



**Court:** Shawnee County District Court  
**Case Number:** 2022-CV-000316  
**Case Title:** In the matter of John Balbirnie  
**Type:** MEMORANDUM DECISION AND ORDER

SO ORDERED.

A handwritten signature in black ink, appearing to read "T. Watson".

/s/ Honorable Teresa L Watson, District Court Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION THREE**

IN THE MATTER OF  
THE WRONGFUL CONVICTION OF  
JOHN BALBIRNIE

2022-CV-316

**MEMORANDUM DECISION AND ORDER**

Petitioner John Balbirnie brings this claim for damages against the State of Kansas pursuant to K.S.A. 60-5004, alleging that he was wrongfully convicted of second-degree murder and imprisoned for nearly 11 years. During discovery, Balbirnie issued his First Request for Production of Documents to the State. In its response, the State withheld 38 documents (500 pages total) from the Franklin County Attorney’s Office claiming they were protected from disclosure by a work product privilege. After the parties unsuccessfully conferred to try to resolve the issue, Balbirnie asked this Court to review the 38 documents *in camera* to determine whether they were properly withheld.

“The work product rule is not an absolute privilege but rather a limitation on discovery.” *City of Neodesha v. BP Corp. N. Am.*, 50 Kan. App. 2d 731, 763, 334 P.3d 830 (2014). “Parties objecting to discovery based on an evidentiary privilege bear the burden of establishing that it applies.” *Flaherty v. CNH Indus. Am., LLC*, 56 Kan. App. 2d 1317, 1325, 446 P.3d 1078 (2019).

The work product privilege protects “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent.” K.S.A. 60-226(b)(4)(A). There is an exception when a “party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” K.S.A. 60-226(b)(4)(A)(ii).

“The work product limitations are based on policy considerations that are similar to those underlying the attorney-client privilege. Work product immunity rests on the idea it is necessary to preserve the independence of the lawyer and thus, indirectly, the adversary system.” (Internal quotations and citations omitted.) *State v. Gonzalez*, 290 Kan. 747, 762, 234 P.3d 1 (2010). It is built on “the need for the lawyer handling a case to have full rein to develop his theory and strategy in the case,” and “work without fear of disclosure, at least in the earlier stages of preparation.” *Id.*

Though Kansas state courts have not addressed this issue, federal courts extend the work product privilege to subsequent litigation where the materials sought were prepared by or for the same party in previous litigation. *Frontier Refining Inc. v. Rupp Co. Inc.*, 136 F.3d 695, 703 (10<sup>th</sup> Cir. 1998); and *Employer's Reinsurance Corp. v. Clarendon Nat. Ins. Co.*, 213 F.R.D. 422, 425 (D. Kan. 2003). Because Federal Rule of Civil Procedure 26(b)(3)(A) defines the discoverability of work product in the same way as K.S.A. 60-226(b)(4)(A), *Frontier Refining* is persuasive authority. Some courts have added a requirement that the previous and subsequent litigation be closely related. *Frontier Refining*, 136 F.3d at 703 (noted but not adopted). That is certainly the situation here. Both the underlying criminal case and the instant wrongful conviction case hinge

upon Balbirnie's role in the victim's death. This is so despite the relative positions of the parties in the two matters and differing burdens of proof between a criminal and civil case.

The Court has reviewed the 38 documents withheld by the State of Kansas based on claims of work product privilege. The documents appear to be prepared by and for the Franklin County Attorney's Office in anticipation of the State's criminal prosecution of Balbirnie in Franklin County case no. 2010-CR-251. And Balbirnie's underlying criminal trial is closely related to the instant civil claim for wrongful conviction in that criminal case. Thus, the documents meet the requirements of K.S.A. 60-226(b)(4)(A) for invoking work product protection. Balbirnie asserts that the documents should nonetheless be disclosed because he has substantial need for the materials to prepare his wrongful conviction case. See K.S.A. 60-226(b)(4)(A)(ii).

Balbirnie points out that some courts have made a distinction between fact work product and opinion work product. "Documents containing factual information prepared in anticipation of litigation generally are referred to by the courts as fact work product and documents containing the mental impressions of an attorney generally are referred to as opinion work product." (Internal quotes omitted.) *Am. Cas. Co. of Reading, PA v. Healthcare Indem., Inc.*, 2001 WL 1718275, at \*6 (D. Kan. 2001) (unpublished). The 38 documents at issue here contain a mixture of both types of work product. Recognizing that opinion work product commands greater protection, K.S.A. 60-226(b)(4)(B), Balbirnie seeks only those documents which contain fact work product. Balbirnie claims that he needs the prosecutor's work product because the passage of time hinders his ability to reconstruct the facts of the underlying criminal case.

The State correctly points out that the facts of the underlying criminal case may be thoroughly reconstructed by reference to the transcript of the criminal trial or from materials in the

files of Balbirnie's criminal attorneys, among other possibilities. Balbirnie does not claim that these items are unavailable to him or inadequate for the task at hand. Thus, while he may assert a need for the prosecutor's fact work product from the underlying criminal trial, he has failed to demonstrate that he cannot, without undue hardship, obtain the substantial equivalent through other sources. K.S.A. 60-226(b)(4)(A)(ii).

### **CONCLUSION**

For the reasons set forth above, following an *in camera* review of the documents at issue, the Court concludes that the work product privilege applies to the documents and they were properly withheld.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON  
DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above document was filed electronically providing notice to counsel of record.

/s Angela Cox  
Administrative Assistant