IN THE SUPREME COURT OF MISSISSIPPI

No. 2019-M-00586-SCT

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA **APPELLANT**

VS.

100 RENAISSANCE, LLC **APPELLEE**

ON APPEAL FROM THE COUNTY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF AMICUS CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for American Property Casualty Insurance Association certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Honorable Edwin Y. Hannan, Madison County Court Judge;
2. 100 Renaissance, LLC, Appellee
3. Joseph E. Roberts, Esq., Attorney for Appellee
4. Ann R. Chandler, Esq., Attorney for Appellee
5. Crymes M. Pittman, Esq., Attorney for Appellee
6. Travelers Property Casualty Company of America, Appellant
7. Thomas R. Julian, Esq., Attorney for Appellant
8. American Property Casualty Insurance Association ("APCIA"), Amicus Curiae
9. Michael F. Myers, Attorney for APCIA
10. William H. Creel, Jr., Attorney for APCIA
11. Kyle R. Ketchings, Attorney for APCIA

Respectfully submitted,

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AMICUS CURIAE

By: *s/Kyle R. Ketchings*
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INTEREST OF AMICUS CURIAE

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA, which was recently formed through a merger of two longstanding trade associations, American Insurance Association and Property Casualty Insurers Association of America, promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's members, which range from small companies to the largest insurers with global operations, represent nearly 60% of the U.S. property and casualty marketplace. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects their members and the policyholders they insure.

The trial court's ruling in this case, if allowed to stand, is of great concern to Amicus, as it represents a substantial weakening of the attorney-client privilege that will have a deleterious effect on not only insurers, but all litigants. Claims professionals, indeed, all parties, should be allowed to consult with counsel without fear that their confidences will be breached absent a conscious, voluntary waiver. Allowing the trial court's ruling to stand will undermine the attorney-client privilege; significantly hamper the ability of individuals and businesses alike to seek legal advice; frustrate discovery efforts; and increase litigation costs for all involved. Amicus urges the court to follow existing Mississippi law, and in doing so, preserve the sanctity of the attorney-client privilege by holding that no waiver of the attorney-client privilege occurred under the facts of this case.

ARGUMENT

THE IMPORTANT PUBLIC POLICIES SERVED BY THE ATTORNEY-CLIENT PRIVILEGE ARE SEVERELY UNDERMINED BY AMBIGUOUS WAIVER DETERMINATIONS AND THE DRAMATIC DEPARTURE FROM MISSISSIPPI LAW IMPLIED BY THE TRIAL COURT'S ORDER

The issue in this case requires the court to consider the sanctity of the attorney-client privilege and the high burden of proof the law requires for an individual to waive the privilege.

> The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (internal citations omitted). Existing Mississippi law places great importance on the privilege. "[T]he privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client. Included are communications made by the client to the attorney and by the attorney to the client." *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003) (*quoting Barnes v. State*, 460 So.2d 126, 131 (Miss. 1984)).

Mississippi law requires clear evidence of a waiver. The trial court's order, however, is not clear and does not identify what specific action by Travelers constituted a waiver of the attorney-client privilege. The trial court ultimately ruled:

> As indicated, this Court has had the benefit of conducting an *in camera* review of the documents at issue. This Court will not divulge the contents of those items in this Order. Suffice it to say, however, that based upon the review of those documents, together with the Court's review of the deposition of Charlene Duncan, this Court is left with the inescapable conclusion that Travelers has waived the attorney-client privilege as it relates to attorney Jim Harris.

See R.E.2, at p. 9; R. at 896. The trial court's order essentially found a waiver based upon the totality of the circumstances, and as such, it is impossible to determine what specific actions constituted a waiver, which undermines the entire purpose of the privilege.

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege ... is little better than no privilege at all.

Upjohn, 449 U.S. at 393.

Although Rule 502 does not include a waiver provision (unlike the medical privilege in Rule 503), this court has identified very narrow circumstances under which a waiver can occur. In *Jackson Med. Clinic for Women, P.A. v. Moore*, 836 So. 2d 767 (Miss. 2003), the court suggested that the client may waive the attorney-client privilege only when the client:

(1) specifically pleads advice of counsel as an element of a claim or defense;

(2) voluntarily testifies regarding portions of the attorney-client communications; or

(3) specifically places at issue the attorney-client relationship. [1]

Id. at 773 (*quoting Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 52-53 (Conn. 1999)). In *Moore*, the court quoted a discussion of the "at issue" waiver of the attorney-client privilege, "voluntarily injecting into a litigated case, a material issue which requires ultimate disclosure by the attorney of information, ordinarily protected by the privilege." *Id.* at 773 (emphasis added) (*citing Am. Standard, Inc. v. Bendix Corp.*, 80 F.R.D. 706, 708 (W.D. Mo. 1978)).

In determining how waiver of a right is determined in general, this court has recognized that "[w]aiver presupposes a full knowledge of a right existing, and an intentional surrender or

[1] Although the trial court appeared to rely on the "at issue" rule when determining that Travelers waived the privilege, it is unclear whether this court actually adopted the "at issue" rule in *Moore*. In *Moore*, the key element was the fact that the client expressly divulged attorney-client communications. *Moore* at 773.

relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights, or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right." *Ewing v. Adams*, 573 So. 2d 1364, 1369 (Miss. 1990) (*quoting Ballentine's Law Dictionary* 1356 (3rd ed. 1969)). "[T]he fact of waiver typically must be proved by clear and convincing evidence." *Hinton v. Pekin Ins. Co.*, 268 So. 3d 543, 557 (Miss. 2019), *reh'g denied* (May 9, 2019).

Because of the ambiguity and generality of the trial court's ruling, it is impossible to specifically determine what Travelers did that supposedly amounted to a waiver of the attorney-client privilege. The trial court's order can be read to suggest that the court relied on three different bases for finding a waiver of the privilege, none of which are correct under existing Mississippi law. First, the trial court's order suggests the content of the privileged communications themselves created a waiver the attorney-client privilege. Second, it suggests that Travelers waived the privilege simply by consulting with counsel and potentially acting on counsel's opinions. Finally, it suggests Travelers voluntarily waived the privilege by answering questions posed by opposing counsel on cross-examination, although the deponent never revealed any confidential communications.

An examination of each of these circumstances through the lens of existing Mississippi law requires a determination that no waiver occurred under these facts. Amicus further respectfully suggests that should this court decide to modify existing law to expand the circumstances under which the attorney-client privilege can be waived, it still cannot allow the trial court's order to stand. All individuals and businesses subject to the laws of this state, as well as their attorneys, must know what specific actions or statements created a waiver in this case if they are to clearly understand how to avoid similar pitfalls in the future.

1. Considering the Relevance of the Attorney-Client Communications as a Factor to Determine Whether a Client Waived the Privilege Undermines the Purpose of the Attorney-Client Privilege.

The trial court's order suggests that the content of the privileged communications themselves waived or contributed to waiving the privilege.[2] In essence, the trial court appears to have found a waiver, at least in part, because of the relevance of the privileged documents.[3]

Allowing this ruling to stand would all but destroy the attorney-client privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the [psychotherapist-patient] privilege."). Considering relevance as a factor when determining a waiver also disregards Mississippi discovery rules, which specifically exempts privileged communications from discovery, even if they are relevant. *See M.R.C.P.* 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party.") (emphasis added). The Fifth Circuit and other courts have expressly rejected considering relevance as a factor in determining whether a party waives the privilege. *See In re Itron, Inc.*, 833 F.3d 553, 561 (5th Cir. 2018); *In re Burlington N., Inc.*, 822 F.2d 518, 533 (5th Cir. 1987) ("Attorney/client documents may be quite helpful [to an adversary's argument], but this

[2] "…based upon the review of those documents, together with the Court's review of the deposition of Charlene Duncan…" *See* R.E.2, at p. 9; R. at 896.

[3] This is essentially Renaissance's argument. Renaissance argues that Travelers' attorney, by virtue of the attorney's communication with his client, is the only one with any information regarding Travelers' reasons for initially denying the claim, and as such, Renaissance is entitled to discovery of the privileged communications. *See Renaissance's Ans. to Trav.'s Pet. for Int.*, at ¶ 16 ("However, no individual tendered by Travelers has been able to set forth such a basis. All arrows point toward Mr. Harris as the one individual possessing any knowledge of the basis of denial, and it is known that Mr. Harris communicated with Travelers specifically regarding a coverage determination of Plaintiff's claim, but Travelers has foreclosed any discovery relating to Mr. Harris.").

is not a sufficient basis for abrogating the privilege.") The Third Circuit in *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3rd Cir. 1994), held:

> Relevance is *not* the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.

The purpose of the attorney-client privilege is to encourage full and frank communications between clients and attorneys as to relevant issues involving disputed matters. If the relevance of the communications is a factor in determining whether a waiver occurred, the purpose of the privilege is undermined. The Third Circuit discussed this issue at length in *Rhone–Poulenc Rorer Inc., supra*:

> As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.

Almost all communications between attorney and client are relevant to a pending lawsuit or a potential lawsuit. There is no purpose in protecting irrelevant communications, as the entire purpose of consulting an attorney is to consult about issues that are relevant to a lawsuit. *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1146 (La. 1987) ("[P]rivileged material will usually be "relevant" and "vital" to the opposing party, or else he would not make the effort to obtain it."). If the court considers relevance as a factor in determining whether a client waives the attorney-client privilege, then the privilege essentially does not exist. Amicus asks the court to confirm the law in this state protecting attorney-client communications, and to find that the trial

court committed clear error to the extent it considered the content or relevance of the protected communications in determining whether Travelers waived the privilege.

2. Clients Must Be Able to Consult with Counsel and Act on Counsel's Opinions without Waiving the Attorney-Client Privilege.

Again, because of the ambiguity of the trial court's ruling, there is no way to determine what specifically Travelers supposedly did to waive the attorney-client privilege. One implication of the trial court's order is that Travelers waived the privilege simply by consulting an attorney and considering the attorney's advice in making its decision. To the extent this may have played a role in the court's ruling, it is contrary to existing law and has significant ramifications on a party's ability to frankly consult with an attorney, receive advice, and act accordingly. Such a ruling would essentially prohibit claims professionals, or any other party, from discussing legal issues with counsel and considering the attorney's advice without fear that the communications will be subject to discovery.

In the context of the insurance industry, claims professionals cannot be expected to know every intricacy of the varying laws of different states when interpreting complex legal issues, such as Mississippi's uninsured motorist law. Claims professionals must be able to freely consult with counsel in the manner described above without fear of waiving the privilege. Federal magistrate judges applying Mississippi's privilege rules have explicitly held that testifying as to consultations with an attorney regarding a coverage dispute does not waive the attorney-client privilege. In *Performance Drilling Co., LLC v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, Civil Action No. 3:14-cv-254-DPJ-FKB, 2015 WL 1279208 (S.D. Miss. Oct. 21, 2015), the court found no waiver occurred when an employee of the insurer testified about consultations with counsel, "I do not remember what [the counsel] may or may not have said. But I agree that if [the counsel] or whoever had given an opinion that the claim could and should be denied, that would have been part of the deciding factor." *Id.* at fn. 1; *See also BancInsure, Inc. v. Peoples Bank of S.*, Civil

Action No. 3:11-cv-78-TSL-MTP, 2012 WL 139208 (S.D. Miss. Jan. 18, 2012) (no waiver when an employee of the insurer testified that they consulted with counsel in determining whether to accept or deny coverage for a claim).

The ramifications of finding a waiver because the adjuster consulted an attorney and considered his advice extend far beyond the insurance industry. For example, if an individual consults an attorney to determine whether he has a legal case and then files a complaint making legal allegations based on the attorney's advice, does the plaintiff waive the attorney-client privilege under these circumstances? Similarly, litigants rely on their counsel to respond to discovery requests requiring legal analysis. Litigants should not be considered to have waived the attorney-client privilege in these circumstances.

All parties should be able to consult an attorney and act on (or choose to disregard) the attorney's advice without fear of waiving the attorney-client privilege. A finding that Travelers waived the attorney-client privilege simply by consulting with counsel and considering, or even acting, on that counsel's advice obliterates the foundation of the attorney-client privilege. To the extent the trial court may have considered this aspect as a factor in finding a waiver, Amicus asks this court to recognize that the trial court committed error and preserve the rights of parties to freely consult with counsel.

3. The Waiver Rules Should Neither Reward Nor Encourage Aggressive Litigation Tactics Designed to Manufacture a Waiver.

The trial court also relied on deposition cross-examination testimony of Travelers' employee in finding a waiver. But the court did not identify which of the employee's answers led to the finding of waiver. As discussed previously, the law requires a voluntary act by the client in order to waive the privilege. *See Moore,* 836 So.2d at 773. Under existing Mississippi law, answering questions from opposing counsel does not constitute a voluntary act required to waive an evidentiary privilege. *See Sessums by Sessums v. McFall*, 551 So. 2d 178, 181 (Miss. 1989)

(answering questions "on cross examination as to communications made to [a] physician is not voluntary so as to constitute a waiver of [the] privilege.") (*citing Coca Cola Bottling Works v. Simpson,* 158 Miss. 390, 130 So. 479, 481 (Miss. 1930)). Similarly, merely testifying as to the identity of a doctor does not waive the physician-patient privilege. *See Bryan Bros. Packing Co. v. Grubbs,* 251 Miss. 52, 168 So. 2d 289 (Miss. 1964) (a party's testimony that a doctor treated her, which did not reveal any confidential communications, does not constitute a waiver of the physician-patient privilege).

The public policies behind the attorney-client privilege, as well as full and fair discovery, are not well served by a ruling that encourages gamesmanship in such circumstances. If a client may waive the privilege simply by answering questions posed by opposing counsel, any attorney could manufacture a waiver of the privilege with questions directed at achieving that goal. And this new weapon could cut both ways. For example, consider the following scenarios. A defense attorney asks a plaintiff, "What is the basis for the allegation in paragraph four (4) of your Complaint?" The plaintiff answers, "I do not know. My attorney wrote it." Has the plaintiff waived the privilege? Likewise, if a plaintiff refers an opposing party to the plaintiff's attorney regarding a response to an interrogatory that concerns legal allegations, does the plaintiff waive the privilege?

Affirming the trial court's ruling will encourage aggressive questioning from opposing counsel as a tactic designed to coerce parties into waiving the attorney-client privilege, which would constitute a type of gamesmanship that this court has always discouraged. *See Holmes v. Holmes,* 628 So. 2d 1361, 1361-65 (Miss. 1993) (stating that improper use of the rules invariably results in gamesmanship). For these reasons, Amicus asks this court to find that a party does not place the attorney-client relationship at issue and has not waived the privilege by simply answering questions posed by opposing counsel.

A finding of a waiver without a voluntary act by the party ignores the sanctity of the attorney-client privilege and creates substantial uncertainty for parties and their attorneys during discovery. Amicus submits that the testimony in the record does not come close to creating a waiver. But at a minimum, since the trial court's order provides no guidance on this issue, counsel must know when and how much to allow clients to answer in response to questioning, and when to instruct them not to answer questions. Without further guidance, how do attorneys balance their obligation not to obstruct discovery with their duty to protect the attorney-client privilege? This court should reverse the trial court's order in its entirety, but at a minimum should provide clarity on this issue if it chooses to modify existing law.

CONCLUSION

Under current Mississippi law, the attorney-client privilege is not waived due to the relevance of attorney-client communications to the underlying litigation; the mere fact that a party consulted with and considered the opinions of an attorney; or the mere fact that a deponent answered questions on cross-examination. Affirming the trial court's ruling would require the court to alter firmly established law protecting the sanctity of attorney-client communications. Deponents and parties answering interrogatories will be forced to be more calculated and circumspect, or even completely non-responsive, which will significantly decrease the effectiveness of the discovery process.

For these reasons, Amicus respectfully requests that the court uphold this state's policy of protecting attorney-client communications by finding the trial court committed clear error in finding that Travelers waived the privilege.

This the 14th day of November, 2019.

Respectfully submitted,

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AMICUS CURIAE

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I hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the MEC system for provision of notification and a copy of the referenced document to the following counsel of record in this cause:

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This the 14th day of November, 2019.

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