IN THE COURT APPEALS OF THE STATE OF NEVADA

No. 81637-COA

KEOLIS TRANSIT SERVICES, LLC
Petitioner

v.

THE EIGHTH 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

ANSWER TO WRIT OF PROHIBITION

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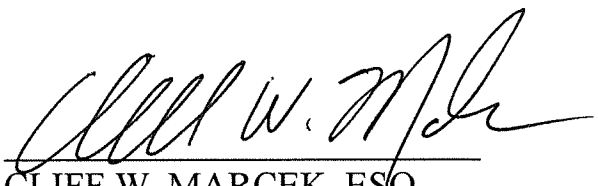
NRAP 26.1. DISCLOSURE

The undersigned counsel certifies there are no parent companies or publicly held companies owning 10% interest in the Real Party in Interest, nor the attorney for the Real Party in Interest.

CLIFF W. MARCEK, P.C.



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CERTIFICATE OF COMPLIANCE

1. I, Cliff W. Marcek, Esq. 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:

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in in size 14 in Times New Roman Font.

3. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,487 words and does not exceed 15 pages.

4. Finally, I hereby certify that I have read this answer to Writ of Prohibition, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 10 day of November, 2020.

.....

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I. OVERVIEW AND ISSUES PRESENTED

1. The Surveillance Videos and Reports Requested by Plaintiff Must be Disclosed Pursuant to N.R.C.P. 16.1
2. Defendant Keolis Purported Privileges and Objections do not Justify Their Refusal to Disclose the Surveillance Video and Reports
3. The Surveillance Videos and Reports Are Neither Protected by the Attorney-Client Privilege, nor the Attorney Work Product Privilege
4. The Trial Court did not Abuse its Discretion when it Ordered the Disclosure of the Videos and the Reports.

II. RELEVANT BACKGROUND FACTS

This is an action for personal injuries and damages as a result of a motor vehicle collision that occurred July 1, 2017. Defendant ANDRE RAMON PETWAY, while in the scope of his employment with Defendant Keolis, was driving a 2013 Dodge Grand Caravan, owned by Defendant Keolis, and was traveling northbound on Boulder Highway. Defendant PETWAY smashed into the back of a 2015 Toyota Corolla that was driven by SHAY TOTH, while she was waiting to make a left turn onto Sahara Avenue. The visible damage was substantial and Ms. Toth's vehicle sustained over $7,000.00 in property damage. **See Respondent's Appendix 00005.**

A. Procedural Posture:

Plaintiff filed her Complaint on June 21, 2019, alleging a claim of negligence against Defendant ANDRE RAMON PETWAY, an Individual; and Defendant KEOLIS TRANSIT SERVICES, a Delaware Limited Liability Company. **See Petitioner's Appendix at 001-004.** Thereafter, on or about August 6, 2019, Defendant Keolis filed its Answer to Plaintiff's Complaint. **Id. at 007** Plaintiff and Defendant Keolis met and conferred at an early case conference and a Joint Case Conference Report was filed on October 16, 2019. On November 21, 2019, Defendant PETWAY filed his Answer to Plaintiff's Complaint. Shortly thereafter, scheduling and trial orders were issued in this case.

B. Facts Relevant to Plaintiff's Motion to Compel:

On October 18, 2019, Plaintiff electronically served Defendant Keolis with her First Set of Requests for Production of Documents.[1] On November 25, 2019, Defendant Keolis served its Responses to Plaintiff's First Requests for Production of Documents.

Defendant Keolis' Responses insufficiently alleged various privileges as its basis of objecting to the production of documents and data requested by Plaintiff.[2]

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[1] Petitioner's Appendix at 037-044

[2] Petitioner's Appendix at 120-128

Further, Defendant Keolis initially failed to provide an associated privilege log to Plaintiff.

On December 27, 2019, Cliff W. Marcek, Esq. emailed Keolis in regard to its objections to the production of documents and data requested by Plaintiff on the basis of its alleged privilege. On January 10, 2020, Defendant Keolis served its Amended Response to Plaintiff's First Requests for Production along with an inadequate Privilege Log.[3] [4]Defendant's January 10, 2020 Amended Responses maintained, and expanded, its alleged privileges as its basis of objecting to the production of three surveillance videos Defendant KEOLIS' bate stamped KEO01311-1313, the two reports on said surveillance videos to be Defendant KEOLIS' KEO01314-1326 and KEO01327-KEO01339 and the ISO report of Plaintiff to be KEO01340-1343.[5] Specifically, Defendant Keolis refused to produce the aforementioned videos and reports requested by Plaintiff in her discovery requests numbered 10, 11 and 23 for (a) documents obtained about the Plaintiff from any source, including, social media, private investigators and/or insurance companies, (b) video surveillance, and/or imaging, of the Plaintiff obtained through private investigators, witnesses, and/or social media, (c) Defendant KEOLIS' claims file, respectively.

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[3] Petitioner's Appendix at 130-139
[4] Petitioner's Appendix at 141-143
[5] Petitioner's Appendix at 145-147

After a meet and confer pursuant to EDCR 2.34, Plaintiff filed a Motion to Compel on March 23, 2020. The main point of the motion was the 2019 changes to NRCP 16.1 compelled disclosure of these documents. The defendants opposed the motion to compel on April 6, 2020 **Petitioner's App. At 062**. In the opposition the Defendant readily admitted that two of the videos and reports were completed well before litigation at the request of the claims adjuster, and one was done after litigation commenced **Id. at 068.** Plaintiff filed a Reply to the Defendants' opposition to the motion to compel **Id. at 087.** and the matter was heard before the Discovery Commissioner April 23, 2020. The Discovery Commissioner ruled as follows:

> "IT IS HEREBY RECOMMENDED that Plaintiff, Shay Toth's, Motion is GRANTED IN PART and DENIED IN PART as follows:
>
> 1. The surveillance videos and reports are protected **at this time**. However, the surveillance video must be disclosed within thirty (30) days of Plaintiff's deposition if Defendant Keolis intends to use the surveillance video [or reports] at trial.
> 2. The ISO Report was done in the normal course of business and it is not protected. Therefore, the ISO Report is to be disclosed to the Plaintiff." (emphasis added) **Petitioner's Appendix at 098**

The Discovery Commissioner's ruling regarding the surveillance videos had no basis in law and is inconsistent with case law and Nevada Rule of Civil Procedure 16.1. Consequently, the Plaintiff filed an Objection to the Discovery Commissioner's Report and Recommendation June 2, 2020. **Id. at 100-108** The Defendants filed an opposition to the Plaintiff's Objection on June 20, 2020. **Id. at**

148. Plaintiff filed a reply to Defendants' opposition on June 26, 2020 **Petitioner's Appendix at 168.** The District Court ruled the videos and reports should be disclosed "immediately". **Id. at 176.** The Judge affirmed the part of the DCRR requiring the disclosure of the ISO report.

The District Court judge properly ruled that the videos and reports be disclosed and the decision should be affirmed.

II. LEGAL AUTHORITY AGAINST ISSUANCE OF WRIT OF PROHIBITION

A. The Surveillance Videos and Reports Requested by Plaintiff Must Be Disclosed Pursuant to NRCP 16.1

The 2019 amendments to the Nevada Rules of Civil Procedure[6] are comprehensive and modeled in part after the Federal Rules of Civil Procedure. The 2019 amendments to NRCP 16.1 has brought NRCP 16.1 in line with the relevant FRCP

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[6] *See ADKT 522 Redline of Proposed NRCP Amendments Against Existing NRCP* at pg 1 Advisory Committee Note 2019 Amendment; Reproduced in Pertinent part: The 2019 amendments to the Nevada Rules of Civil Procedure are comprehensive. Modeled in part on the 2018 version of the Federal Rules of Civil Procedure, the 2019 amendments restyle the rules and modernize their text to make them more easily understood. Although modeled on the FRCP, the amendments retain and add certain Nevada-specific provisions. The stylistic changes are not intended to affect the substance of the former rules.

produced in relevant part in footnote below.[7] As laid out in the redline provisions of the 2019 NRCP amendments, against the previous NRCP, the mandatory disclosure of data, including video, pursuant to NRCP 16.1(a)(1)(A)(ii) is as follows:

> ~~(B) A~~ (ii) a copy ~~of,~~ ~~—~~or a description by category and location ~~—of,~~ all documents, ~~data—compilations~~ electronically stored information, and tangible things that ~~are~~ the disclosing party has in ~~the~~ its possession, custody, or control ~~of~~ 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 ~~party and which are discoverable under Rule 26(b);~~incident that gives rise to the lawsuit;[8] **(emphasis added)**

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[7] *See Supra* at 77-78 Advisory Committee Note 2019 Amendment; Reproduced in Pertinent part:
Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials that it may use to support its claims or defenses. However, **the disclosure requirement also includes any record, report, or witness statement in any form, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit**. The 78 initial disclosure requirement of a "record" or "report" under Rule 16.1(a)(1)(A)(ii) includes but is not limited to: incident reports, records, 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. **(emphasis added)**

[8] *See Supra at* 71

As such, and in accordance with the statutory intent of the drafters of the 2019 amendments to NRCP 16.1, Defendant must disclose in any form, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit, including incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents so long as those documents are prepared or exist at or near the time of the subject incident.

It is clear the overall policy of the FRCP is to promote "transparency and collaboration... and cost-effective discovery" See *Apple, Inc. v. Samsung Electronics Co.* No. 12-CV-0630-LHK PSG, 2013 U.S. Dist. LEXIS 67085, 2013 WL 1942163, at *3 (N.D. Cal. May 9, 2013).

B. Defendant KEOLIS' Purported Privileges and Objections Do Not Justify Their Refusal to Disclose the Surveillance Videos and Reports

The Defendants assert that they do not have to turn over the surveillance videos and reports based on the litigation privilege in NRCP 26(b)(3). That section states in part:

> "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."

As the court can see, the videos and the reports, especially the two videos and the one report from August 2018 were not done at counsel's behest and Rule 26(b)(1) states these are discoverable. This litigation privilege is actually a version of the work product privilege and is not absolute. Further, Defendant's assertion regarding the propriety of withholding the video from Plaintiff or Defendant's employees is not justified. Indeed, preventing access to the video runs counter to the paramount goals of transparency, collaboration, and efficiency in the discovery process.[9] Courts generally have ordered parties to produce materials to promote such goals, particularly the goal of transparency.[10] [11] Given this preference for transparent and collaborative discovery, the videos and reports should have been produced pursuant to NRS 16.1 and in response to Plaintiff's Request for Production. If defendants are allowed to lie

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[9] *See Apple, Inc. v. Samsung Electronics Co.*, No. 12-CV-0630-LHK PSG, 2013 U.S. Dist. LEXIS 67085, 2013 WL 1942163, at *3 (N.D. Cal. May 9, 2013) ("[T]ransparency and collaboration [are] essential to meaningful, cost-effective discovery"); The Sedona Conference, The Sedona Conference Cooperation Proclamation (2008) (http://www.thesedonaconference.org/content/tsc_cooperation_proclamation) (promoting "open and forthright information sharing... to facilitate cooperative, collaborative, transparent discovery.").

[10] *See e.g., Whitney v. City of Milan, Tenn.*, No. 09-1127, 2010 U.S. Dist. LEXIS 54393, 2010 WL 2011663, at *3 (W.D. Tenn. May 20, 2010) (Court denies plaintiff's request to withhold recordings for impeachment purposes until after depositions are complete, holding, among others, that gamesmanship with information is discouraged by the federal rules

[11] *Rofail v. United States of America*, 227 F.R.D. 53, 58 (E.D.N.Y. 2005) (Court held that plaintiff must produce recording because "[o]pen discovery is the norm. Gamesmanship with information is discouraged and surprises are abhorred.").

in wait, secretively video tape plaintiffs and withhold this information, the rule of disclosure is rendered null and void and promotes gamesmanship discouraged by the plain meaning of the rule.

In *Whitney v. City of Milan TN* No. 09-1127, 2010 U.S. District LEXIS 54393, 2010 WL 2011663*3 (W.D. Tenn. May 20, 2010) the Plaintiff wanted to withhold audio recordings of witnesses until after the deposition was taken. The Court, in ruling against Plaintiff's non-disclosure of the recordings until after the depositions, stated:

> ["...the Sixth Circuit and this Court consistently have eschewed discovery practices that run counter to the paramount goals of efficiency and openness in the discovery process. *See, e.g., In re Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation, 664 F.2d 114, 120 (6th Cir. 1981)* (noting the trial judge's goal of promoting "the efficient exchange of discovery information in the litigation before her"); *Webb v. Windsor Republic Doors, 2009 U.S. Dist. LEXIS 110561, 2009 WL 3757714, at *1 (W.D. Tenn. June 25, 2009)* (quoting *Rofail v. United States of America, 227 F.R.D. 53, 58 (E.D.N.Y. 2005)* (with factual circumstances very similar to the case at bar, the plaintiff was ordered to produce a recorded conversation because " '[o]pen discovery is the norm. **[*7]** Gamesmanship with information is discouraged and surprises are abhorred. Adherence to these principles assists the trier of fact and serves efficiency in the adjudication of disputes' ")." Id. at p. 6.

The Court's ruling in *Rofail v. United States,* 227 F.R.D. 53 2005 U.S. Dist. Lexis 1927, is also instructive. The Plaintiff brought a personal injury case against the United States under the *Jones Act*, 46 U.S.C.§ 688. The Defendant took the Plaintiff's statement after the accident and refused to turn over the statement until

after the Plaintiff's deposition was taken. The Court ordered the statement to be turned over. In reaching its conclusion the Court stated:

> "The rules of discovery in the federal system are premised on the principle that parties be forthcoming with relevant information in their possession. See *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683, 2 L. Ed.1077, 78 S. Ct. 983 (1958) ("Modern instruments of discovery serve a useful purpose...They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent".) Open discovery is the norm. Gamesmanship with information is discouraged and surprises are abhorred. Adherence to these principles assists the trier of fact and serves efficiency in the adjudication of disputes. Allowing litigants to obtain a court-sanctioned advantage solely because they asked for it runs counter to these principles." Id. at p. 58.

The Defendants rely on *Wynn Resorts, Ltd v. Eighth Judicial Dist. Ct.*, 399 P. 3d 334 (2017) as authority to withhold the surveillance recordings and the reports. The *Wynn* case did not involve surveillance videotapes and is distinguishable from this case in many particulars. First, it was decided before the rule changes to NRCP 16.1. Though the rule change by itself does not compel a different ruling than the discovery commissioner made, the policy and rational behind the rule is instructive. Second, the issues in *Wynn* were whether documents and communications made directly from lawyers and law firms to a party to litigation were privileged from disclosure by the attorney-client and attorney work product privileges and whether there was a waiver of the privileges. What the court held, *inter alia*, was that documents prepared ". . .in the ordinary course of business or that would have been

created in essentially similar form irrespective of litigation . . ." are not privileged. *Wynn Resorts, Ltd.* at p. 348.

The Defendants admit that much of work done in prelitigation by insurance companies is not 'in anticipation of litigation". *Petition for Writ,* p. 13. However, they misconstrue the holding in *Wynn*, a case that is factually distinguishable. Moreover, to accept Defendants' construction of the rules and case law would be contrary to the express language of NRCP 16.1 and would not require them to exchange documents that support claims or defenses and not require them to turn over impeachment and rebuttal evidence. Insurance companies are required to investigate claims under law. NRS 686A.310 states that it is an unfair claims practice to "not implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies." The law requires them to investigate and many, many claims never make it to court.

The privilege the Defendants are invoking here is the work product privilege. The work product privilege is not absolute. NRCP 26(b)(3) states the records and recording should be disclosed if "they are discoverable under NRCP 26(b)(3) and there is a substantial need by the other party." These recordings were done by the defendant, presumably to obtain information on the plaintiff that would be inconsistent with the injures she is complaining about. Almost by virtue of getting these recordings, they would likely lead to the discovery of admissible evidence or

are admissible evidence already. In particular, they are likely to support either the Plaintiff's claims or Keolis' defenses. There is a substantial need for the Plaintiff to get these because she has no other way to get them. The Defendants are withholding information that they will likely try to use as evidence whether directly or for impeachment or rebuttal. It is improper to assert privilege to hold back relevant evidence only to later attempt to use that evidence to advantage of the withholding party by disclosing it after her deposition. There is no basis in law for the Discovery Commissioner to make such a decision. Such tactics promote gamesmanship and result in trial by ambush or discovery by ambush, both of which are discouraged by law.

C. The Surveillance Videos and Reports Are Neither Protected by the Attorney-Client Privilege, Nor the Attorney Work Product Privilege.

Though the litigation privilege in Rule 26(b)(3) is essentially a restatement of the work product privilege, it is instructive to look at the law of privilege in general to put them in context. The attorney client privilege protects "confidential" information provided from the client to an attorney from being disclosed under any circumstances. It is essential to the attorney-client relationship and to the practitioner's competent and diligent representation of his/her client. It is designed to promote client full disclosure to their attorneys to ". . .promote the broader public interest of recognizing the importance of fully informed advocacy in the

administration of justice." *Upjohn Co. vs. United States*, 449 U.S. 383, 389, 101 S. Ct. 677 (1981). The privilege has been codified in NRS 49.095 and states:

> "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
> 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
> 2. Between the client's lawyer and the lawyer's representative.
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest."

In *Wynn Resorts, Ltd. vs. Eighth Judicial Court,* 133 Nev. Adv. Rep 52, 399 P. 3d 334 (2017) the court stated:

> "Nevada codified the attorney-client privilege at NRS 49.095. For this privilege to apply, the communications must be between an attorney and client, for the purpose of facilitating the rendition of professional legal services, and be confidential. Id. "A communication is confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." NRS 49.055.
> Protected communications can be from a lawyer to a client or from a client to a lawyer. See *Upjohn,* 449 U.S. at 390. Mere facts are not privileged, but communications about facts in order to obtain legal advice are. See id. at 341; see also *Wardleigh,* 111 Nev. at 352, 891 P.2d at 1184."

Though the court was referring to the attorney-client privilege, there is no distinction between it and the work product privilege with respect to the attorney disclosing confidential information. The surveillance videos and reports are not protected by the attorney-client privilege. They are not "communications" made

by the client to the attorney for the purpose of facilitation of the rendition of legal services. They are acts done on behalf of the insurance company to secure information in the claims phase of the case about the claimant that they intend to use in evaluating the case in the claims phase, and if the case doesn't settle, at trial once the plaintiff's deposition is taken. In particular, the information cannot be held onto, and not turned over based on the privilege and then turned over later after potentially maximum damage is done.

The work product privilege has its differences with the attorney-client privilege but has the same core element as does the attorney-client privilege.

As the Court stated:

> "The work-product doctrine protects more than just communications between a client and attorney, and is thus broader than the attorney-client privilege. *Hickman v. Taylor,* 329 U.S. 495, 508 (1947). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles,* 422 U.S. 225, 238 (1975). Thus, an attorney's work product, which includes "mental impressions, conclusions, opinions, and legal theories of counsel. . . , are not discoverable under any circumstances." *Wynn*, supra, at p. 347

Both privileges are nearly inviolate[12] and designed to protect either communications between the attorney-client or the mental impressions of the attorney. Here, these videos and reports, prepared by a third-party investigator

[12] The exceptions are described in Nevada Rules of Professional Conduct 1.6

before litigation was commenced, do not facilitate full disclosure between the attorney and client and have nothing to do with the lawyers' mental impressions.

D. The Trial Court Did Not Abuse its Discretion in Ordering the Disclosure of the Video and the Reports.

As Keolis stated, Writs of Prohibition are extraordinary remedies and the decision whether a petition to entertain a Writ lies within the discretion of the Court." *Poulos vs. District Court* 98 Nevada 453 (1982). A Writ of Prohibition is a remedy to control "arbitrary or capricious exercise of discretion." *Round Hill Gen. Imp. Dist. vs. Newman* 97 Nevada 601 (1981). For a Writ to be granted, the disclosure of the material must cause "irreparable harm" to the party from whom the material is sought. *Hickey vs. Eighth Judicial District Court* 105 Nevada, 729, 730 (1989). It is also axiomatic that reviews of discovery orders are looked at under the abuse of discretion standard. *Means vs. State* 120 Nev. 1001, 1007 (2004).

Keolis is unable to satisfy the law to issue a writ. In particular, it's hard to understand what is the so-called "irreparable harm" to Keolis. The information that Plaintiff seeks are video recordings of her taken secretively by the Defendant. These are not, in any way, confidential communications made by the client to the attorney or mental impressions of the attorney. An order requiring Keolis to turn over the videos and reports does not, in any way, prevent Keolis from doing so in the future. Keolis can continue to do so, but it will have to turn the recording over

in discovery, just like the plaintiffs have to turn over their evidence.

Second, for Keolis to prevail in this action, Keolis has to show the District Court abused its discretion when it ordered the disclosure of the videos and reports. NRCP 16.1 expressly requires the disclosure of document that support "claims or defenses" and documents that are for "impeachment and rebuttal". It's difficult to see how the Court abused its discretion. Moreover, NRCP 26(d), just like the FRCP 26(d), gives the court discretion in the sequence of discovery. See also *Rofail v. United States,* supra, at p. 54.

Last, in an act of desperation, KEOLIS states, *inter alia*, "If the District Court's Decision Is Left Undisturbed, [it] Would Cause Substantial and Unfair Prejudice to Civil Litigation Defendants in Nevada" Petition, at p. 27. In addition, without citing to any authority, Keolis outlandishly states, "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)." This is not a legal argument to grant the writ. It is a political statement and a grievance of counsel made without any basis. There is no reference in the Advisory Committee note indicating they were concerned with this issue or that it was the intent of the rule change. All history in revising the rule to this is contrary, and Keolis is simply making this up. The drafters of the rule and the Nevada Supreme court are not in

the business of protecting defendants and the District Court's order does not prevent Defendants from continuing with their secretive recordings of injured plaintiffs. They are free to do so if they wish.

III. CONCLUSION

The general intent of the Rules of Civil Procedure is to provide the disclosure of evidence so parties have the same information to evaluate their cases. This promotes cooperation so the parties are in a better position to settle the case or go to trial with some confidence as to what the evidence will be. The entirety of the rules are designed to avoid trial by ambush. NRCP 16.1 and the changes in 2019 were designed to further the problem of full disclosure of all non-privileged information. Defendants and insurance companies have a duty under the law to evaluate cases before they are filed and many, many cases resolve at this stage. Video recording of plaintiffs taken by Defendants in pre-litigation are clearly in furtherance of that goal and are not privileged. Even video recordings of Plaintiff taken after counsel is retained should be disclosed because they are not communications between a lawyer and client and do not reveal mental impressions. The Court has discretion to control discovery and set parameters of discovery and those decisions should not be overturned unless the Court abuses its discretion. Last, Keolis cannot identify what irreparable harm it would suffer

from if ordered to turn these recordings over. Plaintiff respectfully requests the Court Deny the Writ.

Dated this 10 day of November, 2020.

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VERIFICATION

I, Cliff W. Marcek, Esq. declare as follows:

1. I am the attorney for the Real Party in Interest, Shay Toth.
2. I verify I have read the foregoing Answer to Writ of Prohibition and 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 this Petition because the issues present a legal issue for the Court to consider.

4. I verify this Answer to Writ of Prohibition is not filed for any improper purpose and is not intended to delay, vex, or annoy.

5. I declare under the penalties of perjury in the State of Nevada the forgoing is true and correct.

This Declaration is executed this 10 day of November, 2020.

By: _____
Cliff W. Marcek, Esq. Bar No.5061

CERTIFICATE OF SERVICE

I hereby certify I am an employee of Cliff W. Marcek, P.C. and on the 12th day of November, I electronically served a true and correct copy of the ANSWER TO WRIT OF PROHIBITION addressed to the parties listed below, addressed as follows:

Eighth Judicial District Court
The Honorable Richard Scotti
Regional Justice Center Dept. II
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An employee of Cliff W. Marcek, P.C.