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# ARKANSAS COURT OF APPEALS

DIVISION II

**No.** CV-17-243

| ENTERGY ARKANSAS, INC., ET AL. APPELLANTS V. RONNIE FRANCIS, ET AL. APPELLEES | **Opinion Delivered:** April 18, 2018 APPEAL FROM THE POPE COUNTY CIRCUIT COURT [NO. 58CV-13-323] HONORABLE DENNIS CHARLES SUTTERFIELD, JUDGE AFFIRMED IN PART AND REVERSED IN PART |
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**RAYMOND R. ABRAMSON, Judge**

This case is one of several that arose from an accident that occurred at Entergy's Arkansas Nuclear One ("Nuclear One") plant in Russellville on March 31, 2013, when a temporary crane failed as it lowered one of the plant's decommissioned main turbine generator stators onto a transport vehicle that was parked one story below, in the facility's train bay. The stator, which weighed over 500 tons, fell approximately thirty feet. The accident caused several injuries and one fatality, as well as considerable structural damage to the plant. Ronnie Francis, the plaintiff in the case below, was an iron worker who was injured as he attempted to help a man who had become trapped under one of the beams of the fallen crane.

Francis filed a complaint in the Pope County Circuit Court, alleging several claims of negligence against Entergy Arkansas, Inc., and Entergy Operations, Inc. ("Entergy");

primary contractor Siemens Energy, Inc. ("Siemens"); and several subcontractors, including Bigge Crane and Rigging Company ("Bigge"). This is an interlocutory appeal from the circuit court's order denying Entergy's motion for a protective order in which Entergy argued that the work-product privilege applied to two internal investigation reports that Entergy prepared in the aftermath of the accident. The circuit court ordered Entergy to produce the documents to Bigge, which had propounded written discovery seeking the documents, and to Francis, who had not. We affirm the circuit court's order requiring production to Bigge. We reverse, however, the order requiring production to Francis.

I. *Jurisdiction*

Rule 2(f)(1) of the Arkansas Rules of Appellate Procedure–Civil provides that a party may seek the supreme court's permission to file an interlocutory appeal from certain discovery orders involving the defense of a privilege, including opinion work product. The rule provides that the supreme court's discretion to grant permission is guided by six factors, including (1) the need to prevent irreparable injury; (2) the likelihood that the petitioner's claim of privilege or protection will be sustained; (3) the likelihood that an immediate appeal will delay a scheduled trial date; (4) the diligence of the parties in seeking or resisting an order compelling the discovery in the circuit court; (5) the circuit court's written statement of reasons supporting or opposing immediate review; and (6) any conflict with precedent or other controlling authority as to which there is substantial ground for difference of opinion. Ark. R. App. P.–Civ. (2)(f)(1) (2017). If the supreme court allows the appeal, the petitioner must file a timely notice of appeal and an appellate record. Ark. R. App. P.–Civ. (2)(f)(3).

In the present case, Entergy filed a Rule 2(f) petition to appeal from the circuit court's order denying its motion for a protective order based on the work-product privilege. On August 3, 2017, the supreme court granted permission and transferred the appeal to our court. Our jurisdiction, therefore, is pursuant to Rule 1-2(d) of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas, which provides that the supreme court may transfer to the court of appeals any case appealed to the supreme court.

II. *Background*

In 2011, Entergy contracted with Siemens to remove and replace one of Nuclear One's main turbine generator stators, which, powered by steam from the plant's nuclear reactor, generated the electricity produced at the plant. Siemens subcontracted with Bigge for a temporary crane and rigging services to remove the original stator and install its replacement. The temporary crane was intended to lift the stator from its mooring on the plant's main turbine deck, carry it several feet to the train-bay opening, and then lower the stator onto a transport that waited below.

The stator lift began at approximately 7:40 a.m. on Sunday, March 13, 2013. After the lift was underway, the supervisors realized that the stator would not clear a guardrail at the opening of the train bay. Several iron workers, including Francis, were called in to remove the guardrail while the stator lift was in progress. Shortly after the guardrail was removed, the temporary crane failed, and pieces of the crane, as well as the stator, fell to the main turbine deck and through the train-bay opening. Several of the workers standing by, including Francis, were injured in the accident. Wade Walters, a twenty-four-year-old journeyman iron worker, was killed.

Entergy immediately began an internal investigation or, by industry terminology, a "root-cause evaluation" of the accident. The root-cause evaluation was required by the Nuclear Regulatory Commission and Entergy's internal policy, and its purpose was to identify and determine the cause(s) of "conditions adverse to quality" and to document the "corrective action taken to preclude repetition."

Entergy issued its first root-cause evaluation on July 22, 2013. The report concluded that the root cause of the stator drop was the crane's defective design, which did not ensure that the crane "could support the loads anticipated for the lift." The report also found, as an additional root cause, that Bigge, who designed and furnished the crane, "failed to perform required load testing of their [crane] prior to its use at [Nuclear One] in accordance with OSHA regulation." The report further concluded, in pertinent part, that Bigge and Siemens also contributed to the accident by "inaccurately represent[ing] that the [crane] had been used at other electric power stations to lift components that exceeded the anticipated weight of the . . . stator," as well as Siemens's failure "to provide adequate oversight and control of Bigge's performance."

The Nuclear Regulatory Commission later found, during its own inspection of the Nuclear One facility, that the July 2013 root-cause evaluation was not adequate. Specifically, the report "did not address Entergy's oversight of the contractors involved with the stator lift," and the Commission's inspectors determined that "Entergy did not ensure adequate supervisory and management oversight of the contractors and other supplemental personnel involved with the stator lift, and this contributed to the event." Consequently, on December 10, 2014, Entergy issued another root-cause evaluation that identified additional root causes

of the accident, including, among other things, Entergy's failure to provide adequate guidance and project-management oversight of the design and testing of the temporary crane.[1]

Francis filed his complaint on November 21, 2013, alleging several claims of negligence against Entergy, Siemens, Bigge, and other contractors associated with the stator-lift project. The *Francis* case was one of several that followed the stator-lift accident, and the multiple cases generated overlapping requests for discovery. Several months after Francis filed his complaint, Bigge propounded 79 interrogatories and 64 requests for production to Entergy. The discovery sought documents and information for a separate property-damage case that Entergy had filed against Bigge and other subcontractors, as well as for the *Francis* case. The interrogatories included "Interrogatory No. 21," which, among other things, requested that Entergy "identify all persons who reviewed and investigated the occurrence" at Nuclear One on March 31, 2013, and "provide all documentation related to that review as it relates to any acts or omissions of Siemens Energy, as it relates to the Stator Exchange Project[.]" The requests for production included "Request for Production No. 9," which sought, in pertinent part, "all documents relating to or referring to [y]our post-accident investigation[,] which you allege revealed the alleged errors of and misrepresentations in [Bigge's] calculations" regarding the temporary crane. Likewise, "Request for Production

[1]Only the conclusions of the second root-cause evaluation, which are attached to a June 9, 2016 letter that the Nuclear Regulatory Commission sent to Entergy, are in the record. As we note, *infra*, the record does not otherwise include the contents of the second root-cause evaluation.

No. 63" specifically requested production of the first root-cause evaluation, in addition to twenty-one other enumerated documents.

Subsequently, on October 30, 2014, Entergy provided responses and objections to the interrogatories and requests for production. To "Interrogatory No. 21," Entergy responded that "Entergy's counsel directed a root cause team that investigated the March 31, 2013, incident," but otherwise objected to the interrogatory "to the extent it [sought] information protected by the attorney-client privilege or attorney work product privilege[,]" as well as other objections. Entergy similarly objected to "Request for Production No. 9," "to the extent that it seeks information protected by the attorney-client privilege or attorney work product privilege," as well as several other objections. In response to "Request for Production No. 63," Entergy stated the following:

> Subject to and without waiving the objections below, Entergy has conducted a reasonable and diligent inquiry, and shall produce responsive, non-privileged documents in its possession located as a result of its inquiry, if any. However, Entergy will not produce documents already produced by Entergy or another party in any of the actions arising out of the March 31, 2013, incident in which Bigge is also a party.

Entergy further stated that it objected to "Request for Production No. 63" "to the extent that it [sought] information protected by the attorney-client privilege or attorney work product privilege."

Bigge filed a motion to compel Entergy to respond to the interrogatories and requests for production on December 18, 2014. Bigge argued, *inter alia*, that Entergy did not "respond to discovery as ordered"; rather, it "provided 117 pages of non-responsive answers and objections." Shortly thereafter, on January 20, 2015, Francis filed a "motion in support" of Bigge's motion to compel, requesting that the circuit court grant Bigge's motion. Entergy

responded to Francis's motion, asserting that it should be denied because the motion to compel was without merit, and, in any event, Francis did not have standing to join the motion to compel because he was not a "discovering party" under Ark. R. Civ. P. 37(a) (2017).

Approximately eighteen months later, on or about October 16, 2016, Entergy provided supplemental responses and objections to the interrogatories and requests for production, including several thousand more documents. Entergy's responses to "Interrogatory No. 21," "Request for Production No. 9," and "Request for Production No. 63" did not materially change, and to that point, it had produced only a heavily redacted version of the first root-cause evaluation.[2] Consequently, Bigge filed a supplement to its motion to compel on January 3, 2017, in which it argued that Entergy should be compelled to produce "documents it has in its possession related to . . . pre-stator drop risk assessments and the Stator Drop Root Cause Evaluation records."

The root-cause evaluations came into sharper focus during a series of events that followed the filing of Bigge's supplemental motion to compel. First, on February 2, 2017, as a court-ordered mediation approached, Francis's counsel wrote a letter to the circuit court, apparently in response to a letter he received from the circuit court on January 31, 2017. Francis's counsel wrote, in pertinent part, that "Ronnie Francis requests the Court rule one document be produced before the Court-ordered mediation" and explained that

> [t]he Nuclear Regulatory Commission (NRC) caused Entergy to prepare a Stator Drop Root-Cause Evaluation. Entergy did so. Bigge served Entergy

[2]The first root-cause evaluation is a 190-page document. Entergy redacted 160 pages, and through a confidentiality agreement with the Nuclear Regulatory Commission, only the redacted version of the report is publicly available.

> with interrogatories and requests for production to produce the Stator Drop Root-Cause Evaluation. Entergy objected and produced the 190-page document with approximately 160 pages of the document redacted. . . . Ronnie Francis joined in Bigge's motion to compel on January 20, 2015.

The circuit court subsequently set the hearing on February 28, 2017.

Nearly two weeks after Francis had requested the hearing, on February 14, 2017, Neil O'Keefe, who was a chief in the Nuclear Regulatory Commission's Division of Reactor Projects, was deposed. Mr. O'Keefe explained the circumstances of the two root-cause evaluations, stating that Entergy's first root-cause-evaluation report failed to address its own lack of oversight of the project, which the Nuclear Regulatory Commission found during its own post-accident inspection. Mr. O'Keefe also explained that the Nuclear Regulatory Commission simply required a complete investigation of the facts, and Entergy, as its licensee, was required to perform a second root-cause evaluation to supply the remainder of the facts regarding the stator-lift accident.

Shortly thereafter, on February 24, 2017, Entergy filed a motion for a protective order, arguing that it should not be compelled to disclose the redacted portions of the first root-cause evaluation, as Francis requested in the letter that he wrote to the circuit court on February 2, 2017. Entergy asserted, as it had previously, that Francis had no right to seek the report because he was not a "discovering party" under Ark. R. Civ. P. 37(a). Entergy further argued that, in any event, the root-cause evaluation was protected by the work-product privilege because it was prepared in anticipation of litigation. As proof of the latter point, Entergy submitted a preservation-of-evidence letter from counsel representing Wade Walters's family and estate, which it received just days after the accident, as well as an

affidavit from Timothy Matthews, Entergy's outside counsel, who averred that he oversaw the root-cause evaluation.

On February 28, 2017, the circuit court held a hearing to determine whether the root-cause evaluations were protected by the work-product privilege and the attorney-client privilege. Francis and Bigge argued that the reports were not work product because they would have been prepared even in the absence of litigation pursuant to Entergy's internal policy and a regulation promulgated by the Nuclear Regulatory Commission. Bigge also argued that, nonetheless, Entergy waived the work-product and attorney-client privileges when it published the results of the first root-cause evaluation in its internal publication, The Navigator. In response, Entergy argued that the reports were indeed prepared in anticipation of litigation but also acknowledged that it "would have done [them] anyway." Entergy further argued its disclosure of the results of the first root-cause evaluation did not constitute a waiver of either privilege because The Navigator is an internal document whose distribution is limited to Entergy's employees and contractors. The circuit court ruled from the bench that "the information should be given over to Francis and Bigge," and it entered its order requiring disclosure of the root-cause evaluations on March 13, 2017.

Two days *after* the circuit court entered its order, Entergy filed a reply in support of its motion for protective order. In that document, Entergy attempted, among other things, to elaborate on its earlier admission that it would have prepared the first root-cause evaluation even in the absence of litigation. Entergy argued in its reply that the first report

> was distinguishable from other investigative reports that are produced in the ordinary course of business because the First Report was nothing like an

> ordinary root-cause report. It was bigger, more complicated, and generated at the direction of Entergy's counsel, which is not an ordinary business practice of Entergy's, for the purpose of Entergy's counsel preparing legal advice regarding the March 31, 2013 stator lift incident (the "Incident") and in reasonable anticipation of litigation.

Entergy also included a more extensive affidavit from attorney Tim Matthews, which, unlike the earlier affidavit, distinguished the attorney-led root-cause evaluation of the stator-lift accident from more "routine root-cause investigations . . . done by facility personnel regarding relatively minor events." Mr. Matthews also averred that the post-accident root-cause evaluation was not done in the ordinary course of business because counsel, as opposed to other Entergy personnel, chose its "methodologies and investigative techniques." There is no indication that the circuit court reconsidered its discovery order, at Entergy's request or otherwise, in light of the new information in Mr. Matthews's second affidavit.

On appeal, Entergy first contends that the circuit court abused its discretion by relying only on lawyer's argument, rather than evidence, to order disclosure of the root-cause evaluations, which, according to Entergy, is not sufficient. Second, Entergy asserts that Francis had no procedural right to seek production of the root-cause evaluations because he was not a "discovering party" entitled to production. Entergy raises two additional subpoints within this argument, including that Bigge was not entitled to production of the reports because Bigge failed to meet and confer with Entergy before filing its motion to compel, as required by Ark. R. Civ. P. 37(a)(2). Entergy further asserts that Francis and Bigge are not entitled, in any event, to production of the second root-cause evaluation because they failed to provide any notice prior to the hearing on February 28, 2017, that they would seek production of that document. Finally, Entergy contends that the circuit

court abused its discretion because the root-cause evaluations are work product and Francis has not shown a substantial need that defeats the privilege.[3]

### III. *Standard of Review*

A circuit court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed on appeal absent an abuse of discretion that is prejudicial to the appealing party. *Gerber Prods. Co. v. CECO Concrete Constr.*, 2017 Ark. App. 568, at 6, 533 S.W.3d 139, 143. To have abused that discretion, the circuit court must have not only made an error in its decision, but also must have acted improvidently, thoughtlessly, or without due consideration. *Id.* The abuse-of-discretion standard is also applied to a circuit court's ruling on a protective order. *See id.*

### IV. *Discussion*

#### A. The Basis of the Circuit Court's Ruling

Mr. O'Keefe's deposition testimony is at the heart of this issue. During the hearing that was held on February 28, 2017, Francis's counsel read excerpts from the deposition to support his argument that the root-cause evaluations were created in the ordinary course of business, rather than in anticipation of litigation. Entergy now claims that the circuit court erred by allowing Francis to use the deposition in that manner because he did not make the showing required by Ark. R. Civ. P. 32(a)(3)(A)–(E) (2017). Entergy further argues that Francis did not introduce the deposition—or any other exhibit—into evidence; therefore, the circuit court erroneously relied solely on the arguments of counsel when it found that

[3]Entergy now appears to have abandoned its initial claim that the reports are also covered by the attorney-client privilege.

the work-product rule did not apply to the root-cause evaluations. We decline to consider this issue because Entergy failed to preserve it for appellate review.

This court will not consider arguments raised for the first time on appeal. *See Parkerson v. Brown*, 2013 Ark. App. 718, at 5, 430 S.W.3d 864, 870. Entergy did not argue below, as it does now, that Francis failed to comply with the requirements of Ark. R. Civ. P. 32, before using Mr. O'Keefe's deposition at the hearing or that only the statements of counsel supported the argument that the work-product rule did not apply to the root-cause evaluations. Accordingly, we must decline to consider these arguments because Entergy makes them for the first time on appeal.

B. Francis's and Bigge's Rights to Seek Production of the Reports

Entergy next argues that the circuit court's order should be reversed because Francis did not have standing to compel production of the root-cause evaluations. Specifically, Entergy contends that Francis did not separately propound interrogatories and requests for production to Entergy and was not a "discovering party" who had standing to file—or join—a motion to compel under Ark. R. Civ. P. 37(a)(2). Entergy also challenges Bigge's right to compel production of the documents, alleging that Bigge failed to confer with Entergy, as also required by Rule 37(a)(2), before filing its motion to compel on December 18, 2014. Finally, Entergy asserts that the circuit court erred by ordering production of the second root-cause evaluation because Entergy did not have fair notice before the hearing that Francis and Bigge would seek its production.

Entergy's argument about Francis's right to seek production of the root-cause evaluations is well taken. Francis never served Entergy with interrogatories or requests for

production formally seeking the root-cause evaluations, and in the absence of making his own requests for discovery from Entergy, he lacked standing to "join" Bigge's motion to compel. *See* Ark. R. Civ. P. 37(a)(2) (providing that only "the discovering party" may move for an order compelling discovery). Accordingly, we reverse the order of the circuit court to the extent that it orders Entergy to produce the root-cause evaluations to Francis.

Entergy is mistaken, however, that the circuit court's order to produce the documents to Bigge was an abuse of discretion because Bigge failed to confer with Entergy prior to filing its motion to compel. As an initial matter, the argument ignores that this is an appeal from the circuit court's order denying Entergy's motion for an order of protection pursuant to Ark. R. Civ. P. 26(c) (2017), which required Entergy, and not Bigge, to state that it "in good faith conferred or attempted to confer with other affected parties." *Id.* Additionally, the record demonstrates that Entergy waived the argument, which first appeared in its response to Bigge's motion to compel, because it later met with Bigge and other parties regarding the items requested in the interrogatories and requests for production and provided its supplemental responses to the discovery in October 2016.

Finally, we decline to reach the merits of Entergy's argument that it was denied fair notice that Francis and Bigge were going to request the second root-cause evaluation at the February 28, 2017, hearing. Quite simply, Entergy failed to preserve the argument for appellate review by raising it in the circuit court. *See Parkerson*, 2013 Ark. App. 718, at 5, 430 S.W.3d at 870. In any event, Entergy cannot credibly claim that it was unaware that the second root-cause evaluation was inextricably linked to the first, or that the second report, which was issued in December 2014, was outside the scope of the discovery that

Bigge requested in "Interrogatory No. 21" or "Request for Production No. 9." Accordingly, we affirm.

### C. The Work-Product Privilege

Entergy next contends that the circuit court abused its discretion by finding that the two root-cause evaluations did not qualify for the work-product privilege because they were created in the ordinary course of business. Specifically, Entergy asserts that, while its own policy required the root-cause evaluations, they had a far different character than those it performs in the ordinary course of business. Unlike more routine root-cause evaluations, those at issue here followed a severe accident that was certain to engender litigation; they were performed with the involvement of counsel; and they required a much more complex level of investigation. Entergy therefore contends that the two root-cause evaluations are "opinion work product" that warrant protection from disclosure even upon another party's showing of substantial need.

We hold that the circuit court did not abuse its discretion by finding that work-product protection did not apply to the two root-cause evaluations. "The work product doctrine was designed to prevent 'unwarranted inquiries into the files and mental impressions of an attorney.'" *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir. 1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)). Ordinary work product, including "raw data collected in the course of litigation and included in an attorney's file," *Shook v. Love's Travel Stops & Country Stores, Inc.*, 2017 Ark. App. 666, at 9, 536 S.W.3d 635, 640, is subject to qualified protection and is discoverable only upon "a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that

he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Ark. R. Civ. P. 26(b)(3). Opinion work product, consisting of "the mental impressions, conclusions, opinions, and or legal theories of an attorney or other representative of a party concerning the litigation," Ark. R. Civ. P. 26(b)(3), is subject to almost absolute protection. "Regardless of the type of work product at issue," however, "the threshold question governing application of the doctrine is whether the contested documents were prepared in anticipation of litigation." *Shook*, 2017 Ark. App. 666, at 9, 536 S.W.3d at 640.

"The mere possibility that litigation may result is not sufficient to trigger the protection of the work-product doctrine." *Id*. Rather, the test is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id*. at 10, 536 S.W.3d at 640. There is no work-product protection for documents prepared in the ordinary course of business. *Id*.

It is undisputed that Entergy would have performed the root-cause evaluations even in the absence of litigation, as required by its own policy and by the Nuclear Regulatory Commission. It argues, however, that the reports of those evaluations should nonetheless be protected as work product because the scale of the root-cause evaluations that followed the stator-lift accident were unlike those that are created in the ordinary course of business for more minor events. According to Entergy, the stator-lift root-cause evaluations were larger and more complex, were overseen by counsel, and were conducted when litigation

was certain to occur. Entergy therefore argues that the circuit court abused its discretion by ordering it to produce the root-cause evaluations.[4]

We must reject this argument. The party asserting work-product privilege has the burden of proving its application, *see Shook*, 2017 Ark. App. 666, at 9, 536 S.W.3d at 640, and Entergy failed to timely offer the evidence that, in its view, establishes that the root-cause evaluations following the stator-drop incident were prepared outside the ordinary course of business. As an initial matter, there is no unredacted version of the first report in the record to allow the circuit court—or this court—to evaluate that claim, and there is no version of the second report—redacted or otherwise—in the record at all. Further, as indicated above, Entergy submitted two substantially different affidavits from Entergy's outside counsel, Timothy Matthews. The first affidavit did little more than establish that counsel was involved in the first root-cause evaluation that was otherwise performed in the ordinary course of business. The second affidavit went to greater lengths to distinguish both root-cause evaluations from those that are more "routine," but it was not presented in a format that allowed the circuit court to consider it. Indeed, Entergy submitted the second affidavit in a reply to Francis's response to Entergy's motion for protective order only *after* the circuit court entered its order denying the motion. Entergy did not request reconsideration of the discovery order based on the new information in the second affidavit. Therefore, Entergy cannot use the second affidavit now to demonstrate that the circuit court

[4]As indicated above, Bigge argued—and the circuit court ruled—that Entergy waived the work-product privilege for the first root-cause evaluation by disclosing its conclusions in its publication, The Navigator. We decline to reach the waiver issue, however, because we find that Entergy has failed to meet its burden of proving that the work-product privilege applies to the root-cause evaluations.

acted "improvidently, thoughtlessly, or without due consideration," *Gerber*, 2017 Ark. App. 568, at 6, 533 S.W.3d at 139, when it ordered production of the root-cause evaluations. Because there was no abuse of discretion, we affirm the circuit court's order requiring production of the root-cause evaluations to Bigge.

V. *Conclusion*

Because we find that Entergy failed to meet its burden of proving that it created the root-cause evaluations in a form that was different from those it creates in the ordinary course of business, we hold that the circuit court did not abuse its discretion when it ordered Entergy to produce those documents to Bigge. The circuit court's order, therefore, is affirmed as it pertains to Entergy's production of the root-cause evaluations to Bigge. We further hold, however, that the circuit court abused its discretion when it ordered Entergy to produce the root-cause evaluations to Francis, who did not propound discovery seeking those documents. Accordingly, the circuit court's order is reversed to the extent that it orders Entergy to produce the root-cause evaluations to Francis.

Affirmed in part and reversed in part.

WHITEAKER, J., agrees.

HIXSON, J., concurs.

**KENNETH S. HIXSON, Judge, concurring**. I concur with the majority that we must affirm in part and reverse in part. First, I agree with the majority's analysis that we must reverse the circuit court's order compelling Entergy to produce the two root-cause evaluation reports to Mr. Francis. Mr. Francis never served Entergy with any interrogatories

or requests for production to formally seek the reports and therefore lacked standing to "join" Bigge's motion to compel. *See* Ark. R. Civ. P. 37(a)(2) (2017).

I must further agree with the majority that Entergy's argument that Bigge failed to comply with Arkansas Rule of Civil Procedure 26(c) is without merit and that Entergy failed to preserve its arguments regarding the evidence considered by the circuit court and that it was denied fair notice that the second root-cause evaluation report was also at issue.

Additionally, I agree that we must affirm the circuit court's order that compelled Entergy to disclose the root-cause evaluation reports to Bigge under these particular facts. However, I write this concurrence to further clarify my reasons for doing so. In this case, we are confronted with dual-purpose documents, i.e., the root-cause evaluation reports. One purpose of the documents was that the reports were prepared in anticipation of litigation. The second purpose of the documents was that the reports were prepared in the ordinary course of business in that the reports were required by the U.S. Nuclear Regulatory Commission (NRC) and Entergy's own internal policies. Hence, we have dual-purpose documents, and the issue is whether these dual-purpose documents can be afforded protection under the attorney-work-product doctrine. It appears that neither Arkansas nor the Eighth Circuit has addressed the specific issues herein. However, the United States District Courts in Louisiana, Mississippi, Arizona, and Utah and the Ninth Circuit Court of Appeals have addressed similar issues, and those opinions contain pertinent insight.

There appears to be at least two somewhat different approaches to determine whether the attorney-work-product doctrine applies in a dual-purpose document case. The first approach is often referred to as the "primary motivating purpose" approach, and the second

approach is often referred to as the "because of" approach. The affidavit filed by Entergy's attorney, Timothy Matthews, makes it clear that the two root-cause reports prepared by Entergy had dual purposes. First, the root-cause reports were ostensibly prepared in anticipation of litigation. Entergy received a demand letter from a plaintiff's attorney only four days after the accident. The affidavit also makes it clear that the root-cause reports were prepared because the NRC and its own internal policies and procedures required Entergy to prepare the root-cause reports to prevent future similar events.

The "primary motivating purpose" approach is adequately described in *Galvan v. Miss. Power Co.*, No. 1:10CV159-KS-MTP, 2012 WL 5873633 (S.D. Miss. Nov. 20, 2012). Mississippi Power Company (MPC) prepared a root-cause analysis to establish the facts and observations of an unidentified event. *Id.* In responding to a request for production of documents, MPC stated that a root-cause analysis existed, which was conducted at the behest of MPC's attorneys; however, MPC declined to deliver the analysis, citing the attorney-work-product doctrine. *Id.* The district court ultimately denied the motion for protective order by MPC and ordered the root-cause analysis to be delivered to Galvan. *Id.* The district court explained its reasoning as follows:

> [T]he work-product doctrine does not apply to documents prepared in the ordinary course of business. In order for a document to be protected by the work-product doctrine, "litigation need not be necessarily imminent . . . as long as the *primary motivating purpose* behind the creation of the document was to aid in possible litigation."

*Galvan*, 2012 WL 5873633, at *2 (internal citations omitted and emphasis added). The *Galvan* court then stated that "[b]ased on the limited information provided by MPC, the court is unable to determine whether the root cause analysis, or any other document

withheld solely on the basis of work-product, was prepared primarily in anticipation of litigation or whether such documents were prepared in the ordinary course of business, and would have been prepared whether litigation was anticipated or not." *Id.*

The following excerpt from *Galvan* is of particular importance to this concurrence and to dual-purpose root-cause analysis cases:

> In making this finding, the court in no way concludes that root cause analysis reports or conclusions are never protected by the work-product doctrine or the attorney-client privilege; in many cases they are protected from disclosure. . . . However, in this instance, based on the record before the court, MPC has failed to meet its burden of establishing that the root cause analysis should be protected from disclosure.

*Id.* at *2 (internal citations omitted).

This approach was also used by the U.S. District Court in Utah in *Chevron Pipe Line Company v. Pacificorp*, No. 2:12-CV-287-TC-BCW, 2016 WL 10520301 (D. Utah Feb. 22, 2016). The following excerpt from *Chevron* is pertinent:

> Here, the Court has no doubt that the Draft Report was created with potential litigation in mind. However, the Court is not persuaded that litigation was a "primary motivating purpose" of this document. This is true in light of the very strong evidence RMP has presented with regard to environmental regulations Chevron had to comply with and Chevron's overarching concerns at the time the spill occurred. Namely, Chevron had legitimate business purposes for the creation of the Draft Report. Chevron was rightly concerned about determining the cause of the spill in order to prevent further leakage and prevent future events from occurring. In addition, upon review, despite the alleged purposes contained in the Legal Charter, the Draft Report contains no language that suggests a particular litigation strategy nor due to the collaborative manner in which this document was created, is it clear if any of its conclusions are explicitly made by counsel or are included solely for counsel to form a *litigation* strategy.

*Id.* at *4 (emphasis in original).

Louisiana has also used the "primary motivating purpose" approach in the dual-purpose-document arena. In *Chevron Midstream Pipelines LLC v. Settoon Towing LLC*, No.

13-CV-2809, 2015 WL 65357 (E.D. La. Jan. 5, 2015), the district court recognized the following:

> The Fifth Circuit has described the standard for determining whether a document has been prepared in anticipation of litigation as follows:
>
> > It is admittedly difficult to reduce to a neat general formula the relationship between preparation of a document and possible litigation necessary to trigger the protection of the work product doctrine. We conclude that litigation need not necessarily be imminent, as some courts have suggested, as long as the *primary motivating purpose* behind the creation of the document was to aid in possible future litigation.
>
> . . . .
>
> "If the document would have been created regardless of whether litigation was also expected to ensue, the document is deemed to be created in the ordinary course of business and not in anticipation of litigation." . . . As one court has observed:
>
> > Following any industrial accident, it can be expected that designated personnel will conduct investigations, not only out of a concern for future litigation, but also to prevent reoccurrences, to improve safety and efficiency in the facility, and to respond to regulatory obligations. Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.

*Id.* at *6–7 (internal citations omitted).

The second approach to determine whether a dual-purpose document may be protected by the attorney-work-product doctrine is sometimes referred to as the "because of" test. This approach was adequately discussed in *United States v. Richey*, 632 F.3d 559, 567–68 (9th Cir. 2011) as follows:

> In circumstances where a document serves a dual purpose, that is, where it was not prepared exclusively for litigation, then the "because of" test is used. Dual purpose documents are deemed prepared because of litigation if "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." In

applying the "because of" standard, courts must consider the totality of the circumstances and determine whether the "'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.'"

(Internal citations omitted.)

That brings me to my conclusion. Regardless of whether the trial court utilizes the "primary motivating purpose" approach or the "because of" approach, Entergy failed to sustain its burden of proving an entitlement to the attorney-work-product doctrine. Here, the record indicates that the first root-cause report was heavily redacted, rendering appellate review meaningless. The second root-cause report was not introduced into evidence, thereby preventing any appellate review. Therefore, the only evidence in the record regarding the primary motivating purpose of the reports or whether the reports were in substantially similar form but for the prospect of litigation, is the affidavit of Entergy attorney, Timothy Matthews. Matthews's affidavit is sufficient to show that the reports were created for the dual purpose of preparation in anticipation of litigation and in the regular course of Entergy's business; but the affidavit does not contain sufficient evidence to sustain Entergy's burden of proving that the primary motivating purpose of the root-cause reports was in preparation of litigation or that the reports were in substantially similar form but for the prospect of litigation. Although the affidavit includes language explaining that the report was prepared in anticipation of litigation, it also states that the NRC-recognized methodologies were used to implement additional corrective actions to prevent the recurrence of an accident such as the one in the case at hand. Further, Entergy's counsel at the hearing conceded that these two reports would have been produced regardless of the anticipation of litigation. Therefore, borrowing from the rationale in *Galvin*, *Chevron*, and

*Richey*, and based on our standard of review, I would conclude the trial court did not err in finding that the root-cause reports are not subject to the attorney-work-product doctrine and should be delivered to separate appellee Bigge because Entergy failed to sustain its burden of proof. Having said that, I would repeat the admonition in *Galvan*, where the *Galvan* court stated: "[T]he court in no way concludes that root cause analysis reports or conclusions are never protected by the work-product doctrine or the attorney-client privilege; in many cases they are protected from disclosure." *Galvan*, 2012 WL 5873633, at *2.

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