

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITED SERVICES AUTOMOBILE
ASSOCIATION, an Unincorporated
Association;

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT FOR
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF CLARK; THE HONORABLE
NADIA KRALL, DISTRICT COURT JUDGE,

Respondents,

and

JOHN ROBERTS

Real Party in Interest.

Supreme Court No. 83355-COA
Electronically Filed
Dec 08 2021 11:23 p.m.
District Court Elizabeth A. Brown-C
Clerk of Supreme Court

**REPLY IN FURTHER SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR MANDAMUS**

Robert W. Freeman, Esq.
Nevada Bar No. 3062
Priscilla L. O'Briant, Esq.
Nevada Bar No. 10171
Lewis Brisbois Bisgaard & Smith LLP
6835 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
Telephone: 702-893-3383
Facsimile: 702-893-3789
Attorneys for Petitioner

TABLE OF CONTENTS

I. ARGUMENT.....2

 A. Relief Requested by USAA.....2

 B. The Disputed Discovery3

 1. USAA is Requesting that the *District Court* Make Findings Regarding Relevance and Proportionality3

 2. USAA’s Request that the *District Court* Make Findings Regarding Relevance and Proportionality is Not Mooted by Production of *Some* Responsive Materials7

 3. USAA Did Not Concede Outsourcing of Its Evaluation of the Injury Portion of Claims7

 4. USAA Did Not Waive its Objection to Production of Bonus Program Documents8

 5. USAA Appropriately Raised Proportionality Challenges at the District Court Level.....9

II. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court, 2020 Nev.
App. LEXIS 2, 467 P.3d 1, 136 Nev. Adv. Rep. 26, 2020 WL
25109236, 9

Rules

NRAP 21(d)11
NRAP 28(e).....11
NRAP 32(a)(4).....11
NRAP 32(a)(5).....11
NRAP 32(a)(6).....11
NRCPC 26(b)(1)..... 3, 4, 6, 9

I. ARGUMENT

Real Party in Interest, John Roberts (“Roberts”) reminds this Court that it is not positioned to make factual determinations related to the relevancy and proportionality of discovery, then spends the bulk of his *Response* arguing that this Court should not grant Petitioner, United Services Automobile Association’s (“USAA”), Writ because the discovery is both relevant and proportional. Finally, Roberts ends by arguing that USAA failed to adequately “preserve” arguments concerning proportionality in the District Court.

USAA’s response follows.

A. Relief Requested by USAA

USAA requested a Writ of Mandamus and/or Writ of Prohibition instructing respondent, the Eighth Judicial District Court of the State of Nevada and the Honorable Judge Krall to vacate the May 12, 2021 Order affirming the Discovery Commissioner’s Report and Recommendations as to specific document requests and interrogatories and enter findings:

1) as to the relevance of the disputed discovery to the parties’ claims and defenses, and whether the disputed discovery is necessary for Roberts to prove his claims, and

2) as to the proportionality of the disputed discovery given: 1) the importance of the issues at stake in the action, 2) the amount in controversy, 3) the

parties' relative access to relevant information, 4) the parties' resources, 5) the importance of the discovery in resolving the issues, and 6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

USAA does not request this Court to make any determinations regarding the relevance or proportionality of the disputed discovery. Rather USAA asserts that it is *entitled* to have the *District Court* determine the relevance and proportionality of the disputed discovery under NRCP 26(b)(1) (as amended in 2019) and make findings regarding the same.

USAA also requested this Court take the opportunity to provide additional guidance as to the appropriate inquiry into relevance under NRCP 26(b)(1) based on the revisions to the rule, which shifted the relevance inquiry from the “subject matter” of the litigation to “the claim or defense of any party.” Additional guidance by this Court as to the discovery allowed under the revised NRCP 26(b)(1) will assist the District Courts in properly following the dictates of NRCP 26(b)(1), benefitting all litigants in Nevada.

B. The Disputed Discovery

1. USAA is Requesting that the *District Court* Make Findings Regarding Relevance and Proportionality

Roberts appears to argue that because the Discovery Commissioner limited the scope of *some* discovery, it follows that her determination on the disputed

discovery properly considered relevance and proportionality. This is faulty logic. However, critically, USAA does not contend that the Discovery Commissioner did not *consider* relevance and proportionality, but that her decision on relevance and proportionality was not correct as to the disputed discovery and/or failed to consider the appropriate standards under the revised NRCP 26(b)(1). Thus, USAA exercised its right to file an objection with the District Court and USAA is entitled to *findings* from the *District Court* as to the relevance and proportionality of the disputed discovery.¹

For example, Roberts cites to various cases for the proposition that underwriting information, as well as policy drafting history is relevant in a breach of contract claim because it indicates what coverage included and also whether the insurer failed to meet its obligation. While underwriting *might* generally be relevant in an “insurance” case, USAA disagrees that underwriting is relevant in this case where there is no dispute that coverage exists. The only dispute is over the value of Roberts’ claim and USAA’s handling of that claim.

///

¹ Given Plaintiff’s heavy reliance on the Discovery Commissioner’s references to proportionality it is important to note that the Transcript of hearing on Motions to Compel held on March 4, 2021, was not filed until October 21, 2021, long after the District Court affirmed the Discovery Commissioner’s Report and Recommendations.

Moreover, Roberts sought and the Court ordered production of all “processing manuals and other materials available to your personnel for reference or training in their duties of processing applications or issuing policies”, i.e. underwriting manuals and training materials. *Petitioner’s Appendix* (“PA”), Vol. I, No. 9, 0157 (RFP 16); PA, Vol. II, No. 19, 0305 (No. 2). There is no dispute that the policy was issued, was in force on the date of the accident, and provides UM coverage to Roberts. The underwriting of the policy is simply not relevant to the claims or defenses in this litigation, *much less* the training or manuals provided to or used by underwriters.

USAA will comply with the ultimate order with regard to the disputed discovery but is simply asking for, and is entitled to, findings from the District Court on how the disputed discovery information is 1) relevant to the claims or defenses in this litigation and 2) proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. In other words, USAA should at least be able to understand why this discovery is being ordered and why the District Court believes it is not, as it appears, simply churn and burn, futile discovery.

In *Venetian*, this Court found that a district court abused its discretion when it considered and made findings only as to relevance:

The district court abused its discretion when it failed to analyze proportionality in light of the revisions to NRC 26(b)(1) and make findings related to proportionality.

Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court, 2020 Nev. App. LEXIS 2, *8, 467 P.3d 1, 5-6, 136 Nev. Adv. Rep. 26, 2020 WL 2510923. Here, the District Court did not make findings as to *either* relevance *or* proportionality. Thus, it abused its discretion and this Court should grant USAA's request, vacate the May 12, 2021 Order affirming the Discovery Commissioner's Report and Recommendations, and order the District Court to make findings as to relevance and proportionality under the current NRC 26(b)(1) standards.

USAA does not respond to the numerous cases cited by Roberts in support of his contention that the disputed discovery is relevant and proportional as this Court will not be making the determination regarding relevance or proportionality. However, USAA feels compelled to point out that vast majority of cases cited by Roberts are based on the allowable scope of discovery *prior* to the 2000 and 2015 revisions to the Federal Rules and are exactly the type of discovery decisions that led the Advisory Committee to revise the Federal Rules to *limit* the scope of discovery, a move which Nevada followed.

///

USAA does, however, respond to Roberts' misstatements of fact and law, as well as his other arguments as to why this Court should not grant USAA's requested relief.

2. USAA's Request that the *District Court* Make Findings Regarding Relevance and Proportionality is Not Mooted by Production of *Some* Responsive Materials

Roberts argues that because USAA produced some documents in response to certain requests, USAA's objections to those requests are moot. This is nonsense. Through this argument, Roberts seeks to deprive USAA of its right to findings on relevance and proportionality based on USAA's good faith production of documents that it agreed *were* relevant and proportional to the case, while continuing to object to the *scope* of documents sought by Roberts. In essence, Roberts requests this Court punish USAA for its cooperation in discovery. Additionally, Roberts offers no legal basis for this contention and this argument should not be considered by the Court.

3. USAA Did Not Concede Outsourcing of Its Evaluation of the Injury Portion of Claims

Roberts inaccurately asserts that USAA conceded that USAA utilizes third party vendors for *evaluating* the injury portion of claims. *Response*, p. 7, Section III.B.iii. As set forth in the transcript, USAA has medical bills audited by a

vendor, but the claims handling itself, and the injury evaluation, is not outsourced. *Real Party in Interest's Appendix* ("RPA"), No. 3, p. 48 (l. 3-10).

4. USAA Did Not Waive its Objection to Production of Bonus Program Documents

At no point did the Discovery Commissioner find that USAA waived its objection to production of its bonus program documents (nor did USAA waive any objections). RPA, No. 3, p. 38, l. 19 to p. 40, l. 9. Roberts offers no legal support for the contention that USAA waived its objections to production of the requested documents and this argument should not be considered by the Court.

In fact, USAA in good faith provided information demonstrating that its bonus program, which is universal across the Company and not limited to claims, does not consider "claims payouts", Roberts' purported basis for relevance. *See Response*, p. 11-12, Section III.B.iii; *see PA*, Vol. I, No. 9, 0171 (RFP 36). USAA also requested that should the District Court find bonus information relevant, that rather than produce all documents relating to its company-wide compensation plan, it be allowed to provide this information in a verified interrogatory as the less burdensome and more proportional discovery method. *PA*, Vol. II, No. 18, 0293 - 0295.

///

///

5. USAA Appropriately Raised Proportionality Challenges at the District Court Level

Finally, Roberts argues that USAA did not sufficiently challenge proportionality because it failed to provide “specific evidence” regarding the burden or expense involved in producing the ordered items. *Response*, p. 15, Section III.C. Here again, Roberts is stuck in the past. The proportionality analysis is not dependent on a party proving that the requested discovery is “burdensome” but rather on whether the requested discovery is “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” NRCP 26(b)(1).

Although Roberts correctly notes that the burden is not only on the moving party to address the proportionality factors, he misses an important point: The proportionality calculation “is the responsibility of the court and the parties.” *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 2020 Nev. App. LEXIS 2, *8, 467 P.3d 1, 6, 136 Nev. Adv. Rep. 26, 2020 WL 2510923.

Commentators, courts, and even the Chief Justice of the Supreme Court of the United States of America, have all acknowledged that the careful and realistic

assessment of the actual discovery needed in any given case must include the active involvement of judges. Petitioner's *Writ*, supra, and p. 12.

This is all USAA seeks, that the District Court is involved and makes a careful and realistic assessment of the actual discovery needed in this particular case.

II. CONCLUSION

Accordingly, Petitioner respectfully requests this Court grants its Petition for a Writ of Prohibition or Mandamus and direct the Respondent to vacate the May 12, 2021 Order affirming the DCCR and enter findings as to the relevance of the disputed discovery to the parties' claims and defenses, its necessity in proving Roberts' claims, and the proportionality of the discovery to the needs of the case.

DATED this 8th day of December, 2021,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Priscilla L. O'Briant
ROBERT W. FREEMAN, ESQ.
Nevada Bar No. 3062
PRISCILLA L. O'BRIANT, ESQ.
Nevada Bar No. 10171
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style required by NRAP 32(a)(6), as the brief includes double spaced, Times New Roman typeface at 14 point. The brief also complies with NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,863 words, less than the maximum of 7,000 words (calculated using the Word Count feature within Microsoft Word).

2. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Priscilla L. O'Briant, Esq.
Priscilla L. O'Briant, Esq.
Nevada Bar No. 10171
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 8th day of December, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jordan P. Schnitzer, Esq.
THE SCHNITZER LAW FIRM
9205 W. Russell Road, Ste. 240
Las Vegas, NV 89148
Attorneys for Plaintiff/Real Party in Interest

I have also prepared this document to be served via United States Postal Service, First Class mail, in a sealed envelope, on the next available postal date of December 9, 2021, to the addressee(s) shown below:

The Honorable Nadia Krall
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

Jordan P. Schnitzer, Esq.
THE SCHNITZER LAW FIRM
9205 W. Russell Road, Ste. 240
Las Vegas, NV 89148
Attorneys for Plaintiff/Real Party in Interest

Dated this 8th date of August, 2021.

By: s/ Priscilla L. O'Briant
An employee of
Lewis Brisbois Bisgaard & Smith LLP