**IN THE DISTRICT COURT OF OKLAHOMA COUNTY**

**STATE OF OKLAHOMA**

JOHN DOE, )

Plaintiff, )

v. ) Case No. CJ-2017-4444

)

JANE DOE, )

Defendant. )

**MOTION TO COMPEL**

**MOTION**

Plaintiff moves the Court for an order compelling Defendant to produce all tape-recorded conversations between Defendant’s insurance company (Geico) and Plaintiff himself.

**BRIEF**

**I. Introduction with Pertinent Facts**

The MVA which precipitated this lawsuit was a clear liability rear-end collision. Mr. Doe felt fine at the scene, but within a few hours was in severe pain and his fingers were numb and burning. He went to Mercy ER where he was told he had symptoms of nerve pain and needed further treatment and testing.

Before he could get the follow-up treatment, Mr. Doe was contacted by a Geico adjuster. Over the course of several conversations, the Geico adjuster told Mr. Doe that he should not get the recommended treatment because: (1) the collision impact was too low for him, or anyone, to have possibly been hurt; (2) Geico would never pay a dime for his injury claim (true so far); *Mr. Doe’s health insurance would not pay his medical bills because they were from an MVA* (a fabrication); and, (3) Mr. Doe would never find an attorney who would to handle such a case (also false)(Ex. 1, Affidavit of John Doe). Afraid to incur a big medical bill, Mr. Doe delayed getting the recommended treatment.

In discovery, Plaintiff’s requested the following, seeking, in part these conversations:

**REQUEST FOR PRODUCTION NO.9: Produce copies of all recorded conversations between your insurance carrier, Geico, and Mr. Doe.**

Defendant did not produce the conversations, so Plaintiff sent a supplemental request by letter (Ex. 2, Letter from Mr. Kouri):

(insert your letter here)

Defendant refused to provide the conversations, offering the following objections (Ex. 3, Letter from Joshua B. Bush):

I am in receipt of your letter dated December 26, 2017, requesting supplementation of our Response to Request for Production No. 9.

Defendant objects to the production of any internal recordings of conversations between Mr. Doe and Tony Folkmann, or any other GEICO representative. This Request is overlybroad, seeks information that falls within the work product doctrine, and any conversations held were in anticipation of litigation.

These conversations are discoverable for at least three reasons: (1) Mr. Doe was a party to the conversations, and thus entitled to a copy; (2) the recordings provide evidence countering a perception, on the part of the jury, of a “treatment gap;” (3) the recordings provide evidence pertaining to additional injury caused be a delay in treatment.

As for the offered objections, (1) it is hardly a broad request, let alone, overly so, to ask Geico to provide the four or five conversations it had with Mr. Doe. (2) the work product doctrine, (A) does not allow a defendant to avoid the duty to provide a copy of a recording to the parties to the recording. That is a basic precept of the judicial system; (B) the work product and “anticipation of litigation” doctrines do not extend to material gathered as part of an insurance company’s claims investigation procedure.

Defendant (and Geico) can hardly claim the work product/anticipation of litigation protections are designed to protect the kind of deception practiced on Mr. Doe with respect to the adjuster’s advice that he should ignore his doctors. It is likewise absurd to claim privileges pertaining to expected litigation when the entire thrust of the adjuster’s claims was that there was never going to be any litigation. *There is simply no “privilege” that shields an insurance adjuster’s efforts to provide medical and legal advice to an injured victim.*

Defendant should be made to provide the recorded conversations, and, should be ordered to pay the costs of this motion to compel, including Plaintiff’s attorney fee.

**II. Certification of Good Faith Conference**

Movant, in good faith, conferred with counsel for Defendant by telephone on ??????????, in an effort to secure the information or material without court action.

**III. Argument and Authorities**

***A. Defendant Cannot Claim a Privilege to Withhold Mr. Doe’s Own Statements***

The work product/anticipation of litigation doctrine simply does not allow a party to withhold a statement from a part to the statement:

12 O.S. § 3226(B)(3)(c): *A party* or other person *may, upon request and without the required showing, obtain the person's own previous statement about the action or its subject matter.* If the request is refused, the person may move for a court order, and the provisions of paragraph 4 of subsection A of Section 3237 of this title apply to the award of expenses. *A previous statement is* either:

(1) a written statement that the person has signed or otherwise adopted or approved, or

(2*) a contemporaneous* stenographic, mechanical, *electrical, or other recording*, or a transcription thereof, *which recites substantially verbatim the person's oral statement*.

***B. Statements Taken in the Ordinary Course of Business are Not Privileged***

Defendants’ “anticipation of litigation” objection was rejected by the Oklahoma Supreme Court more than twenty years ago in *Hall v. Goodwin*, 1989 OK 88, 775 P.2d 291, 295-96. Following established federal precedent, in Hall the court ruled that there is no “work product” protection for documents “secured in the regular course of duties performed by [an] individual as an employee of the insurance company (the ordinary course of business).” *Id*. The court’s focus is on whether the document is one “typically prepared by the insurance company prior to notice of a lawsuit[.]” *Id*.

In *Hall*, the court determined that a statement taken in the ordinary course of the insurance company’s investigation of a claim was not privileged even though it was taken by a lawyer. The reason is obvious – the work product privilege applies only to documents created “in anticipation of litigation.”

It is a given that an insurance company’s initial investigation is conducted as a matter of routine and not based on an imminent threat of a lawsuit. *Hall* relied on the Fourth Circuit’s opinion in *McDougall v. Dunn*, 468 F.2d 468 (4th Cir.1972), where the court held that statements given to an insurance claims adjuster shortly after an automobile accident were discoverable because the statements were not prepared in anticipation of litigation or for trial. *McDougall* rejected the insurance company contention that the statements were prepared in anticipation of litigation or for trial and found that they were “secured by the claim adjuster in the regular course of his duties as an employee of the insurance company and presumably were incorporated in the files of the company.” *McDougall*, 468 F.2d at 473.

“The mere fact that litigation does eventually ensue does not, by itself, cloak materials” with work product immunity. *Binks Mfg. Co. v. National Presto Indus., Inc*., 709 F.2d 1109, 1118 (7th Cir.1983). See also *Janicker v. George Washington Univ*., 94 F.R.D. 648, 650 (D.D.C.1982) (“The fact that a defendant anticipates the contingency of litigation resulting from an accident or an event does not automatically qualify an ‘in house’ report as work product.”). The document “must be prepared because of” the prospect of litigation. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.,* 967 F.2d 980, 984 (4th Cir. 1992). Documents prepared in the “ordinary course” of events are not protected by any work product privilege. *Hall v. Goodwin*, 1989 OK 88, 775 P.2d 291, 295.

Also, the burden is on the party asserting work product protection to demonstrate that the documents at issue were prepared in anticipation of litigation. *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir.1984). “Materials assembled in the ordinary course of business or for other non-litigation purposes are not protected by the work product doctrine. The inchoate possibility, or even likely chance of litigation, does not give rise to work product.” *Ledgin v. Blue Cross & Blue Shield*, 166 F.R.D. 496, 498 (D.Kan.1996).

***C. The Rule of Hall Applies as Well to Third-Party Claims***

Defendant will likely note that *Hall* was a first-party coverage claim and that that makes a difference. Well-reasoned decisions show that is a distinction without a difference. For instance, the Colorado Supreme Court holds, in *Lazar v. Riggs,* 79 P.3d 105 (Colo. 2003) the privilege is not bright line in third-party claims, but still must be assessed with respect to the particular production sought:

Where an insurance contract includes a right and duty to defend (as it typically does), in addition to an obligation to investigate and settle claims arising under the policy, an insurance company's investigation of third-party claims may very well "shift from an ordinary business activity to conduct in anticipation of litigation."[citation omitted] Because there is no bright line between these two activities in all cases, however, the nature of the document in question and the factual situation in the individual case must always be considered. As we held in Hawkins, it is the burden of the insurance company resisting disclosure to demonstrate that the documents in question were prepared in order to defend against a specific claim and that a lawsuit over that claim had already been filed or was imminent. Merely demonstrating that a claims adjuster conducted an investigation to determine whether a claim falls within its insured's coverage is no more sufficient to demonstrate preparation in anticipation of litigation when the claim is made by a third party than when it is the claim of an insured himself. *Lazar,* 79 P.3d at 108.

***D. The Recorded Conversations Here Sought Do Not Qualify for the Suggested Privileges***

Plaintiff does not seek recordings of conversations between Geico *and its own insured* (though Mr. Doe is also insured by Geico, the requested statements were given to the liability adjusters for Defendant’s Geico coverage). Plaintiff instead seeks the recordings of his own conversations with the Geico adjusters. The dissent in *Lazar,* was concerned that the threat of potential disclosure of conversations *between a defendant and his or her own insurance company*, might have a chilling effect on the information gathering process. That concern does not apply to the disclosure of Mr. Doe’s own conversations with the liability adjusters. Indeed, by statute, Geico has no privilege with respect to the telephone conversations (see 12 O.S. § 3226(B)(3)(c), above).

Here, the recorded conversations were made by Geico’s adjusters, in the early aftermath of the MVA, and in the normal course of Geico’s claims handling process. They were not made in anticipation of litigation. That this is so is confirmed by the very subject of the conversations: namely that Mr. Doe should *not* get medical treatment, because *no attorney would ever litigate this case against the Geico insured.* And even if litigation was anticipated—*these privileges do not allow Geico to withhold a statement from a party to the statement*. Geico should not be allowed to wield these legitimate privileges to shield outrageous conduct. Plaintiff requests an order compelling Defendant, and Geico, to produce the recorded conversations between Mr. Doe and the Geico adjusters.

***E. Plaintiff is Entitled to Costs and Fee Associated with this Motion***

Plaintiff should not have had to spend the time, money, and effort making this motion to compel Defendant and Geico to obey the plain language of the Discovery Code. Indeed, 12 O.S. § 3226(B)(3)(c) mandates an award of costs and fee:

If the request is refused, the person may move for a court order, and the provisions of paragraph 4 of subsection A of Section 3237 of this title apply to the award of expenses

Geico should be made to pay the cost and attorney fee associated with the filing and presentation of this motion.

Respectfully,

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PAUL KOURI, OBA# 20751

11221 E I 240 Service Rd

Oklahoma City, OK 73150

Telephone: (405) 347-7140

Facsimile: (800) 590-1966

paul@paulkourilaw.com

**Attorney for Plaintiff**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing was served by first-class mail, postage paid, this \_\_\_\_\_\_ day of May, 2018, upon:

Joshua B. Bush, OBA# 30508

**Law Office Of Michael H. Githens**

2601 N.W. Expressway,Suite 712 W

Oklahoma City, OK 73112

(405)242-6400 - Telephone

(405)242-6401 - Facsimile

JoBush@geico.com

**Attorney for Defendant**

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Paul Kouri