

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN MORGAN and JEANNETTE MORGAN,	:	
Plaintiffs,	:	
v.	:	C.A. No. 03C-12-268 SCD
CONECTIV, DELMARVA POWER & LIGHT	:	
COMPANY, T/B/A CONECTIV POWER :	:	
DELIVERY, VERIZON COMMUNICATIONS,	:	
INC., AND COMCAST OF NEW CASTLE	:	
COUNTY, LLC.,	:	
Defendants.	:	

ORDER

This 7th day of October, 2005, the Court having considered Verizon's Motion to Compel, Plaintiffs' response thereto, oral argument, and having conducted an *in camera* review of the documents at issue, it appears:

(1) This action arises out of an accident which occurred when John Morgan came in contact with a high power line while working on a pole relocation project on February 4, 2002. Morgan was employed by Danella Line Services ("Danella"). Danella is not a party to this litigation. Its workers insurance carrier has hired counsel to protect the lien provided by 19 *Del.C.* 2363 and that counsel has entered an appearance as co-counsel to plaintiffs.

(2) The day of the accident Danella hired an investigator, previously hired in connection with other events, to investigate this accident. The investigator, Alexander Deveney ("Deveney"), prepared an undated report about the incident. That report has been produced. The issue in this dispute relates to the production of his notes and the drafts of the report.

(3) The relevant portion of Superior Court Civil Rule 26 provides that a party may obtain discovery of documents "prepared in anticipation of litigation . . . by or for another party or by or for that other party's representative . . . (including the other party's attorney, consultant. . .or agent) only upon a showing that the party seeking discovery has substantial need of the materials. . .and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The court is directed to protect "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

(4) Deveney has been deposed. He testified that he was hired to collect the facts. He does not claim to have received any direction from counsel in conducting the investigation or in preparing his report.

(5) The assertion here is that the workers compensation carrier can attach to a claim or privilege which, if it exists at all, is the claim of Danella, the employer of the plaintiff and a non-party to this litigation. The theory is that since the workers compensation carrier has a lien, the carrier stands in the shoes of the employer. No authority for this proposition has been offered, and I do not find the argument to be persuasive.

(6) There is nothing in the record to suggest that the mental impressions or guidance of an attorney played any part in the collection of facts or preparation of Devaney's report.

Wherefore, after carefully reviewing the documents *in camera*, I conclude that the Devaney materials are not protected materials prepared "in anticipation of litigation" as that phrase is used in Superior Court Civil Rule 26(b)(3). I further conclude that were the materials protected, Verizon has shown substantial need as the equivalent of the Delaney investigation cannot be obtained due to its immediacy after the incident, and the opportunity he had to talk with witnesses and to observe a reenactment which the other defendants cannot now be recreated.

Plaintiff is instructed to produce, within five (5) days from the date of this order, the documents Bates stamped for purposes of the *in camera* review 0021-0030 and 0031 - 0060.

IT IS SO ORDERED.

/s/ Susan C. Del Pesco

Judge Susan C. Del Pesco

Original to Prothonotary
xc: Counsel of record