moved for a protective order to keep the redacted reports, which Sekera opposed. The district court sided with Sekera, thereby denying the motion for a protective order. The district court concluded (1) there was no legal basis to preclude Sekera from knowing the identity of the persons involved in the prior incidents, as this information was relevant discovery material, and (2) there was no legal basis to prevent the disclosure of unredacted reports to third parties not involved in the Sekera litigation. The Venetian filed a writ petition.

Discussion

Writ consideration is appropriate

The Nevada Court of Appeals has discretion as to whether to entertain a petition for a writ of mandamus.² A writ is issued to compel the performance of an act but is not appropriate where a “plain, speedy, and adequate remedy” at law exists.³ The Court here stated that if the discovery order had remained in effect, that no remedy would exist to retract the Venetian’s guests’ private information. As such, the Court decided to entertain the merits of the writ petition.

¹ By Brendon N. Brandão.

² *Quinn v. Eighth Jud. Dist. Ct.*, 134 Nev. 25, 28, 410 P.3d 984, 987 (2018).

³ *Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013).

The district court should have considered proportionality under NRCP 26(b)(1)

The Venetian argued that the court abused its discretion when it did not assess proportionality under NRCP 26(b)(1) prior to discovery.⁴ Sekera argued that other courts have found the information at odds here to be discoverable under rules similar to NRCP 26(b)(1).⁵ The Court agreed with the Venetian.

The Court recognized that discovery matters are within the district court's sound discretion and that district court's rulings regarding discovery are not to be disturbed unless it has clearly abused its discretion. In this case, the district court considered only relevance as the legal basis to deny the protective order. The court stated at the hearing that the redacted information was relevant to show notice and foreseeability. The court failed to undertake any analysis of proportionality as required by the new rule's amendment, which added a consideration of proportionality.⁶

Further, the court noted that the Federal Rule of Civil Procedure 26(b)(1) has also been amended to require the consideration of proportionality in addition to relevance, when determining the scope of discovery.⁷ When FRCP 26(b)(1) was amended, federal district courts noted that relevance was no longer enough for allowing discovery.⁸

NRCP 26(b)(1) outlines several factors for district courts to consider regarding proportionality.⁹ Upon consideration of these factors a court must limit proposed discovery that it determines is not proportional to the needs of the case. Here, the district court abused its discretion when it failed to analyze proportionality in light of the revisions to NRCP 26(b)(1) and make findings related to proportionality.

The district court should have determined whether the Venetian demonstrated good cause for a protective order under NRCP 26(c)(1)

The Venetian sought a protective order under NRCP 26(c)(1), arguing that it had good cause. The district court determined that there was no legal basis for this. The Court of Appeals disagreed with the district court and concluded that the district court abused its discretion when it determined that it had no legal basis to protect the Venetian's guests' information without first considering whether the Venetian demonstrated good cause for the order based on the individual circumstances of the case.

NRCP 26(c)(1) articulates the standard for protective orders, stating that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment,

⁴ See Nev. R. Civ. P. 26(b)(1).

⁵ The Court was unpersuaded by the authority cited by Sekera because the cases do not consider proportionality, as required by the newly adopted amendments to Nev. R. Civ. P. 26(b)(1).

⁶ See Nev. R. Civ. P. 26(b)(1).

⁷ See Fed. R. Civ. P. 26(b)(1).

⁸ *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) ("Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case."); *Samsung Elecs. Am., Inc. v. Yang Kun Chung*, 321 F.R.D. 250, 279 (N.D. Tex. 2017) ("[D]iscoverable matter must be both relevant and proportional to the needs of the case—which are related but distinct requirements.").

⁹ See Nev. R. Civ. P. 26(b)(1).

oppression, or undue burden or expense”¹⁰ The United States Court of Appeals for the Ninth Circuit has articulated a three-part test for conducting a good-cause analysis under FRCP 26(c).¹¹

First, the district court must determine if particularized harm would occur due to public disclosure of the information.¹²

Second, if particular harm would occur, the court must “balance the public and private interests to decide whether . . . a protective order is necessary.”¹³ To help district courts balance the private and public interests, the Ninth Circuit directed federal district courts to utilize a nonexhaustive list of factors it provided. Among the factors listed by the Ninth Circuit, this Court found the following factors relevant to this case: (1) whether disclosure will violate any privacy interests; (2) whether disclosure of the information will cause a party embarrassment, and; (3) whether the sharing of information among litigants will promote fairness and efficiency.

Finally, even if the factors balance in favor of protecting the discovery material, the district “court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure.”¹⁴

The Nevada Court of Appeals adopted this framework and directed district courts to use it along with applicable factors, and any other relevant factors, when considering whether parties have shown good cause under NRCP 26(c)(1).

Conclusion

The Court held that the district court abused its discretion in two ways when it denied the Venetian’s motion for a protective order. First, it focused solely on relevancy and did not consider proportionality as required under the amendments to NRCP 26(b)(1). Second, the district court did not conduct a good-cause analysis as required by NRCP 26(c)(1).

Accordingly, the Court granted the Venetian’s petition and issued a writ of mandamus requiring that the district court’s order denying the Venetian’s motion for a protective order be vacated. Further, the Court directed the district court to conduct further proceedings to determine whether disclosure of the unredacted reports is relevant and proportional under NRCP 26(b)(1). If disclosure is found to be proper, the district court is directed to conduct a good-cause analysis under NRCP(c)(1), applying the framework provided to determine whether the Venetian has shown good cause for a protective order.

¹⁰ See Nev. R. Civ. P. 26(c)(1).

¹¹ *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011).

¹² *Id.* at 424.

¹³ *Id.*

¹⁴ *Id.* at 425.