IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-IA-00586-SCT

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

v.

100 RENAISSANCE, LLC

DATE OF JUDGMENT:	03/08/2019
TRIAL JUDGE:	HON. EDWIN Y. HANNAN
TRIAL COURT ATTORNEYS:	JOSEPH E. ROBERTS, JR. CRYMES G. PITTMAN THOMAS RAY JULIAN
COURT FROM WHICH APPEALED:	MADISON COUNTY COUNTY COURT
ATTORNEY FOR APPELLANT:	THOMAS RAY JULIAN
ATTORNEYS FOR APPELLEE:	JOSEPH E. ROBERTS, JR. ANN RUSSELL CHANDLER
NATURE OF THE CASE:	CIVIL - INSURANCE
DISPOSITION:	AFFIRMED - 10/29/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, JUSTICE, FOR THE COURT:

¶1. This is an interlocutory appeal of a bad-faith failure-to-pay claim. The trial court found that the insurance company waived the attorney-client privilege and was required to produce written communications between its in-house counsel and its claims handler and to produce its in-house counsel for a deposition. We agree and affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On February 12, 2016, an unidentified driver struck a flagpole owned by 100 Renaissance, LLC, causing $2,134 in damage. Renaissance filed a claim with its insurance

company, Travelers Property Casualty Company of America. Renaissance sought coverage under its automobile liability-insurance policy, which included uninsured-motorist (UM) coverage. The subject UM policy defined "property damage" as follows:

> "Property damage" means injury to or destruction of:
>
> a. A covered "auto";
>
> b. Property contained in the covered "auto" and owned by the Named Insured or, if the Named Insured is an individual, any "family member"; or
>
> c. Property contained in the covered "auto" and owned by anyone else "occupying" the covered "auto".

The UM policy further defined an "uninsured motor vehicle" as one "[t]hat is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying' . . . ."

¶3. Travelers denied Renaissance's claim. Travelers' claims handler, Charlene Duncan, determined there was no coverage under the UM policy because the flagpole was not a covered "auto."

¶4. On February 19, 2016, Renaissance's attorney, Rick Wise, sent an email to Duncan that set forth Renaissance's legal arguments as to why coverage should be afforded under Mississippi's UM statute. Wise cited Mississippi Code Section 83-11-101(2) (Supp. 2019), which stated:

> No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1980, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for property damage from the owner or operator of an uninsured motor vehicle . . . .

The email continued:

> I am aware that Travelers' policy language attempts to limit this legally mandated coverage by narrowly defining the term "property damage" and excluding all forms of property other than an insured's auto and its contents. However, Section MCA 83-11-101(2) contains no such limitation and requires coverage for "all sums" for which the uninsured driver is liable as to "property damage." There is abundant legal precedent for the proposition that this coverage may not be limited or denied by policy provisions that are inconsistent with the statutory requirements.
>
> As you may also be aware, the purpose of UM coverage—and the purpose of the law mandating its inclusion in all policies—is to provide to the insured (100 Renaissance) the same protection that would have been afforded the insured if the negligent driver had possessed legally required minimum auto liability coverage. I'm sure that Travelers would not claim that if this motorist had been an insured under a Travelers auto liability policy, and had run into a person's house, that liability coverage would not apply to the resulting "property damage." The result under UM coverage should be the same.

¶5. Before responding, Duncan sought legal advice from Travelers' then in-house counsel, Jim Harris. Duncan is not an attorney. Duncan sent a letter, dated March 2, 2016, that again advised Renaissance that its claim was denied under its UM policy because the policy required damage to a covered auto. The letter stated:

> Thank you for your email of February 19, 2016. Based on our review of the policy terms and the law, [Travelers] does not afford Underinsured Motorist Property Damage (UMPD) for damage to your company's flagpole.
>
> As the claim was reported, a vehicle damaged a flag pole belonging to Barksdale Management . . . . The driver left the scene, so no information could be obtained from the at fault driver about insurance or financial responsibility. The accident occurred on February 12, 2016, and was reported to Travelers inquiring whether UMPD coverage on Barksdale's auto policy would pay for the damage.
>
> As we understand the Mississippi auto liability and uninsured motorist insurance statutes, coverage is mandated for vehicles listed or otherwise described in the policy (covered autos) and for owners and their family

members, drivers and occupants of those vehicles (insureds). (See Miss. Code. Ann. § 83-11-102(a)).[1]

This insurance plan is carried over to the Mississippi Uninsured Motorists Coverage endorsement in Barksdale's commercial auto policy. Please note the lead-in language to the endorsement on page 1 of 3:

> **MISSISSIPPI UNINSURED MOTORISTS COVERAGE (CA 21 28 10 13).**
> For a covered "auto" licensed or principally garaged in, or for "auto dealers operation" conducted in, Mississippi . . . .

The policy also includes a definition of "property damage" that broadens UMPD coverage so that it applies not just to "covered autos."

> **F. Additional Definitions**
>
> As used in this endorsement:
>
> 1. "Property damage" means injury to or destruction of:
>
> > **a.** A covered "auto",
> >
> > **b.** Property contained in the covered "auto" and owned by the Named Insured or, if the Named Insured is an individual, any "family member"
> >
> > **c.** Property contained in the covered "auto" and owned by someone else "occupying" the covered "auto".

As we discussed previously, the flagpole is not a "covered auto" nor does it come within the expanded definition of "property damage" found in the policy. Therefore, damage to the pole is not eligible for Uninsured Motorist coverage. The damage to the flagpole will need to be filed under your Property Policy.

Please note that there may be other terms, conditions and exclusions in the policy that apply to this claim. Reference to some of those terms, conditions and exclusions in this letter is not intended to waive or estop Travelers from raising other terms, conditions and exclusions that may be applicable.

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[1] Duncan cited Mississippi Code Section 83-11-102(a); but Section 83-11-102 does not contain a subsection (a).

Travelers expressly reserves all of its rights under the policy and neither this letter nor any past or future conduct by Travelers regarding this claim shall modify, limit, estop or waive any of Travelers' rights.

Respectfully,
Charlene Duncan
Claim Representative
Travelers Property Casualty Company of America

¶6. Renaissance took Duncan's deposition and asked that she explain both the denial letter and the reasons Travelers denied the claim. Duncan testified as follows:

Q: Are – does Travelers educate you or do you – or were you educated independently on the law in the different states with regard to how these three specific states deal with insurance policies?

A: I don't know. I mean, I know how the policy works. I know what the policy states, but as far as the law, I'm not an attorney. I don't know.

. . . .

Q: And you're telling me you received no education on Mississippi law and how it affects coverage?

A: As far as I know. I cannot remember.

Q: Okay. Would you agree with me that it's important to know what the law is that affects coverage when you're – prior to making your determination of coverage?

A: Is it important to know the law for Mississippi in order to make this decision? Is that what you're asking me?

Q: Yeah, . . . the reason why is [Mississippi Code Section] 83-11-101 sets up minimum standards for Uninsured Motorist coverage. In other words, it says: "Your policy has to provide these coverages," okay? So when you're making the determination if this is different than your policy, isn't it important to know that?

A: Okay. I don't even know how to answer, to be honest with you . . . .

But as I stated I'm aware of what our – of what UMPD is and what we cover . . . . I don't know Mississippi law. I don't know if it differs.

Q: Okay. Well . . . [y]ou denied coverage – initially denied coverage prior to talking to an attorney, right?

A: Correct.

Q: Okay. And the reason you did that is you did not know – well you're not a lawyer. And so you looked at the policy and only the policy in making that decision, right?

A. Correct.

. . . .

Q: Okay. Did you know – at the time you were adjusting this case, did you know that Mississippi law, UM law, provided minimum provisions?

A: No.

Q: Okay. Do you not think that was important to know?

A: I don't know.

Q: Well, you're – you've been a claims adjustor for ten years . . . you don't know whether it's important to know what the minimum requirements under Mississippi law are?

A: I guess so. I – you know, I don't know.

. . . .

Q: [W]here does it say in what Mr. Wise quoted or in [Section 83-11-101(2)] that it was – that UMPD only covered property damage of a covered auto or anything contained therein?

A: I don't know. I mean, I'm not – I don't – I don't know.

Q: [D]oes it say anywhere that property damage coverage under UMPD is limited to covered auto or any property contained therein?

A: Not that I can see, but I don't know.

Q: Okay.

A: I'm not familiar with [the] statute.

Q: I'm going to show you . . . a letter dated March 2nd, 2016. And I'm going to ask you if you recognize that?

A: Yeah. I mean, I wrote it. Yeah, I wrote the letter.

Q: Okay. And who assisted you in doing that?

A: No one. I did it myself.

Q: Okay. I'm going to show you . . . [Section] 83-11-102 that you cite in there, okay? (Tendering) [Section] 83-11-102, and then you have "a." There's no "a" in [Section 83-11-102]. You're citing to a Mississippi statute, so I guess my question to you is: Where did you come up – where did you find that statute, and what – what does that mean, "83-11-102-a"?

A: I don't know. Maybe it was a typo. I don't know.

. . . .

Q: Okay. Well, where did you come up – did you research Mississippi law?

A: I can't remember.

Q: Well, what do you think happened? What's you best recollection? What's your best recollection about what happened?

A: I mean, General Counsel may have assisted me . . . I don't remember . . . where that came from. And I'm going to be honest with you about that because I don't remember.

. . . .

Q: Did it c[o]me from [Section] 83-11-102?

A: I don't – I don't – I don't know.

Q: And the reason I'm asking, it looks like . . . you're citing misleading language to my client in order to bolster your decision to deny claims. And granted, this was after you talked to Mr. Harris, and so I'm trying -- that's what I'm trying to figure out. Does that make sense?

A: It makes sense, but I don't know.

Q: Okay. So –

A: I don't know what –

Q: – the situation we have is I have a client who is making a UMPD claim. You've denied the claim. [Renaissance] told you there's a statute that says that your policy language is inconsistent with the statute. You go to your in-house lawyer, and then this letter is generated. It . . . seems to be misleading, but it may not be, and that's why I'm trying to figure out where this language came from. And maybe it's a typo. And you're telling me you don't have any recollection of it?

A: No.

Q: Who should I ask about this, then? Did anyone participate with or assist you I preparation of this letter?

A: I don't know.

Q: Okay. Let's look at the . . . letter, okay? And . . . you cite to the policy language with regard to the definition of property damage, right?

A: Correct.

Q: Okay. And then the next sentence reads: "As we discussed previously, the flagpole is not a . . . 'covered auto' . . . nor does it come within the expanded definition of 'property damage' found in the policy." Now, who assisted you in drafting that sentence?

A: Don't remember.

Q: And the reason I ask is the – you've looked at [Section] 83-11-101 right here . . . and it just talks about UMPD covers property damage, right?

A: Uh-huh.

Q: Do you remember when it said that?

A: Yes.

Q: Okay. And now Travelers' policy limits it, right? It says that it's not all property damage; it's just property damage to the covered auto or property within the covered auto, right?

A: Correct.

Q: Okay. So that's not expanded coverage; that's restricted coverage, correct?

Q: When you expand something, you include more stuff, right?

A: Right. Right.

Q: This is taking stuff away, right?

A: Well, that's what it means, yeah. But I don't know if that's what this definition means –

Q: I don't –

A: – with regard to the policy.

Q: I don't know why the word "expand" is used. I'm trying to figure out what your thinking was when you wrote this letter. Does my question make sense to you?

A: I – I just don't know. I'm – I don't know.

Q: Did your supervisor assist you in preparation of this letter?

A: Can't remember.

Q: Go back to that letter . . . that March 2nd letter.

Q: And it – in the third paragraph, it says: "As we understand the Mississippi auto liability and uninsured motorist insurance statutes . .

." Who is "we," do you know?

A: That would be Travelers.

Q: Okay. And . . . I appreciate you have no understanding of the Mississippi auto liability and uninsured motorist statute, correct?

A: Yes.

. . . .

Q: Just looking at the statute, the plain language of the statute right here, okay, [Section] 83-11-101(2), you looked at before. Is there coverage under that statute, under the plain reading of that statute?

Q: In your opinion.

A: I don't know. I'm not an attorney. I don't know anything about statutes. That's what we have General Counsel for. I deal with policy language, what's in the policy.

Q: Okay. Well, let's – let's read this statute, then. Okay. "No" – "no automobile liability policy or contract shall be issued or delivered after January 1st, 1980 unless it contains an endorsement or provision undertaking to pay the insured all sums which he shall legally be" – "shall be legally entitled to recover as damages for property damage from the owner or operator of an uninsured motor vehicle." That's what it says. And we discussed before that whoever – if – whoever – if we found out the identity of the person that hit the flagpole, they would be responsible for it, correct?

A: Right.

Q: The damages, right?

A: (Witness moves head up and down.)

Q: And so they would be, so Barksdale/Renaissance would be legally entitled to recover from the unknown operator of that motor vehicle, that property damage, correct?

A: Correct.

Q: Under the statute, just reading the common language of the statute. That's what – it says, right?

A: I can't interpret what the law is, regardless of how it's read. I can't interpret that. That's not what I do.

Q: Well, we – we agreed before that Renaissance had sustained property damage, right?

A: Yes.

Q: We agreed before that they would be legally entitled to recover that property damage from the owner or operator of that hit-and-run vehicle, correct?

A: Correct.

Q: So how would they not be entitled to coverage under that statute –

Q: -- in your opinion?

A: I, again, am not an attorney. I don't have that information.

¶7. Renaissance commenced this claim on August 25, 2016. In the complaint, Renaissance asserted a claim for coverage under the UM policy and a claim for bad-faith denial of the claim. In an effort to resolve the matter, Travelers paid the full amount for damage to the flagpole. Renaissance, however, continued to litigate its bad-faith claim.

¶8. Travelers filed a motion for summary judgment. Renaissance responded and asked for a continuance to conduct additional discovery. The additional discovery that Renaissance claimed it needed was production of the emails between Duncan and Harris and the deposition of Harris. At the same time, Renaissance filed a motion to compel the emails and Harris's deposition.

¶9. After a hearing, the trial court ordered Travelers to produce the emails for in camera

review. After in camera review, the trial court found that "Travelers ha[d] waived the attorney-client privilege as it relates to attorney Jim Harris." The trial court ordered Travelers to produce the emails and to produce Harris for a deposition. Travelers filed a petition for interlocutory appeal, which this Court granted.

STANDARD OF REVIEW

¶10. Evidentiary rulings and discovery matters are generally reviewed for an abuse of discretion. ***Bay Point Props., Inc. v. Miss. Transp. Comm'n***, 201 So. 3d 1046, 1052 (Miss. 2016). But "[t]he application of privilege is properly a mixed question of law and fact, with the circuit court's factual findings reviewed for clear error and its interpretation of the law reviewed de novo." ***Hewes v. Langston***, 853 So. 2d 1237, 1241 (Miss. 2003) (citing ***United States v. Neal***, 27 F.3d 1035, 1048 (5th Cir. 1994)).

DISCUSSION

¶11. Mississippi Rule of Evidence 502(b) sets forth the general rule of attorney-client privilege:

> **(b) General Rule of Privilege.** A client has a privilege to refuse to disclose—and to prevent others from disclosing—any confidential communication made to facilitate professional legal services to the client:
>
> > **(1)** between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > **(2)** between the client's lawyer and the lawyer's representative;
> >
> > **(3)** by the client, the client's representative, the client's lawyer, or the lawyer's representative to another lawyer or that lawyer's representative, if:
> >
> > > **(A)** the other lawyer represents another party in

> a pending case; and
>
> **(B)** the communication concerns a matter of common interest;
>
> **(4)** between the client's representatives or between the client and a client representative; or
>
> **(5)** among lawyers and their representatives representing the same client.

¶12. "[T]he privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client." ***Jackson Med. Clinic for Women, P.A. v. Moore***, 836 So. 2d 767, 771 (Miss. 2003) (internal quotation marks omitted) (quoting ***Barnes v. State***, 460 So. 2d 126, 131 (Miss. 1984)). "The burden of proof rests with the party asserting the attorney-client privilege." ***Fresenius Med. Care Holdings, Inc. v. Hood***, 269 So. 3d 36, 62 (Miss. 2018) (internal quotation marks omitted) (quoting ***Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay***, 42 So. 3d 474, 494 (Miss. 2010)).

¶13. "[O]nly the client may invoke the privilege." ***Moore***, 836 So. 2d at 771 (internal quotation marks omitted) (quoting ***Barnes***, 460 So. 2d at 131). But "the client may also waive the privilege in certain circumstances." ***Id.*** (citing ***Barnes***, 460 So. 2d at 131). In ***Moore***, this Court listed three such circumstances stating:

> Because of the important public policy considerations that necessitated the creation of the attorney-client privilege, the "at issue," or implied waiver, exception is invoked only when the contents of the legal advice is integral to the outcome of the legal claims of the action. Such is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the

attorney-client relationship.

Id. at 773 (quoting ***Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.***, 730 A.2d 51, 52-53 (Conn. 1999)).

¶14. Mississippi law requires that insurers have an arguable or legitimate basis to deny an insurance claim. *E.g.*, ***Liberty Mut. Ins. Co. v. McKneely***, 862 So. 2d 530, 533 (Miss. 2003) (citing ***State Farm Mut. Auto. Ins. Co. v. Grimes***, 722 So. 2d 637, 641 (Miss. 1998)). Here, through discovery, Renaissance sought to understand Travelers' reasons, or arguable or legitimate basis, to deny the claim.

¶15. Based on Duncan's testimony, Renaissance argues that Travelers' counsel actually made the decision to deny the claim and, as a result, that he must testify. Duncan's deposition testimony offered no information or explanation as to why the claim was denied. She failed to explain Travelers' decision, its rationale, or how the claim would not be covered under the Mississippi UM statute. Her testimony also demonstrated a lack of knowledge of Mississippi UM law. She could not explain the origin or intended purpose of her citation of a nonexistent Mississippi statute in the denial letter. She also repeatedly testified that she was unable to answer coverage questions because she was not an attorney.

¶16. Duncan signed the letter that denied the claim. Generally, it may be expected that the person who signs a letter has personal knowledge of the matters set forth in the letter. But Duncan's deposition testimony clearly evidenced that she did not have personal knowledge of either the applicable law or Travelers' reasons to deny the claim. Thus, considering her testimony, Duncan's purported statements in the denial letter were not based on her actual

personal knowledge.

¶17. The trial court noted that "[i]n her letter, Duncan specifically discussed, among other things, Mississippi UM law, its application to the policy at issue, and how the policy includes a definition of 'property damage' that broadens UMPD coverage so that it applies not just to 'covered autos.'" The trial court then recognized that during her deposition, Duncan repeatedly denied any knowledge of Mississippi law on auto liability and UM statutes. In fact, Duncan conceded that she has "no understanding of the Mississippi auto liability and [UM] statute."

¶18. We agree with the trial court and do not find an abuse of discretion. The attorney-client privilege does not apply here. In ***Moore***, the Court discussed the implied waiver of the attorney-client privilege in instances in which a party "specifically places at issue, in some other manner, the attorney-client relationship." ***Moore***, 836 So. 2d at 773 (quoting ***Metro. Life Ins. Co.***, 730 A.2d at 53). Travelers sent the denial letter to Renaissance in an effort to explain its arguable and legitimate basis to deny the claim. The letter was signed by Duncan; but based on her deposition testimony, it clearly was prepared by someone other than Duncan, most likely Harris. If so, Harris did not act as legal counsel and give advice to Duncan to include in the denial letter. Instead, the denial letter contained Harris's reasons to deny the claim. Duncan's signature was simply an effort to hide the fact that Harris, not Duncan, had the personal knowledge of Travelers' reasons to deny the claim and to use the attorney-client privilege as a sword to prevent Renaissance from discovering the reasons from the person who had personal knowledge of the basis to deny the claim.

¶19. Travelers, in both its motion for summary judgment and its denial letter, claimed that its denial was reasonable under Mississippi law. But Travelers asserts that its actions were reasonable and in good faith based on its investigation when, in reality, specifically in terms of the denial letter, the investigation was based on in-house counsel's evaluation and advice.

¶20. The decision in ***State Farm Mutual Automobile Insurance Co. v. Lee***, 13 P.3d 1169 (Ariz. 2000), is on point. In ***Lee***, a group of policyholders sued State Farm for bad faith for its pattern and practice of denying plaintiffs' coverage-stacking requests based upon antistacking policy language that was inconsistent with Arizona law. ***Id.*** at 1172. The issue was whether State Farm had impliedly waived the attorney-client privilege for documents containing legal opinions regarding the payment or rejection of the plaintiffs' claims. ***Id.*** State Farm implied that its adjusters, based in part on the receipt of legal advice, subjectively believed that their interpretation of the law was reasonable as they continued to deny stacking. ***Id.*** at 1173, 1177. But by so doing, State Farm impliedly waived the attorney-client privilege. ***Id.*** "Having asserted that its actions were reasonable because of what it knew about the applicable law, State Farm has put in issue that information it obtained from counsel." ***Id.*** at 1181. The court ruled:

> But as *our* cases have shown, a litigant's affirmative disavowal of express reliance on the privileged communication is not enough to prevent a finding of waiver. When a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. Thus, the advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions. ***A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself***

> ***about the law, when its investigation of and knowledge about the law included information it obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned and knew.***

Id. at 1177 (second emphasis added). Further, the court ruled:

> State Farm claims that its actions were prompted by what its employees knew and believed, not by what its lawyers told them. But a litigant cannot with one hand wield the sword—asserting as a defense that, as the law requires, it made a reasonable investigation into the state of the law and in good faith drew conclusions from that investigation—and with the other hand raise the shield—using the privilege to keep the jury from finding out what its employees actually did, learned in, and gained from that investigation.

Id. at 1183.

¶21. Additionally, in ***Bertelsen v. Allstate Insurance Co.***, the court held:

> While the insurer did not expressly raise an advice-of-counsel defense, the claims adjusters' knowledge of the law consisted entirely of the advice of counsel. Because the insurer's evaluation of state law necessarily included the advice of counsel, the Arizona Supreme Court . . . held that the insurer affirmatively injected the advice of counsel into the case.

Bertelsen v. Allstate Ins. Co., 796 N.W.2d 685, 703 (S.D. 2011) (citing ***Lee***, 13 P.3d at 1179).

¶22. Other courts have reached similar results and required attorneys to testify when the attorneys make the decision to deny a claim or provide the reasons for the denial. *See* ***Roehrs v. Minn. Life Ins. Co.***, 228 F.R.D. 642, 646 (D. Ariz. 2005) (holding, in part, that defendant, through its adjusters, "impliedly waived the privilege by their deposition testimony that each considered and relied upon . . . the legal opinions or legal investigation in denying that the [plaintiffs'] claims were covered under the . . . policy"); ***Dakota, Minn. & E. R.R. Corp. v. Acuity***, 771 N.W.2d 623, 638 (S.D. 2009) (holding that "where an insurer unequivocally

delegates its initial claims function and relies *exclusively* upon outside counsel to conduct the investigation and determination of coverage, the attorney-client privilege does not protect such communications"); ***Mission Nat'l Ins. Co. v. Lilly***, 112 F.R.D. 160, 163 (D. Minn. 1986) ("To the extent that [counsel] acted as claims adjusters, then, their work-product, communications to client, and impressions about the facts will be treated herein as the ordinary business of [the insurer], outside the scope of the asserted privileges.").

¶23. These decisions clearly state the legal principle that the trial court applied here: if the claims handler relied *substantially, if not wholly,* on in-house counsel to prepare her denial letter, the reasoning of in-house counsel should be discoverable. The trial court was correct that Harris has the personal knowledge of the reasons and the basis of the denial, and Travelers is now relying on those findings to argue its denial was reasonable.

CONCLUSION

¶24. Renaissance is entitled to depose the individual with personal knowledge of the basis for the denial of coverage as set forth in the denial letter. That person is Harris. Accordingly, as determined by the trial court, Travelers shall produce the written communications between Duncan and Harris regarding Renaissance's insurance claim at issue, and Travelers shall produce Harris for a deposition to discover his knowledge about Travelers' arguable and legitimate basis to deny the claim.

¶25. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., MAXWELL, BEAM AND CHAMBERLIN, JJ., CONCUR. ISHEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J.

ISHEE, JUSTICE, DISSENTING:

¶26. I agree with the majority that the attorney-client privilege applies to the communications at issue, but I cannot join in its conclusion that Travelers has waived the privilege. I respectfully dissent.

¶27. The majority lays out the testimony in great detail, but it essentially boils down to this: 100 Renaissance made a claim under its auto-insurance policy for damage to a flagpole in its parking lot inflicted by an unknown motorist. Travelers' claims handler, Charlene Duncan, denied the claim based on the plain language of the auto-insurance policy, which only covered property damage to a "covered auto." Shortly thereafter, Renaissance's attorney sent a demand letter by email to Duncan that presented a legal argument: that Mississippi law required Travelers to cover all property damage inflicted by uninsured motorists, notwithstanding the policy's express limitations. Duncan then consulted with Travelers' attorney, Jim Harris, and sent a response reiterating the denial of coverage for the same reason as before—because the flagpole was not a "covered auto." Duncan's letter also included a brief response to Renaissance's legal argument, which Duncan was unable to explain when she was deposed by Renaissance.

¶28. The majority concludes that the legal arguments contained in Duncan's denial letter were probably the product of her consultation with Harris. That is almost certainly the case, but the majority then goes on to conclude that since Duncan, the claims handler, could not explain the legal arguments, the letter "clearly was prepared by someone other than Duncan, most likely Harris" and that "Duncan's signature was simply an effort to hide the fact that

Harris, not Duncan, had personal knowledge of Travelers' reasons to deny the claim." Maj. Op. ¶ 18. Thus, the majority reasons, Travelers has waived the attorney-client privilege, and Renaissance is entitled to depose the attorney, Harris, and to discovery of the correspondences between the claims handler and the attorney.

¶29. With all due respect to the majority, I disagree with its underlying premise. Duncan clearly understood the reason for denying the claim, which was the same reason stated in her initial denial letter: the express language of the policy precluded coverage. Duncan faltered only when asked to respond to Renaissance's legal arguments concerning questions of statutory interpretation that might have overridden the express policy language. The majority thus appears to impose a requirement that in order to preserve the privilege, a claims handler must be able to explain legal arguments at her deposition—the same legal issues for which she sought advice in the first place. I can find no authority to support this proposition, and I fear it is an unreasonable standard that will have deleterious and chilling effects on the exercise of the attorney-client relationship. "[A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage." ***Aetna Cas. & Sur. Co. v. Superior Ct.***, 200 Cal. Rptr. 471, 475 (Cal. Ct. App. 1984).

> A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege—to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

Id. (citations omitted).

¶30. This Court has said that the attorney-client privilege can be waived "when a party . . . specifically places at issue . . . the attorney-client relationship." ***Jackson Med. Clinic for Women, P.A. v. Moore***, 836 So. 2d 767, 773 (quoting ***Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.***, 730 A.2d 51, 60 (Conn. 1999)). But Travelers has done nothing to place the attorney-client relationship at issue except to seek and rely upon legal advice from its attorney. The fact that the claims handler's correspondence with her attorney might be relevant and helpful to resolving Renaissance's allegations is not sufficient to overcome the privilege. *See, e.g.*, ***In re Burlington N., Inc.***, 822 F.2d 518, 533 (5th Cir. 1987) ("Attorney/client documents may be quite helpful in making out a claim of sham, but this is not a sufficient basis for abrogating the privilege."). "Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue." ***Rhone-Poulenc Rorer Inc. v. Home Indem. Co.***, 32 F.3d 851, 864 (3d Cir. 1994).

¶31. Moreover, I am not convinced that the attorney-client communications must be disclosed in order for Renaissance to prove its case. The majority concludes that disclosure is required so that Renaissance can "depose the individual with personal knowledge of the reasons and basis for the denial," Maj. Op. ¶ 24, but Travelers has already given its reasons for denying the claim. And the relevant question is whether Travelers had an "arguable or legitimate basis for denying the claim." ***Minn. Life Ins. Co. v. Columbia Cas. Co.***, 164 So.

3d 954, 971 (Miss. 2014) (quoting ***Jenkins v. Ohio Cas. Ins. Co.***, 794 So. 2d 228, 232-33 (Miss. 2001)). This is an objective standard and a pure question of law since the underlying facts are not disputed—either the denial had an arguable or legitimate basis in the law, or it did not.

¶32. The majority also cites ***State Farm Mutual Automobile Insurance Company v. Lee***, 13 P.3d 1169, 1174-75 (Ariz. 2000), in which the Arizona Supreme Court held that an insurance company that asserts it had a subjective good-faith belief in the correctness of its position on a legal issue based on advice of counsel has put the legal advice it received from counsel into issue, thus waiving the attorney-client privilege. But ***Lee*** is nothing more than an advice-of-counsel defense case in which the defendant contended that it had subjectively acted in good faith because it relied upon its attorneys' advice. Travelers has not raised advice of counsel as a defense, either expressly or implicitly; it has hung its hat on the objective defense that its rejection of the claim was supported by an arguable or legitimate basis. ***Minn. Life Ins. Co.***, 164 So. 3d at 970. The ***Lee*** court explained the limitations of its holding outside the advice-of-counsel defense context:

> We assume client and counsel will confer in every case, trading information for advice. This does not waive the privilege. We assume most if not all actions taken will be based on counsel's advice. This does not waive the privilege. Based on counsel's advice, the client will always have subjective evaluations of its claims and defenses. This does not waive the privilege. All of this occurred in the present case, and none of it, separately or together, created an implied waiver.

Lee, 13 P.3d at 1183.

¶33. The underlying facts of the claim here were not disputed: an unidentified motorist

struck and damaged Renaissance's flagpole. Travelers' attorney's participation was limited to evaluating legal arguments presented by Renaissance's attorney in a demand letter after the initial denial of coverage. The communications between Travelers' claim handler and its attorney are protected by the attorney-client privilege, and I cannot find the privilege to have been waived by the mere involvement of the attorney in evaluating the legal arguments presented in Renaissance's demand letter. I respectfully dissent.

COLEMAN, J., JOINS THIS OPINION.