

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

STATE FARM FIRE & CASUALTY,)	
Plaintiff,)	Case No. 1016-CV36852
)	
vs.)	Division 13
)	
JUST PLUMBING KCMO, LLC, et al.,)	
Defendants.)	

ORDER

On the 19th day of December, 2011, the Court took up for hearing Defendants' Motion To Enforce Discovery And Supporting Suggestions, filed with the Court on November 15, 2011. Counsel for Plaintiff State Farm Fire and Casualty Co. and Defendants Just Plumbing KCMO, L.L.C. ("Just Plumbing") and Victor Hernandez ("Hernandez") appeared and presented oral arguments. Defendants' motion raised several discovery issues. On the 9th day of January, 2012 the Court issued an Order deciding all matters pertaining to the Defendants' Motion to Enforce, except for the issue regarding an origin and cause report created by Chuck Jacobs.

Plaintiff has alleged that the work-product doctrine precludes disclosure of the Jacobs report. In the Court's January 9th order, Plaintiff was required to produce the Jacobs report to the Court for an *in camera* review. See *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. 2004). Plaintiff produced that report for the Court's review on the 11th day of January, 2012. The Court has reviewed the Jacobs report.

From a review of the pleadings and the oral arguments of counsel, the Court understands the factual allegations to be as follows. The subject of the Jacobs report is Jacobs' investigation into the origin and cause of a fire which occurred at the residence of Mary Tongue. The residence was insured by Plaintiff, State Farm Fire and Casualty Co. (State Farm). Mary Tongue made a claim for her loss which State Farm paid. At or around the time of the fire, Defendant

Hernandez, while employed by Defendant Just Plumbing, was performing remodeling work at the residence.

Plaintiff State Farm is pursuing a subrogation claim as a result of the fire. Plaintiff alleges in its petition that Defendant Hernandez negligently set the fire while performing the remodeling work. Plaintiff is also pursuing a subrogation claim against Defendant Just Plumbing under a respondent superior theory of liability. Defendants have asserted as an affirmative defense that Mary Tongue, or individuals under Tongue's control, purposefully set the fire. Defendants have alleged that the Jacobs report relates to Tongue's underlying claim, and therefore has moved for production of the report. Plaintiff has claimed that the report was created in the anticipation of litigation and is therefore privileged under the work product doctrine.

"The party seeking discovery shall bear the burden of establishing its relevance." Mo. Sup. Court Rule 56.01(b)(1). If the moving party establishes relevance, and the responding party claims a privilege precludes disclosure, "the party asserting the privilege usually has the burden of proof to show that the privilege applies." State ex rel. Ford Motor Co., 151 S.W.3d at 367, citing John T. Hundley, Annotation, Waiver of Evidentiary Privilege by Inadvertent Disclosure-Federal Law, 159 A.L.R. Fed. 153 (2000). In this case, Defendants have established that the Jacobs report is relevant. The burden then shifted to Plaintiff to show that work product doctrine precludes disclosure of the report.

To successfully invoke the tangible work product privilege, the party claiming the privilege must "establish via competent evidence, that the material sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party." State ex rel. Ford Motor Co., 151 S.W.3d at 367, citing Raytheon Aircraft Co. v. United States Army Corps of Eng'rs, 183

F.Supp.2d 1280, 1287-88 (D.Kan. 2001). If the party claiming the privilege meets this burden, and the tangible thing in question is in fact privileged, the party seeking the discovery may obtain that discovery only upon a showing that they are unable, without undue hardship, to obtain the substantial equivalent by other means. Mo. Sup. Ct. Rule 56.01 (b)(3).

Plaintiff stated in its Suggestions in Opposition that it retained Jacobs to investigate the subject fire to aid Plaintiff in their pursuit of a subrogation claim. Further, Plaintiff asserted that it has not, nor does it intend to, identify Chuck Jacobs as a retained expert pursuant to Missouri Supreme Court Rule 56.01 (4). Defendants asserted in its Motion to Enforce that Jacobs was investigating Tongue's underlying claim relating to the fire. At oral arguments on the motion, counsel for Defendants argued that, at most, the Jacobs investigation was a dual purpose investigation as it related to whether Tongue's claim was legitimate, and whether Plaintiff would have potential recourse against third parties. Defendants argued that any information obtained by Plaintiff in its investigation of the underlying claim is not work product, because the work product privilege only protects information and material gathered in anticipation of litigation. Defendants further stated that any element of Jacobs' investigation pertaining to Tongue's underlying claim was conducted in the ordinary course of Plaintiff's business in reviewing submitted claims, and therefore, was not performed in anticipation of litigation. Defendants concluded that the portions of the Jacobs report relating to the underlying Tongue claim should be produced, and other portions relating to the subrogation claim should be redacted. See State ex rel. J.E. Dunn Constr. Co. Inc. v Sprinkle, 650 S.W.2d 707 (Mo. Ct. App.1983); Brantley v. Sears Roebuck & Co., 959 S.W.2d 927 (Mo. Ct. App. 1998).

At oral arguments, counsel for Plaintiff responded that even if Jacobs' investigation may have had some bearing on the claim for the homeowner's policy that would not negate the fact

that Plaintiff hired Jacobs in anticipation of litigation. In support of its assertion, Plaintiff attached a State Farm "claims log note" to its Suggestions in Opposition to Defendant's Motion to Enforce. Plaintiff's "claims log note" indicates that Plaintiff was informed prior to Jacobs' investigation that Defendant Hernandez was working at the location of the fire, painting and refinishing floors, on the day of the fire. See Plaintiff's Suggestions in Opposition, Ex. 1. Further, Plaintiff discovered that neighbors of Tongue reported Defendant Hernandez leaving the scene of the subject fire at 12:30 P.M. The fire was reported at 1:00 P.M. See id. Accordingly, the day after the fire, Plaintiff determined that it should retain Jacobs to conduct a joint-exam "with all interested parties," including Defendants, to "determine whether the contractor is the responsible party for this fire." See id. (*emphasis added*). Pursuant to Plaintiff's request, Jacobs contacted "all interested parties," including Defendants' insurance carrier, to coordinate a joint-exam. Acuity Insurance Co., acting in its representative capacity for Defendants, was at the scene the day of the joint-exam, the same day that Jacobs' conducted his exam which resulted in the report now at issue.

After a thorough review of the matter, the Court finds that Plaintiff has met its burden to show that Jacobs was retained in anticipation of litigation. Because Plaintiff has met its burden, the Court finds that the Jacobs report is the Plaintiff's work product and is privileged. Defendants have neither presented argument, nor indicated that Plaintiff has waived that privilege.

The Court further finds that representatives of Defendants were at the scene of the fire at the time of Jacobs' investigation. Defendants' representative had access to the scene and its contents. Therefore, Defendants had an opportunity to conduct their own investigation of the

scene of the fire. Given these facts, the Court finds that Defendants have failed to show undue hardship pursuant to Rule 56.01(b)(3).

Finally, Plaintiff has not designated Chuck Jacobs as an expert. "The discovery of facts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert." State ex rel. Tracy v Dandurand, 30 S.W. 3d 831, 834 (Mo. 2000).

WHEREFORE, the Court hereby DENIES the Defendant's Motion To Enforce Discovery as it relates to Document Requests Nos. 5 and 6, specifically the origin and cause investigation report created by Chuck Jacobs.

IT IS SO ORDERED.

1/23/12
DATE


CHARLES H. MCKENZIE, Judge

I hereby certify that copies
of the above and foregoing were sent on this
23rd day of January 2012, to the following:

Leonard R. Frischer, Esq.
Jeffrey R. Siegel, Esq.
Fax No. 913-345-1802
Attorneys for Plaintiff

David R. Buchanan, Esq.
Fax No. 816-421-1183
Attorney for Defendant

Steven C. Effertz
Fax No. 816-373-2112
Attorney for Mary Tongue and Guy Banner, Third-Parties

Kelsey O'Donnell, Law Clerk Division 13