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STEADFAST INSURANCE COMPANY and IRONSHORE SPECIALTY INSURANCE COMPANY, Plaintiffs, v. ADMIRAL INSURANCE COMPANY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BURLINGTON COUNTY Docket No. BUR-L-406-19 CBLP Action **OPINION**

Argued: October 22, 2021

Decided: October 26, 2021

Hangley Aronchick Segal Pudlin & Schiller, attorneys for Plaintiffs, Steadfast Insurance Company and Ironshore Specialty Insurance Company

Lindabury, McCormick, Estabrook & Cooper, P.C. and Shipman & Goodwin, LLP, attorneys for Defendant Admiral Insurance Company

HONORABLE AIMEE R. BELGARD, P.J. Cv.

OVERVIEW

A. Defendant's Motion to Remove Plaintiffs' Confidentiality Designations (LCV20201955200)

Defendant, Admiral Insurance Company (hereinafter "Defendant") filed a motion to Remove Plaintiffs' confidentiality designations. Defendant argues that the Plaintiffs, Steadfast Insurance Company and Ironshore Specialty Insurance ("Steadfast" and "Ironshore" respectively), improperly label every page of every deposition transcript and document as "Confidential." (Def. Motion at Pg. 2). It alleges that Plaintiffs wrongly marked and sealed the transcripts and documents, thereby concealing evidence that undercuts Plaintiffs'

narrative. *Id.* The Plaintiffs contend that the documents are rightly designated confidential and commercially sensitive. (Pl. Opp. at Pg. 2).

B. Plaintiffs' Motion to File under Seal (LCV20201773487)

The Plaintiffs filed a motion to seal three exhibits in support of its Motion to Compel Production of Discovery Supporting Defendant Admiral Insurance Company's Counsel's Representations to Witnesses at Depositions.

C. Defendant's Motion for Summary Judgment (LCV2021164635)

Defendant filed a Motion for Summary Judgment alleging that the Plaintiffs' claims fail as a matter of law under New Jersey or Arkansas law for claims for failure to settle between and among upper-layer excess insurers. (Def. Motion at Pg. 2). They further allege that the Plaintiffs did not investigate the communications, the verdict and the negotiations between Ms. Hyett and the Defendant in days after the verdict. *Id.* Plaintiffs oppose this motion stating that under Arkansas law, the Defendant was negligent for not settling the underlying action. Further, the Plaintiffs argue that under New Jersey law, the Defendant does owe a duty to the excess carriers as it controlled settlement potential at the key times. *Id.* at Pg.
3. Furthermore, Plaintiffs argue that there exist genuine issues of material fact regarding Defendant's conduct for the jury to decide. *Id.*

D. Defendant's Motion to Compel Production of Documents (LCV20201876623)

The Defendant argues that the post-verdict communications and pre-verdict loss reserves are important to this case because it expects that they will confirm what witnesses have testified with regards the verdict amount in *Smalls v. Ouchita County Medical Center, et. al.*, Case No. 70CV-16-364-4 (Ark. Ct.) and that Plaintiffs' allegations in their Complaint about the Defendant are not well-founded. (Pl. Motion at Pg. 1). Plaintiffs oppose this motion by stating that they have consistently asserted privilege and work-product over post-verdict

communications based on litigation against the Defendant being anticipated upon the jury's verdict in the *Smalls* Action. *Id.* at Pg. 2. Further, they argue that the Defendant already has Plaintiffs' pre-verdict evaluations, meaning the reserves information is unnecessary and irrelevant. Furthermore, they argue that under New Jersey law, reserves are not discoverable. *Id.* at Pg. 3.

E. Plaintiffs' Motion to Compel Production of Documents (LCV20201773266)

The Plaintiffs filed a motion to compel to confirm the representations made to the witnesses at depositions; however, the Plaintiffs in their response to the Defendant's opposition stated that their Motion to Compel is moot.

The Court heard oral argument of all the motions on October 22, 2021.

For the reasons set forth herein, the Court:

A. GRANTS without prejudice the Defendant's Motion to Remove Plaintiffs' Confidentiality Designations (LCV20201955200);

B. DENIES the Plaintiff's Motion for Leave to File Under Seal (LCV20201773487);

C. DENIES in part, GRANTS in part the Defendant's Motion for Summary Judgment (LCV2021164635);

D. DENIES in part, GRANTS in part the Defendant's Motion to Compel Production of Documents (LCV20201876623); and,

E. DENIES as moot the Plaintiff's Motion to Compel Production of Documents (LCV20201773266).

FACTS

This litigation arises out of a medical malpractice action against an Arkansas clinic and physician affiliated with Baptist Health, which carried excess liability insurance issued by the Defendant and the Plaintiffs, among others. The primary insurance was issued by MedPro and the first, second, third and fourth layers of excess were issued by Continental, i.e. CNA, Defendant Admiral, i.e. Berkley, Plaintiff Steadfast, i.e. Zurich and Plaintiff Ironshore, respectively. The underlying action in Arkansas, *Smalls v. Ouachita County Medical Center, et. al.*, Case No. 70CV-16-364-4 (Ark. Cir. Ct.), resulted in a plaintiffs' verdict of $46.5 million at trial. The Plaintiffs pled derivative (through their insured Baptist Health) and direct counts against the Defendant, alleging that Defendant acted in bad faith and/or negligently in failing to settle the *Smalls* Action. The Plaintiffs claim that Defendant breached its obligations to the insureds and to the Plaintiffs when, during jury deliberations, the jury asked to see the Plaintiffs' life care plan and the Defendant declined to accept Plaintiffs' offer to settle for a lump sum payment of $15 million, net after the payment of $4 million by co-defendant Ouachita County Medical Center.

LEGAL STANDARDS AND ANALYSIS

A.-B. Defendant's Motion to Remove Confidentiality Designations/Plaintiffs' Motion to File Under Seal (LCV20201955200, LCV20201773487)

> Pursuant to the rules governing the courts of New Jersey, parties to a lawsuit: may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party . . . 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 . . .

R. 4:10-2(a).

New Jersey's discovery rules are to be liberally construed because we adhere to the belief that justice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts. *In re Liquidation of Integrity Ins. Co*., 165 N.J. 75, 82 (2000). The discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel. *Abtrax Pharms. v. Elkins-Sinn*, 139 N.J. 499, 512 (1995).

> The right to discovery is not unconditional. Pursuant to R. 4:10-3: On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:
>
> a. That the discovery not be had;
>
> b. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> c. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> d. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> e. That discovery be conducted with no one present except persons designated by the court;
>
> f. That a deposition after being sealed be opened only by order of the court;
>
> g. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
>
> h. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

R. 4:10-3.

Pursuant to R. 4:10-3, to meet the "good cause" standard, a party must demonstrate that a party would be subjected to "annoyance, embarrassment, oppression, or undue burden or expense." Procedurally, the burden of establishing good cause falls squarely on the moving party. *Kerr v. Able Sanitary*, 295 N.J. Super. 147 (App. Div. 1996).

N.J.S.A. 47:1A-10 provides:

> Notwithstanding the provisions of P.L. 1963, c. 73 (C. 47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:
> an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
>
> personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
>
> data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

While N.J.S.A. 47:1A-10 limits discovery, it does not define precisely what information is covered by the phrase "personnel record." *McGee v. Township of East Amwell*, 416 N.J. Super. 602, 615 (App. Div. 2010). Although case law interpreting this provision is sparse, courts have tended to favor the protection of employee confidentiality. *Id*. However, it may not be possible to protect witnesses' identities throughout the entire course of the litigation consistent with plaintiff's right to the opportunity to establish a cause of action. *Connolly v. Burger King Corp.*, 306 N.J. Super. 344, 350 (App. Div. 1997). Regarding confidentiality, the New Jersey Supreme

Court has concluded that the balance weighs in favor of disclosure with appropriate procedures to ensure justified confidentiality in light of plaintiff's paramount interest in obtaining relevant materials. Id.

The Supreme Court in *Hammock* provided for a structured approach to the seal or unseal documents as it is difficult to give the definition of "good cause." 142 N.J. at 380. As stated by the Court, there is no presumptive right of public access to discovery motions filed with the trial court. *Id.* Discovery motions include but are not limited to, those to take depositions, to compel production of a witness for deposition, to compel answers to interrogatories or to compel the production of documents. *Id.* However, the presumption of public access attaches to pre-trial non-discovery motions and to all materials, documents, legal memoranda, and other papers "filed" with the court that are relevant to any material issue involved in the underlying litigation regardless of whether the trial court relied on them in reaching its decision on the merits.

Here, the Defendant has admitted in its response to Plaintiffs' opposition that the documents have been used at deposition of fact witnesses and expert witnesses and have not been filed with the Court. Per the *Hammock* Court, because the documents have not been filed with the Court, there is no presumptive right of public access to the documents. However, the Court may adopt a flexible balancing process depending on the circumstances. *Id.* While the Defendant argues that documents and testimony are not confidential business information, the Plaintiffs are concerned that the declaration of the sensitive information would harm their business.

Given the foregoing and recognizing that disclosure is favored, the Court finds it appropriate to **GRANT without prejudice** Defendant's motion at this time. However, the Court will have the parties work together to adopt a protective Order by consent. Alternatively, should

it become necessary, the Court will review documents, as requested by Plaintiff, *in camera*, for accessibility purposes.

The Plaintiffs have filed three exhibits in support of Plaintiffs' Motion to Compel Production of Discovery Supporting Defense Counsel's Representations to Witnesses at Depositions. Per *Hammock*, good cause must be shown pursuant to R. 1:2-1 and R. 4:10-3 for filing the documents under seal. 142 N.J. at 380. The Plaintiffs bear the burden to overcome the strong presumption of access by a preponderance of the evidence that the interest in secrecy outweighs the presumption of access. *Id.* Currently, the Plaintiffs have not overcome said presumption and the motion is **DENIED.**

C. Defendant's Motion for Summary Judgment (LCV2021164635)

Rule 4:46-2(c) provides that summary judgement shall be granted when the pleadings, discovery and affidavits show that there is no genuine issue of material fact as to the matter challenged and therefore the moving party is entitled to a judgement as a matter of law. When deciding a summary judgement motion, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995). Under this standard, the non-moving party is given the benefit of all reasonable inferences the facts will support. *Miller v. Estate of Walter Sperling*, 326 N.J. Super. 576-77 (App. Div. 1999). Summary judgment is appropriate where the court finds that the evidence presented is insufficient to allow a rational fact finder to resolve the dispute in favor of the non-moving party. *Piccone v. Stiles*, 329 N.J. 191, 194-95 (App. Div. 2000). It is recognized in New Jersey that a court may not grant summary judgment where discovery is incomplete, and where the parties have not had sufficient time to develop "critical factual issues." *Hermann Forwarding*

Co. v. Pappas Ins. Co., 273 N.J. Super. 54, 64 (App. Div. 1994); *see* Scott v. Salerno, 297 N.J. Super. 437, 447-48 (App. Div.), cert. denied, 149 N.J. 409 (1997).

Summary Judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In determining whether summary judgment is appropriate, the motion judge must view all factual evidence in a light most favorable to the non-moving party. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995). Under this standard, the non-moving party is given the benefit of all reasonable inferences the facts will support. *Miller v. Estate of Walter Sperling*, 326 N.J. Super. 576-77 (App. Div. 1999). Summary judgment is appropriate only where the court finds that the evidence presented is insufficient to allow a rational fact finder to resolve the dispute in favor of the non-moving party. *Piccone v. Stiles*, 329 N.J. 191, 194-95 (App. Div. 2000). It is recognized in New Jersey that a court cannot grant summary judgment where discovery is not complete, and where the parties have not had sufficient time to develop "critical factual issues." *Hermann Forwarding Co. v. Pappas Ins. Co.*, 273 N.J. Super. 54, 64 (App. Div. 1994); *see Scott v. Salerno*, 297 N.J. Super. 437, 447-48 (App. Div.), *cert. denied*, 149 N.J. 409 (1997).

i. Plaintiff's Derivative Claims

In its summary judgment brief Defendant cites to both New Jersey and Arkansas law for the proposition that Plaintiffs stand in the shoes of Baptist Health on their derivative claims of Counts I-III and V-VII and further argues that while neither state has recognized a viable cause of action for failure to settle where the insured approves of the conduct at issue, New Jersey specifically rejected such a claim in *Murray v. Allstate Ins. Co.*, 209 N.J. Super. 163, 169 (App.

Div. 1986). However, in its reply brief, Plaintiff concedes that Arkansas law applies to all claims made by Plaintiffs because "Arkansas has the most significant interest in the case." Plaintiffs argue that Arkansas law governs the derivative claims. As such, Plaintiffs have no greater rights than the party from which they allegedly acquired their rights, i.e. Baptist Health. *See Shelter Ins. Co. v. Arnold*, 940 S.W.2d 505, 507 (Ark. App. 1997). Additionally, Arkansas law recognizes that an insurer is liable to its insured for failure to settle a claim within limits if it negligently failed to settle within policy limits or if it acted in bad faith in failing to do so. *See Southern Farm Bureau Cas. Ins. Co. v. Parker*, 341 S.W.2d 36, 40 (1960).

As the forum state, New Jersey's choice of law principles establish which law to apply. *Gantes v. Kason Corp.*, 145 N.J. 478, 484 (1996). In the context of liability insurance contracts, New Jersey courts reject the "mechanical and inflexible *lex loci contractus* rule in resolving conflict-of-law issues in liability-insurance contracts" and employ the governmental-interest analysis considering factors relating to and enumerated in §§ 6, 188 and 193 of the Restatement (Second). *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 134 N.J. 96, 102-04 (1993).

The analysis calls for a two-step process. The first step is to determine whether there is an actual conflict between the laws of the interested states, a determination made on an issue-by-issue basis. *Gantes*, 145 N.J. at 484. An actual conflict exists between the laws of two states if the differences are fundamental, in which case the foreign law may be considered offensive or repugnant to local public policy. *State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 37 (1980). The second step in the analysis is for the court to "determine the interest that each state has in resolving the specific issue in dispute." *Gantes*, 145 N.J. at 485. Where the choice of

law question is inconsequential, the forum state applies its own law to resolve the disputed issue. *See Rowe v. Hoffman-La Roche, Inc.*, 189 N.J. 615, 621 (2007).

While the parties have now agreed that Arkansas law applies to the derivative claims, the Court, through its own analysis, likewise agrees that Arkansas law applies to the derivative claims. Clearly there is a conflict between the law in New Jersey and Arkansas given that a derivative claim stemming from negligence is permitted in Arkansas but not in New Jersey. In looking to the governmental-interest analysis on these claims, the Court recognizes that the policyholder, the insured risk and the underlying action are all located in Arkansas; thus, it is appropriate to apply Arkansas law to the derivative claims conflict. In so doing, the Court finds that an insurer will be considered liable for negligently failing to settle where: (1) the underlying claim could have been settled within the policy limits; (2) a verdict in the underlying case resulted, which exceeded the policy limits; and (3) the refusal to settle was at least negligent or rises to the level of bad faith. *Parker*, *supra,* 341 S.W. 2d at 39.

While the defense has argued that there can be neither bad faith nor negligence here because the underlying insureds approved of the decisions of Admiral relating to settlement both before and after the verdict, the Court is not convinced that these are undisputed facts. First, the Court notes that the Admiral policy required prior written consent before any settlement reaching Admiral's layer of coverage. (Plaintiffs' Stmt. of Facts para. 7). On March 6, 2017, three days prior to the underlying verdict, underlying defense counsel sent an email to Admiral as follows:

> It appears that the latest defense model puts economic damages at 6-9 million. Dr. Lewis has no chance to win. This obviously does not include non economic damages. We have offered 8 million. for us the verdict range is the settlement range.
>
> My duty is to Dr. Lewis and AHG [Clinic]. They want the case settled. I think the case can probably be settled within the Berkley

> [Admiral] layer. On behalf of Lewis and AHG [Clinic] I recommend we try to do such.

(Plaintiff's Ex. 27 to Klebanoff Cert. (P-18) at ADMIRAL001247-48; Ex. 28 to Klebanoff Cert. (P-104) at ADMIRAL005563).

Additionally, Dr. Lewis testified that he wanted the case settled. (Plaintiff's Ex. 29 to Klebanoff Cert., Lewis Dep., 16:17-17:9, 22:19-23:4 & 46:15- 47:9).

On March 7, 2017, two days prior to the underlying verdict, Julia Hyett, Baptist Health's risk manager, sent emails to defendant Admiral as well as to Continental as follows: "it [is] concerning that we are feeling as though we are losing the jury more each day," "we are getting our butts kicked," and "I'd like to get this done within a confidential settlement and avoid reputational risks to our entire entity." (Plaintiff's Ex. 30 to Klebanoff Cert. (P-46) at ADMIRAL003239-40).

At 11:10 AM on March 8, 2017, one day prior to the verdict, Defendant Admiral was advised in an email that Continental was tendering its full $10 million Dr. Lewis/Baptist Policy limits toward a "global offer of $16M" from all defendants (inclusive of tendered MedPro and Hospital insurance limits). (Defendant's MSJ Ex. 44 (P-74) at ADMIRAL001318).

Additionally, at deposition, Ms. Hyett testified:

> Q. You had testified that you said you wanted to accept the 15 million dollar, 19 million dollars if you include the medical center's money demands, do you remember that testimony?
>
> A. At the time that [Smalls Plaintiffs' counsel] Mr. Ratzan said, "You better take the 19," yes, I do remember that.
>
> Q. When you were speaking with Harry Veldhuis during the day of March 9, did you ever say that to Harry?
>
> A. That we should take the 19 million? Yes, it was denied by, it was denied and we had to go back with a high/low.

(Plaintiff's Ex. 9 to Klebanoff Cert., Hyett Dep., 99:21-100:9).

With regard to Ms. Hyett's reaction to the jury's request for the Life Care Plan during deliberations, Ms. Hyatt testified:

> Q. What was your reaction?
>
> A. That we were going to lose fairly badly.
>
> Q. Did that influence at all your view about the 15 million dollar demand?
>
> A. I felt the same way about it as I had from the beginning of the fact that we felt like there needed to be a settlement within the range that our attorney, Paul, indicated and it was right in the middle of it. So that's how I felt.
>
> Q. Did you want to accept the 15 million dollar demand?
>
> A. Yes.
>
> Q. And in order to accept the 15 million collateral demand, would that have required any money from the Admiral layer?
>
> A. Yes, I think it would have been three million at that point.
>
> Q. And was Admiral willing to provide that 3 million dollars to settle the case?
>
> A. Harry did take it back and it was not tendered at that point.

(Plaintiffs' Ex. 9 to Klebanoff Cert., Hyett Dep., 62:4-63:1). Thereafter, Harry Veldhuis sent an email stating: "Admiral has decided to decline to add to the $12M offered on behalf of Dr. Lewis/Baptist and the high/low, which is now $6M/$16M, will be left open for the time being." (Plaintiff's Ex. 35 to Klebanoff Cert., (P 77) at IRONSHORE0000232).

Following the $46.5 million verdict, on May 26, 2017, Ms. Hyett sent a letter to Admiral (Veldhuis) stating that, after Continental had at trial "tendered its limits of $16,000,000, which was rejected," that:

> Plaintiffs then offered to settle the entire case for payment of $19,000,000. Rather than paying $3,000,000 of your policy limits, you chose to act in bad faith towards your insureds, thus, allowing us to have a verdict entered against us for almost $40,000,000. This behavior by your company is reckless and inexcusable and is clear evidence of bad faith. In addition to exposing your insureds to this verdict, you have depleted more than 50% of our available insurance limits for this time period and have exposed us to reputational damage.

(Plaintiff's Ex. 43 to Klebanoff Cert., May 26, 2017 letter from Julia Hyett to Admiral (D-7)).

While the defense argues that Ms. Hyett's deposition testimony directly contradicts the statements contained in her May 26, 2017 letter, this letter - especially in conjunction with the disputed facts outlined above, when viewed in the light most favorable to Plaintiffs as the non-moving parties, is sufficient to permit a rational factfinder to find that the underlying parties not only did not agree with the settlement decisions made in the *Smalls* matter but that they were dissatisfied to the point of taking steps to prosecute against Plaintiffs not merely for negligence but for bad faith. Although the Defendant maintains that Ms. Hyett would not have changed anything relating to the settlement status and she did not place any blame in the situation, the record suggests otherwise. Thus, these issues must go before the factfinder for consideration, including credibility considerations. Given the genuine issue of material facts, Defendant's Motion for Summary Judgment on the derivative claims is **DENIED.**

ii. Plaintiff's Direct Claims

The Plaintiffs and Defendant dispute the applicability of Arkansas law and New Jersey law as to the direct claims asserted in Counts IV and VIII of the Complaint. New Jersey has recognized direct duties between insurers in the context of the duty a primary carrier owes to the excess carrier - the same positive duty to take the initiative and attempt to negotiate a settlement within its policy limit that it owes to its assured. *Estate of Penn v. Amalgamated General*

Agencies, 148 N.J. Super. 419, 424 (App. Div. 1977). Although Arkansas does not have a law specifically addressing the duty of primary carrier to excess carrier, the Arkansas Supreme Court has nonetheless noted its agreement with the North Carolina Supreme Court as follows:

> We are slow to impose upon an insurer liability beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them.

Findley v. Time Ins. Co., 573 S.W.2d 908, 910 (Ark. 1978) (*citing Newton v. Standard Fire Ins. Co.,* 229 S.E.2d 297 (1976)).

While Plaintiffs argue that the absence of specific law disavowing direct claims between low-layer and high-layer carriers in Arkansas amounts to the lack of any conflict between the law in Arkansas and New Jersey, the Court cannot agree. To the contrary, the Court finds that Arkansas's failure to recognize such a direct claim, coupled with its unwillingness to impose liability on an insurer beyond what is permitted in the insurance contract, is fundamentally different from the law in New Jersey. Thus, the Court must once again look to the governmental-interest analysis and, in so doing, the Court recognizes that the policyholder, the insured risk and the underlying action are all located in Arkansas. Accordingly, it is again appropriate to apply Arkansas law to the direct claims at issue.

Because Arkansas does not permit a cause of action for a direct claim between low-layer and high-layer carriers, Plaintiffs direct claims in this matter fail. Moreover, the Court recognizes that even New Jersey law does not impose any direct duty between excess insurers, especially where excess insurers, such as Defendant Admiral here, do not control or otherwise participate in

defense of the case.[1] Accordingly, summary judgment is **GRANTED** in favor of Defendant on Plaintiffs' direct claims and Counts IV and VII are hereby dismissed.

iii. Plaintiff's Bad Faith Claims

Defendant argues that Plaintiffs must establish that Defendant acted with malice, dishonesty or otherwise put its interest above those of the insured to purse its bad faith claims. In applying Arkansas law to Plaintiffs' derivative claims, as established above, the Court notes that where, such as here, punitive damages are not sought, only a showing of negligence is required. *See Parker*, *supra,* at 40. Moreover, as set forth above, there are material facts in dispute with regard to whether the insureds approved of settlement decisions and whether the Defendant acted with malice, dishonesty, or otherwise put its own interests above those of the insureds. Consequently, Defendant's motion for summary judgment is **DENIED** on the bad faith aspects of Counts I-IV.

iv. Plaintiff's Claim for Declaratory Relief

Given the foregoing, the Court finds any determination as to declaratory relief premature at this time given the issues that must be addressed by the factfinder. As such Defendant's motion is **DENIED** as to Count IX of Plaintiffs' Complaint for declaratory relief.

D. Defendant's Motion for Production of Documents (LCV20201876623)

Rule 4:10-2 states that 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. R. 4:10-2(a). Pursuant to subparagraph (e) of R. 4:10-2:

[1] *See IMO Indus. Inc. v. Transamerica Corp.*, 437 N.J. Super. 577, 624-35 (App. Div. 2014)("Excess insurers, on the other hand, generally have no duty to participate in the defense and may rely on the good faith of the primary insurer in settling claims against the insured.")

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

R. 4:10-2(e)(1).

The attorney client privilege covers communications between a lawyer and his or her client. N.J.S.A. § 2A:84A-20(1). Pursuant to this privilege, a client may (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. *Id.*

In *State v. Pavin*, 202 N.J. Super. 255, 263 (App.Div. 1985), the court held that an insured's statement to an adjuster at his insurance company ten days after an automobile accident was not protected by the attorney client privilege and therefore was discoverable. The court noted that this issue was an issue of first impression in New Jersey. *Pavin*, 202 N.J. Super. at 261. The *Pavin* court adopted a view that "no blanket privilege with respect to communications between an insured and his adjuster should be countenanced." *Id.* at 262. Instead, "the privilege should be held to shield communications between the insured and the adjuster only where the communications were in fact made to the adjuster for the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured." *Id.* In essence, "the existence of the privilege depends upon whether the

communication occurred while the client consulted the lawyer or his representative for the purpose of retaining the lawyer or securing a legal service or advice from him in his professional capacity." *Id.* at 260.

Furthermore, in *Pfender v. Torres*, 336 N.J. Super. 379, 386 (App.Div. 2001), the court explained that, in other jurisdictions, "the dominant view is that [insured's post-accident statements to his or her insurer] are discoverable." The *Pfender* court endorsed the decision in *Pavin*, and that the court should consider these factors when determining the purpose of the communication: "whether the statement was made at the direction of an attorney; whether there was anything indicating the insured was seeking legal advice; whether there was pending litigation; and whether the insurance company might have interests other than protecting the insured's rights." *Pfender*, 336 N.J. Super. at 386.

The *Pfender* court held, after examining the above factors, that the communication between the Defendant and an insurance investigator who introduced himself as an agent was not protected under the attorney-client privilege. *Id.* at 388. The court noted that even though the interview occurred after the insurance company received the claim letter, the communication still was not privileged. *Id.* at 388-89 (noting that "the attorney-client privilege should be inapplicable unless and until the interrogation of the insured has occurred at the direction of the attorney assigned to the insured").

The work product doctrine protects documents that a party, or a party's representative prepared in anticipation of litigation. A document will be deemed to have been prepared in anticipation of litigation when the dominant purpose in its preparation was concern for potential litigation, the prospect of which was objectively reasonable. *Rivard v. Am. Home Prods., Inc.*, 391 N.J. Super. 129, 155 (App. Div. 2007). In order to obtain matters prepared in anticipation of

litigation, the party seeking same must show: (1) a substantial need and (2) the materials are not obtainable without undue hardship on the seeking party. Rule 4:10-2(c). The Rule also provides that if discovery is ordered, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *Medford v. Duggan*, 323 N.J. Super. 127, 133 (App. Div. 1999) (emphasis added); *See also Pfender v. Torres*, 336 N.J. Super. 379, 386 (App. Div. 2001) (holding that the judge on remand shall review the statements in camera and delete material that could be mental impressions, conclusions, opinions, or legal theories).

In *Medford*, the court explained that "if the dominant purpose in obtaining a statement is because of the potential for litigation, the qualified work-product privilege of Rule 4:10-2(c) applies." 323 N.J. Super. at 135. The court found that the Defendant's statement to her insurance investigator was not protected by the work product doctrine because the parties could not demonstrate "that they are unable to obtain the substantial equivalent of the statement." *Id.* at 137. The court noted that the parties already deposed the Defendant and that she had a clear recollection of the events. *Id.* ("Thus, after the deposition is taken, the court is better able to determine whether the second prong has been satisfied"). Furthermore, the court held that a witness's statement to the insurance investigator was not covered by the work product doctrine, and was therefore discoverable, because there was substantial need for the production of the statement because the witness could not recollect her statement. *Id.* at 137-8.

"If a document was prepared in the ordinary course of business rather than in anticipation of litigation, it is not entitled to protection as work product. *Miller v. J.B. Hunt Transport*, 339 N.J. Super. 144, 148 (App. Div. 2001). In *Miller*, the court held that a truck driver's recorded statement after an accident taken by the trucking company's litigation attorney was protected by

the work-product doctrine "because the trucking company's dominant purpose in taking the statement was to prepare for potential litigation and the company had an objectively reasonable basis for anticipating that suit would be brought by the other driver." *Id.* at 145. The court distinguished this case from *Pfender*, stating that the statement here was made to an attorney, while the statement in *Pfender* was taken by an insurance adjuster. *Id.* at 150.

As to the common interest rule, confidential communications between a client and his attorney in the course of a professional relationship are privileged. *O Boyle v. Borough of Longport*, 218 N.J. 168, 185 (2014) (*citing* N.J.S.A. 2A:84A-20; N.J.R.E. 504). However, privilege does not attach to a communication knowingly made within the hearing of any person whose presence nullifies the privilege. *Id.* (*citing* N.J.R.E. 504(3)). If, however, the third party is a person to whom disclosure of confidential attorney-client communications is necessary to advance the representation, disclosure will not waive the privilege. *Id.* at 186. The scope or extent of common interests is the subject of considerable debate. *Id.* at 193. In New Jersey, it is not necessary that every party share identical interests. *Id.* (*citing Laporta v. Gloucester County Bd. Of Chosen Freeholders*, 340 N.J. Super 254, 262 (App. Div. 2001). It is also not necessary for actual litigation to have commenced. *Id.* It is sufficient that litigation is contemplated. *Id.* The communication need not be confined to counsel. *Id.* Communications between counsel for a party and a representative of another party with a common interest are also protected. *Id.*

i. Attorney-Client Privilege, Work Product Doctrine and Common Interest Rule

A threshold question in attorney-client privilege, work product doctrine and common interest rule is whether the disclosure is made due to actual or anticipated litigation or for trial. The phrase "in anticipation of litigation" must be examined on a case-by-case basis involving a fact sensitive analysis. *Medford v. Duggan*, 323 N.J. Super. 127, 134 (1999). The comment to

the *Restatement* indicates that "[t]he reasonableness of anticipation is determined objectively by considering the factual context in which materials are prepared, the nature of the materials, and the expected role of the lawyer in ensuing litigation." *Miller v. J.B. Hunt Transport Inc.*, 339 N.J. Super. 144, 149 (2001). A statement or other document will be considered to have been prepared in anticipation of litigation if the "dominant purpose" in preparing the document was concern about potential litigation and the anticipation of litigation was "objectively reasonable." *Id*. at 150. However, our Supreme Court defined the "necessary foundations to the valid piercing of the privilege…" There must be: (1) a legitimate need of the party to reach the evidence sought to be privileged; (2) a showing of relevance and materiality; and (3) the information cannot be secured from any less intrusive source. *In re Kozlov*, 79 N.J. 232, 243-44 (1979).

Here, the Plaintiffs argue that at the time of the subject communications the Defendant was already apprised of the excess verdict and that the failure to settle the matter would lead to litigation. Further, after the jury verdict, the Defendant, as well as other parties, retained outside counsel less than 24 hours after the verdict, meaning that all parties anticipated litigation against the Defendant.

Following oral argument of the subject motion, the Court had an opportunity to review, *in camera*, the subject documents. Through this review the Court is satisfied that the subject statements were made in anticipation of litigation and with the dominant purpose of representation of the clients by the attorney for the purpose of retaining the lawyer or while securing a legal service or advice in a professional capacity. Further, the statements contained confidentiality markings; thus, representing a reasonable expectation of confidentiality by the clients. Accordingly, the Court finds that the statements are, indeed, privileged and Defendant's motion as to these statements is **DENIED.**

ii. Discovery of Indemnity Reserves

A reserve "essentially reflects an assessment of the value of the claim taking into consideration the likelihood of an adverse judgment." *Moslimani v. Union Valley Corp.*, 271 N.J. Super Ct. 147, 150 (1993) (*citing Rhone-Poulenc Rorer, Inc. v. Aetna Casually & Surety Co.*, 139 F.R.D. 609, 613 (E.D. Pa. 1991)). Plaintiffs rely on the unpublished case, *Alden Leeds, Inc. v. QBE Specialty Ins. Co.*, 2015 N.J. Super Unpub. LEXIS 1793, at *21 (Sup. Ct. of N.J. App. Div.) (*citing Rhone-Poulenc Rorer, Inc.*, 139 F.R.F. at 610-11), holding that where reserves have been established based on legal input, the results and supporting papers most likely will be work-product and may also reflect attorney-client privilege communications. However, Plaintiffs have overlooked *Leksi, Inc. v. Federal Insurance Co.*, 129 F.R.D. 99, 101-02 (D. N.J. 1989), where the Court found that the discovery of the reserve information must be based on a showing that reserve information is more than just "tenuously relevant" to the issue on which it is sought. There, the Judge noted that a reserve amount was an estimate of liability that was not normally based on evaluation of coverage through extensive factual and legal analysis. *Id*. at 106; *Raclaur, Inc. v. Allianz Ins. Group*, No. L-12078-95 (N.J. Super. Ct. Law Div. Oct. 4, 1996) (holding that discovery of reserves is not protected by claims of privilege). Neither *Alden* nor *Leski* are binding on this Court.

Here, the Defendant alleges that the Plaintiffs have directly placed at issue their evaluations as insurers of the *Smalls* case. It argues that Plaintiffs' communications and notes memorializing evaluation of the *Smalls* matter and its exposure would be reflected in their reserving communications. The Court recognizes that pre-verdict reserve notes and communications would likely include statements setting forth Plaintiffs' assessment of a value of the claim. Furthermore, such communication would likely take into account, as the Court

in *Moslimani* stated, the likelihood of an adverse judgement. Accordingly, the Court finds such communications to be reasonably calculated to lead to the discovery of admissible evidence and thereby discoverable to the extent that they do not contain any attorney client communications. As such, the Court **GRANTS** Defendant's motion in this regard.

E. Motion to Compel Production of Documents (LCV20201773266)

The Plaintiffs in their response to the Defendant's opposition stated that their Motion to Compel is moot; thus, it is **DENIED as moot.**

CONCLUSION

For the foregoing reasons, the Court:

- **GRANTS without prejudice** the Defendant's Motion to Remove Plaintiffs' Confidentiality Designations (LCV20201955200);
- **DENIES** the Plaintiff's Motion for Leave to File Under Seal (LCV20201773487);
- **DENIES in part, GRANTS in part** the Defendant's Motion for Summary Judgment (LCV2021164635);
- **DENIES in part, GRANTS in part** the Defendant's Motion to Compel Production of Documents (LCV20201876623); and,
- **DENIES as moot** the Plaintiff's Motion to Compel Production of Documents (LCV20201773266).