

1993

## Julia Lee Askew v. Paul Hardman : Amicus Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary A. Dodge; Mark F. James; Kimball, Parr, Waddoups, Brown & Gee; Attorneys for Appellant.  
Ford G. Scalley; Steven B. Smith; Scalley & Reading; Attorneys for Appellee.

---

### Recommended Citation

Legal Brief, *Askew v. Hardman*, No. 930537 (Utah Court of Appeals, 1993).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/5465](https://digitalcommons.law.byu.edu/byu_ca1/5465)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH

(  
K. F. U

50

.A10

DOCKET NO. 930537 CA

---

**IN THE UTAH COURT OF APPEALS**

---

JULIA LEE ASKEW,	)	
	)	AMERICAN INSURANCE ASSOCIATION'S
Plaintiff and Appellant	)	AMICUS CURIAE BRIEF IN SUPPORT
	)	OF APPELLEE'S PETITION FOR
vs.	)	REHEARING
	)	
PAUL HARDMAN,	)	Appeals No.: 930537-CA
	)	
Defendant and Appellee.	)	

---

**AMERICAN INSURANCE ASSOCIATION'S AMICUS BRIEF  
IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING**

---

**Appeal From The Decision Of The Honorable Lynn W. Davis Of  
The Fourth Judicial District Court Of Utah County, State Of Utah**

---

Gary A. Dodge  
Mark F. James  
KIMBALL, PARR, WADDOUPS,  
BROWN & GEE  
185 South State Street  
Salt Lake City, Utah 84147

Attorneys for Plaintiff/Appellant  
Julia Hardman

Ford G. Scalley  
Steven B. Smith  
SCALLEY & READING  
261 East 300 South  
Suite 200  
Salt Lake City, Utah 84111

Attorneys for Amicus Curiae  
American Insurance Assoc.

**FILED**  
Utah Court of Appeals

**OCT 25 1994**

**Marilyn M. Brann**

JULIA LEE ASKEW,	)	AMERICAN INSURANCE ASSOCIATION'S
	)	AMICUS CURIAE BRIEF IN SUPPORT
Plaintiff and Appellant	)	OF APPELLEE'S PETITION FOR
	)	REHEARING
vs.	)	
	)	Appeals No.: 930537-CA
PAUL HARDMAN,	)	
	)	
Defendant and Appellee.	)	

**Appeal From The Decision Of The Honorable Lynn W. Davis Of  
The Fourth Judicial District Court Of Utah County, State Of Utah**

Attorneys for Amicus Curiae  
American Insurance Assoc.

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
ARGUMENT . . . . .	2
I. THE <u>ASKEW</u> OPINION FAILS TO RECOGNIZE THE UNIQUE ROLE OF INSURANCE COMPANIES AS FIDUCIARY REPRESENTATIVES OF THEIR INSURED'S INTERESTS IN THIRD PARTY CLAIMS . . . . .	2
II. THE <u>ASKEW</u> OPINION FAILED TO RECOGNIZE THE WIDE RANGE OF DOCUMENTS AND INFORMATION CONTAINED IN AN INSURANCE COMPANY'S FILES ON CLAIMS AND LOSSES . . . . .	4
III. IF INSURANCE COMPANY INVESTIGATIONS OF THIRD PARTY CLAIMS ARE NOT PROTECTED BY THE WORK PRODUCT DOCTRINE, THIS COURT MUST SET FORTH THE FACTORS AND STANDARDS TRIAL COURTS SHOULD USE TO DETERMINE WHAT MATERIALS ARE PREPARED IN ANTICIPATION OF LITIGATION. . . . .	6
CONCLUSION . . . . .	9
CERTIFICATE OF MAILING . . . . .	10

## **TABLE OF AUTHORITIES**

### **CASES:**

### **Page**

<u>Beck v. Farmers Ins. Exchange</u> , 701 P.2d 795 (Utah 1985). . .	2
<u>Brown v. Sup. Ct. of Maricopa Cnty.</u> , 670 P.2d 725, (Ariz. 1983) . . . . .	8
<u>Gold Standard, Inc. v. American Barrick Resources Corp.</u> , 805 P.2d 164 (Utah 1990) . . . . .	3, 4, 6, 8
<u>Heidebrink v. Moriwaki</u> , 706 P.2d 212 (Wash. 1985). . . . .	7
<u>Thomas Organ Co. v. Jadranska Slobodna Plovidba</u> , 54 F.R.D. 367 (N.D. Ill. 1972) . . . . .	2, 3, 4

### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:**

Utah R. Civ. P., 26(b)(3). . . . .	5
------------------------------------	---

---

**IN THE UTAH COURT OF APPEALS**

---

JULIA LEE ASKEW,	)	AMERICAN INSURANCE ASSOCIATION'S
	)	AMICUS CURIAE BRIEF IN SUPPORT
Plaintiff and Appellant	)	OF APPELLEE'S PETITION FOR
	)	REHEARING
vs.	)	
	)	Appeals No.: 930537-CA
PAUL HARDMAN,	)	
	)	
Defendant and Appellee.	)	

---

**AMERICAN INSURANCE ASSOCIATION'S AMICUS BRIEF  
IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING**

---

Amicus Curiae, American Insurance Association, by and through counsel, hereby submits this Brief in Support of Appellee's Petition for Rehearing and request that the decision of this Court be modified to: recognize the special relationship that exists between an insurer and its insured for third party claims; comport with prior case law; and articulate the factors to be considered in determining what documents and tangible things are protected from discovery by the "work product" doctrine.

When dealing with the files of an insurance adjuster the line between "ordinary course of business" and "prepared in anticipation of litigation" is often blurred. This Court's decision in Askew v. Hardman, appears to draw that line without even reviewing a single document in the adjustor's claim file, simply because the trial court erred. The remedy for error by the trial court should be to correct the error not to compound it by requiring disclosure of documents which may even include confidential attorney client information.

## **ARGUMENT**

### **I**

#### **THE ASKEW OPINION FAILS TO RECOGNIZE THE UNIQUE ROLE OF INSURANCE COMPANIES AS FIDUCIARY REPRESENTATIVES OF THEIR INSURED'S INTERESTS IN THIRD PARTY CLAIMS**

Insurance companies occupy a special niche in society. They enter into insurance contracts with individuals, businesses and corporations and, for a fee, agree to indemnify and defend their insureds under certain circumstances. Insurers have legal and contractual obligations to protect their insureds' interests. Those obligations require insurers to investigate losses and potential claims and resolve them.

Insurance companies are generally faced with two types of claims. One is a loss to an insured (first party claims) and the other arises when an insured may be liable for a loss to a third party (third party claims). The Utah Supreme Court has recognized the different obligations imposed upon insurance companies in first party and third party claims. See Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985). In either situation the insurance company owes its allegiance to the insured.

The insurance company's obligation to its insured makes it essential that the differences between the cases relied upon by this court as the basis for its opinion in this case be recognized and distinguished. Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972) began as a first party claim. Fireman's Fund insurance investigated the loss as a first party claim to determine if its insured was entitled to compensation under the

policy. That investigation led to the filing of a claim for subrogation against a party allegedly responsible for the loss.

That scenario is far different from an investigation conducted by an insurance company who has learned that one of its insureds may be liable for a loss to another. For the instant case to be analogous to Thomas Organ Paul Hardman would have had to make a claim on his insurance company for the damage done to his fence. The insurance company would have had to investigate the claim, compensate him for the damage and pursue its subrogation interests against the individual who damaged the property. In the instant case, however, the only reason Utah Farm Bureau's Adjustor Harmon investigated this accident was because of its insured's possible liability for Plaintiff's injuries.

This case is also quite different from Gold Standard, Inc. v. American Barrick Resources Corp., 805 P.2d 164 (Utah 1990). The materials involved in the Gold Standard cases were generated by Gold Standard itself in its ordinary course of business. The material was not compiled or generated by an independent entity with fiduciary obligations to protect Gold Standard. For the instant case to be analogous to the Gold Standard cases, Defendant himself, in his ordinary course of business or everyday activities, would have had to generate the documents and materials in question.

Third party claims deal with liability. Insurance coverage of those claims deals exclusively with liability, the lack thereof and, if necessary, the third party's damages. Such insurance in essence is litigation insurance. The responsibility to provide a defense for



and indemnify an insured causes steps taken to fulfill that responsibility are all in anticipation of litigation. While such work may be in the ordinary course of the insurance company's business, the preparation and compilation of pleadings, memoranda, notes and other information related to lawsuits is in the ordinary course of a law firm's business. Nevertheless, when that information deals with representation of a client it is protected. Likewise, the compilation of information during an insurance company's representation of its insured should be protected.

It would be prejudicial and illogical to rely on Thomas Organ and Gold Standard to create a rule of law making an insurance company's investigation file of a **third party claim** against its insured discoverable. Such a rule of law ignores the fiduciary relationship that exists between an insurance company and its insured. Such a rule of law would also ignore the nature of much of the information contained in an insurance company's file regarding a loss.

## II

### THE ASKEW OPINION FAILED TO RECOGNIZE THE WIDE RANGE OF DOCUMENTS AND INFORMATION CONTAINED IN AN INSURANCE COMPANY'S FILES ON CLAIMS AND LOSSES

Most insurance claims files will contain many factual observations. Those factual observations may include photographs, diagrams, recorded statements, statement summaries, as well as names, addresses and telephone numbers of individuals with information regarding an occurrence. A party can and should be able to obtain most if not all that information when that party can show "a substantial need of the materials in the preparation of his case and

he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Utah R. Civ. P., 26(b)(3). One purpose of this rule is to preserve the adversarial process and not force a prepared party to do the work for an unprepared party without substantial justification. This rule also creates an incentive for candid discussions, complete investigation and accurate reporting of the facts. Permitting unabashed discovery of insurance company files would create a disincentive for full investigations, probing inquiries and accurate recitation of the facts and circumstances surrounding an incident. The chilling effect on such investigations would detrimentally impact the insurer, the insured, the aggrieved party, and the legal system. Instead of a quick, reasonable assessment of liability and damages, an injured party would end up with a heavier burden to investigate and develop the facts sufficient to establish liability. Fewer cases would be resolved prior to the commencement of litigation, and the costs to insurance companies and insureds would increase.

Furthermore, in addition to the factual investigation conducted by an adjuster, insurance company claims files also contain information regarding assessments of liability, assessments of insurance coverage, assessments of possible exclusions from insurance coverage and assessments of potential damages. Such information, if released to a third party, or sometimes to an insured, could constitute a breach of an insurance company's obligation to its insured or give rise to a dispute between the insurer and its insured. Such information is irrelevant to the litigation of a claim

on its merits and would severely prejudice the generator of that information.

This court's decision in the case of Askew v. Hardman, if left intact, will create a plethora of problems for the trial courts, the appellate courts, the insurance industry, the plaintiff's bar and the citizens of this state. It should be modified to protect insurance companies investigative files of third party claims unless substantial need and or undue hardship can be shown.

### III

IF INSURANCE COMPANY INVESTIGATIONS OF THIRD  
PARTY CLAIMS ARE NOT PROTECTED BY THE WORK PRODUCT  
DOCTRINE, THIS COURT MUST SET FORTH THE FACTORS AND  
STANDARDS TRIAL COURTS SHOULD USE TO DETERMINE WHAT  
MATERIALS ARE PREPARED IN ANTICIPATION OF LITIGATION

The law is well settled in Utah that for materials to be protected from discovery by the "work product privilege" they must meet the following three criteria: "(1) the material must be documents and tangible things otherwise discoverable; (2) prepared in anticipation of litigation or for trial; [and] (3) by or for another party or by or for that party's representative." Opinion at p. 3; citing Gold Standard, 805 P.2d at 168. In the instant case this Court overruled the trial court's determination that the material in question was not prepared in anticipation of litigation. Op. at p. 7.

This case was remanded for a new trial with the direction that "**adjustor Harmon's report** is [] not entitled to work product protection and the trial court [should] compel its production." Id. (emphasis added). The opinion in this case also held that "[t]he

trial court erred in holding that adjustor Harmon's **investigative file** was prepared in anticipation of litigation..." Op. at p. 9 (emphasis added). There was no explanation of what documents or materials were included in "adjuster Harmon's report" or whether that report was the same as, or only a part of, the "investigation file." There was no direction to the trial court to review the material in question and determine if it was prepared in anticipation of litigation. The trial court's factual determination was overturned without providing the trial court with a description of the documents to be produced or an articulation of the factors that should be utilized to determine which, if **ANY**, of the materials in Farm Bureau's file may have been prepared in anticipation of litigation.

Without additional guidance, the issue of what is prepared in anticipation of litigation and thus protected from discovery by the work product doctrine will likely be re-visited in this and hundreds of other cases. Trial courts will lack standards to apply and likely render inconsistent and widely varying opinions.

The Washington Supreme Court recognized and addressed this problem in Heidebrink v. Moriwaki, 706 P.2d 212 (Wash. 1985). In that decision the court wrote:

[t]he requirement of having an attorney involved in the case before documents prepared by an insurance carrier are protected is a rather conclusory determination of the issue and is contrary to the plain language of the rule. On the other hand, broad protection for all investigations conducted by an insurer...is likewise an unsatisfactory answer to the problem....We believe the better approach to the problem is to look to the specific parties involved and the expectations of those parties.

Id. at 216.

The Supreme Court of Arizona has also recognized the difficulty trial courts experience in determining what materials are subject to the protections of the work-product privilege. It held "no single test should or could be imposed to determine whether material was 'prepared' in anticipation of litigation." In considering the issue, the court should consider [several factors]..." Brown v. Sup. Ct. of Maricopa Cnty., 670 P.2d 725, 733 (Ariz. 1983).

The factors enumerated by the Arizona court include: (1) the nature of the event that prompted the preparation of the materials and whether the event is likely to lead to litigation; (2) whether the requested materials contain legal analyses and opinions or purely factual contents; (3) whether the material was prepared by the party itself or by its representatives; (4) whether the materials are routinely prepared and, if so, the purposes that were served by that routine preparation; and (5) when the materials were prepared. Id. citation omitted.

The Askew opinion states that "attorney involvement in the preparation of accident investigation documents is only one factor to be considered in determining whether documents [are] entitled to work-product protection." Op. at p. 5; citing Gold Standard. The test espoused in Gold Standard of whether "the primary purpose behind the creation of the document is [] to assist in pending or impending litigation..." was cited with approval but not otherwise addressed or expounded upon. The string citations to cases from other jurisdictions do nothing to inform, but do much to confuse the standards that apply to discovery and work product issues in Utah.

If left unmodified the overly broad and ambiguous rulings that "[a]djustor Harmon's report" (Op. at p. 9) and "Adjustor Harmon's investigative file" (Op. at p. 9) are/is not entitled to protection from discovery by the work product doctrine, will open the flood gates of appeals based on trial court rulings compelling and refusing to compel the production of documents.

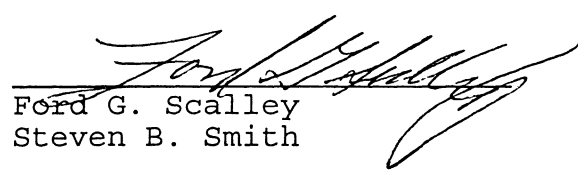
To avoid such an outcome this case should be revisited and modified to set forth the standards which apply to determine when the work product privilege attaches to documents and tangible things.

#### CONCLUSION

For the reasons set forth above AIA respectfully requests that Appellee's Petition for Reconsideration be granted and the decision modified.

DATED THIS ~~25th~~ day of October, 1994.

SCALLEY & READING  
Attorneys for Amicus,  
American Insurance Association

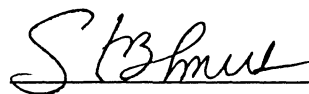
  
\_\_\_\_\_  
Ford G. Scalley  
Steven B. Smith

CERTIFICATION OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of October 1994, two true and correct copies of American Insurance Association's Brief in Support of Appellee's Petition for Rehearing were deposited the U.S. Mail, postage prepaid, addressed to the following:

Gary A. Dodge  
Mark F. James  
KIMBALL, PARR WADDOUPS, BROWN & GEE  
185 South State Street Suite 1300  
Salt Lake City, Utah 84147

Stephen G. Morgan  
Mitchel T. Rice  
MORGAN & HANSEN  
136 South Main Street, Suite 800  
Salt Lake City, Utah 84101

\_\_\_\_\_