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CASE ALERT

APPELLATE DIVISION CLARIFIES STANDARD FOR EVALUATING WORK-PRODUCT PRIVILEGE

In [Paladino v. Auletto Enters.](#), No. A-0232-18T1 (App. Div. June 6, 2019), the Appellate Division articulated standards for the assertion of privilege over pre-litigation documents obtained by liability insurers. Specifically, the case involved witness statements and photographs taken by the defendant's liability insurer. The photos depicted the scene of the plaintiff's fall-down accident. The insurer obtained the photos and statements before litigation was commenced and before defense counsel was retained.

In [Paladino](#), the insurer retained an investigator after the claim was reported and instructed the investigator to take photos of the accident scene and obtain witness statements. Accordingly, the investigator took photos of the scene and obtained three recorded statements from the defendant's employees. The adjuster later certified that her purpose in retaining the investigator was "to prepare a defense for [defendant] in the event that [plaintiff] filed a suit" rather than for the purpose of making a coverage determination. The plaintiff subsequently filed suit.

The plaintiff's attorney filed a motion to compel the production of the photographs and recorded statements, which defense counsel refused to produce as work product. The trial court granted the plaintiff's motion without oral argument.

The Appellate Division initially denied leave, but the Supreme Court granted leave to appeal and remanded the case to the Appellate Division to consider the issue on the merits.

The work-product doctrine is memorialized in [Rule 4:10-2\(c\)](#). The Appellate Division reaffirmed the "multi-part, fact-specific test" set forth under [Rule 4:10-2\(c\)](#), requiring that a party seeking to "pierce" the work-product privilege must demonstrate (1) a substantial need for the materials and (2) that he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials. As to the threshold question—whether or not the materials constitute protected work-product—the Appellate Division rejected the trial court's reasoning that the carrier was not acting in anticipation of litigation simply because there was no pending litigation at the time. The Appellate Division explicitly held that "there is no *per se* or presumptive rule that materials prepared or collected before litigation are not prepared in anticipation of litigation."

The Appellate Division explained that both [Pfender v. Torres](#), 336 N.J. Super. 379 (App. Div. 2001), and [Medford v. Duggan](#), 323 N.J. Super. 127 (App. Div. 1999), should be read to demonstrate that the two-part test under [Rule 4:10-2\(c\)](#) is "fact-specific" and must be conducted on a

“case-by-case” basis. The trial court failed to make the requisite fact-specific analysis, i.e. whether the witnesses whose statements were taken still had an independent recollection of the accident and could thus be deposed, whether the scene of the accident depicted in the photos had changed since the photos were taken, etc.

The Appellate Division further held that the trial court should have evaluated the claims examiner’s certification before making a decision on the issue. Thus, the Appellate Division remanded to the trial court to conduct the appropriate case-by-case, fact-specific analysis to determine whether the photographs and witness

statements fall within the ambit of the work-product doctrine.

This holding underscores the importance of making clear the intention of pre-litigation evidence-gathering, i.e. coverage investigation vs. investigation of claim merits. It also reiterates the wisdom of retaining counsel early in the process, as pre-litigation investigation materials are more likely to be protected as litigation work product if they are gathered at the direction of counsel.

Feel free to email any of [our partners](#) should you have any questions about this important ruling and its application to your claims.

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