DOCKET NO. CV-11-6022089-S	:	SUPERIOR COURT
SEGWAY, INC.	:	JUDICIAL DISTRICT OF NEW HAVEN
V.	:	AT NEW HAVEN
SPECIAL OLYMPICS	:	
CONNECTICUT, INC.	:	OCTOBER 29, 2015

MEMORANDUM OF DECISION
MOTION TO COMPEL AND FOR SANCTIONS (#143)

FACTS AND PROCEDURAL HISTORY

The facts of this case are as set forth in the court's (*Fischer, J.*) decision on the defendants' Special Olympics Connecticut, Inc.'s (SOCT) and Thomas Madera's motion for summary judgment, and are as follows. This action was commenced by service of writ, summons, and complaint on July 5, 2011. "The plaintiffs, Segway, Inc. (Segway), Vincent Schuck, and Sarah Laufersweiler, filed their second amended complaint on March 27, 2012 . . . which is the operative complaint in the present case. The defendants, Special Olympics Connecticut, Inc. . . . and Thomas Madera, filed an answer on June 22, 2012. This is an indemnification action in which the plaintiffs seek recovery under principles of common-law indemnification. In the second amended complaint, the plaintiffs allege the following facts.

"The defendants were planning and hosting an event for law enforcement personnel called the Law Enforcement Torch Run International Conference to be held at Foxwoods Resort Casino in November 2009. Among the planned events was an obstacle course that featured Segway Personal Transporters (SPTs). In or about February 2009, the defendants reached out to the plaintiffs to ask if the plaintiffs would donate SPTs for the defendants' use during the obstacle course. The plaintiffs agreed. Madera, who at all relevant times was an agent, servant, and/or employee of SOCT, sent the plaintiffs a description of the proposed obstacle course. At that time the course featured ramps, traffic cones, and other potentially dangerous obstacles. One leg of the defendants' proposed obstacle course involved blindfolding a participant while the participant rode an SPT.

"The plaintiffs informed the defendants that operation of an SPT while blindfolded was dangerous and could not be done. The plaintiffs also warned the defendants of the hazards the other

proposed obstacles presented. At some point, the parties agreed that Segway representatives should observe the proposed obstacle course to determine whether it was suitable for safety purposes. On September 16, 2009, Schuck and Laufersweiler traveled to Southern Connecticut State University (SCSU), where the parties prepared the obstacle course and staged a dry run of the event. Schuck and Laufersweiler recommended, and the defendants agreed, that the traffic cones set up on the obstacle course by the defendants should be replaced with smaller markers. Schuck and Laufersweiler also learned for the first time that the defendants planned to use student volunteers to operate the SPTs on the obstacle course.

"John Ezzo, a student at SCSU, was one of the student volunteers. During the dry run, Ezzo, who was operating an SPT without a helmet and with his vision impaired by the hood of his sweatshirt, fell and sustained injuries. Ezzo subsequently commenced an action (the Ezzo action) against the plaintiffs in the Bridgeport Superior Court. See *Ezzo* v. *Segway Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-09-6005385-S. The *Ezzo* action settled, and the plaintiffs now seek indemnification from the defendants for Ezzo's damages.

"The plaintiffs' second amended complaint contains four counts. Counts one and two are against SOCT and sound in negligence and recklessness, respectively. Counts three and four are against Madera and sound in negligence and recklessness, respectively." *Segway, Inc., et al.* v. *Special Olympics Connecticut, et al.*, Superior Court, judicial district of New Haven at New Haven Docket No. CV-11-6022089-S, (February 23, 2015, *Fischer, J.*) The defendants filed a motion for summary judgment on January 21, 2014." On February 23, 2015, the court, *Fischer, J.* granted the motion as to Madera and denied the motion as to SOCT."

On August 5, 2015, pursuant to Practice Book § 13-27 (h), the defendant, SOCT filed a motion to compel the plaintiff Segway to produce its "designated representative" at a deposition to testify or alternatively in accordance with § 13-14, an order from the court precluding the plaintiff from calling any witnesses to testify regarding the topics in the defendant's notice of deposition. Additionally, the defendant has moved for sanctions against Segway for which it characterizes as the extraordinary efforts to which the plaintiff's counsel has gone to prevent their "designated representative" from testifying. In support of its motion, the defendant claims the following. This

is an indemnification action against the defendant in which the plaintiff is seeking reimbursement from a $10 million dollar settlement it paid out in the *Ezzo* personal injury claim. As previously noted the allegations against the defendant sound in negligence and recklessness on the theory that the defendant was in "exclusive control" of the situation. The defendant has been trying to depose Segway's "designated representative" since December 17, 2012, and in fact, the deposition was postponed by Segway on three prior occasions which prompted Special Olympics to file a prior motion to compel (#142). In response to that motion, counsel for Segway agreed to produce a "designated representative" at a time and place that was mutually agreed upon.

The deposition of Roxanne Lamonde, Segway's designated representative was scheduled for June 23, 2015, and all the necessary arrangements were made in accordance with their agreement. The defendant claims that Segway never objected to any of the items that were designated by SOCT, however, that deposition was again postponed by Segway, this time, counsel for Segway called two days before the deposition to inform counsel for SOCT that he wasn't feeling well and needed to postpone the deposition a fourth time. Again, no objections were raised to the designated topics, nor were any issues identified with those topics, instead, counsel for Segway requested a postponement due to illness. The deposition was rescheduled for July 8, 2015. Segway's counsel contacted SOCT counsel to advise him that the person they were designating, Roxanne Lamonde, may not be the right person for all the designated areas, but she was the right person for most of them. In addition, defendant claims that Segway's counsel mentioned that there might be one or two areas in which he would have to assert the attorney/client privilege depending upon what questions were asked. The defendant claims that at no time did Segway object to the designated areas, or raise any issues involving those designated areas. Plaintiff's counsel and counsel for SOCT did attend the July 8, 2015 deposition of Ms. Lamonde, however shortly after the deposition began, after having traveled 2 ½ hours, it became clear to defendant's counsel that Segway's counsel was not going to allow Ms. Lamonde, the designated representative answer any of the substantive questions as set forth in defendant's topics. According to defendant, Segway cited two reasons, first any communications Ms. Lamonde had were attorney/client privilege because she was a paralegal, and somehow that privilege extends to her; and second, Segway claims that any and all questions after this incident are

protected by the work product privilege, and thus the designated representative was not to answer questions about any topic after the date of the incident.

The defendant claims that the designated representative was not prepared to discuss all of the topics requested of her, which defendant claims was information that was requested as far back as December 2012. Specifically, the defendant claims that Segway has not disclosed any of its economic damages, nor was the designated representative prepared to testify about those damages, although she conceded she was the person designated to do so. Defendant further claims that although the claim has been pending for four years, the plaintiff has not produced any information about its economic damages. The defendant argues that trial on this case is scheduled to start on November 18, 2015, and it has still not been able to depose plaintiff's designated representative on the topics outlined in defense of the action. The defendant requests the court to compel the plaintiff to produce a witness immediately, and should be further required to drop his claim of attorney/client and/or work product privilege. In addition, the defendant requests the court to order plaintiff to pay the costs of counsel fees for his trip to New Hampshire for a deposition that was interrupted by the plaintiff's claimed bad faith objections.

The plaintiff has objected to defendant's motion and has filed a memorandum in support thereof. The plaintiff in its objection claims that when the defendants first noticed the deposition of Segway's corporate representatives, Segway was prepared to produce three employees to testify regarding the 21 topics identified in defendants' notice of deposition. The three employees designated were Francis "Chip" McDonald, Deb Jordan and Gerri Moriarty. However, according to Segway, over the course of almost three years, these employees left Segway. Segway claims that there are currently very few employees with any knowledge of the underlying incident or the company policies and procedures in place at the time of the underlying incident. One of the only individuals currently employed by Segway who has knowledge pertaining to most of the 21 topics identified in the notice of deposition is paralegal, Roxanne Lamonde. When the July 8, 2015 deposition of Roxanne Lamonde was originally scheduled, plaintiff's counsel claims that he emailed defendant's counsel and indicated to him that over the years numerous people had left Segway, but that Segway would produce Ms. Lamonde with the understanding that the attorney/client privilege

and/or work product doctrine would be asserted where appropriate.

Counsel for the plaintiff claims that in a separate telephone conversation with defendant's counsel, he also indicated that while Lamonde would have some information pertaining to the 21 topics, she would be a resource for determining which former employees may have information. During the deposition, Lamonde did identify several individuals and plaintiffs have since provided defendants with the names of and contact information for 11 former employees and the names of 7 employees who may have the information defendants seek. During the deposition, plaintiff's counsel asserted the attorney/client privilege and work product doctrine and at times directed Lamonde not to answer particular questions. The plaintiffs do not have an objection to the 21 topics being inquired into and were prepared to produce three different Segway employees to testify regarding these topics, however, they claim that because Lamonde is a paralegal working within the plaintiffs' corporate department, the attorney/client privilege and work product doctrine can be asserted with respect to work done and information obtained by Lamonde since she was a paralegal working within the corporate legal department of the plaintiff at the time she conducted the investigation of the incident.

Oral argument was heard on the motion on October 13, 2015.

DISCUSSION

Practice Book § 13-27(h) provides that: "A party may in the notice and in the subpoena name as the deponent a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude the taking of a deposition by any other procedure authorized by the rules of practice."

The court in *DGG Properties* v. *Konover Construction Co.*, Superior Court, judicial district of New Britain, Complex Litigation Docket, Docket No. X03-CV990501534 (September 19, 2000,

Aurigemma, J.), relying on the federal rules of procedure, held that Conn. Practice Book § 13-27(h) does not carve out a special limitation on the scope of discovery for a corporate designee, but rather provides specific notice to a corporation of the subjects upon which its designee must be fully prepared to testify. The court noted that "[w]hile neither the Connecticut nor federal rule is explicit on its face, it is untenable to suggest that they were meant to carve out a special limitation on discovery for corporate designees. Rather than limit the scope of normal discovery, Conn. Prac. Book § 13-27(h) is meant to give notice to the corporation so that the appropriate number of persons, properly prepared, will be produced to give complete answers for the corporation at the deposition. *Starlight Intern, Inc.* v. *Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999) (quoting *Audiotext Communications Network, Inc.* v. *U.S. Telecom, Inc.*, No. Civ. A. 94-2395-GTV, 1995 WL 625962, at *13 (D. Kan. Oct. 5, 1995)). See also, *Cabot Corp.* v. *Yamulla Enterprises, Inc.*, 194 F.R.D. 499 (M.D.Pa. 2000), *King* v. *Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D.Fla. 1995).

"To read Conn. Prac. Book § 13-27(h) in the manner suggested by the Plaintiff would provide greater notice and protection to corporate deponents than to other party deponents. `[T]o the contrary, upon being deposed, witnesses must provide all the information he has [sic] which is relevant or likely to lead to relevant information. [The court] cannot excuse [a witness] from this responsibility merely [because] he works for a corporation.' *Overseas Private Inv. Corp.* v. *Mandelbaum*, 185 F.R.D. 67, 69 (D.D.C. 1999).

"Our rules of discovery are meant to serve the ends of justice by `facilitating an intensive search for the truth through accuracy and fairness, provid[ing] procedural mechanisms designed to make a 'trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' *Picketts* v. *Int'l. Playtex, Inc.*, 215 Conn. 490, 508, 576 A.2d 518 (1990), *United States* v. *Procter and Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); see *Pool* v. *Bell*, 209 Conn. 536, 541, 551 A.2d 1254 (1989); *Sturdivant* v. *Yale-New Haven Hosp.*, 2 Conn.App. 103, 106, 476 A.2d 1074 (1984); K. Sinclair, Federal Civil Practice (2d Ed.) 9.03 through 9.10. Conn. Prac. Book § 13-27(h) requires a corporation to provide one or more persons who can accurately and fully answer questions on the particular subjects presaged by the notice. It does not, however, limit the scope of discovery allowable under Conn.

Prac. Book § 13-2.[1] The examining party may ask questions outside the scope of the matters described in the § 13-27(h) notice, as long as the information sought would be admissible at trial or appears reasonably calculated to lead to the discovery of admissible evidence." *DGG Properties* v. *Konover Construction Co.*, supra, Superior Court, Docket No. X03-CV990501534.

The plaintiff Segway initially designated as their corporate designees, Francis "Chip" McDonald, Deb Jordan, Gerri Moriarty and Roxanne Lamonde. At oral argument, counsel for plaintiff pursuant to court order issued from the bench, designated the following as corporate designees pursuant to § 13-27 (h). Rod Keller, Francis "Chip" McDonald, Deb Jordan, William Twomey and Roxanne Lamonde. According to defendant's counsel, Keller, McDonald, Jordan and Twomey have been deposed and stated that "collectively they knew nothing." Transcript, 10/13/2015, p. 30. Thus, there is no issue with respect to these witnesses.

With respect to witnesses the plaintiff plans to call at trial, counsel for the plaintiff agreed to provide counsel for the defendant with a list of witnesses to be called at trial on or before November 6, 2015. Accordingly, the court hereby orders plaintiff's counsel to provide defense counsel with a list of plaintiff's witnesses to be called at trial, on or before November 6, 2015.

The only witness to which the plaintiff has raised objections to defendant's covered topics, and who was previously designated by plaintiff as plaintiff's corporate designee, is Roxanne

---

[1] Practice Book § 13-2 provides: "In any civil action . . . where the judicial authority finds it reasonably probable that evidence outside the record will be required, a party may obtain in accordance with the provisions of this chapter discovery of information or disclosure, production and inspection of papers, books, documents and electronically stored information material to the subject matter involved in the pending action, which are not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . ."

Lamonde. The plaintiff has raised the attorney/client and work product privilege as to Lamonde. During the course of oral argument, plaintiff designated Lamonde as its corporate designee relating to the issue of damages. Counsel for the plaintiff represented to the court that plaintiff "[has] not alleged attorney's fees as damages." Transcript, p. 46., 10/13/2015. Accordingly, Lamonde is hereby ordered to answer questions related to the issue of damages as set forth in topic number 18 in defense counsel's list of topics set forth in accordance with § 13-27 (h).

With respect to topic number 19, the court rules as follows with respect to plaintiff's objection on attorney/client and work product privilege grounds. "'The attorney-client privilege protects communications between client and attorney when made in confidence for the purpose of seeking or giving legal advice.' *Ullman* v. *State*, 23 Conn. 698, 711 (1994). 'In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice.' *Metropolitan Life Insurance Co.* v. *Aetna Casualty and Surety Co.*, 249 Conn. 36, 52 (1999). 'As with all privileges, the [party] claiming the attorney-client privilege has the burden of establishing all essential elements.' (Internal quotation marks omitted.) *Harp* v. *King*, 266 Conn. 747, 770 (2003). And since the rule tends to prevent a full disclosure of the truth in court, it should be strictly construed. *Turner's Appeal*, 72 Conn. 305, 317-18 (1899).

"It is true, of course, that the privilege accorded communications between attorney and client is not limited to direct communications between the two. It extends to communications made through agents for communication. *State* v. *Hanna*, 150 Conn. 457, 465 (1963). 'Statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality.' *State* v. *Cascone*, 195 Conn. 183, 186 (1985). 'The presence of certain third parties, however, who are agents or employees of an attorney or client, and who are necessary for consultation, will not destroy the confidential nature of the communications.' *State* v. *Gordon*, 197 Conn. 413, 424 (1985)." *Amica MIC* v. *Fasarella Pro Paint*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. FSTCV10-6003636 (July 11, 2011, *Jenning, J.T.R.*).

"The trial court properly noted that the common law in Connecticut has evolved and now extends the attorney-client privilege to communications when the client is a corporate entity.... In *Shew*, this court set forth the four criteria that must be present, in the corporate context, in order for the privilege to attach: '(1) the attorney must be acting in a professional capacity for the [corporation], (2) the [communication] must be made to the attorney by current employees or officials of the [corporation], (3) the [communication] must relate to the legal advice sought by the [corporation] from the attorney, and (4) the [communication] must be made in confidence.' (Internal quotation marks omitted.) Id., 159. 'The burden of proving each element of the privilege, by a fair preponderance of the evidence, rests with the respondents, as they are seeking to assert it. *State* v. *Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963).' *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1 (2003). (Citations omitted.) *Anderson* v. *United Way, Inc.*, Superior Court, judicial district of New Haven at New Haven, Docket No. CV 11-6017085 S (Oct. 4, 2013, *Hadden, J.T.R.*).

In the present case, the plaintiff has failed to sustain its burden that all of Lamonde's investigation of the incident that occurred on and after September 16, 2009, is subject to the attorney/client privilege. Plaintiff's counsel argues that the gathering of information regarding the subject accident by Lamonde is within the attorney/client privilege simply because she was employed by the plaintiff's legal department at the time and supervised by legal counsel. The gathering of information in this capacity does not automatically subject that information to the attorney/client privilege. Part of Lamonde's investigation clearly involved fact-finding as to what actually happened on September 16, 2009, and thus not in preparation for litigation or for the giving of legal advice. Plaintiff's have not demonstrated to this court that the four elements have been met to protect Lamonde's investigation of the September 16, 2009 incident. Namely, that (1) the attorney must be acting in a professional capacity for the corporation, Lamonde is not an attorney and she cannot give legal advice; (2) the communication must be made to the attorney by current employees or officials of the corporation; (3) the communication must relate to the legal advice sought by the corporation from the attorney, and (4) the communication must be made in confidence. As to elements 2 through 4, counsel for the plaintiff has not persuaded this court by any evidence or an affidavit, that

Lamonde's investigation of the accident right after the accident occurred was for the purpose of providing legal advice or for providing such information in connection with legal advice to be given to the corporate client. Accordingly, the court hereby orders Lamonde to provide information she gathered from her investigation in the first two weeks immediately following the September 16, 2009 accident. The court, however cautions counsel for the defendant, that he is not to inquire into areas of the investigation for which information was specifically obtained for the purpose of determining trial strategy and or settlement.

The plaintiff also claims that Lamonde's investigation of the September 16, 2009 accident is protected by the work product doctrine under Practice Book § 13-3, which provides in part: "(a) Subject to the provisions of Section 13-4, a party may obtain discovery of documents and tangible things otherwise discoverable under section 13-2 and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials. In ordering discovery of such materials when the required showing has been made, the judicial authority shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

"Under Connecticut law the lack of involvement of counsel can be dispositive of a claim that reports are work product. 'Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation. The attorney's work must have been an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys.' (Citations and internal quotation marks omitted.) *Stanley Works* v. *New Britain Redevelopment Agency*, 155 Conn. 86, 95 (1967)." *Amica MIC* v. *Fasarella Pro. Paint*, supra, Superior Court, Docket No. FST CV10-6003636 S.

Counsel for the plaintiff argues that because Lamonde's investigation into the September 16, 2009 incident was supervised by General Counsel and outside counsel, that investigation is subject

to the work product doctrine. In support of its opposition to the defendant's motion to compel, the plaintiff submitted the affidavit of Lamonde in which she avers in relevant part that she "is the Senior Paralegal and *Risk Manager* for Segway, Inc. [and that] in her role as Senior Paralegal she worked under the direction of general counsel to investigate where litigation is anticipated or pending. [She further avers that] following the September 16, 2009, incident involving John Ezzo and Segway Personal Transporter, she communicated with individuals and conducted an investigation into the incident. [Lamonde avers that her] investigation into the September 16, 2009 incident was directed and supervised, at all times by General Counsel of Segway and outside counsel." (Emphasis added) Affidavit, Roxanne Lamonde.

"As in the case of attorney-client privilege, the burden of establishing that the information sought constitutes an attorney work product is on the party asserting such a claim. *Geib* v. *Sheraton Stamford Hotel*, Superior Court, Judicial District of Stamford/Norwalk at Stamford, Docket No. X08CV05-5000466S (December 3, 2008, *Jennings, J.*) (2008 Ct.Sup. 19286). Since Rule 26 of the Federal Rules of Civil Procedure addresses work product in like terms, Connecticut courts have looked to federal decisional law in order to adjudicate work product issues arising under Practice Book § 13-3. See *Garcia* v. *Yale New Haven Hospital*, Superior Court, Judicial District of New Haven, Docket No. CV95-037032 (July 2, 1999, *Lager, J.*) (25 CLR 78)." *Amica MIC* v. *Fasarella*, supra, Superior Court, Docket No. FST CV-10-6003636-S.

In *Amica*, both sides cited federal cases dealing with statements developed by an independent adjuster working at the request of an insurance company which had been put on notice of a claim covered by a policy issued to the claimant. After reviewing the memoranda and considering the arguments of counsel for all parties, the court in *Amica* was guided by the principles and standards applied by the District Court in *QBE Insurance Corp.* v. *Interstate Fire and Safety Equipment Company*, U.S. D.C., D.Conn., Docket No. 3:07cv1883(SRU) (February 18, 2011, Underhill, U.S. D.J.) 2011 WL 69282 which involved a fire loss followed by a subrogation action brought by the insurer against a party alleged to have been responsible for the fire. The defendant Interstate sought to depose the adjuster who had investigated the fire on behalf of the plaintiff insurer, and specifically

sought to question the adjuster about claim notes he had prepared. The plaintiff QBE Insurance sought to protect the claim notes as attorney work product. The issue was whether or not those notes had been "prepared in anticipation of litigation or for trial by or for another party or its representative" under Federal Rule 26(b)(3)(A).

Although not directly on point, this court likewise finds the court's decision in *QBE* instructional, since in the present case, like in *QBE,* Lamonde, similar to the adjuster in *QBE*, conducted an initial investigation of the September 16, 2009 accident. Indeed, as Risk Manager, Lamonde's job involves "applying procedures or systems to minimize accidental losses, [especially] to a business." See Black's Law Dictionary, Tenth Edition. In the present case, as Risk Manager, Lamonde was notified of the accident on the date of the accident, September 16, 2009 and conducted her investigation immediately upon being notified. Further, there is no evidence that at the time Lamonde was notified of the accident, a claim or lawsuit had been filed or was pending.

"Citing *Weber* v. *Paduano*, U.S. D.C., S.D.N.Y Docket No. 02cv3392 (GEL) (January 22, 2003, Lynch, U.S.D.J.), 2003 WL 161340, [t]he QBE court cautioned against protecting documents from discovery simply because of a 'ritualistic incantation' by insurers that documents are prepared in preparation for litigation and drew a 'fact specific' distinction between documents prepared in the ordinary course of an insurer's business of investigation of a claim and documents created 'because of' anticipated litigation. 'Because all insurance investigations are likely performed with an eye toward the prospect of future litigation, it is particularly important that the party opposing production of the documents, on whom the burden of proof as to the privilege rests, demonstrate by specific and competent evidence that the documents were created in anticipation of litigation,' *QBE* at *3 (citing *Weber*). Both *QBE* and *Weber* focus on the date the insurer 'settles on pursuing subrogation' as opposed to 'only investigating whether it had subrogation rights to enforce' as the distinguishing factor. *QBE*, at *4; *Weber*, at *8; although *Weber* also holds that even documents created after the institution of litigation must be proven to have been created because of the lawsuit. Other 'objective benchmarks' relied upon by the federal courts, as cited in *QBE* and/or *Weber* bearing on the anticipation of litigation issue include the following: (1) whether the investigation is of a third-party

claim, the very nature of which is anticipating litigation, or a first-party claim; (2) that insurer-authored documents are more likely than attorney-authored documents to have been prepared in the ordinary course of business; (3) that the work product doctrine most strongly protects the mental processes of the attorney, providing a privileged area in which to analyze and prepare a client's case as opposed to documents which consist of factual materials and analyses of facts; (4) that actions taken by an insurance company immediately after being notified of a potential claim are almost always part of its ordinary business of claim investigation; and (5) that blanket assertions of work product as to entire files, rather than specific documents are never sufficient to prevent discovery, since the party opposing discovery must establish that each document is work product. By application of these principles, the party opposing discovery of documents as work product in *QBE*, the plaintiff, was denied its protective order, and the party opposing discovery of documents as work product in *Weber*, the *Paduano* defendants, lost their opposition to the plaintiff's motion to compel production with respect to a majority of the documents at issue. In each case the ruling of the court was based on the failure of the party opposing disclosure to meet its factual burden of proof by specific and competent evidence as to the elements of the claim of work product protection."

In the present case, Segway has not provided sufficient evidence to satisfy its burden of proof that Lamonde's testimony regarding her investigation and any documents which are derived therefrom is the subject of work product. There is no evidence that at the time Lamonde began her investigation which was the day of the accident, that any key decision was made to pursue litigation. What is clear to this court is that Lamonde in her capacity as Risk Manager was assessing the potential loss as a result of the accident, and in so doing, was obtaining the facts of what happened on September 16, 2009. Thus, the plaintiff here has essentially relied upon a "ritualistic incantation" of anticipation of litigation which was found to be lacking in *QBE*.

Accordingly, the defendant's motion to compel Lamonde's deposition is hereby granted. The court hereby orders Lamonde to submit to a deposition and to answer questions relating to her own investigation as to what occurred on September 16, 2009. Any accident reports, witness statements, photos, etc. shall be disclosed. The court cautions counsel for the defendant to avoid inquiring

Lamonde about information that relates to the mental processes of the lawyers, settlement discussions or legal strategy. The defendant's motion for sanctions is denied. However, failure to comply with the court's present order will result in the issuance of sanctions pursuant to Practice Book § 13-14.

Robin L. Wilson

Wilson, J. 10/29/2015