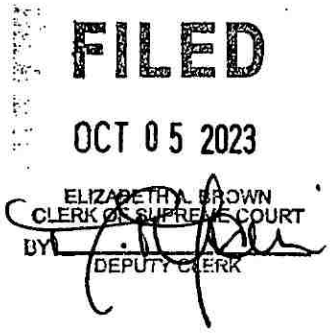
IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL, INC.; KEITH MOYER; GLENN COOK; ANASTASIA HENDRIX; BRIANA ERICKSON; AND ARTHUR KANE,
Appellants,
vs.
THE STATE OF NEVADA; ROBERT TELLES; AND LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Respondents.

No. 85553



ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dissolving a preliminary injunction in an action seeking the return and/or protection of certain property. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

FACTS

After the murder of Jeff German, a reporter working for appellants (collectively referred to as the Review-Journal), respondent Las Vegas Metropolitan Police Department (LVMPD), obtained and executed a search warrant permitting the seizure of numerous electronic devices and other property belonging to German. The Review-Journal later filed a complaint under NRS 179.085 seeking the return of the seized devices and any other relevant property, claiming that any journalistic information the devices contained or that LVMPD otherwise seized was not subject to disclosure due to various journalistic privileges and must be returned to the Review-Journal. The district court initially granted a preliminary

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injunction that prevented LVMPD and respondent the State of Nevada (collectively Metro) from inspecting, searching, or reviewing any information on the seized devices that might otherwise be subject to a journalistic privilege. On Metro's motion the district court later dissolved that injunction and put in place a search protocol allowing employees of LVMPD and the Clark County District Attorney's office to first review the materials on any seized devices for those relevant to the criminal prosecution, and to thereafter provide the Review-Journal imaged copies of any materials that a reasonable person would understand may constitute journalistic materials for the Review-Journal to assert any claimed privilege. In doing so, the district court also rejected the Review-Journal's and the defendant in the related criminal trial, respondent Robert Telles', joint motion for a different search protocol order. The Review-Journal now appeals that decision. *See* NRAP 3A(b)(3) (making an order dissolving an injunction independently appealable).[1]

[1]We reject Metro's argument that the order is not appealable. Even if we considered the search protocol as separate from the dissolution of the preliminary injunction, it would still be appealable as it was contained within an otherwise appealable order. *See Vaile v. Vaile*, 133 Nev. 213, 217, 396 P.3d 791, 794-95 (2017) (declining to dismiss an appeal challenging a vexatious litigant determination because that determination was included in an otherwise appealable order regarding child support).

DISCUSSION

Standing

Metro argues that the Review-Journal lacks standing to seek return of the seized devices or to assert any journalistic privileges over the material on the devices. Reviewing de novo, we disagree. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (holding that standing issues are reviewed de novo).

As to the return of seized property, NRS 179.085(1) allows "[a] person aggrieved by . . . the deprivation of property"[2] to seek its return in district court. "Property" under this statutory scheme "includes documents, books, papers and any other tangible objects." NRS 179.015. It would be absurd to conclude that the property the Review-Journal wants returned would fall under the statute if it were printed materials or in another tangible form but would be excluded because it only exists in electronic form stored on a device that is otherwise subject to the statute. *See Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) (noting that this court generally interprets statutes based on their plain language unless "the plain meaning would provide an absurd result" (internal quotation marks omitted)); *accord* 90 C.J.S. *Trover and Conversion* § 14 (2023) (recognizing, in the context of conversion claims, that despite electronic documents not being tangible property they may still be subject to conversion claims and that "the needs of the digital age could prompt the courts to revisit the scope of a conversion cause of action in the future").

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[2]Any argument that the Review-Journal lacks standing because it does not own the property in question fails as the statute confers standing broadly to any party "aggrieved" without requiring that the party hold an ownership interest in the property. NRS 179.085(1).

As to the privilege issue, NRS 49.275 provides that "[n]o reporter, former reporter or editorial employee of any newspaper, periodical or press association" may be forced to disclose information gathered in the person's professional capacity or the source of any information gathered. The statute's purpose is to "protect[ ] confidentiality during and after the news gathering process." *Las Vegas Sun, Inc. v. Eighth Judicial Dist. Court*, 104 Nev. 508, 511, 761 P.2d 849, 851 (1988), *overruled on other grounds by Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 878, 313 P.3d 875 (2013) and *Diaz v. Eighth Judicial District Court*, 116 Nev. 88, 993 P.2d 50 (2000). It is also designed "to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution." *Diaz*, 116 Nev. at 99, 993 P.2d at 57. To hold that the privilege NRS 49.275 creates ends with German's death is not required by the statute's plain text and would be directly contrary to the statute's purpose. We therefore hold, consistent with courts elsewhere, that the Review-Journal has standing to assert the privilege provided by NRS 49.275 in this case.[3]

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[3]*See, e.g., Cukier v. Am. Med. Ass'n*, 630 N.E.2d 1198, 1200-01 (Ill. Ct. App. 1994) (concluding that a medical journal and its editor met the definition of "reporter" under Illinois' news shield statute); *Marketos v. Am. Emp'rs Ins. Co.*, 460 N.W.2d 272, 281 (Mich. Ct. App. 1990) (considering a newspaper's raising of the news shield privilege without concern that the newspaper was not "[a] reporter or other person" (quoting Mich. Comp. Laws § 28.945(1)), but concluding the statute did not apply for other reasons); *Gastman, D.O. v. N.J. Newspapers Co.*, 603 A.2d 111, 114 (N.J. Sup. Ct. App. Div. 1992) (recognizing that the state's news shield statute's language did not include news organizations but concluding that the news organization had standing regardless because "[t]he privilege would be easily circumvented were [the court] to bar the corporate entity from invoking [the law's] benefit"); *Castellani v. Scranton Times, L.P.*, 956 A.2d

The search protocol

Turning to the substantive merits of this appeal, we first address the scope of the Review-Journal's privilege under NRS 49.275. That statute provides a privilege against the disclosure of "any published or unpublished information obtained or prepared [in a] person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person." The Review-Journal argues that this statute provides an absolute privilege against the disclosure of any journalistic information obtained by Metro in the execution of the search warrant or that, if the privilege is not absolute, no countervailing interests outweigh the privilege in this case. Despite this argument, the Review-Journal asserts that the adoption of its proposed search protocol would alleviate its concerns about its privilege being violated, such that it would not seek to have all journalistic materials returned to it immediately. Metro concedes that the property in its possession likely contains journalistic materials subject to the statute.[4]

937, 943 (Pa. 2008) (considering a joint assertion by a newspaper and reporter of privilege under Pennsylvania's news shield statute without noting any concerns with the newspaper's standing). *But see Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97, 102 (Iowa 2002) (concluding that a news organization lacked standing to waive the privilege under Iowa's news shield statute because "[t]he [news organization] is not the holder of the reporters' privilege, but the privilege is strictly held by the editors and is subject to waiver only by their actions").

[4]Metro asserts that the Review-Journal waived any privilege under NRS 49.275 by emailing certain journalistic information to LVMPD immediately after German's death. *See Diaz*, 116 Nev. at 95, 99-100 & n.5, 993 P.2d at 54, 58 & n.5 (discussing waiver under the news shield statute). But, to satisfy the policy underlying the statute, any waiver would

We have already recognized that the privilege under the news shield statute is not absolute "when a defendant's countervailing constitutional rights are at issue, in which [case] the news shield statute might have to yield so that justice may be served." *Diaz*, 116 Nev. at 101, 993 P.2d at 59; *see also Aspen Fin. Servs.*, 129 Nev. at 885, 313 P.3d at 879-80 (quoting *Diaz* with approval but concluding no such rights were at issue in the case); 2 David M. Greenwald et al., Testimonial Privileges § 8:6 (3d ed. 2023) (recognizing that a majority of courts to consider the issue of whether a news shield privilege is absolute "have held that the privilege may not be applied in an absolute fashion [when confronted by a defendant's invocation of the Sixth Amendment right to obtain evidence by compulsory process,] but must instead be balanced against the defendant's need for the information"). Although the privilege is not absolute, the search protocol entered by the district court constitutes an abuse of discretion because it allows that privilege to be violated before the court has the opportunity to weigh the privilege against any assertion of countervailing constitutional rights. *See MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 240-41, 416 P.3d 249, 255 (2018) (holding that discovery decisions are reviewed for an abuse of discretion). Indeed, it allows LVMPD and the district attorney's office—entities within which the Review-Journal asserts it has confidential sources from whom it receives information under the promise of confidentiality—to review the journalistic materials immediately, thus irreparably destroying any privilege the Review-Journal

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necessarily be limited to the disclosed information, *see id.* at 99, 993 P.2d at 55; *Las Vegas Sun*, 104 Nev. at 511, 761 P.2d at 851, and we conclude that the waiver of the privilege as to that information does not otherwise affect our decision herein.

may have. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011) (recognizing that no remedy at law can "restore the privileged nature of the information, because once such information is disclosed, it is irretrievable"); *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th 1235, 1247 (11th Cir. 2021) ("Once the government improperly reviews privileged materials, the damage to the Intervenors' interests is 'definitive and complete.'" (quoting *DiBella v. United States*, 369 U.S. 121, 124 (1962))).

Moreover, despite procedures included in the district court's protocol to otherwise preserve the privilege, including a confidentiality order placed on the search team, the search team "also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some [search]-team [members] will make mistakes or violate their ethical obligations." *In re Grand Jury Subpoenas 04-124-03 & 04-124-05*, 454 F.3d 511, 523 (6th Cir. 2006) (discussing *United States v. Noriega*, 764 F. Supp 1480 (S.D. Fla. 1991), wherein a search team turned over information to the government investigating team thereby destroying any privilege). Permitting the search to proceed would therefore allow "the government's fox [to be] left in charge of the appellants' henhouse." *Id.* The Nevada Court of Appeals recognized as much in *In re Search Warrants re Seizure of Documents, Laptop Computers, Cellular Telephones, & Other Digital Storage Devices*, wherein it rejected a search protocol allowing a LVMPD search team to conduct the first review of items potentially subject to attorney-client privilege. 139 Nev., Adv. Op. 23, ___ P.3d ___ (Nev. Ct. App. 2023). Based on the foregoing, we reject the district court's search protocol insofar as it allows LVMPD and the district attorney's office to conduct the search.

Instructions on remand

As a remedy for the improper search protocol entered by the district court, the Review-Journal asks that we direct the district court to enter the search protocol that it and Telles jointly requested. This we decline to do. Instead, we direct the district court on remand to enter a search protocol that: (1) uses the Review-Journal and Telles' search team consisting of the Honorable Peggy A. Leen (retired) as the Special Master and David Roger, general counsel of the Police Protective Association, as the Assistant Special Master ("the Special Master search team"); and (2) allows the Special Master search team to employ a single technology service provider to assist with the technical aspects of the review. Both the Special Master search team and any technology service provider must be subject to a protective order. The district court must consider NRCP 53(g) in determining how to apportion costs for the Special Master search team. Otherwise, the remaining provisions and the procedure for resolving any disputed claim of privilege in the district court's search protocol order adequately protects any privilege the Review-Journal may be able to assert and we do not disturb those provisions or procedures.

The dissolution of the preliminary injunction

In entering the search protocol, the district court also dissolved the preliminary injunction prohibiting Metro from searching the seized devices. Because we conclude that the district court abused its discretion in entering the search protocol, we reverse the dissolution of the preliminary injunction until the district court enters a new search protocol that complies with this order so that any privilege the Review-Journal may

hold remains intact. *See Shores v. Global Experience Specs., Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018) (discussing preliminary injunctions).

Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Bell

cc: Hon. Michelle Leavitt, District Judge
Hon. Susan Johnson, District Judge
Lansford W. Levitt, Settlement Judge
Ballard Spahr LLP/Denver
Ballard Spahr LLP/Las Vegas
Chesnoff & Schonfeld
Ballard Spahr LLP/Phoenix
Clark County District Attorney
Marquis Aurbach Chtd.
Liesl K. Freedman
Matthew J. Christian
Robert Telles
Lewis Roca Rothgerber Christie LLP/Las Vegas
McDonald Carano LLP/Reno
Eighth District Court Clerk

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[5]Any petition for rehearing must be filed within seven (7) days of the date of this order. If one is not timely filed, the clerk of this court shall issue the remittitur ten (10) days from the date of this order.