**FLORIDA SUPREME COURT**

---

**CASE NO.: SC17-1848**
L.T. No.: 3D17-1421, 3D17-1500, 3D17-1527, 3D17-1457

---

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A.,
D/B/A HERSSEIN LAW GROUP AND REUVEN T. HERSSEIN,

Petitioners,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent.

---

**PETITIONERS' EMERGENCY MOTION TO QUASH THE DECEMBER 13, 2017 OPINION ISSUED BY THE THIRD DISTRICT COURT OF APPEAL IN VIOLATION OF THIS COURT'S DECEMBER 7, 2017 STAY ORDER**

---



Petitioners, Law Offices of Herssein and Herssein, P.A., d/b/a Herssein Law Group (hereinafter "HLG") and Reuven T. Herssein, (collectively hereinafter "Petitioners") pursuant to Rule 9.300, 9.310, and 9.130(f), Florida Rules of Appellate Procedure, respectfully request this Court to enter an Order Quashing the December 13, 2017 Opinion and affiliated Order(s), Issued by the Third District Court of Appeal in violation of this Court's December 7, 2017 Stay Order. In further support of this Motion, Petitioners state:

## BACKGROUND

1. On **December 7, 2017**, this Court granted Petitioners' Motion to Stay Proceedings in the Lower Tribunal[1], and issued the Order[2] which stayed the "proceedings in the Third District Court of Appeal and in the Circuit Court of the Eleventh Judicial Circuit." (*See* Exhibit "1").
2. On **December 8, 2017**, the Third District Court of Appeal, via its 3DCA CaseMail system, provided a copy of the stay order to counsel of record. (*See* Exhibit "2"[3]).
3. On **December 11, 2017**, this Court accepted jurisdiction of this case. (*See* Exhibit "3"[4])
4. On **December 12, 2017**, the Third District Court of Appeal, again, via its 3DCA CaseMail system, provided a copy of this Court's Order accepting jurisdiction of the case, to counsel of record. (*See* Exhibit "4"[5]).
5. The Third District Court of Appeal was obviously on notice of the Stay Order issued by this Court, but for some unknown reason, in clear violation of this Court's Stay Order, on **December 13, 2017**, issued an opinion and additional

---

[1] The full title is Petitioners' *Motion to Stay Effect of Mandate And Stay Proceedings in the Lower Tribunal* (*See* Filing # 63413864 E-Filed 10/27/2017)

[2] A copy of this Court's December 7, 2017 Stay Order is attached is attached hereto, as Exhibit "1." (*See* Filing # 65124804 E-Filed 12/07/2017)

[3] Exhibit "2" is a copy of the December 8, 2017 e-mail from the 3DCA CaseMail system.

[4] A copy of this Court's December 11, 2017 Order Accepting Jurisdiction is attached hereto, as Exhibit "3." (*See* Filing # 65225184 E-Filed 12/11/2017)

[5] Exhibit "4" is a copy of the December 12, 2017 e-mail from the 3DCA CaseMail system.

order(s) on proceedings before it[6] in the consolidated cases numbered 3D17-1500, 3D17-1457, 3D17-1527 which arise out of the lower court case involving the same parties and same trial court judge. (S*ee* Exhibit "5").

6. Perhaps the Third District Court of Appeal's internal operating procedures did not account for the stay order which involved proceedings involving the same lower court case and parties, even though it was on notice of the pending Petition for Review before the Florida Supreme Court.

7. Indeed, Judge Edwin Scales, the author of the December 13, 2017 opinion, was on the panel of judges who denied the petition for writ of prohibition under review before this Court. (S*ee* Exhibit "5").

8. Because the Petition for Review before this Court involves the potential removal of the trial court judge based on the Third District Court of Appeal's denial of the writ of prohibition for disqualification pursuant to Fla. R. Jud. Admin. 2.330, if the trial court is ultimately removed from the case, either party could seek re-hearing of the trial court's orders under review in the trial court, which may very well render the consolidated appeal that the December 13, 2017 opinion addressed moot.

9. Importantly, one of the main purposes of a stay is to preserve the status quo of the case below. The Third District Court of Appeal's December 13, 2017 Opinion and

[6] There were three (3) consolidated petitions pending before the Third DCA on this case: 3D17-1457; 3D17-1500; 3D17-1527; Importantly, in its opinion, (at f.n. 6, Pg. 10) the Third DCA acknowledges they are ruling on a final order.

any orders issued while the stay of proceedings on this case was in effect, cannot be considered harmless error to the Petitioners.

10. Moreover, because of the stay issued by this Court, Petitioners are unable to move for a rehearing of the opinion and order and seek the appropriate appellate remedies in the Third District Court of Appeal.

11. The Third District Court of Appeal must adhere to the Stay Order issued by this Court and did not have jurisdiction to issue any opinion or order after December 7, 2017. Any opinion or order issued in violation of the stay order is a legal nullity and must be quashed.

## ARGUMENT

12. In *Plavnicky v. Deluicia*, 954 So.2d 1178 (Fla. 4th DCA 2007) the Fourth District held that the lower tribunal "did not have jurisdiction while the stay was in effect, and as a result, these orders [entered] are a nullity." *See id*. at 1179. *also*, *See Leslie v. Leslie*, 840 So.2d 1097 (Fla. 4th DCA 2003).

13. Just like the lower court in *Plavnicky,* the Third DCA did not have jurisdiction to issue any opinions or orders after December 7, 2017, and must adhere to the Stay Order issued by this Court; any opinion or orders issued in violation of the Stay Order is itself a legal nullity.

14. Florida Rules of Appellate Procedure 9.130(f) states:

> **(f) Stay of Proceedings.** In the *absence* of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with

> all matters, including trial or final hearing, except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court.

15. Here, the Stay Order specifically states:

> "Petitioners' Motion to Stay Effect of Mandate and Stay Proceedings in the Lower Tribunal is granted **and proceedings in the Third District Court of Appeal and in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida are hereby stayed pending disposition of the petition for review filed herein.**" (emphasis added) (*See* Exhibit "1").

16. In *Dragomirecky v. Town of Ponce Inlet*, 891 So.2d 633 (Fla. 5th DCA 2005), the Fifth District held that an order entered without jurisdiction is a nullity, and cannot be considered harmless error. *See Katz v. NME Hospitals, Inc*., 791 So.2d 1127 (Fla. 4th DCA 2000) (holding that even though non-final appeal was ultimately dismissed, circuit court was without jurisdiction to enter final judgment while appeal was pending); *Kessler v. City of Naples*, 779 So.2d 378 (Fla. 2d DCA 2000) (holding that final order dismissing case while non-final appeal was pending was entered without jurisdiction and is a nullity); *Sears Termite & Pest Control, Inc. v. Arnold*, 743 So.2d 597 (Fla. 1st DCA 1999)(holding that trial court lacked jurisdiction to enter final judgment dismissing complaint against two defendants while non-final appeal of order denying temporary injunction was pending); *see also MML Dev. Corp. v. Eagle Nat'l Bank of Miami*, 597 So.2d 968 (Fla. 5th DCA 1992). *Id.* at 635.

17. Petitioners' Motion to Stay Proceedings specifically requested this Court stay all proceedings, to preserve the status quo of the case, "until this Court decides the issues, the mandate of the Third District Court of Appeal should be stayed and a stay entered in the entire case, to preserve the status quo pending this Court's interpretation of the Judicial Canons which will affect this trial court." (*See* Motion to Stay at 13).

18. Finally, the Third District Court of Appeal on this case, in its December 13, 2017 opinion, acknowledges they are ruling on a final order, and specifically state:

> Because Wadsworth is a non-party to the lawsuit between USAA and Herssein, the trial court's May 30, 2017 order compelling Wadsworth to respond to Herssein's non-party subpoena is, indeed, a final order as to Wadsworth. See Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 520 (Fla. 1st DCA 2012) (finding that an order compelling discovery by third parties was final because it "adjudicates the legal rights of nonparties and because it otherwise meets the general test of finality") (f.n. 6, pg. 10 of Exhibit "5")

19. Accordingly, Petitioners' respectfully request this Court quash the December 13, 2017 Opinion and any Order issued on any proceedings before the Third District Court of Appeal.

**WHEREFORE**, Petitioners respectfully request that this Court enter an Order Quashing the December 13, 2017 Opinion and affiliated Order(s), Issued by the Third District Court of Appeal and any further relief this Court deems just and proper.

*Respectfully Submitted*,

**HERSSEIN LAW GROUP**
1801 NE 123rd Street, Suite 314
North Miami, Florida 33181
Telephone No: (305) 531-1431
Miamieservice@hersseinlaw.com

By: /s/ Reuven Herssein
REUVEN T. HERSSEIN, ESQ.
FBN 0461504

**BEIGHLEY, MYRICK, UDELL & LYNNE, P.A.**
150 West Flagler Street, Suite 1800
Miami, Florida 33130
Telephone No: (305) 349-3930
mudell@bmulaw.com

By: /s/ Maury L. Udell
MAURY L. UDELL, ESQ.
FBN 121673

## CERTIFICATE OF FONT COMPLIANCE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Motion has been prepared using Microsoft Word, Times New Roman 14-point font.

By: /s/Reuven Herssein
REUVEN HERSSEIN, ESQUIRE
FBN 0461504

## CERTIFICATE OF SERVICE

**WE HEREBY CERTIFY** that a true and correct copy of the foregoing Emergency Motion To Quash was served via the Florida Court's E-Filing Portal this this **13th day of December** 2017 on: The Honorable Beatrice Butchko, Miami Dade County Courthouse, 73 West Flagler Street Room 303, Miami, FL 33130; bbutchko@jud11.flcourts.org; Frank Zacherl, Esq., fzacherl@shutts.com; gservice@shutts.com; Patrick G. Brugger, Esq. pbrugger@shutts.com; Stephen B. Gillman, Esq., sgillman@shutts.com; Suzanne Y. Labrit, B.C.S. (slabrit@shutts.com), of Shutts & Bowen, LLP 201 South Biscayne Boulevard, Suite 4100 Miami, FL 33131; Manuel Garcia-Linares, Esquire mlinares@richmangreer.com; Richman Greer, P.A. 396 Alhambra Circle, North Tower- 14th Floor, Miami FL 33134.

**HERSSEIN LAW GROUP**
1801 NE 123rd Street, Suite 314
North Miami, Florida 33181
Telephone No: (305) 531-1431
Miamieservice@hersseinlaw.com

By: /s/ Reuven Herssein
REUVEN T. HERSSEIN, ESQ.
FBN 0461504

**BEIGHLEY,MYRICK, UDELL & LYNNE, P.A.**
150 West Flagler Street, Suite 1800
Miami, Florida 33130
Telephone No: (305) 349-3930
mudell@bmulaw.com

By: /s/ Maury L. Udell
MAURY L. UDELL, ESQ.
FBN 121673

# EXHIBIT

# “1”

Filing # 65124804 E-Filed 12/07/2017 04:50:43 PM

# Supreme Court of Florida

THURSDAY, DECEMBER 7, 2017

**CASE NO.: SC17-1848**
Lower Tribunal No(s).:
3D17-1421; 132015CA015825000001

| | | |
|---|---|---|
| LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., ETC., ET AL. | vs. | UNITED SERVICES AUTOMOBILE ASSOCIATION |
| Petitioner(s) | | Respondent(s) |

Petitioners' Motion to Stay Effect of Mandate and Stay Proceedings in the Lower Tribunal filed in the above cause is granted and proceedings in the Third District Court of Appeal and in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, are hereby stayed pending disposition of the petition for review filed herein.

LABARGA, C.J., and PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

lc
Served:

MANUEL A GARCIA-LINARES
FRANK AUGUSTINE ZACHERL, III

PATRICK G. BRUGGER
STEPHEN B. GILLMAN
AMY M. WESSEL
REUVEN T. HERSSEIN
SUZANNE YOUMANS LABRIT
MAURY L. UDELL
HON. MARY CAY BLANKS, CLERK
HON. BEATRICE AVGHERINO BUTCHKO, JUDGE
HON. HARVEY RUVIN, CLERK

# EXHIBIT

# “2”

| | |
|---|---|
| **From:** | eFile3DCA@flcourts.org |
| **To:** | Reuven Herssein; Miamieservice; Reuven Herssein |
| **Subject:** | CaseMail: A Document(Supreme Court Disposition) has been filed in case: 17-1421 (Category: Civil) |
| **Date:** | Friday, December 08, 2017 9:09:40 AM |

DCA Case No: 17-1421
Case Name : LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., etc., et al., v UNITED SERVICES AUTOMOBILE ASSOCIATION,
LT Case No : 15-15825

A document has been filed in the above referenced case. You may use the link below to view the document or you can log on eDCA to access the document.
https://edca.3dca.flcourts.org/eNotice.aspx?id=22213-6670-502223-166630

Please DO NOT respond to this email. It was sent from an unattended mailbox.

# EXHIBIT

# “3”

Filing # 65225184 E-Filed 12/11/2017 02:37:04 PM

# Supreme Court of Florida

MONDAY, DECEMBER 11, 2017

**CASE NO.: SC17-1848**
Lower Tribunal No(s).:
3D17-1421;
132015CA015825000001

| | | |
|---|---|---|
| LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., ETC., ET AL. | vs. | UNITED SERVICES AUTOMOBILE ASSOCIATION |
| Petitioner(s) | | Respondent(s) |

The Court accepts jurisdiction of this case.

Petitioner's initial brief on the merits must be served on or before January 2, 2018; respondent's answer brief on the merits must be served twenty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits must be served twenty days after service of respondent's answer brief on the merits.

The Clerk of the Third District Court of Appeal must file the record which must be properly indexed and paginated on or before February 9, 2018. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

LABARGA, C.J., and PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.

Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kj
Served:

MANUEL A GARCIA-LINARES
FRANK AUGUSTINE ZACHERL, III
PATRICK G. BRUGGER
STEPHEN B. GILLMAN
AMY M. WESSEL
REUVEN T. HERSSEIN
SUZANNE YOUMANS LABRIT
MAURY L. UDELL
HON. MARY CAY BLANKS, CLERK
HON. BEATRICE AVGHERINO BUTCHKO, JUDGE

# EXHIBIT

# “4”

| | |
|---|---|
| **From:** | eFile3DCA@flcourts.org |
| **To:** | Reuven Herssein; Miamieservice; Reuven Herssein |
| **Subject:** | CaseMail: A Document(Supreme Court Disposition) has been filed in case: 17-1421 (Category: Civil) |
| **Date:** | Tuesday, December 12, 2017 3:00:31 PM |

DCA Case No: 17-1421
Case Name : LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., etc., et al., v UNITED SERVICES AUTOMOBILE ASSOCIATION,
LT Case No : 15-15825

A document has been filed in the above referenced case. You may use the link below to view the document or you can log on eDCA to access the document.
https://edca.3dca.flcourts.org/eNotice.aspx?id=22213-6670-503023-166630

Please DO NOT respond to this email. It was sent from an unattended mailbox.

# EXHIBIT

# “5”

# Third District Court of Appeal

**State of Florida**

Opinion filed December 13, 2017.
Not final until disposition of timely filed motion for rehearing.

---

Nos. 3D17-1457, 3D17-1500 & 3D17-1527
Lower Tribunal No. 15-15825

---

**United Services Automobile Association, et al.,**
Petitioners,

vs.

**Law Offices of Herssein and Herssein, P.A., etc., et al.,**
Respondents.

3D17-1457 & 3D17-1500: Writs of Certiorari to the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

3D17-1527: An Appeal from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Shutts & Bowen LLP, and Suzanne Y. Labrit (Tampa), Frank A. Zacherl and Patrick G. Brugger; Law Offices of Charles M-P George, and Charles M-P George; Wadsworth Law, LLP, and Christopher W. Wadsworth and Katya H. Rehders, for petitioners.

Herssein Law Group, and Reuven Herssein; Beighley, Myrick, Udell & Lynne, P.A., and Maury L. Udell, for respondents.

Before SUAREZ, LAGOA and SCALES, JJ.

SCALES, J.

United Services Automobile Association ("USAA"), the defendant/counter-plaintiff below, and non-party the Wadsworth Huott, LLP law firm ("Wadsworth"), each filed a certiorari petition with this Court seeking to quash trial court discovery orders compelling petitioners to disclose information protected by Florida's attorney-client privilege. We consolidated the petitions, and grant them both because, under the unique facts of this case, the implied waiver of the privilege asserted by respondent, Law Offices of Herssein & Herssein, P.A. ("Herssein"), is inapplicable.

## FACTS AND RELEVANT BACKGROUND

In July 2008, USAA entered into a legal services contract with Herssein whereby Herssein agreed to defend USAA, USAA's affiliates and USAA's insureds. As relevant here, Herssein agreed to defend liability claims made against homeowners insured by USAA.[1]

In 2011, a claimant sustained personal injuries when the claimant fell after an encounter with dogs owned by Colleen Brennan, a USAA insured. The claimant made a pre-suit demand for the $100,000 policy limit of Brennan's insurance policy. USAA accepted the demand and tendered its check for the policy limits. Rather than

[1] While not relevant to the issues before us, we note that the agreement between USAA and Herssein is memorialized by several documents, various extensions, amendments, et cetera.

cashing USAA's settlement check, the claimant, in March 2013, filed a personal injury action against Brennan and others in the Palm Beach County Circuit Court ("Claimant's Case"). Pursuant to the 2008 legal services contract, USAA appointed Herssein to defend Brennan in Claimant's Case.

Herssein did not seek to enforce USAA's settlement agreement with the claimant; instead, in May 2013, Herssein withdrew the pre-suit policy limit tender. During the course of the ensuing litigation, in October 2013, the claimant served Brennan with a proposal for settlement, again offering to settle the claimant's claim for Brennan's policy limits. Following Herssein's advice, Brennan rejected the claimant's renewed policy-limit demand, and served the claimant with a $65,000 counter-proposal for settlement, which the claimant rejected.

In August 2014, the trial court in Claimant's Case entered a partial summary judgment for the claimant, finding Brennan was strictly liable for the claimant's personal injuries. Sometime later, Brennan hired a separate lawyer, Stephen Maher, who, on February 23, 2015, advised USAA in a letter that Brennan would pursue a bad faith action against USAA, and a malpractice action against Herssein, if Brennan was exposed to a judgment in Claimant's Case in excess of Brennan's $100,000 policy limits. Noting the ensuing conflict of interest created by Mr. Maher's February 23, 2015 letter, Herssein immediately withdrew as Brennan's counsel in Claimant's Case.

USAA then appointed Wadsworth to succeed Herssein in representing Brennan in Claimant's Case, which went to mediation on May 19, 2015. At the mediation, USAA was represented by David Lichter, one of USAA's in-house lawyers, and outside bad faith counsel, Frank Zacherl. Wadsworth and Brennan's own private counsel, Fred Cunningham, also attended the mediation conference on behalf of Brennan. Claimant's Case was settled at this mediation for an amount in excess of USAA's policy limits.[2] Claimant's Case was dismissed on June 30, 2015.

Shortly after the mediation, settlement and dismissal of Claimant's Case, on July 1, 2015, USAA purported to terminate its legal services agreement with Herssein, and, two weeks later, on July 13, 2015, Herssein brought the instant lawsuit against USAA in the Miami-Dade Circuit Court. Herssein generally alleges that USAA violated its legal services agreement with Herssein by, inter alia, failing to appoint Herssein to a sufficient number of PIP defense cases. Herssein's lawsuit seeks in excess of $20,000,000 in damages.

In February 2017, USAA filed a counterclaim against Herssein alleging, in one of the counterclaim's five counts, that USAA suffered damages as a result of Herssein's allegedly negligent handling of Claimant's Case. On March 7, 2017, Herssein propounded interrogatories on USAA regarding USAA's malpractice

[2] The settlement amount is confidential.

claim involving Claimant's Case, including the following interrogatory relevant here:

> **INTERROGATORY NO. 15.** Whose advice did USAA take to settle [Claimaint's Case] and pay over the insured's policy limits, if that is what occurred?

USAA objected to this interrogatory based on the attorney-client privilege, and Herssein moved to compel USAA to answer the interrogatory. The trial court held a hearing on Herssein's motion on May 23, 2017, and entered an order compelling USAA to answer the interrogatory.

On March 27, 2017, Herssein served Wadsworth with a non-party subpoena seeking information related to Wadsworth's representation of Brennan in Claimant's Case. The subpoena sought the following documents:

1. Any and all correspondence, emails, notes, documents, or electronic version of any correspondence, emails, notes, letters, documents by or between any person including you or your firm and any person or party involved [in Claimant's Case], including USAA, of *any kind*.

2. Any emails, notes, letters, documents or electronic version of any correspondence, emails, notes, letters, document[s] regarding Herssein Law Group or Reuven Herssein from January 2015 to date.

Wadsworth objected to the subpoena based on the attorney-client privilege and, on May 30, 2017, the trial court entered an order requiring Wadsworth to produce the documents to the court for an in camera inspection.[3, 4]

USAA seeks certiorari review of the trial court's May 23, 2017 order, and Wadsworth seeks certiorari review of the trial court's May 30, 2017 order. We consolidated the two petitions and grant same.

## STANDARD OF REVIEW

"Certiorari review extends to discovery orders which depart from the essential requirements of law, cause material injury to a petitioner throughout the remainder of the proceedings, and effectively leave no adequate remedy on appeal." Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A., 715 So. 2d 1021, 1022 (Fla. 4th DCA 1998). "Orders compelling production of matters claimed to be protected by the attorney-client privilege . . . present the required potential for irreparable harm." Id.

## ANALYSIS

*1. Florida's Attorney-Client Privilege and the "Malpractice Exception"*

[3] The hearing transcripts reflect that the trial court had already determined that the requested communications were not privileged, but ordered the in camera inspection to prevent the disclosure of irrelevant material.

[4] The trial court's order expressly states that Wadsworth is not required to produce any communications between Wadsworth and Brennan.

Florida's attorney-client privilege is codified in section 90.502(2) of the Florida Statutes (2017), which provides that "[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." A "communication" between a lawyer and a client is "confidential" if the communication is not intended to be disclosed to third persons. See § 90.502(1)(c), Fla. Stat. (2017).

The "malpractice exception" to the privilege is codified in section 90.502(4)(c), which provides that "[t]here is no lawyer-client privilege . . . when . . . [a] communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship."

*2. USAA's Petition – Case Number 3D17-1457*

At first blush, it may seem that Herssein's interrogatory seeks only the identity of a USAA lawyer, rather than any confidential communication between USAA and its lawyer. Generally, such identity information is not protected by the attorney-client privilege. See Coffey-Garcia v. S. Miami Hosp., Inc., 194 So. 3d 533, 537-38 (Fla. 3d DCA 2016) (recognizing that because the lawyer-client privilege set forth in section 90.502 "protects only communications to and from a lawyer," the plaintiff in a malpractice action could be compelled to answer deposition questions regarding

"the names of the attorneys whom she consulted with" in pursuing her claim). After all, who attended the mediation conference in Claimant's Case on behalf of USAA is certainly no secret to the parties; and, that USAA settled Claimant's Case is no secret either. But, the wording of the interrogatory seeks the identity of the lawyer *who advised USAA to settle the case at the mediation*. There is no practical difference, then, between this interrogatory question and asking USAA to divulge the content of the legal advice each attorney attending the mediation provided to USAA. Plainly, then, the subject interrogatory seeks confidential communications between USAA and its lawyers and is protected by the attorney-client privilege. See id. at 538-39 (finding that while the plaintiff could be compelled to reveal "the names of the attorneys whom she consulted with" in pursuing a medical malpractice claim, "the reasons why she sought out legal counsel and any subsequent counsel" was protected by the attorney-client privilege).

The trial court concluded, however, that the "malpractice exception" to the privilege applies to the subject communications and ordered USAA to answer the interrogatory. We find the trial court erred for the following reasons. The trial court determined that Herssein was entitled to know who advised USAA to settle Claimant's Case for an amount in excess of policy limits at mediation – if that was, in fact, what happened – as USAA claimed that Herssein committed malpractice by advising Brennan against settling Claimant's Case for policy limits. The trial court

explained: "I can't see how [Herssein can] defend the malpractice case without this information."

Nevertheless, while the contents of the confidential communications between USAA and its mediation counsel may have some relevancy regarding whether Herssein's settlement advice breached a legal duty owed to USAA and its insured[5], we are persuaded by our sister court's rationale that the "malpractice exception" applies only to communications between the client and the lawyer being sued. See Coyne, 715 So. 2d at 1022-23. Just as the Fourth District did in Coyne, we decline to extend the "malpractice exception" to compel a lawyer's former client to disclose confidential communications with that client's other lawyers simply because such information may be relevant to the former lawyer's defense of the client's malpractice case against the lawyer. Id. at 1023; see also Coates v. Akerman, Senterfitt & Eidson, P.A., 940 So. 2d 504, 509 (Fla. 2d DCA 2006) (citing Coyne, stating "[t]he possibility that the disputed documents may be relevant to or may assist the lawyers in their defense or in their third-party claims, or may perhaps assist in the lawyer's efforts to impeach the clients, does not create a waiver of the privilege").

[5] Because we find the "malpractice exception" inapplicable in this case, we express no opinion on the relevancy of such communications.

We, therefore, grant USAA's petition, and quash the trial court's May 23, 2017 order requiring USAA to answer interrogatory 15.

*3. Wadsworth's Petition – Case Number 3D17-1500*[6]

As mentioned above, USAA appointed Wadsworth to represent Brennan when Herssein withdrew from representing Brennan in Claimant's Case. After USAA sued Herssein for Herssein's alleged malpractice in representing Brennan, Herssein served Wadsworth with a non-party subpoena seeking communications regarding Wadsworth's representation of Brennan in Claimant's Case. Again, relying on the "malpractice exception," the trial court overruled Wadsworth's objections and compelled Wadsworth to produce the documents – except for any

[6] Because Wadsworth is a non-party to the lawsuit between USAA and Herssein, the trial court's May 30, 2017 order compelling Wadsworth to respond to Herssein's non-party subpoena is, indeed, a final order as to Wadsworth. See Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 520 (Fla. 1st DCA 2012) (finding that an order compelling discovery by third parties was final because it "adjudicates the legal rights of nonparties and because it otherwise meets the general test of finality"). Hence, in addition to filing the instant petition for writ of certiorari, Wadsworth also filed an appeal of the trial court's order. We assigned case number 3D17-1527 to this appeal. See Fla. R. App. P. 9.030(b)(1)(A); Office of the Public Defender v. Lakicevic, 215 So. 3d 112 (Fla. 3d DCA 2017) (treating an order denying the public defender's motion for a protective order from a third-party subpoena duces tecum for deposition as a final order reviewable on appeal, rather than via a petition for writ of certiorari). We consolidated Wadsworth's appeal with the two petitions, and, because we are quashing the subject order, we dismiss, as moot, Wadsworth's appeal in case number 3D17-1527. We need not, and therefore do not, reach the perplexing issue of whether it is a better practice for a non-party to seek appellate, rather than certiorari, review of a final discovery order.

communications between Wadsworth and Brennan – for an in camera inspection by the trial court.

As we did with USAA's petition, we find here that the "malpractice exception" is applicable only to communications between the client and the lawyer being sued for malpractice. See Coyne, 715 So. 2d at 1022-23. The "malpractice exception," therefore, is inapplicable to communications between USAA and Wadsworth.

Interestingly, though, Herssein suggests that Wadsworth and USAA did not have an attorney-client relationship. Herssein argues that Wadsworth's actual client in Claimant's Case was not USAA, but rather, only Brennan. Herssein additionally argues that once Brennan's private counsel, Mr. Maher, notified USAA of Brennan's intention to sue USAA for bad faith on February 23, 2015, USAA and Brennan's interests were no longer aligned so that any imputed attorney-client relationship between USAA and Wadsworth was destroyed. Therefore, Herssein argues, any communications between Wadsworth and USAA are not protected by the attorney-client privilege.

These arguments are unpersuasive. While the insured is the attorney's client when an attorney is hired by an insurance company to represent an insured in a

liability case,[7] it is well settled that communications between an insurer and the lawyer hired by the insurer to protect the insured's interests are protected by the attorney-client privilege because the insurer and insured share a common interest in the outcome of the case. See Liberty Mut. Fire Ins. Co. v. Kaufman, 885 So. 2d 905, 908 (Fla. 3d DCA 2004) ("[W]hen an insurer accepts the defense obligations of its insured, certain interests of the insured and the insurer essentially merge."). Similarly, an insurer's fiduciary obligation to its insured, and the common interests of the insured and insurer, continue even after the insured notifies the insurer of a potential bad faith claim. See id. at 908, 909 (stating that "a liability insurer has a continuing duty to use the degree of care and diligence a person would exercise in the management of his or own business when it undertakes to defend it insured," finding that where "'[t]he relationship between [the parties] evolved from fiduciary to adversarial, or a combination of the two, with no clear line of demarcation separating them,'" that the attorney-client privilege still applied (quoting Fla. Sheriff's Self-Insurance Fund v. Escambia Cty., 585 So. 2d 461, 463 (Fla. 1st DCA 1991))); Cone v. Culverhouse, 687 So. 2d 888, 893 (Fla. 2d DCA 1997) (recognizing

[7] see Marlin v. State Farm Auto. Ins. Co., 761 So. 2d 380, 381(Fla. 4th DCA 2000) (holding that where the insurer retains an attorney to represent the insured pursuant to an insurance policy, the attorney "acts in the capacity of an independent contractor" for the insured)

"that 'common interest' can exist, even if some conflict is present or stands between the clients").

Indeed, notwithstanding Mr. Maher's February 23, 2105 bad faith letter to USAA, at all times relevant, the interests of both USAA and Brennan were common and aligned in defending against Claimant's Case. Thus, the confidential communications between USAA and Wadsworth remain protected by the attorney-client privilege from discovery by Herssein. See Progressive Express Ins. Co. v. Scoma, 975 So. 2d 461, 467 (Fla. 2d DCA 2007) ("[T]he confidential communications between the insured, the insurer, and any counsel representing them regarding the matter of common interest are protected by the attorney-client privilege from discovery by third parties.").

We, therefore, grant Wadsworth's petition, and quash the trial court's May 30, 2017 order.

## CONCLUSION

In sum, USAA's communications with both of its own lawyers, and with Wadsworth, the lawyer USAA hired to represent Brennan, are protected by the attorney-client privilege, and, given this case's unique situation, the "malpractice exception" is inapplicable to those communications.

We grant both petitions, quash the challenged orders, and dismiss as moot, Wadsworth's appeal.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

DECEMBER 13, 2017

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.,
Appellant(s)/Petitioner(s),
vs.
LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., etc., et al.,
Appellee(s)/Respondent(s),

CASE NO.: 3D**17-1457**, 3D**17-1500**, 3D**17-1527**

L.T. NO.: 15-15825

Upon consideration of petitioner United Services Automobile Association's July 26, 2017 motion for appellate fees pursuant to proposals for settlement, it is ordered that said motion is conditionally granted and remanded to the trial court to fix amount.

Respondent Herssein Law Group's July 11, 2017 and July 24, 2017 motions for attorney's fees pursuant to proposal for settlement are hereby denied.

Respondents' August 3, 2017, August 16, 2017 and October 20, 2017 motions for sanctions are hereby denied.

Petitioner Wadsworth Huott, LLP's July 27, 2017 motion to strike respondent's reply in support of Herssein Law Group's motion for attorney's fees pursuant to proposal for settlement is hereby denied as moot.

SUAREZ, LAGOA and SCALES, JJ., concur.

cc: Frank A. Zacherl
Christopher W. Wadsworth
Katya M. Rehders
Miami-Dade Clerk
Charles M-P George
Suzanne Y. Labrit
Reuven T. Herssein
Maury L. Udell
Patrick G. Brugger
Hon. Beatrice Butchko

ns