STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

VANESSA ANSTINE,)
Plaintiff,)
vs.)
DBH PROPERTIES, LP d/b/a LAKE VILLA APARTMENTS, ET AL,)
Defendant.)

Case No. **CV 2011 6360**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's Motion to Compel filed July 11, 2012, seeking to compel defendant DBH Properties, LP d/b/a Lake Villa Apartments (DBH) to produce a document in their control, specifically, an incident report prepared by maintenance supervisor Scott Pirch. Plaintiff's Memorandum in Support of Motion to Compel, p. 1. DBH claimed the report was "expressly prepared in anticipation of litigation." *Id.*

The Complaint filed by Vanessa Anstine (Anstine) on August 5, 2011, alleges that on January 19, 2011, Anstine fell on the ice while walking from her apartment at Lake Villa Apartments (owned by DBH) to her car parked at the apartment complex parking lot. Complaint, p. 2, ¶ 2.1. Anstine alleges DBH was negligent in maintaining its premises and failed to warn Anstine, and should be responsible for the injuries she sustained. *Id.,* p. 3, ¶¶ 3.2.1 - 3.2.5. The Amended Complaint, filed October 3, 2011, added Bushwacker Landscape, LLC (Bushwacker) as a party, alleging that Bushwacker

provided snow removal at the apartment complex. Amended Complaint for Damages, p. 2, ¶ 2.3.

In responding to a request for production of documents asking for any written reports, DBH referenced an "incident report" as follows: "…Scott Pirch prepared an Incident Report on the day of the accident which was expressly in anticipation of litigation, and thus is protected from discovery." Response to Request for Production No. 8. This led to Anstine's Motion to Compel. The parties briefed the issue. Bushwacker joined Anstine's position on the motion to compel. Oral argument was held on July 26, 2012. At the conclusion of that oral argument, the Court directed the "incident report" be furnished to the Court to be reviewed in camera, and the Court would announce its decision on the motion to compel prior to the disclosure of any document. The incident report was received by the Court on July 27, 2012, and the Court has reviewed the same. The following is the Court's decision and order.

III. ANALYSIS.

Idaho Rule of Civil Procedure 26(b)(3) provides, under the heading "scope of discovery", the circumstances when privileged information may be withheld:

> Rule 26(b)(3). Trial preparation - Materials.
> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, including communications between the attorney and client, whether written or oral. The court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other

> representative of a party concerning the litigation, including communications between the attorney and client, whether written or oral.

The phrase "prepared in anticipation of litigation" connotes "work product." If an item is "work product", the rule discusses the showing of "undue hardship" the movant must show in order to obtain the document. The rule also makes it clear that the court shall not disclose mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. However, the Rule does not explain what "work product" consists of, other than as "prepared in anticipation of litigation." The only appellate case listed under the rule is *Bailey v. Sanford,* 139 Idaho 744, 86 P.3d 458 (2004). Bailey offers no guidance for this case as it discusses what amounts to "undue hardship" or an undue burden upon the party requesting the discovery. The "undue hardship analysis" only applies if in fact the object sought is "work product."

Clearly, Pirch is a "representative of a party", specifically, an agent of the non-requesting party. DBH meets that requirement.

The "incident report" in question is on what appears to be a pre-printed form titled "Notice/Incident Report" for "Hagadone Corporation, Hagadone Hospitality Co, The Hagadone Group of Related Operations." The report form was filled out by Scott Pirch, apparently on January 20, 2011, the same day as the accident. The form as filled out by Pirch lists Anstine as the party involved, lists a witness, describes what happened under the heading "Facts of Incident".

The report also has three choices that can be checked: "Property damage", "Personal Injury Claimed" and "Incident Report/Future Anticipation of Litigation." On the form pertaining to Anstine, only "Incident Report/Future Anticipation of Litigation" is checked.

However, simply checking the box does not make the document non-

discoverable as work product.

DBH submitted an "Affidavit of Scott Pirch in Opposition to Motion to Compel." In that affidavit, Pirch states: "I prepared the Report in anticipation of litigation and clearly designated that it was being prepared in anticipation of litigation at the top of the Report." Affidavit of Scott Pirch in Opposition to Motion to Compel, p. 2, ¶ 6. Pirch's claim that it was prepared in anticipation of litigation is also not controlling for a variety of reasons. First, it is a conclusory statement on Pirch's part. Pirch gives no other information in his affidavit as to why his conclusion, that the report was prepared in anticipation of litigation, is so. The conclusion of Pirch thus lacks any cognizable foundation. Pirch's conclusion has no support. Second, simply labeling a document a certain way does not necessarily make it so. What is "contained" in that report is what is actually more pertinent. Third, the primary motivating purpose behind the creation of the document is determinative. The analysis of the Superior Court of Massachusetts in *Rhodes v. AIG Domestic Claims, Inc.,* 20 Mass.L.Rptr. 491, Not Reported in N.E.2d, 2006 WL 307911 (Mass.Super.,2006), especially in its discussion of *Shotwell v. Winthrop Comm. Hosp.,* 26 Mass.App.Ct. 1014, 1016, 531 N.E.2d 269 (Mass.App.Ct. 1988) is instructive. *Rhodes* dealt with an unfair claims practice case, which creates its own peculiar analysis of what constitutes "work product". However, the germane portions of *Rhodes* as it discussed *Shotwell* are instructive, and are as follows:

> The Rule [26(b)(3)] effectively incorporates into Massachusetts law the work product doctrine first articulated by the United States Supreme Court in *Hickman v. Taylor,* which sought to protect from disclosure certain information regarding an attorney's preparation of a client's case. 329 U.S. 495, 510-11, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The information protected includes information an attorney or her agent assembles in anticipation of litigation as well as her mental impressions, conclusions, opinions, legal theories or trial strategy. *Id.;* see Fed.R.Civ.P. 26(b). Such information is technically not privileged, but is generally protected from

discovery. See *Messelman v. Phillips,* 176 F.R.D. 194, 195 n. 1 (D.Md.1997).

The Rule distinguishes between what has become known as ordinary or fact work product versus opinion work product. Fact work product is protected from disclosure, but to a lesser degree than opinion work product-it may be ordered produced upon a showing that the opposing party has substantial need for the fact work product and cannot without undue hardship obtain the substantial equivalent. See Mass. R. Civ. P. 26(b)(3) and Reporter's Notes. Opinion work product is protected from disclosure "except in extremely unusual circumstances." Reporter's Notes, Mass. R. Civ. P. 26(b)(3). The greater protection given to opinion work product includes not only the attorney's mental impressions or "intellectual work-product" but also that of "investigators and claim-agents." Reporter's Notes, Mass. R. Civ. P. 26(b)(3), quoting 48 F.R.D. 500, 502 (1970).

Although the language of the Rule protects from disclosure the work product prepared both by a party and that party's representative (generally, her attorney and the agents of her attorney), that protection applies only to work product prepared "in anticipation of litigation or for trial." Mass. R. Civ. P. 26(b)(3). **When the work product is prepared in "the ordinary line of business and duty, looking to the gathering and beneficial use of information," it does not enjoy any protection under the Rule even if "such reports might ultimately be useful to one or another party in case of future litigation."** *Shotwell v. Winthrop Comm. Hosp.,* 26 Mass.App.Ct. 1014, 1016, 531 N.E.2d 269 (1988). **Thus, in *Shotwell,* when the plaintiff injured herself by walking into a glass panel in a hospital doorway, incident reports prepared by the hospital were not found to be protected work product, even though there plainly was the risk of a lawsuit once the incident had occurred.** *Id.* at 1014-1015, 531 N.E.2d 269. "[T]he mere possibility that a certain event could potentially lead to future litigation does not render all documents subsequently prepared with regard to that event privileged.... **The essential question is what was the primary motivating purpose behind the creation of a particular document.**" *Harris v. Steinberg,* 6 Mass. L. Rptr. 417, 1997 WL 89164 (Mass.Super.Feb.10, 1997) (Doerfer, J.). In other words, "[t]he pertinent test is: whether in light of the nature of the document and factual situation in the particular case the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Colonial Gas Co. v. Aetna Cas. & Sur. Co.,* 144 F.R.D. 600, 605 (D.Mass.1992).

* * *

Therefore, this Court finds that, until litigation has been threatened or commenced, the factual reports of investigation and the insurer's evaluation of those reports contained in the claims file are prepared in "the ordinary line of business and duty" and not in anticipation of litigation, and thereby do not constitute protected work product.

The defendants may contend that the logical consequence of this decision is that any part of the insurance claims file prepared before

litigation was threatened or initiated would be discoverable by any party in litigation, even the plaintiffs in the underlying tort case. This is true only as to the factual reports of investigation contained in the claims file, not as to the claims representative's evaluation of the facts developed during the investigation. The insurer's evaluation of the facts would not be discoverable by the plaintiffs in the underlying tort litigation because the evaluation would not be admissible nor likely to lead to admissible evidence. In the underlying tort litigation, the insured, not the insurance company, is the defendant, and the insurance company's evaluation of the strength of the plaintiffs' case would not be admissible into evidence as a statement of a party opponent and would not be likely to lead to admissible evidence. In contrast, here, the insurance companies themselves are the defendants and their evaluation of the strength of the plaintiffs' case is a central issue in determining the reasonableness and good faith of their settlement offers. Indeed, this difference in the scope of discovery is one of the key reasons why trial courts generally sever the Chapter 93A/176D claims brought by a plaintiff against a defendant's insurance company from the tort claims brought against the insured defendant.

As to the factual reports of investigation, under Mass. R. Civ. P. 26(b)(3), the defendant's insurer stands in the same shoes as the defendant itself-the documents protected by that Rule are those "prepared in anticipation of litigation ... *by or for another party* or by or for that other party's representative (including his attorney, ... insurer, or agent)." Mass. R. Civ. P. 26(b)(3) (emphasis added). **If a corporation were to direct its quality control department to conduct an internal investigation of an accident caused by product failure or its personnel office to investigate a sexual harassment complaint, the documents generated by that investigation would be discoverable in a subsequent litigation,** since Massachusetts does not recognize any internal investigation privilege apart from the *statutory* privilege granted to hospitals to conduct internal peer investigations of alleged medical errors. See *Carr v. Howard,* 426 Mass. 514, 517-518, 689 N.E.2d 1304 (1998) ("Massachusetts provided no common law privilege for materials submitted to or produced by a medical peer review committee"); *McGuire v. Acuflex Microsurgical, Inc.,* 175 F.R.D. 149, 155-156 & n. 8 (D.Mass.1997) (Gertner, J.) (employers' internal investigations into allegations of sexual harassment "are not privileged"); *Harris-Lewis v. Mudge,* 1999 WL 98589 (Mass.Super.Feb.18, 1999) (Fremont-Smith, J.) (Massachusetts does not recognize a common law privilege for an organization's internal investigations, sometimes characterized as the self-critical analysis privilege). See also *In re Grand Jury Subpoena,* 599 F.2d 504, 510 (2d Cir.1979) ("To the extent that an internal corporate investigation is made by management itself, there is no attorney-client privilege"). Compare with G.L. c. 11, § 204 (medical peer review privilege). **If the corporation wished to protect the documents generated by the internal investigation from disclosure in discovery, it would need to direct its attorney to conduct an internal investigation for the**

> **purpose of providing legal advice to the company regarding the accident, and have the internal investigation conducted under the direction of that attorney.** See *In re Grand Jury Investigation,* 437 Mass. 340, 351, 772 N.E.2d 9 (2002) ("A construction of the attorney-client privilege that would leave internal investigations wide open to third-party invasion would effectively penalize an institution for attempting to conform its operations to legal requirements by seeking the advice of knowledgeable and informed counsel."). If the documents generated by a corporation's own internal investigation would not be protected from disclosure unless the investigation were conducted by an attorney for the purpose of providing legal advice, then the documents generated by an investigation conducted by the corporation's representative, specifically its insurer, also would not be protected from disclosure unless the investigation were conducted by an attorney for the purpose of providing legal advice.
>
> **This Court rejects the defendants' contention that litigation is anticipated as to every claim from the moment the claim is reported by the insured. This proposition would essentially require this Court to ignore the controlling precedent of the Appeals Court in *Shotwell* because there, too, there was a risk of litigation once the hospital learned that a visitor was injured by walking into a glass panel. If the mere possibility of litigation is sufficient to provide work product protection to any internal investigation of an incident, whether by the insured or the insurance company, then *Shotwell* must be overruled and an implicit internal investigation privilege will effectively have been created.**
>
> *** * ***
>
> Once litigation has been threatened or commenced, the factual reports of investigation and the internal reports evaluating the strength of the litigation become work product that falls within the rubric of Mass. R. Civ. P. 26(b)(3), because such documents, from that moment in time forward, are now deemed to have been prepared in anticipation of litigation.

2006 WL 307911, pp. 2-5. (bold added).

Applying the above to the Pirch report in the instant case leads this Court to find that the document is discoverable and is not protected as work product. Again, Pirch's checking a description on a pre-printed form that reads "Incident Report/Future Anticipation of Litigation" is not determinative. Such a label is an obvious attempt by the creator of the form to make all future use of the form non-discoverable. If this were allowed, there is little use for the discovery rules found in the Idaho Rules of Civil Procedure promulgated by the Idaho Supreme Court. Pirch's conclusory statement in

his affidavit is not determinative. Pirch gave no other information in his affidavit as to why his conclusion, that the report was prepared in anticipation of litigation, is so. What is "contained" in that report is pertinent. There are no theories contained in the report, only facts observed or reported. There are no mental impressions, conclusions, opinions, legal theories or trial strategy in the report. As shown above, the primary motivating purpose behind the creation of the document is determinative. While the category "Incident Report/Future Anticipation of Litigation" was checked by Pirch, the purpose behind creating the report was to document what happened, to whom, and when, what was said and by whom, and what was observed near the time of the incident.

The Court finds that given the answers Pirch made to questions asked on the pre-printed, the purpose behind Pirch's creating the report was not to prepare for litigation. While the purpose behind the category "Incident Report/Future Anticipation of Litigation" on the pre-printed form may have been an attempt to insulate *anything* ever written on *any* such form from *ever* being discoverable, the law will not countenance such. The report is discoverable.

III. CONCLUSION AND ORDER.

For the reasons stated above, the "Notice/Incident Report" is discoverable, Anstine's Motion to Compel is granted. Unless DBH files a motion to reconsider this decision, DBH has until the close of business on August 6, 2012, to produce this document to Anstine and Bushwacker. In compliance with this Court's scheduling order, Anstine has produced evidence of her efforts to obtain compliance from DBH to her discovery requests short of filing her motion to compel. Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, p. 3, ¶ 3. Accordingly, Anstine is entitled to attorney fees incurred in bringing her motion to compel.

IT IS HEREBY ORDERED Anstine's Motion to Compel is GRANTED.

IT IS FURTHER ORDERED unless DBH files a motion to reconsider this ruling, DBH must produce this document to Anstine and Bushwacker before the close of business on August 6, 2012.

IT IS FURTHER ORDERED Anstine is entitled to recover her reasonable attorney fees incurred in bringing her Motion to Compel, from DBH, should she choose to do so.

Entered this 1st day of August, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
R. Bruce Owens	667-1939	David W. Knotts	208-345-8660
Patrick W. Harwood	509-624-2081		

_____
Jeanne Clausen, Deputy Clerk