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The State of Nevada, Department of Taxation v. The Eighth Judicial District Court of the State of Nevada, 136 Nev. Adv. Op. 42 (July 9, 2020)

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CIVIL PROCEDURE: “POSSESSION, CUSTODY, OR CONTROL” OF NRCP 16.1

Summary

The Court considered whether under NRCP 16.1 a government entity has “possession, custody, or control” over the cellphone data of former workers hired through a temporary employment agency. The Court held that a party has “possession, custody, or control” of such information if the party has either actual possession of the data or the legal right to obtain the data.

Background

The State of Nevada Department of Taxation licenses and regulates Nevada’s marijuana businesses. Pursuant to NRS 333.700, the Department entered into a contract with Manpower, an independent contractor and temporary employment agency.² The Department hired and trained eight temporary workers from Manpower. The contract provided that neither the independent contractor nor its employees, agents, or representatives would be considered agents, representatives, or employees of the State of Nevada.

After unsuccessfully applying for recreational marijuana establishment licenses in several jurisdictions within the State, Nevada Wellness Center, LLC, brought suit against the Department for allegedly using unlawful and unconstitutional application procedures in awarding licenses. Nevada Wellness moved the Eighth Judicial District Court for an order directing the Department to preserve relevant information electronically stored in computers, servers, and/or cell phones. The discovery commissioner clarified that this order included the cell phones of the workers hired through Manpower.

The Department objected, arguing that it had no control over the workers hired through the independent contractor, Manpower, and therefore could not subject these workers to the discovery order. The Eighth Judicial District Court denied the Department’s objection and granted Nevada Wellness’s motion to compel the production of cell phone data from the Manpower workers. Upon a petition to the Nevada Supreme Court for a writ of prohibition or mandamus barring enforcement of the District Court’s ruling, the Department maintains that it had no duty to seize, duplicate, or produce the cellphone data of the Manpower workers because it lacked “possession, custody, or control” over their phones pursuant to NRCP 16.1.

Discussion

First, the Court explained its role in adjudicating on a matter usually reserved for the discretion of the district court. While discovery matters are entrusted to the sound discretion of the district court, the Nevada Supreme Court will intervene when the challenged discovery order would cause irreparable harm, or where an important issue of law needs clarification as a matter of public policy. Since the Nevada Supreme Court has yet to define “possession, custody, or control” within the context of the Nevada Rules of Civil Procedure, and because diverging federal

¹ By Luis Montanez

² NRS 333.700 permits a state agency to engage the services of an independent contractor under certain circumstances, subject to the approval by the Board of Examiners.

authority on this issue risks inconsistent results, the Nevada Supreme Court concluded that it needed to intervene and exercise its discretion on this issue.

Because the provision in question mirrors its federal counterpart, the Nevada Supreme Court turned to federal authority for guidance. The Court explained that federal courts employ two distinct standards when deciding whether a party has “possession, custody, or control” within the context of the Federal Rules of Civil Procedure. First, some courts conclude that a party has “possession, custody, or control” over documents, physical or electronic, when the party has actual possession of or a legal right to obtain the same. Other federal jurisdictions interpret “possession, custody, or control” as mandating that a party produce documents—physical or electronic—if a party has actual possession of the documents or the practical ability to produce them, even when no legal right to obtain such documents exists.

The Nevada Supreme Court was persuaded by federal jurisdictions that use the *legal control* standard. Under this standard, the Nevada Supreme Court defined “possession, custody, or control” in the context of the Nevada Rules of Civil Procedure to mean either actual possession of documents or the “legal control,” or legal right, to obtain such documents. The Court gave three justifications for their adoption of the legal control standard. First, the Court explained that it was bound by their decision in *Leven*³ and thus chose the legal control test for its superior propensity to prevent unreasonable results. Second, the Court agreed with the Ninth Circuit Court of Appeals that mandating a party to produce documents that it has no legal right to obtain will often produce ineffectual results, because the party may not have a certain method of obtaining such documents. Finally, the Court emphasized that the Nevada Rules of Civil Procedure provide a mechanism for obtaining documents from a nonparty and that these mechanisms also grant nonparties certain protections⁴.

Using the legal control standard, the Court had to determine whether the Department had the legal right to seize and copy the cellphone data of the Manpower workers. The Department argued that it did not because (1) its contract with Manpower explicitly stated that neither Manpower nor its employees, agents, or representatives shall be considered employees, agents or representatives of the state and (2) because the district court discovery order would force the Department to seize the personal property of a nonparty, impermissibly sidestepping the procedural protections afforded to nonparties subject to a subpoena in NRCP 45. While Nevada Wellness offered a competing interpretation of the contract and also relied on a previous Nevada Supreme Court case, the Court determined that both of those arguments were misguided. Accordingly, the Court held that the cellphone data of the Manpower workers was outside of the Department’s “possession, custody, or control” because the Department had no legal right to obtain that data and that the district court exceeded its authority when it ordered the Department to produce such data.

Conclusion

The Court granted the Department’s petition and vacated the district court’s order granting Nevada Wellness’ motion to compel.

³ See *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (explaining that “when construing an ambiguous statutory provision,” a statute’s language must be read to produce reasonable results).

⁴ NRCP 34(c) (“As provided in Rule 45, a nonparty may be compelled to produce documents, electronically stored information, and tangible things or to permit an inspection.”). NRCP 45 provides nonparties subject to a subpoena the power to stop or modify the subpoena if it unduly burdens the nonparty. NRCP 45(c)(3)(A)(iv).