

SUPREME COURT OF WASHINGTON

Harris v. Drake

152 Wn. 2d 480 (2004) · Decided October 14, 2004

OPINION

IRELAND, J.

Ireland, J. In this case we consider whether the report of, and opinions gained from, a medical examination conducted pursuant to the terms of personal injury protection (PIP) in an automobile insurance policy may be considered work product in the subsequent litigation with the *484 tortfeasor.

We hold that the report may be entitled to the qualified immunity of the work product doctrine. FACTS Doris Drake, defendant/petitioner, rear-ended Bradley Harris, plaintiff/respondent in April 1996. Harris injured his back and shoulder in the accident. He filed a PIP claim with his insurer, United Services Automobile Associates (USAA). Numerous physicians treated Harris over the next 20 months.

In November 1996, USAA required Harris undergo an independent medical examination (IME), according to the terms of Harris's PIP coverage. USAA retained Dr. Brandt Bede to perform the examination. Dr. Bede's report indicated that Harris had suffered an impingement syndrome of the left shoulder as a result of the automobile accident.

In September 1997, Harris's orthopedic surgeon also diagnosed him with impingement syndrome and performed arthroscopic surgery for the condition. By December 1997, Harris was recovered and pain free with full range of motion. He moved to Augusta, Georgia in February 1998. Dr. Bede wrote a second report in February 1998, after reviewing additional medical information.

In the second report, Dr. Bede concluded that Harris's impingement syndrome was not related to the automobile accident with Drake. Harris filed suit against Drake in May 1998. During discovery, Drake obtained copies of Dr. Bede's reports, though the reports were not provided by Harris or his attorney. Neither party contends that Harris knowingly and voluntarily provided Dr. Bede's reports to Drake.

In March 1999, Drake listed Dr. Bede as a defense expert. The original trial date was continued from June 1999 to September 1999. The parties filed and exchanged witness and exhibit lists prior to the September 1999 trial date. Drake designated Dr. Bede as a witness and listed Dr. Bede's reports as exhibits. Harris objected to Dr. Bede's reports, *485 but the objections did not raise the issue of privilege or work product immunity.

Once more the trial was postponed before going forward on April 10, 2001. On April 9, 2001, the day before trial, Harris filed a motion in limine to exclude the testimony of Dr. Bede. Harris contended that Dr. Bede was Harris's own consulting expert, whom Harris was not intending to call at trial. Further, Harris claimed that Dr. Bede's reports were the work product of Harris's insurance company.

Harris claimed he was entitled to assert qualified immunity under the work product doctrine on behalf of the insurance company because Harris was authorized by USAA to seek reimbursement of the PIP coverage from Drake.

The trial court instructed the parties to consult with USAA concerning its position regarding Drake's use of Dr. Bede's report, and Drake's intent to call Bede as a witness. Joanne Randolph, a subrogation specialist at USAA, indicated during a phone call with Harris's counsel that USAA would not take a position adverse to its insured and would not allow Dr. Bede to be called as Drake's witness.

Harris's counsel advised the court of USAA's position. The court granted Harris's motion to exclude Dr. Bede. Drake argued that exclusion of Dr. Bede left her without a medical witness. She asked for a continuance. Noting that the trial had already been continued two times and that Harris had traveled from Georgia for the trial, the court denied Drake's request for a continuance.

At trial, Drake admitted liability. At the end of the evidence, the court directed a verdict for Harris on causation and special damages, and submitted general damages to the jury. The jury awarded \$120,000 in general damages, plus costs, for a total verdict of \$140,965. ANALYSIS Civil Rule (CR) 26 sets forth the general rules of discovery in civil matters.

That rule allows for discovery of anything material to the litigation and not protected by *486 privilege. The work product doctrine provides a qualified immunity from discovery. Under the work product doctrine, documents prepared in anticipation of litigation are discoverable only upon a showing of substantial need. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985).

The doctrine is incorporated in CR 26(b)(4),¹ which provides in part: Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his 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 his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Thus, CR 26(b)(4) requires that work product can be obtained only upon a showing of necessity for one's case and an inability to acquire similar material elsewhere. *Pappas v. Holloway*, 114

Wn.2d 198, 210, 787 P.2d 30 (1990).

As set out above, CR 26(b)(4) begins with a proviso: “Subject to the provisions of subsection (b) (5) of this rule, a party may....” CR 26(b)(5) concerns discovery from experts. CR 26(b)(5) provides that when a party retains an expert, who acquires or develops facts and opinions in anticipation of litigation, and the party does not expect to call that expert at trial, another party may obtain discovery only as provided in CR 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Detwiler v. Gall, Landau & Young Constr. Co., 42 Wn. App. 567, 568-69, 712 P.2d 316 (1986). The work product doctrine limits not only pretrial discovery but may also prevent a consulting expert who is hired in anticipation of litigation from testifying at deposition or trial. See *Crenna v. Ford Motor Co.*, 12 Wn. App. 824, 828-31, 532 P.2d 290 (1975).

To determine whether the work product privilege should apply under the facts of this case, the Court of Appeals proposed three questions: (1) “Did the work product protection attach in anticipation of PIP litigation or arbitration between USAA and Harris?” (2) “If the privilege attached, did it terminate before the trial of this tort litigation between Harris and Drake?” and (3) “If the privilege attached and did not terminate, was it properly claimed at the trial of this tort litigation between Harris and Drake?” *Harris v. Drake*, 116 Wn.

App. 261, 272, 65 P.3d 350 (2003). Did the work product protection attach? In answering the first question, we refer to *Heidebrink*, 104 Wn.2d 392, the key Washington case on work product doctrine. Under *Heidebrink*, determination of whether material was prepared in the anticipation of litigation in a particular case, and thus qualifies as work product, requires examination of the specific parties and their expectations.

Id. at 400. In *Heidebrink*, the defendant/insured gave a recorded statement to his insurer following an automobile accident. Plaintiff brought suit for injuries and sought to obtain a copy of the defendant/insured’s recorded statement.

The insurance company refused to turn it over, claiming the recorded statement was prepared in anticipation of a possible lawsuit against the insured and was therefore work product. *Heidebrink*, 104 Wn.2d at 399 (citing *Fireman’s Fund Ins. Co. v. McAlpine*, 120 R.I. 744, 391 A.2d 84 (1978) (where a Rhode Island court reasoned that the seeds of prospective litigation are sown when the insured reports a claim to the insurance company, and the prudent party begins to prepare his or her case at that time)).

Further, the *Heidebrink* court noted that when the insurance company takes its insured’s statement of how the accident happened, the insured reasonably expects that this statement to his own

insurer will be kept confidential, will be transmitted to the attorney selected to represent the insured, and will not be turned over to the opposing side. *Id.* at 400.

In addition, the insured is required by the insurance contract's cooperation clause to supply a statement to the insurer. An insured risks losing coverage for the incident if he or she fails to cooperate by refusing to supply the requested statement. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 224, 961 P.2d 358 (1998). This contractual obligation creates a reasonable expectation in the insured that the information obtained by the insurer will be kept confidential.

Heidebrink, 104 Wn.2d at 400. Just as the insured's statement in *Heidebrink* was obtained for the purpose of defending against a liability claim, Harris's medical examination was conducted by USAA for the purpose of defending against a claim for further PIP benefits.

In addition, like the "liability insured" in *Heidebrink*, a "PIP insured" has a contractual obligation to submit to an IME at the PIP insurer's request. The insured must comply with the insurance contract's requirements in order to secure the promised coverage. Like the liability insured in *Heidebrink*, the PIP insured likely expects his insurance company to keep the IME confidential.

It is just as reasonable an expectation for a PIP insured to expect medical information to be held confidential as it is for a liability insured to expect that accident information given to the liability insurer will be kept confidential. Especially medical information, which is generally regarded as confidential, should be subject to an expectation of protection from disclosure to the tortfeasor.

Drake claims that the relationship between Harris and USAA is not analogous to the relationship between the insured and insurer in *Heidebrink*. However, no authority has been cited to treat information developed in anticipation of PIP arbitration or litigation any differently from information developed in anticipation of liability litigation for purposes of work product protection. *489We recognize that the relationship between an insured and his or her insurer is sometimes adversarial, while at other times the interests of the insured and insurer are aligned.

This dual relationship requires close examination, evaluating the specific positions of the insurer and insured in each instance. See, e.g., *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 781, 15 P.3d 640 (2001) (quoting *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 672 P.2d 1137, 1141 (Ct. App. 1983) (stating that the insurer may not overreach the insured, and the insured expects to be treated fairly and in good faith despite an adversarial posture)), overruled on other grounds by *Smith v. Safeco Ins.*

Co., 150 Wn.2d 478, 78 P.3d 1274 (2003); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P.2d 350 (1998) (Underinsured motor vehicle coverage (UIM) is adversarial by nature and thus gives rise to an inevitable conflict between the UIM carrier and the UIM insured). Indeed, *Heidebrink* requires examination of the relationship of the parties in each case.

In examining the relationship between the insured and the insurer in this case, we note that Harris's and USAA's interests are aligned. USAA specifically authorized Harris to represent USAA's subrogation interests in the litigation with Drake. USAA is interested in recouping its PIP payments, and Harris is interested in seeking compensation for his injuries.

In this case, the Court of Appeals' determination that the work product privilege should attach in anticipation of PIP litigation or arbitration seems better reasoned than Drake's position that confidentiality cannot be expected.

Therefore, we hold that the PIP insurer's IME may properly be considered work product protected. When does the work product protection terminate? Next the Court of Appeals considered whether the work product protection can be claimed even after the PIP litigation or arbitration has terminated.

We have previously answered that question in the affirmative. Pappas, 114 Wn.2d at 209-10 (the underlying purposes served by the work product doctrine can be preserved only if the protection attaches even after litigation has terminated). See also Limstrom v. Ladenburg, 136 Wn.2d 595, 963 P.2d 869 (1998); Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993).

Drake cites a Court of Appeals, Division Three case, Johnson v. McCay, for the holding that a doctor who performs a PIP medical examination is not a consulting expert and the report of the examination is not work product because it is not prepared in anticipation of litigation. 77 Wn. App. 603, 609, 893 P.2d 641 (1995).

In that case, Beverly Johnson was a passenger in Marcy Turner's car when it was rear-ended by Kimberly McCay. Johnson made a claim for medical expenses against Allstate, Turner's PIP carrier. Allstate demanded Johnson undergo a medical examination pursuant to the terms of the PIP coverage. When Johnson later sued McCay for negligence, McCay sought to call the PIP physician.

The trial court upheld the work product protection, but Division Three disagreed and quoted a federal decision that held that the work product protection applies " 'only insofar as the information sought was obtained for the very purpose of preparing for the litigation in question.' " Johnson, 77 Wn. App. at 609 (emphasis added) (quoting Grinnell Corp. v. Hackett, 70 F.R.D.

326, 332 (D.R.I. 1976)). Division Three held that the medical evidence would be subject to the work product protection only if prepared for the instant litigation between Johnson and McCay. Johnson, 77 Wn. App. at 609. Division Three held that it was error to exclude the medical evidence, though the error was harmless under the facts of that case. Id. at 610.

The Johnson court relied on a fragment from Wright's Federal Practice and Procedure to conclude that " ' [documents prepared for one who is not a party to the present suit are wholly unprotected

by Rule 26(b)...’.” Johnson, 77 Wn. App. at 609 (quoting 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024, at 354 (2d ed.

1994)). However, as Division Two noted, the commentary from Wright concludes that it would *491be intolerable to interpret CR 26(b)(4) as providing protection only to the parties in the particular case for which the documents were created. “Fortunately the courts need not be confined by a literal reading of [CR 26(b)(4)] and can continue to arrive at sensible decisions on this narrow point.

To the extent that rule [26(b)(4)], literally read, seems to give insufficient protection to material prepared in connection with some other litigation, the court can vindicate the purposes of the work-product rule by the issuance of a protective order under Rule 26(c).” Harris, 116 Wn. App. at 282 (quoting 8 Wright, Miller & Marcus, *supra*, at 354-56).

In this case, Division Two followed the analysis of Pappas, Daly, and Limstrom, and properly rejected the analysis in Johnson. Harris at 277. We hold that the work product protection in this case did not terminate upon resolution of the PIP dispute between Harris and USAA. Was the work product protection properly asserted? This leads us to the third question posed by the Court of Appeals, which is whether work product protection was appropriately asserted in this case.

In general, both a party and the party’s representative may assert the protection of the work product rule. A party’s representatives may include those retained or employed by the party’s insurer. Heidebrink, 104 Wn.2d at 400-01; see also Lewis H. Orland, Observations on the Work Product Rule, 29 Gonz. L. Rev. 281, 289-90 (1993-94).

In addition, as set out above, the protection extends beyond the litigation in which the protected materials were developed. For example, in *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237, 824 P.2d 1237 (1991), the protection was successfully claimed by a party not present in the original litigation.

In *Dever*, the prosecutor charged defendant *Dever* with arson. The prosecutor prepared various documents in anticipation of trial but dismissed the case before trial. *Dever* then sued the investigating fire marshal (and the city that employed him) for malicious prosecution. *492When *Dever* attempted to discover the prosecutor’s documents, the prosecutor claimed work product protection, even though he was not a party to the civil case.

Division One stated: The language found in [CR 26(b)(4)] does not limit work product protection to parties to the instant litigation. We conclude, “based on the underlying purposes served by the work-product doctrine,” that protection under the work product doctrine extends to documents prepared in anticipation of any litigation, regardless of whether the party from whom it is requested is a party in the present litigation.

Dever, 63 Wn. App. at 47. Division One concluded that the work product rule protected from discovery the documents prepared by the prosecuting attorneys. *Id.* Here, the trial court directed the parties to contact USAA and determine its position.

The parties talked with a subrogation specialist at USAA who indicated that USAA would not allow Dr. Bede to testify against its insured. USAA had a subrogation interest in Harris's suit against Drake, and USAA sought to protect that interest.

In addition, the USAA representative stated that USAA would not take a position contrary to its insured. Taking a position opposed to its insured might be interpreted as a violation of USAA's quasi-fiduciary duty to Harris. *Ellwein*, 142 Wn.2d 766. There is no assertion by either party that the subrogation specialist was not authorized to act on behalf of USAA.

Therefore, we hold that USAA properly claimed the protection of the work product doctrine under the facts of this case. We recognize that it is the better practice to assert a claim of work product as soon as is practicable, and it should be asserted far enough before trial for the opposing party to acquire alternate materials and witnesses.

However, under the facts of this case, we cannot say that it was an abuse of discretion for the trial court to exclude Dr. Bede as a witness on the basis of work product protections. Continuance Drake argues that the trial court's denial of a continuance under the circumstances was an abuse of *493discretion.

The decision to grant a continuance is at the discretion of the trial court and its decision will be upheld absent an abuse of discretion. *In re Det. of G.V.*, 124 Wn.2d 288, 295, 877 P.2d 680 (1994). A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary. *Weyerhaeuser Co. v. Commercial Union Ins.*

Co., 142 Wn.2d 654, 683, 15 P.3d 115 (2000). Drake argues that the exclusion of Dr. Bede left her without a medical witness and that the trial court should therefore have granted a continuance. Harris, on the other hand, argues that Drake should have known that *Johnson v. McCay* could not be relied upon and that Drake had nearly three years to obtain her own independent medical exam of Harris.

While it is true that Drake had three years to seek an IME, so too did Harris have three years to claim the work product protections he sought the day before trial. However, the trial had already been continued multiple times and Harris had made cross-country trips more than once to attend the trial. At some point a trial must proceed.

Therefore, we cannot say that under the circumstances of this case it was an abuse of discretion for the trial court to deny Drake's motion for a continuance. Directed Verdict on Causation Drake argues that the trial court erred in granting a directed verdict on the issue of causation. A trial court

should grant a motion for directed verdict if, as a matter of law, no competent evidence or reasonable inferences exist to sustain a verdict for the nonmoving party.

Moe v. Wise, 97 Wn. App. 950, 956-57, 989 P.2d 1148 (1999) (citing *Bender v. City of Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983)). Drake argues that there was evidence at trial that made causation reasonably debatable. An MRI (magnetic resonance imaging) performed one month after the accident showed Harris's shoulder was normal; Harris's shoulder problem appeared later, after he resumed his painting job. *494Also, Harris's surgeon testified that painters often have impingement syndrome problems caused by their profession.

However, there was no evidence of a shoulder problem prior to trial. Even allowing for the possibility of a preexisting condition, the defense failed to show that such condition was symptomatic prior to the accident. When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition is not a proximate cause of the resulting damages.

Bennett v. Messick, 76 Wn.2d 474, 478-79, 457 P.2d 609 (1969). We affirm the Court of Appeals. Johnson, Madsen, Sanders, Bridge, Chambers, Owens, and Fairhurst, JJ., concur. CR 26(b)(4) and CR 26(b)(5) were renumbered in 1990 from the former CR 26(b)(3) and CR 26(b)(4).

The federal rules have been similarly renumbered. For ease of reading we will refer to the current numbers.