IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

KEOLIS TRANSIT SERVICES, LLC,

Petitioner,

v.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD SCOTTI, DEPT. II,

Respondents,

and

SHAY TOTH,

Real Party in Interest.

PETITION FOR WRIT OF PROHIBITION

ANDREW R. MUEHLBAUER, ESQ.
Nevada Bar No. 10161
SEAN P. CONNELL, ESQ.
Nevada Bar No. 7311
MUEHLBAUER LAW OFFICE, LTD.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Telephone: (702) 330-4505
Facsimile: (702) 825-0141
Email: andrew@mlolegal.com

Attorneys for Petitioner Keolis Transit Services, LLC

RULE 26.1 DISCLOSURE

Parent corporations and any publicly held companies owning 10% interest in Petitioner:

- Keolis Group
- Keolis North America
- Caisse de Dépôt et Placement du Québec
- Société Nationale des Chemins de fer Français (SNCF)

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

Petitioner Keolis Transit Service, LLC is and has only ever been represented by the law firm of Muehlbauer Law Office, Ltd. in the underlying action.

MUEHLBAUER LAW OFFICE, LTD.

By: /s/ Andrew R. Muehlbauer

ANDREW R. MUEHLBAUER, ESQ.
Nevada Bar No. 10161
SEAN P. CONNELL, ESQ.
Nevada Bar No. 7311
MUEHLBAUER LAW OFFICE, LTD.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Telephone: (702) 330-4505
Facsimile: (702) 825-0141
Email: andrew@mlolegal.com

Attorneys for Petitioner Keolis Transit Services, LLC

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because the writ's principal issue raised is one of statewide importance pursuant to NRAP 17(a)(14).

TABLE OF CONTENTS

RULE 26 DISCLOSURE.....i

ROUTING STATEMENT……..ii

TABLE OF AUTHORITIES……vi

I. OVERVIEW AND RELIEF SOUGHT……...1

II. ISSUE PRESENTED…….....5

III. BACKGROUND FACTS RELEVANT TO THIS PETITION…….....5

IV. LEGAL AUTHORITY TO ISSUE A WRIT OF PROHIBITION IN THIS CASE…….9

A. Writ Authority for Discovery Disputes Involving Privilege Claims……...……...……9

B. NRCP 26(b)(3)'s Work-Product Privilege……...….9

C. Case Law Construing NRCP 26(b)(3)'s Work-Product Privilege…...13

D. NRCP 16.1(a)(1)(A)(ii) …….……15

V. REASONS WHY THE REQUESTED RELIEF SHOULD ISSUE…….20

A. Writ Relief is Warranted Because the Documents Sought Were Prepared in Anticipation of Litigation and District Court Disregarded the Plain Language of the Nevada Rules of Civil Procedure…….....19

B. Writ Relief is Warranted Because the District Court Disregarded Binding Precedent of the Nevada Supreme Court Directly on Point ……...…...…….25

C. The District Court's Decision, if Left Undisturbed, Would Cause Substantial and Unfair Prejudice to Civil Litigation Defendants in Nevada …….…….…….….27

VI. CONCLUSION……30

VERIFICATION……...…32

CERTIFICATE OF COMPLIANCE……...33

CERTIFICATE OF SERVICE…….34

TABLE OF AUTHORITIES

Cases

Burns v. Mulder, 20 F.R.D. 605 (ED.Pa 1957)……...11-12

Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C.1959)…….11

Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship, 131 Nev. Adv. Rep. 69, 356 P.3d 511 (Nev. 2015)……..17

New York v. Solvent Chem. Co., 166 F.R.D. 284, 288 (W.D.N.Y. 1996)……28

Round Hill Gen. Improvement Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981)……...10

Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 818 P.2d 849 (1991) ……...9

United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995)……..28

Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995) ……10

Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev., 133 Nev. Adv. Rep. 52, 399 P.3d 334 (2017) ……*en passim*

Statutes

N.R.S. § 34.320……1, 9, 30

N.R.S. § 34.330……..…….. 9

Rules

1 FRCP 26(b)(3)……...13

2. FRCP 26(b)(3) Notes of Advisory Committee on 1970 amendments……...13

3. NRCP 26(b)(3)……..……..…*en passim*

4. NRCP16.1(a)(1)(A)(ii)……1, 3, 4, 16, 18, 19

5. NRAP 21……1

I. OVERVIEW AND RELIEF SOUGHT

This petition is addressed narrowly to only one issue: whether surveillance videos and related reports generated by a party in anticipation of litigation are privileged under NRCP 26(b)(3). Petitioner Keolis Transit Service, LLC ("Petitioner") petitions this Court under NRAP 21 and N.R.S. § 34.320 et seq. for a writ of prohibition vacating the District Court's June 24, 2020 Order compelling Defendant to disclose surveillance videos and related reports in violation of its valid claim of privilege.

The issue arose when Plaintiff in the underlying action and real party in interest, Shay Toth ("Plaintiff"), filed a Motion to Compel the production of all surveillance videos, related reports, and Insurance Services Offices ("ISO") reports relying on NRCP 16.1(a)(1)(A)(ii). The ISO reports are not the subject of this Petition, but the surveillance materials are. Two of the videos were taken at the direction of Petitioner's insurance adjuster after receiving a letter of representation from Plaintiff's counsel, and one of the videos was taken at the direction of Petitioner's legal counsel after litigation was ongoing. Petitioner opposed the Motion and asserted the following three arguments (1) given that litigation was reasonably anticipated and/or ongoing at the time the videos were commissioned, the documents were privileged under NRCP 26(b)(3) work-product doctrine and *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. Adv. Rep. 52, 399 P.3d 334 (2017);

(2) NRCP 16.1's plain language states that Petitioner need only disclose information that it intends to use at trial, and such a determination had yet to be made by Petitioner at the time of the Motion to Compel; and (3) the only way to compel disclosure of privileged documents would be to show "substantial need," as required by NRCP 26(b)(3), and that Plaintiff had never even attempted to satisfy that element of the Rule.

After full briefing and oral argument, the Discovery Commissioner concluded the ISO reports were not prepared in anticipation of litigation but, rather, were prepared in the ordinary course of the duties of the insurance adjuster for Petitioner and directed Petitioner to disclose the ISO reports. The Discovery Commissioner agreed with Petitioner as to the privilege of the surveillance videos and reports, but directed that Petitioner would be obligated to disclose the surveillance videos and reports within 30 days after Plaintiff's deposition if Petitioner planned to use such videos or reports at trial.

The Discovery Commissioner's decision balanced the competing interests of privilege on the one hand and avoidance of "trial by ambush" on the other hand by forcing Petitioner to disclose the documents well before the close of discovery if Petitioner planned to use said documents for impeachment. This would ensure that Plaintiff would be fully aware of the contents of the videos and reports and would have adequate time to respond to same. The Discovery Commissioner's

recommendation was based on the plain language of NRCP 16.1, NRCP 26(b)(3), and the holding of the *Wynn Resorts* case.

Plaintiff filed an Objection to the Discovery Commissioner's Recommendation on May 26, 2020 and asked the District Court to overrule the Discovery Commissioner on June 4, 2020. In her Objection briefing, Plaintiff, once again, relied almost exclusively on the language of NRCP 16.1(a)(1)(A)(ii) with little regard to Petitioner's claims of privilege. Petitioner opposed the Objection and reiterated its arguments on privilege, NRCP 16.1's language as to impeachment evidence, and a lack of proof of a "substantial need."

After briefing was completed, the Honorable Richard Scotti issued an order "confirming" the Discovery Commissioner, but only as to the ISO reports. Judge Scotti reversed the Discovery Commissioner via a hand-written "footnote" stating that Petitioner was to immediately turn over all surveillance videos and reports. The order was signed on June 24, 2020 but was filed on July 13, 2020. The Notice of Entry of Order was later filed on July 31, 2020. There was no discussion of what compelled Judge Scotti to reverse the Discovery Commissioner. There was no hearing set to argue the incredibly important issue of work-product privilege and attorney-client privilege. There was only a hand-written notation at the bottom of the Order reversing the Discovery Commissioner and effectively denying Petitioner's claims of privilege without any explanation.

Given that privileged documents lose their protected status and value the moment they are disclosed, Petitioner is left with no adequate remedy post-trial to address the District Court's ruling in this case. Thus, writ relief is needed to correct the District Court's clearly erroneous application of law in its ruling as to work-product privilege. The Nevada Supreme Court has already set forth the considerations for claims of privilege in this context at length in the *Wynn Resorts* case just recently, and the language of NRCP 16.1(a)(1)(A)(ii) and NRCP 26(b)(3) is clear. Due to Judge Scotti's refusal to even hold a hearing or issue findings of fact, it is extremely difficult for Petitioner to discern what possible basis Judge Scotti could have had to disagree with the Discovery Commissioner's report and recommendations.

If allowed to stand, the District Court's order will inflict substantial unfair and irreversible prejudice upon Petitioner in its defense of the underlying action. It would all but eliminate the work-product protection in Nevada and place litigation defendants at a severe disadvantage to plaintiffs in direct contradiction of the equitable structure set forth in 16.1(a)(1)(A)(ii) as to impeachment evidence, and NRCP 26(b)(3) and *Wynn Resorts* as to work-product privilege. For these reasons, as more fully detailed herein, Petitioner has no choice but to ask this Court for extraordinary relief in the form of a Writ of Prohibition to protect its work-product privilege and preserve the fair balance between plaintiffs and defendants enshrined

in the Nevada Rules of Civil Procedure and the Nevada Supreme Court's holding in *Wynn Resorts*.

II. ISSUE PRESENTED

1. Did the District Court exceed its authority by denying Petitioner's claim of privilege and ordering Petitioner to produce surveillance videos and reports that were created in anticipation of litigation pursuant to NRCP 26(b)(3)?

III. BACKGROUND FACTS RELEVANT TO THIS PETITION

This case arises out of a car accident on July 1, 2017 between a vehicle driven by Plaintiff and a vehicle driven by Defendant Andre Petway that was owned by Petitioner, who was his employer at the time. Mr. Petway's vehicle rear-end Plaintiff's vehicle shortly after they began making a left turn.

Despite the apparently low speed of impact, Plaintiff has claimed severe and debilitating injuries arising out of this accident. At the time of filing her Complaint, Plaintiff amassed an astonishing $274,199.33 in medical billings that she claims are directly attributed to this accident. (*See* App. at 013)

Within five days following the accident, Plaintiff had retained an attorney and her attorney had contacted Petitioner to inform it of the claims of injury. (App. at 086.) Thus, Petitioner was on notice that a lawsuit was likely on the horizon almost immediately after the accident occurred. As information kept coming in to Petitioner from Plaintiff's counsel, it became more and more clear that Plaintiff would be

seeking substantial compensation from Petitioner for her alleged injuries.

In light of these claims of severe injury, Petitioner, through its third-party insurance administrator, undertook investigation of Plaintiff's history and physical condition. This included running an Insurance Services Office ("ISO") report to see what other insurance claims Plaintiff had made previously, as well as conducting a limited amount of public surveillance to observe Plaintiff's condition in order to independently evaluate the credibility of Plaintiff's injury and disability claims.

Plaintiff, apparently concerned about what Petitioner had learned through the ISO search and surveillance, issued a Request for Production of Documents on October 18, 2019, requesting that Petitioner turn over the ISO report, surveillance videos, surveillance reports, and various other documents. Petitioner, through counsel, refused to produce the requested documents based on the claims of privilege. (App. At 037-044.) Petitioner served a privilege log (App. at 059-061) that was later amended (App. at 145-147) to add additional detail as to the month and year the materials were created to allow Plaintiff to challenge the privilege with sufficient knowledge of the privileged documents. Plaintiff then filed a Motion to Compel the production of these privileged documents on March 23, 2020. (App. at 020-061) Petitioner opposed the Motion to Compel on April 6, 2020, based on its claims of privilege discussed in depth herein. (App. at 062-086) Plaintiff filed her Reply on April 16, 2020. (App. at 087-094)

After full briefing and oral argument occurred, the Discovery Commissioner concluded in her May 26, 2020 Report and Recommendation (App. at 095-099) that the ISO report was generated in the normal course of business for Petitioner's third-party insurance administrator rather than due to the threat of upcoming litigation and ordered Petitioner to disclose the ISO report. The Discovery Commissioner agreed with Petitioner, however, that the the surveillance videos and related reports were protected by privilege pursuant to NRCP 26(b)(3). The Discovery Commissioner directed that Petitioner would be required to disclose the surveillance videos and reports no later than 30 days after Plaintiff's deposition if Petitioner intended to utilize the videos and/or reports for impeachment purposes.

Plaintiff filed an Objection to the Discovery Commissioner's Recommendation on May 26, 2020 (App. at 100-147) and asked the District Court to overrule the Discovery Commissioner on June 4, 2020. Petitioner opposed the Objection and reiterated its arguments on privilege, NRCP 16.1's language as to impeachment evidence, and a lack of proof of a "substantial need" on June 16, 2020. (*See* App. at 148-167). Plaintiff filed her Reply on June 26, 2020.

After briefing was completed, the Honorable Richard Scotti issued a one-page order "confirming" the Discovery Commissioner, but only as to the ISO reports (a finding and recommendation which Petitioner did not challenge). (App. at 176.) Judge Scotti went on to reverse the Discovery Commissioner via a hand-written

"footnote" stating, "Defendant is ordered to immediately respond to Plaintiff's First Set of Requests for Production of Documents, including the subject surveillance videos and reports." (*Id*.) The order was signed on June 24, 2020 but was filed on July 13, 2020. The Notice of Entry of Order was later filed on July 31, 2020. There was no discussion of what compelled Judge Scotti to overrule the Discovery Commissioner on such an important issue of privilege. There was no hearing set to argue the issue before Judge Scotti. There was no remand to the Discovery Commissioner to have Plaintiff address the mandatory element of "substantial need" as set forth in NRCP 26(b)(3). There was only a hand-written notation at the bottom of the Order effectively reversing the Discovery Commissioner and denying Petitioner's claim of privilege under NRCP 26(b)(3) and *Wynn Resorts* without an ounce of explanation. This Petition follows.

IV. LEGAL AUTHORITY TO ISSUE A WRIT OF PROHIBITION IN THIS CASE

A. Writ Authority for Discovery Disputes Involving Privilege Claims

Petitioner here is seeking a Writ of Prohibition, pursuant to N.R.S. § 34.320. "The issuance of a writ of prohibition is purely discretionary with this Court." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) "A writ of prohibition may issue when the district court exceeds its authority, N.R.S. § 34.320, and it 'is a more appropriate remedy for the prevention of improper

discovery than mandamus.' To that end, '**a writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information**.'" *Wynn Resorts*, 399 P.3d at 341 (emphasis added, internal citations omitted).

A writ will issue only when there is no plain, speedy, and adequate remedy in the ordinary course of law. N.R.S. § 34.330. In the context of a claim of privilege that is wrongly denied by a district court judge, a writ of prohibition is the appropriate remedy because "if the discovery permitted by the district court is inappropriate, a later appeal would not remedy any improper disclosure of the information." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995).

A court will generally not issue a writ "unless legal, rather than factual, issues are presented." *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) Here, the issues presented are solely the interpretation and application of the Nevada Rules of Civil Procedure and the Nevada Supreme Court's binding precedent. No testimony or affidavits were considered by the Discovery Commissioner or the District Court. The parties relied solely on the law governing the issue in their briefings. Thus, this Court has the exact same record and law presented to it as the Discovery Commissioner and District Court did, and this Court is not being asked to evaluate the credibility of any evidence in this case.

B. NRCP 26(b)(3)'s Work-Product Privilege

Petitioner is fortunate in that the drafters of the Nevada Rules of Civil Procedure wrote an entire section of the Rules that is directly on point for this case. There is no need to try and force some ill-fitting rule into the factual framework presented; the Rule as written is directly on point. That provision is contained in NRCP 26(b)(3) and reads as follows:

> **(3)** *Trial Preparation: Materials.*
>
> **(A)** ***Documents and Tangible Things.*** Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's **attorney**, consultant, surety, indemnitor, **insurer**, or agent). But, subject to Rule 26 (b)(4), those materials may be discovered if:
> **(i)** they are otherwise discoverable under Rule 26 (b)(1); and
> **(ii)** the party shows that it has **substantial need** for the materials to prepare its case and cannot, without **undue hardship**, obtain their substantial equivalent by other means.
>
> **(B)** ***Protection Against Disclosure.*** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

N.R.C.P. 26 (emphasis added). This protection of litigation and trial preparation materials is often referred to as the "litigation privilege," rather than the work-product privilege, because past generations of lawyers had learned that "work product" was product prepared by *attorneys* only.

NRCP 26(b)(3) is a far broader protection than the work-product doctrine was for the majority of the 20th century. Under prior applications of the doctrine, only the work product of attorneys was assured of protection and courts were inconsistent in applying the doctrine to agents of a party, such as insurers. Compare *Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder*, 20 F.R.D. 605 (ED.Pa 1957). Now, though, the work-product privilege has been codified in the Rules of Civil Procedure, theoretically ending the dispute as to its application. Under both the Nevada Rules of Civil Procedure and the Federal Rules of Civil Procedure ("FRCP") upon which Nevada's Rules are based, the privilege extends to any materials prepared by a party, its attorneys, or another representative on its behalf, so long as the materials are prepared in anticipation of litigation or for use at trial.

What we can glean from the language of NRCP 26(b)(3) is an essential framework as follows:

- The presumption is that any materials prepared in anticipation of litigation or for trial are not discoverable, so long as they are prepared by a party, for a party, or for a party's representative (including its insurer).
- This presumption has exceptions where the party seeking disclosure of said materials can show that the materials are otherwise discoverable under NRCP 26(b)(1), the seeking party shows a substantial need for the materials, AND

that said party cannot obtain the materials by other means without undue hardship.

- However, even *if* the seeking party proves up the exception to the court's satisfaction, the court *still* must protect from disclosure the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative.

The Nevada Rules on this issue mirror the FRCP on this provision, which is contained in FRCP 26(b)(3). The advisory committee notes for this section of the Federal Rules explain the change from the historical protection of attorney work product to the current, broader rule: "Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf." *FRCP 26 Notes of Advisory Committee on 1970 amendments.*

C. Case Law Construing NRCP 26(b)(3)'s Work-Product Privilege

As with even the best written rules, however, the drafters could not possibly include every detail of application in the plain language of the Rule. Although more defined than many of our Rules in Nevada, there is still some level of ambiguity remaining as to the term "prepared in anticipation of litigation." After all, an insurance company conducts routine processing of claims as part of its general duties

in adjusting claims, regardless of whether litigation is expected to follow or not. This raises the question of what materials would be generated as part of routine claim handling as opposed to materials generated in anticipation of litigation. No reasonable person would argue that every document generated by an insurer would be protected by NRCP 26(b)(3), after all. The materials must be prepared in "anticipation of litigation."

Thankfully, the Nevada Supreme Court recently examined this issue in the *Wynn Resorts* case in 2017. In *Wynn Resorts*, the Nevada Supreme Court evaluated whether an investigative report prepared by outside counsel was protected by the work-product privilege. The report in that case was publicly disclosed, thereby waiving any attorney-client privilege for the underlying documents supporting the report. The disclosing party argued, however, that the work product doctrine contained in NRCP 26(b)(3) still protected the underlying documents.

In evaluating these claims, the *Wynn Resorts* court adopted the "because of" test to determine the applicability of the privilege. *See Wynn Resorts, Ltd.*, 133 Nev. Adv. Rep. 52 at *24-25, 399 P.3d at 347. This *Wynn Resorts* court explained the "because of" test as follows:

> Under the "because of" test, documents are prepared in anticipation of litigation when "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of the* prospect of litigation."

Id (internal citations omitted). The court went on to expand the application even further,

> The anticipation of litigation must be the *sine qua non* for the creation of the document—"but for the prospect of that litigation," the document would not exist. However, "a document. . . does not lose protection under this formulation merely because it is created in order to assist with a business decision." "Conversely . . . [this rule] withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.*
>
> In determining whether the "because of test is met, we join other jurisdictions in adopting a "totality of the circumstances" standard. In *Torf*, the Ninth Circuit Court of Appeals stated that [t]he "because of standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the **"document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation**[.]"

Wynn Resorts, Ltd., 133 Nev. Adv. Rep. 52 at *25-26, 399 P.3d at 348 (internal citations omitted, emphases added). The *Wynn Resorts* case was evaluating work product generated by an attorney, but the rule itself does not require the work product to have been prepared by an attorney, as discussed at length herein above. As the *Wynn Resorts* court held, NRCP 26(b)(3) protects documents so long as they have "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 party's representative." *Wynn Resorts*, 133 Nev. Adv. Rep. 52 at *24-25, 399 P.3d at 347.

Thus, in summary, so long as the documents meet the "because of" test when

considering "the totality of the circumstances" and they were prepared by or for a party or its representative, NRCP 26(b)(3)'s privilege applies. Unless the party seeking disclosure can demonstrate the "substantial need" and "no other means without undue burden" tests identified above, the documents cannot be obtained.

D. NRCP 16.1(a)(1)(A)(ii)

NRCP 16.1(a)(1)(A)(ii) is only marginally relevant to the issue at hand, but Plaintiff in the underlying briefing relied almost exclusively on its language in making her argument. Thus, out of an abundance of caution, Petitioner will address this Rule, even though NRCP 26(b)(3)'s work-product doctrine would control this issue and the documents were actually requested as part of an NRCP 34 Request for Production of Documents, not as part of an NRCP 16.1 automatic disclosure.

NRCP 16.1(a)(1)(A)(ii) states that a party must automatically disclose,

> (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control **and may use to support its claims or defenses**, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit;

(emphasis added). This Rule contains two separate categories of documents: everything before the "and" and everything after the "and."

1. <u>All Documents That a Party May Use to Support its Claims or Defenses</u>

To the extent NRCP 16.1(a)(1)(A)(ii) has anything to say on the issue at hand at all, the first section of the Rule would be the most applicable. Plaintiff in the underlying action goes on at length to focus on the fact that, as part of this Rule, the drafters state that all impeachment or rebuttal evidence must be disclosed. (*See* App. at 029-030.) Plaintiff pays no mind whatsoever to the emphasized portion of the Rule above, however: "and may use to support its claims or defenses…" This is axiomatic in litigation – if a party plans to use any document to support its claims or defenses, even including impeachment evidence, it must appropriately disclose said information to all parties. This is to avoid the classic "trial by ambush" by forcing opposing parties to show their hand during discovery instead of allowing them to surprise their opponent. *See Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship,* 131 Nev. Adv. Rep. 69 at n.14, 356 P.3d 511, 522 n.14 (Nev. 2015)

Plaintiff ignores this provision of the Rule, and instead seems to believe that any materials an adverse party ever comes in contact with that could arguably be relevant must be disclosed. This construction of this Rule as set forth by Plaintiff's Motion is not only inconsistent with the plain language of the Rule, but would also be impossible to enforce. It would require opposing parties to disclose every possible document that could possibly be relevant to some aspects of their opponent's case, regardless of whether the party intends to use the document or not. Investigation of claims like Plaintiff's involve countless hours of investigation and research to

determine the credibility of Plaintiff's claims. To torture the Rules to include every single document unearthed that could arguably contain impeachment evidence would create an unlimited universe of documents subject to automatic disclosures. This surely is not what the drafters intended.

Rather, the only rational construction of the NRCP 16.1(a)(1)(A)(ii) is to rely on the plain language of the Rule: if a party intends to use the impeachment evidence in any way at trial, it must be disclosed without awaiting a specific request under NRCP 34.

2. <u>Any Record, Report, or Incident Statement Prepared at or Near the Time of the Incident</u>

In reviewing the second section of the cited Rule, it should become immediately clear that it has nothing to do with the issue at hand. This section is directed at incident reports, sweep sheets, repair records, and similar materials generated at or near the time of the incident as a part of ordinary business operations. Plaintiff's own Motion cites to the Advisory Committee Notes saying exactly that:

> The 78 [sic] initial disclosure requirement of a "record" or "report" under Rule 16.1(a)(1)(A)(ii) includes but is not limited to: incident reports, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents. Documents identified or produced under Rule 16.1(a)(1)(A)(ii) should include those that are prepared or exist at or near the time of the subject incident. The reasonable time required for production of such documents will depend on the facts and circumstances of each case. **A party who seeks to avoid disclosure based on privilege must provide a privilege log.**

(App. at 029, n. 13.) (citing ADKT 522 Redline of Proposed NRCP Amendments Against Existing NRCP, at 77-78) (emphasis added). What this should demonstrate is that this section of the Rule is directed exclusively at contemporaneous or near-contemporaneous incident reports and business records regarding the incident.

The second fact that should be clear is that *even if* Plaintiff could somehow twist the language here to include her requested materials, the Rule specifically includes an acknowledgment that privilege may attach to said documents. Plaintiff omits this sentence when she goes on to argue the application of the Rule on page 11 of her Motion. (App. at 030.)

What we are left with, then, is simply a statement that all incident reports or similar materials must be automatically disclosed unless they are subject to a privilege. Petitioner has never denied that this is the law, and the Discovery Commissioner's Recommendation specifically enforced this provision.

V. REASONS WHY THE REQUESTED RELIEF SHOULD ISSUE

A. Writ Relief is Warranted Because the Documents Sought Were Prepared in Anticipation of Litigation and District Court Disregarded the Plain Language of the Nevada Rules of Civil Procedure

The documents at issue here are three surveillance videos and their related reports. Petitioner supplemented its original Privilege Log on April 3, 2018 to provide Plaintiff with the date and year of each video and report in order to allow

Plaintiff a fair opportunity to evaluate whether such materials were prepared in anticipation of litigation. (App. at 145-147.) Petitioner's original Privilege Log did not contain any dates for the videos to preserve their confidential nature, but Petitioner later agreed that Plaintiff deserved to know the general time period so that Plaintiff could make the appropriate argument to the Discovery Commissioner, so Petitioner amended its Privilege Log to provide that detail. (*Id*.)

The first two surveillance videos were taken in August of 2018, and the related surveillance report was authored that same month. (App. at 145-146.) The last surveillance video was taken in September of 2019, and the report was generated that same month (App. at 146.) The Complaint in this matter was filed on June 21, 2019. (App. at 001.) Petitioner's Answer was filed, through counsel, on August 6, 2019. (App. at 007.) Thus, the first two videos were taken at the direction of Petitioner's insurance adjuster handling the file and the final video was taken at the direction of defense counsel.

It should not even have to be argued that the third video and report were prepared "in anticipation of litigation or for trial," pursuant to NRCP 26(b)(3). They were generated at the direction of defense counsel *a month into litigation*. Petitioner need show nothing more than this chronology of pleadings to prove conclusively that these materials are absolutely protected, absent Plaintiff demonstrating a substantial need and an inability to procure the materials through other means,

pursuant to NRCP 26(b)(3)'s plain language.

Although all of the videos and reports are protected by the work-product doctrine, the videos and reports commissioned prior to litigation require some amount of additional information (set forth below) to be provided to the Court to ensure their protection from disclosure because the bare pleading chronology alone is insufficient.

As to the first two videos, the key event that triggers the protection of Petitioner's work product occurred on July 5, 2017 – four short days after the accident. On July 5, 2017, Plaintiff's counsel of record sent Petitioner a Letter of Representation advising Petitioner of his representation and directing all correspondence to be sent to his attention. (App. at 086.) If a letter from an attorney directing all communications to go through his office is not a sufficient basis to be "anticipating" litigation, then it would be hard to imagine anything that would.

The Court can see, then, that the first two videos and the first report were all generated *more than a year after the Letter of Representation was received*. Communications between Plaintiff's counsel and the insurance adjuster for Petitioner regarding her injury claims had been ongoing for more than a year before Petitioner's insurance adjuster finally commissioned the first two surveillance videos and report in August of 2018.

The plain language of NRCP 26(b)(3) states that materials prepared by both attorneys and insurers qualifies for the work-product privilege. All three videos and both reports were generated well after the Letter of Representation was received, and Petitioner was reasonably anticipating litigation. The language of the Rule is directed precisely at situations like this, and Petitioner was justified in believing that its investigation efforts would be protected from disclosure unless and until it decided to use said materials at trial.

What should be clear at this point is that the Discovery Commissioner's analysis was directly on point and followed the law as written. She understood NRCP 26(b)(3) and she created a recommendation that properly balanced the competing interests of privilege and transparency being brought by both parties to the litigation.

Furthermore, Plaintiff in the underlying action never once argued the necessary element of "substantial need" for the materials. It takes little thought to understand why Plaintiff never attempted to argue substantial need for the videos or reports: she was the subject of the videos and reports. Plaintiff has no actual need of these documents for her case, she just wants to know what Petitioner has learned about her daily life.

Presumably, Plaintiff wants to begin preparing an explanation of why she is claiming massive, debilitating injuries but is still capable of doing whatever physical

activity the surveillance videos show. Without knowing precisely which date and what activity was captured, Plaintiff is left guessing at which activity she needs to explain away. This curiosity is understandable, given the circumstances of this case, but curiosity deso not even come close to demonstrating a "substantial need."

The classic example used in law school of "substantial need" would be a witness statement obtained by the defendant from a person who cannot be located by plaintiff. The theory there is that the defendant has learned something about the claim that the plaintiff has no ability to learn by herself. Under that circumstance, the textbooks suggest that as long as the thoughts and mental impressions of the person taking the statement are protected, the plaintiff can demonstrate that she has a substantial need and cannot possibly obtain the statement from any other source.

Here, Plaintiff never argues anything close to this because it would be an absurdity. There is no "substantial need" for surveillance videos of the Plaintiff's everyday activities. Plaintiff does not care about the contents of the video – she knows what public activity she has undertaken over the past several years – she only cares to learn what *Petitioner* knows. The contents of the videos are only important to her to the extent they demonstrate what Petitioner has learned in preparation of its defense, not what the videos actually show. Plaintiff knows generally what they show because she was living it in August of 2018 and September of 2019. To find

this as a "substantial need" would make a mockery of the NRCP 26(b)(3) work-product privilege.

All of this makes it all the more puzzling how the District Court could review the exact same record and the same Rule and come to the conclusion that these surveillance videos were not protected from disclosure. The District Court did not issue findings of fact or even order a hearing for Plaintiff to demonstrate her substantial need for the materials. The District Court simply overruled the Discovery Commissioner with a footnote and destroyed Petitioner's work-product privilege without any explanation as to why. Petitioner is left with no choice but to ask this Court to intervene and issue a Writ of Prohibition to protect its confidential and privileged materials.

B. Writ Relief is Warranted Because the District Court Disregarded Binding Precedent of the Nevada Supreme Court Directly on Point

The plain language of NRCP 26(b)(3) supports Petitioner, but so does the on-point, controlling precedent set forth by the Nevada Supreme Court in *Wynn Resorts*. In applying *Wynn Resorts* and its construction of NRCP 26(b)(3), this Court has to simply determine whether the documents sought by Plaintiff were generated "because of" litigation. The surveillance materials satisfy this test without question.

Surveillance is only conducted on plaintiffs or potential plaintiffs in litigation who are claiming damages substantial enough to justify the expense of verifying their claims through surveillance. The need for surveillance was solely based on the

fact that an attorney had contacted Petitioner on July 5, 2017 and then subsequently informed Petitioner's insurer that massive damages would be claimed related to this case. Any insurance adjuster in the country would take these signs as an indication that litigation was on the horizon.

Although specific communications between Plaintiff's counsel and Petitioner during this period regarding damages and settlement are protected from disclosure, Plaintiff's counsel has not changed since July 5, 2017 and he certainly knows the gravity of the claims he made to Petitioner between July 5, 2017 and August of 2018 to justify Petitioner's anticipation of litigation in this case. From the outside, though, this Court need only look at Plaintiff's Request for Exemption From Arbitration filed on August 22, 2019 to see that Plaintiff appears to have amassed up to $274,199.33 in claimed medical bills by the time she filed her Complaint. (App. at 013.) This document was filed a mere two months after the Complaint was filed, and it details "severe and serious injuries to [Plaintiff's] body, has had to undergo back surgery, and has had to engage the services of physicians and other health care providers." (*Id.*)

Applying *Wynn Resorts*, this Court must determine "in light of the nature of the document and the factual situation in particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *Wynn Resorts*, 133 Nev. Adv. Rep. 52 at *25, 399 P.3d at 348 (internal quotation marks

omitted). The nature of the document is that it is solely used to impeach claims of serious injury raised by Plaintiff, and the factual situation is that Plaintiff's counsel had alleged six-figure special damages prior to the initiation of the surveillance. If this does not satisfy the "because of" test, then no document would. Surveillance videos are impeachment evidence only, and are generally intended to persuade a third party that the claimed injuries are being exaggerated. While the videos would have some nominal utility in non-litigation contexts, it would be extremely rare to ever pay the substantial cost for surveillance if an insurer was not anticipating needing to use the videos in a litigation context. Thus, there is no doubt that, under the *Wynn Resorts* framework, all surveillance materials were made in anticipation of litigation to support Petitioner's defenses at trial.

The District Court's decision appears to have not even considered the *Wynn Resorts* "because of" test. There were no facts presented by Plaintiff in the underlying briefing that could have overridden the arguments of Petitioner, and the District Court certainly has no knowledge of this case beyond the briefing. It is, therefore, difficult to understand how the District Court could have concluded that the surveillance videos and reports were not prepared "because of" litigation, particularly when one of the videos and one report were prepared *during litigation*. Thus, a Writ of Prohibition is necessary to protect Petitioner's privileged work product from disclosure.

C. The District Court's Decision, if Left Undisturbed, Would Cause Substantial and Unfair Prejudice to Civil Litigation Defendants in Nevada

The fact pattern presented in this case is by no means unique. Surveillance, or *sub rosa* investigation, is commonplace in the world of civil litigation when serious injuries are claimed. Every experienced defense attorney in Nevada likely has a story of catching an allegedly disabled plaintiff dancing, rock climbing, or playing football during the discovery process. Experienced plaintiff lawyers know to instruct their clients to monitor their public activities and social media presence in order to avoid defense counsel obtaining valuable impeachment evidence.

This is what makes the issues at stake in this Petition so important to litigation in Nevada: Judge Scotti's decision has the potential to fundamentally alter the equities of litigation in favor of the plaintiff and against the defendant in direct contravention of the long-standing work-product privilege.

The work-product doctrine "shields from disclosure materials prepared 'in anticipation of litigation' by a party, or the party's representative, absent a showing of substantial need." *United States v. Adlman,* 68 F.3d 1495, 1501 (2d Cir. 1995) (citing Fed. R. Civ. P. 26(b)(3)). "The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggy-backing on the adversary's preparation." *Id. New York v. Solvent Chem. Co.,* 166 F.R.D. 284, 288 (W.D.N.Y. 1996). Indeed, plaintiffs in litigation already start out at a distinct advantage as compared to defendants in that the plaintiff knows well before

the defendant whether a lawsuit will be coming and what that lawsuit will allege. A defendant is left at the mercy of a plaintiff for months, or even years, while a plaintiff generates documents, talks to experts, and obtains professional opinions in support of his or her claim. A defendant typically only learns of the upcoming lawsuit when the plaintiff chooses to inform the defendant, through either a letter of representation or the service of a summons and complaint.

To compensate for this disadvantage, the drafters of the Nevada Rules of Civil Procedure and the Nevada Supreme Court have created a complementary system of protection for defendants facing litigation contained in NRCP 26(b)(3). Once the plaintiff alerts the defendant that litigation may be on the horizon, a defendant begins to plan a strategic defense to protect itself. This defense entails countless conversations, e-mails, notes, and reports generated by a defendant in an effort to learn more about what is coming, who is bringing the claim, and what the risk of liability may be. This is an essential function of both a defendant and the adjusters and insurers who are charged with initial responsibilities for a claim.

The idea that every piece of investigation conducted during this time could be exposed to their adversaries is offensive to our adversarial legal system. A plaintiff cannot simply make a threat of a lawsuit and then sit back and let his or her adversary do all the work of investigation and evaluation and then walk up and demand a copy of the fruits of the defendant's labor.

The results of a holding allowing such "piggy-backing" off an adversary's work would be incalculably damaging to defendants all across Nevada. No frank discussions could be had with anyone but an attorney, and no meaningful investigation could be conducted without fear that everything learned would be subject to disclosure to the opposition at a later date. It would create an astonishing chilling effect on all communications and would force defendants to operate in the dark unless and until they hire an attorney to "direct" every action they take.[1] While this may result in a massive financial windfall for attorneys, it would violate the express directive of the drafters of the Rules and the Nevada Supreme Court in expanding the work product privilege in NRCP 26(b)(3) to cover *all* documents generated in anticipation of litigation.

Thus, not only does the law support overturning the District Court's Order, but common sense and public policy support the issuance of a Writ of Prohibition as well. The system as it currently stands is intended to strike a balance between the competing interests of defendants and plaintiffs, and it successfully does this only when the "zone of privacy for strategic litigation planning" is protected by the courts.

VI. CONCLUSION

[1] Although, as the District Court's ruling has demonstrated here, even investigation directed by counsel is potentially no longer safe from disclosure.

Based on the plain language of NRCP 26(b)(3), the controlling law from the Nevada Supreme Court contained in *Wynn Resorts*, and the public policy supporting upholding the work-product privilege, Petitioner respectfully requests that this Court issue a Writ of Prohibition to the District Court in regards to its June 24, 2020 Order on the Discovery Commissioner's Report and Recommendations pursuant to N.R.S. § 34.320. There is no plain, speedy, and adequate remedy available to Petitioner other than a Writ of Prohibition due to the privileged nature of the documents ordered to be disclosed by the District Court.

DATED this 14th day of August, 2020.

MUEHLBAUER LAW OFFICE, LTD.

By: /s/ Andrew R. Muehlbauer
ANDREW R. MUEHLBAUER, ESQ.
Nevada Bar No. 10161
SEAN P. CONNELL, ESQ.
Nevada Bar No. 7311
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Telephone: (702) 330-4505
Facsimile: (702) 825-0141
Email: andrew@mlolegal.com
sean@mlolegal.com

Attorneys for Petitioner Keolis Transit Services, LLC

VERIFICATION

I, Andrew R. Muehlbauer, declare as follows:

1. I am one of the attorneys for Petitioner Keolis Transit Services, LLC.
2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF PROHIBITION and that the same is true to my own knowledge, except to those matters stated on information and belief, and as to those matters, I believe them to be true.
3. I, as legal counsel, am verifying the Petition because the question presented is a legal issue as to the obligations of a District Court Judge to follow the Nevada Supreme Court's precedent, which is a matter appropriate for legal counsel to verify.
4. I verify that this Petition is not filed for any improper purpose and is not intended to delay, vex, or annoy.
5. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is executed this 14th day of August, 2020 in Las Vegas, Nevada.

By: /s/ Andrew R. Muehlbauer
Andrew R. Muehlbauer, Esq., Bar No. 10161

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)m 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 typefont using Microsoft Office Word 2013 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, it has a typeface of 14 points or more, and, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,960 words, which is less than the 7,000 words allowed by NRAP 32(a)(7)(A)(ii) and the Amendment set forth in ADKT 553 effective June 7, 2020.

I hereby certify that 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)(1), which requires that every assertion in this brief regarding matters in the record be supported by appropriate reference to the record on appeal. 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.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(a)(4) and NRAP 30.

DATED this 14th day of August, 2020.

MUEHLBAUER LAW OFFICE, LTD.

By: /s/ Andrew R. Muehlbauer

ANDREW R. MUEHLBAUER, ESQ.
Nevada Bar No. 10161
SEAN P. CONNELL, ESQ.
Nevada Bar No. 7311
MUEHLBAUER LAW OFFICE, LTD.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Telephone: (702) 330-4505
Facsimile: (702) 825-0141
Email: andrew@mlolegal.com

Attorneys for Petitioner Keolis Transit Services, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Muehlbauer Law Office, Ltd. and that, on this 14th day of August, 2020, I electronically served a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION** properly addressed to the following:

Cliff W. Marcek, Esq.
CLIFF W. MARCEK, P.C.
411 E. Bonneville, Suite 390
Las Vegas, NV 89101
Telephone: (702) 366-7076
Facsimile: (702) 366-7078

Boyd B. Moss III, Esq.
MOSS BERG INJURY LAWYERS
4101 Meadows Lane Suite 110
Las Vegas, NV 89107
P: (702) 222-4555
F: (702) 222-4556

Attorneys for Real Party in Interest
Shay Toth

DUE TO COVID-19 RESTRICTIONS SET FORTH BY CHIEF JUDGE LINDA MARIE BELL, SERVICE WAS ACCOMPLISHED VIA FACSIMILE AND U.S. MAIL TO THE FOLLOWING:

The Honorable Richard Scotti
Eighth Judicial District Court, Dept. II
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Facsimile: (702) 671-4317

____/s/ Andrew R. Muehlbauer_____
An Employee of Muehlbauer Law Office, Ltd.