WORK PRODUCT DOCTRINE FOR NON-ATTORNEY PRODUCED DOCUMENTS

BY MELANIE J. WHITTAMORE-MANTZIOS
WOLFE, SNOWDEN, HURD, LUERS & AHL, LLP

Fed. R. Civ. P. 26(b)(3)(A) makes it clear that documents produced by non-attorneys may also enjoy work product privilege:

> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover 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).**

The party claiming the work product privilege must prove that the materials are:

1. Documents and tangible things;
2. Prepared in anticipation of litigation or trial; and
3. By or for the party or by or for the party's representative.

Fed. R. Civ. P. 26(b)(3)(A). It is fairly easy to establish the material is a document or tangible thing. The most difficult matter to prove for non-attorney work product is that it was prepared in anticipation of litigation. A comment to the 1970 Amendment to 26(b)(3) suggests that if a document has been prepared "in the ordinary course of business" it may not be found to have been prepared in anticipation of litigation. See *Advisory Committee's Notes,* 48 F.R.D. 487, 501 (1970) and *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 604 (8th Cir. 1977). Factors considered in determining whether a document has been prepared in anticipation of litigation include the purpose or reason the document was created; when the document was created; and the likelihood that litigation will ensue.

> Work product is determined to be procedural so that in diversity action federal law will be used. *Baker v. Gen. Motors. Corp.,* 209 F.3d 1051 (8th Cir. 2000) and *Fontaine v. Sunflower Beef Carrier,* 87 F.R.D. 89, 91 (E. D. Mo. 1980) Determining whether documents were prepared in anticipation of litigation is a fact question governed by federal law. *PepsiCo, Inc. v. Baird, Kurtz & Dobson, LLP.,* 305 F.3d 813, 817 (8th Cir. 2002) and *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.,*197 F.R.D. 620, 627 (N.D. Iowa 2000). The party raising the work product privilege as a bar to production bears the initial burden of proving the factual basis for the privilege. *Falkner v. General Motors Corp.,* 200 F.R.D. 620, 622 (S. D. Iowa 2001). This burden can be met by providing the reviewing court with a detailed privilege log and explanatory affidavit of counsel or the person who prepared the document setting forth the factual basis. *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 925 (8th Cir. 1997).

The work product privilege may be waived. A party seeking material that has been found to be ordinary work product may obtain the material by showing a substantial need for the document and undue hardship in obtaining substantially equivalent information. Fed. R. Civ. P. 26(b)(3)(A)(ii). "If the court orders disclosure, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theroires of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). A party or other person, upon request may obtain a copy of their own previous statement without any showing. Fed. R. Civ. P. 26(b)(3)(C).

I. IS IT WORK PRODUCT?

More than a remote possibility of litigation is required when a document is created. There is no work product protection for documents prepared in the ordinary course of business rather than for the purpose of litigation. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977). Weatherhead sued Diversified for unlawful conspiracy between Diversified and a Weatherhead employee to sell to Weatherhead large amounts of inferior copper. Weatherhead sought production of the investigative reports by a law firm hired by Diversified. The SEC had brought an injunction action against Diversified based upon allegations that Diversified has "slush funds" that were used to bribe purchasing agents of other business entities. The matter was resolved by a consent decree. Diversified had hired a law firm to perform an investigation of what had actually occurred within Diversified after the SEC action was resolved. The court found that the investigation by the law firm was not done in anticipation of litigation but to frame policies and procedures to protect Diversified against repetition of prior misdeeds, if any, its employees committed in the past.

The test in the Eighth Circuit for determining whether a document has been prepared in anticipation of litigation is as follows:

> [T]he test should be 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. But the converse of this is that even though litigation is already in prospect, **there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.**

Simon v. G. D. Searle, 816 F.2d 397, 401 (8th Cir. 1987). (Emphasis supplied). In *Simon* at issue were documents prepared by non-attorneys in the risk management department of a manufacturer of intrauterine contraceptive devices that had forty product liability lawsuits that were consolidated for discovery. The special master had found that the documents were generated in an attempt to keep track of, control and anticipate the costs of Searle's product liability litigation. The risk management department would use the individual case reserves set by the Searle legal department for a variety of reserve analysis functions for business planning purposes including budget, profit, and insurance considerations. *Simon*, 816 F.2d at 399-401.

> The risk management department was not involved in giving legal advice or in mapping litigation strategy in any individual case. The aggregate reserve information in the risk management documents serves numerous business planning functions, but we cannot see how it enhances the defense of any particular lawsuit.

Simon, 816 F.2d at 401. The court rejected Searle's argument that its business was healthcare not litigation because litigation planning was just as much a part of its business as marketing, accounting, advertising, and sales. Note that information as to the individual case reserves were deemed protected as work product, but the aggregate amount was not.

In *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 912 (8th Cir. 1997), the court reversed the district court's denial of the Office of Independent Counsel's, Kenneth Star, motion to enforce a grand jury subpoena to the White House to produce certain documents created from discussions between the First Lady and the White House Counsel regarding "Whitewater." The court rejected the White House's argument that the documents were protected by the work product doctrine because they were anticipating the Office of Independent Counsel's investigation. The court found the White House was not the subject of the investigation, Hillary Clinton was the subject. The court also rejected the White House's argument that the adversarial process that was anticipated was a congressional investigation because even if that was an adversarial process for the White House, which the court did not seem to embrace, the only harm to the White House was political harm which was not sufficient to establish anticipation of litigation.

A. Claims Investigation

1. **Railroad Claims Investigation**-In *Almaguer v. Chicago, Rock Island & Pacific Railroad Co.,* 55 F.R.D. 147 (D. Neb. 1972), Judge Urbom determined that a statement taken by the railroad's claim agent of the only witness to a railroad employee's injury while he was working as part of a routine investigation was taken in anticipation of litigation. This decision was made two years after the 1970 amendment to Fed. R. Civ. P. 26(b)(3). "The anticipation of a claim against a railroad, when a railroad employee has been injured on the job, is undeniable, and the expectation of litigation in such circumstances is a reasonable assumption." *Almagauer,* 55 F.R.D. at 149. Note that Judge Beam of the Eighth Circuit Court of Appeals represented the railroad in this case.
2. **Insurance Claims Investigation, First Party Claim-**Typically are not determined to be performed in anticipation of litigation because they are found to be done in the ordinary course of business. Insurer owes insured a contractual duty to adjust the claim. *Weitzman v. Blazing Pedals, Inc.,*151 F.R.D. 125, 126 (D. Colo. 1993); *Connecticut Indem. Co. v. Carrier Haulers, Inc.,* 197 F.R.D. 564, 571 (W.D.N.C. 2000).

a. **Timing.**

i. In *Falkner v. General Motors Corp.*, 200 F.R.D. 620 (S. D. Iowa 2001), a statement a father provided to insurer five days after his three year old child was killed when he climbed into the family vehicle that was running in the church parking lot and leaned out a side window and pressed his knee against the power window switch was not protected by the work product privilege. There was no showing that the statement was taken under the direction of or on behalf of an attorney. The statement was found to be obtained primarily for insurance coverage purposes. There was no threat of litigation against the father, the death had been ruled an accident, the *in camera* review of the statement showed the discussion between the father and claims adjuster focused on coverage. Additionally, the father had told the paper he did not plan to sue. *Falkner,* 200 F.R.D. at 624. The mother's statement taken by the insurer more than a year after the child's death was deemed protected, because she was the one who had left the car running in the church parking lot. *Falkner,* 200 F.R.D. at 624.

ii. *St. Paul Reinsurance Company, Ltd v. Commercial Financial Corp.,* 197 F.R.D. 620,637 (N.D. Iowa 2000), point in time in which insurer's investigation of insured's claim changed from being one in the ordinary course of business to one in anticipation of litigation was when insurer actually attempted to rescind the policy.

iii. *Tayler v. Travelers Insurance Company,* 183 F.R.D. 67 (N.D. N.Y. 1998), in an uninsured motorist case, the insurer's investigation was not protected by the work product privilege. There was no evidence that the documents sought were prepared after Travelers had denied the plaintiff's claim or that they had firmly decided to do so.

iv. *Schmidt v. California State Automobile Association,* 127 F.R.D. 182 (D. Nev. 1989), work of insurer's claims adjuster was not prepared in anticipation of litigation prior to the time a complaint for underinsured coverage was filed.

v. *Connecticut Indemnity Company v. Carrier Haulers, Inc.,* 197 F.R.D. 564 (W.D. N.C. 2000), documents created by insurer prior to deciding to deny claim and prior to date that insurer decided to litigate claim were not protected.

b. **Serious Injury.** In *Turner v. Moen Steel,* 2006 WL 3392206 (D. Neb. 2006)(unpublished), Magistrate Judge Gossett determined that documents prepared as part of the investigation by the worker compensation insurer of Lund Ross Constructors, Inc., was protected by work product privilege. Steve Turner, a concrete finisher for Lund Ross, was crushed when a 4,600 pound precast concrete wall panel

fell on the site of a parking garage. Turner nearly died from internal bleeding, his pelvis was crushed, and he went blind. Moen Steel was the subcontractor that erected the concrete panel. Moen Steel had sought the production of the workers compensation insurer's investigative file. The insurer had argued that within hours of the accident, a preliminary investigation into the cause indicated that Moen Steel was at fault. The company's attorney was contacted within days of the accident and provided periodic counseling on the anticipated claims. The anticipated claims included both Turner's claim against Lund Ross and a subrogation action against Moen Steel. *17. Judge Gossett granted the motion for protective order filed by the insurer noting that the claim was one of enormous magnitude and there was more than a remote chance of litigation.

3. **Insurance Claims Investigation, Third Party Claim-**The more severe the injuries and damages, the more likely it will be found to have been performed in anticipation of litigation
    a. *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89 (E.D. Mo. 1980) Statement of driver of insured's vehicle taken the day of the accident by the insured's safety director protected by work product because although no suit had been filed it was clear who the plaintiff would be and what the claims likely would be. Significantly, the lawsuit was filed ten days after the accident. Contrast *Thomas Organ Co. v. Jadranska Slobondna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972), documents prepared in ordinary course of business and not compiled for an attorney or requested by an attorney could not be protected by the work product privilege. This case is in the minority.
    b. **Timing**
        i. *Banks v. Wilson*, 151 F.R.D. 109 (D. Minn. 1993), insured's statement obtained after plaintiff had filed a claim was found to have been prepared in anticipation of litigation. "Here the filing of the Plaintiffs' claim, which placed the Defendant's insurer on notice that they were alleging that their injuries and losses had resulted from Defendant's fault, resolves any doubt, however remote, we might otherwise have had as to the purpose of the Defendant's statement." *Banks*, 151 F.R.D. at 112.
        ii. *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125 (D. Colo. 1993), documents prepared by insurer after it was informed of demand against its insured with a copy of a draft complaint was protected by the work product privilege.
        iii. *Wikel v. Wal-mart Stores, Inc.*, 197 F.R.D. 493 (N.D. Okla 2000), documents prepared as part of defendant's routine claims investigation before injured party informed the adjuster that he would get an attorney if the medical bills were not paid were not prepared in anticipation of litigation.

iv. *Thiele Dairy, LLC, v. Earthsoils, Inc.,* 2008 WL 2309454 (D. Neb. 2008), documents prepared by agronomist consultants retained by insurer prior to the denial of the insurance claim were not protected by work product but documents prepared after denial of claim were protected.

c. **Severity of the Injuries or Damages**

i. *Basinger v. Glacier Carriers, Inc.,* 107 F.R.D. 771 (M.D. Pa 1985), plaintiff's decedent was killed when his motorcycle collided with a tractor-trailer operated by defendants. Defendants had served a deposition subpoena on the insurer of a non-party, the restaurant where the decedent had been drinking alcohol just prior to the accident. The restaurant's insurer had performed an investigation a month after the accident and obtained statements from two persons who had worked at the restaurant at the time of the accident. The court acknowledged that because of the Dram Shop Act the restaurant could anticipate litigation by either the plaintiff or the defendant bringing a third party claim by the defendants.

ii. *S.D. Warren Company v. Eastern Electric Corp.,* 201 F.R.D. 280 (D. Maine 2001), determined that insurer failed to meet its threshold burden of proving documents in claims file were prepared in anticipation of litigation even though alleged claim was for 1.5 million dollars. Court was given insufficient information as to the validity of the claim actually being for 1.5 million dollars and any supporting information that the insurer anticipated litigation.

iii. *Suggs v. Whitaker,* 152 F.R.D. 501 (M.D. N. C. 1993), statements obtained from insured and witness to accident within a week of an accident where one person died and another plaintiff was a quadriplegic was found to have been created in anticipation of litigation.

B. Business Documents

1. Internal Affairs Police Investigations-Not protected as work product

a. *Miller v. Pancucci,* 141 F.R.D. 292 (C.D. Cal. 1992), documents of an investigation completed by the internal affairs section of a police department are not protected because the police internal affairs section purpose is to investigate claims involving police officers misconduct made by citizens and complaints are investigated regardless if litigation is anticipated.

b. *Collins v. Mullins,* 170 F.R.D. 132 (W.D. Va. 1996), witness statements obtained by internal affairs investigation were not protected because they were obtained in the ordinary course of business with

specific citations to the Sheriff Office's rules and regulations providing for the investigation.

2. Incident Reports

a. *Leviathan, Inc. v. Alaska Maru,* 86 F.R.D. 8 (W.D. Wash. 1979), captain's incident report after a collision between two vessels of a ship was considered to have been created in the ordinary course of business. Since it was made months in advance of any claim it could not have been made in anticipation of litigation.

b. *Cochran v. St. Paul Fire and Marine Insurance Co.,* 909 F. Supp. 641 (W.D. Ark. 1995), incident reports of medication errors were routinely created in the ordinary course of business and not in anticipation of litigation.

3. Employment Cases

a. *Navigant Consulting, Inc. v. Wilkinson,* 220 F.R.D. 467 (N.D. Tex. 2004), Employer investigation into why employees were making surreptitious back-ups of proprietary information was found not to be created in anticipation of litigation. The affidavit from the employer's attorney indicated that the investigation was to find out if something was wrong and to fix it.

b. *Sanchez v. Matta,* 229 F.R.D. 649 (D. N.M. 2004), employer's investigation in December 1999 of employee's complaint of misconduct by the employer was deemed to have been performed in anticipation of litigation.

c. *Hugley v. The Art Institute of Chicago,* 981 F. Supp. 1123 (N.D. Ill. 1997), the Illinois Dept. of Human Rights' ("IDHR") investigation into a charge of discrimination was not created in anticipation of litigation. "The reality is that the IDHR investigator and staff members prepared the documents at issue for the purposes of collecting the facts and determining whether substantial evidence exists to support the charge." 981 F.Supp. at 1129.

C. Consultants

1. **Past Consideration of Bringing an Action.** In *Western Resources, Inc. v. Union Pacific Railroad Co.,* 2002 WL 181494 (D. Kan. 2002), Documents prepared by consulting experts in early 1990s to provide technical advice to Western Resource, a generator, distributor, and seller of retail electric power, in developing a gross inequity claim against UP and BNSF related to the price charged for coal transportation were created in anticipation of litigation and protected by work product in subsequent suit by Western Resources against UP and BNSF for breach of the express terms of the Railroad Transportation Claim.
2. **Threatened Litigation.** In *Caremark, Inc. v. Affiliated Computer Services, Inc.,* 195 F.R.D. 610 (N.D. Ill. 2000). In 1992 ACS agreed to supply Caremark with data processing services. In April of 1999 Caremark brought a breach of contract claim. On December 8, 1998, Caremark sent a letter to ACS alleging

$7 million in over billings for contract year 1998 and identifying a number of billing irregularities. ACS claimed work product privilege for many of its documents. The court noted that whether a document is protected depends on the motivation behind its preparation, rather than on the person who prepares it. If a document would have been created regardless of whether litigation was anticipated or not, it is not work product. 195 F.R.D. at 615-616. The court found that the documents ACS prepared after December 8, 1998, were prepared in anticipation of litigation based on the threat of litigation in Caremark's letter.

3. **Responding to Federal Agency Inquiry**
    a. *In re Grand Jury Subpoena,* 357 F.3d 900 (9th Cir. 2004), single purpose documents prepared exclusively in anticipation of litigation by environmental consultant retained by attorney for company under investigation by EPA for violation of waste management were deemed protected. The court also found that dual purpose documents prepared by environmental consultant in compliance with the Information Request and Consent Order or were otherwise related to the clean-up order of the CERCLA sites were also protected '[w]hen the litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated." 357 F.3d at 910.
    b. *Martin v. Monfort, Inc.,* 150 F.R.D. 172 (D. Colo. 1993), time motion studies prepared at the request of Monfort's general counsel upon receipt of letter from Department of Labor inquiring about certain activities of Monfort employees before and after their normal work day were protected. "Investigation by a federal agency presents more than a remote prospect of future litigation, and provides reasonable grounds for anticipating litigation sufficient to trigger application of the work product doctrine." *Id.,* 150 F.R.D. at 173.
4. **Business Purpose**-In *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.,* 690 N.W.2d 38 (Iowa 2004), investigative report prepared at plaintiff's request after an explosion and a fire at plaintiff's plant of plaintiff's refrigeration system were not prepared in anticipation of litigation. The three questions answered by the investigation were (1) is refrigeration a core competency for the plaintiff? (2) how competent is the plaintiff in the area of refrigeration? And (3) what refrigeration capabilities should plaintiff possess. *Id.,* 690 N.W.2d at 41. The court determined it was prepared for business purposes not for litigation.
5. **Security and Exchange**
    a. *In re Raytheon Securities Litigation,* 218 F.R.D. 354 (D. Mass. 2003), Court would perform *in camera* review of audit opinion letters to determine if the Information in audit opinion letters had to be disclosed in corporation's financial statements. Work product did apply to documents prepared by corporation in preparation for litigation and shared with the audit team.
    b. *McEwen v. Digitran Systems, Inc.,* 155 F.R.D. 678 (D. Utah 1994),after *in camera* review of documents prepared by Arthur

Andersen the court could not find any reference to any SEC litigation or the class action lawsuit at issue and could not determine what the primary motivating purpose was for the preparation of the documents. As a result the documents were not protected.

6. **Tax Related**
   a. *U.S. v. Roxworthy,* 457 F.3d 590, 591 (6th Cir. 2006), two memos prepared by KPMG, LLP, concerning tax treatment of a $112 million loss for tax purposes, but not book purposes, which outlined defenses and likely outcome should the IRS contest the tax treatment were deemed to be created in anticipation of litigation. This was based on the conspicuousness of such tax treatment, the certainty of an IRS audit, and the unsettled area of the law in that area.
   b. *U.S. v. Textron Inc.,* 577 F.3d 21 (1st Cir. 2009), tax accrual work papers prepared by attorneys and others in corporation's tax department to support Textron's calculation of tax reserves for its audited corporate financial statement was not prepared in anticipation of litigation.
   c. *U.S. v. Adlman,* 134 F.3d 1194 (2nd Cir. 1998), documents created at the request of taxpayer's tax attorney by outside accounting firm for the purpose of evaluating tax consequences of proposed corporate organization upon expected litigation with IRS were prepared in anticipation of litigation. "Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation." *Id.,* at 1195

II. **WAIVER-**The work product privilege can be waived by disclosure. Work product privilege is broader than the attorney/client privilege because its purpose is to protect the adversary process. An attorney may independently invoke the work product privilege and a waiver of the privilege by the client does not waive the privilege on behalf of the client. *Hobley v. Burge,* 433 F.3d 946, 949 (7th Cir. 2006).

A. **Disclosure to Third Party-Non Adversary**
   i. *Gutter v. E. I. DuPont de Nemours & Co.,* 1998 WL 2017926 (S.D. Fla. May 28, 1998), disclosure to non-adversary party did not waive protection unless it substantially increased the opportunities for potential adversaries to obtain the information. Disclosure to outside accountant waived attorney-client privilege but not work product privilege. See also, *Samuels v. Mitchell,*155 F.R.D. 195, 200-01 (N.D. Cal. 1994)
   ii. *In re Pfizer,* 1993 WL 561125 (1993), disclosure to independent auditor is not reasonably viewed as conduit to potential adversary.
   iii. *Falkner v. General Motors Corp.,* 200 F.R.D. 620, 625 (S.D. Iowa 2001), insured's disclosure of her statement to her attorney representing her in the underlying action did not waive the privilege.

GM argued that because plaintiff's attorney represented the Estate of plaintiff's deceased study he was an adverse party. The court disagreed that the Estate was an adverse party. GM had not joined the Estate in its counterclaim against the Falkners. Additionally, there was no evidence that insured intended GM to see her statement. *Falkner,* 200 F.R.D. at 625.

B. **Mention of Information-**In *Martin v. Monfort, Inc.,* 150 F.R.D. 172 (D. Colo. 1993), Monfort's attorney's letter to D.O.L. disagreeing with government's estimates of preliminary and postliminary time for Monfort employees based on Monfort's time and motion studies was not sufficient to waive privilege. However court did note that if the studies were used at trial or the experts relied on the studies it would waive the privilege.

C. **Disclosure in Prior Litigation-***In re Chrysler Motors Corp Overnight Evaluation Program Litigation,* 850 F.2d 844 (8th Cir. 1989), Chrysler Motors waived work product privilege to computer tape about manufacturer's "Overnight Evaluation Program" by disclosing the tapes in settling an earlier class action.

D. **Failure to Assert the Privilege in Timely and Effective Matter**- The non-movant meets its burden of providing a factual basis for the privilege by providing a detailed privilege log stating the basis of the claimed privilege for each document in question together with an explanatory affidavit at the time the court is required to rule on the issue. *Rabushka v. Crane Co.,* 122 F.3d 559, 565 (8th Cir. 1997), The failure to make a timely and effective showing of entitlement to the privilege is deemed to be a waiver. *St. Paul Reinsurance Company, Ltd., CNA v. Commercial Financial Corp.,* 197 F.R.D. 620, 640-641 (N.D. Iowa 2000), It does not make a difference if the privilege is subsequently established. In *St. Paul* the court refused to conduct an *in camera* review when the plaintiff had submitted an inadequate privilege log and no explanatory affidavit. *St. Paul*, 197 F.R.D. at 641.

E. **By Placing the Substance of Documents at Issue.** In *Harding v. Dana Transp. Inc.,* 914 F. Supp.1084, 1098-1099 (D.N.J. 1996), an employer who defended sexual harassment suit by focusing on the investigation into allegations impliedly waived work product protection of transcript and reports of interviews. Similarly if work product documents are used in testimony it is waived. *U.S. v. Nobles,* 422 U.S. 225, 239 (1975); *Remington Arms Co. v. Liberty Mut. Ins. Co.,*142 F. R.D. 408, 419-420 (D.Del. 1992). But use of investigator's photos at trial did not waive protection to entire investigator's file. *Pittman v. Frazer,* 129 F. 3d. 983, 988 (8th Cir. 1997).

III. **SUBSTANTIAL NEED/ UNDUE HARDSHIP FOR ORDINARY WORK PRODUCT-**A finding that a document is prepared in anticipation of litigation or for trial does not end the inquiry because it can be overcome by a showing that the party has substantial need for the document and the party is unable to obtain the substantial equivalent without undue hardship. Fed. R. Civ. P. 26(b)(3)(a)(ii). The burden is on the requesting party to show the relevance and importance of the document and the inability to obtain the facts from other sources. A party may be required to take a deposition of a witness before seeking privileged documents. *National Union Fire Ins. V. Murray Sheet Metal,* 967 F.2d , 980, 985 (4th Cir. 1992).

A. **First Party Insurance Claim-** *St. Paul Reinsurance Company, Ltd., CNA v. Commercial Financial Corp.,* 197 F.R.D. 620, 639 (N.D. Iowa 2000), because the insurer is the only party with the information as to what it knew at the time it denied a claim, the insured has met its burden of establishing substantial need for all of the insurance investigative file. *Citing to Mission Nat'l Ins. Co. v. Lilly,* 112 F.R.D. 160, 164 (D. Minn. 1986).

B. Contemporaneous Statements

1. Substantially Equivalent Statement

a. *Fontaine v. Sunflower Beef Carrier, Inc.,* 87 F.R.D. 89, 93 (E.D. Mo. 1980), "mere speculation or hope that the requested statement may prove to be contradictory or impeaching is not sufficient to overcome the limited privilege applicable to trial preparation documents." The requesting party must make a showing that efforts to obtain similar material were made and have proved futile. The police report of the accident was deemed to be the substantial equivalent.

2. Sufficient Showing

a. *Suggs v. Whitaker,* 152 F.R.D. 501 (M.D. N.C. 1993), plaintiff made showing of substantial need because of witness' inability to recall what he had said in recorded statement to insurer. Note plaintiff's attorney had interviewed the same witness but did not record the interview. The unrecorded interview was not deemed to be the substantial equivalent because plaintiff's counsel would have to be called to properly impeach the witness' testimony.

b. *Savoy v. Richard A. Carrier Trucking, Inc.,* 176 F.R.D. 10, 14 (D. Mass. 1997), defendant's offer to produce driver for deposition was not substantial equivalent when trucker had lost driver's log.

3. **Insufficient Showing**

a. *Banks v. Wilson,* 151 F.R.D. 109, 113-114 (D. Minn. 1993), plaintiff had not yet taken defendant's deposition but argued

that the defendant's statement was needed to refresh the defendant's recollection and for impeachment.

b. *Baker v. Gen. Motors Corp.* 209 F.3d 1051, 1054 (8th Cir. 2000); *Falkner v. Gen. Motors Corp.*, 200 F.R.D. 620, 626 (S.D. Iowa 2001); and *Schipp v. General Motors Corp.*, 457 F. Supp.2d 917, 923-24 (E.D. Ark. 2006). Witness statements are not usually discoverable if the witness is available to the opposing party. In *Falkner* defendant had deposed decedent's mother and had obtained other discovery, that was deemed to be substantially equivalent and the statement was just cumulative and corroborative evidence. "GM's desire to obtain 'immediate factual observations unmarred by the passage of the time' does not rise to the level of substantial need imposed by Rule 26." *Schipp*, 457 F. Supp.2d at 924.

c. *Almaguer v. Chicago, Rock Island & Pacific Railroad Co.*, 55 F.R.D. 147, 149-150 (D. Neb. 1972), Judge Urbom rejected plaintiff's argument that because the statement was taken a month after the accident and the witness in his deposition exhibited some uncertainty about some circumstances of the accident the plaintiff has shown a substantial need for the document. Plaintiff's attorney was retained two months after the statement was taken and knew that there was a witness to the accident. Plaintiff offered no explanation as to why he did not take a statement from the witness earlier. Plaintiff's attorney did not ask witness during the deposition about the statement or if he had used it to refresh his recollection. More than the passage of time is required. "If the plaintiff's counsel may show a need merely by failing to interview a witness for a substantial length of time, the goal expressed by the Advisory Committee would be frustrated." *Almaguer*, 55 F.R.D. at 150.

i. **Test Results that Cannot be Duplicated**. Plaintiff failed to show substantial need and lack of alternatives to support requested order to allow plaintiff's experts to attend any testing performed by manufacture. *Hendrick v. Avis Rent A Car Sys.*, 916 F. Supp. 256, 261 (W.D.N.Y. 1996) and *Donohue v. American Isuzu Motors, Inc.*, 157 F.R.D. 238, 246 (M.D. Pa. 1994).

D. **Photographs of Accident Scene-** when accident scene has been changed photographs ordered produced. *Reedy v. Lull Egn'g Co.*, 137 F.R.D. 405, 407-408 (M.D. Fla. 1991).

E. **Surveillance Tapes** are the type that plaintiff almost always has substantial need. *Gutshall v. New Prime, Inc.*, 196 F.R.D. 43, 46 (W.D.

Va. 2000), Impossible to procure substantial equivalent of such evidence as videotape fixes information available at particular place under particular circumstance, and therefore can't be duplicated. Other courts have held whether videotape is going to be used at trial is a significant factor in determining substantial need and have not ordered videotape turned over when defendant stipulated it would not be used at trial. *Bradley v. Wal-Mart Stores, Inc.*, 196 F.R.D. 557, 558 (E.D. Mo. 2000) and *Fletcher v. Union Pac. R.R.*, 194 F.R.D. 666, 671 (S.D. Cal. 2000).

F. **Expense-**Mere allegation of unusual expense is insufficient. Party must set forth specific facts verifying the expense. *Castle v. Sangamo* Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984).