IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Case No. 81637-COA

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.

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

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I. INTRODUCTION AND SUMMARY OF ARGUMENTS

The Nevada Justice Association ("NJA") inappropriately substitutes its own arguments in contradiction of the Real Party In Interest Shay Toth's ("Toth") arguments, and also relies on misdirection and straw man arguments to advance its position.

NJA first argues that the standard set forth by the Nevada Supreme Court is not the "because of" test, but rather the "would not exist but for that prospect of litigation" test (Amicus Brf. at 2) and that Petitioner Keolis Transit Services, LLC did not satisfy this test because Petitioner focused on proving that the surveillance documents were generated *because of* the reasonable prospect of litigation. This is semantics, and unnecessarily muddies the clear test set forth in the *Wynn Resorts, Ltd v. Eighth Judicial Dist. Ct,* 399 P.3d 334 (2017) case. Petitioner spent its entire brief proving to this Court not only that the surveillance documents were generated because Petitioner and its insurers anticipated litigation, but also that such anticipation was reasonable under the circumstances. This was what the *Wynn Resorts* court directed all parties seeking to utilize NRCP 26(b)(3)'s work product privilege to show.

The second argument raised by NJA is that Petitioner's reference to attorney representation and claimed damages by Toth somehow makes those considerations the sole basis for Petitioner's privilege claims. (*See* Amicus Brf. at 8.) To accomplish

this, however, NJA is forced to twist Petitioner's language to make it appear that Petitioner was saying things it was not.

In reality, the reference to the early attorney retention and substantial damages claimed by Toth in Petitioner's brief was provided to demonstrate that Petitioner's insurer's anticipation of litigation was reasonable in nature and to give this Court the information it needed to conduct a "totality of the circumstances" test required by the *Wynn Resorts* court, just as the Discovery Commissioner did. It was in no way intended to be the beginning and end of the inquiry, as NJA claims.

Regardless of the questionable tactics utilized, however, the arguments do not save Toth and this Court will hopefully see through NJA's misdirection.

II. THE AMICUS BRIEF FILED RAISES ENTIRELY NEW ARGUMENTS NEVER ADDRESSED BY THE REAL PARTY IN INTEREST

At the outset, it must be noted that NJA filed an *amicus* brief that contradicts its own stated purpose of *amicus* filings. In NJA's own brief, it correctly identifies the purpose of *amicus* filings, citing to *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) for the proposition that *amicus* intervention is appropriate where "the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." (Amicus Brf. at iii.) Similarly, the brief cites to *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F2.d 203, 204 (9th Cir. 1982) for the proposition that

"the classic role of an *amicus curiae* is to assist in cases of general public interest and to supplement the efforts of counsel by drawing the Court's attention to law that may have escaped consideration." (Amicus Brf. at iii.)

Despite this, NJA goes on to file a 15-page brief that raises entirely new and separate arguments from Toth, the Real Party In Interest in this case. NJA never once references the arguments of Toth raised in her Answering Brief. Instead, NJA appears more interested in stepping in to try and replace Toth's arguments with arguments it believes to be superior.

Toth's arguments were almost exclusively based on NRCP 16.1 and its 2019 amendments (*see, e.g., Ans. Brf.* at 5-7, 8, 16). Even when Toth did address *Wynn Resorts, Ltd v. Eighth Judicial Dist. Ct,* 399 P.3d 334 (2017), Toth tried to *distinguish Wynn Resorts* as opposed to relying on it, stating, "[t]he Wynn case did not involve surveillance videotapes and is distinguishable from this case in many particulars." (Resp. at 10.) Yet NJA spends virtually every page of its brief contradicting Toth's argument on this point and relying exclusively on the very same case Toth tries to distinguish. Despite Toth's focus on NRCP 16.1, NJA never mentions NRCP 16.1 once (*See* Amicus Brf. at vi-vii) and instead focuses on trying to reshape the holding of *Wynn Resorts* to suit its purposes. This leads to Petitioner being forced to respond to arguments on both sides of the same issue; *Wynn Resorts*

is apparently simultaneously wholly distinguishable as well as controlling, depending on which brief is considered.

While none of NJA's arguments have sufficient merit to prevail, this Court should not indulge NJA's desire to try and replace the arguments raised by Toth under the guise of being an *amicus curiae*.

III. DESPITE NJA'S REPEATED CLAIMS TO THE CONTRARY, PETITIONER DIRECTED ALL BRIEFING AT MEETING THE ACTUAL TEST SET FORTH IN *WYNN RESORTS*

NJA alleges that Petitioner somehow failed to carry its burden to demonstrate that the videos and reports at issue were created "because of" anticipated litigation. NJA claims that Petitioner "*disregards* that test" (Amicus Brf. at 4), and claims that "[n]othing in Defendant's analysis addresses whether the videos 'would not [or would] exist 'but for the prospect of that litigation,' or whether the videos 'would not [or would] have been created in substantially similar form but for the prospect of that litigation.'" (Amicus Brf. at 5.)

Apparently, stating "[i]f this does not satisfy the 'because of' test, then no document would," (Petition at 25) was not a clear enough statement by Petitioner in its brief to show its brief was specifically directed at meeting this standard. Laying out the elements of the test meticulously, quoting every word of the holding by the Nevada Supreme Court (Petition at 13-14), stating that these documents satisfy the test (Petition at 25), and going on for multiple pages of *why* they satisfy the test (*see,*

e.g., Petition at 18-22) is not sufficient for NJA. It is worth noting that the *actual party* in this case, Toth, never challenged that the documents satisfied the "because of" test. This was purely a creation of the NJA *amicus curiae*.

One possible explanation for NJA's position here is NJA's focus is on a different, sub-part of the *Wynn Resort* court's analysis: the "but for" aspect of the analysis. NJA's version of the *Wynn Resorts* test appears to be set forth in the heading on page two of its brief, "TO SHOW THAT THE VIDEOS WERE PROTECTED UNDER NRCP 26(B)(3), DEFENDANT BORE THE BURDEN TO SHOW THAT THE VIDEOS *WOULD NOT EXIST* "BUT FOR" THAT PROSPECT OF LITIGATION." (Amicus Brf. at 2, emphasis in original.) This is referencing the language used by the *Wynn Resorts* court in explaining the analysis to consider when applying its holding, the "because of" test.

As a reminder, the test at issue was stated as follows by the *Wynn Resorts* court:

> 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, emphasis added).

While it is clear that this language *does* appear at the end of a long explanation by the *Wynn Resorts* court of how to apply the "because of" test, NJA seems to discard every sentence that comes before this phrase to try and defeat Petitioner. Petitioner chose to address the *actual holding* and the entire test set forth in *Wynn Resorts* rather than focus on one clause above all others, like NJA.

Petitioner spent its briefing proving that the surveillance documents were generated "because of" litigation, which Petitioner submits is just different way of saying "would not have been created in substantially similar form but for the prospect of litigation." If one does something "because of" something, it means one would not have done it *but for* that something occurring.

NJA's argument that somehow Petitioner must fail because its briefing only sought to prove the surveillance videos were generated because of the anticipation of litigation is semantics at its worst. The test from the Nevada Supreme Court is the "because of" test, not the "but for" test. Torturing the English language to try and draw a distinction between these two phrases cannot possibly carry the day for NJA.

Finally, NJA's proposed standard would yield absurd results, as demonstrated by its discussion on the third video, which was commissioned by defense counsel during litigation. In NJA's world, even a litigation attorney retained to defend an active lawsuit who orders the production of surveillance videos in the midst of litigation must offer additional evidence to pass NJA's "but for" test to gain protection. (*See* Amicus Brf. at 13.)

This is preposterous. A defense attorney retained to represent a party in litigation is only hired "because of" litigation, and once the attorney appears in litigation, all actions taken on behalf of the client retaining that attorney would most obviously be undertaken "because of" litigation. The only other explanation is that the attorney would be using his client's money to fund some bizarre fascination with the defendant separate and apart from defending the litigation. This cannot possibly be what the drafters of NRCP 26(b)(3) or the *Wynn Resorts* court contemplated.

IV. NJA MISREPRESENTS PETITIONER'S ARGUMENT ON ATTORNEY RETENTION AND DAMAGES TO ATTEMPT TO MISLEAD THIS COURT TO BELIEVE PETITIONER DISREGARDED THE TEST

A. NJA Deceptively Edits Petitioner's Brief to Remove References to Litigation in Order to Support its Erroneous Conclusion

In a brief filled with bold assertions and conclusory statements, perhaps the boldest statement by NJA is that "Defendant admits that the force driving the surveillance decision is *not* the potential litigation (or even actual litigation, but is instead the *amount of the claim*." (Amicus Brf. at 14.) NJA has no citation to support

this claim, and for good reason: it exists only in the mind of NJA's attorneys. It is a strawman argument fabricated to persuade this Court to ignore pages of briefing submitted by Petitioner and reframe Petitioner's arguments into a faulty argument NJA can defeat.

NJA goes even further and provides deceptively edited quotations from Petitioner's brief to try and support its straw man argument. Near the end of its brief, NJA sets forth the following quotation from Petitioner and its own analysis of same:

> As noted above, Defendant asserts that "[t]he nature of the document [video] 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." Id. at 25 (emphases added).
>
> Tellingly, in this entire explanation of why Defendant obtained the surveillance videos of Plaintiff and what use Defendant envisioned for them, **there is not even a hint of litigation**.

(Amicus Brf. at 13.) What is curious, however, is that NJA omits the very next sentence from Petitioner's brief explaining the relationship of surveillance videos and litigation: "Surveillance videos are impeachment evidence only, and are generally **intended to persuade a third party that the claimed injuries are being exaggerated**." (Petition at 25, emphasis added.) Here, Petitioner is referencing persuasion of a **third party**, i.e., a jury or a judge in a bench trial. Furthermore, one does not "persuade" the injured person they are exaggerating. This is obviously a reference to impending litigation and the function surveillance serves in litigation.

Even more surprising is that NJA even acknowledges this same fact earlier in its brief, where it cites Petitioner's brief and acknowledges the reference is to litigation, "[w]hile they *may* be used to 'persuade a third party' (**e.g., a jury**), they may also be used to persuade a pre-litigation claimant (and even her attorney) that the claims are excessive." (Amicus Brf. at 12-13, bold-faced emphasis added.) Yet NJA claims later on the very same page that "there is not even a hint of litigation" in Petitioner's discussion. (Amicus Brf. at 13.)

NJA's version of what it believes surveillance videos are used for cannot possibly trump the *actual* purpose in this case. Surveillance was conducted in this case *because of* litigation, and not "to persuade a pre-litigation claimant that the claims are excessive." How can we know? The existence of the surveillance video *was never disclosed pre-litigation*. NJA appears to be operating in a hypothetical world of assumptions and speculation not at all grounded in the facts of this case.

B. The Damages Discussion was Offered to Fulfill the Objective Element of the "Because Of" Test, Not as a Substitute for Application of the Test

The test set forth by the *Wynn Resorts* court requires an element of objectivity, in that it explains that the question to consider is whether 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 (emphasis added, internal citations omitted).

When the Nevada Supreme Court issues a holding, we must assume that every word of the holding is included for a reason. The use of the term "fairly be said" injects an objective element into the test, much like when the term "reasonably" is used in numerous other contexts. Based on this, Petitioner directed its argument towards proving that a reasonable person in Petitioner's insurer's position would have expected that litigation was upcoming. This included being served with a letter of representation immediately after the accident followed by evidence of six-figure damages being claimed within the next few months.

This *has* to be how the Court is to apply the test, otherwise any party could simply state, "I created this document because of the prospect of litigation and I would not have created it but for this prospect of litigation," and the inquiry would end. Having no objective methodology to evaluate the reasonableness of the belief would lead to simply attaching a boilerplate affidavit to every Privilege Log without any evidence or further explanation. The test set forth in the *Wynn Resorts* case would be rendered meaningless because it would be turned into a completely subjective and self-serving analysis by the party claiming privilege.

NJA fundamentally misconstrues the arguments of Petitioner on this point to try and persuade the Court that discussing claim value somehow contradicts

Petitioner's argument that it satisfied the "because of" test. This could not be further from the truth. Petitioner stated unequivocally that the document satisfies the "because of" test (Petition at 25) but then proceeded to give the Court a chronology of events and considerations that support the reasonableness of the belief that litigation was anticipated, thereby supporting the claim that the documents were generated because of this anticipation of litigation.

V. NJA'S QUARREL WITH PETITIONER'S BRIEF IS ALL FORM AND NO SUBSTANCE

As discussed herein, NJA continually claims that Petitioner "inexplicably disregards" (Amicus Brf. at 4) the very test that Petitioner sets forth in great detail using the Nevada Supreme Court's own language. It disingenuously claims that "Defendant simply asserts that, because Plaintiff hired an attorney and later filed a lawsuit, the videos are protected under NRCP 26(b)(3). *Petition,* 19-20." (Amicus Brf. at 5.) This alleged citation quotes no language from Petitioner's brief, nor does it even use the proper "*see"* signal, so it is difficult to figure out where this conclusory statement finds its basis in Petitioner's brief. Regardless, this is false. NJA mistakes Petitioner's offering of context for the Court as being a substitute for argument, as discussed at length above.

Everything argued by Petitioner in its Petition and Reply as to NRCP 26(b)(3)'s potential application, as well as the underlying briefing at every level of review, was directed at proving to the Court that the videos were created *because of*

the *reasonable* belief that litigation was on the horizon. The elements of that analysis are satisfied by the facts set forth in the Petition regarding Petitioner's insurer being placed on notice of attorney representation followed by the massive damages claimed. This led Petitioner's insurer to reasonably believe that litigation would be upcoming because (1) attorneys getting involved drastically increase the chances of a lawsuit being filed, and (2) massive damages being claimed make it difficult to settle a claim before litigation is commenced. Because of this realization, Petitioner's insurer ordered the generation of the surveillance videos but never disclosed their findings to Toth during the pre-litigation process, as they were to be used for litigation.

The evidence similarly demonstrates that videos would not have been created *but for* the prospect of litigation. As stated by Petitioner in its opening brief, "[s]urveillance videos are impeachment evidence only, and are generally intended to persuade a third party that the claimed injuries are being exaggerated." (Petition at 25.) This "third party" that needs to be "persuaded" of exaggeration would be a jury, in the case of a jury trial, or a judge, in the case of a bench trial. Anticipation of litigation is the *sine qua non* for the commissioning of surveillance videos for Petitioner's insurer. The decision to pay an investigator a substantial sum to try and obtain impeachment evidence regarding the claims was something only undertaken by Petitioner's insurer when litigation was reasonably anticipated, and therefore

would not be created *but for* the anticipation of such litigation. This is further demonstrated by the fact that the very existence of the videos was never disclosed to Toth prior to litigation commencing.

Petitioner is at a loss as to what NJA would have this Court consider as the "totality of the circumstances" if not a thorough chronology of events leading up to the creation of the surveillance videos. The Court will note that NJA never offers a single consideration that this Court should have in evaluating the claim of privilege under the totality of the circumstance consideration. All NJA can do is repeatedly state that Petitioner's evidence is insufficient. If NJA has such a keen grasp on Petitioner's burden, one wonders why nothing was ever proffered by NJA that would satisfy this test in its opinion.

The Court should note that all of the above would have been demonstrated through affidavit or live testimony to the District Court had the District Court ordered an evidentiary hearing on the matter instead of reversing the Discovery Commissioner through a footnote.

VI. THE DISCOVERY COMMISSIONER PROPERLY APPLIED THE TOTALITY OF THE CIRCUMSTANCES ANALYSIS

NJA spends a great deal of time in its brief trying to argue that Petitioner's arguments on attorney representation and damages claimed have no bearing on the *Wynn Resorts* test. NJA apparently forgets that the *Wynn Resorts* court told us to "consider[] the **totality of the circumstances** and afford 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 (emphasis added, internal citations omitted). Petitioner reads this test to state that a party claiming privilege must present to the Court sufficient context to support a finding that litigation was reasonably anticipated when considering the entire context of the creation of the document. The Court can then decide whether the documents were, essentially, created in the ordinary course of investigation by Petitioner's insurer or whether it created because litigation was anticipated.

Once again, the Discovery Commissioner in this case understood this analysis perfectly. She identified that ISO Reports were "done in the normal course of business" and forced Petitioner to disclose such reports. (App. at 098.) She then evaluated Petitioner's briefing and oral argument and agreed that surveillance documents were not in the same category, as such methods are reserved for claims that are expected to be litigated or are currently being litigated. (*Id.*) In other words, the Discovery Commissioner determined that the surveillance documents were generated "because of" anticipation of litigation, but that the ISO Reports would have "been created in substantially similar form" regardless of the prospect of litigation.

VII. CONCLUSION

NJA's brief raises wholly new arguments from Toth's brief, but it relies on linguistic contortions of the *Wynn Resorts* case to prevail. Petitioner briefing was properly directed at satisfying the *Wynn Resorts* case's "because of" test after considering the "totality of the circumstances." Petitioner carried its burden, and the District Court should have shifted the burden back to Toth to prove she had "substantial need" and could not procure the records from another source without undue hardship, pursuant to NRCP 26(b)(3) instead of reversing the Discovery Commissioner. Petitioner requests that the Writ of Prohibition be granted.

DATED this 29th day of January, 2021.

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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) and Court's January 15, 2021 Order 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 is 15 pages in length and contains 3,594 words.

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 29th day of January, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Muehlbauer Law Office, Ltd. and that, on this 29th day of January, 2021, I electronically served a true and correct copy of the above and foregoing **PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION** properly addressed to the following:

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

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