

*NO. SC 84896*

*IN THE SUPREME COURT OF MISSOURI*

*CHARLES I. GREWELL and  
LINDA GREWELL,*

*APPELLANTS,*

*vs.*

*STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY and NERESSA L. WILKINS,*

*RESPONDENTS.*

*Appeal from the Circuit Court of Jackson County, Missouri*

*Sixteenth Judicial Circuit*

*Honorable Jay A. Daugherty, Judge*

**APPELLANTS' SUBSTITUTE BRIEF**

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***APPELLANTS' SUBSTITUTE BRIEF***

***JURISDICTIONAL STATEMENT***

This case involves a declaratory judgment action pursuant to MO.REV.STAT. Sections 527.010 to 527.140 filed in the Circuit Court of Jackson County, Missouri, Sixteenth Judicial Circuit, before the Honorable Jay A. Daugherty. Plaintiffs/Appellants, Charles and Linda Grewell, are the insureds of Defendant/Respondent State Farm Mutual Automobile Insurance Company. Appellant Linda Grewell was involved in a motor vehicle collision with a third party who was also an insured of State Farm. Defendant/Respondent Neressa L. Wilkins became the claims specialist for the Grewells, representing them as to any claim which the third party might assert against the Grewells. Appellants requested access to the claims file generated by Wilkins, seeking certain information. Wilkins provided

some records, but denied access to certain items, declaring these items to be “work product”. The Appellants filed this action to require production of these documents and to declare their rights of access to the claims file. Respondents filed a motion to dismiss for failure to state a cause of action. The trial court sustained the motion, dismissing the petition with prejudice and entering judgment on October 22, 2001. Appellants timely filed the notice of appeal on November 1, 2001.

Jurisdiction and venue was in the Missouri Court of Appeals, Western District, pursuant to MO.REV.STAT. Sections 477.070 and Article 5, Section 3, of the Missouri Constitution because Jackson County is within the territorial boundaries of the Western District and because the issues did not involve a matter within the exclusive jurisdiction of the Supreme Court as the main issue involved whether an insured has access to the claims file, particularly wherein the liability insurer denied access based upon the file containing “work product”.

The Court of Appeals issued a Memorandum opinion on August 20, 2002. Appellants timely filed motions for rehearing/transfer on September 3, 2002. The Court of Appeals overruled the motion for rehearing and denied the motion for transfer on October 29, 2002, but modified the opinion on its own motion, changing its status as a Memorandum to a published opinion. Appellants timely filed an application for transfer with this Court on November 7, 2002. This Court sustained the application on November 26, 2002. Jurisdiction is in this Court pursuant to Article 5, Section 10 of the Missouri Constitution and Missouri Rules of Court 83.04. Substitute briefs are permitted under Rule 83.08.

### **STATEMENT OF FACTS**

Appellants will hereinafter also be referred to as the Grewells. Respondents will hereinafter also be referred to as State Farm and Wilkins. References to the legal file will be abbreviated as “L.F.”, to the transcript as “Tr.”, and to the Court of Appeals’ opinion as “Op.”. Because this matter involves a

motion to dismiss, a plaintiff's properly pleaded facts must be accepted as true, all averments must be given a liberal construction, and all reasonable inferences that are fairly deducible must be drawn from the facts stated. See, e.g., Sullivan v. Carlisle, 851 S.W.2d 510, 512[1, 2](Mo.banc 1993).

On May 1, 2000, Linda Grewell was involved in a motor vehicle collision with a person named James A. Kephart. Both parties were insured by State Farm Mutual Automobile Insurance Company. On May 2, 2000, Neressa Wilkins became the claims specialist for Linda, representing her as to any claims which Kephart or other persons might assert against her. Tom Prawl became the claims specialist for Kephart, representing him as to any claim the Grewells or any other persons might assert against him. (L.F. 6 & 7).

Initially, Wilkins had indicated to the Grewells that she had concluded that Linda was 20% at fault. (L.F. 14). By June 12, 2000, Prawl had concluded that Linda was at least fifty percent (50%) at fault for a failure to yield to Kephart. On August 31, 2000, Wilkins notified the Grewells' attorney by letter that "among other things, State Farm and she had determined the liability of Linda Grewell to be fifty percent (50%)". The Grewells disagreed with Wilkins' conclusions. (L.F. 7). Wilkins also informed Grewells' attorney that except for a statement from Linda Grewell to her, "we are unable to release our file contents for your review as this is considered work product". (L.F. 13).

On October 20, 2000, the Grewells, by and through their attorney, notified Wilkins by letter of their disagreement with the fifty percent (50%) liability determination. The Grewells' attorney also notified Wilkins and State Farm of their good faith duty to handle the liability claim against the Grewells, of the relationship between an insurer and insured, and of the fact that the assertion of "work product" as to the Grewells with regard to the investigation conducted by Wilkins was improper and invalid. The Grewells also requested the following specific information:

1. Any statements of Charles I. Grewell and Linda Grewell to you or anyone else with State Farm acting on behalf of Charles I. Grewell and Linda Grewell.

2. Names and addresses of any witnesses to the collision on May 1, 2000.

3. Statements of any witnesses obtained by you and anyone else with State Farm acting on behalf of Charles I. Grewell and Linda Grewell.

4. Names of all persons with State Farm acting on behalf of Charles I. Grewell and Linda Grewell who have been involved in conducting the investigation of the collision on May 1, 2000.

5. Pictures of the vehicles and accident scene.

6. Any measurements of the accident scene, particularly as to the point of impact.

7. Transcript of or any of your notes pertaining to any proceeding or meeting whereby State Farm, acting within the capacity of representing Charles I. Grewell and Linda Grewell, and State Farm, acting within the capacity of representing James Kephart, determined or otherwise agreed to the percentage of fault between Linda Grewell and James Kephart, and the names of all parties to this proceeding or meeting and the position of each person with State Farm. Please also provide the date when this proceeding or meeting occurred.

8. Any other facts upon which you or other representatives of State Farm, acting on behalf of Charles I. Grewell and Linda Grewell, rely in assessing any percentage of fault as to Linda Grewell.

(L.F. 7, 8, 14, 15).

On October 31, 2000, Wilkins sent a letter to the Grewells' attorney providing the following information:

- Statement obtained from Linda Grewell.
- Name and address of witness, Robert Weir, 815 N.W. 1911 Road, Lone Jack, Missouri 64078. This information was obtained from the Missouri State Highway Patrol report number 300640035.
- Names of persons with State Farm acting on behalf of Charles I. Grewell and Linda Grewell, who have been involved in conducting the investigation of the collision on May 1, 2000: Neressa L. Wilkins.
- Pictures of Ms. Grewell's vehicle.

Wilkins refused to provide the information as to the remaining requests, stating as follows:

Please be advised I am unable to release items numbered as 3, 6, 7, and 8 in your correspondence or the accident scene photos as these items are considered work product.

(L.F. 8, 9, 17, 18).

On November 6, 2000, the Grewells, by and through their attorney, sent a letter to Wilkins, notifying her of their intent to file a lawsuit to obtain the aforesaid information. Neither State Farm nor Wilkins responded. (L.F. 9, 19).

On December 20, 2000, the Grewells filed a declaratory judgment action, seeking a judgment "declaring the relationship between Plaintiffs and Defendants to be an insurer-insured relationship and ordering the Defendants to produce to Plaintiffs and their attorney the information \* \* \* which

Defendants have refused to release, as well as all information which Defendants may obtain in the future while acting on behalf of the Plaintiffs”, and awarding attorney fees, costs, and punitive damages for Respondents’ wrongful conduct in forcing the Grewells to file suit. (L.F. 10-12). As reflected in the petition, Appellants’ basic position was summarized as follows:

4. That the Defendant State Farm in the consideration of a payment by the Plaintiffs, issued to the Plaintiffs an automobile insurance policy, which was in effect on May 1, 2000, on a 1993 Jeep Cherokee. That as part of the coverage, Defendant State Farm agreed to pay certain types of damages which the Plaintiffs would become legally liable to pay as a result of Plaintiffs’ negligence and to defend the Plaintiffs against any claim or suit involving Plaintiffs’ liability. Defendant State Farm also reserved the right to investigate, negotiate and settle any claim or suit against Plaintiffs.

\* \* \*

12. That as the liability insurer of Plaintiffs, Defendant State Farm and its employees such as Defendant Wilkins have an insurer-insured relationship similar to that of an attorney-client relationship, which involves, among other things, a nonadversarial relationship characterized as one of identity of interest. That “work product” is a qualified immunity which denies an opposing or adversarial party information and materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative. That the information which Plaintiffs requested as set forth herein in Paragraph 9 is not “work product” because of the insurer-insured relationship. As a result, Defendants’ assertion of “work product” is invalid, and

Defendants are obligated to provide Plaintiffs and their attorney with the aforesaid requested information.

13. That even if any of the information set forth in Paragraph 9 could be characterized as “work product”, the good faith or fiduciary obligations imposed upon a liability insurer require the liability insurer to provide access to all information which the insured would need to protect his/her interests. That the information requested as set forth in Paragraph 9 is needed by Plaintiffs to protect their interests, including but not limited to enabling Plaintiffs to support their position that Plaintiff Linda Grewell was not liable or, if there is liability, that the liability is less than fifty percent (50%). As a result, Defendants are obligated to provide Plaintiffs and their attorney with the aforesaid requested information.

14. That pursuant to MO.REV.STAT. Section 527.080 and elsewhere as provided by law or equity, this Court can grant coercive relief and order Defendants to produce to Plaintiffs and their attorney any or all of the information as set forth in Paragraph 9 which Defendants have refused to release and any and all information which Defendants may obtain in the future while acting on behalf of the Plaintiffs.

(L.F. 6, 9 & 10).

On January 26, 2000, Respondents filed a motion to dismiss with suggestions in support. (L.F. 20-30). In summary, Respondents asserted that Missouri law does not recognize any special relationship which would require a liability insurer to provide access to the insured to the claims file and further asserted that access could be denied on the work product doctrine. (L.F. 25-29). Respondents

also asserted that a declaratory judgment action was not the “proper procedural mechanism”, but instead it would be a deposition request in a “lawsuit filed by the Grewells against the other alleged tortfeasor, or pursuant to Rule 57.02(a) RSMo. (which would allow plaintiffs to petition the Court to authorize the taking of such a deposition prior to the Grewells actually filing a lawsuit for compensation, against the other alleged tortfeasor).” (L.F. 26 & 27, 29). Respondents also asserted that neither attorney fees nor punitive damages were available. (L.F. 25, 29 & 30).

The Appellants filed suggestions in opposition, addressing each issue. (L.F. 31-43). Although Appellants could not cite any case authority directly on point as to the “access issue”, Appellants did cite several cases which Appellants asserted as reflecting “well-settled, unambiguous law” as to the special relationship between the liability insurer and the insured, as reflecting the “well-settled” law involving the right of access to a file which exists between an attorney and client, and as reflecting the well-settled law involving the right of access to the file of an attorney who represents the liability insurer and insured in a lawsuit by a third party. (L.F. 32-35). Respondents filed a reply (L.F. 44-50), which can be summarized by Respondents’ following statement:

In order to survive defendants’ motion to dismiss, plaintiffs must essentially prove that in the absence of a claim for bad faith refusal to settle, State Farm has a legally recognizable duty to give the plaintiffs free access to its claims file. Simply stated, the general question raised by defendants’ motion to dismiss is the following: Does a liability insurer who is not being accused of bad faith refusal to settle have a duty to share all portions of its claims file with its insured? If the answer to this question is “No,” plaintiffs have necessarily failed to state a cause of action, and their declaratory judgment petition should be dismissed.

(L.F. 44).

On March 2, 2001, there was oral argument before the trial court. (Tr. 1-30). Judge Daugherty eventually entered judgment, granting the motion to dismiss and dismissing the cause of action with prejudice. (L.F. 56).

**POINTS RELIED ON**

**POINT ONE**

**The trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss, ruling that Plaintiffs did not have a right of access to the claims file generated by Defendants, because a special relationship exists between a liability insurer and the insured, which is similar to the attorney-client relationship and which is also characterized as a relationship of identity of interest, and because an insured is entitled to be fully informed as to all matters arising from transactions with the liability insurer as to a claims file in that State**

**Farm is the liability insurer of the Plaintiffs, in that the claims file was generated as a result of a third party claim against Plaintiff Linda Grewell, and in that the coincidence of the liability insurer providing coverage to adverse insureds does not void the special relationship.**

*State ex rel. Cain v. Barker*, 540 S.W.2d 50(Mo.banc 1976).

*In Re Conrad*, 105 S.W.2d 1(Mo. 1937).

*State ex rel. Dunn Construction Co., Inc. v. Sprinkle*, 650 S.W.2d 707

(Mo.App. W.D. 1983).

*State Farm Mutual Automobile Insurance Company v. Keet*, 644 S.W.2d 654

(Mo.App. S.D. 1982).

*MO.REV.STAT. Section 375.445.*

*Missouri Rules of Court 4-1.4.*

### **POINT TWO**

**Assuming Plaintiffs have stated a substantive cause of action, then the trial court erred as a matter of law and to the prejudice of Plaintiffs by sustaining that part of Defendants' motion to dismiss as to a declaratory judgment action not being the proper remedy for seeking access to the claims file because a declaratory judgment action is available upon a showing of (1) existence of a justiciable controversy admitting of specific relief by decree; (2) the presence of a legally protectable interest; (3) the existence of a question ripe for judicial decision; and (4) the absence of an adequate legal remedy in that Plaintiffs have a written contract of insurance with State Farm, in that a liability insurer-insured relationship exists**

**between Plaintiffs and State Farm, in that Plaintiffs have a legal right of access to the claims file which State Farm has denied, in that the respective positions of the parties are polarized and cannot be resolved without judicial resolution, and in that no other adequate legal remedy exists.**

*Lake Ozark Construction v. North Port Assoc.*, 859 S.W.2d 710(Mo.App. W.D. 1993).

*Harness v. State Farm Mutual Automobile Insurance Co.*, 867 S.W.2d 591 (Mo.App. E.D. 1994).

*Missouri Dept. of Social Services v. AGI-Bloomfield*, 682 S.W.2d 166 (Mo.App. W.D. 1984).

*Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group*, 916 S.W.2d 821(Mo.App. W.D. 1995).

*MO.REV.STAT. Section 527.010*

*MO.REV.STAT. Section 527.020*

*MO.REV.STAT. Section 527.080*

*MO.REV.STAT. Section 527.120*

**POINT THREE**

Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants motion to dismiss as failing to state a cause of action in Count Two of the petition for attorney fees because attorney fees can be awarded in a declaratory judgment action when there is a showing of “very unusual circumstances” in that the law regarding the relationship between an insured and a liability insurer and regarding “work product” is well-delineated and well-settled and in that Defendants’ refusal, and continuing refusal, to release the requested information was in bad faith, was without just cause or excuse, was intentional, was

**frivolous, and/or was outrageous because of Defendants' evil motive or reckless indifference to Plaintiffs' rights.**

*Law v. City of Maryville*, 933 S.W.2d 873(Mo.App. W.D. 1996).

*Landie v. Century Indemnity Company*, 390 S.W.2d 558(Mo.App. K.C. 1965).

*Ritterbusch v. Holt*, 789 S.W.2d 491(Mo.banc 1990).

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303(Mo.banc 1993).

*MO.REV.STAT. Section 527.080.*

*MO.REV.STAT. Section 527.100.*

#### **POINT FOUR**

**Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants motion to dismiss as failing to state a cause of action in Count Three of the petition for nominal and punitive damages because damages can be awarded in a declaratory judgment action and because nominal and punitive damages are available in an action involving a breach of a fiduciary duty in that when Respondents refused to provide Appellants access to the claims file, Respondents, as liability insurer, breached various fiduciary duties to Appellants, as insureds.**

*Klemme v. Best*, 941 S.W.2d 493(Mo.banc 1997).

*Clark v. Beverly Enterprises-Missouri*, 872 S.W.2d 522(Mo.App. 1994).

*Farley v. Missouri Dept. of Natural Resources*, 592 S.W.2d 539(Mo.App. W.D. 1979).

*Gibson v. Adams*, 946 S.W.2d 796(Mo.App.E.D. 1997).

*MO.REV.STAT. Section 527.010.*

*MO.REV.STAT. Section 527.080.*

*MAI 10.01.*

## **ARGUMENT**

### **POINT ONE**

**The trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss, ruling that Plaintiffs did not have a right of access to the claims file generated by Defendants, because a special relationship exists between a liability insurer and the insured, which is similar to the attorney-client relationship and which is also characterized as a relationship of identity of interest, and because an insured is entitled to be fully informed as to all matters arising from transactions with the liability insurer as to a claims file in that State Farm is the liability insurer of the Plaintiffs, in that the claims file was generated as a result of a third party claim against Plaintiff Linda Grewell, and in that the**

**coincidence of the liability insurer providing coverage to adverse insureds does not void the special relationship.**

**Standard of Review**

As to the general standard of review, because this case involves a judge-tried case, this Court will sustain the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32(Mo.banc 1976). Because this case also involves the trial court's dismissal of the petition for a failure to state a cause of action, the following rules should apply:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512(Mo.banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306[2](Mo.banc 1993).

A petition is sufficient to withstand a motion to dismiss for failure to state a claim if it invokes substantive principles of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial. [citations

omitted]. It is not to be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. [citation omitted].

*Ritterbusch v. Holt*, 789 S.W.2d 491, 493[1, 2](Mo.banc 1990).

In addition, because the facts are not disputed, and the issues involve the interpretation and application of the law to the facts, “the trial court’s interpretation receives no deference in our review. \* \* \* This court will reach its own conclusions about whether the trial court correctly interpreted and applied the law”. *John L. Thuston & Assoc. v. FDIC*, 869 S.W.2d 105, 107(Mo.App. W.D. 1993).

### *Issue*

Initially, the Court should note that in dismissing the petition with prejudice, Judge Daugherty did not state any reasons for doing so. However, the gist of Appellants’ cause of action and ground for relief involves the issue of whether or not an insured has a legal right of access to the claims file generated by the liability insurer involving a third party claim against the insured, particularly wherein the insurer denied access based upon the file containing “work product”. This issue appears to not be definitively answered in Missouri, but various principles of law clearly support the proposition that an insured has a legal right of access to the claims file, neither barred nor restricted by the work product doctrine, while the cases upon which Respondents relied actually rebut Respondents’ position that the liability insurer can deny or restrict an insured’s access to the claims file based on the work product doctrine.

### *The Law*

First, the Court should note that a contractual relationship exists between Appellants and State Farm because Appellants paid State Farm a premium and because State Farm issued an automobile

insurance policy. As a part of the liability coverage, State Farm agreed to defend the Appellants against any claim or suit involving Appellants' liability, further reserving the right to investigate, negotiate and settle any such claim or suit. (L.F. 6).

Second, whether imposed by statute, case law, and/or the insurance contract, there is generally a reciprocal duty of good faith and fair dealing between an insurer and insureds. See, e.g., *Craig v. Iowa Kemper Mutual Ins. Co.*, 565 S.W.2d 716, 722 & 723(Mo.App. W.D. 1978) overruled on other grounds in *Thomas v. American Casualty Ins. Co.*, 871 S.W.2d 460(Mo.App. W.D. 1993); MO.REV.STAT. Section 375.445(imposes good faith obligation upon insurer to “carry out its contracts” and not to conduct “business fraudulently”); MO.REV.STAT. Section 375.1007(itemized list of various improper claims practices); Couch on Insurance 3d, Section 198.16. Although there should also be a duty of mutual cooperation, there is no question that if the insurance policy contains a “typical cooperation clause”, such a provision is valid and enforceable, requiring the insured to cooperate with the insurer and not materially impair the insurer’s right to investigate, negotiate, or settle a liability claim or suit. See, e.g., *Hendrix v. Jones*, 580 S.W.2d 740(Mo.banc 1979).

Third, in *State ex rel. Cain v. Barker*, 540 S.W.2d 50(Mo.banc 1976), the Supreme Court recognized a special relationship between the liability insurer and the insured, which is similar to the relationship of an attorney and client. As recognized in *State ex rel. J.E. Dunn Construction Co., Inc. v. Sprinkle*, 650 S.W.2d 707, 710(Mo.App. W.D. 1983) and *Brantley v. Sears Roebuck & Co.*, 959 S.W.2d 927, 928(Mo.App. E.D. 1998), this relationship is characterized as one of “identity of interest”. This special relationship is based upon such circumstances as the insurer’s contractual duty to defend and pay judgments, the insurer’s right to exclusively contest or negotiate the claim of liability against the insured, and the insured’s obligation to cooperate, see, *Cain*, 540 S.W.2d at 53-57;

*J.E. Dunn*, 650 S.W.2d at 710, fn. 1; *Brantley*, 959 S.W.2d at 928; *Craig*, 565 S.W.2d at 723, and imposes fiduciary obligations upon the liability insurer because the insurer has the “power to act for the insured, akin to authority a client vests in an attorney, or a principal in an agent – each a relationship of inherent fiduciary obligation”. *Craig*, 565 S.W.2d at 723; *J.E. Dunn*, 650 S.W.2d at 710, fn. 1; see also, *Duncan v. Andrew County Mutual Insurance Co.*, 665 S.W.2d 13, 18(Mo.App. W.D. 1983), modified on other grounds, *Overcast v. Billings Mutual Insurance Company*, 11 S.W.3d 62, 68-70(Mo.banc 200). Among other things, the liability insurer is empowered “to act independently in protecting the interests of itself and its insured”, but the liability insurer does not have “any express or implied authority to settle an insured’s claim against a third party or *otherwise prejudice the substantial rights of an insured without his knowledge or consent.*” *Faught v. Washam*, 329 S.W.2d 588, 594(Mo. 1959)(Emphasis ours).

Fourth, in *State Farm Mutual Automobile Insurance Company v. Keet*, 644 S.W.2d 654(Mo.App. S.D. 1982), the Southern District recognized that transactions among the liability insurer, the insured, and the defense attorney engaged by the insurer are not “privileged” as to all such parties and their representatives who are a part of such relationship and that any such person has a right of access to all information contained in the claim file. *Id.* at 655. In rejecting State Farm’s objections that communications between the defense lawyer and the liability insurer need not be disclosed to the insured because such matters were “privileged, contained work product and are overbroad”, the Southern District ruled as follows:

By his request for production number 2, Davis [the insured] simply asked for the production of written correspondence and memoranda between his insurer and the lawyer his insurer engaged to defend him on the counterclaim. Respectable authority

has held that in situations of this sort, i.e., where an insurer employs counsel as specified in its policy to represent its insured and both the insurer and insured consult with that counsel for their individual and mutual benefit, testimony or evidence as to communications between insurer and insured or between either of them and their mutual attorney are not privileged in a later transaction between such parties or their representatives. Dumas v. State Farm Mutual Automobile Ins. Co., 111 N.H. 43, 274 A.2d 781, 784-785[4, 5](1971); Brasseaux v. Girouard, 214 So.2d 401, 410[15](La.App. 1968); Nationwide Mutual Insurance Company v. Smith, 280 Ala. 343, 194 So.2d 505, 508-510[2, 3](1966); Henke v. Iowa Home Mutual Casualty Company, 249 Iowa 614, 87 N.W.2d 920, 923[3](1958). See also, Glacier General Assur. v. Superior Court, 95 Cal.App.3d 836, 940-842, 157 Cal.Rptr. 435, 436-438[2](1979).

Id.

This Court should note that the Keet Court did not limit the meaning of a “later transaction” to a lawsuit between the liability insurer and insured or between the insured and the third party who is making a claim against the insured. In light of the liability insurer-insured relationship, the term “transaction” should be given a “broad and flexible meaning”, involving all dealings between the insurer and insured or their representatives. Cf., Stevinson v. Deffenbaugh Industries, 870 S.W.2d 851, 857[14](Mo.App. W.D. 1993)(The term transaction “is one of broad and flexible meaning and is intended to include all the facts and circumstances constituting the foundation of a claim and shall be applied so as to bring all logically related claims into a single litigation”); Henke, 87 N.W.2d at

927(claims file is open to insured and its availability did not cease when a controversy arose between insurer and insured). The Keet Court also did not limit this special relationship in situations where the insurer provides liability coverage to adverse insureds with claims against each other, recognizing that such a “coincidence” does not change the special relationship between a liability insurer and the insured, 644 S.W.2d at 655, and even confirmed this special relationship, recognizing that communications among the liability insurer, the insured, and the insurer/insured lawyer are privileged and not subject to disclosure to the adverse insured or to the attorney retained by the insurer to represent the adverse insured because an attorney-client relationship exists. Id. at 655 & 656, *citing Cain*.

Fifth, as reflected in the Cain Court’s analysis and approval of the People v. Ryan case, 540 S.W.2d at 54 & 55, a private attorney for the insured should be a part of this special relationship. In Ryan, the liability insurer permitted the private attorney to inspect the claims file. Subsequently, the private attorney “was served with a subpoena duces tecum to produce his client’s statement given to the insurance company”. Id. at 54. The private attorney declined, “basing his refusal on the grounds that to do so would violate his client’s rights against self-incrimination and that the written statement was a privileged communication between attorney and client”. Id. The trial court ordered disclosure and found the private attorney guilty of contempt. On appeal, the Ryan Court “reversed the conviction”, holding that the insured’s statement to the liability insurer was “clothed with the attorney-client privilege while in control of the insurer.” Id. at 54 & 55.

Sixth, both the J.E. Dunn and the Brantley Courts recognized a definition of “work product”. 650 S.W.2d at 710; 959 S.W.2d at 928 & 929. In Brantley, the Court stated as follows:

Work product is a qualified immunity pursuant to Rule 56.01(b)(3) which denies the *opposing* party materials “prepared in anticipation of litigation or for trial by

or for another party or by or for that other party's representative . . . ” Work product immunity applies *only* to information and materials gathered by *one's adversary* in the litigation, or in preparation for the litigation, in which the discovery is being sought; \* \* \*

959 S.W.2d at 928 & 929. (Emphasis ours).

Simply put, if there is no adversarial relationship, there is no work product.

Seventh, as reflected in such cases as Chitty v. State Farm Mutual Automobile Insurance Co., 36 F.R.D. 37(1964) and Nationwide Mutual Fire Ins. Co. v. Smith, 174 F.R.D. 250(1997), in a “bad faith action” by the insured against the insurer, involving the insurer’s handling of a third party claim<sup>1</sup> or the insurer’s denial of the insured’s claim<sup>2</sup>, a work product objection is invalid as to the insured’s request for discovery of the claims file because in a “bad faith action”, the insured must prove an “unreasonable and arbitrary attitude” on the part of the insurer. As the Nationwide Court recognized:

“Bad faith actions against an insurer . . . by their very nature `can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action that it did.” [Citations omitted].

To establish that the insurer acted in bad faith, the plaintiff “must show `whether [the insurer] sought and followed [the] advice and recommendation of its agents, adjusters

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<sup>1</sup> See, e.g., Zumwalt v. Utilities Insurance Co., 228 S.W.2d 750(Mo. 1950)(bad faith refusal to settle).

<sup>2</sup> See, e.g., MO.REV.STAT. Section 375.420(vexatious refusal to pay insured’s claim).

and attorneys.’ Therefore, all such information is relevant and good cause [is] established for its production.” [quoting *Chitty*].

174 FRD at 252 & 253.

As the *Chitty* Court further recognized, the claims file is accessible to the insured because it was not prepared at a time when the insurer and insured were involved in an adversarial relationship, such as the later bad faith action. 36 F.R.D. at 40-42.

Eighth, the Court should note the disclosure rules applicable in an attorney-client relationship. For example, in the case of *In Re Conrad*, 105 S.W.2d 1(Mo. 1937), the Supreme Court stated as follows:

“The relation of attorney and client is one of the highest trust and confidence, requiring from the attorney the observance of the utmost good faith toward his client, and the parties have been held to sustain to each other, during the time the relation exists, in respect to any matter being conducted for the client by the attorney, the relation of trustee and cetui que trust, and their dealings with each other are subject to the same intendments and imputations as obtain between other trustees and beneficiaries.” The client is entitled to be fully informed of his rights and interests in the subject-matter of the transaction; and of the nature and effect of the transaction itself, and to be so placed as to be able to deal with the attorney at arm’s length.

*Id.* at 10.

In addition, Rule 4-1.4 (Communications) provides as follows:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

And, as reflected in Spivey v. Zant, 683 F.2d 881(5<sup>th</sup> Cir. 1982), the “work product doctrine does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation”. Id. at 885. A client’s access to the file would also not be limited to situations involving a lawsuit between the lawyer and client, between the client and adverse third party, or between the client and an adverse client. The special relationship between the attorney and the client does not change if another client becomes adverse to the client, although the attorney would likely have to withdraw from representing both clients. See, e.g., Missouri Rules of Court, Rule 4-1.7; Henke, 87 N.W.2d at 925[7].

Finally, the Court should take note of various examples of fiduciary responsibilities wherein the liability insurer-insured relationship is essentially the same as an attorney-client relationship. In addition to the obligation of confidentiality, *compare Cain*, 540 S.W.2d 50 *with* Missouri Rules of Court, Rule 4-1.6, there are duties to avoid and deal with conflicts of interest, *compare Henke*, 87 N.W.2d at 925[7] *with* Rule 4-1.7, to be competent, *compare* MO.REV.STAT. Section 375.1007(3, 14) *with* Rule 4-1.1, to be diligent, *compare* Section 375.1007(2, 3, 7, 13) *with* Rule 4-1.3, to be truthful, *compare* Section 375.1007(1, 4, 8, 9, 12, 15) *with* Rule 4-4.1, and to deal with an unrepresented person. *Compare* 20 CSR 100-1.050(E) *with* Rule 4-4.3.

In light of such well-settled, unambiguous, and respectable authority, an insured clearly has a right of access to the claims file generated by the liability insurer as a result of the third party claim, and

the work product doctrine does not apply to bar or restrict this right of access. Particularly in light of the Conrad case, the insured has a right of access “in respect to any matter being conducted” for the insured by the liability insurer “during the time the relation exists”, being “entitled to be fully informed of his rights and interests in the subject-matter of the transaction; and of the nature and effect of the transaction itself, and to be so placed as to be able to deal with the” liability insurer at arm’s length. And, the claims file remains open and available to the insured even when a controversy arises between the liability insurer and the insured and even when the claims file is created as a result of a claim against the insured by an adverse insured.

Despite these well-delineated and well-settled principles of law, Respondents basically relied on two cases – namely, State ex rel. Safeco National Insurance Company v. Rausch, 849 S.W.2d 632(Mo.App. E.D. 1993) and State ex rel State Farm Mutual Automobile Insurance Company v. Keet, 601 S.W.2d 669(Mo.App. S.D. 1980)<sup>3</sup> for the proposition that the “law is clear in Missouri . . . that the `work product` doctrine does apply to work performed by insurance companies.” (L.F. 28 & 29). However, even a cursory examination of these cases reveals that these two cases specifically limit this doctrine to situations wherein the relationship between the insurer and the insured is “adversarial”. Both cases involved an uninsured motorist claim, which did not involve the special relationship as between a liability insurer and its insured. Keet, 601 S.W.2d at 671; Rauch, 849 S.W.2d at 634 & 635. (L.F. 39). Such an adversarial relationship also exists between a casualty loss insurer and the insured “until the insurer acknowledges coverage under its policy terms.” J.E.

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<sup>3</sup> This “Keet case” is not the same as the “Keet case” relied upon by Appellants.

Dunn, 650 S.W.2d at 710; Brantley, 959 S.W.2d at 928. Thus, while the “law is clear in Missouri”, the fact is that the Keet and Rausch cases actually rebut Respondent’s position.

In its reply, Respondents essentially asserted that the special relationship does not exist until a lawsuit is filed because until Linda Grewell is sued by Kephart, she “is not defending against anything, as no claim has been made against her personally” (L.F. 46) and further asserted that a fiduciary duty between an insurer and insured only arises in the context of a “bad faith refusal to settle”. (L.F. 44, 46, 47, 48, 49). Such arguments are without any merit.

First, the Cain Court clearly ruled that the attorney-client/insurer-insured relationship exists before a lawsuit is filed. Cain, 540 S.W.2d at 53(time of statement by insured to insurer); and at 56, citing, Hollien v. Kaye, recognizing that the attorney-client relationship exists as to communications “whether made before or after suit is instituted or to its lay representatives, either before or after an attorney has been formally selected by the carrier to represent its assured”; see, State ex rel. Day v. Patterson, 773 S.W.2d 224, 227 & 228(Mo.App. E.D. 1989). As the Day Court further recognized, the “test of when matters and documents are prepared ‘in anticipation of litigation or for trial’ is not whether an action has been commenced, but whether ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’” Id. at 228[7]. Thus, the special relationship should generally begin as soon as the liability insurer receives notice of the third party claim and, in response thereto, the liability insurer opens a claims file.

Second, although the cases relied upon by the “second Keet Court”, such as Henke, supra, involved “bad faith refusals to settle”, neither the Keet Court nor the Henke case limited the holdings to such a situation. In the Keet case, as herein, State Farm insured conflicting claimants (Davis and

Clouse). Davis gave a recorded statement to his State Farm representative. Eventually Clouse and Davis filed lawsuits against each other, and State Farm hired separate defense counsel. Davis also retained private counsel (McDonald). During pretrial proceedings, McDonald discovered that Davis' recorded statement had been given to the defense lawyer for Clouse, apparently without the knowledge and consent of Davis or McDonald: "Davis, via attorney McDonald, sued State Farm in Greene County alleging he had been damaged because the Lowther firm, representing Clouse in the Wright County cause, had been given the recorded statement Davis had made to the State Farm investigator". 644 S.W.2d at 654. The *Keet* Court subsequently recognized that "testimony or evidence as to communications between insurer and insured or between either of them and their mutual attorney are not privileged in a later transaction between such parties or their representatives. *Id.* at 654. (Emphasis ours). The *Henke* Court also applied the same principle. *Henke*, 87 N.W.2d at 923[3] and 925[6].

Thus, the special relationship arises when the claims file is opened and continues at least until the relationship becomes adversarial as a result of a situation such as a "bad faith refusal to settle action". See also, *Chitty*, 36 F.R.D. at 40-42. It is not a cause of action which creates the fiduciary duties, but instead it is the contractual relationship which imposes various obligations upon the liability insurer and the insured, which in turn creates the fiduciary relationship.

Despite the law and Appellants' arguments, the Court of Appeals rejected the existence of a special relationship between Appellants and Respondents because such a relationship exists "in contexts other than in the context of a dispute between the insured and the insurer over the insured's degree of fault". The Court of Appeals recognized only one reason for an absence of a special relationship: "because State Farm insured both Kephart [the third party/adverse insured] and Grewell [Appellants]".

(Op. 5). The Court of Appeals did not cite any supporting authority. Appellants respectfully submit that the Court of Appeals' reasoning is misplaced and untenable.

First, the relationship between an insurer and insured must be viewed from the perspective of the insured, not the insurer. Cf., e.g., *State ex rel. Rimco Inc. v. Dowd*, 858 S.W.2d 307, 309(Mo.App. E.D. 1993), recognizing that the insurer must make hard decisions and assume the risk of decisions when determining whether to defend a tort action when some issue of coverage is present; see also, MO.REV.STAT. Section 375.445, essentially imposing a duty upon insurance companies to carry out its contracts in good faith. The insured pays a premium to be defended and protected against the liability claims of a third party, and the insurance contract does not make any exceptions for an "adverse insured". Cf. *Cain*, 540 S.W.2d at 56 & 57, citing, *Hollien v. Kaye*(insured pays valuable consideration to insurer to be defended and to protect his interests in the event of an accident). In addition, while the liability insurer is empowered "to act independently in protecting the interests of itself and its insured", the liability insurer does not have authority to "prejudice the substantial rights of an insured without his knowledge or consent." See, *Faught*, supra.

Second, the legal principles cited by Appellants are clear and well-supported by case law. All of these principles and cases involve the relationship between a *liability* insurer and the insured. All of these cases recognize the special relationship. That relationship begins as soon as a claims file is opened and an adjuster is assigned. It ends when an irreconcilable conflict between the liability insurer and insured occurs, such as herein when an adversarial relationship arose because Respondents refused to provide access to the claims file and when Appellants filed a lawsuit. However, the claims file remains open and accessible because it was generated when the relationship was not adversarial. And,

while there are “many facets of their relationship”, all of these “facets” arise out of the same context of a *liability* insurer-insured relationship.

Third, as the *Keet* Court recognized, the “coincidence” of an insurer providing liability coverage to adverse insureds with claims against each other does not change the special relationship between a liability insurer and the insured. 644 S.W.2d at 655. Obviously, if Kephart had been insured by a different insurer, there would still be a special relationship between Appellants and Respondents. A fiduciary relationship should not be destroyed by the simple fact that adverse insureds have the same insurer. The repercussions of permitting an avoidance of such a relationship would also be disastrous.

As reflected in the *Cain* case, a confidential relationship exists between the liability insurer and insured, similar to an attorney-client relationship, which protects communications from third party inquiries. As reflected in the *Keet* case, the Southern District not only ruled that “communications between insurer and insured or between either of them and their mutual attorney are not privileged in a later transaction between such parties or their representatives”, 644 S.W.2d at 655, but also recognized that a confidential relationship existed which denied the “adverse insured” and his/her agents a right to access such communications. *Id.* at 655 & 656, citing *Cain*. As reflected in the *Day* case, the special relationship exists in contexts other than the “instant litigation”. 773 S.W.2d at 227-230. Obviously, if one adjuster is used or two adjusters “openly disclose”, there would no longer be any right to deny a third party or the adverse insured access to such communications. *See, e.g., Maher v. Maher*, 951 S.W.2d 669, 674[8, 9](Mo.App. E.D. 1997)(Communications between counsel for opposing parties are not protected by either attorney-client or work product privileges; attorney-client

privilege protects only communications between attorney and her client, not communications between attorney and opponent's counsel).

As an example, if an insured admitted to his adjuster to leaving the scene of an accident or to being intoxicated, which are criminal acts, see, MO.REV.STAT. Sections 577.060 and 577.010, and admitted operation, which is a necessary element of either crime, and if such an admission was the only substantial proof of operation, this information would become accessible to a prosecutor or law enforcement if the adjuster disclosed it to the other party's insurance adjuster or if the same adjuster handled both claims. Of course, the adverse party could also use such information to attempt to obtain punitive damages, which are not covered by insurance, or to expose the insured to damages in excess of policy limits. Based on Cain, Keet, and Day, this communication between the insured's adjuster and the insured is confidential and cannot be disclosed without the insured's consent. However, based on this Court of Appeals' declarations, if the same insurance company insures both parties, there is no longer any "identity of interest" or attorney-client relationship.

Finally, the Court should note that the solution is simple as to rectifying the dilemma faced by the liability insurer when insuring adverse insureds. As occurred herein, State Farm assigned separate adjusters. The adjusters were also in separate offices, and separate claims numbers were assigned. As also deemed admitted herein, each adjuster was acting as a "claims specialist" to represent each insured as to claims asserted against each other or by third parties. (L.F. 6 & 7). State Farm undoubtedly handled this matter in this manner as a response to such cases as Cain and Keet. Proper training and greater authority to act within each claim office will further reduce the possibility of violating fiduciary responsibilities and will maintain the "identity of interest" between the insured and liability insurer.

### *Application Of Law To Facts*

As these principles would apply to the facts herein, State Farm is the liability insurer of the Grewells, and Wilkins is the representative of both State Farm and the Grewells, handling the investigation and defense of the Grewells with regard to third party claims. (L.F. 6 & 7). Thus, there is a special relationship which is essentially the same as an attorney-client relationship. There is an “identity of interest”. The relationship is supposed to be nonadversarial and mutually beneficial with a goal of working together in a common defense. There is a fiduciary relationship.

For reasons unknown, Wilkins concluded that Linda Grewell is fifty percent (50%) liable as to the collision with Kephart. (L.F. 7). The Grewells not only dispute this determination, but are also concerned that the fault determination could affect their insurance premiums or ability to maintain insurance coverage with State Farm or to obtain coverage from another insurance company, particularly if “publicly reported”.<sup>4</sup> (L.F. 7 & 8, 14 & 15, 38). Therefore, the Grewells desire to protect their interests and to understand the at-fault analysis. Access to the claims file, particularly as to the eight requested items (L.F. 7, 8, 14, 15) should be helpful. And, even though the “insurer is entitled to make its own determination for its own purposes”, and even though access to the claims file would not guarantee that the insured could change their insurer’s determination, see, Op. at ??, the insurer cannot “prejudice the substantial rights of an insured without his knowledge or consent”, see, Faught, supra, and access would allow the insured to determine whether or not the adjuster conducted a thorough investigation, basing his/her conclusions on substantial facts. As reflected in such cases as Laster v.

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<sup>4</sup> Business entities do exist which compile claims history information about all of us and which provide such information to insurance companies. See, Appendix, A-1 to A-3.

State Farm Fire & Casualty Co., 693 S.W.2d 195(Mo.App. E.D. 1985); Travelers Indemnity Co. v. Woods, 663 S.W.2d 392(Mo.App. S.D. 1983); Hounihan v. Farm Bureau Mutual Insurance Co., 523 S.W.2d 173(Mo.App. S.D. 1975), insurance companies do conduct insufficient investigations. Access would definitely give the insured the opportunity to dispute the determination *before* the damage is done – either by increased rates or by public reporting.

In addition, any information exchanged between Wilkins and Prawl is not privileged. See, e.g., Maher, 951 S.W.2d at 674[8]. Therefore, any information obtained by Wilkins during her investigation may also be useful in developing strategies prior to prosecuting a lawsuit in an effort to settle Appellants’ claim against Kephart. (L.F. 38). Likewise, any information obtained by Prawl from Wilkins could be used by Kephart in defending the Grewells’ claim. Obviously, the Grewells would want to know about this information to avoid “unjust surprise” and to deal at arm’s length in pursuing any claim against Kephart, particularly before the filing of a lawsuit. Again, this information would protect the Grewells’ interests. Such reasons for accessing the claims file are clearly legitimate, see, e.g., Chitty, 36 F.R.D. at 39 & 40, even though “good cause” should not be a barrier to the insured because of the absence of an adversarial relationship and the existence of an attorney-client relationship.

Simply put, the liability insurer and insured are not adversaries and must work together in a “common defense”. The Grewells as insureds are “entitled to be fully informed of [their] rights and interests in the subject-matter of the transaction; and of the nature and effect of the transaction itself, and to be so placed as to be able to deal with the [liability insurer] at arm’s length”. See, In Re Conrad, 105 S.W.2d at 10. The Grewells are also entitled to be fully informed so as to deal with the tortfeasor at arms’ length. Respondents’ denial of access to the claims file, based upon the ground of

“work product”, is simply invalid. Thus, the Grewells are entitled to any information in the claims file which may be individually or mutually beneficial. See, Keet, 644 S.W.2d at 655.

The problems which a liability insurer must face as to the conflict of interest between adverse insureds is different from an attorney with adverse clients in that the liability insurer cannot withdraw from representation. However, it is the liability insurer who must make hard decisions. A fiduciary obligation to the insured requires the liability insurer to find a solution at its expense. And there is a solution, which simply requires the liability insurer to provide separate claims specialists as is required when the liability insurer must provide separate attorneys.

As a result, the Appellants have stated a substantive cause of action. The Court should reverse the judgment and remand with directions to the trial court to recognize this cause of action.

### **POINT TWO**

**Assuming Plaintiffs have stated a substantive cause of action, then the trial court erred as a matter of law and to the prejudice of Plaintiffs by sustaining that part of Defendants’ motion to dismiss as to a declaratory judgment action not being the proper remedy for seeking access to the claims file because a declaratory judgment action is available upon a showing of (1) existence of a justiciable controversy admitting of specific relief by decree; (2) the presence of a legally protectable interest; (3) the existence of a question ripe for judicial decision; and (4) the absence of an adequate legal remedy in that Plaintiffs have a written contract of insurance with State Farm, in that a liability insurer-insured relationship exists between Plaintiffs and State Farm, in that Plaintiffs have a legal right of access to**

**the claims file which State Farm has denied, in that the respective positions of the parties are polarized and cannot be resolved without judicial resolution, and in that no other adequate legal remedy exists.**

### **Standard of Review**

As to the general standard of review, because this case involves a judge-trying case, this Court will sustain the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32(Mo.banc 1976). As in the case of *Lake Ozark Construction v. North Port Assoc.*, 859 S.W.2d 710(Mo.App. W.D. 1993), "[r]eview here is of the granting of a motion to dismiss a petition for declaratory relief." Thus, "[t]his court must accept as true all well-pleaded facts and inferences. The sufficiency of such petition hinges on whether the parties show entitlement to a declaration of rights or status on the pleaded facts. \* \* \* If the averments of the petition show such entitlement, then it is improper to dismiss the petition. \* \* \* This court must determine whether the trial court's legal conclusion was correct. \* \* \*." *Id.* at 714. "Concomitantly, a petition invoking declaratory relief, in order to survive a motion to dismiss for failure to state a claim upon which relief can be granted, must allege a state of facts demonstrating the existence of certain obtaining principles which have evolved from cases addressing actions for declaratory judgments". *AGI-Bloomfield*, 682 S.W.2d at 168.

### **Issue**

Assuming the Court agrees with Appellants in Point One that they have stated a substantive cause of action, there is still an issue as to whether the procedural remedy for pursuing this cause of action is a declaratory judgment action under MO.REV.STAT. Sections 527.010 to 527.140. See,

also, Missouri Rules of Court 87.01-87.11. The trial court did not specifically address this issue in the judgment (L.F. 66), but Respondents did assert that a declaratory judgment action was not the “proper procedural mechanism”, instead being a deposition request in a “lawsuit filed by the Grewells against the other alleged tortfeasor, or pursuant to Rule 57.02(a) RSMo. (which would allow plaintiffs to petition the Court to authorize the taking of such a deposition prior to the Grewells actually filing a lawsuit for compensation, against the other alleged tortfeasor).” (L.F. 26 & 27, 29). Appellants addressed this issue in detail in their suggestions in opposition. (L.F. 35-37). Respondents did not present any argument in their reply, other than to reassert their position. (L.F. 50). “Accordingly, it is assumed on appeal that the trial court dismissed plaintiffs’ petition for declaratory judgment on the grounds or for the reasons set forth in defendants’ motion to dismiss.” *Missouri Dept. of Social Services v. AGI-Bloomfield Convalescent Center, Inc.*, 682 S.W.2d 166, 167 & 168(Mo.App. W.D. 1984). In its Opinion, the Court of Appeals declared that an insured could not have access to the claims file until “the prosecution or defense of a formal claim involving” the third party/adverse insured at which time “they will have the right to conduct formal discovery of the claim file pursuant to a subpoena as to items which may be admissible or which may lead to the discovery of admissible evidence”. (Op. 6).

### **The Law**

To state a cause of action under MO.REV.STAT. Section 527.010 generally requires three elements: “1) existence of a justiciable controversy admitting of specific relief by decree; 2) the presence of a legally protectable interest; and 3) the existence of a question ripe for judicial decision.” *Lake Ozark*, 859 S.W.2d at 714. Because there is a written contract of insurance coverage between the parties, Section 527.020 and Rule 87.02(a) also apply. See, *Harness v. State Farm Mutual*

*Automobile Insurance Co.*, 867 S.W.2d 591, 592(Mo.App. E.D. 1994). Pursuant to these statutes and rules, the courts have the power and duty to declare “rights, status or other legal relations.” *Lake Ozark*, 859 S.W.2d at 714; *Harness*, 867 S.W.2d at 592; see, also, Section 527.120. Coercive relief is also available. *Lake Ozark*, 859 S.W.2d at 715. And, if the relationship between the parties is “continuing” and involves “future acts which depend upon the outcome”, it is “desirable that the courts establish the relationship of the parties”. *Id.* at 714. The declaratory judgment act is also remedial and is to be liberally construed and administered. See, Section 527.120; *AGI-Bloomfield*, 682 S.W.2d at 171 & 172.

Upon satisfying these three elements, there is still a requirement that the party does not have an adequate remedy at law. See, e.g., Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group, 916 S.W.2d 821, 824[5](Mo.App. W.D. 1995). However, where there is no pending litigation between the parties and “where the facts do not show such imminence of suit, or where there is a practical ground for permitting a party . . . to claim and obtain exoneration from a judicial proceeding, there is no reason why the court should not take cognizance – of a declaratory action covering the same issues”. *Id.* at 824, relying on Missouri Supreme Court cases. In considering whether “practical grounds” exist, factors to consider “include public policy and interest, efficiency, convenience, economy, the good or bad faith of the party bringing the declaratory judgment action, and whether the trial court’s administration of the Declaratory Judgment Act served the purposes for which the legislation was enacted”. *Id.* at 825.

### **Application Of Law To Facts**

Herein, the pleaded facts establish all of the elements for stating a cause of action for declaratory relief. As addressed in Point One, there is a written contract of insurance between the

parties with State Farm being the insurer and the Grewells being the insureds. (L.F. 6). As a result of the third party claims, there is the special relationship of a liability insurer and insured which creates the legal right of an insured's access to the claims file. Thus, there is a legally protectable interest. State Farm has denied the Grewells access to the claims file, thus creating a justiciable controversy. The Grewells are seeking coercive relief, requesting the trial court to order State Farm to produce the information which it has refused to release as well as any and all information which State Farm may obtain while acting on behalf of the Grewells. (L.F. 7-10). Thus, there is a continuing relationship of which the future depends upon the outcome of this proceeding. The positions of the parties are polarized and cannot be resolved without judicial resolution. Thus, this question is ripe for judicial decision.

As to the adequacy of another remedy, the Court should be aware there was no pending litigation at the time of the filing of the declaratory judgment action and no showing of any "imminence of suit". And, there are "practical grounds" for rejecting Respondents' and the Court of Appeals' theory of the "proper procedural mechanism".

One, as to a deposition under Rule 57.02(a), there would be some question as to whether the insured could validly establish a ground for perpetuating testimony. But even if it might be available, it is not an adequate remedy because it is more complicated than a declaratory judgment action as reflected in the procedural and substantive requirements set forth in Rule 57.02(a) and because the "adverse party" has a right to be notified and served and to be present for purposes of cross-examination. The records requested herein are generally not discoverable by the adverse party – namely, James A. Kephart and his State Farm representatives such as Tom Prowl. See, State ex rel. Cain v. Barker, 540 S.W.2d 50(Mo.banc 1976); State Farm Mutual Automobile Insurance Company v.

Keet, 644 S.W.2d 654, 655 & 656(Mo.App. S.D. 1982); State ex rel. Day v. Patterson, 773 S.W.2d 224(Mo.App.E.D. 1989). However, Kephart or Prowl could possibly obtain these records or other privileged information if an action is pursued under Rule 57.02(a). In a declaratory judgment action, neither Kephart nor his representatives have any legal right to notice or intervention. And if Respondents produce the information requested herein – whether voluntarily or under court order – Appellants will request that these records will be produced in such a manner as to avoid public disclosure. The courts have the power under Sections 527.010 (Rule 87.08) and 527.080 (Rule 87.10) to require production in such a manner as to keep these records confidential – such as by a protective order. Cf., Cain, 540 S.W.2d at 57[3].

Two, as to the filing of a lawsuit/“formal claim” and then conducting “limited discovery”, the Court should initially note that besides having the problems previously identified as to this adverse party possibly obtaining access to privileged information, filing such a lawsuit defeats one of the purposes for having access to the claims file – namely, using these records to make an informed decision about whether to accept or reject the comparative fault analysis or whether to settle or file the lawsuit. As in an attorney-client relationship, it is paramount that such a decision should be as fully informed as possible and remain confidential.

In addition, requiring an insured to file a lawsuit or wait to defend a lawsuit and then to conduct discovery is unduly burdensome, expensive, and time consuming, particularly when the claims file should be presumed accessible to the insured as would a file in an attorney-client relationship and when the information in the claims file is simply not “work product”. Unnecessary and more litigation will potentially occur. Recognizing a right of access to the claims file, as exists in an attorney-client relationship, would promote informal resolution of disputes. And, if the dispute cannot be resolved

informally, a declaratory judgment action is comprehensive and potentially penalizes the liability insurer for wrongfully withholding accessible information. See, Points Three and Four.

Appellants would also refer the Court to the case of Henke v. Iowa Home Mutual Casualty Company, 87 N.W. 2d 920(Iowa S.Ct. 1958) which is cited by the Keet Court as “respectable authority”. 644 S.W.2d at 655. Addressing the applicability of a “discovery rule” involving production of work product, the Henke Court observed as follows:

The papers and writings which the plaintiff [insured] is requesting were not related to or prepared for the present action between the insurer and the insured. These papers were prepared in a different action at an earlier time when an attorney represented both the insurer and the insured. As determined in the earlier discussion of the privilege, all of this information was open to both parties and its availability did not cease when a controversy arose between the two. The discovery rule is designed to accomplish a different purpose. It applies in an action between two adverse parties whose separate counsels have each made investigations in respect to that action which they intend to use in the adversary proceeding between the two. These papers were not in that classification because at the time the papers demanded were prepared, the parties were not adverse to each other but were working together in a common defense.

87 N.W. 2d at 927.

Likewise, the Missouri “discovery rules” are designed for use by adverse parties. See, Rules 56 to 61. And likewise, at the time the Respondents’ claims file was generated and Appellants’ demand for

access was made, Respondents and Appellants “were not adverse to each other but were working together in a common defense.”

As a result, the proper procedural mechanism for prosecuting Appellants’ cause of action against the Respondents is a declaratory judgment action. The trial court and this Court can declare the rights, status, and other legal relations between the parties, can order Respondents to permit Appellants to access the claims file, can grant “supplemental relief ” (Section 527.080), and can award costs (Section 527.100). Moreover, neither Kephart nor his representatives have any right to be notified of the action or to intervene.

### **POINT THREE**

**Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendant’s motion to dismiss as failing to state a cause of action in Count Two of the petition for attorney fees because attorney fees can be awarded in a declaratory judgment action when there is a showing of “very unusual circumstances” in that the law regarding the relationship between an insured and a liability insurer and regarding “work product” is well-delineated and well-settled and in that Defendants’ refusal, and continuing refusal, to release the requested information was in bad faith, was without just cause or excuse, was intentional, was**

**frivolous, and/or was outrageous because of Defendants' evil motive or reckless indifference to Plaintiffs' rights.**

**Standard of Review**

As to the general standard of review, because this case involves a judge-trying case, this Court will sustain the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32(Mo.banc 1976). Because this case also involves the trial court's dismissal of the petition for a failure to state a cause of action, the following rules should apply:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512(Mo.banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306[2](Mo.banc 1993).

A petition is sufficient to withstand a motion to dismiss for failure to state a claim if it invokes substantive principles of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial. [citations omitted]. It is not to be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. [citation omitted].

*Ritterbusch v. Holt*, 789 S.W.2d 491, 493[1, 2](Mo.banc 1990).

In addition, because the facts are not disputed, and the issues involve the interpretation and application of the law to the facts, “the trial court’s interpretation receives no deference in our review. \* \* \* This court will reach its own conclusions about whether the trial court correctly interpreted and applied the law”. *John L. Thuston & Assoc. v. FDIC*, 869 S.W.2d 105, 107(Mo.App. W.D. 1993).

### Issue

Assuming the Court agrees with Appellants in Points One and Two that they have stated a substantive and procedural cause of action, there is still an issue as to whether attorney fees can be awarded in a declaratory judgment action under MO.REV.STAT. Sections 527.010 to 527.140; see also, Missouri Rules of Court 87.01-87.11, and whether in Count Two of the Petition, Appellants stated a cause of action therefor. The trial court did not specifically address this issue in the judgment (L.F. 66), but Respondents did assert that Count Two “does not specifically state a cause of action, but is simply a request for ‘attorney’s fees,’ relating to the claim of Count I.” (L.F. 25). Appellants addressed this issue in their suggestions in opposition. (L.F. 42 & 43). Respondents did not present any argument in their reply. “Accordingly, it is assumed on appeal that the trial court dismissed plaintiffs’ petition for declaratory judgment on the grounds or for the reasons set forth in defendants’ motion to dismiss.” *Missouri Dept. of Social Services v. AGI-Bloomfield Convalescent Center, Inc.*, 682 S.W.2d 166, 167 & 168(Mo.App. W.D. 1984).

### The Law

Attorney fees can be awarded in a declaratory judgment action when the trial court concludes that “very unusual circumstances” have been shown. See, e.g., *Law v. City of Maryville*, 933 S.W.2d 873, 878(Mo.App. W.D. 1996), also referring to MO.REV.STAT. Section 527.100. Such circumstances can exist when there is an improper, intentional interference with the legal rights of another. See, *Law*, supra, wherein the City essentially committed an act of outrageous tortious interference. In addition, as reflected in the case of *Landie v. Century Indemnity Company*, 390 S.W.2d 558(Mo.App. K.C. 1965), when an insurer breaches its “implied duty of good faith and fair dealing” and acts in bad faith, “damages for such breach would include whatever was necessary to place this insured in as good a position as if the company had not breached its contract”. Id. at 565. Obviously an award of attorney fees would put the insured “in a position which is equally as good as that which he would have occupied if the company had performed its contract”. Id. As also reflected in the *Law* case, attorney fees can be awarded “to balance the benefits”. *Law*, 933 S.W.2d at 878. Pursuant to MO.REV.STAT. Section 527.080, “[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper.” See also, Rule 87.10.

### ***Application Of Law To Facts***

As reflected in Count Two of the petition, Appellants adopt and incorporate all of the allegations of the special relationship in Count One. (L.F. 11). Appellants then state as follows:

15. That the law regarding the relationship between an insured and a liability insurer and regarding “work product” is well-delineated and well-settled.

16. That Defendants’ refusal, and continuing refusal, to release the information requested as set forth hereinbefore was in bad faith, was without just cause or excuse, was intentional, was frivolous, and/or was outrageous because of Defendants’ evil

motive or reckless indifference to Plaintiffs' rights. That as a result of Defendants' refusal to provide the aforesaid information to Plaintiffs or their attorney, Plaintiffs engaged their attorney to pursue this cause of action against Defendants. That under such circumstances, this Court is authorized under Sections 527.100, 527.080, or 514.205 or elsewhere as provided by law or equity to award Plaintiffs' attorney fees. That as a result of all of the aforesaid circumstances, Plaintiffs are entitled to an award of attorney fees.

(L.F. 11).

These allegations invoke substantive principles of law entitling Appellants to relief and allege ultimate facts informing Respondents of that which Appellants will attempt to establish at trial. See, Ritterbusch, supra.

As reflected in Point One, contrary to Respondents' assertions that they could not find "any authority which would support" Appellants' cause of action under Count One for a right of access to the claims file (L.F. 26), the law regarding the relationship between an insured and a liability insurer and regarding "work product" is well-delineated and well-settled. With the exception of the opinion of the Court of Appeals, law to the contrary does not exist. And, in light of these well-settled principles, in light of the fact that the Respondents as insurance carrier and employee are presumed to be aware of such case law which directly deals with insurance law, in light of the fact that Appellants generally advised Respondents of their duties before filing suit, and in light of the fact that Respondents obviously ignored or disregarded these unambiguous and well-settled principles of insurance law, Appellants have stated a cause of action. On remand, discovery will potentially reveal the nature and extent of Respondents' misconduct and of the unusual circumstances. (L.F. 42 & 43).

**POINT FOUR**

**Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendant's motion to dismiss as failing to state a cause of action in Count**

**Three of the petition for nominal and punitive damages because damages can be awarded in a declaratory judgment action and because nominal and punitive damages are available in an action involving a breach of a fiduciary duty in that when Respondents refused to provide Appellants access to the claims file, Respondents, as liability insurer, breached various fiduciary duties to Appellants, as insureds.**

**Standard of Review**

As to the general standard of review, because this case involves a judge-tryed case, this Court will sustain the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32(Mo.banc 1976). Because this case also involves the trial court's dismissal of the petition for a failure to state a cause of action, the following rules should apply:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512(Mo.banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306[2](Mo.banc 1993).

A petition is sufficient to withstand a motion to dismiss for failure to state a claim if it invokes substantive principles of law entitling plaintiff to relief and alleges ultimate

facts informing defendant of that which plaintiff will attempt to establish at trial. [citations omitted]. It is not to be dismissed for mere lack of definiteness of certainty or because of informality in the statement of an essential fact. [citation omitted].

*Ritterbusch v. Holt*, 789 S.W.2d 491, 493[1, 2](Mo.banc 1990).

In addition, because the facts are not disputed, and the issues involve the interpretation and application of the law to the fact, “the trial court’s interpretation receives no deference in our review. \* \* \* This court will reach its own conclusions about whether the trial court correctly interpreted and applied the law”. *John L. Thuston & Assoc. v. FDIC*, 869 S.W.2d 105, 107(Mo.App. W.D. 1993).

### Issue

Assuming the Court agrees with Appellants in Point One and Two that they have stated a substantive and procedural cause of action, there is still an issue as to whether punitive damages can be awarded in a declaratory judgment action under MO.REV.STAT. Sections 527.010 to 527.140; see also, Missouri Rules of Court 87.01-87.11, and whether Appellants stated a cause of action therefor. The trial court did not specifically address this issue in the judgment (L.F. 66), but Respondents did assert that Appellants failed to state a cause of action because Count Three “seeks damages based upon the claims in Count I” (L.F. 25), because as “a matter of law, plaintiffs are not allowed to make a claim for ‘punitive damages’ based upon a breach of a contract provision” (L.F. 29), and because “the longstanding law in Missouri is that before one is entitled to punitive damages, they must have actual damages”. (L.F. 29). Appellants addressed this issue in detail in their suggestions in opposition. (L.F. 41 & 42). Respondents did not present any argument in their reply. “Accordingly, it is assumed on appeal that the trial court dismissed plaintiffs’ petition for declaratory judgment on the grounds or for the

reasons set forth in defendants' motion to dismiss". Missouri Dept. of Social Services v. AGI-Bloomfield Convalescent Center, Inc., 682 S.W.2d 166, 167, 168(Mo.App. W.D. 1984).

### The Law

Whether based on statute, court rule, or case law, damages are available in a declaratory judgment action. See, MO.REV.STAT. Sections 527.010 and 527.080; Missouri Rules of Court 87.08 and 87.10; Farley v. Missouri Dept. of Natural Resources, 592 S.W.2d 539, 541(Mo.App. W.D. 1979); Satterfield v. Layton, 669 S.W.2d 287, 289[4](Mo.App. E.D. 1984). Punitive damages are available in an action involving a breach of a fiduciary duty. See, e.g., Gibson v. Adams, 946 S.W.2d 796, 804[16](Mo.App. E.D. 1997); McKeehan v. Wittels, 508 S.W.2d 277(Mo.App. 1974). Appellants would refer the Court to such cases as Clark v. Beverly Enterprises - Missouri, 872 S.W.2d 522, 527[8-11](Mo.App. W.D. 1994) and Simpkins v. Ryder Freight System, Inc., 855 S.W.2d 416, 422 & 423(Mo.App. W.D. 1993) for an excellent analysis of the nature and purpose of nominal damages and for the proposition that an award of nominal damages "suffices to sustain an award of punitive damages." Simpkins, 855 S.W.2d at 423[12] and fn. 5. This law is well-settled.

In addition, as reflected in the case of Klemme v. Best, 941 S.W.2d 493(Mo.banc 1997), a "breach of a fiduciary obligation is constructive fraud . . . [which] is a long-recognized cause of action." Id. at 495. The Klemme case involved a breach of a fiduciary duty in the context of an attorney-client relationship and reflects the elements of such a claim: "(1) an attorney-client relationship; (2) breach of a fiduciary obligation by the attorney; (3) proximate causation; (4) damages to the client; (5) no other recognized tort encompasses the facts alleged". Id. at 496. The Klemme Court also recognized that "an attorney has the basic fiduciary obligations of undivided loyalty and confidentiality", id. at 495,

that “an attorney may breach a fiduciary duty at any time during their relationship”, *id.* at 496, and that “[p]roof of an attorney’s intent is not required to establish breach of fiduciary duty or constructive fraud.” *Id.* This type of action is an independent tort and is not based on any negligence or breach of contract by the attorney. *Id.* at 495 & 496.

As reflected in Point One, *supra*, there is a special relationship between the liability insurer and insured which is akin to the attorney-client relationship and which thereby imposes fiduciary obligations upon the liability insurer. These fiduciary obligations would undoubtedly include undivided loyalty, confidentiality, utmost good faith, and access to the client/claims file “to the extent reasonably necessary” so to be “fully informed of his rights and interest in the subject-matter of the transaction; and of the nature and effect of the transaction itself, and to be so placed as to be able to deal with the attorney [liability insurer] at arm’s length”. *See, In re Conrad*, 105 S.W.2d 1, 10(Mo. 1937); Rule 4-1.4. And, because the liability insurer-insured relationship is akin to the attorney-client relationship, the elements of a breach of fiduciary duty/constructive fraud as set forth in *Klemme* would apply herein.

With regard to the first element, Appellants have alleged in detail the liability insurer-insured relationship. *See*, Petition, Count One, Paragraphs 2, 3, 4, 7, 9, 12, 13. (L.F. 7-10). With regard to the second element, Appellants have alleged a breach of fiduciary duty involving the wrongful denial of access to the claims file because the work product doctrine does not apply and also because Appellants need to access the claims file to “protect their interest, including but not limited to enabling Plaintiffs to support their position that Plaintiff Linda Grewell was not liable or, if there is liability, that the liability is less than fifty percent (50%)”. (L.F. 9 & 10). As to elements three and four, Appellants have alleged that “as a result of Defendants’ improper and outrageous conduct, Plaintiffs are entitled to nominal damages and punitive damages in such sum as will serve to punish Defendants and others from like

conduct”. See, Petition, Count Three, Paragraph 17. (L.F. 12). The nominal damages arise from the breach of fiduciary duty, see, e.g., Clark, 872 S.W. 2d at 527; Simpkins, 855 S.W.2d at 422, and the punitive damages arise from the outrageous conduct involving “Defendants’ evil motive or reckless indifference to Plaintiffs’ rights.” (L.F. 11 & 12). See, e.g., MAI 10.01. Finally, as in Klemme, no other tort encompasses the claim. 941 S.W.2d at 946[9]. This action is also not based on any breach of contract by Respondents.

In light of these well-delineated principles of law and the alleged substantial breach of fiduciary duty, there is a cause of action for nominal damages. Discovery will reveal the true nature and extent of Defendants’ misconduct for purposes of being entitled to punitive damages.

### **CONCLUSION**

For the reasons stated hereinbefore, Appellants respectfully request the Court to reverse the judgment of the trial court, finding that Appellants have stated both a substantive and procedural cause of action, to remand the cause to the trial court, directing the trial court to allow Appellants to proceed with their claim, and for such other relief as this Court deems just.

*Respectfully submitted,*

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**CERTIFICATE OF MAILING**

I hereby certify that one copy of the Appellants Substitute Brief and one copy of the disk thereof were mailed this \_\_\_\_ day of December, 2002, to:

Mr. Michael E. McCausland  
9233 Ward Parkway, Suite 270  
Kansas City, Missouri 64114

I further certify that the brief complies with Rule 84.06(b) by not exceeding 31,000 words and that it contains 14,151 words, that the disk has been scanned for viruses, and that the disk is virus-free to the best of my knowledge.

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*BRUCE B. BROWN*