

**CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT**

Minnehaha County
425 N. Dakota Ave.
Sioux Falls, SD 57104

February 19, 2021

[Sent by email and not by U.S. Mail]

David Ganje

Gary Thimsen & Joel Engle III

Dustin DeBoer
Special Assistant AG / DOT

Karla Engle
Special Assistant AG / DOT

Re: Denise Zimmerman, Dale Olstad, Emily Muller & Jeffrey James v.
State of South Dakota
49 CIV 20-808

Dear Counsel:

This letter is my decision on Plaintiffs' motion to compel.

Facts & Procedural Background

Most of the relevant facts and procedural background are set forth in the Court's October 30, 2020, letter decision on the State's motion for summary judgment.

Plaintiffs own residential properties near Renner, South Dakota. Plaintiffs' properties abut South Dakota Highway 115. Highway 115 crosses an unnamed tributary of Silver Creek. The tributary acts as drainage for surface waters.

In 1988, the State replaced a six-foot by six-foot box culvert that ran underneath Highway 115 with four 48-inch concrete pipe culverts.

On March 13, 2019, the area received a large amount of rainfall. The soil was frozen and not able to absorb additional water. Also, the four culverts were clogged with ice and snow, thus the highway acted like a dam. The ground water that normally drains through the course of the unnamed tributary began to pool and eventually flooded the Plaintiffs' properties.

Plaintiffs are making a claim against the State for inverse condemnation, alleging that the State's construction and maintenance of Highway 115, including the pipe culverts, was the legal cause of flooding and damage to the Plaintiffs' property on March 13, 2019.

Plaintiffs' served interrogatories and requests for production of documents on the State. The State served its responses on May 1, 2020. A copy of the State's answers to interrogatories and requests for production of documents is attached as Exhibit A to the Affidavit of Joel Engel, filed October 9, 2020.

Plaintiffs filed a motion to compel pursuant to SDCL 15-6-37(a), asserting the State's responses are incomplete. The parties have briefed the issues and a hearing was held on the motion at which the parties presented oral argument.

Legal Analysis

Overview of Discovery Statutes

SDCL § 15-6-26(b) provides for the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SDCL § 15-6-37(a)(2) -(3) provides the statutory basis for filing a motion to compel:

If... a party fails to answer an interrogatory submitted under § 15-6-33, or if a party in response to a request for inspection submitted under § 15-6-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order...

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

SDCL § 15-6-37(a)(4)(A) provides:

If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court ~~ng~~s N

avoid suppressing otherwise competent evidence.” *Bertelsen v. Allstate Ins. Co.*, 2001 S.D. 13, H 44, 796 N.W.2d 685, 700 (quoting *DM&E* ¶ 57).

The purpose of the attorney/client privilege is to encourage clients “to make full disclosures to their attorneys, in turn enabling the attorney to act more effectively, justly and expeditiously.” *Kaarup v. St. Paul Fire and Marine Insurance Company*, 436 N.W.2d 17, 20-21 (S.D. 1989)(citing 2 J. Weinstein and M. Berger, Weinstein’s Evidence § 503[02] (1988)).

Work Product Doctrine

SDCL § 15-6-26(b)(3) provides for the privilege of documents created in anticipation of litigation:

Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

To determine whether a document or tangible thing is attorney work product, courts are to determine whether “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Kaarup* at 21 (quoting 8 C. Wright and A. Miller § 2024 at 198).

Attorney work product is afforded broader protection than that created by the attorney/client privilege. *Kaarup* at 21. Work product is discoverable only if 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.” SDCL § 15-6-25(b)(3). However, an attorney’s *opinion* work product receives greater protection as even if a party can show a substantial need for the materials, SDCL § 15-6-25(b)(3) requires that a court “shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

Pre-Denial Investigation

After the flooding occurred, at least some of the Plaintiffs submitted a claim for damages to the State. The State utilizes the Public Entity Pool for Liability (PEPL Fund) to provide tort liability coverage for employees of the State. The PEPL Fund is not insurance. The State further utilizes the Office of Risk Management (ORM) to address claims of loss or liability made against the State. The ORM, in turn, contracts with a third party, Claims Associates, to assist in investigating and evaluating claims against the State.

After the State was notified of the claims, an employee of Claims Associates, Cory Beck, began an investigation. On April 22, 2019, the State informed Plaintiffs Zimmerman and Muller that it was denying liability for the flood damage. Plaintiff James was informed of the same on May 3, 2019.

Plaintiffs argue that the State should be compelled to produce documents in response to Plaintiffs "Additional Requests for Production of Documents" #1 which asks that the State produce "Any and all reports and communications by and between the State's insurance carriers and the State regarding the flood." The State responded that there was "no insurance coverage for this matter." The Defendant also produced a Vaughn Index, which included, among other entries, an entry for reports from Cory Beck of Claims Associates created between April 1, 2019, and April 13, 2019, which were being withheld on the basis of attorney-client privilege and the work-product doctrine.

The Plaintiffs, in fulfilling the "meet and confer" requirement of 37(a), asked the State for documents created before May 3, 2019. The State again objected to the discovery on the grounds of work product and attorney-client privilege:

In *Dakota, Minnesota & Eastern Railroad Corporation v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623, the Court examined a case in which an attorney essentially acted as the claims adjuster, ruling that when an insurer "unequivocally delegates its initial claims function and relies exclusively upon outside counsel to conduct the investigation and determination of coverage, the attorney-client privilege does not protect such communications." *DM&E*, 156. The Court reasoned that holding otherwise "would permit an insurer to insulate its claims handling process from any disclosure or review by simply delegating the claims process to its attorneys and asserting privilege." *DM&E*, H 57. The Court also reinforced the idea that "privileges created by statute are to be strictly construed to avoid suppressing otherwise competent evidence." *DM&E*, 157.

In this case I do not have sufficient information to know what, if any, of the reports and accompanying documents submitted to the State by Cory Beck of Claims Associates are protected by either the attorney-client privilege or the work product doctrine. I do not know if the State is claiming Beck is an attorney, what information provided by Beck was

sent to an attorney, what information is factual, what information is disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney, etc.

Factual information regarding the flood event contained in the documents is likely discoverable. Other information including mental impressions, conclusions, opinions, or legal theories, is likely not discoverable.

I order that the State provide to the Court for an *in-camera* review those documents that are responsive to Plaintiff's "Additional Requests for Production of Documents" #1. The State must also specifically identify the information in said documents that the State is claiming is protected from disclosure and why the State is claiming it is protected.

Pre- and Post-Flood Reports, Studies and Communications

Plaintiffs "Additional Requests for Production of Documents" #4 requests that the State produce "Any pre-flood and post-flood incident reports, studies, and communications concerning the flood; the timeframe here is 6 months pre-flood and 6 months post-flood."

The State responded that there were no pre-flood incident reports, studies or communications. As to the remainder of the request, the State referred to exhibits that were being produced with the discovery responses.

Plaintiffs maintain that it is unlikely the information provided constitutes all the documents and information in the possession of or under the control of the State. Plaintiffs further assert that if the State is going to maintain the position that there are no pre- or post-flood reports or communications for the DOT workers on scene, the State should be required to submit affidavits by each of the DOT personnel identified in the State's answer to Plaintiffs Interrogatory #6 stating that they created and received no pre- or post-flood incident reports or communications.

There is no authority for the Court to require affidavits from each of the DOT personnel stating that there are no pre- or post-flood reports or communications for the DOT workers on scene. I also cannot order production of documents that the State asserts do not exist. If there is information or a document in the possession of the State or under the State's control that is responsive to any of the discovery requests, the State of course must disclose the information or produce the documents. If any such information or document exists that should be disclosed, but is not, and Plaintiffs can prove the same, the Court can impose appropriate sanctions. But again, I cannot compel disclosure of information or production of documents that the State asserts do not exist.

A Full Copy of Exhibit N

Plaintiffs assert that Exhibit N produced by the State is incomplete, including that the date and time of the communication has been omitted. I order that the State produce a complete image of Exhibit N that includes the time and date the message was sent. If the State is claiming any portion of Exhibit N is protected from disclosure, the State may submit it to the Court for an *in-camera* review.

Other Information

Plaintiffs request that the Court order production of documents related to the State's Maintenance Decision Support System, WebMDSS, Integrated Road Information System, and Environmental Sensor Stations. I do not see in the discovery requests any such specific requests. If Plaintiffs believe such information should be produced, they should make a specific discovery request to the State.

Attorney Fees

I do not award attorney fees to any party.

I direct Plaintiffs to prepare a proposed order incorporating this letter decision by reference.

Sincerely,



Jon Sogn
Circuit Court Judge