Case No. 74184

In the Supreme Court of Nevada

ELAINE P. WYNN,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondents,

and

STEPHEN A. WYNN; WYNN RESORTS, LIMITED; LINDA CHEN; RUSSELL GOLDSMITH; RAY R. IRANI; ROBERT J. MILLER; JOHN A. MORAN; MARC D. SCHORR; ALVIN V. SHOEMAKER; KIMMARIE SINATRA; D. BOONE WAYSON; and ALLAN ZEMAN,

Real Parties in Interest.

District Court
No. A656710

ELAINE P. WYNN'S REPLY

With Supporting Points and Authorities

(*Redacted*)

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MEMORANDUM OF POINTS AND AUTHORITIES

Ms. Wynn's petition demonstrated that, under this Court's totality-of-the-circumstance test, she prepared the notes at issue in 2009 "because of" her then-pending divorce litigation. Specifically, (1) Ms. Wynn prepared the notes in the midst of her ongoing divorce litigation; (2) the notes document an investigation that Ms. Wynn undertook in communication with her attorney in connection with her divorce litigation; (3) the notes relate to allegations [redacted]; (4) Ms. Wynn discussed the substance of her notes with her attorney, and (5) the subject of the notes was directly litigated in her divorce proceedings. The "nature of [the notes] and the factual situation in [this] particular case," show that the notes "can fairly be said to have been prepared . . . *because of* the prospect of litigation.'" *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev., Adv. Op. 52, 399 P.3d 334, 347–48 (2017). Ms. Wynn's petition also showed that the district court abused its discretion when—despite its recognition that Ms. Wynn's notes were prepared "for purposes of" her divorce litigation—the court ruled that the notes do not qualify as work product because she made the notes "all on her own as part of her

divorce," and did so "to refresh [her] memory for purposes of [her] litigation." (1 App. 104:11–13, 105:2–3.)

The Wynn Parties make no effort to defend the district court's ruling on its terms. Indeed, they all but concede that the district court abused its discretion in rejecting work product protection on the ground that Ms. Wynn prepared the notes "on her own" rather than at the instruction of her attorney. *See* Answer 20. And they focus on [redacted] to suggest that, contrary to the district court's ruling, she prepared the notes [redacted]. In doing so, they attempt to manufacture discrepancies between Ms. Wynn's declaration and her earlier deposition, advocate for a "magic words" requirement that is inconsistent with this Court's totality-of-the-circumstance test, allude to principles of waiver that do not apply here and that they themselves have waived, and improperly rely on a rough draft of a transcript that is not in the district court record and [redacted].

In any event, the Wynn Parties' efforts to recast the record cannot undermine the clear import of the circumstances in which Ms. Wynn

prepared the notes in connection with her divorce. The totality of those circumstances compels the conclusion that the notes are protected work product.

The Wynn Parties likewise fail to demonstrate that the notes should nonetheless be produced. Initially, the district court did not address whether the Wynn Parties have shown a substantial need for the notes sufficient to overcome work product protection, *see* Pet. 19 n.4—and the issue should be presented to that court in the first instance. Regardless, however, the Wynn Parties have not met their burden. The notes of witness interviews necessarily reflect Ms. Wynn's analysis of the relevant questions and facts. And the Wynn Parties show no substantial need for the notes. Not only have they had an opportunity to depose all of the individuals who participated in the conversations reflected in the notes, but they also have access to multiple sources of information about the allegations [redacted] that are the subject of Ms. Wynn's notes—given that the Wynn Parties include [redacted] and various company employees who had knowledge of the events. The Wynn Parties therefore have no substantial need for Ms. Wynn's work product.

I.

THE RECORD DEMONSTRATES THAT MS. WYNN PREPARED THE NOTES BECAUSE OF HER DIVORCE LITIGATION

As Ms. Wynn's petition demonstrated, the totality of the circumstances establishes that she prepared the notes because of her divorce litigation: she learned of the allegations that are the subject of the notes [redacted], the allegations concerned misconduct by Ms. Wynn's soon-to-be ex-husband and involved [redacted], Ms. Wynn took the notes as part of the investigation into these allegations in connection with her divorce litigation, she shared the substance of the notes with her attorney in those proceedings, and the settlement payment became an issue in the litigation. *See* Pet. 11–13. These facts plainly establish that the notes were prepared "because of" litigation as this Court's test requires. *See Wynn Resorts*, 133 Nev., Adv. Op. 52, 399 P.3d at 348

Significantly, ***none of these facts are in dispute***. Indeed, although the Wynn Parties devote much of their answer to asserting purported "conflicts" between Ms. Wynn's declaration and her deposition testimony, *see* Answer 6–14, 20–24, they do not and cannot

dispute the ***facts*** that support work product protection here: the notes were prepared to record Ms. Wynn's investigation of allegations that [redacted]—an investigation that related to a key issue in that litigation and the results of which she discussed with her attorney in the course of that litigation.

Unable to establish any contrary facts, the Wynn Parties attempt to discredit Ms. Wynn by manufacturing supposed inconsistencies between Ms. Wynn's declaration and her February 2017 deposition testimony—but there are no inconsistencies. They further improperly attempt to rely on a rough draft of a transcript that is not part of the record in the district court and [redacted]—but that in any event [redacted]. The Wynn Parties' efforts are unavailing. The record amply establishes that Ms. Wynn prepared the notes because of her divorce litigation.

A. Ms. Wynn's February 2017 Deposition Testimony Fully Supports Her Declaration

Contrary to the Wynn Parties' arguments, Ms. Wynn's February 2017 deposition in no way calls into question any of the facts set forth in her declaration. The Wynn Parties attack several supposed

discrepancies between Ms. Wynn's declaration and her February 2017 deposition, but none of the statements they identify is in fact inconsistent.

The Wynn Parties acknowledge that at the February 2017 deposition, "counsel for the Wynn Parties did not conduct an exhaustive examination of Ms. Wynn regarding the Notes." Answer 7. Yet despite their own failure to conduct more than a "limited examination," *id.*, the Wynn Parties attempt to fault Ms. Wynn for not providing more information about her notes in her deposition before she bore any burden to establish that the notes are protected work product.

For example, they assert that Ms. Wynn did not say in her deposition [redacted]. Answer 1–2. But Ms. Wynn testified [redacted] 2 App. 155:7–9, [redacted] 2 App. 162:4–5, and [redacted] 2 App. 163:23–164:5.

This testimony is fully consistent with the declaration she provided once the Wynn Parties sought to obtain the notes. The Wynn Parties cannot place the blame on Ms. Wynn for their own failure to ask follow-up questions in taking her earlier deposition.

Similarly, the Wynn Parties attempt to create a discrepancy between Ms. Wynn's deposition and her declaration by stating that [redacted] Answer 2. But the Wynn Parties did not ask her at the deposition [redacted]. Instead, they asked [redacted] 2 App. 153 (emphasis added). Ms. Wynn testified [redacted]. *Id.* The Wynn Parties then asked [redacted]. *Id.* Again, Ms. Wynn testified [redacted]. *Id.* Finally, they asked [redacted]. *Id.* Ms. Wynn responded [redacted] *id.*—precisely what her declaration reflects, 2 App. 369 ¶ 5 [redacted]

[redacted].

Nothing in this exchange during the February 2017 deposition is any way inconsistent with Ms. Wynn's declaration.

Finally, the Wynn Parties emphasize that Ms. Wynn testified "[redacted]" while her declaration states [redacted]. Answer 2, 13 n.3.[1] This is nonsense. The Wynn Parties did not ask Ms. Wynn [redacted]. They asked only [redacted] 2 App. 171 (emphasis added). Ms. Wynn responded [redacted] There is nothing inconsistent in stating [redacted]

[1] The Wynn Parties also repeatedly insinuate that the statement in Ms. Wynn's sworn [redacted] is untrue. Answer 2, 7, 12–13. But as Ms. Wynn's declaration explained, [redacted]. Decl. ¶ 6 (2 App. 369). And the Wynn Parties fail to mention that Ms. Wynn offered to provide the notes to the district court to review in camera [redacted]. Opp. 4 n.1 (2 App. 358).

[redacted]. Ms. Wynn's February 2017 deposition therefore does nothing to undermine her declaration in support of her assertion of work product protection establishing that her notes were prepared because of her divorce litigation.[2]

B. Ms. Wynn's Declaration Meets Her Burden to Establish the Applicability of the Work Product Doctrine

1. The Declaration States Facts that Compel the Legal Conclusion that the Notes are Work Product

Unable to discredit Ms. Wynn's declaration with her earlier testimony, the Wynn Parties contend that Ms. Wynn's declaration is insufficient because it does not state the legal conclusion that the notes would not have been prepared in substantially the same form but for litigation. Answer 3, 22–23. But rather than regurgitating legal standards, Ms. Wynn's declaration sets forth the factual circumstances that compel this conclusion. *See* Decl. ¶ 3 (2 App. 369) ([redacted]

[redacted]

[redacted]

[2] Given the Wynn Parties' failure to identify any actual discrepancies between Ms. Wynn's declaration and her earlier deposition, the cases they cite for the proposition that courts disregard conclusory or conflicting declarations are inapposite. *See* Answer 21–22 & n. 5.

[redacted]); *id.* ([redacted]

[redacted]);

id. ([redacted]);

id ¶ 4 ([redacted]

[redacted]); *id.* ¶ 5 ([redacted]

[redacted]). In other words, the facts recounted in Ms. Wynn's declaration make clear that the notes reflect an investigation that Ms. Wynn initiated [redacted], that concerned a key issue actually disputed in the litigation, and that she and her attorney discussed in connection with the litigation.

The Wynn Parties complain that the declaration lacks certain magic words drawn from legal precedent, but if the actual *facts* recited in the declaration do not demonstrate that the notes would not exist in substantially the same form absent the litigation, it is difficult to imagine any set of circumstances that would do so.

2. The Declaration is Detailed

Ironically, after complaining that Ms. Wynn's declaration does not recite a legal conclusion, the Wynn Parties then go on to fault Ms. Wynn's declaration for being "conclusory" and "*ipse dixit*." Answer 21–22. This is contradicted not only by the Wynn Parties' own argument that the declaration does not have *enough* conclusions, but also by the face of the declaration. Each paragraph of the declaration [redacted]. Such a declaration is detailed and concrete, not conclusory.

3. Ms. Wynn Recorded Her Notes when She was Litigating Her Divorce

Equally perplexing is the Wynn Parties' effort to suggest that the timeline of the notes somehow undermines the conclusion that they were prepared because of litigation. Answer 18 ("Ms. Wynn created the Notes in April 2009—*four* years after the alleged incident in question (May 2005), more than *three* years before she filed her original crossclaim in this action (June 2012), and nearly *seven* years before she filed her Fifth Amended Crossclaim (March 2016) in which she raised allegations about the alleged former employee incident for the first time."). Contrary to the Wynn Parties' suggestion, the timeline they set

forth *confirms* that Ms. Wynn prepared the notes because of her divorce litigation. She prepared them in April 2009, four years after the alleged incident, because that is *when her divorce litigation was taking place* and that is [redacted]. And why the number of years between her preparation of the notes and the filing of her claims in *this* litigation is relevant to anything is a complete mystery. Ms. Wynn prepared the notes because of her *divorce* litigation, and she did so contemporaneously with that litigation. Ms. Wynn's declaration therefore satisfies her burden to demonstrate that her notes qualify as work product.

4. Ms. Wynn Submitted Undisputed Evidence that She Prepared the Notes because of the Divorce Litigation

The Wynn Parties' reliance on *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384 (S.D.N.Y. 2015), Answer 22–23, is likewise misplaced. In *Wultz*, the defendant Bank learned of allegations that it had supported terrorist activity in a letter threatening litigation. 304 F.R.D. at 386–87, 395. The Bank asserted—without any declaration or other evidentiary support—that it would have conducted no investigation at

all if it had learned of the allegations of support for terrorism in some other way, unaccompanied by a threat of litigation. *Id.* at 395. The plaintiff submitted undisputed evidence, however, that the Bank would have conducted the same investigation without threat of litigation because, among other reasons, the Bank was specifically subject to regulatory requirements that compelled such an investigation. *Id.* at 396.

Here, the reverse is true. Ms. Wynn is the one who has submitted undisputed evidence to show that she prepared the notes [redacted]. (2 App. 369 ¶¶ 2–5.) It is the Wynn Parties who speculate—without citing any evidence at all—that Ms. Wynn might have "prepared the Notes in essentially the same form had she learned about the underlying events that triggered their creation outside the context of her divorce proceedings." Answer 23. Their speculation, however, is utterly without basis. Unlike the *Wultz* plaintiffs, the Wynn Parties can cite no

regulatory requirement that would have compelled Ms. Wynn to prepare the notes in the same form, even if (contrary to fact) she had not been in the midst of divorce litigation that the notes were directly relevant to. Ms. Wynn has fully carried her burden to establish that the notes were prepared because of litigation, and the Wynn Parties' unfounded speculation can support no contrary conclusion.

C. Ms. Wynn's [redacted] is Irrelevant to Their Status as Protected Work Product

1. Reviewing Work Product Does Not Mean it is Not Work Product

Disregarding the district court's ruling that Ms. Wynn prepared the notes and reviewed them for purposes of her divorce litigation, the Wynn Parties contend that because Ms. Wynn [redacted], they cannot have been prepared because of litigation. Under the Wynn Parties' view, once a party creates a work-product protected document, the party may never look at it again for any purpose other than litigation. This is not the law. *See Wynn Resorts*, 133 Nev., Adv. Op. 52, 399 P.3d at 348 (recognizing that "a document . . . does not lose protection under this formulation merely because it is created in order to assist with a business decision"). Indeed, the totality of the circumstances shows that Ms. Wynn prepared

the notes because of her divorce litigation. [redacted] does not retroactively transform Ms. Wynn's motivation for preparing them in the first place.

2. Ms. Wynn Did Not Waive Protection

Although the Wynn Parties allude to the principle that using work product to refresh one's recollection for purposes of testifying waives the privilege, Answer 3, 26 n.6, this principle has no application here for three independent reasons.

First, Ms. Wynn's sworn testimony establishes that [redacted]. 2 App. 155–56 ([redacted]).

Second, the district court did not rule that Ms. Wynn *waived* the notes' work product protection because she used them to refresh her recollection. Instead, the district court ruled that because Ms. Wynn prepared the notes "all on her own as part of her divorce to refresh her memory" the notes do not qualify as work product to begin with. (1

App. 104:10–13.) As Ms. Wynn's petition demonstrates, that ruling is erroneous. Pet. 17–19.

Third, despite the Wynn Parties' repeated allusions to waiver, they conspicuously do not press the position before this Court that Ms. Wynn waived work product protection for the notes in this litigation. Nor did they raise such an argument in the district court. Such an argument would necessarily fail in light of Ms. Wynn's testimony [redacted]. But in any event, by failing to raise the argument, the Wynn Parties have waived it. See *Nye Cty. v. Washoe Med. Ctr.*, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) ("an issue which is not raised in the district court is waived on appeal") (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.")).

D. Ms. Wynn's October 2017 Deposition is Not Properly Before this Court and in Any Event Does not Undermine Ms. Wynn's Claim of Work Product Protection

1. This Court Should Disregard the Materials Outside the District-Court Record

The Wynn Parties seek to rely in this Court on the rough draft of Ms. Wynn's October 26, 2017 deposition testimony that is not in the record before the district court. Answer 24. This effort is wholly improper. As explained in Ms. Wynn's motion to strike, this Court "cannot consider matters not properly appearing in the record on appeal." *Wynn Resorts*, 133 Nev., Adv. Op. 52, 399 P.3d at 340 n.3 (quoting *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981)). Mot. at 2.

2. Ms. Wynn's Testimony is Consistent

This case demonstrates the importance of this rule prohibiting use of such unfiled materials on appeal. Specifically, [redacted]. As explained in her declaration in support of the motion to strike, [redacted]

Mot. Ex. A (Decl. ¶ 7). *Id.* Id. *Id.* *Id.*

As a result, even if this Court chose to engage in fact-finding based on this testimony outside the district-court record, the testimony does not undermine the conclusion that Ms. Wynn prepared the notes because of her divorce litigation. Although

[redacted].

II.

THE WYNN PARTIES HAVE NOT SHOWN A SUBSTANTIAL NEED FOR THE NOTES

Finally, the Wynn Parties assert that even if the notes are work product, they should nonetheless be produced in this litigation because the Wynn Parties supposedly have "substantial need" of them. The district court did not reach this issue, and the Court need not address it in the first instance. But in any event, the Wynn Parties fail to make the required showing to overcome work product protection.

1. The Notes Reflect Ms. Wynn's Analysis and Theories

The Wynn Parties contend that [redacted] Answer 25. But Ms. Wynn testified that [redacted]. As the Eighth Circuit has recognized in granting work product protection for witness interview notes, such interviews necessarily reflect analysis in the questions asked and the information recorded. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir.

2000) (witness interview notes are protected opinion work product; such notes reveal "legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant."). Ms. Wynn's [redacted] therefore cannot be separated from the analytic component of her interviews with the two individuals in connection with the allegations.

2. The Witnesses Ms. Wynn Interviewed are Available to the Wynn Parties

The Wynn Parties assert that they lack access to the factual information reflected in the notes through other sources, but any constraints on their access to such sources is of their own making. The notes reflect Ms. Wynn's conversations with Doreen Whennen and Arte Nathan regarding the allegations of misconduct against Mr. Wynn. The Wynn Parties have had the opportunity to depose all three individuals who participated.

As to Ms. Whennen's deposition, the Wynn Parties assert that the "deposition ended early and is now the subject of a separate writ petition before this Court." Answer 26. But it was the Wynn Parties themselves that cut the deposition short for reasons unrelated to Ms. Wynn's notes. *See* Answer 26. Moreover, it was the Wynn Parties who

failed, despite ample opportunity, to ask Ms. Whennen the questions they now seek to answer through Ms. Wynn's privileged notes. And the "separate writ petition" they invoke has nothing to do with the availability of Ms. Whennen to testify about the issue before this Court in Ms. Wynn's petition. Any deficiencies in Ms. Whennen's deposition are therefore solely the fault of the Wynn Parties.

As to Mr. Nathan, the Wynn Parties again improperly attempt to rely on a deposition that has not been filed with the district court. But even if the excerpt they provide were properly before this Court, it does not support their assertion that [redacted]. Answer 27. To the contrary, Mr. Nathan testified [redacted] Wynn App. 10. And although Mr. Nathan subsequently stated [redacted], Wynn App. 11, [redacted]. Moreover, [redacted]

[redacted]. Wynn App. 11. Wynn Resorts therefore retains the ability to obtain further information from Mr. Nathan on this topic.

And more broadly, the Wynn Parties have access to numerous additional sources of information about the allegations that are the subject of Ms. Wynn's notes. Ms. Whennen and Mr. Nathan both testified [redacted]. And, after all, the parties seeking Ms. Wynn's notes include [redacted], Mr. Wynn himself, as well as Wynn Resorts, whose employees had knowledge of the allegations. In these circumstances, the Wynn Parties have not established a substantial need for Ms. Wynn's notes, nor could they. *In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 1566, 2016 WL 2593916, at *3 (D. Nev. May 5, 2016).

CONCLUSION

Ms. Wynn's notes prepared because of her divorce proceedings against Mr. Wynn are protected work product. This Court should issue a writ of prohibition to prevent the district court from enforcing its September 25, 2017 order overruling work product claims and compelling immediate production of the notes.

Dated this 20th day of November 2017.

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CERTIFICATE OF COMPLIANCE

1.I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Century Schoolbook font.

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3.I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in 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 on is to be found. I understand that I may be subject to sanctions in the event that

the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of November, 2017.

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CERTIFICATE OF SERVICE

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