# In The
# Court of Appeals
# Sixth Appellate District of Texas at Texarkana

No. 06-17-00047-CV

IN RE JOHN GOIN AND HOPE CRUMP

Original Mandamus Proceeding

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

## MEMORANDUM OPINION

This original mandamus proceeding emanates from a discovery dispute regarding allegedly privileged attorney-client communications—comprised of an insurance claim file—in connection with a lawsuit in which relator John Goin has alleged various causes of action against the real party in interest, Travelers Property Casualty Company of America (Travelers), based on Travelers' alleged abandonment of Goin's defense in a lawsuit in which an eight-figure damage award was rendered against him. The trial court reviewed the disputed communications in camera and upheld the privilege with respect to certain of the communications. Goin, together with relator Hope Crump,[1] filed this petition for a writ of mandamus, asking this Court to direct the 336th Judicial District Court of Fannin County to compel Travelers to produce the disputed claim file free of redaction. We conditionally grant, in part, the petition for writ of mandamus.

### I. Background

In January 2012, Goin, an employee of Mica Corporation (Mica), was driving a pickup truck owned by Mica when it was involved in a rollover accident in which the passenger, Hope Crump, was ejected and rendered a paraplegic. In March 2012, Crump sued Goin and Mica in Anderson County, seeking recovery of damages for personal injuries sustained as a result of the accident. The truck, and all permissive users, were covered by a commercial automobile policy issued to Mica by Travelers. Consequently, Travelers hired counsel to defend Goin in the lawsuit.[2]

[1]Crump, a judgment creditor of Goin, intervened in the lawsuit.

[2]This defense was tendered pursuant to a reservation of rights, as there was a question about whether Goin had Mica's permission to operate the pickup truck at the time of the accident.

In January 2013, Crump nonsuited the Anderson County lawsuit and later refiled her claims in Dallas County.[3] Travelers did not tender a defense on Goin's behalf for approximately eighteen months after the lawsuit was filed, by which time most of the pretrial deadlines had expired. The trial took place in February 2015, at the conclusion of which the trial court entered judgment against Goin in the amount of $10,125,433.96, prejudgment interest in the amount of $220,532.40, and post-judgment interest at the rate of 5% per annum. In April 2015, Goin filed suit (bad faith lawsuit) against Travelers, alleging causes of action for breach of contract, tortious interference, promissory estoppel, breach of fiduciary duty, negligence, breach of the duty of good faith and fair dealing, unfair insurance practices, deceptive trade practices, violations of the Texas Insurance Code, and fraud, among other things, primarily as a result of Travelers' failure to defend and to indemnify Goin in the Dallas County lawsuit.

During the course of the bad faith lawsuit, Goin requested a copy of Travelers' claim file relating to the Dallas County lawsuit, as the adjuster assigned to the claim testified in his deposition that he reviewed the claim file to prepare for his deposition. Travelers produced a heavily redacted version of the claim file and asserted attorney-client privilege with respect to the redacted information. Both Goin and Crump moved to compel the production of an unredacted version of the claim file, contending that Travelers' internal discussions regarding its decision to abandon Goins' defense went to the heart of Goin's bad faith and fraud claims. Travelers produced a privilege log, and asserted that the redacted information was protected by the attorney-client

[3]In the interim, Goin was sentenced to a term of twelve years' incarceration, allegedly as a result of his conviction of intoxication assault.

privilege. In addition, it proffered a declaration of senior counsel, Alicia Barton, in support of the privilege assertion. The declaration reads,

> 1. My name is Alicia Barton, my date of birth is June 5, 1978, and I reside in Plano[,] Texas.
>
> 2. I am of sound mind and am in all respects competent to make this declaration. The facts contained in this declaration are true and correct.
>
> 3. I am employed as Senior Counsel by The Travelers Indemnity Company and their property-casualty affiliates, one of which is Travelers Property Casualty Company of America ("Travelers"), and I have worked in this role since September 1, 2010.
>
> 4. My role as Senior Counsel is to provide legal advice in connection with insurance claim related matters.
>
> 5. I am licensed to practice law in the State of Texas and am in good standing.
>
> 6. I declare under penalty of perjury that the foregoing is true and correct.

Travelers advanced no other testimonial evidence in support of its claim of privilege.

At the hearing on the motion to compel, Travelers submitted the claim file to the trial court for an in-camera review. The trial court sustained Travelers' assertion of the attorney-client privilege regarding the majority of the redacted information. Much of that information is comprised of communications between the adjuster and Barton. Relators claim that, without that information, their ability to prosecute the underlying bad faith and fraud claims is severely compromised. Consequently, relators seek a writ of mandamus directing the trial court to compel Travelers to produce the claim file at issue without redaction.

## II. Standards of Review

Mandamus issues only when the mandamus record establishes (1) that the relator has no adequate remedy at law and (2) that the action he seeks to compel is ministerial, not one involving a discretionary or judicial decision. *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals at Texarkana*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). A trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

"Mandamus is not available for most discovery disputes," because an appeal is an adequate remedy for most such disputes. *In re Pilgrim's Pride Corp.*, 204 S.W.3d 831, 834 (Tex. App.—Texarkana 2006, orig. proceeding). However, there is no adequate remedy by appeal when the trial court's discovery error is not curable on appeal. *In re Kuntz*, 124 S.W.3d 179, 181 (Tex. 2003) (orig. proceeding). Moreover, an appellate remedy is inadequate when "the discovery denied by the trial court goes to the very heart of the . . . case." *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995); *see Walker*, 827 S.W.2d at 839, 842 (appeal from discovery order not adequate if party's ability to present viable claim is vitiated or severely compromised); *In re Drews*, No. 06-12-00084-CV, 2012 WL 4854716, at *1 (Tex. App.—Texarkana Oct. 12, 2012, orig. proceeding) (mem. op.).

The attorney-client privilege is governed by Rule 503 of the Texas Rules of Evidence. TEX. R. EVID. 503. Under this Rule, a "client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." TEX. R. EVID. 503(b)(1). The privilege

covers not only direct communication between lawyer and client, but also communications involving the client's representatives and the lawyer's representatives, so long as they were made for the purpose of facilitating legal services to the client. TEX. R. EVID. 503(b)(1)(A), (D).

## III. Analysis

### A. Prima Facie Evidence of Privilege

Here, relators contend that Travelers failed to present sufficient evidence in support of its claim of attorney-client privilege. When mandamus relief is sought to overcome a trial court's conclusion that evidence is privileged absent sufficient evidence to support the privilege claim, we must determine whether the party asserting the privilege has discharged its burden of proof. *See Barnes v. Whittington*, 751 S.W.2d 493, 494 (Tex. 1988); *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding). The party asserting a privilege from discovery has the burden to produce evidence concerning its applicability. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding); *In re Tex. Farmers Ins. Exchange*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding). Generally, this is accomplished by testimony or affidavit evidence sufficient to establish a prima facie case for the privilege. *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 261 (Tex. 2005) (orig. proceeding). "The prima facie standard requires only the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *DuPont*, 136 S.W.3d at 223 (quoting *Tex. Tech Univ. Health Scis. Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994, writ denied)).

Here, Travelers properly pled that the redacted portions of the claim file were subject to the attorney-client privilege and produced a privilege log with respect to the file entries.[4] Travelers likewise produced the affidavit of its senior counsel, Barton, as previously set forth. Relators contend that the affidavit, in and of itself, is insufficient to establish even a prima facie claim of privilege relative to the various redacted claim-file entries. Accordingly, Relators conclude that Travelers failed to satisfy its evidentiary burden of establishing that the redacted claim file notes are protected by the attorney-client privilege and, therefore, that the trial court abused its discretion in refusing to compel Travelers to produce the claim file without redaction.

We cannot agree with this reasoning. While it is true that the Barton affidavit is not prima facie evidence that the attorney-client privilege applies to the redacted portions of the claim file, the crucial privilege determinations could still have been made by the trial court when it reviewed the file in camera.[5] *See DuPont*, 136 S.W.3d at 223 (documents themselves may constitute sufficient evidence to make prima facie showing of attorney-client privilege); *Weisel Enters., Inc.*, 718 S.W.2d at 58. Notwithstanding the deficiencies of Barton's affidavit, the trial court could have made the requisite finding if the file documents themselves demonstrate that (1) they are "confidential communications made to facilitate the rendition of professional service

[4]The attorney-client privilege protects confidential communications between a lawyer and a client or their respective representatives made to facilitate the rendition of professional legal services to the client. TEX. R. EVID. 503(b).

[5]The Barton affidavit did, however, establish that Barton's role as senior counsel for Travelers was to provide legal advice in connection with insurance-claim-related matters, thereby establishing the attorney prong of the attorney-client privilege. *See* TEX. R. EVID. 503(a)(3).

to [Travelers]"; and (2) the communications were made by (a) a representative of Travelers[6] or (b) "[Barton] or [Barton's] representative"; and (3) the communications were passed between them. *See* TEX. R. EVID. 503(a)(2), (b)(1)(A).

Our review of the redacted claim file, which is before us in the form of a sealed record, indicates that Matt Willson was an employee of Travelers acting in the course and scope of his employment as a claims adjuster on the claim against Goin. The file includes various communications between Willson and Barton. The claim file, taken together with Barton's affidavit indicating that her role as senior counsel for Travelers is to provide legal advice in connection with insurance-claim-related matters, suggests that Travelers has properly made a prima facie showing of privilege with respect to certain of the redacted claim file entries. Because these entries reflect communications between Barton and Willson, the claims adjuster on the claim by Crump against Goin,[7] they support a rational inference that the attorney-client privilege applies.[8] *See generally In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 818 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (request for coverage opinion from adjuster to in-

[6]In order to establish that the person making or receiving the communications was a representative of Travelers, the records themselves must establish that the person (1) "[had] the authority to obtain professional legal services for [Travelers]"; or (2) had authority "to act for [Travelers] on the legal advice rendered"; or (3) "[made] or [received the] confidential communication while acting in the scope of employment for [Travelers]." TEX. R. EVID. 503(a)(2).

[7]The claim file indicated that the adjuster was Willson, an employee of Travelers. The mandamus record includes portions of Willson's deposition testimony to the effect that he was acting in the scope of his employment with Travelers as a claims handler when he generated notes in the claim log and that Barton was an attorney for travelers.

[8]We uphold the trial court's privilege finding as to the redacted claim file entries on the following numbered pages of the claim file: 40, 41, 43, 44, 45, 46, 47, 49, 56, 59, 64, and 77.

house counsel and responsive opinion made for purpose of facilitating the rendition of professional legal services to insurance company).[9]

### B. Documents not Covered by the Attorney-Client Privilege

We cannot conclude, however, that prima facie evidence supports the claim of privilege as to all claim file entries found by the trial court to be privileged. The trial court ruled that all redactions on pages 65 through 76 of the claim file will stand. We disagree with this ruling and hold that it is not supported by prima facie evidence of the attorney-client privilege. Each of the redacted entries on the referenced pages indicates that a certain individual transmitted certain items by email and facsimile to Willson on the dates noted. Also listed in those entries are the items transmitted to Willson. There is no evidence in the mandamus record revealing the identity of the individual who transmitted the referenced information to Willson. The listing of information transmitted does not otherwise indicate that it is in any way privileged. We, therefore, direct the trial court to order Travelers to produce to relators a claim file free of redaction on pages 65 through 76 of that file.

[9]Relators further contend that the redacted claim file entries of Willson's communications with Barton are not privileged based on *Humphreys v. Caldwell*, 888 S.W.2d 469, 470–71 (Tex. 1984). In *Humphries*, State Farm Mutual Insurance Company submitted an affidavit that included both personal knowledge of the affiant and second-hand information that the affiant had learned through investigating an automobile accident. The Texas Supreme Court held that composite or hybrid affidavit violated the rule that affidavits must be based exclusively on personal knowledge. The Court then disallowed consideration of the affidavit. *Id*. In the case now before us, Travelers did not submit a composite or hybrid affidavit like that submitted in *Humphries*. The trial court acted within its discretion in considering Barton's affidavit in conjunction with the claim file to determine whether Travelers established a prima facie showing of attorney-client privileged communications.

### C. No Waiver of Attorney-Client Privilege

Finally, relators point to Willson's testimony that he reviewed the claim file in preparation for his deposition. Based on this testimony, and pursuant to Rule 612(a)(2) of the Texas Rules of Evidence, relators contend that Travelers waived any attorney-client privilege which may have otherwise applied to the claim file by allowing Willson to review the claim file notes in preparation for his deposition.

Rule 612(a) provides:

> **(a) Scope.** This rule gives and adverse party certain options when a witness uses a writing to refresh memory:
>
> (1) while testifying;
>
> (2) before testifying, in civil cases, if the court decides that justice requires the party to have those options; or
>
> (3) before testifying, in criminal cases.

TEX. R. EVID. 612(a). The "options" referred to in Rule 612(a) are set out at length in Rule 612(b):

> **(b) Adverse Party's Options; Deleting Unrelated Matter.** An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

TEX. R. EVID. 612(b). Despite the fact that the Rule does not purport to effect a waiver of communications protected by the attorney-client privilege, relators rely on *City of Denison v. Grisham*, 716 S.W.2d 121 (Tex. App.—Dallas 1986, no writ). In *Grisham*, however, the deponents had used certain documents to refresh their memory while testifying, under subpart

(a)(1) of the Rule. *Id*. at 123.[10] The court stated, "If the papers are used by the witness in advance to prepare for deposition, the court may refuse to order their delivery." *Id*. Conversely, "when privileged documents are used to refresh the memory of a witness while he is in the process of testifying at a deposition, there is no discretion—production is required . . . ." *Id*. Our sister court then held that "use of a writing to refresh the memory of a witness while he is testifying waives both attorney-client privilege and work-product protection of the document and that rule 611(1) requires the trial court to insure, upon proper request, the delivery of such material to opposing counsel." *Id*.

Here, it is undisputed that Willson reviewed the claim file in advance of his deposition. However, there is no contention that he used the claim file to refresh his memory while testifying. Consequently, even if we were inclined to adopt the reasoning of our sister court, that reasoning would not dictate a waiver of the attorney-client privilege under the facts of this case.[11]

[10]*Grisham* was decided under former Rule 611.

[11]Relators do not claim a waiver of the attorney-client privilege under Rule 511 of the Texas Rules of Evidence. *See* TEX. R. EVID. 511.

## IV. Conclusion

We conditionally grant, in part, the petition for a writ of mandamus. We direct the trial court to issue an order requiring Travelers to produce to relators a copy of its claim file absent the redactions on pages 65 through 76 of that file. The writ will issue only upon the trial court's failure to comply in a timely fashion.

Ralph K. Burgess
Justice

Date Submitted: July 11, 2017
Date Decided: July 12, 2017