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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**

8 HILLARY SCHIEVE, an individual,
9 VAUGHN HARTUNG, an individual,

CASE NO.: CV22-02015

10 Plaintiffs,

DEPT. NO.: 15

11 v.

12 DAVID MCNEELY, an individual, 5
13 ALPHA INDUSTRIES, LLC, a Nevada
14 Limited-liability company, and DOES 1
15 Through X and ROES 1 through X, inclusive,

Defendants.

16 **ORDER DENYING OBJECTION AND**
17 **PARTIALLY GRANTING MOTION TO DISMISS**

18 Before this Court are 1) Defendant McNeely's objection to the Discovery
19 Commissioner's recommendation, dated March 15, 2023; and 2) Defendant McNeely's
20 motion to dismiss, dated March 9, 2023.¹ This Court has read the moving papers and
21 considered the arguments of counsel. It now orders as follows:

22 Objection to Discovery Commissioner's Recommendation

23 The parties' motion to compel and motion for protective order were referred to
24 the Discovery Commissioner for substantive analysis and recommendation. The
25 Discovery Commissioner is an adjunct to the judiciary empowered by NRCP 16.3(b) to
26 preside over discovery motions. The Commissioner is a discovery expert who performs
27 an essential role to ensure that all disputes are resolved in a "just, speedy, and
28 inexpensive" manner. NRCP 1.

¹ This Court refers to the Defendants in the singular form of Mr. McNeely.

1 This Court has discretion to determine the manner in which the Commissioner's
2 recommendation will be reviewed. WDCR 24(6). This Court determines, consistent
3 with other authorities, that a deferential standard of review is warranted. Otherwise,
4 this Court becomes a de facto second Discovery Commissioner for every dispute in
5 which a litigant is aggrieved. Therefore, the Discovery Commissioner's
6 recommendation will be reversed or modified only if it is "clearly erroneous" and this
7 Court has a "definite and firm conviction that a mistake was made." Valley Health Sys.,
8 LLC v. District Court, 127 Nev. 167, 252 P.3d 676 (2011) (citing United States v. Howell,
9 231 F.3d 615 (9th Cir. 2000)) (noting that Discovery Commissioners promote the efficient
10 use of judicial resources and district courts should prevent parties from making "an end
11 run around" the commissioner and frustrating the very purposes of having
12 commissioner judges)).

13 Mr. McNeely urges this Court to find protection where it is not clearly provided
14 by law. Unlike other states, Nevada has not promulgated an express privilege for
15 private investigators. NRS 648.200, which makes it unlawful for a private investigator
16 to divulge information about his or her investigative efforts without client approval,
17 contains an exception for disclosures required by law. Commissioner Ayers correctly
18 distinguished a voluntary, unauthorized disclosure from a disclosure compelled by
19 subpoena process.

20 The identity of a private investigator's single client (in contrast to voluminous
21 customer lists) is not embedded within the definition of a trade secret. NRS 600A.030.
22 Even if a private investigator derives independent economic value from protecting the
23 identity of a single client, and thus the identity is a trade secret, the trade secret
24 privilege is not absolute. The privilege may be penetrated if its preservation would
25 "otherwise work injustice." NRS 49.325(2).

26 The use of a GPS tracking device to monitor the movements of a person could be
27 a tortious invasion of privacy because a person has a reasonable expectation of privacy
28 with respect to his or her daily movements in a motor vehicle.

1 Ringelberg v. Vanguard Integrity Prof'ls-Nev., Inc., No. 2:17-CV-01788-JAD-PAL (D.
2 Nev. Dec. 3, 2018). Thus, the protection Mr. McNeely seeks could create unfettered
3 immunity for a tortfeasor who acted through an investigator — either as a tacit,
4 unknowing participant or intentional co-conspirator. This outcome is not contemplated
5 by Nevada law and would work an injustice to plaintiffs who suffer tortious invasions
6 to privacy.

7 Mr. McNeely's position is well-researched and persuasively presented. But in
8 the final analysis, Mr. McNeely asks this Court to collate existing law and create
9 protection by an extension of law not previously acknowledged by statute or decisional
10 authority. This Court cannot conclude Commissioner Ayers's recommendation is
11 clearly erroneous; similarly, this Court does not have a "definite and firm conviction
12 that a mistake was made." The phased protections through privilege logs and finite
13 anonymity are inapplicable to conceal the identity of a named party. For these reasons,
14 the Discovery Commissioner's recommendation is affirmed.² Mr. McNeely shall, by
15 Friday, May 12, 2023, produce to Plaintiffs the documents described in the subpoenas
16 duces tecum previously served in this action.³

17 Motion to Dismiss

18 Defendant McNeely asks this Court to dismiss four of the eight claims for relief
19 pursuant to NRCP 12(b)(5). The parties are familiar with the rigorous standards
20 governing dismissal. This Court does not qualitatively analyze the merits of claims and
21 defenses when adjudicating a motion to dismiss. This Court accepts all fact allegations
22 as proven and determines if there is any possibility plaintiff would be entitled to legal
23 relief. If yes, the motion to dismiss is denied; if no, the motion to dismiss is granted.
24 See generally Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008).
25 The adjudication of a motion to dismiss does not foreshadow future decisions or
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27 ² This Court references and incorporates the recommendation in its entirety.

28 ³ Mr. McNeely asserted a novel legal theory in good faith. This Court acknowledges the irreparability of harm if Mr. McNeely's client's identity is disclosed now but an appellate court later reaches a different conclusion. This Court is therefore inclined to grant a stay of proceedings pursuant to NRAP 8 if Mr. McNeely chooses to pursue extraordinary relief through a petition for writ of mandamus or prohibition.

1 otherwise create litigation momentum for the non-moving party. Indeed, whereas a
2 motion to dismiss challenges the sufficiency of the pleadings, a subsequent motion for
3 summary adjudication tests the sufficiency of evidence.

4 Having read the moving papers, this Court agrees with Plaintiffs that they have
5 satisfied the notice-pleading standards to state a claim for Invasion of Privacy – Public
6 Disclosure of Private Facts. Mr. McNeely’s arguments transcend the limited rule for
7 dismissal and ask this Court to evaluate fact allegations as evidentiary propositions.
8 Plaintiffs shall submit a proposed order denying the motion to dismiss based upon the
9 points and authorities set forth in their opposition motion.

10 This Court agrees with Mr. McNeely that Plaintiffs have failed to state a civil
11 claim for violations of NRS 41.1347. Plaintiffs expand the statutorily defined terms of
12 “personal identifying information” and “sensitive information” beyond what the
13 legislature prescribed. See NRS 41.1347(7)(e); NRS 205.4617. For these reasons, the
14 claim for declaratory relief shall also be dismissed.

15 This Court agrees with Mr. McNeely that Plaintiffs have failed to state a claim for
16 negligence. The implicit underpinning of negligence per se is not supported by statute.
17 The existence of a duty is a question of law. Scialabba v. Brandise Const. Co., 112 Nev.
18 965, 921 P.2d 928 (1996). Plaintiffs have not sufficiently alleged a “special relationship”
19 between them and Mr. McNeely that would give rise to duty. Negligence cannot exist
20 without the element of duty. Mr. McNeely shall submit a proposed order granting
21 dismissal of the third, fourth, and eighth claims for relief based upon the points and
22 authorities set forth in his motion.⁴

23 Based upon the arguments presented, this Court declines to dismiss, strike, or
24 require greater specificity for the requested relief in the forms of injunction or fees as

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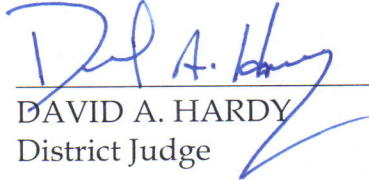
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27 _____
28 ⁴ This Court acknowledges Plaintiffs’ argument that discovery may reveal factual predicates to establish a
duty. Thus, Plaintiffs may seek to amend if they have an adequate factual basis to establish a negligence
duty in the future.

1 special damages.⁵ The relief sought will be visited after discovery or other motion
2 practice is commenced. It is this Court's preference to resolve these matters through
3 summary adjudication, *in limine* decisions, jury instructions, verdict forms, and
4 directing a final amendment of the complaint that may be submitted for juror review.

5 **IT IS SO ORDERED.**

6 Dated: This 3rd day of May, 2023.

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9 DAVID A. HARDY
10 District Judge
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⁵ Fees as special damages under NRS 41.1347 will be unavailable.

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