FILED

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

AXIALL CORPORATION and
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; ALLIANZ GLOBAL RISKS US INSURANCE COMPANY; ACE AMERICAN INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY; GREAT LAKES INSURANCE SE; XL INSURANCE AMERICA, INC.; GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA; ASPEN INSURANCE UK LIMITED; NAVIGATORS MANAGEMENT COMPANY, INC.; IRONSHORE SPECIALTY INSURANCE COMPANY; VALIDUS SPECIALTY UNDERWRITING SERVICES, INC.; and HDI-GERLING AMERICA INSURANCE COMPANY,

Defendants.

Civil Action No. 19-C-59

Presiding Judge Christopher C. Wilkes

Discovery Commissioner Judge Russell M. Clawges, Jr.

ORDER DENYING DEFENDANTS' THIRD AND FOURTH MOTIONS TO COMPEL

This matter came before the Discovery Commissioner the 30th day of July, 2021. The Defendant insurance companies (collectively, "Defendants"), by counsel, filed Defendants' Third and Fourth Motions to Compel the Production of Documents withheld or redacted by Plaintiffs Axiall Corporation and Westlake Chemical Corporation (collectively, "Plaintiffs"). Plaintiffs and Defendants have fully briefed the issues necessary, and Plaintiffs have submitted to the Discovery Commissioner the documents in question for *in camera* review. The Discovery Commissioner has determined that oral argument on the motions was unnecessary. So upon full

consideration of the issues, the record, and the pertinent legal authorities, the Discovery Commissioner makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 27, 2016, a tank car at Westlake's Natrium Plant in Marshall County, West Virginia ruptured after being filled with 90 tons of liquefied chlorine, resulting in the release of liquid chlorine that immediately vaporized and formed a cloud or plume of chlorine that traveled throughout the Plant, and then downwind along the banks of the Ohio River (the "Accident"). Opp. at 2.

2. In addition to causing damage to the Natrium Plant, neighboring property owners in West Virginia and across the River in Ohio asserted that their property was damaged in the Accident. *Id.*

3. Shortly after the release, the National Transportation and Safety Board (the "NTSB") launched a multi-year investigation into the Accident. *Id.*

4. As a result, Westlake faced a number of legal battles on multiple fronts. *Id.*

5. To assist with these various legal battles, Westlake retained four different law firms: Steptoe & Johnson, Thomson Hine, Porter Hedges, and K&L Gates. *Id.* at 2-3.

6. In addition to retaining the above-mentioned counsel, Westlake (sometimes directly and sometimes through counsel) hired consultants and experts to assist counsel with the handling the various legal proceedings arising from the Accident. *Id.* at 3.

7. The consultants and experts included the engineering firm Exponent, PwC Insurance Claims Services, and broker Aon PLC. *Id.* at 3.

8. Defendants filed their Third and Fourth Motions to Compel, which seek four categories of materials claimed by Plaintiffs to be privileged: (1) documents containing

Westlake's counsel's advice that were shared with Westlake's consultants; (2) documents prepared by Axiall's in-house counsel; (3) documents prepared in anticipation of litigation by counsel or at counsel's direction that predate 2018; and (4) documents prepared by and with the assistance of Westlake's coverage counsel prior to the commencement of this litigation. Westlake opposed the Motions asserting that the Insurers were expressly seeking the communications, legal advice, mental impressions, and strategy of Westlake's counsel. *See generally* Opp.

9. The Discovery Commissioner finds this issue ripe for decision.

CONCLUSIONS OF LAW

The burden of establishing the attorney-client privilege...in all [its] elements, always rests upon the person asserting it." *State ex rel. Medical Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80, 89 (W. Va. 2003); *State ex rel. U.S. Fidelity & Guar. Co. v. Canady*, 460 S.E.2d 677, 684 (W. Va. 1995). "In order to assert an attorney-client privilege, three main elements must be present: (1) both [client and attorney] must contemplate that an attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential." *Canady*, 460 S.E.2d at 688; *Recht*, 583 S.E.2d at 89 (same). "'[T]he privilege extends to protect communications between the ***attorney*** and the ***agents***, superiors, or attorneys in joint representation.'" *State ex rel. Doe v. Troisi*, 459 S.E.2d 139, 147 (W. Va. 1995)); *Recht*, 583 S.E.2d at 88-89 ("[T]he privilege extends to protect communication between the attorney and the agents, superiors, or attorneys in joint representation."); Rule 26(b)(3) (noting that the work product doctrine applies to information shared with the "party's representative (including the party's...agent) ...."). More specifically, the privilege is extended to include experts and

consultants acting as agents on behalf of the party. *See Pajak v. Under Armour, Inc.*, 1:21-MC-27, 2021 WL 2933713, at *3 (N.D.W. Va. July 12, 2021) ("[W]hen an attorney rendering legal services directs confidential communications to other parties in aid of rendering such services, such as that of Under Armour's counsel to JND [a third-party agent] here, the attorney-client privilege operates to protect such communications.") (citing *Troisi*, 459 S.E.2d at 147); *In re Tri-State Outdoor Media Grp., Inc.*, 283 B.R. 358, 362 (M.D. Ga. 2002) ("[I]n today's complicated world, attorneys cannot work alone and must hire others to assist them; otherwise they would not be able to render adequate legal advice.... Therefore, the presence of a third party, so long as it is assisting the attorney with a complicated matter, does not destroy the privilege."); *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219-20 (S.D.N.Y. 2001) (public relations firm hired by company was found to be an agent of the client, thus communications with inside and outside counsel were protected by the attorney-client privilege).

The purpose of the work product doctrine is to protect "from disclosure materials generated by an attorney in the course of, or in preparation for, litigation." *State ex rel. Allstate Ins. Co. v. Madden*, 601 S.E.2d 25, 34-35 (W. Va. 2004). Work product falls into two categories: fact and opinion work product. *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 648 S.E.2d 31, 38 (W. Va. 2007); *Canady*, 460 S.E.2d at 691; *Recht*, 583 S.E.2d at 90. "[F]act work product includes any documents or tangible things prepared by a party, or a party's representative, in anticipation of litigation." *Mazzone*, 648 S.E.2d at 38. "Opinion work product encompasses those documents or tangible materials which contain the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation.'" *Mazzone*, 648 S.E.2d at 38 (quoting W. Va. R. Civ. P. 26(b)(3)) (internal punctuation omitted); *Recht*, 583 S.E.2d at 90 (same). Fact work product is discoverable when

the party demanding production demonstrates a "substantial need" for the material and that the material cannot be obtained through other means "without undue hardship." *Mazzone*, 648 S.E.2d at 38. As a threshold matter, however, in order to constitute work product of either type, the document must be "prepared in anticipation of litigation." *See Mazzone*, 648 S.E.2d at 38; *Recht*, 583 S.E.2d at 89 ("By its express terms, Rule 26(b)(3) defines work product as 'documents and tangible things...prepared in anticipation of litigation or for trial.'"). The Supreme Court of West Virginia has explained that this means that the "primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." *Mazzone*, 648 S.E.2d at 38 (emphasis added); *Recht*, 583 S.E.2d at 89 (same). The burden of proving that a document constitutes work product rests on the party asserting the protection. *Canady*, 460 S.E.2d at 684 (W. Va. 1995); *Recht*, 583 S.E.2d at 89 ("The burden of establishing the work product protection...in all [its] elements, always rests upon the person asserting it.").

The Insurers raise five arguments in the Motions. First, the Insurers assert that Westlake has waived the attorney client privilege by sharing otherwise privileged documents with Aon, PwC, and Exponent. Third Motion at 8-12. Aon, PwC, and Exponent were all consultants retained by Westlake and Westlake's counsel in order to assist counsel with providing legal advice to Westlake related to multiple legal matters arising out of the Accident. Therefore, all of these entities qualify as Westlake's agents for purposes of protecting the attorney-client privilege as defined in the applicable case law, and sharing counsels' advice, strategy, etc. with these entities does not constitute a waiver.

Second, the Insurers argue that Westlake has adopted a "*per se* rule" that documents prepared by Mr. Dan Brown – an attorney who served both as Axiall in-house counsel and as

Axiall risk manager – are privileged. Third Motion at 12. Westlake has produced approximately 2,400 documents totaling approximately 21,000 pages from Mr. Brown's files. Opp. at 9. Thus, Westlake has not adopted a "*per se* rule." As is explained in Westlake's Opposition Brief, those documents that Westlake has withheld reflect Mr. Brown's legal advice provided to his client in confidence. Opp. at 8-9. As such, these documents are properly treated as privileged.

Third, the Insurers argue that documents prepared in anticipation of a separate litigation cannot be protected by the work product doctrine in this litigation. Third Motion at 15. Although the Supreme Court of West Virginia has not yet addressed this issue,[1] the federal courts of West Virginia have repeatedly held that documents prepared in anticipation of *any* litigation are protected by the work product doctrine and can rightfully be withheld. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 (4th Cir. 1973) ("[W]e think the legal profession and the interests of the public are better served by recognizing the qualified immunity of work product materials in a subsequent case as well as that in which they were prepared."); *Parsons v. Columbia Gas Transmission, LLC*, No. 2:19-cv-000649, 2021 WL 1894244, at *5 (S.D.W. Va. May 11, 2021) ("Plaintiffs also suggest that the work product doctrine only protects documents within the context of the litigation for which they were purportedly created... but that is plainly not correct"); *Smith v. Scottsdale Ins. Co.*, 40 F. Supp. 3d 704, 721 (N.D.W. Va. May 16, 2014) ("Moreover, the fact that the claim-file documents were created for the underlying litigation, and not for the instant case, is of no consequence because documents do not lose their work-product protection in subsequent litigation."). Even though

[1] The Supreme Court of Appeals of West Virginia routinely looks to federal decisions as guidance in determining the scope of the work product protection as the standard for applying both doctrines is the same. *See, e.g., State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 460 S.E.2d 677, 691 (W. Va. 1995) (agreeing with the Fourth Circuit's articulation of the work product doctrine); *Recht*, 583 S.E.2d at 467 (citing to both Fourth Circuit and various federal district court decisions in articulating the scope of the work product doctrine).

Westlake did not anticipate this particular coverage litigation in 2016 or 2017 – given that, during this period, the Insurers worked cooperatively with Westlake to investigate and adjust the claim and never raised a single coverage issue – it did anticipate multiple other litigations (and was in fact sued by third parties for alleged property damage related to the Accident) during this time period. Applicable case law is clear that the work product and privileged advice of Westlake's other counsel in 2016 and 2017 is entitled to the same protections in this coverage litigation as is K&L Gates' work product and advice from 2018 on.

Fourth, the Insurers argue that Westlake has waived the privilege with respect to certain documents prepared by Westlake's counsel Paul Fuener by engaging in "sword-shield behavior." Third Motion at 14. Westlake has properly withheld documents prepared by/involving its coverage counsel in connection with the coverage claim prior to litigation. Opp. at 12. Westlake has also produced documents prepared by/involving Natrium Plant personnel and Westlake's technical consultants and in connection with the coverage claim, unless those documents expressly referenced or included counsels' legal advice, strategy, etc. *Id.* There is no evidence that Westlake has engaged in sword-shield behavior with respect to Mr. Fuener's documents. *Id.*

Fifth, the Insurers argue that Westlake has improperly withheld certain 2016 Exponent documents. Fourth Motion at 7-10. Specifically, they argue that (1) these documents cannot be withheld on the basis of the work product doctrine because they predate the period of time where Westlake began to anticipate coverage litigation with the Insurers and (2) there is nothing to suggest counsels' involvement in these documents. *Id.* Several of the documents noted by the Insurers were produced by Westlake prior to the Insurers' filing of their Fourth Motion. Westlake's production moots the Insurers' complaints with respect to the documents identified at Privilege Counts 7, 16, 17, and 411. Opp. at 13. With respect to the remaining documents, each

of them is properly protected by the work product doctrine. *Id.* As is explained above, documents prepared in anticipation of litigation in connection with one litigation do not lose their work product protection in subsequent litigations. *See Duplan Corp.*, 487 F.2d at 484. Each of the Exponent documents identified by the Insurers were properly withheld on the basis of the work product doctrine because they were prepared by Exponent at the request of Westlake's counsel Thompson Hine to assist Thompson Hine with preparing for litigation relating to Accident. Opp. at 13. Moreover, as Westlake's privilege log makes clear, each of the documents identified by the Insurers involve counsel. Each entry notes expressly that the communication was made at the direction of "T. Coughlin, Esq.," an attorney with Thompson Hine, or "Thompson Hine." *See* Westlake's Exponent Privilege Log, at Counts 6, 8-12, 15, 20-21, 109, 112, 399-404. In all but one of these documents, Exponent employees are forwarding communications with Mr. Coughlin and Thompson Hine for the purpose of collecting information in order to assist Mr. Coughlin in providing legal advice. The remaining document, Privilege Count 12, is a communication undertaken at the direction of counsel. As such, each of these documents are protected not only by the work product doctrine, but also by the attorney-client privilege.

CONCLUSION

Upon consideration of Defendants' Third and Fourth Motion to Compel, and the briefs and arguments in support thereof and in opposition thereto, the Discovery Commissioner does ORDER that the Defendants' Third and Fourth Motions to Compel are DENIED.

A Copy Teste:
Joseph M. Rucki, Clerk
By Jackie Galk Deputy

ENTER: January 6, 2022
RUSSELL M. CLAWGES, JR.
Discovery Commissioner