2013 IL App (2d) 121410-U
No. 2-12-1410
Order filed October 1, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEPOSITORS INSURANCE COMPANY, Indiv. and as subrogee of Michael Baumann and Martha Baumann,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 09-MR-171
CANAL INSURANCE COMPANY,	)	
Defendant-Appellant	)	
(Four Winds Corp. and Audrius Narmontas, Defendants).	)	Honorable Thomas E. Mueller, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Certain documents were protected by the work product privilege (which was not waived) and thus were not subject to discovery, but none were protected by the attorney-client privilege; thus, we modified the trial court's discovery order to omit the protected documents, but, because many documents were withheld without a good-faith basis for believing that they were privileged, we affirmed the trial court's finding and sanction for contempt.

¶ 2 Canal Insurance Company (Canal), one of the defendants in a declaratory judgment action brought by Depositors Insurance Company (Depositors), appeals from an order of the circuit court of Kane County finding Canal in contempt of court for failing to comply with an order to produce various documents requested by Depositors in discovery. Canal contends that the documents in question are protected by the attorney-client privilege, the work product privilege, or both. We modify the order requiring the production of documents, but we affirm in all other respects.

¶ 3 At issue in the declaratory judgment action is the scope of liability coverage under a policy of motor vehicle insurance issued by Canal to Four Winds Corporation (Four Winds). The coverage dispute relates to a collision that occurred on April 24, 2006, between a motor vehicle operated by Michael Baumann and a tractor-trailer unit negligently operated by an alleged employee of Four Winds. Michael Baumann, whose vehicle was insured by Depositors, sought recovery for personal injuries. Martha Baumann sought recovery for loss of consortium.

¶ 4 Four Winds allegedly owned the trailer involved in the accident, but Canal denied coverage on the basis that the trailer was not listed in the policy's schedule of insured vehicles. As a result of the denial of coverage, the Baumanns received payment from Depositors under the uninsured motorist coverage of their policy. Depositors, as the Baumanns' subrogee, filed a negligence action against Four Winds, the driver of the tractor-trailer, and the owner of the tractor pulling Four Winds' trailer. Canal provided a defense under a reservation of rights, retaining the law firm of Leahy, Eisenberg & Frankel (defense counsel) for the defendants in the negligence lawsuit. In its declaratory judgment action, Depositors asserted that Four Winds' liability was covered under an endorsement to the policy providing coverage for vehicles not listed in the policy where such coverage is required under federal law establishing financial responsibility requirements for motor

carriers. See 49 U.S.C. § 13906 (2006). Canal retained the law firm of Kopka, Pinkus, Dolin and Eads, P.C. (coverage counsel) to represent it in the declaratory judgment action.

¶ 5 Pursuant to Illinois Supreme Court Rule 214 (eff. Jan 1, 1996), Depositors requested that Canal produce, *inter alia*, "[a] full and complete copy of the electronic and paper claim file created and/or maintained by Canal Insurance Company in connection with the *** claim filed by Michael and Martha Baumann for injuries or damages allegedly sustained in the April 24, 2006 vehicle accident including, but not limited to, that portion of any claim file created and/or maintained for the litigation arising out of [the negligence lawsuit filed by Depositors as the Baumanns' subrogee]." Depositors also requested production of the underwriting file for the policy issued by Canal to Four Winds. Canal produced various documents, which were organized into three files (which have been referred to as the "claim center file," the "underwriting file," and the "final file"). However, Canal also withheld documents from each of the files, claiming that the documents were privileged from discovery.

¶ 6 Depositors moved to compel production of the withheld documents. On March 21, 2011, the trial court ordered Canal to prepare a privilege log (see generally Ill. S. Ct. R. 201(n) (eff. July 1, 2002)) with respect to those documents. Canal did so, and submitted the files to the trial court for *in camera* review. On October 8, 2011, the trial court ordered Canal to produce the documents in the claim center file and the underwriting file. The court also ordered production of a portion of the final file. Canal complied with the order in part, producing some of the documents in question. However, Canal refused to produce roughly 200 pages of documents. Depositors subsequently moved for sanctions against Canal for its noncompliance with the October 8, 2011, order. In response, Canal argued for the first time that certain documents were not merely privileged, but were

also not relevant. The trial court awarded Depositors roughly $8,000 in attorney fees as a sanction against Canal. Canal persisted in its refusal to turn over the remaining documents. That refusal resulted in the finding of contempt giving rise to this appeal. As a penalty for Canal's contempt, the trial court imposed a fine of $1 per day until Canal complied with the order. The documents submitted to the trial court for *in camera* review have been made part of the record on appeal and we have impounded those documents and examined them *in camera*.

¶ 7 We initially consider whether any of the documents that Canal claims are privileged from discovery are within the ambit of the work product doctrine. Attorney work product is protected under Illinois Supreme Court Rule 201(b)(2) (eff. July 1, 2002), which provides, in pertinent part, that "[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." A major point of contention between the parties is whether work product created by defense counsel in the negligence lawsuit is privileged from discovery in the declaratory judgment action. Depositors contends that defense counsel's theories, mental impressions, and litigation plans relate to the negligence action, not the coverage dispute, and are therefore not privileged from discovery in the coverage matter. Canal argues that a party may not be allowed to circumvent the work product rule by crafting discovery requests in one lawsuit that require disclosure of an opponent's litigation strategy in separate litigation in which both parties are also adversaries. Canal clearly prevails on this point. In *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579 (2000), a decision cited by neither party, our supreme court stated:

> "It has been held *** that the work product doctrine protects materials prepared for any litigation or trial so long as they were prepared by or for a party to the subsequent litigation.

> [Citation.] The rationale for continuing protection, even in unrelated cases, was explained in *In re Murphy*, 560 F.2d 326 (8th Cir. 1977):
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> > 'If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern that the materials will not be protected in later, unrelated litigation. The unrelatedness of the subsequent litigation provides an insufficient basis for disregarding the privilege ***.' *Murphy*, 560 F.2d at 335.
>
> We agree with the rationale expressed in *Murphy* and conclude that the work product privilege extends to all subsequent litigation." *Id.* at 591-92.

Accordingly, all material prepared by or for Canal is privileged from discovery if it "contain[s] or disclose[s] the theories, mental impressions, or litigation plans" (Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002)) of defense counsel *or* coverage counsel.

¶ 8 We note that Canal has claimed the work product privilege against disclosure of the reserves it set for the Baumanns' negligence claim and Depositors' subrogation claim. The documents submitted for review do not show that the reserves necessarily reflect the theories, mental impressions, or litigation plans *of defense counsel or coverage counsel*. Canal cites *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 117 F.R.D. 283, 288 (D.D.C. 1986), for the proposition that "[w]here the reserves have been established based on legal input, the results and the supporting papers most likely will be work product." That case is inapposite, however, because the scope of protected work product is broader in federal courts than in Illinois courts. By its terms, Rule 201(b)(2) does not forbid discovery of material created in preparation for trial unless the material "contain[s] or disclose[s] the theories, mental impressions, or litigation plans of the party's

attorney." Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002); see *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 230 (2006) (notes prepared by a registered nurse in contemplation of litigation were not protected by the work product doctrine). In contrast, in federal court "the work-product doctrine is not confined solely to information and materials gathered or assembled by a lawyer, but also covers materials gathered by any consultant, surety, indemnitor, insurer, agent, or even the party itself." *Nicholas v. Bituminous Casualty Corp.*, 235 F.R.D. 325, 332 (N.D. W. Va. 2006) (holding that "loss reserve information assembled by [insurance company's] line claims handlers would be protected under the work-product doctrine.").

¶ 9 Canal also argues that reserve information simply is not relevant to the question of coverage. It is true that "the right of discovery is traditionally limited to disclosure of matters relevant to the case at issue." *In re All Asbestos Litigation*, 385 Ill. App. 3d 386, 389 (2008). However, it does not appear that Canal raised any objection based on relevance until after the trial court had conducted its *in camera* review of the documents in question and had entered its order of December 8, 2011, requiring Canal to produce various documents. As noted, the relevance objection first appears in Canal's response to Depositors' request for sanctions against Canal for failure to comply with the December 8, 2011, order. For all practical purposes, the relevance objection amounted to a request for reconsideration of that order. "A party may raise a new issue for the first time in a motion to reconsider *only* when a party has a *reasonable explanation* for why it did not raise the issue earlier in the proceedings." (Emphases in original and added.) *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41. We see no reason why Canal could not have raised a relevance objection when it originally submitted its files to the trial court for *in camera* review. Because the relevance objection

was not properly raised below, we will not consider the issue on appeal. See *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 550 (1983).

¶ 10 Mindful of these principles, and having reviewed the documents that Canal contends are privileged against discovery, we conclude that the following material constitutes protected work product:

File	**Page**	**Privileged Material**
Claim Center File	3	File entries of November 12, 2010, 10:26 a.m., and December 13, 2010, 8:57 a.m.
Claim Center File	5	File entry of October 6, 2010, 8:53 a.m.
Claim Center File	6	File entry of June 23, 2010, 3:09 p.m.
Claim Center File	6-7	File entry of June 17, 2010, 4:28 p.m.
Claim Center File	7	File entry of May 13, 2010, 2:58 p.m.
Claim Center File	8	File entries of March 29, 2010, 3:59 p.m., and April 23, 2010, 11:39 a.m.
Claim Center File	9	File entries of March 22, 2010, 4:27 p.m. and March 24, 2010, 11:45 a.m.
Claim Center File	9-10	File entry of February 11, 2010, 4:38 p.m.
Claim Center File	10	File entry of February 1, 2010, 3:25 p.m.
Claim Center File	11	File entry of

		November 5, 2009, 9:04 a.m.
Claim Center File	12	File entry of August 11, 2009, 9:45 a.m.
Claim Center File	13	File entries of March 13, 2009, 12:28 p.m., March 20, 2009, 2:59 p.m., and May 5, 2009, 9:55 a.m.
Claim Center File	13-14	File entry of February 26, 2009, 11:24 a.m.
Claim Center File	14	File entry of January 21, 2009, 10:12 a.m.
Claim Center File	68-69	File entry of October 6, 2010, 8:53 a.m.
Claim Center File	79	File entry of November 5, 2009, 9:04 a.m.
Claim Center File	80	File entry of August 11, 2009, 9:45 a.m.
Claim Center File	81	File entry of May 5, 2009, 9:55 a.m.
Claim Center File	84	File entry of March 13, 2009, 12:28 p.m.
Claim Center File	86	File entry of January 21, 2009, 10:12 a.m.
Claim Center File	89	File entry of October 8, 2008, 5:42 p.m.
Final File	1486	Full page
Final File	1488	Full page
Final File	1490	Full page

¶ 11 We next consider whether any of the remaining documents that Canal has withheld are protected by the attorney-client privilege. "To be entitled to the protection of the attorney-client privilege, a claimant must show that (1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Cangelosi*, 366 Ill. App. 3d at 228. The privilege applies only where the client has expressly made the communication confidential or where the client would reasonably believe that the attorney would understand the communication to be confidential. *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 464 (2010). When the client is a corporation, the communication must be made by a member of a "control group" consisting of top management and any employee "whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority." *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 120 (1982).

¶ 12 Having reviewed the documents that Canal contends are privileged against discovery, we find no documents that meet all of the above criteria for privileged status that are not otherwise covered by the work product privilege as previously discussed.

¶ 13 We next consider Depositors' argument that Canal has waived any claim of privilege. Because we have found that the withheld documents in the underwriting file are not privileged and that none of the withheld documents are protected by the attorney-client privilege, we consider the issue of waiver only as it applies to protected work product in the claims file and the final file.

¶ 14 Depositors first argues that Canal's original response to Depositors' request for production of documents did not assert any privilege with respect to documents in the final file. As noted, three

pages of documents in the final file are protected under the work product doctrine. We further note that these three pages apparently did not exist at the time of Canal's original response to Depositors' discovery request. When it originally responded to Depositors' discovery request, Canal was not obliged to assert a claim of privilege over documents not yet in existence.

¶ 15 Depositors next argues that Canal waived any claim of privilege by its initial failure or refusal to submit a privilege log. Depositors cites no authority that Canal's delay in submitting a privilege log constitutes a waiver of any privilege that would otherwise protect a document from disclosure. "[F]ailure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument." *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37.

¶ 16 Depositors also asserts that the privilege log that Canal ultimately submitted "never identified what privilege is being asserted with respect to dozens of documents" in the claim center file and the underwriting file. Illinois Supreme Court Rule 201(n) (eff. July 1, 2002) provides, "When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed." Entries in Canal's privilege log for the particular documents that we have identified as protected work product indicate that those documents "include[] information received from defense counsel concerning *** litigation strategy"; or that they "incorporate[] information obtained from reports from defense counsel and reports on *** strategic considerations, including *** [the] defense attorney's estimate of case value." Rule 201(n)'s purpose is "to enable the court to evaluate the applicability of the asserted privilege and determine the need for an *in camera* inspection of the documents, and also to minimize

any disputes between the parties regarding those matters." *Thomas v. Page*, 361 Ill. App. 3d 484, 497 (2005). With respect to the documents that we have found to be privileged, the privilege log served its purpose.

¶ 17 Depositors contends that Canal waived any privilege because it did not maintain separate files for the coverage litigation and the negligence litigation and because Canal employees responsible for Four Winds' defense shared information with Canal employees responsible for the coverage litigation. According to Depositors, "When Canal employees commingled communications, it was akin to a client (Canal) sharing privileged information with its opponent (Four Winds)." We disagree. Depositors' argument seems to assume a complete alignment of interests between Four Winds and the employees of Canal responsible for Four Winds' defense. However, those employees stand to gain nothing from a determination that Four Winds' policy covers any liability to Depositors. The employees all worked for Canal and had a common interest in serving Canal's best interests, whether that was defeating coverage altogether or minimizing damages should coverage be established. See *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 195-95 (1991). Accordingly, internal communications are not tantamount to disclosure to an adverse party.

¶ 18 Depositors asserts that Canal actually produced certain documents that it later claimed were privileged and that "after the *in camera* inspection, Canal produced hundreds of documents required by the court order." Depositors does not explain why the production of those documents should be considered a waiver of a claim of privilege over *different* documents that Canal *did not* produce.

¶ 19 Finally we consider whether Canal is entitled to relief from the finding of contempt and the order to pay roughly $8,000 in attorney fees to Depositors. "Where a party's refusal to comply with

a trial court's order constitutes a good-faith effort to secure an interpretation of the *** privileges in question, it is appropriate to vacate a contempt citation on appeal." *Cangelosi*, 366 Ill. App. 3d at 230. It is true that the trial court erroneously ordered Canal to turn over a number of documents that were entitled to protection under the work product doctrine. However, after reviewing all of the documents that Canal refused to turn over, we conclude that Canal withheld a substantial number of documents with no good-faith basis to believe that they were privileged. Accordingly, we decline to disturb the finding of contempt or the award of attorney fees.

¶ 20 For the foregoing reasons, we modify the order of October 8, 2011, such that the documents found herein to be protected work product need not be produced. In all other respects, the judgment of the circuit court of Kane County is affirmed and the case is remanded for further proceedings.

¶ 21 Affirmed as modified; cause remanded.