

IN THE SUPREME COURT OF THE STATE OF NEVADA

NISSAN NORTH AMERICA, INC.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,

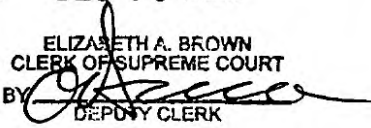
and

THE DUNHAM TRUST COMPANY, BY
AND THROUGH ITS AGENT ROBERT
L. ANSARA, AS SPECIAL
ADMINISTRATOR ON BEHALF OF
THE ESTATE OF JOHN C. PAXIN, JR.,
INDIVIDUALLY; AND LUANA IRENE
HULSEY, INDIVIDUALLY AND AS
ATTORNEY IN FACT,
Real Parties in Interest.

No. 84491

FILED

DEC 15 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR
PROHIBITION*

This is an original petition for a writ of mandamus or prohibition challenging a district court's order directing petitioner to produce work product and or privileged information contained within a report. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Petitioner Nissan North America, Inc. (NNA) manufactures a truck known as the "Titan." Decedent John Paxin's Nissan Titan had a rollover curtain airbag system. Such airbags generally deploy when the Airbag Control Unit (ACU) registers a rollover event. An "Event Data Recorder" (EDR) is contained within the ACU. Upon crash situations, the

EDR records data in a hexadecimal format to document the vehicle's performance.

In 2017, Paxin lost consciousness at the wheel of his truck, traveled off the road, and hit a pedestrian and another driver. At some point, the Titan's ACU registered a rollover event. It then deployed the curtain airbags and recorded data in the EDR. Paxin ultimately died from injuries sustained in the incident. Real parties in interest Dunham Trust Company, by and through its agent Robert L. Ansara as Special Administrator, and Luana Irene Hulsey as Attorney in Fact (collectively, Paxin), brought products-liability claims against NNA on behalf of Paxin's estate, claiming that the airbags deployed defectively. NNA maintained that the airbags deployed properly and that Paxin's injuries occurred before they deployed.

In response to the suit, NNA's in-house counsel asked Nissan engineer Jessica Matos to prepare an engineering assessment in order to render legal advice. Matos then prepared a "Technical Investigation Report" (TIR) based on her inspection of Paxin's truck. NNA claims that the TIR is both a privileged communication and protected work product.

Thereafter, Paxin requested that NNA provide a designated corporate representative for deposition under NRCP 30(b)(6).¹ NNA designated Matos, and Paxin deposed her in July 2021. In preparation for the deposition, Matos stated she reviewed the TIR, as well as a PowerPoint created specifically for the deposition. Upon questioning about the contents of these documents, Matos stated the TIR consisted of the police report,

¹While NNA maintains that it provided a corporate witness to explain the recorded data, the record provided does not contain a copy of the NRCP 30(b)(6) notice.

witness statements, photos from her inspection, and calculations using the hex data downloaded from the EDR. Importantly, she added that her calculations feasibly supported a conclusion that Paxin's airbags deployed properly. In a subsequent declaration, Matos clarified that she reviewed only a portion of the TIR that discussed the data downloaded from the EDR.

Subsequently, NNA disclosed Matos as a "non-retained, reporting expert" and adopted her deposition testimony in lieu of a NRCP 16.1(a)(2)(B) written report. This prompted Paxin to request production of the TIR and other documents Matos relied on in preparation for the deposition. NNA refused on the grounds that the TIR was protected by attorney-client privilege and the work-product doctrine and that it had already produced the information Matos relied on from the TIR.² After additional, failed attempts to obtain the TIR, Paxin moved to compel production of the TIR and other information.

Following a hearing, the discovery commissioner agreed that NNA waived its privilege claim under both NRS 50.125 and the at-issue waiver doctrine and issued a report and recommendations. The commissioner did not address the sufficiency of the designation of Matos's deposition testimony to satisfy the expert report requirement. In its objection to the discovery commissioner's report and recommendations, NNA for the first time offered the TIR for in camera review to prove up its assertions. Nevertheless, the district court summarily adopted the discovery commissioner's report and recommendations. NNA, as a result, was obligated to produce the TIR and other requested information. This writ petition followed as to the TIR only.

²There is no privilege log in the record showing the extent of NNA's privilege and work product claims here.

We elect to entertain the writ petition

Writ relief is a mechanism to correct a district court's manifest abuse of discretion. *See Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011). Although a district court's determination in discovery matters is typically unreviewable by writ petition, we elect to entertain this petition because the district court's order could conceivably "cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective." *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 639-40, 289 P.3d 201, 204 (2012). Still, as discussed below, the district court did not manifestly abuse its discretion in ordering disclosure of the report. We therefore deny the relief petitioner seeks.

The district court properly ordered disclosure of the report

NRS 50.125

A party whose witness relies on a writing to refresh their memory to testify, whether in a deposition or at a court hearing, implicates NRS 50.125. *See Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 341, 325 P.3d 1259, 1263 (2014). Specifically, where a testifying witness uses the writing to refresh her memory while testifying, NRS 50.125(1)(a) entitles an adverse party to have the writing "produced at the hearing," "inspect it," "cross-examine the witness thereon," and "introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility." Meanwhile, where the witness uses the writing to refresh her memory before testifying, the adverse party only has such access "if the judge in his or her discretion determines that the interests of justice so require." *See* NRS 50.125(1)(b). Moreover, NRS 50.125(2) directs district courts to "examine the writing in

chambers” where “it is claimed that the writing contains matters not related to the subject matter of the testimony.”

Arguing that the statute’s 2015 amendment conditions disclosure on the district court’s discretion where a witness relies on the writing beforehand, as is the case here, NNA maintains that the district court erred in ordering immediate disclosure. It further argues that, at minimum, in camera review was necessary before ordering disclosure because the TIR allegedly contains information unrelated to Matos’s testimony. NNA’s arguments are not persuasive.

Even in a writ proceeding, interpretation of a statute like NRS 50.125 is a question of law subject to de novo review. *See Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. 118, 123, 319 P.3d 618, 621 (2014). Yet, as a threshold matter, an argument not raised before a discovery commissioner is waived even if later raised before the district court. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011). In the same way a party fails to preserve an argument raised on appeal if it is not raised before the district court, this rule is designed “to allow the lower tribunal”—the discovery commissioner—“the first opportunity to decide the issue.” *Id.* at 172, 252 P.3d at 679; *see also Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Otherwise, we would “frustrate the purpose” of discovery commissioners and condone inefficient use of judicial resources. *Valley Health*, 127 Nev. at 173, 252 P.3d at 679-80 (denying writ relief to a petitioner who first raised a privilege in an objection to the discovery commissioner’s report and recommendations); *see also Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017) (noting that, “in the context of extraordinary writ relief, consideration of

legal arguments not properly presented to and resolved by the district court will almost never be appropriate”).

In this case, we would frustrate the discovery commissioner’s role in litigation should we grant NNA extraordinary relief. NNA did not argue that in camera review was necessary before the discovery commissioner. And, once it raised the in camera review argument, it did so in only one sentence in its objection to the discovery commissioner’s report and recommendations saying that it would be happy to submit the report in camera, but failing to argue that such review was mandatory under NRS 50.125.³ Permitting such an untimely argument would allow NNA to “make an end run around the discovery commissioner by making one set of arguments before the commissioner, [and] waiting until the outcome is determined, then adding or switching to alternative arguments before the district court.” *Id.* at 172-73, 252 P.3d at 679-80. Therefore, we decline to extend writ relief on the basis that there was no in camera review of the TIR.

NNA’s remaining contention similarly fails.⁴ NNA did not make any arguments about the 2015 amendment before the discovery

³We also note that it did not seek to provide the TIR to us in any form. Nor did NNA provide this court with the complaint, answer, NRCP 30(b)(6) deposition notice, or the entire deposition transcript (only select portions were provided). It was NNA’s obligation, as the petitioner, to provide us with the pertinent portions of the record necessary for our review. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also* NRAP 21(a)(4).

⁴NNA also argues that NRS 50.125 applies only where a witness testifies at a hearing and not a deposition. This argument is unavailing, as we previously held that “we see no reason why writings used to refresh the memory of a witness before or during a deposition should be treated

commissioner. Moreover, even if NNA properly preserved this argument, the statute as amended does not prohibit the district court's exercise of discretion here. Rather, NRS 50.125(1)(b) explicitly grants the district court discretion to order disclosure where the writing is relied on before the hearing. NNA thereby implicated NRS 50.125(1)(b) and its consequences when it permitted Matos, the employee who created the TIR, to rely on the report in preparation for the deposition and then testify based on information in that report. Thus, without reaching the merits of NNA's arguments about the effect of the 2015 amendment, we hold that the district court's application of NRS 50.125 was not a manifest abuse of discretion warranting extraordinary relief.⁵

At-issue waiver doctrine

At-issue waiver applies when a party "injects part of a [privileged] communication as evidence," such that "fairness demands that the opposing party be allowed to examine the whole picture." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995); see also 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2016.6 (3d ed. 2022 Update) (explaining that at-issue waiver occurs where the privilege holder "seeks to use some protected material as evidence but asserts privilege to withhold other related material from disclosure"). And, when it applies, "use of some privileged material as

differently than those used by a witness before or at 'the trial'" under NRS 50.125. *Las Vegas Dev. Assocs.*, 130 Nev. at 342, 325 P.3d 1264-65.

⁵NNA also argued that Paxin's request to produce the TIR was untimely because it was made five months after the deposition. Whether disclosure is barred because the request is not timely falls within the district court's discretion, which we hold was not manifestly abused on these facts.

evidence provides a basis for insisting that all related material also be disclosed.” Wright & Miller, *supra*, § 2016.6.

NNA maintains that the district court erred when it alternatively ordered disclosure of the TIR under the at-issue waiver doctrine.⁶ In particular, NNA argues that the doctrine does not mandate disclosure of the entire report, as Matos only introduced unprivileged portions of the TIR during her deposition. NNA’s argument fails.⁷

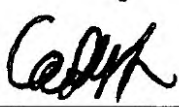
In the context of a writ petition, we generally review the district court’s discovery ruling regarding waiver of a privilege for a manifest abuse of discretion. *See Cotter v. Eighth Judicial Dist. Court*, 134 Nev. 247, 249, 416 P.3d 228, 231 (2018). Here, the at-issue waiver doctrine applied once Matos based her deposition testimony on information specifically contained in the TIR. Indeed, Matos’s conduct went beyond mere review; she authored and testified specifically about information contained in the report, and later relied on that testimony to constitute her report as a testifying expert for NNA. In doing so, NNA “inject[ed]” part of the communication into evidence. *See Wardleigh*, 111 Nev. at 355, 891 P.2d at 1186. Consequently, NNA “cannot be allowed, after disclosing as much as [it] pleases, to withhold the remainder.” 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2327 (1961); *see also Wynn Resorts, Ltd. v. Eighth Judicial. Dist. Court*, 133 Nev. 369, 381, 399 P.3d 334, 345 (2017) (“If the substance of one privileged

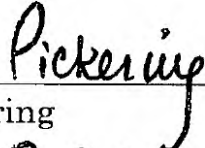
⁶The court also relied on other bases to find disclosure required. But, in light of our conclusions here, we need not address those alternative bases.

⁷We note that the district court did not address whether a deposition transcript can satisfy NRCP 16.1(a)(2)(B)’s requirements, so we need not address the issue here. *See Archon Corp.*, 133 Nev. at 822, 407 P.3d at 708 (2017).

document is disclosed, the privilege is considered waived as to all documents relating to that subject matter.”). And while NNA asserts that it disclosed the unprivileged portions of the TIR and seeks only to protect the privileged portions, it also inconsistently argues that the entire report is protected pursuant to the statement regarding its confidential nature and intent to be used only for litigation purposes on its first page. Given this piecemeal attempt to rely on some portions of the TIR but withhold the rest, we do not consider the district court’s order under these circumstances to be a manifest abuse of discretion.

For the foregoing reasons, we
ORDER the petition DENIED.⁸


_____, J.
Cadish


_____, J.
Pickering


_____, Sr. J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Klein Thomas & Lee/Phoenix
Mario D. Valencia
Kemp Jones, LLP
Queenan Law Firm, P.C./Texas
Eighth District Court Clerk

⁸The Honorable Mark Gibbons, Senior Justice, participated in the decision in this matter under a general order of assignment.