IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT CANARELLI, Beneficiary of The Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998

Petitioners,

vs.

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

Respondent,

and

LAWRENCE and HEIDI CANARELLI, and FRANK MARTIN, Special Administrator of the Estate of Edward C. Lubbers, Former Trustees,

Real Party in Interest.

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Case No. 82299

District Court No. A-13-078912-T

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

CAMPBELL & WILLIAMS
DONALD J. CAMPBELL, ESQ. (1216)
djc@cwlawlv.com
J. COLBY WILLIAMS, ESQ. (5549)
jcw@cwlawlv.com
PHILIP R. ERWIN, ESQ. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Tel. (702) 382-5222

Attorneys for Lawrence and Heidi Canarelli, and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers, Real Parties in Interest

HAYES WAKAYAMA
LIANE K. WAKAYAMA, ESQ. (11313)
lkw@hwlawnv.com
4375 South Durango Drive, Suite 105
Las Vegas, Nevada 89147
Tel. (702) 656-0808

Attorneys for Frank Martin, Special Administrator of the Estate of the Estate of Edward C. Lubbers, Real Party in Interest

VERIFICATION

Under penalties of perjury, the undersigned declares that he is counsel for the Real Parties in Interest named in this answer and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 15th day of March, 2021.

/s/ *J. Colby Williams*
J. COLBY WILLIAMS

RULE 26.1 DISCLOSURE

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

Real Parties in Interest are all individuals and the former trustees (or the representative of a former trustee) of the Scott Lyle Graves Canarelli Irrevocable Trust dated February 24, 1998 (the "Trust"). Lawrence and Heidi Canarelli (the parents of Petitioner Scott Canarelli) resigned as Family Trustees of the Trust on May 24, 2013, and appointed Edward C. Lubbers ("Lubbers") as their successor. Lubbers resigned as Family Trustee of the Trust on October 6, 2017, and died on April 2, 2018. On June 27, 2018, Frank Martin, as the duly-appointed Special Administrator of Mr. Lubbers' estate, was substituted as a party in this action in the stead of Mr. Lubbers. Real Parties in Interest are referred to herein collectively as the "former trustees."

The following attorneys and law firms have appeared for the former trustees in the action below:

Donald J. Campbell, J. Colby Williams and Philip R. Erwin of Campbell & Williams;

Liane K. Wakayama of Hayes Wakayama; and

Joel Schwarz, Elizabeth Brickfield, and Var Lordahl all formerly of Dickinson Wright, PLLC.

DATED this 15th day of March, 2021.

CAMPBELL & WILLIAMS

By /s/ *J. Colby Williams*
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101

HAYES WAKAYAMA
LIANE K. WAKAYAMA, ESQ. (11313)
4375 South Durango Drive, Suite 105
Las Vegas, Nevada 89147

Attorneys for Real Parties in Interest

RESPONSE TO ROUTING STATEMENT

Though the former trustees do not acquiesce in the arguments contained in petitioner's Routing Statement, they agree this matter should be assigned to the Supreme Court.

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I. INTRODUCTION

Facts matter in all legal disputes. Nowhere is that truism more apt than in the context of judicial disqualification motions, which must be decided on a case-by-case basis. Perhaps that is why Petitioner Scott Canarelli ("Scott"), from the opening paragraph of his writ petition, erects an artificial construct in hopes of persuading this Court that Chief Judge Linda Marie Bell erroneously adopted a "dangerous" new standard that enables calculating litigants to easily disqualify any judge sitting as the trier of fact based on nothing more than the routine *in camera* review of privileged material. Not exactly. The sky-is-falling scenario Scott portrays is based on a selective recitation of the underlying facts. Now, for the rest of the story.

The privileged notes at issue here are anything but "routine." Their subject matter, generally described, reflects communications between a now-deceased party, Lubbers, and his attorneys about how the Honorable Gloria Sturman would potentially view the merits of the underlying trust dispute—a dispute over which she was presiding as the trier of fact. The notes also reflect Lubbers' beliefs regarding litigation strategy and where the former trustees may have risk. Notwithstanding that Scott's trial counsel (after receiving the notes through an inadvertent disclosure) used them to expand Scott's claims below, the current writ petition assiduously avoids any mention of the notes' general subject matter. That is likely because this Court unanimously determined the notes were entirely protected by the attorney-

client privilege, and that Judge Sturman erred when ordering them partially produced.[1]

The petition also buries the undisputed fact that the former trustees twice-alerted Judge Sturman before any *in camera* review as to the existence of the notes, that the parties were disputing their privileged status, that review of the notes could unwittingly taint her given their prejudicial subject matter, and that she may wish to consider assigning the privilege review to another judge. Put differently, the primary rationale for arguably requiring consideration of additional factors when seeking to disqualify a judge based on a judicial source—to prevent dissatisfied litigants from forum shopping—has no application here as the former trustees actually tried to preserve Judge Sturman's ability to continue sitting on the case. Judge Sturman, however, opted to review and analyze the notes as part of the parties' privilege dispute, ultimately finding portions were privileged while other portions were not and could be produced to (or, in this case, retained by) Scott. After this Court held the notes were entirely protected, the former trustees promptly sought Judge Sturman's disqualification pursuant to *Towbin Dodge, LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 112 P.3d 1063 (2005).

[1] *See Canarelli v. Eighth Judicial Dist. Ct.*, 136 Nev. Adv. Op. 29, 464 P.3d 114 (2020) ("*Canarelli I*").

Based on the complete record, including extensive briefing by the parties, a response from Judge Sturman and her own *in camera* review of the notes, Chief Judge Bell granted the disqualification motion based in part on the finding that a reasonable person, aware of all the relevant facts, may harbor doubts about Judge Sturman's impartiality. Scott now argues this objective standard has no role in a disqualification motion premised on a judicial source (*i.e.*, an event occurring during the litigation). He instead contends that disqualification can occur in such cases only where the judge "displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (1996). Scott's blinkered approach suffers from several infirmities.

First, this Court has never held that the *Kirksey* standard entirely supplants the objective standard used to determine whether disqualification is required under Rule 2.11(A) of the Nevada Code of Judicial Conduct ("NCJC"). *Towbin Dodge*—a case decided years after *Kirksey*—involved allegations of impartiality based on judicial events, established a procedural mechanism for raising such challenges during ongoing litigation after the strict time limits in NRS 1.235 have expired, and reaffirmed that the objective standard addressed in *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 894 P.2d 337 (1995) applies to disqualification motions premised on the NCJC.

Second, the commentary to Rule 2.11 explains that a judge is disqualified "whenever" the judge's impartiality might reasonably be questioned. The Court, respectfully, should clarify that this principle reflects the reality that judicial officers can sometimes hear, learn or do something intrajudicially that is so prejudicial as to require recusal or disqualification. Indeed, multiple courts have found that *in camera* privilege reviews can be one such circumstance depending on the subject matter involved.

Third, assuming the *Kirksey* standard is the sole yardstick for measuring whether a judge is subject to recusal or disqualification based on a judicial source, the former trustees respectfully submit they have met the impossibility-of-fair-judgment standard, which this Court reviews independently, given the unique facts here.

Alternatively, Scott contends the chief judge abused her discretion by disqualifying Judge Sturman without first determining whether the former trustees had waived the attorney-client privilege based on their inadvertent disclosure below. This is a classic red herring as Scott already presented the exact waiver argument as part of the initial privilege determination, and Judge Sturman rejected it when she denied Scott's objections to the discovery commissioner's report and found the notes were at least partially protected. That ruling necessarily encompassed Scott's waiver arguments as no portion of Lubbers' notes could be deemed privileged had there

been any waiver since, to use Scott's words, "[w]aiver is a threshold issue." (Pet. at 28.)

Scott was free to contest this adverse ruling in *Canarelli I*, but failed to or at least failed to do so in the manner he now wishes he had. Even if Scott's waiver arguments were not now barred by the law of the case doctrine, they nonetheless fail because the parties' ESI Protocol—an enforceable contract—expressly precludes the parties from arguing waiver of the attorney-client privilege based on inadvertent productions during discovery.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Did the district court properly exercise its discretion when disqualifying Judge Sturman pursuant to *Towbin Dodge*, NCJC 2.11(A), and the objective standard applicable thereto where the court found a reasonable observer—aware *inter alia* that Judge Sturman had reviewed privileged notes *in camera* from a now-deceased party after being warned of their highly-prejudicial nature—may harbor doubts about Judge Sturman's impartiality?

2. Is the objective standard endorsed in *Towbin Dodge* and applicable to NCJC 2.11(A) entirely supplanted by the Court's earlier recognition in *Kirksey* that judges may be disqualified based on a judicial source where the judge displays "a deep-seated favoritism or antagonism that would make fair judgment impossible" or

is the judicial versus extrajudicial source simply one factor in the disqualification calculus?

3. Assuming *arguendo* the *Kirksey* standard is the only one that applies when disqualification is premised on a judicial source, should the Court nonetheless recognize that judges sometimes hear, learn or do something intrajudicially so prejudicial as to require disqualification regardless of whether that event has ripened into an outward expression of deep-seated favoritism or antagonism?

4. Did the district court reach the right result by denying Scott's alternative countermotion alleging waiver of the attorney-client privilege where Scott already presented that argument to Judge Sturman as part of his prior objections, Judge Sturman denied Scott's objections and Scott failed to challenge that adverse ruling in *Canarelli I*, thus barring the argument under the law of the case doctrine?

III. COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

The Court has previously recounted the facts underlying this trust dispute. (5 App. 916-19.) The former trustees will accordingly focus on the facts and procedural history relevant to the disqualification question.

A. The Former Trustees Inadvertently Disclose Lubbers' Notes, and Scott Uses Them.

Scott, as the beneficiary of the Trust, commenced the underlying action against the former trustees in September 2013 after learning that Lubbers had entered

into a purchase agreement to sell the Trust's assets for more than $25 million. (5 App. 917.) Shortly thereafter, Lubbers prepared a set of typed and handwritten notes reflecting communications with attorneys he retained to represent him in the trust dispute (the "Group 1 notes"). (*Id.* at 917-18.)[2] The handwritten notes were a contemporaneous recording of matters discussed during a call with counsel. The typed notes initially set forth questions that Lubbers sought to pose to counsel regarding how to respond to Scott's petition. (*Id.*) They next describe Lubbers' "beliefs" regarding the dispute including—most notably—how the probate court may view the case. (*Id.*) The notes additionally reflect Lubbers' assessment of certain legal issues and strategies, including potential strengths and weaknesses, and where the former trustees may have "risk." (*Id.*)

Scott filed a surcharge petition in late June 2017. (1 App. 89.) After initial motion practice on the surcharge petition, the parties entered into an ESI Protocol to govern production of discovery materials going forward. (1 App. 1-13.) As part of their initial disclosures, the former trustees inadvertently produced the Group 1 notes. The former trustees learned of the inadvertent disclosure when Scott unilaterally included the Group 1 notes as an exhibit to a supplemental petition filed in May 2018. (1 App. 55-56.) While the exhibit itself was submitted *in camera*,

[2] The former trustees have concurrently sought leave to submit the Group 1 notes *in camera* to the Court.

Scott's trial counsel nonetheless quoted substantial portions of the typed notes in the publicly-filed body of the supplemental petition as constituting alleged "admissions" the former trustees had breached their fiduciary duties. (Supp. App. 1-49.) Not only did Scott's attorneys expand the existing fiduciary breach claim based on the typed notes, they also added new fraud and conspiracy claims premised thereon. (*Id*.) The former trustees thereafter sought to claw back the Group 1 notes pursuant to the ESI Protocol, which lead to the privilege dispute in *Canarelli I*.

B. The Former Trustees' First Effort to Prevent Judge Sturman from Becoming Unwittingly Tainted by Exposure to the Prejudicial Group 1 Notes.

The former trustees also moved to dismiss the supplemental petition. (Supp. App. 50-80.) After briefing on the motion was complete, the former trustees wrote a letter to Judge Sturman days before the August 16, 2018 hearing. (5 App. 933-939.) The letter generally described the Group 1 notes, explained that the parties were simultaneously disputing their privileged nature before the discovery commissioner, and that Scott attached the notes to the supplemental petition, quoting them therein and in the briefing on the motion to dismiss. (*Id.*)

Given the foregoing and the notes' prejudicial nature, the former trustees respectfully submitted it would be inappropriate for Judge Sturman to review the notes at that time as she may unwittingly taint herself and become subject to recusal—an outcome the former trustees sought to prevent. (*Id.*) The former trustees

thus suggested that Judge Sturman consider deferring the motion to dismiss until the discovery commissioner ruled on the privilege dispute, after which the parties and the Court could explore the appropriate way to handle review of the discovery commissioner's findings should any party object thereto. (*Id.*)[3] The letter initially succeeded as the parties stipulated to continue the motion to dismiss hearing until after the discovery commissioner's ruling on the privilege dispute and any review thereof. (Supp. App. 121-26.)[4]

C. The Former Trustees' Second Effort to Prevent Judge Sturman from Becoming Unwittingly Tainted.

The discovery commissioner found portions of the Group 1 notes were protected by the attorney-client privilege and work product doctrine, but other portions were discoverable because they contained facts and/or fell within the fiduciary and common interest exceptions to the attorney-client privilege. (5 App. 918.) Scott and the former trustees each objected to the commissioner's findings.

As part of their objections, the former trustees reminded Judge Sturman to exercise caution before deciding to review the notes *in camera*:

> [Scott] provided copies of Lubbers' notes to the Discovery Commissioner *in camera* as sealed Exhibits 1 and 2 to his underlying

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[3] One option the former trustees identified was to refer review of the Group 1 notes to another judicial officer to avoid "***the possibility that a review of privileged materials may be so prejudicial as to require the judge's recusal***." (5 App. 933-34) (quoting *Lund v. Myers*, 305 P.3d 374, 377 (Ariz. 2013)) (emphasis added).

[4] The motion to dismiss remains pending.

> Motion. In the context of moving to dismiss [Scott's] Supplemental Petition filed on May 18, 2018, which attached certain of the notes at issue herein as Exhibit 4 thereto, [the former trustees] notified the Court that it may wish to exercise caution before reviewing Lubbers' typed notes so that it did not become unwittingly tainted ***as the notes reflect Lubbers' beliefs as to how the Court may view this litigation***. *See* Letter from C. Williams dated August 13, 2018. [The former trustees] wish to remind the Court of this issue so that it has the chance to consider how best to proceed with the review of the DCRR.

(2 App. 270) (emphasis added). The parties' objections are notable here for two additional reasons. First, Scott repeatedly argued the Group 1 notes were a key piece of evidence without which the ability to prove his tort claims would be "thwarted." (3 App. 420; 4 App. 657-58.) Second, after the discovery commissioner found the Group 1 notes partially protected, Scott argued for the first time before Judge Sturman that the former trustees' inadvertent disclosure of the notes constituted a waiver that prevented "any portion" of the notes from being attorney-client privileged. (3 App. 429-35; 4 App. 669-77.)[5]

Notwithstanding the former trustees' repeated warnings, Judge Sturman proceeded to review the Group 1 notes extensively when ruling on the parties' respective objections. (5 App. 865-82.) Judge Sturman generally adopted the discovery commissioner's findings. (5 App. 919.) Even though Judge Sturman

[5] Despite being a new argument, Scott argued that "judicial economy favors having this Court hear arguments on [the waiver] issue simultaneous with the several other pending issues concerning the Disputed Documents." (4 App. 670.) The issue was also presented at the time of hearing. (5 App. 856-858.)

denied Scott's objections (5 App. 894), the net effect of her order allowed Scott to retain portions of the Group 1 notes. The former trustees promptly obtained a stay (Supp. App. 131-33) and pursued writ relief, which this Court unanimously granted. (5 App. 930) (concluding the Group 1 notes are entirely protected by the attorney-client privilege and, thus, "undiscoverable").

D. The Disqualification Proceedings.

Eleven days after the Court decided *Canarelli I*, the former trustees moved to disqualify Judge Sturman pursuant to the procedure established in *Towbin Dodge*. (5 App. 896-967.) The matter was referred to the chief judge. Scott opposed the motion and countermoved for waiver of the attorney-client privilege based on the inadvertent disclosure giving rise to the parties' original privilege dispute. (5 App. 968-1184.) The former trustees opposed Scott's countermotion based on the law of the case doctrine and the ESI Protocol. (6 App. 1191-1217.)

Judge Sturman filed a short answer in which she opined that her review of the Group 1 notes had not given rise to any personal knowledge of disputed facts, bias or prejudice under NCJC 2.11(A)(1), and that she knew of no bias or prejudice for or against any party or attorney. (6 App. 1190.) Judge Sturman did not otherwise contest the facts set forth in the former trustees' motion. (*Id.*)

Chief Judge Bell conducted a hearing on July 28, 2020 (7 App. 1366-89), and issued her decision on August 13, 2020 after considering the parties' and Judge

Sturman's papers, relevant law (including *Kirksey* and *Towbin Dodge*), and the Group 1 notes *in camera*. (7 App. 1357-65.) After acknowledging the "general rule" that disqualification is normally not warranted based on acts taken in a judicial capacity, the chief judge nonetheless granted the disqualification motion because a reasonable person, aware of all relevant facts, may harbor doubts about Judge Sturman's impartiality. (7 App. 1362-63.)

Judge Sturman's status as the trier of fact in the underlying trust dispute certainly played a significant part in the chief judge's decision, but Scott doubly misstates the record when he argues that was the "sole" basis for disqualification and that the ruling lacked "any analysis of the particular notes or circumstances here." (Pet. at 6.) Chief Judge Bell explained that the notes "contained opinions that spoke directly on the merits of Mr. Canarelli's petitions and . . . Mr. Lubbers's personal assessment of the risk faced by the Former Trustees." (7 App. 1362.) Thus, it was "the ***prejudicial effect*** of Mr. Lubbers's notes"—combined with Judge Sturman's role as the trier of fact—that lead to the court's conclusion that "[a] reasonable person, ***aware of the contents of the notes***, may harbor reasonable doubts about Judge Sturman's impartiality in this case." (7 App. 1362-63.) (emphases added).

The chief judge denied Scott's countermotion as outside the scope of proceedings. (*Id.*)

The parties stipulated to a continued stay of proceedings on October 9, 2020. (Supp. App. 134-41.) Scott filed his writ petition on January 8, 2021, inexplicably waiting almost five months after entry of the disqualification order.

IV. REASONS THE WRIT SHOULD NOT ISSUE

The former trustees agree that writ petitions are the correct means to seek review of judicial disqualification rulings. Writ relief, however, is not appropriate here as the chief judge properly exercised her discretion to disqualify Judge Sturman under NCJC 2.11(A) and the objective standard applicable thereto after considering the unique facts below and relevant legal authorities. Assuming *arguendo* that Chief Judge Bell applied an incorrect legal standard, this Court may still deny writ relief as it reviews a judge's impartiality de novo based on the undisputed facts and, hence, may independently confirm that disqualification is appropriate here. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for the wrong reasons."). The same principle disposes of Scott's complaint that the chief judge denied his countermotion without considering it as this Court can find, based on the undisputed record, that the law of the case doctrine and the ESI Protocol bar Scott's recycled waiver argument.

V. ARGUMENT

A. Standard of Review.

This Court reviews judicial disqualification matters under an abuse of discretion standard, *see Kirksey,* 112 Nev. at 1007, 923 P.2d at 1119, but the district court's impartiality is reviewed de novo. *See PETA*, 111 Nev. at 437, 894 P.2d at 341 (a judge's impartiality is a "question of law [such that] this court will exercise its independent judgment based on the undisputed facts."). Because a judge is presumed to be impartial, the party seeking disqualification bears the burden of proof. *Id.* Disqualification issues are "necessarily fact-driven and may turn on subtleties in the particular case." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008); *Ivey v. Dist. Ct.*, 129 Nev. 154, 159, 299 P.3d 354, 357 (2013) (determining whether risk of judicial bias violates party's rights "must be done on a case-by-case basis"). In close cases, "the balance tips in favor of recusal." *Id.* at 912.

B. The Chief Judge Correctly Ruled that Judge Sturman Should Be Disqualified Under NCJC 2.11(A).

Because the time limits in NRS 1.235 had expired by the time Judge Sturman analyzed the Group 1 notes, the former trustees promptly moved for her disqualification pursuant to NCJC 2.11(A) and *Towbin Dodge* once this Court ruled the notes were entirely protected and undiscoverable. Scott nowhere contends that the former trustees' invocation of the *Towbin Dodge* procedures was improper or

that they failed to comply therewith. He instead argues that the objective standard for determining whether a judge should be disqualified endorsed in *Towbin Dodge* has no application here because the former trustees' disqualification motion was premised on a judicial source. We briefly review *Towbin Dodge* before addressing Scott's contentions.

Notably, the disqualification motion in *Towbin Dodge* was similarly based on judicial events. There, a lawyer had two different cases pending before the same district court judge. 121 Nev. at 253-54, 112 P.3d at 1065. When the judge ruled against the lawyer on an attorney's lien in the first case, the lawyer moved to disqualify the judge in the second case on grounds she questioned his credibility and, thus, was biased against him. *Id.* Though the Court did not reach the merits of the disqualification motion, it nonetheless held that NCJC Canon 3E (now Rule 2.11) provides both ethical requirements for judges and "an additional, independent basis for seeking disqualification" through motion practice "when new grounds for disqualification are discovered after the statutory" deadlines in NRS 1.235 have expired. *Id.* at 253-57, 112 P.3d at 1065-67.

Rule 2.11 states in part that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" NCJC Rule 2.11(A). While Rule 2.11 enumerates six such circumstances, Comment 1 thereto clarifies that "a judge is disqualified ***whenever*** the judge's impartiality

might reasonably be questioned, ***regardless of whether any of the specific provisions in paragraphs (A)(1) through (6) apply***." (emphases added). "Impartiality" not only means the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties," but also the "maintenance of an open mind in considering issues that may come before a judge." NCJC, Terminology.

Towbin Dodge further instructs that a disqualification motion pursuant to NCJC 2.11 should allege facts demonstrating the "judge's impartiality might reasonably be questioned," and cited *PETA* as setting forth the correct test for determining whether a judge should be disqualified. 121 Nev. at 260, 112 P.3d at 1069 and n.22. That test is an objective one, which asks "whether a reasonable person, knowing all the facts, would harbor doubts about [the judge's] impartiality." *PETA*, 111 Nev. at 437-38, 894 P.2d at 341.[6] "Whether a judge is actually impartial is immaterial" as Rule 2.11 is "designed to promote public confidence in the integrity of the judicial process." *Id.* at 436, 894 P.2d at 340.

The former trustees argued that a reasonable person, knowing all the facts at issue here, would certainly harbor doubts about Judge Sturman's impartiality. Those facts include:

[6] "The reasonable third-party observer is . . . someone who 'understand[s] all the relevant facts' and has examined the record and the law." *Holland*, 519 F.3d at 914 (quotation omitted).

(i) that Scott used the Group 1 notes to expand his claims against the former trustees, claiming they were "admissions" and that his ability to prove breach of fiduciary duty, fraud and conspiracy would be "thwarted" without the notes;

(ii) that the former trustees twice-warned Judge Sturman of their position that the notes were privileged and that her review could unwittingly taint her given their prejudicial subject matter;

(iii) that the former trustees proposed a reasonable solution to address the situation by having another judicial officer perform the privilege review, but Judge Sturman chose a different path;

(iv) that the contents of the notes provide a window into the mind of a now deceased party in which he was confiding to counsel about his views of the merits, Judge Sturman's potential views of the case, litigation strategy, and where the formers trustees may have risk;

(v) that Judge Sturman reviewed the notes extensively when ruling on the parties' objections to the discovery commissioner's findings;

(vi) that this Court found the Group 1 notes entirely protected by the attorney-client privilege and, thus, "undiscoverable;" and

(vii) that Judge Sturman was the ultimate trier of fact in the underlying trust dispute.

(7 App. 1371-73.) For reasons set forth in Point III(D) *supra*, Chief Judge Bell agreed and granted the disqualification motion.

C. The Court Should Clarify that *Kirksey* Does Not Supplant NCJC 2.11(A) and *Towbin Dodge* when Disqualification Is Based on a Judicial Source.

Scott does not meaningfully contest that Judge Sturman was properly disqualified under the objective standard that applies to NCJC 2.11(A). Relying on *Kirksey* and the extrajudicial source factor discussed therein, Scott contends the chief judge, by applying the objective test, adopted a "dangerous" new standard with "disastrous consequences" that lowers the bar for disqualification motions premised on a judicial source where the judge is presiding over a bench trial. (Pet. at 13; 29.)

Scott's hyperbolic criticism of the district court is unfair for two reasons. First, as we explained above, the chief judge's ruling was not premised exclusively on Judge Sturman's role as the trier of fact; it was one factor among many. Second, as we explain below, this Court has never endorsed Scott's absolutist position that NCJC 2.11(A) and *Towbin Dodge* apply only to disqualifications based on extrajudicial sources because *Kirksey* impliedly supplants NCJC's objective standard where disqualification is based on a judicial source. (Pet. at 16-17.)

1. The Court has not examined *Kirksey* and the extrajudicial source factor in light of *Towbin Dodge* and NCJC 2.11(A).

The capital defendant in *Kirksey* claimed he was denied a fair post-conviction hearing when the presiding judge refused to recuse himself despite communicating *ex parte* with one of defendant's doctors, calling his own staff members as witnesses, and acquiring knowledge through judicial means that the defendant wanted the death penalty. *Id.* at 1006-07, 923 P.2d at 1118-19. Examining bias and prejudice under NRS 1.230 (not impartiality under the NCJC), this Court concluded the judge did not abuse his discretion when denying the disqualification motion. *Id.*

Kirksey was partially based on the "general rule" that "what a judge learns in his official capacity does not result in disqualification." *Id.* at 1007, 923 P.2d at 1119. The Court acknowledged, however, that a judicial source can lead to disqualification where an opinion displays a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994)).[7] Though *Liteky* and its progeny

[7] *Liteky* examined 28 U.S.C. 455(a), the federal analogue to NCJC 2.11(A), and whether the "extrajudicial source" doctrine applied thereto. After noting the so-called "doctrine" was more standard in its formulation than clear in its application, the Court found the doctrine was more properly characterized as a "factor," that it did apply to § 455(a), but that the facts of the case did not require it to describe the factor in complete detail because the disqualification motion at issue was premised on rulings and statements made by the judge, which "rarely suffice." 510 U.S. at 544-55, 114 S.Ct. at 1157.

may mean that disqualification based on a judicial source is a "rare" exception to the "general rule," Nevada law does not support Scott's position that *Kirksey* entirely supplants NCJC 2.11(A) when a judicial source is involved.

For starters, Scott's argument that "the examples in Canon 2.11(A) are exclusively extrajudicial sources of bias" (Pet. at 16) ignores both the plain language of rule, which makes clear the examples are nonexhaustive (*i.e.*, "including but not limited to"), and Comment 1 thereto, which instructs that the rule applies "whenever" the judge's impartiality may reasonably be questioned.[8] Simply put, nothing in Rule 2.11(A) itself limits the source of the disqualifying impartiality.

Next, *Towbin Dodge* was decided years after *Kirksey* but never referenced it, and the former trustees have not found any opinions where this Court has since examined the interplay between the two. Scott's position that *Towbin Dodge* and Rule 2.11 apply exclusively to extrajudicial source cases seems illogical considering the former established a procedure to seek a judge's disqualification during ongoing litigation when any new disqualifying information would be more likely to arise from a judicial source. *Cf. Millen v. Eighth Judicial Dist. Ct.*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 700-01 (2006) (disqualifying relationships and factors in NCJC

[8] *See* NCJC, Scope(3) (the Comments "provide guidance regarding the purpose, meaning, and proper application of the Rules."). The term "whenever" is defined as "at any or every time that" or "at whatever time." *See* www.merriam-webster.com/dictionary/whenever (last visited March 5, 2021).

2.11(A)(2)-(6) are generally known to a judge before a case is filed whereas knowledge of disputed facts is generally not known "until long after the case has been filed").

While Scott cites a smattering of unpublished cases where this Court has subsequently cited *Kirksey* or the "general rule" (Pet. at 9; 17, n.26), those authorities address attempts to disqualify judges for bias based on rulings, intemperate comments or similar conduct, which will "rarely suffice." But none hold that *Kirksey* renders the objective standard under NCJC 2.11(A) obsolete in all judicial source impartiality challenges. Though not controlling, the Nevada Court of Appeals recently applied the objective standard to a disqualification motion premised on a judicial source, *see Matter of A.M.*, 476 P.3d 927, 2020 WL 6955396, at *3 (Nev. App. Nov. 25, 2020) (unpub. disp.) ("Considered together, these comments and actions may create a reasonable doubt as to the district court's impartiality in this matter."), as have federal courts in the wake of *Liteky*. *See, e.g.*, *Arkansas Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, 404 F. Supp. 3d 486, 515-16 (D. Mass 2018) ("A reasonable person could not believe that my statements at the [ ] hearing, in open court or at the sidebar, meet [the objective] standard.").[9] The

[9] The former trustees are cognizant of NRAP 36(c)(3), and do not cite *Matter of A.M.* for any reason other than to provide the Court with notice of its existence.

objective standard, at a minimum, should remain the starting point in all judicial source impartiality challenges under NCJC 2.11(A).

2. Scott's policy considerations do not render *Kirksey* dispositive in all judicial source cases.

Scott contends multiple policy rationales "justify applying a heightened standard to judicial sources of bias." (Pet. at 14; 17-21; 24-26.) Perhaps in some cases. Disqualification motions, though, "must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *Holland*, 519 F.3d at 913. Scott's policy rationales are largely inapplicable here.

Judge Shopping. Dissatisfied litigants should obviously not be permitted to manipulate the judicial system through baseless disqualification motions or other acts (*e.g.*, threats, formal complaints) to rid themselves of judges they dislike. (Pet. at 17-20.) As the former trustees have explained, nothing of the sort happened here. Just the opposite; they twice-forewarned Judge Sturman about the prejudicial nature of the notes and suggested a solution to preserve her ability to continue sitting on the case. Judge Sturman chose a different path.

The Duty to Sit. The former trustees' suggestion to have a different judicial officer review the privileged notes did not undermine the duty to sit. (Pet. at 20.) Courts have inherent authority to manage their day-to-day activities, *see Hunter v. Gang*, 132 Nev. 249, 258, 377 P.3d 448, 454 (Nev. App. 2016), and are free to

establish procedures to avoid potentially prejudicial situations. *See Las Vegas Sands Corp. v. Eighth Judicial Dist. Ct.*, 132 Nev. 998, 2016 WL 2842901, at *2 (Nev. May 11, 2016) (unpub. disp.) (judge instituted process where objections to deposition questions regarding media coverage "were to be directed to the discovery commissioner and another district judge").[10]

Controlled Exposure. Scott argues the judicial versus extrajudicial distinction is partially attributable to the "reality" that "the parties can control what a judge is exposed to in his or her judicial capacity." (Pet. at 18.) Really? The former trustees repeatedly tried to control what Judge Sturman was (or was not) exposed to during the parties' privilege dispute, but were unsuccessful. While Judge Sturman was free to handle the situation as she chose, that does not mean her decision lacked consequences.

Judicial Training. Scott closes with several cases standing for the proposition that judges presiding at bench trials are presumed to disregard improperly admitted evidence where there is other substantial evidence to support the outcome. (Pet. at 24-26.) The former trustees do not quarrel with this general principle, but we are not here dealing with mistaken evidentiary calls during the heat

[10] One commentator has criticized several 1990's Nevada disqualification decisions—including *Kirksey*—as unduly emphasizing the duty to sit in situations where "recusal should have been required or would have been the better, more confidence-building course of action." Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 Buff. L. Rev. 813, 926-27 (2009).

of trial as in most of Scott's authorities. (Pet. at 25, n.43; 6 App. 1204-05 (distinguishing the same).) Judge Sturman reviewed highly prejudicial, privileged notes during discovery after being twice forewarned and with ample time to consider other options. Admittedly, most *in camera* privilege reviews will not raise disqualification concerns, but every case is unique such that the general deference owed to judicial training cannot control the outcome in all cases.[11]

D. If Anything, the *Kirksey* Standard Should Be Considered as one Factor in the Disqualification Calculus, not a *per se* Test.

The former trustees submit that NCJC 2.11(A) and the objective standard that applies thereto is the proper test for determining judicial disqualification motions regardless of whether they are premised on extrajudicial or intrajudicial sources. That was Justice Kennedy's view when writing for the four-member concurrence in *Liteky*: "placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry . . . the appearance of impartiality." 510 U.S. at 558, 114 S.Ct. at 1158-59 (Kennedy, J., concurring); *see also id.* at 564, 114 S.Ct. at 1162 (suggesting the standard for "all allegations of fixed predisposition, extrajudicial or otherwise, follows from the statute itself:

[11] The deference given to Judge Sturman's determination that her recusal was not required is likewise not controlling (Pet. at 8). *See PETA*, 111 Nev. at 437, 894 P.2d at 341 (the objective standard ignores judge's personal view and litigant's partisan view of judge's impartiality; ordering disqualification despite substantial weight given to judge's decision not to recuse).

Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality.").

Should the Court nonetheless determine that *Kirksey* and the "extrajudicial source doctrine" do apply to NCJC 2.11(A), they should not displace the objective standard altogether but, instead, should be deemed one factor in the disqualification calculus. Thus, in impartiality challenges under NCJC 2.11(A), the reviewing court would first ask whether a reasonable observer, aware of all relevant facts, would harbor questions about the judge's impartiality. If the answer is yes, the court can then consider whether the source of impartiality is judicial. If so, and it falls into a frequently-recurring category such as adverse rulings, intemperate comments, etc., then disqualification would only be proper where the source resulted in an opinion that displays "deep-seated favoritism or antagonism that would make fair judgment impossible."

Where, however, the judicial source is something uniquely problematic, the reviewing court should be free to recognize that sometimes disqualification is required when "a judicial officer hears, learns or does something intrajudicially so prejudicial that further participation would be unfair." *Downs v. Downs,* 440 P.3d 294, 299-300 (Alaska 2019). Multiple courts have recognized that one such

circumstance can arise from *in camera* privilege reviews—depending, of course, on the content of the material reviewed.[12]

Another such circumstance can occur where a criminal defendant's guilty plea is aborted. *See Plummer v. United States*, 43 A.3d 260, 265-67 (D.C. 2012) (trial judge's "recusal from sitting as trier of fact ***clearly would have been warranted*** had appellant actually admitted guilt or incriminated himself. . . . [I]t would have been difficult for any trier of fact to put it out of mind, and, ***at the very least, the impartiality of the judge who heard it could reasonably have been questioned by 'an objective observer'***[.]") (emphases added).

This Court has recognized similar concerns. *See Cripps v. State*, 122 Nev. 764, 769-70, 137 P.3d 1187, 1190-91 (2006) (prohibiting judicial involvement in plea negotiations in part to remove questions about the judge's impartiality at trial and sentencing). The analogy fits squarely here given that Judge Sturman extensively reviewed notes that Scott's counsel claimed were admissions of liability by the former trustees. (3 App. 421) ("the Typed Notes are **admissions by a party**

[12] *See, e.g.*, *In re St. Johnsbury Trucking Co., Inc.*, 184 B.R. 446, 455 n.17 (Bankr. D. Vt. 1995) (acknowledging inappropriateness of conducting privilege review in sanction proceeding where court was ultimate decision-maker); *Lund*, 305 P.3d at 377; *In re Marriage of Decker*, 606 N.E.2d 1094, 1107 (Ill. 1992) (recognizing "inherent problem" of some privilege reviews); *Reilly by Reilly v. Se. Penn. Transp. Auth.*, 479 A.2d 973, 991 (Pa. Sup. Ct. 1984). *Cf. State v. Medina*, 793 A.2d 68, 80 (N.J. App. 2002) ("exposure to inflammatory material might irredeemably preclude [judge] from serving as [ ] impartial arbiter of the facts.").

opponent that demonstrate fraud and breach of fiduciary duty") (emphasis in original).

Treating a judicial versus extrajudicial source as one factor among many in the disqualification calculus, as opposed to a *per se* test, gives reviewing courts the breathing room to address problematic situations that defy easy categorization. A small degree of flexibility will not open the floodgates to endless disqualifications as most motions can still be disposed of by the objective standard and, where necessary, additional consideration of the *Kirksey* standard. *See Liteky*, 510 U.S. at 561, 114 S.Ct. at 1160 (the extrajudicial/intrajudicial dichotomy has some utility by providing a convenient shorthand to address frequently recurring situations) (Kennedy, J. concurring).

This Court, moreover, can remedy inappropriate disqualifications through its independent review of a judge's impartiality. Finally, this approach will promote public confidence in the judiciary and protect litigants who find themselves trying to balance the tension between *Towbin Dodge*—which requires them to move "promptly" after learning a new basis for disqualification in the middle of litigation—and *Kirksey*—which incongruously requires them to wait until a judicial

source of impartiality ripens into an outward expression of deep-seated favoritism or antagonism that would render fair judgment impossible.[13]

E. The Law of the Case Doctrine and the ESI Protocol Bar Scott's Waiver Argument.

Law of the Case. "The law of the case doctrine 'refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (*i.e.*, established as law of the case) by that court or a higher court in earlier phases.'" *Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014) (quotation omitted). The doctrine bars reconsideration of a court's explicit decisions as well as those issues decided by necessary implication. *See id.* at 9, 317 P.3d at 819. It also applies to writ proceedings. *See Righetti v. State*, 439 P.3d 392, 2019 WL 1772303, at *2 (Nev. Apr. 19, 2019) (unpub. disp.) (applying doctrine where prior writ petition was rejected on its merits).

One of the "family of rules" encompassed in the law of the case context is the waiver doctrine, which applies "when the trial court has expressly or impliedly ruled on a question and there has been an opportunity to challenge that ruling on a

[13] Should the Court determine *Kirksey* is a *per se* test when a judicial source is involved, the former trustees submit they have met the impossibility-of-fair-judgment standard here—which this Court reviews independently—for all the reasons set forth herein. *See Rosenstein*, 103 Nev. at 575, 747 P.2d at 233.

prior appeal." *Zhang*, 130 Nev. at 9, 317 P.3d at 819 (quotation omitted). As one federal appellate court has explained:

> [T]he waiver doctrine is a consequence of a party's inaction. The waiver doctrine holds that an issue that could have been decided but was not raised on appeal is forfeited and may not be revisited by the district court on remand. The doctrine also prevents us from considering such an issue during a second appeal.

Lindquist v. City of Pasadena Texas, 669 F.3d 225, 239-40 (5th Cir. 2012) (internal quotations and footnotes omitted).

The waiver doctrine clearly applies here. Scott's objections before Judge Sturman argued that the former trustees had waived the attorney client privilege based on their alleged "reckless" inadvertent disclosures. *See* Point III(C), *supra*. Judge Sturman expressly ruled that "Petitioner's Objections to the DCRR are DENIED." (*Id.*) Contrary to Scott's misleading footnote number 49, Judge Sturman affirmed the discovery commissioner's findings that portions of Lubbers' notes *were* attorney-client privileged without exception, a ruling that could only be made if Scott's waiver arguments were rejected as "[w]aiver is a threshold issue." (*Id.*; Pet. at 28.) This portion of the district court's ruling was obviously adverse to Scott who could have challenged it in *Canarelli I*, but failed to do so (at least meaningfully). (6 App. 1028.)

ESI Protocol. The parties' ESI Protocol is a binding contract. *See Great-West Life & Annuity Ins. Co. v. American Economy Ins. Co.*, 2013 WL 5332410, at

*5 (D. Nev. Sept. 23, 2013). It provides that a party who disputes a claim of privilege after an inadvertently produced document has been clawed back under the agreement may bring a motion seeking a determination of whether a privilege applies, "***but may only contest the asserted privileges on ground[s] other than the inadvertent production of such document(s)***." (1 App. 9) (emphasis added). Scott's countermotion is premised entirely on the argument that the former trustees waived the attorney-client privilege based on their inadvertent disclosures in this action. Accordingly, the Court's analysis can end here as the countermotion is additionally barred by the foregoing contractual prohibition.[14]

[14] The former trustees addressed these issues in far more detail below. (6 App. 1206-16.) Because application of the law of the case doctrine and interpretation of unambiguous contractual provisions are questions of law, *see Estate of Adams By & Through Adams v. Fallini*, 132 Nev. 814, 818–19, 386 P.3d 621, 624 (2016) and *Am. First Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015), the former trustees submit the Court can deny Scott's countermotion on these alternative grounds. *See Rosenstein*, *supra*.

VI. CONCLUSION

For the reasons set forth herein, the former trustees respectfully submit that Scott's petition be denied.

DATED this 15th day of March, 2021.

CAMPBELL & WILLIAMS

By: /s/ *J. Colby Williams*
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101

HAYES WAKAYAMA
LIANE K. WAKAYAMA, ESQ. (11313)
4375 South Durango Drive, Suite 105
Las Vegas, Nevada 89147

Attorneys for Lawrence and Heidi Canarelli, and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers, Real Parties in Interest

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this answering 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

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 6,980 words.

I further certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(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 reply does not conform with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 15th day of March, 2021.

CAMPBELL & WILLIAMS

By /s/ *J. Colby Williams*
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101

HAYES WAKAYAMA
LIANE K. WAKAYAMA, ESQ. (11313)
4375 South Durango Drive, Suite 105
Las Vegas, Nevada 89147

Attorneys for Lawrence and Heidi Canarelli, and Frank Martin, Special Administrator of the Estate of Edward C. Lubbers, Real Parties in Interest

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Campbell & Williams and that I did, on the 15th day of March, 2021, file a true and correct copy of the foregoing **Answer to Petition for Writ of Mandamus or Prohibition** with the Clerk of the Court through the Court's e-flex filing system, which will send notice electronically to the following:

SOLOMON DWIGGINS & FREER, LTD.
Dana Dwiggins, Esq.
ddwiggins@sdfnvlaw.com
Craig D. Friedel, Esq.
cfriedel@sdfnvlaw.com
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

LEWIS ROCA ROTHGERBER CHRISTIE LLP
Daniel F. Polsenberg, Esq.
dpolsenberg@lrrc.com
Abraham G. Smith, Esq.
asmith@lrrc.com
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Attorneys for Petitioner Scott Canarelli

I further certify that a copy of the foregoing document will be served via U.S. Mail, first class postage prepaid, to the following:

THE HONORABLE LINDA MARIE BELL
Chief Judge, Eighth Judicial District Court
Department VII
200 Lewis Avenue
Las Vegas, Nevada 89155

By /s/ *John Y. Chong*
An employee of Campbell & Williams