IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2019-IA-00586

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA APPELLANT

VS.

100 RENAISSANCE, LLC APPELLEE

**ON APPEAL FROM THE COUNTY COURT
OF MADISON COUNTY, MISSISSIPPI**

MOTION FOR REHEARING OF APPELLANT, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

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MOTION FOR REHEARING OF APPELLANT,
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

I. INTRODUCTION

This is a bad faith case stemming from Travelers' denial of uninsured motorists (UM) coverage for damage to the plaintiff's flag pole. This Court ruled that Travelers waived the attorney-client privilege when Travelers' adjuster consulted with in-house counsel and issued a denial of coverage letter that incorporated advice of counsel. [Opinion, October 29, 2020]. Respectfully, the Court overlooked or misapprehended two key facts:

(1) The Court concluded Charlene Duncan could not explain why the claim was denied, when in fact she testified the claim was denied based upon the plain policy language; and

(2) The Court concluded Travelers' in-house attorney, Jim Harris, authored the March 2, 2016 denial of coverage letter, when in fact he did not author the letter.

In addition, the Court's Opinion is at odds with Mississippi law that requires a voluntary act to waive the attorney-client privilege. Moreover, while the Opinion states that the case of *State Farm Mutual Automobile Insurance Co. v. Lee*, 13 P. 3d 1169 (Ariz. 2000) is "on point," there would be no waiver under the *Lee* analysis. Travelers respectfully requests this Court reconsider its Opinion pursuant to Mississippi Rule of Appellate Procedure 40.

II. ARGUMENT

A. The Court misapprehended the facts surrounding Travelers' denial of coverage.

The Court found that Travelers' claims handler, Charlene Duncan, "offered no information or explanation as to why the claim was denied." [Opinion, p. 14]. That is incorrect and contrary to the record evidence. On February 18, 2016, prior to ever consulting with Travelers' in-house

counsel, Duncan denied the claim because the plain language of Travelers' UM policy requires damage to a covered auto. R. 466. Duncan testified repeatedly during her deposition that she initially denied the UM claim ***prior*** to seeking advice from coverage counsel by relying upon the plain policy language:

> Q. You denied coverage - - initially denied coverage prior to talking to an attorney?
>
> A. Correct.
>
> Q. Okay. And the reason you did that is you did not know - - well, you're not a lawyer. And so you looked at the policy and only the policy in making that decision, right?
>
> A. Correct.

R. 475 at deposition p. 21 (emphasis added).

> Q. Why was this claim denied?
>
> A. It was denied because . . . the vehicle that left the scene hit a flagpole. The flagpole is property. It is not a vehicle. For an auto policy, a vehicle has to be involved. There was no vehicle involved, so it should have been under a property policy.

R.490 at deposition p.79 (emphasis added).

As the Dissent correctly found, "Duncan clearly understood the reason for denying the claim, which was the same reason stated in her initial denial letter: the express language of the policy precluded coverage." [Opinion, p. 20].

After Duncan issued the February 18 denial letter, Renaissance's attorney sent Duncan an email presenting legal arguments regarding Mississippi's UM law. R. 490 at deposition p. 80; R. 520-21. It was at that point Duncan referred those legal arguments to Travelers' in-house counsel, because Duncan is not an attorney and she was unsure if any of the legal arguments raised by Renaissance's counsel would require her to change her decision on coverage, which it did not. *Id.*

The questions that Duncan was unable to answer during her deposition, which are cited on pages 5 to 11 of the Opinion, pertained to her understanding of Mississippi's statutory UM laws, not her understanding of why the claim was denied. The Dissent correctly found, "Duncan faltered [during her deposition] only when asked to respond to Renaissance's legal arguments concerning questions of statutory interpretation that might have overridden the express policy language." [Opinion, p. 20]. In other words, Duncan was unable to answer questions of statutory interpretation, which is the very reason she consulted in-house counsel in the first place.

As the Dissent correctly states, the Opinion would "impose a requirement that in order to preserve the privilege, a claims handler must be able to explain legal arguments at her deposition—the same legal issues for which she sought advice in the first place," which would have "deleterious and chilling effects on the exercise of the attorney-client relationship," as discussed below. [Opinion, p. 20].

B. The Court incorrectly concluded that Harris prepared the March 2, 2016 letter.

The Court found that the March 2, 2016 letter was actually authored by Harris, not Duncan:

> The [March 2, 2016] letter was signed by Duncan; but based on her deposition testimony, it clearly was prepared by someone other than Duncan, most likely Harris. If so, Harris did not act as legal counsel and give advice to Duncan to include in the denial letter. Instead, the denial letter contained Harris' reasons to deny the claim. Duncan's signature was simply an effort to hide the fact that Harris, not Duncan, had the personal knowledge of Travelers' reasons to deny the claim and to use the attorney-client privilege as a sword to prevent Renaissance from discovering the reasons from the person who had personal knowledge of the basis to deny the claim.

[Opinion, p. 15].

That finding is incorrect. Duncan testified as follows:

> Q. I'm going to show you . . . a letter dated March 2nd, 2016. And I'm going to ask you if you recognize that?

. . . .

A. Yeah. I mean, I wrote it. Yeah, I wrote the letter.

Q. Okay. And who assisted you in doing that?

A. No one. I did it myself.

R. 486 at deposition p. 62 (emphasis added).

There is not a shred of evidence that Harris authored that letter. Moreover, the letter reiterated that coverage was denied for the same reason Duncan had already denied coverage prior to even consulting Harris—"the flag pole is not a covered auto nor does it come within the expanded definition of 'property damage' found in the policy." R. 530. While the letter may have incorporated Harris' legal advice, merely relying upon counsel's advice when drafting the letter would not waive the privilege under established Mississippi law or the holding of *State Farm Mutual Automobile Insurance Co. v. Lee*, 13 P. 3d 1169 (Ariz. 2000), as discussed below.

C. The Court failed to follow *State Farm v. Lee*.

The Court found that the decision of the Arizona Supreme Court in *Lee* is "on point," but there would be no waiver under *Lee.* The critical distinction is that in *Lee*, State Farm had "alleged that its actions were objectively and subjectively reasonable and in good faith based on its evaluation of the law—an evaluation that included advice of counsel . . ." *Id*. at 1174. The Arizona Supreme Court stressed that it was this act—State Farm asserting the reasonableness of its subjective belief based on its evaluation of the law—that waived the attorney-client privilege:

> We assume client and counsel will confer in every case, trading information for advice. This does not waive the privilege. We assume most if not all actions taken will be based on counsel's advice. This does not waive the privilege. Based on counsel's advice, the client will always have subjective evaluations of its claims and defenses. This does not waive the privilege. All of this occurred in the present case, and none of it, separately or together, created an implied waiver. But the present case has one more factor—State Farm claims its actions were the result of its reasonable and good-faith belief that its conduct was

> permitted by law and its subjective belief based on its claims agents' investigation into and evaluation of the law. It turns out that the investigation and evaluation included information and advice received from a number of lawyers. It is the last element, combined with the others, that impliedly waives the privilege.

Id. at ¶38 (emphasis added).

Therefore, merely incorporating counsel's advice into Duncan's March 2 letter would not waive the privilege under *Lee*, as Arizona courts following *Lee* have recognized. See *Everest Indemnity Ins. Co. v. Rea*, 236 Ariz. 503 (Ariz. Ct. App. 2015) ("In *Lee,* the Arizona Supreme Court explained that to waive the privilege, a party must do more than simply confer with counsel and take action incorporating counsel's advice.") (emphasis added); *Labertew v. Chartis Property Casualty Company*, 2018 WL 1876901, *4 (D. Ariz. 2018) ("[T]o waive the privilege under *Lee*, 'something more is required' than merely consulting with counsel and taking action based on the advice received.") (emphasis added); *Barten v. State Farm Mutual Automobile Insurance Company*, 2015 WL 11111310, *6 (D. Ariz. 2015) ("To waive the privilege, a party must do more than simply confer with counsel and take action incorporating counsel's advice.") (emphasis added).

As the Dissent in the present case correctly noted,

> *Lee* is nothing more than an advice-of-counsel defense case in which the defendant contended that it had subjectively acted in good faith because it relied upon its attorneys' advice. Travelers has not raised advice of counsel as a defense, either expressly or implicitly; it has hung its hat on the objective defense that its rejection of the claim was supported by an arguable or legitimate basis.

[Opinion, p. 22]. The trial court also correctly found that "Travelers has not expressly pled advice of counsel as an affirmative defense." R.E.1, p. 3.

Travelers' defense has always been that it had an arguable basis to deny coverage based upon the plain policy language. Because this is a bad faith case, Travelers necessarily asserted

that it had an arguable basis to deny coverage.[1] If asserting this defense waived the attorney-client privilege, then it would be impossible to defend a bad faith case without waiving the attorney-client privilege.

Not only does the present case not present a waiver under *Lee*, there would be no waiver under the other cases cited by this Court. In *Bertelsen v. Allstate Insurance Co.*, 796 N.W. 2d 685, 703 (S.D. 2011), the Court actually declined to follow *Lee*, finding that "*Lee* goes too far" in that it "does not strike an appropriate balance of the need for discovery with the importance of maintaining the privilege." The Court thus ruled, "a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case. A denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege." *Id*. at 703 (emphasis added).

In *Dakota, Minnesota & E. R.R. Corp. v. Acuity*, 771 N.W. 623, 626 (S.D. 2009), the attorney for the insurance company had "exclusively handled the investigation and made the determination on the UM claim." The Court found that the attorney-client privilege was waived because "outside counsel *exclusively* conducted the investigation and *solely* made the initial determination to deny the UM claim." *Id*. at 638 (emphasis in original).

Similarly, in *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986), immediately after receiving notice of a fire loss, the insurance company "employ[ed] attorneys to fulfill its ordinary business function of claims investigation." As in *Dakota*, the Court found that the attorney-client privilege would not apply "[t]o the extent that [the attorneys] acted as claims adjusters . . . ." *Id*. at 163.

[1] See *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So. 2d 637, 641 (Miss. 1998) (An insurance company defending a bad faith denial case must establish it had an arguable or legitimate basis to deny coverage.)

These cases are fundamentally different from the present case because it is undisputed that Duncan conducted the initial investigation and that she, not Harris, made the initial determination to deny the UM claim prior to consulting Harris. As the Dissent correctly found, "Travelers' attorney's participation was limited to evaluating legal arguments presented by Renaissance's attorney in a demand letter after the initial denial of coverage." [Opinion, p. 23]. Travelers did not "delegate its initial claims function and rel[y] exclusively" upon Harris, as in *Dakota*. Nor did Harris act as a claims adjuster, as in *Mission*.

D. The Court's Opinion will have deleterious and chilling effects on the exercise of the attorney-client privilege in Mississippi.

The Court's Opinion will significantly undermine the attorney-client privilege in Mississippi. The Opinion states, "if the claims handler relied *substantially, if not wholly*, on in-house counsel to prepare her denial letter, the reasoning of in-house counsel should be discoverable." [Opinion, p. 18 (emphasis in original)]. This ruling represents a sea change in Mississippi's attorney-client privilege and casts doubt on existing Mississippi law.

In *Performance Drilling Co., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* No. 3:14-CV-254-DPJ-FKB, 2015 WL 12979208 (S.D. Miss. 2015), the Court found no waiver occurred when an employee of the insurer testified that he relied upon counsel in denying the subject claim and had further testified, "I do not remember what [the attorney] may or may not have said. But I would agree that if [he] 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.

In *BancInsure, Inc. v. Peoples Bank of the South*, 2012 WL 139208, *2 (S.D. Miss. 2012), the Court found no waiver where the insurer's 30(b)(6) representative "testified that [the insurer] relied on counsel in determining whether to accept or deny coverage for the claims, and [the

insurer's] discovery responses indicate that outside counsel was involved in determining that the claims were not covered."

In both cases the district court judges concluded that the privilege had not been waived because the insurers had not asserted "advice of counsel" as a defense. *Performance Drilling*, 2015 WL at *3; *BankInsure*, 2012 WL at *2. In the current case, Travelers has never asserted an "advice of counsel" defense.

The Court's ruling will have significant ramifications on a party's ability to frankly consult with an attorney and act upon the advice received. The ruling will prevent claims professionals, if not any party, from discussing legal issues with counsel and relying upon counsel's advice without fear that the communications will be subject to discovery. Claims professionals cannot be expected to know the intricacies of the laws of every state when interpreting complex legal issues, such as Mississippi's UM law. Claims professionals must be able to freely consult with counsel without fear of waiving the privilege:

> [A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. A contrary ruling would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege-to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

Aetna Cas. & Sur. Co. v. Superior Ct., 200 Cal. Rptr. 471, 475 (Cal. Ct. App. 1984).

> If admitting that one relied on legal advice in making a legal decision put the communications relating to the advice at issue, such advice would be at issue whenever the legal decision was litigated. If that were true, the at issue doctrine would severely erode the attorney-client privilege and undermine the public policy considerations upon which it is based.

Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co., 249 Conn. 36, 730 A.2d 51, 52–53 (Conn. 1999).

> There would be little point in retaining coverage counsel to issue an opinion if a party did not intend to rely on it. Likewise, if reliance always gave rise to waiver in this circumstance, no one would seek coverage counsel's advice.

Botkin v. Donegal Mut. Ins. Co., 2011 WL 2447939 (W.D. Va. 2011).

The Opinion would also create situations where a waiver can be manufactured by opposing counsel. For example, suppose a defense attorney asks a plaintiff, "What is the basis for Count Four of your Complaint?" The plaintiff answers, "I do not know. My attorney wrote it." The privilege would arguably be waived. Likewise, if a party is unable to explain a response to an interrogatory that concerns legal allegations, the privilege would arguably be waived.

It should remain the law in Mississippi that waiver of the attorney-client privilege is a voluntary act, not one that can be elicited by opposing counsel.

III. CONCLUSION

Travelers respectfully submits that this Court misapprehended the facts and law in its October 29, 2020 Opinion, and respectfully requests that it reconsider its Opinion affirming the trial court's Order.

This, the 12th day of November, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Supreme Court of Mississippi, Court of Appeals, using the MEC system which sent notification of such filing to the following:

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This the 12th day of November, 2020.

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