SC97352

In The
SUPREME COURT OF MISSOURI

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

v.

THE HONORABLE R. MICHAEL WAGNER
Respondent

Original Proceeding in Prohibition
Circuit Court of Johnson County, Missouri
Case No. 13JO-CV01550-01

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

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent, the Honorable R. Michael Wagner, ordered Relator Shelter Mutual Insurance Company to produce to its insured, Nathaniel Brennan, his entire claims file. Shelter refused to produce some of the documents from Mr. Brennan's claims file claiming that they are protected by the attorney-client privilege or the work-product privilege, and seeks a writ of prohibition from this Court. Some facts necessary for the resolution of the issues in this case were omitted from Shelter's statement of facts so Respondent is providing these additional facts.

I. Background.

On December 6, 2009, Kathlene McKeehan-Brown was involved in a car wreck with Shelter's insured Nathaniel Brennan. Ms. Brown sent Shelter an offer to settle her injury claim against Nathaniel Brennan for the limits of his insurance. (*Suggestions Opposing Writ, Exhibit 1, page 103*). Shelter responded by offering to pay Ms. Brown $50,000.00 if she and her husband released their injury and property claims against Nathaniel Brennan, Chris Brennan and Stacy Brennan, and if she and her husband agreed to indemnify and hold harmless the Brennans and those who may be liable on their behalf for all expenses incurred, including attorneys fees, for any claim brought by another tortfeasor for contribution or noncontractual indemnity. (*Id. at p. 81-83, 108-109*). Ms. Brown did not accept. She subsequently obtained a $300,000.00 judgment against Nathaniel Brennan, and filed this equitable garnishment claim against Shelter and Nathaniel Brennan. Mr. Brennan then filed a cross-claim against Shelter for bad faith.

II. The Roles Of The Various Shelter Employees Involved In This Case.

Shortly after Ms. Brown rejected Shelter's offer to settle her claim, Shelter hired the Foland Wickens firm. Shelter told the trial court that Foland Wickens "never represented Nathaniel Brennan, had nothing to do with Nathaniel Brennan" and that their office "wasn't involved in defending him in any way." (*See Petition for Writ, Exhibit LL, p. 252*). According to Shelter, it assigned specific employees to represent the interest of Shelter and communicate with Foland Wickens, and it assigned another line of employees to represent and protect the interest of Shelter's insured, Nathaniel Brennan. (*See Id. at p. 248, 250-51, 252, and 258*). Shelter claims that the two lines of employees were separated. (*Id. at 258*). Shelter also told the trial court that Gary Dauer[1], Brian Waller and Connie Morely were the Shelter employees assigned to communicate with Foland Wickens and protect the interest of Shelter. (*Id.*). While Brian Stegeman, Kathie Nold, and Carter Ross were assigned to protect the interest of Shelter's insured, Nathaniel Brennan. (*Suggestions Opposing Writ, Exhibit 1, p. 66 and 68*).

III. Discovery Dispute.

Pursuant to the decisions in *Grewell v. State Farm Mut. Auto Ins. Co.*, 102 S.W.3d 33, 37 (Mo. banc 2003) (*Grewell I*) and *Grewell v. State Farm Mut. Auto Ins. Co.*,162 S.W.3d 503, 507 (Mo. App. 2005) (*Grewell II*), Nathaniel Brennan requested his entire claims file from Shelter. Shelter refused to produce the entire claims file claiming that some of the documents were protected by the attorney-client privilege or the work-

[1] Shelter's privilege log states that Mr. Dauer is an attorney; he's not. (*Petition for Writ, Exhibit V, page 143; Suggestions Opposing Writ, Exhibit 1, p. 221-22*).

product privilege or both. Shelter produced a privilege log where it also asserted that the requested documents were not part of the claims file. (*Petition for Writ, Exhibit V, page 137-144*). The "basis for privilege" asserted by Shelter for two of the withheld documents was only that the documents were "not part of the claims file." (*Id. at 138*). But Shelter's corporate representative identified Deposition Exhibit 2, Bates numbered from 1 to 453, as a complete copy of Nathaniel Brennan's claims file maintained by Shelter. (*Suggestions Opposing Writ, Exhibit 1, pages 62-63; Suggestions Opposing Writ, Deposition Exhibit 2*). And all of the redacted documents are from that claims file, bates numbered 1 to 453. (*Id.*).

Shelter's privilege log has sixty-five different entries. Of those sixty-five entries, forty-six are "claims notes" from a Shelter employee to the claims file. (*Petition for Writ, Exhibit V, page 137-144*). One is an email to Brian Stegeman from Gary Dauer, and one is from Kathie Nold to the claims file. (*Id. at p.137-138*). The final entry on the privilege log simply says "various" and does not indicate who the "various" communications were between. (*Id. at p.144*). The remaining documents are letters or emails to or from Shelter employees in the line of employees assigned to protect the interest of Shelter and communicate with Foland Wickens and to or from other such employees or Foland Wickens. (*Id. at p.137-144*).

IV. The Allegedly Privileged Documents Were Disclosed To Persons Not Part Of The Line Of Shelter Employees Assigned To Communicate With Foland Wickens.

As discussed above, Kathie Nold, Brian Stegeman, and Carter Ross were assigned the duty of protecting the interest of Nathaniel Brennan; they were not part of the

separate line of employees who were assigned the task of communicating with Foland Wickens. (*Suggestions Opposing Writ, Exhibit 1, p. 66 and 68 and Petition for Writ, Exhibit LL, p. 258*). Nonetheless, it appears from the privilege log that Kathie Nold spoke directly with Mr. Crawford; and Mr. Dauer disclosed Mr. Crawford's communications to Brian Stegeman. (*Petition for Writ, Exhibit V, page 137-138*). Carter Ross reviewed the claims file on several occasions, including December 24, 2010, and January 31, 2013. (*Suggestions Opposing Writ, Exhibit 1, p. 181. Suggestions Opposing Writ, Exhibit 1/Deposition Exhibit 2, SHELTER 00022*). As of January 31, 2013, fifty-six of the documents that Shelter alleges are privileged were in the claims file for Mr. Ross to review. (*Petition for Writ, Exhibit V, pages 137-140*).

Similarly, on or about August 25, 2011, the claim file was overnighted to Paul Link, Jr., (*Suggestions Opposing Writ, Exhibit 1, page 184*). Mr. Link had been hired by Shelter to represent the parents of Nathaniel Brennan in case they were sued for some reason. (*Id. at 185*). He was not one of the persons assigned to protect the interest of Shelter. (*Petition for Writ, Exhibit LL, p. 258).* At the time the claims file was overnighted to Mr. Link, forty of the allegedly privileged documents were in the file. (*Petition for Writ, Exhibit V, page 137-141).*

V. Shelter's Corporate Representative Testified About The Advice Of Its Counsel During Her Deposition.

Shelter's corporate representative testified that Shelter relied upon the advice of "outside counsel" in making the decision to accept or reject any settlement offers in the underlying matter. (*Suggestions Opposing Writ, Exhibit 1, pages 190-95*). "Outside

counsel" in this case referred primarily to "Clay Crawford" and "Jim Maloney." (*Suggestions Opposing Writ, Exhibit 1, page 197*).

Shelter's corporate representative was asked: "in regard to this case specifically, were you involved in rejecting any of the offers made in this case or given advice to that effect?" (*Id. at p. 193, l. 25 – p. 194, l. 2*). Shelter's attorney objected "on the basis that that called for attorney/client privileged communications." (*Id. at p. 194*). Shelter's corporate representative answered anyway stating, "any decisions that we made on how to respond to any correspondence received from [Mr. Gelbach's] office would have gone through outside counsel." (*Id.*). Shelter's corporate representative was then asked: "So what you are telling me then is that Shelter would rely on the advice of outside counsel on whether they accepted or rejected?" She responded, "Yes." (*Id.*). Shelter's corporate representative was then asked, "so asked a little differently, you were not the one that made the decision to accept or reject any settlement offer, correct? She answered, "we would have relied upon the advice of outside counsel to make that decision." (*Id. at p. 194, l. 24 – p. 195, l. 4*). Shelter's corporate representative further disclosed that the amount of the confession of judgment agreed to by Shelter was done at the advice of counsel. (*Id. at p. 197*).

The following exchange also took place during the corporate representative's deposition in which she again discussed the advice of Shelter's counsel:

> Q. Well, your opinion was there was no settlement because you never moved to enforce it, correct?
>
> A. That is not true.

. . . .

A. We believe there was a settlement agreement. However we did not move to enforce it, no.

Q. Why?

A. That was a discussion had with counsel, and it was determined not to proceed on that.

Q. What counsel?

A. Well, in terms of Shelter, it was determined that we would not Personally file such a motion in consultation with Foland Wickens.

(*Id. at p. 242, l. 21 – 24, and p. 243, l. 7 -17*). When asked to give all of the reasons that Shelter made the decision not to try to enforce what it believed to be a settlement agreement that would have protected Nathaniel Brennan, Shelter's corporate representative testified, "again, we consulted with outside counsel. We determined that we were not going to proceed in that fashion." (*Id. at p. 247*).

Finally, with respect to the 537 agreement reached between the Browns, Nathaniel Brennan and Shelter, Ms. Morley testified that Shelter, with the advice of Clay Crawford and Jim Maloney, authorized her to sign on behalf of Shelter. (*Id. at p. 278, l. 19 – p. 279, l. 4*).

VI. Trial Court's Ruling And Shelter's Writ

The trial court entered an order by docket entry on January 22, 2018 stating: "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." (*Petition for Writ, Exhibit BB, page 173*). Shelter filed its initial Petition for Writ of

Prohibition with the Missouri Court of Appeals, Western District, on January 29, 2018. (*Petition for Writ, page 1; Petition for Writ, Exhibit EE, pages 203, 215*). The Court of Appeals issued its Order on January 31, 2018 denying the Petition on the mistaken belief that Plaintiffs were not seeking discovery of communications between Shelter and Attorneys Crawford and Maloney. (*Petition for Writ, Exhibit FF, page 215*). Counsel for Nathaniel Brennan has since made clear that he is seeking his entire claim file maintained by Shelter, including all of the materials identified on Shelter's privilege logs. (*Petition for Writ, page 4 paragraph 6*).

Following a hearing on February 28, 2018, the trial court entered its Order on March 1, 2018 finding, "Nathaniel Brennan is entitled to his entire claims file including all the claims notes, emails and documents listed on Shelter's Privilege Log, Exhibit A." *(Petition for Writ, Exhibit LL, page 243, App 10; Petition for Writ, Exhibit PP, page 282).*

Shelter filed the current Petition for Writ of Prohibition on March 6, 2018, and Suggestion in Opposition were filed on Judge Wagner's behalf on March 19, 2018. (*Petition for Writ*) (*Suggestions Opposing Writ*). The case was submitted to Writ Division on June 12, 2018. (*Respondent's Motion for Rehearing, page 8*). On June 26, 2018, without the benefit of briefing or oral argument from either party**,** the Court of Appeals issued its opinion holding that Mr. Brennan is not entitled to his entire claims file. (*Respondent's Motion for Rehearing, page 9*). On October 30, 2018, this Court ordered transfer.

ARGUMENT-RESPONSE TO RELATOR'S POINT I

I. Standard Of Review.

A. A Trial Court's Ruling On Discovery Is Reviewed For An Abuse of Discretion.

Missouri appellate courts have consistently held that trial courts have "broad discretion in controlling, managing, and administering the rules of discovery." See, e.g., *State ex rel. Kander v. Green*, 462 S.W.3d 844, 847 (Mo. App. 2015) (citation omitted) and *State ex rel. Crowden v. Dandurand*, 970 S.W. 2d 340, 343 (Mo. banc 1998). Consequently, appellate courts "interfere with the trial court's exercise of discretion regarding discovery issues only when [they] deem it to have abused its discretion." *Id.* Shelter, as the party seeking the writ, has the burden of proving that the trial court abused its discretion. See *Kander*, 462 S.W.3d at 48. To sustain its burden, Shelter must show that the trial court's ruling is "clearly against the logic of the circumstances then before the court *and* is so arbitrary *and* unreasonable as to shock the sense of justice *and* indicate a lack of careful consideration." *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364, 374 (Mo. App. 2010) (emphasis added)(citation omitted).

B. A Writ Should Not Issue Unless It Is Demonstrated "Unequivocally That There Exists An Extreme Necessity For Preventive Action."

In *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985), this Court explained that courts should only exercise their discretionary authority to issue a writ of prohibition "when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventive action." Consequently, "Courts should employ the writ judiciously and with great restraint." *Id.* Similarly, with respect to writs

of mandamus, which Shelter seeks in the alternative, Shelter "must allege and *prove* that [it] has a clear, unequivocal, specific right to the thing claimed." *State ex rel. BNSF Ry. Co. v. Neill*, 356 S.W.3d 169, 172 (Mo banc. 2011)(emphasis added).

II. Summary Of Grounds Supporting The Trial Court's Ruling

Nathaniel Brennan is entitled to production of the documents included on Shelter's privilege log and submitted for *in camera* review for multiple reasons. First, Shelter did not sustain its burden of proving each and every element necessary to support the applicability of the privilege. Second, in *Grewell v. State Farm Mut. Auto Ins. Co.*, 102 S.W.3d 33, 37 (Mo. banc 2003) (*Grewell I*), this Court established the rule that a liability insurer's claims file belongs to the insured, and all of the documents Shelter refused to produce were part of Mr. Brennan's claim file. See also, *Grewell v. State Farm Mut. Auto Ins. Co.*, 162 S.W.3d 503, 507 (Mo. App. 2005) (*Grewell II*). Third, Shelter waived any alleged privilege. Fourth, Shelter is attempting to use the attorney-client privilege in a fundamentally unfair manner by attempting to shield from their insured the when where and whys of its ordinary claims handling process and decisions by farming that work to "outside counsel." For all of these reasons, Respondent respectfully requests that this Court deny Shelter's petition.

III. Shelter Failed To Meet Its Burden Of Proving That The Attorney/Client Privilege Applied.

The attorney/client privilege is found in § 491.060 RSMo. In *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61–62 (Mo. banc 1999), this Court explained that the testimonial privileges granted by that statute "are to be strictly construed against the

privilege." Furthermore, "The circumstances, facts and interest of justice dictate whether" the attorney/client privilege is applicable to a particular situation. See, *State v. Gerhart*, 129 S.W.3d 893, 898 (Mo. App. 2004).

As the party claiming the privilege, Shelter bore the burden of proving that the privilege applied. See *Ratcliff v. Sprint Missouri, Inc., 261 S.W.3d 534, 549* (Mo. App. 2008). Its failure to prove "any element of the privilege causes the claim of privilege to fail." *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 70 (Mo. App. 1997). The party seeking to invoke the privilege must not only adduce sufficient evidence to prove each and every element of the privilege, but it must also persuade the trial court to credit its evidence. *State v. Hooper*, 552 S.W.3d 123, 130 (Mo. App. 2018). Here, Shelter did not adduce sufficient evidence to prove each and every element of the privilege much less persuade the trial court to credit its evidence.

To succeed on its claim of attorney/client privilege, Shelter had to produce sufficient evidence, and persuade the trial court to credit such evidence, of the following:

1) Information was transmitted by voluntary act of disclosure;

2) Between a client and his lawyer;

3) In confidence; and

4) By a means which, so far as the client is aware, discloses the information to no third-parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted.

Id. at 130-31. Shelter failed to sustain its burden, and therefore, "the trial court ha[d] no basis for deciding that the attorney/client privilege should attach, and [was] obligated to reject the application of the privilege to the matters at issue." *Id.* at 131.

A. At Least 47 Of The Allegedly Privileged Communications Were Not Between Attorney And Client.

To sustain its burden, Shelter had to produce evidence of and persuade the Trial Court that the allegedly privileged communications were between Shelter[2] and its attorney. *Id.* at 130-31. As demonstrated by Shelter's privilege log, 46 of the 65 allegedly privileged communications were between a Shelter employee, who may or may not be a "client", and the claims file. In other words, none of these 46 communications were between Shelter and its lawyers; rather, the communications were between Shelter's employees and the claims file: A file Nathaniel Brennan had free and open access to; it belonged to him. *Grewell I*, 102 S.W.3d at 37 and *Grewell II*, 162 S.W.3d at 507.

In addition, at least two allegedly privileged documents were either to or from a Shelter employee who is not considered a "client" for the purposes of the attorney-client privilege. Which employees of a corporation are deemed to be the "client" does not appear to be a question directly addressed by this court. In *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. banc 1995), this court found that a "corporate officer" was a client for attorney-client privilege purposes, but did not analyze what, if any, general category of employees would be considered a "client". The Court of Appeals has

[2] Whether the Shelter employees who communicated with Foland Wickens were the "client" for attorney-client privilege purposes is discussed below.

considered the issue and found that to be deemed a client for the purposes of the privilege, an employee must show, among other things, that the "subject matter of the communication is within the scope of the employee's corporate duties." *DeLaporte v. Robey Building Supply Inc,* 812 S.W.2d 526, 531 (Mo. App. 1991).

Here, Shelter emphasized to the trial court that Foland Wickens "never represented Nathaniel Brennan, had nothing to do with Nathaniel Brennan" and that their office "wasn't involved in defending him in any way." *(See Petition for Writ, Exhibit LL, p. 252).* Their duty was only to Shelter. Shelter further assured the trial court that they had two lines of employees: one line included employees who had the duty of protecting Shelter and communicating with outside counsel, and the other line included employees who had the duty of protecting Nathaniel Brennan. According to Shelter, those two lines of employees were separated. *(Id. at 248, 250-51, 252, and 258).* The line of employees assigned to protect the interest of Shelter and communicate with its counsel included only Morley, Dauer, and Waller. *(Id. at 258).*

Shelter's corporate representative testified that Kathie Nold and Brian Stegeman were both assigned to represent Nathaniel Brennan's interest. *(Suggestions Opposing Writ, Exhibit 1, p. 66).* Consequently, receiving communications from Foland Wickens, attorneys who allegedly had nothing to do with the defense of Nathaniel Brennan, would not be within the scope of their duties. In other words, they were not "clients" for purposes of the attorney client privilege. See, *DeLaporte*, 812 S.W.2d at 531. Thus, Shelter failed to sustain its burden of proving that the allegedly privileged communications with those two employees were between attorney and "client".

Shelter failed to produce evidence of and persuade the trial court that 47 of the communications were between attorney and client. Furthermore, Shelter has failed to prove that the facts and circumstances of [this] particular case demonstrate unequivocally that there exists an extreme necessity for preventive action." See, *Derfelt*, 692 S.W.2d at 301. Thus, Respondent respectfully requests that this Court deny Shelter's petition.

B. Shelter Failed To Produce Evidence Of Or Persuade The Trial Court That The Allegedly Privileged Communications Were Made "In Confidence" Between Attorney And Client.

The third element Shelter was required to prove was that the communications were made "in confidence." *Hooper*, 552 S.W.3d at 130-31. "In confidence" is generally defined to mean communicating as a secret or as a private matter not to be divulged. Here, all of the allegedly privileged documents were either directly communicated to the claims file by way of "claims notes" or, after received by a Shelter employee, who may or may not qualify as a "client", delivered to the claim file. *(Petition for Writ, Exhibit V, p. 137-144).* Shelter made no showing that the communications made to or transmitted to the file were made "in confidence." And, the evidence the trial court did have demonstrated that communications to the file were not kept in confidence.

In an apparent attempt to persuade the Trial Court that the communications from Shelter's attorney were kept in confidence, Shelter' told the Court: "[Shelter] took a reasonable step, they separated the people, Dauer and Morley, who would be responsible for communicating with their counsel, they separated them away from the people who were defending the case." *(Shelter's Exhibit LL, p. 258).* But, this representation is not

borne out by the privilege log or the testimony of Shelter's corporate representative. Consider the following:

- Shelter's corporate representative testified that Brian Stegeman was assigned to represent and protect the interest of Nathaniel Brennan. *(Suggestions Opposing Writ, Exhibit 1, p. 66).* In other words, he was a person involved in "defending the case." The privilege log shows that Mr. Stegeman was in communication with Dauer about Mr. Crawford's recommendations to Shelter. *(Petition for Writ, Exhibit V, p. 137).*
- The privilege log further reflects that Mr. Crawford was communicating with Kathie Nold who, like Brian Stegeman, was responsible for representing the interest of Nathaniel Brennan. *(Suggestions Opposing Writ, Exhibit 1, p. 66 and Petition for Writ, Exhibit V, p. 138).*
- On January 31, 2013, the claims file was reviewed by Carter Ross who was a Shelter employee assigned to protect the interest of Nathaniel Brennan. *(Suggestions Opposing Writ, Exhibit 1, p. 68-69. Suggestions Opposing Writ, Exhibit 1/Deposition Exhibit 2, SHELTER 00022).* On January 31, 2013, fifty-six of the allegedly privileged documents were in the claims file. *(Petition for Writ, Exhibit V, p. 137-140).*
- The claims file was sent to Paul Link, Jr. who was hired to defend a possible case against Mr. and Mrs. Brennan, not Shelter. *(Suggestions Opposing Writ, Exhibit 1, p. 184-85).* And at the time the file was sent to

Mr. Link, forty of the allegedly privileged documents were in the file. *(Id. and Petition for Writ, Exhibit V, p. 137-141).*

As these examples demonstrate, the allegedly privileged communications were not kept in confidence.

More generally, Shelter knew, after the *Grewell* opinion in 2003, that Nathaniel Brennan had "free and open access" to the claims file. *Grewell I*, 102 S.W.3d at 37. Consequently, when Shelter was communicating to the claims file, it knew its insured had free and open access to those communications. In other words, they were not communicated as a private matter not to be divulged; rather, the communications were made to and put in a file that Shelter knew was freely accessible to Mr. Brennan.

The free and open access to the file is demonstrated not only by this Court's decision in *Grewell*, but also by Shelter's conduct in mailing the file to Paul Link, Jr. who was hired to defend a possible case against Mr. and Mrs. Brennan. *(Suggestions Opposing Writ, Exhibit 1, p. 184-85).* Similarly, Shelter employees, like Carter Ross, who were assigned to protect the interest of Nathaniel Brennan, as opposed to Shelter, could and did review the file. *(Suggestions Opposing Writ, Exhibit 1, p. 68-69 and 181).*

Shelter failed to adduce any evidence that the allegedly privileged communications were kept in confidence, much less persuade the trial court to credit such evidence. Consequently, Shelter failed to sustain its burden of proof. The trial court's ruling therefore was not "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a

lack of careful consideration." See, *Noble*, 316 S.W.3d at 374. Respondent respectfully requests that this Court deny Shelter's petition.

C. Shelter Failed To Produce Evidence Of Or Persuade The Trial Court That Communicating The Allegedly Privileged Communications To The Claims File Did Not Disclose The Information To "Third-Parties".

Finally, Shelter had the burden to adduce evidence, and persuade the Trial Court to credit such evidence, that the means by which Shelter disclosed the information protected it from being disclosed to "third-parties" who were not reasonably necessary "for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted." *Hooper*, 552 S.W.3d at 130-31. Shelter assured the trial court that it separated the people who were representing its interest from those that were representing the interest of their insured. *(Petition for Writ, Exhibit LL, p. 250-251 and 258).* According to Shelter, the people representing solely its interest included the attorneys at Foland Wickens, and Shelter employees Gary Dauer, Connie Morley, and Brian Waller. *(Id, p. 267).* Thus, anyone other than those employees are third-parties who are not necessary to accomplish the task for which Foland Wickens was giving advice: the protection of Shelter.

Shelter's counsel specifically told the trial court that he "had nothing to do with Nathaniel Brennan", and that his office "wasn't involved in defending him in any way." *(Petition for Writ, Exhibit LL, p. 252).* Consequently, it would be completely unnecessary for anyone, including Shelter employees, involved in defending Shelter's insureds, to communicate with Foland Wickens or be advised about the communications with Foland Wickens. Yet, the privilege log demonstrates that Foland Wickens

communicated with Kathie Noland, and Gary Dauer told Brian Stegeman about communications with Foland Wickens. *(Petition for Writ, Exhibit V, p. 138 and 137).* Furthermore, all of the communications with Foland Wickens were put in the claims file, a file that was available to be reviewed by, and was reviewed by, Shelter employees who were assigned to represent the interest of the insured, as opposed to Shelter. *(Suggestions Opposing Writ, Exhibit 1, p. 68-69).* What's more, Shelter sent the claim file to attorney Paul Link, Jr. who was hired to represent Nathaniel Brennan' mother and father, not Shelter. *(Suggestions Opposing Writ, Exhibit 1, p. 184-85).*

Shelter offered no evidence that Ms. Noland, Mr. Stegeman, Mr. Ross or Mr. Link were "reasonably necessary for the transmission of the [allegedly privileged] information or for the accomplishment of the purpose for which it is to be transmitted." Thus, it failed to sustain its burden of adducing evidence, much less persuading the trial court to credit such evidence, that the attorney/client privilege applied.

IV. Shelter's Documents Are Discoverable Because They Are Part Of Nathaniel Brennan's Claim File.

All of the documents included on Shelter's privilege log and submitted for *in camera* review are part of Nathaniel Brennan's claims file. (*Suggestions Opposing Writ, Exhibit 1, pages 62-63; Suggestions Opposing Writ, Deposition Exhibit 2* and *Petition for Writ, Exhibits V and W, pages 137-44*) and see the Court of Appeals opinion at 1. This Court, in *Grewell I*, established the rule that a liability insurer's claims file belongs to the insured. *Grewell II*, 162 S.W.3d at 507. Thus, regardless of alleged work product or attorney/client privileges, the documents belong to Nathaniel Brennan. *Id.*

The insurer in *Grewell II* argued that despite this Court's ruling in *Grewell I*, it could withhold documents from the claims file that were work product. The Court of Appeals not only disagreed, but found the insurer's conduct created "an inference of evil motive and reckless conduct, in that [insurer's] conduct was directly contrary to the Supreme Court's instruction to provide the insured with unrestricted access to the file." *Id.* at 509. Likewise, here, Shelter's argument that it can withhold work product documents from Nathaniel Brennan's claims file is "directly contrary to the Supreme Court's instruction to provide the insured with unrestricted access to the file."

While the insurer in *Grewell I* and *II* did not raise the attorney client privilege, the rule announced by those Courts does not, and should not, include any exception for documents related to communications with attorneys hired by the insurer, especially when the insurer is relying on the attorneys' review and evaluation in making decisions on behalf of the insured. (*Suggestions Opposing Writ, Exhibit 1, p. 194, l. 24 – p. 195, l. 4.*). "In *Grewell I*, the Missouri Supreme Court made it clear that an insurance claim file belongs to the insured." *Grewell II*, 162 S.W.3d at 507 (citing *Grewell I*, 102 S.W.3d at 37). "The Court concluded that State Farm should provide the Grewells with *free and open access* to their file." *Id.* (emphasis added). The insurer has a duty to provide its insured "*unimpeded access* to the claims file" because of "the nature of the protected relationship between the insurer and insured." *Id.* (emphasis added). Nothing about the Court's statements indicates an exception to the bright-line rule.

Shelter seeks to escape the rule announced in *Grewell I* and *Grewell II* by arguing that the claims notes and some of the documents contained in the "claims file" are not

really part of the claims file because Shelter was not acting on behalf of Nathaniel Brennan when it prepared the claims notes or correspondence. (*See Substitute Brief of Relator, pages 30-32*). Shelter does not get to pick and choose when it owes its insureds a fiduciary duty. The fiduciary duty is contracted for by payment of a premium and the relationship is recognized and protected by Missouri law:

> The circuit court erred in granting State Farm's summary judgment motion on the basis that Missouri does not recognize a fiduciary relationship between the insurer and insured. *Grewell I* provides authority for such a relationship, and the Grewells presented facts to show State Farm breached its fiduciary duty by refusing to provide copies of the claims file maintained on behalf of the insured.

Grewell II, 162 S.W.3d at 509. Shelter fails to recognize that until the claims against its insured, Nathaniel Brennan, were finally resolved, it was in a fiduciary relationship with him, even if a conflict arose. In *Grewell I*, State Farm also had conflicting interests with its insureds, yet the Court in *Grewell II* recognized that "State Farm breached its fiduciary duty by refusing to provide copies of the claims file maintained on behalf of the insured." *Id.*

Without obtaining their entire claims files, which shows exactly how and why decisions were made by the insurer during the claims handling process, insureds would have no recourse against insurers for failing to accept offers to settle within coverage and resulting excess judgments. Other courts have recognized and acknowledged that an insurer's fiduciary duty to its insureds is something that is always owed even when conflict arises:

> Under *Rauch*, it is assumed that once an insured makes a claim, the insured and insurer are automatically adversaries. But, under *Grewell* (which was decided after *Rauch*), it is assumed that once there is a communication between the insured

> and insurer, an attorney-client-like relationship is established, and any claim file that results belongs to the insured. The Court follows Grewell.

McConnell v. Farmers Ins. Co., 2008 U.S. Dist. LEXIS 14039 (W.D. Mo 2008).

Shelter argues that it makes no difference where privileged communications are put. However, in *State ex rel. Tracy v. Dandurand*, this Court ruled that otherwise privileged materials are discoverable when the materials are inadvertently put in a file sent to an expert. 30 S.W.3d 831, 835-36 (Mo. banc 2000). In that case, after acknowledging the sanctity of the attorney-client privilege, the Missouri Supreme Court reasoned that:

> All materials given to a testifying expert must, if requested, be disclosed. This indeed is a "bright line" rule, as our *Rule 56.01(b)(4)* requires. It is clear, understandable, and does not require the application of a multi-prong test.

Id. at 836. No privilege was found even though the documents were inadvertently provided by the client's attorney to a third person hired by the attorney to work on behalf of the client. *Id.* at 835-36.

Like the holding in *State ex rel. Tracy*, this Court's ruling and longstanding holding in *Grewell I* is clear, understandable, and does not require the application of a multi-prong test. An insured is entitled to free and open access to the claims file; it belongs to the insured. Thus, as in *Tracy*, the *Grewell* Court established a bright line test, and the file, even if it contains allegedly privileged documents, belongs to the insured. *Grewell II*, 162 S.W.3d at 507 (citing *Grewell I*, 102 S.W.3d at 37).

In its attempt to persuade this court that *Grewell* "simply does not apply" to the facts of this case, Shelter cites *Grinnell Mutual Reinsurance Corp. v. Rambo*, 2014 WL

12616792 (W.D. Mo. May 27, 2014).[3] *(See Shelter's brief at 33).* Despite devoting two pages of its brief to quoting the *Rambo* case, Shelter omits the most significant part of the *Rambo* Court's discussion of the *Grewell* Opinion. In distinguishing *Grewell* from the case before it, the *Rambo* court stated:

> In this case, it is not the insured seeking production of the insurance file from their insurer, as was the case in *Grewell.* Rather, in this case, a third party is seeking to compel production of the insurance company's file. **This is a very different factual scenario**.

Id. at *2 (emphasis added). Here, as in *Grewell,* it is Shelter's insured who is seeking the production of the insurance claims file from Shelter. Consequently, this case, like *Grewell*, presents a "very different factual scenario" than the facts at issue in *Rambo*. In other words, *Grewell* applies to the facts of this case, not *Rambo*.

Grewell is in accord with other state and federal courts that have addressed the discoverability of a claims file in the context of a bad faith case. *See, e.g.*, *Boone v Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001); *Transport Ins. Co. Inc. v. Post Express Co., Inc.*, No. 91 C 5750, 1996 U.S. Dist. LEXIS 688 (N.D. Ill. January 22, 1996); *Dunn v. National Security Fire & Cas. Co.*, 631 So.2d 1103 (Fla. App. 1994); *LaRocca v. State Farm Mut. Auto Ins. Co.*, 47 F.R.D. 278 (W.D. Pa. 1969).

In the bad faith case of *Silva v. Fire Ins. Exchange*, the insured requested that the insurer produce her entire claims file. 112 F.R.D 699 (D. Mont. 1986). The insurer objected on the basis of the attorney-client privilege. *Id.* The Court overruled the

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[3] Shelter's cite "*2014 WL 1266792"* omits the number "1".

insurer's objection and granted the insured's motion to compel production reasoning that except in extraordinary circumstances:

> The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim.

Id. at 700.

This Court, in *Grewell I*, established the rule that a liability insurer's claims file belongs to the insured. *Grewell II*, 162 S.W.3d at 507. That rule does not, and should not, include any exception for documents related to communications with attorneys hired by the insurer, especially when the insurer is relying on the attorneys' review and evaluation in making decisions on behalf of the insured. In light of *Grewell I* and *II*, and the facts discussed above, Judge Wagner's ruling was not "clearly against the logic of the circumstances then before [him] *and* … so arbitrary *and* unreasonable as to shock the sense of justice *and* indicate a lack of careful consideration." Because Shelter has failed to sustain its burden of proving that Judge Wagner abused his discretion, Respondent respectfully requests that his Court deny Shelter's petition.

V. Any Claims Of Privilege By Shelter Regarding Documents Submitted For *In Camera* Review Have Been Waived.

Nathaniel Brennan is entitled to production of the documents included on Shelter's privilege log and submitted for *in camera* review for the additional reason that Shelter has waived any alleged privileges by voluntarily disclosing those documents to "third-parties", and also by injecting the issue of its reliance upon the advice of outside counsel, Foland Wickens.

A. Waiver By Voluntary Disclosure To Third Parties.

Both the attorney-client privilege and work product immunity may be waived by voluntary disclosure of the allegedly protected information. See, *Tracy*, 30 S.W.3d at 835 and *Edwards v. Missouri State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 27 (Mo. App. 2002).

As discussed in section III above, Shelter voluntarily disclosed the allegedly privileged documents to several people not in the "line" of Shelter employees who were assigned to communicate with Foland Wickens and protect the interest of Shelter. For example, Shelter sent the documents to Paul Link, Jr. who was not hired to represent Shelter, but to represent the interest of Mr. and Mrs. Brennan in the event they were sued. *(Suggestions Opposing Writ, Exhibit 1, p. 184-85 and Petition for Writ, Exhibit V, p. 137-141).* Allegedly privileged communications were also disclosed to Kathie Nold and Brian Stegeman, Shelter employees who were both assigned to represent the interest of Nathaniel Brennan, not Shelter. *(Suggestions Opposing Writ, Exhibit 1, p. 66 and Petition for Writ, Exhibit V, p. 137-138).* As discussed above, Ms. Nold and Mr. Stegeman were not "clients" for purposes of the attorney client privilege. See, DeLaporte, 812 S.W.2d at 531.

Finally, Shelter disclosed the allegedly privileged documents by putting them in the claims file. Shelter knew as of 2003 that Nathaniel Brennan had free and open access to the claims file, and that the file belonged to him. *Grewell I* and *II*. Nonetheless, Shelter placed its allegedly privileged documents in that file. Furthermore, as a result of being in the claims file, non-client Shelter employees who were assigned to represent the

interest of Nathaniel Brennan, as opposed to Shelter, and had no duty to communicate with Foland Wickens, also had access to the documents. Carter Ross is just one example of a non-client Shelter employee who reviewed the claims file which included allegedly privileged documents. *(Suggestions Opposing Writ, Exhibit 1, p. 68-69 and Petition for Writ, Exhibit V, p. 137-140).*

The facts set forth above support the finding that Shelter voluntarily disclosed allegedly privileged documents to "third-parties", and therefore, the trial court did not abuse his discretion in finding that the privileges asserted by Shelter did not apply.

B. Waiver By Placing The Advice Of Counsel At Issue.

A party also waives its privilege "by placing the subject matter of the privileged communications in issue in the litigation." *State v. Timmons*, 956 S.W.2d 277, 285 (Mo. App. 1997); see *Sappington v. Miller*, 821 S.W.2d 901, 905 (Mo. App. 1992). The rationale behind the rule is fairness, and "is grounded in the notion that it is unfair to permit a party to make use of privileged information as a sword when it is advantageous for the privilege holder to do so, and then as a shield when the party opponent seeks to use privileged information that might be harmful to the privilege holder." *State ex rel. St. Johns v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002) and see also, *State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 103 (Mo. App. 1994) (citing *State ex rel. Southwestern Bell Public's. v. Regan*, 754 S.W.2d 30, 32 (Mo. App. 1998).

Courts from other states have found that such advice has been placed at issue in response to a bad faith claim regardless of whether the insurance carrier directly plead advice of counsel as a defense. In *State Farm Mut. Auto. Ins. Co. v. Lee*, the Arizona

Supreme Court found that State Farm had impliedly waived the attorney-client privilege despite State Farm's disavowal of an advice of counsel defense. 13 P.3d 1169, 1177 (Ariz. banc 2000). Rather, the court determined that State Farm's defense of reasonableness based on its claims personnel's beliefs and investigation as to the state of the law, part of which was information received from counsel, waived the privilege and permitted the discovery of the files and communication between State Farm and its counsel. *Id*. at 1184.

Similarly, the Delaware Supreme Court in *Tackett v. State Farm Fire & Cas. Ins. Co*., when finding an implied waiver despite the absence of an express advice of counsel defense, determined the issue of waiver rested on a fairness rationale. 653 A.2d 254, 259 (Del. 1995). The Court noted that "Where an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of counsel, it cannot deny an opposing party an opportunity to uncover the foundation for those assertions…" *Id*. The court went on to find State Farm had implicitly waived its attorney-client privilege by alleging the Tackett claim was handled routinely and any delay was attributable to inaction by the Tacketts. *Id*. at 260. As a result, State Farm could not invoke the privilege to "shield itself from disclosure of the complete advice of counsel relevant to claims handling." *Id*.

Shelter in the present case relied on the advice and communications with Attorney Crawford in making claims handling and settlement decisions. Shelter's corporate representative testified that Shelter relied on advice of counsel to not accept the Brown Plaintiffs' settlement offers and to not sign the Shelter/Vulgamott and other agreements,

thereby placing that advice at issue and making it discoverable in Nate Brennan's bad faith case. (*Respondent's Suggestions Opposing Writ, Exhibit 1, pages 193-195*). She also testified that Shelter relied on the advice of outside counsel to refrain from enforcing a settlement agreement that Shelter believed it had reached, on behalf of Nathaniel Brennan, with the Browns, even though that alleged settlement agreement would have fully protected Mr. Brennan. (*Id. at p. 242, l. 21 – 24, p. 243, l. 7 -17 and p. 244, l. 5-11*).

Arguing against waiver, Shelter claims that it "has made no allegations here. All of the allegations in this case are against Shelter." *(Shelter's Brief at 37).* Contrary to Shelter's argument, it made allegations in 18 separate affirmative defenses. *(See Shelter's Answer to Brennon's Cross-Claim at Pgs. 10-19).* In addition, for its 19th affirmative defense, Shelter reserved its right to assert additional affirmative defenses stating, "Shelter reserves its right to assert additional or supplemental defenses to Brennan's claims, whether as affirmative defenses or otherwise as this matter progresses." *(Id. at p. 19).* Contrast these facts with the facts at issue in the case upon which Shelter relies for its argument: *State ex rel. Behrendt v. Neill*, 337 S.W. 3d 720,730 (Mo. App. 2011).

In *Behrendt*, the Court of Appeals specifically noted that any uncertainty as to the waiver issue was "answered when Relators formally waived, of record, any advice of counsel defense." Here, Shelter has not formally waived, of record, any advice of counsel defense but has, instead, reserved its right to assert any additional defenses which presumably includes an advice of counsel defense.

Furthermore, the testimony at issue here is more similar to the testimony at issue in *Knight v. M.H. Siegfried Real Estate, Inc.*, 647 S.W.2d 811,816 (Mo. App. 1982). In that case, the Court rejected the argument that the testimony, even though solicited on cross-examination, was involuntary and did not waive the privilege. The Court explained that unless there were circumstances showing that the client "was surprised or misled" … "the decision treating such testimony on cross-examination as being involuntary and not constituting a waiver are hardly supportable." *Id*. (citation omitted). The Court further noted that the client who was testifying "was himself an attorney", and that the questions posed to him were "general and did not compel an answer that would disclose privileged communications." Consequently, the Court held that the testimony resulted in the waiver of the attorney/client privilege. *Id*.

Likewise, here, the waiver occurred during the testimony of Shelter's senior litigation attorney and corporate representative, Connie Morley. And, there is no claim of surprise or that Shelter was misled. Finally, like the witness in *Knight*, Shelter's corporate representative, attorney Connie Morley, initially cited the advice of counsel in response to a general question, not a question that attempted to "extort" such an answer from her. When asked if she talked to her supervisor about any proposed 537 agreements in the case, Shelter's corporate representative responded:

> If I had received – well, when I receive any kind of these agreements, I would forward those to Mark Jones and *with outside counsel*, we would make a decision on what we were going to do in response.

(Suggestions Opposing Writ, Exhibit 1, p. 191)(italics added).

The following exchange also took place during Shelter's corporate representative's deposition in which she disclosed additional advice from counsel:

> Q. Well, your opinion was there was no settlement because you never moved to enforce it, correct?
>
> A. That is not true.
>
> . . . .
>
> A. We believe there was a settlement agreement. However we did not move to enforce it, no.
>
> Q. Why?
>
> A. That was a discussion had with counsel, and it was determined not to proceed on that.
>
> Q. What counsel?
>
> A. Well, in terms of Shelter, it was determined that we would not personally file such a motion in consultation with Foland Wickens.

(Id. at p. 242, l. 21 – 24, and p. 243, l. 7 -17). Plaintiffs' counsel did not "extort" an advice of counsel answer from Shelter; rather, Shelter voluntarily put the advice of its counsel at issue.

Finally, Shelter's position that there was not a waiver as a result of its corporate representative's testimony being "extorted" conflicts with cases that hold that an objection to a question is waived if not made before an answer is given. See, e.g. *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107,109 (Mo. App. 1981). In *Gipson*, the Court explained that an objection based on attorney-client privilege is waived unless it is raised "when the question calling for disclosure of privileged matters is asked and before it is answered." *Id.* (citation omitted). See also *State ex rel. Mueller v. Dixon*, 456 S.W.2d

594, 597 (Mo. App. 1970) where the court held that a party's answer to an interrogatory, without objection, waived the party's claim of work product privilege.

Nathaniel Brennan is entitled to production of his entire claims file. Any alleged privilege has been waived; thus, Judge Wagner did not abuse his discretion in ordering production of the entire claims file. Shelter has failed to sustain its burden of demonstrating that "the facts and circumstances of [this] particular case demonstrate unequivocally that there exists an extreme necessity for preventive action", and therefore, Respondent respectfully requests that this Court deny Shelter's petition.

VI. Shelter Has Invoked The Privileges In A Fundamentally Unfair Way.

Nathaniel Brennan is entitled to production of the documents included on Shelter's privilege log and submitted for *in camera* review for the additional reason that Shelter is attempting to use the alleged privileges in a fundamentally unfair manner. Shelter had outside counsel participate in its ordinary claims handling process and decisions in an effort to protect that decision-making process from discovery to escape liability for any potential bad faith on its part.

Our Court of Appeals has held:

> Privilege may also be waived when invoked in some fundamentally unfair way. The so-called "fairness doctrine" is grounded in the notion that it is unfair to permit a party to make use of privileged information as a sword when it is advantageous for the privilege holder to do so, and then as a shield when the party opponent seeks to use privileged information that might be harmful to the privilege holder. *In re Von Bulow*, 828 F.2d 94, 101 (2nd Cir. 1987). The rationale is that a party should not be able to use a privilege to prejudice an opponent's case or to disclose some selected communications for self-serving purposes. *U.S. V. Bilzerian*, 926 F.2d 1285, 1292[2] (2nd Cir. 1991). Accordingly, a privilege may be waived when a party asserts a claim that in fairness requires examination of

> protected communications. *Id*. at 1292. Without calling it the "fairness doctrine", Missouri courts apply its rationale when analyzing privilege waiver issues.

State ex rel. St. Johns Reg'l Med. Ctr. v. Dally, 90 S.W.3d 209 at 215 (Mo. App. 2002). Here, Shelter is using the privilege to prejudice Brennan's bad faith case, and to disclose only selected communications for self-serving purposes. Fairness requires that Nathaniel Brennan be allowed to discover the documents and communications at issue.

"Missouri courts have historically invoked a 'fairness' rationale to preclude a privilege holder from using the privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence." *State ex rel. St. Johns Reg'l Med. Ctr.*, 90 S.W.3d at 216; see *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 672 (Mo. banc 1993); see also *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 32 (Mo. App. 1988); *State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 103 (Mo. App. 1994). Allowing the use of privilege to preclude discovery under the current circumstances would allow an insurer to protect all documentation regarding the claims handling process from discovery by hiring "outside counsel" to represent the insurer's interests at the beginning of the claims process. Insurers such as Shelter could then employ outside counsel to make tough decisions, such as deciding whether or not to accept a settlement offer and shield all the details regarding that decision-making process from the insured.

This also gives insurers like Shelter the advantage of disclosing favorable parts of the claims handling process by strategically choosing what decisions to involve outside counsel in, and with whom outside counsel communicates. Essentially, if privilege were

allowed to be invoked in situations such as this, insurers could shield any unfavorable information from the insured as long as outside counsel is involved in making the tough claims handling decisions that would give rise to an insured's claim for bad faith.

In addition, the current discovery dispute centers on alleged advice pertaining to how Shelter should adjust and resolve the Browns claims made against Nathaniel Brennan and offers they made to settle. The period of time at issue was one in which Shelter was performing a contractual claims obligation owed to Mr. Brennan by handling and adjusting claims made against him by the Browns and deciding whether to accept their offers of settlement. (*Suggestions Opposing Writ, Exhibit 1, pages 101-104, Deposition Exhibit 2*).

Courts across the country have held that a lawyer's involvement in the ordinary course of claims handling does not justify the invocation of privilege to prevent the discovery of relevant information. See *Mission Nat. Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986); *Aviation Services, Inc. v. Gulf Ins. Co*., 205 F.R.D. 65, 69 (D. Conn. 2001) ("To the extent an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply."); *St. Paul Reinsurance Co. Ltd. v. Commercial Financial Corp*., 197 F.R.D. 620 (N.D. Iowa 200); *Harper v. Auto Owner's Ins. Co*., 138 F.R.D. 655, 671 (S.D. Ind. 1991) ("To the extent that this attorney acted as a claims adjuster, claims process supervisor, or claims investigation monitor…the attorney-client privilege would not apply."); *Nat. Un. Fire Ins. Co. v. Transcanada Energy USA, Inc*., 119 A.D.3d 492, 493 (N.Y. App. Div. 2014) ("Documents prepared in the ordinary course of an insurer's investigation of

whether to pay or deny a claim are not privileged, and do not become so merely because the investigation was conducted by an attorney.").

This rule principally flows from the concept that an insurance carrier should not be able to restrict the discovery of otherwise discoverable information by seeking the involvement of outside counsel in performing the ordinary course of the carrier's business. *Aviation Services, Inc*., 205 F.R.D. at 69 ("An insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations."); *Cedell v. Farmers Ins. Co.*, 295 P.3d 239, 245 (Wash. banc. 2013) ("To permit a blanket privilege in insurance bad faith claims because of the participation for lawyers hired or employed by insurers would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices.). Thus, an insurance company cannot, by its own actions, turn otherwise discoverable documents into privileged documents. *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 49 F.R.D. 54, 57 (S.D.N.Y. 1970). Documents prepared in the ordinary course of an insurance company's investigation are not privileged and an insurance company cannot cloak them in privilege merely by having an attorney create the document. *Id.*

Shelter's privilege log indicates that Attorney Crawford was involved in the claims handling process. Kathie Nold, the claims adjustor, and her supervisor, Brian Stegeman, were assigned to protect Nate Brennan's interests regarding the underlying matter. (*Suggestions Opposing Writ, Exhibit 1, pages 56-57 and 66; Suggestions Opposing Writ, Deposition Exhibit 2, pages 1, 9*). Neither one was in the line of employees who had the duty of communicating with outside counsel or protecting

Shelter's interest. *(See Petition for Writ, Exhibit LL, p. 258).* Yet, Shelter's privilege log shows that Mr. Crawford communicated directly with Ms. Nold, and that Mr. Dauer communicated Mr. Crawford's recommendations to Mr. Stegeman. (*Respondent's Suggestions Opposing Writ, Exhibit 1, page 66 and Petition for Writ, Exhibit V, pages 137-38*). Finally, Shelter's corporate representative testified that Shelter sought the advice of Clay Crawford on how to respond to the Browns offers to settle their claims against Mr. Brennan. (*Respondent's Suggestions Opposing Writ, Ex. 1, pages 190-194*).

Shelter argues that the alleged privileged communications were all created in anticipation of future litigation, however courts have held that anticipation of litigation is presumed unreasonable regarding communications during the claims handling process:

> Fed. R. Civ. P. 26(b)(3) requires that a document or thing produced or used by an insurer to evaluate an insured's claim in order to arrive at a claims decision in the ordinary and regular course of business is not work product regardless of the fact that it was produced after litigation was reasonably anticipated. It is presumed that a document or thing prepared before a final decision was reached on an insured's claim, and which constitutes part of the factual inquiry into or evaluation of that claim, was prepared in the ordinary and routine course of the insurer's business of claim determination and is not work product. Likewise, anticipation of litigation is presumed unreasonable under the Rule before a final decision is reached on the claim.

Lindley v. Life Investors Ins. Co. Of America, 267 F.R.D. 382 at 399 (N.D. Okla. 2010) (quoting *Harper*, 138 F.R.D. at 663-664 ; see also *Morrison v. Chartis Property Cas. Co.*, 2014 U.S. Dist. LEXIS 27302 (N.D. Okla. March 4, 2014)(ongoing investigation of plaintiff's claim did not become privileged simply because a lawsuit was filed); and *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331 (E.D. Pa. 1999)(finding plaintiff's bad faith claim can included evidence of the insurer's bad faith that occurred after the filing of the

complaint). The communications at issue here all occurred before a final decision was reached on the Browns' claims against Nathaniel Brennan.

Nathaniel Brennan is entitled to production of the documents included on Shelter's privilege log and submitted for *in camera* review because Shelter is attempting to use the alleged privileges in a fundamentally unfair way. The documents at issue are discoverable in this matter and Judge Wagner did not abuse his discretion in ordering production of the unredacted documents. Consequently, Respondent respectfully requests that this Court deny Shelter's petition.

VII. Shelter's Documents Submitted For *In Camera* Review Are Not Protected By Work-Product Privilege.

Finally, even if Shelter did not waive its alleged work-product privilege, the Trial Court did not abuse its discretion is ordering Shelter to produce the documents because Shelter failed to sustain its burden of proving that the documents are in fact protected by the work-product privilege.

As discussed in detail above, it is well settled in Missouri that the work-product doctrine may not be invoked for documents or communications contained within an insured's claims file. *Grewell I*, 102 S.W.3d at 37 and *Grewell II*, 162 S.W.3d at 509. Here, like in *Grewell I and II*, the documents and communications at issue were all part of Nathaniel Brennan's claims file. (*Suggestions Opposing Writ, Exhibit 1, pages 62-63; Suggestions Opposing Writ, Deposition Exhibit 2* and *Petition for Writ, Exhibits V and W, pages 137-44*) and see the Court of Appeals opinion at 1. Thus, they are not protected by the work product privilege. *Id.*

Additionally, contrary to Shelter's argument, the work-product privilege does not protect the mental impressions of its employees involved in protecting the interests of Nathaniel Brennan. "The work product privilege precludes an opposing party from discovering materials created or commissioned by counsel in preparation for possible litigation. In addition, it protects the 'thoughts' and 'mental processes' of the attorney preparing a case." *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004). Thus, two elements must both be present for the work product doctrine to apply. First, the documents sought must include the thoughts and impressions of an attorney. Second, the documents must be created in anticipation of possible litigation.

The work product doctrine does not apply to the subject claims notes and communications because they do not reflect the mental impressions of an attorney. The entries themselves reflect only the mental impressions of Shelter employees and their recordation in Nathaniel Brennan's claims file. (*Suggestions Opposing Writ, Exhibit 1 and Deposition Exhibit 2*). The work product doctrine does not apply to notes reflecting claims activity created internally by Shelter. In addition, the notes that reference communications with outside counsel reflect Shelter's mental impressions after speaking with its attorney—not the attorney's mental impressions. Shelter's mental impressions—after consulting whatever sources it deemed appropriate, including any attorneys—when deciding to reject settlement offers or making other decisions on behalf of its insured are exactly what is at issue in Nathan Brennan's cross-claim for bad faith refusal to settle. They are not the mental impressions of an attorney and are therefore not subject to the work product doctrine.

Finally, the claims activity notes and communications related thereto are discoverable even if they contain some work-product privileged materials.

> [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…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.

Missouri Rule of Civil Procedure 56.01(b)(3). Claims files consist of present sense impressions and contemporary statements containing information considered in denial of a claim for which insureds are unable to obtain a substantial equivalent. *O'Boyle*, 299 F.Supp. at 705. The need for these notes is not only "substantial" but overwhelming.

The discovery dispute at issue here arises in the context of Nathaniel Brennan's bad faith claim against Shelter. A bad faith refusal to settle action will lie when a liability insurer: (1) reserves the exclusive right to contest or settle any claims; (2) prohibits the insured from voluntarily assuming any liability or settling any claims without consent; and (3) is guilty of fraud or bad faith in refusing to settle a claim within the policy. See *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818 (Mo. En Banc. 2014). A bad faith refusal to settle action arises from an insurer's breach of its duty to settle third party claims in good faith. *Scottsdale* at 828 and 829. "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).

An insurance company's "state of mind" when deciding whether to settle a claim is recorded in the insured's claims file. The claims file is the best evidence what the

insurance company did and why, including the communications, internal and external, upon which the company relied in making decisions. The claims file—including all claims activity notes—is a unique, contemporaneously prepared history of the company's handling of the claim. Thus, the file is directly relevant to Mr. Brennan's cross-claim for bad faith refusal to settle, and he cannot obtain the "substantial equivalent" of this material through any other means of discovery.

Nathaniel Brennan is entitled to production of the documents included on Shelter's privilege log and submitted for *in camera* review because such documents are not protected by the work-product privilege and are discoverable in this matter. Consequently, Judge Wagner did not abuse his discretion in ordering production of Mr. Brennan's unredacted claims file. Respondent respectfully that Shelter's petition be denied.

CONCLUSION

Shelter has failed to sustain its burden of demonstrating that Judge Wagner's ruling, in light of the facts and law set forth above, was "clearly against the logic of the circumstances then before [him] *and* … so arbitrary *and* unreasonable as to shock the sense of justice *and* indicate a lack of careful consideration." Because Shelter has failed to sustain its burden of proving that Judge Wagner abused his discretion, Respondent respectfully requests that his Court deny Shelter's Petition for Writ of Prohibition and for such further relief as the Court deems proper.

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RULE 84.06(c) CERTIFICATION

Pursuant to Supreme Court Rule 84.06(c), the undersigned hereby certifies that: (1) this brief was served pursuant to Rule 103.08; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 11,643 words, as calculated by the Microsoft Word software used to prepare this brief.

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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 26th day of December, 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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