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.

REPLY BRIEF IN SUPPORT OF WRIT OF PROHIBITION

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I. INTRODUCTION

Real Party in Interest Shay Toth continues to apply the wrong rules and wrong standards to virtually every argument made by Petitioner Keolis Transit Service, LLC in the Petition for Writ of Prohibition, just like she did before the Discovery Commissioner and the District Court. Beyond this, Toth also fundamentally misconstrues the work product doctrine and cites only inapposite Nevada authority and inapposite non-binding authority from lower courts in other jurisdictions to support her arguments.

In short, the Answering Brief (hereinafter cited as "Resp.") is filled with inaccuracies, incorrect statements of law, and, in some cases, even inaccurate citations to legal authority. Each of these issues will be addressed herein in the order in which they appear in the Answering Brief.

II. ARGUMENT

A. Despite Toth's Repeated Reference to NRCP 16.1, This Rule Has No Bearing on the Issues at Hand

Despite Petitioner repeatedly explaining at every level of this dispute that NRCP 16.1 has absolutely no bearing on the issues here, Toth once again refers to NRCP 16.1 and its recent amendments as somehow controlling in this case. (*See* Resp. at 5-7.) Toth's NRCP 16.1 arguments do not assist her in this case for three reasons: (1) NRCP 16.1 is not even the basis claimed for the disclosure of the records, NRCP 34 is; (2) NRCP 16.1, by its own terms, only addresses disclosure of

materials a party "may use to support its claims or defenses," and, most importantly, (3) NRCP 16.1's disclosures are in no way immune from application of legal privileges.

1. NRCP 34, Not NRCP 16.1 is at Issue in this Petition

The entire basis for the underlying Motion to Compel (App., 20-61) was the refusal of Petitioner to turn over privileged documents sought by Toth under an NRCP 34 Request for Production of Documents. This was not an NRCP 16.1 dispute, as stated in the Motion to Compel itself, "Defendant KEOLIS' Responses to Plaintiff's First Requests for Production insufficiently alleged various privileges as its basis of objecting to the production of documents and data requested by Plaintiff." (App. at 027.)

NRCP 16.1 and its recent amendments are simply not at issue in this case. Even if they were, however, it would not change the law of privilege and would in no way assist Toth's position.

2. Even if NRCP 16.1 Was the Rule at Issue Here, it Would Not Help Toth

Petitioner need not even rely on the inapplicability of NRCP 16.1 to defeat Toth's arguments here, though. As discussed at length in prior briefings, NRCP 16.1's own language states that documents subject to automatic disclosure are only those documents a party "may use to support its claims or defenses." NRCP 16.1(a)(1)(A)(ii). It has never been in dispute that *if* Petitioner chooses to use the

materials in question to support its defenses in this case, they *must* be disclosed without awaiting a NRCP 34 discovery request pursuant to NRCP 16.1(a)(1)(A)(ii).

The 2019 Amendments only made the Rule *more* clear in this regard and *more* supportive of Petitioner's arguments, as cited by Toth's own brief in the discussion on the Advisory Committee Notes: "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." (Resp. at 6., emphasis added)

To counter this obvious reading, however, Toth cites to another sentence in the Advisory Committee Notes that Toth apparently thinks supports her position: "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 this lawsuit.**" (*Id*, emphasis added by Answering Brief.) This sentence from the Advisory Committee offers Toth no support for her position. The key clause, which applies to all preceding language, is "concerning the incident that gives rise to the lawsuit." It is impossible, without twisting the basic meaning of words common to the English language, for Toth to claim that video surveillance of her public conduct months or years after the incident could possibly be defined as "concerning the incident that gives rise to the lawsuit." To the extent the Advisory Committee Notes on the NRCP 16.1 amendments have *anything* to say about this case at all, this sentence takes the documents at issue out of this Rule's

scope. The term "the incident" cannot possibly be stretched to include evidence regarding damages claimed months or years after the incident occurred. If that were the case, every single document generated in litigation would qualify under this sentence by the Advisory Committee and the universe of mandatory disclosure documents would increase tenfold overnight.

The plain meaning of these Advisory Committee Notes is just what they say: if you have possession of witness statements or videos of the incident, you need to produce them automatically without awaiting a specific request. These types of documents are inherently relevant to the case and must be disclosed automatically. This provision, like many of the 2019 Amendments, appears to have been added to streamline the discovery process and to avoid delays and gamesmanship. There is no indication in any of the text that it was added to eliminate NRCP 26(b)(3)'s work product doctrine and related privilege.

In this case, all such documents referenced by the Rule were automatically disclosed. Police reports, incident reports, and all related documents "concerning the incident that gives rise to the lawsuit" have been disclosed as part of the automatic disclosures in this case. One again, Toth's reliance on not only NRCP 16.1 but a misreading of the non-binding Advisory Committee Notes is entirely misplaced and offers her no support.

3. Regardless of Any Other Arguments on NRCP 16.1, Every Disclosure of Documents is Subject to a Privilege Analysis

More important than any of the above discussions, however, is the very basic fact that every single disclosure made by an attorney in litigation must pass a privilege check. The discovery rules, such of NRCP 26, NRCP 16.1, or NRCP 34 are *the beginning* of the analysis and not the end. Every attorney knows this, and no attorney would pretend that NRCP 16.1, or even NRCP 34, is the sole and final word as to whether a document must be disclosed. Every single document produced in litigation goes through an attorney's privilege check to ensure that it is properly subject to disclosure.

The vast majority of relevant documents pass through the privilege check without the least bit of hesitation, such as photos taken at the scene of the accident or police reports obtained from local authorities. We know as lawyers that the privilege arguments for such documents rarely if ever exist, and that these types of documents are almost universally disclosed without a second thought.

On the other end of the spectrum, however, are documents that almost always send up an alert during the privilege check, such as e-mails to the client, reports from non-testifying consultants, or attorney notes from a client meeting. Regardless of whether these documents would satisfy NRCP 16.1's standard for disclosure or NRCP 26's requirement for relevance to litigation, every practicing attorney in the

State of Nevada knows, or should know, that these documents are not subject to disclosure in litigation.

In this case, there is no doubt that the surveillance videos and documents are relevant to litigation and would potentially be subject to disclosure either in response to an NRCP 34 Request for Production of documents or, if intended to be used by Petitioner to support its defenses, under the automatic disclosure provisions of NRCP 16.1. Toth would have this Court cease the analysis right there and order production without any consideration of the claims of privilege. This is entirely improper, however, because NRCP 16.1 and NRCP 34 are only the beginning of the analysis and not the end. The next step of the analysis here, and in every single disclosure made by a competent attorney, is whether the documents are privileged and whether that privilege was properly raised. Here, the answer to both questions is yes and the documents must be protected from disclosure.

B. Toth Misstates and Misapplies NRCP 26(b)(3)'s Work Product Doctrine and Controlling Case Law

1. NRCP 26(b)(3)'s Work Product Doctrine Expressly States That it is Not Limited to Documents Produced at the Request of an Attorney

At the very outset of Toth's discussion regarding NRCP 26(b)(3), she properly cites the language relied upon by Petitioner, which states that documents prepared in anticipation of litigation "by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." (Resp.

at 7.) The following sentence of Toth's brief, however, goes on to argue precisely the opposite of the language of the rule: "As the [C]ourt can see, the videos and reports, especially the one report from August 2018 were not done at counsel's behest and Rule 26(b)(1) states these are discoverable." (Resp. at 8.) This statement contradicts the immediately preceding quotation to the Rule. NRCP 26(b)(3)'s protection is expressly extended to materials created by, a party, its insurer, or its attorney, *inter alia*. Toth here is arguing in direct contradiction of the governing law by claiming that the privilege would only apply to documents created "at counsel's behest."

As was argued extensively in Petitioner's Opening Brief, NRCP 26(b)(3) is very often confused by seasoned attorneys with the former standard wherein an attorney had to direct the production of documents for them to qualify for the work product privilege. This was addressed in the Opening Brief in an attempt to head off Toth's expected arguments as to the application of the privilege. (*See* Op. Brf. at 10-11.) Apparently, this attempt was made in vain, as Toth continues to propagate the argument that work product protection hinges on whether an attorney directed the creation of the document. It does not in Nevada, as the language of NRCP 26(b)(3) above conclusively establishes.

For the sake of completeness, Petitioner will also address Toth's argument regarding NRCP 26(b)(1) cited above. As this Court likely knows very well, NRCP

26(b)(1) is the Rule that sets forth the scope of discovery. The most relevant part of the Rule for this case's purposes reads, "[p]arties may obtain discovery regarding any **nonprivileged** matter that is relevant to any party's claims or defenses and proportional to the needs of the case…" NRCP 26(b)(1) (emphasis added). NRCP 26(b)(3) references this scope solely to set forth the standard for a court to use in determining whether to force disclosure of privilege documents; the first question a court must ask is whether the documents even qualify as discoverable, as set forth in NRCP 26(b)(1). *See* NRCP 26(b)(3)(A)(i).

Thus, no matter how one construes Toth's argument, it is directly contrary to written language of the Rule. If the drafters of NRCP 26(b)(3) wanted to limit the work product doctrine to only such documents as were created at the direction of counsel, they would not have included the language "by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." NRCP 26(b)(3).

2. Toth's Arguments on Transparency Trumping Privilege are Unsupported by any Authority

After misconstruing the scope of application of NRCP 26(b)(3), Toth then moves on to essentially arguing that the paramount consideration in discovery is transparency and not privilege, and cites to United States District Court level cases across the country that Toth apparently claims are on point. They are not. No case cited by Toth even comes close to arguing that transparency interests should trump

claims of privilege. Every one of the case citations buried in the footnotes on page eight of Toth's brief do not address anything remotely similar to our legal issues considered in this case.

Apple, Inc. v. Samsung Electronics Co., 2013 U.S. Dist. LEXIS 67085, 2013 WL 1942163 (N.D. Cal. May 9, 2013) is a U.S. District Court case from the Northern District of California that dealt with Apple seeking the production of "search terms and custodians Google used in response to requests for production Apple served on it." *Apple Inc.*, No. 12-CV-0630-LHK (PSG), 2013 U.S. Dist. LEXIS 67085, at *36. No claims of privilege were ever raised in that case; it was purely a question of whether such a broad discovery request was reasonable under the circumstances. *Apple* has no application to this matter, even if this Court was so inclined to follow the holding of a United States District Court judge in California.

Whitney v. City of Milan, 2010 U.S. Dist. LEXIS 54393 (W.D. Tenn. May 20, 2010) was a United States District Court case in Tennessee that involved a failure to timely object to a discovery request for audio recordings of certain witnesses. Once again, no claim of privilege was raised. The question was purely as to whether the party in possession of said recordings could properly withhold them from production until after the deposition of those recorded. The issues raised had absolutely nothing to do with claims of privilege; even if they had, however, the *Whitney* court held that the failure to object to the discovery request was the critical consideration:

> Finally, and perhaps most importantly, the Court finds persuasive Defendant's argument that "[i]f Plaintiff believed she had a basis for withholding the recordings, the proper procedure was for her to seek an order of protection under Fed. R. Civ. P. 26(c)(1)(B) prior to her response deadline under Rules 33 and 34 [of the Federal Rules of Civil Procedure]… Pursuant to Rules 33(b)(2) and 34(b)(2) of the Federal Rules of Civil Procedure, Plaintiff had a thirty-day period during which she could object to the request or file a motion for a protective order. *See* Fed. R. Civ. P. 33(b)(2), 34(b)(2). According to the docket, she did neither. Because she did not do so in a timely fashion, she waived her objection to the Defendant's request, and cannot now assert her right to withhold the recordings.

Whitney, No. 09-1127, 2010 U.S. Dist. LEXIS 54393, at *8-9. Thus, even if this Court were inclined to follow the guidance of a federal district court from Tennessee, the facts are completely distinguishable here. Petitioner objected to the disclosure as privileged during the prescribed timeframe, thereby preserving its right to challenge the disclosure.

Finally, Toth relies on *Rofail v. United States*, 227 F.R.D. 53, 54 (E.D.N.Y. 2005), which is yet another United States District Court case venued in the Eastern District of New York. *Rofail* involved a plaintiff's witness statement taken after the plaintiff's accident aboard a United States Naval vessel. (*See Rofail*, 227 F.R.D. at 54.) Once again, no privilege claims were made by any party. The question was solely as to the timing of the disclosure in relation to the depositions, not whether the possessing party had any basis to withhold the disclosure altogether.

In this case, Petitioner has asserted the work product doctrine and related privilege to protect the disclosure of the sought documents. There is no doubt that

the Request for Production was properly issued, nor is there any doubt that Petitioner properly objected to the disclosure of said documents based on privilege. None of the cases cited by Toth have any bearing on these issues, but rather just stand for the general proposition that transparency in discovery is a good idea. While true, this is not enough to trump a legitimate and supported claim of privilege. The benefits of a transparent discovery process do not override the substantially more important doctrine of privilege, and there is no case law cited by Toth that would support her proposition in this regard.

3. The *Wynn Resorts* Case is On Point and Controlling Authority, Despite Toth's Claims to the Contrary

Toth's next avenue of attack is to try and differentiate the holding in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334 (2017) from the facts of our case. Their first argument is that the "it was decided before the rule changes to NRCP 16.1." (Resp. at 10.) Toth goes on, however, to acknowledge that the rule change itself would "not compel a different ruling," but she argues that the "policy and rational [sic] behind the rule is instructive." (*Id*.) Toth does not explain what this policy and rationale are that would support her claims. As discussed at length above, NRCP 16.1 has no bearing on this case, is not the rule at issue, and would not assist Toth in her arguments regardless of what the policy and rationale behind the rule change were.

Toth next attacks the applicability of the *Wynn Resorts* case by making a convoluted argument regarding attorney-client privilege, waiver, and materials prepared in the ordinary course of business. The argument appears to be that the materials requested were generated in the ordinary course of business irrespective of litigation. (*See* Resp. at 10-11.)

Toth rightly notes that prelitigation investigation by an insurer often includes generation of some documents, and that NRS § 686A.310 does require an insurer to investigate all claims. As was briefed extensively before the Discovery Commissioner, District Court, and this Court, however, there is a substantial distinction between routine investigation and investigations conducted in anticipation of litigation. The Discovery Commissioner is the only fact-finder in this case to date who actually conducted such an analysis, and the Discovery Commissioner determined that the "[t]he ISO Report was done in the normal course of business and it is not protected." (App. at 098.) As to the other materials, however, the Discovery Commissioner found, consistent with Nevada law, that "[t]he surveillance videos and reports are protected at this time." (*Id*.)

Toth's argument appears to be that every piece of investigation conducted by an insurer would be done "in the ordinary course" due to its obligations to investigate claims. This is contradicted by the language of NRCP 26(b)(3) which creates the standard of "in anticipation of litigation" as defining what materials are protected.

Toth argues that NRS § 686A.310 creates some unique obligation on insurers that would somehow pull them out of NRCP 26(b)(3)'s protections, but this is unsupported by the language of NRCP 26(b)(3) which specifically includes a "party or its representative (including the other party's attorney, consultant, surety, indemnitor, **insurer**, or agent)." NRCP 26(b)(3) (emphasis added).

The Discovery Commissioner in this case evaluated all materials withheld by Petitioner and determined that the ISO Report was generated in the ordinary part of a claim investigation and not due to the anticipation of litigation and determined that it must be disclosed. Petitioner complied with this and disclosed the ISO Report. The Discovery Commissioner looked at the remaining documents, however, and properly determined that the other materials would not have been generated but for the expectation of litigation, thus garnering them the protection of NRCP 26(b)(3). This was argued extensively in the Motion to Compel briefing by Petitioner; an insurer does not, as a matter of course, conduct surveillance on a claimant unless there is a reasonable expectation that litigation will follow. (*See* App. at 074.) In this case, the need for surveillance was based on the fact that Toth's attorney contacted Petitioner's representatives on July 5, 2017, indicating his representation of Toth and then subsequently informed Petitioner's representatives in March of 2018 that massive damages would be claimed related to this case. All surveillance was conducted *after* the notice of representation was received and after these allegations

were made and litigation was clearly on the horizon. Thus, the Discovery Commissioner conducted an appropriate analysis of the different materials and ruled accordingly.

4. Toth Cannot First Raise a Substantial Need Claim Before The Nevada Court of Appeals

It took more than seven months of argument on this issue before Toth finally made her first reference to the "substantial need" element of NRCP 26(b)(3)'s test on work product privilege and it was first raised in these Writ of Prohibition proceedings. (Resp. at 11.) Make no mistake, this was never raised with the Discovery Commissioner nor with the District Court, despite Petitioner's repeated citation to the standard set forth in NRCP 26(b)(3) as a basis for refusing to disclose the records. It is entirely improper to first raise this issue in a Writ of Prohibition proceeding with the Nevada Court of Appeals.

This ad hoc argument should not be considered by this Court. It should have been raised at the lower court levels and subject to appropriate findings by either the Discovery Commissioner or the District Court. Neither engaged in such an analysis because Toth never addressed the factors of NRCP 26(b)(3).

Regardless of the procedural impropriety of Toth's late-arriving argument, she also fails to substantiate the claim whatsoever. Toth cites to no case law to support her definition of "substantial need" or explain why she has a "substantial need" for videos of her own public activities. Her only argument is that "[t]here is

substantial need for the Plaintiff to get these because she has no other way to get them." (Resp. at 12.) That is not the standard, but rather just reciting both elements of the standard. To meet NRCP 26(b)(3)'s standard, the materials must be otherwise discoverable and then "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." NRCP 26(b)(3). Toth does not even make any effort to explain how there is substantial need.

5. Withholding Privileged Documents is not Gamesmanship, Despite Toth's Claims to the Contrary

Toth argues throughout her Motion to Compel and now in her Answering Brief that it really is just not fair that she does not know what the surveillance videos show. To support this claim, Toth first cites to United States District Court case opinions on transparency (*See* Resp. at 8), discussed above, and then goes on to argue that Petitioner is somehow engaging in gamesmanship by not handing over privileged documents when she demands them, stating "[s]uch tactics promote gamesmanship and result in trial by ambush or discovery by ambush, both of which are discouraged by law." (Resp. at 12.) Notably, no citation is attached to this proposition.

The Discovery Commissioner directed that all surveillance materials "must be disclosed within thirty (30) days of [Toth's] deposition if [Petitioner] intends to use the surveillance video or reports at trial." (App. at 098.) While Toth decries this

as unfair, it is a ruling that is perfectly in line with the law on privilege. The Discovery Commissioner was setting a deadline for Petitioner to determine whether it wanted to use the materials at trial to protect the interests of Toth so Petitioner would not be able to drop the materials on her at the last second. Giving Petitioner 30 days to evaluate the deposition of Toth and determine whether the surveillance materials have any utility to its case is a perfectly reasonable application of law that balances the interests of privilege against the countervailing interest of notice to the opposing party. To the extent Petitioner decides to use the materials, it will have to waive its privilege and disclose them within the time period set by the Discovery Commissioner. Setting a firm deadline like gives Toth and her counsel an ample opportunity to evaluate the materials and conduct their own investigation into matters disclosed on the videos prior to the close of discovery.

Gamesmanship should never be sanctioned by a court, but it is not gamesmanship to preserve the privileged nature of documents through appropriate objections. The Discovery Commissioner's ruling actually guards against potential gamesmanship by Petitioner by setting a hard deadline for the disclosure that is well before the close of discovery.

Finally, as discussed above, all the cases cited by Toth regarding transparency and gamesmanship involved clearly discoverable documents withheld for improper purposes; none of those cases addressed privileged documents being withheld until

after a deposition is complete. There is simply no support for the proposition that withholding privileged documents until a party determines whether they have any utility to its defenses can be called unfair gamesmanship.

C. The Standard of Review is Not Abuse of Discretion, it is Whether the District Court Exceeded its Authority

Toth claims that the standard of review for an issue such as this is abuse of discretion. (*See* Resp. at 156.) To support this proposition, Toth first cites to *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601 (1981), "A Writ of Prohibition is a remedy to control 'arbitrary or capricious exercise of discretion.'" (Resp. at 156, internal citations omitted.) This quotation never appears in that case, hence the lack of a page citation by Toth. The *Round Hill Gen. Imp. Dist.* quote that Toth appears to be trying to cite reads, "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *The Round Hill Gen. Imp. Dist.*, 97 Nev. at 603-604.

The above quote, even if properly cited, does not support Toth's case, however. *The Round Hill Gen. Imp. Dist.* case involved compelling a governmental body to act on applications for permits to appropriate water from Lake Tahoe. *See The Round Hill Gen. Imp. Dist.*, 97 Nev. at 603. The state engineer had utilized his discretion to refuse to act on the applications and the petitioner there argued it was an abuse of discretion. *See Id.* This case has absolutely no bearing on the fact pattern of this case and there is no basis for Toth to cite such a case to try and establish a

novel standard of review for writ proceedings involving compelled disclosure of privileged information by a district court.

Toth's next basis for claiming the standard of review is abuse of discretion is that "[i]t is also axiomatic that reviews of discovery orders are looked at under the abuse of discretion standard. *Means vs. [sic] State [sic]* 120 Nev. 1001, 1007 (2004)." (Resp. at 15.) The actual statement of law from *Means* is:

> We review the district court's resolution of discovery disputes for an abuse of discretion. We also review a district court's decision to admit or exclude evidence at hearings and trials for an abuse of discretion. It is within the district court's sound discretion to admit or exclude evidence, and "this court will not overturn [the district court's] decision absent manifest error."

Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004). Thus, the *Means* case was addressing the standard of review in evaluating decisions on the admission of evidence, not whether to violate privilege. These are two entirely different standards, and it is inaccurate to argue that this application of an abuse of discretion standard to this case is in any way "axiomatic."

The actual standard in this case is what was stated by Petitioner based on the binding language of the Nevada Supreme Court: whether the District Court exceeded its authority in ordering the disclosure. *Wynn Resorts, Ltd.*, 399 P.3d at 341. *See also Clark v. District Court*, 101 Nev. 58, 692 P.2d 512 (1985) (writ of mandamus issued upon finding that a district court had exceeded its jurisdiction in ordering production and disclosure of privileged information). This standard does not call for

deference to the District Court because the Court will only issue a writ if "legal, rather than factual, issues are presented." *Round Hill Gen. Improvement Dist.*, 97 Nev. at 604. This language is far more consistent with a *de novo* standard of review than of the more deferential abuse of discretion standard for good reason: this Court is viewing the exact same argument and context as the courts below. There was no testimony of any witness or any determination rendered by the District Court as to disputed facts. The District Court was presented with the very same record as this Court and made a ruling based on the District Court's view of the applicable law, just as this Court will do. Under these circumstances, there is no justification to claim that this Court need defer to the judgment of the District Court or conclude that the District Court abused its discretion to issue the Writ of Prohibition. Rather, the sole question for this Court is whether the District Court exceeded its authority to order the disclosure of privileged documents by Petitioner. This Court can apply its own analysis to the legal issues presented without having to evaluate whether the lower court abused its discretion, and Toth has cited to no case to contradict this fact.

D. Irreparable Harm is Established by Petitioner as Supported by the Clear Language of the *Wardleigh* and *Wynn Resorts* Cases

Toth misconstrues the element of irreparable harm and apparently chooses to simply ignore the binding precedent by the Nevada Supreme Court set forth in *Wardleigh v. Second Judicial Dis. Court,* 111 Nev. 345, 350-351, 891 P.2d 1180, 1183-84 (1995) and cited by Petitioner in its opening brief which states that a writ is

the appropriate remedy in this context because "if the discovery permitted by the district court is inappropriate, a later appeal would not remedy any improper disclosure." This is just a longer way of the court saying "the harm would be irreparable." The *Wynn Resorts* case established this same point in the clearest language possible, stating, "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. As the saying goes, there is no "unringing the bell" when it comes to the disclosure of privileged documents.

Rather than addressing these holdings, however, Toth gives a convoluted argument that seems to blend irreparable harm considerations with the inapplicable attorney-client privilege arguments:

> Keolis is unable to satisfy the law to issue a writ. It's [sic] hard to understand what is the so-called 'irreparable harm' to [Petitioner]. The information that [Toth] seeks are video recordings of her taken secretively by the Defendant. There 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 will have to turn the recording over in discovery, just like the plaintiffs have to turn over their evidence.

(Resp. at 15-16.) Petitioner does not fully understand what the quoted paragraph is trying to say. Petitioner's best guess is that Toth is arguing that the Order from the District Court does not prevent Petitioner from conducting surveillance in the future, but just forces Petitioner to disclose every such surveillance activity conducted. If

this is what Toth intends to argue, this is not a reasonable argument at all when it comes to privilege. The very point of privilege is that it can be protected from disclosure and the harm done *is* that very disclosure. Privilege arguments are concerned with the disclosure of the results of an action, not the ability to perform any particular action.

Regardless, the irreparable harm has nothing to do with the character or content of the evidence protected, but has everything to do with the privilege asserted. Once privilege is violated, it cannot be recaptured through subsequent order by a court. While we could still argue about the admissibility of the documents disclosed, Petitioner would have already lost its work product privilege by that point, thereby causing irreparable harm if the compelled disclosure order was beyond the authority of the District Court to issue.

Additionally, Petitioner has never claimed that there were confidential communications between counsel and client in the materials sought by Toth. Nor did Petitioner assert the "thoughts and impressions" aspect of the work product privilege set forth in NRCP 26(b)(3). This entire argument offered by Toth is inapplicable. The privilege asserted here is the plain language of NRCP 26(b)(3)(A) regarding materials prepared by a party or its representative in anticipation of litigation. Petitioner is not claiming the higher level of protection set forth in NRCP 26(b)(3)(B).

III. CONCLUSION

None of the arguments made by Toth and none of the case law cited can possibly override the unmistakable protection offered by NRCP 26(b)(3) to Petitioner in this precise situation. The documents in question were generated at the direction of Petitioner's insurer and, later, Petitioner's attorney. The documents generated at the direction of Petitioner's insurer were generated in anticipation of litigation only after Toth's attorney made serious claims of injury. The documents generated at the direction of Petitioner's counsel were generated during ongoing litigation.

Given all of this, these requested materials fall squarely within the protection NRCP 26(b)(3)'s work product privilege. If and when Petitioner determines to use said materials to support its defenses, Petitioner would then waive the work product privilege and disclose these materials to Toth in a reasonable manner that gives Toth sufficient notice of the contents and ability to independently investigate the materials prior to the close of discovery. This is what the Discovery Commissioner recommended, and her recommendations should not have been overturned.

For all of these reasons, Petitioner respectfully requests that the Writ of Prohibition be issued and the District Court's ruling be overturned as being beyond the District Court's authority.

DATED this 25th day of November, 2020.

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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 5,576 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.

DATED this 25th day of November, 2020.

MUEHLBAUER LAW OFFICE, LTD.

By: /s/ Andrew R. Muehlbauer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Muehlbauer Law Office, Ltd. and that, on this 25th day of November, 2020, I electronically served a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION** properly addressed to the following:

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Service on the following parties was accomplished on the same date by First Class United State Mail, postage fully prepaid:

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.