SC100440

IN THE MISSOURI SUPREME COURT

State of Missouri ex rel. Brittany Trexler
Relator,

v.

The Honorable Scott A. Lipke, Circuit Court of Cape Girardeau County, Missouri
Respondent.

SUBSTITUTE BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

This Petition for Writ of Mandamus, or alternatively Prohibition, involves the question of whether Respondent, the Honorable Scott A. Lipke, Circuit Court of Cape Girardeau, Missouri, exceeded his authority when he refused to grant Relator Brittany Trexler access to an insurance claims file in a case where Trexler alleges her insurer, Consumers Insurance USA, Inc., acted in bad faith. The Missouri Court of Appeals Eastern District issued an opinion making its preliminary writ of mandamus permanent on November 21, 2023. A1-13. This Court ordered the cause transferred on March 5, 2024. Jurisdiction is proper pursuant to MO. CONST. ART V, § 4, which states "[t]he supreme court and districts of the court of appeals may issue and determine original remedial writs."[1]

[1] Alternatively, the Court has jurisdiction over a Writ of Prohibition pursuant to § 530.020 R.S.Mo., which states the Supreme Court "shall have power to hear and determine proceedings in prohibition."

STATEMENT OF FACTS

This is a proceeding in mandamus related to discovery in a bad faith case in which the insurance carrier admits it must provide coverage under the Missouri Motor Vehicle Financial Responsibility Law and in which the insurance carrier's contract (1) demanded that it control all aspects of the dispute and (2) provide primary coverage.

In the underlying equitable garnishment case, Relator Brittany Trexler (defendant/cross claim plaintiff below) filed a cross claim against liability insurer Consumer Insurance USA, Inc. (defendant/cross claim defendant below) (hereinafter "Consumers") for bad faith refusal to settle, bad faith refusal to defend, bad faith refusal to pay known insurance coverage, negligence, and breach of contract. *Ex*. 2. The underlying facts are:

On March 4, 2017, Brittany Trexler was permissively test driving a Ford Explorer owned by Hitt Automotive, a used car dealer. *Ex*. 2, p. 026-27; *Ex*. 12, p. 214. While on the test drive, Trexler crashed into a truck driven by Sean Monighan (plaintiff below). *Ex*. 12, p. 214. Monighan suffered personal injuries. *Id*.

Hitt insured the Ford Explorer through a garage liability policy it purchased from Consumers.[2] *Ex*. 3. Consumers now admits to owing Trexler $25,000 in liability coverage under that policy. *Ex*. 11, p. 207, ¶ 22. As to that coverage, the policy reserved to Consumers the exclusive right to settle:

> We may investigate and settle any claim or "suit" as we consider appropriate.

[2] The Consumers policy indicated its coverage applied to "any auto." *Ex*. 3, p. 055, 58.

…

Additionally, you and any other involved "insured" must:

(1) assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.

…

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit."

Ex. 3, p. 060, 070.

Trexler also had a personal policy from Progressive Insurance that covered a 1993 Oldsmobile sedan, which was not involved in the accident. *Ex*. 4, p. 127. The Progressive policy had a coverage limit of $25,000 per person. *Id.*

Consistent with Missouri's general rule requiring the vehicle owner's policy to have the first and primary coverage,[3] the Consumers policy had an "other insurance" clause which stated: "For any covered 'auto' you [Hitt] own, this coverage form provides **primary** insurance." *Ex*. 3, p. 071. (emphasis added). Also, the Progressive policy had an "other insurance" clause which stated: "[I]f any insurance we provide in accordance with the terms of this Part I is applicable and any other insurance from another insurer, any self-insurance or any bond also applies, any insurance we provide will be **excess** over any other collectible liability insurance from another insurer, any self-insurance, or any bond." *Ex*. 4, p. 140 (emphasis added). So, if there is a conflict between the two insurance policies,

[3] *Distler v. Reuther Jeep Eagle*, 14 S.W.3d 179, 185 (Mo. App. E.D. 2000).

the Consumers policy says it provides the first coverage, and the Progressive policy cedes primacy to Consumers. *Ex*. 3, p. 071; *Ex*. 4, p. 140.

By at least March 16, 2017, Consumers knew that Trexler (and not someone from Hitt) was driving the Ford Explorer with Hitt's permission. *Ex*. 21, p. 279. On August 22, 2019, Monighan's attorney, Dan Grimm, notified Consumers that the injured Monighan was asserting a claim against Trexler under the Consumers policy. *Ex*. 2, p. 030.[4]

On July 2, 2020, Monighan forwarded a written settlement demand to Consumers. *Ex*. 5. The demand informed Consumers that Monighan had been stopped and was waiting to turn left when Trexler struck him from behind. *Ex*. 5, p. 174-75. It advised Consumers that investigating officers cited Trexler for being distracted and inattentive and included photos of the vehicles demonstrating the force of the impact. *Id*. at p. 175-76. The demand detailed Monighan's injuries and treatment, which confirmed his past medical expenses were approximately $43,000. *Id*. at p. 177-88. It revealed that Monighan required additional surgical treatment and estimated future medical expenses of $235,000.00. *Id*. at p. 188-89. It demanded the sum of $979,371.82 or the Consumers policy limits, whichever is less. *Id*. at p. 190. The demand made clear to Consumers that Monighan's damages would exceed the coverage available to Trexler. Respondent's *Ex*. D, p. 3-4.

The July 2, 2020 demand offered to release Hitt Automotive of liability (*Ex*. 5, p. 190); however, Consumers responded to the demand on August 21, 2020 by seeking information about Trexler:

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[4] Monighan had previously notified Consumers of his claim against Trexler on April 27, 2017 through another attorney, who he later discharged.

> We have received your demand for Sean Monighan. In order for us to properly evaluate this claim we will need some additional information. The driver, Brittany Trexler, was insured by Progressive Insurance. Please advise us as to the status of whether they have made any offers to settle this claim. We have made numerous attempts to contact Progressive but have not had any response. Once we have this information, we will be in a better position to evaluate.

Ex. 10. Consumers' response showed it was evaluating the claim and demand **as to Trexler**. The claim notes from this time as produced by Consumers were redacted. *Ex*. 21.

Monighan responded on September 2, 2020 that there had been no offer and acceptance as to Trexler's Progressive Insurance policy. Respondent's *Ex*. C-1. On October 20, 2020, Consumers formally responded to Monighan's demand by denying coverage for Trexler. *Ex*. 6. Consumers did not, however, inform Trexler of its decision at that time; indeed, Consumers never communicated with Trexler before denying coverage.

On October 27, 2020, Monighan forwarded a second settlement demand to Consumers, which included a demand specific to Trexler. *Ex*. 7. The letter advised that Monighan "will continue to decline its [Progressive's] tender until all the limits available to her [Trexler] (including Consumers') are exhausted." *Ex*. 7.[5] The claim notes surrounding the time of the second demand specific to Trexler are also redacted. *Ex*. 21.

[5] Before the Court of Appeals, Consumers' initial Suggestions in Opposition (filed June 12, 2023) to Relator's Writ Petition incorrectly stated: "Following the accident involving Sean Monighan (the plaintiff in the underlying case), Monighan never sent Consumers a demand letter directed to Relator, but rather sent demands directed to Consumers' insured Hitt Automotive….No demands were directed to Trexler." Relator filed a letter with the Court of Appeals on June 13, 2023 correcting this inaccurate representation.

Consumers refused the second opportunity to tender its coverage limit for Trexler in settlement. *Exs*. 8, 9. Finally, on November 10, 2020, Consumers sent Trexler a single paragraph letter denying coverage. *Ex*. 8. This was the only time Consumers contacted Trexler, and the letter did not disclose the policy language upon which Consumers relied. *Id*. On November 16, 2020, Consumers wrote Monighan's counsel that "there is NO coverage for Ms. Trexler under Hitt Automotive's Auto Dealer policy." *Ex*. 9.

Consumers based its denial on an exclusionary provision in its policy, which stated:

> a. The following are "insureds" for covered "autos";
>
> …
>
> (2) Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> (d) Your customers. However, if a customer of yours:
>
> (i) Has no other available insurance (whether primary, excess, or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.
>
> (ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of the other insurance.

Ex. 9; *Ex*. 3, p. 060-61.

Consumers, however, has since admitted that its coverage denial was wrongful:

> But, the **definition exclusion in The Policy is invalid** up to the Missouri Vehicle Financial Responsibility Law, and **The Policy provides mandatory Missouri Vehicle Financial Responsibility limits of $25,000 per person**. *See*, *Rutledge v. Bough*, 399 S.W.3d 884 (Mo. App. S.D. 2013).

Ex. 11, p. 207 (emphasis added).

Because Consumers refused to settle and denied coverage, which prevented Trexler from obtaining a release, Trexler and Monighan entered into a R.S.Mo. § 537.065 (2017) agreement. Respondent's *Ex*. A. Monighan and Trexler thereafter agreed to arbitrate Monighan's claims, and on July 9, 2021, arbitrator Thomas Stewart entered an award in favor of Monighan, and against Trexler, in the amount of $4,250,000. *Ex*. 12, p. 214-18. By this time, Monighan had undergone surgery on his cervical spine. *Id*. at 217. In a separate proceeding in which Consumers tried unsuccessfully to intervene, Respondent confirmed the arbitration award and entered judgment against Trexler on January 10, 2022 for $4,250,000. *Id.* at p. 210-13.

When the underlying judgment became final, Monighan filed this equitable garnishment action. *Ex*. 13. Despite now contending in its Answer to Relator's Writ Petition that the arbitration and judgment are not valid, on February 28, 2022, Consumers paid the $25,000 in coverage it owed Trexler into the Court's registry, stating "[t]hese funds being deposited by Consumers Insurance are in satisfaction of Consumers Insurance' obligation under this judgment." Respondent's *Ex*. B.

Trexler asserted cross claims against Consumers for Breach of Contract, Insurance Bad Faith (refusal to settle, refusal to defend and refusal to pay known insurance coverage), and negligence. *Ex*. 2. Consumers has never moved to dismiss any of Relator's claims.

In furtherance of her bad faith claims, Trexler sought the following discovery pursuant to Missouri Rule of Civil Procedure 58.01:

> **RFP # 1**: The complete claim file(s), including all documents, notes and communications that are part of any claims file(s), related to Brittany Trexler or the March 4, 2017 car accident in which Sean Monighan was injured, generated up through October 10, 2020 (the date of your coverage denial).[6]
>
> **RFP # 6**: All internal communications (written, recorded and electronic) at Consumers Insurance USA, Inc. referencing or related to Brittany Trexler or the March 4, 2017, car accident generated up through October 10, 2020 (the date you denied coverage).[7]

A4-5.

> Consumers objected to the discovery as follows:
>
> **Response to RFP # 1**: Defendant does not have a claim file for Brittany Trexler. Defendant objects to producing its claim file for its insured Hitt Automotive because such is protected by the insurer insured privilege and the attorney client privilege.
>
> **Response to RFP # 6:** Defendant objects to producing its claim file for its insured Hitt Automotive because such is protected by the insurer insured privilege and the attorney client privilege.

A14-15. Consumers did not object based on work product, relevance, or proportionality. *Id*.

Trexler filed a Motion to enforce her discovery requests. *Ex*. 15. The parties filed briefs and argued the Motion to Respondent on October 20, 2022. *Exs*. 15, 16. On October 27, 2022, Respondent's administrative assistant emailed the parties that Respondent was granting the motion to compel production of the insurance claims file "but only those

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[6] It was later discovered the actual date of the coverage denial was November 10, 2020. This was disclosed to Respondent and Respondent's November 14, 2022 order listed the correct date.

[7] The purpose of Request # 6 was to capture any communications not documented in the adjusters' claim notes – a common occurrence.

portions relating to Trexler." *Ex*. 17. The email did not clarify what "only those portions related to Trexler" meant. *Id*. The email asked that "someone send me an order." *Id*.

Both Relator and Consumers submitted proposed orders. *Exs*. 18, 19. Trexler's proposed order stated Consumers shall "produce the Insurance claims file related to Trexler and the March 4, 2017 accident, and any internal communications related to Trexler and the March 4, 2017 accident kept separate from the claims file, up through November 10, 2020, except that any communications between Consumers and Hitt Automotive LLC that Consumers deems protected by privilege may be redacted and identified on a privilege log…." *Ex*. 18.

Consumers, however, submitted an order that would only require it to "produce those portions of the Insurance Claims File that relate to any coverage decision made by Consumers USA regarding Ms. Trexler and the March 4, 2017 accident, including any internal communications related to such which are kept separate from the claims file, up through November 10, 2020. *Ex*. 19. Of note, Consumers proposed order would not require it to turn over claim notes related to the settlement offers Monighan made – even though Trexler had stated claims for bad faith failure to settle – as well as general claim notes detailing how it evaluated and handled the claim. *Ex*. 19.

On November 14, 2022, Respondent entered Consumers' Proposed Order without modification. A16.

Consumers subsequently produced eleven pages of heavily redacted claim notes. *Ex*. 21. Except for a single entry dated March 16, 2017, all claim notes from the first thirty-four months of the claim were redacted. *Id*. at p. 277-79. Consumers recently informed

Relator's counsel that due to a change in email systems, it is not able to locate any emails from the first 3 years of the claim—the same period when nearly all of Consumers' claim notes are redacted.

Likewise, claim notes from the timeframe when Monighan made settlement demands (July 2, 2020 and October 27, 2020) were redacted. *Id*. at p. 271-75. It also appeared Consumers redacted claim notes detailing basic claims activity, which did not involve any direct report or communication from Hitt to Consumers about the accident. *Id*. at p. 269-79.

Consumers subsequently produced two emails from September and October of 2020 confirming Consumers knew Monighan's damages would exceed Trexler's available insurance coverage and the potential for an excess judgment was real. Respondent's *Exs*. D, E.

Relator filed a motion for *in camera* inspection of the claim notes. The Motion also asked Respondent to clarify his November 14, 2022 Order to authorize discovery of what Missouri law required, including all claims file materials and claim notes evidencing Consumers handling of the claim, other than direct communications between Consumers and Hitt. *Ex*. 22. Consumers responded that it would consent to an *in camera* inspection, but argued it was Respondent's intent to issue a much narrower order that would permit Consumers to withhold any claim note unless it was "BOTH…related to coverage decisions made by Consumers USA regarding Ms. Trexler and the March 4, 2017 accident." *Ex*. 23. Relator filed her reply to Consumers response on March 8, 2023. *Ex*. 24.

Respondent, however, refused to conduct an *in camera* review, and on May 2, 2023, denied Relator's Motion in its entirety. A17. Ultimately, Respondent's Orders require Relator to litigate a bad faith case—where Consumers' state of mind and conduct vis a vis settlement and handling the claim are directly at issue—without access to significant portions of the claim notes and claims file, including how it evaluated the two settlement opportunities.[8]

Relator filed a Petition for Writ of Mandamus, or alternatively Prohibition, on May 31, 2023 in the Missouri Court of Appeals Eastern District. The Petition asked the Court to issue a Permanent Order in Mandamus directing Respondent to:

(1) vacate his November 14, 2022 Order;

(2) to order Consumers to produce the complete claims file, including all claim notes and all internal communications related to the underlying accident, except for direct communications between it and Hitt Automotive; and

(3) to order Consumers to list any such communications between it and Hitt on a privilege log, so Relator may evaluate whether the privilege applies.

On June 28, 2023, the Court of Appeals issued its Preliminary Order in Mandamus directing Respondent to Answer the Petition. A18. After briefing, the Court of Appeals issued an opinion making its preliminary writ permanent on November 21, 2023. A1-13.

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[8] Trexler has also become aware through other sources that Consumers had coverage discussions pertaining to Trexler in 2019. *Ex*. 22, p. 282. Yet, all claim notes from March 2017 to January of 2020 except one have been redacted, and Consumers now says emails from that time period are unavailable. *Ex*. 21, p. 277-79.

This Court sustained Consumers' transfer application on March 5, 2014. In this writ proceeding, Consumers takes the untenable position that Relator is not its insured, that it owed no duties to Relator under its policy, that its only obligation was to pay $25,000 *after* a judgment against Relator became final (apparently on behalf of someone it does not insure!), and that it may withhold the only insurance claims file from someone it now admits it was required to insure for this accident.

POINT RELIED ON

THE COURT SHOULD ISSUE A PERMANENT ORDER IN MANDAMUS DIRECTING RESPONDENT TO VACATE HIS NOVEMBER 14, 2022 ORDER AND GRANT RELATOR ACCESS TO THE COMPLETE INSURANCE CLAIMS FILE OTHER THAN DIRECT COMMUNICATIONS OR REPORTS BY HITT TO CONSUMERS CONCERNING AN EVENT WHICH MAY BE MADE THE BASIS OF A CLAIM, AND WHICH WAS INTENDED TO ASSIST ANY ATTORNEY THE INSURER MAY RETAIN TO DEFEND THE INSURED, BECAUSE A TRIAL COURT HAS NO DISCRETION TO DENY DISCOVERY OF MATTERS RELEVANT TO THE SUIT WHICH ARE NEITHER PRIVILEGED NOR WORK PRODUCT, OR TO DENY AN INSURED ACCESS TO HER CLAIMS FILE, IN THAT THE INSURANCE CLAIMS FILE, WHICH IS THE ONLY CONTEMPORANEOUS EVIDENCE REVEALING THE INSURER'S MINDSET AND CONDUCT IN HANDLING THE CLAIM, IS RELEVANT TO RELATOR'S BAD FAITH CLAIMS AND NEITHER PRIVILEGED NOR WORK PRODUCT.

State ex rel. BNSF Ry. Co. v. Neill, 356 S.W.3d 169 (Mo. banc 2011);

Dutton v. American Family Mut. Ins. Co., 454 S.W.3d 319 (Mo. banc 2015);

Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818 (Mo. banc 2014);

Grewell v. State Farm Mut. Auto Ins. Co., Inc., 102 S.W.3d 33 (Mo. banc 2003);

§ 303.190 R.S.Mo. (2019);

20 C.S.R. § 500-2.100.

SUMMARY OF ARGUMENT

This mandamus proceeding arises out of Respondent's refusal to allow Relator, a plaintiff in an underlying breach of contract and bad faith insurance case, to discover materials contained within an insurance claims file. This claims file was created by an insurer that was required to insure Relator, and the file is relevant to Relator's pending breach of contract and bad faith claims and neither privileged nor work product. "Mandamus is proper…when a court abuses its discretion in denying 'discovery because a trial court has no discretion to deny discovery of matters [that] are relevant to [a] lawsuit and are reasonably calculated to lead to the discovery of admissible evidence when the matters are neither work product nor privileged.'" *State ex rel. BNSF Ry. Co. v. Neill*, 356 S.W.3d 169, 172 (Mo. banc 2011) (citation omitted).

Although Consumers never objected to the relevancy of Relator's discovery, the claims file materials are nevertheless relevant because Relator has asserted claims for breach of insurance contract, bad faith failure to settle, bad faith refusal to defend, bad faith refusal to unconditionally pay known insurance coverage, and negligence against Consumers. *Ex*. 2. Bad faith is a state of mind,[9] and the insurance claims file is the only contemporaneously created evidence demonstrating the insurer's mindset while handling the claim. In any insurance case alleging bad faith, the insurance claims file is the key and essential evidence. The need for such discovery is compelling and overwhelming. By

[9] *Zumwalt v. Utilities Ins. Co*., 228 S.W.2d 750, 754 (Mo. 1950)

refusing to meet its obligations under Missouri law to an insured, the carrier puts its mental state at issue.

Additionally, the claims file materials are neither privileged nor work product. A liability insurer may not shield the evidence of its claims handling activity from a person it was required to insure.[10] In any event, the insurer-insured privilege only applies to a limited subset of communications—specifically, **reports or statements made to the insurer** concerning an event which may be made the basis of a claim, and the communication is intended to assist the attorney retained to defend the insured. *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 54 (Mo. banc 1976). Thus, the only parts of the claims file that conceivably could be subject to this privilege would be direct reports or statements made by Hitt to Consumers for the specific purpose stated in *Cain*, and Relator agreed that any such communications may be identified on a privilege log. Yet, Consumers completely failed to meet its burden to show through competent evidence that there were any privileged documents in the claims file. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004). Likewise, the claims file Consumers created in the ordinary course of its business while adjusting the underlying claim as to Monighan cannot, as a matter of law, have been done in anticipation of this subsequent bad faith case, and Consumers never objected based on work product below. *Ex*. 14. Accordingly, the claims file is not protected by any privilege and is, therefore, discoverable.

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[10] *Grewell v. State Farm Mut. Auto Ins. Co., Inc.,* 102 S.W.3d 33 (Mo. banc 2003).

Consumers opposes the discovery by contending Relator is not its insured, that it owed her no duties—not even as to the coverage it admits it owed—and therefore she is not entitled to the claims file. This is an attack on the merits of Relator's claims, even though Consumers never filed a motion to dismiss or motion for summary judgment as to Trexler's claims. Regardless, Consumers' arguments conflict directly with its policy language, controlling statutes, and settled case law.

First, Relator was an insured under the Consumers policy to whom Consumers owed $25,000 in liability insurance coverage for two reasons:

(1) Irrespective of any exclusionary language in the policy, Missouri law required Consumers to insure Relator as an "insured" up to a coverage limit of $25,000 per person/$50,000 per accident. § 303.190.2(2) R.S.Mo. (2019); 20 C.S.R. § 500-2.100; *Rutledge v. Bough*, 399 S.W.3d 884, 887-88 (Mo. App. S.D. 2013); *Rader v. Johnson*, 910 S.W.2d 280, 283-84 (Mo. App. W.D. 1995).

(2) Relator also met the definition of "insured" in the Consumers policy because that definition was, at a minimum, ambiguous when considered alongside the "other insurance" provisions in the Consumers policy and Relator's Progressive policy.

Second, Consumers contracted for the right to have exclusive control over settlement decisions involving the $25,000 in coverage it owed Trexler. *Ex*. 3, p. 060, 070. Consumers refusal to offer coverage in response to Monighan's settlement demands confirms it exerted exclusive control over whether that coverage would be offered in settlement. This created a duty of good faith as to settlement involving Trexler's

coverage.[11] *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 829-30 (Mo. banc 2014); § 309.190.6(3) R.S.Mo. As shown below, this conclusion promotes the policy underlying the Financial Responsibility Law.

This conclusion also does not conflict with *State Farm Mutual Auto Ins. Co. v. Ballmer*, 899 S.W.2d 523 (Mo. banc 1995).[12] *Ballmer* held that the Financial Responsibility Law permits, but does not require, additional coverage for a defense of claims. *Id*. at 526. Unlike additional coverage for a defense, an insurer's duty to use good faith in settlement is not "additional coverage" a liability policy may afford. It is a **duty that arises as to existing coverage** (which coverage in this case is undisputed) **when the insurer reserves the right to control settlement**, as Consumers did here. *Scottsdale*, 448 S.W.3d at 829-30. Additionally, *Ballmer* involved a household exclusion clause that was invalid up to the statutory minimum coverage. Here, Consumers—in direct contravention of the Financial Responsibility Law—attempted to strip a permissive user of her insured status. That exclusion directly violates Missouri public policy as expressed in the Financial Responsibility Law as this Court has made clear: the Law supplements the policy, and the Law's provisions providing coverage are read into the policy up to the statutory coverage

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[11] Because Relator also met the policy definition of insured, Consumers owed her additional coverage for a defense pursuant to the terms of the policy.

[12] Consumers also argues that Relator's position conflicts with *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 92 (Mo. banc 2000). This is a curious argument as *Hargrave* simply held that when a negligent driver is covered by two policies (as here), each policy must, at a minimum, insure the driver up to $25,000 per person/$50,000 per accident. Thus, *Hargrave* reinforces Relator's argument that she was an insured under the Consumers policy and entitled to $25,000 in coverage from it.

requirements. *Dutton v. American Family Mut. Ins. Co*., 454 S.W.3d 319, 324 (Mo. banc 2015).

A litigant seeking mandamus must show a clear, unequivocal, specific right to a thing claimed, and a litigant makes that showing where, as here, the trial court denies discovery of essential, non-privileged evidence necessary to support her claim. *Neill*, 356 S.W.3d at 172. Limiting Relator to claim notes setting forth the ultimate coverage decision, without allowing her to discover claim notes indicating how Consumers arrived there and, most critically, how it interpreted and responded to settlement opportunities—unfairly and prejudicially impedes her ability to prosecute her claims. Further, Relator, as an insured under the policy, had an absolute right to access the insurance claims file. *Grewell v. State Farm Mut. Auto. Ins. Co*., 102 S.W.3d 33, 37 (Mo. banc 2003). Therefore, a permanent writ should issue.

ARGUMENT

I.

THE COURT SHOULD ISSUE A PERMANENT ORDER IN MANDAMUS DIRECTING RESPONDENT TO VACATE HIS NOVEMBER 14, 2022 ORDER AND GRANT RELATOR ACCESS TO THE COMPLETE INSURANCE CLAIMS FILE OTHER THAN DIRECT COMMUNICATIONS OR REPORTS BY HITT TO CONSUMERS CONCERNING AN EVENT WHICH MAY BE MADE THE BASIS OF A CLAIM, AND WHICH WAS INTENDED TO ASSIST ANY ATTORNEY THE INSURER MAY RETAIN TO DEFEND THE INSURED, BECAUSE A TRIAL COURT HAS NO DISCRETION TO DENY DISCOVERY OF MATTERS RELEVANT TO THE SUIT WHICH ARE NEITHER PRIVILEGED NOR WORK PRODUCT, OR TO DENY AN INSURED ACCESS TO HER CLAIMS FILE, IN THAT THE INSURANCE CLAIMS FILE, WHICH IS THE ONLY CONTEMPORANEOUS EVIDENCE REVEALING THE INSURER'S MINDSET AND CONDUCT IN HANDLING THE CLAIM, IS RELEVANT TO RELATOR'S BAD FAITH CLAIMS AND NEITHER PRIVILEGED NOR WORK PRODUCT.

A. Standard of Review and the Role of Mandamus.

"A litigant seeking relief by mandamus must allege and prove that [she] has a clear, unequivocal specific right to a thing claimed." *Neill*, 356 S.W.3d at 172 (citation omitted). "Mandamus is proper, however, when a court abuses its discretion in denying 'discovery because a trial court has no discretion to deny 'discovery of matters [that] are relevant to [a] lawsuit and are reasonably calculated to lead to the discovery of admissible evidence when the matters are neither work product nor privileged.'" *Id*. (citation omitted).

"Whether matters are privileged and therefore protected from discovery presents a question of law." *State ex rel. Kilroy was Here, LLC v. Moriarity,* 633 S.W.3d 406, 413 (Mo. App. E.D. 2021). "[I]f the trial court's discovery order is based on an erroneous conclusion of law, then the order is subject to reversal." *Id*. (citation omitted). Likewise, a trial court has no discretion to deny an insured access to her insurance claims file. *Grewell v. State Farm Mut. Auto. Ins. Co*., 102 S.W.3d 33, 37 (Mo. banc 2003).

At its heart, mandamus furthers the interests of judicial economy. *See State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009) (stating "[t]his Court has repeatedly held that 'prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.'") (quoting *State ex rel. Coca Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008)). In the discovery context, mandamus prevents the injustice of forcing a party to proceed with an unfair trial based on incomplete evidence and promotes judicial economy by ensuring a case will not have to be tried (and paid for) twice.

Respondent's refusal to grant Relator access to her insurance claims file has impeded Relator's ability to prosecute her bad faith claims. If the underlying case were tried absent Relator gaining access to the most basic, non-privileged discovery with a trial resulting in a judgment against Relator, and if Respondent's erroneous discovery order would then be reversed on direct appeal, a new trial would be ordered. Should that happen, the prior trial would be for naught, and the trial court and parties' resources would be wasted. A Permanent Order in Mandamus correcting Respondent's clear error can eliminate that waste of resources and remove the prejudice Respondent's orders have created.

B. Discovery Principles Applicable to this Writ Proceeding.

Any discovery analysis begins with Rule 56.01(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery…provided the discovery is proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties' relative access relevant information, the parties resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.

The rules of discovery are to be liberally construed. *Board of Registration for Healing Arts v. Spinden*, 798 S.W.2d 472, 478 (Mo. App. W.D. 1990). The party seeking discovery has the burden of establishing the relevance of the sought-after materials. *State ex rel. Ford Motor Co. v. Westbrooke,* 151 S.W.3d 364, 367 (Mo. banc 2004). "If relevance either has been established or is uncontested and a party claims that a privilege precludes disclosure, 'the party asserting the privilege usually has the burden of proof to show that the privilege applies." *Id*. (citation omitted). Blanket assertions of privilege are insufficient, and the party asserting privilege must come forward with competent evidence showing a privilege applies. *Id*. Under these principles, Respondent lacked authority to deny Trexler discovery of the insurance claims file, claim notes, and internal communications about the claim.

C. The Claims File Discovery is Relevant.

"Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and

bears on the principal issue of the case." *Kappel v. Prater*, 599 S.W.3d 189, 193 (Mo. banc 2020) (citation omitted). "Once logical relevance is established, 'legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness.'" *Id.* (citation omitted). Even so, the "relevance" standard as it applies to discovery is broader than the standard that governs admissibility at trial. Rule 56.01(b)(1). A matter is discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. *Id.*

Relator's First Amended Petition asserts claims for breach of contract, bad faith (refusal to unconditionally pay known insurance coverage), bad faith (refusal to settle), bad faith (refusal to defend), and negligence. *Ex*. 2. "Bad faith is, of course, a state of mind, indicated by acts and circumstances, and is provable by circumstantial as well as direct evidence." *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 754 (Mo. 1950). This is a highly case specific factual test where the strategy and mental impressions of the insurer's agents are directly at issue. Relator's claims, thus, directly implicate Consumers' mindset in refusing to settle, refusing to defend, and, ultimately, in refusing to provide coverage.

It is difficult to conceive a bad faith case where the insurer's claim notes would not be admissible at trial, let alone discoverable. The insurer's conduct and mindset while handling the claim is an essential fact for the determination of the action, and the insurer's claim notes provide significant insight into this fact, so there can be no dispute that the probative value of such evidence outweighs any other consideration. The "file certainly includes present sense impressions and contemporary statements containing information considered in denial of the claim [and in this case the refusal to defend or settle it]."

McConnell v. Farmers Ins. Co., Inc., 2008 WL 510392, at *3 (W.D. Mo. Feb. 25, 2008) (citing *O'Boyle v. Life Ins. Co. of North America*, 299 F. Supp. 704 (W.D. Mo. 1969). Because it "describes the thought processes and basis of the decision to deny the claim…[and in this case, to refuse to defend and settle] it would be unjust not to allow discovery." *Id*.

Consumers nonetheless contends Respondent's Order granted access to everything relevant because it allowed Relator to see claim notes related to Consumers' ultimate coverage determination.[13] Yet, as *McConnell* makes clear, it is **the insurer's thought process and basis for the decision to deny the claim** that is important. *Id*. That is, discovery as to "why" the insurer denied coverage in a bad faith claim is more important than the insurer's ultimate decision to deny coverage.

Additionally, the issues in this case go beyond Consumers' wrongful coverage denial. As just one example, Relator has a bad faith refusal to settle claim based on Consumers' refusal to consider two settlement opportunities (July 2, 2020 and October 27, 2020). How Consumers interpreted and otherwise considered (or did not consider) Trexler's interests in responding to these demands is directly relevant to the refusal to settle claims. Yet Respondent's Order allowed Consumers to shield this evidence from Relator's view by redacting the claim notes associated with those settlement opportunities. *Ex*. 21, p. 271-75.

[13] Of course, Relator already had this information because Consumers put it in the coverage denial letters.

What if this were a medical malpractice case where the allegation was the doctor performed an unnecessary surgery? A discovery order limiting the patient to the operative note describing **what** the doctor did during the surgery, but denying discovery of the prior progress notes, lab tests, and radiology studies shedding light on **why** the doctor decided to do the surgery in the first place, would find no support under Missouri law. Respondent's Order in this case is no different. Limiting Relator to notes involving the ultimate coverage determination, without allowing Relator to discover the facts of how Consumers made the determination, unfairly handcuffs Relator and prejudicially inhibits her ability to evaluate and prove the fact-intensive inquiry of bad faith.

Respondent's Order is even more problematic because Missouri Rule of Civil Procedure 58.01(c)(3) requires that "[i]f information is withheld because of an objection, then each reason for the objection shall be stated." Consumers never objected to the discovery based on relevance (*Ex*. 14, Nos. 1, 6) and it, therefore, waived any such objection.

D. The Claims File Discovery is Neither Privileged Nor Work Product.

From the false premise that Trexler was not an "insured,"[14] Consumers reasons the claims file belongs only to Hitt Automotive (which was not driving the covered auto at the time of the accident) and is, therefore, protected in its entirety by the attorney-client and insurer-insured privilege. Moreover, Consumers now contends for the first time (it did not

[14] As shown below, Trexler was required to be "an insured" under the express terms of § 303.190 up to the statutory minimum coverage. She further met the policy definition of "insured" because the definition is ambiguous when read alongside the "other insurance" provisions of the Consumers and Progressive policies.

do so below) that the claims file created during the underlying car accident claim is work product in this subsequent bad faith case.

As an initial matter, Consumers cannot assert privileges having their foundation in the insurer-insured relationship against a person it was required to insure. *Grewell*, 102 S.W.3d at 37. Additionally, Consumers failed to meet its burden because, aside from the sweeping, blanket assertions made in its discovery responses (*Ex*. 14, Nos. 1, 6), Consumers furnished no evidence—not even a basic privilege log—proving it possessed any documents covered by any privilege.

1. Attorney Client Privilege

The attorney-client privilege applies to "confidential communications between an attorney and his [or her] client concerning the representation of the client." *State ex rel. Kilroy was Here, LLC*, 633 S.W.3d at 413. "Privileged material is any professionally-oriented communication between attorney and client regardless of whether it is made in anticipation of litigation or for preparation for trial." *Id*. at 413-14. To be privileged, the communication must be made to secure legal advice. *Id*. Likewise, factual information cannot be made privileged by being recited by the attorney or client or contained within a lawyer or insurer's file. *Board of Registration for Healing Arts v. Spinden*, 798 S.W.2d 472, 476 (Mo. App. W.D. 1990).

As is clear, the attorney-client privilege only applies to **communications**. *State ex rel. Koster*, 383 S.W.3d 105, 119 (Mo. App. W.D. 2012) ("[T]he attorney-client privilege applies only to confidential professional communications…."). It cannot apply to documents in an insurance claims file created in the ordinary course of an insurer's

business, such as adjusters' claim notes, the company's coverage analysis, notes about interviews with third parties, or notes about the activities of other supervising adjusters working on the claim. Nor does the privilege apply to communications between the claims handling professionals about the claim because those are not communications between an attorney and client. *See State ex rel. Kilroy was Here, LLC*, 633 S.W.3d at 413.

Additionally, "[n]ot all communications between an attorney and client are privileged." *Id*. at 415. For instance, where an attorney is acting as a claims adjuster, a claims process supervisor, or a claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply. *Id*.; *see also Curtis v. Indem. Co. of Am.*, 37 S.W.2d 616, 625 (Mo. 1931) (finding letter to insurer from claims attorney providing details of the insurer's investigation to be admissible in action on the policy); *Western Nat'l Bank of Denver v. Employers Ins. of Wasau*, 109 F.R.D. 55, 56-57 (D. Colo. 1985) ("This rule also includes investigations by a person who is an attorney but acting in the capacity of an investigator and adjustor for the insurance company."). This principle also applies where an insurer has an attorney assist with a coverage determination because determining coverage is an essential function of an insurance adjuster. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. TransCanada Energy USA*, 119 A.D.3d 492, 493 (N.Y. App. Div. 2014) (finding coverage opinion performed by attorney to be a claims handling role performed in the ordinary course of the insurer's business and not otherwise privileged).

Aside from a blanket privilege assertion, Consumers **did nothing** to prove there are any protected attorney-client communications in the claims file.[15] The only thing to which the privilege could conceivably apply would be any professionally oriented communications between Hitt and its attorney made for purpose of securing legal advice. *State ex rel. Kilroy was Here, LLC*, 633 S.W.3d at 413. Those communications, though, should be in the file of any lawyer representing Hitt, and Consumers has done nothing to show there are any such communications in the insurance claims file.[16] Even if they did exist, the remainder of the claims file would need to be produced because it does not constitute a protected communication between attorney and client, and it is relevant to Relator's claims.

There is no authority for the proposition that the attorney-client privilege protects an entire insurance claims file. Consumers has failed to meet its burden of showing a privilege applies. Respondent lacked authority to prohibit discovery of the claims file on the basis of privilege.

2. Insurer-Insured Variant of the Attorney-Client Privilege

In *State ex rel. Cain v. Barker,* this Court recognized a limited variant of the attorney-client privilege, which some now call the insurer-insured privilege. 540 S.W.2d 50, 54 (Mo. banc 1976). *Cain* involved the discoverability of two written statements an insured

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15 Obviously, Relator is not seeking communications between Consumers and its current counsel related to this garnishment and bad faith action.

16 At a minimum, Consumers was required to identify them on a sufficiently detailed privilege log so Relator and Respondent could assess the claim. *State ex rel. Hayes v. Dieker*, 535 S.W.3d 372, 374 (Mo. App. E.D. 2017).

provided **to** his liability insurer after an incident. The Court, in a split decision, ruled that the statements were privileged as they were made for the purpose of assisting attorneys the insurer would retain to defend the insured. *Id*. at 54. The rationale for recognizing this limited extension of the attorney-client privilege was that the insurer was acting as an agent for the primary purpose of transmitting the statements to an attorney for the protection of the insured's interests. *Id*. at 55.

Cain, thus, narrowly extended the attorney-client privilege to a single class of communications: **a report or statement made to the insurer concerning an event which may be made the basis of a claim, and which is intended to assist any attorney the insurer may retain to defend the insured**. *Id*. at 54. Respondent, however, extended this narrow privilege to the entire claims file Consumers created in the regular course of its business, and Respondent wrongly applied the privilege to parts of the claims file not involving communications between Consumers and any insured. Respondent did so even though Consumers failed to prove the file contained any privileged communications. This was a clear error warranting mandamus relief.

Because Trexler was Consumers insured too and Consumers never bifurcated its claims file, Trexler may be entitled to all communications in the file as Hitt's co-insured. Nonetheless, Relator has agreed that Consumers may log any direct communications[17] between it and Hitt Automotive if they exist, so Trexler may assess whether the communication is potentially of the nature described in *Cain* and determine how to

[17] Only the actual communications should be logged. Any portion of any claim note that does not consist of such a communication should still be produced.

proceed. But Consumers cannot invoke the insurer-insured privilege for the remaining claims file materials because they are not communications made by an insured to the insurer concerning an event that may be the subject of a claim and which are designed to be transmitted to any attorney. *Cain,* 540 S.W.2d at 54.

3. Work Product

The work product doctrine "precludes an opposing party from discovering materials created or commissioned by counsel in preparation for possible litigation" (*i.e.* ordinary or tangible work product), as well as "the 'thoughts' and 'mental processes' of the attorney preparing the case" (*i.e.* opinion or intangible work product). *State ex rel. Ford Motor Co. v. Westbrooke,* 151 S.W.3d 364, 367 (Mo. banc 2004) (citation omitted). Rule 56.01(b)(5) codifies this doctrine in Missouri. Its purpose is "to prevent a party from reaping the benefits of his opponent's labors…for the same or a related cause of action." *Westbrooke*, 151 S.W.3d 366, n. 3. "Blanket assertions of work product are insufficient to invoke protection" and the party seeking to apply the doctrine must show that it applies through competent evidence. *Westbrooke*, 151 S.W.3d at 367. Consumers did not even assert a work product objection below (*Ex*. 14), much less establish through competent evidence—a privilege log or affidavits from counsel—that work product applied.

It cannot be said that Consumers prepared the claims file for the underlying car accident claim in anticipation of this bad faith case. Trexler's bad faith claims did not arise until **after** Consumers denied coverage to her on November 10, 2020 (*Ex*. 8) and closed its file, and her causes of action did not accrue until **after** the excess judgment was entered against her more than a year later. Moreover, Trexler and Monighan did not enter the §

537.065 agreement until some four months after Consumers' final coverage denial (Respondent's *Ex*. A; *Ex*. 7), and Trexler's bad faith case was not filed until approximately a year and a half following Consumers' coverage denial. (*Exs*. 1, 9).

Thus, the evidence does not show, and it cannot credibly be argued, that the car accident claims file was created in anticipation of this bad faith case. While the same may have been privileged from Monighan in the underlying car accident case, it is not privileged from Trexler in this subsequent case where she alleges Consumers acted in bad faith in handling Monighan's claim against her.

Instead, in creating the claims file for the car accident claim, Consumers was acting in the ordinary course of its business, which is adjusting liability claims. "Materials prepared in the ordinary course of business do not fall within the work product exception." *Spinden*, 798 S.W.2d at 478. "Insurance companies' factual investigations of claims are included in that rule." *W. Nat. Bank of Denver*, 109 F.R.D. at 57; *see also Curtis,* 37 S.W.2d at 625 (holding internal communications at insurance company regarding a loss to have been made in the ordinary course of the insurer's business and not in view of any prospective litigation); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 119 A.D.3d at 493 (recognizing "[d]ocuments prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged"). Relator is not trying to reap the benefits of Consumers' labor in investigating the now resolved car accident claim. Rather, Trexler's request is aimed at discovering how Consumers conducted itself during that investigation, which is the whole issue in this bad faith case. Bad faith is a factual test that may only be examined by obtaining information about how Consumers investigated the claim. *W. Nat.*

Bank of Denver, 109 F.R.D. at 57. Aside from a wholly insufficient blanket assertion of work product, Consumers did nothing to establish that the claims file or claim notes are either tangible or intangible work product in this bad faith case. It failed to meet its burden of showing the doctrine applies to anything created before it denied coverage to Trexler on November 10, 2020.

Nonetheless, the claims file and claim notes would be discoverable anyway under Rule 56.01(b)(5) because Relator has a substantial need for the contemporaneous evidence revealing Consumers' mindset in handling her claim. Relator is unable to obtain the substantial equivalent through other means because "the file certainly includes present sense impressions and contemporary statements containing information considered in denial of [and refusal to defend or settle] the claim." *McConnell*, 2008 WL 510392, at *3.

Respondent's Order requiring production of claim notes related to its final coverage decision was not sufficient because the full picture of how Consumers handled the underlying claim goes to the heart of Trexler's claims, and Trexler's claims are broader in scope encompassing Consumers' refusal to defend and settle. Trexler has a right to see not just **what** Consumers concluded but **why** it reached that conclusion. The information is relevant, it is reasonably calculated to lead to the discovery of admissible evidence, it could not be obtained by other means, and "it would be unjust not to allow discovery." *Id*.

E. Consumers' Arguments in Opposition to Relator's Writ Petition Misstate Missouri Law.

Consumers resists the essential discovery in this case by attacking the merits of Relator's claims. It contends Relator may not conduct discovery into the claims file because only Hitt, and not Trexler, was its insured. This argument alone is breathtaking. Consumers is saying that, as an insurance company, it must pay $25,000 in liability insurance coverage, but on behalf of someone who it does not insure. Now, confronted with its wrongful attempt to pass all responsibility off to Trexler's personal auto insurer, Consumers further claims its only obligation was to pay $25,000 after judgment was entered in the underlying car accident case. Consumers relies on *Ballmer*, which simply held the Financial Responsibility Law does not require additional coverage for a defense of claims, for the proposition that it did not have to use good faith in settlement as to the coverage it now admits it owed, even though its own insurance contract gave it the right to control settlement as to that coverage. Not only do these arguments conflict with § 303.190 R.S.Mo. (A.19-21) and the language of policy (*Ex*. 3), but also they undermine important policy considerations underlying the Financial Responsibility Law.

1. As a Permissive User of an Insured Vehicle, Trexler was an "Insured" Under the Consumers Policy Entitled to a Minimum of $25,000 per person/$50,000 per accident in Coverage.

Consumers' policy is a garage liability insurance policy subject to the "owner's policy" requirements of Missouri's Motor Vehicle Financial Responsibility Law. *Rutledge v. Bough*, 399 S.W.3d 884 (Mo. App. S.D. 2013); *Rader v. Johnson*, 910 S.W.2d 280 (Mo. App. W.D. 1995). Section 303.190.2 details those requirements:

2. Such owner's policy of liability insurance:

> (1) Shall designate by explicit description or appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;
>
> (2) Shall insure the person named therein and any other person, **as insured**, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle…subject to limits, exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident….

§ 303.190.2(2) R.S.Mo. (emphasis added). A19-21.

Consistent with § 303.190.2(2), the Director of Revenue has promulgated administrative regulations, which require auto liability insurers to include permissive users in the definition of "insured" in auto policies.

> (2) Minimum Standards for Automobile Policies
>
> (B) **Definition of insured**, as to an owned automobile, **shall include** –
>
> …
>
> (2) **Any person using…the automobile with the express or implied permission of the named insured** or spouse."

20 C.S.R. § 500-2.100(2)(B)(2) (emphasis added). A12-14. "In giving the Director [of Revenue] a broad grant to 'prescribe rules and regulations for the implementation' of section 303.025, the legislature obviously intended the Director to 'have the power to issue legislative regulations that…are binding on courts.'" *Dilts v. Director of Revenue*, 208 S.W.3d 299, 302 (Mo. App. W.D. 2006) (citation omitted). Section 500-2.100(2)(B)(2), therefore, has the force and effect of law. *Id.*

In this case, the fact that the Ford Explorer was a covered auto is not disputed. The policy stated "Item 2 of the declarations shows the 'autos' that are covered 'autos' for each

of your coverages. The following numerical symbols describe the 'autos' that may be covered 'autos.'" *Ex*. 3, p. 058. The policy defined symbol "21" to mean "Any 'Auto.'" *Id*. The symbol listed on the declaration for the liability coverage was symbol "21." *Id*. at p. 055. Confirming this, Consumers referred to the Ford Explorer as an "IV" (the common abbreviation for insured vehicle). *Ex*. 21, p. 279. There is no dispute that the Ford Explorer was a "covered auto," and Trexler was driving it with Hitt's express permission at the time of the accident.

As such, and even though Consumers decided not to treat her as one, controlling Missouri law required Consumers to include Relator under the definition of "insured" in the policy. § 303.190.2(2); 20 C.S.R. § 500-2.100(2)(B)(2). Consumers' attempt to disclaim Relator's insured status directly violates Missouri public policy.

This Court's decision in *Dutton* determines what happens next. "[I]t is well-settled that to effectuate the purpose of the MVFRL, the MVFRL *supplements* every insurance policy in Missouri even if the express terms of the policy do not provide coverage." *Dutton v. American Family Mut. Ins. Co*., 454 S.W.3d 319, 324 (Mo. banc 2015) (emphasis in original). This is because "the legislature intended that 'the minimum coverage required by the MVFRL becomes a part of the insurance contracts to which it applies, as fully as if such provisions were written into the policies.'" *Id*. (citing *Cashon v. Allstate Ins. Co*., 190 S.W.3d 573, 576 (Mo. App. E.D. 2006)). "In other words, if the MVFRL requires a policy issued in Missouri to provide coverage, and if the policy as a whole excludes such coverage, **then a provision providing such coverage will in effect be read into the policy**, up to the MVFRL's minimum statutory limit of liability coverage." *Id*. (emphasis

added). What this means is that the Consumers policy must be interpreted as if the definition exclusion is stricken from policy and, instead, supplemented with express language making Trexler Consumers' "insured" up to a coverage limit of at least $25,000. *Id*. The net effect up to a coverage limit of $25,000 per person/$50,000 per accident is:

3. Who Is An Insured

a. The following are "insureds" for covel "autos":

(1) You for any covered "auto".

(2) Anyone else while using with your permission a covered "auto" you own, hire or borrow ~~except~~:

~~**(a)** The owner or anyone else from whom you hire or borrow a covered "auto". This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.~~

~~**(b)** Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.~~

~~**(c)** Someone using a covered "auto" while he or she is working in a business of selling, servicing or repairing "autos" unless that business is your "garage operations".~~

~~**(d)** Your customers. However, if a customer of yours:~~

~~**(i)** Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.~~

~~**(ii)** Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance.~~

This is not a novel result. In *Rutledge v. Bough*, a customer (Bough) of an auto-dealer (Thomson Capital) obtained the dealer's permission to test drive a 1991 Mercury Cougar. 399 S.W.3d 884, 885 (Mo. App. S.D. 2013). The Cougar was insured under a garage liability policy the dealer had purchased from National Casualty Company (NCC). *Id*. While driving the Cougar, Bough caused an accident that killed Rutledge's daughter. *Id*.

Rutledge and her husband sued Bough for wrongful death and obtained a judgment for $750,000. Bough had a personal auto policy issued by Safeco. *Id*. Safeco paid its $50,000 limit in partial satisfaction of that judgment. *Id*. NCC, however, denied coverage, relying on an exclusion **identical** to the one in this case. *Id*. at 885-86. It was undisputed (as it is here) that the auto dealer owned the accident vehicle and that Bough was driving it with the dealer's permission. Nonetheless, the trial court granted NCC's motion for summary judgment in an equitable garnishment case and determined Bough was not an insured because the policy excluded a customer who had other liability coverage equal to the minimum limits required by the MVFRL. *Id*. at 886. This is the same argument Consumers asks this Court to adopt.

The Missouri Court of Appeals reversed and noted "nothing in the plain language of the MVFRL restricts its mandatory coverage to a single insurance policy." *Id.* at 887-88. The Court held "[b]ecause that provision excluding Bough as an insured conflicts with the MVFRL's requirements for an owner's policy, NCC's argument fails." *Id*. Thus, "the MVFRL required **that Bough be provided with liability coverage**, up to the MVFRL limits, under the owner's [garage] policy issued by NCC." *Id*. at 888 (emphasis added).

Rader v. Johnson also involved a car dealer's (Metro Ford's) customer (Johnson) that caused an accident on a test drive. 910 S.W.2d 280, 281 (Mo. App. W.D. 1995). The dealer's garage liability insurer (Universal Underwriter's Insurance Company) denied coverage claiming Johnson was not required to be an "insured" under the policy because he had personal coverage. *Id*. at 282. The trial court granted summary judgment to Universal, but the Court of Appeals again reversed, noting "[p]ursuant to section 303.190.2(2), the Universal policy must provide coverage to Johnson while he was driving the Metro Ford vehicle" and that "**Johnson became *an insured* under the Universal policy** only by operation of the law requiring Metro Ford to provide coverage for permissive users of their vehicles." *Id*. at 283-84 (emphasis added).

Rutledge's and *Rader's* holdings that a permissive user of an insured auto is an "insured" under the owner's policy is a straightforward application of § 303.190.2(2). *See also Safeco Ins. Co. of America v. American Hardware Mut. Ins. Co.*, 9 P.3d 749 (Or. Ct. App. 2000). A straightforward application of § 303.190.2(2) in this case leads to the same result. Irrespective of any contrary policy term, Trexler was Consumers' "insured" to whom it owed $25,000 in liability insurance coverage.

2. Trexler is also Consumers Insured Because the Policy's Definition of Insured and "Other Insurance" Clause Render it Ambiguous.

Aside from the Financial Responsibility Law, Trexler is an insured because the Consumers policy's "Who is an Insured" section is ambiguous when read together with the "Other Insurance" provisions in the Consumers policy and Progressive policy. "An insurance policy, being a contract designated to furnish protection, will, if reasonably

possible, be construed so as to accomplish that object and not to defeat it." *Owners Ins. Co. v. Parkison*, 517 S.W.3d 608, 616 (Mo. App. E.D. 2017). "Hence, if the terms are susceptible of two possible interpretations and there is room for construction, provisions limiting, cutting down, or avoiding liability on the coverage made in the policy are construed **most strongly against** the insurer." *Id*. An "ambiguity exists if there is duplicity, indistinctiveness, or uncertainty in the meaning of the policy's language." *Id*. at 613. "When interpreting specific policy provisions, [courts] are required to evaluate the policy as a whole, rather than viewing each provision in isolation." *Id*. If the policy is ambiguous, it must be construed in favor of coverage. *Id*.

Consumers' policy definition of "insured" tries to exclude the car dealer's customers from coverage, but then reinstates insured status for customers if the customer "has no other **available** insurance (whether primary, excess or contingent)." *Ex*. 3, p. 061 (emphasis added). Where a customer has no other "available" insurance, the policy recognizes the customer as an "insured" "up to the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged." *Ex*. 3, p. 061.[18] In this case, Missouri's limit is $25,000 per person/$50,000 per accident. Thus, for a customer not to qualify as an "insured" under this violative definition as Consumers wrote it, two requirements must be met. First, the customer must have other insurance (primary, excess, or contingent).

[18] Subsection (d)(ii) creates another similar exception. If a customer "has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged, they are an 'insured' only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance." *Ex*. 3, p. 061.

Second, that other insurance must also be "available." This adjective cannot be overlooked, avoided, or ignored, and it must be interpreted alongside the words beside it and the policy as a whole.

"When interpreting the language of an insurance policy, this Court gives a term its ordinary meaning, unless it plainly appears that a technical meaning was intended." *Martin v. U.S. Fidelity and Guar. Co*., 996 S.W.2d 506, 508 (Mo. banc 1999). "The ordinary meaning of a term is the meaning that the average layperson would reasonably understand." *Id*. "To determine the ordinary meaning of a term, this Court consults standard English language dictionaries." *Id*. The commonly understood definition of "available" is "present or ready for immediate use."[19] The word "available" does not have a technical meaning, so this ordinary meaning controls.

Consumers' use of the adjective "available," thus, introduces a timing component into this provision. For "other insurance" to be "available" as a reasonable insured might interpret it, the other insurance must be present or ready for immediate use. Accordingly, and consistent with the principle that courts evaluate policies as a whole, the "Other Insurance" clauses in the Consumers policy and Trexler's Progressive policy are relevant to determine whether Trexler's Progressive coverage was present and ready for immediate use and, therefore, "available."[20]

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19 https://www.merriam-webster.com/dictionary/available.

20 *Rader* demonstrates the importance of considering the "other insurance" clauses in both the garage liability policy and the customer's personal policy. *Rader*, 910 S.W.2d at 283-85. There, both the garage policy and the customer's personal policies had "other insurance" clauses which attempted to make their coverage excess. *Id*. at 283. Because

"'Other insurance' clauses function to vary, reduce, or eliminate the insurer's loss in the event of concurrent coverage of the same risk." *Distler v. Reuther Jeep Eagle*, 14 S.W.3d 179, 183 (Mo. App. E.D. 2000). Such clauses are commonplace in auto liability insurance policies because there are routinely concurrent coverages that may apply to any single accident. "Such excess insurance clauses serve a useful purpose in avoiding conflict." *Id.* at 186 (citation omitted). They clarify which policy has the primary obligation, and therefore when any additional coverages may become "available." They are neither invalid nor unconscionable, and they may be given their intended effect. *Id*.

In Missouri, the general rule is that "the policy insuring the liability of the car owner [in this case Hitt] has the first and primary coverage unless the policy has altered that situation or unless the other insurance clauses are mutually repugnant."[21] *Id*. at 186. This is because vehicle owners and their insurers are primarily responsible for bearing the costs of injuries caused by permissive users of insured vehicles. Both the Consumers policy and Progressive policy are primary policies, and the Consumers policy insures the vehicle and the liability of the owner, Hitt Automotive. The other insurance provisions in each policy adhere to this general rule.

The Consumers policy states in relevant part:

5. Other Insurance

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those clauses conflicted, they were treated as being mutually repugnant and were disregarded. *Id*. at 285. In this case, the "other insurance" clauses do not conflict and clearly establish Consumers' role as the primary insurer.

[21] This is the rule in other states, too. *Auto-Owners Ins. Co. v. Martin*, 773 N.W.2d 29 (Mich. App. 2009).

> a. For any covered "auto" you own, this coverage form provides **primary** insurance.

Ex. 3, p. 071 (emphasis added). The provision then has a subsequent "pro rata" clause, which states that where the policy and any other policy cover on the same basis "we will pay only our share" (defined to mean "the proportion that the Limit of Insurance of our coverage form bears to the total of the limits of all the coverage forms and policies covering on the same basis"). *Id.* This means that if another policy also agrees to cover the loss on a primary basis, the policies share in the coverage proportionally in accordance with the limits of each policy.

Trexler's Progressive policy, though, does not cover on the same basis. Instead, it clearly states:

> …if any insurance we provide in accordance with the terms of this Part I [Liability to Others] is applicable and any other insurance from another insurer, any self-insurance or any bond also applies, any insurance we provide will be **excess** over any other collectible liability insurance from another insurer, any self-insurance, or any bond.

Ex. 4, p. 140 (emphasis added). In other words, the Progressive policy expressly anticipated the scenario that another insurance policy might apply on a primary basis and accounted for that by contracting for its coverage to be excess whenever that occurred. *Id*.

Because the two "Other Insurance" clauses are not mutually repugnant, they must be enforced as written and consistent with the general rule that the policy insuring the vehicle owner has the primary obligation. Thus, interpreting the policies together, and as a whole, the Consumers policy should have applied first, and the Progressive coverage should not have become "available" until **after** the Consumers coverage was exhausted. A

reasonable lay person could, therefore, read the policies and conclude that Trexler's other insurance, which said would not apply until the primary coverage was exhausted, was not present and ready for immediate use (*i.e.* available) until Consumers satisfied its first in line priority. And even if the policy could be read the other way—as Consumers will surely argue—that proves the ambiguity.

Of course, Consumers did not honor its contracted for first-in-line priority coverage obligation. Instead, it tried to use the existence of Progressive's excess coverage to escape its primary coverage obligation. With Consumers abrogating its responsibility, Progressive honored its coverage promise when called upon to do so. But that does not justify Consumers' conduct after-the-fact or relieve Consumers of the primary insuring obligation it should have honored.

"It is well-settled that Missouri courts apply the doctrine of *contra proferentum* more rigorously when reviewing insurance contracts." *Owners Ins. Co. v. Parkison*, 517 S.W.3d 608, 616 (Mo. App. E.D. 2017). Consumers could have easily written its definition to say that a customer would not qualify as an insured anytime he or she had any "other insurance (whether primary, excess, or contingent)." Instead, it chose to condition insured status further on whether such other insurance was "available." At a minimum, this makes the policy ambiguous when the other insurance clauses are taken into consideration, as they must be. As the drafter of the policy, Consumers was in the best position to remove ambiguity in its meaning. *Id*. at 617. Because the provision is subject to more than one reasonable construction, the construction most favorable to Trexler controls. *Id*. at 616.

O'Neal v. Argonaut Midwest Ins. Co. is illustrative. 415 S.W.3d 720 (Mo. App. S.D. 2013). In that case, O'Neal leased a Nissan from Auto by Rent. *Id*. at 722. The lease agreement required O'Neal to buy a personal auto policy with limits of at least $100,000 per person/$300,000 per occurrence. *Id*. O'Neal purchased a liability policy from Haulers Insurance Company with those limits. *Id*. at 722. Her Haulers' policy had a named driver exclusion, which excluded O'Neal's daughter Kristen as an insured. *Id*.

Auto by Rent had its own liability policy on the vehicle through Argonaut Midwest Insurance Company. *Id.* The Argonaut policy contained a provision stating its coverage would only apply when the insurance required by the lease agreement was "not in effect or [was] not collectible." *Id.* at 722-23.

While driving the Nissan with O'Neal's permission, Kristen caused an accident that injured her brother, Levi. *Id*. A judgment was entered against Kristen and in favor of Levi in the amount of $273,169. *Id*. Even though its policy excluded Kristen as an insured, Haulers paid the $25,000 as the Financial Responsibility Law required. *Id.* Argonaut, though, denied coverage, and Levi filed an equitable garnishment action against Argonaut. *Id*.

Argonaut filed a summary judgment motion claiming it owed no coverage because the Haulers' policy was in effect at the time of the accident and had coverage that was "collectible." *Id*. It also relied on an escape clause providing that its coverage was "contingent only, and if there is any other collectible insurance whether primary, excess, contingent or self insurance, this insurance does not apply." *Id*. at 723. The trial court entered judgment in favor of Argonaut. *Id*.

The Court of Appeals reversed and noted the commonly understood dictionary definition of "collectible" to be "due for present payment." *Id*. at 725. The Court held the "insurance required by the lease agreement," $100,000 per person, was not "due for present payment" because Kristin was an excluded driver. *Id*. Thus, when the two policies were construed together, the named driver exclusion in the Haulers' policy prevented the entire Hauler's coverage from being "collectible" as that term was used in the Argonaut policy. *Id*. This triggered Argonaut's coverage obligation. *Id.*

The same analysis applies to this case. Trexler's Progressive coverage was not "available" ("present or ready for immediate use") because the other insurance provisions in both policies expressly made the Progressive coverage **unavailable** until the underlying Consumers' limit was exhausted. Trexler, therefore, met the definition of insured because she did not have other insurance that was available until Consumers paid its limit.

Applying Missouri's well-settled rules of insurance policy construction, and interpreting the definitional exclusion most strictly against Consumers, Trexler met the policy definition of "insured." Trexler was, therefore, Consumers "insured" under the policy definition as well, which brought about all the duties owed under the policy.

3. Consumers Owed a Duty of Good Faith as to the Coverage it was Required to Provide.

The faulty premise that Trexler was not its insured infects the remainder of Consumers' arguments opposing the discovery. To try and establish its claim handling and conduct as to settlement are not relevant, Consumers contends its only obligation was to pay $25,000 in indemnity **after** judgment was entered. *See* Respondent's Answer to

Relator's Writ Petition, ¶ 5, 33; Suggestions in Opposition to Relator's Writ Petition, p. 4, July 10, 2023. It points to language in § 303.190.2(2) stating insurers must insure permissive users "against loss from the liability imposed by law for damages," and it contends there is no "liability imposed by law" until there is a judgment, which means an automobile liability insurer need not do anything until a judgment is entered against the permissive user. This misinterprets the statute as it contradicts subsequent subdivisions of § 303.190 and frustrates the statute's purpose.

First, nowhere does the Financial Responsibility Law say an insurer has no obligation to cover the permissive user until after a judgment is entered. To the contrary, § 303.190.6(1) mandates "**the liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs**." (emphasis added). This means the insurer's coverage obligations spring into existence the moment the accident causes injury, not only once the permissive user has become subjected to a judgment. The phrase "against loss from the liability imposed by law" simply refers to the insurer's obligation to cover a permissive user when his or her negligence [a liability imposed by law] injures another. It does not mean the insurer has no obligation to do anything until and unless there is a judgment against the permissive user. Section 303.190.6(1) establishes **when** the insurer's coverage obligation is triggered, and it sets the time for when the claimant's injury is sustained—not after a judgment.

Consistent with this, § 303.190.6(3) provides:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> …
>
> (3) The insurance carrier shall have the **right to settle** any claim covered by the policy , and **if such settlement is made in good faith**, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (2) of this section.

§ 303.190.6(3) (emphasis added). This gives insurers a contractual right to settle as to the coverage required by the Financial Responsibility Law, and, consistent with this, Consumers included such a provision in its contract which gave it the exclusive right to control settlement as to any coverage it was required to provide:

> We may investigate and settle any claim or "suit" **as we consider appropriate**. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance – "Garage Operations" – Covered "Autos" has been exhausted by payment of judgments or settlements.
>
> …
>
> b. Additionally, you and any other involved "insured"[22] must:
>
> (1) Assume no obligation, make no payment or incur no expenses without our consent, except at the "insured's" own cost.
>
> …
>
> (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit".

Ex. 3, p. 060, 070 (emphasis added).

[22] As shown previously, Trexler was required to be in the definition of insured up to $25,000 in coverage, and she also met the policy definition due to an ambiguity in the policy.

Reserving these rights was consistent with the Financial Responsibility Law, and § 303.190.6(4) provides that the "[t]he policy, the written application thereof, if any, and any rider or endorsement which does not conflict with the provisions of this chapter shall constitute the **entire contract between the parties**." (emphasis added). Moreover, controlling settlement decisions through this contractual language has a purpose for non-named permissive user insureds the insurer must cover as a matter of law. It prevents permissive users on relatively smaller claims from being able to bind the insurer to pay the full statutory coverage. For instance, on a claim where the plaintiff's damages may only be $1,000, Consumers (or any other auto insurer) would not want an insured permissive user obligating it to pay the full $25,000 in coverage. This language in the Consumers policy prevents exactly that by reserving control over settlement to the insurer. Thus, the insurer may under the MVFRL contract for the right to control settlement, but Missouri law is clear that when an insurer elects to guard against this possibility—as Consumers did here—it assumes a duty to use good faith when exercising the contracted for settlement control.[23] *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 827 (Mo. banc 2014).

"It is well established that an insurer owes to its insured a duty to act in good faith in settling a claim against the insured and that the insurer may be liable to the insured when it breaches this duty." *Id.* at 829; *see also Sprint Lumber Inc. v. Union Ins. Co*., 627 S.W.3d

[23] Consumers could have written its policy to expressly state it did not have any settlement rights as to anyone required to be insured due to the Financial Responsibility Law, but it opted for language giving it the right to control settlement as to any coverage it owed. The policy even refers to it as a "duty to settle" and distinguishes it from the separate duty to defend. *Ex*. 3, p. 60.

96, 119 (Mo. App. W.D. 2021). "An insurer's duty to act in good faith in settling third-party claims arises from the insurer's reservation in the policy of the exclusive right to contest and settle third-party claims." *Scottsdale*, 448 S.W.3d at 829-30. Consistent with these principles, Consumers did exactly what its policy said it could do—it exercised complete control over the coverage it was obligated to provide for Trexler, and it refused to offer anything in response to two separate settlement opportunities.[24] Thus, regardless of whether Trexler was an insured by meeting the policy definition of "insured" or because of the MVFRL, Consumers reserved the right to control settlement decisions as to her coverage, so it was required to use good faith in exercising that right.

Second, Consumers owed a duty of good faith regarding the coverage it provided for permissive users because they are third-party beneficiaries. "A third party beneficiary is one who is not privy to a contract but who is benefitted by it and who may maintain a cause of action for its breach." *Volume Services, Inc. v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 785, 794 (Mo. App. W.D. 1983). Here, the breach was the refusal to use good faith as to the coverage Consumers now admits it owed Trexler. "Although the third party beneficiary need not be named in the contract, the contract terms must clearly express an intent either to benefit that party or an identifiable class of which the party is a member." *Id*. at 795. Such intent is present when "the promisor assume[s] a direct obligation to [the

[24] It is no defense that Trexler did not pay the premium for the Consumers policy or was not a "named insured." Liability policies cover non-named people as additional insureds regularly, and when the policy reserves the right to control settlement as to any coverage it affords, duties of good faith are owed to all insureds affected by the insurer's settlement decisions. This necessarily includes permissive user insureds where the policy gives the insurer the right to control settlement as to their coverage.

third-party beneficiary].” *Id*. at 794. In Missouri, every auto liability policy that insures a car assumes a direct obligation to an identifiable class of people—permissive users of the insured vehicle. This makes any permissive user an intended third-party beneficiary of the contract. *See Great American Alliance Ins. Co., v. Anderson*, 847 F.3d 1327, 1331 (11th Cir. 2017) (“In the event of an accident, the permissive user is generally covered under the named insured’s insurance policy as a third-party beneficiary.”); *Northwestern Mut. Ins. Co., v. Farmers’ Ins. Group*, 76 Cal. App. 3d 1031 (Cal. Ct. App. 1997) (stating as to a permissive user that “[a]t the very least, as one of a class for whose benefit the policy was expressly made, he was an express third party beneficiary”). Insurers owe the same duty of good faith to third-party beneficiaries as they do to the named insured. *See Ennen v. Integon Indemnity Corp*., 268 P.3d 277, 283-84 (Alaska 2012) (“It follows that an intended third-party beneficiary of an insurance contract should be able to bring a cause of action for bad faith against the insurer.”); *Northwestern*, 76 Cal. App. 3d at 1044 (“[W]e conclude that performance of the insurer’s duty to settle was intended for the benefit of an omnibus insured and is enforceable by him.”); *St. Paul Guardian Ins. Co. v. Luker*, 801 S.W.2d 614, 618-19 (Tex.Ct.App. 1990) (“We hold that when an insurer agrees to insure a third party beneficiary under the terms of an insurance contract, it owes the same duty of good faith and fair dealing to the third party as it does to the purchaser of the insurance.”); *Contreras v. U.S. Security Ins. Co*., 927 So. 2d 16, 21 (Fla. Dist. Ct. App. 2006) (concluding auto insurer owed duty of good faith to both named insured and permissive user).

Third, Consumers’ argument, if adopted, would frustrate the statutory intent. The purpose of the MVFRL is to ensure people injured on Missouri highways may be

compensated for their injuries by the negligent motor vehicle operators who caused them. *Halpin v. Am. Family Mut. Ins. Co*. 823 S.W.2d 479, 482 (Mo. banc 1992). The law accomplishes this by mandating insurers to also insure permissive users of covered autos.

> The MVFRL requires that every owner's motor vehicle liability policy issued in Missouri provide a minimum of $25,000.00 in liability coverage for bodily injury to any one person in any one accident to protect the named insured as well as any other person using the vehicle with the named insured's express or implied permission.

Distler v. Reuther Jeep Eagle, 14 S.W.3d 179, 182 (Mo. App. E.D. 2000). If the insurer was allowed to sit back and do nothing until a judgment against the insured materializes, why would any insurer ever offer its mandatory coverage in settlement? Instead, insurers would do exactly what Consumers did to Ms. Trexler—sit back for years, completely ignore the person they are required to insure, and hope a judgment never materializes. All the while, the injured person who the Financial Responsibility Law is designed to protect would be deprived of the policy benefits at a time when those benefits are sorely needed. Clearly, that cannot be the system the legislature had in mind.

Respondent confuses the issue by contending that, under *Ballmer*, Consumers had no duty to provide additional coverage in the form of a duty to defend and "by implication" a duty to settle.[25] *See* Consumers' Suggestions in Opposition to Relator's Writ Petition, p. 12. This conflates two distinct concepts.

When an insurer agrees to pay for the insured's defense of a claim, that is additional coverage the insurer provides apart from the policy's liability coverage. *Ballmer* simply

[25] *Ballmer* does not mention the insurer's separate and distinct obligation to use good faith as to settlement.

held the Financial Responsibility Law does not require an auto liability policy to provide additional coverage for a defense. *Id*. at 526-27. But "an insurer's duty to defend is distinct and different from its duty to settle a claim against its insured within its policy limits when it has a chance to do so." *State ex rel Kilroy was Here, LLC*, 633 S.W.3d at 417 (citing *Ganaway v. Shelter Mut. Ins. Co*., 895 S.W.2d 554, 556 (Mo. App. S.D. 1990); *Sprint Lumber, Inc*., 627 S.W.3d at 119 ("In addition to a duty to defend, inherent in an insurance policy is the insurer's obligation to act in good faith regarding the settlement of a claim"). While an insurer's defense duties arise from additional defense coverage the insurer may choose to grant, the duty to exercise good faith in settlement is not "additional coverage" under a liability policy. It is a duty the insurer is already required to provide pursuant to existing liability coverage, which arises anytime the insurer reserves the exclusive right to control settlement, as Consumers did here. *Scottsdale Ins. Co*., 448 S.W.3d at 829-30. *Ballmer* does not abrogate the duty to use good faith Consumers' assumed when it contracted to have exclusive control over settlement related to any coverage it owed Trexler.[26]

Consumers reliance on *Clayborne v. Enterprise Leasing Co. of St. Louis*, 524 S.W.3d 101 (Mo. App. E.D. 2017) is also misplaced. *Clayborne* held a rental car company (not an insurance company) did not owe a duty to defend or a duty to settle under a rental

[26] This case is further different from *Ballmer* because, as shown above, the policy must be interpreted in favor of Trexler meeting its definition of "insured" based upon the "other insurance" clauses. Thus, Consumers did owe a separate duty to defend under its contract. *Ex*. 3, p. 060.

agreement (not an insurance policy) where the renter declined insurance coverage. *Id*. at 106-108. Being subject to the Financial Responsibility Law, Enterprise paid the minimum limits, but unlike an insurance policy there was no provision in the rental agreement under which Enterprise agreed to provide coverage for a defense or control settlement of claims brought against the renter. *Id*. at 106. And the Financial Responsibility Law standing alone (because the renter declined the option to purchase additional insurance through Enterprise) did not create those duties. Here though, the Financial Responsibility Law at minimum required Consumers to grant Trexler $25,000 in coverage and made Trexler an insured under the policy as to that coverage. The **policy** then gave Consumers the exclusive right to control settlement as to that coverage, which created the duty of good faith under *Scottsdale*.[27]

F. As a Person Consumers was Required to Insure and to Whom (at minimum) it Owed a Duty of Good Faith as to Settlement, Trexler is Entitled to Free and Open Access to Her Insurance Claims File.

Trexler, and not someone from Hitt Automotive, was the driver of the accident vehicle. The limited portions of the claim notes produced, including the fact that Consumers responded to the initial settlement demand with questions about Trexler, confirm this. *Exs*.10, 21. The initial letters of representation Monighan's lawyers submitted informed Consumers that Monighan was asserting claims **against Trexler** under the

[27] Again, as the ambiguity with the "Other Insurance" clause also requires that the policy be interpreted to include Trexler as an insured, the duty to use good faith when considering settlement exists for that reason as well.

Consumers policy. *Ex*. 2, p. 30.[28] Consumers likewise had multiple opportunities to tender Trexler's coverage in settlement, and one of Monighan's letters made a settlement demand **specific to Trexler**. *Ex*. 7. Yet, Consumers' position is that it may hide how it evaluated and interpreted those settlement demands and how it otherwise handled the claim from a person it was required to insure. As Trexler was also Consumers' insured for this accident, Consumers position is little different than a lawyer trying to hide a file from his or her own client based on the attorney-client privilege.

This directly contradicts the principles this Court set forth in *Grewell*, which recognized an insured's right to access the claims file detailing the handling of her claim.102 S.W.3d at 36-37. Consumers contends the right only exists based on the duty to defend. Setting aside the fact that a duty to defend existed here as set forth above, the underpinning of the insured's right of access to the claims file is the fiduciary relationship that exists between insurer and insured in the liability insurance context where the insurer reserves the right to control defense **or** settlement. *See Sprint Lumber, Inc*., 627 S.W.3d at 118. That same relationship exists where the insurer reserves the right to control settlement as Consumers did here: "An insurer under a liability policy has a fiduciary duty to its insured to evaluate and negotiate third-party claims in good faith." *Shobe v. Kelly*, 279 S.W.3d 203, 209 (Mo. App. W.D. 2009); *Sprint Lumber, Inc*. 627 S.W.3d at 118. A party to

[28] If the Court would like to see the August 22, 2019 letter from Monighan's current counsel or the April 17, 2017 letter from Monighan's prior counsel to Consumers advising that claims were being made against Trexler, its insured, Relator can provide those letters.

whom a fiduciary duty is owed has an absolute right to discover the facts (in this case, set forth in the claims file) revealing how the fiduciary is discharging that duty (or not). Thus, in addition to the fact that the claims file is relevant to Relator's claims and not privileged, Trexler's status as an insured under the Consumers policy vests her with a clear, unequivocal, specific right to the claims file.

Consumers tries to avoid this by saying its claims file "belongs" to Hitt Automotive. But as already shown, Trexler was Consumers "insured" too. Consumers issued a policy not only to Hitt Automotive but any person permissively driving a covered auto. And as the at-fault driver of the covered Ford Explorer entitled to $25,000 in coverage, Relator has as much a right to see Consumers' contemporaneous handling of her claim as does the named-insured Hitt Automotive. Consumers never bifurcated or created separate claims files to account for the fact that it had two insureds, and it now must make the only claims file generated because of this accident available to either insured upon request.[29] Respondent had no authority to deny Relator access to her complete claims file in a case where Consumers' state of mind in handling the claim is the core issue. *Id*.

G. The Court Should Issue a Permanent Writ of Mandamus, or Alternatively, Prohibition.

One of a trial court's jobs is to ensure that the discovery "process does not favor one party over another by giving it a tactical advantage." *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. W.D. 2008). Respondent's

[29] As set forth above, Relator did agree that Consumers may log any direct communications between Hitt and Consumers, so Relator may determine how to proceed as to such communications.

Order—which refused to allow Relator to discover the most basic, non-privileged documents in an insurance bad faith case—has created an unfair, prejudicial, and tactical advantage for Consumers. Indeed, Consumers may now defend the bad faith claims without having to turn over all the relevant evidence revealing its mindset underlying its wrongful coverage denial, refusal to settle, and refusal to defend.

The fact that the claims file materials Trexler seeks are reasonably calculated to lead to the discovery of admissible evidence and not privileged is enough by itself to justify a writ of mandamus because the discovery goes to the heart of her claims and a trial court has no discretion to deny discovery of relevant and non-privileged matters. *Neill*, 356 S.W.3d at 172. Relator has also shown a clear, unequivocal, and specific right to the claims file because, as Consumers' insured, she is entitled to it under *Grewell*.

CONCLUSION

WHEREFORE, Relator prays the Court for a permanent order in mandamus instructing Respondent:

(1) to vacate his November 14, 2022 Order;

(2) to order Consumers to produce the complete claims file, including all claim notes and all internal communications related to the underlying accident, except for any direct communications from Hitt to Consumers; and

(3) to order Consumers to list any such communications between it and Hitt on a privilege log with sufficient information, so Relator may evaluate whether a privilege applies.

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CERTIFICATE OF COMPLIANCE FOR WORD OR LINE LIMITS

Counsel for Relator hereby certifies the following:

1. The Substitute Brief of Relator complies with the type-volume limitation set forth in Mo. R. Civ. P. 84.06, in that the Brief contains 15,710 words which is less than 31,000 words (including headings, footnotes and quotes, Table of Contents and Table of Authorities and excluding the Cover, Rule 84.069(c) Certificate, Signature Block and Appendix).

2. The Brief of Relator complies with the typeface and type style requirements of MO SC Rule 84.06(a) because this Brief and Appendix have been prepared in a proportionally spaced typeface using Microsoft Word in 13-point font size and Times New Roman type style, and have been scanned for viruses and they are virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 25, 2024, a copy of this Relator's Brief and Appendix were filed electronically, in compliance with Mo. Sup. Ct. R. 84.015, with the Clerk of the Court and all attorneys of record were notified via electronic mail of submitting the Relator's Substitute Brief and Appendix to:

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