IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANGELA and MICHAEL MANCINELLI, her husband,	)	
Plaintiffs,	)	
v.	)	C.A. No. N12C-07-135 CLS
DELAWARE RACING ASSOCIATION, a Delaware corporation t/a DELAWARE STEEPLECHASE AND RACE ASSOC.,	)	
Defendants.	)	

ORDER

On this 24th Day of March, 2014, it is hereby ordered that:

1. This is the Court's decision on the pending motion to compel and motion to quash in this slip-and-fall action by Plaintiff Angela Mancinelli ("Plaintiff") against Defendant Delaware Racing Association ("Defendant"). On March 8, 2013, Plaintiff testified in a deposition that she was minimally injured in an automobile accident that occurred about one month prior to the deposition.[1] As a

[1] Def. Motion to Compel, Ex. A., Angela Mancinelli Dep., at 22:16.

result, Defendant issued a subpoena *duces tecum* to Plaintiff's automobile insurance carrier, Erie Insurance Exchange ("Erie"), to obtain Plaintiff's entire insurance file. Thereafter, Erie produced certain documents, but withheld other documents in the file which Erie claimed were protected by the work-product doctrine. These items are: 1) File Notes, 2) Correspondence, 3) Recorded Statement Transcript of Angela Mancinelli, 4) Written Statement of Karen Maddox,[2] 5) ISO Report, 6) Intercompany Arbitration Documents, and 7) PIP Waiver.

2. On December 19, 2013, Defendant filed a motion to compel, arguing that the documents in the file were not protected by the doctrine because they were not prepared in anticipation of litigation. Defendant asserts that, in a conversation on November 8, 2013, an Erie representative stated that there was no active litigation about the automobile accident and that it did not anticipate litigation. Defendant seeks to discover the documents because they may contain information about Plaintiff's physical condition and information that may help Defendant to challenge Plaintiff's credibility. Alternatively, Defendant argues that it has a substantial need for the documents and cannot obtain the information without undue hardship.

3. On December 20, 2013, Erie filed a motion to quash the subpoena, questioning the relevance of the documents and arguing that they were protected

[2] Karen Maddox was a driver involved in the automobile accident.

by the doctrine because they were prepared in the anticipation of litigation and that they would "reveal legal strategies, tactics, and theories of Erie, Erie counsel, and Erie representatives."[3] On December 31, 2013, Erie and Defendant filed their respective responses to the motion to compel and motion to quash. In Erie's response, it asserted that it believed litigation was likely. On January 7, 2014, the Court held oral argument on the motions and requested that Erie submit the documents to the Court for an *in camera* review.

4. Under Del. Super. Ct. Civ. R. 26(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action […]"[4] so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[5] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[6] However, a party must show "substantial need" and the inability "without undue hardship [,] to obtain the substantial equivalent of the materials by other means…", when seeking to "obtain discovery of documents and tangible things […] prepared in anticipation of litigation or for trial by or for another party's representative (including the other

[3] Erie Mot. to Quash, at ¶8.
[4] Del. Super. Ct. Civ. R. 26(b)(1).
[5] *Id.*
[6] D.R.E. 401.

party's attorney, consultant, surety, indemnitor, insurer or agent)".[7] Even if a party establishes substantial need, "the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[8]

5. In the context of insurance investigations, Delaware courts have previously limited the application of the work product doctrine to those documents and statements which were requested by or prepared for an attorney or which otherwise demonstrated an attorney's expertise.[9] However, as explained in *Mullins v. Vakili*,[10] the Court's analysis has become "not whether an attorney is involved, but whether the documents or things sought were prepared in anticipation of litigation."[11] In *Mullins*, a plaintiff in a medical malpractice suit sought to discover transcripts of a defendant-doctor's phone conversations with, letters from, and claims progress records kept by his insurer's claims attorneys. The Court acknowledged that "[c]ases involving insurance companies present particularly tricky questions of determining at what point 'an insurance company's activity shifts from the ordinary course of business to the anticipation of litigation.'"[12] The

[7] Del. Super. Ct. Civ. R. 26(b)(3).
[8] *Id.*
[9] *See Conley v. Graybeal*, 315 A.2d 609, 610 (citing *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (D.C.Ill.1972)).
[10] *Mullins v. Vakili*, 506 A.2d 192 (Del. Super. 1986).
[11] *Id.* at 196.
[12] *Id.* at 197 (quoting *Westhemeco Ltd. v. New Hampshire Insurance Co.*, 82 F.R.D. 702, 708 (S.D.N.Y.1979)).

Court then applied the following five-part test which it has continued to apply in cases involving similar discovery requests.[13]

> First, courts should consider the nature of the event that prompted the preparation of the materials and whether the event is one that is likely to lead to litigation.... Second, courts should determine whether the requested materials contain legal analyses and opinions or purely factual contents in order to make inferences about why the document was prepared. Third, courts should ascertain whether the material was requested or prepared by the party or their representative ... [W]hen litigation is anticipated it is expected that an attorney or party will [have] become involved. Fourth, courts should consider whether the materials were routinely prepared and, if so, the purposes that were served by that routine preparation ... Last, courts should examine the timing of the preparation and ascertain whether specific claims were present or whether discussion or negotiation had occurred at the time the materials were prepared.[14]

6. The Court has conducted an *in camera* review of the documents. Applying the five-factor test above, the Court finds the work-product doctrine to be inapplicable to the items withheld by Erie, **except for the following pages contained in the File Notes: Erie 16-33, 39-48, 54-59, 95-98, and 139-146.** First, the nature of the event that prompted the preparation of the File Notes, Correspondence, Plaintiff's Recorded Statement Transcript, and Written Statement of Karen Maddox (collectively, the "four items") is distinguishable from those cases in which the preparation of materials was prompted by an attorney contacting

[13] *See E.g.,Gonzalez v. Caraballo,*2008 WL 4902686, at *1-2, (Del. Super. Nov. 2, 2008); *Hart ex rel. Estate of McConnell v. Edwards*, 1990 WL 1104266, at *1 (Del. Super. July 26, 1990); *Tarker v. Yowell*, 1988 WL 40017, at *1 (Del. Super April 13, 1988).
[14] *Mullins*, 506 A.2d at 198 (quoting *Brown v. Superior Court*, 670 P.2d 725, 733 (Ariz.1983)).

the insured or the insurer.[15] Here, it was the accident itself that prompted the preparation of the four items.[16] Second, aside from the pages listed above, the four items do not contain legal analysis; instead, they primarily contain factual information. Third, the four items appear to be prepared by the insurer without the aid of an attorney. Fourth, those items were prepared in the ordinary course of business for the purpose of a routine insurance claim. There was no notice of a suit or any indication that a suit was contemplated. Although Erie argued at the hearing that all insurance companies take recorded statements to prepare for litigation, this Court has "rejected the proposition that materials prepared with the general knowledge that a suit may follow the incident being investigated are prepared in anticipation of trial…"[17] Lastly, Plaintiff's recorded statement was taken only five days after the accident and the initial entries in the File Notes, a few of the pages of correspondence, and the Statement of Karen Maddox were dated shortly after the accident. Based on these factors, the work-product does not apply to the four items.

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[15] *See Id.* at 199 ("Unlike cases where the event prompting the preparation of documents is the event out of which the claim arises, i.e. the accident or injury itself, here the initiating event was the notification by an attorney of his representation of [the defendant-doctor's] patient.")

[16] *See Tarker*, 1988 WL 40017 at *1 (In finding the doctrine inapplicable to a summary of a conversation between a defendant and his automobile insurance adjuster, the Court, evaluating the first factor, observed that "the preparation of the material sought was due to the accident itself").

[17] *Conley*, 315 A.2d at 610.

7. Erie has also failed to show that the work-product doctrine applies to the ISO Report, Intercompany Arbitration Documents, and PIP Waiver.[18] Since these documents appear reasonably calculated to lead to admissible evidence, Erie must produce them.

8. For the reasons stated above, Erie's Motion to Quash is **GRANTED, in part and DENIED, in part** and Defendant's Motion to Compel is **GRANTED, in part and DENIED, in part**.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

[18] The Court notes that the Intercompany Arbitration Documents are not prepared by Erie or any other party involved, but by Arbitration Forums, Inc.