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Supreme Court of Texas.
In re XL Specialty Insurance Company and Cambridge Integrated Services Group Inc., Relators.
No. 10-0960.

November 10, 2011.

Appearances:

David Brenner, Burns Anderson Jury & Brenner, LLP, Austin, TX, for the Relators.

Alan B. Daughtry, Attorney-at-Law, Houston, TX, for the Real Party in Interest: Jerome Wagner.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0960 In re XL Specialty.

MARSHAL: May it please the Court, Mr. Brenner will present argument for the Relators. Relators have reserved five minutes for rebuttal.

ORAL ARGUMENT OF DAVID BRENNER ON BEHALF OF THE RELATOR

ATTORNEY DAVID BRENNER: May it please the Court, in 1989 as part of the restructuring and overhaul of the Workers Compensation Act, the legislature took certain steps to ensure the efficiency and affordability of the system. One of those steps was to require insurers to provide a self-insured deductible system for employers. In addition thereto, unlike the previous act, they empowered the employer with certain specific rights to participate in the administrative process. They created the Employers Bill of Rights that allows the employer to be advised by the commission or the divisional workers comp that they have a right to participate in the process, present evidence and dispute the employees right to benefits when the carrier does not. They also gave the employer the right to discuss with the insurance carrier freely the claim to assist in investigation of the claim and assist in evaluation and participate in proceedings during the division. In this case, the employer, Cintas, did just that. They purchased self-insured deductible policy, which under its terms, Cintas pays the first million dollars of each claim and defense costs associated with the claim. Cintas participated in the discussions of the claim as it proceeded. The question this case presents is does sharing attorney communication between the attorney representing the carrier at the commission and the employer result in a waiver of the attorney-client communication privilege? Now we think that there are three reasons it does not. First, under this Court's prior evaluations

in numerous cases, the representation may constitute in mutual representations. Although the employer is not named a party, they are a Real Party in Interest under the tripartite-type relationship. Second, precedence supports the conclusion that insurers and insurers are each others representatives under 503(b)(1)(A). And finally, the common legal interest doctrine, which I think absorbs everything we just discussed, shows that they share a common legal interest doctrine and when communications are shared among those who have a common legal interest doctrine there's no wait. The communications and questions are without doubt communications from counsel to the adjustor for the insurance carrier and to the employer discussing the defense of the case, the strategies that they'll undertake the defense of the case and the procedure that will go forward. There's no question that there's communication between attorney and client and the employer. So the only question left for the court is does sharing that with the employer result in waiver? I think the analysis should begin with this Court's decision in State Farm Mutual v. Trevor and American Home v. Unauthorized Practice of Law Commission. In those cases, the court examined the tripartite relationship that arises out of an insurance contract between the insured, the insurer and the attorney. And the question the court wasn't addressing, wasn't specifically privileged, but who's represented and who has a right to representation? In that case, the court concluded that the insurance policy grants the insurance carrier a right to defend and resolve the claim. And you'll see in this case that the workers compensation insurance language of the right to defend and right to resolve the claim are almost identical to those contained in any liability policy and the very liability policy addressed in Trevor and American Home v. Unauthorized Practice of Law. This Court concluded that generally the insured's interest and the insurance interest are congruent and the defense attorney's representation of the insured and the insurer are indistinguishable absent coverage issues.

CHIEF JUSTICE WALLACE B. JEFFERSON: If they're indistinguishable, what do you make of labor code provision 415.002A6?

ATTORNEY DAVID BRENNER: Of course.

CHIEF JUSTICE WALLACE B. JEFFERSON: That says, a carrier or its representative commits an administrative violation that that person allows an employer other than the self-insured employer to dictate the methods by which and the terms on which a claim is handled and settled?

ATTORNEY DAVID BRENNER: Well, 415002 has parts A6 has to be read in conjunction with 415.002B. 415002B says, clearly that there is no violation by allowing the employer and the carrier to freely discuss the claim, to participate in investigation, to participate in evaluation and to attend administrative proceedings. It also has to be read in conjunction with 409.011 which is the Bill of Rights. 409.011 talks about the employers' right to challenge the claim when the carrier has disputed the claim and participate in the process and actually present evidence during the hearing only when the carrier chooses not to. In Symplex Electric, the Third Court held that the employers' rights only trigger when the carrier has made a decision not to. I think 415.002 taken in the whole and taken in connection with 401.011 show that in this case when we're dealing with the self-insured employer, there is no violation first. Second, you cannot have a system where the employer freely participates in the discussion of the claim, freely participates in the investigation of the claim, freely participates in the evaluation of the claim and does it with blinders. If they don't understand the legal ramifications of their evaluation, the legal ramifications of what they're doing, the effect on the case as it proceeds forward, that participation is completely undermined.

JUSTICE EVA M. GUZMAN: Should there be any limitations on that privilege though in the context, unique context and posture of the insured [inaudible].

ATTORNEY DAVID BRENNER: There are limitations on that privilege and the limitations on the privilege have been set like it is in all liability insurance cases. Generally, as long as their interests are congruent, as long they're not adverse, the privilege applies and they share in their privilege. As between the two of them while they're together in position, there is no privilege. In other words, they share in the privilege, but they can't use the privilege against each other.

JUSTICE EVA M. GUZMAN: But, there doesn't need to be a requirement of some sort of intent that this was done in furtherance of litigation, the communications and what have you?

ATTORNEY DAVID BRENNER: Well, under the common legal interest doctrine, that was addressed by the Fifth Circuit Court of Appeals and I didn't cite this in the brief, but in 961 F 2nd 65 In re Auclair, the court was addressing the common legal interest doctrine and how you evaluate that and with the Fifth Circuit Court of Appeals says, is when two parties seek consultation with an attorney on a matter that they share a common legal interest, there's a presumption that is a common legal interest and in order to break that common legal interest since the parties are entitled to assume that their communications are privileged, someone has to communicate a contrary intention of the privilege. In other words, I don't intend this to be privilege. I intend to share these; otherwise privilege should apply.

JUSTICE EVA M. GUZMAN: So that attaches at the beginning even though the employer is not supposed to dictate the methods and what have you that.

ATTORNEY DAVID BRENNER: Well, I think this Court addressed that in American home v. Unauthorized Practice of Law Committee and what this Court said, is that there are times that the employer, the insured and the insurer are clearly adverse to each other. There's no question about it. Questions of coverage, questions of whether something will be addressed and if they're adverse and if there's an outward manifestation of adversity, then they don't share the privilege, but absent that the privilege is shared and their interest is presumed congruent. And so that allows the attorney to represent both parties and is a manifestation of representing both parties in a mutual relationship.

JUSTICE NATHAN L. HECHT: Under Rule 503, you don't contend that the employer's a client, is that true?

ATTORNEY DAVID BRENNER: I'm not sure, Your Honor. I believe that under Rule 503 and under this Court's holding in American Home and in Trevor, they are both clients. The question is, for the attorney, who's the primary duty owed to in specific circumstances. Typically, in a liability policy since the insured is being sued and the insurer is indemnifying, this Court has held that the primary loyalty, although they're both clients, is to the insured. In this case, you have the same relationship, but inverse relationships. The carrier is being sued and the insured is indemnifying and in that case, I think there would be a primary loyalty to the insurer; however, the privilege wouldn't change.

JUSTICE NATHAN L. HECHT: And you, but you do think the employer's at least a representative of the client?

ATTORNEY DAVID BRENNER: I think there's no question that a representative under these code.

JUSTICE NATHAN L. HECHT: 2B?

ATTORNEY DAVID BRENNER: 2B, no question. I think actually they're both implicated because of the unusual relationship. They may both be clients under this closed holding, but without any doubt under 2B, they are both representatives of each other and carry out each other's functions. This Court has included that they're both representatives of each other in liability claims based on the right to defend clause, which applies and is equal here. In re Fontenot, the Fort Worth Court of Appeals, not a workers compensation claim, found that the letters from a doctor to his insurer were considered letters to a representative under part B because the insured, the insurer served that the represented insured for purposes of the attorney-client privilege. And I think In re Fontenot supports that. The only difference in this case is the actual party that is the defendant. Now we point out that this policy covers 50 states. Of those 50 states, many of those states the same policy, the same previsions, Alabama, Idaho, Kansas, Kentucky, New York, Virginia and Utah require the claim to be brought specifically under the employer under this same policy and then this policy is interpreted identically to a liability insurance

policy that we would in any other case.

JUSTICE DEBRA H. LEHRMANN: Can I ask you something, when we look at the broader picture here, wouldn't it do great damage to the statute if we were to say that the injured worker can't get any information about the employers' participation?

ATTORNEY DAVID BRENNER: No, I think it's actually the opposite. First of all, the system contemplates that the insured is advised by the carrier through the PLNs and other issues as to the reason there may be a DP. The employer is given specific forms they have to file in certain circumstances. PLN1's, which, the PLNs, which are the basis for the dispute, employers' report of injury, the employers' identification and the report of injury of who the witnesses are. Wage statements and other documents. Those are all provided to the employee and shared with the [inaudible] workers comp. What we're dealing with here is a question of when the claim is in dispute, what information is shared. It would totally undermine the attorney-client relationship and the ability of the employer to participate in the evaluation if that information was shared. I'll point out the other thing is that the ability for the employer to participate in the system isn't only adverse, but at times, it's meant to assist the carrier in evaluation in determining whether they go forward.

JUSTICE DON R. WILLETT: I've got a question about just the language of 503(b)(1)(C). Okay, so the rule is I read it, privileges, communications made by the client or his rep "to a lawyer for a representative of a lawyer" who's representing the third party. Now I assume the client in the rule, referenced in the rule is XL, is that correct?

ATTORNEY DAVID BRENNER: The client in the rule--

JUSTICE DON R. WILLETT: The rule privileges communications made by the client or his rep to a lawyer or a rep of the lawyer.

ATTORNEY DAVID BRENNER: You're looking at part C, Your Honor?

JUSTICE DON R. WILLETT: I'm looking at 503(b)(1)(C).

ATTORNEY DAVID BRENNER: Okay, 503(b)(1)(C) generally is talking about a joint defense agreement privilege. So when there are multiple parties in a lawsuit, the courts have allowed them to enter into a joint defense agreement. Under those interests, you have attorneys and parties and attorneys in parties, codefendants in a lawsuit and typically in those circumstances, you have communications among the attorneys and among the attorneys in parties. However, when you're talking about the common legal interest doctrine, that has been applied in the interpretation of part A and that's between the client and representative of the client and the lawyers and representatives of the lawyers. So in the insurer-insured relationship, the communication from the lawyer to the insured and insurer, they're considered representatives of each other and as long as they have a common legal interest that would apply, if that makes sense. As far as whether it would enter as hindrance in the system, Justice Lehrmann, the employer by fully participating in the claim and understating the carrier's position and in the evaluation, has the ability to go back, conduct investigations, share information and has a continuing relationship with the employee. So by being fully informed, the employer can make decisions that, at times, are beneficial to the employee, not necessarily adverse. And that's intended by the legislature clearly and by not allowing the privilege to stay, that's undermined because an employer can't be fully informed and can't truly participate in the evaluation. So we believe that not holding, upholding the privilege would actually cause great harm to the system and its intent as opposed to sharing the information because there wouldn't be a free flow of information, which is the underpinning of the attorney- client privilege. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Real Party in Interest.

MARSHAL: May it please the Court Mr. Daughtry will present argument to the Real Party in Interest.

ORAL ARGUMENT OF ALAN B. DAUGHTRY ON BEHALF OF THE REAL PARTY IN INTEREST

ATTORNEY ALAN B. DAUGHTRY: May it please the Court and Counsel, I think it's a great mistake to equate the third-party liability duty to the defend and indemnify with the first-party benefits provided under this workers compensation insurance policy. And I think the key statement that was made in this argument for this recognition of privilege and duty was mutual representation. You are dealing with two totally divergent interests here and let's stat with the self-insured retention thing. You have a statute that says, you can do one of two things. You can participate in adjustment by being a wholly self-insured employer with internal statutory safeguards for adjustments of claims and procedural safeguards or you can turn it over to an insurance company to do adjustment and then don't meddle, don't make decisions and don't adjust a claim. You can't do in between. And we're seeing in a business type of decision--

JUSTICE PHIL JOHNSON: I thought he just went through the statute and the statute required that the employer be consulted and be given information when they changed it. But you just can't allow the employer to dictate and there's a difference between information and sharing and dictating, is there not?

ATTORNEY ALAN B. DAUGHTRY: Yes, Your Honor. [inaudible]

JUSTICE PHIL JOHNSON: How would you respond to that?

ATTORNEY ALAN B. DAUGHTRY: Well, first, let's talk about duty and I'll come back to that and secondly, there's a right to participate and gain information suddenly rising to a level of duty and create privilege, keeping in mind that the duties are divergent here and let's take it up from a common interest type of obligation. The insurer has a first-party duty to provide first-party benefits to adjust a claim. A claim may be in dispute, but if the insurer obtains information that the claim is nevertheless covered later on in this process, the insurer has a duty to adjust that claim and turn over benefits whereas the employer does not have any duty whatsoever. Consider this example under a common interest type of argument where the insurer has secret consultations with the employer and there's no duty there, that's very important, we'll get there in a second and discloses in the judicial review context whether there's maybe a course and scope of employment dispute and the employer discloses, oh actually you know what? He wasn't the course and scope of employment and that's a common interest privilege communication, but the insurer has a duty to take that information and adjust benefits on it. There are conflicting and it's not just potentially adversarial. It's a fundamental conflict of interest that the insurer has a duty to adjust this claim for the benefit of the worker and there's been some discussion about the duty being owed. I draw the Court's attention to this policy and it's a standard workers compensation policy. Page 259 of the electronic record on the court and the same provision is on page 266, we are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties, some may an agency authorized by law. And again, any of the duties under this policy can be enforced by the workers compensation claimant. Who's entitled to the benefits? Not the employer. And keep in mind this obligation of disclosure, there's an endorsement, it's page 278 electronic record, talking about disclosure of claims data and rights. This is one of the duties under the policy that frankly the workers compensation claimant can enforce and get that type of information too, but we need to be careful not to equate a right to converse, a right to discuss and be involved with a somehow right to have a privilege because those are two divergent things. When I flip it over and think about what's the consequence of having some type of duty or obligation or privilege to an employer who's interest may be totally contrary to the insurer because a lot of these policies now we're seeing have incrdibly high self-insured retentions. They're totally self-insured under the statute. They're not adjusting their own claims and yet they are maintaining an insurance company to adjust the claim with the duty and yet there's a massive, in this case, I think there's a million dollar deductible. So the employer has a huge incentive to cut down costs, not pay claims and that's fundamentally inconsistent with an obligation of an insurer to determine hey are benefits owed? Because clearly, I want to stress that this issue and it did come up about whether we should still have

oral argument. This issue far transcends whether duty of good faith and fair dealing survives under Rutteger on remand. We're dealing with, and it's never been on the table, the insurer in a workers compensation policy owing a direct duty to adjust a claim to the worker for whom the benefits are purchased and who is supposed to receive those benefits.

JUSTICE DEBRA H. LEHRMANN: Do you worry that your position might discourage comp insurers from advising insurer to settle? Do you worry about that?

ATTORNEY ALAN B. DAUGHTRY: If I heard you right, am I worried that this would discourage workers comp insurers from advising employers?

JUSTICE DEBRA H. LEHRMANN: No, the insured to settle. Do you think that would have any kind of ramification?

ATTORNEY ALAN B. DAUGHTRY: Well, the question is, who's the insured in your question? You saying insured is employer?

JUSTICE DEBRA H. LEHRMANN: Uh-huh.

ATTORNEY ALAN B. DAUGHTRY: Then that actually proves my point. That type of discussion shouldn't be going on. That's the point, that shows that the employer insured is dictating or getting involved into the adjustment process and that's what's prohibited by statute. And if you flip around the duty question, it was looked at, in a lot of these big self-insured retention cases, these employers are coming back and looking to the insurer for the workers comp claim saying, hey, I don't like that you're paying out all these claims. This is coming out of my pocket. We went to recognize duties in court.

JUSTICE PHIL JOHNSON: That happens even if they don't have a big retention though doesn't it, because their rates are based on their experience.

ATTORNEY ALAN B. DAUGHTRY: Could be.

JUSTICE PHIL JOHNSON: So you always have that tension.

ATTORNEY ALAN B. DAUGHTRY: You could have that tension.

JUSTICE PHIL JOHNSON: And the legislature, as opposing counsel says, looked at that and when they modified the law, they required big policies to be with big deductibles that puts the financial burden on the employer unless they go bankrupt or something and the carrier's on the hook no question. [inadible]

ATTORNEY ALAN B. DAUGHTRY: They allow. They allow a company to have a self-insured retention.

JUSTICE PHIL JOHNSON: But even if they don't have the self-insured retention, you had that tension to begin with.

ATTORNEY ALAN B. DAUGHTRY: But there's a right to participate. There's a right to put on an employer's adverse position to the insurer, who might have accepted liability for this claim suddenly transform that into some type of duty or relationship or a privilege. That's the key question here. Clearly, an employer who doesn't like, and that statute says, an employer that doesn't like an insurer's acceptance of liability for a claim can't participate. That doesn't mean that it represents the employer as an attorney-client type of potential relationship, that's dangerous because you're dealing with a significant conflict of interest. And I cited, there are very few cases on this type of issue, but looking at it from the opposite perspective, I cited this Methodist Zurich case where Methodist was complaining that, hey, you have a duty to adjust these claims and not pay these things out

because this is affecting my pocketbook and the court refusing to recognize duties and courts have refused to recognize duties in this case, said, consequently we decline to approve a scenario in which Methodist indirectly retained discretion over Zurich's handling and settlement of claims, yet Zurich, not Methodist, was potentially liable to an employee for claims-related decisions. That's the real rub here. We're not saying that you can't consult. We're not saying that an employer can't get involved. It just doesn't mean that somehow you are manipulating this claim's tripartite relationship to have competing masters, competing obligations in attorney-client privileges. It cannot coexist and it's a source of great mischief.

JUSTICE PAUL W. GREEN: How do other states treat this issue?

ATTORNEY ALAN B. DAUGHTRY: I'm sorry what?

JUSTICE PAUL W. GREEN: How do other states treat this issue?

ATTORNEY ALAN B. DAUGHTRY: I've looked and it really hasn't come up and if you looked at the survey of cases done by Relator, those are, the vast majority of them deal with typical situations of third-party liability policies and I'm not here to dispute those. I mean you have typically an alignment of interest in those cases. The State Farm Traver case, it's duties owed to you know defense counsel and insurer who's paying for the defense and then the insured who's being defended. That's not really the situation here. This isn't truly a duty to defend. It's a duty to adjust a claim and pay first-party benefits. Regardless of how the policy is written, that's how this doctrine's always been, these policies have always been recognized, in fact imposing a non-delegable duty on the insurer. It can't be delegated. So then that's why we have the conflict, but the other states I have not picked up and maybe that the search terms are so generic that it doesn't really locate stuff, but neither side has picked up on any case really addressing the situation.

JUSTICE NATHAN L. HECHT: If we thought there was less tension than you say in the relationship between the carrier and the employer and not so much conflict that they couldn't avail themselves of joint representation, then is that the end of the case or is that fatal to your position?

ATTORNEY ALAN B. DAUGHTRY: No, Your Honor; in fact, I would suggest that given that one party has a duty that cannot be abrogated and one party doesn't have a duty and a potential economic disinterest, that you should never recognize the common interest doctrine. But I do need to mention that this has sort of come up after the fact of when you look at how these things were raised in the trial court and you look at the affidavit proof to prove up this privilege, it was all based upon attorney-client communications and what the trial court judge said, and I think the transcript's like tab C pages 31, 32, the trial court said, repeatedly, I get that these are attorney-client communications, the vast majority of these, between the lawyer for the insurer and the insurer and then the third-party claims handler that's doing the adjustment. And the court said, I get that and I think that that's attorney-client privilege, but you've never addressed these communications here with the employer and there's never been an answer for that. There is no evidence. There was no proof of privilege regarding that. It's a fatal defect.

CHIEF JUSTICE WALLACE B. JEFFERSON: What sort of communications are you likely to receive when looking at what the carrier and the employer are talking about? What are you looking for?

ATTORNEY ALAN B. DAUGHTRY: Communications that talk about facts, talk about investigation of the case, reports on defensive. You can get a whole host of communications.

CHIEF JUSTICE WALLACE B. JEFFERSON: That's the kind of thing that you would get in your client's claim for benefits anyway, isn't that right? Depositions and all that.

ATTORNEY ALAN B. DAUGHTRY: Oftentimes, but discussions, not necessarily and again, I come back to my scenario. What we're really worried about here is also the potential for mischief if you have these shrouded

secret communications going on between an employer who has a disincentive, an economic disincentive.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are you looking for fraud? I'm just trying to understand what is it you're trying to find that you wouldn't find in ordinary litigation?

ATTORNEY ALAN B. DAUGHTRY: Well, if it's shrouded in communications between the employer, it might give details or discussions about the case, thoughts, beliefs, discussions about the employee and if those are somehow shrouded by a common interest doctrine. And here's another reason why to distinguish how this case came up where it was initially argued as attorney-client privilege and common interest. When you look at, from a practical standpoint, disclosure obligations and like requests for production of documents, the rules 193.3 and I think comment 3 of the Rules of Civil Procedure say hey we presume core attorney-client and work core work product. Now we presume that those aren't being asked for, but typically people require you to put down, hey, we've got a joint defense or common interest privilege and disclose that. If we're going to mush the two, that's another area of great potential mischief where things just may all be done, shared and communicated and documents created and not shared that, frankly, no one ever knows about until the end game.

JUSTICE NATHAN L. HECHT: I'm trying to be sure I understand your position, but there's a lot of discussion about whether this is a good idea or a bad idea. But in the event that the Court decides this case on the basis of Rule 503, is it your position that this fits, this is privileged under 503 even though it shouldn't be or it's not privileged under 503.

ATTORNEY ALAN B. DAUGHTRY: It's our position it's not privileged under 503.

JUSTICE NATHAN L. HECHT: That's because?

ATTORNEY ALAN B. DAUGHTRY: The employer is not a representative of the client.

JUSTICE NATHAN L. HECHT: Or the client.

ATTORNEY ALAN B. DAUGHTRY: Yes, Your Honor, can't be and because of a fundamental conflict of interest here. And let's think about it. If we're going to talk about competing privileges and mutual representation, I guess the Canal Insurance case. It talks about an insurer who somehow has some type of claim or an employer, someone might have a claim against the lawyer handing in the claim. Are we going to expose employers to say oh I don't like how you did that and create a duty there because you paid out on that claim. It's a really conflicting set of duties and obligations and that's really, really the rub here. Of course, the documents that we're actually talking about here were provided in camera and I don't have the benefit of looking those to talk about it. But when we're talking about recognizing at attorney-client privilege with an employer and an insurer who has a claim for benefits that the employer might have to pay for and not want to pay for, then you have a potential for a very significant conflict of interest.

JUSTICE DALE WAINWRIGHT: What role does the fact that your client is adverse to those parties play? I mean you talk about the potential for bad stuff happening, fraud or the like, but I mean your client has sued them. It sounds like you want your client to be able to sit in the conference room during the discussions of strategy about their case.

ATTORNEY ALAN B. DAUGHTRY: Well, realistically, my client has a right and all workers compensation clients have a right.

JUSTICE DALE WAINWRIGHT: And your client does have rights under the workers compensation statute and pretty specific rights the legislature has laid out. There is an adverse relationship there.

ATTORNEY ALAN B. DAUGHTRY: To have and again, recognize that this issue is coming up in a bad-faith

claim, but that the issue of privilege will have ramifications in all judicial review and initial benefit claims. The client, well my client and workers compensation employees seeking benefits have a right to have disclosure of how their claims are being handled and adjusted and the evidence and proof upon which they are.

JUSTICE DALE WAINWRIGHT: Statutorily required disclosures, I mean that's not at issue here and facts that occurred. Those are not privilege. That's not at issue here. It's the work product, which you are candid about saying you're entitled to.

ATTORNEY ALAN B. DAUGHTRY: If you have a disclosure to an employer, yes, and we're also worried about this scope of common interest privilege somehow attaching and creating. Keep in mind, what this Court is being asked to find is that the insurer and the insurer's lawyer has some type of attorney-client relationship with an employer and that's dangerous. And regardless of the documents that I haven't looked at, obviously, to see in this case regardless of whether those are limited or broad in scope, when you have those types of unrestrained communications based upon some privilege and we're over the implication that this Court is saying that an attorney-client relationship can be created by insurance companies or an employer, that is a potential for a conflict of interest and a dangerous step down a slippery slope. So I'm saying it is a difference and again, these are--

JUSTICE DALE WAINWRIGHT: Of course, there are exceptions allowed to the privilege if there's evidence of fraud, misleading the court, those type of, committing a crime.

ATTORNEY ALAN B. DAUGHTRY: Sure we can get that in court.

JUSTICE DALE WAINWRIGHT: That's not sufficient.

ATTORNEY ALAN B. DAUGHTRY: Absolutely. We can get those in core attorney-client privilege situations. This has to do with having communications and again, I need to stress one type of, I think, policy discussion that was raised by counsel for XL was like hey the employer might actually want to assist here. We've all actually seen employers who actually might want to have their employees have their benefits covered and paid and participate. That's well and good. That doesn't necessarily mean that it creates an attorney-client privilege between the insurer or that it creates some duty where it doesn't otherwise exist. The employer can participate in opposition or not, but it doesn't necessarily transform all these communications.

JUSTICE PHIL JOHNSON: If the employer were to hire an attorney because the carrier said, we're denying a claim or we're paying the claim, whichever, but we're not going to tell you why. So the employer then has an attorney to represent them and they go to the insurer's attorney and says, okay, I want to know why you're denying a claim or why you're paying the claim and the carrier's attorney explains that to the employer's attorney. Privileged or not privileged under your scenario?

ATTORNEY ALAN B. DAUGHTRY: I don't think it's privileged.

JUSTICE PHIL JOHNSON: Okay, so anything, any communication except direct communication between the insurer and the insurer's attorney is not privileged under your view?

ATTORNEY ALAN B. DAUGHTRY: Yes. And also under your example, Justice Johnson, the employer's lawyer discussing these issues with the employer client, that would be privileged as well. But key to your fact is that they're talking about why or why it's not covered. That should all be disclosed and moreover these disclosure obligations, they're in the policy and moreover there are duties in the policy and pages 259, 266 say whatever duties are in the policy are also owed and to be enforced by the workers compensation claimant. I see that my time is running out, do I have any further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Appears not, thank you, Counsel.

REBUTTAL ARGUMENT OF DAVID BRENNER ON BEHALF OF PETITIONER

JUSTICE NATHAN L. HECHT: Let me ask you at the outset, does it ever happen that the employer formally engages the carrier's attorney for representation?

ATTORNEY DAVID BRENNER: As a practical matter, it happens on a frequent basis and in fact, in many large deductible policies the employer is actually by contract allowed to select which defense counsel will be defending the workers compensation claim within a specific state. So it's typical that that's the case.

JUSTICE NATHAN L. HECHT: So there would be like documentation that the lawyer is representing carrier and also representing the employer?

ATTORNEY DAVID BRENNER: In some cases, that's the situation. In other cases, it's not. Counsel discusses duties and duties and privilege really have nothing to do with each other. Duties may come into play if there's an adverse relationship with the party and if the parties are in an adverse relationship, there cannot be a common legal privilege. In this case, there's no indication of an adverse relationship. The contracts, the insurance contract, the insurance documents and all of the letters show a common interest, common purpose, common defense, which implies the privilege and we are not asking the Court to create a new privilege or to create an expansion of the privilege. This Court has held in Home v. Unauthorized Practice of Law Commission and State Farm v. Trevor and in Tilly for the last 60 years that in the insured-insurer relationship, there's a tripartite relationship. Between the insured, the insurer and defense counsel defending the claims brought, the defense counsel has a duty to both, represents both and there has never been a case in Texas jurisprudence where this Court or any appellate court has compelled the production of attorney communications between the insured and the insurer whether or not in an adverse situation. In essence, what the trial court here said, is I don't see this applying specifically to workers compensation cases and so therefore, I don't think this same privilege, this tripartite relationship applies. The policy is the same, the insurance policy. The provisions under the policy created the duty are the same. The obligations with respect to each other mirror many liability policies. For example, in many, many professional liability policies, the first tier of coverage is self-insured deductible. Most attorneys, most physicians have the obligation to pay the first level of exposure before their liability kicks in. Indemnity provisions are identical in the workers comp claim and in the liability policies. The only difference in this case is the procedural process as to who gets sued. Now counsel suggests that perhaps this self-insured doctrine isn't truly self-insurance. I'll point out that 415.0026, which the rely upon [inaudible] self-insurance. The Texas legislature has created two ways to self-insured in workers comp. One is to get a certification of self-insurance. The other is to self-insure with a large deductible and this Court addressed in Argonaut. Regardless of how you self-insurer, regardless of whether you're fully insured, the claims must be handled by claims adjuster. Only a claims adjuster in Texas law, licensed in workers comp, can actually do the claims handling claims adjustment. And because of that just like Rule 11 in Chapter 9 of the Civil Practice and Remedies Code that says, only an attorney who's licensed to practice can represent a corporation. A corporation can't represent themselves. There are procedures that make sure that certain methods and rules are followed. I cannot take the position, which would violate Rule 11 or Chapter 9 of the Civil Practice Remedies Code in front of a court despite my client's desires in representing the client. This Court has said that's prohibited and the legislature has said that's prohibited. It does not place me in an adverse situation. I still represent the client. 415.002b makes clear and 401.011 make clear. The employer and the insurance carrier should freely discuss a claim, assist in investigation and evaluation of the claim and attend proceedings. Simplex makes clear that the employer's right to dispute a claim is dependent on the carrier's decision to freely accept a claim. They have a relationship that is recognized by the legislature, a relationship that's recognized by the insurance policy and disallowing the privilege would absolutely undermine the relationship and undermine this Court's holding on [inaudible]. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you for both Counsel. The cause is submitted and the Court will take another brief recess.

MARSHAL: All rise.

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