128 A.D.2d 502
Supreme Court, Appellate Division, Second Department, New York.

Vincent A. GRIECO, et al., Appellants,
v.
James CUNNINGHAM, Respondent.

March 2, 1987.

Synopsis
Personal injury action was filed. The Supreme Court, Suffolk County, Underwood, J., entered judgment in favor of the defendant. Plaintiffs appealed. The Supreme Court, Appellate Division, held that any attorney work product or attorney-client privilege which attached to written statements was waived when those statements were used by the declarants to refresh their recollections.

Judgment affirmed.

West Headnotes (1)

[1] **Pretrial Procedure** Statements
Privileged Communications and Confidentiality Waiver of Privilege

Any attorney work product or attorney-client privilege which may have attached to written statements was waived when statements were used to refresh declarants' recollections as to events of incident giving rise to personal injury action and, therefore, statements could be made available for use in cross-examination.

2 Cases that cite this headnote

Attorneys and Law Firms

*432 Robert Wilson, West Islip, for appellants.

Paul J. Donnelly, Jr., Oyster Bay Cove, for respondent.

Before MANGANO, J.P., and BRACKEN, BROWN and SPATT, JJ.

Opinion

MEMORANDUM BY THE COURT.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from a judgment of the Supreme Court, Suffolk County (Underwood, J.), entered August 16, 1985, which was is in favor of the defendant and against them, upon a jury verdict.

ORDERED that judgment is affirmed, with costs.

The plaintiffs claim that the trial court erred in directing production of two written statements, one made by the plaintiff Vincent Grieco before trial and one made by a plaintiffs' witness, as these writings were privileged as attorney's work product and pursuant to the attorney-client relationship (*see,* CPLR 3101[b], [c]). We disagree.

Any privilege under CPLR 3101 was waived when Vincent Grieco used his written statement prior to his deposition to refresh his recollection as to the events of the incident, and when the plaintiffs' witness reread her statement prior to the trial for the same purpose. The defendant was thus entitled to have the statements made available to him and to use them in cross-examination (*see, Merrill Lynch Realty Commercial Servs. v. Rudin Mgt. Co.,* 94 A.D.2d 617, 462 N.Y.S.2d 16; *Herrmann v. General Tire & Rubber Co.,* 79 A.D.2d 955, 435 N.Y.S.2d 14; *Doxtator v. Swarthout,* 38 A.D.2d 782, 328 N.Y.S.2d 150; *see, also,* Richardson, Evidence § 467 [10th ed., Prince]; 3 Wigmore, Evidence §§ 762, 763 [Chadbourn rev.]).

We have reviewed the plaintiffs' other claim and find it to be without merit.

All Citations

128 A.D.2d 502, 512 N.Y.S.2d 432

99 A.D.3d 167
Supreme Court, Appellate Division, First Department, New York.

Gentry T. BEACH, et al., Plaintiffs–Respondents
v.
TOURADJI CAPITAL MANAGEMENT, LP, et al., Defendants/Counterclaim Plaintiffs–Appellants,
v.
Gentry T. Beach, et al., Counterclaim Defendants–Respondents.
Touradji Capital Management, LP, et al., Counterclaim Plaintiffs–Appellants,
v.
Vollero Beach Capital Partners, LLC, et al., Counterclaim Defendants–Respondents.

Aug. 21, 2012.

Synopsis
Background: Portfolio managers brought action against former employers, seeking compensation allegedly owed to them. Former employers asserted counterclaims against portfolio managers and their new business, which directly competed with former employers, including claim that portfolio managers had stolen proprietary information to form their new venture. The Supreme Court, New York County, Richard B. Lowe III, J., denied former employers' motion for review of special referee's ruling denying their application for production of reports prepared by computer forensic analyst who examined one portfolio manager's personal computers and to obtain discovery of reports. Former employers appealed.

Holdings: The Supreme Court, Appellate Division, Abdus-Salaam, J., held that:

[1] in ruling on former employers' motion, trial court had to conduct in camera review to ascertain whether any portion of reports was attorney work product, and

[2] to the extent that any portion of reports was attorney work product, privilege protected reports from disclosure even though analyst reviewed reports prior to his deposition.

Reversed and remanded.

West Headnotes (7)

[1] **Pretrial Procedure** Work-product privilege

Work product of an attorney is privileged, and that privilege extends to experts retained as consultants to assist in analyzing or preparing the case.

4 Cases that cite this headnote

[2] **Pretrial Procedure** Work-product privilege

Work product doctrine affords protection only to facts and observations disclosed by attorney, such that it is the information and observations of attorney which are conveyed to expert retained to assist in analyzing or preparing case that may be subject to trial exclusion; doctrine does not operate to insulate other disclosed information from public exposure.

3 Cases that cite this headnote

[3] **Pretrial Procedure** Records and reports in general

Only portions of reports that were prepared by computer forensic analyst at request of plaintiffs' counsel, in response to defendants' demand that they be permitted to examine one plaintiff's personal computers, that could be attorney work product protected by work product privilege were impressions, directions, and the like of plaintiffs' counsel.

1 Cases that cite this headnote

[4] **Pretrial Procedure**⇐Records and reports in general

Information in reports prepared by computer forensic analyst who examined one plaintiff's personal computers respecting how search of computers was conducted, what was found, and what was deleted, and when, was material prepared for litigation, and defendants demonstrated substantial need for reports and were unable to obtain information by other means, and therefore trial court had to conduct in camera review to ascertain whether any portion of reports was attorney work product in deciding defendants' motion for review of special referee's ruling denying their application for production of reports and to obtain discovery of reports. McKinney's CPLR 3101(d)(2).

[5] **Pretrial Procedure**⇐Work product privilege; trial preparation materials

Conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony.

2 Cases that cite this headnote

[6] **Pretrial Procedure**⇐Records and reports in general

To the extent that any portion of reports prepared by computer forensic analyst at request of plaintiffs' counsel, in response to defendants' demand that they be permitted to examine one plaintiff's personal computers, was attorney work product, privilege protected reports from disclosure even though analyst reviewed reports prior to his deposition.

[7] **Pretrial Procedure**⇐Work product privilege; trial preparation materials

Attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony.

2 Cases that cite this headnote

Attorneys and Law Firms

**667 O'Brien LLP, New York (Sean O'Brien and Sara A. Welch of counsel), and Gibbons, P.C., New York (Elizabeth Ann Fitzwater of counsel), for appellants.

Liddle & Robinson, L.L.P., New York (David I. Greenberger, Jeffrey L. Liddle, James R. Hubbard and Jennifer Rodriguez of counsel), for respondents.

**668 DAVID FRIEDMAN, J.P., LELAND G. DeGRASSE, HELEN E. FREEDMAN, SHEILA ABDUS–SALAAM, JJ.

Opinion

ABDUS–SALAAM, J.

*168 At issue in this appeal is whether reports prepared by a computer forensic analyst retained by plaintiff's counsel in connection with a discovery demand by defendants for production of plaintiff's computers are privileged. The motion court held that the reports are privileged and that the privilege was not waived when the analyst read his reports to refresh his recollection prior to testifying. We reverse, and remand the matter to the motion court for an in camera inspection to determine what portions, if any, of the reports are privileged attorney work product, as the remaining portions are discoverable pursuant to CPLR 3101(d)(2).

Plaintiffs Gentry Beach and Robert Vollero were employed as portfolio managers by defendant-counterclaim plaintiff Touradji Capital Management LP (Touradji) from 2005 through 2008.

After their departure, plaintiffs commenced this action seeking more than $50 million in compensation they claimed was owed to them. Defendants filed counterclaims against plaintiffs and their new business, Vollero Beach Capital Funds, including a claim that plaintiffs had stolen its proprietary information in order to form their new venture, which directly competes with defendants.

***169** During discovery, in response to a demand by defendants, Vollero produced a CD containing electronic files related to his work at Touradji. Defendants sought to obtain Vollero's personal laptop computers for a forensic examination, believing they contained stolen proprietary information. The Special Master denied that request, instead ordering Vollero to be deposed concerning the electronic files he had produced. At deposition, Vollero testified that he believed the files he had produced on the CD had been transferred from his personal Sony Vaio computer. He also testified that he owned an IBM Thinkpad, but did not recall putting any Touradji data on that computer. In response to this testimony, Touradji requested that it be permitted to examine both of the personal computers, or that the computers be analyzed by a third-party forensic examiner. Vollero did not comply with that request, but his counsel arranged for a forensic examination of the computers, and Touradji identified specific areas of inquiry for the examiner.

The forensic computer analyst retained by Vollero's counsel performed an examination which revealed that none of the electronic files produced by Vollero had been located on the Sony Vaio, but instead had been on the IBM Thinkpad. Additionally, the forensic analyst identified hundreds of deleted files related to Touradji on the IBM Thinkpad and restored them. He also found other files on both the Sony Vaio and the IBM Thinkpad that were responsive to Touradji's discovery demands. Those files were produced to Touradji. A subsequent application by defendants for an order compelling Vollero to turn over the two computers to their own vendor for inspection and analysis was denied; instead the Special Referee ordered a four-hour deposition of the forensic analyst.

The forensic analyst testified about the searches, software, and methods he used to examine the computers, although he could not recall all the specifics of his findings. Touradji's counsel asked the forensic analyst whether he had prepared a "written report" of his findings concerning the Vollero computers. Plaintiffs' counsel ****669** objected to the question on the grounds of privilege. The Special Referee permitted the question to be asked, as it simply called for a yes or no answer, and the forensic analyst responded, "yes." Touradji's counsel then asked the forensic analyst if he had reviewed the reports prior to his deposition and the analyst replied that he had reviewed his reports. Touradji made an application to the Referee seeking production of those reports, asserting that the reports were not privileged, ***170** and that even if they were, the privilege was waived when the forensic analyst used the reports to refresh his recollection prior to his deposition. The Referee denied the application, noting that the reports were privileged or material prepared for litigation and not subject to discovery.

In moving to review the Referee's ruling and obtain discovery of the forensic analyst's reports, Touradji argued that this Court's decision in *Herrmann v. General Tire & Rubber Co.* (79 A.D.2d 955, 435 N.Y.S.2d 14 [1981]), held that once a witness has reviewed a document to refresh his recollection for a deposition, the adverse party is entitled to it, even if it is otherwise privileged. Plaintiffs opposed the motion, arguing that although the *Herrmann* case seemed to direct release of the report, *Herrmann* is not followed by the other Departments. The motion court held that the reports are privileged and denied the motion.

[1] [2] The work product of an attorney is privileged, and that privilege "extends to experts retained as consultants to assist in analyzing or preparing the case ... (*Hudson Ins. Co. v. Oppenheim,* 72 A.D.3d 489, 899 N.Y.S.2d 29 [2010]). However,

> "that doctrine affords protection only to facts and observations disclosed by the attorney. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure" (*People v. Edney,* 39 N.Y.2d 620, 625, 385 N.Y.S.2d 23, 350 N.E.2d 400 [1976]*; see also Central Buffalo Project Corp. v. Rainbow Salads, Inc.,* 140 A.D.2d 943, 530 N.Y.S.2d 346 [1988] [the concept of attorney work product is narrowly construed and "embraces 'interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs' that were held, prepared or conducted by the attorney"]; *Zimmerman v. Nassau Hospital,* 76 A.D.2d 921, 922, 429 N.Y.S.2d 262 [1980] [only the information and observations disclosed *by the attorney* and conveyed to the expert[ ] are subject to exclusion"]).

[3] In this case, the reports were prepared at the request of plaintiff's counsel in response to defendants' demand that they be permitted to examine plaintiff's computers. Instead of permitting defendants to conduct their own examination, plaintiff's counsel retained a forensic

analyst to ostensibly perform the same search that would have been conducted by ***171** defendants if they had been given access to the computers. The only portion of the analyst's reports that could be attorney work product would be impressions, directions, etc., of counsel.

[4] [5] The court should have conducted an in camera review to ascertain whether any portion of the reports is attorney work product (*see Hudson Ins. Co. v. Oppenheim,* 72 A.D.3d 489, 899 N.Y.S.2d 29 [2010], *supra* [court conducted in camera review of the withheld documents before concluding that they were privileged]). The information in the reports as to how the search was conducted, what was found, what was deleted, when it was deleted, etc., is material prepared for litigation, and ****670** defendants have demonstrated a substantial need for the reports and are unable to obtain the information by any other means (CPLR 3101[d][2]); *see Drizin v. Sprint Corp.,* 3 A.D.3d 388, 390, 771 N.Y.S.2d 82 [2004]). Additionally, the conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony (*see Merrill Lynch Realty Commercial Servs. v. Rudin Mgt. Co.,* 94 A.D.2d 617, 462 N.Y.S.2d 16 [1983]; *compare Maisch v. Millard Fillmore Hosps.,* 278 A.D.2d 838, 718 N.Y.S.2d 776 [2000]).

[6] [7] To the extent that any portion of the reports prepared by the forensic analyst is attorney work product, the privilege protects the reports notwithstanding that the analyst reviewed the reports prior to his deposition (*see generally Fernekes v. Catskill Regional Med. Ctr.,* 75 A.D.3d 959, 961, 906 N.Y.S.2d 167 [2010]; *Geffers v. Canisteo Cent. School Dist. No. 463201,* 105 A.D.2d 1062, 482 N.Y.S.2d 635 [1984]). While *Herrmann,* 79 A.D.2d 955, 435 N.Y.S.2d 14 has been cited for the contrary result, requiring production of a report on the ground that the attorney work product privilege has been waived by the witness's review of a work product document prior to testimony (*see e.g. Crawford v. Lahiri,* 250 A.D.2d 722, 673 N.Y.S.2d 189 [1998]), the issue in *Herrmann* involved a tape recording of a witness interview that had been made by an insurance company, not by or for an attorney. Thus, it was material prepared for litigation, and whatever conditional privilege attached to the tape was waived when it was used to refresh the witness's recollection prior to testimony (*see Rouse v. County of Greene,* 115 A.D.2d 162, 495 N.Y.S.2d 496 [1985], *supra,* [citing *Herrmann,* and holding that any conditional privilege that may have attached to a diary kept of medical treatment was waived when witness used diary to refresh recollection prior to testimony]; *see also Merrill Lynch Realty Commercial Servs. v. Rudin Mgt. Co.,* 94 A.D.2d 617, 462 N.Y.S.2d 16 [1983], *supra* [citing *Herrmann* and holding that any privilege for a chronology that had been kept was waived when used to prepare for deposition]). ***172** Because an inartful reference to attorney work product in *Herrmann* may indicate that the ruling in *Herrmann* applies to a waiver of attorney work product privilege, we clarify that the attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.) entered September 29, 2011 which denied the motion by defendants and counterclaim plaintiffs for review of the Special Referee's ruling and to obtain discovery of forensic reports, unanimously reversed, on the law, with costs, the order vacated, and the matter remanded for an in camera inspection of the reports to determine what portion, if any, are subject to privilege.

Order Supreme Court, New York County (Richard B. Lowe III, J.), entered September 29, 2011, reversed, on the law, with costs, the order vacated, and the matter remanded for an in camera inspection of the reports to determine what portion, if any, are subject to privilege.

All concur.

All Citations

99 A.D.3d 167, 949 N.Y.S.2d 666, 2012 N.Y. Slip Op. 06004

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105 A.D.2d 1062
Supreme Court, Appellate Division, Fourth Department, New York.

Michael Dale GEFFERS, Respondent,
v.
CANISTEO CENTRAL SCHOOL DISTRICT No. 463201, Wayne Hartmen, Paul Thurkins, Patrick House, Joseph Paconowski and Gerald Rife, Jr., Appellants.

Nov. 7, 1984.

Synopsis
Appeal was taken from an order of the Supreme Court, Steuben County, Galloway, J., denying discovery of memorandum prepared by an attorney as part of his work product. The Supreme Court, Appellate Division, held that trial court was correct in denying discovery of memorandum prepared by attorney as part of work product.

Affirmed.

West Headnotes (2)

[1] **Pretrial Procedure** Documents, papers, and books in general

Trial court was correct in denying discovery of memorandum prepared by attorney as part of work product.

2 Cases that cite this headnote

[2] **Pretrial Procedure** Documents, papers, and books in general

Fact that memorandum prepared by attorney was reviewed by his client in preparation for examination before trial did not constitute waiver of attorney work product privilege. McKinney's CPLR 3101(c).

5 Cases that cite this headnote

Attorneys and Law Firms

****636** Woods, Oviatt, Gilman, Sturman & Clarke, by Donald W. O'Brien, Jr., Rochester, for appellants,

Shultz & Shults by Brian Schu, Hornell, for respondent.

Before HANCOCK, J.P., and DENMAN, GREEN, O'DONNELL and SCHNEPP, JJ.

Opinion

***1062** MEMORANDUM:

[1] [2] Special Term was correct in denying discovery of a memorandum prepared by an attorney as part of his work product. The fact that the memorandum was reviewed by his client in preparation for an examination before trial does not constitute a waiver of the privilege under CPLR 3101, subd. [c] (see *Hickman v. Taylor,* 329 U.S. 495, 511, 67 S.Ct. 385, 393, 91 L.Ed. 451; *Kenford Co. v. County of Erie,* 55 A.D.2d 466, 470, 390 N.Y.S.2d 715).

Order unanimously affirmed with costs.

All Citations

105 A.D.2d 1062, 482 N.Y.S.2d 635

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75 A.D.3d 959
Supreme Court, Appellate Division, Third Department, New York.

Raymond B. FERNEKES, Respondent,
v.
CATSKILL REGIONAL MEDICAL CENTER, Appellant, et al., Defendant.

July 22, 2010.

Synopsis
Background: Patient brought action against hospital operator and others, seeking to recover damages for injuries he sustained when he was assaulted by another patient. The Supreme Court, Sullivan County, Meddaugh, J., granted patient's motion to compel discovery. Operator appealed.

Holdings: The Supreme Court, Appellate Division, McCarthy, J., held that:

[1] trial court properly ordered operator to produce its incident coordinator for a deposition;

[2] incident report of patient's injury would be exempt from disclosure; but

[3] remittal to the trial court was warranted for determination of whether operator waived its statutory privilege.

Affirmed as modified.

West Headnotes (7)

[1] **Pretrial Procedure** ⇐ Parties' agents or employees

Trial court properly ordered hospital operator to produce its incident coordinator and director of performance improvement department for a deposition, in patient's action seeking to recover damages for injuries he sustained when he was assaulted by another patient, where material sought was not privileged, and patient sought the deposition to obtain relevant and material evidence. McKinney's CPLR 3124.

[2] **Privileged Communications and Confidentiality** ⇐ Medical or Health Care Peer Review

Incident report of hospital patient's injury would be exempt from disclosure, in patient's action against hospital operator and others, seeking to recover damages for injuries he allegedly sustained when he was assaulted by another patient, whether patient was assaulted by another patient or he merely fell of his own accord, under statute requiring hospital to file with the Department of Health an incident report about any incident which led to the impairment of a patient's bodily functions due to circumstances unrelated to the natural course of an illness, disease, or proper treatment. McKinney's Public Health Law § 2805–*l*(2)(a).

[3] **Appeal and Error** ⇐ Particular Issues

Remittal to the trial court was warranted, in patient's action against hospital operator and others, seeking to recover damages for injuries he allegedly sustained when he was assaulted by another patient, for an in camera review of hospital's incident report, to determine whether the report was protected from disclosure under statutory privilege for hospital incident reports. McKinney's Public Health Law § 2805–*l*(2)(a).

[4] **Pretrial Procedure** ⇐ Work product privilege; trial preparation materials

The privilege attached to material prepared for litigation is conditional, with the possibility of a party being required to disclose it, even if the privilege is not waived, if the other party has substantial need of it and withholding the document would result in undue hardship. McKinney's CPLR 3101(d)(2).

2 Cases that cite this headnote

[5] **Pretrial Procedure**—Documents, papers, and books in general

While an unqualified privilege, such as applies to attorney work product, can be waived by a party, it is not waived merely through the client's review of an attorney's memorandum in preparation for a deposition.

3 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**—Waiver of privilege

When a witness preparing for a deposition reviews a document that is statutorily protected from disclosure by an unqualified privilege, that review itself does not waive the privilege.

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**—Medical or Health Care Peer Review

Hospital operator, as the party opposing disclosure and invoking statutory privilege for incident reports, bore the burden of demonstrating that incident report was prepared in accordance with the statute and was therefore privileged. McKinney's Public Health Law § 2805–*l*(2)(a).

1 Cases that cite this headnote

Attorneys and Law Firms

****168** Peltz & Walker, New York City (Bhalinder L. Rikhye of counsel), for appellant.

James R. McCarl & Associates, Montgomery (James McCarl of counsel), for respondent.

Before: PETERS, J.P., ROSE, LAHTINEN, McCARTHY and EGAN JR., JJ.

Opinion

McCARTHY, J.

***959** Appeal from an order of the Supreme Court (Meddaugh, J.), entered October 6, 2009 in Sullivan County, which, among other things, granted plaintiff's motion to compel discovery.

Plaintiff commenced this action alleging that he was assaulted by defendant "John Doe"[1] when both were patients at the hospital operated by defendant Catskill Regional Medical Center (hereinafter CRMC). CRMC opposed disclosure of certain documents requested by plaintiff, including an incident report written by Barbara Blume, the nurse who discovered plaintiff after the incident. CRMC also refused to produce Ann Korabik, incident coordinator and director of the performance improvement department, for a deposition. Plaintiff moved to compel disclosure (*see* CPLR 3124). CRMC cross-moved for protective orders (*see* CPLR 3103). As relevant here, Supreme Court held that CRMC was required to disclose the incident report because Blume reviewed it before her deposition. The court also ordered ***960** that Korabik appear at a deposition and produce business operations reports relating to the incident. CRMC appeals.

[1] Supreme Court properly ordered CRMC to produce Korabik for a deposition and for her to bring nonprivileged documents with her. As the party objecting to disclosure, CRMC bore the burden ****169** of establishing that the material sought was privileged (*see Jackson v. Jamaica Hosp. Med. Ctr.*, 61 A.D.3d 1166, 1168, 876 N.Y.S.2d 246 [2009]). CRMC submitted only an attorney affirmation stating that Korabik had no

knowledge of the incident other than from reading the incident report, which she did not prepare, and that no investigation into the incident was ever conducted.[2] CRMC contends that the incident report was created pursuant to Public Health Law § 2805–*l*. That statute requires an investigation of reportable incidents (*see* Public Health Law § 2805–*l* [3]), raising concerns as to whether the mandatory investigation was conducted and whether any nonprivileged information was revealed. Additionally, the record contains a redacted portion of the incident report submitted to the Department of Health. That redacted report does not list the name of the person who created it, raising a question as to who authored the submitted report and whether more than one report was created. The court only required Korabik to be deposed on and produce documents relating to hospital procedures and nonprivileged information pertaining to this incident obtained in the regular course of business. As no privilege was implicated, and plaintiff sought the deposition to obtain relevant and material evidence, the court's order regarding Korabik was proper.

[2] CRMC was statutorily mandated to file with the Department of Health an incident report about any incident which led to the impairment of a patient's bodily functions due to circumstances unrelated to the natural course of an illness, disease or proper treatment (*see* Public Health Law § 2805–*l* [2] [a]). Any such reports required by Public Health Law § 2805–*l* are exempt from disclosure pursuant to CPLR article 31 (*see* Education Law § 6527 [3]; *Katherine F. v. State of New York,* 94 N.Y.2d 200, 204–205, 702 N.Y.S.2d 231, 723 N.E.2d 1016 [1999]; *Marte v. Brooklyn Hosp. Ctr.,* 9 A.D.3d 41, 46, 779 N.Y.S.2d 82 [2004]; *see also Stalker v. Abraham,* 69 A.D.3d 1172, 1174–1175, 897 N.Y.S.2d 250 [2010]; *Matter of Khan v. New York State Dept. of Health,* 17 A.D.3d 938, 941, 794 N.Y.S.2d 145 [2005]). Whether plaintiff was injured because he was assaulted, as he alleges, or he merely fell of his own accord, as implied by CRMC, a report of that incident created pursuant to Public Health Law § 2805–*l* would not be subject to disclosure.

[3] [4] [5] [6] ***961** Plaintiff contends that Blume's report is subject to disclosure because any statutory exemption was waived by CRMC when Blume reviewed it prior to her deposition. CRMC did not waive, or intentionally relinquish, its right to keep the report confidential simply by allowing its own employee to read the document, unlike if the report had been supplied to a disinterested third party (*see Nga Le v. Stea,* 286 A.D.2d 939, 939–940, 730 N.Y.S.2d 620 [2001]; *Little v. Hicks,* 236 A.D.2d 794, 795, 653 N.Y.S.2d 740 [1997]; *see also Matter of Khan v. New York State Dept. of Health,* 17 A.D.3d at 941, 794 N.Y.S.2d 145). In comparison, a party is deemed to have waived the privilege that applies to material prepared for litigation if that material is reviewed by a witness to refresh his or her recollection prior to a trial or deposition and the testimony is based, at least in part, on that material (*see Hannold v. First Baptist Church,* 254 A.D.2d 746, 747, 677 N.Y.S.2d 859 [1998]; *Stern v. Aetna Cas. & Sur. Co.,* 159 A.D.2d 1013, 1013–1014, 552 N.Y.S.2d 730 [1990]; ****170** *Rouse v. County of Greene,* 115 A.D.2d 162, 162, 495 N.Y.S.2d 496 [1985]; *Doxtator v. Swarthout,* 38 A.D.2d 782, 328 N.Y.S.2d 150 [1972]). Yet the privilege attached to material prepared for litigation is conditional, with the possibility of a party being required to disclose it, even if the privilege is not waived, if the other party has substantial need of it and withholding the document would result in undue hardship (*see* CPLR 3101[d][2]). While an unqualified privilege, such as applies to attorney work product, can be waived by a party, it is not waived merely through the client's review of an attorney's memorandum in preparation for a deposition (*see Geffers v. Canisteo Cent. School Dist. No. 463201,* 105 A.D.2d 1062, 1062, 482 N.Y.S.2d 635 [1984]). Similarly, a social worker's review of a confidential case file prior to testifying does not constitute a wholesale waiver of the privileges attached to that file (*see Matter of Lenny McN.,* 183 A.D.2d 627, 627–628, 584 N.Y.S.2d 17 [1992]). Where a witness preparing for a deposition reviews a document that is statutorily protected from disclosure by an unqualified privilege, that review itself does not waive the privilege (*cf. id.; but see Matter of Slotnik v. State of New York,* 129 Misc.2d 553, 555, 493 N.Y.S.2d 731 [1985]). Hence, if Blume's incident report was truly created pursuant to Public Health Law § 2805–*l,* CRMC did not waive the statutory privilege attached to the incident report, and it is not subject to disclosure.

[7] Based on its ruling, Supreme Court did not decide whether Blume's report qualified as an incident report under Public Health Law § 2805–*l.* CRMC, as the party opposing disclosure and invoking a privilege, bore the burden of demonstrating that the report was prepared in accordance with the statute and is therefore privileged (*see Ross v. Northern Westchester Hosp. Assn.,* 43 A.D.3d 1135, 1136, 842 N.Y.S.2d 543 [2007]; *cf. Friend v. SDTC–Center for Discovery, Inc.,* 13 A.D.3d 827, 829, 787 N.Y.S.2d 163 [2004]). Because we cannot ***962** determine from this record whether CRMC has met its burden, we remit the matter to Supreme Court to review the report in camera and determine whether that document, or any part of it, is protected from disclosure (*see Learned v. Faxton–St. Luke's Healthcare,* 70 A.D.3d 1398, 1399, 894 N.Y.S.2d 783 [2010]; *Leardi v. Lutheran Med. Ctr.,* 67 A.D.3d 651, 652, 888 N.Y.S.2d 168 [2009];

Fray v. Fulton Commons Care Ctr., Inc., 51 A.D.3d 968, 969, 860 N.Y.S.2d 543 [2008]; *Klingner v. Mashioff*, 50 A.D.3d 746, 747, 855 N.Y.S.2d 628 [2008]; *Ross v. Northern Westchester Hosp. Assn.*, 43 A.D.3d at 1136, 842 N.Y.S.2d 543).

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as ordered disclosure of defendant Catskill Regional Medical Center's incident report prepared by Barbara Blume; matter remitted to the Supreme Court for an in camera review of that report in accordance with this Court's decision; and, as so modified, affirmed.

PETERS, J.P., ROSE, LAHTINEN and EGAN Jr., JJ., concur.

All Citations

75 A.D.3d 959, 906 N.Y.S.2d 167, 2010 N.Y. Slip Op. 06201

Footnotes

1 Plaintiff sued Doe using a fictitious name and has since learned his true identity, but the action's caption has not been amended and it is unclear whether Doe has been served.

2 While the attorney affirmation states that Korabik was willing to submit an affidavit to that effect, no such affidavit was produced in response to the instant motions.

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