No. COA 12-1493 TWENTY-FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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JUDY HAMMOND, Plaintiff, v. SAIRA SAINI, M.D., CAROLINA PLASTIC SURGERY OF FAYETTEVILLE, P.C., VICTOR KUBIT, M.D., CUMBERLAND ANESTHESIA ASSOCIATES, P.A., WANDA UNTCH, JAMES BAX, and CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., Defendants.	)	From Cumberland County No. 11-CVS-8281

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PLAINTIFF-APPELLEE'S BRIEF

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ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN ORDERING DEFENDANTS TO PRODUCE DISCOVERY WHEN THEY FAILED TO MEET THEIR BURDEN OF PROVING THE INFORMATION IS PROTECTED BY THE MEDICAL PEER REVIEW PRIVILEGE?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ORDERING DEFENDANTS TO PRODUCE DISCOVERY WHEN THEY FAILED TO MEET THEIR BURDEN OF PROVING THE INFORMATION IS PROTECTED BY THE WORK PRODUCT DOCTRINE OR ATTORNEY-CLIENT PRIVILEGE?

III. DOES THIS COURT HAVE JURISDICTION TO CONSIDER DEFENDANTS' INTERLOCUTORY APPEAL OF THE TRIAL COURT'S DISCOVERY RULINGS ON NON-STATUTORY GROUNDS?

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REJECTING DEFENDANTS' RELEVANCY OBJECTIONS TO DISCOVERY?

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). A narrow exception to the general rule applies when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial." *Id.* at 166, 522 S.E.2d at 581. Thus, challenges to discovery orders based on the medical peer review privilege, attorney-client privilege, or work product doctrine may be heard on an interlocutory appeal. *See Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 124, 678 S.E.2d 787, 790 (2009) (peer review privilege); *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 636, 673 S.E.2d 694, 701 (2009) (work product); *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001) (attorney-client privilege).

The portions of defendants' appeal related to statutory privileges – Issues I and II – are properly before this Court.

However, as discussed in Argument Section IV.A, *infra*, the remaining portion of the appeal – Issue III – does not concern a substantial right and should be dismissed.

STATEMENT OF FACTS

I. PLAINTIFF'S LAWSUIT FOR MEDICAL MALPRACTICE

On 28 September 2011, plaintiff Judy Hammond filed this action against Defendants Sairi Saini, M.D., Carolina Plastic Surgery of Fayetteville, P.C., Victor Kubit, M.D., Cumberland Anesthesia Associates, P.A., James Bax, Wanda Untch, and Cumberland County Hospital System, Inc. ("CCHS"). As described in the Complaint, plaintiff suffered severe injuries from a fire that occurred in the operating room during her surgery and has brought negligence claims against each of the defendants. (R pp 3-18).[1]

Specifically, on 17 September 2010, defendant Saini, an employee of Carolina Plastic Surgery of Fayetteville, P.C., operated on plaintiff to excise a possible basal cell carcinoma from plaintiff's face. (R pp 4, 8). Defendant Kubit, an employee of Cumberland Anesthesia Associates, P.A., was the anesthesiologist for the surgery. (R pp 5, 8). Defendants Untch

[1] In their Statement of the Facts, defendants cite to statements made by their counsel at the motion hearing regarding their conduct during the surgery in question. (Defs' Br. at 6-7.) There is no evidence in the record to support these statements.

and Bax, employees of CCHS, are registered nurse anesthetists who were involved in the provision of anesthesia care to plaintiff. (R p 8). Kubit, Untch, and Bax used monitored anesthesia with total intravenous anesthesia to anesthetize plaintiff during the surgery. *Id.* The surgery was performed at the Cape Fear Valley Medical Center, which is operated by CCHS. (R p 6).

During the surgery, Kubit, Untch, and Bax administered supplemental oxygen to plaintiff through a face mask. (R p 8). Drapes were placed on plaintiff's face in such a way that oxygen from the supplemental oxygen built up under the drapes. (R p 11). The oxygen administered to plaintiff created an oxygen-enriched environment near the area of plaintiff's face where Dr. Saini was operating. (R p 9).

Electrocautery is commonly used to stop bleeding that occurs during surgery like that performed on plaintiff. *Id.* Dr. Saini used electrocautery on plaintiff while the defendants who were providing anesthesia services continued to administer oxygen, igniting a fire that burned the drape that was near plaintiff's face. (R pp 11-12). Plaintiff sustained first and second degree burns on her face, head and neck, upper back, right hand, and tongue, as well as a respiratory thermal injury,

right bronchial edema, oral stomatitis, and nasal trauma, leaving her with permanent injuries and scars. (R p 12).

II. PLAINTIFF'S DISCOVERY REQUESTS AND DEFENDANTS' RESPONSES

On 12 January 2012, plaintiff served separate sets of interrogatories and requests for production of documents on defendants Bax and Untch. (R pp 36-61). The discovery requests sought information concerning discussions involving or statements made by the defendants about plaintiff's surgery, documents regarding those statements, and documents about the surgery. *Id.*

On 19 January 2012, plaintiff served a set of interrogatories and requests for production of documents on defendant CCHS. (R pp 62-83). The discovery requests sought information concerning written statements about plaintiff's surgery, any investigation or root cause analysis of the incident, any committee or department meetings about the incident, incident reports, related discussions, relevant policies and bylaws, and documents submitted to any peer review committee. *Id.*

Defendant Bax served his discovery responses on 21 March 2012. (R pp 95-107). In his response to Interrogatory #5, Bax stated that he met with Harold Maynard, in CCHS Risk Management,

to discuss plaintiff's surgery. (R p 98). He objected to disclosing the contents of the meeting, claiming they were privileged. *Id.* Another meeting was held at the same time with the medical staff and plaintiff's family members about the surgery and fire. *Id.* Bax did not recall what was specifically said at this meeting. *Id.*

Defendant Untch served her discovery responses on 21 March 2012. (R pp 108-20). In her response to Interrogatory #13, Untch stated that she met with a representative of the CCHS Risk Management department after the surgery. (R p 115). She likewise objected to disclosing the contents of the meeting, claiming they were privileged. *Id.* Untch also met with Bax and Dr. Kubit on the day of the surgery and they talked about the fire. (R p 112). Untch did not recall what was specifically said at this meeting. *Id.*

Defendant Bax served his supplemental discovery responses on 9 April 2012. (R pp 233-47). In his supplemental response to Interrogatory #9, which concerned documents about plaintiff's medical treatment, Bax stated that he prepared a Quality Control Report on the day of the surgery. (R pp 239-40). He claimed that the document was privileged. (R p 240).

Defendant CCHS served its initial discovery responses on 10 April 2012. (R pp 121-232). In its response to Interrogatory #1,

which concerned statements or reports about plaintiff's surgery, CCHS identified three documents: (1) Quality Control Reports prepared by Defendant Bax and Stephanie Emanuel on 17 September 2010; (2) notes of Harold Maynard, CCHS Risk Manager, made after a 20 September 2010 meeting with operating room personnel; and (3) a Root Cause Analysis Report prepared on 15 November 2010. (R pp 122-23). No other details regarding the documents were provided. *Id.* CCHS claimed that all the documents were privileged. (R p 123).

In its response to Interrogatory #2, which requested details on any investigation about plaintiff's surgery, CCHS stated that five named individuals made up the "RCA Team." (R p 123). No other information about the investigation was provided, including the positions or credentials of the five named persons. *Id.* CCHS claimed that all information and related documents were privileged. *Id.*

In its response to Document Request #1, which requested hospital policies and procedures regarding nine specific relevant topics, CCHS produced two indices of policies instead of the responsive policies. (R pp 132-33). CCHS asked plaintiff to identify policies from the indices that would be responsive to the request, though it indicated it would only produce those it considered relevant. (R p 133).

Document Request #3 requested "all documents submitted to any peer review committee, not to include any documents prepared at the direction of the committee or for purposes of the committee, regarding the incident alleged in plaintiff's complaint." (R p 133). In its response, CCHS stated that "the incident alleged in Plaintiff's Complaint was not subject to peer review." *Id.*

On 9 April 2012, plaintiff's counsel sent a detailed letter to defendants' counsel concerning inadequacies and omissions in the discovery responses from defendants Bax and Untch. (R pp 275-79). Because Bax and Untch failed to address these issues, plaintiff filed a motion to compel discovery from Bax and Untch on 23 May 2012. (R pp 262-87).

On 18 May 2012, plaintiff's counsel sent a detailed letter to defendants' counsel concerning inadequacies and omissions in the discovery responses from defendant CCHS. (R pp 301-05). In the letter, plaintiff's counsel requested that 23 specific policies from the policy indices be produced immediately, including the Quality Care Control Report, Reportable Incidents, and Patient Safety Response Team policies. (R p 304). Because CCHS failed to address these issues, plaintiff filed a motion to compel discovery from CCHS on 25 May 2012. (R pp 288-306).

On 30 May 2012, CCHS served its supplemental discovery responses. (R pp 310-30). In the response to Document Request #3, CCHS maintained that "the incident alleged in Plaintiff's Complaint was not subject to peer review." (R p 323). CCHS did not provide any of the additional policies specifically requested by plaintiff's counsel.

III. THE TRIAL COURT'S HEARING ON PLAINTIFF'S MOTIONS TO COMPEL AND ORDERS COMPELLING DISCOVERY

Plaintiff's motions to compel against defendants Bax, Untch, and CCHS were both heard by the Honorable Mary A. Tally on 4 June 2012. (R pp 344, 348). During the hearing, defendants submitted several documents to the court for *in camera* review, apparently consisting of the identified Quality Care Control Reports and Root Cause Analysis report. (T pp 85-86).

Defendants also submitted the affidavit of Harold Maynard during the hearing. (T p 53; R p 331). Maynard is the risk manager for CCHS, and is not identified as an attorney. (R p 331). Attached to the affidavit is a CCHS policy titled "Sentinel Events and Root Cause Analysis," which had not been produced in response to plaintiff's discovery requests. (R pp 334-38). The policy states on the top of each page that it was "Approved by MN." *Id.* Without any supporting documentation or assertion of first-hand knowledge, Maynard stated in his

affidavit that the policy had been adopted by the medical staff and governing board of CCHS. (R p 331).

Maynard stated that the Quality Care Control Reports prepared by Bax and Emanuel were considered by the Root Cause Analysis Committee. (R p 332). He stated that a Root Cause Analysis Report was prepared on 15 November 2010, but did not describe who created the report and what process led to its creation. *Id.* Finally, he claimed that the notes he took in the 20 September 2010 meetings with operating room personnel and with plaintiff's family members were prepared in anticipation of litigation. *Id.*[2]

On 18 June 2012, the court issued orders granting plaintiff's motions to compel discovery. (R pp 344-52). With regard to defendants Bax and Untch, the court overruled their objections and ordered them to provide full and complete answers to Interrogatory Nos. 2, 3, 4, 5, 7, 9, 12, 13, and 14, and Document Request Nos. 1, 2, and 4, with a protective order in place for produced personnel files. (R pp 344-46).

[2] After the hearing, on 11 June 2012, defendant CCHS served its second supplemental set of discovery responses, in which it belatedly claimed that the events of plaintiff's surgery were subject to a peer review process. (R S pp 373-93). This document was not submitted to the trial court for consideration on plaintiff's motions to compel.

With regard to defendant CCHS, the court stated that it considered the motion, arguments of counsel, the parties' post-hearing briefs, and the documents submitted for *in camera* review. (R p 348). The court further stated that CCHS "did not carry its burden of proof that the documents are privileged materials." *Id.* The court thus overruled CCHS's objections and ordered it to provide full and complete answers to Interrogatory Nos. 1, 2, 3, 4, 5, 6, 8, 11, 12, 13, and 18, and Document Request Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 20, 21, and 22, with various limitations and a protective order in place for produced personnel files. (R pp 348-51).

The court did not make findings of fact or conclusions of law in either of its orders. (R pp 344-51). At no point did defendants request that the court make findings of fact or conclusions of law.

ARGUMENT

The trial court correctly concluded that defendants failed to carry their burden of showing that their post-incident documents and discussions are covered by the medical peer review privilege. Defendants failed to prove that its "RCA Team" meets the statutory definition of "medical review committee," or that the RCA Team created the Root Cause Analysis Report. The other contested sources of information – the Quality Care Control

Reports, notes of Harold Maynard, and contents of the immediate post-incident discussions – are not protected by the peer review privilege because they were not produced by or at the explicit direction of any medical review committee.

Defendants likewise failed to prove that any of these documents are covered by attorney-client privilege or the work product doctrine. None of the documents or discussions involved an attorney, so the attorney-client privilege is inapplicable. The documents in question were created in the ordinary course of business, and thus do not quality as work product. And, even if they do so qualify, plaintiff demonstrated a substantial need for the documents because the witnesses now claim to have forgotten the post-incident discussions.

Defendants' remaining arguments as to the overbreadth and relevance of certain discovery requests are not properly before this Court because no substantial right is affected. Defendants' non-statutory challenges to an interlocutory order compelling discovery should be dismissed. In the alternative, the trial court's orders should be affirmed because all of the information sought is relevant for discovery purposes, and defendants have failed to show that the trial court abused its discretion.

I. STANDARD OF REVIEW

"'Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion.'" *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 535, 694 S.E.2d 416, 419 (2010) (quoting *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318–19 (2007)). "Under this standard, an appellant can only prevail 'upon a showing that the actions are manifestly unsupported by reason and so arbitrary that they could not have been the result of a reasoned decision.'" *K2 Asia Ventures v. Trota*, __ N.C. App. __, 717 S.E.2d 1, 8 (2011) (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998)).

Issues of statutory construction in a discovery dispute, such as the applicability of N.C. Gen. Stat. § 131E–95(b), are reviewed *de novo*. *Bryson*, 204 N.C. App. at 535, 694 S.E.2d at 419. However, application of the work product doctrine and the attorney-client privilege in a discovery dispute is reviewed under the abuse of discretion standard. *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788 (2001).

"Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party ...." N.C. Gen. Stat. § 1A–1, Rule

52(a)(2). "It has been repeatedly held by our Supreme Court that, when the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *K2 Asia Ventures*, 717 S.E.2d at 8 (quoting *Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788). "'Thus, it is within the trial judge's discretion whether to make findings of fact if a party does not choose to compel a finding through the simple mechanism of so requesting.'" *Id.* (quoting same).

II. DEFENDANTS DID NOT MEET THEIR BURDEN OF ESTABLISHING THAT THE POST-INCIDENT INFORMATION IS COVERED BY THE MEDICAL PEER REVIEW PRIVILEGE.

"'It is for the party objecting to discovery of privileged information to raise the objection in the first instance and he has the burden of establishing the existence of the privilege.'" *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 536, 694 S.E.2d 416, 420 (2010) (quoting *Adams v. Lovette*, 105 N.C. App. 23, 28, 411 S.E.2d 620, 624 (1992)). Defendants, therefore, have the burden of establishing that discoverable information is protected by the peer review privilege. *Id.* As the trial court concluded, defendants have not met their burden.

The medical peer review privilege for a hospital is codified in N.C. Gen. Stat. § 131E–95, which provides in part:

> The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and ... shall not be subject to discovery or introduction into evidence in any civil action against a hospital ... which results from matters which are the subject of evaluation and review by the committee.

§ 131E-95(b). Section 131E–76 in turn defines "medical review committee":

> (5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
>
> a. A committee of a state or local professional society.
> b. A committee of a medical staff of a hospital.
> c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
> d. A committee of a peer review corporation or organization.

§ 131E-76(5).

"By its plain language, N.C. Gen. Stat. § 131E–95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee." *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009). "The statute

also, however, provides that 'information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.'" *Bryson*, 204 N.C. App. at 537, 694 S.E.2d at 420 (quoting § 131E-95(b)).

The Supreme Court construed the interplay of these two provisions in *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 347 S.E.2d 824 (1986). "These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings." *Id.* at 318 N.C. at 83, 347 S.E.2d at 829.

The Court explained further: "The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose." *Id.* Accordingly, these "materials may be discovered and used in evidence even though they were considered by the medical review committee." *Id.* at 84, 347 S.E.2d at 829.

Applying these principles, defendants have not established that the peer review privilege is applicable here.

A. DEFENDANTS FAILED TO SHOW THAT THE ROOT CAUSE ANALYSIS REPORT WAS PRODUCED BY A "MEDICAL REVIEW COMMITTEE."

Defendants contend that the Root Cause Analysis Report concerning the operating room fire is privileged because the "RCA Team" is a medical review committee. (Defs' Br. at 18-20.) Defendants' argument fails for two reasons.

First, defendants have not shown that the RCA Team is a properly constituted medical review committee. It is evident that the RCA Team does not meet prongs (a), (b), and (d) of the definition of "medical review committee" in section § 131E-76(5). The RCA Team is apparently affiliated with the hospital, so it is not a "committee of a state or local professional society" or "committee of a peer review corporation or organization." *See* § 131E-76(5)(a), (d). No evidence in the record shows that the five named individuals on the RCA Team are part of the medical staff of CCHS or that they are licensed in any medical field. Thus, the RCA Team does not constitute a "committee of a medical staff of a hospital." *See* § 131E-76(5)(b).

This leaves prong (c), which requires that a committee be "created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system." §

131E-76(5)(c). There is no evidence that the RCA Team was created by the governing board or medical staff of CCHS. In fact, there is no evidence at all about how the RCA Team was created following the operating room fire.

Under the second part of prong (c), defendants argue that the RCA Team operates under the Sentinel Event policy attached to Maynard's affidavit. However, defendants produced no evidence that this policy was adopted by the governing board or medical staff of CCHS. To the contrary, the policy explicitly states on the top of each page that it was "Approved by MN." (R pp 334-38). No evidence shows that "MN" stands for the governing board or medical staff of CCHS, and the initials apparently reference some other person or entity.

Defendants instead rely on Maynard's affidavit, which summarily claims that the Sentinel Event policy was adopted by the medical staff and governing board of CCHS. Maynard, however, did not provide the basis for this assertion, any first-hand knowledge of the approval process, or any supporting documentation other than the policy itself, which contradicts his assertion. Moreover, in its initial and supplemental discovery responses, CCHS stated that the operating room fire "was not subject to peer review." (R pp 133, 323).

Because the trial court was not required to issue findings of fact, "it is presumed that the court on proper evidence found facts to support its judgment." *See K2 Asia Ventures v. Trota*, __ N.C. App. __, 717 S.E.2d 1, 8 (2011). Therefore, it must be presumed that the trial court resolved this factual dispute in favor of plaintiff and either found as fact that the Sentinel Event policy was not adopted by the governing board or medical staff of CCHS or that defendants failed to meet their burden on this point. As a result, the RCA Team does not constitute a medical review committee under § 131E-76.

Second, even if the RCA Team is a medical review committee, defendants have not established that the RCA Team produced the Root Cause Analysis Report. Paragraph 8 in Maynard's affidavit identifies the five individuals on the RCA Team. (R p 332). The next sentence reads: "A Root Cause Analysis Report was prepared on November 15, 2010." *Id.* At no point, however, does Maynard state that the RCA Team, or any of its members, prepared the report. On the contrary, the obscurantist passive voice ("was prepared") indicates that some other individual or entity created the report.

Again, because of the presumption that the trial court found facts to support its decision, it must be presumed that the court either found as fact that the RCA Team did not produce

the Root Cause Analysis Report or that defendants failed to meet their burden on this point. The evidence fully supports either finding. The report thus cannot be protected by the peer review privilege.

B. DOCUMENTS PRODUCED BY OPERATING ROOM STAFF AND NOTES CONCERNING DISCUSSIONS WITH THEM ARE NOT PROTECTED BY THE PEER REVIEW PRIVILEGE.

Because the RCA Team does not meet the statutory definition of medical review team, the post-incident documents and information from operating room personnel are not protected by the peer review privilege. Moreover, even if the RCA Team were a proper peer review committee, these documents and information were merely considered by the committee and thus are not shielded from discovery.

The Supreme Court in *Shelton* established that "information, in whatever form available, from original sources other than the medical review committee is not immune from discovery," even though "they were considered by the medical review committee." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 83-84, 347 S.E.2d 824, 829 (1986). This Court has repeatedly applied this principle.

In *Cunningham v. Cannon*, 187 N.C. App. 732, 654 S.E.2d 24 (2007), the Court considered the application of the peer review privilege to information submitted by the defendant physician to

a peer review committee for its consideration. *Id.* at 737, 654 S.E.2d at 27. The Court held that because the information was generated by the defendant, and not by the committee, the information was not protected by the peer review privilege and was discoverable. *Id.*

Similarly, in *Armstrong v. Barnes*, 171 N.C. App. 287, 614 S.E.2d 371 (2005), the Court considered whether the defendant physician could be deposed regarding information he had disclosed to a medical review committee. *Id.* at 294, 614 S.E.2d at 376. The Court held that because the physician was the original source of the information, the peer review privilege did not apply. *Id.*

In this case, defendants seek to shield (1) Quality Care Control Reports prepared by Defendant Bax and Stephanie Emanuel on 17 September 2010; (2) notes of Harold Maynard, CCHS Risk Manager, made after a 20 September 2010 meeting with operating room personnel; and (3) the contents of the 20 September 2010 meeting with operating room personnel. All of this information was generated by individuals who were not on the RCA Team. Bax, Emanuel, and Maynard are the original sources of this information, not the RCA Team. Regardless of whether the RCA Team considered this information, it is not shielded by the peer review privilege, and is thus discoverable. *See Shelton*, 318

N.C. at 83-84, 347 S.E.2d at 829; *Cunningham*, 187 N.C. App. at 737, 654 S.E.2d at 27; *Armstrong*, 171 N.C. App. at 294, 614 S.E.2d at 376.

Defendants argue that the Quality Care Control Reports should be shielded as part of the peer review process because the Sentinel Event policy states that such reports can identify errors worthy of review. (R p 336). The mere fact that reports bring errors to the review committee's knowledge does not mean that they are privileged. Information from sources outside the committee is not shielded, regardless of whether the committee regularly considers the same type of information. *See Cunningham*, 187 N.C. App. at 737, 654 S.E.2d at 27. Otherwise, even information from patients, listed as a means of identifying sentinel events, (R p 336), would be shielded from discovery. Such a result is plainly at odds with the Supreme Court's construction of the privilege.

C. THE SEPARATE MEDICAL REVIEW PRIVILEGE IN CHAPTER 90 IS NOT APPLICABLE.

A distinct but similar peer review privilege is codified in N.C. Gen. Stat. § 90-21.22A. This privilege covers the proceedings and documents produced by a "medical review committee," or a "quality assurance committee," as specifically defined in section 90-21.22A(a). The privilege does not apply

here because the RCA Team is neither a "medical review committee" nor a "quality assurance committee."

A "medical review committee" for this peer review statute is defined as a "committee composed of health care providers licensed under this Chapter that is formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing." § 90-21.22A(a)(1). Defendants produced no evidence that any of the five named individuals on the RCA Team is a licensed health care provider. The RCA Team thus cannot be a "medical review committee."

A "quality assurance committee" is composed of "risk management employees of an insurer licensed to write medical professional liability insurance in this State, who work in collaboration with health care providers licensed under this Chapter, and insured by that insurer, to evaluate and improve the quality of health care services." § 90-21.22A(a)(2) (emphasis added). Because no evidence shows that any of the five named individuals on the RCA Team are employees of an insurer, the RCA Team cannot be a "quality assurance committee."

Defendants also argue that Harold Maynard's notes are protected because he is a quality assurance committee member. (Defs.' Br. at 17.) Maynard, however, identified himself as an employee of CCHS, not an employee of an insurer. Thus, even if

Maynard were a member of a committee that addressed "quality assurance" issues, that committee could not meet the statutory definition of a "quality assurance committee." Therefore, the privilege in section 90-21.22A is wholly inapplicable.

III. DEFENDANTS' DOCUMENTS ARE NOT PROTECTED BY THE WORK PRODUCT DOCTRINE OR ATTORNEY-CLIENT PRIVILEGE.

Defendants contend that either the work product doctrine or attorney-client privilege prevents discovery of the contents of Harold Maynard's discussions with operating room personnel soon after the operating room fire and his notes of those discussions. As the trial court concluded, defendants have failed to establish that either privilege is applicable.

A. WORK PRODUCT.

The work-product doctrine shields from discovery materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent...." N.C. Gen. Stat. § 1A-1, Rule 26(b)(3). The protection encompasses documents prepared after a party secures an attorney and documents prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2007); *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976).

Materials prepared in the ordinary course of business, however, are not protected by the work-product doctrine. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006). Specifically, "even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation." *Cook v. Wake Cty. Hosp. Sys.*, 125 N.C. App. 618, 624, 482 S.E.2d 546, 551 (1997) (quoting 8 Wright, Miller and Marcus, Federal Practice and Procedure: Civil, § 2024 at 343 (1994)).

The party asserting the work product privilege "bears the burden of showing that the documents were prepared 'in anticipation of litigation.'" *Diggs*, 177 N.C. App. at 310, 628 S.E.2d at 864. "Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose, which is to safeguard the lawyer's work in developing his client's case." *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) (quoting *Suggs v. Whitaker*, 152 F.R.D. 501, 505 (M.D.N.C.1993)). The work product doctrine only protects "documents or tangible things." *Brown v. Am. Partners*

Fed. Credit Union, 183 N.C. App. 529, 540, 645 S.E.2d 117, 125 (2007).[3]

"The protection given to matters prepared in anticipation of trial, or work product, is not a privilege, but a qualified immunity." *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 594, 551 S.E.2d 873, 876 (2001). The work product doctrine "forbids the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship ... obtain the substantial equivalent of the materials by other means.'" *Long v. Joyner*, 155 N.C. App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)).

In this case, defendants seek to shield from discovery documents that were created immediately after an accident. Because post-accident investigative reports are routinely prepared in the ordinary course of business, this Court has rejected similar claims of work product protection.

In *Cook v. Wake County Hospital System*, this Court considered whether an accident report prepared by a hospital regarding a doctor's slip and fall constituted work product.

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[3] Because the work product protection applies only to documents, it does not preclude interrogatory responses about the substance of Maynard's discussions with operating room personnel.

After noting that risk management documents are not automatically work product, the Court reviewed the hospital's "risk management policy." *Cook*, 125 N.C. App. at 624-25, 482 S.E.2d at 551. That policy set out mandatory reporting procedures for incidents and accidents as an administrative tool for identifying areas of risk and reporting occurrences inconsistent with hospital safety or care of patients. *Id.* at 625, 482 S.E.2d at 551. The Court pointed out that the accident reports were not discretionary, but were required of all employees. *Id.* Once a report was made, the administration and Risk Management would make the final decision to report potential claims of liability. *Id.* The Court concluded that "defendant's accident reporting policy exists to serve a number of nonlitigation, business purposes" and accident investigation occurs regardless of whether litigation was ever anticipated. *Id.* Therefore, work product protection did not apply. *Id.* at 625-26, 482 S.E.2d at 551-52.

In *Diggs v. Novant Health, Inc.*, the defendant hospital had a policy "for the reporting of all unexpected events." *Diggs*, 177 N.C. App. at 311, 628 S.E.2d at 865. The Court held that any "documents generated pursuant to that policy would not be entitled to protection" as work product. *Id.* at 311-12, 628 S.E.2d at 865. Similarly, in *Fulmore v. Howell*, 189 N.C. App.

93, 657 S.E.2d 437 (2008), the Court rejected work product protection for an accident report because the company's policy manual required the creation of such reports for safety purposes. *Id.* at 102, 657 S.E.2d at 443; *see also Evans*, 142 N.C. App. at 30, 541 S.E.2d at 790 (holding that materials prepared in the course of an insurance company's investigatory process are not covered as work product).

Here, defendant CCHS has policies for Quality Care Control Reports, Reportable Incidents, and a Patient Safety Response Team. (R pp 165-66). It is likely that these policies required the production of Quality Care Control Reports by Bax and Emanuel, as well as Maynard's discussions with them, both of which occurred immediately after the operating room fire. The full extent of the obligations under these policies is unknown, though, because defendants have repeatedly failed to produce these policies in discovery, even though they were specifically requested by plaintiff, not privileged, and obviously relevant.

Because the trial court below was not required to find facts, "it is presumed that the court on proper evidence found facts to support its judgment." *See K2 Asia Ventures v. Trota*, __ N.C. App. __, 717 S.E.2d 1, 8 (2011). Therefore, it must be presumed that the trial court resolved this factual dispute in favor of plaintiff and either found as fact that the post-

accident investigatory documents were created pursuant to CCHS policies, and thus in the ordinary course of business, or that defendants failed to meet their burden on this point. This decision is fully supported by the record, including CCHS's repeated failure to produce the relevant policies.

In addition, plaintiff has a substantial need for Maynard's interview notes because the operating room personnel stated in their discovery responses that they do not recall the specifics of the post-fire discussions with Maynard and plaintiff's family members. Maynard's notes are the only substitute for their lost recollections. Therefore, plaintiff's substantial need for the documents and inability to obtain the information in any other way would overcome the qualified immunity that work product protection would provide if applicable. *See Long*, 155 N.C. App. at 136, 574 S.E.2d at 176; *see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 985 (4th Cir. 1992) (noting the substantial need for witness statements taken soon after an accident because they are "unique catalysts in the search for truth in the judicial process").

B. ATTORNEY-CLIENT PRIVILEGE.

There are five requirements for a communication to be protected by attorney-client privilege:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Fulmore v. Howell, 189 N.C. App. 93, 99, 657 S.E.2d 437, 441 (2008) (quoting *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003)). If any requirement is not met, the communication is not privileged. *Id.* "The party who claims the privilege bears the burden of demonstrating that the communication at issue meets all the requirements of the privilege." *Id.*

None of the documents or communications at issue were made by or to an attorney. Neither Harold Maynard nor any members of the RCA Team are identified as attorneys. Therefore, the attorney-client privilege is inapplicable.

Finally, defendants argue that the trial court erred in not finding facts regarding their assertions of privilege. The court was not required to do so because defendants did not request findings. *See K2 Asia Ventures v. Trota*, __ N.C. App. __, 717 S.E.2d 1, 8 (2011); *cf. Hall v. Cumberland County Hosp. Sys., Inc.*, 121 N.C. App. 425, 431, 466 S.E.2d 317, 320 (1996) ("The trial judge erred in not making these determinations and in

refusing to enter any findings of fact when requested to do so by the defendant." (emphasis added)).

IV. DEFENDANTS' CHALLENGES BASED ON OVERBREADTH AND RELEVANCE SHOULD BE DISMISSED FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, REJECTED ON THEIR MERITS BECAUSE THERE WAS NO ABUSE OF DISCRETION.

A. THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER DEFENDANTS' NON-STATUTORY ARGUMENTS.

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). If a portion of an appeal of a discovery order concerns a substantial right and a portion does not, the latter part of the appeal should be dismissed.

For example, in *Veitia v. Mulshine Builders, LLC*, COA No. 12-309, 2012 WL 4878877 (N.C. Ct. App. Oct. 16, 2012) (unpublished, in attached addendum), the first part of the appeal challenged the relevance of a compelled response, and the second part concerned work product. The Court dismissed the first part of the appeal because no substantial right was affected. *Id.* at *3; *see also K2 Asia Ventures v. Trota*, __ N.C. App. __, 717 S.E.2d 1, 4 (N.C. Ct. App. 2011) (holding that only

the portion of a discovery order concerning privilege was immediately appealable).

Defendants challenge the orders compelling discovery on overbreadth and relevance grounds, without even claiming that a substantial right is affected. (Defs.' Br. at 29-35.) Because these garden-variety discovery disputes do not affect a substantial right, this portion of defendants' appeal should be dismissed.

B. PLAINTIFF'S DISCOVERY REQUESTS SEEK RELEVANT INFORMATION AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN COMPELLING RESPONSES.

The test of relevancy under Rule 26(b) differs from the more "stringent test" of relevancy under the rules of evidence. *Adams v. Lovette*, 105 N.C. App. 23, 29, 411 S.E.2d 620, 624 *aff'd per curiam*, 332 N.C. 659, 422 S.E.2d 575 (1992). Information is relevant for discovery purposes if it is "reasonably calculated to lead to the discovery of admissible evidence." *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(1)). This test "must be construed liberally," and "the determination of relevance is within the trial court's discretion." *Id.* The trial court's determinations can only be reversed for an abuse of discretion, which is when "its actions are manifestly unsupported by reason." *Id.*

Defendants raise six relevancy objections to the trial court's decision, none of which have merit. First, the trial court compelled disclosure of any past legal claims brought against defendant Bax arising out of his medical practice. (R p 345). The information sought is relevant because previous claims may have placed Bax on additional notice of hazards to avoid in performing plaintiff's surgery.

Second, the trial court compelled disclosure of Bax and Untch's personnel files, subject to a protective order. (R p 346). The personnel files undoubtedly describe defendants' "training and experience" – information that is directly relevant to the standard of care in medical malpractice actions. *See* N.C. Gen. Stat. § 90-21.12 ("members of the same health care profession with *similar training and experience*"). Although defendants raise the specter of a violation of the Health Insurance Portability and Accountability Act (HIPAA), there is no evidence in the record that disclosure of any documents in the personnel files would violate HIPAA. *See also* 45 C.F.R. § 164.512(e)(1) (permitting disclosure in judicial proceedings).

Third, the trial court compelled disclosure of information concerning training at CCHS hospitals other than Cape Fear Valley Medical Center. (R p 349). Such information is plainly relevant because it could show that the training provided at

Cape Fear Valley Medical Center was less comprehensive than that at other hospitals and thus negligent.

Fourth, the trial court compelled Bax and Untch's identification of documents maintained by CCHS that are related to plaintiff's surgery and medical treatment. (R p 345). Identification of such documents is plainly relevant. That CCHS is also a defendant does not preclude Bax and Untch from disclosing their knowledge of relevant documents.

Fifth, the trial court compelled CCHS to produce copies of advertisements for the Cape Fear Valley Medical Center from 1 January 2005 to the date of the order. (R p 350). Even though this information extends beyond the date of plaintiff's surgery and involves services other than surgery, the advertisements demonstrate CCHS's public statements concerning the quality of its care and are potentially relevant to establishing the standard of care for plaintiff's claims.

Finally, the trial court compelled Bax and Untch to provide complete responses regarding communications about plaintiff's surgery. (R p 345). Such communications are plainly relevant. All of the trial court's decisions are consistent with the broad definition of relevance under Rule 26, and none are manifestly unsupported by reason.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's orders granting plaintiff's motions to compel discovery.

Respectfully submitted, this 26th day of February, 2013.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff-appellee hereby certifies that a copy of Plaintiff-Appellee's Brief was sent via first class mail, postage prepaid, addressed as follows:

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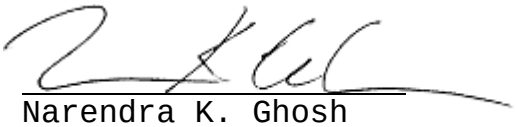
This the 26th day of February, 2013.



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Unpublished Disposition
2012 WL 4878877
Only the Westlaw citation is currently available.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

Agustin E. VEITIA, Plaintiff
v.
MULSHINE BUILDERS LLC, Defendant.

No. COA12–309. | Oct. 16, 2012.

Opinion

***1** Appeal by plaintiff from order entered 21 October 2011 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 29 August 2012.

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CALABRIA, Judge.

Agustin E. Veitia ("plaintiff") appeals from an order compelling discovery in favor of Mulshine Builders, LLC ("defendant"). We dismiss in part and affirm in part.

I. Background

In September 2007, plaintiff contracted with defendant to build a house located at Far Away Drive in Boone, North Carolina. Defendant, as the general contractor, was to coordinate and supervise the subcontractors that he hired to perform work on the premises. A year later, in late September 2008, the house burned to the ground.

The Watauga County Fire Marshal's Office investigated the fire and determined that the fire was likely caused by a painter's rags that were discarded in an open plastic garbage can. Some of defendant's employees observed the painter, Marty Green ("Green"), "throwing his painting and staining rags into an open plastic trash can."

Plaintiff claims that defendant agreed to "coordinate and oversee the work of third-parties performing work on the premises." Defendant admits that he agreed to supervise subcontractors but his supervision was limited to the individuals that he hired, not third-parties hired directly by plaintiff. Green was not one of the subcontractors defendant hired; plaintiff hired him.

Both plaintiff and defendant were insured by North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"). On 26 September 2008, plaintiff submitted a claim for the loss of the house to Farm Bureau. Between the date of the fire and 14 October 2008, investigators from Farm Bureau determined that the amount of the loss and damage exceeded $600,000, but plaintiff's builder's risk policy only provided $250,000 of coverage. In addition, they determined that Green discarded the rags that potentially caused the fire and that plaintiff hired Green, not defendant. On 15 October 2008, Vernie Earl Fountain ("Fountain"), the Manager for the Special Investigative Unit for Farm Bureau, along with two other individuals, determined that there was no evidence of liability on the part of defendant. Since plaintiff was underinsured and Green had no assets from which plaintiff could recoup his losses, Farm Bureau decided to open a liability claim file to protect defendant because of "the anticipation of litigation against" defendant.

Plaintiff hired an independent fire investigator ("the unnamed individual" or "consultant") prior to removing the debris from the area affected by the fire ("the area"). On 16 October 2008, plaintiff's consultant inspected the area and took photographs. In addition, plaintiff removed a wire from the area in the consultant's presence.

***2** On 13 February 2009, Farm Bureau sent plaintiff a letter indicating that their investigation revealed "no legal liability on the part of" defendant, and indicated they were unable to compensate plaintiff for his loss. On 10 November 2010, plaintiff filed a complaint against defendant alleging breach of contract, negligence and promissory estoppel. On 10 February 2011, plaintiff filed an amended complaint which added a claim for breach of

an implied-in-fact contract and another count of negligent supervision. Defendant filed an answer, interrogatories and requests for production of documents. Defendant also conducted depositions to use at trial, including the deposition of plaintiff's interior decorator, Sheila Wilde ("Wilde").

On 12 September 2011, defendant filed a motion to compel discovery, seeking, *inter alia*, production of an investigative report prepared by the unnamed individual along with a request for the court to enter an order compelling plaintiff to answer questions regarding the identity of the unnamed individual and the nature and extent of the relationship between plaintiff and Wilde. On 21 September 2011, defendant also filed a request to inspect a wire that plaintiff had removed from the fire area. On 21 October 2011, subsequent to a hearing, the trial court granted defendant's motion to compel, in part, and denied the motion in part. The specific portions of defendant's motion to compel information that the trial court granted were, *inter alia*, the identity of plaintiff's fire consultant, as well as production of his report and the materials that had been gathered from the fire scene. Plaintiff was also required to answer questions regarding his relationship with Wilde. Plaintiff appeals. On 14 November 2011, an order was entered granting plaintiff's motion to stay the case pending resolution of the appeal.

II. Interlocutory Appeal

Plaintiff argues that the trial court erred by ordering him to answer questions regarding an alleged affair with Wilde. We find that plaintiff has failed to show that **discovery** of this issue affects a substantial right, and thus dismiss this **portion** of plaintiff's **appeal** as **interlocutory**.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp .*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> [I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay.... Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted).

In the instant case, the trial court's order was not a "final" judgment as to one of the claims or parties. Since the trial court's order was not "final" in nature, the order is not immediately appealable by a Rule 54(b) certification. *Evans v. United Servs. Auto. Ass'n*, 142 N.C.App. 18, 23, 541 S.E.2d 782, 786 (2001). Therefore, plaintiff "has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C.App. 377, 380, 444 S.E.2d 252, 254 (1994). In determining whether a substantial right has been affected, "a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury ... if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

***3** In the instant case, plaintiff initially notes that evidence of an extramarital affair with a non-party is "inadmissible and, hence, not discoverable." However, our statutes indicate that "it is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." N.C. Gen.Stat. § 1A–1, Rule 26(b)(1) (2011). Therefore, the fact that the information may be later inadmissible does not determine that the information is not discoverable.

Plaintiff also contends that the testimony in question affects a substantial right because it infringes on state and federal constitutional protections. Specifically, plaintiff contends if he is required to testify regarding the alleged extramarital affair his right to privacy will be violated.

As an initial matter, the trial court's order placed limitations on the questions defendant could ask:

> That Defendant's motion that Plaintiff fully answer questions regarding the nature of the relationship between Plaintiff and witness [Wilde] IS GRANTED. Defendant may ask questions regarding, for example, whether the relationship was professional, platonic, friendly, antagonistic, romantic, and intimate or sexual,

> may ask questions regarding the duration of the relationship and may ask questions which explore the factual basis for any such label. The Defendant shall not ask questions delving into the nature and extent of private and intimate activities of Plaintiff and [Wilde], if any beyond asking about whether or not there was a sexual component to the relationship.

Plaintiff's claim that the information sought by defendant seeks to "harass" plaintiff and Wilde and "explore and introduce prejudicial testimony about a supposed affair" fails. The trial court's order specifically notes that defendant "shall not ask questions delving into the nature and extent of private and intimate activities of plaintiff" and Wilde.

Since the trial court's order protects plaintiff's right to privacy, plaintiff has the burden of demonstrating how the trial court's order affects a substantial right. One of the questions plaintiff was required to answer was whether the relationship was professional, platonic, friendly, antagonistic, romantic, and intimate or sexual. Another question was what was the duration of the relationship. Once the questions were answered, plaintiff was also required to provide the factual basis for any such label. "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C.App. 274, 277–78, 679 S.E.2d 512, 516 (2009). Plaintiff's bare assertion that the order affects a substantial right without demonstrating why is insufficient to meet the burden of showing a substantial right. Since plaintiff failed to demonstrate how an inquiry into the nature and extent of his *relationship* with Wilde would affect his substantial right to privacy, we dismiss this portion of plaintiff's appeal as interlocutory.

III. Discovery of Work Product

***4** As an initial matter, our Supreme Court has held that where "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right...." *Boyce & Isley, PLLC v. Cooper*, 195 N.C.App. 625, 637, 673 S.E.2d 694, 701–02 (2009). Therefore, plaintiff's issues concerning the discovery of what he considers is undiscoverable work product, is immediately appealable. *See id.*

Plaintiff argues that the trial court erred by finding that the unnamed individual's report was not the type of report that is considered work product under the work product doctrine. We disagree.

"When reviewing a trial court's ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C.App. 21, 24, 693 S.E.2d 172, 175, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason ... [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

According to our statutes:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's 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 case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

N.C. Gen.Stat. § 1A1, Rule 26(b)(3) (2011). However, when ordering discovery of such materials, the trial court "may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought." *Id.* Such information concerning the litigation that is "prepared in anticipation of trial" is considered work product and is not discoverable. *Evans*, 142 N.C.App. at 28, 541 S.E.2d at 788–89. The party seeking the protection of the work product doctrine "is required to show: (1) the material consists of documents or tangible things; (2) which were prepared in anticipation of litigation or for trial; (3) by or for another party or its representatives." *In re Ernst &*

Young, LLP, 191 N.C.App. 668, 678, 663 S.E.2d 921, 928 (2008), *aff'd in part, modified in part and remanded*, 363 N.C. 612, 684 S.E.2d 151 (2009). "The protection [under the work product doctrine] is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). Generally, "documents prepared before an insurance company denies a claim ... will not be afforded work product protection." *Evans*, 142 N.C.App. at 31, 541 S.E.2d at 790.

***5** In the instant case, the material plaintiff seeks to protect involves the unnamed individual and material acquired by the unnamed individual. In order to be protected by the work product doctrine, plaintiff must show that the unnamed individual was a protected party and that the material was "prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. The trial court's order to compel discovery found that the unnamed individual was not a consulting, non-testifying expert, and thus was not a protected party. Plaintiff claims the trial court's ruling was error, and that the unnamed individual was a consulting, non-testifying expert. Even assuming, *arguendo*, plaintiff's contention is correct, that the unnamed individual was a consultant and his report could be considered work product, plaintiff still has the burden to show that the information was "prepared in anticipation of litigation" in order for it to be excluded from discovery. *Ernst*, 191 N.C.App. at 678, 663 S.E.2d at 928.

In the instant case, the fire occurred on 25 September 2008. The next day, plaintiff submitted a claim of loss to Farm Bureau. Between the time of the loss due to the fire and 14 October 2008, Farm Bureau employees investigated the loss and damage. On 15 October 2008, Fountain, along with two other employees, conducted a review of the investigation. Although Farm Bureau employees determined that there was no evidence of defendant's liability, a liability claim file was opened because they anticipated litigation against defendant. At plaintiff's request, the unnamed individual investigated the fire scene on 16 October 2008. Farm Bureau delayed informing plaintiff of its intention to deny coverage until 13 February 2009.

Plaintiff claims that his contact with Farm Bureau in the time period after the fire led him to believe that "Farm Bureau and [defendant] were planning to deny responsibility for the fire." While plaintiff has produced evidence that Farm Bureau anticipated litigation prior to 16 October 2008, this evidence is insufficient to prove that plaintiff also anticipated litigation. When plaintiff hired the unnamed individual to conduct an independent investigation of the fire, he did not have access to Farm Bureau's investigation material or its internal documentation indicating its position that defendant was not liable for the loss. On 29 September 2008, plaintiff spoke with Farm Bureau adjuster Josh Overcash ("Overcash") and asked about defendant's policy. Overcash indicated that a claim had not yet been filed against defendant's policy because the cause of the fire had not yet been determined. While plaintiff stated at that time that he wanted to hire an independent fire investigator, nothing in the log suggests that, at this time, Farm Bureau communicated to plaintiff a reason that he should anticipate litigation. Overcash merely indicated the cause of the fire must be determined prior to determining the negligence of any party. Furthermore, Farm Bureau's SIU activity log indicates that plaintiff contacted Farm Bureau on 13 October 2008 to inquire about the status of his claim. There is no indication that Farm Bureau communicated to plaintiff that his claim would be denied at that time. Rather, Roy Hensley, a Farm Bureau investigator, told plaintiff that he needed to speak with Green as part of the investigation.

***6** We do not believe that under these circumstances, a "reasonable person" in plaintiff's position would have "anticipate[d] a possibility of litigation" on 16 October 2008. *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Therefore, we find that the trial court did not abuse its discretion in determining that the report, wire and photographs were not protected "work product" and affirm the order compelling discovery.

Plaintiff also alleges that even if we determine that the information sought was protected work product, the unnamed individual's report is still not discoverable because defendant failed to show a substantial need or undue hardship to obtain the materials. Since we have found that the unnamed individual's report was not protected by the work product doctrine, there is no need to address the substance of this argument.

IV. Conclusion

Plaintiff failed to show how an inquiry into the *nature* and extent of his relationship with Wilde would affect a substantial right. Therefore, we dismiss this portion of plaintiff's appeal as interlocutory. We also find that the trial court did not abuse its discretion in determining that the unnamed individual's report and materials were not

protected by the work product doctrine.

Dismissed in part, affirmed in part.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).