CASE NO. 2024 – 0623

IN THE SUPREME COURT OF OHIO

MELISSA EDDY, et al.
Plaintiffs-Appellees,

v.

FARMERS PROPERTY AND CASUALTY INSURANCE COMPANY, et al
Defendant-Appellant.

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

MERIT BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEES

Robert P. Rutter (0021907)
Robert A. Rutter (0081503)
Rutter & Russin, LLC.
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, Ohio 44131
(216) 642-1425 – Phone
brutter@OhioInsuranceLawyer.com
bobbyrutter@OhioInsuranceLawyer.com
Counsel for Amicus Curiae, Ohio Association of Justice

Gregory E. O'Brien (0037073)
1300 E. Ninth Street, 20th Floor
Cleveland, Ohio 44113
(216) 621-7860 – Phone
gobrien@cavitch.com
Counsel for Amicus Curiae, Ohio Insurance Institute

Gus Lazares (0092206)
Wesley M. Nakajima (0084563)
Rittgers Rittgers & Nakajima
12 East Warren St.
Lebanon, Ohio 45036
Lebanon, Ohio 45036
(513) 932-2115– Phone
gus@rittgers.com
matt@rittgers.com
Counsel for Plaintiff-Appellees Melissa Eddy and Alexis Eddy

Timothy J. Fitzgerald (0042734)
Koehler Fitzgerald LLC.
1111 Superior Ave., East Suite 2500
Cleveland, Ohio 44114
(216) 539-9370 – Phone
Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

Richard N. Garner (0061734)
David W. Orlandini (0064850)
Sunny L. Horacek (004554)
Collins Roche Utley & Garner
655 Metro Place South, Suite 200
Dublin, Ohio 43017
(614) 901-9600 – Phone
rgarner@cruglaw.com
dorlandini@crulaw.com
shoracek@crulaw.com

Counsel for Defendant-Appellant Farmers Property Casualty Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF THE AMICUS CURIAE

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may have justice and wrongdoers are held accountable. The OAJ comprises approximately one-thousand five-hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

ARGUMENT OPPOSING PROPOSITION OF LAW NUMBER 1:

Proposition of Law Number 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.

Prompt and fair claim handling is a cornerstone of the insurer-insured relationship. Any deviation from this obligation can be grounds for bad faith. "Based upon the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer." *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315, 1316 (1983). Appellee traces the history of these they of claims within its brief.

Boone, which applies to foot-dragging claims, was decided 24 years ago, and the insurance industry has been acting like Chicken Little and screaming that "the sky is falling" since day one. In fact, *Boone* has worked quite well, as evidenced by the fact that this Court has let the decision stand undisturbed for a quarter of a century.

Pre-*Boone*, insurers customarily refused to produce any portion of the claim file, asserting that all claim file materials on every claim were work product because they were prepared in anticipation of litigation. The insurance industry's position was that since litigation

was possible down the road on any claim, all claim file documents were prepared in anticipation of litigation.

The effect of this tactic was to keep policyholders in the dark about why claims were denied, or why claim payments were delayed, or why claim payments were for a certain amount. This tactic also shielded the claims process from examination and allowed the insurers to hide facts such as roundtable claim evaluations, where managers critiqued claim adjusters and their claim decisions, sometimes agreeing with them, but sometimes disagreeing and pointing out why a claim should be paid, or a claim payment amount increased.

Claim file discovery has little to do with attorney-client privilege, although that is what Farmers and their amici spend almost all of their briefs discussing. Instead, work product is the privilege usually asserted to shield claim files based on the logic discussed above.

In Proposition of Law Number 1, Farmers asks the Court to establish a blanket rule that once litigation ensues, then every document that the insurer thereafter creates in the claim file is in anticipation of litigation and protected from disclosure. But the work product privilege is not that broad. First, this Court held in *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 662, 635 N.E.2d 331, 350 (1994) that "good cause" is categorically satisfied in these cases. Second, even if that were not that case, to otherwise qualify as work product, the document must be prepared ***because of*** and ***exclusively for*** the lawsuit. *Peyko v. Frederick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986); *Estate of Hohler v. Hohler*, 185 Ohio App.3d 420, 2009-Ohio-7013, 924 N.E.2d 419, ¶47-49 (7th District).

The test is even stricter when the documents are prepared by a non-lawyer:

> Material prepared by nonattorneys, even if prepared in anticipation of litigation, is protected from discovery only where the material is prepared exclusively and in specific response to imminent litigation. *Perfection*

> *Corp. v. Travelers Casualty & Surety*, 153 Ohio App.3d 28, 790 N.E.2d 817, 2003-Ohio-2750 (8th District)

When documents are produced both in anticipation of litigation and in the ordinary course of business, the latter rule takes precedence. *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972)("[T]he evaluation of claims of its policyholders is the regular, ordinary and principal business of defendant insurance company. Most of such claims result in payment by the defendant; it can hardly be said that the evaluation of a routine claim from a policyholder is undertaken in anticipation of litigation, even though litigation often does result from a denial of a claim.").

Boone recognized that since the ordinary business of an insurance company is handling claims, then **claim files are not generally subject to the work product privilege**:

> We disagree with Allstate's position that, by definition, its claims file was prepared in anticipation of litigation. Allstate's business is providing insurance to insureds for a premium. Whenever an insured makes a claim, Allstate, in the ordinary course of business, opens a file for the claim. "[A]n insurance company has a routine duty to investigate accidents, and, thus, such materials generated are not prepared in anticipation of litigation, but prepared in the ordinary course of business." *DeMarco v. Allstate Ins. Co.*, 2014-Ohio-933 (8th District)

Farmers asks for a bright-line rule, but we already have such a rule. Claim file materials are subject to discovery up until the date of claim denial—in the case of a denied claim—or payment—in the case of a paid claim. As explained by *Eddy*, since there is no date of denial or constructive date of denial, the discoverable information cut-off date must be the date the full or agreed benefit is paid. Bad faith conduct continued "throughout the entire claims process" thereby justifying a cutoff date of the date that the insurer ultimately paid the benefits owed under the policy (i.e., the "benefit-payment date") in *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630, 855 N.E.2d 516, ¶ 12 (2d Dist.). In *Unklesbay*, a UIM insurer did not pay

its insured's UIM claim until approximately thirty-nine months after the insured sent a demand, thirty-eight months after UIM litigation was initiated, and eleven months after a bad faith claim was added to the litigation. *Id.* at ¶ 3-6.

Here are the problems with Proposition of Law Number 1. First, it will encourage insurers to file lawsuits against their insureds early in the claim process in order to cut off claim file discovery. Perhaps the lawsuit is filed under the guise of a declaratory judgment seeking direction from the court as to whether a claim is covered. But the effect is that the insurer can now claim privilege for all ordinary claim activities and shield its decision-making process from view.

Second, Proposition of Law Number 1 rewards insurers who sit on their hands and do nothing to move a claim forward after a lawsuit is filed. We see this all the time when policyholders come to us after months of waiting for an adjuster to review an estimate, or make a claim decision, or issue a check. If we file suit immediately, which is usually warranted, the insurer often "puts the claim on hold" indefinitely pending the outcome of litigation. In some courts, that could be years. At least today, we can force a recalcitrant insurer to continue adjusting a claim in litigation by pointing to its duty of good faith. Per Proposition of Law Number 1, the destitute insured would have no recourse in bad faith since the matter is in suit.

Farmers argues that any bad faith that occurs during litigation can be monitored by the trial court. But that is not true. Litigation tactics of counsel that are subject to Rule 11 sanctions are not the same thing as claim decisions. By litigation tactics of counsel, courts mean decisions made by counsel on what affirmative defenses to raise, what pleadings to file, what discovery to undertake, and what motions to file. See, for example:

- *Timberlake Constr. Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335 (10th Cir. 1995)(filing of counterclaim and motion to join a necessary party);

- *Dakota, Minn. & Eastern R.R. Corp. v. Acuity*, 771 N.W.2d 623 (S.D. Sup. Ct. 2009)(decision not to hire an expert, attempts to appeal interlocutory orders, improper objections to requests for discovery);

- *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895 (Mont. Sup. Ct. 1993) (reimbursement of key witness for travel expenses to accident scene, "firming up" session with other witnesses to the accident, decision not to call retained expert as trial witness);

- *Helms v. Nationwide Ins. Co.*, 280 F.R.D. 354 (S.D. Ohio 2012)(filing notice of removal, filing motion to dismiss for failure to join a necessary party).

It makes sense to allow courts to use Rule 11 to police these sorts of litigation tactics, because these are tactics that can be policed by trial courts. But a trial court cannot use Rule 11 to order an insurer to conduct a full claim investigation or to reassess a claim determination, and sometimes these sorts of actions must be taken by insurers after litigation has commenced because the duty of good faith continues even after a claim decision and "requires the insurer to consider new evidence brought to its attention after the initial denial." *Sosabee v. State Farm Mut. Auto. Ins. Co.*, 164 F.3d 1215 (9th Cir. 1999).

See also *Sinclair v. Zurich American Ins. Co.*, 129 F.Supp.3d 1252, 1257 (D.N.M. 2015):

> New Mexico courts would recognize that an insurer has an obligation to timely reassess its initial decision to deny coverage based upon information received subsequent to the initial decision, even if that information is received after suit is filed.

And *American Nat. Property & Cas. Co. v. Stutte*, 105 F.Supp.3d 849 (E.D. Tenn. 2015):

> [T]he Court has no trouble finding that ANPAC had a good faith duty to consider evidence that came to light over the course of this litigation, and if that evidence made clear that the Stuttes did not destroy their home and that they were due losses under the policy, it should have paid their claims.

And *Rancosky v. Washington Nat. Ins. Co.*. 130 A.3d 79 (Pa Sup. Ct. 2015), ("[A] refusal to reconsider a denial of coverage based on new evidence is a separate and independent injury to the insured.")

The Tenth District has endorsed this view by holding that "[E]vidence of the breach of the insurer's duty to exercise good faith occurring after the time of filing suit is relevant so long as the evidence related to the bad faith handling or refusal to pay the claim." *Spadafore v. Blue Shield*, 21 Ohio App.3d 201, 486 N.E.2d 1201 (1985).

In *Valley Force Ins. Co. v. Fisher Klosterman, Inc.*, 2016 WL 1642961 (S.D. Ohio), Magistrate Michael Barrett reviewed the conflicting case law in this area (continuing duty of good faith vs. litigation tactics of counsel that are generally not admissible to demonstrate bad faith) and held that the insured's arguments:

> [A]s to bad faith based upon Valley Forge's actions in regard to its pleadings and motion for summary judgment in this declaratory judgment action fail to state a plausible claim for bad faith against Valley Forge.
>
> That is not to say, however, that other post-filing conduct of Valley Forge outside the particular litigation tactics and strategies in this Court cannot be relevant to proving FKI's bad faith claim. * * *
>
> While the relevance of the allegations to the claim for bad faith against Valley Forge based upon the handling of its claims under the contract are at this time unclear, or, at least, in dispute, the Court finds it plausible that such allegations could be relevant to or somehow support FKI's claim for bad faith. (at ¶11)

The court in *Palmer v. Farmers Ins. Exchange*, *supra* cited with approval the following language from *Insurer's Duty of Good Faith in the Context of Litigation*, 60 Geo. Wash. L. Rev. 1931, 1972 (1992):

> When analyzing the relevance of an insurer's postfiling conduct, therefore, the proper inquiry should be into the extent to which such conduct casts light on the reasonableness of the original denial of the policyholder's claim.

So, a blanket rule holding that an insurer cannot breach its duty of good faith after a lawsuit is filed is a bad idea. The duty of good faith continues until the claim is resolved—via denial or payment. There is no reason to limit the discovery allowed by *Boone* to only pre-litigation when the duty of good faith continues throughout litigation.

ARGUMENT OPPOSING PROPOSITION OF LAW NUMBER 2:

Proposition Of Law Number 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 rules of the game set forth in *Boone*, are simple, well justified, and known by everyone before the game begins. Deviating from the rules has consequences. An in camera inspection of documents claimed to be privileged is generally a good idea, but a blanket rule ***requiring*** a trial court to hold an in camera inspection turns on its head the requirement that places the burden of proof on the party asserting the privilege. If the party asserting the privilege fails to come forth with evidence to support its position, including an adequate privilege log that eases the considerable burden imposed on a trial court in conducting an in camera inspection, then there should be no requirement on the trial court to conduct an in camera inspection.

This appeal only came about because Farmers did such a poor job of presenting its privilege arguments. Farmers' privilege log was insufficient, and it included on its privilege log certain documents with no clear indication of why these documents were privileged. That is, it failed to meet its initial burden to present evidence to support its privilege argument.

For example, one of the 20 documents listed on the privilege log was "Claim file Log Notes created on 8/27/21 and after" authored by "Various." See court of appeals decision, ¶34.

The plaintiff's document request was for all claim file documents prepared from 8/27/21 until 4/4/22, a period of over seven months. During this period, when Farmers was re-evaluating its decision that the UIM claim was only worth $33,312, there were certainly dozens of claim log entries by many different adjusters, managers, and supervisors. Farmers lumped all of these numerous entries into one document, made a generic claim of attorney-client privilege and work product privilege for the entire log, apparently did not bates-stamp any of the numerous documents, and never submitted the documents itself asking for an in camera inspection.

This placed far too great a burden on the trial court to do Farmers' job for it. Trial judges are busy; they should not have to sift through an entire claim log trying to figure out fundamental questions like:

- What privilege is being claimed for each claim log entry?
- What evidence did the moving party present to support its privilege position?
- Did any of these entries deal with attorney-client communications?
- Who prepared the entries and to whom were they directed?
- Were any entries prepared specifically because the litigation was in progress, or were they prepared in the ordinary course of business?

Having an in camera inspection of contested documents is a good practice, and it is routinely done in cases in which we are involved. But it is also routine in our cases for defense counsel to provide us a detailed privilege log that lists each bates-stamped document being withheld, the date the document was prepared, who prepared the document and to whom it was sent, a basic description of the document (discussion with expert, roundtable discussion, review of medical records, etc.), and the precise privilege being asserted, and why.

When a party fails to produce an adequate privilege log, fails to bates-stamp the documents at issue, fails to file them under seal with the court, and fails to submit documents for an in-camera inspection, then that party should not complain when a trial court orders production of the documents at issue.

Here, there is nothing wrong with the rule set forth in *Boone* that requires this Court to modify the decision as requested by the amici. This is simply a case of Farmers doing a poor job of presenting its privilege claims, and now blaming the trial court and the court of appeals for Farmers' own inadequacies.

Amicus curiae The Ohio Association for Justice respectfully urges this Court to deny both propositions of law, and especially the positions advocated by the amici—the Ohio Insurance Institute and the Ohio Association of Civil Trial Attorneys—which consists of a "wish list" for the insurance industry.

Respectfully submitted,

/s/ Robert P. Rutter
Robert P. Rutter (0021907)
Robert A. Rutter (0081503)
RUTTER & RUSSIN, LLC
4700 Rockside Road, Suite 650
Cleveland, Ohio 44131
(216) 642-1425
brutter@OhioInsuranceLawyer.com
bobbyrutter@OhioInsuranceLawyer.com

Counsel for Amicus Curiae The Ohio Association for Justice

CERTIFICATE OF SERVICE

The foregoing MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION FOR JUSTICE was sent via e-mail pursuant to S.Ct.Prac.R. 3.11 (C) on this 15th day of January, 2025 to:

Richard M. Garner
David W. Orlandini
Sunny L. Horacek
Collins Roche Utley & Garner, LLC
655 Metro Place South, Suite 200
Dublin, Ohio 43017
E-mail:rgarner@cruglaw.com
dorlandini@cruglaw.com
shoracek@cruglaw.com
Counsel for Defendant-Appellant Farmers Property Casualty Insurance Company

Gus J. Lazares
Wesley M. Nakajima
Rittgers, Rittgers & Nakajima
12 E. Warren Street
Lebanon, Ohio 45036
E-mail: gus@rittgers.com
matt@rittgers.com
Counsel for Plaintiffs-Appellees Melissa Eddy, et al.

Gregory E. O'Brien
Cavitch, Familo & Durkin Co., LPA
1300 East Ninth Street, 20th Floor
Cleveland, Ohio 44114
E-mail: gobrien@cavitch.com
Counsel for Amicus Curiae, Ohio Insurance Institute

Timothy Fitzgerald
Koehler Fitzgerald LLC
1111 Superior Avenue East, Suite 1360
Cleveland, Ohio 44114
E-mail: tfitzgerald@koehler.law
Counsel for Amicus Curiae, Ohio Association of Trial Attorneys

/s/ Robert P. Rutter
ROBERT P. RUTTER (0021907)