DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JAMES RAWE,

Appellant,

v.

ABRAM LEE COLEMAN and VEOLIA WATER NORTH AMERICA-SOUTH LLC,

Appellees.

No. 2D21-635

November 9, 2022

Appeal from the Circuit Court for Manatee County; Charles Sniffen, Judge.

Annabel C. Majewski of Wasson & Associates, Chartered, Miami; and Steven G. Lavely of Law Office of Steven G. Lavely, Bradenton, for Appellant.

Kimberly Kanoff Berman of Marshal Dennehey Warner Coleman & Goggin, Fort Lauderdale; and Michael G. Archibald of Marshall Dennehey Warner Coleman & Goggin, Tampa, for Appellees.

ATKINSON, Judge.

James Rawe appeals from the final judgment entered following a jury trial in favor of Abram Lee Coleman and Veolia Water North America-South, LLC. Rawe sued Coleman and Veolia for injuries he sustained as a passenger when the Chevrolet Camaro that his significant other was driving struck the Veolia company van Coleman was driving that was in the median waiting to continue straight across a highway in Palmetto, Florida.

Rawe raises several issues on appeal; however, we write to address only one—the trial court's failure to permit impeachment of a Veolia employee using a "Root Cause Analysis" indicating that Coleman "failed to yield to the right of way." This constituted error because the Root Cause Analysis was not covered by the accident report privilege and because Veolia waived the work product privilege by producing it during discovery. We reverse and remand for a new trial because the error was not harmless.

On June 25, 2018, a collision occurred between the white Camaro driven by Rawe's significant other, Lisa Lemieux, and the van owned by Veolia and driven by Coleman. The photograph of the vehicles depicts damage to the front end of the white Camaro and to the middle of the Veolia van.

Coleman testified that he saw the white Camaro in the left lane. When the Camaro driven by Lemieux collided with his van, "she was in the shoulder. So, she had crossed not only into the right lane, but she went into the other lane to hit me. It was like she was either distracted or she panicked and she pulled to the right, I think." Coleman said that he did not pull onto the highway heading in the same direction as the Camaro because "[y]ou would miss the turn. You would have to literally do a U-turn in the middle of the road." He also testified that "[w]e all know she was going too fast. She moved that car sideways."

Lemieux described the events leading up to the accident:

> I just turned on to 301. I got into the left lane as I always do. And I saw Mr. Coleman with his work van at a stop right there. It looked like he wanted to get into the left lane, so I moved over to the right lane so he could have the left lane. And before I knew it, he had just turned right straight in front of me.

She said that there was nothing that she could have done to avoid hitting Coleman because "[h]e came straight at me out of nowhere."

There was testimony from Coleman's supervisor, Mr. Taylor, that Coleman did not drive contrary to any posted traffic control signs. Mr. Taylor was asked, "based on your investigation of the

accident scene, there was no violation of any traffic control device by Mr. Coleman to get from one end of 16th Avenue to the other, is that correct?" Mr. Taylor replied, "None that I could detect." When asked what Coleman told Mr. Taylor at the accident scene, Mr. Taylor said, "he told me that he felt that he had . . . ample room to make the crossing, and as he was making it, he went from the feeling safe, to . . . all hell broke loose and he got hit."

Rawe's counsel asked for a side bar and indicated to the judge that on cross-examination he wanted to impeach Mr. Taylor with the "Root Cause Analysis,"[1] an incident report prepared by Veoila: "He just testified in his opinion this defendant did nothing wrong. I want to cross-examine him and say, wait a minute, you did an investigation that day. You found differently that day, didn't you?

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[1] In the Root Cause Analysis, Mr. Taylor described the accident as follows: "Veoila driver failed to yield right of way and pulled from median into the path of oncoming vehicle (private party.) Police was at the scene. Veolia driver cited. No injuries reported." In explaining the "[v]iolation of requirement/procedure," Mr. Taylor indicated, "Veoila driver failed to yield right of way." He listed as "[o]ther human error" the fact that "Veolia's [e]mployee failed to yield while driving a Veolia [v]ehicle." A later description of the human error states, "Veolia driver failed to yield to the right of way. Veolia driver cited by Police." The report further indicated that Coleman had completed "Defensive Driving Training at his personal expense."

You found he violated the right of way." Defense counsel raised the work product as well as the accident report privilege. The trial court determined that the report was work product that could not be used for impeachment.

On an initial privilege log filed on June 5, 2020, the defendants had asserted the work product privilege; on an amended log, filed June 9, 2020, they asserted the "Accident Report Privilege - Florida Statute § 316.066(4)." In the Amended Response to Plaintiff's Second Request for Production, Veolia objected to the production of the Root Cause Analysis based upon the accident report privilege. However, it produced the document, preserving "its objection as stated herein."

The jury returned a verdict that Coleman was not negligent. Rawe filed a motion for new trial, which the trial court denied.

Rawe argues that the trial court erred by preventing him from impeaching Mr. Taylor with the Root Cause Analysis. He contends that neither the accident report nor the work product privileges apply. We agree that exclusion of that evidence constituted an abuse of discretion. *See Pelham v. Walker*, 135 So. 3d 1114, 1118

(Fla. 2d DCA 2013) (providing that a trial court's evidentiary rulings are reviewed for abuse of discretion).

The accident report privilege (better described as an exclusionary rule) appears in section 316.066, Florida Statutes (2020), which prohibits a party from admitting into evidence accident reports[2] or statements made to a person completing an accident report:

> Except as specified in this subsection, *each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section* shall be without prejudice to the individual so reporting. Such report or statement *may not be used as evidence in any trial*, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated. The results of breath, urine, and blood tests administered as provided in s. 316.1932 or s. 316.1933 are not confidential and are admissible into evidence in accordance with the provisions of s. 316.1934(2).

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[2] We recognize the statute uses the term 'crash report' as opposed to 'accident report,' but, for the purposes of this opinion, we refer to the rule by the nomenclature employed by the parties, which is also consistent with a majority of the published opinions on the topic. *See, e.g.*, *Anderson v. Mitchell*, 300 So. 3d 693, 694 (Fla. 2d DCA 2019); *Stewart v. Draleaus*, 226 So. 3d 990, 994 (Fla. 4th DCA 2017).

§ 316.066(4) (emphasis added).

There is nothing in the record indicating that the conclusion in the Root Cause Analysis was based upon any accident report to which the exclusionary rule of section 316.066 would apply. And even if it was based on the accident report, the subsequent adoption by Mr. Taylor in the Root Cause Analysis of a conclusion regarding the accident reached by the officer who authored the accident report does not directly implicate the accident report privilege if that conclusion does not make specific reference to the report or include or refer to a statement made by a person involved in the crash for the purpose of completing a report. *See* § 316.066(4) (providing that "each crash *report* made by a person involved in a crash and any *statement* made by such person to a law enforcement officer for the purpose of completing a crash report required . . . may not be used as evidence in any trial" (emphasis added)). The Root Cause Analysis says, "Veolia driver failed to yield to the right of way. Veolia driver cited by Police." But this was not the portion that Rawe was attempting to utilize for impeachment purposes. Rather, it was the following statement from the Analysis: "Employee failed to yield while driving a Veolia vehicle. Vehicle

driver failed to yield right of way"; Rawe wanted to question Mr. Taylor about that statement after Mr. Taylor suggested at trial that Coleman had not committed any traffic infractions. The portion of the Root Cause Analysis discussing whether Coleman violated the right-of-way does not disclose the accident report or anything about it or any statements made by persons involved in the crash to a law enforcement officer for the purpose of completing a report. *See* § 316.066(4). Accordingly, the accident report privilege was not a proper basis upon which to exclude the Root Cause Analysis.

Although the work product privilege was arguably abandoned by Coleman and Veolia when they amended their privilege log, *cf. Gen. Motors Corp. v. McGee*, 837 So. 2d 1010, 1033 (Fla. 4th DCA 2002) (concluding that the failure to file privilege log during discovery resulted in a waiver of the privilege), the trial court found that the report constituted work product and was inadmissible on that ground. A document qualifies as work product where it contains "[i]nformation relating to a matter which is the subject of litigation, which is received by a party's attorneys from investigators and adjusters in anticipation of or in connection with litigation." *Nevin v. Palm Beach Cnty. Sch. Bd.*, 958 So. 2d 1003, 1006 (Fla. 1st

DCA 2007) (quoting *Huet v. Tromp*, 912 So. 2d 336, 338 (Fla. 5th DCA 2005)). "Reports prepared after a tragic incident . . . may be prepared in the ordinary course of business yet also constitute records prepared in anticipation of litigation." *Onward Living Recovery Cmty., LLC v. Mormeneo*, 319 So. 3d 115, 117 (Fla. 3d DCA 2021).

Rawe does not argue that the Root Cause Analysis is not protected by the work-product privilege, and we do not reach the question of whether it would be. Instead, Rawe contends that the privilege was waived, citing *Tumelaire v. Naples Estates Homeowners Ass'n*, 137 So. 3d 596 (Fla. 2d DCA 2014). To the extent he argues that the production of the document subject to their objection in the amended response to the second request for production constituted a waiver, the argument is well-taken.

In its amended response, Veolia stated that it was "produc[ing] the Investigation and Root Cause Analysis Form but was preserv[ing] its objection as stated herein." The amended response indicated that it was relying upon the accident report privilege; there was no mention of the work product privilege.

Waiver occurs when a party "voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication." § 90.507, Fla. Stat. (2020). By abandoning the work-product argument in their Amended Response to Plaintiff's Second Request for Production, they waived it.

Furthermore, Veolia's voluntary production of the Root Cause Analysis subject only to the accident report privilege further supports their waiver of the work product privilege. "The rationale supporting the work product doctrine is that 'one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.' " *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) (quoting *Dodson v. Persell*, 390 So. 2d 704, 708 (Fla. 1980)). The record indicates that the disclosure of the document was intentional; at the time, it was produced by Veolia as responsive to a discovery request along with a privilege log to put Rawe on notice that what was being produced was inadmissible

pursuant to § 316.066(4). In other words, the producing party was voluntarily producing a responsive document and—while it considered it *inadmissible as evidence*—at the time of production it did not consider it to be *privileged from disclosure* based on a theory that it consisted of work product. As such, the cases cited by Coleman and Veolia dealing with *inadvertent* disclosure are inapposite. *See Lightbourne v. McCollum*, 969 So. 2d 326, 333–34 (Fla. 2007) (applying a five-part test to determine whether a waiver occurred); *Abamar Housing & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So. 2d 276, 279 (Fla. 3d DCA 1997) (determining that no waiver occurred when documents including a letter containing counsel's preliminary assessment of the litigation was inadvertently disclosed); *cf. Gen. Motors Corp.*, 837 So. 2d at 1040 (concluding that a waiver had not occurred when a party maintained its privilege to a document and only produced it pursuant to a court order). Further, even presuming for the sake of analysis that the disclosure *was* inadvertent, the manner in which it was disclosed—production to the opposing party and identification on a privilege log that only mentioned inadmissibility under section 316.066(4)—and the delay in asserting the work product privilege—until the

opposing party had been lulled into strategic reliance upon the document and later sought to utilize it during trial—would militate in favor of a finding of waiver under the "relevant circumstances test." *See Nova Se. Univ., Inc. v. Jacobson*, 25 So. 3d 82, 86 (Fla. 4th DCA 2009) (describing the factors which courts consider to determine whether a waiver has occurred following inadvertent production as "(1) the *reasonableness of the precautions taken to prevent inadvertent disclosure* in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) *the delay and measures taken to rectify the inadvertent disclosures*; and (5) *whether overriding interests of justice will be served by relieving the party of its error*" (emphasis added)).

Because the Root Cause Analysis was not subject to exclusion under the accident report privilege and because Veolia waived the work-product privilege to the extent that it might apply, the trial court erred by excluding the Root Cause Analysis. While neither party addresses the harmless error test in its briefs, this court has authority to reverse a judgment only upon determination that an error is harmful. *See* § 59.041, Fla. Stat. (2020) ("No judgment

shall be set aside or reversed, or new trial granted by any court of the state . . . on the ground of . . . the improper admission or rejection of evidence . . . unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."). "[T]he test for harmless error requires the beneficiary of the error to prove that the error complained of did not contribute to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1253 (Fla. 2014). It is not clear on what basis the jury found Coleman not negligent. The verdict form asked, "Was there negligence on the part of Abram Lee Coleman which was the legal cause of loss, injury, or damage to James Rawe." The jurors checked, "No." They could have found that Coleman did not cause the accident or they could have found that the injuries that Rawe sustained were not caused by the collision. Because the error here could have affected the jury's determination regarding causation, the error is not harmless. As a result, a new trial is warranted.

Reversed and remanded.

MORRIS, C.J., Concurs in result only.
KHOUZAM, J., Concurs specially with an opinion in which MORRIS, C.J. Concurs.

KHOUZAM, Judge, Specially concurring.

I agree with the result reached by the majority; I write separately to explain my reasoning.

As the majority has correctly delineated, the accident report privilege was not an appropriate basis to preclude the requested impeachment in this case. The requested impeachment did not involve any statements governed by section 316.066(4), and nothing in the record indicates that it was based upon any crash report. Further, the work-product privilege was waived as to the Root Cause Analysis. Because it is not clear that this error did not contribute to the verdict, reversal is appropriate.

MORRIS, C.J., Concurs.

Opinion subject to revision prior to official publication.