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Keolis Transit Services, LLC v. Eighth Judicial Dist. Ct. & Shay Toth 138 Nev. Adv. Op. 8 (Feb. 24, 2022)

Kassandra Acosta

Keolis Transit Services, LLC v. Eighth Judicial Dist. Ct. & Shay Toth
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NRCP 26(b)(3): Work Product Doctrine

Summary:

In an opinion drafted by Justice Tao, the Nevada Supreme Court considered whether the district court properly ordered that three surveillance videos and two related reports created by the petitioner's insurance company's investigators were subject to discovery and not protected from disclosure as "work product" under NRCP 26(b)(3). The Court concluded that the first two videos and the related report are not protected work product because their production was not directed by the petitioner's counsel. Moreover, the Court concluded that it could not reach a conclusion as to the ultimate discoverability of the third video and accompanying report. The Court opined that the third video and accompanying report constitute as work product because it was created at the direction of the petitioner's counsel after the suit was commenced. However, the district court did not analyze whether the material was nonetheless to be discoverable upon a showing of substantial need and undue hardship. The district court did not use the appropriate analysis when ordering the disclosure of all the videos and reports at issue. Therefore, the Court grants the petition in part with regards to the first two videos and the related report, but directs for further proceedings on the third video and its accompanying report.

Facts:

Andre Petway, an employee for Keolis Transit Services, LLC (Keolis), while driving a vehicle for Keolis, rear ended a vehicle driven by Shay Toth. The accident allegedly caused Shay Toth serious injuries. Toth retained counsel.

On July 2017, a few days after the collision, Toth's counsel notified Keolis's third party insurer of Toth's representation and disclosed that Toth was claiming damages for personal injuries in connection with the collision. After receiving the notice, the insurer obtained an Insurance Services Office (ISO) report to ascertain whether Toth had filed other insurance claims

In August 2018, the insurer initiated an investigation to assess Toth's injuries and the truthfulness of her claims. As a part of this investigation, an investigator recorded video surveillance of Toth publicly engaged in daily activities. Keolis's counsel represented that a claims adjuster directed this surveillance. However, the record does not reveal who participated in the decision to conduct this additional investigation or what specifically prompted it. The investigator generated two surveillance videos of Toth, both dated August 2018 in Keolis's privilege log. The investigator also produced a written report associated with these two videos, likewise dated August 2018.

In June 2019, Toth filed the instant suit for negligence against both Petway and Keolis. After, Keolis's council directed further investigation, culminating in a third surveillance video of Toth engaged in public activities and an accompanying written report.

During discovery, Keolis disclosed the existence of these videos or reports without disclosing their contents. Toth then specifically requested copies of, or access to, the videos and reports, but Keolis refused, asserting that the surveillance videos and reports are protected work product.

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[1] By Kassandra Acosta

Toth then filed a motion to compel pursuant to NRCP 16.1(a)(1(A)(ii). Toth argued that Keolis was required to disclose the videos and reports with its initial disclosures. The discovery commissioner determined that the ISO or it should be disclosed, as it was prepared in the ordinary course of business. However, the discovery commissioner concluded that the videos and related reports are protected from discovery as work product. The discovery commissioner also made it known that if Keolis intended to use the videos and reports at trial, then Keolis would need to disclose the materials within 30 days of Toth's deposition.

Toth filed an objection. The district court partly modified the discovery commissioner's report and recommendation and ordered Keolis to immediately produce all three videos and both related reports.

Keolis filed this petition seeking a writ of prohibition challenging the district court's discovery order with respect to the surveillance materials, but not the ISO report.

Discussion:

Standard for Writ Relief

In *Diaz v. Eighth Judicial Dist. Court* the Court held that extraordinary relief is unavailable to review a discoverable order.[2] However, a court may consider a writ petition raising a discovery issue if "an important issue of law needs clarification and public policy is served by the court's invocation of its original jurisdiction."[3] Moreover, the Court in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court* held a writ of prohibition is appropriate to prevent improper discovery.[4]

The Court decided to consider the petition for two reasons. First, to clarify the legal analysis a district court must apply when determining the qualifications for work product protection and whether material is nevertheless subject to discovery. Second, the Court argued that without their intervention, the district court's order compelling disclosure of the videos and related reports may result in the unjust compromise of potentially protected work product, that in appeal could not rectify after a final judgment.

In *Canarelli v. Eighth Judicial Dist. Court*, the Court held that it will not disturb the district court's ruling on discovery matters absent a clear abuse of discretion.[5] However, the "district court must apply the correct legal standard in reaching its decision…"[6]

Surveillance Videos and the Work-Product Doctrine

The work product doctrine is codified in NRCP 26(b)(3). When analyzing a work-product issue, the primary inquiry is whether the material was created in anticipation of litigation or trial. As explained in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, a document is prepared in the anticipation of litigation when, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[7] This test, the "because of" test, asks whether a party prepared or obtained document because of the prospect of litigation and whether the anticipation of litigation was essential for the creation of the document."[8] In other words, "but for the prospect of that

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[2] Diaz v. Eighth Judicial Dist. Court, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000).
[3] *Id.*
[4] Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court, 133 Nev. 369, 373-74, 399 P. 3d 334, 341 (2017).
[5] Canarelli v. Eighth Judicial Dist. Court, 136 Nev. 247, 251, 464 P. 3d 114, 119 (2020).
[6] In re Gaurdianship pf B.A.A.R., 136 Nev. 494, 496, 474 P.3d 838, 841 (Ct. App. 2020).
[7] *Wynn Resorts Ltd*., 133 Nev. at 384, 399 P.3d at 348.
[8] *Id.*

litigation,' the document would not exist."[9] Therefore, the "because of" test does not protect "documents that are prepared in the ordinary course of business or what would have been created in essentially similar form irrespective of the litigation."[10]

In this case, the third video and related report were created by the direction of Keolis's counsel after Toth filed suit. However, the first two videos and their related report were completed at the direction of the insurance carrier, before Toth's suit was filed, and for reasons not clear from the record. Therefore, the questions regarding the first two videos and the report are whether Keolis, through its insurer, created these materials in the ordinary course of business (which is not protected under the work product doctrine) or created the videos because of looming litigation (which would protect the materials under the work product doctrine).

Keolis argues that because the majority of what insurance companies do is anticipate and respond to possible litigation threats, then every investigation they conduct in response to the receivable attorney's letter of representation must be considered protected work product. Toth argues that because insurance carriers are in the business of routinely conducting such investigations whenever they receive a letter of representation from an attorney, such investigations are merely part of their regular and ordinary business activities.

The Nevada Supreme Court established a rule for insurers' investigations in *Ballard v. Eighth Judicial Dist. Court*: investigative materials generated in the context of an insurance investigation are considered to have been created in the ordinary course of business of the insurance company, rather than in anticipation of the delegation, unless the investigation was performed at the request or under the direction of an attorney.[11] In *Ballard*, once the defendants learned that the plaintiff in an automobile/pedestrian accident was represented by counsel, the defendant's automobile liability insurance company began its own investigation into the facts and circumstances of the accident.[12] The plaintiffs sought to discover a statement that the defendant made to the insurer during that investigation.[13] However, the Court held that "materials resulting from an insurance company's investigation are not made 'in anticipation of litigation' unless the insurer's investigation has been performed at the request of an attorney."[14] Thus, the Court concluded the statement was not privileged under NRCP 2b(b)(3) because it was not taken at the request of an attorney.[15]

The Supreme Court clarified this rule is *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, holding that an attorney's involvement is not itself sufficient to confer work product protection to materials that otherwise would have been prepared in the ordinary course of business, irrespective of the attorney's involvement.[16]

With respect to the first two videos, under *Ballard*'s insurer exception, these materials would not be privileged under the work product doctrine. According to *Ballard*, even if there was an argument that the videos were created because of litigation or the potential of future litigation, any subjective anticipation of litigation, no matter how real it may have been, is immaterial so long as the insurer's attorney did not direct the surveillance. Because the initial investigation did not come at the direction of Keolis's counsel, the first two videos and the report should be produced.

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[9] *Id*.
[10] *Id*.
[11] Ballard v. Eighth Judicial Dist. Court, 106 Nev. 83, 85, 787 P.2d 406, 407 (1990).
[12] *Id*. at 84, 787 P.2d at 407.
[13] *Id*. at 85, 787 P.2d at 407.
[14] *Id*.
[15] *Id*.
[16] Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court, 113 Nev. 521, 526-27, 936 P.2d 844, 848 (1997).

The third video and its report were created at the direction of Keolis's counsel. Furthermore, the third video was created after Toth filed her lawsuit. This is important because work product protections attached to materials prepared both "in anticipation of litigation or for trial."[17] Because the third video and the related report were created after Toth filed suit, the materials were prepared for trial. Therefore, the third video and the accompanying report are materials protected by the work product doctrine under NRCP 26(b). However, this Court cannot determine whether the third video and related report are discoverable.

Keolis argues that the district court failed to perform the complete and necessary analysis to determine whether the third video and its report are discoverable. Keolis is correct. When materials meet the requirement for protection under the work product doctrine, they may still be subject to discovery upon a showing by the requesting party of substantial need and undue hardship under NRCP 26(b)(3)(A). Therefore, if the record demonstrates that this exception is met, then the third video and related report are discoverable regardless of whether the work product doctrine applies to them.

According to *Wardleigh v. Second Judicial Dist. Court*, the term "substantial need" is proven when the party seeking to overcome work-product protection demonstrates an actual need for the evidence in the preparation of its case; "mere assertion of the need will not suffice."[18] The Court in *Wardleigh* also held that the requesting party must also demonstrate that he or she would face undue hardship to discover the same evidence "or the substantial equivalent thereof."[19]

In this case, the district court disposed of the discoverability of all these surveillance videos in a single sentence footnote, ordering all the materials disclosed. The district court made no findings and provided no analysis of the exception under NRCP 26(b)(3)(A). Based on the record, this Court is unable to determine whether Toth demonstrated, or could have demonstrated, substantial need and undue hardship. Therefore, the Court grants Keolis's petition in part and directs the district court to reconsider Toth's motion to compel under the standard set forth herein.

Conclusion:

The first two videos and the related report were created before the suit was filed. These materials fail *Ballard's* explicit requirement for counsel involvement in insurance cases. Therefore, those materials are not protected work product.

The third video and its accompanying report were created at the direction of counsel after Toth filed suit against Keolis. These materials fall under work product. However, the third video and its related report may nonetheless be discoverable upon a showing of substantial need and undue hardship. The district court failed to apply this framework.

The Court grants in part Keolis's petition and instructs the district court to vacate its order granting Toth's motion to compel in regards to the third video and its related report and to conduct further proceedings consistent with this opinion.

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[17] Nev. R. Civ. P. 26(b)(3)(A).

[18] Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 358, 891 P.2d 1180, 1188 (1995).

[19] *Id*.