IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1115

Filed: 20 March 2018

Henderson County, No. 16 CVS 1001

PAULA SAUNDERS, Plaintiff

v.

HULL PROPERTY GROUP, LLC and BLUE RIDGE MALL, LLC, Defendants

Appeal by defendants from order entered 12 July 2017 by Judge Thomas Davis in Henderson County Superior Court. Heard in the Court of Appeals 5 March 2018.

Patterson Harkavy LLP, by Narendra K. Ghosh, and Lakota R. Denton, P.A., by Lakota R. Denton, for plaintiff-appellee.

Roberts & Stevens, P.A., by Jacqueline D. Grant and Eric P. Edgerton, for defendant-appellants.

CALABRIA, Judge.

Hull Property Group, LLC, and Blue Ridge Mall, LLC, (collectively, "defendants") appeal from an order granting plaintiff's motion to compel production of an incident report, which defendants drafted following plaintiff's slip-and-fall accident at Blue Ridge Mall. On appeal, defendants assert that the incident report

is not discoverable, but rather is protected by the attorney-client privilege and the work-product doctrine. After careful review, we affirm.

I. Background

On 10 May 2016, Paula Saunders ("plaintiff") parked her vehicle in a handicapped spot in the parking lot at Blue Ridge Mall in Henderson County, North Carolina. Upon exiting her vehicle, plaintiff tripped and fell on an uneven patch of pavement, causing her to sustain "severe and painful injuries." That day, Blue Ridge Mall property manager Tonya Jackson completed an incident report pursuant to defendants' established policy for reporting "occurrences on the property."

On 10 June 2016, plaintiff filed a complaint against defendants in Henderson County Superior Court, seeking damages under a premises-liability theory of negligence. On 18 July 2016, plaintiff served defendants with her First Set of Interrogatories and Requests for Production of Documents. Plaintiff requested, *inter alia*, that defendants "produce copies of all incident reports for the subject incident." In their response served on 19 September 2016, defendants objected to plaintiff's request "on the grounds that it seeks information and documents prepared in anticipation of litigation."

Plaintiff subsequently filed a Motion to Compel Discovery of the incident report. Following a hearing, on 12 July 2017, the trial court entered an order finding:

> 1. That the incident report was created pursuant to the Defendant Hull Property Group, LLC's internal policies

> and procedures;
> 2. That the incident was created for a non-litigation purpose;
> 3. That the incident report was sent to in-house counsel for Defendant Hull Property Group, LLC;
> 4. That the incident report was not created in anticipation of litigation; and
> 5. That the incident report is not protected by either the attorney-client privilege or the work-product doctrine[.]

Accordingly, the trial court granted plaintiff's Motion to Compel and ordered defendants to produce the incident report within 48 hours. Defendants appeal.

II. Interlocutory Appeal

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). An exception to this rule applies when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial[.]" *Id.* at 166, 522 S.E.2d at 581. Under those narrow circumstances, the challenged order *does* affect a substantial right and may be immediately reviewed. *Id.*

The availability of such appeals, however, "is contingent upon the proper assertion of the claimed privilege." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, __ N.C. App. __, __, 788 S.E.2d 170, 174 (2016), *aff'd as modified*,

__ N.C. __, 805 S.E.2d 664 (2017). "[B]lanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties' discovery requests are inadequate to effect their intended purpose and do not establish a substantial right to an immediate appeal." *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4-5, *disc. review denied*, 365 N.C. 369, 719 S.E.2d 37 (2011). Rule 34 of the North Carolina Rules of Civil Procedure governs the production of documents and requires, in pertinent part:

> The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. . . .
>
> There shall be sufficient space following each request in which the respondent may state the response. The respondent shall: (1) state the response in the space provided, using additional pages if necessary; or (2) restate the request to be followed by the response. An objection to a request shall be made by stating the objection and the reason therefor either in the space following the request or following the restated request.

N.C. Gen. Stat. § 1A-1, Rule 34(b)-(b1) (2017).

Here, defendants made a general objection to plaintiff's First Set of Interrogatories and Requests for Production of Documents "to the extent that they seek information or documents that constitute attorney work product or information protected by the attorney-client privilege." This "blanket general objection" is

inadequate to establish a substantial right to an immediate appeal on either basis. *K2 Asia Ventures*, 215 N.C. App. at 447, 717 S.E.2d at 4-5. However, in response to plaintiff's request for production of the incident report, defendants specifically objected "on the grounds that it seeks information and documents prepared in anticipation of litigation." This objection invokes the work-product doctrine and thus establishes defendants' right to immediate review. Yet, defendants do not assert that the document is protected by the attorney-client privilege, and their "blanket general objection" is insufficient to establish a substantial right to immediate appeal. *Id.* Since we conclude that the issue is not properly before this Court, we therefore dismiss defendants' appeal concerning the applicability of the attorney-client privilege.

III. Work-Product Doctrine

"It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Id.* at 453, 717 S.E.2d at 8 (citation and quotation marks omitted). "Under this standard, an appellant can only prevail upon a showing that the actions are manifestly unsupported by reason and so arbitrary that they could not have been the result of a reasoned decision." *Id.* (citation, quotation marks, and internal alterations omitted).

N.C. Gen. Stat. § 1A-1, Rule 26 "tempers its broad grant of the power to discover any matter relevant to pending litigation through an exemption for privileged matter (such as the attorney-client privilege), provision for protective orders, and a qualified immunity for documents and other tangible things prepared 'in anticipation of litigation[,]' " frequently called "work product." *Evans v. United Servs. Auto. Ass'n.*, 142 N.C. App. 18, 28, 541 S.E.2d 782, 788 (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)), *review dismissed and cert. denied*, 353 N.C. 371, 547 S.E.2d 809-10 (2001). "If a document is created in anticipation of litigation, the party seeking discovery may access the document only by demonstrating a 'substantial need' for the document and 'undue hardship' in obtaining its substantial equivalent by other means." *Id.* at 28, 541 S.E.2d at 789 (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)).

The work-product doctrine protects "not only materials prepared after the other party has secured an attorney," but also "those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). "[W]ork product containing the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought' is not discoverable." *Evans*, 142 N.C. App. at 28, 541 S.E.2d at 789 (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)). However, "[m]aterials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by

any party." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. The party asserting protection under the work-product doctrine "bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer, or agent." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (citation and quotation marks omitted).

"[T]he phrase 'in anticipation of litigation' encompasses a concept without sharply defined boundaries." *Id.* However, this Court has consistently held that reports published in accordance with a company's established policy are not protected work product, even when drafted in response to an event that might foreseeably give rise to litigation. *See, e.g.*, *Fulmore v. Howell*, 189 N.C. App. 93, 102, 657 S.E.2d 437, 444 (concluding that "the accident report was created in the ordinary course of the business of Pilgrim's Pride, pursuant to their safety manual, which negates the possibility of the protection of the report under the doctrine of work product"), *disc. review denied*, 362 N.C. 470, 666 S.E.2d 119 (2008), *cert. denied*, 555 U.S. 1171, 173 L. Ed. 2d 586 (2009); *Evans*, 142 N.C. App. at 30, 541 S.E.2d at 790 (affirming the trial court's denial of work-product immunity over the defendant-insurers' "claims diary" because "the investigation stage of the claims process is one carried out in the ordinary course of an insurer's business"); *Cook v. Wake Cty. Hosp. Sys., Inc.*, 125 N.C. App. 618, 625, 482 S.E.2d 546, 551-52 (1997) (reversing the trial court's denial

of a motion to compel production of an accident report that "would have been compiled, pursuant to the hospital's policy, regardless of whether [the plaintiff] intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital").

Here, following plaintiff's slip-and-fall accident on 10 May 2016, Blue Ridge Mall property manager Tonya Jackson completed a "First Report" pursuant to the policy established in the Hull Property Group 2015 Guide to Onsite Roles & Responsibilities. The policy states, in pertinent part:

> **LEGAL: ONSITE RESPONSIBILITIES**
>
> **Reporting Occurrences**
>
> The onsite manager should complete a First Report for occurrences on the property per the instructions below. In deciding whether or not to report something, always err on the side of caution. If you are not sure whether an occurrence should be reported, discuss it with [in-house counsel] Ashley Dolce or other legal counsel at corporate office only including Wayne Grovenstein and Matt Matson.
>
> - Fill out the First Report or First Report – Workers Compensation with basic information on the occurrence. The following occurrences warrant a report:
>   - Slip and fall
>   - Personal injury
>   - Property damage
>   - HPG employee injury
>   - Vehicular accident while at work (rental or personal car)
>   - Suspicious, criminal or destructive actions

- Send the report and the following information to Ashley Dolce via email.
  - A police report if applicable
  - Photos of the scene and/or property damage
  - Photos of any injuries that were sustained

- If your property has cameras, send a burned copy of the security camera footage for 1 hour before and after the occurrence, via mail or other means available, regardless of whether cameras caught the occurrence or not.

- Follow up via phone to Ashley Dolce to discuss the occurrence further.

- If applicable or as instructed, continue to follow up with the police or sheriff's department for leads or information regarding the occurrence. Report any updates to Ashley Dolce.

(emphases in original).

On appeal, defendants contend that the trial court erroneously granted plaintiff's Motion to Compel Discovery, because this policy "has no stated non-litigation purpose, requires employees [to] exercise discretion in determining whether to prepare a report, and provides that any questions they may have in determining whether to prepare a report be directed only to in-house counsel." We disagree.

Defendants cite no authority, and our research discloses none, which supports the proposition that reports drafted pursuant to an established policy are *presumed* to be in anticipation of litigation. To the contrary, "[w]ere this the rule, . . . any

accident report compiled by a business would be considered undiscoverable work product." *Cook*, 125 N.C. App. at 625, 482 S.E.2d at 552.

The policy directs the onsite manager to provide only "basic information" in the First Report, and to subsequently "follow up via phone to [in-house counsel] to discuss the occurrence further." These instructions suggest that potentially sensitive details should *not* be included in the First Report, evincing the policy's non-litigation purpose. Furthermore, "slip and fall" accidents are specifically identified as one of six occurrences that "warrant a report" under the policy. At her deposition, Jackson testified that she completed a First Report every time one of the listed events occurred:

> Q Do you agree that that's part of your job is to fill out a first report or an incident report?
>
> A Yes.
>
> Q So this is a responsibility that you follow strictly?
>
> A Yes.
>
> Q Every time there's an incident, you fill out an incident report?
>
> A If I'm onsite.
>
> Q What happens if you're not onsite?
>
> A Security fills it out.
>
> Q So an incident report should be filled out every time there are one of these incidents that are listed here.

> A Correct.
>
> Q And, as far as you know, you've done that every time there has been one of these incidents. Is that correct?
>
> A Correct.

Accordingly, "it cannot be fairly said that the employee prepared the [incident] report because of the prospect of litigation." *Id.* at 625, 482 S.E.2d at 551. Moreover, the First Report was neither written by, nor at the direction of, legal counsel, and contains no legal opinions. *Evans*, 142 N.C. App. at 28, 541 S.E.2d at 789. Consequently, preventing its disclosure would not serve the purposes of the work-product doctrine. *See id.* (stating that "[a]ttorneys should not be deterred from adequately preparing for trial because of fear that the fruits of *their labors* will be freely accessible to opposing counsel" (emphasis added)).

IV. Conclusion

Since defendants failed to properly assert the attorney-client privilege over the incident report, we dismiss defendants' interlocutory appeal of that issue. Furthermore, defendants failed to meet their burden of proving that the incident report was produced in anticipation of litigation. Accordingly, we affirm the trial court's order granting plaintiff's Motion to Compel Discovery and remand.

DISMISSED IN PART; AFFIRMED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).