

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIA CANALES BROWN in her :
own right and as Administratrix of the :
ESTATE OF GERALD BROWN :
: CIVIL ACTION
v. :
: NO. 06-5149
STEPHEN NICHOLSON :

SURRICK, J.

APRIL 25, 2007

MEMORANDUM & ORDER

Presently before the Court is Plaintiff's Motion for Order Compelling Discovery (Doc. No. 14) and Defendant's letter response dated April 17, 2007. For the following reasons, the Motion will be denied.

I. BACKGROUND

This action concerns a motor vehicle accident that occurred on April 18, 2005 in Philadelphia. (Doc. No. 4 at 1.) Defendant Stephen Nicholson was driving an automobile that collided with the motorcycle being operated by Plaintiff's decedent, Gerald Brown. (*Id.*) Brown died as a result of the accident. The Complaint is based on the alleged negligence of the Defendant. (*Id.*) Plaintiff originally filed the Complaint in the Court of Common Pleas of Philadelphia on August 18, 2006. (Doc. No. 1 at 4.) The Complaint was reinstated on September 29, 2006. (*Id.*) On November 21, 2006, the case was removed to this Court based on diversity jurisdiction under 28 U.S.C. §§ 1332, 1441, and 1446. (*Id.*) Plaintiff's Complaint alleges claims under the Pennsylvania Wrongful Death Act (Count I) and the Pennsylvania Survival Act (Count II) and states a claim for loss of consortium (Count III).

Plaintiff's Motion seeks to compel production of three statements made to Defendant's

insurance carrier or its representative. Plaintiff contends that these statements are discoverable. Defendant argues that the statements are all privileged work product and are not discoverable.

The first statement is a statement by Defendant Nicholson. It was made to Nicholson's insurance carrier, Performance Insurance, on August 3, 2005, three-and-a-half months after the accident. (Def.'s Letter of Apr. 17, 2007.) The statement was taken over the phone in the presence of Nicholson's personal attorney and consists of questions and answers regarding the accident of April 18, 2005. The statement was recorded and subsequently transcribed. (*Id.*) The second statement is also by Nicholson but was given to an investigator hired by Nicholson's insurance carrier. The statement was taken in person and was made in the presence of Nicholson's personal attorney in that attorney's office. It consists of questions and answers concerning the accident of April 18, 2005. The statement was recorded and subsequently transcribed. (*Id.*) The final statement is the statement of David Culbreth, a witness to the accident. It is a recorded statement that was reduced to writing. The statement was made to Stanley Kanterman of Investigative Resource Center, Inc., a firm hired by Defendant's insurance carrier. The assignment to take Culbreth's statement was given to Kanterman on August 5, 2005. (*Id.*)

II. LEGAL ANALYSIS

Citing Federal Rule of Evidence 501, Plaintiff contends that because the claims in this case are based on Pennsylvania law, the decision regarding privilege should be determined based on Pennsylvania law.¹ Plaintiff then focuses the argument solely on attorney-client privilege

¹ Federal Rule of Evidence 501 provides in relevant part: "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision

under Pennsylvania law and Pennsylvania Rule of Civil Procedure 4003.3 regarding the work-product privilege. While Plaintiff is correct that generally, in diversity cases, “the law of privilege which controls is that which would be applied by the courts of the state in which it sits,” *Maertin v. Armstrong World Industries, Inc.*, 172 F.R.D. 143, 147 (D.N.J. 1997), that is not the case when the work-product privilege is at issue.² “[U]nlike the attorney-client privilege, the work product privilege is governed, even in diversity cases, by uniform federal law embodied in Rule 26(b)(3), Fed. R. Civ. P.” *Id.*; *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988).

Federal Rule of Civil Procedure 26(b)(3) provides:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3). The rule requires that we consider three questions in determining whether the statements at issue in this case are discoverable: (1) whether the statements were made “in anticipation of litigation,” (2) whether Plaintiff has shown “substantial need” of the statements, and (3) whether Plaintiff is “unable without undue hardship to obtain the substantial equivalent” of the statements.

In considering the first question, we are mindful of the nature of the statements, made not

thereof shall be determined in accordance with State law.” Fed. R. Evid. 501.

² Defendant contends that the work-product privilege embodied in Fed. R. Civ. P. 26(b)(3) applies to the statements at issue. Defendant does not assert attorney-client privilege.

to Defense counsel, but to Defendant's insurance carrier and its representatives. However, "federal courts have consistently ruled that the work product doctrine is not inapplicable merely because the material was prepared by or for a party's insurer or agents of the insurer." *United Coal Cos.*, 839 F.2d at 966 (citing *R.R. Salvage of Conn. Inc. v. Japan Freight Consolidators (U.S.A.), Inc.*, 97 F.R.D. 37, 41 (E.D.N.Y. 1983) (holding that correspondence between defendant and its liability carriers was protected), *aff'd*, 779 F.2d 38 (2d Cir. 1985); *Home Ins. Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga. 1977) (protecting from discovery a report to plaintiff insurer's home office made by plaintiff's regional claims supervisor)). The fact that these statements were made to Defendant's insurance carrier, or investigators hired by the insurance carrier, does not exempt them from coverage under Rule 26(b)(3) nor does it automatically entitle them to the Rule's protection. *See Lyvan v. Harleysville Ins. Co.*, No. Civ. A. 93-6145, 1994 WL 533907, at *3 (E.D. Pa. Sept. 29, 1994) ("An insurance company cannot reasonably argue that the entirety of its claims files are accumulated in anticipation of litigation when it has a duty to investigate, evaluate and make a decision with respect to claims made on it by its insureds.").

When deciding whether statements made to insurance companies should receive work-product protection, courts, deciding these questions on a case by case basis, "have considered the nature of the documents, the nature of the litigation, the relationship between the parties and any other fact peculiar to the case." *Id.* (citing *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 202 (M.D.N.C. 1988)). In addition, courts have considered the involvement of an attorney to be "highly relevant, although not necessarily [the] controlling factor." *Id.* (citing *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420 (S.D.N.Y. 1981)).

We are persuaded that the statements here fall within the category of work product, having been produced “in anticipation of litigation.” The statements at issue were made by Defendant and by an eyewitness to the event that is the basis of the litigation. That event was a motor vehicle accident that resulted in Plaintiff’s death. The first statement was made by Defendant to his insurance carrier in the presence of his personal attorney. The second was made by Defendant, again in the presence of his attorney, to an investigator hired by the insurance company, and the third was made by an eyewitness to an investigator hired by the insurance company. The facts of this case, a fatal vehicular accident, made litigation likely if not certain. *See Carson v. Mar-tee Inc.*, 165 F.R.D. 48, 50 (E.D. Pa. 1996) (finding defendant’s statements to insurer to be made in anticipation of litigation when, among other factors, case dealt with a rear-end vehicular accident in Philadelphia County). In addition, the involvement of an investigator suggests that the parties believed litigation to be imminent. *See Rintchen v. Walker*, No. Civ. A. 95-CV-6861, 1996 WL 238701, at *3 (E.D. Pa. 1996) (“Unlike an insurance agency, which conducts investigations both in the ordinary course of business and in anticipation of litigation, an investigation agency is more likely to be hired in anticipation of litigation. This is particularly so when there is already an insurance carrier investigating the same claim.” (quoting *Jet Plastica Indus., Inc. v. Goodson Polymers, Inc.*, Civ. A. No. 91-3470, 1992 WL 10474 at *2 (E.D. Pa. Jan. 15, 1992))). Finally, the presence of Defendant’s personal attorney at the first two statements suggests that the parties were acting under the belief that litigation was likely. As a result, we conclude that the statements were taken in anticipation of litigation, warranting the protection of Rule 26(b)(3).

Having so concluded, we now consider the second and third questions, whether Plaintiff

has shown both a “substantial need” and an inability without “undue hardship” to obtain the “substantial equivalent” of the statements. While Plaintiff may reasonably argue that there is a substantial need for statements made by Defendant and an eyewitness about the subject of the litigation, Plaintiff cannot make a reasonable argument regarding the third prong. Plaintiff can, in the normal course of discovery, obtain the substantial equivalent of all three statements at issue. Plaintiff has already deposed Defendant without restrictions and without pending objections on the record. (Def.’s Letter of Apr. 17, 2007.) As such, any topics covered by Defendant’s statements could have been addressed in the deposition. Had Defendant been hostile or reluctant to speak during his deposition, there might be some reason to believe that the deposition testimony would not be the substantial equivalent of the prior statement. *See Basinger v. Glacier Carriers, Inc.*, 107 F.R.D. 771, 774 (M.D. Pa. 1985). Plaintiff has made no such allegation. Moreover, while Plaintiff has not yet deposed the witness, Plaintiff’s counsel has indicated that he plans to subpoena him for a deposition. Plaintiff has offered no reason to believe that the witness will be anything but truthful and cooperative.

In addition, the timing of the statements do not prevent depositions from serving as their substantial equivalents. While the statements were made closer to the time of the accident, they were not contemporaneous with it and, as a result, are not so unique that they cannot be substantially replicated in depositions. *See id.* (“[M]ere lapse of time should normally be enough to require production only of statements given at almost the same time as the accident. Were a statement given a week, or two weeks, after the accident at issue, the court might well require counsel to demonstrate . . . that the witness was not available for deposition without undue hardship.” (quoting *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 978 (E.D. La. 1974))); *see*

also Carson, 165 F.R.D. at 50 (finding that plaintiffs had not made the requisite showing under Rule 26(b)(3) because statement at issue, “made months after the accident, [wa]s not the most contemporaneous”). Finally, the mere possibility that Defendant or the witness may contradict their prior statements when deposed, making the statements impeachment material, is insufficient to warrant exempting the material from Rule 26(b)(3) protection. *See Spruill v. Winner Ford of Dover, Ltd.*, 175 F.R.D. 194, 202 (D. Del. 1997) (“[T]he possibility of impeachment does not satisfy the showing required by Rule 26.”); *see also Dingler v. Halcyon Lijn N.V.*, 50 F.R.D. 211, 212 (E.D. Pa. 1970).³

As a result, we are compelled to conclude that all three statements are covered by Rule 26(b)(3)’s protections and are not discoverable. Accordingly, we will deny Plaintiff’s Motion to Compel.

An appropriate Order follows.

³ It may be appropriate in limited circumstances for the Court to conduct an *in camera* review of the statements at issue when there is reason to believe that the deposition testimony is inconsistent with the prior statement and thus not its substantial equivalent. *See Hoban v. Morrow’s Marina, Inc.*, Civ. A. No. 88-6022, 1989 WL 4453, at *2 (E.D. Pa. Jan. 20, 1989) (ordering defendant to produce statement after *in camera* review where deposed party disavowed prior statement in deposition). Plaintiff has provided no reason for the Court to undertake such a review in this case.

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ESTATE OF GERALD BROWN

v.

STEPHEN NICHOLSON

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CIVIL ACTION

NO. 06-5149

ORDER

AND NOW, this 25th day of April, 2007, upon consideration of Plaintiff's Motion For Order Compelling Discovery (Doc. No. 14), it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:



R. Barclay Surrick, Judge