IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNSON CONTROLS FIRE PROTECTION, LP F/K/A SIMPLEXGRINNEL LP OR TYCO SIMPLEX GRINNEL LP,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE TAMMY RIGGS, DISTRICT JUDGE PRESIDING,
Respondents,
and
AQUA METALS, INC.; AQUA METALS RENO, INC.; AND INDUSTRIAL LOGISTICS SERVICES, INC.,
Real Parties in Interest.

No. 87907

FILED
SEP 12 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

This is an original petition for a writ of prohibition challenging a district court order affirming a discovery commissioner's recommendation to grant a motion to compel the production of documents.

This case stems from litigation between a business—Aqua Metals, Inc.—and a fire protection company—Johnson Controls Fire Protection, LP—following a fire in a commercial building occupied by Aqua Metals. During the discovery process in the underlying litigation, Aqua Metals sought all communications between Johnson Controls and a consulting firm, Jensen Hughes. The discovery commissioner granted the request only for a single email sent December 5, 2019, between Johnson Controls and Stephen Hill of Jensen Hughes. The discovery commissioner

24-336642

determined the December 5 email was not protected under work-product or attorney-client privilege. Johnson Controls filed an objection to the discovery commissioner's recommendation with the district court, asserting that the December 5 email was protected under the work-product privilege. The district court affirmed the discovery commissioner's recommendation, ordering production of the December 5 email. Johnson Controls Fire Protection, LP petitions for a writ of prohibition to prevent the production of the email.

A writ of prohibition is an extraordinary remedy that "arrest[s] the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court." *Club Vista Fin. Servs., L.L.C. v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). Petitioners bear the burden to demonstrate that this court's intervention is warranted. *Id.* Writ relief is available only if a petitioner does not have "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330. This court will entertain writ petitions where petitioners have demonstrated that the disclosure of privileged material would cause irreparable harm and leave a petitioner with no effective remedy, even by subsequent appeal, because the disclosure would rob the privileged document of its confidential nature. *See Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 247, 249, 416 P.3d 228, 231 (2018); *Club Vista*, 128 Nev. at 229, 276 P.3d at 249. In considering a writ on work-product privilege, "discovery rulings are reviewed for an abuse of discretion." *Cotter*, 134 Nev. at 249, 416 P.3d at 231-32 (citing *Club Vista*, 128 Nev. at 228, 276 P.3d at 249.). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Id.* at 249, 416 P.3d at 232 (internal quotation marks omitted).

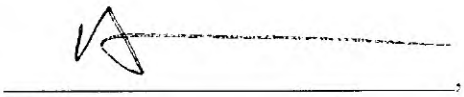
Having considered the petition and supporting record, we conclude that our intervention by way of extraordinary writ relief is not warranted. Generally, under NRCP 26(b), "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" are protected work product and may not be discovered. NRCP 26(b)(3)(A). In determining whether the privilege applies, "the court must consider the totality of the circumstances." *Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 256, 464 P.3d 114, 123 (2020). Here, Johnson Controls has not demonstrated that the district court manifestly abused its discretion by ordering the disclosure of the December 5 email because Johnson Controls failed to show that the email was made in anticipation of litigation. NRCP 26(b)(3)(A); *cf. Canarelli*, 136 Nev. at 252, 464 P.3d at 120 (citing *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995)) (concluding that the party asserting privilege "has the burden to prove that the material is in fact privileged"). Johnson Controls did not submit evidence to provide context for the December 5 email. Only communications "prepared or obtained because of the prospect of litigation" are protected. *Canarelli*, 136 Nev. at 256, 464 P.3d at 123. Johnson Controls retaining Hill or Jensen Hughes to assist with the litigation at a later time does not necessarily render prior communications privileged. Based on the totality of the circumstances, the district court was within its discretion to determine that Johnson Controls had not met its burden to show that the December 5 email was protected work-product.

Johnson Controls also argues that the district court should have reviewed the email in camera if it believed the document was not privileged based on the facts presented in the record. Yet Johnson Controls failed to make any mention of an in camera review to the discovery commissioner or

the district court and failed to offer the email for the in camera review. We therefore conclude that the argument is waived. *See Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011) (concluding that a party had waived its privilege argument by failing to raise privilege before the discovery commissioner).

Because no manifest abuse of discretion warrants our extraordinary intervention, we

ORDER the petition DENIED.



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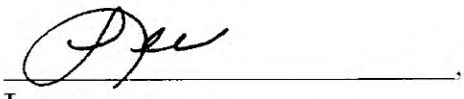

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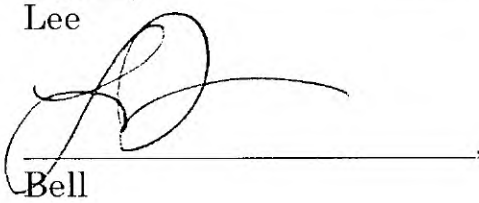

_____, J.
Bell

cc: Hon. Tammy Riggs, District Judge
Gordon Rees Scully Mansukhani LLP/Reno
Laxalt Law Group, Ltd./Reno
Wood, Smith, Henning & Berman, LLP/Las Vegas
Washoe County District Court Clerk