REL: November 27, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1171118

Ex parte Dow Corning Alabama, Inc., et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Alabama Electric Company, Inc., of Dothan and National Trust Insurance Company, Inc.

v.

Dow Corning Alabama, Inc., et al.)

(Houston Circuit Court, CV-14-900316)

SELLERS, Justice.[1]

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[1]This case was originally assigned to another Justice on this Court. It was reassigned to Justice Sellers on October

Dow Corning Corporation, Dow Corning Alabama, Inc. ("Dow Corning Alabama"), Rajesh Mahadasyam, Fred McNett, Zurich American Insurance Company ("Zurich"), and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), petition this Court for a writ of mandamus directing the Houston Circuit Court ("the trial court") to vacate an order, entered in a declaratory-judgment action, requiring disclosure of what the petitioners contend is information protected by the attorney-client privilege and the work-product doctrine and to grant their motion for a protective order. We grant the petition and issue the writ.

In August 2011, Scotty Blue II was injured while working at a facility owned by Dow Corning Alabama. Blue's employer at the time of the accident was Alabama Electric Company, Inc., of Dothan ("Alabama Electric"), which was, pursuant to a contract with Dow Corning Alabama, installing a vacuum system at Dow Corning Alabama's facility.

Blue filed a personal-injury action against Dow Corning Alabama; Mahadasyam, an employee of Dow Corning Alabama; Dow Corning Corporation, the parent company of Dow Corning

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16, 2019.

Alabama; and McNett, an employee of Dow Corning Corporation (hereinafter collectively referred to as "the Dow defendants"). Blue sought compensatory and punitive damages from the Dow defendants; Blue also sought worker's compensation benefits from his employer, Alabama Electric.

The contract between Alabama Electric and Dow Corning Alabama contains the following indemnity provision:

> "[Section 15.01] INDEMNITY—[Alabama Electric] assumes all risk and liability for provision of the Work and agrees to defend, indemnify and hold harmless [Dow Corning Alabama], its subsidiaries and affiliated companies and their officers, directors, agents, employees and assigns (each 'Indemnified Party'), from and against all claims, including claims of bodily injury or death, all damages, losses and expenses, including attorneys' fees and expenses, arising out of or resulting from the negligent acts or omissions of [Alabama Electric], [its] employees, representatives subcontractors and independent contractors under [Alabama Electric's] supervision and control while on [Dow Corning Alabama's] premises or traveling to or from [Dow Corning Alabama's] premises for the purpose of performing Work, regardless of whether caused in part by [Dow Corning Alabama]."

The contract also required Alabama Electric to maintain liability insurance naming Dow Corning Alabama as an additional insured. At the time of the accident, Alabama Electric's insurance policy with National Trust Insurance

Company, Inc. ("National Trust"), in fact named Dow Corning Alabama as an additional insured.

The Dow defendants demanded that Alabama Electric and National Trust provide them with a defense and indemnity in Blue's personal-injury action. That request, however, was denied. Accordingly, the Dow defendants' own insurers, Zurich and National Union (hereinafter collectively referred to as "the Dow insurers"), provided a defense. In April 2014, after more than a year of litigation, the Dow defendants settled with Blue, and the personal-injury action was dismissed.

In May 2014, Alabama Electric and National Trust filed an action in the trial court against the Dow Defendants and Blue, seeking a judgment declaring that they are not responsible for the defense costs incurred by the Dow defendants in Blue's personal-injury action or for the settlement proceeds paid to Blue, i.e., that Alabama Electric was not required to indemnify the Dow defendants. The Dow insurers were later added as defendants in the declaratory-judgment action and the claims were asserted against them. The Dow insurers filed a counterclaim seeking contribution for the defense costs they

incurred and settlement funds they paid to Blue in the personal-injury action.[2]

In the declaratory-judgment action, Alabama Electric and National Trust propounded deposition notices pursuant to Rule 30(b)(6), Ala. R. Civ. P., seeking to depose representatives of Dow Corning Corporation and Dow Corning Alabama. The deposition notices stated that Alabama Electric and National Trust would seek testimony regarding Dow Corning Corporation's and Dow Corning Alabama's "decision to settle Mr. Blue's claims, including but not limited to [their] analysis of [their] liability for the claims asserted against [them] in the [personal-injury action] and [their] analysis of the settlement value of Mr. Blue's claims." Alabama Electric and National Trust also submitted Rule 30(b)(6) deposition notices to the Dow insurers, seeking similar testimony and, in addition, testimony regarding:

> "Reports, evaluations, and recommendations from defense counsel for the Dow defendants in the underlying action that relate to:
>
> "a. Facts

[2]The materials before the Court suggest that Blue's recovery of the settlement funds is not contingent on a ruling that Alabama Electric or National Trust are liable for the settlement.

"b. Liability

"c. Injury

"d. Damages

"e. Analysis and recommendation on settlement/alternative dispute resolution

"f. Potential outcomes for settlement and trial

"g. Litigation plan and timeframe for completion

"h. Budget

"i. Liability and/or negligence of third parties."

The Dow defendants and the Dow insurers objected, asserting that the subpoenas called for the production of information protected by the attorney-client privilege and the work-product doctrine. The parties were unable to resolve their discovery dispute, and the Dow defendants and the Dow insurers filed a motion for a protective order.

There appears to be no dispute for purposes of the underlying proceeding that Alabama Electric and National Trust seek information that normally would be protected under either the attorney-client privilege or the work-product doctrine. Alabama Electric and National Trust, however, have argued

that, by seeking indemnity in Blue's personal-injury action, the Dow defendants and the Dow insurers waived the protection afforded by those privileges. The trial court agreed and denied the motion for a protective order. Thereafter, the Dow defendants and the Dow insurers (hereinafter collectively referred to as "the Dow parties") filed the instant mandamus petition.

> "Mandamus is an extraordinary remedy and will be granted only when there is '(1) a clear legal right in the petitioner to the order sought, (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so, (3) the lack of another adequate remedy, and (4) properly invoked jurisdiction of the court.' Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991)."

Ex parte Dillard Dep't Stores, Inc., 879 So. 2d 1134, 1136 (Ala. 2003). This Court will review a discovery order by way of a petition for a writ of mandamus when a privilege has been disregarded. Id. We review rulings on discovery matters to determine whether the trial court exceeded its discretion. Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 547 (Ala. 2007).

The parties agree that, in order for the Dow parties to prevail on an indemnity claim, they will have to demonstrate the existence of a valid indemnity obligation with respect to

Blue's personal-injury action, that the Dow defendants were potentially liable to Blue in that action, and that the settlement reached with Blue was a "good faith reasonable settlement." See Star Elec. Contractors, Inc. v. Stone Bldg. Co., 863 So. 2d 1071, 1077 (Ala. 2003) ("[W]hen an indemnitor has refused to defend the claim and participate in the settlement of that claim, 'the indemnitor ... is bound by any good faith reasonable settlement, and the indemnitee ... need only show potential liability.'" (quoting Stone Bldg. Co. v. Star Elec. Contractors, Inc., 796 So. 2d 1076, 1090 (Ala. 2000))). In a footnote in Star Electrical Contractors, the Court stated that the indemnitee in that case would be required to demonstrate its potential liability to the plaintiffs in the underlying action, the reasonableness of the settlement it had entered into with those plaintiffs, and the indemnitee's "good faith in entering into the settlement." 863 So. 2d at 1077 n.3. It does not appear that this Court has further elaborated on the "good faith" and "reasonable" standard.[3]

[3]The parties in this proceeding rely on the standard for establishing a right to indemnity acknowledged in Star Electrical Contractors, which involved a contractual indemnity claim brought by a contractor against its subcontractor after

Alabama Electric and National Trust assert that reports, evaluations, and recommendations regarding liability exposure, potential verdict range, and settlement value in Blue's personal-injury action, which would typically be protected by the attorney-client privilege or the work-product doctrine, are relevant to establishing whether the settlement with Blue was reasonable and was made in good faith. According to Alabama Electric and National Trust, the Dow parties have, by seeking indemnity and putting the reasonableness and good faith of the settlement in issue, waived the attorney-client privilege and the protection afforded by the work-product doctrine.[4]

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the contractor was sued by an injured employee of another subcontractor. The parties do not differentiate between the Dow parties' claims against Alabama Electric, which entered into an indemnity agreement with Dow Corning Alabama, and the Dow parties' claims against National Trust, which issued an insurance policy to Alabama Electric naming Dow Corning Alabama as an additional insured.

[4]A trial court has the power to order disclosure of some work product "upon a showing that the party seeking discovery has a substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(4), Ala. R. Civ. P. Alabama Electric and National Trust, however, have concentrated on the alleged waiver of the attorney-client privilege and the protection afforded by the work-product doctrine. They have not articulated a separate argument that work product may be

In Ex parte State Farm Fire & Casualty Co., 794 So. 2d 368 (Ala. 2001), this Court considered whether there had been a waiver of the attorney-client privilege by "issue injection." Two insureds of State Farm Fire and Casualty Company had been sued by family members in connection with a dispute over whether the body of the insureds' deceased brother should be cremated or buried. The insureds sought a defense and indemnity from State Farm under their homeowner's insurance policies. State Farm initially provided a defense under a reservation of rights but, after investigation, denied coverage. The insureds then retained attorneys at their own cost.

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discoverable under the "substantial need" aspect of Rule 26(b)(4). This Court also notes that, in discussing the work-product doctrine, Alabama Electric and National Trust point out that "[n]one of the documents sought by [Alabama Electric and National Trust] were prepared in anticipation of this indemnity litigation." (Emphasis in original.) That statement appears to suggest that, independent of a waiver argument, materials prepared in anticipation of litigation arising out of the accident that injured Blue are not protected by the work-product doctrine in the underlying case. Alabama Electric and National Trust, however, do not point to any authority indicating that materials that are prepared in anticipation of litigation with respect to one matter are not protected if sought in a different matter. This Court's research has not revealed any Alabama cases so holding, and we decline to make that holding in the present case.

Ultimately, the insureds were dismissed from the action before trial. They then sued State Farm, seeking to recover the legal fees and costs they had incurred in the prior action. State Farm served a subpoena on the insureds' attorneys in the prior action, seeking production of:

> "'Those portions of any record(s) and files regarding [the insureds], including but not limited to: correspondence, calendars, pleadings, drafts, billing files, time sheets, statement of accounts [sic], lists of expenses, retainers or payments on account, collection letters, notices of past due accounts, letters of referral, referral agreements, legal services agreements, contracts, and retainer agreements.'"

794 So. 2d at 370. In response to an objection to the discovery based on the attorney-client privilege, State Farm argued that the insureds had waived the privilege "by making facts and circumstances of their earlier legal representation the central issue in their current action against State Farm [and] by claiming damages to compensate them for the fees and expenses they say they incurred in that earlier representation." 794 So. 2d at 370-71. In other words, State Farm claimed that the insureds had "injected into the case the issue of their legal expenses and the basis therefor, and, by

doing so, [had] waived any attorney-client privilege they may have had." 794 So. 2d at 371.

This Court held:

> "The question whether a party has implicitly waived the attorney-client privilege 'turns on whether the actual content of the attorney-client communication has been placed in issue [in such a way] that the information is actually required for the truthful resolution of the issues raised in the controversy.'"

794 So. 2d at 376 (quoting Mortgage Guar. & Title Co. v. Cunha, 745 A.2d 156, 160 (R.I. 2000)). According to State Farm, the records it had requested were "'the only means of substantiating and testing the reasonableness and the accuracy of the fees claimed.'" 794 So. 2d at 371. This Court acknowledged that State Farm had a legitimate interest in challenging the attorney fees incurred by its insureds in the prior action. The Court, however, concluded that "the substantive content of the attorneys' files related to the earlier action is not essential to proof of [the insureds'] damages claim in [the action against State Farm]." 794 So. 2d at 376. Rather, there were other nonprivileged means available for evaluating the reasonableness of the attorney fees the insureds had incurred:

> "The reasonableness of the attorney fees can be determined independently by use of expert testimony, without disclosure of the documents relating to the actual advice given by the attorneys to [the insureds]. [Mortgage Guar. & Title Co. v. Cunha, 745 A.2d 156, 160 (R.I. 2000)]. Competent attorneys can examine the pleadings, discovery materials, and nonprivileged communications and review the invoices and from that examination form an opinion as to the number of hours that should have been expended on the case and the number of attorneys who would have had to work on it, and then render an opinion as to the reasonableness of the fees charged."

794 So. 2d at 376. Thus, the insureds had not, by seeking to recover attorney fees, made attorney-client-privileged materials an issue in such a way as to make discovery of those materials necessary for the resolution of the action. The Court concluded that State Farm was entitled to discovery of all documents relating to the reasonableness of the fees but that the insureds were entitled to redact those documents in order to protect privileged information. As Alabama Electric and National Trust point out, State Farm involved the reasonableness of attorney fees, while the present case involves the reasonableness and good faith of the settlement reached with Blue.

Both sides in this dispute rely on cases from other jurisdictions. We find persuasive those opinions in which

courts have concluded that the reasonableness and good faith of a settlement in the context of an indemnity claim are to be judged using an objective standard. See, e.g., In re RFC & ResCap Liquidating Tr. Action, 399 F. Supp. 3d 804, 813 n.6 (D. Minn. 2019) (noting that reasonableness and good faith with respect to an indemnitee's settlement are treated as part of the same objective inquiry); Kansas City Power & Light Co. v. United States, 139 Fed. Cl. 546, 570 (2018) (stating that an objective standard, as opposed to a subjective standard, of testing the reasonableness of an indemnitee's settlement "is the better approach"); In re Exxon Mobil Corp., 389 S.W.3d 577, 581 (Tex. App. 2012) (holding that the reasonableness and good faith of a settlement entered into by an indemnitee should be measured using an objective standard and not the subjective beliefs of the indemnitee and its attorneys); Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr., 43 A.D.3d 56, 67 n.9, 837 N.Y.S.2d 15, 26 n.9 (2007) (stating that "it is difficult to see how [an indemnitee] could prove its good faith [in settling] other than by establishing the objective reasonableness of the settlement"); Burlington N., Inc. v. Hughes Bros., 671 F.2d 279, 282 (8th Cir. 1982)

(suggesting that reasonableness of a settlement relates to the size of the settlement amount compared to the nature of the injury and damages and that good faith relates to the indemnitee's potential liability in the underlying case). Cf. Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., 851 So. 2d 466, 479 (Ala. 2002) (concluding, in a garnishment proceeding against a liability insurer, that the record supported a determination that a $2,500,000 settlement between the garnishor and the liability insurer's insured in an underlying action "was not collusive or made in bad faith," because the garnishor was prepared to present evidence establishing that the insured had caused the garnishor to suffer damages in excess of $3,000,000).[5]

We are also persuaded by opinions holding that a party, by seeking indemnity and thereby placing the reasonableness and good faith of a settlement in issue, does not waive the attorney-client privilege or the protection afforded by the work-product doctrine. See Kansas City Power & Light Co., 139

[5]We have not been asked in this case to provide a conclusive definition of "reasonableness" or "good faith" in the context of an indemnity claim. We simply conclude that the inquiry whether a settlement is reasonable and in good faith is objective in nature.

Fed. Cl. at 570 (indemnitee did not waive the attorney-client privilege or protection of the work-product doctrine by seeking indemnity); Steel v. Philadelphia Indem. Ins. Co., 195 Wash. App. 811, 841, 381 P.3d 111, 127–28 (2016) ("Because plaintiffs' counsel's work product opinion and mental impressions have not been shown to be central to plaintiffs' claim that the settlement is reasonable or to [insurer's] defense that the settlement was unreasonable ..., plaintiffs' work product should remain protected."); In re Exxon Mobil Corp., 389 S.W.3d at 581 (concluding that materials protected by the attorney-client privilege were not necessary to establish or challenge the reasonableness and good faith of a settlement entered into by an indemnitee); Deutsche Bank Tr. Co. of Americas, 43 A.D.3d at 65, 87 N.Y.S.2d at 24 (concluding that nonprivileged materials could be used to evaluate the reasonableness and good faith of an indemnitee's settlement and that the indemnitee had not, by seeking indemnification, waived the attorney-client privilege or the protection of the work-product doctrine); Chomat v. Northern Ins. Co. of New York, 919 So. 2d 535, 538 (Fla. Dist. Ct. App. 2006) ("The determination of whether a settlement is

reasonable is made by a 'reasonable person' standard. ... [P]roof of reasonableness is ordinarily established through use of expert witnesses to testify about such matters as the extent of the defendant's liability, the reasonableness of the damages amount in comparison with compensatory awards in other cases, and the expense which would have been required for the settling defendants to defend the lawsuit." "Without attempting a comprehensive definition, we think a bad faith claim includes a false claim, or collusion in which the plaintiffs agree to share the recovery with the insured. These matters involve the underlying facts of the case and do not involve the injection of privileged matters." (footnote omitted)).[6]

As was the case with the defense costs in State Farm, proving or disproving the objective reasonableness and good

[6]Some of the opinions cited above apply the test set out in Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), for determining whether a party has waived the attorney-client privilege by placing privileged materials "at issue." In State Farm, this Court purported to reject the Hearn test in favor of a stricter test to determine whether there has been such a waiver. Nevertheless, we find persuasive the discussions in the cited cases of the objective nature of the reasonableness and good-faith requirements in indemnity cases and the conclusions that access to privileged materials is not required to demonstrate or challenge reasonableness and good faith.

faith of the settlement in Blue's personal-injury case does not require the production of attorney-client-privileged materials or materials protected by the work-product doctrine. The filings, discovery, documentary evidence, witness testimony, nonprivileged correspondence, and other nonprivileged materials generated in connection with Blue's personal-injury action can be used to evaluate the Dow defendants' potential liability to Blue and to prove or disprove whether the settlement was reasonable and entered into in good faith.[7]

In sum, although the Dow parties seek contribution from Alabama Electric and National Trust, thereby raising the issue whether the settlement with Blue was a good-faith, reasonable settlement, resolution of that issue will not require information protected by the attorney-client privilege or the work-product doctrine. The issue can be resolved by consideration of the nonprivileged materials generated in

[7]In their reply brief to this Court, the Dow parties appear to suggest that, unlike the attorney-client privilege, the privilege afforded by the work-product doctrine can never be waived by "issue injection." We need not decide that issue, however, because we have concluded that the Dow parties have not, by seeking indemnity, raised issues that require the disclosure of work product.

connection with Blue's personal-injury action. Thus, the Dow parties have not waived those protections by seeking indemnity.[8] Accordingly, we grant the Dow parties' petition and direct the trial court to vacate its discovery order requiring disclosure of the requested information and to enter an appropriate protective order.[9]

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin and Stewart, JJ., concur.

Shaw and Bryan, JJ., concur in the result.

Wise, Mendheim, and Mitchell, JJ., recuse themselves.

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[8]The materials before the Court suggest that the parties intend to use expert testimony to establish, or attack, the reasonableness and good faith of the settlement. We have not been asked in this case to determine whether expert testimony would be necessary.

[9]Of course, the Dow parties, in attempting to demonstrate that they are entitled to indemnity, cannot use privileged materials and, at the same time, assert privilege as a shield to resist production of other materials dealing with the same subject matter. See Ex parte Meadowbrook Ins. Grp., Inc., 987 So. 2d 540, 551 (Ala. 2007) (defendants' reliance on an advice-of-counsel defense resulted in waiver of attorney-client privilege, because defendants could not use the privilege "'as both a sword and a shield.'" (quoting Ex parte Malone Freight Lines, Inc., 492 So. 2d 1301, 1303 (Ala. 1986))); Ex parte Mobile Gas Serv. Corp., 123 So. 3d 499, 512 (Ala. 2013) ("'Waiver [of work-product doctrine] occurs when a party discloses material "'in a way inconsistent with keeping it from the adversary,'" Evergreen [Trading, LLC v. United States], 80 Fed. Cl. [122,] 133 [(2007)] (quoting United States v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997)), such as using material as a basis for an affirmative defense, id. at 130.'" (quoting Salem Fin., Inc. v. United States, 102 Fed. Cl. 793, 796 (2012))).