

STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 415-7-12 Wrcv

Brittany Kelton,
Plaintiff

v.

Progressive Specialty Insurance Company,
Defendant

Decision on Motion to Compel and Motion for Protective Order

This is an action for compensatory and consequential damages founded on contractual obligations in an insurance policy. Plaintiff Brittany Kelton was involved in a motor vehicle accident with an uninsured motorist and seeks payments allegedly due to her pursuant to an insurance policy with Defendant Progressive Insurance Company. Plaintiff filed a motion to compel discovery on June 6, 2013. Defendant filed a motion for protective order and a response to Plaintiff's motion on June 20, 2013.

Plaintiff asks the Court to compel Defendant to answer three discovery requests. The first request is for all documents in Defendant's claim file generated between the date of the accident and the date Plaintiff obtained counsel. The second request is for communications between Defendant and any other person regarding the accident. The third request concerns Defendant's valuation of Plaintiff's claim.

Defendant offers several opposing arguments in its filings. Defendant argues that Plaintiff seeks protected attorney work product in her requests for the claim file and Defendant's valuation of the claim. It further argues that the request for "all communications" between certain dates is not relevant and not "reasonably calculated" as required by Vermont's Rules of Civil Procedure. Defendant additionally requests that it be protected from the annoyance, embarrassment, oppression, and undue burden of responding to Plaintiff's requests.

The scope and limits of discovery are governed by Rule 26 of the Vermont Rules of Civil Procedure. Information and documents obtained through discovery must be relevant to the subject matter involved in the pending action and reasonably calculated to lead to the discovery

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of admissible evidence. V.R.C.P. 26(b)(1). Even when requested information is relevant, the Court has a duty to limit discovery to protect parties from annoyance and excessive expense. *Chrysler Corp. v. Makovec*, 157 Vt. 84, 89 (1991). Rule 26(b)(1) thus requires the Court to limit discovery if it determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from a less burdensome source, or if the discovery is unduly burdensome considering the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake. V.R.C.P. 26(b)(1). Attorney work product is generally privileged unless compelling circumstances make disclosure necessary. *In re PCB File No. 92.27*, 167 Vt. 379, 382 (1998); *Hartnett v. Med. Ctr. Hosp. of Vt.*, 146 Vt. 297, 299 (1985).

Plaintiff correctly argues that the attorney work product privilege does not preclude her request for the portion of the claim file dated before Plaintiff acquired counsel. See *Killington, Ltd. v. Lash*, 153 Vt. 628, 647 (1990) (work product privilege only applies when litigation is imminent or pending). Plaintiff fails to establish, however, how her request is relevant to the subject matter involved in the pending action and how it is reasonably calculated to lead to the discovery of admissible evidence. Plaintiff asserts that "the value that a party places on a contract is centrally relevant to the cause of action" but does not explain why. It actually is not relevant to this contract action.

The claim file will likely only contain information about Defendant's subjective view of how the claim is valued. Defendant's subjective valuations are not relevant to the subject matter underlying this action, which is whether the insurance policy requires Defendant to pay the claim. The request would be relevant, however, if Plaintiff's claim involved a refusal to settle based on bad faith. See *Maglin v. Tschannerl*, 174 Vt. 39, 42–43 (2002) (claim valuation is relevant in the context of determining whether a settlement was conscionable).

The third request, which explicitly requests Defendant's valuation of the claim, is also irrelevant to the subject matter of the pending action as well as a direct request for privileged attorney work product. For the reasons given above, Plaintiff's first and third requests, which concern claim valuation, are unlikely to lead to admissible evidence and the third request is for privileged information.¹ The Court protects Defendant from answering those requests.

The above conclusion does not necessarily prevent Plaintiff from acquiring some of the requested information. Factual information, such as statements made by Plaintiff or the uninsured motorist, is relevant to the claim and may be discoverable. Thus, Plaintiff's second request for communications between Defendant and any other person regarding the accident is relevant.² Defendant argues that the request is not reasonably calculated because it is too broad, possibly because it uses the phrase "any person." The request is limited, however, to communications regarding the accident underlying this action. The request is relevant and reasonably calculated to lead to admissible evidence. Defendant is compelled to answer the

¹ Plaintiff does not argue that compelling circumstances exist here that outweigh the privilege.

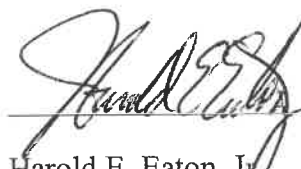
² Subject to some caveats, such as communications protected by attorney-client privilege.

second request insofar as the requested communications are not privileged, such as by attorney work-product, attorney-client privilege or otherwise. It is not possible as a broad proposition to determine what communications may need to be disclosed, but those taken after counsel was retained by Defendant in answer to the litigation, in general, are protected by work-product privilege.

ORDER

Plaintiff's motion to compel is **granted** for the second discovery request, which asks for communications between Defendant and any person regarding the accident, subject to any claim of privilege. Plaintiff's motion to compel is **denied** for the remaining requests and Defendant's motion for a protective order is **granted** for those requests. Plaintiff may make further requests for factual information contained in the claim file, subject to Defendant's claims of privilege on a statement-specific basis.

Dated this 29 day of July, 2013, at Woodstock, Vermont.



Harold E. Eaton, Jr.
Superior Court Judge

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