No. 2024-0623

IN THE

SUPREME COURT OF OHIO

MELISSA EDDY, *et al.,*
Plaintiffs-Appellees,

v.

FARMERS PROPERTY CASUALTY INSURANCE COMPANY,
Defendant-Appellant.

JURISDICTIONAL APPEAL FROM THE
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
CASE NO. C-230298

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS URGING REVERSAL

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INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose wide array of members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations, and governmental entities. For over fifty years, OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents.

OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio's case law and jurisprudence. On issues of importance to its members, OACTA has filed amicus curiae briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters that will shape and develop Ohio law.

OACTA's appearance as *amicus* in this case in support of Appellant Farmers Property Casualty Insurance Company ("Farmers") and in favor of reversal of the First Appellate District is premised upon the recognition that there is a glaring need for the Court to provide clear, consistent and reasoned guidance to Ohio courts regarding the scope of discovery of the contents from an insurer's claim file which contain presumptively attorney-client and attorney work product privileged materials prepared and generated after the insured has commenced litigation. Merely making an assertion or allegation of bad faith by the insured does not open the flood gates to allow

discovery of such privileged materials under *Boone v. Vanliner Ins. Co*., 91 Ohio St.3d 209 (2001).

Under the First Appellate District's gross misinterpretation and unprecedented expansion of *Boone*, Ohio insurers will no longer be able to shield from discovery attorney-client or work-product privileged materials prepared by their attorneys in anticipation of litigation and during the pendency of a lawsuit with their insureds. Compounding the First Appellate District's unworkable standard is the holding that the trial court can compel the production of the disputed materials without conducting an *in camera* inspection. *Eddy v. Farmers Prop. and Cas. Ins. Co.*, 2024-Ohio-1047, ¶¶ 34-35 (1st Dist.).

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts from the Merit Brief filed by Farmers.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of Law No. I: *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.

Proposition of Law No. II: 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 First Appellate District's holding in *Eddy* that *Boone* can be applied to overcome a claim of privilege by Farmers with respect to claim file materials that were undisputedly created during litigation between Farmers and its insured needs to be addressed and clarified. According to the *Eddy* court, the *Boone* exception was triggered simply where the insured *alleged* bad faith

against Farmers. The First Appellate District embraced the principle that *Boone* was premised upon the idea that materials prepared in anticipation of litigation were not intended to be privileged and refused to recognize that the insured's commencement of litigation against Farmers should serve as a bright line bar to an insured's discovery of privileged materials created by legal counsel for the insurer thereafter.

The problems caused by *Eddy*'s unprecedented expansion of *Boone* are compounded by the appellate court's determination that Farmers' privilege log, which identified twenty documents created during litigation as being privileged, was simply conclusory thereby relieving the trial court of any obligation to conduct an *in camera* inspection. By sidestepping the *in camera* inspection stage designed to insure that claim file materials still worthy of privileged treatment are preserved and protected, *Eddy*'s holdings are contrary to *Boone* as well as subsequent amendments to R. C. 2317.02 and Civ. R. 26. In doing so, Farmers was stripped of any privilege and denied any meaningful review.

Given the *Eddy* court's distorted and unworkable application of *Boone* to extend beyond the filing of litigation, this Court should adopt both propositions of law advanced by Farmers in order to clarify the timing of when, in the course of an insurance coverage dispute, an insured may be entitled to discover claims file materials containing attorney-client communications since *Boone* limited that discovery to privileged materials "related to the issue of coverage" but only "that were created *prior to the denial of coverage*." *Boone* at 213-214. An insured should not be able to whipsaw an insurer by filing a lawsuit with mere allegations of bad faith compelling an insurer to engage legal representation but then turn around and obtain discovery of attorney-client and work product privileged materials necessitated and generated in defense of that litigation. *Eddy* permits that to happen.

Allowing *Eddy* to stand as good law in Ohio to be followed by other courts will encourage and allow other insureds to do exactly what the First Appellate District has allowed to be done here against Farmers. The two propositions of law advanced by Farmers here provide fair, workable, and predictable guidelines for trial courts to implement when confronted with issues surrounding the pretrial discovery of claims file materials in connection with bad faith litigation. Preserving the sanctity of the attorney-client and work product privileges calls for the adoption of these propositions of law. At a minimum, it must be emphasized to trial courts that *in camera* inspections of Farmers' presumptively privileged materials must be undertaken in order to comply with R. C. 2317.02 and Civ. R. 26.

I.

Insurers Deserve the Protection of Privilege.

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998), citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The [attorney-client privilege] rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). "The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin*, *supra*, quoting *Upjohn*, *supra*, at 389. The importance of the observance and protection of the confidentiality of attorney-client communications is elevated by ethical safeguards governing Ohio attorneys. Prof. Cond. Rule 1.6.

Yes, there are exceptions to the absolute and strict application of the attorney-client privilege.[1] One common law exception previously recognized by this Court is applicable here. The treatment of the attorney-client privilege and attorney work product privilege which is at issue in this appeal is found in this Court's opinion in *Boone*. But the *Boone* holding was subsequently modified by statute, R.C. 2317.02(A)(2).[2] So now, there is a presumption that the attorney-client privilege applies – even if the insured alleges bad faith. In order to compel production of the privileged communication, the amended statute now requires the insured to make a *prima-facie* showing of bad faith and provides for an *in camera* inspection by the trial court with respect to the

[1] For example, communications in contemplation or furtherance of a crime or fraud by the client are unworthy of the privilege. See, e.g., *United States v. Zolin*, 491 U.S. 554, 563 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy,' …, between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime"). Also, when a party to litigation asserts defensively that its actions or conduct was undertaken based upon the advice of counsel, the privilege will be cast aside. *State ex rel. Hicks v. Fraley*, 2021-Ohio-2724, ¶ 13 ("In the civil context, asserting the affirmative defense of advice of counsel waives the attorney-client privilege with regard to such advice."). The attorney-client privilege does not block an attorney from revealing confidential communications with a client in connection with joint-representation of multiple clients or where necessary to establish a claim for legal fees on behalf of the attorney or to defend against a charge of malpractice or other wrongdoing in litigation between the attorney and the client. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 2010-Ohio-4469, ¶ 32-41. Discovery of privileged claim file materials can be permitted post-trial in a proceeding for prejudgment interest under R.C. 1343.03(C) to determine if a party failed to make a good faith effort to settle. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994). These common law exceptions to the attorney-client and work product privileges are not applicable here.

[2] Per R.C. 2317.02(A)(2), the privilege applies to

> 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. (Emphasis added).

communications between insurer and attorney. Stated differently, an insured must offer actual evidence to support the allegation of bad faith before seeking or obtaining access to privileged communications. This more stringent requirement imposes a greater burden on the party seeking waiver than the *Boone* standard which required nothing more than the mere allegation of bad faith to render claims material discoverable.

The issue which makes this case so critical is whether, under *Boone* and the current version of R.C. 2317.02(A)(2), insurers still have protections afforded other litigants with respect to work-product and attorney-client privileges applicable to materials prepared in anticipation of and during litigation because those protections have been sharply called into question by *Eddy*.

II.

Boone Needs to Be Revisited.

Given the *Eddy* court's distorted application of *Boone* to extend beyond the filing of litigation, this Court should clarify the timing of when, if at all, in the course of an insurance coverage dispute, an insured may be entitled to discover claims file materials containing attorney-client communications since *Boone* limited that discovery to privileged materials only "that were created prior to the denial of coverage." *Boone*, 91 Ohio St.3d at 213-214. An insured should not be able to whipsaw an insurer by filing a lawsuit compelling an insurer to engage legal representation but then turn around and obtain discovery of attorney-client and work product privileged materials necessitated and generated in defense of that litigation. But that is exactly what the insured did here against Farmers. And the First Appellate District has allowed and condoned that strategy.

In *Eddy*, the First Appellate District held that *Boone* could overcome a claim of privilege by Farmers with respect to claim file materials that were undisputedly created during litigation

between Farmers and its insured. According to the *Eddy* court, the *Boone* exception was triggered because the insured only needed to ***allege*** bad faith against Farmers. The problems caused by *Eddy*'s unprecedented expansion of *Boone* were compounded by the appellate court's determination that Farmers' privilege log, which identified twenty documents created during litigation as being privileged, was simply conclusory thereby relieving the trial court of any obligation to conduct an *in camera* inspection[3] – despite the fact that *Boone* expressly held that it is only "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." *Boone*, 91 Ohio St.3d at 213. By sidestepping the *in camera* inspection stage designed to insure that claim file materials still worthy of privileged treatment are preserved and protected, *Eddy*'s holdings violate *Boone* and subsequent amendments to R. C. 2317.02 and Civ. R. 26. In doing so, Farmers was stripped of any privilege and denied any meaningful review.

Before *Eddy*, no court had interpreted and extended *Boone* to the point of stripping insurers of the usual litigation privileges historically afforded all litigants – work-product and attorney-client privileges. Now, because of *Eddy*, trial courts can – and most likely will – misapprehend *Boone* and allow insureds to have unrestricted access to privileged claim file materials in any future litigation where an insured ***merely alleges*** insurer bad faith. To avoid that from happening, this Court should adopt the propositions of law proposed by Farmers in this case. Otherwise, uncertainty and confusion in Ohio courts are sure to ensue as to whether this Court's opinion in *Boone* extends to discovery situations like what has happened to Farmers here.

[3] The mandated use of *in camera* inspections to preserve privileged materials from disclosure in discovery has been utilized in Ohio for at least the past 38 years. *Peyko v. Frederick*, 25 Ohio St.3d 164, 167 (1986).

III.

R.C. 2317.02(A)(2) and Civ.R. 26(A) Limit Boone.

While both the attorney-client privilege and attorney work product doctrine have their origins in the common law, the attorney-client privilege is codified in R. C. 2317.02. Pertinent here, in the wake of *Boone*, the Ohio General Assembly expressly amended R. C. 2317.02 to circumscribe *Boone*'s reach by legislating as follows: (1) prior to seeking the otherwise privileged materials from an insurer, the insured must make a "prima-facie showing of bad faith, fraud or criminal misconduct" by the insurer; (2) the materials must be "related to the attorney's aiding or furthering of an ongoing or future commission of bad faith" by the insurer; and (3) the trial court must conduct an *in camera* inspection of the materials. R. C. 2317.02(A)(2). None of that happened here.

"The General Assembly has the power to alter the common law." *Brandt v. Pompa*, 2022-Ohio-4525, ¶ 99. It exercised that authority in the wake of *Boone* by amending R.C. 2317.02(A)(2). No reason was offered by the First Appellate District as to why the mandates of the Revised Code were and could be ignored. Statutes and rules cannot be ignored by the courts of Ohio. *Ackman v. Mercy Health W. Hosp., L.L.C.*, 2024-Ohio-3159.

The work-product doctrine encourages "the orderly prosecution and defense of legal claims ... [by preventing] unwarranted inquiries into the files and the mental impressions of an attorney" in the course of litigation. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). As cogently explained by this Court in *Squire, Sanders & Dempsey, L.L.P.*, 2010-Ohio-4469, at ¶ 54:

> The work-product doctrine emanates from *Hickman v. Taylor* (1947), 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451, in which the Supreme Court of the United States recognized that "[p]roper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. *

> * * This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

To the extent that the contents of Farmers' claim file which have been ordered produced to the insured contains materials protected by the work-product privilege, Civ. R. 26 weighs against allowing discovery, despite *Boone*, in the litigation context. Civ. R. 26(A) provides, in pertinent part:

> It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of an adversary's industry or efforts . . .

As with the attorney-client privilege, discovery of work product materials in litigation is not permissible based upon a mere allegation of wrongdoing or simple need for the materials to prove one's case. *Jackson v. Greger*, 2006-Ohio-4968, ¶ 16. The same should be true in the context of insurance bad faith litigation.

But, without sound reasoning or justification, *Eddy* ran roughshod over the protections afforded other litigants and appears to be based upon the fact that Farmers is an insurance company accused by one of its insureds of bad faith. There is no explanation offered by the First Appellate District as to why insurers should be treated differently from other litigants which are accused of tortious wrongdoing and bad faith in their business dealings.

A cause of action for bad faith against an insurer is a tort. *Scott Fetzer Co. v. Am. Home Assur. Co., Inc.*, 2023-Ohio-3921, ¶ 22. Bad faith can be found to be present when the claims

handling conduct and decisions by the insurer are not predicated upon circumstances that furnish reasonable justification therefor. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 555 (1994); *Staff Builders, Inc. v. Armstrong*, 37 Ohio St.3d 298, 303 (1988). *Zoppo* emphasized that "[i]ntent is *not* and has never been an element of the reasonable justification standard." *Zoppo*, at 555 (italics sic).

Yet, there is no explanation as to why insurance bad faith (which is not based upon malice or other intentional wrongdoing by the insurer) should be treated differently in terms of foregoing the protection of an insurer's attorney-client privilege during the course of litigation than other torts which are based upon far more egregious intentional or malicious misconduct, for example, intentional interference with a contract,[4] interference with a business relationship,[5] or intentional interference with expectancy or inheritance.[6] Even torts committed during the course of litigation

[4] See, *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, paragraph two of syllabus ("In order to recover for a claim of intentional interference with a contract, one must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages.")

[5] See, *N. Chem. Blending Corp. v. Strib Indus.*, 2018-Ohio-3364, ¶ 42 (8th Dist.) (The elements of a tortious interference with a business relationship claim require (1) a business relationship; (2) the wrongdoer's knowledge of the relationship; (3) the wrongdoer's intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages.)

[6] See, *Firestone v. Galbreath*, 67 Ohio St. 3d 87, 88 (1993) (The elements of the tort of intentional interference with expectancy of inheritance are: (1) an existence of an expectancy of inheritance in the plaintiff; (2) an intentional interference by a defendant(s) with that expectancy of inheritance; (3) conduct by the defendant involving the interference which is tortious, such as fraud, duress or undue influence, in nature; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and (5) damage resulting from the interference.)

such as malicious civil prosecution[7] and abuse of process[8] do not trigger unfettered access to a defendant's attorney-client or work product privileges to uncover or prove greater requirements of intentional wrongdoing.

Even in *Moskovitz*, which was relied upon by *Boone*, discovery of the materials from the claim file did not occur until after trial and a judgment. But even so, discovery was not permitted to allow disclosure of those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense in the litigation which materials are to be excluded from discovery. *Moskovitz*, 69 Ohio St.3d at 662. Under *Eddy*, no such safeguard is afforded.

Here, not only has the First Appellate District announced an unexpected shift in the scope of discovery in the context of insurance bad faith litigation allowing unprecedented access to claims file materials prepared after the commencement of litigation which are presumptively subject to the attorney-client privilege and work product but the opinion ignores the General Assembly's legislative response to *Boone* as codified in R.C. 2317.02. When the General Assembly disagrees with an opinion of the Supreme Court, the General Assembly has the constitutional authority to enact legislation changing the law. *Morris v. Morris*, 2016-Ohio-5002,

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[7] See, *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 269 (1996) ("'In order to state a cause of action for malicious prosecution in Ohio, four essential elements must be alleged by the plaintiff:(1) malicious institution of prior proceedings against the plaintiff by defendant, * * * (2) lack of probable cause for the filing of the prior lawsuit, * * * (3) termination of the prior proceedings in plaintiff's favor, * * * and (4) seizure of plaintiff's person or property during the course of the prior proceedings * * * .'" (quoting *Crawford v. Euclid Natl. Bank*, 19 Ohio St. 3d 135, 139 (1985)).

[8] See, *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294 (1994), paragraph one of syllabus (The elements of the tort of abuse of process are "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.").

¶ 28. *Eddy* improperly ignores what the General Assembly enacted in R.C. 2317.02 in the wake of *Boone*. The First Appellate District's opinion frustrates that intent and purpose.

IV.

Privilege Appeals Will Become More Complicated Without An In Camera Review.

Further evidence of the sanctity of preserving the attorney-client privilege and emphasis of the need for a trial court to conduct an *in camera* review is found in the fact that orders compelling disclosure of privileged materials in discovery are immediately appealable under R.C. 2505.02(B)(4). *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, ¶ 30:

> An order compelling the production of materials alleged to be protected by the attorney-client privilege is a final, appealable order under R.C. 2505.02(B)(4). Prejudice would be inherent in violating the confidentiality guaranteed by the attorney-client privilege, and therefore, an appeal after final judgment would not provide an adequate remedy.

Further safeguarding the privilege is the *de novo* standard of review applicable to appeals from orders compelling disclosure in discovery. *Med. Mut. of Ohio v. Schlotterer*, 2009-Ohio-2496, ¶ 13.

The *Eddy* opinion allows trial courts to dispense with an *in camera* review of the privileged materials in a claim file. Without an *in camera* review, reviewing courts are simply forced to reverse with orders for the lower courts to conduct mandatory *in camera* reviews. This causes unnecessary delay and expense that can be avoided if the lower courts simply do what is required in the first place.

CONCLUSION

Amicus curiae The Ohio Association of Civil Trial Attorneys respectfully urges this Court to adopt both Propositions of Law advanced by Appellant Farmers Property Casualty Insurance Company, reverse the judgment and opinion of the First Appellate District, and clarify the law defining the scope of the attorney-client and work product privileges when insurers are sued by their insureds. This case demonstrates and presents these critically important and wide-ranging, yet still unsettled, areas of Ohio insurer bad faith law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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