IN THE STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

[redacted]

Plaintiff,

v.

[redacted]

Defendant.

CIVIL CASE NO. 19-SCCV-090337

PLAINTIFF'S REPLY IN SUPPORT OF HER MOTION TO COMPEL PROGRESSIVE TO PRODUCE RECORDED STATEMENT

Plaintiff recently took Defendant's deposition. Defendant stuck to her story that *she* had a green light and it was Plaintiff who ran the red light and caused the wreck, despite a contrary finding by the Bibb County Sheriff's Department. Defendant also swore that she was *not* using her phone. Plaintiff obtained Defendant's cell phone records which prove that Defendant was not telling the truth about the phone—she was texting while driving. Since Defendant has not been truthful under oath, Plaintiff needs to see her recorded statement to see what she said shortly after the collision *before* anyone anticipated litigation, which is directly relevant to Plaintiff's claims for bad faith and stubborn litigiousness under O.C.G.A. § 13-6-11. *Trehel Corp. v. Owners Ins. Co.*, 2013 WL 12061845, at *2 (N.D. Ga. Dec. 2, 2013) (finding that insurance claim file may be relevant to a claim arising under O.C.G.A. § 13-6-11). Defendant does not challenge relevance.

1. The recorded statement is not work product.

Georgia's appellate courts have not analyzed the discoverability of a recorded statement taken *before* litigation was anticipated. *Cf. Copher v. Mackey*, 220 Ga. App. 43 (1996) (reviewing

discoverability of defendant's recorded statement taken *after* plaintiff gave a statement claiming to have suffered injuries as a result of the defendant's negligence). However, federal district courts applying Georgia law have concluded that an insurance claim file is not always work product. Rather, a claim file is only protected when prepared in anticipation of litigation. *State Farm Mut. Auto. Ins. Co. v. Howard*, 296 F.R.D. 692, 695 n. 7 (S.D. Ga. 2013) ("Courts are reluctant to declare as 'work product' the routine 'file investigation' of each claim, especially those portions of a claims file generated before a decision is made to investigate in bona fide anticipation of litigation.")

Critically, where a recorded statement is taken in the "early stages of investigation, when the insurance company is primarily concerned with 'deciding whether to resist the claim," the statement is typically ***not work product***. *E.g.*, *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)). Stated differently, whether a recorded statement constitutes work product is entirely based upon the timing of the statement and the purpose for which the statement was taken.

A Virginia Circuit Court was faced this issue and held that the recorded statement was *not* entitled to work product protection under similar circumstances to the present. *Estabrook v. Conley*, 42 Va. Cir. 512 (1997). In *Estabrook*, Progressive Insurance Company took the recorded statement of its insured two days after a car wreck. *Id.* at 512. Like here, the recorded statement was taken early in Progressive's investigation, before the defendant retained counsel or the carrier assigned counsel, and "before Plaintiff had made or suggested any claim." *Id.* The Court keenly noted that "[i]f the matter was not significant enough to involve counsel with an eye to preparing a litigation defense, it is not in this Court's view entitled to the protection" as work product. *Id.*

Here, the recorded statement is not work product. Progressive took the recorded statement "a short time after the subject occurrence," but Defendant nonetheless claims the recorded statement was taken in anticipation of litigation despite lack of notice of any forthcoming claim. Def.'s Resp., p. 2. The Court in *Estabrook* rejected the proposition that *every* recorded statement is taken in anticipation of litigation. *Estabrook*, 42 Va. Cir. at 512. The Court held that such an "assumption [of litigation] *cannot be the predicate for a sweeping claim of work product protection*." *Id.* (emphasis added). This proposition "would create a *de facto* new class of privileged material which would cover virtually all types of routine accident investigations." *Id.* "If there is going to be such a sweeping change in trial practice, it must come from the General Assembly." *Id.*

The Georgia General Assembly has not issued a blanket protection for all recorded statements. Nor have Georgia's appellate courts. The Court should compel Progressive to produce the recorded statement.

2. <u>Any putative work product objection was waived.</u>

Even assuming *arguendo* that the recorded statement is work product—it is not—Defendant waived any work product protection when Defendant answered questions about the recorded statement with no objection from defense counsel. *See, e.g.*, *Sperling v. City of Kennesaw Dep't*, 202 F.R.D. 325, 328 (N.D. Ga. 2001) (holding that a party waived work product protection by referring to an otherwise protected document in her deposition); *see also Mohawk Indus., Inc. v. Interface, Inc.*, 2008 WL 5210386, at *9 (N.D. Ga. Sept. 29, 2008) ("A waiver of the attorney-client privilege also may occur when a party discloses otherwise privileged communications, *or testifies as to those communications*."); *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 503 (2002) ("Most courts hold that to waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information.").

Plaintiff made this point in her Motion to Compel, and Defendant has conceded it by offering no counterargument or authority in Defendant's response. *See O'Donnell v. Bd. of Trustees*, 2016 WL 3633348, at *2 (M.D. Ga. June 29, 2016) (dismissing one of plaintiff's claims because she failed to address the argument in her brief); *see also Alexander-Igbani v. Dekalb Cty. Sch. Dist.*, 2013 WL 12097455, at *5 (N.D. Ga. July 11, 2013) (finding a party's failure to address an argument meant the party conceded the argument).

The Georgia Supreme Court has held that "the burden of proving a waiver of work-product protection lies on the party asserting the waiver." *McKesson Corp. v. Green*, 279 Ga. 95, 96 (2005). Plaintiff met her burden, but Defendant made no attempt to rebut the argument (likely because she cannot). Georgia law is clear that a waiver occurs where otherwise protected information is disclosed to an actual or potential adversary. *Id.* Because Defendant (and her legal counsel) waived any putative protection under the work product doctrine, the Court should compel Progressive to produce the statement.

3. <u>Plaintiff has a substantial need for the recorded statement.</u>

Plaintiff *already* deposed Defendant. Plaintiff asked whether Defendant used her phone at all while she was driving, including just before the wreck. Manning Dep., 22:4-23:6, 57:7-9 (Ex. 1). Defendant denied using her phone while driving or at the time of the wreck. *Id.* However, Defendant's phone records show incoming and outgoing text messages during the time she said she was in the car leading right up the wreck. Pl.'s MTC, Ex. 5 thereto. Further, although Defendant contends it was Plaintiff who ran the red light, not her, she admits that the officer found that it was Defendant that ran the light. *Id.*, 31:20-33:8, 36:10-12. The inconsistencies directly impact Defendant's credibility in this disputed liability case.

Appellate courts have found a lack of credibility sufficient to compel a recorded witness statement. *See, e.g.*, *Dillard Dep't Stores, Inc. v. Sanderson*, 928 S.W.2d 319, 321–22 (Tex. App. 1996) (holding "[i]ssues of credibility and failing memory have been held to satisfy the substantial need and undue hardship exception" in the context of recorded witness statements); *accord Underwriters Insurance*, 248 F.R.D. at 669 (N.D. Ga. 2008) (finding substantial need where "the accuracy of certain deposition testimony is itself at issue"). At least one Georgia trial court ordered an insurer to produce a recorded statement under these circumstances. *See* Order Granting Motion to Compel, *Alan Stevenson v. Ahmed Sabbir, et al.*, In the State Court of Gwinnett County, CAFN: 17-C-07405-S5 (Ex. 2) ("Plaintiff attempted to obtain the information in the recorded statement directly from Defendant Mohammad by other means (taking his deposition July 27, 2018) but was unable to do so.").

Here, Defendant's recorded statement, which was taken shortly after the wreck, *before* Defendant anticipated a lawsuit, is the *most* reliable source to learn Defendant's account of the wreck. *See Camacho*, 287 F.R.D. at 695 (holding that a plaintiff's need for information in an insurer's claim file is substantial because the documents in the file are often the only *reliable* documents). Unless Defendant contradicted herself, as Plaintiff suspects, there is no reason for Progressive to want to withhold the recorded statement.

CONCLUSION

Progressive should be compelled to produce Defendant's recorded statement. At the very least, the Court should conduct an *in camera* review of the recorded statement to determine if Defendant made material misrepresentations during her deposition and in her pleadings. *See McKinnon v. Smock*, 264 Ga. 375 (1994) (holding that court must conduct an *in camera* review of documents where dispute exists over whether document is work product).

Respectfully submitted this 27th day of February 2020.

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CERTIFICATE OF SERVICE

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

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This 27th day of February 2020.

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