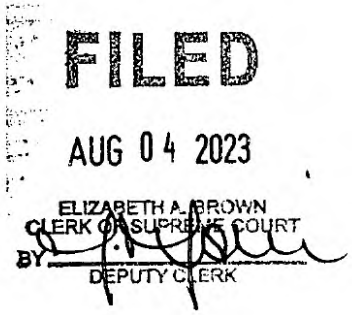
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE PETITION OF GO BEST, LLC.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Appellant,
vs.
GO BEST, LLC,
Respondent.

No. 85082-COA



ORDER OF AFFIRMANCE

Las Vegas Metropolitan Police Department (LVMPD) appeals from a district court order returning seized property under NRS 179.085. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.[1]

After conducting undercover investigations of Las Vegas Bistro, LLC, d/b/a Larry Flint's Hustler Club (Hustler Club), for the crimes of advancing prostitution and living from the earnings of prostitution, LVMPD established probable cause in an affidavit[2] to obtain a search warrant of the establishment.[3] Hustler Club leased space to respondent Go BEST, LLC (Go BEST), whose suite was located in the basement of the Hustler Club building. Go BEST is a separate business entity, with a different logo, and its suite is locked by a digital padlock. The search warrant did not name,

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[1]The Honorable Deborah L. Westbrook, Judge, did not participate in the decision of this matter.

[2]We note that we do not know the precise contents of the probable cause affidavit supporting the search warrant as it was sealed and not included in the record on appeal.

[3]We do not recount the facts except as necessary to our disposition.

describe or provide any identifying information about Go BEST. *See* NRS 179.045(1) (stating a "magistrate shall issue a warrant identifying the property and naming or describing the person or place to be searched").

LVMPD executed the search warrant in April 2022. During the over seven-hour search, LVMPD eventually demanded entry into the Go BEST suite. Deanna L. Forbush, Hustler Club's counsel, was present during the search and relayed the request to the managing member of Hustler Club and Go BEST—Jason Mohney, who was not present. Mohney initially denied LVMPD's request to enter the Go BEST suite, but after being informed that LVMPD threatened to break down the suite door or suspend the Go BEST business license for not cooperating with the search, Mohney instructed Forbush to provide LVMPD with the digital code to the suite door. Upon entry to the suite, the Go BEST business license, tax permit, and logo were visible. Still, LVMPD proceeded to search the suite and seized a Go BEST laptop computer (the laptop).

Following the search, Go BEST initiated an action for return of the laptop pursuant to NRS 179.085. Go BEST argued that LVMPD illegally seized the laptop because the search warrant did not authorize a search of Go BEST's suite and retention of the laptop was not reasonable because Go BEST was not a target of any investigation. Conversely, LVMPD argued that Go BEST was bound by an order by the Honorable Jerry A. Wiese, District Judge, denying Hustler Club's prior motion for return of property in a different action, including the Go BEST laptop, based on claim and issue preclusion. Specifically, LVMPD argued that because Mohney submitted a declaration in that case for the return of the same Go BEST laptop, which was denied, Go BEST was precluded from making

another request for the return of the laptop before a different judge.[4] Alternatively, LVMPD requested an evidentiary hearing to resolve factual disputes regarding whether consent was obtained to search the Go BEST suite.

Following a hearing on the motion, the district court entered its written order and granted Go BEST's motion. The court determined that claim and issue preclusion did not preclude Go BEST from seeking return of its laptop because it was not a party to the related Hustler Club case, nor was it identified as a target of the warrant. Further, it found that LVMPD exceeded the scope of the search warrant because it did not have probable cause to enter the Go BEST suite and seize the laptop without a warrant. The court also denied LVMPD's request for an evidentiary hearing, finding it "unnecessary in light of the nature of GO BEST's claim that its laptop was seized without a warrant." Finally, the court found that LVMPD's retention of the laptop was not reasonable under the totality of the circumstances. Accordingly, the district court ordered LVMPD to image the laptop, return it to Go BEST within seven business days, and that LVMPD

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[4]Hustler Club had filed a motion for, in relevant part, the return of property pursuant to NRS 179.085 before Judge Wiese and argued that LVMPD's retention of the property was not reasonable due to attorney-client communications and privileged accounting documents contained within the laptop. Go BEST and Mohney were not parties in the Hustler Club case. That case is currently pending before this court on rehearing for reasons unrelated to the issue in this appeal regarding the improper warrantless search of Go BEST. *See In re Search Warrants Regarding Seizure of Documents, Laptop Computers, Cellular Telephones, & Other Digital Storage Devices from the Premises of Las Vegas Bistro, LLC, & Little Darlings of Las Vegas, LLC*, No. 84931-COA, 2023 WL 2861201 (Nev. Ct. App. Apr. 7, 2023) (Order Affirming in Part, Reversing in Part, and Remanding).

not access the imaged copies without a warrant to search the laptop.[5] This appeal followed.

On appeal, LVMPD asserts that the district court erred in (1) finding that LVMPD exceeded the scope of the warrant because the warrant sufficiently described the entire Hustler Club establishment and, alternatively, Go BEST consented to the search; (2) finding that retention of the laptop was not reasonable and ordering its return;[6] (3) ruling on this case because Go BEST was barred due to claim and issue preclusion and because Judge Sturman was bound by Judge Wiese's order pursuant to EDCR 7.10(b); (4) exceeding its jurisdiction by enjoining LVMPD from

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[5]This court granted LVMPD's motion to stay the district court's order. *In re Petition of Go BEST*, Docket No. 85082-COA (Order Denying Motion to Dismiss and Granting Stay, Sept. 1, 2022). LVMPD continues to retain the Go BEST laptop.

[6]In light of our conclusion that LVMPD conducted a warrantless search of the Go BEST suite and illegally seized the Go BEST laptop, we conclude that return of the laptop was appropriate pursuant to NRS 179.085(1)(a), (d). While we acknowledge that the district court ordered the return of the laptop because LVMPD's retention of it was not reasonable pursuant to NRS 179.085(1)(e), the district court reached the correct result, albeit for a different reason. *Cf. Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

searching the imaged laptop;[7] and (5) failing to conduct an evidentiary hearing.[8] We disagree.

LVMPD exceeded the scope of the search warrant and failed to prove by clear and convincing evidence that Go BEST consented to the search and seizure

LVMPD's primary argument is that the district court erred in determining that LVMPD exceeded the scope of the warrant because the search warrant sufficiently described the entire Hustler Club establishment as part of the search, and that LVMPD was never made aware during the search that Go BEST was a separate entity. We review de novo whether the district court erred in determining that LVMPD exceeded the scope of

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[7]We reject LVMPD's argument that nothing in NRS 179.085 permitted the district court "to restrain a law enforcement agency's ability to search seized devices," (emphasis omitted), because the plain language of NRS 179.085(3) expressly permits the district court to impose this type of reasonable condition to protect access to the property.

[8]We also reject LVMPD's argument that the district court was required to hold an evidentiary hearing because federal jurisprudence that has interpreted Federal Rule of Criminal Procedure 41(g), the federal counterpart to NRS 179.085, held that an evidentiary hearing is not required in every case. *See In re Execution of Search Warrants for: 12067 Oakland Hills, Las Vegas, Nev.*, 134 Nev. 799, 805 n.3, 435 P.3d 672, 678 n.3 (2018) (citing *United States v. Albinson*, 356 F.3d 278, 281 (3d Cir. 2004) ("We review the District Court's decision to exercise its equitable jurisdiction under Fed.R.Crim.P. 41(g) for abuse of discretion." (internal quotation marks omitted))). Here, the district court considered the declarations submitted by Mohney and Forbush, which set forth facts to support the district court's conclusion that the laptop did not fall within the scope of the search warrant and that consent to search the Go BEST suite was not obtained. Thus, the district court did not abuse its discretion in denying an evidentiary hearing, particularly due to the expedited nature of the procedure. *See id.* at 805, 435 P.3d at 677 (recognizing that NRS 179.085(1) "contemplates an expedited procedure with no formal discovery mechanisms or jury trial").

the search warrant. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013).

The Fourth Amendment to the United States Constitution and Article 1, Section 18 of the Nevada Constitution prohibit unreasonable searches and seizures and provide that a warrant shall particularly describe the place to be searched, and the person or things to be seized. The purpose of the particularity "requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The Fourth Amendment requires that a search conducted pursuant to a warrant not exceed the strict bounds of the warrant. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971). Whether a search exceeds the scope of a search warrant must be determined "through an objective assessment of the circumstances surrounding the issuance of the warrant, the contents of the search warrant, and the circumstances of the search." *United States v. Hitchcock*, 286 F.3d 1064, 1071, *amended on other grounds*, 298 F.3d 1021 (9th Cir. 2002).

In this case, LVMPD obtained a search warrant for the Hustler Club establishment, but the warrant did not reference Go BEST. Although Hustler Club leases space to Go BEST, Go BEST had a reasonable expectation of privacy because it was a separate business, and its suite was demarcated by a door with a locked digital padlock. *See United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001) ("Similarly, a search of a guest room in a single family home which is rented or used by a third party, and, to the extent that the party acquires a reasonable expectation of privacy, requires a warrant."). Moreover, counsel for Go BEST advised LVMPD that

it was separate, and upon entry into the Go BEST suite, there were immediate and obvious visual signs—such as the business license, tax permit, and logo displayed on the wall—showing that Go BEST is a separate business entity than that of Hustler Club. *See United States v. Robinson*, 623 F. App'x 855, 857 (9th Cir. 2015) (concluding that "obvious visual signs demonstrated immediately upon entry" indicated that the separate building was not a garage, but a residence, and was not covered by the warrant (internal quotation marks omitted)). Based on an objective assessment of the circumstances surrounding the issuance of the warrant, the contents of the search warrant, and the obvious visual signs that demonstrated Go BEST was a separate entity than that of Hustler Club, we conclude that LVMPD exceeded the scope of the search warrant. Nevertheless, LVMPD proceeded with the search without seeking a separate warrant and seized the laptop. Accordingly, LVMPD conducted a warrantless search of the Go BEST suite and illegally seized a Go BEST laptop. Therefore, the district court did not err in finding that LVMPD exceeded the scope of the search warrant when it seized the laptop.

While LVMPD alternatively argues that Go BEST consented to the search, our review of the record does not support this contention. LVMPD bears the burden of proving the voluntariness of Go BEST's consent by clear and convincing evidence. *McMorran v. State*, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002). Here, LVMPD demanded entry into the Go BEST suite and threatened to break down the door or suspend the Go BEST business license for not cooperating with the search. Although Go BEST eventually provided the code to enter the suite, it only consented after hearing such threats. *See id.* (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("Consent that is the product of official intimidation or harassment is not

consent at all." (internal quotation marks omitted))). This fact is further supported by the district court's reliance on Mohney and Forbush's declarations. *See In re Execution of Search Warrants*, 134 Nev. at 805, 435 P.3d at 677 ("Fed. R. Crim. P. 41(g) generally requires that factual disputes in return-of-property motions be resolved through evidence, either affidavits or other documentary evidence or, if documentary evidence is insufficient, then by considering the testimony of witnesses during an evidentiary hearing."). Thus, based on the totality of the circumstances, we conclude that LVMPD failed to prove by clear and convincing evidence that Go BEST freely and voluntarily consented to the warrantless search and seizure. *See McMorran*, 118 Nev. at 383, 46 P.3d at 83 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.")).

Go BEST was not barred from bringing this case due to claim and issue preclusion

Finally, LVMPD argues that Go BEST was barred from bringing this case due to claim and issue preclusion because Go BEST's managing member had submitted a declaration in support of the Hustler Club's prior motion for return of the same property. We first address LVMPD's argument as to claim preclusion. Whether claim preclusion operates to bar an action is a question of law that we review de novo. *Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev. 923, 925, 407 P.3d 761, 763 (2017). This court applies

> a three-part test to determine the availability of claim preclusion: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or

> any part of them that were or could have been brought in the first case.

G.C. Wallace, Inc. v. Eighth Judicial Dist. Court, 127 Nev. 701, 705-06, 262 P.3d 1135, 1138 (2011) (internal quotation marks omitted). In short, "claim preclusion applies to prevent a second suit based on all grounds of recovery that were or could have been brought in the first suit." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1058, 194 P.3d 709, 715 (2008).

Privity exists when a person has "acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (omission in original) (internal quotation marks omitted). Privity can "encompass a relationship in which 'there is substantial identity between parties, that is, when there is sufficient commonality of interest." *Id.* (internal quotation marks omitted). However, "privity does not lend itself to a neat definition, thus determining privity for preclusion purposes requires a close examination of the facts and circumstances of each case." *Id.* at 619, 403 P.3d at 369.

Here, LVMPD has failed to demonstrate sufficient commonality of interest between the Hustler Club and Go BEST to prove privity between the two entities. Although Go BEST is located within the Hustler Club building and it is managed by at least one of the same members, Go BEST is its own separate entity and distinct business. Go BEST has a separate business license and tax permit. Further, because Go BEST was not a named party in the Hustler Club case, we conclude that it was not precluded from bringing this separate cause of action for the return of its property based on an invalid warrantless search.

This court also reviews issue preclusion de novo. *Cf. Boca Park Marketplace Syndications Grp., LLC*, 133 Nev. at 925, 407 P.3d at 763. For

issue preclusion to apply, LVMPD is required to demonstrate each of the following:

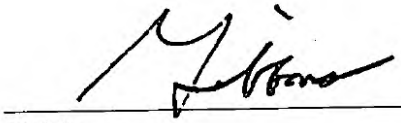
> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity within a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

Five Star Capital Corp., 124 Nev. at 1055, 194 P.3d at 713. As the party raising issue preclusion, the burden of proof was on LVMPD. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 474, 117 P.3d 227, 234-35 (2005); *see generally Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 255, 321 P.3d 912, 914 (2014).

Because we have determined that there is no privity between Go BEST and the parties in the Hustler Club case for purposes of claim preclusion, we need not readdress privity for purposes of our conclusion that issue preclusion does not apply here. Nevertheless, we also conclude that the issues in this case are not identical to those in the related Hustler Club case. Although return of the Go BEST laptop was requested in the related Hustler Club case, it was requested on the basis of attorney-client privileged communications and privileged accounting documents. Whereas, here, Go BEST sought the return of the laptop because of LVMPD's unlawful warrantless search of the Go BEST suite—which was not an issue actually and necessarily litigated in the Hustler Club case. Because LVMPD failed to prove all the necessary factors for issue preclusion to apply, we conclude LVMPD has not established that Go BEST was barred from bringing this

cause of action due to issue preclusion.[9] Accordingly, we lift the stay previously granted by this court and

ORDER the judgment of the district court AFFIRMED.[10]



_____, C.J.
Gibbons

_____, J.
Bulla

cc: Hon. Gloria Sturman, District Judge
Marquis Aurbach Chtd.
Armstrong Teasdale, LLP/Las Vegas
Eighth District Court Clerk

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[9]As we have established that this case is distinct from the Hustler Club case, we also reject LVMPD's position that Judge Sturman was bound by Judge Wiese's order pursuant to EDCR 7.10(b).

[10]Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.