2013 IL App (1st) 120883-U

SECOND DIVISION
February 19, 2013

No. 1-12-0883

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WAYNE VROMAN, Plaintiff-Appellee, v. JUDY WENCIKER and MIDWEST GROUNDCOVERS, LLC, Defendants-Appellants.	))))))))))	Appeal from the Circuit Court of Cook County, Illinois. 10 L 13572 Honorable James N. O'Hara, Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Quinn and Connors, JJ., concurred in the judgment.

ORDER

HELD: Where insured defendant gives a recorded statement to a claims adjuster for her employer's insurer which has a duty to defend, with the intent it might be used in future litigation, the insurer-insured privilege exists to prevent disclosure of that statement in discovery and trial court erred in finding totality of circumstances and pleadings in case waived that privilege where insured did not expressly or impliedly waive the privilege.

HELD: Where defendants' counsel refuses to comply with discovery order in a good faith effort to secure appellate review of the underlying order, it is appropriate for this court to vacate the contempt order upon review.

¶ 1 This appeal arises from a finding of civil contempt and $50 fine against counsel for defendants, Judy Wenciker and Midwest Groundcovers, LLC (Midwest). Counsel was found in contempt for refusing to comply with the trial court's discovery order and, pursuant to Illinois Supreme Court Rule 304(b)(5) (Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010)), filed this appeal. Plaintiff, Wayne Vroman, filed the underlying complaint on November 30, 2010, sounding in negligence against defendants in relation to an accident between Wenciker, who was driving a vehicle owned by Midwest, and Vroman, who was driving a motorcycle. During the course of discovery, defendants objected to a request to produce a recorded statement Wenciker gave to a claims adjuster for the liability insurer. Rejecting defendants' claim of attorney-client/insurer-insured privilege, the trial court ordered that the statement be produced. The trial court specifically based the ruling on the "totality of the circumstances both in open court and in the pleadings."

¶ 2 Following denial of defendants' motion to reconsider, counsel refused to produce the statement and was found in contempt. On appeal, defendants' argue that the attorney-client privilege applies and the trial court erred in ordering production of Wenciker's statement. For the following reasons we reverse the findings of the trial court concerning the discovery issue, vacate the contempt finding against defendants' counsel, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On September 21, 2010, while riding his motorcycle at the intersection of West Main Street and Barbara Ann Drive in St. Charles, Illinois, plaintiff was allegedly struck by a vehicle owned by Midwest and operated by Wenciker, a Midwest employee. On November 30, 2010, plaintiff filed the underlying negligence action against defendants. Plaintiff alleged that Wenciker was negligent and plaintiff sustained serious injuries as a result of the accident.

Plaintiff asserted that defendants, "through their authorized agent, Gary Newswander, accepted liability for and did agree to admit liability to [plaintiff] for the September 21, 2010 motor vehicle collision."

¶ 5 On January 10, 2011, defendants filed an emergency motion to preserve evidence. Defendants asserted that defense counsel wrote to plaintiff's counsel on October 27, 2010, regarding preservation of the vehicles in the accident. Defendants asserted that the parties had not resolved defendants' concern over the preservation and ability to inspect the evidence. Defendants attached copies of the correspondence between the parties. This correspondence is addressed in chronological order, as follows.

¶ 6 Prior to the filing of any cause of action, counsel for plaintiff contacted Gary Newswander, claims adjuster for defendants' insurer, Grinnell Mutual Reinsurance Company, via telephone. In e-mail correspondence dated September 29, 2010, counsel and Newswander continued and memorialized their conversation. Plaintiff's counsel attached a copy of the email correspondence to a December 15, 2010, letter to defendants' counsel. In his initial email, plaintiff's counsel stated:

> "Please allow this email to confirm that I am representing Mr. Wayne Vroman in his claims against your insureds arising out of the collision of 9-21-2010. Please direct all further communications to me.
>
> Please allow this to confirm my request and instruction that you do not dispose of, alter, repair test or otherwise change you[r] insureds' vehicle involved in the collision as it is a critical piece of evidence. Please immediately communicate this information to your insured so that they preserve their vehicle and do nothing to affect the evidence.

Please allow this to confirm that you have been paying the storage on Mr. Vroman's motorcycle but have decided Grinnell will not pay any storage after today. You advised you will provide me with the name, phone [number] and address of the location of the vehicles. Please inform the storer of the vehicle to preserve Mr. Vroman's motorcycle and do nothing to alter it while I arrange for a tow vehicle and take possession.

You advised that Grinnell and its insureds are accepting the liability for the collision and I would ask that you confirm same in writing to me. You also asked me to inform you of the [*sic*] Mr. Vroman's condition and keep you updated on his progress and I intend to do so.

At this time I have not received any medical records, however it is clear that Mr. Vroman has suffered multiple severe and complex injuries internally and externally including a catastrophic injury to his right foot. I enclose a photo of his right foot which was partially severed and which the specialists are trying to save. It is my understanding that his many injuries include a brain injury."

¶ 7 In his response e-mail to plaintiff's counsel, also dated September 29, 2010, Newswander stated, in relevant part:

"You had asked for the location of your client's motorcycle, it is at Chad's Towing and Recovery *** As far as what they do or have done with the motorcycle, I have had no control of that. Again, we will pay the towing and storage charges to 9/29/10 and nothing after that date.

As far as our insured's vehicle, they are using and repairing the vehicle as they need. We have photos of the damaged vehicle and we have accepted

liability for the accident. Therefore we will not ask the insured to park a vehicle they may need to use. If you would like to have the vehicle parked and not used and you are willing to pay the loss of use for the vehicle, we will ask our insured to consider that.

Please do not contact our insured or the driver of the insured vehicle as I will be more than happy to assist you with any needs you may have. When we spoke earlier today you said you will not allow your client to provide us with a statement of the accident. Is that correct?

Your request for the policy limits of liability are for a personal private passenger automobile policy and that is not what our insured has. Therefore we will not disclose the policy limits at this time."

¶ 8 On October 27, 2010, defendants' counsel wrote that defendants' vehicle had been taken out of service and was not repaired. Counsel indicated that the vehicle was available for inspection for 60 days, until December 27, 2010. Counsel also requested the opportunity to inspect plaintiff's motorcycle that was involved in the accident. Plaintiff's counsel sent a response letter dated November 30, 2010, the same day the complaint was filed, in which he stated that he "cannot agree to anything contained in your letter of October 27, 2010," because he was informed by "your client's agent, Gary Newswander," that liability was accepted for the accident and defendants' vehicle would not be preserved.

¶ 9 Plaintiff's counsel once again wrote to defendants' counsel on December 15, 2010, attaching a copy of the aforementioned email correspondence for reference. Plaintiff sought clarification as to whether defendants' counsel was Midwest's personal counsel or whether the insurer, Grinnell, hired him to represent defendants. Plaintiff's counsel explained that the

liability insurer had been communicating with counsel as Midwest's agent and had provided instructions not to communicate with its principal, Midwest. Counsel further stated that Midwest's agent accepted liability thereby removing the need to preserve Midwest's automobile. Further, counsel explained that, because Newswander refused to disclose the limits of liability for the catastrophic injury and admitted liability, plaintiff was forced to file the underlying lawsuit.

¶ 10 Defendants' counsel responded by December 17, 2010, letter in response, stating "I appreciate that there has been some confusion regarding preservation of the Chevy Van involved in this auto accident. My letter to you of October 27th should have cleared up the confusion, and if it did not, I am sorry for my inartful language." The letter continued:

> "I have instructed my client to preserve the vehicle an additional month, until January 27, 2011, in its immediate post-accident state. That way no one is harmed for any mistake or assumption, however caused. I have reviewed the email attachment, in which Mr. Newswander accepts or acknowledges Grinnell Mutual has coverage for the incident at an early stage of an investigation, and am perplexed by conclusions reached to the contrary.
>
> I ask you again for a time and place where we can inspect the motorcycle your client was riding at the time of the accident."

¶ 11 Plaintiff's counsel responded in a letter dated December 21, 2010, maintaining that "there was no confusion and nothing to be cleared up. Your client, through its agent, unequivocally admitted and accepted liability for the accident, as clearly should have been done in this liability case." In the final letter attached to defendants' motion, dated December 22, 2010, defendants'

counsel rejected plaintiff's contention that Newswander had the authority to stipulate to liability for a lawsuit that had not been filed and reiterated the request to inspect the motorcycle.

¶ 12 A portion of the transcript of the January 10, 2011, hearing on defendants' motion is of record. The trial court considered the email correspondence of December 15, 2010, and plaintiff explained that he had communicated with the adjuster in charge of the file, Newswander, to set up a time to inspect Midwest's vehicle but was told it would not be preserved and liability was accepted. Defendants' counsel explained that it did not put the vehicle back in use and that the October 27, 2010, letter informed plaintiff that the vehicle would be preserved and available for inspection. This exchange between the trial court and defendants' counsel followed:

"THE COURT: What about when they say we're accepting liability - -

COUNSEL: I don't know what that means. That means he's accepting coverage on behalf of the liability carrier, I don't know. Gary Newswander is not our agent.

THE COURT: Whose agent is he?

COUNSEL: He has no authority to stipulate to liability.

THE COURT: Whose agent is he?

COUNSEL: He's an agent for Grinnell Mutual.

THE COURT: He's the insurance carrier for your client?

COUNSEL: He's an insurance carrier that bought a commercial liability insurance to - -

THE COURT: For your client?

COUNSEL: Yes."

¶ 13 The remainder of the transcript from the hearing is not of record. Ultimately, the court ordered plaintiff to preserve the motorcycle for defendants' inspection. Defendants

answered the complaint, denying all allegations of negligence and asserting affirmative defenses, including plaintiff's comparative negligence. On February 1, 2011, defendants filed a motion to strike paragraph 11 of plaintiff's complaint alleging that Newswander was defendants' authorized agent and that he accepted liability for the accident. Defendants argued that the allegation was insufficient as a matter of law because no facts were pleaded in support. On March 22, 2011, the trial court granted defendants' motion to strike and granted plaintiff leave to re-plead that paragraph of the complaint.

¶ 14 On April 12, 2011, plaintiff filed an amended complaint with the September 29, 2010, email correspondence attached as an exhibit. Plaintiff amended paragraph 11 to include allegations that defendants entrusted and delegated the right and duty to conduct and control their investigation, defense and settlement of any bodily injury claim to its agent, Newswander. Plaintiff alleged that, through their agent, Newswander, defendants stated that they would not preserve or pay to store the vehicles in the accident and agreed to accept liability. Plaintiff also claimed that, in reliance on these statements, plaintiff withdrew his demands to preserve and inspect defendants' vehicle. In their amended answer defendants again denied these allegations as legal conclusions and, to the extent an answer was required, denied the allegations.

¶ 15 Plaintiff subpoenaed Newswander and his deposition was taken on April 15, 2011, in Peoria, Illinois. At the deposition, Newswander was represented by a separate law firm from defendants' firm. Newswander testified as to his duties as a claims adjuster and his handling of plaintiff's claim against defendants. He stated that his authority to settle automobile claims was capped at $35,000 and that the intent of his email correspondence was to resolve the issue of the preservation and salvage of the

vehicles and to pay for damages relating thereto. When questioned about a recorded statement he took from Wenciker during the course of his investigation, Newswander's attorney asserted the attorney-client/ insurer-insured privilege.

¶ 16 Following the deposition, plaintiff filed a motion for a ruling on defendants' claim of privilege. Plaintiff asserted that defendants repeatedly stated that Newswander was not their agent early in the proceedings of the case when refuting arguments that he had accepted liability for the accident. Plaintiff also pointed to defendants' pleadings and comments in court to that same effect. Plaintiff argued that defendants' claim of privilege was foreclosed by their repeated assertion that Newswander was not defendants' agent.

¶ 17 Defendants' response to the motion included an affidavit from Wenciker, in which she averred that she was interviewed by Newswander and provided a statement with the understanding that it would be used by her employer's insurer and any attorney hired to defend her employer and her in the event of a lawsuit. Wenciker testified that she did not authorize anyone to make statements regarding her culpability for the accident. In further support, defendants pointed to the language in their policy with Grinnell that requires cooperation by the insured in order to maintain the duty to provide coverage.

¶ 18 On March 20, 2012, the trial court entered an order finding that defendants had waived the privilege as to Wenciker's communications with Newswander based on the "totality of the circumstances both in open court and in the pleadings." On March 26, 2012, the trial court denied defendants' motion to reconsider that order, stating that it had made its decision "based on the totality of the circumstances and all the pleadings and all the representations made [to the court] in open court the numerous times that this case

appeared in front of me including deposition testimony that related to this subject. So it is more than amply clear and the motion to reconsider is denied." Defendants' counsel requested that the trial court find defendants' law firm in contempt of court. The trial court made a finding that defense counsel was "in friendly civil contempt of court" and fined defendants' firm $50. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Pursuant to Illinois Supreme Court Rule 304(b)(5) (Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010)), a party may appeal, without a special finding, an interlocutory order finding a person or entity in contempt of court that imposes a penalty. An appeal of a finding of direct civil contempt for noncompliance with a discovery order requires our review of the propriety of the discovery order. *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 227 (2006). Discovery rulings are generally reviewed under an abuse-of-discretion standard, but rulings concerning application of privileges are reviewed *de novo*. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 735 (2009). Furthermore, these rulings are strictly construed because they are outside of the discovery process and run counter to the general duty to disclose. *Id*. The burden of establishing the applicability of a discovery privilege rests on the party seeking that application. *Chicago Trust Company v. Cook County Hospital*, 298 Ill. App. 3d 396, 401 (1998).

¶ 21 Supreme Court Rule 201(b)(2) ennunciates the attorney-client privilege in Illinois. Ill. S. Ct. R. 201(b)(2) (eff. Jan. 1, 2013). The attorney-client privilege exists to promote and encourage frank and open consultation between clients and their legal advisors by removing the fear that they will be compelled to disclose in discovery the attorney-client privilege. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d

541, 551 (2004). The attorney-client privilege extends to communications between an insurer and insured where the insurer has a duty to defend. *People v. Ryan*, 30 Ill. 2d 456, 460-61 (1964).

¶ 22 The attorney-client privilege extends to this relationship because, in the typical situation, the insured is not represented at the time of communicating with the insurer. In addition, the insurer is also typically delegated the task of selecting an attorney and conducting the defense. Therefore, the insured should be able to assume that the communication is made for the purpose of transmitting it to an attorney to protect the insured. *Id.* The insurer-insured privilege covers statements that are made prior to the filing of a suit or retention of counsel if the communication is made with the possibility of being made a defendant in a future suit. *Lower v. Rucker*, 217 Ill. App. 3d 1, 4 (1991). This court has extended the privilege to independent contractors hired by the insurer to investigate a possible claim. *Rapps v. Keldermans*, 257 Ill. App. 3d 205, 211 (1993).

¶ 23 Like the attorney-client privilege, the insurer-insured privilege is personal to the client and does not cease upon termination of the relationship. *Ryan* at 461; *In re Marriage of Decker*, 153 Ill. 2d 298, 313 (1992). While the attorney asserts the privilege on behalf of the client, it may only be waived by the client. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107 ¶35. Waiver by the client may be express or implied. *Lama v. Preskill*, 353 Ill. App. 3d 300, 305 (2004). Express waiver occurs where the client voluntarily testifies to the privileged communications or expressly waives or fails to raise the privilege. *Center Partners* at 2012 IL 113107 ¶ 51; *Lama*, 353 Ill. App. 3d at 305. Implied waiver, or at issue waiver, occurs when the client asserts

a claim or defense that squarely puts the communication at issue in the litigation, as in a malpractice or fee dispute claim. *Id*.

¶ 24 In order to extend the insurer-insured privilege, the party desiring the exercise of the privilege must prove: "(1) the identity of the insured; (2) the identity of the insurance carrier; (3) the duty to defend the lawsuit: and (4) that a communication was made between the insured and an agent of the insurer." *Pietro*, 348 Ill. App. 3d at 552. We agree with defendants that evidence of each of these four elements was established for application of this privilege to Wenciker. Further, we agree that the rule from *Ryan* controls this case and requires reversal of the trial court's order.

¶ 25 There is no dispute that Wenciker was an employee of Midwest at the time of the accident and was driving the van as an employee, agent or servant of Midwest. Defendants presented a copy of Midwest's insurance policy with Grinnell that included the obligation to defend defendants in the event of an automobile accident. Newswander testified to his duties as a claims adjuster for Grinnell and his handling of plaintiff's claim against defendants and that he interviewed Wenciker. Finally, Wenciker completed an affidavit testifying that she gave her statement to Newswander with the understanding that he worked for her employer's insurer and that her statements could be utilized by her attorneys in the event of a lawsuit. These facts establish each element and support invoking the insurer-insured privilege.

¶ 26 There is no evidence that Wenciker expressly or impliedly waived the privilege. The trial court's own statements and order indicate the decision to overcome the privilege was based on the "totality of the circumstances," particularly counsel's actions and statements. Wenciker averred that she made the communications to Newswander in

anticipation of possible liability and believed that she could be candid without concern of opening herself to liability. This is the basic purpose of the attorney-client privilege and the extension to the insurer-insured relationship. Wenciker did not volunteer the information contained in her communication to anyone, she did not put the communication or relationship with the insurer at issue, and she did not waive the privilege. Accordingly, the trial court erred in finding the privilege waived.

¶ 27 Plaintiff argues that defendants' answer and various arguments before the trial court are legally inconsistent with the privilege claim. Plaintiff contends that defendants' judicial admissions require affirming the trial court because they disavowed Newswander's agency, an element necessary to establish the privilege. However, the elements for applying the privilege require the communication be made between an insured and an agent of the insurer. Whether or not Newswander's agency to defendants was disavowed is immaterial. Counsel has consistently asserted that Newswander was Grinnell's agent.

¶ 28 Similarly, plaintiff argues that defendants are judicially estopped from invoking the insurer-insured privilege based on the arguments and admissions made before the trial court. Judicial estoppel applies to a judicial proceeding where a party takes a position, benefits from that position, and then seeks to take a contrary position in a subsequent proceeding. *Smeilis v. Lipkis*, 2012 IL App (1st) 103385 ¶19. Ostensibly, the doctrine of judicial estoppel supports the public policy of truth-seeking in the courts and protecting the integrity of the courts by preventing gamesmanship and abuse of the system by litigants. *Moy v. Ng*, 371 Ill. App. 3d at 962 (2007). To apply judicial estoppel, five elements must be established, that the party to be estopped (1) took two

positions, (2) that are factually inconsistent, (3) in separate judicial proceedings, (4) with the intent that the facts be accepted as true by the trier of fact, and (5) succeeded and benefitted in the first proceeding. *Smeilis*, 2012 IL App (1st) 103385 at ¶20.

¶ 29 Plaintiff argues that *Smeilis* held that application of judicial estoppel is flexible and not reducible to a pat formula so certain requirements may be discarded to serve the underlying public policy. *Id.* at ¶46. Plaintiff argues judicial estoppel is necessary and appropriate in this case because defendants have advanced contradictory arguments concerning the viability of the insurance contract and Newswander's status. Plaintiff contends that defendants' disavowal of Newswander's acceptance of liability was advanced in order to secure the protective order over plaintiff's motorcycle.

¶ 30 Plaintiff asserts that this matter is on point with *Smeilis*. In *Smeilis*, the plaintiffs filed a medical negligence claim against the defendant hospital, nursing home and medical doctor. Following discovery, on the eve of trial, plaintiffs reached a settlement with the hospital and nursing home, and plaintiffs voluntarily dismissed the complaint against all defendants. *Id.* at ¶12. Only 20 days later, the plaintiffs filed a new complaint against the doctor and gave notice of a new expert witness, who provided an opinion contradicting plaintiffs' expert witness from the first action whose opinion did not implicate the doctor. *Id.* at ¶13-14. The defendant doctor asserted the affirmative defense of judicial estoppel, which the trial court converted to a motion to dismiss and dismissed the complaint following a hearing. *Id.* at ¶15.

¶ 31 This court affirmed, finding that the practical effect of the new testimony was to inculpate the sole remaining defendant and was the sort of behavior the doctrine is designed to prevent. *Id.* at ¶33. The fact that the parties settled prior to trial and did not

present evidence concerning the settlement to the court did not persuade the court to find that no binding assertions had been made. The court opined that the key concern is contradictory positions, not the truthfulness of the statement. *Id.* at ¶¶39-49. The court also rejected the argument that there must be a showing that the settlements came about from the contradicting opinion, concluding that "[w]e need say nothing more than the plaintiffs as a matter of common sense and law benefitted from their claims" in the earlier litigation. *Id.* at ¶55.

¶ 32 Plaintiff asserts that the *Smeilis* court's relaxation of the requirements for the application of judicial estoppel supports the trial court's finding that Wenciker's statement be disclosed. Plaintiff argues that defendants disavowed the insurance contract with Grinnell in order to avoid Newswander's admission of liability to secure a protective order over the motorcycle and to assert an affirmative defense of negligent spoliation. Plaintiff notes that defendants then attempted to hide behind that same insurance contract and Newswander's agency in invoking the insurer-insured privilege. Plaintiff concludes that the integrity of the judicial process requires application of the doctrine in response to defendants' selective and contradictory application of the facts.

¶ 33 We agree with defendants that, even under an expansive view such as that espoused in *Smeilis*, the facts of this case do not support the application of judicial estoppel. Unlike *Smeilis*, there is not a second proceeding in which the contradictory position was taken and benefit received. Even if we accepted that the separate proceeding requirement did not apply in this case, it cannot be said that defendants secured the benefit of the preservation of the motorcycle as a result of this statement, nor can it be said that the statements are absolutely contradictory.

¶ 34 In this case, defendants filed their emergency motion to preserve evidence and argued before the trial court that Newswander was not their agent, but Grinnell's, at the time he allegedly accepted liability. Defendants' counsel asserted that he did not know what Newswander's letter meant and, in any event, that Newswander did not have any authority to accept liability. Defendants indicated that after the insurance company released their vehicle, it remained preserved and was available for inspection. Later, defendants answered plaintiff's amended complaint, denying the allegations that Newswander accepted liability as defendants' agent as legal conclusions.

¶ 35 Defendants claim that these positions are not contradictory, asserting that it is "clear" from Newswander's email that he was only accepting liability with respect to damage to the vehicle. We disagree with that argument based upon the correspondence of record. It is not reasonable to conclude that it was "clear" that Newswander was only accepting liability as to the damage to the vehicle.

¶ 36 However, defendants' counsel has consistently stated that Newswander was acting as an agent of Grinnell and that he was not authorized to accept liability as plaintiff contends. More importantly, the trial court granted the motion to preserve the motorcycle without discussion of Newswander's alleged agency. Therefore, from the record before this court, plaintiff has not overcome the proof that Wenciker properly evoked the insurer-insured privilege in this case. Based on the failure to meet the elements of judicial estoppel, waiving Wenciker's privilege is unwarranted and the trial court's order must be reversed.

¶ 37 Where a party's refusal to comply with an order of the trial court constitutes a good faith effort to secure appellate review of the propriety of the underlying order, it is

appropriate for this court to vacate that order. *Cangelosi*, 366 Ill. App. 3d at 230. Plaintiff does not provide an argument in response to this issue. The record indicates that counsel requested a finding of contempt and fine so that the discovery issue could be resolved on appeal and the trial court order indicated a finding of "friendly contempt." Accordingly, we find defendants' refusal was in good faith and vacate the contempt order against defendants' firm.

¶ 38 III. CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the trial court is reversed, the order of contempt is vacated, and the matter is remanded for further proceedings.

¶ 40 Reversed in part, vacated in part, and remanded.