IN THE OHIO SUPREME COURT

CASE NO. 2024-0623

MELISSA EDDY, ET AL.,

Appellees,

v.

FARMERS PROPERTY & CASUALTY INSURANCE COMPANY, ET AL.,

Appellant.

APPEAL FROM THE HAMILTON COUNTY COURT OF APPEALS,
FIRST APPELLATE DISTRICT
COURT OF APPEALS CASE NO: C-230298

MERIT BRIEF OF AMICUS CURIAE OHIO INSURANCE INSTITUTE IN SUPPORT OF APPELLANT FARMERS PROPERTY & CASUALTY INSURANCE COMPANY

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Insurance Institute ("OII") is a member-run trade organization comprised of leading domestic, regional and national property and casualty insurance companies, trade groups and related organizations throughout the state of Ohio. Since 1968, the OII has sought to help Ohioans achieve a better understanding of insurance and related safety issues and has been recognized as the Ohio property and casualty insurance industry's voice on matters affecting or involving the industry.

The issues presented by this appeal are of great interest to the OII and its member organizations. OII member insurers take seriously their common law obligation to resolve their insureds' claims in good faith. Yet, despite the "best laid plans," disputes inevitably arise. And when they do, it is critical that Ohio's insurers, insureds and lower courts have clear and even handed rules for the manner in which they are resolved. The OII and its member organizations support transparency, uniformity, and impartiality in the resolution of *all* insurance coverage disputes, but such traits are particularly critical in cases like this one where the specter of bad faith claims handling haunts the litigation. The First District Court of Appeals' Judgment Entry and Opinion in this case sets a dangerous precedent and is seemingly at cross-purposes with the foregoing public policy goals that the OII and the insurance markets of Ohio desire to promote.

The Court should reverse the judgment of the intermediate court of appeals and remand this case to the trial court for further proceedings with instructions that: (1) *Boone* does not apply to litigation materials prepared by Farmers during litigation with the Eddy's, or alternatively, that Farmers owes the Eddys no continuing duty of good faith after the commencement of coverage litigation; (2) the trial court must comply with R.C. 2317.02 and Civ. R. 26; and, (3) the trial court must conduct an in-camera inspection of Farmers' presumptively privileged materials.

II. STATEMENT OF THE FACTS AND CASE

The OII adopts the recitation of the facts and the procedural history of the case set forth in the Appellant's Memorandum.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

> ***Boone v. Vanliner Ins. Co*., 91 Ohio St.3d 209, 744 N.E.2d 154 (2001) does not apply to an insurer's privileged materials created during litigation between the insurer and its insured.**

The OII stands squarely with its member organization Farmers Property & Casualty Insurance Company in its appeal from the Journal Entry and Opinion issued by the First District Court of Appeals for Hamilton County in this case. The State of Ohio and the many fine companies that provide property and casualty insurance to its citizens are in desperate need of guidance from this Court with regard to those companies' rights to the same "litigation privileges" (*i.e.*, the attorney client privilege and the attorney work product "privilege") that are enjoyed not only by banks, hospitals, manufacturers, distributors, retailers, and governmental entities, but all other non-insurer citizens and foreigners who come before the courts of this state. Nowhere is such guidance needed more than when such traditional litigation privileges are challenged in the context of insurance coverage and bad faith litigation. This includes clear guidance on the role and authority of R.C. 2317.02(A)(2) and Civ.R. 26(B)(8)(a) with respect to those litigation privileges, which in this particular case, the lower courts appear to have wholly disregarded.

The OII is acutely aware that this Court is not a forum for mere error correction. And while there were certainly errors committed in the trial court and in the intermediate court of appeals, the most egregious errors that manifest in the First District Court of Appeals' Journal Entry and Opinion emanate from those lower courts' reliance on flawed legal principles and presumptions

that have festered in and spread throughout Ohio's law of insurance coverage, bad faith claims handling, and privilege for the last quarter of a century. It is upon those underlying principles and presumptions that the Court should focus in bringing Ohio's law of bad faith and privilege back into balance.

Rather than mere "error correction," this appeal presents the Court with an opportunity for "course correction." This appeal presents the Court with a vehicle for reviewing and reassessing fundamental principles of fairness, due process and equal protection as those principles manifest in litigation invoking Ohio's common law tort of bad faith insurance claims handling, generally, and in the application of the traditional litigation privileges in such cases, specifically.

Boone and Privilege

In *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 744 N.E.2d 154 (2001), this Court held (in a 4-3 decision) that "in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications that are related to the issue of coverage and were created prior to the denial of coverage." This holding was premised on the presumption that "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection by the attorney-client privilege."

Boone was an extension of this Court's earlier ruling in *Moskovitz v. Mt. Sinai Med. Ctr.*, 1994-Ohio-324, 69 Ohio St. 3d 638, 635 N.E.2d 331 (1994), in which the Court determined that "[d]ocuments and other things showing the lack of a good faith effort to settle" were "wholly unworthy of the protections afforded by any claimed privilege." *Id.* at 661, 635 N.E.2d at 349. The *Moskovitz* Court held only that the attorney-client privilege and the work product exception did not preclude discovery of an insurer's claims file in a prejudgment interest proceeding commenced against the insured *after conclusion* of an underlying medical malpractice suit. Under *Moskovitz*,

the only privileged materials not subject to discovery were those "that go directly to the theory of defense of the underlying claim."

This Court differentiated *Boone* from *Moskovitz* by recognizing that, "while the lack of a good faith effort to settle involves conduct that may continue throughout the entire claims process, a lack of good faith in determining coverage involves conduct that occurs when assessment of coverage is being considered." Accordingly, *Boone* concluded that only privileged materials "created prior to the denial of coverage" could potentially "cast light" on alleged bad faith (and thus be unworthy of protection). *Boone* reasoned that until the insurer determined whether coverage was owed, the claim file would not contain work product, *i.e.,* things prepared in anticipation of litigation.

To the OII's knowledge, no other industry or group---regardless of its perceived size, strength, and/or supposed appetite for litigation---has been singled out by the Court for such surgical dissection of its litigation privileges. And while the OII remains steadfast in its belief that *Boone* was wrongly decided from the start, at least under the original holding, the loss of the insurance industry's litigation privileges was "limited" to communications created prior to the insurer being drawn into litigation over the subject of those very same privileged communications.

Moreover, in the early post-*Boone* days, Courts generally recognized that an insurer was at least entitled to have the allegedly discoverable file materials reviewed in camera by the trial court before any definitive decision was made as to their discoverability, and where applicable, to have litigation of the bad faith claim stayed pending resolution of the coverage issues. Perhaps most importantly, even *Boone* recognized a connection between the work product and attorney client privileged communications that remained non-discoverable, on the one hand---even in the

presence of alleged bad faith claims handling---and the denial of coverage, which was typically recognized as or equated with the commencement of litigation, on the other.

Expansion of *Boone* by the Courts of Appeals

In the two decades following its publication, *Boone* has emerged as a one-size-fits-all panacea for all manner of discovery and litigation privilege abuses. First and foremost among them is *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630 (2d Dist.), upon which the First District relied heavily here. In *Unklesbay*, the Second District relied on *Boone* to hold that "claims-file materials showing an insurer's lack of good faith in processing, evaluating, or refusing to pay a claim" were unworthy of the protection afforded by the traditional litigation privileges, "regardless of whether the insurer ever denied the claim outright." *Id.* At para. 16. *Unklesbay* created from whole cloth a "new" form of bad baith commonly referred to as "foot dragging," which permitted the insured litigant to invade the insurer's litigation privileges *during* litigation, up until the insurer "quit dragging its feet, settled [the] claim, and paid [the insured his] benefits." *Id.* At para. 26.

Other Ohio Courts of Appeals immediately followed the Second District's lead. See, e.g., *Stewart v. Siciliano*, 2012-Ohio-6123, 985 N.E.2d 226 (11th Dist., Ashtabula Cty.) (withdraw of offer to settle UM claim though not an express denial, did not shield claims file from discovery required by *Boone*); *Mundy v. Roy*, 2006-Ohio-993, 2006 Ohio App. LEXIS 922 (2nd Dist., Clark Cty.) (citing *Boone* for the proposition that the traditional litigation privileges "have limited applicability in cases involving bad-faith insurance claims" where alleged bad faith arose out of suit to resolve dispute over the value of the insured's UM/UIM claim); *Drouard v. United Servs. Auto. Ass'n*, 2007-Ohio-1049, (6th Dist., Lucas Cty.) (following *Unklesbay* and *Mundy* and noting that a "refusal to pay" exists where insurer disputes insured's alleged damages, rejects settlement

demands, and pays claim only after a jury returned a verdict for the insured); *TOL Aviation, Inc. v. Intercargo Ins. Co*., 2006-Ohio-6061 (6th Dist., Lucas Cty.) (genuine issue of fact on bad faith where insurer agreed to pay damages presuit but did not tender settlement until after being named in coverage litigation); *Jay v. Mass. Cas. Ins. Co*., 2008-Ohio-846 (5th Dist., Stark Cty.) ("duty of good faith extends beyond those scenarios involving an outright denial of payment for a claim" ... even in cases where a claim is ultimately paid, the insurer's "foot-dragging" in the claims-handling and evaluation process could support a bad-faith cause of action).

The Amended Statute

Decisions like those led the Ohio General Assembly to eventually amend R.C. 2317.02 in 2007. The amended statute, R.C. 2317.02(A)(2) expressly modified *Boone*, requiring in relevant part that:

> The following persons shall not testify in certain respects:
>
> * * *
>
> (A) (2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

This amendment, which became effective on October 31, 2007, was expressly designed to limit the rule announced in *Boone*:

> SECTION 6. The General Assembly declares that the attorney client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party

> seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The common law established in *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, and *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, is modified accordingly to provide for judicial review regarding the privilege. *Id*.

This amendment expressly modifies the *common law* exception to the attorney-client privilege that was established in *Boone*. "The General Assembly unquestionably has the power to enact laws which modify or abrogate the common law." *In re McWilson's Estate* (1951), 155 Ohio St. 261, 266, 98 N.E.2d 289. While such a modification or abrogation can only be found to have occurred where the General Assembly has expressly stated its intent to do so, *e.g., Carrel v. Allied Prods. Corp.* (1997), 78 Ohio St. 3d 284, 287 1997-Ohio-12, the above-quoted comment to Am. Sub. S.B. 117 clearly states such an intent. *See Scanlan v. Consolidated Rail Corp.* (6th Dist. Apr. 13, 1990), Case No. 89FU000008, 1990 WL 42652, at *2 (finding legislative intent in Section 5 of the amending bill, where the legislature listed its reasons and intent for the amendment).

Accordingly, under the version of the statute in effect at the time this case was before the lower courts here, Ohio's attorney client privilege statute prohibited discovery of advice or other confidential communications between an attorney and his or her insurer client, unless: (1) the party seeking disclosure had first made a prima facie showing of "bad faith, fraud, or criminal misconduct" by the insurer; (2), the trial court had conducted an in camera inspection; in which it determined that (3) the otherwise privileged communications related to the attorney's "aiding or furthering" acts of current or future bad faith claims handling by the client.

The Courts Below Disregarded the Amended Statute

Ohio's trial and intermediate courts of appeals generally, and the First District Court of Appeals in this case particularly, have largely disregarded the statute and continued to enforce

Boone, *Unklesbay*, and *Boone*'s other wayward progeny as if the statute had never been amended. See, e.g., *Toman v. State Farm Mut. Auto Ins. Co.*, 2015-Ohio-3351 (8th Dist., Cuyahoga Cty.) ("a genuine issue of material fact exists as to whether State Farm lacked a reasonable justification for its failure to make [plaintiff] an offer to settle her uninsured motorists claim"); *Morgan Bldg. Grp., LLC v. Owners Ins. Co.*, 2023-Ohio-3133, ¶ 14, 224 N.E.3d 150, 155 (9th Dist., Summit Cty.) (no error in failing to determine whether privileged claims file materials relevant to insurer's defense of the bad-faith claim did not themselves show any bad faith); and *Drummond v. State Farm Mut. Auto Ins. Co.*, 2023-Ohio-283 (trial court did not prejudicially err by ordering disclosure of work product materials in the claims file ahead of the trial on the breach of contract claim).

In the lower courts here, the Appellees were not required to make a prima facie case of "bad faith, fraud, or criminal misconduct" by Farmers as a prerequisite to discovering its privileged coverage litigation communications with its lawyer. Nor could any such showing have been made, given the record. The record establishes that Farmers settled the underlying UM/UIM claim for policy limits on the terms the insureds demanded approximately sixty days after they first produced medical evidence supporting their---up to that time---mere allegations of the seriousness of their injuries. At most, Farmers held the opposing party to its burden of proof. This cannot be "bad faith, fraud, or criminal misconduct."

The trial court conducted no in camera review of the presumptively privileged evidence. On the contrary, it refused Farmers' request for such a review and instead issued a single page order compelling Farmers to disclose to its insureds its entire claim file, including the confidential documents that Farmers asserted were privileged and including the portions of the file created after coverage litigation had commenced, and without finding any gross deficiency in Farmers' privilege log.

And the trial court obviously never determined that Farmers' counsel had aided or abetted Farmers in "an ongoing or future commission of bad faith." When the trial court refused to undertake the statutorily mandated in camera review of the testimony and/or documentary evidence that Farmers claimed was privileged, it literally became impossible for it to comply with its remaining statutory duties that were dependent on an in camera inspection.

Nonetheless, the First District Court of Appeals, with barely a nod in the direction of the amended statute, cited, *Boone*, *Unklesbay*, and *Moskovitz* as authority for the conclusions that "discovery of claims files is not precluded in bad faith litigation" (Journal Entry and Opinion, p. 7) and that Farmers' claims file in this case was "discoverable up to the date of payment" (Journal Entry and Opinion, p. 9).

Likewise, with respect to work product, the First District Court of Appeals paid lip service to Civ.R. 26, which governs work product and protects, "documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial," and recognized that "material that falls under this protection" may still be discoverable "upon a showing of good cause" (Journal Entry and Opinion, p. 7). Neither the trial court nor the intermediate court of appeals made an express finding that Appellees had made such a "showing of good cause." Yet both courts gave the green light to the discovery of what was conceded by all to have been otherwise protected work product, leaving Farmers and the OII to conclude that a mere allegation of bad faith constitutes "good cause" as a matter of law for abrogating the work product doctrine. This cannot be the law in Ohio.

An Alternate Road to the Same Destination

The OII respectfully suggests that this Court would greatly benefit the bench and bar of Ohio generally, and would find a fair, workable and bright line resolution to the discovery and

privilege issues that it confronts in this appeal---as well as in future cases---by simply clarifying the elements of the underlying tort of bad faith insurance claims handling that is at the root of this appeal, including answering the ultimate question here of whether an insurer has, in the first instance, a continuing duty of good faith claims handling to its insured, even after the insurance dispute has been removed from the "private sector" and become the subject of formal litigation in the courts of this state?

This Court has never addressed the issue head on, and the intermediate appellate authority is limited, poorly reasoned, and split. See e.g., *Spadafore v. Blue Shield, Ohio Medical Indem. Corp*. (1985), 21 Ohio App. 3d 201, 204 (evidence of post-suit bad faith is relevant if it relates to claim handling or refusal to pay); *Unklesbay v. Fenwick* (2006), 167 Ohio App. 3d 408 (permitting discovery of post-suit claims file material only after in camera inspection). But see, *Brionez v. Auto-Owners Ins*., 1996 Ohio App. LEXIS 4922 (even if trial court's refusal to allow evidence that insurer delayed paying covered charge on basis that the bill was submitted after complaint filed was error, it was harmless); *Furr v. State Farm Mut. Auto. Ins. Co*. (1998), 128 Ohio App. 3d 607, 6th Dist. (insurer's failure to object on the record to jury instruction that duty of good faith continues even after onset of litigation waived right to raise issue on appeal).

Whether an insurer has a continuing duty of good faith to its insured, even after the insured has filed suit, has an obvious and enormous impact on the insurer's ability to defend itself in a "bad faith" lawsuit. As this case well illustrates, the imposition of "claims handling" standards on parties in litigation wreaks havoc on both the insurer's ability to seek the guidance of and communicate with its legal counsel in confidence, and on its counsel's ability to prepare for trial. And these issues are only the tip of the proverbial iceberg. Requiring insurers in litigation to conform to the common law claims handling standards designed to regulate unsupervised

marketplace transactions runs roughshod over insurers' ability to conduct discovery (see e.g., *Zaychek v. Nationwide*, 2007 Ohio 3297, 9th Dist., Summit Cty.), negotiate settlements (e.g., *Spadafore v. Blue Shield, Ohio Medical Indem. Corp*. (1985), 21 Ohio App. 3d 201, 204), and potentially, even to select counsel (see, *155 N. High v. Cincinnati Ins. Co*., 1995-Ohio-85, 72 Ohio St. 3d 423, 650 N.E.2d 869).

In the normal presentation of an insurance claim, both parties desire to resolve the claim as efficiently and as fairly as is reasonably possible. While an outcome that is acceptable to both sides is not always achieved, the process is generally one in which the parties communicate, cooperate, and strive toward a common goal. In the relatively few situations in which this is not the case, the law imposes on the insurer a duty of good faith claims handling to discourage it from using its (usually) superior expertise and economic resources from depriving the insured of the benefit of its bargain.

On the other hand, an insurer who has been sued by its insured is in the same position as any other defendant in a civil lawsuit. The insurer-defendant has a right (and an obligation to its shareholders/other policyholders, creditors, regulators, etc.) to defend itself against the plaintiffs' allegations and to use all lawful means at its disposal to seek to prevail in the litigation or to negotiate a compromise on the most advantageous terms it can achieve.

Because the nature of the relationship between the insurer and its insured changes so drastically once either party decides to invoke the power of the Court to resolve their dispute via litigation, this Court should recognize that the duties the insurer owes to the insured when the claim is being processed as a private business or consumer transaction no longer apply when the claim becomes the subject of a formal lawsuit.

However, some intermediate appellate courts, including the First District Court of Appeals in this case, believe they are bound to impose good faith claims handling duties---designed to regulate private, free-market transactions between bargaining partners of presumed unequal strength---on litigants in this state's courts, all of whom are presumed to enjoy the *equal* protection of the law. As a result, the insurer-defendant is shackled with competing obligations that prevent it from fully enjoying its constitutional rights to due process, equal protection under the law, and a fair trial.

For example, some intermediate courts of appeals have described an insurer's duty of good faith as "fiduciary" in nature. See e.g., *Johnson v. Am. Gen. Life Ins. Co.*, 2006-Ohio-5771, 2006 Ohio App. LEXIS 5754 (6th Dist., Erie Cty.), citing, *Red Head Brass, Inc. v. Buckeye Union Ins. Co.* (1999), 135 Ohio App.3d 616, 632, (insurance company has fiduciary responsibility toward its insured to act in good faith in carrying out duties under contract.); see also, *Jokic v. State Auto. Mut. Ins. Co.*, 2005-Ohio-7044 (11th Dist., Lake Cty.). This Court has defined a fiduciary as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235, quoting *Haluka v. Baker* (1941), 66 Ohio App. 308, 312, 20 O.O. 136, 33 Ohio Law Abs. 435, 34 N.E.2d 68, quoting 1 Restatement of the Law, Agency (1933), Section 13, Comment *a.* Yet, once either party elects to file suit, their relationship is, by definition, *adversarial* in nature.

An insurer who is saddled with a continuing fiduciary, quasi-fiduciary, or any other "extra contractual" obligations to its insured with respect to a claim that is the subject of pending litigation between them is deprived of a fair opportunity to defend itself. Imposing a continuing duty of good faith places the insurer in an impossible position. How can an insurer aggressively defend itself if it must at the same time elevate the insured's interests above its own? Any efforts the insurer makes

to assert its rights or prevail in (or even compromise) the litigation only become additional evidence of its alleged bad faith, while any effort to comply with a presumed continuing duty unfairly hampers, constrains, and weakens the insurer's defense. The imposition of a continuing duty is doubly wrong because it not only compels a "Hobson's Choice" between mutually contradictory obligations, but it allows the insured to be the one to unilaterally decide whether and when these unworkable restrictions will be imposed.

The public policy rationale supporting the recognition of a duty of good faith in the context of "informal" (*i.e.*, pre-litigation) claims handling is non-existent once one of the parties abandon that process and seek resolution of the claim under the supervision of the courts. In the pre-suit context, the imposition of the duty of good faith upon the insurer is justified because: (1) the insured is not normally able to negotiate the terms; (2) the insurer typically has superior economic strength and expertise; and (3) the insured may be in dire financial straits and/or otherwise vulnerable to oppressive tactics. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983), citing, *Motorist Mut. Ins. Co.* v.. *Trainor,* 33 Ohio St. 2d 41, 62 O.O.2d 402 (1973), *Battista* v. *Lebanon Trotting Assn*., 538 F. 2d 111, 118 (6th Cir., 1976, construing Ohio law). The imposition of a duty of good faith claims handling is designed to dissuade unscrupulous insurers from unfairly taking advantage of any of the foregoing factors to deprive the insured of rights or benefits to which the insured is entitled under the policy.

However, in the context of a lawsuit between the insured and insurer, these safeguards are no longer necessary. Once litigation is commenced, the parties' relationship is no longer that of "insurer and insured." In the context of a lawsuit, the parties' relationship is only that of "plaintiff and defendant." They stand on equal footing, with the potential for the insurer-defendant to utilize

its supposed superior resources to bully, coerce, or disadvantage the plaintiff-insured largely neutralized.

For example, once a suit is commenced, both parties are bound by the rules of practice and procedure that have been refined over generations to assure the provision of a "level playing field" for the resolution of their dispute. The Ohio Rules of Civil Procedure and Evidence, as well as local rules of court and specific case management, discovery, or other orders entered during the course of the litigation, strictly govern the parties' interactions. Neither side has the ability to unilaterally dictate to the other how the claim will be resolved. The trial court acts as, among other things, a neutral and impartial referee whose role is to ensure that the dispute is concluded in a manner that is open, even-handed, economical, and fair.

And, to the extent that one side or the other refuses to abide by these rules of conduct, or attempts to circumvent them, the judicial system provides the trial court with numerous tools for sanctioning such conduct. For example, Civil Rules 11, and 37 provide explicit sanctions for documented abuses in the filing of pleadings, motions, and in the propounding of and responding to discovery requests. Likewise, the Ohio Revised Code provides trial courts with additional tools to ensure that one litigant is not tempted to unfairly take advantage of the other or to engage in oppressive or "Rambo" litigation tactics. For example, R.C. 1343.03 permits an award of prejudgment interest against a litigant who refuses to make a good faith effort to settle, while R.C. 2323.51 provides a variety of sanctions for conduct deemed "frivolous," to name only a few. And of course, trial courts always retain the inherent authority to maintain control of their dockets and their courtrooms through their contempt powers.[1]

[1]In addition to the traditional economic disparity between insurer and insured (which does not always exist), the availability of these other tools is one of the reasons why this Court declined to recognize a cause of

Finally, in practice, virtually all "bad faith" litigation is conducted by attorneys retained to represent the disputing parties. These lawyers are further restrained from engaging in unscrupulous behavior by the Ohio Rules of Professional Conduct and similar ethical and professional codes and guidelines.

A Modest Proposal

Nowhere is the inherent unfairness of imposing on an insurer an extra judicial, continuing duty of good faith claims handling more obvious than in the contexts of the attorney client privilege and the attorney work product doctrine. This Court recognized in *Boone*, if only implicitly, that the duty of good faith claims handling is a regulatory tool for insurance disputes still outside the judicial system. The Court should take this opportunity to make that implicit recognition explicit and craft a rule of law establishing the temporal scope of the insurer's duty of good faith claims handling (*i.e.*, when does it begin? when does it end?). With a bright line rule answering these questions in place, discerning the contours of the attorney client privilege and work product doctrine in the context of insurance bad faith litigation becomes a much more manageable task.

In *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, this Court held that: "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefore." Since *Zoppo*, the Court has never reexamined the elements of the cause of action or commented on the temporal scope of the duty, including when it is triggered and whether it continues beyond the

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action for "reverse bad faith" in *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 632-33 605 N.E.2d 936 (1992)("There are other avenues for the insurer to pursue in the event that an insured submits a fraudulent claim. An insurer drafts the policy, can refuse the insured's claim, and could assert a cause of action against the insured for fraud"). The same logic applies in the context of a "continuing" duty of good faith during coverage litigation between the parties to the insurance contract.

commencement of coverage litigation. This is an underlying predicate to the privilege issues in this case. Under *Zoppo*, "denial of" or "refusal to pay" the claim is---or should be recognized as---an element of the tort.

The Court should recognize that an insurer's duty of good faith claims handling is triggered upon the insurer's first notice of a claim, and concludes when the insurer renders a coverage decision, either accepting or denying the claim. The Court should further recognize that when either party to the insurance contract elects to remove their coverage dispute from the "private sector" and to bring it before the courts of this state for resolution, that the claims handling/adjusting process is over, and that coverage is constructively denied pending the resolution of the lawsuit.

The First District was presented with an opportunity to provide a practical, bright-line privilege trigger below, but passed with a single sentence justification. (Journal Entry and Opinion, at para. 24; "We decline to adopt the Eddy's filing of the complaint as a constructive denial of coverage"). If a denial of the insured's claim is deemed an element of the tort of bad faith claims handling (as suggested by *Zoppo*), and if choosing to abandon pursuit of the claim in the private sector in favor of court supervised litigation is deemed a constructive denial (as suggested by *Boone*), then this Court's further holding in *Boone*, that "the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage," is easily, efficiently, and consistently applied in case after case.

The First District's elimination of privilege until the claim is eventually "paid" is not only unfair on its face (it appears to accept as a given that all disputed insurance claims in which an allegation of bad faith is included, will eventually be paid) it is bad public policy. Stripping one

industry or group of civil litigants of the litigation privileges enjoyed by all others is anachronistic, wasteful, unnecessary, and unfair. Nowhere are its flaws more apparent than here, where the insurer's fundamental rights to the confidentiality of its attorney's counsel, and the attorney's ability to prepare the client's case for trial needlessly trampled upon.

The Court should reverse and remand to the trial court with appropriate instructions.

Proposition of Law No. 2:

> **To the extent *Boone v. Vanliner Ins. Co*., 91 Ohio St.3d 209, 744 N.E.2d 154 (2001) applies to an insurer's privileged materials created during litigation between the insurer and its insured, trial courts are required to conduct an in-camera inspection of such materials to determine the scope of the exception to the privileges set forth in *Boone*.**

The OII supports the Appellant's second proposition of law but believes it will be rendered largely superfluous if the Court enters judgment for Farmers on the first proposition for the reasons offered in this memorandum. Accordingly, the OII adopts by reference Farmers' argument in support of its second proposition of law.

IV. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth by Farmers and its amicus, the Ohio Association of Civil Trial Attorneys in their merit briefs, the OII urges the Court to reverse the judgment of the intermediate court of appeals and remand this case to the trial court for further proceedings with instructions that: (1) *Boone* does not apply to Farmers' litigation file materials, or in the alternative that Farmers does not owe a continuing duty of good faith claims handling to the Eddys following their initiation of coverage litigation; (2) the trial court must

comply with R.C. 2317.02 and Civ. R. 26; and, (3) the trial court must conduct an in-camera inspection of Farmers' presumptively privileged litigation file materials.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae Ohio Insurance Institute has been electronically filed with the Supreme Court of Ohio this 25th day of November 2024 and separately served by email to:

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