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Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court, 133 Nev. Adv. Op. 52 (July 27, 2017)¹

DISCOVERY: BUSINESS JUDGMENT RULE, ATTORNEY-CLIENT PRIVILEGE, WORK-PRODUCT PRIVILEGE

Summary

The Court held that the business judgment rule defense alone does not mandate waiver of attorney-client privilege related to discovery documents. The Court also adopted the “because of” test with a “totality of the circumstances” standard to determine when a document falls under the work-product privilege.

Background

Kazuo Okada owned about half of Wynn Resorts stock through Azure USA, Inc. He was also part of the Wynn Resorts board of directors (the Board). The underlying litigation involves Wynn Resorts’ concerns with Okada’s casino involvement in the Philippines. Particularly, Wynn Resorts was concerned about the risk to its gaming licenses. After Wynn Resorts’ investigated the Philippines dealings, the Board cautioned Okada against further involvement. However, Okada proceeded with the Philippines casino.

Wynn retains the Freeh Group

The Board hired Louis J. Freeh and his firm (the Freeh Group) to investigate Okada’s involvement in the Philippines. The letter of engagement specifically stated that the Freeh Group was hired as legal counsel to investigate and report to the Board whether Okada’s involvement in the Philippines violated any of the Wynn Resorts’ policies and would put Wynn Resorts’ gaming licenses at risk.

The Freeh Group presented its findings to the Board (except for Okada). The Freeh Group alleged misconduct against Okada in the development of the Philippines casino. Two other law firms, including Brownstein Hyatt, reviewed the report and provided legal counsel.

The Board adopted the Freeh Group’s findings and found that Okada violated Wynn Resorts’ articles of incorporation. Thus, the Board redeemed Azure’s stock in exchange for a promissory note of \$1.9 billion. Okada alleged that is only a fraction of the stock’s value.

As a result, Wynn Resorts filed a complaint against Okada and Azure for declaratory relief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. The complaint relied on the Freeh Report and the advice from Brownstein Hyatt. The Freeh Report was attached to the complaint. Okada and Azure filed counterclaims for declaratory relief, an injunction against the redemption of the stock, breach of contract, breach of Wynn Resorts’ articles of incorporation, and other tort-based actions.

Wynn Resorts attached a copy of the Freeh Report with the notice to the Securities and Exchange Commission. Wynn Resorts also allegedly gave a copy to the Wall Street Journal.

Motion to compel: Brownstein Hyatt documents (Docket No. 70050)

During litigation, Okada filed a motion to compel Wynn Resorts to disclose Brownstein Hyatt documents that were created to advise the Board. Okada argued that Wynn Resorts waived

¹ By Elise Conlin.

attorney-client privilege and work-product privilege by putting the Brownstein Hyatt advice at issue. Wynn Resorts countered that simply stating that the Board received legal advice to reach a business decision did not place the advice at issue. Ultimately, the district court granted the motion to compel because Wynn Resorts asserted the business judgment rule as a defense.

Motions to compel: Freeh Report documents (Docket No. 70452)

Okada filed two other motions to compel the Freeh Report's underlying documents. First, Okada filed a motion to compel arguing that Wynn Resorts waived attorney-client privilege and work-product privilege because it attached the Freeh Report to the complaint and allegedly sent the Freeh Report to the newspaper. The district court granted in part stating that some of the documents may be protected by attorney-client privilege, and that the work-product privilege did not apply. Wynn Resorts was ordered to supplement the disclosure.

Okada then filed a third motion to compel, arguing that Wynn Resorts was withholding documents. The district court reviewed a fourth of the documents in the Freeh Report. It held that Wynn Resorts had to disclose all of the documents because the work-product privilege did not apply, and Wynn Resorts waived attorney-client privilege by publicly disclosing the document.

As a result, Wynn Resorts filed these petitions for writ of prohibition or mandamus.

Discussion

Writ relief is appropriate

The Court held that a writ of prohibition was more appropriate in this case to avoid improper disclosure of documents.² The Court exercised its discretion to issue a writ of prohibition because of the important legal—not factual—issues in this case.³ This case involves review of the scope of discovery and privilege as related to the business judgment rule.

Attorney-client privilege

Nevada law recognizes the attorney-client privilege.⁴ For the privilege to apply, there must be communication between the attorney and the client related to legal advice. The communication must also be confidential.⁵ A confidential communication is one that is not meant to be disclosed to third parties, unless related to the legal advice given.⁶ A communication will not be confidential if its disclosed as public information.⁷ The Court held that both the Freeh documents and the Brownstein Hyatt documents are possibly protected by attorney-client privilege.

Wynn Resorts did not waive the attorney-client privilege as to the Brownstein Hyatt documents by asserting the business judgment rule

When the business judgment rule is offered, there is a presumption that the director, or board of directors, acted in good faith and with an honest belief that the best interests of the

² Wardleigh v. Second Judicial Dist. Ct., 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

³ Round Hill Gen. Improvement Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

⁴ NEV. REV. STAT. § 49.095 (2017).

⁵ *Id.*

⁶ NEV. REV. STAT. § 49.055 (2017).

⁷ See Cheyenne Constr., Inc. v. Hozz, 102 Nev. 308, 311–12, 720 P.2d 1224, 1226 (1986).

company would be served in reaching a particular decision.⁸ The director will not be liable for damages unless it is shown that the director breached his fiduciary duties or that the breach involved misconduct, fraud, or other violation of law.⁹

The business judgment rule applies to the Board

Okada and Azure argue that the business judgment rule only protects individual directors. However, the Court held that it protects the Board as well. The business judgment rule is meant to prevent courts from interfering with business decisions made with appropriate care, either by an individual or a board.¹⁰ The Court noted it has previously applied the business judgment rule to a board.¹¹

The business judgment rule precludes judicial interference with decision-making when a director or board of directors acts in good faith

The Court held that a substantive review of the advice given to the Board is not appropriate to determine if their decision was made in good faith. Nevada's business judgment statute is a slightly modified version of the Model Business Corporation Act.¹² The Nevada rule rejects the "reasonableness" standard for determining whether a director's actions were justified, signaling that Nevada rejected a substantive review of the advice given.¹³

Determining whether a director or board of directors acted in good faith

The Court adopted the *WLR Foods, Inc.* standard for determining whether a director acted in good faith.¹⁴ The factors are: 1) the identity and quality of the source of information; 2) how the source was selected; 3) the general topic of the information sought; 4) whether advice was in fact given; 5) whether the advice was followed; and 6) if the advice was not followed, what sources were used to reach the decision.¹⁵ These factors protect the director from judicial second-guessing.

The district court erred in finding that Wynn Resorts waived the attorney-client privilege of the Brownstein Hyatt documents (Docket No. 70050)

The Court held that NRS 78.138 stands for two things: 1) the Board is presumed to act in good faith for the interests of the corporation; and 2) the Board can establish the presumption by relying on the reports and advice of counsel, as long as the Board had no reason or knowledge to question the quality of that information.¹⁶ The statute does not imply that the Board waived attorney-client privilege by asserting the business judgment rule.

⁸ *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178–79 (2006).

⁹ NEV. REV. STAT. § 78.138(7) (2017).

¹⁰ 18B Am. Jur. 2d Corporations § 1451 (2016).

¹¹ *Shoen*, 122 Nev. at 636–37, 137 P.3d at 1181.

¹² Compare NEV. REV. STAT. § 78.138 with 2 Model Business Corporation Act Annotated § 8.30(e) (4th ed. 2011).

¹³ *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ NEV. REV. STAT. § 78.138 (2017).

Whether the Board acted in good faith is determined by the existence of the advice, not the actual substance.¹⁷ Thus, the Court held that the district court erred when it compelled Wynn Resorts to disclose the Brownstein Hyatt documents simply because Wynn Resorts asserted the business judgment rule as a defense. The Court granted Wynn Resorts' writ of prohibition in Docket No. 70050 and instructed the district court to vacate the order mandating disclosure of the privileged Brownstein Hyatt documents.

Wynn Resorts waived attorney-client privilege by placing the Freeh Report at issue in the initial litigation (Docket No. 70452)

A client waives attorney-client privilege when it discloses or describes the content of the privileged information in litigation.¹⁸ If one document describing the privileged information is disclosed, then all of the related documents are no longer privileged.¹⁹

Wynn Resorts argued that the underlying documents of the Freeh Report are irrelevant to the litigation because it is only using the report to overcome any challenge to the business judgment rule. Okada and other parties counter that the underlying documents are relevant and should be disclosed because the investigation lead to the end result—the Freeh Report. The Court reviewed the case *In re OM Securities Litigation*.²⁰ That case held that disclosure of the final presentation in an investigation warranted the disclosure of the underlying documents.²¹ The presentation disclosure was significant enough to warrant disclosure of the underlying documents so that the plaintiffs could have a full picture of the information.²²

The Court held that the district court did not err when it held that Wynn Resorts waived attorney-client privilege as to the Freeh Report and the underlying documents. The Court compared the defendant's actions in *In re OM* with Wynn Resorts' actions. Wynn Resorts voluntarily put the information into the litigation by filing the Freeh Report with the complaint. The Freeh Report referred to the underlying documents. Also, Wynn Resorts publicly disclosed the Freeh Report to the newspaper. However, the Court stated that some of the underlying documents may be protected by work-product privilege.

Freeh Report documents and work-product protection (Docket No. 70452)

The work-product doctrine protects the attorney's impressions, conclusions, opinions, and legal theories.²³ A document is protected by work-product privilege if the material was created in anticipation of litigation and the material was created by the client's representative.²⁴ To determine whether a document was created in anticipation of litigation, the Court adopted the "because of" test. This test looks at whether the document was obtained or created "because of" the prospect of litigation.²⁵ The Court also looks at the "totality of the circumstances" in determining whether the

¹⁷ *In re Comverge, Inc. S'holders Litig.*, No. 7368-VCP, 2013 WL 1455827 at *4 (Del. Ch. Apr. 10, 2013).

¹⁸ *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994).

¹⁹ *See Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 883–84 (1st Cir. 1995); *Wardleigh*, 111 Nev. at 354–55, 891 P.2d at 1186.

²⁰ 226 F.R.D. 579 (N.D. Ohio 2005).

²¹ *Id.* at 593.

²² *Id.*

²³ *Wardleigh*, 111 Nev. at 359, 891 P.2d at 1189; NEV. R. CIV. P. 26(b)(3).

²⁴ *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004).

²⁵ Restatement (Third) of the Law Governing Lawyers § 87 cmt. i (2000) (quoting 8 Charles A. Wright et al., *Federal Practice & Procedure* § 2024, at 343 (2d ed. 1994)).

“because of” test is met. The Court should look to the circumstances surrounding the creation of the document, the document’s content and nature, and whether a request for legal advice is implied or explicit.²⁶ Thus, the Court granted Wynn Resorts’ writ in part and directed the district court to reconsider this matter to determine if the Freeh Report meets the “because of” test after applying the totality of the circumstances standard.

Waiver of the work-product privilege

Work product disclosure is allowed and will not necessarily waive the privilege.²⁷ However, if the work product is disclosed to an adversary, then the privilege is waived.

The district court compelled disclosure because it found that the work was not created in anticipation of litigation. It did not compel disclosure based on waiver. Thus, the Court did not decide whether Wynn Resorts waived the work-product privilege as to the Freeh Report.

Conclusion

The Court held that the district court erred by finding that Wynn Resorts waived attorney-client privilege of the Brownstein Hyatt documents. The Court directed the work-product privilege question back to the district court to determine if the Freeh Report was created in anticipation of litigation, applying the “because of” test that the Court adopted.

²⁶ *In re* CV Therapeutics, Inc. Sec. Litig., No. C-03-3709 SI(EMC), 2006 WL 1699536, at *4 (N.D. Cal. June 16, 2006).

²⁷ *See* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 530 (3d ed. 2010).