IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL. RONNIE CHRISTIAN

Relator

v.

THE HONORABLE JACQUELINE COOK

Respondent

S.C. No. 087570

RESPONDENT'S BRIEF

Dale L. Beckerman MO 26937
DEACY & DEACY, LLP
920 Main Street, Suite 1900
Kansas City, Missouri 64105
Telephone: (816) 421-4000
Facsimile: (816) 421-7880
ATTORNEYS FOR RESPONDENT

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, EX REL. RONNIE CHRISTIAN

Relator

v.

THE HONORABLE JACQUELINE COOK

Respondent

S.C. No. 087570

RESPONDENT'S APPENDIX

Dale L. Beckerman MO 26937
DEACY & DEACY, LLP
920 Main Street, Suite 1900
Kansas City, Missouri 64105
Telephone: (816) 421-4000
Facsimile: (816) 421-7880
ATTORNEYS FOR RESPONDENT

APPENDIX INDEX

Page No.

Exhibit 1: Letter from Andrew J. Gelbach to Ronald Christian dated September 29, 1999 . . . . . A1

Exhibit 2: Letter from William Graham of State Farm to Ronald Christian dated October 14, 1999 . . . . . A2

Exhibit 3: Petition for Damages for Wrongful Death A4

Exhibit 4: Letter from William Graham of State Farm to Ronald Christian dated November 24, 1999 . . . . . A14

Exhibit 5: Letter from Andrew J. Gelbach to William Graham dated February 15, 2000 . . . . . A16

Exhibit 6: Affidavit of James M. McClintock A21

Exhibit 7: Letter from Terry M. Evans to Judy Racy dated December 15, 1999 . . . . . A25

Exhibit 8: Letter from Terry M. Evans to Judy Racy and Ronald Christian dated August 23, 2000 . . . . . A26

Exhibit 9: Missouri Revised Statute §537.065 Contract to Limit Recovery to Specified Assets A28

Exhibit 10: State Farm's Answer to Cross-Claim A33

Exhibit 11: Certificate of Service A41

Exhibit 12: Motion for In Camera Review of State Farm's Privilege Log and Supplemental Privilege Log Documents A43

Exhibit 13: Transcript of Proceedings for hearing of August 20, 2004 . . . . . A45

Exhibit 14: Letter from Dale L. Beckerman to Andrew J. Gelbach and Phillip S. Smith dated October 31, 2001 . . . . . A62

Exhibit 15: State Farm's Privilege Log A63

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

STATEMENT OF FACTS 7

A. The Accident and Underlying Suit 7

B. Proceedings Related to State Farm's Privilege Claims 11

ARGUMENT 15

RELATOR IS NOT ENTITLED TO A WRIT OF PROHIBITION BECAUSE THE CIRCUIT COURT RULING AFTER *IN CAMERA* REVIEW THAT THE DOCUMENTS ARE PROTECTED FROM DISCOVERY BY THE ATTORNEY-CLIENT PRIVILEGE IS CORRECT THUS RESPONDENT DID NOT ABUSE HER DISCRETION 15

A. STANDARD OF REVIEW 15

B. THE ISSUE 16

C. THE ATTORNEY-CLIENT PRIVILEGE PROTECTS THE REQUESTED DOCUMENTS FROM DISCOVERY (RESPONDING TO POINT I) 17

1. Recognition of the Attorney-Client Privilege In Missouri 17

2. Scope of the Attorney-Client Privilege in Missouri 19

3. Judge Campbell Correctly Held that the State Farm's Documents Are Privileged (Responding to Point I.D.) 22

4. Relator has Failed to Show the Privilege is Inapplicable (Responding to Point I.D.) 23

a. Deacy & Deacy Did Not Represent Christian 23

b. There is No Support for Relator's Argument that Deacy & Deacy Performed Claim Handling Work . . 26

5. State Farm Has Not Waived the Privilege (Responding To Points I.C. and I.E) 28

D. THE DOCUMENTS ARE ALSO PROTECTED AS ATTORNEY MENTAL IMPRESSIONS 32

E. RESPONDENT PROPERLY REFERRED THE PRIVILEGE ISSUE TO JUDGE CAMPBELL 33

F. CONCLUSION 36

CERTIFICATE OF SERVICE 37

CERTIFICATE OF COMPLIANCE 39

TABLE OF CASES AND OTHER AUTHORITIES

Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005) 17,28

Baker v. GMC, 197 F.R.D. 376 (W.D. Mo. 1999) 31

Corrigan v. Armstrong, Teasdale, et al., 824 S.W.2d 92 (Mo. App. 1992) . . . 30

Edwards v. Missouri State Board of Chiropractic Examiners,
85 S.W.3d 10 (Mo. App. 2002) 33

Grewell v. State Farm Mutual Automobile Insurance Co.,
102 S.W.2d 33 (Mo. banc 2003) 16,25,29,30

Grewell v. State Farm Mutual Automobile Insurance Co.,
162 S.W.2d 504 (Mo. App. 2005) 16

Gulf Ins. Co. v. Noble Broadcast, 936 S.W.2d 810 (Mo. 1997) 34

Houston General Ins. Co. v. Superior Court, 108 Cal. App. 3d 958,
166 Cal. Rptr. 904 (Cal. App. 1980) 24

Jones v. Harmon County Sheriffs Dept, 2003 U.S. Dist. Lexis 10100 *12
(S.D. Ind. 2003) 32

Long v. Anderson University, 204 F.R.D. 129 (S.D. Ind. 2001) 32

Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095 (7th Cir. 1987) 31

McCaffrey v. Estate of Brennan, 533 S.W.2d 264 (Mo. App. 1976) 30

Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160 (D. Minn. 1986) 27

Mueller v. Ruddy, 617 S.W.2d 466 (Mo. App. 1981) 16

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 23

Sappington v. Miller, 821 S.W.2d 901 (Mo. App. 1992) 31

Shahan v. Shahan, 988 S.W.2d 529 (Mo. banc 1999) 30

Sildon v. O'Melveney & Myers LLP, 89 Cal. App. 4th 451, 107 Cal. Rptr.2d 456 (Cal. App. 2001) 25

State v. Pride, 1 S.W.3d 494 (Mo. App. 1999) 22,28,29

State ex rel. The Atchison, Topeka & Santa Fe Railway Co. v. O'Malley, 898 S.W.2d 550 (Mo. en banc 1995) 22, 29, 33

State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. banc 2002) 15,16

State ex rel. Ford Motor Co. v. Westbrooke, 151 S.W.3d 364 (Mo. banc 2004) 19,33

State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379 (Mo. banc 1978) 19,20,21,26

State ex rel. Great American Ins. Co. v. Smith, 563 S.W.2d 62 (Mo. banc 1978) 20,32

State ex rel. M.D.K. v. Dolan, 968 S.W.2d 740 (Mo. App. 1998) 16

State ex rel. Missouri Highway & Transp. Com. v. Anderson,
735 S.W.2d 350 (Mo. banc 1987) 15

State ex rel. Missouri Highways & Transp. Com. v. Legere,
706 S.W.2d 560 (Mo. Ct. App. 1986) 22

State ex rel. Peabody Coal Co. v. Clark, 863 S.W.2d 604
(Mo. banc 1993) 15,19

State ex rel. Polytech, Inc. v. Vorhees, 895 S.W.2d 13 (Mo. App. 1995) 21

State ex rel. Syntex Agri-Business, Inc. v. Adolf, 700 S.W.2d 886
(Mo. App. 1985) 19,20,31

State ex rel. Tracy v. Dandurand, 30 S.W.3d 831 (Mo. banc 2000) 31

Tomkins Industries, Inc. v. Warren Technology, Inc., 768 So. 2d 1125
(Fla. App. 2000) 32

White v. Auto Club Inter-Insurance Exch., 984 S.W.2d 156
(Mo. App. 1998) 24

Missouri Revised Statute §210.140 19

Missouri Revised Statute §408.040.2 8

Missouri Revised Statute §491.060(3) 17

Missouri Revised Statute §537.065 10,11

Supreme Court Rule 56.01(b)(3) 29,33

STATEMENT OF FACTS

Respondent believes Relator's Statement of Facts omits material facts and includes considerable irrelevant material. Much of it is intended to divert the Court's attention from the privilege issue by prematurely advancing Christian's arguments on the merits and attempting to cast defendant State Farm in a bad light. To the extent possible Respondent will avoid those issues and focus on the attorney-client privilege issue. Accordingly, Respondent submits the following.

A. The Accident and Underlying Suit.

On September 23, 1999, Micah Gaus and Relator Ronald Christian ("Christian" or Relator") engaged in a drag race on a county road in Johnson County. Gaus collided head-on with Martin Gentry (a retired police officer). The collision killed Gentry and Gaus's passengers, Matthew Cantrell, Jr. and Amy Brown. Petition Exhibit A ¶¶ 6-10.[1] State Farm insured Christian under an automobile liability

---

[1] Exhibit References are as follows:

"*Pet. Exh.* __" refers to the Exhibits to Relator's Petition filed in this Court with the Petition on or about March 17, 2006.

"*Rel. App. Exh.* __" refers to the Appendix to Relator's Brief filed with his Brief on or about June 1, 2006.

"*Resp. App. Exh.* __" refers to the Appendix to this Brief.

policy with limits of liability of $25,000 per person/$50,000 per accident. Pet. Exh. R, p. 253.

Six days after the accident, on September 29, 1999, Mr. Gelbach, counsel for plaintiffs Parsons and Cantrell (collectively "plaintiffs"), wrote Christian pursuant to §408.040.2 R.S.Mo. and demanded $500,000 ($250,000 for each parent) in settlement of the claim for the death of Matthew Cantrell. Resp. App. Exh. 1. Two days later, on October 1, 1999, plaintiffs filed suit against Christian for the wrongful death of Matthew Cantrell. Pet. Exh. A. On October 14, 1999, State Farm retained Attorney Terry Evans to defend Christian in the wrongful death suit plaintiffs had filed.[2] Resp. App. Exh. 2. State Farm advised Christian his policy did not cover

---

[2] On October 14, 1999, 21 days after the accident, State Farm Team Manager Bill Graham wrote to plaintiffs' counsel, Mr. Gelbach as follows:

> [W]e are willing to pay our $50,000 total policy limits to the three families of the deceased people in the accident of September 23, 1999. Up to $25,000 per person, we are willing to pay this in any manner that is agreeable among the three families.
>
> If you have any suggestions on how to fairly divide

punitive damages. There were no other questions or reservations concerning coverage. Resp. App. Exh. 2.

On or about October 22, 1999, still within a month after the accident, the parents of Amy Brown also sued Christian for wrongful death. Resp. App. Exh. 3. State Farm also retained Attorney Evans to defend Christian in that suit. Resp. App. Exh. 4.

On November 30, 1999, plaintiffs' counsel wrote State Farm and charged that State Farm's failure to pay his clients $25,000 (one-half the total insurance) constituted "bad faith" on the part of State Farm. Pet. Exh. R, p. 260. Shortly after that, State Farm retained Deacy & Deacy with respect to those allegations. Resp. App. Exh. 6; Resp. App. Exh. 15 (1st entry – 12/7/99). In a series of contentious letters, plaintiffs' counsel repeated his allegations of "bad faith" and dereliction of duty to Christian (who was not his client) throughout the suit between plaintiffs and Christian. *See* Rel. App. Exh. D; Resp. App. Exh. 5.

Numerous written communications passed between Deacy & Deacy and State Farm over the next several months. *See* Resp. App. Exh. 15. Those documents were maintained in the claim file at the office where the claim was being handled and are

---

the policy limits, please advise us.

Pet. Exh. R, p. 253.

the subject of this writ. Those communications extend into the period after the plaintiffs filed their Equitable Garnishment Action against State Farm on December 21, 2000 (Pet. Exh. C). *See* Resp. App. Exh. 15 at A65-A66.

Deacy & Deacy was not retained to represent Christian and did not do so. Resp. App. Exh. 6. Deacy & Deacy did not perform any investigation or interviews. Deacy & Deacy did not prepare or sign any pleadings in the damage suit. There are no communications between Deacy & Deacy and counsel for any claimant during the damage suits. Deacy & Deacy did not participate in the extensive discovery that occurred in plaintiffs' suit against Relator and Gaus. There is no evidence that Deacy & Deacy engaged in "claim handling".

On or about December 15, 1999, Mr. Evans, as attorney for Christian, negotiated a complete settlement of the claim against Ronald Christian for the death of Martin Gentry for $16,666.66. *See* Resp. App. Exh. 7. Deacy & Deacy had no role in the negotiation or effectuation of that settlement.

In August 2000, Attorney Evans negotiated a complete settlement of the claim against Ronald Christian for the death of Amy Brown for $16,666.66. *See* Resp. App. Exh. 8. Again, Deacy & Deacy had no role in the settlement.

In late October and early November 2000, on behalf of Christian, Attorney Evans negotiated with plaintiffs herein a "Missouri Revised Statute §537.065

Contract to Limit Recovery". Resp. App. Exh. 9. Under that agreement, Christian agreed to cooperate in subsequent actions against State Farm and to pay $1,000 to plaintiffs. Plaintiffs agreed pursuant to §537.065 R.S.Mo. to limit execution on any judgment against Christian to monies recoverable from State Farm. Resp. App. Exh. 9 at A29. State Farm paid plaintiffs the remaining $16,666.67. Rel App. Exh. F. Plaintiffs then took an uncontested judgment against Christian and Gaus, jointly and severally, for $3,000,000 actual damages and $1,000,000 punitive damages, plus interest thereon and costs. Pet. Exh. B. Deacy & Deacy had no role in the negotiation of that agreement or the uncontested judgment which followed.

Shortly after securing that judgment, plaintiffs initiated this Equitable Garnishment Action on December 21, 2000 in the Circuit Court of Johnson County. Christian was named as a defendant. Pet. Exh. C. The action was later transferred to Cass County. On or about April 4, 2001, Christian served his crossclaim against State Farm in which he alleged it had acted in bad faith. State Farm has not asserted advice of counsel as a defense thereto. *See* Resp. App. Exh. 10.

B. Proceedings Related to State Farm's Privilege Claims.

Christian served his First Request for Documents on or about August 5, 2001. Request No. 6 sought:

> A complete copy of the claims file or facsimile with Defendant State Farm concerning the motor vehicle wreck in question.

Pet. Exh. E. State Farm served its responses on October 5, 2001; the response included assertion of both the attorney-client privilege and the protection for work product.

On October 31, 2001 State Farm delivered a copy of the claim file to counsel for plaintiffs and Relator. Resp. App. Exh. 14. The cover letter advised State Farm was withholding documents protected by the attorney-client privilege, but made clear that "Those objections do not involve communications with Mr. Evans." *See also* Resp. App. Exh. 13 at A49. The several hundred pages of documents that accompanied Exhibit G included all of the communications between State Farm and Mr. Evans regarding the claims and suits against Relator.

There matters stood as to State Farm's privilege claims for over two and one-half years.[3] On June 14, 2004, Christian moved for *in camera* inspection of the

[3] Discovery continued unabated. Numerous depositions were taken and Relator and plaintiffs propounded extensive written discovery. Indeed, together, plaintiffs and Christian have propounded over 170 interrogatories and over 75 document requests to State Farm.

documents to which State Farm claimed privilege in 2001. Resp. App. Exh. 12.

The motion came on for hearing on August 20, 2004. Resp. App. Exh. 13. State Farm did not resist *in camera* inspection to verify the privileged nature of the communications. State Farm only requested that Respondent not conduct the review because of her role as trial judge of the non-jury equitable garnishment. Resp. App. Exh. 13 at A53-A56. Neither plaintiff nor Relator opposed that request. ***Id.*** Respondent thereupon appointed Judge Campbell to review the documents. Resp. App. Exh. 13 at A56. State Farm submitted the documents and an Affidavit (Resp. App. Exh. 6) supporting its privilege assertions on September 3, 2004. *See* Pet. Exh. M.

Judge Campbell reviewed the documents. Pet. Exh. L. After reviewing written briefs and hearing argument, on November 15, 2004 he entered his Order sustaining State Farm's privilege objections. Based on his review of the documents, Judge Campbell found as a matter of fact and law that:

> ... all of the documents are protected from disclosure by the attorney-client privilege and/or the work product protection and should not be produced.
>
> IT IS SO ORDERED.

Pet. Exh. M.

Over six months later, on June 14, 2005, plaintiffs and Relator moved for reconsideration of Judge Campbell's November 15, 2004 Order. Pet. Exh. N. They gave no reason for the delay. Respondent promptly heard arguments on July 14 and 20, 2005. Pet. Exhs. O and P. On July 20, 2005 Respondent denied the Motion to Reconsider in a thorough opinion in which she affirmed the conclusion that the documents:

> generated from [State Farm's] seeking independent advice from outside counsel for the benefit of State Farm and not for the benefit of the insured.

Pet. Exh. Q at 247. The Order of July 20, 2005 was the last act of the Circuit Court related to this discovery.

On January 31, 2006. six months after the last Order of the Circuit Court and just nine weeks before plaintiffs' five year-old equitable garnishment was scheduled to be tried, Relator sought a Writ from the Western District of the Court of Appeals. The Writ was denied on February 24, 2006. Pet. Exh. U.

ARGUMENT

RELATOR IS NOT ENTITLED TO A WRIT OF PROHIBITION BECAUSE THE CIRCUIT COURT RULING AFTER *IN CAMERA* REVIEW THAT THE DOCUMENTS ARE PROTECTED FROM DISCOVERY BY THE ATTORNEY-CLIENT PRIVILEGE IS CORRECT AND RESPONDENT DID NOT ABUSE HER DISCRETION.

A. STANDARD OF REVIEW.

Relator seeks the "extreme remedy" of an extraordinary writ. ***State ex rel. Peabody Coal Co. v. Clark***, 863 S.W.2d 604, 608 (Mo. banc 1993). The issue is whether Respondent abused her discretion in holding the documents at issue were privileged. "[P]rohibition and mandamus may sparingly be employed to review a trial court's overruling of objections to discovery on grounds that the matters sought are privileged or constitute work product, if it can be seen the refusal to forbid discovery exceeds the trial court's jurisdiction or constitutes a clear abuse of discretion." ***State ex rel. Missouri Highway & Transp. Com. v. Anderson***, 735 S.W.2d 350, 359 (Mo. banc 1987).

Relator has the burden of showing abuse of discretion. ***State ex rel. Ford***

Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002); *see* ***Mueller v. Ruddy***, 617 S.W.2d 466, 479 (Mo. App. 1981). The discretionary ruling of the Circuit Court is presumed to be correct. ***State ex rel. M.D.K. v. Dolan***, 968 S.W.2d 740, 745 (Mo. App. 1998).

B. THE ISSUE.

The central issue is whether an insurer, which has been accused of acting in bad faith toward its insured in the handling of a claim or suit can invoke the attorney-client privilege for its communications with counsel it retains to consult with it in respect of those allegations where it has maintained those communications in its file concerning the claim.

Relator principally urges that the decisions in ***Grewell v. State Farm Mutual Automobile Insurance Co.***, 102 S.W.2d 33 (Mo. banc 2003) and 162 SW.2d 503 (Mo. App. 2005) dictate that disclosure is required. It is Respondent's position that neither ***Grewell*** opinion ruled on application of the attorney-client privilege and that the documents are protected from discovery.

It is equally important to understand what is not at issue in this proceeding. It *does not* involve the question litigated in the authorities cited and relied upon by Relator: Whether the insured can discover the communications between the insurer and the counsel retained by the insurer to represent the insured in the damage suit.

E.g., ***Allstate Indem. Co. v. Ruiz***, 899 So. 2d 1121 (Fla. 2005). State Farm did not claim any protection for those communications and produced them with the letter of October 31, 2001. Resp. App. Exh. 14.

Nor does this case involve an attempt to shield otherwise non-privileged materials, *e.g.*, letters, reports, etc. by attaching them to attorney-client communications. The materials State Farm seeks to protect are direct communications between attorney and client and related internal communications within State Farm's management.

C. THE ATTORNEY-CLIENT PRIVILEGE PROTECTS THE REQUESTED DOCUMENTS FROM DISCOVERY (RESPONDING TO POINT I)

1. Recognition of the Attorney-Client Privilege in Missouri.

Missouri recognizes the attorney-client privilege both by statute and case law. Section 491.060(3) R.S.Mo. codifies the privilege as adopted by the legislature:

> The following persons shall be incompetent to testify:
>
> (3) An attorney, concerning any communication made to the attorney by such attorney's client in that relation, or

> such attorney's advice thereon, without the consent of such client....[4]

This Court has recognized for many years that the attorney-client privilege is a fundamental component of our legal system:

> As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law - - that is, by lawyers -- anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened. The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value ... than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.

---

[4] Citations to "R.S.Mo." are to the 2004 edition.

State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978).

Because of its importance to the functioning of the legal system in a civil society based on the rule of law, this Court has acknowledged the "sanctity" of the attorney-client privilege and has described it as "absolute in all but the most extraordinary situations." ***State ex rel. Ford Motor Co. v. Westbrooke***, 151 S.W.3d 364, 367 (Mo. banc 2004)(*citing* ***State ex rel. Peabody Coal Co. v. Clark***, 863 S.W.2d 604, 607 (Mo. banc 1993)). Similarly, the legislature reemphasized the central role of the attorney-client privilege when it exempted it from the general abolition of privileges in cases of suspected child abuse. § 210.140 R.S.Mo.

2. Scope of the Attorney-Client Privilege in Missouri.

Missouri follows a "very broad concept of attorney-client privilege." ***State ex rel. Syntex Agri-Business, Inc. v. Adolf***, 700 S.W.2d 886, 888 (Mo. App. 1985). Where the privilege applies, it protects both direct attorney-client communication and communications from which the content of the confidential communications could be gleaned:

> We conclude from the above that, even in a case involving alleged vexatious refusal to pay, the attorney-client privilege protects a letter written by an attorney to his

> client from discovery when the letter: (1) "concerns any communication made to him by his client" in the attorney-client relation; or (2) contains "his advice thereon"; or (3) could lead to "the use of his statements as admissions of the client"; or (4) could lead "to inferences of the tenor of the client's communications."

State ex rel. Great American Ins. Co. v. Smith, 563 S.W.2d 62, 64 (Mo. banc 1978).

As the Eastern District of the Court of Appeals explained in ***State ex rel. Syntex Agri-Business, Inc. v. Adolf***, ***supra***, 700 S.W.2d at 888:

> The privilege as recognized in Missouri applies to information transmitted by a voluntary act of disclosure between the client and his lawyer in confidence and through a means which as far as the client is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was transmitted. *State ex rel. Great American Ins. Co. v. Smith, supra*, [....]

In ***State ex re. Great American v. Smith,*** 574 S.W.2d 379, 383 (Mo. banc

1978)(the second ***Great American*** opinion), this Court reiterated the scope of the privilege and held that all communications by an attorney, not just those giving legal advice, were essential elements of attorney-client consultation and are protected by the privilege. Thus, advice given by the attorney based on information obtained from the client or from sources other than the client is protected. Communications from an attorney as to the course of conduct to be followed are privileged. Discussion of additional avenues to be pursued is privileged. Keeping a client advised of things done or opinions formed to date is privileged. Analysis of what is known to date of a situation is privileged. *See also* ***State ex rel. Polytech, Inc. v. Vorhees***, 895 S.W.2d 13 (Mo. App. 1995).

"Substantial need" is not a factor in determining whether a document is protected by the attorney-client privilege:

> In contrast, any professionally oriented communication between attorney and client is absolutely privileged, in the absence of waiver, regardless of substantial need. *Id. See also State ex rel. Cain v. Barker, supra*, 540 S.W.2d at 52, 57-58 (under Rule 56.01(b)(1), if matter is privileged, it cannot be produced for pretrial discovery even if a showing of need is made).

State ex rel. Missouri Highways & Transp. Com. v. Legere, 706 S.W.2d 560, 566 (Mo. Ct. App. 1986). The same is true of opinion work product; need is immaterial. ***State ex rel. Atchison, T. & S.F. Ry. v. O'Malley***, 898 S.W.2d 550, 552-53 (Mo. 1995). Accordingly, Relator's arguments (*e.g.*, Br. 24) about how the documents might assist him are based on a misapprehension of the law and are irrelevant.

3. Judge Campbell Correctly Held State Farm's Documents Are Privileged (Responding to Point I.D.).

Missouri employs a two-part test to determine whether the attorney-client privilege applies to a communication:

> In order to invoke this privilege, the party asserting it must show: (1) the existence of an attorney-client relationship at the time of the interaction or communication, and (2) that an attorney-client relationship existed with regard to the subject matter of the communication or incident.

State v. Pride, 1 S.W.3d 494, 505 (Mo. App. 1999).

Judge Campbell reviewed all the documents involved here and found they satisfy the two part test that they are communications between attorney and client about a subject matter within the professional relationship. That finding was fully supported by State Farm's factual submissions, as well as the materials themselves.

Pet. Exhs. M; Resp. App. Exhs. 6, 15.

Confirming those facts and the accuracy of the privilege log are the essential purposes of a privilege review. That has already occurred here. Judge Campbell's finding that the documents were attorney-client communications and/or work product is entitled to this Court's deference. *See* ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo. banc 1976).

4. Relator Has Failed to Show the Privilege is Inapplicable (Responding to Point I.D.).

Relator argues at length there is no privilege here for several reasons. Each of his arguments rests upon contradiction of either the facts as found by the Circuit Court or the law of Missouri or both.

a. Deacy & Deacy Did Not Represent Christian.

Relator's principal argument is there could be no attorney-client relationship between State Farm and its counsel to which Relator was not also a party. Although the argument is repeated at length (Br. 19), it lacks any support in the record or the law. Plaintiff argued this in the Circuit Court. Pet. Exh. N at 183. The Court rejected the argument and found the documents were:

> generated from [State Farm's] seeking independent advice from outside counsel for the benefit of State Farm and not for the

benefit of the insured.

Pet. Exh. Q at 247. Relator can point to no contrary facts in the record. Nor can he point to any facts in the record which support the existence of an attorney-client relationship between Deacy & Deacy and Christian. There is no evidence Deacy & Deacy interviewed any witnesses, met Christian, prepared pleadings or performed any other function on behalf of Christian.

Likewise, Relator can point to no law which supports the proposition that any lawyer consulted by State Farm automatically also becomes a lawyer for the insured. Adoption of the proposition would drastically change Missouri law respecting attorneys and clients. Missouri has long recognized the attorney-client relation is a voluntary relation of a personal nature. ***White v. Auto Club Inter-Insurance Exch.***, 984 S.W.2d 156, 159 (Mo. App. 1998). It is utterly inconsistent with the personal nature of the relationship to inject into it a client whom the lawyer does not seek to represent and who has not looked to the lawyer for counsel. *See* ***Houston General Ins. Co. v. Superior Court***, 108 Cal. App. 3d 958, 166 Cal. Rptr. 904 (Cal. App. 1980)(rejecting argument that counsel consulted by the insurer automatically serves the insured as well).

Accordingly, it was not at all improper for State Farm to permit Deacy & Deacy to review material in the claim file. The premise of Relator's argument is that

State Farm owes an insured all the duties an attorney owes a client. However, in ***Grewell v. State Farm Mutual Automobile Insurance Co.***, 102 S.W.2d 33, 37 (Mo. banc 2003) this Court specifically refrained from requiring in the insurer-insured relationship all the incidents of the attorney-client relation:

> While the attorney-client relationship carries with it numerous duties and privileges, the Court today refrains from recognizing all of those duties and privileges in the insured/insurer relationship.

Moreover, Rule 4-1.6 of this Court requires all Missouri lawyers to hold in confidence information received from a client. That Rule applied to any confidential information in the claim file. That rule and other rules governing the conduct of Missouri attorneys enable clients to share confidences, even confidences of others, with counsel as necessary to secure legal advice. *Cf.* ***Sildon v. O'Melveney & Myers LLP***, 89 Cal. App. 4th 451, 107 Cal. Rptr. 2d 456 (Cal. App. 2001)(application of attorney-client privilege to confidential client information provided by one lawyer seeking legal advice from another lawyer).

Relator argues that any lawyer for the insurer also represents the insured. This argument has troublesome implications, specifically when an insurer is faced with assertion of bad faith. The result would be the insurer could not have a confidential relation with independent counsel selected to assist with those issues. Such a rule

would clearly have a chilling effect on the decision of whether to seek such legal advice at all. That is diametrically opposed to the public policy of Missouri, as recognized by this Court, to promote solicitation of legal advice by recognizing the need for confidentiality, ***State ex rel. Great American Ins. Co. v. Smith, supra***, 574 S.W.2d at 383.

Zealous counsel could make unfounded allegations of the type found here (*e.g.*, Resp. App. Exh. 10) secure in the knowledge that the insurer would be virtually precluded from even seeking legal advice. The risk it could not communicate in confidence with independent counsel – or even share the claim file with such counsel – would discourage an insurer from seeking advice. No other person or entity in Missouri labors under such a disadvantage. There is no legitimate reason to restrict the right of insurers to seek legal advice in such a fashion. Indeed, public policy has always encouraged the solicitation of legal advice and should continue to do so.

b. There Is No Support for Relator's Argument that Deacy & Deacy Performed Claim Handling Work.

Relator also fails in his arguments (Br. 21, 27) that Deacy & Deacy performed claim work and, therefore, no privilege exists. He relies on cases in which insurers retained counsel to investigate claims or perform similar work. For example in ***Mission Nat'l Ins. Co. v. Lilly,*** 112 F.R.D. 160 (D. Minn. 1986), the law firm was

retained to be the insurer's sole investigator of a fire. Its work product was held not to be protected.

Again, there is no factual support for the application of such cases here. There is no evidence Deacy & Deacy performed any investigative work, contacted any witness, engaged in any communications with claimants or their representatives during the damage suits or performed any other function typical to the representation of a client sued for wrongful death. The Orders by which Judge Campbell upheld the privilege claims and Judge Cook declined reconsideration demonstrate a complete absence from the record of any factual support for this argument. Pet. Exhs. M, Q.

The other authorities upon which Relator relies do not support invasion of State Farm's attorney-client privilege here. As noted at the outset, most deal with situations where the insurer sought to shield its communications with the counsel who was retained to actually defend the insured. Mr. Windt's treatise, cited by Relator at 22-23, is no authority for the relief Relator seeks here. That discussion addresses claims of work-product protection for claim file documents generated internally by the insurer. State Farm produced those without objection (Resp. App. Exh. 14), including its communications with Mr. Evans, the attorney retained to represent Christian.

Similarly, ***Allstate Indem. Co. v. Ruiz***, 899 So. 2d 1121 (Fla. 2005), cited by

Relator at 22 as authority for the position of Mr. Windt, does not assist Relator. Here, Judge Campbell specifically found the documents were attorney-client communications. Conversely, in ***Allstate Indemnity Co. v. Ruiz***, the trial court specifically noted the disputed documents *did not* involve attorney-client communications. ***Id.*** at 1123. Relator's other authorities are similarly inapposite to the facts already found in the Circuit Court proceedings here.

5. State Farm Has Not Waived the Privilege (Responding to Points I.C. and I.E.).

As ***State v. Pride, supra,*** 1 S.W.3d at 505, makes clear, whether a document is protected by the attorney-client privilege depends on the character of the document – that is, the identity of the parties to the communication, the relation between them and the subject matter. Relator seeks by this Writ to change that so that the focus is not on the character or substance of the document but on where it is kept. As stated in the proceedings below, Respondent is aware of no authority for the proposition that where the document is maintained dictates whether it is protected by the privilege. *See* Pet. Exh. Q at 10.

Relator's waiver argument is built on opinions in ***Grewell v. State Farm Mutual Automobile Insurance Co.***, 102 S.W.3d 33 (Mo. banc 2003) and 162 S.W.3d 503 (Mo. App. 2005). In its ***Grewell*** opinion (102 S.W.3d 33), this Court

drew on the similarity between the insurer-insured relation and that between attorney and client and held the insured is entitled to broad access to the claim file.

Subsequently, the Court of Appeals held the insurer cannot withhold "work product" from the insured. 162 S.W.3d 503. It is evident from the opinion that the materials were "ordinary work product" of the type addressed by the first part of Rule 56.01(b)(3), *e.g.*, investigative materials, etc. There is no indication that there was any attorney "mental impression" work product of the type absolutely protected by the last sentence of Rule 56.01(b)(3). ***State ex rel. The Atchison, Topeka & Santa Fe Railway Co. v. O'Malley***, 898 S.W.2d 550, 552-53 (Mo. banc 1995).

Neither ***Grewell*** opinion indicates that State Farm asserted the attorney-client privilege protected any communication from discovery; indeed, there is no suggestion of any involvement of outside counsel in a role similar to that here. Neither opinion hints of an intent to abolish the attorney-client privilege as applied to insurers. Neither opinion suggests an intent to change the established test for application of the privilege from an examination of the character of the document, ***State v. Pride***, 1 S.W.3d 494, 505 (Mo. App. 1999), to a focus on its location. Nothing in either decision suggests the Court intended to dictate the manner in which insurers maintain their files or to create special privilege rules applicable only to liability insurers.

Relator argues that, because the ***Grewell*** opinions give the insured access to the claim file, placement of privileged documents in that file is a waiver of the privilege. The argument misapprehends what constitutes a waiver. Waiver is breach of the confidential nature of the privileged communication by disclosure to a non-client. ***McCaffrey v. Estate of Brennan***, 533 S.W.2d 264, 267 (Mo. App. 1976). No such disclosure has occurred here. Simply maintaining the documents in the claim file does not constitute a disclosure to anyone else. State Farm retained both physical custody of the file and the right to such custody. *Cf.* ***Corrigan v. Armstrong, Teasdale, et al.***, 824 S.W.2d 92, 97-99 (Mo. App. 1992).

Moreover, waiver is the intentional relinquishment of a known right. ***Shahan v. Shahan***, 988 S.W.2d 529, 534 (Mo. banc 1999). The documents involved here were prepared from late 1999 to 2001 (Resp. App. Exh.15), well before the first ***Grewell*** decision in 2003. All the evidence shows State Farm believed it was maintaining the documents in confidence. It has asserted the protected status of the documents from the outset of discovery directed to them. To hold now that keeping the documents in the claim file in 2000 and 2001 constituted a waiver is to unfairly impose a waiver on State Farm after the fact.

Relator's reliance on ***State ex rel. Tracy v. Dandurand,*** 30 S.W.3d 831 (Mo. banc 2000) is misplaced. There the privileged documents were provided to an expert

for his review. No such disclosure has occurred here.

Equally unsound is Relator's argument that State Farm has waived the privilege by allegedly putting the advice of its counsel at issue. As ***Sappington v. Miller***, 821 S.W.2d 901, 904-05 (Mo. App. 1992) holds, waiver can occur where the client affirmatively puts the advice of counsel at issue in the pleadings by an affirmative claim or defense. That has not occurred here. Relator advanced this argument without including State Farm's Answer to his Crossclaim as an exhibit. That Answer does not contain any defense based upon advice of counsel. Resp. App. Exh. 10. Mere denial of wrongdoing does not place counsel's advice at issue for purposes of waiver. *See* ***Lorenz v. Valley Forge Ins. Co.***, 815 F.2d 1095, 1098 (7th Cir. 1987); *cf.* ***Baker v. GMC***, 197 F.R.D. 376, 388 (W.D. Mo. 1999).

Relator also claims there is no privilege because Deacy & Deacy participated or assisted in written responses to plaintiffs' numerous accusations of bad faith. Relator accords the privilege a much narrower scope than the Missouri courts have. ***State ex rel. Syntex Agri-Business, Inc. v. Adolf***, 700 S.W.2d 886, 888 (Mo. App. 1985). Discussions of responses to communications and exchanges of draft correspondence between counsel and client are at the heart of a lawyer's work. *Cf.* ***State ex rel. Great American Ins. Co. v. Smith, supra***, 563 S.W.2d at 64. Accordingly, courts have routinely recognized the attorney-client privilege applies

to the documentary product of such activities. *E.g.*, ***Tomkins Industries, Inc. v. Warren Technology, Inc.***, 768 So. 2d 1125 (Fla. App. 2000); ***Long v. Anderson University***, 204 F.R.D. 129 (S.D. Ind. 2001); ***Jones v. Harmon County Sheriff's Dep't***, 2003 U.S. Dist. Lexis 10100 *12 (S.D. Ind. 2003).

The determination that the materials are privileged is clearly correct.

D. THE DOCUMENTS ARE ALSO PROTECTED AS ATTORNEY MENTAL IMPRESSIONS.

The documents involved here are replete with mental impressions of State Farm's outside counsel. Both by Rule of this Court and by case law, opinion work product is absolutely immune from discovery:

> In ordering discovery of such materials when the required showing has been made, the court *shall protect against disclosure of* the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 56.01(b)(3)(emphasis added). ***Edwards v. Missouri State Board of Chiropractic Examiners***, 85 S.W.3d 10, 26 (Mo. App. 2002).

In ***State ex rel. The Atchison, Topeka & Santa Fe Railway Co. v.***

O'Malley, 898 S.W.2d 550, 552-53 (Mo. banc 1995) this Court reiterated its recognition that such material is "privileged":

> This Court has long considered work product a privilege. *See State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 536 (Mo. banc 1968). Tangible work product is provided for in Rule 56.01(b)(3), and the words "not privileged" from Rule 56.01(b)(1) incorporate into this section and subject all of the Missouri discovery law to the general principles of intangible work product. Rule 56.01(b)(1) does not, therefore, mandate disclosure of intangible work product.

See also ***State ex rel. Ford Motor Co. v. Westbrooke***,151 S.W.3d 364 (Mo. banc 2004).

E. RESPONDENT PROPERLY REFERRED THE PRIVILEGE ISSUE TO JUDGE CAMPBELL.

Although Respondent believes the facts and law do not entitle Relator to relief, this Writ gives the Court an opportunity to address the procedures for *in camera* reviews. Relator now requests that Respondent should review these documents herself even though Judge Campbell has already reviewed them. Rel. Br. 29. The

request should be denied as unnecessary and an undue burden on the Circuit Court.

Plaintiffs initiated this case in December 2000 by filing an equitable garnishment which is still pending. Pet. Exh. C. Respondent is the assigned trial judge for that non-jury proceeding.

Because Respondent will hear the equitable garnishment, State Farm requested Respondent not conduct the *in camera* review in order to avoid possible influence from materials that will not be in evidence. Resp. App. Exh. 13 at A53-A56. Indeed, Respondent had some hesitation about making the review even before State Farm's request.

In the Circuit Court, Relator did not object to reference of the review to Judge Campbell. Resp. App. Exh. 13 at A53-A57. He cannot complain of that now. ***Gulf Ins. Co. v. Noble Broadcast***, 936 S.W.2d 810, 816 (Mo. 1997).

More importantly, it is Respondent's duty at all times to avoid even the appearance of impropriety. Canon 2 of the Code of Judicial Conduct. Any party to any case might legitimately have concern about the propriety of a trial judge hearing a case after reviewing communications between client and counsel. They might contain facts known only to attorney and client. Exposure to any such information could raise questions about the propriety of the judge proceeding in the case. A party who knows what is in the documents may fairly have such apprehensions;

likewise, a party who does not know their content may fairly have concerns.

Thus, an order requiring the sitting trial judge to make the privilege evaluation would likely put that judge in a position of having to disqualify himself or herself at the request of either party. That opens the door to the prospect of manipulation and judge-shopping in any case where privilege issues arise. A request for *in camera* inspection could be used as the predicate for a motion to disqualify a sitting judge at almost any time in a case. That is not the function of such proceedings and would unduly burden the judiciary and create unnecessary delay and uncertainty. *E.g.*, Pet. Exh. P, at 224-28.

Likewise, it is inappropriate of Relator to ask this Court to require the Circuit Court to determine "the nature and character" (Br. 29) of the documents. Judge Campbell has done that. Relator is simply dissatisfied with the outcome.

In the Circuit Court, plaintiffs argued Respondent should not only review the documents, but describe and make individual findings as to each. That imposes an unnecessary burden on the Circuit Court. The Court's Orders fairly inform the parties and this Court of what the Circuit Court found and concluded. There is no reason to make the process more onerous on the Circuit Court; indeed there is every reason not to do so.[5]

---

[5] In addition to the burden, Respondent respectfully suggests that the

F. CONCLUSION.

Relator has failed to show Respondent abused her discretion. The documents were properly reviewed by Judge Campbell. He correctly found them to be protected from discovery. The record contains no facts to support Relator's various arguments of dual representation, "claim handling" or waiver. Accordingly, for all the foregoing reasons, Respondent respectfully urges the Preliminary Writ be quashed, and that the Circuit Court be directed to return the documents to State Farm's counsel.

Respectfully Submitted.

Dale L. Beckerman MO 26937
920 Main Street, Suite 1900
Kansas City, Missouri 64105-2010
Telephone: (816) 421-4000

Court must protect against requiring in the Circuit court such a level of detail (either in the privilege log or the ruling or both) that the review process results in disclosure of the very information sought to be protected.

Facsimile: (816) 421-7880
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Respondent's Brief and the Appendix thereto together with a disc were duly mailed, postage prepaid, this 20th day of July, 2006 to:

Phillip S. Smith, Esq.
1660 City Center Square
1100 Main Street
Kansas City, Missouri 64105
Telephone: 816-471-4747
Facsimile: 816-471-4949
ATTORNEY FOR RELATOR
RONNIE CHRISTIAN

Andrew J. Gelbach, Esq.
109 East Market
Warrensburg, Missouri 64093
Telephone: 660-474-5138
Facsimile: 660-747-8198
ATTORNEY FOR DEBORAH PARSONS
AND MATTHEW CANTRELL, SR.

Mr. John E. Turner, Esq.
Turner & Sweeny
10401 Holmes Road, Suite 450
Kansas City, Missouri 64131
Telephone: 816-942-5100
Facsimile: 816-942-5104
ATTORNEYS FOR DEBORAH PARSONS

AND MATTHEW CANTRELL, SR.

The Honorable Jacqueline Cook
2501 West Wall Street
Harrisonville, Missouri 64701
Telephone: 816-380-8180
Facsimile: 816-380-8225

Ms. Kelly Sue Elliott
Circuit Clerk of Cass County
2501 West Wall Street
Harrisonville, Missouri 64701
Telephone: 816-380-8226
Facsimile: 816-380-8225

_____
ATTORNEY FOR RESPONDENT

CERTIFICATION PURSUANT TO RULE 84.06

1. Respondent's Attorney: Dale L. Beckerman, Deacy & Deacy, LLP, 920 Main Street, Suite 1900, Kansas City, Missouri 64105-2010.

2. This brief contains 7012 words in compliance with Rule 84.06.(b).

3. This brief contains 790 lines.

4. The disc has been scanned and is virus free.

_____

Dale L. Beckerman