IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

[redacted]

Plaintiff,

v.

[redacted]

Defendant.

CIVIL CASE NO. 19-SCCV-090337

PLAINTIFF'S MOTION TO COMPEL PROGRESSIVE TO PRODUCE RECORDED STATEMENT

I. INTRODUCTION

This case arises from a collision at a four-way intersection. Plaintiff [redacted]'s light changed green and she began to accelerate into the intersection. At the same time, Defendant [redacted] ran a red light and drove in front of Ms. [redacted]'s path. Ms. [redacted] was unable to stop and struck Defendant's car. Ms. [redacted] suffered serious injuries, including a fractured wrist. Defendant has denied *any* responsibility for this wreck.

The evidence shows two important things in this case. *First*, Defendant [redacted] violated at least two laws in place for the protection of motorists. Defendant failed to obey a traffic control device, *see* Police Report (Ex. 1); *see also* [redacted] Dep., 31:20-22; 32:21-33:8. (Ex. 2), and her cell phone records also show that she was texting while she was driving in violation of Georgia law,

which likely caused the wreck.[1] Defendant's traffic violations support Plaintiff's claim for "bad faith" attorney's fees under O.C.G.A. § 13-6-11. *Nash v. Reed*, 349 Ga. App. 381, 383 (2019) (holding that a defendant's violation of laws enacted to protect motorists was sufficient evidence of bad faith to send the issue of attorney's fees under O.C.G.A. § 13-6-11 to the jury).

Second, the investigating officer spoke to both parties and found that Defendant was at-fault for the collision. [redacted] Dep., 31:20-22; 32:21-33:8. Defendant's continued denial of responsibility, despite clear evidence of fault, supports Plaintiff's claim for "stubborn litigiousness" under O.C.G.A. § 13-6-11. *See Daniel v. Smith*, 266 Ga. App. 637, 638 (2004) (holding that the evidence of "stubborn litigiousness," *i.e.*, the defendant's testimony tending to show some potential liability, was sufficient to send the issue of attorney's fees to the jury, even though the defendant denied liability).

In support of her two claims for attorney's fees under O.C.G.A. § 13-6-11, Plaintiff sought a copy of Defendant's recorded statement from Progressive Specialty Insurance Company ("Progressive"). Pl.'s Non-Party Requests (Ex. 3). Progressive served a response but refused to provide a copy of the recorded statement, contending the recorded statement was work product. Progressive's NP-RPD Resp. (Ex. 4).

On December 18, 2019, Plaintiff deposed Defendant. During the deposition, Defendant's sworn testimony confirmed that Progressive took her recorded statement. [redacted] Dep., 52:14-

[1] Relevant portions of Defendant's cell phone records are attached as Exhibit "5." Defendant testified about the times she was in her car driving on the day of the wreck leading up to the wreck. [redacted] Dep., 9:1-4,10:4-15, 12:19-21, 14:1-3. Defendant also testified that she called her mother about fifteen minutes after the wreck. *Id.* at 56:7-19. She also unequivocally testified that she was driving during the twenty minutes before the subject wreck. *Id.* at 16:18-22. Although Defendant denied texting while driving, her cell phone records provide prove that she was. The evidence also shows that approximately fifteen minutes after the time of the wreck—at 3:03PM—Defendant called her mother just as she testified. That records also show that Defendant was sending and receiving text messages every minute or so from around 2:30PM through 2:45PM—about 15 minutes before she called her mother.

53:1. **Without objection by defense counsel,** Defendant also testified about the contents of the recorded statement:

> Q. Did you call your insurance company after the wreck?
>
> A. Yes.
>
> Q. And for what purpose did you contact them?
>
> A. To say that I had been in an accident.
>
> Q. Did you give a recorded statement? Did you explain what happened to the insurance company?
>
> A. Yes.
>
> Q. And what did you tell them?
>
> A. That someone ran a red light and hit me.
>
> Q. So if there were a recorded statement, it would be consistent with your testimony today?
>
> A. Yes.

[redacted] Dep., 52:14-53:1.

On January 15, 2020, Plaintiff again sought a copy of the recorded statement by explaining that the recorded statement was not work product and why, if it was considered work product, she was still entitled to it. Kahn to Shelton 1/15/20 Letter (Ex. 6).[2] The undersigned requested a response by January 24, 2020 to avoid a motion to compel. Defendant has made no attempt to meet and confer with Plaintiff.

[2] Plaintiff's Certificate of Compliance with Uniform Superior Court Rule 6.4B is attached hereto as Exhibit "7."

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Court Should Order Progressive to Produce Defendant [redacted]'s Recorded Statement.

1. Standard for a Motion to Compel.

Code Section 9-11-26(b)(1) permits parties to obtain discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending litigation." O.C.G.A. § 9-11-26(b)(1). "[E]ven inadmissible documents are discoverable so long as they appear reasonably calculated to lead to the discovery of admissible evidence." *Tyson v. Old Dominion Freight Line, Inc.*, 270 Ga. App. 897, 900 (2004) (citations omitted). The goal of discovery "is the fair resolution of legal disputes, 'to remove the potential for secrecy and hiding of material.'" *Int'l Harvester Co. v. Cunningham*, 245 Ga. App. 736, 738 (2000) (quoting *Hanna Creative Enterprises v. Alterman Foods,* 156 Ga. App. 376, 378 (1980)).

Code Section 9-11-34(c)(1) provides that any party may serve on a non-party a request to produce documents containing any matter discoverable under the scope of O.C.G.A. § 9-11-26(b). Code Section 9-11-37(a)(2), made applicable to non-parties by O.C.G.A. § 9-11-34(c), allows for a party seeking discovery to move for an order compelling discovery where the recipient of a request fails to respond. O.C.G.A. § 9-11-37(a)(2).

The trial court's discretion in dealing with discovery matters is very broad, and appellate courts will not interfere with the exercise of that discretion absent a clear abuse. *Emmett v. Regions Bank*, 238 Ga. App. 455, 456 (1999); *Ostroff v. Coyner,* 187 Ga. App. 109, 117 (1988).

2. The recorded statement is relevant to establishing bad faith and stubborn litigiousness.

The recorded statement is relevant to Plaintiff's claims for attorney's fees under O.C.G.A. § 13-6-11 based on Defendant's "bad faith" and "stubborn litigiousness." Defendant claims she had a green light and that Plaintiff ran a red light, despite *clear* evidence that

Defendant ran the red light because she was distracted by her cell phone. The recorded statement is relevant to Defendant's bad faith because it will show what she told her insurance company shortly after the wreck, such as whether she was texting. The recorded statement is also relevant to Plaintiff's claim for stubborn litigiousness to the extent it contains evidence tending to show Defendant's liability, which contradicts Defendant's denial of liability in this case.

The contents of an insurance claim file are relevant to claims of "bad faith," including claims under O.C.G.A. § 13-6-11, and may be discovered. *Trehel Corp. v. Owners Ins. Co.*, No. 1:12-CV-3366-CAP, 2014 WL 11820250 (N.D. Ga. Nov. 19, 2014) (noting that "there is prior case law by this court ordering insurers to produce claim files where there is a claim of bad faith pursuant to O.C.G.A. § 13-6-11."); *see also Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663 (N.D. Ga. 2008).

Here, Plaintiff does not seek Progressive's *entire* claim file, but only Ms. [redacted]'s recorded statement, which will directly support her claims for attorney's fees. The bad faith conduct of Defendant is already clear from the record. For example, Defendant's cell phone records show that she was texting while driving, despite her admissions that texting while driving was dangerous. The recorded statement is indisputably relevant.

3. <u>The recorded statement is not subject to a claim of privilege.</u>

a. The recorded statement is not subject to protection under the work product doctrine.

Plaintiff seeks the recorded statement of Defendant [redacted], which was presumably taken early in this case, not to learn the mental impressions of the adjuster, but to understand whether Ms. [redacted] told the adjuster the same story she is telling in this lawsuit. "[T]he work product doctrine typically does *not* protect documents from discovery unless they are prepared in

anticipation of litigation." *State Farm Mut. Auto. Ins. Co. v. Howard*, 296 F.R.D. 692, 695 (S.D. Ga. 2013) (emphasis added). Thus, "the privilege is not automatically conferred upon insurer claims files." *Id.* In fact, courts have held that "[i]nsurance claim files generally *do not constitute work product* in the early stages of investigation, when the insurance company is primarily concerned with 'deciding whether to resist the claim . . .'" *Camacho v. Nationwide Mut. Ins. Co.*, 287 F.R.D. 688, 694 (N.D. Ga. 2012) (quoting *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 667 (N.D. Ga. 2008)) (emphasis added). Notably, Plaintiff does not seek the entire claim file, but only Ms. Manning's recorded statement.

Here, Progressive presumably took Ms. [redacted]'s recorded statement at the very early stages of its investigation and, therefore, it is not work product. *See Camacho*, 287 F.R.D. at 694. Importantly, Plaintiff does not seek the recorded statement to learn the mental impressions of the adjuster, but to understand whether factual statements made by Defendant are in fact true. Accordingly, Progressive should produce the recorded statement.

b. Progressive waived any claim of privilege over the recorded statement by failing to timely object during Defendant's deposition.

Even if the recorded statement was work product—which it is *not*—any attempt to assert a privilege objection would be futile. During her deposition, Defendant [redacted] testified about what she told Progressive shortly after reporting the subject wreck:

> Q. Did you call your insurance company after the wreck?
>
> A. Yes.
>
> Q. And for what purpose did you contact them?
>
> A. To say that I had been in an accident.
>
> Q. Did you give a recorded statement? Did you explain what happened to the insurance company?
>
> A. Yes.

Q. And what did you tell them?

A. That someone ran a red light and hit me.

Q. So if there were a recorded statement, it would be consistent with your testimony today?

A. Yes.

[redacted] Dep., 52:14-53:1.

Notably, no objection was raised. The failure to object and to allow Ms. [redacted] to testify as to what she told Progressive immediately following the subject wreck constitutes a waiver of any purported privilege. Accordingly, Progressive should be compelled to produce the recorded statement.

c. Plaintiff has a substantial need for the recorded statement.

To the extent the recorded statement constitutes work product and that claim of privilege was not waived during the deposition, Plaintiff shows a substantial need for the recorded statement. Accordingly, Progressive should produce the recorded statement.

The Civil Practice Act contemplates the discovery of documents, otherwise protected by the work product doctrine, where "the party seeking discovery has *substantial need* of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." O.C.G.A. § 9-11-26(b)(3) (emphasis added). Courts routinely order insurers to produce *entire* claim files where the files contain relevant information that cannot be obtained elsewhere. *See, e.g., Trehel Corporation*, 2013 WL 12061845, at *2 (recognizing relevance of claim file to claim for attorneys' fees for bad faith); *Camacho*, 287 F.R.D. at 696; *Underwriters Ins. Co.*, 248 F.R.D at 670-71 (finding that the plaintiff's need for the information in the insurer's claim file was substantial and the documents

in the file were the only reliable indication of the insurer's bad faith). Notably, here, Plaintiff does not seek the entire claim file, but only the recorded statement.

In *Trehel Corporation*, for example, the plaintiff sought to compel the production of an *entire* insurance claim file in relation to a claim for attorney's fees under O.C.G.A. § 13-6-11, relying principally on *Camacho*. 2013 WL 12061845, at *2. The defendant opposed the motion, arguing that *Camacho* (which ordered production of the claim file) was limited to the context of bad faith *failure to settle* versus a claim for attorney's fees. *Id.* The court rejected the defendant's argument, finding that the *Camacho* court "used the language of 'bad faith' without any reference to failure to settle in the portion of the opinion relevant to this issue.'" *Id.* Thus, in *Trehel*, the holding of *Camacho* was broadly construed to apply in any scenario where "bad faith" is an issue, such as a claim for attorney's fees as is the case here. *Id.*

Here, just as in *Trehel*, the recorded statement is indisputably relevant to the issue of Defendant's bad faith and Plaintiff's claims for attorney's fees. Defendant is denying responsibility for a wreck for which she was found at-fault. Further the evidence shows that Defendant's violation of a statute enacted to protect motorists was the proximate cause of the wreck. The recorded statement will illustrate whether Defendant told Progressive the same story then as she does now in an attempt to avoid responsibility. The only reliable source of this information is the recorded statement as Defendant [redacted] demonstrated a willingness to contradict her sworn testimony during her deposition. Accordingly, Plaintiff respectfully asks the Court to compel Progressive to produce the recorded statement.

B. The Court Should Award Plaintiff Attorney's Fees for the Cost of Bringing the Motion to Compel.

Progressive forced Plaintiff to seek the Court's intervention, requiring Plaintiff to incur attorney time for something it should have turned over without a fight. If the Court grants this

Motion, then pursuant to O.C.G.A. § 9-11-37(a)(4) an award attorney's fees to Plaintiff is required "unless [it] finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

Here, Progressive's failure to produce the recorded statement lacks justification for three reasons. *First*, the recorded statement is not subject to protection under the work product doctrine because it was taken early on in Progressive's investigation into the claims. *Second*, to the extent the recorded statement does constitute work product, Progressive waived any objection when it totally failed to respond to Plaintiff's discovery requests or Motion to Compel. *Third*, even if the Court finds that the recorded statement is work product and that Progressive has not waived its privilege, Plaintiff has demonstrated a substantial need for the recorded statement. Accordingly, an award of costs is warranted.

III. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court grant Plaintiff's Motion to Compel Progressive to Produce the Recorded Statement, and order Progressive to produce Defendant Alison [redacted]s recorded statement within ten (10) days of an Order. Plaintiff also requests her reasonable attorney's fees.

Respectfully submitted this 24th day of January 2020.

BUTLER LAW FIRM

BY: */s/ Matthew R. Kahn*
JAMES E. BUTLER, III
Georgia Bar No. 116955
MATTHEW R. KAHN
Georgia Bar No. 833443

10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
(t) 678 940 1444
(f) 678 306 4646

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served, this date, the within and foregoing ***PLAINTIFF'S MOTION TO COMPEL PROGRESSIVE TO PRODUCE RECORDED STATEMENT*** on all parties via U.S. First Class mail or as indicated below:

William R. Shelton, Jr.
Worsham, Corsi, Scott & Dobur
P.O. Box 674027
Marietta, GA 30006
Attorney for Defendant and Non-Party Progressive Specialty Insurance Company

Norman C. Pearson, III
Chambless, Higdon, Richardson, Katz & Griggs, LLP
P.O. Box 18086
Macon, GA 31209-8086
Attorney for Attorney for GEICO General Insurance Company

This 24th day of January 2020.

BUTLER LAW FIRM

BY: */s/ Matthew R. Kahn*
JAMES E. BUTLER, III
Georgia Bar No. 116955
MATTHEW R. KAHN
Georgia Bar No. 833443

10 Lenox Pointe
Atlanta, Georgia 30324
jeb@butlerfirm.com
matt@butlerfirm.com
(t) 678 940 1444
(f) 678 306 4646

ATTORNEYS FOR PLAINTIFF