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 REPLY BRIEF

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POINT RELIED ON WITH PRIMARY AUTHORITIES

RELATOR IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO ODRER 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 PRECLUDE THE PRODUCTION OF THE FILE IN THAT THE MISSOURI SUPREME COURT HAS FOUND THAT AN INSURED MUST BE GIVEN 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.

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

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

Waste Management, Inc., v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991)

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

* * *

RESPONSE TO RESPONDENT'S "STATEMENT OF FACTS"

On page 9 of its Brief, Respondent claims that State Farm retained Deacy & Deacy with respect to the bad faith allegations made against State Farm. Respondent cites Exhibit 6 in its Appendix in support of this allegation. That Exhibit is an Affidavit of James McClintock who is a section manager for State Farm. (Respondent's App. at 21). In his affidavit, Mr. McClintock does not claim that State Farm retained Deacy & Deacy with respect to the bad faith allegation; rather, he states that Deacy & Deacy was retained "to advise and counsel State Farm on claims made by the families of Amy Brown, Mark Gentry and Matthew Cantrell against State Farm's insured, Ronnie Christian." (Respondent's App. at 22). Mr. McClintock goes on to claim that State Farm did not retain Deacy & Deacy to represent the insured, Ronnie Christian. (Respondent's App. at 22). However, Mr. McClintock and State Farm fail to explain how Deacy & Deacy can advise State Farm as to the handling of claims made against Ronnie Christian without representing the interests of Ronnie Christian.

On page 10 of its Brief, Respondent claims, without any cite to the record, "There is no evidence that Deacy & Deacy engaged in 'claim handling'." This statement is belied by the affidavit of James McClintock cited above, wherein he acknowledges that Deacy & Deacy was retained to advise State Farm on claims made against State Farm's insured Ronnie Christian. (Respondent's App. at 22). In addition, the adjuster handling the claims against Ronnie Christian stated that after December 30, 1999, all of his letters to Andrew Gelbach, attorney for the family of Matthew Cantrell, were written in consultation with Dale Beckerman. (See Exhibit K at 162). At that same page, the

adjuster states, “We have kept Mr. Evans advised of all the letters we have received and our replies so he could keep our insured advised.” Mr. Evans is the attorney that State Farm says that it hired to represent Ronnie Christian. However, it is Mr. Beckerman, not Mr. Evans, who State Farm is consulting when replying to settlement demands made against Ronnie Christian and State Farm.

On page 11 of its Brief, Respondent claims that Deacy & Deacy had no role in the negotiation of the settlement agreement entered into between Ronnie Christian and the family of Matthew Cantrell. This allegation is not supported by the record, and the facts discussed in the preceding paragraph demonstrate that this allegation is false.

ARGUMENT

RELATOR IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO ODRER 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 PRECLUDE THE PRODUCTION OF THE FILE IN THAT THE MISSOURI SUPREME COURT HAS FOUND THAT AN INSURED MUST BE GIVEN 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. GREWELL MANDATES FREE AND OPEN ACCESS TO THE ENTIRE CLAIMS FILE.

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

Mrs. Grewell, a State Farm insured, was involved in a car wreck, and State Farm determined that she was 50% at fault. The Grewells disagreed with the determination of

fault and asked for the claims file. State Farm denied the Grewells' request, and therefore, the Grewells brought a declaratory judgment suit pursuant to Missouri Revised Statute §527.010 seeking the contents of the file.

It is interesting to note that this Court declared that the Grewells had free and open access to the claims file even when a bad faith action was not pending. Because the insurer's state of mind is at issue in a bad faith case, what the insurer knew and when it knew it are critical issues in the case. Thus, the reasons for requiring free and open access to the claims file when an insured has a bad faith action against its insurer are even more compelling than the reasons mandating free and open access to the claims file in the Grewell case.

When an insured has a bad faith action against its insurer, the reasons for requiring free and open access to the claims file are even more compelling.

B. DEACY & DEACY WAS REPRESENTING THE INTEREST OF BOTH STATE FARM AND ITS INSURED.

In State ex rel. Cain v. Barker, 540 S.W.2d 50 (Mo. En Banc. 1976), this Court recognized the special relationship between the liability insurer and the insured, which is similar to the relationship of an attorney-client. As recognized in State ex. rel. J.E. Dunn Construction Co., Inc., v. Sprinkle, 650 S.W.2d 707, 710 (Mo.App. W.D. 1983) and Brantley v. Sears Roebuck & Co., 959 S.W.2d 927, 928 (Mo.App. E.D. 1998) this relationship is characterized as one of "identity of interest." The special relationship is based upon such circumstances as the insurer's contractual duty to defend and pay judgment, the insurer's right to exclusively contest or negotiate the liability claim against

the insured, and the insured's obligation to cooperate. See Cain, 540 S.W.2d at 53-57; J.E. Dunn, 650 S.W.2d at 710, n. 1; Brantley, 959 S.W.2d at 928. Consequently, the law imposes fiduciary obligations upon the liability insurer. Id.

Because of this "identity of interest" between the insured and insurer, when Deacy & Deacy advised State Farm as to the handling of the claims against Ronnie Christian, Deacy & Deacy was also acting for both State Farm and Mr. Christian. After all, Deacy & Deacy was advising State Farm as to how it should respond to settlement demands made against its insured, Ronnie Christian and State Farm. (See Exhibit K at 162). Furthermore, State Farm's section manager specifically acknowledged that Deacy & Deacy was retained to advise State Farm on claims made against Ronnie Christian. (Respondent's App. at 22). Nowhere in his affidavit does State Farm's section manager claim that Deacy & Deacy was retained to advise and counsel State Farm only on the issue of Ronnie Christian's potential bad faith claim against State Farm. It is only in the bad faith action that Mr. Christian and State Farm would not have an identity of interest. However, in settling the claims against its insured, the insured and insurer clearly have an identity of interest.

Despite the facts discussed above, State Farm asserts that Deacy & Deacy was only looking out for State Farm's interest, and not the interest of its insured. Even if State Farm told the Deacy & Deacy firm to only consider the interest of State Farm, this fact does not defeat the identity of interest between Ronnie Christian and State Farm. State Farm, with the advice of Deacy & Deacy, was negotiating the claims being asserted against Mr. Christian. Mr. Christian clearly had an interest in the settlement of those

claims. State Farm's bad faith conduct in ignoring the interest of its insured does not defeat the fact that there was an identity of interest.

An argument similar to the one asserted here by State Farm was made and rejected in Waste Management, Inc., v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991). In that case, an insurance company had denied coverage and the insured hired its own attorney to represent it in the underlying action. In the declaratory judgment action filed between the insured and insurer, the insurer requested production of counsel for the insured's files in the underlying action. The insured refused on attorney-client privilege grounds, but the Illinois Supreme Court ordered that the files be produced.

On appeal, the insurer argued that under the common interest doctrine, the attorney-client privilege is unavailable to the insureds. Although the Illinois Supreme Court could not find any Illinois cases on point, they were persuaded by the authority of the following cases: International Ins. Co. v. Peabody International Corp., 1988 W.L. 58611 (N.D. Ill. 1988); Truck Ins. Exchange v. St. Paul Fire and Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975); Southeastern Pennsylvania Transportation Authority v. Transit Casualty Co., 55 F.R.D. 553 (E.D. Pa. 1972); Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988); Goldberg v. American Home Assurance Co., 439 N.Y.S.2d 2 (1981) and Liberty Mutual Ins. Co. v. Engels, 244 N.Y.S.2d 983 (1963).

In reaching its holding, the Illinois Supreme Court stated:

> "Evidence scholars have variously stated that under the common interest doctrine, when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged and the subsequent controversy between the two parties." Id. at 328.

The Court recognized that this is especially so where an insured and an insurer initially have a common interest in defending an action against an injured party and there is a possibility that those communications might play a role in a subsequent action between the insured and his insurer. Id. Citing Goldberg, 439 N.Y.S.2d at 5.

The Waste Management Court found that the insurer and insured had a common interest in defeating or settling the underlying action against the insured, and consequently, the communication by the insureds with their defense counsel was of the kind reasonably calculated to protect or further the common interest. Id.

On appeal, the insureds argued that the common interest doctrine was not applicable because the insurer refused to provide a defense in the underlying suit. The Illinois Supreme Court disagreed. The Court recognized that in the common case, the attorney is provided a joint or simultaneous representation of both parties. However, the Court recognized that the common interest doctrine was also applicable where the attorney, "though neither retained by nor in direct communication with the insurer, acts for the mutual benefit of the both the insured and insurer." Id. at 781. (citation omitted). The Court noted that in matters of defense and settlement, an insured and insurer have

common interests and it is the commonality of those interests which creates the exception to the attorney-client privilege, not the conduct of the litigation. Id. (citation omitted).

Likewise, here, in matters of defense and settlement of the claims against Mr. Christian, State Farm and Mr. Christian have common interests, and the commonality of those interests creates the exception to the attorney-client privilege. This commonality of interests did not disappear in the Waste Management case simply because an attorney was hired by the insured to represent only the insured. So the fact that State Farm hired Deacy & Deacy to represent only its interest does not eliminate the commonality of interests State Farm and Mr. Christian had in the defense and settlement of the claims made against Mr. Christian. And it is this commonality of interests that creates the exception to the attorney-client privilege, not the conduct of the litigation. Id.

State Farm cannot assert on one hand that Deacy & Deacy was hired solely to represent State Farm's interest without any consideration of the interest of Ronnie Christian and then turn around and claim that it was appropriate for it to disclose the entire claims file to Deacy & Deacy when the claims file included correspondence to and from Terry Evans who State Farm admits was hired to represent the interest of Ronnie Christian. State Farm's position seems to be that an insured has no attorney-client privilege with the attorney hired to represent the insured's interest. But, State Farm does have an attorney-client privilege with the attorney it hires to represent its interest.

State Farm's position is not supported by law. The cases hold that those persons who are part of the special relationship between an insured and insurer can communicate with one another and those communications are protected. Even a private attorney for

the insured is part of the special relationship whose communications are protected. See People v. Ryan 197 N.E.2d 15 (Ill. 1964) cited with approval in Barker, 540 S.W.2d at 54. In order to disclose the privileged and confidential information in Ronnie Christian's claims file to the law firm of Deacy & Deacy, State Farm must have intended for Deacy & Deacy to be part of this special relationship between the insured and insurer. In a subsequent action between those who were part of the special relationship, the communications between any of the parties who were part of the special relationship are not privileged. See Keet, 644 S.W.2d at 655.

See also Transport Ins. Co., Inc., v. Post Express Co., Inc., 1996 W.L. 32877 (N.D. Ill. 1996). In that case, an insured brought a bad faith action against its insurer for failing to settle within the policy limits. The Court recognized that bad faith actions, like actions by a client against an attorney, can only be proved by showing exactly how the insurer processed the claim and why the insurer took the action it did. Id. at *3. Because the claims file is a "contemporaneously prepared history of how the insurer actually handled the claim, the need for this information is not only substantial but overwhelming." Id. (citations omitted). The Court found that the insurer's claim file was the only record of how the insurer handled the claim, and therefore, the only evidence of whether the insurer acted in good faith in failing to settle the claim. Id. The Court concluded that the insurer could not invoke the work product or attorney-client privileges to defeat discovery of the complete claims file. Id.

In Central National Ins. Co. of Omaha v. Medical Protective Co. of Fort Wayne, Indiana, 107 F.R.D. 393 (E.D. Mo. 1985), an excess insurer sued the primary insurer for

bad faith refusal to settle the underlying claim. The excess insurer sought documents pertaining to the settlement negotiations of the underlying claim. The primary insurer argued that the information was protected by the attorney-client and work product privileges. Id. at 394. The Court disagreed and granted the excess insurer's motion to compel production of those documents. Id.

In reaching its conclusion, the Court noted that when a lawyer represents two clients in a matter of common interest, the attorney-client privilege "cannot be claimed by one client with respect to communications between him and the attorney in the subsequent action between the two clients." Id. (citations omitted). The Court concluded that even though the case before it was not a direct action between two clients, the rule of law discussed above was applicable. Id.

In Southeastern Pennsylvania Transit Authority v. Transit Casualty Co., 55 F.R.D. 553 (E.D. Pa. 1972), an insured under an excess policy hired attorneys to represent it in an underlying injury claim. The excess insurer did not hire or communicate with the lawyers hired by the insured. Nonetheless, the insured was ordered to produce to the excess insurer all communications from its attorneys containing information and advice as to steps it should take in the underlying litigation. Id. at 555.

In reaching its decision, the Court relied in part on the policy but also recognized that the identity of interests justified requiring the insured to produce the documents. The Court stated:

> "It would be unrealistic to separate the interests of [the insured] and [the insurer] by refusing disclosure of the contested communication which involved the

> defense of [the injured party's] claim when the present lawsuit arises out of that claim. Here, the insurance company and the insured had a common interest in the defense of the suit against the injured party."

Id. at 557. Thus, even though the attorneys were hired solely by the insured to represent it in an underlying injury claim, the identity of interest between the insured and the excess insurer justified disclosure of documents otherwise protected by the attorney client privilege. Id.

The Court in Dunn v. National Security Fire and Casualty Co., 631 So.2d 1103, 1109 (Fla.App. 1994) stated, "In bad faith suits against the insurance company for failure to settle within the policy limits, all materials in the insurance company's claim file up to the date of the judgment in the underlying suit are obtainable, and should be produced when sought by discovery." (citations omitted). The Court further recognized that discovery of the insurer's claims file and litigation file is allowed in a bad faith case over any attorney-client or work product objection. Id.

Like the cases discussed above, LaRocca v. State Farm Mutual Automobile Insurance Company, 47 F.R.D. 278, 280 (W.D. Pa. 1969) involved a bad faith action against an insurer for failing to settle within the policy limits. The insured sought production of the entire claims file. The insurer agreed to produce everything except the correspondence between it and counsel. Id. at 280. In ordering the production of the entire claims file, including correspondence between the insurer and its counsel, the Court noted, "It has long been held that where an attorney acts for two parties, the communications from either are not privileged from disclosure to the other." Id.

(citations omitted). State Farm argued that that rule of law should not apply because plaintiff had the assistance of his own personal counsel. Id. The Court rejected this argument stating, "Nevertheless, the insurance company and its counsel are in command [of] the conduct of the suit, and therefore, act in an agency or fiduciary capacity with respect to plaintiff's interest, regardless of the possibility of plaintiff receiving independent legal advice." Id.

Likewise, here, the fact that Terry Evans had been hired to represent Ronnie Christian does not defeat Ronnie Christian's claim for the entirety of his claims file. State Farm and its counsel, including the Deacy & Deacy firm, were in command of the lawsuit, and were controlling the settlement negotiations of the claims against Mr. Christian. James McClintock, section manager for State Farm, stated in his affidavit that Deacy & Deacy was retained "to advise and counsel State Farm on claims made… against State Farm's insured, Ronnie Christian." (Respondent's App. at 22). State Farm's adjuster admitted that after December 30, 1999, all of his letters to Andrew Gelbach, attorney for the family of Matthew Cantrell, were written in consultation with Dale Beckerman, not Terry Evans. (See Exhibit K at 162). Mr. Evans is the attorney hired to represent Ronnie Christian, but it is Mr. Beckerman, not Mr. Evans, who State Farm is consulting when replying to settlement demands. Consequently, State Farm and its counsel, Deacy & Deacy, were acting in an agency or fiduciary capacity with respect to Ronnie Christian's interest. Thus, communications between State Farm and Deacy & Deacy are not privileged. Id.

C. STATE FARM WAIVED ANY ALLEGED PRIVILEGE.

In Grewell v. State Farm Mutual Auto. Insur. Co., 102 S.W.3d 33 (Mo. En Banc. 2003), this Court held that an insured should be given free and open access to their insurance claims file. Id. at 37. The Court likened the claim file to the file of a client held by an attorney. In the Matter of Cupples, 952 S.W.2d 226, 234 (Mo. En Banc. 1997), this Court found that a client's file belongs to the client and not the attorney representing the client. State Farm admits that it put the documents it now claims to be privileged under the attorney-client privilege or work product doctrine in Ronnie Christian's claims file. Ronnie Christian, the insured, had free and open access to these documents; in fact, he owned the claims file. Thus, State Farm waived any alleged privilege by putting the documents in a file Mr. Christian had free and open access to.

State Farm argues that because the documents were placed in the claims file before the 2003 Grewell decision, it cannot be held to have waived the privilege. State Farm acts as though Grewell is the first decision in the state that ever gave notice to an insurance company that an insured may have access to his or her claims file. However, as early as 1982, the Missouri Court of Appeals, in a case involving State Farm, found that an insured has a right of access to information contained in the claims file. See State Farm Mutual Automobile Ins. Co. v. Keet, 644 S.W.2d 654, 655 (Mo.App. S.D. 1982). In addition, as early as 1976, this Court found that the relationship between a liability insurer and its insured was similar to the relationship of an attorney and client. See State, ex. rel., Cain v. Barker, 540 S.W.2d 50 (Mo. En Banc. 1976). And in 1997, this Court, in Cupples, made it clear that a client's file belongs to the client and not the attorney

representing the client. Cupples, 952 S.W.2d at 234. It is disingenuous of State Farm to claim that these cases did not make it aware of the fact that documents in the claims file were accessible to its insured.

Out of state cases also put State Farm on notice that the claims file was open to an insured. See e.g., Henke v. Iowa Home Mutual Casualty Co., 87 N.W.2d 920, 923 (Iowa 1958) and Chitty v. State Farm Mutual Automobile Ins. Co., 36 F.R.D. 37, 40-42 (E.D. S.C. 1964).

D. STATE FARM'S PUBLIC POLICY ARGUMENT HAS PREVIOUSLY BEEN CONSIDERED AND REJECTED.

In Boone v. Vanliner Insur. Co., 744 N.E.2d 154 (Ohio 2001) the Ohio Supreme Court found that an insurer's claims file containing material showing an insurer's lack of good faith in determining coverage was unworthy of protection under the attorney-client privilege. Id. at 157. The Court noted that it was not finding a waiver of the attorney-client privilege; rather, it was finding an exception to the privilege. Id. at 157.

In reaching its conclusion, the Boone Court rejected the public policy argument asserted by the insurer. The insurer argued:

> "If insureds alleging bad faith are able to access certain attorney-client communications within the claims file, then insurers will be discouraged from seeking legal advice as to whether a certain claim is covered under a policy of insurance."

The Ohio Supreme Court responded stating, "this argument is not well taken because it assumes that insurers will violate their duty to conduct a thorough investigation by

failing, when necessary, to seek legal counsel regarding whether an insured's claim is covered under the policy of insurance, in order to avoid the insured later having access to such communications, through discovery."

Likewise, here, State Farm's argument that access to certain attorney-client communications within the claims file would discourage it and other insurers from seeking legal advice is not well taken. State Farm's argument, like the insurer's argument in Boone, assumes that it and other insurers will violate their duty of good faith by failing, when necessary, to seek legal counsel to insure that they are protecting the interest of its insured. What's more, the argument assumes that State Farm and other insurers will fail to obtain legal advice on matters when necessary just to avoid the insured having access to such communications. The Ohio Supreme Court was unwilling to make the assumptions upon which State Farm's argument relies and Ronnie Christian respectfully suggests that this Court should likewise avoid making any such assumption.

E. THE NEED FOR A BRIGHT LINE TEST.

This Court has recently declared that an insured is entitled to free and open access to his claims file. See Grewell v. State Farm Mutual Auto. Ins. Co., 102 S.W.3d 33 (Mo. En Banc. 2003). In that case, the Court likened the insurance claim file to the file of a client held by an attorney. Id. at 37. In the Matter of Cupples, 952 S.W.2d 226, 234 (Mo. En Banc. 1997), this Court found that a client's file belongs to the client and not the attorney representing the client. These cases provide a clear indication that the entire claims file must be produce to the insured.

State Farm has refused to comply with this Court's holding in Grewell, and Relator can envision other insurers attempting to avoid the production of documents related to an insured's claim by placing the documents in a file called anything but the claims file. To preclude such conduct, Relator respectfully suggests that this Court establish a bright line test that requires an insurer to produce to an insured all documents generated or obtained in the processing or handling of a claim against an insured belongs to the insured. In a bad faith case, those documents that demonstrate the knowledge and activities of the insurer up to the date the bad faith case is filed are discoverable and not subject to the attorney-client or work-product privilege.

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

1. Relator's Attorney: Phillip S. Smith, 1660 City Center Square, 1100 Main, Kansas City, Missouri 64105, Missouri Bar No: 26320.

2. This brief contains 5,199 words in compliance with Rule 84.06(b).

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