STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Bennington Unit — Docket No. 363-10-15 Bncv

LaRoche vs. Champlain Oil Company Inc. et al

ENTRY REGARDING MOTION

Count 1, Personal Injury - Slip & Fall (363-10-15 Bncv)
Count 2, Personal Injury - Slip & Fall (363-10-15 Bncv)

Title: Motion QUASH SUBPOENA (Motion 1)
Filer: Thomas Haskins
Attorney: Richard J. Windish
Filed Date: April 22, 2016

Response filed on 04/29/2016 by Attorney Bernard J. Boudreau for Plaintiff Cheryl LaRoche

The motion is GRANTED IN PART.

Opinion

This is a personal injury case. Defendant Thomas Haskins d/b/a All Service Citgo has filed a motion to quash a subpoena that Plaintiff served upon his insurance carrier. The subpoena is for recorded statements by two witness and a report prepared by an investigator regarding the alleged incident, which is the subject of this case. Plaintiff previously sought the documents through discovery requests and Defendant claimed they were protected attorney work products. Plaintiff opposes the motion to quash and filed her own motion to compel Defendant to turn over the information. This is a close case. However, for the reasons stated below, the court DENIES Defendant's motion to quash and GRANTS Plaintiff's motion to compel.

Background

On June 5, 2015, the alleged "trip and fall" incident occurred on Defendant's premises.

Within two weeks, Plaintiff went with her current counsel to the site of the accident to see "if [she] had any case." It is unclear whether Defendant observed this visit, and if he did, whether he was informed of their purpose.

On July 30, 2015, Plaintiff's counsel mailed Defendant the following letter:

> Dear Mr. Haskins:
>
> Please be advised that this law firm has been retained to represent Cheryl LaRoche with regards to injuries she sustained on your property at 165 West Main Street in Bennington, Vermont on June 5, 2015. Upon receipt of this letter please forward a copy of same to your insurance carrier in an effort to amicably resolve this matter.
>
> Sincerely,
> /s/
> BERNARD J. BOUDREAU

On August 20, 2015, Gary Gagnon, an employee of G4S Compliance and Investigations, took recorded statements of two witnesses who were present on June 5, 2015.

On September 1, 2015, Mr. Gagnon prepared a four-page report.

On September 29, 2015, Plaintiff filed a complaint, initiating this case.

The Present Motions

On April 22, 2016, Defendant filed a motion to quash a subpoena Plaintiff had filed on Defendant's insurance carrier, Wills Insurance.[1] Defendant informed the court that Plaintiff had already attempted to obtain this information directly from Defendant through discovery. Defendant had objected to the requests, asserting that they were covered by the attorney work product privilege. Defendant accused Plaintiff's counsel of attempting to circumvent this privilege through the subpoena, when he should have filed a motion to compel in order to allow the court to determine whether the documents are privileged.

Plaintiff's response was both an opposition to the motion to quash and a motion to compel.[2] In her motion, Plaintiff argues that the recorded statements and report are not privileged because they were not made in anticipation of litigation, but even if they are privileged, they should still be discoverable under V.R.C.P. 26(b)(3) because they contain the earliest recorded impressions of key witnesses, which could not be duplicated in later interviews or depositions.

[1] The court apologizes for the significant delay in issuing this opinion. While this was a close case, that was not the reason for the delay.

[2] The court finds that outside, perhaps, the motions in limine context, filing multiple motions in the same document is confusing and unnecessarily complicates the process. The court requests that, in the future, counsel files motions in separate documents.

Standard

Vermont recognizes the attorney work product privilege under both the common law and rules of civil procedure. *Killington, Ltd. v. Lash*, 153 Vt. 628, 641-48 (1990); see also *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("In performing his various duties, … it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he … prepare his legal theories and plan his strategy without undue and needless interference.").

> It is well settled that "[r]eports prepared for counsel in connection with litigation constitute the attorney's work product and are immune from discovery absent compelling circumstances." *Hartnett v. Med. Ctr. Hosp. of Vt.*, 146 Vt. 297, 299 (1985) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)). Pursuant to Vermont Rule of Civil Procedure 26(b)(3), this protection extends to documents prepared in anticipation of litigation by or for another party's representative, including documents prepared by or for the other party's insurer or agent.

Pcolar v. Casella Waste Sys., Inc., 2012 VT 58, ¶ 17, 192 Vt. 343, 351.

The privilege "is a narrow one," requiring that the materials be "prepared in anticipation of litigation or for trial." *Killington, Ltd.*, 153 Vt. at 647; V.R.C.P. 26(b)(3). "The litigation which serves as the basis for the claim must be in esse and not merely threatened." *Killington, Ltd.*, 153 Vt. at 647.

As explained by a leading treatise:

> Some pre-1970 cases attributed significance to whether a document was created or obtained before or after litigation was commenced, but this cannot be sound as an absolute dividing line. Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. *Thus the test should be whether, 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*. …But the converse of this is that even though litigation is already in prospect, there is no work–product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.
>
> Reports prepared by or for insurers present particular difficulties as responding to claims and preparing for resulting litigation are significant parts of the ordinary business of insurers. Involvement of counsel is not a guarantee that work-product protection will apply, although it may show that the pertinent documents were prompted by the prospect of litigation. *The focus is on whether specific materials were prepared in the ordinary course of business, or were principally prompted by the prospect of litigation*. In this regard, "dual purpose" documents may be protected even though a nonlitigation purpose can also be ascertained.

8 Wright & Miller, Fed. Prac. & Proc. Civ. § 2024 (3d ed.) (footnotes omitted) (emphasis added).

This test, referred to as the "because of" test, has been widely adopted by the federal courts. See *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998) (adopting "because of" test and noting test had been adopted by Third, Fourth, Seventh, Eighth and D.C. Circuits).

> [I]t should be emphasized that the "because of" formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well established that work-product privilege does not apply to such documents.

Adlman, 134 F.3d at 1202 (2d Cir. 1998) (citing F.R.C.P. 26(b)(3), Advisory Committee Note).

> It is, moreover, well established that the party invoking a privilege bears the burden of establishing its applicability to the case at hand. The burden is a heavy one, because privileges are neither lightly created nor expansively construed. Instead, privileges are recognized only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002, 318 F.3d 379, 384 (2d Cir.2003) (citations and quotation marks omitted); see also *Schulman v. Saloon Beverage, Inc.*, No. 2:13-CV-193, 2014 WL 3353254 (D. Vt. Jul. 9, 2014) (holding Defendants asserting attorney work product privilege had not met their burden).

Analysis

Defendant is correct that the best course of action in this case would have been for Plaintiff's counsel to file a motion to compel following the V.R.C.P. 26(h) correspondence rather than issue the subpoena. However, that reason alone would not justify granting Defendant's motion.

Turning to the issue at bar, these facts illustrate the difficulty in assessing whether certain materials are protected by the attorney work product doctrine. "Distinguishing between documents prepared in anticipation of litigation and those created in the ordinary course of business is particularly fact specific in the insurance context because the very business of an insurance company is to evaluate claims that may ultimately ripen into litigation." *Schulman*, 2014 WL at * 10 (citation and quotation marks omitted).

As Plaintiff notes, the Vermont Supreme Court held that the work must have been done while the claim was "in esse and not merely threatened." *Killington, Ltd.*, 153 Vt. at 647. However, the filing of a complaint is not the dividing line. Wright & Miller, § 2024. Indeed, the Vermont Supreme Court has held that an insurance adjuster's interview with a plaintiff twenty days after an accident was covered by the privilege in V.R.C.P. 26(b)(3) because it came after a call from the plaintiff to the defendant's CEO the day after the accident in which the parties discussed

payment of plaintiff's medical bills. See *Pcolar v. Casella Waste Sys., Inc.*, 2012 VT 58, ¶ 18, 192 Vt. 343. Still, it is Defendant's burden to show that the preparation of those materials was "principally prompted" by the prospect of litigation. Wright & Miller, § 2024.

The court agrees with Defendant that this case is distinguishable from the facts cited in the two superior court cases attached to Plaintiff's submission. In *Herrmann v. Hewitt*, the plaintiff sought to compel production of statements made to the defendant's insurer shortly after the incident. This court held: "The Court agrees that Defendant has shown no more than that the statement was made in the normal course of the adjustment of a claim by the company's employee, and does not qualify for work product protection." *Herrmann v. Hewitt*, No. 272-7-05 Bncv (Vt. Super. Ct. Jan. 26, 2006) (Wesley, J.). Similarly, this Court granted a motion to compel in another case where the plaintiff sought statements collected by the defendant's insurance company within a week of an automobile accident and the insurance company was not notified of possible litigation until almost two years later. *Ringwood v. Harris*, No. 228-6-04 Bncv (Vt. Super. Ct. Feb. 11, 2005) (Carroll, J.).

This case presents a clearly different scenario. Here, the insurance investigator conducted his interviews 2 ½ months after the incident. In between the incident and the investigation, Plaintiff had taken her current counsel to the site of the incident with the purpose of determining whether she had "a case."[3] Then, Plaintiff's attorney sent a letter, stating his client had been injured on Defendant's property and requested that the letter be forwarded on to the insurer "in an effort to amicably resolve this matter." In light of those facts, the court agrees that the "prospect of litigation was looming" at the time Mr. Gagnon interviewed the witnesses and wrote his report. See *Schulman*, 2014 WL at *10.

However, as in *Schulman*, the prospect of litigation is not enough. Defendant bears the burden to show "whether specific materials were prepared in the ordinary course of business, or were principally prompted by the prospect of litigation." Wright & Miller, § 2024. On the record before it, this court cannot conclude that Mr. Gagnon's interviews and report would not have been prepared "in essentially similar form" had Wills Insurance and Defendant not anticipated litigation. *Schulman*. 2014 WL at *11 (citing *Adlman*, 134 F.3d at 1202). In other words, Defendant has not shown that the creation of the materials was "principally prompted" by the prospect of litigation.

Defendant uses the phrase "prepared in anticipation of litigation" to explain the reason for the claim of work product. However, Defendant's repetition of a legal term is not sufficient to meet his burden. The court understands that there may have been a "dual purpose" behind the collection of the witness statements and the investigator's report. However, merely stating a timeline – that the statements were collected and the report was created after Plaintiff's counsel sent a letter asking to resolve the matter and before a complaint was filed – does not show that the documents can fairly be said to have been prepared because of, much less principally prompted by, the prospect of litigation. Wright & Miller, § 2024. There is no affidavit from Mr. Gagnon supporting that his acquisition of the witness statements and writing of the report were

[3] As noted above, it is unclear if counsel had already been retained at that point or if Defendant was aware of the visit, and if he was, if he was aware of the purpose of the visit.

principally prompted by the prospect of litigation. There is nothing in the record from which the court can determine when the investigation was requested – being after the alleged accident or after the letter was received from plaintiff's counsel. As it is Defendant's burden, and a heavy one at that, to show the material is attorney work product, the court concludes that burden is not met on this record.

There is a question as to what in the investigation is relevant or would be reasonably calculated lead to the discovery of relevant evidence. V.R.C.P. 26(b)(1). The court concludes, the relevant portion of the investigation is limited to any witness statements, not the opinions or impression of the investigator. Thus, the court concludes that the witnesses' statements are not privileged and are discoverable. Therefore, there is no need to conduct a further V.R.C.P. 26(b)(3) analysis.

Order

WHEREFORE, Defendant's motion to quash is hereby DENIED. Plaintiff's motion to compel the statements of witnesses is hereby GRANTED.

So ordered.

Electronically signed on July 27, 2016 at 10:49 AM pursuant to V.R.E.F. 7(d).

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John W. Valente
Superior Court Judge

Notifications:
Bernard J. Boudreau (ERN 1145), Attorney for Plaintiff Cheryl LaRoche
Kaveh S. Shahi (ERN 2339), Attorney for Defendant Champlain Oil Company Inc.
Richard J. Windish (ERN 3044), Attorney for Defendant Thomas Haskins