

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 74063

District Court Case No. A-12-656710-B

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WYNN RESORTS, LIMITED,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE
HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI,

Respondent,

and

ELAINE P. WYNN

Real Party in Interest.

**REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION
OR ALTERNATIVELY, MANDAMUS**

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner Wynn Resorts, Limited is a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada.

DATED this 20th day of November, 2017.

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I. INTRODUCTION

As Real Party in Interest Elaine P. Wynn's (hereinafter "Ms. Wynn") Answer readily admits, the District Court failed to consider this Court's prior pronouncement that documents can be created for a dual purpose and still receive work product protection. (Answer at 3.) Disregarding that standard, the District Court erroneously overruled Wynn Resorts, Limited's ("Wynn Resorts" or the "Company") claim of work product protection for handwritten notes ("Notes") made by then-employee Doreen Whennen ("Ms. Whennen") concerning a threat of litigation by another employee. Not considering any dual purpose for these Notes, the District Court categorically determined that they were merely a "Human Resources typed report" and therefore "not one that in of itself would fit" as receiving work product protections.¹

Wynn Resorts' Petition for Writ of Prohibition or Alternatively, Mandamus is necessary to preserve work product protection and enforce this Court's previously-articulated dual purpose standard, with which the District Court disagrees. As the Notes' author, Ms. Whennen testified she did not take these Notes in the ordinary course of business. [REDACTED]

¹ At the time of the filing of the Petition, the Order Denying Wynn Resorts, Limited's Motion for Protective Order had not yet been entered. (*See* App. Vol. IV, 627-33.)

██████, and was immediately recognized as likely leading to litigation. Despite the District Court's approach, this Court did not reject application of work product protection for documents that may serve a "dual purpose."

Instead, the cases this Court cited when adopting the "because of" test highlight that documents created for a "dual purpose" are still protected under the work product doctrine. Writ relief is necessary in order to correct the District Court's rejection of that standard and the resulting rejection of work product protection.

II. ARGUMENT

A. Writ Relief is Warranted Because the District Court's Ruling Would Require the Disclosure of Protected Information.

A writ of prohibition is appropriate when, as here, the District Court's order would require Wynn Resorts to disclose "assertedly privileged information" that, once disclosed, would "irretrievably lose its confidential and privileged quality." *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995). This Court will intervene when a district court's order would require the disclosure of protected information. *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014).

This Court has also found that writ relief is "often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'" *Mineral Cty. v. Dep't of Conserv.*,

117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting *Bus. Comput. Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)). For example, writ relief is appropriate "when the petition provides a unique opportunity to define the precise parameters of a statutory privilege." *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013) (internal quotation marks omitted). Here, writ relief is appropriate in order to again reiterate – contrary to the District Court's position – that work product protection applies to a document prepared both in the course of litigation and to serve a business purpose.

Similarly, a writ of mandamus will issue when the Respondent has a clear and present legal duty to act, and is appropriate when "discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). An arbitrary or capricious exercise of discretion occurs when a court acts "contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (quoting *Black's Law Dictionary*, 119, 239 (9th ed. 2009)). In failing to apply the standard set forth in *Wynn Resorts, Limited v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 52 (2017) regarding "dual purpose," the District Court acted arbitrary and capriciously, and a writ of mandamus should issue.

B. The District Court Erred When it Failed to Consider the Dual Purpose Test.

Derived from NRCP 26(b)(3), the work product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." "NRCP 26(b)(3) protects documents with 'two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *Wynn Resorts*, 133 Nev. Adv. Op. 52 (2017) (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d 900, 907).

As discussed *infra*, this Court formally adopted the "because of" test to decide when a document is created in anticipation of litigation. *Wynn Resorts*, 133 Nev. Adv. Op. 52 (citations omitted). In doing so, it directed the district courts to consider the "totality of the circumstances" surrounding the document's creation, including the context of the communication and the content of the document. *Id.*

But here, the District Court erroneously determined that the "because of" test adopted in *Wynn Resorts* excludes any documents that serve a "dual purpose," asserting that this Court had somehow rejected the dual purpose standard. (App. Vol. I at 159.) Respectfully, the District Court's approach belies this Court's

decision. "[A] document . . . does not lose protection under this formulation merely because it is created in order to assist with a business decision." *Wynn Resorts*, 133 Nev. Adv. Op. 52, p 26 (quoting and citing *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)). In *Adlman*, the Second Circuit employed the "because of" test and rejected the "primary purpose" test. See *Adlman*, 134 F.3d at 1203. In doing so, the Second Circuit explained that "[n]othing in the Rule states or suggests that documents prepared 'in anticipation of litigation' with the purpose of assisting in the making of a business decision do not fall within its scope." *Id.* at 1198-99.

Similarly, in *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)(Torf)*, 357 F.3d 900 (9th Cir. 2004), the Ninth Circuit held that documents created in connection with an internal investigation were protected by the work product doctrine even though they also served a business purpose: the government's investigation of potential violations of federal waste management laws, and the company's separate business-related reporting obligations to the Environmental Protection Agency. *Torf*, 357 F.3d at 909-10, cited in *Mega Mfg.*, 2014 WL 2527226, at *2. See also *In re CV Therapeutics Inc. Secs. Litig.*, No. C-03-3709 SI(EMC), 2006 WL 1699536, at *2 (9th Cir. June 16, 2016) (stating that under the "because of" test, the court must examine whether the threat of litigation "animated" preparation of the document); *In re Woolworth Corp. Sec.*

Class Action Litig., 1996 WL 306576, at *3 (S.D.N.Y. June 7, 1996) ("Applying a distinction between 'anticipation of litigation' and 'business purposes' is in this case artificial, unrealistic, and the line between is here essentially blurred to oblivion.")

Considering this Court's holding that a document can maintain its work product protection when it was prepared in anticipation of litigation as well as having a purpose related to a business decision, the District Court must necessarily analyze the "totality of the circumstances" regardless of whether it also serves a dual business purpose. *Wynn Resorts*, 133 Nev. Adv. Op. 52, (citing *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d at 908). To consider the totality of the circumstances "the court should 'look[] to the context of the communication and content of documents to determine whether a request for legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of the document and the nature of the document.'" *Wynn Resorts* (quoting *In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI(EMC), 2006 WL 1699536, at *4).

Here, the District Court short-circuited its analysis when it asserted that this Court had rejected work product protection for documents that serve both a litigation and business purpose. That failure is fatal to the District Court's decision to overrule protection for the Notes.

C. The Whennen's Notes are Wynn Resorts' Protected Work Product As They Were Created in Anticipation of Litigation.

At its August 25, 2017 hearing, the District Court rejected Wynn Resorts' request for a protective order, instead stating that "the Human Resources typed [sic] report that taken by Ms. Whennen is not one that in and of itself would fit the because of test under the Nevada Supreme Court's most recent pronouncement of the work product privilege in a case called Wynn Resorts versus Okada, 133 Nev. 52. For that reason, the notes do not fall within the attorney work product exception; . . ." (App. Vol. I, 123.)² In its Order, the District Court said the same thing: The work product claim "is overruled because the document does not appear to be one that, in and of itself, would fit the 'because of' test" under *Wynn Resorts*. (App. Vol. IV, 631-32.) Yet, such a cursory and categorical analysis of the Notes, and disregard of the extraordinary circumstances of their creation, does not constitute a sufficient analysis of the "totality of the circumstances," particularly in light of this Court's ruling that a document can serve a "dual purpose."

² At the same hearing on August 25, 2017, the District Court also misinterpreted and misapplied the "because of" test which is the subject of Wynn Resorts' Writ Petition filed September 12, 2017 Case No. 73949. On October 31, 2017, this Court issued an Order coordinating the petitions "based on overlapping legal issues to ensure that they are resolved in a consistent and efficient manner." (Order, Oct. 31, 2017.)

From the moment she received [REDACTED]

[REDACTED] Ms. Whennen treated this situation as unique and unprecedented.

(App. Vol. II, 433.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 440.) [REDACTED]

[REDACTED] (*Id.* at 425.) [REDACTED]

[REDACTED]

[REDACTED]. (App. Vol. III, 503.) [REDACTED]

[REDACTED]

[REDACTED]

Ms. Wynn relies heavily on *Columbia/HCA Healthcare Corporation v. Eighth Judicial District Court* for the position that routine reports taken by employees in the course of their employment are not eligible for work product protection. 133 Nev. 521, 936 P.2d 844 (1997). There are, however, material differences between a standard occurrence report filled out by employees in the ordinary course of business and Ms. Whennen's Notes. "The occurrence reports were prepared in the ordinary course of business. Sunrise Hospital's petition implicitly admits this fact by requiring personnel to fill out pre-printed forms in the event of an unexpected occurrence." *Id.* at 527, 936 P.2d at 848. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In characterizing Ms. Whennen's Notes as simply a "Human Resources typed [sic] report," the District Court failed to consider the totality of the circumstances in which these Notes were made. It is not sufficient to look only at the type of document; courts must look at the totality of the circumstances that surround the creation of that document and whether it was made "because of" litigation. Here, the District Court's failure to acknowledge that documents can serve a dual purpose – in express disregard of this Court's prior ruling – has led to an erroneous application of the law.³

III. CONCLUSION

When it determined Ms. Whennen's Notes did "not appear to be one that, in of itself, would fit the 'because of' test," the District Court failed to consider to follow this Court's direction to meaningfully evaluate the totality of the circumstances under which the document was created, and whether the document serves a dual litigation and business decision purpose. The District Court has, in effect, disregarded this Court's ruling in *Wynn Resorts* that documents which serve

³ When coupled with the District Court's pronouncement that this Court "didn't adopt the dual purpose" test, it becomes apparent that the District Court did properly analyze the scope of the work product protection under *Wynn Resorts*. (App. Vol. I, 159.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 20th day of November, 2017, I electronically filed and served a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS**

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