

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2014

Cir. Ct. No. 2007GF2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE DEPOSITION OF RANDY BLUMER:

DELOITTE & TOUCHE LLP AND JAN A. LOMMELE,

PETITIONERS-RESPONDENTS,

v.

**M. DIANE KOKEN, INSURANCE COMMISSIONER OF THE COMMONWEALTH
OF PENNSYLVANIA, IN HER OFFICIAL CAPACITY AS LIQUIDATOR OF
RELiance INSURANCE COMPANY,**

RESPONDENT,

STATE OF WISCONSIN OFFICE OF COMMISSIONER OF INSURANCE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 VERGERONT, J. The issue on this appeal is the scope of the privilege established in WIS. STAT. § 601.465 (2005-06)¹ for the Office of Commissioner of Insurance (OCI). We agree with the circuit court that the privilege does not apply to the facts of this case, although our reasoning is somewhat different. We therefore affirm the court's order denying reconsideration, in which it reaffirmed its ruling granting the motion to compel the deposition of the then OCI deputy commissioner, Randy Blumer.

BACKGROUND

¶2 This action was initiated by a petition for issuance of a subpoena to compel Blumer to appear at a deposition for a Pennsylvania lawsuit.² The Pennsylvania suit is a malpractice action against Deloitte & Touche (Deloitte), filed by the Pennsylvania Insurance Commissioner as liquidator of Reliance Insurance Company. Deloitte seeks to discover the information Blumer acquired about Reliance's financial situation in his role as chair of a subgroup of the National Association of Insurance Commissioners (NAIC). As chair of the subgroup, the Financial Analysis Working Group (Financial Group), Blumer had requested and received confidential information from the Pennsylvania Insurance Commissioner about Reliance. His letter of request stated that he did so in furtherance of the Financial Group's task of identifying and monitoring insurance companies that might have problems.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Under WIS. STAT. § 887.24 a witness may be compelled by subpoena to attend and give testimony at a deposition in this state for a lawsuit pending in another state.

¶3 During Blumer's deposition, OCI counsel asserted on his behalf a privilege under WIS. STAT. § 601.465 in response to all questions regarding information Blumer had obtained on Reliance while participating in NAIC and the Financial Group. In response, Deloitte filed a motion to compel the continued deposition of Blumer. Deloitte argued, among other points, that § 601.465 protected only documents, and testimony about those documents, generated or received by OCI. According to Deloitte, because it was seeking information that Blumer had obtained as chair of the Financial Group and not information provided by OCI from or to NAIC, the statutory privilege did not apply. OCI's position was and is that Blumer's participation in NAIC and the Financial Group was part of his official duties as OCI deputy commissioner and therefore the privilege applies to those activities.

¶4 The circuit court granted Deloitte's motion. It concluded that the record did not establish that either NAIC or the Financial Group was itself conducting an investigation or an examination of the financial condition of Reliance as required by WIS. STAT. § 601.465. Rather, in the court's view, the Pennsylvania Insurance Commissioner was conducting the investigation and the Financial Group was simply requesting information the Pennsylvania Insurance Commissioner obtained so that the Financial Group could monitor Reliance's financial condition. The circuit court also determined that the confidentiality of the documents provided by the Pennsylvania Insurance Commissioner to Blumer had been "shattered" because that office had already provided in discovery the documents regarding its investigation of Reliance and because the Pennsylvania court had ordered NAIC to disclose the information it had on the subject. Thus, the court concluded, OCI had no legitimate interest to protect in asserting the

privilege and allowing the privilege would be inconsistent with the purposes of § 601.465.

¶5 The court denied OCI's motion for reconsideration. It reaffirmed its prior ruling, clarifying certain points. OCI appeals from the order denying its motion for reconsideration.

DISCUSSION

¶6 OCI asserts that the circuit court erred because the record shows that NAIC and the Financial Group were conducting an investigation of Reliance. They point to Blumer's affidavit in which he avers that the activities of NAIC and the Financial Group in which he participated included "coordinated investigations of certain insurance companies, including Reliance Insurance Company." Deloitte in response points to correspondence between Blumer, as chair of the Financial Group, and the Pennsylvania Insurance Commissioner's office that describe the Financial Group's task as "monitoring" and "identifying" insurance companies rather than "investigating" or "examining." In addition, Deloitte contends, as it did in the circuit court, that the documents at issue are not documents provided by OCI or received by OCI, which, it contends, is required by WIS. STAT. § 601.465(3).

¶7 A resolution of this appeal requires that we construe and apply WIS. STAT. § 601.465 to facts that are not disputed.³ This is a question of law, which

³ Although the way the parties phrase their reliance on different parts of the record on the investigation/monitoring issue might suggest there is a factual dispute, they are not, as we understand it, disputing what NAIC and the Financial Group did with respect to Reliance. Rather, they are disputing whether that activity is "investigating" within the meaning of the statute.

we review de novo. *Williams v. American Transmission Co., LLC*, 2007 WI App 246, ¶5, 306 Wis. 2d 181, 742 N.W.2d 882. In construing a statute we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Because the statute at issue here establishes a privilege, we bear in mind that we are to construe the statute narrowly. See *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 2d 190, 197, 248 N.W.2d 433 (1977).

¶8 WISCONSIN STAT. § 601.465 provides:

Nondisclosure of information. The office [OCI] may refuse to disclose and may prevent any other person from disclosing any of the following:

(1) Testimony, reports, records and information that are obtained, produced or created in the course of an inquiry under s. 601.42.

(2) Except as provided in s. 601.44 (6) to (10), testimony, reports, records and information that are obtained, produced or created in the course of an examination under s. 601.43.

(3) Testimony, reports, records, communications, and information that are obtained by the office from, or provided by the office to, any of the following, under a pledge of confidentiality or for the purpose of assisting in the conduct of an investigation or examination:

(a) The National Association of Insurance Commissioners.

(b) An agent or employee of the National Association of Insurance Commissioners.

(c) The insurance commissioner of another state.

(d) An agent or employee of the insurance commissioner of another state.

(e) An international, federal, state or local regulatory or law enforcement agency.

(f) An agent or employee of an agency described in par. (e).⁴

(Footnote added.)

⁴ After the circuit court rendered its decision, WIS. STAT. § 601.465 was renumbered to § 601.465(1m) and amended by 2007 Wis. Act 170, § 7, effective April 9, 2008. The last phrase of § 601.465(3) (renumbered § 601.465(1m)(c)) now reads, with the new words italicized: “or for the purpose of assisting *or participating in monitoring activities* or in the conduct of an *inquiry*, investigation or examination.” In addition, a new subsection, 601.465(2m), was created:

(2m) WAIVER AND APPLICABILITY OF THE PRIVILEGE. All of the following apply to the privilege under this section:

(a) The privilege may be waived only by the affirmative written and specific consent of the commissioner.

(b) The privilege may not be constructively waived.

(c) The privilege applies to testimony, reports, records, communications, and information obtained, created, or provided by any official, employee, or agent of the office for the purpose of assisting or participating in monitoring activities or in the conduct of an inquiry, investigation, or examination by, or coordinated through, the National Association of Insurance Commissioners.

(d) The privilege applies to testimony, reports, records, communications, and information in existence on or after [April 9, 2008].

2007 Wis. Act 170, § 9.

OCI argues in a footnote in its main appellate brief that the issue raised in this appeal “now appear[s] to be moot” because the amendment now “clarifies that the privilege includes “monitoring activities.” Deloitte responds in a footnote that it is not moot, and OCI replies to that footnote. The arguments on mootness are too abbreviated to permit a complete analysis of the issue. More importantly, OCI seeks reversal of the circuit court’s order, not dismissal of its appeal on the ground of mootness. We therefore do not decide the issue of mootness.

The parties also address the recent amendment in their arguments on the proper construction of “investigation” in WIS. STAT. § 601.465(3). However, we resolve this appeal without addressing that issue. *See infra* paragraph 12. Therefore, we do not discuss the recent amendment in this opinion.

¶9 OCI does not contend that either WIS. STAT. § 601.465(1) or (2) apply. We therefore focus on subsec. (3). To qualify as a privilege under subsec. (3), the testimony or documents must meet two fundamental requirements, each of which contains alternatives. First, the testimony or documents must be either obtained by OCI from one of the listed entities or provided by OCI to one of those entities. Second, that must occur either under a pledge of confidentiality or for the purpose of “assisting in the conduct of an investigation or examination.” Section 601.465(3).

¶10 We first examine whether the documents at issue were either obtained by OCI from one of the listed entities or provided by OCI to one of them. We can immediately eliminate the latter option. The documents were provided by the Pennsylvania Insurance Commissioner; they were not provided by OCI. As for the former option, the documents were obtained by Blumer as chair of the Financial Group. While it is undisputed that Blumer participated in NAIC and the Financial Group as part of his duties as OCI deputy commissioner, it does not follow that his request and receipt of documents from the Pennsylvania Insurance Commissioner were on behalf of OCI. The letter he wrote is on NAIC letterhead and he describes himself as chair of the Financial Group and as seeking the documents to further the task of that group. The response to Blumer’s letter from the Pennsylvania Insurance Commissioner’s office is directed to Blumer at the NAIC address in Missouri. There is no indication in this correspondence or elsewhere in the record that OCI obtained the documents from the Pennsylvania Insurance Commissioner or its agents or that Blumer was acting on behalf of OCI in obtaining the documents.

¶11 Similarly, there is no evidence that OCI obtained the documents from NAIC or its agents, including Blumer in his capacity as chair of the Financial Group.

¶12 Because we conclude the first requirement of WIS. STAT. § 601.465(3) is not met, we do not examine the second requirement. Specifically, we do not take up the issue whether the documents were obtained for “the purpose of assisting in the conduct of an investigation or examination.” Section 601.465(3).

CONCLUSION

¶13 We affirm the circuit court’s order denying OCI’s motion for reconsideration.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

