Case No. 083739

IN THE MISSOURI SUPREME COURT

STATE EX REL. AMERICAN ECONOMY INSURANCE COMPANY,

Relator,

v.

HONORABLE WILLIAM C. CRAWFORD, Circuit Judge, Jasper County Circuit Court,

Respondent.

RELATOR'S REPLY BRIEF

From the Circuit Court of Jasper County, Missouri The Honorable William C. Crawford, Judge Circuit Court No. CV199-640CC

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POINT RELIED ON

RELATOR AMERICAN ECONOMY INSURANCE COMPANY IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT, THE HONORABLE WILLIAM C. CRAWFORD, FROM ENFORCING HIS ORDER OF FEBRUARY 7, 2001 SUSTAINING PLAINTIFFS' MOTION TO QUASH RELATOR AMERICAN ECONOMY INSURANCE COMPANY'S NOTICE TO TAKE DEPOSITION OF MR. JAMES LOUMIET ON THE GROUNDS THAT MR. LOUMIET IS PLAINTIFFS' CONSULTING EXPERT ON ACCIDENT RECONSTRUCTION AND HIS FINDINGS AND OPINIONS ARE THE WORK PRODUCT OF PLAINTIFFS' COUNSEL BECAUSE THE PLAINTIFFS HAVE WAIVED ANY CLAIM OF WORK PRODUCT PRIVILEGE AS TO MR. LOUMIET AND HIS REPORT IN THAT PLAINTIFFS IDENTIFIED MR. LOUMIET AND PROVIDED RELATOR A COPY OF MR. LOUMIET'S WRITTEN OPINIONS, CONCLUSIONS, AND REPORT.

Brown v. Hamid, 856 S.W. 2d 51 (Mo. banc. 1993)

ARGUMENT

RELATOR AMERICAN ECONOMY INSURANCE COMPANY IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT, THE HONORABLE WILLIAM C. CRAWFORD, FROM ENFORCING HIS ORDER OF FEBRUARY 7, 2001 SUSTAINING PLAINTIFFS' MOTION TO QUASH RELATOR AMERICAN ECONOMY INSURANCE COMPANY'S NOTICE TO TAKE DEPOSITION OF MR. JAMES LOUMIET ON THE GROUNDS THAT MR. LOUMIET IS PLAINTIFFS' CONSULTING EXPERT ON ACCIDENT RECONSTRUCTION AND HIS FINDINGS AND OPINIONS ARE THE WORK PRODUCT OF PLAINTIFFS' COUNSEL BECAUSE THE PLAINTIFFS HAVE WAIVED ANY CLAIM OF WORK PRODUCT PRIVILEGE AS TO MR. LOUMIET AND HIS REPORT IN THAT PLAINTIFFS IDENTIFIED MR. LOUMIET AND PROVIDED RELATOR A COPY OF MR. LOUMIET'S WRITTEN OPINIONS, CONCLUSIONS, AND REPORT.

This Court must decide 1) did Plaintiff waive the claim of work product privilege by his previous disclosure of the name of his accident reconstruction expert and his report concerning the July, 1998 accident in the intersection at issue in the underlying case? and 2) Did Respondent abuse or exceed his jurisdiction or abuse his discretion in granting Plaintiff's motion to quash and for protective order?

A.

Relator will not re-argue the points in its argument which encompass the materials under sub-point A of the Respondent's Brief, pp. 12-16.

B.

The Relator has not misconstrued this Court's decision in *Brown v. Hamid,* 856 S.W. 2d 51 (Mo. banc. 1993). In the *Brown v. Hamid* case, this Court explained how a party could use informal discovery, including *ex parte* contacts, to discuss matters previously disclosed. Like the case before this Court, the previous disclosure in the *Brown v. Hamid* case occurred by way of an interrogatory answer and tendering of a report. *Id.* at 53. In other words, the party "gave" work product to the other side. In *Brown v. Hamid*, there was no issue concerning an authorization by a party for a consultant to talk to the other side. This Court did not place any limitation on the effect of waiver by prior disclosure, determining "a party waives <u>any work product immunity</u> for consultant by giving the work product to the other side . . ." *Id.* at 54. (Emphasis added). Any immunity gets waived by giving the work product to the other side. That is what occurred in the case before this Court. Like it or not, and notwithstanding the fact that prior disclosure occurred in a different jurisdiction, and pursuant to a scheduling order, the Plaintiff gave work product to the Relator. Under this Court's *Brown v. Hamid* decision, that works a waiver of "any work product immunity" for Mr. Loumiet's work and his identity. The Relator admits that the *Brown v. Hamid* case does not affect the additional concern of the Respondent regarding the prior disclosure occurring in a separate case previously filed and dismissed in another jurisdiction. However, that concern is of no moment here.

Under the *Brown v. Hamid* case, and as between the parties herein, the impressions, conclusions, or opinions of Plaintiff's expert consultant, Mr. Loumiet, have never been clothed with absolute immunity because Plaintiff gave the work product of Mr. Loumiet to Relator. In the *Brown v. Hamid* case and in this case, the disclosure occurred by way of formal procedure, that being disclosure pursuant to court rule or court order. No informal or *ex parte* disclosure has been requested or has occurred which this Court has been asked to address herein.

The *Brown v. Hamid* case addressed informal discovery. However, this Court recognized, and the Relator asks this Court to give effect, to its proposition that "in both formal and informal discovery, the Rules do not prohibit a party from trying to convince an expert that an opinion is erroneous . . ." *Id.* at 54. This Court also noted, in *Brown v. Hamid*, that the informal discovery had occurred within the scope of the waiver in that case. In *Brown v. Hamid*, this Court determined that "significant information" was disclosed by way of the interrogatory answer and the summary opinion letter attached thereto. *Id.* at 54. Mr. Loumiet's report has revealed "significant information" by the prior disclosure. Mr. Loumiet's two-page letter setting forth his opinions and conclusions dated October 29, 1999, (RPW, Exhibit "F," Exhibit "C" therein; see Appendix to Opening Brief), shows that he considered public information in terms of accident reports or government manuals, as well as photographs of the accident site and subject vehicles, hand-written statements of two persons, and an investigative report authored by an investigation firm. That, Relator respectfully suggests, constitutes "significant information" within the meaning of the *Brown v. Hamid* case which

has been disclosed and worked a waiver of the work product privilege, and which should be subject to both formal and informal discovery, all as explained by this Court's prior decision in *Brown v. Hamid*. Although Mr. Loumiet may be a consulting expert, Plaintiff has revealed his impressions, conclusions, or opinions, by way of the prior disclosures noted. So considered, and as recognized by this Court in its prior *Brown v. Hamid* opinion, those opinions of Mr. Loumiet as well as his impressions, conclusions, and background information and materials and documents are subject to not only informal discovery but formal discovery as authorized by the Missouri Supreme Court Rules.

The other part of Respondent's argument under its Part B only needs short reply. Objectively considered, there should be no doubt, contrary to the limitation noted by Respondent's Brief concerning the specific written notice quashed by the trial court, the Relator argued specifically that it sought discovery of only those things have occurred by prior disclosure. (RWP, Exhibit "A," pp. 13-14; p. 17, l. 2 through p. 18, l. 4). The Relator suggests this Court should agree there is no reasonable dispute as to the request by Relator to obtain formal discovery only as to matters previously waived. Consistent with this Court's ruling in the *Brown v. Hamid* case, the Relator requested that the Respondent allow it to proceed with formal discovery consistent with the waiver, and as allowed by this Court's decision in the *Brown v. Hamid* case.

Finally, contrary to the Respondent's briefing under its Part B, the waiver by prior disclosure was not imaginary, but very real and very public. The record easily supports that conclusion.

C.

There can be no dispute also that an information disclosing event has occurred within the meaning of the *State ex rel. Tracy v. Dandurand,* 30 S.W. 3d 831 (Mo.banc. 2000) case. The specific facts of *State ex rel. Tracy v. Dandurand* consider waiver of the attorney/client privilege by expert deposition. In the case before this Court, the waiver of work product occurred prior to deposition. The Plaintiff gave the information and documents to the Relator. This occurred before the deposition. The Respondent rests a great part of his argument on the presumption, as noted by this Court in *State ex rel. Tracy v. Dandurand* that an attorney can claim work product as to certain information previously disclosed and withdraw the expert as a witness prior to trial. For that "presumption" to work for Respondent in this case, this Court would have to obey the implicit suggestion that it should overrule the *Brown v. Hamid* case. The *State ex rel. Tracy v. Dandurand* case concerns different facts and a different claim of privilege. Simply dubbing Mr. Loumiet a "consultant" for purposes of the case before this Court accomplishes no more than putting a title before a person's professional name and occupation. As shown, prior identification and prior production were waiver and where this occurs prior to deposition, no right to claim work product privilege attaches.

D.

The Relator is not arguing in this case that simply knowing the identity of Plaintiff's expert eliminates the work product immunity for an expert. As discussed above, the prior disclosures by Plaintiff have resulted in not only the Realtor learning the identity of Plaintiff's accident reconstruction expert, Mr. Loumiet, but also the prior disclosure revealed significant

information by way of the expert designation document and the two-page summary of the expert's opinion. Under the *Brown v. Hamid* case, and the other authorities cited in support of its argument, the Relator can obtain discovery under the Missouri Supreme Court Rule related to said disclosure. Realtor need not rely solely on informal discovery. Instead, as noted by this Court in the *Brown v. Hamid* decision, formal discovery can be employed to discuss matters previously disclosed and within the scope of the waiver by that disclosure. *Brown v. Hamid,* 856 S.W. 2d at 54. Relator takes Plaintiff at his word, saying that Mr. Loumiet will not be a testifying expert. However, Relator can employ Missouri Supreme Court Rule 57.03 and Rule 57.09 to formally discover the facts known and opinions held by Mr. Loumiet.

E.

Relator does not need to re-argue the points made in its Opening Brief concerning waiver of work product privilege and work product privilege and related cases or litigation. (Relator's Opening Brief, pp. 21-24 and pp. 27-33). The Plaintiff instituted an action for underinsured motorist benefits against Relator in the State of Kansas. That same claim exists in the case now pending before the Respondent in the Circuit Court below. Somewhat conceding the issue, the Respondent states that Mr. Loumiet's report as produced in the Kansas case would no longer have any work product immunity in the Kansas case. This Court in a context also involving the claim of privilege and waiver of same by participation in litigation, has denounced and held in reproach attempts to strategically turn on and off privilege. *Brandt v. Medical Defense Associates*, 856 S.W. 2d 667, 672-673 (Mo. banc. 1993).

A privilege waived is a privilege lost. As with the medical privilege, so it should be with work product privilege. A litigant should not be allowed to pick and choose between binding and loosing. Once a Plaintiff makes a decision to enter into litigation, that decision must carry with it the recognition that where information has been disclosed and waiver of the privilege against disclosure occurs, the privilege cannot be re-asserted. In other words, no party shall use the privilege or its waiver as a dagger in one instance and a shield in another. *Brandt*, 856 S.W. 2d at 671-674. Mr. Loumiet's report certainly bears on the issues not only in the previously dismissed case, but also in the case pending before the Respondent. The rule of reason should prevail in these circumstances. What has been public and available and therefore

subject to discovery in one case cannot be re-immunized or shielded or made unavailable in another case.

This Court has stated previously in the *Brown v. Hamid* case that formal or informal means can be used to discover privileged information previously disclosed. It makes no sense and it would be unreasonable for the Court to hold that Relator must obtain this non-privileged information only by way of informal discovery. Relator seeks to compel formal discovery within the scope of the waiver made by Plaintiff in his prior identification and disclosure. Mr. Loumiet should not have the option to be a volunteer.

There has been no dispute of the relevancy or materiality of the material sought. Therefore, under the cases discussed, Relator may compel the production of documents and take the oral deposition of Mr. Loumiet concerning his report, the information serving as the basis of his report, and his analysis related thereto. As shown, this information is not privileged and therefore discoverable. Rule 56.01(a); Rule 56.01(b)(1), Rule 57.09.

F.

Contrary to the argument of the Respondent, (see Respondent's Brief at p. 30), the suggested prejudice analysis plays no role in the determinations this Court has been requested to make in this case. Also contrary to the Respondent's view, the Relator did suggest to this Court that the denial of the requested discovery would cause the Relator to "suffer considerable expense and hardship as a consequence of the Circuit Judge's ruling to deny the discovery requested concerning the Loumiet report." See Petition for Writ of Prohibition at p. 10.

The Relator further suggested:

> "Relator would suffer extreme hardship, expense and burden if it had to re-invent the wheel with respect to these 'facts' which Plaintiff previously volunteered, but under the Respondent's Ruling which the Relator may not discover. To the extent which the Circuit Judge tried to order economic justice by considering that Plaintiff had 'paid' for Mr. Loumiet's efforts and report, see **Exhibit A,** p. 16, ll. 4-23, the Relator argues that the discovery rules in cases do not consider any such implied cost shifting analysis in determining whether waive occurred, or if so, a party's investment therein somehow mitigating its effect." (Relator's Suggestions in Support of American Economy Insurance's Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus, p. 15).

Missouri courts have known for years that appeal is often an inadequate remedy as concerns discovery matters. Actual prejudice might be great but hidden from view as a result of the denial of discovery before trial. *State ex rel. Stolfa v. Ely*, 875 S.W. 2d 579, 581 (Mo. App. W.D. 1994).

> "The denial of discovery matters has thus been held to fall within the third category of reviewability under a writ of prohibition because, although a party may in fact be prejudiced by the court's denial, it is nearly impossible to show on appeal how the denied information could have affected and prejudiced the result of the trial."

(*Ferrellgas, L.P. v. Williamson,* 24 S.W. 3d 171, 175 (Mo. App. W.D. 2000). No showing of prejudice is required as a predicate for this Court to undertake and decide the question presented. *Id.*

Finally, the Relator has not quibbled about the evidentiary "showing" reflected in the record, see paragraph 23, Petition for Writ of Prohibition, and transcript references citing to Exhibit "A" therein, but could. See *State ex rel. Dixon v. Darnold,* 939 S.W. 2d 66, 68-71 (Mo. App. S.D. 1997) (burden rests upon party claiming privilege to establish that material is in fact not discoverable; unsworn statements of counsel are not evidence of facts asserted; absence of probative evidence to support refusal of discovery constitutes an abuse of discretion); *Lassiter v. Martin,* 748 S.W. 2d 819, 821-822 (Mo. App. S.D. 1988) (counsel's statements constitute no record proof nor a substitute therefor even though Court has no doubt as to accuracy). The Court should deny this point.

CONCLUSION

In consideration of the foregoing, and gauged against the applicable standard of review, this Court should exercise its superintending power and restrain permanently the Respondent Circuit Judge from enforcing his February 7, 2001 Order sustaining Plaintiff's Motion to Quash and for Protective Order.

Plaintiff's prior disclosure of Mr. Loumiet's name and his report in the related Kansas case concerning the accident at issue worked a waiver of any work product privilege as to his identity and his accident reconstruction work. The work product privilege does apply in related litigation. The Missouri courts not only have recognized that, but also have to recognize that waiver of the privilege applies in related litigation. Objectively considered, the underlying case now pending before the Respondent is the same litigation involved in the prior Kansas case brought by the Plaintiff involving the same parties, the same issues, and the same claims concerning the collision at the intersection.

Also as noted, a party entitled to assert work product privilege may also waive that privilege as to related litigation. That waiver occurred in this case. Plaintiff provided Mr. Loumiet's name and his report to the Relator. The information sought is relevant and material. There is no claim, and can be no claim made, that Plaintiff provided Mr. Loumiet's name and his report with an intention or purpose to preserve any privilege. The privilege cannot be used as a dagger in one case and a shield in another. The revelation of Mr. Loumiet's name and report did not occur by accident or inadvertence. Although it occurred pursuant to a scheduling order in another case, it occurred voluntarily.

Accordingly, in light of the foregoing, the Relator respectfully request this Court to agree, and order the Respondent to vacate his order and allow the deposition and discovery requested by Relator to proceed in the underlying case.

WHEREFORE, in consideration of the foregoing, the Relator respectfully requests an Order of this Court entering its permanent Order in Prohibition which bars the Respondent and any other judge of the Circuit Court of Jasper County, Missouri, from enforcing the Order entered February 7, 2001 sustaining Plaintiff's Motion to Quash Subpoena and for Protective Order and for other relief just and proper herein.

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84.06 (c) CERTIFICATION

I hereby certify that this brief contains the information required by Rule 55.03.

Further, this brief complies with the limitations contained in Rule 84.06 (b) in that it contains 3,382 words, and that this disk has been scanned for viruses and is virus free.

I hereby certify that a copy of the above and foregoing RELATOR'S REPLY BRIEF was sent via U.S. mail, postage prepaid, this _____ day of November, 2001, to:

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