

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLSTATE FIRE AND CASUALTY  
INSURANCE COMPANY,

Petitioner,

vs.

THE HONORABLE KATHLEEN M.  
DRAKULICH, DISTRICT JUDGE; AND  
THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE,

Respondents,

and

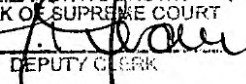
STACI MITCHELL,

Real Party in Interest.

No. 83931

FILED

MAR 28 2023

ELIZABETH A. AROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

*ORDER GRANTING PETITION IN PART*

This is an original petition for a writ of prohibition or, in the alternative, mandamus challenging a district court order compelling disclosure of assertedly privileged documents and imposing discovery sanctions.

The underlying suit arises out of an underinsured motorist (UIM) claim by real party in interest Staci Mitchell against petitioner Allstate Fire and Casualty Insurance Company (Allstate). In her second amended complaint, Mitchell seeks contract, tort, and punitive damages from Allstate for its alleged breach of contract, bad faith, and violation of Nevada's Fair Claims Practice Act, *see* NRS 686A.310. During discovery, Mitchell served Allstate with requests for production of documents under NRCP 34, asking Allstate, among other things, to "[p]roduce the claim file for the claim of Staci Mitchell." After motion practice and several rounds of court-ordered disclosures by Allstate, the Allstate adjustor assigned to

Mitchell's UIM claim, Lynn Williamson, testified in deposition that Allstate maintained two separate files that contained information potentially relevant to this litigation. One file consisted of documents directly related to Mitchell's contract-based claim to UIM policy benefits (the UIM file); the other related to Allstate's potential extracontractual-liability exposure to tort and punitive damages for its handling of Mitchell's UIM claim (the ECL file). Williamson testified that, while she maintained the UIM file, she had never seen and did not have access to the ECL file, which she believed was maintained by Allstate's extracontractual liability consultant, Tom Thompson, whom she did not deal with or report to.

Allstate had not previously identified or produced the ECL file in discovery. Additionally, while Allstate had produced the pre-suit documents in its UIM file, Allstate failed to timely comply with an order directing it to either produce or provide an adequate privilege log for the post-January 4, 2021, documents that it withheld from the UIM file. Contending that the "claim file" comprised *both* the UIM file *and* the ECL file, Mitchell filed a motion to compel and for sanctions. The district court agreed with Mitchell that the request to produce the claim file encompassed both the ECL and the UIM files and that Allstate had violated its prior discovery orders in not producing and adequately scheduling the documents withheld from those files. Based on Allstate's failure to have identified the ECL file earlier in the litigation, the district court sanctioned Allstate by striking its answer and defenses as to liability. The district court further held that Allstate had waived any claim of privilege as to the ECL file and the post-January 4, 2021, documents withheld from the UIM file and ordered Allstate to produce the same with no redactions. This petition for writ relief followed. We deny the petition in part and grant it in part.

## DISCUSSION

“A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may issue to restrain the district court from acting in excess of its jurisdiction. NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). The petitioner bears the burden to show that extraordinary relief is warranted; such relief is proper only when there is no plain, speedy, and adequate remedy at law. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 228, 88 P.3d 840, 841, 844 (2004). A writ is an extraordinary remedy, *see Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 476 P.3d 1194, 1195 (2020), and whether a petition for extraordinary relief will be considered is solely within this court’s discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851.

Discovery orders seldom qualify for extraordinary writ relief, *see Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011), since most can be adequately reviewed on direct appeal from the eventual final judgment. *Pan*, 120 Nev. at 225, 88 P.3d at 841. However, we have made exceptions to this general rule where the petition challenges an order compelling disclosure of privileged information, *see Valley Health*, 127 Nev. at 171-72, 252 P.3d at 679 (noting that “if the discovery order requires the disclosure of privileged material, there would be no adequate remedy at law that could restore the privileged nature of the information, because once such information is disclosed, it is irretrievable”), or “where, in the absence of writ relief, the resulting prejudice would not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice

or other similar sanctions,” *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 351, 891 P.2d 1180, 1184 (1995).

The order Allstate challenges compels disclosure of assertedly privileged documents from both the UIM file and the ECL file and sanctions Allstate by striking its answer as to liability for not having previously produced or scheduled as withheld the documents comprising the ECL file. An order striking an answer as to liability is not of the same magnitude as an order imposing case-concluding sanctions. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). Nonetheless, the magnitude of the prejudice Allstate faces with the threatened disclosure of the allegedly privileged materials and the striking of its answer as to liability persuades us that writ review is appropriate in this case. *See Cotter v. Eighth Judicial Dist. Court*, 134 Nev. 247, 249, 416 P.3d 228, 231 (2018) (looking at the “magnitude” of prejudice to a party in deciding whether to consider a petition for writ) (internal quotation marks omitted).

*Allstate waived its privileges as to the post-January 4, 2021, documents in its UIM file*

Mitchell served Allstate with numerous requests for production of documents (RFPs). At issue here is RFP 1 which, reprinted in full text, asked Allstate to:

Produce the claim file for the claim of Staci Mitchell. The claim file, regardless of how it may actually be named contains all communications, claim valuation, reserve/s, and analysis regarding the underinsured and medical payment claim of Staci Mitchell.

Allstate interpreted RFP 1 as requesting production of the UIM file.

In response to RFP 1, Allstate directed Mitchell to its NRCP 16.1 disclosures, which included the pre-suit documents from its UIM file, and objected on relevance and privilege grounds “to the extent the request



seeks information that post-dates the filing of the Complaint.” Motion practice followed, in which the district court rejected Allstate’s categorical objection to the production of post-suit claim file documents. In doing so, the district court distinguished this case from *Abueg v. State Farm Mutual Automobile Insurance Co.*, No. 2:14–CV–00635–GMN–GWF, 2014 WL 5503114 (D. Nev. 2014), where the federal district court denied post-suit UIM claim-file discovery. In *Abueg*, “[t]he bad faith claim [was] based [exclusively] on State Farm’s pre-lawsuit conduct in allegedly delaying payment and denying Plaintiff’s [UIM] claim on the basis of an allegedly biased medical records review.” *Id.* at \*3; see *Richardson v. GEICO*, 403 P.3d 115, 122-23, 125 (Wash. App. 2017) (similarly denying post-suit discovery in a suit seeking UIM benefits and damages for bad faith where the insurer denied the claim and committed the alleged bad faith before the insured sued). In this case, by contrast, Mitchell’s bad faith claims included allegations that Mitchell’s medical expenses were ongoing, and that Allstate failed to complete its investigation and adjust her UIM claim, which included those ongoing expenses, after the litigation began. Mitchell’s allegations of ongoing bad faith in the claim adjustment process led the district court to hold that, in this circumstance, “post-litigation information in an insurer’s claim file is not absolutely protected from disclosure and is not necessarily irrelevant.” Accordingly, it ordered Allstate to either produce the post-suit claim-file documents or schedule them as privileged.

Even as to the UIM file—which RFP 1 clearly encompassed—Allstate did not timely comply with the district court’s order compelling it to produce or schedule the documents withheld from that file. This failure led the district court to overrule Allstate’s claims of privilege as to the post-January 4, 2021, documents in its UIM file and order their production. In

its petition, Allstate maintains that its attorney-client privilege and work product protection “cannot be involuntarily waived as a sanction.” But the district court did not sanction Allstate by finding its privileges waived as to one document for its withholding of another. *Cf. Am. Nat’l Bank & Tr. Co. v. Equitable Life Assurance Soc’y*, 406 F.3d 867, 878 (7th Cir. 2005) (recounting district court proceeding in which the court examined 20 documents within a larger subset that the party claimed were privileged, and if the court disagreed about the nature of more than three of those documents, it would strike the party’s entire privilege log). Rather, the district court found that Allstate lost its ability to assert privilege and work product protections as to the documents withheld from the UIM file, because Allstate did not assert those privileges within the appropriate time and in the appropriate way, thereby waiving them.

A party who seeks to withhold a document based on a claim of privilege bears the burden of establishing that privilege. *Superpumper, Inc. v. Leonard*, 137 Nev., Adv. Op. 43, 495 P.3d 101, 107 (2021); see NRCP 26(b)(5) (specifying the requirements to establish a claim of privilege). Failure to timely and properly assert a privilege can result in its waiver, especially when the failure is flagrant or persists in the face of a clear request and adequate direction as to the specificity required in the privilege log. 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2016.1, 317-18 n.1 (3d ed.) (Supp. 2022); see *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (upholding finding of waiver where the privilege log was not provided with the original responses or for five months thereafter); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984) (“It is not enough that a document would have been privileged if an adequate and timely

showing had been made. The applicability of the privilege turns on the adequacy and timeliness of the showing [and] the nature of the document.”).

Allstate understood RFP 1 called for it to produce its UIM file. Yet, it did not timely comply with the order directing it to provide an adequate privilege log for the documents it withheld from the UIM file. The district court did not abuse its discretion when it found that Allstate’s months-long delay in providing the privilege log waived the privileges it claimed. We therefore deny writ relief as to the order compelling production of the post-January 4, 2021, documents in Allstate’s UIM file up to and including the date of the district court’s order.

*The district court’s production and sanction order as to the ECL file was clearly erroneous and, on this record, an abuse of discretion*

The district court based its order compelling production of Allstate’s ECL file—and its decision to strike Allstate’s answer as to liability—on its conclusion that RFP 1 required Allstate to produce and/or schedule its extracontractual liability or ECL file, in addition to its UIM file. The full text of RFP 1 is set out *supra*, at page 4. It requests that Allstate produce the “claim file for the claim of Staci Mitchell,” then defines “claim file” as containing “all communications, claim valuation, reserve/s, and analysis regarding the underinsured and medical payment claim of Staci Mitchell.” Unlike the UIM file, whose production both sides agree RFP 1 required, Allstate and its lawyers deny that the ECL file constitutes a “claim file.”

On a plain text reading, the final clause in RFP 1 that starts with “regarding” indicates that Mitchell sought documents that Allstate maintained related to her claim for UIM and associated medical payment benefits. The litigation of this request makes clear why she wanted this information, and why the court agreed she was entitled to it despite

Allstate's objections. Mitchell believed that by knowing what Allstate had done (and not done) to investigate, analyze, and value her UIM claim, she would be able to prove that Allstate had not only breached its insurance contract but acted in bad faith. For example, Mitchell believed that Allstate knew of, but failed to investigate, her ongoing medical care when it made a low offer to settle her claim for UIM benefits, thus breaching its duty of good faith and fair dealing. So, the file that Allstate maintained, which dealt with Mitchell's claims for UIM and medical payment benefits, would show if Mitchell was right—it would indicate what Allstate knew about Mitchell's medical treatment and what it did, and did not do, to investigate. As a result, documents in Allstate's UIM claim file were potentially relevant to her cause of action for bad faith, that is, extra-contractual liability (ECL). See Jay M. Feinman, *Attorney-Client Privilege and Work-Product Protection in Insurance Bad Faith Litigation*, 53 *Tort Trial & Ins. Prac. L.J.* 777, 779 (2018) (noting that a bad faith action requires “evaluating whether the insurer's determination on the policyholder's claim, and the actions it took in making that determination, were reasonable; the claim file reflects what actions the insurer took (and did not take) [in processing the claim], which are a necessary element of that evaluation.”).

The issue of whether Allstate's ECL file was part of Allstate's “claim file,” and so covered by RFP 1, did not emerge until the Williamson deposition, very late in discovery. The only information the district court had about the ECL file was Williamson's reference to it in her deposition, Tom Thompson's declaration describing it, and the attorneys' representations at oral argument about what a claim file does and does not include. The Thompson declaration states that any documentation he maintains in the ECL file “is not part of the [UIM] ‘claims file’ previously



requested and produced.” In fact, he has “no authority over contractual claims presented pursuant to a policy and specifically [does] not have the authority to make a payment or authorize a payment for policy contractual benefits.” His role is “to do a risk analysis on the handling of the underlying claim and provide oversight and direction for the handling of extra-con[tractual] (‘bad-faith’) suits with local retained counsel and Home Office Claim Litigation.” His “handling of any extra-contractual liability claim or suit is separate and apart from contractual claims handled by claim department personnel such as Lynn Williamson. In that regard Ms. Williamson does not have access to any information I have been provided from counsel or home office in connection with the defense of the lawsuit.”

In RFP 1 Mitchell asked for her *claim file* regarding her UIM claim, not all documents relating to the causes of action or “claims” she asserted in her second amended complaint. NRCP 34 requires that a request for production “describe with reasonable particularity each item or category of items” sought. The meaning of “claim file” in the context of a suit seeking both policy benefits and extra-contractual recovery depends on how a reasonable reader, responding in good faith, would understand it in context. *See Wright & Miller, supra* § 2211 & note 15 (explaining that the requirement of reasonable particularity depends on “pragmatic consideration of the circumstances in each case” and that the rules expect a “good-faith reading of [a] request”).

Reading RFP 1 both reasonably and in good faith, the words “claim file” are a term of art in the insurance industry, which limits Mitchell’s request to a specific kind of file—as opposed to any documents Allstate maintains with communication and analysis about her and the underlying suit. A claim file “is a unique, contemporaneously prepared

history of the company's handling of the claim." *Brown v. Super. Ct.*, 670 P.2d 725, 734 (Ariz. 1983).

When a policyholder reports a loss, the insurer's personnel receive the report, investigate the cause and extent of the loss, assess the amount of damage and the cost to repair, determine whether the cause and amount are covered under the policy, and communicate with the policyholder throughout the process. *The claim file is the complete record of the insurer's investigation and evaluation of a policyholder's claim.*

Jay M. Feinman, *supra* at 779 (emphasis added). A claim file stands in contrast to the separate litigation file maintained by an individual tasked with coordinating the defense of a suit seeking to impose extra-contractual liability with outside counsel. *See Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1130 (Fla. 2005) (discussing a plaintiff's right to production of "claim and related litigation file material"); *State ex rel. Brison v. Kaufman*, 584 S.E.2d 480, 483 (W. Va. 2003) (holding that the district court "exceeded its jurisdiction [by] ordering production and disclosure of the litigation file and the redacted portions of the claim file"); *Costco Wholesale Corp. v. Arrowood Indem. Co.*, No. CV C17-1212RSI, 2018 WL 4385853, at \*2 n.3 (W.D. Wash. Sept. 14, 2018) (stating that the Washington Supreme Court has "advised insurers to set up and maintain separate files for adjustment and non-adjustment activities").

The district court's earlier order, in which it rejected Allstate's categorical claim of privilege for post-suit information, addressed RFP 1 in the context of a series of separate requests for production. It did not hold that RFP 1's request for the "claim file" reached all post-litigation documents, including those in the ECL file. On the contrary, the earlier order explained that, unlike the insured in *Abueg v. State Farm*, 2014 WL

5503114 (D. Nev. 2014), discussed *supra*, at 5, whose insurer denied her UIM claim before she sued, Mitchell could be entitled to post-litigation claim file information because Allstate continued to process her UIM claim even after she sued. Thus, Mitchell's post-suit claim file, unlike Abueg's, may show Allstate failing to value, investigate, or resolve her claim for benefits appropriately, which supports her ECL allegations. But the order did *not* find that Mitchell was entitled to post-litigation information in the claim file because such information could support a possible assertion that Allstate's ECL-defense litigation strategy itself supports her ECL allegations.

"In general, an insurer's litigation tactics and strategy in defending a claim are not relevant to the insurer's decision to deny coverage." *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 915 (Mont. 1993); *see also id.* at 914 (expressing concern that if an insurer's litigation decisions were actionable as bad faith, the insurer's right to defend itself would be impaired); *Richardson*, 403 P.3d at 123 (distinguishing the claim file from the bad-faith litigation file and holding the district court abused its discretion and committed clear legal error in holding otherwise). Yet, from the limited record available, that is what Thompson's ECL file goes to: Allstate's ECL-defense litigation strategy. According to the Thompson declaration (and Williamson's deposition testimony), Thompson coordinates the defense of the ECL causes of action with defense counsel and is not involved with Allstate's decisions to investigate or pay the underlying UIM claim. So, Thompson's file is not a claim file, concerned with adjusting Mitchell's UIM claim; it is a litigation file concerned with defending the extracontractual liability claims. Thus,


from what appears in the record, RFP 1 did not reach Thompson's ECL file, because the ECL file is not a claim file.

Of note, the district court did not review the ECL file in camera. It may be that, on in camera review, the documents comprising the ECL file would appear misdescribed in the Thompson declaration, or responsive to other requests for production besides RFP 1. But based on the record presented, we conclude that, read reasonably and in good faith, RFP 1 did not reach the ECL file. The district court clearly erred when it held to the contrary and when it struck Allstate's answer as to liability based on Allstate's failure to have produced or scheduled the ECL file in response to RFP 1.

We therefore ORDER the petition DENIED IN PART AND GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS directing the district court to vacate its order compelling production of the ECL file and striking Allstate's answer as to liability.<sup>1</sup>

  
\_\_\_\_\_, J.  
Cadish

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, Sr.J.  
Gibbons

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<sup>1</sup>The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.



cc: Hon. Kathleen M. Drakulich, District Judge  
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP/Las Vegas  
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP/Reno  
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