IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL. RONNIE CHRISTIAN

Relator

v.

THE HONORABLE JACQUELINE COOK

Respondent

S.C. No. 087570

RELATOR'S BRIEF

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RONNIE CHRISTIAN

TABLE OF CONTENTS

* * *

TABLE OF CASES AND OTHER AUTHORITIES

* * *

JURISDICTIONAL STATEMENT

Deborah Parsons and Matt Cantrell, Sr.'s, son, Matt, Jr., was killed in a motor vehicle accident that occurred on September 23, 1999. When State Farm failed to settle their wrongful death claim they filed suit against Relator, Ronnie Christian, and the other driver. The case was tried and Relator was found liable for Matt, Jr.'s death and a Judgment was entered against Relator for $3,000,000 actual damage and $1,000,000 aggravated circumstance damages plus prejudgment interest.

Deborah Parsons and Matt Cantrell, Sr., filed an equitable garnishment action against State Farm and Relator pursuant to Missouri Revised Statute §379.200. Ronnie Christian filed a cross-claim against State Farm for bad faith for failing to timely settle with Plaintiffs. Ronnie Christian filed a request for State Farm to produce his insurance claims file related to the September 23, 1999 car wreck. State Farm objected. The trial court refused to order State Farm to produce Ronnie Christian's entire insurance claims file. Relator sought a Writ from the Missouri Court of Appeals, which was denied on February 24, 2006. Relator sought a Writ from this Court, which was preliminarily granted. This Court has jurisdiction to hear this case. See Supreme Court Rules 94 and 97 and V.A.M.S. Const. Art. 5, §4.

* * *

POINT RELIED ON WITH PRIMARY AUTHORITIES

I. RELATOR IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO ORDER STATE FARM TO PRODUCE THE ENTIRETY OF RONNIE CHRISTIAN'S INSURANCE CLAIMS FILE OR, IN THE ALTERNATIVE, AN ORDER PROHIBITING RESPONDENT FROM SUSTAINING STATE FARM'S OBJECTIONS TO PRODUCING THE ENTIRETY OF THE FILE BECAUSE NO PRIVILEGE APPLIED TO PLECLUDE THE PRODUCTION OF THE ENTIRE FILE IN THAT THE MISSOURI SUPREME COURT HAS FOUND THAT AN INSURED IS ENTITLED TO FREE AND OPEN ACCESS TO HIS INSURANCE CLAIMS FILE, AND ANY ALLEGED PRIVILEGE WAS WAIVED WHEN STATE FARM PUT THE DOCUMENTS IN RONNIE CHRISTIAN'S INSURANCE CLAIMS FILE, A FILE THAT THIS COURT HAS HELD BELONGS TO THE INSURED.

Allstate Indemnity Company v. Ruiz, 899 So. 2d 1121 (Fla. 2005)

Grewell v. State Farm Mutual Automobile Insurance Company, 102 S.W.3d 33 (Mo. En Banc. 2003)

Grewell v. State Farm Mutual Automobile Insurance Company, 162 S.W.3d 503 (Mo.App. W.D. 2005)

State ex rel. Jennifer Welch (Tracy) v. Dandurand, 30 S.W.3d 831 (Mo. En Banc. 2000)

* * *

STATEMENT OF FACTS

On September 23, 1999, Micah Gaus and Ronnie Christian were racing when Gaus collided head-on with the vehicle Martin Gentry was driving. The collision killed Gentry and Gaus' passengers, Matthew Cantrell, Jr., and Amy Brown. Plaintiffs, Deborah Parsons and Matt Cantrell Sr., were the parents of Matt Cantrell, Jr. (See Plaintiffs' Petition, Exhibit A.)[1] State Farm insured Ronnie Christian's legal liability for this accident through his parents' policy with limits of liability of $25,000 per person and $50,000 per accident. State Farm opened a claims file and undertook to investigate, settle and defend Ronnie Christian in accordance with its contractual obligations.

William Graham was the "Team Leader" for State Farm's claims department and he was in charge of handling this loss and the subsequent claims and civil suits. (See Exhibits A and G.) Plaintiffs offered to settle their wrongful death claim for Ronnie Christian's per person policy limit of $25,000 for a full release. State Farm offered $20,000. Later, Plaintiffs, through their attorney Andrew Gelbach, offered to settle their claim for the death of their son for $16,666.67, the remaining "policy limits," with a Missouri Revised Statute §537.065 Agreement. State Farm refused to accept Plaintiffs' offer. (See Exhibit G at pp. 122, 126-130, Appendix B at pp. 173-174 and Appendix D.)

On December 17, 1999, Mr. Graham sent a copy of Ronnie Christian's insurance claims file to Attorney Dale Beckerman and asked him to contact him after reviewing it.

[1] The references, unless otherwise noted, are to Relator's "Index to Exhibits" filed with Relator's Petition.

(See Exhibit K, "Confidential Consultant's File at p. 161, which is Mr. Graham's Auto Claim Committee Report without the redactions and the General Claims Decision pp. 152 through 165.) Thereafter, all of the letters Mr. Graham sent to Plaintiffs' counsel were written in consultation with Mr. Beckerman. (See Exhibit K at p. 162.)

Mr. Graham recorded in Ronnie Christian's claims file the reason why State Farm would not be a party to any settlement agreement.

> "We told him [Mr. Gelbach] State Farm would not be a party to any agreement concerning the settlement of the matter … We have several other cases where this is the same scenario and we have refused to agree to an assignment where State Farm has to be a party to it." (See Exhibit G at p. 129.)

In his deposition Mr. Graham testified that if State Farm agreed to protect Ronnie Christian in this case with the type of agreement Plaintiffs were requesting, it would have an impact on other cases because Plaintiffs' attorney would request it in the next case. (Appendix B at p. 176 and 177.)

Mr. Graham said State Farm was concerned about having "one set of rules today" and "then next want to do it tomorrow … I mean it certainly would have been argued against us if we would have done today if we refused to do it again." (Appendix C at pp. 68 and 69.) "We get into a bad faith issue to that in a hurry." (Appendix C at p. 70.) The "reality of it" is if State Farm agreed to enter into a 537.065 agreement in this case, State Farm would have to do it in every case. (Appendix C at pp. 114-115.) It would be very difficult to justify doing it in the Cantrell/Parsons case and not doing it in the next case. (Appendix C at pp. 115-116.)

After suit was filed, the case was tried to the Court on October 31 and November 1, 2000, resulting in a judgment for Deborah Parsons and Matt Cantrell Sr. of $3,000,000 for actual damages and $1,000,000 for aggravated circumstances damages against Ronnie Christian.[2] In addition, the Court awarded prejudgment interest of $250,768.47 on Plaintiffs' actual damage award and $83,590.62 on their award for aggravated circumstances damages pursuant to §408.040 RSMo. (See Exhibit B.)

On December 21, 2000, Deborah Parsons and Matt Cantrell filed an equitable garnishment action against State Farm and Ronnie Christian seeking the State Farm insurance money pursuant to Missouri Revised Statute §379.200. (See Exhibit C.) State Farm paid $16,666.67 into the Circuit Court, the remaining policy limits, $1,393.189 for prejudgment interest on $16,666.67, and $201.30 for post-judgment interest on $16,666.67. (See Appendix F.) Approximately three (3) months later State Farm paid an additional $116,024.72 for post-judgment interest. (See Appendix G.)

In April 2002, Ronnie Christian filed a cross-claim against State Farm for bad faith settlement practices for failing to timely settle Plaintiffs' wrongful death claim within his liability coverage when it had the opportunity to do so, which caused excess judgments being rendered against him. He sought actual and punitive damages. (See Exhibit D.)

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[2] Just before trial, Ronnie Christian in an effort to protect his financial interest entered into a Missouri Revised Statute §537.065 Agreement with Plaintiffs and paid $1,000 out of his pocket. There was no assignment of the bad faith claims. (See Appendix C.)

Ronnie Christian filed a production request (paragraph 6) directed to State Farm requesting that State Farm produce his entire insurance claims file concerning the subject accident. (See Exhibit E.) State Farm objected. (See Exhibit F.) State Farm ultimately produced portions of Ronnie Christian's insurance claims file and redacted portions of the Auto Claim Committee Report prepared by William Graham claiming "attorney client-privilege" with attorney Dale Beckerman. (See Exhibit G.) State Farm then produced a "privilege log" that listed 39 faxes and letters from Ronnie Christian's insurance claims file that were not produced. (See Exhibit H.) The privilege log listed the April 11, 2000, Auto Claim Committee Report, but redacted two (2) paragraphs. The reason given was "attorney-client privilege" with Mr. Beckerman and "work product." (See Exhibit H.) Later, State Farm submitted a "Supplemental Privilege Log" listing 106 more faxes and letters from Ronnie Christian's insurance claims file that State Farm had not produced. (See Exhibit I.) The Supplemental Privilege Log listed primarily faxes, letters and memos from and to Dale Beckerman and William Graham and his boss, Jim McClintock, who was the Claims Section Manager for State Farm. The basis listed was "attorney-client privilege" and "work product." The log also listed William Graham's claim status reports of March 2, March 20 and December 28, 2001, to Jim McClintock.

Later, State Farm submitted yet another "Supplemental Privilege Log" for the Claims Consultant file listing 28 more faxes, letters and memoranda out of Ronnie Christian's insurance claims file not produced by State Farm. (See Exhibit J.)

State Farm later produced the Claims Consultant file. In that file was another copy of the Auto Claim Committee Report, the Regional State Farm Claim's office

decision and the General Claim's decision to not accept Plaintiffs' settlement offers, and specifically, Plaintiffs' offer to settle Matt Cantrell's wrongful death claim for $16,666.67 with a Missouri Revised Statute §537.065 Agreement. (See Exhibit K.) The paragraphs redacted in the originally produced Auto Claim Committee Report were not redacted in this document. The two (2) paragraphs previously concealed from Ronnie Christian, said this:

> "On December 17, 1999, I sent a copy of the file to Attorney Dale Beckerman and asked him to contact me after he had reviewed it."
>
> "All of my letters to Mr. Gelbach after that date [12-30-1999] were written in consultation with Dale Beckerman."
>
> (See Exhibit K at pp. 161-162.)

At a hearing concerning the production of Ronnie Christian's insurance claims file, State Farm requested that Judge Cook, the trial judge, not review the "privileged" documents because of the "sensitivity" of the information in the letters and memos and because she would be hearing the equitable garnishment and bad faith case. (Exhibits M, p. 13, N, P and S.)

A hearing was held on August 20, 2004. Judge Cook appointed the Probate Judge, Judge Campbell, to review the "privileged" documents out of Ronnie Christian's insurance claims file. (See Exhibit L.)

On October 25, 2004, a hearing was held before Judge Campbell. (See Exhibit M.) On November 15, 2004, Judge Campbell found the documents in the claims file

were not discoverable based on the "work product" doctrine and "attorney-client privilege." (See Exhibit M.) Judge Cook adopted his findings without reviewing the documents. (See Exhibit P, pp. 3 and 4.)

On July 5, 2005, Ronnie Christian and the Plaintiffs filed a Motion for Rehearing after the Court of Appeals' decision in Grewell v. State Farm Mutual Automobile Insurance Company, 162 S.W.3d 503 (Mo.App. W.D. 2005). (See Exhibit N.) On remand from Grewell I, State Farm refused to turn over to the Grewells all of the documents in the Grewells' insurance claims file. State Farm claimed the documents were privileged as "work product." The Western District, in Grewell II held that the Grewells had a "right to full disclosure of all documents in the file" despite State Farm's claim of "privilege." Id at 507 and 508.

A hearing was held on July 14, 2005, before Judge Cook. (See Exhibit O.) At the July 14, 2005, hearing, Mr. Beckerman clarified for Judge Cook that it was State Farm's practice at that time to keep a single claims file and all of the documents State Farm contended were work product or privileged were intentionally put in and kept in Ronnie Christian's insurance claims file. (See Exhibit O, pp. 10 and 11.) Judge Cook said that she was in the "unenviable position" of not having had the "privilege of being able to view" the documents. (See Exhibit O, p. 11.) Judge Cook then set forth the three issues this way: First, does Grewell mandate State Farm to turn over Ronnie Christian's entire insurance claims file to him. Second, whether any claim of privilege was waived by State Farm intentionally putting the letters and memos in Ronnie Christian's insurance

claims file. Third, if the correspondences were written by Mr. Beckerman as part of the claims process, was there any "privilege" at all. (See Exhibit O, pp. 11 and 12.)

At a hearing on July 20, 2005, Judge Cook said "I understand that my ruling seems to be in contradiction with Grewell, which says that all the claims file is to be opened and accessed." (Exhibit P at pp. 3 and 4.) The trial court was again asked to review the letters to determine Mr. Beckerman's involvement in writing the letters for William Graham on behalf of Ronnie Christian and the content of those letters. The Court said "maybe the Court of Appeals will come back and say, 'Judge Cook, you know, when there is this motion for rehearing, you, yourself, should review them.'" Mr. Gelbach asked Judge Cook to review the letters and determine their character and content. Mr. Beckerman objected. Judge Cook then said to Mr. Beckerman, "you can't have it both ways, and that's really what you are asking me." "You are asking me not to look at them." "I don't see any case law that mandated that I have a Master look at it." "How can I make a knowing, intelligent ruling on a Motion for Reconsideration if I've never looked at the documents." (See Exhibit P, pp. 9 and 10.) If the letters Mr. Beckerman wrote for William Graham are for the benefit of Ronnie Christian is kind of a "quasi area." (See Exhibit P, p. 12.) "I do urge the Missouri Court of Appeals for the Western District to take a look at this case and see whether I have properly applied the law…." (See Exhibit P, pp. 16 and 17.)

Mr. Gelbach then asked whether the Court was going to look at the documents. Judge Cook said, "I am not going to look at the documents. If the Court of Appeals

believes that I should look at these documents, I would encourage them to remand the case to me to do that…." (See Exhibit P, p. 20.)

The parties' Motion For Rehearing and Reconsideration was denied. (See Exhibit Q.) A Writ was filed with the Missouri Court of Appeals, Western District, on January 30, 2006. (See Exhibit T.) The Missouri Court of Appeals on February 24, 2006, denied the Writ. (See Exhibit U.) Relator filed his Writ with this Court.

* * *

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO ORDER STATE FARM TO PRODUCE THE ENTIRETY OF RONNIE CHRISTIAN'S INSURANCE CLAIMS FILE OR, IN THE ALTERNATIVE, AN ORDER PROHIBITING RESPONDENT FROM SUSTAINING STATE FARM'S OBJECTIONS TO PRODUCING THE ENTIRETY OF THE FILE BECAUSE NO PRIVILEGE APPLIED TO PLECLUDE THE PRODUCTION OF THE ENTIRE FILE IN THAT THE MISSOURI SUPREME COURT HAS FOUND THAT AN INSURED IS ENTITLED TO FREE AND OPEN ACCESS TO HIS INSURANCE CLAIMS FILE, AND ANY ALLEGED PRIVILEGE WAS WAIVED WHEN STATE FARM PUT THE DOCUMENTS IN RONNIE CHRISTIAN'S INSURANCE CLAIMS FILE, A FILE THAT THIS COURT HAS HELD BELONGS TO THE INSURED.

A. STANDARD OF REVIEW

The trial court's decision refusing to order State Farm to turn over Ronnie Christian's entire insurance claims file should be reviewed under an abuse of discretion standard. See State ex rel. Nixon v. Kinder, 129 S.W.3d 5 (Mo.App. 2003).

B. SCOPE OF DISCOVERY AND BURDEN OF PROOF

Pursuant to Missouri Supreme Court Rule 56.01(b)(1), a party may obtain discovery regarding any matter so long as it appears reasonably calculated to lead to the discovery of admissible evidence. The rule states in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action….

It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The party seeking discovery shall bear the burden of establishing relevance.

Here, Relator sought from his insurance company, State Farm, the production of his claims file related to the defense of Plaintiffs' claim and civil suit for the death of their son. This Court has declared that an insured is entitled to free and open access to his insurance claims file. See Grewell v. State Farm Mutual Auto. Ins. Co., 102 S.W.3d 33 (Mo. En Banc. 2003). In Grewell the Court likened the insurance claim file to the file of a client held by an attorney. Id. at 37.

There is no dispute that the claims file is relevant; rather, State Farm asserts that documents within Ronnie Christian's claims file are protected under the attorney-client privilege and work-product doctrine. As the party asserting privilege, State Farm has the burden to establish that the material is in fact not discoverable. See State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 70 (Mo.App. 1997). In that case, the Court stated, "where a privilege is asserted and then challenged, the burden rests upon the party claiming the privilege to establish that the material is, in fact, not discoverable." Id. To satisfy this burden, State Farm is obligated to supply the Court with sufficient information to enable the Court to determine if the privilege applied. Id.

State Farm failed to sustain its burden to prove that the attorney-client privilege and/or work product doctrine applied to materials within Ronnie Christian's insurance claims file, and therefore, the Trial Court erred and exceeded her jurisdiction in

sustaining State Farm's objection to the production of various documents within his claims file. In addition, the trial court failed to follow this Court's holding in Grewell which mandates that an insured have free and open access to the entire claims file. Finally, State Farm waived any alleged privilege when it placed the allegedly privileged documents into the claims file which belonged to the insured, Ronnie Christian.

C. GREWELL MANDATES FREE AND OPEN ACCESS TO THE ENTIRE CLAIMS FILE

This Court in Grewell held the insured should be given free and open access to their insurance claims file. In that case (like here), Charles Grewell, the State Farm insured, asked for his claims file with State Farm. The claims file originated as a result of an automobile accident involving Mrs. Grewell and James Kephart. State Farm denied the Grewells' request for their insurance claims file. The Grewells brought a declaratory judgment suit pursuant to Missouri Revised Statute §527.010 seeking the contents of the file. This Court held that the insurer-insured relationship is analogous to the attorney-client relationship. In State ex rel. Cain v. Barker, 540 S.W. 2d 50 (Mo. En Banc. 1996), this Court expressly recognized the insurer-insured relationship and its similarity to the attorney-client relationship. Specifically, this Court stated that a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through his attorney, and the communication is intended for the information or assistance of the attorney in so defending him. Barker at 54, citing

Privilege of Communications or Reports Between Liability or Indemnity Insurer and Insured, 22 A.L.R.2d 659 (1952).

Following the direction of Cain, this Court recognized that the Grewells' insurance policy required State Farm to defend them when they became subject to a claim covered by that policy. As such, the Grewells' communications with State Farm and its employees were subject to a privilege analogous to that between an attorney and the client.

This Court said the emergence of this privilege between the insured-insurer also brings with it some of the "additional protections" that the attorney-client relationship has traditionally provided. The Court said, "When considering a client's access to their file, this Court has previously stated that the client's files belong to the client, and not the attorney representing the client." See In The Matter Of Gary M. Cupples, 952 S.W.2d 226, 234 (Mo. En Banc. 1997). This Court concluded that the Grewells' insurance claims file, held by State Farm, was analogous to the file of a client held by an attorney, and belonged to the Grewells. Consequently, the insured should be provided "free and open access to that file."

In Grewell v. State Farm Mutual Automobile Insurance Company, 162 S.W.3d 503 (Mo.App. W.D. 2005), the Western District revisited the insureds' claims file issue when State Farm, on remand from Grewell I, refused to produce certain portions of the insureds' claims file claiming the documents were protected by the "work product" privilege. The Western District held, "the Supreme Court made it clear that an insurance claims file belongs to the insured." The insured must be given "free and open access" to

the entire insurance claims file. This is "Grewells' right to full disclosure of all documents (emphasis added) in the file." Id. at 507 and 508. The Western District Court held State Farm breached its fiduciary relationship with its insured by refusing on remand to provide the entire insurance claims file, justifying a trial on punitive damages and attorney's fees against State Farm.

From Grewell I and Grewell II, our Courts have held Ronnie Christian's insurance claims file is his file and he is entitled to free and open access to all documents in his claims file. For this reason alone, the Trial Court erred and exceeded her jurisdiction in sustaining State Farm's objections to producing the entire claims file and refusing to order State Farm to produce the file.

D. ATTORNEY DALE BECKERMAN WAS REPRESENTING BOTH THE INTEREST OF STATE FARM AND ITS INSURED, AND THEREFORE, THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVLEGES DO NOT APPLY TO PRECLUDE THE PRODUCTION OF DOCUMENTS TO THE INSURED

State Farm gave Ronnie Christian's claims file to attorney Dale Beckerman. Presumably, Beckerman was acting on behalf of Ronnie Christian, or State Farm had no business turning the confidential file and information of their insured over to attorney Beckerman. For State Farm to maintain otherwise would be untenable. State Farm cannot seriously contend that it took the confidential file of one of its insureds and disclosed that file to an outside party without the consent of the insured. If State Farm did give the claims file to Beckerman so that Beckerman could act on behalf of the insured, then everything that took place in that regard is accessible to the insured. If State

Farm disclosed the claims file to attorney Beckerman to assist State Farm in a potential adversarial role with its own insured, then it has breached its fiduciary obligations to its insured and should be required to disclose all of those communications so the insured can attempt to protect himself against a fiduciary that has acted in a hostile manner.

See the case of RULES OF PROFESSIONAL CONDUCT AND INSURER IMPOSED BILLING RULES AND PROCEDURES, 2 P.3d 806 (Mont. 2000). In this case, the Montana Supreme Court was called upon to review the propriety of an insurance company disclosing billing records showing work done by retained counsel to an outside auditing company. The Court undertook an extensive review of the law dealing with the disclosure of claims file information to others. The Court noted that there is a recognized "magic circle" of individuals to whom attorney confidential information can be disclosed. Included in this "magic circle" are individuals like secretaries, interpreters, counsel for cooperating co-defendant and a parent present when a child consults a lawyer. Id. at 818. The Court held that auditors could end up in an adversarial role against the attorneys or the insured and thus auditors stand in potential conflict with the interest of insureds. The Court concluded that under such circumstances of potential conflict, disclosures could not be made to these third parties without first obtaining informed consent of the insured as required by the Rules of Professional Conduct. Id. at 821-822.

To the extent that State Farm was contemporaneously defending its insured below and at the same time preparing for a potential bad faith case down the road, it could not

disclose confidential information obtained in the defense of its insured to attorney Dale Beckerman because of the clear and obvious conflict that would have existed.

The Auto Claim Committee Report written by William Graham shows that attorney Dale Beckerman was writing all letters (in consultation) for Mr. Graham to respond to Mr. Gelbach's settlement offers during the claims handling process for Ronnie Christian. Mr. Beckerman was a part of the claims process assisting the claims department for Ronnie Christian. Mr. Graham's role was to handle and settle the claims brought against Ronnie Christian as the insurance policy obligated State Farm to do. He asked for Mr. Beckerman's help in responding to settlement letters and offers from the Plaintiffs. This claims process is not something that can contracted out to an attorney and then concealed or hidden from State Farm's insured, Ronnie Christian. See Mission National Insurance Company v. Lilly, 112 F.R.D. 160 (Minn. 1986) where the Court held that an insurance company could not prevent the disclosure of portions of its file because it had utilized lawyers to assist in the claims process. Id. at 163.

A leading insurance commentator has also addressed this issue relying on case law to support the proposition that the claims file should be produced. See Insurance Claims and Disputes 4th, §9:19, where Professor Allen Windt, recognizes that an insurance company "can be expected to vigorously resist producing the [claims] file on the basis that the documents in it were prepared in contemplation of litigation with the insured." But, Professor Windt finds that "the file should be held to be discoverable." Professor Windt then goes on to address several ways in which Courts can deal with the request for production of claims file. Here, State Farm asserts that once the prospect of a bad faith

case arose and it hired Dale Beckerman, that those documents were protected by attorney-client privilege. In rejecting this manner as a proper way of dealing with the claims file, Professor Windt stated:

> "such a rule, however, is arbitrary and serves unjustifiably to reward those insurers that routinely send significant matters to their attorneys. As summarized by one Court, an insurer should not by using an attorney when none is necessary, be able to 'cloak with privilege matters that would otherwise be discoverable.'"

Id. citing Merrin Jewelry Company v. St. Paul Fire and Marine Insurance Company, 49 F.R.D. 54, 57 (S.D.N.Y. 1970).

After discussing various ways in which Courts could handle the matter, Professor Windt states that the correct manner in which to handle the claims file is to hold that "the entire file, up to the date litigation is commenced between the insurance company and the insured, is discoverable because the documents were produced both in anticipation of litigation and in the ordinary course of business and, under the discovery rule, the latter takes precedent. Id. citing Allstate Indemnity Company v. Ruiz, 899 So. 2d 1121, 1130 (Fla. 2005).

Professor Windt explains that "if the document or documents sought to be protected should have been prepared by the insurer regardless of the existence of potential future litigation by virtue of the company's responsibility to the insured to exercise due care before denying liability, the documents should not be extended any immunity." Id. He concluded by finding that an insured's claims file falls within that description.

In the Ruiz case cited by Professor Windt, the Florida Supreme Court stated:

> In no event should parties be permitted to undermine the plain meaning, spirit, and intent of the Legislature's mandate or this pronouncement by attempting to shield documents that pertain to the processing or litigation of the underlying claim by merely asserting that such documents were prepared in anticipation of litigation of the bad faith action. Obviously, files are opened routinely in the insurance business when claims are presented and that type of material should contain an accurate record of the manner in which the matter has been processed.

Ruiz, 899 So.2d at 1130.

Here, the documents in the claims file pertain to the processing or litigation of the underlying death claim, and therefore, that are not protected from discovery by State Farm's mere assertion that the documents were prepared in anticipation of the bad faith action. Id. William Graham was the head of State Farm's claims department and the supervisor on the subject loss of September 23, 1999, and the resulting claims and suits. He, or attorneys hired by State Farm, were negotiating with the claimants and their attorneys to settle the claims for and on behalf of Ronnie Christian. He wrote, with Dale Beckerman's help, letters to attorney Gelbach rejecting settlement offers that would have protected the personal financial interest of Ronnie Christian. Mr. Graham wrote in his Auto Claim Committee Report that "All my letters to Mr. Gelbach after that date [December 30, 1999] were written in consultation with Dale Beckerman." (See Ex. G.)

By comparing the dates of the letters listed in the privilege log with the letters of Mr. Gelbach and Mr. Graham, one can invision the chronology. (See Ex. R.). Mr.

Gelbach's letter is sent to William Graham making a settlement offer. Mr. Graham sends Mr. Gelbach's letter to Mr. Beckerman. Mr. Beckerman writes the response for Mr. Graham and sends it back to Mr. Graham. Mr. Graham has the letter typed and then it is sent to Mr. Gelbach rejecting the settlement offer. This is particularly evident when compared with two (2) other State Farm bad faith cases where Mr. Beckerman's letters have been produced and this is the exact chronology. (See Ex. S.) This letter writing process was all part of the claims handling process for Ronnie Christian and is highly relevant to his bad faith claim against State Farm for refusing to settle. It is highly relevant on Ronnie Christian's punitive damage claim against State Farm, also.

State Farm's motive, intent and reasoning in refusing to accept settlement offers within Ronnie Christian's liability coverage is the very essence of his bad faith claim pled in his cross-claim. State Farm was putting its financial interest ahead of its insured when it rejected the Plaintiffs' settlement offers. State Farm (William Graham) was concerned that if State Farm agreed to the Plaintiffs' 537.065 agreement in this case, it would have to do it in every other case. If State Farm refused to enter into this same type of statutory contract to limit recovery in other cases, it surely was acting in bad faith.

Ronnie Christian has sued State Farm for bad faith. Bad faith is a state of mind, indicated by acts and circumstances, and is provable by circumstantial as well as direct evidence. Zumwalt v. Utilities Insurance Company, 228 S.W.2d 350 (Mo. 1950) and Ganaway v. Shelter Mutual Insurance Company, 795 S.W.2d 554 (Mo.App. 1990). An insurance company, having assumed control of the right to settle claims against the

insured, may become liable in excess of the policy limits, if it fails to exercise good faith in considering offers to settle within the policy limits. Ganaway Id.

There is no attorney-client protection, exclusive of Ronnie Christian between State Farm and Dale Beckerman when Mr. Beckerman is assisting Mr. Graham with writing letters to Mr. Gelbach during the claims process on behalf of Ronnie Christian. If there is such a "relationship," it is part of Ronnie Christian's "representation" and he has a right to see and know what the claims department and Mr. Beckerman were doing and why the case was not getting settled so as to protect him from an excess judgment. State Farm's reason for not settling the Parsons/Cantrell death claim goes to the heart of the bad faith suit and Ronnie Christian's claim for punitive damages against State Farm. If State Farm wanted legal advice for its own liability for failing to settle and thereby exposing its insured to an excess judgment, it should have hired a lawyer who did not take part in the claims handling process with William Graham.

As set forth above, State Farm has the burden of proving the applicability of the attorney-client and/or work product privileges. Claims of privilege are "impediments to discovery of the truth" and as an exception to the rule of evidence are to be "carefully scrutinized." See State ex rel. Health Midwest Development Group, Inc., v. Daugherty, 965 S.W.2d 841 (Mo. En Banc. 1998); State ex rel. State Board of Pharmacy v. Otto, 866 S.W.2d 480 (Mo.App. W.D. 1993) and State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (Mo.App. S.D. 1997). Failure to prove any element of the claimed privilege causes the entire claim of protection to fail. Dixon at page 70. Here, State Farm has not met its burden, and the claims file should have been given to Ronnie Christian.

E. ANY ALLEGED PRIVILEGE HAS BEEN WAIVED

State Farm admits it intentionally put the letters between William Graham and Dale Beckerman in Ronnie Christian's insurance claims file. Any "privilege" has been waived. See State ex rel. Jennifer Welch (Tracy) v. Dandurand, 30 S.W.3d 831 (Mo. En Banc. 2000), Sappington v. Miller, 821 S.W.2d 901 (Mo.App. 1992); State v. Timmons, 956 S.W.2d 277 (Mo.App. 1997) and Baker v. General Motors Corporation, 197 F.R.D. 376 (W.D. Mo 1999). State Farm and Mr. Beckerman knew the letter writing was to be used and sent to Mr. Gelbach, a third party. There was no expectation of privacy. The requirement of confidentiality is lacking ab initio. See In re Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978).

F. THE NEED FOR A BRIGHT LINE TEST

The Grewell Court held that a claims file is like an attorney's file. If a client wants to review the work of his attorney on a matter and requests the file, there is a certain reluctance in the attorney to turn over the file. But the attorney must turn over the file because it is the business of the client and the attorney is a fiduciary. Likewise, if an insured asks his insurance company for the claims file, there is a reluctance to turn the file over and in fact Professor Windt recognized that an insurance company can be expected to rigorously resist producing the claims file. But the insurance company must produce the file because the file represents the business of the insured and if access to the

file is necessary for the insured to protect his own interest, then the insurance company as a fiduciary must turn the file over.

This case demonstrates the efforts that can be undertaken to circumvent this rule. Insurance companies can subcontract out decision making to lawyers and then claim attorney-client privilege or work product. Additionally, insurance companies can begin to prepare a defense of a bad faith claim simultaneously with the defense of the insured. Under these circumstances a carrier may inappropriately make a claim of work product privilege. In General Refractories Co., v. Fireman's Fund Insurance Company, 2000 WL 1137844 (Pa. 2000) the Court discussed why the work product privilege is inapplicable stating, "In a case such as malicious prosecution, or abuse of process, legal malpractice, bad faith or any other action where the opinion of counsel is in question, there is no work product protection. Where the legal opinion of a party's attorney is relevant in an action, it is discoverable."

The General Refractories Court also spoke strongly to the conduct of insurance companies in attempting to hide documents in an attorney's file. The Court noted:

> Where the actions of counsel are placed directly in question by the substantive claim there is no privilege. Where, as here, counsel is integrally involved in claims handling, the facts of the insurance company's dealing with its insured cannot be insulated from discovery. An insurance company may not ignore the advice of counsel concerning its obligations to an insured, cannot seek advice concerning bad faith and thereafter hide their knowledge and the documentation of intent behind a claim of privilege when sued for bad faith. An

> insurance company may not hide knowledge that a claim must be paid or strategies for delay by hiding documents in an attorney's file. As to documents that demonstrate the knowledge and pre-litigation activities of defendant, there is no valid claim of privilege or work product protection and all such documents are to be provided to plaintiff.

Attempts to circumvent the need by an insured for his or her file can only be stopped by a bright line rule which provides the insured access to the entire claims file. To the extent insurers attempt to circumvent the rule by filing documents in a file other than the claims file, the Court should make it clear that all documents generated or obtained in the processing or handling of a claim against an insured belongs to the insured. And in a bad faith case, those documents that demonstrate the knowledge and pre-litigation activities of the insurer are discoverable and not subject to the attorney-client or work-product privilege. This was a rule essentially adopted by the Court in Allstate Indemnity Company v. Ruiz, 899 So.2d 1121 (Fla. 2005) and the General Refractories cases discussed above.

* * *

CONCLUSION

Relator, Ronnie Christian, prays for this Court's Order compelling Judge Cook to order State Farm to produce the entire insurance claims file to Ronnie Christian. In the alternative, Relator prays that this Court remand this case with directions for Judge Cook to review the allegedly privileged documents to determine their nature and character and to issue her decision on their production so that appropriate appellate review can be had thereafter if Ronnie Christian is denied access to his entire file pursuant to State ex rel. Ford Motor Company v. Westbrooke, 151 S.W.3d 364 (Mo. En Banc. 2005).

RESPECTFULLY SUBMITTED,

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CERTIFICATION PURSUANT TO RULE 84.06

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2. This brief contains 7,002 words in compliance with Rule 84.06(b).

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