NO. 12-17-00210-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE: YORK RISK SERVICES GROUP, INC., BRAD SELPH, AND SELPH ARMS, LLC, RELATOR	*§*	
	§	***ORIGINAL PROCEEDING***
	§	

MEMORANDUM OPINION

York Risk Services Group, Inc. (York), Brad Selph (Selph), and Selph Arms, L.L.C. (Selph Arms) filed this original proceeding in which they challenge the trial court's order requiring the production of certain documents.[1] In two issues, Relators maintain that the trial court abused its discretion by ordering them to produce privileged documents and that they have no adequate remedy by appeal. We conditionally grant the writ.

BACKGROUND

Corby Hall was employed by F&D Defense, L.L.C., a weapons manufacturer. According to Hall, he invented a device to reduce a problem with certain rifles. He shared this invention with Jesus Gomez from LWRC International, LLC (LWRC). In July 2013, Hall sued LWRC in Comal County for defamation based on forum posts disclaiming his involvement in the invention. In October 2013, Hall sued Selph and later added Selph Arms to the suit. Hall alleged that Selph made false and disparaging comments regarding Hall's involvement in the invention.

Selph Arms had a general liability policy with Granite State Insurance Company (Granite), which contained a duty to defend provision. York was Granite's claims administrator. On October 25, Selph submitted a claim for a defense under the policy. James Beltrante, a York

[1] Respondent is the Honorable Clay J. Gossett, judge of the 4th Judicial District Court in Rusk County, Texas. The Real Party in Interest is Corby Hall.

employee, was Selph's claims adjuster. On November 6, York informed Selph that it was investigating whether Selph's claim was covered.

In February 2014, LWRC sued Hall and F&D in federal court asserting various causes of action. Hall also sued LWRC in federal court for correction of inventorship. That May, F&D settled LWRC's lawsuit against it. Like Selph Arms, F&D had a commercial general liability insurance policy with Granite. The policy contained a duty to defend provision. On August 11, Hall filed a claim for a defense on F&D's policy. Beltrante was assigned to Hall's claim. LWRC subsequently dismissed its case against F&D. Hall settled with LWRC in September 2014.

On December 18, 2014, York informed Selph that Granite would "continue to furnish the defense with regard to the entire Corby Hall lawsuit; however you may wish to retain your own counsel, at your own expense, to participate with respect to any uncovered claims." In September 2015, Hall was denied coverage under F&D's policy because he did not qualify as an insured. The denial letter explained that (1) Hall's employment with F&D terminated on or about April 24, 2014 and at the time Hall provided notice of his claim, on or about August 13, he was no longer an employee with F&D; and (2) even if he qualified as an insured, he was not entitled to coverage for affirmative claims, i.e., those against LWRC.

On October 27, 2015, Hall sued York, Granite, and AIG Claims, Inc. for various causes of action.[2] Specifically, Hall sued York for violations of the insurance code and the Texas Deceptive Trade Practices Act. He alleged a conflict of interest based on York's investigation of Selph's claim in Hall's lawsuit against Selph at the time that Hall filed his claim with York. In May 2017, Hall filed an emergency motion to compel discovery based on York's refusal to produce documents in response to the following requests:

> Produce each Claim Management Review ("CMR") document which relates to Brad Selph's request for coverage regarding 0902B. This request does not pertain to privileged portions of the related documents, if any.
>
> Produce each document containing coverage investigations, notes, memorandums, and conclusions which relate to Brad Selph's request for coverage regarding 0902B. This request does not pertain to privileged portions of the related documents, if any.
>
> Produce each email communication between You and Brad Selph which relates to Brad Selph's request for coverage regarding 0902B.

[2] The record suggests that AIG was the underwriter for F&D's policy.

"0902B" refers to Hall's lawsuit against Selph, trial court cause number 2013-0902B. York objected to these requests, in part, on grounds that the requests sought "confidential and/or proprietary documents pertaining to another insured concerning litigation in which [Hall] was the claimant." The trial court granted Hall partial relief and ordered that the following documents be produced:

> Non-privileged portions of Claim Note entries from York's Claims Connect system with respect to York File No. LXFD – 1720A1 (Brad Selph's Request for a defense under Policy No. 02-LX-864785123);
>
> AND
>
> Non-privileged email communications between James Beltrante on the one hand, and Brad Selph and/or James Bettersworth on the other hand, from October 24, 2013 to May 21, 2015.

The order allowed York to redact portions of the documents it claimed to be privileged, provide a privilege log on or before May 25, and submit documents for in camera review on or before May 25. On May 25, York provided a privilege log and tendered multiple documents for in camera review.

On May 30, Hall's counsel provided a letter to the trial court, in which it alleged that York's redacted documents and privilege log reflected an attempt to "improperly shield communications behind baseless assertions of attorney-client privilege and/or work product." On June 30, the trial court issued a supplemental order determining that York "failed to make a prima facie case of privilege[,]" and ordering York to provide Hall with unredacted versions of documents that were "created, sent, received, or maintained by York between October 25, 2013 and December 18, 2014[.]" This original proceeding followed.

PREREQUISITES TO MANDAMUS

Mandamus is an extraordinary remedy. ***In re Sw. Bell Tel. Co., L.P.***, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). A writ of mandamus will issue only when the relator has no adequate remedy by appeal and the trial court committed a clear abuse of discretion. ***In re Cerberus Capital Mgmt., L.P.***, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). The relator has the burden of establishing both of these prerequisites. ***In re Fitzgerald***, 429 S.W.3d 886, 891 (Tex. App.—Tyler 2014, orig. proceeding.). "[M]andamus will not issue when the law provides

another plain, adequate, and complete remedy." ***In re Tex. Dep't of Family & Protective Servs.***, 210 S.W.3d 609, 613 (Tex. 2006) (orig. proceeding).

ADEQUATE REMEDY

In issue one, York maintains that mandamus review is appropriate in this case because there is no adequate remedy by appeal. We agree.

"Mandamus is appropriate to protect confidential documents from discovery." ***In re Living Centers of Tex., Inc.***, 175 S.W.3d 253, 256 (Tex. 2005) (orig. proceeding). When "the documents at issue are alleged to be privileged, mandamus is appropriate if we conclude that they are privileged and have been improperly ordered disclosed." ***Id***. Accordingly, because there is no adequate remedy by appeal for an erroneous order requiring a party to produce privileged documents, the trial court's order in this case is reviewable by mandamus. *See* ***id***.; *see also* ***In re Christus Santa Rosa Health System***, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding); ***In re Park Cities Bank***, 409 S.W.3d 859, 866 (Tex. App.—Tyler 2013, orig. proceeding).

ABUSE OF DISCRETION

In issue one, Relators maintain that the trial court abused its discretion by ordering the production of York's claim notes and the file belonging to Selph's attorney. According to Relators, these documents are privileged and not subject to disclosure.

Applicable Law

Our procedural rules define the general scope of discovery as any unprivileged information that is relevant to the subject matter of the action, even if it would be inadmissible at trial, as long as the information sought is "reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 192.3(a); ***In re CSX Corp.***, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding). At issue in this case are the work product and attorney-client privileges.

Under the attorney-client privilege, a client has a privilege to refuse to disclose and to prevent another person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client. TEX. R. EVID. 503(b)(1). A "confidential" communication is one that is not intended to be disclosed to third persons other than those (1) to whom disclosure is made to further the rendition of professional legal services to the client; or

(2) reasonably necessary to transmit the communication. TEX. R. EVID. 503(a)(5). The privilege applies to confidential communications (1) between the client or the client's representative and the client's lawyer or the lawyer's representative; (2) between the client's lawyer and the lawyer's representative; (3) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action; (4) between the client's representatives or between the client and the client's representative; or (5) among lawyers and their representatives representing the same client. TEX. R. EVID. 503(b)(1). This privilege attaches to the complete communication between attorney and client. ***Park Cities Bank***, 409 S.W.3d at 868. The subject matter of the information communicated is irrelevant when determining whether the privilege applies. ***Id***. The privilege attaches to legal advice and factual information included in completed communications between attorney and client. ***Id***.

Under the work-product privilege, "[c]ore work product--the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories--is not discoverable." TEX. R. CIV. P. 192.5(b)(1). "Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means." TEX. R. CIV. P. 192.5(b)(2). Work product includes the following:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). The work product privilege is broader than the attorney-client privilege because it includes all communications made in preparation for trial, such as an attorney's interviews with parties and nonparty witnesses, extends to an attorney's mental impressions, opinion, conclusions, and legal theories, and includes the selection and ordering of documents. ***Park Cities Bank***, 409 S.W.3d at 867.

To determine if this privilege applies, a trial court must consider the totality of the circumstances in each case and decide whether (1) a reasonable person in the party's position would have anticipated litigation, and (2) the party actually did anticipate litigation. ***Id***. The first prong requires an objective examination of the facts with consideration given to outward manifestations that indicate litigation is imminent. ***Id***. The second prong utilizes a subjective approach by asking if the party opposing discovery had a good faith belief that litigation would ensue. ***Id***. A party may reasonably anticipate suit being filed and prepare for the expected litigation before anyone manifests an intent to sue. ***Id***. Actual notice of a potential lawsuit is not required. ***Id***.

A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. TEX. R. CIV. P. 193.3(a). The party must state: (1) that information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. ***Id***. Upon request, the withholding party must serve a privilege log that (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, (2) enables other parties to assess the applicability of the privilege, and (3) asserts a specific privilege for each item or group of items withheld. TEX. R. CIV. P. 193.3(b).

The party asserting a privilege has the burden to produce evidence concerning the applicability of the privilege. ***Park Cities Bank***, 409 S.W.3d at 868. In addition to providing a privilege log, the party resisting discovery must provide testimony or affidavits establishing a prima facie case for the privilege. ***Id***. "The prima facie standard requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." ***Id***. Once the party resisting discovery establishes a prima facie case of privilege, the burden shifts to the discovering party to refute the claim. ***Id***. at 868-69. If the trial court determines that an in camera review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. TEX. R. CIV. P. 193.4(a). When "a party asserting privilege claims makes a prima facie showing of privilege and tenders documents to the trial court, the trial court must conduct an in camera inspection of those documents before deciding to

compel production." ***In re E.I. DuPont de Nemours & Co.***, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding).

Missing Documents

We first address Hall's contention that, because SELPH 000001-95 were not submitted to the trial court for in camera inspection until after York filed its petition for writ of mandamus, this Court cannot consider those documents. York filed its petition on July 5, 2017. When the trial court subsequently delivered SELPH 000096-953 to this Court under seal, the trial court explained that it had not reviewed the documents in camera because of its finding that York failed to make a prima facie case of privilege. The trial court further explained that it had not previously noticed that SELPH 000001-95 were missing and that it did not believe the documents had been provided for its review. On July 13, York provided a letter to the trial court expressing surprise regarding the missing documents and requesting that the trial court accept SELPH 000001-95 for in camera inspection so that the documents could be made part of the mandamus record. On that same day, at a hearing, York requested that the trial court accept the missing documents and the trial court accepted the documents without an objection from Hall. The trial court subsequently provided this Court with the missing documents via a sealed record.

When, as here, a "claim for protection is based on a specific privilege, such as attorney-client or attorney work product, the documents themselves may constitute the only evidence substantiating the claim of privilege." ***In re Fairway Methanol***, LLC, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding). An appellate court may conduct its "own in camera review to determine if the documents themselves support the privilege and if the trial court properly applied the law of privilege to the documents." ***Id***. In this case, the trial court did not review any documents to determine whether a privilege applied. A trial court abuses its discretion by failing to conduct an in camera inspection when such review is critical to the evaluation of a privilege claim. ***Park Cities Bank***, 409 S.W.3d at 869. Accordingly, because we are authorized to conduct our own in camera review of the documents and because we must determine whether an in camera inspection, which the trial court admittedly failed to do, was critical to the evaluation of York's privilege claim, we conclude that we may properly consider SELPH 000001-95.

York as Selph's Representative

The next question we must answer is whether York qualified as Selph's "representative." According to evidentiary Rule 503(a)(2), a "client's representative" includes the following:

> (A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or
>
> (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.

TEX. R. EVID. 503(a)(2). The Texas Supreme Court has held that, under certain circumstances, communications between an insurer and its insured may be shielded from discovery by the attorney-client privilege. ***In re XL Specialty Ins. Co***., 373 S.W.3d 46, 53 (Tex. 2012) (orig. proceeding); *see* ***In re Tex. Health Res.***, 472 S.W.3d 895, 902 (Tex. App.—Dallas 2015, orig. proceeding). In a case, such as this one, that involves a standard liability insurance policy, "only the insured is a party to the case." ***In re XL Specialty Ins. Co.***, 373 S.W.3d at 54. The insurer typically retains counsel on the insured's behalf and has the duty to conduct the insured's defense under a liability policy. ***Id***.; ***In re Tex. Health Res.***, 472 S.W.3d at 902. Such a policy usually gives the insurer complete and exclusive control of the defense, "including the ability to obtain professional legal services on behalf of the insured." ***In re Tex. Health Res.***, 472 S.W.3d at 902. When "a person is authorized by the client to obtain legal services or act on legal advice on behalf of the client or to make or receive confidential communications with respect to legal services, that person is a client's representative even if the person is not an employee of the client." ***Id.***

Hall sued Selph in October 2013. Shortly thereafter, Selph requested a defense under Selph Arms's insurance policy. The policy provides that "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies[]" and "we will have the right and duty to defend the insured against any 'suit' seeking those damages." The policy further provides that "[w]e may, at our discretion, investigate any 'occurrence' or offense and settle any claim or suit that may result[.]" Because litigation was already pending at the time of Selph's request for a defense, it is reasonable to conclude that Selph's communications with York were made for the purpose of

facilitating the rendition of professional legal services. This is particularly true given that Selph's in camera documents demonstrate that Beltrante and James Bettersworth, Selph's attorney, began communicating about the litigation almost immediately after Selph submitted his request for coverage. Moreover, the documents show that Selph expressly authorized Bettersworth to communicate with York.

Accordingly, the mandamus record contains evidence showing that York had the authority to obtain professional legal services for Selph, to act for Selph on the legal advice rendered, and to facilitate the rendition of professional legal services to Selph. *See* ***In re E.I. DuPont de Nemours & Co.***, 136 S.W.3d at 223; *see also* ***Park Cities Bank***, 409 S.W.3d at 868; TEX. R. EVID. 503(a)(2). Thus, we conclude that York was Selph's representative. *See* ***In re Arden***, No. 08-03-00269-CV, 2004 WL 576064, *3 (Tex. App.—El Paso Mar. 24, 2004, orig. proceeding) (holding that "adjuster's role in collecting Arden's [the insured] witness statement was as a representative acting with the purpose of obtaining and facilitating Arden's legal representation, rendering their communication protected by the attorney-client privilege[]").

Selph's Affidavit

On June 6, 2017, York provided the trial court with Selph's affidavit. In his affidavit, Selph stated that he requested a defense under Selph Arms's insurance policy and that Beltrante was assigned to his claim. Selph stated that the communications between Beltrante and Bettersworth were made in furtherance of his defense in Hall's suit against him because Beltrante was authorized to obtain legal services on behalf of Selph and Selph Arms, communicate with Bettersworth, and act on Bettersworth's advice. He avers that the communications between Beltrante and Bettersworth occurred between October 25, 2013 and December 18, 2014, and that those communications are protected by the work product and attorney client privileges. Selph explained that York's claim file notes and communications were made for the "primary motivating purpose of preparing for litigation and/or the pending trial" and that most of the "information generated, collected or assembled by Beltrante contained his and Bettersworth's mental impressions, opinions, conclusions and or/legal theories" regarding Selph's defense.

According to Hall, Selph's affidavit was untimely filed under Texas Rule of Civil Procedure 193.4. Rule 193.4 provides that a party may "at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule." TEX. R. CIV. P. 193.4(a).

Evidence in support of the objection or privilege may include "affidavits served at least seven days before the hearing or at such other reasonable time as the court permits." ***Id***. Hall argues that York had multiple opportunities to file Selph's affidavit, but waited until June 6, after the trial court had already held hearings on Hall's motion to compel and Selph's motion for protective order.

The record shows that York responded to Hall's emergency motion to compel discovery on May 5. On May 8, the trial court held a hearing on Hall's motion to compel, at which the trial court verbally ordered production of York's claim notes and emails. The next day, York sought clarification of the trial court's verbal order. On May 10, Selph and Selph Arms filed an emergency motion for a protective order. Two days later, the trial court held a hearing on Selph's motion. At the conclusion of the hearing, the trial court informed the parties that it would take the matter under advisement. On May 25, the trial court signed an order requiring York to provide a privilege log and redacted versions of any documents it claimed to be privileged. York tendered a privilege log and the disputed documents for in camera inspection on May 25. Hall responded on May 30. Not until June 6, when York responded to Hall's May 30 letter, did York provide Selph's affidavit. On June 30, the trial court signed the supplemental order requiring York to produce unredacted versions of the documents to Hall. Based on these facts, Selph's affidavit was not served seven days before any hearing on the issue of privilege, as required by Rule 193.4, and the record does not indicate that the trial court gave York permission to file the affidavit. *See* TEX. R. CIV. P. 193.4(a). Absent affirmative evidence demonstrating otherwise, we must presume that the trial court did not consider the affidavit. *See* ***Benchmark Bank v. Crowder***, 919 S.W.2d 657, 663 (Tex. 1996). Because the record does not show that Selph's affidavit was timely filed in accordance with Rule 193.4 and that the untimely filing was permitted by the trial court, we are precluded from considering Selph's affidavit. *See* ***id***.

For this reason, Hall maintains that York failed to present testimony or affidavits sufficient to support a prima facie case of privilege. However, the Texas Supreme Court has stated that "[t]he documents themselves may constitute sufficient evidence to make a prima facie showing of attorney-client or work product privilege." ***E.I. DuPont de Nemours & Co.***, 136 S.W.3d at 223; *see* ***Park Cities Bank***, 409 S.W.3d at 868; *see also* ***Fairway Methanol***, 515 S.W.3d at 494. Although affidavits or testimony may be sufficient, when a "claim is based on attorney-client or attorney-work product, the documents themselves may constitute the *only*, and

certainly the *best*, evidence substantiating the claim of privilege." ***Arkla, Inc. v. Harris***, 846 S.W.2d 623, 631 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (emphasis added). Accordingly, without Selph's affidavit, we must determine whether the documents themselves demonstrate a prima facie case of privilege.

York's Claim Notes

SELPH 000001-95 consist of claim notes from York's file. We need only address SELPH 000016-31, 000033, and 000036-42.[3] In a privilege log, Selph identified these documents as pertaining to privileged claim and liability evaluations, reserve information, memorialization of conversations, and correspondence. In their petition, Relators maintain that these documents can be categorized as follows: (1) communications between and among Selph, Bettersworth, and York; and (2) notes memorializing privileged communications between York and Selph or Bettersworth, and other historical aspects of the claim. According to Relators, "Selph and his attorney were communicating with York, who was authorized to (and later did) obtain legal services for Selph in the form of defending the lawsuit."

Hall argues that no privilege attached to Selph's communications with York until December 18, 2014 when York agreed to provide a defense to Selph. According to Hall, Selph and York were adverse until the issue of coverage was resolved and the privilege is waived as to documents generated before York agreed to provide coverage. However, the pertinent question before us is whether the disputed communications were confidential and made to facilitate the rendition of professional legal services to Selph. *See* TEX. R. EVID. 503(b)(1). Although York did not formally notify Selph of coverage until December 18, 2014, our review of the record reveals that at least some of the prior communications were confidential and made to facilitate the rendition of professional legal services to Selph. *See* ***id***. This is particularly true in light of the fact that Hall's lawsuit against Selph was already pending when Selph requested a defense under Selph Arms's insurance policy and that Beltrante and Bettersworth began communicating about the litigation almost immediately thereafter.

[3] Relators have informed this Court that SELPH 000001-15 (these documents are outside the applicable time period for disclosure ordered by the trial court), a portion of SELPH 000016 (regarding a December 19, 2014 note that falls outside the applicable time period for disclosure ordered by the trial court), SELPH 000032 (this document has already been produced), SELPH 000034-35 (these documents have already been produced), and SELPH 000043-95 (these documents are outside the applicable time period for disclosure ordered by the trial court) are undisputed in this proceeding.

Nevertheless, all of the claim notes are not protected from disclosure. Some of the notes contain nothing more than generalized, vague information: (1) SELPH 000016, December 18, 2014 note at 2:46 p.m., reflecting the drafting of a coverage disclaimer; (2) SELPH 000023, September 9, 2014 note at 2:40 p.m., which reflects the date and amount for legal invoice 21646, but no other billing information; (3) SELPH 000025, August 5, 2014 note regarding a file update and August 7 note, which reflects the date and amount for legal invoice 21498, but no other billing information; (4) SELPH 000026, August 5, 2014 note reflecting the receipt of Bettersworth's file, but no other information; and (5) SELPH 000031, November 8, 2013 notes at 11:31 a.m. reflecting a financial transaction and the filing of a report. These cursory notes do not disclose the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1); *see also* ***Leede Oil & Gas, Inc. v. McCorkle***, 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (holding that neutral recitals of facts that contain no commentary are not privileged, as they did not show how the facts would be used and did not remotely suggest trial strategy). Nor do they reveal confidential information with respect to legal advice, factual information, or other matters concerning the litigation. *See* ***Park Cities Bank***, 409 S.W.3d at 868; *see also* ***Boales v. Brighton Builders, Inc.***, 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Additionally, the following documents have already been produced: (1) SELPH 000016, December 15, 2014 note at 12:23 p.m.; (2) SELPH 000019, two November 20, 2014 notes; (3) SELPH 000022, a portion of note dated October 13, 2014 at 10:19 a.m. that says "CMR is updated;" (4) SELPH 000023, a portion of the September 18, 2014 note at 12:12 p.m.;[4] (5) SELPH 000028, June 11, 2014 note at 4:10 p.m.; (6) SELPH 000029, notes for December 10, 2013 at 1:55 a.m. that carry onto SELPH 000030, January 17, 2014, February 13, 2014, May 9, 20, and 21, 2014, and a portion of the May 8, 2014 note that states "Diary," "Reviewed file this date on diary," and "Updated CMR and drafted coverage denial letter for carrier approval[;]" (7) the entirety of SELPH 000030, including the November 25, 2013 note at 12:00 p.m. that carries onto SELPH 000031; (8) SELPH 000031, November 7, 2013 notes at 9:16 p.m. and 10:01 a.m.;

[4] The disclosed portion states: "Spoke with Brad this morning on this claim…Brad advised me that claimant wife has now left the plaintiff and that LWRC may have settled [its] claim with Corby Hall…I told Brad that I will follow up with LWRC counsel to see if they did indeed settle their claim."

(9) SELPH 000033, October 30, 2013 note and portions of November 4 and 5, 2013 notes;[5] and (10) SELPH 000038-39, which consist of a November 6, 2013 letter from Beltrante to Selph. "A person upon whom these rules confer a privilege against disclosure waives the privilege if … the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged[.]" TEX. R. EVID. 511(a)(1). Accordingly, Relators waived any privilege related to the disclosed portions of York's claim notes. *See* ***id.***; *see also* ***Freeman v. Bianchi***, 820 S.W.2d 853, 861 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) ("defendants waived any privilege that attached to the documents submitted for in camera review that had been disclosed to plaintiffs").

Finally, the entirety of SELPH 000017-18, including a December 10, 2014 note that carries onto SELPH 000019, consists of an email exchange between Hall and Bettersworth that was forwarded to Beltrante. As Hall is a party to this communication, it is reasonable to presume that he is also in possession of documents reflecting this email exchange. Moreover, this exchange does not fall within the list of protected communications outlined in Rule 503(b)(1). *See* TEX. R. EVID. 503(b)(1). The attorney-client privilege does not apply to a situation, such as Hall's communications with Bettersworth, which fall outside of the attorney-client relationship. *See* ***In re Baytown Nissan, Inc.***, 451 S.W.3d 140, 146 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) ("It is the relationship with the client that confers the privilege. Accordingly, we reject Baytown Nissan's request to expand the attorney-client privilege to situations outside of an attorney-client relationship[]"). Nor does it qualify as work product. *See* TEX. R. CIV. P. 192.5(a), (b)(1). "The 'work product' of an attorney or party to litigation is material that is created for the sole use of the attorney or party in anticipation of litigation and is not to be shared with anyone else, especially the opposing party." ***Wilson v. State***, 311 S.W.3d 452, 464 n.47 (Tex. Crim. App. 2010) (referencing rule of civil procedure 192.5).

The remaining notes fall within the categories of legal advice, factual information, and the litigation itself. Specifically, the claim notes relate to Selph's defense, including strategy,

[5] The disclosed portions identify the type of loss, venue, date of loss, carrier, insured, policy number, effective dates, and other policy details, include a "to do" list, and contain the following statements: "Subrogation: I will investigate to see if there is any Risk transfer or Subro potential," "SIU: I will consider if needed," "Medicare: N/A for this loss as this is a none injury claim."

memorialization of verbal conversations, the adequacy of reserves, detailed factual notes, litigation updates, and settlement discussions. The attorney-client privilege attaches to both legal advice and factual information and extends to all matters concerning the litigation. ***Park Cities Bank***, 409 S.W.3d at 868; ***Boales***, 29 S.W.3d at 168. Accordingly, the majority of information contained in York's claim file is confidential and, by its very nature, made to facilitate the rendition of professional legal services to the client. *See* ***Park Cities Bank***, 409 S.W.3d at 868; *see also* ***Boales***, 29 S.W.3d at 168; ***Pittsburgh Corning Corp. v. Caldwell***, 861 S.W.2d 423, 424 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (discussions between attorneys and their clients' representatives, regarding defense strategies, fall under Rule 503(b)(1)). Thus, Relators have demonstrated a prima facie case of privilege with respect to York's claim notes, with the exception of those notes that this Court has identified above as not protected from disclosure and those that Relators have identified as undisputed. *See* ***E.I. DuPont de Nemours & Co.***, 136 S.W.3d at 223; *see also* ***Park Cities Bank***, 409 S.W.3d at 868; ***Harris***, 846 S.W.2d at 631; TEX. R. EVID. 503(a)(5), (b)(1).

Under these circumstances, a review of York's claim file notes was critical to the evaluation of Relators' privilege claims. *See* ***E.I. DuPont de Nemours & Co.***, 136 S.W.3d at 223. Thus, before compelling their production, the trial court should have conducted an in camera inspection of the documents to determine whether they established a prima facie case of privilege. *See* ***id.***; *see also* ***Park Cities Bank***, 409 S.W.3d at 868. Having failed to do so, the trial court abused its discretion by ordering disclosure of York's claim notes in their entirety. *See* ***E.I. DuPont de Nemours & Co.***, 136 S.W.3d at 223; *see also* ***Park Cities Bank***, 409 S.W.3d at 868.

Attorney Case File

SELPH 000096-953 consist of pages from Bettersworth's attorney case file. Selph's privilege log states that these documents encompass "Email correspondence between Lynne B. Fults, paralegal acting on behalf of James Bettersworth, and James Beltrante regarding representation of Brad Selph in *Hall v. Selph, et. al.*, including an attachment with documents maintained by James Bettersworth."

"An attorney's litigation file goes to the heart of the privileged work area guaranteed by the work product exemption." ***Nat'l Union Fire Ins. Co. v. Valdez***, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding). "[A]n attorney's selection and ordering of documents in anticipation of

litigation is protected work product, even where the individual documents are not privileged[.]" ***Id***. at 461. A party may request specific documents or categories of documents relevant to issues in a pending case, even when some or all of the documents may be contained in an attorney's file, but a party is prevented from "requesting the entire file, which is almost certain to encompass numerous irrelevant and immaterial documents, such as transmittal letters and pleadings already on file with the court, as well as privileged information." ***Id***. "[A] document is not privileged simply because it is contained in an attorney's files." ***Id***. at 460.

Our review of the case file reveals that only SELPH 00096 and 00099-109 qualify as privileged. These particular documents include a draft and a letter from Betterworth's firm to Beltrante. *See* TEX. R. EVID. 503(b)(1)(A) (attorney-client privilege applies to communications between the client's representative and the client's attorney or the attorney's representative); *see also* TEX. R. CIV. P. 192.5(a)(1) (work product includes material prepared in anticipation of litigation or for trial by or for a party's attorney); ***Park Cities Bank***, 409 S.W.3d at 867-68. There is no indication that these documents were intended to be disclosed to third persons other than those (1) to whom disclosure was made to further the rendition of professional legal services to Selph; or (2) reasonably necessary to transmit the communication. *See* TEX. R. EVID. 503(a)(5). Accordingly, the trial court abused its discretion by ordering disclosure of SELPH 00096 and 00099-109.

Most of the documents, however, pertain to Hall's Comal County lawsuit against LWRC and Selph in trial court cause number C2013-902B. These include: (1) trial court orders and other rulings, (2) various documents signed by Hall or his counsel, (3) file-marked documents, (4) citations, (5) Hall's petitions, motions, and other documents, (6) fax cover sheets, (7) documents shared with Hall or his counsel, (8) discovery responses and requests, and responsive documents, (9) correspondence from Hall, (10) filing receipts, and (11) various documents that, based on the attached certificates of service, were shared with Hall.[6] The file also contains file-marked copies of documents in F&D's lawsuit against Hall in trial court cause number C2014-0510 D. These types of documents fall within the category of immaterial or irrelevant information, as they are equally available to Hall, shared with Hall, or simply inconsequential. *See* ***Valdez***, 863 S.W.2d at 461; *see also* ***Wilson***, 311 S.W.3d at 464 n.47. If, as in this case, information conveyed to an attorney is also made known to others or is discovered by a third

[6] At some point during the litigation, Hall was represented by counsel and at other times Hall acted pro se.

person through independent means, it is not confidential. ***Landers v. State***, 256 S.W.3d 295, 309 (Tex. Crim. App. 2008) (referencing Texas Rule of Evidence 503(a)(5)).

Even though a minute portion of the file can be classified as privileged, a review of Bettersworth's case file was critical to the evaluation of Relators' privilege claims. *See* ***E.I. DuPont de Nemours & Co.***, 136 S.W.3d at 223. Thus, as with York's claim notes, the trial court abused its discretion by failing to conduct an in camera inspection of the attorney case file before compelling production of the documents contained therein. *See* ***id.***; *see also* ***Park Cities Bank***, 409 S.W.3d at 869.

CONCLUSION

Based upon our review of the record and the foregoing analysis, we conclude the trial court abused its discretion by ordering production of the documents identified as privileged without first conducting an in camera review of those documents. Accordingly, we ***conditionally grant*** Relators' petition for writ of mandamus. We direct the trial court to vacate its June 30, 2017 supplemental order requiring York to provide Hall with un-redacted versions of the documents tendered for in camera review and to conduct further proceedings consistent with this opinion. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within fifteen days of the date of the opinion and order***. The trial court shall furnish this Court, within the time of compliance with this Court's opinion and order, a certified copy of the order evidencing such compliance. We ***lift*** our stay of proceedings ordered on July 5, 2017.

GREG NEELEY
Justice

Opinion delivered November 22, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

ORDER

NOVEMBER 22, 2017

NO. 12-17-00210-CV

YORK RISK SERVICES GROUP, INC.,
BRAD SELPH, AND SELPH ARMS, LLC,
Relators
V.

HON. CLAY J. GOSSETT,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by York Risk Services Group, Inc., Brad Selph, and Selph Arms, LLC; who are the relators in Cause No. 2015-351, pending on the docket of the 4th Judicial District Court of Rusk County, Texas. Said petition for writ of mandamus having been filed herein on July 5, 2017, and the same having been duly considered, because it is the opinion of this Court that the petition for writ of mandamus be, and the same is, **conditionally granted**.

And because it is further the opinion of this Court that the trial judge will act promptly and vacate his order of June 30, 2017, requiring York to provide Corby Hall, Real Party in Interest, with un-redacted versions of documents tendered for in camera review; the writ will not

issue unless the **HONORABLE CLAY J. GOSSETT** fails to comply with this Court's order **within fifteen (15) days** from the date of this order.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.