No. SC97352

SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* **SHELTER MUTUAL INSURANCE COMPANY**

Relator

v.

THE HONORABLE R. MICHAEL WAGNER
Circuit Judge, Division II
17 Judicial Circuit
Johnson County, Missouri

Respondent

Original Proceeding in Prohibition
Circuit Court Case No. 13JO-CV01550-01

Transfer from the Missouri Court of Appeals, Western District
No. WD81541

SUBSTITUTE BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition in which Shelter Mutual Insurance Company seeks to prohibit the Honorable R. Michael Wagner, judge in the underlying case pending in the circuit court, from producing to Shelter's adversaries or ordering Shelter to produce to its adversaries communications between Shelter and its counsel that are protected by privileged. "The supreme court shall have general superintending control over all courts and tribunals" and "may issue and determine original remedial writs." Mo.Const. Art. V, Sec. 4.1. "The supreme court, and each division thereof, the court of appeals and the circuit courts, within their several jurisdictions, and also the judges of the supreme court and court of appeals and circuit judges to the extent herein provided in this chapter, shall have power to hear and determine proceedings in prohibition." R.S.Mo. § 530.020.

STATEMENT OF FACTS

Kathlene D. McKeehan-Brown and her husband, Danny Brown, filed suit against Nathaniel Brennan seeking damages arising from a December 6, 2009 car accident, specifically case number 11HE-CC00026 in the Circuit Court of Henry County. [*Exhibit A: R. at 1-9*] Brennan was driving a 1984 Mercury Grand Marquis at the time of the accident. [*Exhibit B: R. at 10*] Shelter had issued six auto insurance policies to Brennan and/or his parents that were in effect when the accident occurred, although only one of those policies insured the Mercury. [*Exhibit C: R. at 14-17*; *Exhibit D: R. at 18-22*; *Exhibit E: R. at 23-28*; *Exhibit F: R. at 29-34*; *Exhibit G: R. at 35-38*; *Exhibit H: R. at 39-45*] Shelter acknowledged coverage under the Mercury policy and, beginning eight days after the accident and continuing thereafter, offered to pay the $50,000 coverage limit of the Mercury policy in settlement of the Browns' claims against Brennan. [*Exhibit I: R. at 46-48*; *Exhibit J: R. at 49-53*] In a letter dated January 4, 2010, counsel for the Browns[1] responded to Shelter's first offer to pay the limit of the Mercury policy with a demand that Shelter sign a contract specifically designed to facilitate, and requiring Brennan to prosecute, a bad faith action against Shelter following a confession of judgment by Brennan. [*Exhibit K: R. at 54-65*]

[1] The attorney who represented the Browns at that time and throughout the injury lawsuit on the claims against Brennan, Andrew J. Gelbach, has now become Brennan's attorney in the underlying equitable garnishment and bad faith action pending before Judge Wagner.

No later than January 27, 2010, counsel for the Browns was notified that Wm. Clayton Crawford and his firm of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.[2] had been retained to represent Shelter. [*Exhibit J: R. at 49*] Shelter retained separate counsel to represent Brennan with regard to the Browns' claims against him and against the Henry County injury lawsuit. [*Exhibit L: R. at 66*; *Exhibit M: R. at 67*]

A judgment was entered against Brennan and in favor of the Browns in the injury lawsuit in April 2013 for the total sum of $300,000 plus pre-judgment interest. [*Exhibit O: R. at 69-70*] Shelter paid the $50,000 coverage limit of the Mercury policy to the Browns in May 2013 in partial satisfaction of the judgment, and it issued payment to the Browns for costs and post-judgment interest owed under the Mercury policy shortly thereafter. [*Exhibit P: R. at 71-73*; *Exhibit Q: R. at 74-76*]

The underlying case pending before Judge Wagner was filed by the Browns in November 2013 and given case number 13JO-CV01550.[3] [*Exhibit R: R. at 77*] They brought an action against Shelter for equitable garnishment pursuant to Section 379.299, in which they sought amounts allegedly still owed under the Mercury policy and in which they also alleged the other five policies issued by Shelter afforded coverage to Brennan for the injury lawsuit and the judgment entered against him. [*Exhibit R: R. at 77-83*] Shelter denied owing anything under the Mercury policy beyond what it had already paid

[2] The firm is now known as Foland, Wickens, Roper, Hofer & Crawford, P.C.

[3] Following transfer within the same judicial circuit, case number 13JO-CV01550-01 was used. The case remained pending with Judge Wagner.

and further denied any coverage under the other five policies. [*Exhibit S: R. at 84-92*] Although no relief was sought from him, Brennan was also named as a defendant in the underlying suit. [*Exhibit R: R. at 77-83*] Nearly four years after the underlying suit was first filed, in September 2017, Brennan filed a cross-claim against Shelter in which he asserts a claim for bad faith refusal to settle the Browns' injury claims. [*Exhibit T: R. at 94-129*]

Responding to a request by Brennan, Shelter produced documents to him in November 2016. [*Exhibit U: R. at 136*] Shelter withheld and redacted certain documents from that production on the basis of the attorney/client and work-product privileges, and it provided a privilege log. [*Exhibit U: R. at 136*; *Exhibit V: R. at 137-143*] Shelter withheld and redacted additional documents from a supplemental production in November 2017 and provided a supplemental privilege log. [*Exhibit W: R. at 144*] One week later, Brennan filed a motion seeking *in camera* review of the documents withheld and redacted by Shelter. [*Exhibit X: R. at 145-146*] Following a hearing before Judge Wagner, Shelter filed its brief explaining why its document withholdings and redactions were proper in light of the attorney/client and work-product privileges. [*Exhibit Y: R. at 147-159*] Shelter also delivered to Judge Wagner for *in camera* review the documents it withheld and redacted from its productions, along with copies of its privilege logs and brief. [*Exhibit Z: R. at 160-161*][4]

[4] Given the nature of the enclosures to the letter submitted as Exhibit Z—*i.e.*, documents over which Shelter asserts the attorney/client and work-product privileges—the

The documents withheld and redacted by Shelter from its productions and provided to Judge Wagner for *in camera* review are all communications between Shelter and its own attorneys at the Foland Wickens firm pertaining to legal advice sought by Shelter, internal notes made by Shelter memorializing and describing such communications, and/or notes and other documents containing mental impressions of Shelter and its counsel at Foland Wickens as to planning and strategy development for the current litigation against Shelter in the underlying suit pending before Judge Wagner. [*Exhibit V: R. at 137-143*; *Exhibit W: R. at 144*] Judge Wagner entered an order on January 22, 2018 to the effect that Shelter's adversaries would be permitted to discover those attorney/client communications and mental impressions:

> The Court after conducting in camera review of all documents and reviewing briefs finds the documents discoverable and should be produced to Nathaniel Brennan's attorney. Per request of Shelter Mutual Insurance Company the documents

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enclosures were not included as part of the exhibit filed with the Missouri Court of Appeals, Western District. However, on March 21, 2018, those same documents were provided for *in camera* review to the Western District by email per its request. It is not entirely clear from the Western District's transfer of the record on appeal whether the privileged materials were included for *in camera* review by this Court, but Shelter is requesting that the Court allow it to submit the withheld and redacted documents under seal for such review.

> shall not be made available or accessible to anyone for ten (10) days from the date of this docket entry. RMW/tb

[*Exhibit BB: R. at 173*]

Shelter first sought relief from Judge Wagner's order by petitioning the Western District for a writ of prohibition (WD81437; not the present proceeding) within a week after the order was entered. [*Exhibit EE: R. at 203-214*] Before the end of January 2018, the Western district issued its order:

> Relator's Petition for Writ of Prohibition with Suggestions in Support filed on January 29, 2018, is taken up and considered. Plaintiffs in cause 13JO-CV01550-01 have affirmatively stated that they have not sought discovery of communications from Shelter Insurance Company to its counsel, Foland, Wickens, Roper, Hofer & Crawford, P.C. or from Foland, Wickens, Roper, Hofer & Crawford, P.C. to Shelter Insurance Company.
>
> THEREFORE, Respondent is directed to insure no such communications were inadvertently included in the materials Respondent has determined discoverable. All such communications are privileged and, thus, absent waiver, are not discoverable. In all other respects the Petition is **denied**.

[*Exhibit FF: R. at 215-216*]

Upon receipt of the Western District's order in the first writ proceeding on January 31, 2018, Shelter filed a motion in the circuit court the same day titled "Emergency Motion to Remove Attorney/Client Communications Under *In Camera* Review From Materials to be Released to Opposing Parties and Suggestions in Support." [*Exhibit GG: R. at 217-219*] In that motion, Shelter requested that Judge Wagner modify his January 22, 2018 order determining the documents were discoverable in order to comply with the Western District's directive of January 31, 2018. [*Exhibit GG: R. at 217-219*] The next day, Brennan filed suggestions in opposition to Shelter's emergency motion explicitly arguing he was entitled to discover Shelter's communications with Foland Wickens and urging Judge Wagner to release those communications to Brennan's counsel. [*Exhibit HH: R. at 220-223*] This was directly contrary to the Western District's directive of January 31, 2018 and also called into question the Western District's impression that Brennan and his counsel were not seeking discovery of the communications. [*Exhibit FF: R. at 215-216*; *Exhibit HH: R. at 220-223*]

Shelter then petitioned this Court for a writ of prohibition (SC96937; again, not this proceeding) on February 5, 2018 seeking effectively the same relief it is seeking now. [*Exhibit II: R. at 224-238*] Two days later, this Court entered its order:

> Now at this day, on consideration of the petition for a writ of prohibition herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied without prejudice to allow Respondent to consider and rule on Relator's emergency motion filed in the circuit court

> on January 31, 2018, in light of the court of appeals' order on this issue. Relator's motion to dispense with time limits overruled as moot. Relator's motion to file exhibits under seal for in camera inspection overruled as moot.

[*Exhibit JJ: R. at 239-240*]

Judge Wagner heard argument on Shelter's emergency motion on February 28, 2018, during which Brennan's attorney stated to Judge Wagner: "[W]hat I want to make a record on today is let's start from scratch because the Court of Appeals got it wrong in the sense that they made an entry that says plaintiffs have affirmatively stated they have not sought discovery of communications from Shelter Insurance Company to its counsel, Foland & Wickens. We sought production of everything on the privilege log[.]" [*Exhibit LL: R. at 253*] At the conclusion of the hearing, Judge Wagner announced his decision to allow discovery of Shelter's communications with its counsel despite the Western District's directive of January 31, 2018:

> THE COURT: I will say for what it is worth I want both sides to know I really worked on this. I think the fair thing to do is as suggested by Mr. Gelbach. It is clear to this Court that it is Brennan's privilege to waive if those documents are privileged, so I would stand on my prior ruling and say that everything prior to that underlying judgment would be waived by Mr. Brennan and they should get them. If the Court of Appeals tells me that is wrong, then God bless them,

> just let them tell me one way or the other and we will go from there.
>
> MR. CRAWFORD: Your Honor, request before we go off the record, please, request ten days to seek relief from the Court of Appeals before any materials are disseminated and would ask the Court to enter that ruling as an order on our pending emergency motion to what we thought was to comply with the Court of Appeals, but to remove documents from the in camera, so I understand from what you've just said that the Court is overruling that motion in total, correct?
>
> THE COURT: Yes, that would be the order of the Court and you will have your ten days.

[*Exhibit KK: R. at 241-242*; *Exhibit LL: R. at 275-276*] Brennan submitted a proposed order, to which Shelter objected and submitted its own proposal. [*Exhibit MM: R. at 278*; *Exhibit NN: R. at 279-280*; *Exhibit OO: R. at 281*] Judge Wagner entered Brennan's proposed order, which was dated February 28, 2018 but not filed until March 5, 2018. [*Exhibit PP: R. at 282*; *Exhibit QQ: R. at 283*]

Shelter promptly initiated this proceeding in prohibition by filing its petition with the Western District on March 6, 2018.

POINTS RELIED ON

I. Shelter is entitled to an order prohibiting Judge Wagner from allowing discovery of Shelter's documents submitted for *in camera* review because those documents are protected from discovery by the attorney/client and work-product privileges, in that the documents consist of communications between Shelter and its attorneys and pertain to the subject matter of the attorneys' representation of Shelter, the communications were prepared in anticipation of litigation against Shelter and contain mental impressions of Shelter and its counsel, and no privilege has been waived.

Primary Authorities:

a. *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*
898 S.W.2d 550 (Mo.banc 1995)

b. *State ex rel. Behrendt v. Neill*
337 S.W.3d 727 (Mo.App.2011)

c. *State ex rel. Great American Ins. Co. v. Smith*
574 S.W.2d 379 (Mo.banc 1978

d. Mo.Sup.Ct.R. 56.01

ARGUMENT

POINT I

Shelter is entitled to an order prohibiting Judge Wagner from allowing discovery of Shelter's documents submitted for *in camera* review because those documents are protected from discovery by the attorney/client and work-product privileges, in that the documents consist of communications between Shelter and its attorneys and pertain to the subject matter of the attorneys' representation of Shelter, the communications were prepared in anticipation of litigation against Shelter and contain mental impressions of Shelter and its counsel, and no privilege has been waived.

I. Propriety of Prohibition

"Prohibition is available to prevent disclosure of privileged material because an erroneous disclosure cannot be repaired on appeal." *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo.banc 1995) (*citing State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608-609 (Mo.banc 1993)). This is true with regard to both material protected by the attorney/client privilege and material privileged under the work-product doctrine. *See generally Id*; *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13 (Mo.banc 1995); *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364 (Mo.banc 2004). Prohibition is "appropriate in this case because the trial court exceeded its authority by ordering discovery of privileged material." *Peabody Coal*, 863 S.W.2d at 608. "Once the privilege is discarded and the privileged material produced, the damage to the party against whom discovery is sought is both severe and irreparable." *Id.* "The damage cannot be repaired on appeal." *Id* (*citing State ex rel.*

Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-863 (Mo.banc 1986)); *also Polytech, Inc.*, 895 S.W.2d at 14.

For those reasons, as well as those set forth more fully below, Shelter requests this Court's writ of prohibition to prevent Judge Wagner from ordering discovery of Shelter's attorney/client privileged documents. In the event this Court determines mandamus, as opposed to prohibition, would be the proper writ to protect Shelter's privileges in these circumstances, Shelter requests that the Court issue such a writ. After noting the procedural differences between writs of prohibition and writs of mandamus, this Court has held, "Failure to follow the foregoing practice is not fatal." *See State ex rel. Missouri Public Service Comm'n v. Joyce*, 258 S.W.3d 58, 60 (Mo.banc 2008). "When a petitioner requests the wrong writ, this Court construes the petition as a request for the appropriate writ." *Id*.

II. Relevance does not overcome privilege.

It is a fundamental rule of law that attorney/client communications are privileged and protected from discovery no matter how relevant the information addressed in those communications might be. Brennan has argued more than once, both to Judge Wagner and to the Western District, that he is entitled to the documents withheld and redacted by Shelter because they go to show Shelter's state of mind. This, Brennan said, was material to his cross-claim for bad faith refusal to settle. In other words, Brennan has adopted the position that he is entitled to Shelter's privileged communications with its attorneys merely because the communications are relevant.

The fact that a communication may be relevant, however, does not overcome the attorney/client privilege or the work-product privilege:

> Plaintiffs make several other arguments, none of which are persuasive. One is that these attorney-client communications include relevant information. This seems almost self-evident, but misses the point of privilege. The fact that Plaintiffs may find the information helpful does not justify a finding of waiver. The attorney-client privilege is a fundamental policy, to which disclosure is the exception. Absent a waiver, privileged materials are immune from discovery. For these reasons alone, all such relevance arguments fail and merit no further discussion.

See State ex rel. Behrendt v. Neill, 337 S.W.3d 727, 730 (Mo.App.2011) (internal citations, quotations omitted) (*citing* State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832, 837 (Mo.App.1995); *In re Marriage of Hershewe*, 931 S.W.2d 198, 202 (Mo.App.1996)).

Simply stated, the fact that a document is or may be relevant does not defeat the attorney/client privilege. *See, e.g.*, *Chase Resorts*, 913 S.W.2d at 837 ("The fact that [the party seeking privileged communications] may find the information helpful in cross-examination does not justify a finding of waiver"); *State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo.banc 1978) ("The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the

law is of greater societal value, it is submitted, than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted"); *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 78 (Mo.banc 1984) (describing *Great American*: "this Court adopted an approach to the attorney-client privilege that recognizes the confidentiality of communications between attorney and client as a fundamental societal policy, to which disclosure is the exception. In so doing the Court rejected the 'Wigmore Approach,' which emphasizes the fundamental societal need to have all evidence having rational probative value placed before the trier of facts in a lawsuit. […] In holding that letters from an attorney to his client could not be discovered by an opposing party in a civil suit for vexatious refusal to pay on a fire insurance policy, the Court noted that the client's expectations of confidentiality were of primary concern"); *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45 (Mo.App.2008) ("The privilege is absolute. Therefore, even if an adversary can show a need for the material and hardship in acquiring it, discovery of the privileged communication is not authorized"); *State ex rel. Missouri Highways & Transportation Comm'n v. Legere*, 706 S.W.2d 560, 566 (Mo.App.1986) ("any professionally oriented communication between attorney and client is absolutely privileged, in the absence of waiver, regardless of substantial need"); *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 57-58 (Mo.banc 1976) ("In view of the fact that we have concluded that the statements sought are privileged and, hence, not subject to discovery under rule 56.01, it is unnecessary for us to consider whether respondent in seeking the statements made a sufficient showing of substantial

need therefor and that she was unable without undue hardship to obtain the substantial equivalent as required by rule 56.01(b)(3)").

A similar approach, although slightly different in one respect, applies to the work-product privilege, as codified in the rules of procedure with added emphasis here:

> Subject to the provisions of Rule 56.01(b)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or *by or for that other party's representative*, *including an* attorney, consultant, surety, indemnitor, *insurer, or agent*, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

See Mo.Sup.Ct.R. 56.01(b)(3).

Thus, intangible work product consisting of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party such as Shelter

are afforded absolute protection and are never discoverable regardless of relevance or even a showing of substantial need. *See* Atchison, Topeka & Santa Fe, 898 S.W.2d at 552 ("The substantial need requirement applies only to tangible work product and does not apply to require disclosure of intangible work product"); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 547 (Mo.App.2008) ("unlike with tangible work product, a showing of substantial need does not require disclosure of intangible work product"); *Tillman*, 271 S.W.3d at 46 ("Rule 56.01(b)(3) does not permit the discovery of intangible work product even if the party seeking it has a substantial need for it").

Even for discovery requests seeking strictly tangible work product, exclusive of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party, the protection still applies unless there is a substantial need for the documents and a substantial equivalent cannot be obtained by other means. The party seeking the discovery bears the burden of demonstrating as much. *Id* at 45 ("discoverable if the party seeking discovery has shown a substantial need"); *Ratcliff*, 261 S.W.3d at 547 ("may be discovered only if the party seeking discovery shows a substantial need"). Moreover, demonstrating substantial need requires the party seeking the discovery to show more than just relevance of the documents sought. *State ex rel. Day v. Patterson*, 773 S.W.2d 224, 226 (Mo.App.1989) ("Relator finally argues that the information sought is relevant to her tort action with regard to prior notice of the defective condition of the Bransons' property as well as other matters. No showing has been made that relator has a substantial need for the materials"). Moreover, a showing of substantial need does not allow discovery of tangible work product if it is otherwise

privileged; in other words, once it is determined that a document is protected by the attorney/client privilege, it is unnecessary to determine whether there may be a substantial need for it because the document is not discoverable one way or the other. *Id* at 227 (*citing Cain*, 540 S.W.2d at 57).

III. Shelter's documents submitted for *in camera* review are protected by the attorney/client privilege.

In the simplest terms, the documents Brennan asked Judge Wagner to rule are discoverable, which documents Judge Wagner has ordered be produced to Brennan and others, are direct communications—or notes describing direct communications—between Shelter, a party to this lawsuit, and its attorneys Mr. Crawford and James P. Maloney, who were and are that party's attorneys of record. Such materials concern the very matters at issue in the underlying equitable garnishment and bad faith lawsuit. These are inarguably communications between an attorney and client related to the subject matter of the representation. Stated again, Brennan sought to discover, and Judge Wagner has determined Brennan should discover, communications between a party to the pending underlying lawsuit and that party's attorneys of record in that case related to the very subject matter of the case. Those communications are plainly subject to the attorney/client privilege and may not be discovered by Brennan or anyone else.

"The language of rule 56.01 authorizes the discovery of matters not privileged." *State ex rel. Great American Ins. Co. v. Smith*, 563 S.W.2d 62, 63 (Mo.banc 1978). "This necessarily means that privileged matters, such as communications between attorney and client, are not discoverable unless the privilege is waived by the client." *Id*.

"[W]hen one undertakes to confer in confidence with an attorney whom he employs in connection with the particular matter at hand, it is vital that all of what the client says to the lawyer and what the lawyer says to the client to be treated as confidential and protected by the attorney-client privilege." *Great American*, 574 S.W.2d at 383. This has been further explained and expended by this Court:

> When a client goes to an attorney and asks him to represent him on a claim which […] is being asserted against him, even if he as yet has no knowledge or information about the claim, subsequent communications by the attorney to the client should be privileged. Some of the advice given by the attorney may be based on the information obtained from sources other than the client. Some of what the attorney says will not actually be advise as to a course of conduct to be followed. Part may be analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected.

Id at 384-385. "[T]he determinative issue [is] whether the relationship of attorney and client existed between the parties at the time of the communication with reference to the subject matter of the communication." *Id* at 386. As indicated here and in Shelter's

privilege logs, and as may be plainly seen from the actual documents, the documents withheld and items redacted consist of communications between Shelter and its attorneys of record and all relate to claims now pending against Shelter in the underlying lawsuit. Accordingly, all of the items withheld are protected from discovery by the attorney/client privilege.

There are a total of 65 entries in the privilege logs, each of which corresponds to a redaction from the documents produced by Shelter or a document withheld in its entirety from Shelter's production. All of the items relate to the auto accident in which the Browns sustained damages, legal issues pertaining to Shelter's coverage under six policies issued by Shelter that allegedly "stack" to afford additional coverage to Brennan, and Shelter's legal strategy for defeating the anticipated allegations of "bad faith". All were written and received in anticipation of litigation against Shelter as to coverage disputes under the six policies (*i.e.*, the subject of the current equitable garnishment by the Browns) and allegations of bad faith refusal to settle (*i.e.*, the current cross-claim by Brennan). Of the 65 total redacted or withheld items, 16 are copies of communications between Shelter and its attorneys in the underlying lawsuit and herein, to include both Mr. Crawford and Mr. Maloney. Of the remainder, 47 are notes made internally by Shelter memorializing or describing communications between Shelter and those same attorneys. The remaining two are notes made by those at Shelter not handling the defense of Brennan in the Browns' injury lawsuit but which, instead, reflect Shelter's strategies in anticipation of a claim against Shelter arising from a coverage or settlement dispute. In

fact, all of the notes redacted from Shelter's document production reflect intangible work product in anticipation of litigation, not against Brennan, but against Shelter.

IV. Shelter's documents submitted for *in camera* review are protected by the work-product privilege.

In his various arguments to Judge Wagner and the Western District, Brennan has quoted an excerpt from one case, *Ford Motor Co.*, 151 S.W.3d at 367, stating that the work-product doctrine "protects the 'thoughts' and 'mental processes' of the attorney preparing a case." Brennan used that isolated quotation to argue the work product privilege only if the documents "include the thoughts and impressions of an attorney" and that "the notes that reference communications with outside counsel reflect Shelter's mental impressions after speaking with its attorney—*not* the attorney's mental impressions." That is incorrect. Though the quote handpicked by Brennan in his previous briefing mentions the thoughts and mental processes of an attorney, the rule extends much farther. That the particular quotation selected by Brennan was directed toward the work product of a lawyer does not mean the doctrine is limited to lawyers.

For tangible work product, the rule specifically states that the protection applies to discovery seeking materials "prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative." *See* Mo.Sup.Ct.R. 56.01(b)(3). That is in no way limited to attorneys, as tangible work product is protected if prepared by the party itself. Further, for intangible work product, or mental impressions, the rule specifically states that the "court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative

of a party." *See Id*. The words "an attorney or other representative" necessarily mean mental impressions of any representative of a party, such as a Shelter employee working on behalf of the company with regard to anticipated litigation, in addition to the mental impressions of that party's attorney. This is plain to see from the wording of the rule itself. If the rule extended only to an attorney's mental impressions, the words "or other representative" would be rendered meaningless.

Further to this point, the notes of a Shelter employee about Shelter's attorney's mental impressions do not, by virtue of the note being made, somehow convert attorney's mental impressions to discoverable information. If a note made by a Shelter employee states, "Mr. Crawford's opinion is ABC" or "Mr. Maloney recommends we do XYZ," disclosure of that note would necessarily reveal protected mental impressions and thoughts and processes of the attorney, just as it would reveal the privileged communication. The rule states that these "shall" be protected. This is true even if the words on paper were written by the client rather than the attorney.

Thus, even if Brennan was correct that the absolute protection afforded to intangible work product only applied to the mental impressions of attorneys at law, which is wrong per the rule itself, the notes Brennan is referring to would still be protected as attorney work product. Moreover, all of this is unnecessary to reach the proper conclusion in this case, as the attorney/client privilege protects these communications in the first place. The additional protection afforded by the work-product privilege merely adds another layer Brennan is not allowed to penetrate.

Finally with regard to the work-product doctrine, Brennan argued previously to Judge Wagner that he is entitled to all of the documents withheld and redacted because he has a substantial need for them. There are several flaws here. First, Brennan already has the entire *Grewell* claim file, meaning everything Shelter did on his behalf in defending the claim and litigation against him. What he does not have is merely what Shelter and its attorneys thought and said in anticipation of the current underlying litigation against Shelter. Thus, Brennan already has the "unique, contemporaneously prepared history of the company's handling of a claim" he says he needs.

Second, even if Brennan did have a substantial need for the documents, that would only allow access to purely tangible work product. The rule would still require protection of intangible work product consisting of anything setting forth the mental impressions, thoughts, and theories of Shelter's attorneys or the employees acting on Shelter's behalf. *See Id.*; *Atchison, Topeka & Santa Fe*, 898 S.W.2d at 552; *Ratcliff*, 261 S.W.3d at 547; *Tillman*, 271 S.W.3d at 46.

Third, and perhaps most importantly, showing a substantial need to avoid work-product protection for tangible work product does not somehow eviscerate the attorney/client privilege for communications between Shelter and its attorneys and for notes made by Shelter employees describing those communications. *See Behrendt*, 337 S.W.3d at 730 (*citing Chase Resorts*, 913 S.W.2d at 837; *Hershewe*, 931 S.W.2d at 202). If a party could execute an end run around an adverse party's attorney/client privilege, simply by showing a need for the privileged communications, the fundamental and

necessary privilege would be completely worthless. That has never been the law in Missouri, and it should not change here.

V. It makes no difference whether Shelter stored its privileged documents somewhere called a "claim file."

The protection afforded to Shelter for its attorney/client communications and its tangible and intangible work product is not affected by the fact that they may have been stored with the claim file for the original tort claim against Brennan.

Brennan bases his argument in this regard on *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33 (Mo.banc 2003), in which this Court analogized the insurer/insured relationship to the attorney/client relationship—and thus an insurer's file for its defense of the insured in a third-party claim to an attorney's file for his or her representation of the client—and determined the insured has a right to such a claim file. From there, Brennan and apparently Judge Wagner have made the illogical leap to conclude any piece of paper put physically or electronically into something labeled "claim file" becomes a document the insured has an absolute right to receive and that, by simply putting a piece of paper into one box instead of another, without showing the document to anyone outside the company, an insurer waives its attorney/client privilege. That is not the law. Instead, what is or is not considered part of the claim file to which the insured in a third-party claim has an absolute right of access is determined by the nature and capacity of the document.

One can imagine how Brennan's position on this would turn 180° and how Brennan would suddenly take the position that his own argument is senseless if Shelter

had chosen not to label anything a "claim file." In handling the defense of Brennan against the Browns' injury claims in that hypothetical, Shelter very obviously would have generated, obtained, and compiled documents falling with the *Grewell* right to a claim file. Yet, applying Brennan's argument, because nothing would be labeled a "claim file," Brennan as the insured would have the right to nothing. It seems clear labels are not the key. *Grewell* requires a "document character and purpose" test, not a "document label or location" test to determine whether it is part of the insured's discoverable claim file.

As indicated, the *Grewell* decision was based upon a comparison of the insurer/insured relationship in a third-party insurance case to the attorney/client relationship, and the Court noted that a file maintained by an attorney actually belongs to the client. 102 S.W.3d at 36-37 (citing *In the Matter of Gary M. Cupples*, 952 S.W.2d 226 (Mo.banc 1997)). The *Cupples* decision, which held that a file maintained by an attorney with regard to his representation of a client belongs to the client, in turn relied upon *In re Grand Jury Proceedings*, 727 F.2d 941 (10th Cir.1984). According to that case, this principle is based upon the fact that an attorney is accountable to his client as a fiduciary and that the client (*i.e.*, the principal) may enforce his rights by demanding production of the file. *Id*.

Thus, an insured's right to the claim file in a third-party case arises out of and depends upon the fiduciary relationship between the insurer and the insured. When the insurer is acting as the insured's fiduciary, meaning when it is acting on the insured's behalf, what it does is part of the claim file to which the insured is entitled under *Grewell*. On the other hand, when the insurer is wearing a different hat and acting on its own

behalf and not as fiduciary of the insured, its actions and communications are not part of the *Grewell* claim file. Here, Shelter retained the Foland Wickens firm as its own counsel to provide Shelter with legal advice regarding its rights and duties in the face of a coverage dispute and in the face of an anticipated suit against Shelter for bad faith refusal to settle.

Drawing on this Court's analogy of the insurer/insured relationship to the attorney/client relationship, one might consider the example of an attorney with a file for his or her representation of the client. Certainly, whatever the attorney does in furtherance of the client's interests or otherwise acting on behalf of the client is part of the file belonging to the client. If, on the other hand, the attorney seeks advice from his own counsel (an attorney for the attorney), whether for guidance on ethical issues or for consultation concerning anticipated, even if wholly unfounded, allegations of professional malpractice bearing a connection to representation of the original client, those communications fall within the attorney's privilege with his own counsel. Those communications were not made with the attorney acting as fiduciary of the original client but, rather, acting on his or her own behalf as client of the ethics or malpractice counsel, and they are not discoverable by the original client simply because they may have been placed in any one given file folder. The same is true of an insurer that, while wearing one hat, acts as the insured's fiduciary and, while wearing a different hat, seeks advice for itself from counsel for the insurer, even if those communications are stored in the same box or file folder as the other items.

The court in *Grinnell Mut. Reinsurance Corp. v. Rambo*, 2014 WL 1266792 (W.D.Mo.2014), considered the *Grewell* holding in addressing a motion to compel, and it concluded *Grewell* simply does not apply. The insurance company, Grinnell, objected to producing "communications between Grinnell's in-house legal counsel and staff and outside legal counsel including coverage analyses and determination." *See Id* at *1. The court carefully considered *Grewell* and held:

> The documents which reveal communications between Grinnell's in-house legal counsel and employees with outside legal counsel are also protected by the attorney-client privilege. These communications were made in anticipation of litigation being filed against Grinnell's insureds David Rambo, Terry Reynolds and Danny Mazelin. The content of the communications shows that the purpose was to obtain legal advice from outside counsel as to coverage for the claims anticipated/filed against Grinnell's insureds. These are exactly the type of communications protected by the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981) (communications between employees and corporate counsel to secure legal advice for the corporation are protected against compelled disclosure). Moreover, to the extent there are some communications transmitted within the Grinnell corporation from one employee to another for

> purposes of securing this legal advice or regarding legal advice given from outside counsel, these communications are also a part of the confidential communications between an attorney and client, and therefore, are privileged. *See* May [*Department Stores Co. v. Ryan*], 699 S.W.2d [134,] 137 [(Mo.App.1985)] (report by employee to his employer, which is transmitted to the employer's attorney is within the confidential communication privilege and is not subject to discovery, absent waiver). Additionally, to the extent that the documents include not only communications, but also coverage analysis prepared by outside counsel for Grinnell, these documents are clearly privileged attorney work-product. Documents created in anticipation for litigation are covered by the work-product privilege. *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813 (8th Cir.2002); *see also Medical Protective Co. v. Bubenik*, 2007 WL 3026939 (E.D.Mo.2007) ("Work product prepared in anticipation of litigation or trial does not mean that a suit must be commenced or terminated before materials and documents come within the protection of work product."); *State ex rel. Day v. Patterson*, 773 S.W.2d 224, 228 (Mo.App.1989).

See Id at *3.

Brennan acknowledged in his briefing to Judge Wagner that the claim file contemplated in *Grewell* extends only so far as Shelter was acting as Brennan's fiduciary, meaning when Shelter was acting on behalf of Brennan in defense of the Browns' injury claims, and not when Shelter was seeking legal advice on its own behalf or planning and preparing for anticipated litigation against Shelter. Brennan said he and Shelter did not have an adversarial relationship because Shelter did not deny coverage to him, incorrectly implying that, unless Brennan and Shelter were adversaries, Shelter must have been acting as his fiduciary. This is far from true.

First, the premise is wrong. Shelter did acknowledge coverage under the Mercury policy, but it denied any additional "stacked" coverage under the other five policies issued to Brennan and/or his parents. As to those alleged "stacked" coverages, which were the primary subject of many communications between Shelter and its counsel, Shelter and Brennan were adversaries if his test is applied.

Second, it is not necessary that an insurer and insured be adversaries in litigation for their interests to diverge to the point where the insurer, while still acting as a fiduciary when acting on behalf of Brennan and his interests, does not act as a fiduciary when seeking legal advice and preparing for litigation that will impact its own interests. Shelter's interests were not aligned with Brennan's as to coverage under five of the six insurance policies. More significantly, Shelter's interests were not aligned with Brennan's as to the anticipated claim for bad faith that the Browns' counsel in the injury lawsuit, who now represents Brennan in the underlying case, was obviously trying to build. His demand less than a month after the accident made it clear Plaintiffs' counsel

was targeting Shelter for bad faith litigation: The letter dated January 4, 2010 from the Browns' (now Brennan's) attorney demanded that Shelter and Brennan enter into a contract expressly requiring the filing of a bad faith lawsuit against Shelter as a condition to the proposed contract to limit recovery. Thus, less than a month after the accident occurred, Shelter had good reason to anticipate not only a coverage dispute but litigation against it seeking damages beyond the limits of any applicable coverage based on allegations of a tort.

Moreover, the effect of Judge Wagner's ruling would be that insurers would never be permitted to seek advice of counsel over such complex issues as Missouri law on insurance coverage stacking, the implications and potentially offensive (against the insurer) uses of Section 537.065, and threatened litigation for bad faith refusal to settle. Instead, insurers would be left adrift, knowing their attorney/client communications would be an open book to their adversaries in any future litigation. Individuals and businesses alike have a fundamental right to counsel and privileged communications regarding their legal rights in every other context. Liability insurers should not be singled out as the only group who cannot find safety in the protections of the attorney/client privilege.

Where it acted on its own behalf with respect to its own interests that were not aligned with Brennan's, Shelter did not act as a fiduciary. What it did and the communications it had in that capacity are not contemplated by the *Grewell* rule, which, as shown above, relies entirely on the existence of a fiduciary relationship. Lest there be any doubt from the authorities already cited, a claim based on failure of an insurer to

provide its insured access to the *Grewell* claim file is a claim for breach of fiduciary duty. *See generally* *Grewell v. State Farm Mut. Auto. Ins. Co.*, 162 S.W.3d 503 (Mo.App.2005) (noting at 508: "*Grewell I* did not formally declare that an insurer has a fiduciary duty to the insured, but that conclusion is a logical extension of the Supreme Court's reasoning" given "the nature of the insurer's responsibility to defend a claim for potential liability on behalf of the insured"). Shelter has already produced to Brennan what he is entitled to discover under *Grewell*, and the documents it withheld or redacted and submitted to Judge Wagner for *in camera* review do not fall in the same category.

VI. Shelter did not waive its privileges.

Brennan argued to Judge Wagner that Shelter waived its privileges by placing the communications at issue, but he never explained how Shelter did so. Shelter does not disagree with the general principle that a party cannot place privileged matters at issue and then hide behind the privilege. But, that is not what Shelter is doing, and Brennan has offered no theory to the contrary. At best, Brennan's earlier submissions have implied that Shelter placed its privileged communications at issue by (i) denying the allegations of bad faith against it or (ii) testifying that it did consider the advice of its counsel in making decisions related to coverage and in anticipation of the current litigation against it.

As to the first implication, Shelter has made no allegations here. All of the allegations in this case are against Shelter. Thus, Shelter has not placed anything at issue; it has simply responded to allegations. Denying an allegation is not the same as placing something at issue. *Behrendt*, 337 S.W.3d at 729 ("Relators did not waive their attorney-

client privilege by their pleadings or deposition testimony. […] They did plead that they acted 'without malice'—which is now the sole liability issue left for trial, but this injected no new issue because malice is an element of malicious prosecution on which Plaintiffs bear the burden of proof") (*citing* Diehl v. Fred Weber, Inc., 309 S.W.3d 309, 318 (Mo.App.2010)). A plaintiff cannot make allegations against a party that touch on privileged matters and then use that plaintiff's own allegations to argue the defendant's privileged matters have been placed in issue. *State ex rel. Stinson v. House*, 316 S.W.3d 915, 918-919 (Mo.banc 2010).

With respect to Brennan's "advice of counsel" theory, Missouri courts have already addressed and flatly rejected his argument. Shelter's testimony as to reliance on Mr. Crawford and Mr. Maloney for legal advice came on cross-examination of a Shelter lawyer by Brennan's attorney. As a general matter, however, "[f]or a party to waive a confidential privilege such as that of attorney-client the waiver must be voluntary which does not occur when it is extorted under cross-examination." *Smith v. Smith*, 839 S.W.2d 382, 385 (Mo.App.1992) (*citing* *State ex rel. DeGraffenreid v. Keet*, 619 S.W.2d 873, 878 (Mo.App.1981); *State ex rel. Hayter v. Griffin*, 785 S.W.2d 590, 594 (Mo.App.1990)); *also* *Behrendt*, 337 S.W.3d at 729-730 ("Information given in reply to an adverse party's inquiry is considered to be 'extorted' and involuntary") (*citing* *State ex rel. Chance v. Sweeney*, 70 S.W.3d 664, 670 (Mo.App.2002)).

Further, a party's testimony as to reliance on the advice of counsel does not operate as a waiver of the attorney/client privilege where that party "never pleaded advice of counsel as a defense." *Behrendt*, 337 S.W.3d at 729. Here, Shelter has not pled

advice of counsel as a defense. Moreover, simply denying the plaintiff's allegations, such as insurer pleading it acted reasonably and without bad faith, does not inject any new issue in the case because those matters, such as the insurer having acted unreasonably and in bad faith, are elements of the plaintiff's claim on which the plaintiff bears the burden of proof. *Id*.

VII. Shelter's attorneys were not acting in an ordinary claim handling role.

Brennan has cited other cases to argue the documents at issue are discoverable and not privileged because Shelter's attorneys at the Foland Wickens firm were acting in an ordinary claim handling role. Those are not Missouri cases. Shelter is aware of no Missouri case where a privileged communication was held discoverable on this basis.

Missouri has not embraced that general concept, nor would it apply here. Contrary to Brennan's statements in previous briefing, this case does involve Shelter seeking the advice and coverage opinion of its outside counsel. This is plainly seen in the documents submitted for *in camera* review. Of course, Shelter also sought advice from its attorneys concerning strategy as it relates to the potential for litigation against Shelter. This does not mean the outside attorneys were acting as claims adjusters. The opinions and strategies of Mr. Crawford and Mr. Maloney were requested because Shelter anticipated claims and litigation against it, as opposed to against its insured, with regard to disputed coverage issues and allegations of bad faith. Shelter did not act in bad faith toward Brennan. However, Shelter had good reason to believe allegations of "bad faith" would be lodged against it. The Browns rejected Shelter's offer to pay its coverage limit on the policy covering the accident vehicle in settlement of their claim against Brennan.

This is often a telltale sign that a claimant is seeking recovery from an insurer beyond its contractual liability limit. Additionally, the Browns' attorney made a demand less than a month after the accident that, if accepted by Shelter and Brennan, would have required Brennan to file a bad faith lawsuit against Shelter. Thus, Shelter could and did anticipate bad faith litigation against it from nearly the beginning. In seeking legal advice with regard to those anticipated claims, Shelter was not passing off to its outside counsel the role of an adjuster handling the claim against Brennan. All of this is evident from the documents submitted to the Court for review.

Shelter hired its attorneys at the Foland Wickens firm specifically to represent Shelter, as opposed to them being hired to represent or work on the Browns' injury claims against Brennan. Mr. Crawford and Mr. Maloney were not acting in the ordinary course of Shelter's business of adjusting a claim. Rather, they were retained specifically to protect Shelter's interests as settlement negotiations occurred. They were not doing the work of a claims processor or an adjustor.

CONCLUSION

For the foregoing reasons, Shelter requests that the Court issue a writ of prohibition (i) to prevent Judge Wagner from enforcing any of his February 28, 2018 orders refusing to comply with the January 31, 2018 order of the Western District in the first writ proceeding; (ii) to prevent Judge Wagner from denying Shelter's emergency motion to protect Shelter's privileged communications from the documents Judge Wagner had ordered be disclosed and produced to Shelter's adversaries; and (iii) to prevent Judge Wagner from making available or otherwise compelling Shelter to produce to any other person or entity the privileged documents submitted for *in camera* review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Rule 84.06(c) that:

(i) This brief complies with the limitations contained in Rule 84.06(b); and

(ii) Excluding the cover, this Certificate of Compliance, the Certificate of Service, and signature blocks, this brief contains 9,194 words, as determined by the "word count" tool included in the Microsoft Word software with which the brief was prepared.

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CERTIFICATE OF SERVICE

I hereby certify that, in conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that, on this 16th day of November, 2018, I electronically filed the foregoing using the Missouri Courts eFiling System, which will send notice of electronic filing. I further certify that, on said date, I placed a true and accurate copy of the foregoing for delivery via U.S. Mail to:

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