IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

No. 31392

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL.
ALLSTATE INSURANCE COMPANY,
Petitioner,**

V.

**THE HONORABLE JOHN T. MADDEN,
JUDGE OF THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA,
Respondent.**

PETITION FOR WRIT OF PROHIBITION

WRIT GRANTED AS MOULDED

Submitted: February 24, 2004
Filed: May 18, 2004

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JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE STARCHER, deeming himself disqualified, did not participate in the decision of this case.

JUDGE WALKER, sitting by temporary assignment.

CHIEF JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.

JUSTICE MCGRAW and JUSTICE ALBRIGHT dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate." Syllabus point 3, *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995).

2. "In clear language, Rule 26 of the West Virginia Rules of Civil Procedure provides that privileged matters, although relevant, are not discoverable. As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence. In determining what privileges or protections are applicable, we are obligated to look both at the rules themselves and to our statutory and common law." Syllabus point 12, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

3. "'In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential.' Syllabus Point 2, *State v. Burton*, 163 W. Va. 40, 254

S.E.2d 129 (1979)." Syllabus point 7, *United States Fidelity & Guaranty Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995).

4. "Where the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company's attorney-client privilege concerning the underinsurance claim." Syllabus point 7, *State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480 (2003).

5. "'To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation.' Syllabus Point 7, *State ex rel. United Hosp. [Ctr., Inc.] v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997)." Syllabus point 9, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

6. Where the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically preclude the insurance company from raising the

work product doctrine as a defense to discovery concerning the underinsurance claim.

7. To establish the application of the crime-fraud exception, a party must demonstrate an adequate factual basis exists to support a reasonable person's good faith belief that an *in camera* review of the privileged materials would produce evidence to render the exception applicable. In making this *prima facie* showing, the party must rely on nonprivileged evidence, unless the court has not previously made a preliminary determination on the matter of privilege, in which case the allegedly privileged materials may also be considered. Discretion as to whether to conduct an *in camera* review of the privileged materials rests with the court. If, however, the *prima facie* evidence is sufficient to establish the existence of a crime or fraud so as to render the exception operable, the court need not conduct an *in camera* review of the otherwise privileged materials before finding the exception to apply and requiring disclosure of the previously protected materials. The crime-fraud exception operates to compel disclosure of otherwise privileged materials only when the evidence establishes that the client intended to perpetrate a crime or fraud and that the confidential communications between the attorney and client were made in furtherance of such crime or fraud.

8. To the extent the attorney-client privilege and the work product doctrine operate to protect communications between a client and his or her counsel in a first-party bad faith action, the crime-fraud exception also operates to require disclosure

of such communications made in furtherance of a crime or fraud.

9. "The burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it." Syllabus point 4, *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995).

10. "In an action for bad faith against an insurer, the general procedure involved with discovery of documents contained in an insurer's litigation or claim file is as follows: (1) The party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) If the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) The privilege log should be provided to the requesting party and the trial court; and (4) If the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery." Syllabus point 2, *State ex rel. Westfield Insurance Co. v. Madden*, ___ W. Va. ___, ___ S.E.2d ___ (No. 31579 Feb. 27, 2004).

11. In an action for bad faith against an insurer, the general procedure to be followed to depose attorneys employed by the insurer is as follows: (1) The party desiring to take the deposition(s) must do so in accordance with the mandates of Rule 30 of the West Virginia Rules of Civil Procedure; (2) If the responding party asserts a privilege to any of the questions posed, the responding party must object to such questioning in accordance with the directives of Rule 30(d)(1); and (3) If the party seeking testimony for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an *in camera* proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

Davis, Justice:

The petitioner herein, Allstate Insurance Company [hereinafter referred to as "Allstate"], requests this Court to issue a writ of prohibition to prevent the respondent herein, the Honorable John T. Madden, Judge of the Circuit Court of Marshall County [hereinafter referred to as "Judge Madden"], from enforcing certain orders requiring Allstate to submit to discovery requests made by the plaintiff below, Cindy Jo Falls [hereinafter referred to as "Ms. Falls"].[1] Specifically, Allstate objects to the circuit court's rulings requiring it to produce documents and submit to depositions regarding matters which Allstate claims are protected by the attorney-client privilege and the work product doctrine. In rendering his rulings, below, Judge Madden found that the aforementioned privileges were inapplicable in the context of a first-party bad faith action and, even if the privileges applied, Allstate had not met its burden of proof to establish entitlement to the protections afforded by the privileges. Upon a review of the parties' arguments and the pertinent authorities, we grant as moulded the requested writ of prohibition.

[1]We also recognize, and appreciate, the participation of the various Amici Curiae in this case: the Association of Trial Lawyers of America, State Farm Mutual Automobile Insurance Company, United Policyholders, and the West Virginia Trial Lawyers Association.

I.

FACTUAL AND PROCEDURAL HISTORY

The instant proceeding has its origins in the Circuit Court of Monongalia County, when, in 1990, Ms. Falls filed a civil action seeking to recoup damages she had incurred during a 1989 automobile accident. At that time, Ms. Falls had a policy of motor vehicle insurance with Allstate and, during the course of said litigation, Allstate paid Ms. Falls $100,000, which represented the liability limits of the other driver's insurance policy, and an additional $100,000, an amount equal to the limits of her underinsured motorists coverage under her Allstate policy. When Ms. Falls attempted to stack coverages under her Allstate policy, the parties' failure to resolve the claim resulted in its submission to arbitration. As a result of such arbitration, Allstate paid Ms. Falls an additional $429,143.90, plus pre-judgment interest in the amount of $64,205.12. Following these proceedings, the Circuit Court of Monongalia County dismissed Ms. Falls' case with prejudice by order entered September 24, 1999.

Thereafter, on September 25, 2000, Ms. Falls instituted the bad faith action underlying the instant proceeding. In that suit, Ms. Falls alleged that Allstate, and its casualty claim manager, Larry Poynter, had violated W. Va. Code § 33-11-4(9) (1985) (Repl. Vol. 2000)[2] of the West Virginia Unfair Trade Practices Act. In the course of such

[2]W. Va. Code § 33-11-4(9) (1985) (Repl. Vol. 2000) sets forth the prohibited (continued...)

litigation, Ms. Falls sought various documents that had been authored by Allstate's in-house and defense counsel. Allstate objected to the disclosure of these documents claiming that they were protected by the attorney-client privilege and the work product doctrine. By order entered November 14, 2001, Judge Madden determined that the requested documents were not so protected because the attorney-client privilege and the work product doctrine do not protect an insurer's files and personnel in a first-party bad faith action. In the alternative, the court found that Allstate had not provided evidence sufficient to establish the protections' applicability. As a result of this ruling, the circuit court required Allstate to tender the requested documents to Ms. Falls. Allstate sough a writ of prohibition to prevent Judge Madden from enforcing this order, but the writ was refused.

After the disclosure of these documents, Ms. Falls sought to depose the attorney authors of said documents, to which Allstate objected based upon the fact that those counsel had not participated in Ms. Falls' claim for underinsured motorist benefits. Allstate then moved for a protective order to preclude the depositions of these individuals, which motion was denied by order entered April 15, 2003. In so ruling, the circuit court

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[2](...continued)
conduct that constitutes "[u]nfair claim settlement practices". Although this statute has been modified since the initiation of the bad faith litigation underlying the present proceeding, such amendments do not affect our decision of this case. *Compare* W. Va. Code § 33-11-4(9) (2002) (Repl. Vol. 2003) *with* W. Va. Code § 33-11-4(9) (1985) (Repl. Vol. 2000).

determined that the communications would not be privileged insofar as they concerned matters of fact rather than opinion.

Following these adverse rulings of the circuit court, Allstate petitioned this Court for a writ of prohibition to prevent Judge Madden from enforcing his orders requiring Allstate to tender the allegedly privileged documents and permitting Ms. Falls to depose the authors thereof. By order entered June 17, 2003, we directed the circuit court to "conduct[] such proceedings and analysis as set forth in this Court's opinion in *SER Medical Assurance of West Virginia, Inc. v. Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County*, No. 30840 (April 30, 2003)." Upon the conclusion of these proceedings, Judge Madden, by order entered September 8, 2003, concluded that "Allstate is not able to demonstrate to this Court that the elements establishing the attorney-client privilege or work product exception have been established." Having not been mooted by Judge Madden's final consideration of the matter, we proceed to consider Allstate's request for prohibitory relief.

II.

STANDARD FOR ISSUANCE OF WRIT

The question presented by this petition is whether Allstate is entitled to the writ of prohibition it requests. When determining whether a writ of prohibition should issue, we consider the following factors:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). *Accord* Syl. pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).

Of particular relevance to cases concerning discovery matters, such as the case presently before us, we additionally have held that

> "'[a] writ of prohibition is available to correct a clear

> legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.' Syllabus Point 1, *State Farm Mutual Automobile Insurance Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)." Syllabus Point 3, *State ex rel. McCormick v. Zakaib*, 189 W. Va. 258, 430 S.E.2d 316 (1993).

Syl. pt. 2, *State ex rel. United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995). Thus, where, as here, the party seeking the issuance of a prohibitory writ complains that the circuit court's ruling will require the disclosure of allegedly privileged materials, it is proper for this Court to entertain the petition. "When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate." Syl. pt. 3, *U.S.F.&G.*, 194 W. Va. 431, 460 S.E.2d 677. Mindful of these standards, we proceed to consider the parties' arguments.

III.

DISCUSSION

The sole issue presented in this case for resolution by the Court is whether, or to what degree are, documents protected from disclosure and individuals insulated from providing testimony when a party in a first-party bad faith action asserts that the documents and/or individuals are protected from discovery by the attorney-client privilege and/or the work product doctrine. In short, the circuit court found the attorney-client

privilege and the work product doctrine to be inapplicable to first-party bad faith cases and, even if they did apply, Allstate had failed to establish the requisite elements for either protection. Before this Court, Allstate argues that the circuit court erred by finding the privileges to be inapplicable. Ms. Falls contends that the circuit court correctly ruled and that if the privileges are found to apply, the crime-fraud exception operates to compel disclosure of the requested communications. Prior to addressing the specific queries presented in this case, however, we find it instructive to review our prior cases discussing the requisite components of the asserted privileges and the exceptions applicable thereto.

A. Attorney-Client Privilege

Generally speaking, the discovery process allows litigants to obtain materials that are critical to the proof of their case. As such, materials that are relevant and probative to the asserted claim, or any defenses thereto, usually are discoverable.

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

W. Va. R. Civ. P. 26(b)(1). Material can be excluded from discovery, however, where the discovery request is unduly burdensome.

> "Where a claim is made that a discovery request is unduly burdensome under Rule 26(b)(1)(iii) of the West Virginia Rules of Civil Procedure, the trial court should consider several factors. First, a court should weigh the requesting party's need to obtain the information against the burden that producing the information places on the opposing party. This requires an analysis of the issues in the case, the amount in controversy, and the resources of the parties. Secondly, the opposing party has the obligation to show why the discovery is burdensome unless, in light of the issues, the discovery request is oppressive on its face. Finally, the court must consider the relevancy and materiality of the information sought." Syl. pt. 3, *State Farm Mutual Automobile Insurance Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).

Syl. pt. 5, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998). Additionally, in order to protect the sanctity of certain relationships, precise exceptions have been established to limit or prohibit access to evidence generated in the course of said communications. To this end, we have held that

> [i]n clear language, Rule 26 of the West Virginia Rules of Civil Procedure provides that privileged matters, although relevant, are not discoverable. As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence. In determining what privileges or protections are applicable, we are obligated to look both at the rules themselves and to our statutory and common law.

Syl. pt. 12, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). One of the special relationships to which these privileges apply, which is at issue in the case *sub judice*, is the attorney-client relationship.[3]

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[3]Other types of relationship-based privileges protecting confidential (continued...)

The attorney-client privilege was developed as a means of protecting the confidential relationship shared between a client and his/her counsel. "Originating at common law, the attorney-client privilege 'has as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.'" *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 326, 484 S.E.2d 199, 209 (1997) (quoting Syl. pt. 11, in part, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988)) (additional citation omitted). To shield evidence from disclosure based upon this privilege, certain enumerated criteria must be satisfied.

> "In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential." Syllabus Point 2, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979).

Syl. pt. 7, *United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677. However, "[a] party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue." Syl. pt. 8, *United States Fid. &*

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[3](...continued)
communications include the spousal privilege and the priest-penitent privilege. *See, e.g.*, W. Va. Code § 57-3-4 (1923) (Repl. Vol. 1997) (deeming confidential communications between husband and wife); W. Va. Code § 57-3-9 (2001) (Supp. 2003) (protecting communications with religious counselors in their professional capacity); *State v. Bohon*, 211 W. Va. 277, 565 S.E.2d 399 (2002) (discussing "marital confidence privilege"); *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996) (considering "clergy-communicant privilege").

Guar. Co. v. Canady, 194 W. Va. 431, 460 S.E.2d 677.

Although the attorney-client privilege historically belongs to the client, *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W. Va. at 372 n.21, 508 S.E.2d at 89 n.21, the dynamics of the attorney-client relationship in suits alleging bad faith[4] has prompted the recognition of situations in which the insurer may nevertheless assert entitlement to the privilege despite the fact that it provided counsel for its insured in the underlying coverage litigation. With specific regard to first-party bad faith actions[5] resulting from the insurer's denial of coverage,[6] such as the case *sub judice*, we have held

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[4]In *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998), we differentiated between "first-party" and "third-party" bad faith actions.

> [A] first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. A third-party bad faith action is one that is brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor. In the bad faith action against the insurance company the third-party alleges the insurer insurance company engaged in bad faith settlement in the first action against the insured tortfeasor.

Id., 203 W. Va. at 369-70, 508 S.E.2d at 86-87 (footnotes and citation omitted).

[5]For a discussion of the availability and application of the attorney-client privilege in third-party bad faith cases, see Syl. pts. 7-10, *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75.

[6]In the concurrence to *Brison*, a distinction was made between first-party bad faith actions arising from claims of loss versus those resulting from excess judgments having been entered against the insured. *See State ex rel. Brison v. Kaufman*, 213 W. Va. (continued...)

> [w]here the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company's attorney-client privilege concerning the underinsurance claim.

Syl. pt. 7, *State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480 (2003). *Cf. Medical Assurance*, 213 W. Va. at 470 & n.12, 583 S.E.2d at 93 & n.12 (discussing attorney-client privilege of insured in first-party bad faith action (citation omitted)). Thus, while the insured may effectuate a waiver of the privilege in the bad faith action by placing into issue the advice of his or her insurer-provided counsel in the underlying coverage litigation, *see* Syl. pt. 8, *United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677, the insurer may nevertheless rely upon the privilege to shield evidence from disclosure if it can establish the satisfaction of the privilege's requisite elements, *see* Syl. pt. 7, *id.* In the case *sub judice*, to the extent the trial judge found that the bringing of a first-party bad faith action automatically results in a waiver of the attorney-client privilege, that ruling was error.

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[6](...continued)
624, 634-36, 584 S.E.2d 480, 490-92 (2003) (Davis, J., concurring). Because the instant proceeding involves the aforementioned "loss claim" type of first-party bad faith action, and because that was the type of litigation upon which the holdings of *Brison* were based, we do not herein address the availability of the attorney-client privilege in "excess judgment" first-party bad faith cases.

B. Work Product Doctrine

If the materials sought to be protected from disclosure do not satisfy the criteria necessary for the assertion of the attorney-client privilege, they nonetheless may be insulated from discovery by resort to the work product doctrine. *See* W. Va. R. Civ. P. 26(b)(3); *Brison*, 213 W. Va. at 633, 584 S.E.2d at 489; *Medical Assurance*, 213 W. Va. at 466, 583 S.E.2d at 89; *U.S.F.&G.*, 194 W. Va. at 444, 460 S.E.2d at 690. This evidentiary rule protects from disclosure materials generated by an attorney in the course of, or in preparation for, litigation. "The work product doctrine in West Virginia, which historically protects against disclosure of the fruits of an attorney's labor, is necessary to prevent one attorney from invading the files of another attorney." *U.S.F.&G.*, 194 W. Va. at 444, 460 S.E.2d at 690. Rule 26(b)(3) of the West Virginia Rules of Civil Procedure defines the scope of this doctrine, in pertinent part,

> [s]ubject to the provisions of subdivision (b)(4)[7] of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) *only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* In ordering the discovery of such materials when the required showing has been made, *the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other*

[7]Rule 26(b)(4) of the West Virginia Rules of Civil Procedure addresses discovery of experts and trial preparation.

representative of a party concerning the litigation. . . .

(Footnote and emphasis added). We previously have interpreted this rule as meaning "'[t]he limitation in Rule 26(b)(3) of the West Virginia Rules of Civil Procedure is against obtaining documents and other tangible things used in trial preparation.' Syllabus Point 8, in part, *In re Markle*, 174 W. Va. 550, 328 S.E.2d 157 (1984)." Syl. pt. 8, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80. Therefore, insofar as materials are otherwise discoverable under Rule 26(b)(1), *i.e.*, not privileged, they still may be protected from discovery if they fall within the confines of the work product rule. *See Medical Assurance*, 213 W. Va. at 466-67, 583 S.E.2d at 89-90.

"'[T]he literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation.'" *U.S.F.&G.*, 194 W. Va. at 445, 460 S.E.2d at 691 (quoting *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 25, 103 S. Ct. 2209, 2213, 76 L. Ed. 2d 387, 393 (1983) (emphasis in original) (citation omitted)). Thus,

> "[t]o determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." Syllabus Point 7, *State ex rel. United Hosp. [Ctr., Inc.] v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997).

Syl. pt. 9, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80.

Unlike the attorney-client privilege, however, the protections afforded by the work product rule are provided solely for the attorney who authored the materials sought. *Gaughan*, 203 W. Va. at 375 n.33, 508 S.E.2d at 92 n.33 (citation omitted). In other words, "the attorney has the exclusive authority to invoke the work product rule." *Id.*

> Where the work product exception is asserted, a circuit court must consider that the protection stemming from this privilege belongs to the professional, rather than the client, and that efforts to obtain disclosure of opinion work product should be evaluated with particular care.

Syl. pt. 9, *United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677.

Less formally defined, however, is the availability of the work product doctrine in first-party bad faith cases.[8] In *Brison* and *Medical Assurance*, we acknowledged that the work product doctrine had application in those first-party actions. *Brison*, 213 W. Va. at 633, 584 S.E.2d at 489; *Medical Assurance*, 213 W. Va. at 467, 583 S.E.2d at 90. Furthermore, in the context of third-party bad faith cases, we recognized, in *Gaughan*, that the authority to invoke this doctrine rests "with the insurer." *Gaughan*, 203 W. Va. at 375 n.33, 508 S.E.2d at 92 n.33. Beyond these fleeting references, however, we have yet to establish definitive guidance as to the doctrine's availability in first-party cases.

[8]For a discussion of the availability and application of the work product doctrine in third-party bad faith cases, see Syl. pts. 11-13, *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75.

As was the case in *Brison*, the circuit court in the instant proceeding did not conduct a detailed examination to determine whether, in fact, the requirements of the work product doctrine had been satisfied. Rather, the circuit court's determination that the doctrine was inapplicable stemmed more from the fact that the proceeding was a first-party bad faith action to which, in the court's opinion, the work product doctrine did not apply. For the same reasons we clarified the availability of the attorney-client privilege in bad faith actions, we do likewise herein with respect to the work product doctrine. Accordingly, we hold that where the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically preclude the insurance company from raising the work product doctrine as a defense to discovery concerning the underinsurance claim.

That is not to say, however, that an insurer may automatically protect from discovery the entire contents of an insured's claim file, or even a portion thereof, by asserting the work product doctrine.

> The work product doctrine differs from attorney-client privilege in that work product protections are not absolute. "While the work product doctrine creates a form of qualified immunity from discovery, it does not label protected material as 'privileged' and thus outside the scope of discovery under Rule 26(b)(1), *W.V.R.C.P.*" *State ex rel. Chaparro v. Wilkes*, 190 W. Va. 395, 397, 438 S.E.2d 575, 577 (1993).

Medical Assurance, 213 W. Va. at 466-67, 583 S.E.2d at 89-90. Rather, the extent of the

doctrine's applicability in a given case will depend upon the satisfaction of the elements necessary to establish entitlement to its protections.[9]

C. Crime-Fraud Exception

Once the attorney-client privilege or the work product doctrine has been found to apply to insulate communications from discovery, the protections afforded thereby nevertheless may be overcome through application of the crime-fraud exception. In short, the crime-fraud exception operates to remove the privilege attaching to communications between a client and his or her counsel that were made in furtherance of a fraudulent or criminal scheme. *See generally United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989); *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 472, 583 S.E.2d 80, 95 (2003) (Davis, J., concurring). Although the exception historically applied only to obviate the attorney-client privilege, current jurisprudence has also found it to nullify the protections afforded by the work product doctrine. *See Medical Assurance*, 213 W. Va. at 472, 583 S.E.2d at 95 (Davis, J., concurring) ("'One of the more important exceptions to the attorney-client privilege is the

[9]The level of protection afforded by the work product doctrine in a given case also depends upon whether the work product at issue is based upon fact or opinion. *See* Syl. pt. 10, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003) ("'Rule 26(b)(3) of the West Virginia Rules of Civil Procedure makes a distinction between factual and opinion work product with regard to the level of necessity that has to be shown to obtain their discovery.' Syllabus Point 7, *In re Markle*, 174 W. Va. 550, 328 S.E.2d 157 (1984)."). As the differentiation between these two types of work product has not been placed in issue in this proceeding, we will not make such a distinction herein, but will reserve such a discussion for a more factually appropriate case.

"crime-fraud" exception.'" (quoting *Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567, 572 (W.D. Wash. 2003))).[10]

While the crime-fraud exception is widely recognized, much confusion has persisted as to its precise application. *See Medical Assurance*, 213 W. Va. at 474, 583 S.E.2d at 97 (Davis, J., concurring) (commenting on the lack of uniformity among courts that have addressed the application of the crime-fraud exception). Compounding this uncertainty are the recent decisions of this Court extending application of the attorney-client privilege and the work product doctrine to first- and third-party bad faith cases. *See, e.g.*, Syl. pt. 7, *State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480; Syl. pts. 7-10 & 11-13, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75. Given that this exception operates to overcome these privileges and to render discoverable evidence that would otherwise be protected from disclosure, it stands to reason that the crime-fraud exception will be asserted with increasingly more fervor in cases such as the one presently under consideration. *See Medical Assurance*, 213 W. Va. at 472, 583 S.E.2d at 95 (Davis, J., concurring) (surmising that "the crime-fraud exception will, in fact, be a recurring matter in insurance bad faith claims"). In an attempt to provide guidance as to the requisite elements and application of the crime-fraud exception in bad faith cases,

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[10]*See also Medical Assurance*, 213 W. Va. at 472 n.1, 583 S.E.2d at 95 n.1 (Davis, J., concurring) ("'The crime-fraud exception also applies to materials otherwise protected by the work product doctrine.'" (quoting *In re Grand Jury Investigation*, 437 Mass. 340, 357 n.28, 772 N.E.2d 9, 21 n.28 (2002)) (additional citations omitted)).

then, we undertake the following analysis.

The crime-fraud exception has long been recognized as a means to overcome the privilege ordinarily afforded to communications between a client and his or her counsel when such communications have been made in furtherance of the commission of a crime or fraud. "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 2626, 105 L. Ed. 2d 469, 485 (1989) (citations omitted). In the context of

> "the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud. The crime/fraud exception comes into play when a prospective client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage."

Medical Assurance, 213 W. Va. at 473, 583 S.E.2d at 96 (Davis, J., concurring) (quoting *Volcanic Gardens Mgmt. Co., Inc. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct. App. 1993)). *See also* Syl. pt. 2, *Thomas v. Jones*, 105 W. Va. 46, 141 S.E. 434 (1928) ("In order to admit in evidence confidential communications between attorney and client under the exception to the general rule that if such communications were made in order to perpetrate a fraud on justice they are not privileged, it must clearly appear that such communications

were made by the client with that intent and purpose.").

Moreover, for the exception to be operable, the fraud or crime contemplated need not have been actually committed; the mere intent to perpetrate the wrongdoing will suffice. In other words, "'[t]he client need not succeed in committing the intended crime or fraud in order to forfeit the attorney-client privilege. The dispositive question is whether the attorney-client communications are part of the client's effort to commit a crime or perpetrate a fraud.'" *Medical Assurance*, 213 W. Va. at 473, 583 S.E.2d at 96 (Davis, J., concurring) (quoting *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (Fla. Dist. Ct. App. 2001), *stay denied*, 832 So. 2d 768 (Fla. Dist. Ct. App.), *review denied*, 828 So. 2d 385 (Fla. 2002) (table decision)). Neither must the attorney be aware of his or her client's intention to commit a crime or fraud for the exception to be implicated. "The crime-fraud 'exception applies even if the attorney is unaware of the client's criminal or fraudulent intent, and applies of course where the attorney knows of the forbidden goal.'" *Medical Assurance*, 213 W. Va. at 473, 583 S.E.2d at 96 (Davis, J., concurring) (quoting *Ocean Spray Cranberries, Inc. v. Holt Cargo Sys., Inc.*, 345 N.J. Super. 515, 522, 785 A.2d 955, 959 (Law Div. 2000)) (additional citations omitted).

The elements of the crime-fraud exception, as recognized by the United States Supreme Court in the seminal case of *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989), require the party seeking to establish the exception

to demonstrate, "through nonprivileged evidence, '"a factual basis adequate to support a good faith belief by a reasonable person," that *in camera* review of the [privileged] materials may reveal evidence to establish the claim that the crime-fraud exception applies.'" *Medical Assurance*, 213 W. Va. at 475-76, 583 S.E.2d at 98-99 (Davis, J., concurring) (quoting *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631, 105 L. Ed. 2d at 490 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982))). In so doing, "the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review[.]" *Zolin*, 491 U.S. at 574, 109 S. Ct. at 2632, 105 L. Ed. 2d at 492. However, where a determination of privilege has not yet been made, the party seeking disclosure may also rely on the allegedly privileged materials to establish a *prima facie* showing that the crime-fraud exception applies to compel disclosure. *Id.*, 491 U.S. at 573-74, 109 S. Ct. at 2631-32, 105 L. Ed. 2d at 491-92.

Additionally, the decision as to whether an *in camera* review is warranted rests with the court. "'[O]n a showing of a factual basis adequate to support a reasonable belief that an *in camera* review of the evidence may establish that the exception applies, the judge has discretion to conduct such an *in camera* review.'" *Medical Assurance*, 213 W. Va. at 476 n.8, 583 S.E.2d at 99 n.8 (Davis, J., concurring) (quoting *Purcell v. District Attorney*, 424 Mass. 109, 113, 676 N.E.2d 436, 439 (1997)) (additional citation omitted). A "court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged,

and that production of the additional evidence will not unduly disrupt or delay the proceedings." *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631, 105 L. Ed. 2d at 491 (emphasis in original). Nevertheless, "[a]n *in camera* review is not necessary if a party's initial evidence is sufficient to establish the crime-fraud exception." *Medical Assurance*, 213 W. Va. at 476 n.7, 583 S.E.2d at 99 n.7 (Davis, J., concurring).

Once a determination has been made to conduct *in camera* proceedings, "the party opposing the privilege may prevail only where the evidence establishes 'that the client intended to perpetrate a [crime or] fraud.'" *Medical Assurance*, 213 W. Va. at 476-77, 583 S.E.2d at 99-100 (Davis, J., concurring) (quoting *Olson v. Accessory Controls & Equip. Corp.*, 254 Conn. 145, 174, 757 A.2d 14, 31 (2000)) (footnote omitted). The evidence proffered by the party seeking disclosure must also permit the court to "'find a valid relationship between the confidential communication that was made and the crime or fraud.'" *Medical Assurance*, 213 W. Va. at 477, 583 S.E.2d at 100 (Davis, J., concurring) (quoting 1 Franklin D. Cleckley, *Handbook on Evidence* § 5-4(E)(6)(a) (1994)) (footnote omitted).

To facilitate the application of this standard in future cases, we reiterate the tenets of *Zolin* set forth above and hold that to establish the application of the crime-fraud exception, a party must demonstrate an adequate factual basis exists to support a reasonable person's good faith belief that an *in camera* review of the privileged materials

would produce evidence to render the exception applicable. In making this *prima facie* showing, the party must rely on nonprivileged evidence, unless the court has not previously made a preliminary determination on the matter of privilege, in which case the allegedly privileged materials may also be considered. Discretion as to whether to conduct an *in camera* review of the privileged materials rests with the court. If, however, the *prima facie* evidence is sufficient to establish the existence of a crime or fraud so as to render the exception operable, the court need not conduct an *in camera* review of the otherwise privileged materials before finding the exception to apply and requiring disclosure of the previously protected materials. The crime-fraud exception operates to compel disclosure of otherwise privileged materials only when the evidence establishes that the client intended to perpetrate a crime or fraud and that the confidential communications between the attorney and client were made in furtherance of such crime or fraud.

Finally, as we have determined both the attorney-client privilege and the work product doctrine to apply in first-party bad faith actions, we likewise find the crime-fraud exception to be applicable. *See, e.g., Medical Assurance,* 213 W. Va. at 479, 583 S.E.2d at 102 (Davis, J., concurring) ("[A]n 'insurer's allegedly tortious conduct in asserting bad faith defenses against a claim for coverage constitute[s] "civil fraud," and . . . the attorney-client privilege [will] not protect communications between an attorney and her client relating to that fraud.'" (quoting *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d

188, 195 (Alaska 1989))). Accordingly, we hold that, to the extent the attorney-client privilege and the work product doctrine operate to protect communications between a client and his or her counsel in a first-party bad faith action, the crime-fraud exception also operates to require disclosure of such communications made in furtherance of a crime or fraud. It goes without saying, however, that where no attorney-client privilege or work product doctrine protections exist, the materials allegedly protected thereby are automatically subject to disclosure and the crime-fraud exception would have no application.

D. Decision

Applying the above-referenced principles of law and rendering our rulings in this case, we note that, due to the measure of protection ordinarily provided by the privileges claimed herein, we duly consider the propriety of the circuit court's order that required disclosure of the allegedly privileged documents and testimony. In this regard, we have held that "[u]nless obviously correct or unreviewably discretionary, rulings requiring attorneys to turn over documents that are presumably prepared for their clients' information and future action are presumptively erroneous." Syl. pt. 6, *State ex rel. United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677. Nevertheless, "[t]he burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it." Syl. pt. 4, *id.* That said, we turn to the resolution of the precise controversy before us.

Our recent decision in *State ex rel. Westfield Insurance Co. v. Madden*, ___ W. Va. ___, ___ S.E.2d ___ (No. 31579 Feb. 27, 2004), clarified the procedure to be followed in bad faith cases wherein the discovery of documents is sought and the party holding said documents asserts a privilege in response to the discovery request:

> In an action for bad faith against an insurer, the general procedure involved with discovery of documents contained in an insurer's litigation or claim file is as follows: (1) The party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) If the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) The privilege log should be provided to the requesting party and the trial court; and (4) If the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

Syl. pt. 2, *State ex rel. Westfield Ins. Co. v. Madden*, ___ W. Va. ___, ___ S.E.2d ___.

Inasmuch as the defenses to discovery disclosure of counsel's testimony are the same as those pertaining to the documents to which Allstate also maintains privileges and other protections apply, we find that the procedures to be followed vis-a-vis documents apply with equal force to requests for deposition testimony, with the necessary modifications to allow for the distinctions between documentary and testimonial

discovery. *See, e.g., Mordesovitch v. Westfield Ins. Co.*, 235 F. Supp. 2d 512, 516 (S.D.W. Va. 2002) (mem. op.); *Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990); *Ex parte Alfa Mut. Ins. Co.*, 631 So. 2d 858, 859-60 (Ala. 1993); *2,022 Ranch, L.L.C. v. Superior Court*, 7 Cal. Rptr. 3d 197, 212-13 & 215, 113 Cal. App. 4th 1377, 1397 & 1400 (2003); *Aetna Cas. & Sur. Co. v. Superior Court*, 200 Cal. Rptr. 471, 476, 153 Cal. App. 3d 467, 476 (1984). Accordingly, we hold that in an action for bad faith against an insurer, the general procedure to be followed to depose attorneys employed by the insurer is as follows: (1) The party desiring to take the deposition(s) must do so in accordance with the mandates of Rule 30 of the West Virginia Rules of Civil Procedure; (2) If the responding party asserts a privilege to any of the questions posed, the responding party must object to such questioning in accordance with the directives of Rule 30(d)(1); and (3) If the party seeking testimony for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an *in camera* proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

From our review of the proceedings below, it is apparent to this Court that, while an *in camera* review was ostensibly conducted, it was not the meaningful review contemplated by our recent holding in *Westfield*. Moreover, while Allstate purportedly tendered a privilege log to the lower court in an attempt to shield its documents from

disclosure, said log did not contain the requisite specificity delineated in *Westfield*. Neither did the circuit court or Allstate follow the procedures herein announced for the taking of depositions, the subjects of which are allegedly protected by the attorney-client privilege or the work product doctrine. Given the chronology of events, however, it is inconceivable that either the circuit court or Allstate could have anticipated or complied with the tenets we so recently have announced.

Accordingly, we grant as moulded the writ of prohibition requested by Allstate, and remand this case for further proceedings before the circuit court. During remand, the circuit court should afford Allstate an opportunity to submit an amended privilege log in conformity with our holding in *Westfield*. Additionally, the circuit court should apply the law announced herein to determine whether the documents and testimony Ms. Falls seeks from Allstate are protected from discovery by the attorney-client privilege or the work product doctrine or whether they are rendered discoverable due to the inapplicability of the aforementioned protections or the destruction of privileged status by the crime-fraud exception. In conducting *in camera* examinations of the purportedly privileged communications, the circuit court may conduct such inquiries itself or may, in the interests of judicial economy, appoint a special master for this purpose. *See State ex rel. Westfield Ins. Co. v. Madden*, ___ W. Va. at ___, ___ S.E.2d at ___, slip op. at 10 ("[S]hould the court deem it to be more expedient, the court may 'appoint[] a special master to review the withheld documents in camera and to determine whether they were

exempt from disclosure[.]'" (quoting *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 198 W. Va. 563, 566, 482 S.E.2d 180, 183 (1996))). Furthermore, to the extent that the circuit court determines the privileges claimed by Allstate to exist as to the documents it earlier disclosed, the court should enter an order precluding Ms. Falls from using such documents in any capacity during this litigation.

Lastly, we wish to caution litigants who raise claims of privilege in response to discovery requests to be scrupulous in their assertions insofar as false claims of privilege are sanctionable under Rule 37 of the West Virginia Rules of Civil Procedure. *See* W. Va. R. Civ. P. 37 (authorizing sanctions for "[f]ailure to cooperate in discovery"). That is not to say that we believe all claims of privilege are frivolous, nor should this opinion be construed as eroding any of the well-established privileges discussed herein. We simply urge parties to consider whether, in fact, the privileges asserted do in fact, or arguably may, shield their evidence from discovery rather than willy-nilly asserting colorable claims of privilege in response to discovery requests.

IV.

CONCLUSION

For the foregoing reasons, we grant as moulded the requested writ of prohibition.

Writ Granted as Moulded.