No. 31392 – *State of West Virginia ex rel. Allstate Insurance Company v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County, West Virginia*

**FILED**
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

I strongly dissent from both the result reached by the majority and the new points of law set forth in syllabus points seven and eight.[1] The writ of prohibition granted

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[1]In syllabus points seven and eight, the majority holds as follows:

> 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.
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> To the extent the attorney-client privilege and the work

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in this cause, coupled with those new syllabus points drawn in a virtual factual vacuum, constitute nothing more than an advisory opinion on the sensitive subject of the attorney-client privilege and its narrowly-tailored crime-fraud exception. Through its opinion, the majority seeks to guarantee that counsel for the plaintiff in substantially every bad-faith insurance action may embark on a fishing expedition during the discovery phase calculated to invade the oldest of all common-law privileges – the attorney-client privilege.[2] Moreover, although the trial court committed error in holding that the attorney-client privilege did not apply in first-party insurance bad-faith cases, that error was not prejudicial because the trial judge fully complied with our instructions to follow the tests previously discussed in *State ex rel. Medical Assurance v. Honorable Arthur M. Recht,* 213 W.Va. 457, 583 S.E.2d 80 (2003), for the purpose of identifying whether the attorney-client privilege applies. Upon application of those enunciated standards, the trial court determined that the disputed documents were subject to discovery, given the failure of the defendant to establish the necessary grounds for their exclusion.

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[1](...continued)
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.

[2]*See Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (stating that attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law").

Because the majority chose to address these issues involving the venerated attorney-client privilege upon a severely limited record given the matter's presentation on application for a writ of prohibition, I fully anticipate the result of this impolitic course of action will be protracted litigation for the purpose of testing the limits and probing the ambiguities which continue to surface due to the abstract and confusing rules that the majority sets forth to justify its invasion of the privilege. The majority unwisely and unnecessarily injects this Court into the thicket of unresolved questions that surrounds application of the crime-fraud exception. Critically, the new syllabus points, while clearly fashioned to echo the holdings in *United States v. Zolin*, 491 U.S. 554 (1989), fail to address the lingering unanswered issues involving *Zolin's* application that authorities have repeatedly identified. Furthermore, the majority wrongly attempts to announce new legal standards without having either a complete record or full briefing and argument on the issues – items which should always attend both our deliberations and our legal pronouncements on weighty issues such as those improvidently addressed by the majority.

**Interlocutory Nature of Proceeding**

As an initial matter, I object to the action of the majority because the challenged trial court ruling is contained in an interlocutory order issued in conjunction with the discovery stage of the proceeding below and also because of the extraordinary nature of the relief sought from this Court. *See State ex rel. Charles Town General Hosp. v. Sanders,*

210 W.Va. 118, 122-23, 556 S.E.2d 85, 89-90 (2001) (recognizing that "relief of this nature is reserved for rather extraordinary cases" and stating that "we employ a detailed analysis of various criteria" "when deciding whether prohibitory relief is appropriate"). While purportedly relying upon the exception we carved to this general rule of not reviewing discovery matters by means of a writ of prohibition, *State ex rel. USF&G Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995), the majority does not cite any evidence that the discovery rulings at issue made by Judge Madden "involve[d] the *probable* invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3)." *Id.* at 437, 460 S.E.2d at 683 (footnotes omitted and emphasis supplied). Instead, exactly the opposite appears from the limited record before us. The trial judge was fully justified in finding that the parties opposing disclosure of the documents at issue here failed in their duty to establish a legitimate basis for withholding those papers. Consequently, I am concerned that this Court has chosen to embark down a path of crafting advisory opinions in extraordinary proceedings where the evidence does not justify an intrusion into the non-final rulings of the case below and the limited record before the Court was completely devoid of prejudicial error.

If the majority had before it a record justifying this Court's issuance of a writ of prohibition solely to direct the trial court not to enforce a discovery order based on an erroneous legal ruling, a writ of prohibition might have properly issued under the standard

established in *Canady*, assuming a proper showing of "probable invasion of confidential materials." *Ibid.* However, as noted, the trial court found that the defendants below failed to carry their burden under this Court's rulings in *Medical Assurance* and, consequently, this Court had no basis from which to conclude that ruling was issued in error.

**Issues Not Before This Court**

Although the majority acknowledges that the crime-fraud exception to the attorney-client privilege was never raised below,[3] the majority opportunistically used this case as a means for creating new law. While advisory opinions and rulings are never the preferred method of establishing law, utilizing an extraordinary proceeding for the purpose of adopting new law, especially when the legal basis for such law was not presented in the case at bar, compounds the error. Given the context under which the majority adopted the crime-fraud exception, it is fair to characterize the majority's rulings as constituting both undue judicial activism and an abuse of judicial power.

[3]The reason it was not raised below was because the lower court ruled that the attorney-client privilege was inapplicable. Consequently, there was no basis for addressing an exception to the privilege at the trial court level. On appeal, the plaintiff below asserts that if the attorney-client privilege were found to be applicable, the requested discovery materials would still be subject to disclosure based on the crime-fraud exception.

**Distinctions Between Bad-Faith Insurance Claims and Civil Fraud**

Besides the complete procedural impropriety of delving into a new area of law absent a proper foundation, there are serious flaws in the majority's wholesale adoption of the crime-fraud exception, given the numerous parameters involving this exception and, in particular, its questionable applicability to bad-faith insurance suits.[4] The most significant and troubling flaw that the majority seems to have overlooked is that bad faith and civil fraud are not synonymous legal concepts. Because the crime-fraud exception to the attorney-client privilege was specifically created for the purpose of not allowing individuals to involve or utilize the services of an attorney for the furtherance of a fraud or crime,[5] it

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[4]While the majority indirectly asserts by means of recurring references to its eponymous concurrence in *Medical Assurance* that bad-faith insurance actions can and properly do fall under the civil fraud umbrella, the majority of this Court arguably took the exact opposite position in *Medical Assurance*. *See* 213 W.Va. at 470, 583 S.E.2d at 93 (stating that "[t]his Court concurs with the reasoning of the Montana court" in rejecting discoverability of insurance company's files in bad-faith actions) (citing *State ex rel. USF&G v. Montana* 783 P.2d 911, 915-16). Given the clear position of this Court in *Medical Assurance*, conjoined with Justice Davis's unmistakably clear position in her concurrence to that case in favor of extending the applicability of the crime-fraud exception to bad-faith insurance cases (announced under cover of her statement that she "'agree[d] entirely with Justice [Maynard's] analysis of the legal issues presented [t]here and with his application of them to the facts of th[at] case'"), it can only be said that the adoption of the crime-fraud exception in the manner undertaken by the majority in this case effectively "gets around" this Court's concerted effort not to expressly adopt such law in *Medical Assurance*. 213 W.Va. at 472, 583 S.E.2d at 95. The majority has clearly "made law," law expressly contrary to the positions adopted by this Court in *Medical Assurance* barely one year ago.

[5]*See U.S. v. Zolin*, 491 U.S. 554, 563 (1989) (stating that "the purpose of the crime-fraud exception to the attorney-client privilege [is] to assure that the 'seal of secrecy,' between lawyer and client does not extend to communications 'made for the purpose of (continued...)

does not follow that bad faith, with its distinguishable elements of proof, would squarely fall within the category of legal offenses contemplated by the exception.

In explanation of why bad-faith claims are not routinely encompassed within the crime-fraud exception, one commentator has observed:

> The attorney-client privilege is obviously one of the most guarded rights that a litigant is afforded. Due to the importance of this privilege, courts have recognized rare limited exceptions to the privilege. One of those exceptions that policyholders' counsel have recently resorted to in support of a litigation bad faith theory is the "crime-fraud" exception. The crime-fraud exception exists because the very purpose of the attorney-client privilege would be abrogated by allowing attorneys and their clients to use the privilege to conceal evidence of fraud or to protect communications that are part of a criminal activity.
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> Not surprisingly, courts are reluctant to pierce the attorney-client privilege based on this exception. For the crime-fraud exception to apply, the proponent carries a high burden of establishing that the fraud was ongoing or occurred at or during the time that the documents were prepared, and that legal services were obtained in order to plan or commit a fraud. The majority of courts that have entertained an insured's argument that the attorney-client privilege can be abrogated by the filing of a bad faith claim, however, have refused to equate a bad faith cause of action with civil fraud. Such courts view civil fraud as a discrete cause of action distinct from bad faith and requiring different elements of proof.

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[5](...continued)
getting advice for the commission of a fraud' or crime") (citing *O'Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.))

Edward Zampino and M. Jarrett Coleman, *Turning the Other Cheek: Can Insurers' Defense of Coverage Suits Constitute Grounds for Bad Faith Litigation,* 38 Tort Trial & Ins. Practice Law J. 103 (Fall 2002) (footnotes omitted).

Yet another explanation of why bad-faith claims cannot be categorically lumped into the crime-fraud exception was offered by three Ohio jurists:

> [B]ad faith by an insurer is conceptually different from fraud. Bad-faith denial of insurance coverage means merely that the insurer lacked a "reasonable justification" for denying a claim. In contrast, an actionable claim of fraud requires proof of a false statement made with intent to mislead. Proof of an insurer's bad faith in denying coverage does not require proof of any false or misleading statements; an insurer could, for example, act in bad faith by denying coverage without explanation. Because bad faith is not inherently similar to fraud, there is no reason why an allegation of bad faith should result in an exception to the attorney-client privilege akin to the crime-fraud exception.

*Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 160 (Ohio 2001) (Moyer, C.J., Cook, Lundberg Stratton, J.J., dissenting) (citations omitted).

In finding an opinion letter written by counsel for the insurer non-discoverable under the attorney-client privilege, the Kentucky Supreme Court concluded that the document was privileged "in the absence of any evidence indicating the contemplation of a tortious act on behalf of [the insurance company.]" *Guaranty Nat'l Ins. Co. v. George*, 953 S.W.2d 946, 948 (Ky. 1997). The court further opined: "To develop an exception in bad-

faith cases against insurers would impede the free flow of information and honest evaluation of claims. In the absence of fraud or criminal activity, an insurer is entitled to the attorney-client privilege to the same extent as other litigants." *Id.* at 948; *see also State ex rel. U.S.F.& G. Co. v. Montana Second Jud. Dist. Ct.*, 783 P.2d 911, 916 (Mont. 1989) (observing that "[a]n insurance company must have an honest and candid evaluation of the case, possibly including a 'worse case scenario'" and that "concern[s] by the attorney that communications would be discoverable in a [third-party] bad faith suit would certainly chill open and honest communication . . . [and] impede settlements").

**Likely Result of Majority's Opinion**

The majority does not expressly take the position that evidence of bad faith is the equivalent of civil fraud for purposes of defeating the attorney-client privilege. *But see Medical Assurance*, 213 W.Va. at 478-79, 583 S.E.2d at 101-02 (Davis, J., concurring). However, by adopting legal standards for the invasion of the attorney-client privilege under the crime-fraud exception without reference to specific facts, the majority has opened the door for any practicing lawyer to make that assertion. As the Kentucky Supreme Court demonstrated by its choice of words in *Guaranty National Insurance Co.*, it is a short leap from the initial concepts embodied in the crime-fraud exception – of the actual commission of a crime or actually perpetrating a fraud – to "*any evidence indicating the contemplation*

*of a tortious act."* 953 S.W.2d at 948 (emphasis supplied).[6] By suggesting or leaving open the possibility that something less than actual civil fraud is sufficient to invoke the crime-fraud exception, the majority, through its inexact and incomplete articulation of the standard to be applied, has performed a great disservice to the bar and to the citizens of this state. Moreover, by ruling in the absence of a specific factual scenario which would permit application via paradigm of the conceptually involved two-stage test the majority adopts for applying the crime-fraud exception,[7] the lawyers of this state are guaranteed to be advocating

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[6]Under modern insurance law, bad faith in the resolution of an insurance claim is recognized as tortious in nature. *See Poling v. Motorists Mut. Ins. Co.,* 192 W.Va. 46, 450 S.E.2d 635 (1994).

[7]Pursuant to the crime-fraud exception standard that the majority adopts, there must first be a *prima facie* showing which demonstrates an "adequate factual basis" "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." *Allstate,* __ W.Va. __, __ S.E.2d __, No. 31392 (filed May 18, 2004), Syl. Pt. 7, in part. Provided there has not been a previous ruling in the case declaring specific evidence sought to be introduced at the threshold hearing to be subject to the attorney-client privilege, all relevant and lawfully obtained evidence is admissible to demonstrate the requirements of the *prima facie* showing. Following this threshold or *prima facie* hearing, provided that the trial court exercises its discretion to hold an *in camera* hearing or has not determined that such a hearing is unnecessary due to the establishment of a crime or fraud at the threshold hearing, an *in camera* review of the subject documents is the focus of the second stage of the process. The only guidance the majority provides to trial courts for this stage is that the party seeking to defeat application of the attorney-client privilege must introduce evidence establishing "'that the client intended to perpetrate a [crime or] fraud'" and that the trial court must "'"find a valid relationship between the confidential communication that was made and the crime or fraud."'" *Id.* at __, __ S.E.2d at __ (slip op. at 21-22 (quoting *Medical Assurance,* 213 W.Va. at 477, 583 S.E.2d at 100) (quoting 1 Franklin D. Cleckley, *Handbook on Evidence* § 5-4(E)(6)(a) (1994)).

conflicting positions for years to come, all at the expense of the very citizens the court system is designed to serve.

**Real and Present Danger of Weakened Privilege**

There is real cause for concern that the courts – including the majority of this Court – are unwittingly assisting in the weakening of a venerated privilege. As the Second Circuit astutely observed, "[g]iven that the attorney-client privilege and work product immunity play a critical role in our judicial system, the limited exceptions to them should not be framed so broadly as to vitiate much of the protection they afford." *In Re Roe, Inc.*, 168 F.3d 69, 71 (2nd Cir. 1999) (citations omitted). Somewhere along the way, the majority appears to have lost sight of the fact that the "'crime-fraud exception' is narrow and comes into play only when the attorney-client relation is abused such that the benefits of client candor with a legal advisor are outweighed." H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling,* 87 Ky. L.J. 1191, 1243 (1998-1999); *see also In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985) (holding that proponents of crime-fraud exception must demonstrate that crime or fraud was committed which was "sufficiently serious to defeat the [attorney-client] privilege"). What this should mean is that each document that exists in an insurance file, or any other case file, is not subject to the exception just because the document may help prove that a fraud occurred. *See Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 283 (8thCir. 1984)

("That the report may help *prove* that a fraud occurred does not mean that it was *used* in perpetrating the fraud.") (emphasis in original). As Judge Ginsberg explained in *U.S. v. White,* 887 F.2d 267 (D.C. Cir. 1989):

> The crime-fraud exception has a precise focus: It applies only when the communications between the client and his lawyer further a crime, fraud or other misconduct. It does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act.

*Id.* at 271; *accord In Re Roe,* 168 F.3d at 71-72 (rejecting application of crime-fraud exception on grounds that documents at issue were not shown to have been "'in furtherance of a fraud'"). This significant limitation on the crime-fraud exception bears emphasis in light of the fact that there appears to be a concerted and orchestrated attempt underway to use the crime-fraud exception to gain access to the insurance claims file[8] or what is referred to by lawyers involved in bad-faith litigation as the "ticket to the gold mine." James R. Jebo, *Overcoming Attorney-Client Privilege and Work Product Protection in Bad-Faith Cases,* 70 Defense Counsel J. 261, 264 (April 2003). And this increase in attempts at using the crime-fraud exception as a means of gaining access to case files has imposed a substantial burden on trial judges who must conduct lengthy and time-consuming *in camera* inspections of documents to resolve these issues. *See Clausen v. Nat'l Grange Mut. Ins. Co.,* 730 A.2d

[8]While we refer to insurance cases given the factual underpinnings of this case, the rulings of the majority clearly extend to and will impact upon every type of business transaction wherein allegations of fraud or other crimes may at some point be raised in response to an assertion of the attorney-client privilege.

133, 142 (Del. Super. 1997) (recognizing substantial burden of *in camera* inspections on trial judges and commenting "it is difficult for a Judge to interrupt the norm of a trial day and quickly digest the complexity of the factual issues of a significant document production case in the context of a claim of privilege").

The United States Supreme Court cautioned in *Zolin* that "[t]here is no reason to permit opponents of the [attorney-client] privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." 491 U.S. at 571. The high court was concerned that absent a necessary threshold showing of an adequate factual basis suggesting applicability of the crime-fraud exception numerous unwarranted *in camera* hearings might be forced upon the trial courts. *Id.* Since *Zolin*, scholars, jurists, and practitioners have all recognized the heavy burdens that *in camera* proceedings impose upon the trial courts and have further identified a marked divergence among the courts on critical evidentiary issues involved in applying the crime-fraud exception.[9] Consequently, it appears that rather than adopting a standard that will assist

[9]*See* Susan W. Crump, *The Attorney-Client Privilege and Other Ethical Issues in the Corporate Context Where there is Widespread Fraud or Criminal Conduct*, 45 S.Tex.L.Rev. 171, 178-81 (Winter 2003) (discussing conflicting positions taken by courts based on failure of *Zolin* to identify quantum of proof necessary to make either *prima facie* showing or to establish applicability of crime-fraud exception and remarking that "results of the *Zolin* process can be of questionable fairness"); *accord* Brown, *supra*, 87 Ky.L.J. at 1244-47 (recognizing that dearth of "guidance or continuity . . . in the standards applied by the courts in evaluating the substance of the prima facie showing" "reflect[s] a fundamental conflict among the courts concerning the evidentiary threshold that must be met before the (continued...)

courts and lawyers with application of this significant and troublesome standard, the majority has just launched this state into the murky waters in which other jurisdictions have been floundering for quite some time. Without a truly workable standard for application of the crime-fraud exception – one that has been carefully thought out and one that permits both expeditious and uniform application in the full panoply of cases typically brought before our state courts, our courts may soon find themselves unwittingly assisting in fishing expeditions while simultaneously aiding in unintended eviscerations of both the attorney-client privilege and the work-product doctrine. The majority's opinion, given its attempt to fashion law out of sack cloth, was imprudent and will surely result in protracted litigation as both attorneys and jurists alike attempt to make sense out of the amorphous procedural morass that the majority announced amidst a dearth of factual underpinnings from which to evaluate application of the purely, hypothetical standards. Rather than achieving final resolution, the majority's declaration of law in a factual vacuum can only result in one certainty: the necessity and likelihood of endless litigation as the full parameters of the standards created by the majority continue to be identified and continue to demand substantial clarification by this Court.

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[9](...continued)
attorney-client privilege will be invaded"); *see also id*. at 1236-38 (commenting on "substantial divergence of views concerning the degree of relatedness which must be shown to demonstrate that the attorney-client communication was in furtherance of a crime or fraud").

**Establishing Clear Grounds For Invoking the Exception**

If this Court is to develop a workable jurisprudence for the application of the crime-fraud exception to the attorney-client privilege and the work-product doctrine, especially in bad-faith insurance cases, I respectfully submit that the Court should first address the shortcomings in the *Zolin* case well-established by numerous authorities. As mentioned above, the failure of the high court to quantify in *Zolin* the amount of proof required at either the threshold stage or during the actual *in camera* review has resulted in a scenario where some courts apply a preponderance of the evidence standard; some courts require clear and convincing evidence; and yet others view it akin to a probable cause hearing.[10] *See Medical Assurance*, 213 W.Va. at 477-78, 583 S.E.2d at 100-101 (Davis, J., concurring) (delineating divergence of authority on evidentiary standard required to establish application of crime-fraud exception including preponderance of the evidence; probable cause; reasonable cause). What this means is that the same set of factual evidence presented to five different tribunals is likely to result in five distinct rulings, none of which follow the same line of reasoning.

[10]Considering the fact that the majority's author, also the author of the much-relied upon concurrence to *Medical Assurance*, readily acknowledged in that separate opinion the split of opinion existing on the standard of proof necessary to establish the crime-fraud exception, it is even more remarkable that the majority adopted the crime-fraud exception without setting forth any evidentiary standard for its application. 213 W.Va. at 477, 583 S.E.2d at 100 (Davis, J., concurring).

Second, I respectfully suggest that the standards governing the antecedent proof that must be adduced by the party desiring to overcome the attorney-client privilege must be clearly set forth before a trial court conducts a review of the challenged documents to ascertain their relationship to the asserted crime or fraud. One commentator has suggested the following as a useful standard for applying the crime-fraud exception to insurance cases:

> A preliminary determination should be made as to whether fraudulent conduct on the part of the insurance company has occurred and whether such conduct was sufficient to overcome the privilege before permitting discovery of attorney-client privileged communications. A factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct of a sufficient magnitude has taken place should be a preliminary trial court determination. Upon this determination, the court should then subject the claims file to an *in camera* inspection to determine whether there is a "foundation in fact" to overcome the privilege based upon an allegation of fraud.

Steven Plitt, *The Elastic Contours of Attorney-Client Privilege and Waiver in the Context of Insurance Company Bad Faith: There's a Chill in the Air*, 34 Seton Hall L. Rev. 513, 571 (2004). Moreover, absent a clearly articulated standard that specifies the degree of relation the subject documents must bear to the crime or fraud in issue, we are assuredly sanctioning an improper and unauthorized broadening of the intended scope of the crime-fraud exception.

Third, given the broad definitions of fraud and constructive fraud adopted by this Court, I respectfully suggest that the application of the exception to asserted matters of

fraud should be limited to actual, [intentional] or criminal fraud. *See* Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981) (holding that "[t]he essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.' *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927)"); *cf.* Syl. Pt. 4, *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W.Va. 1, 491 S.E.2d 1 (1996) (setting forth elements of statutory "bad-faith" claim for committing unfair settlement practices in violation of W.Va. Code § 33-11-4(9)). To equate the commission of a statutory violation of bad faith or even a common-law bad-faith insurance claim with what the exception was originally aimed at – preventing the attorney-client privilege from shielding the planning of or current commission of criminal or fraudulent offenses (both of which significantly required the critical element of intent) – is a serious attenuation of the laudatory objective that resulted in the creation of the crime-fraud exception.

Fourth, I respectfully suggest that we must heed the concerns noted by several courts and various commentators. The courts must be vigilant in not permitting the oldest common-law privilege to be cast aside in the guise of assuring open and fair discovery, when the true objective at hand is to assist one recognizable group of litigators while simultaneously singling out one specific business enterprise and denying that business

interest the protections that all other businesses are afforded. As one commentator has recognized, "[a]n insurance company should not lose the protection of the attorney-client privilege simply because its litigation opponent raises an issue to which advice of counsel may be relevant." Plitt, *supra,* 34 Seton Hall L.Rev. at 568.

Fifth, I respectfully suggest that the trial courts of this state be urged to view the invasion of the attorney-client privilege as warranted on only rare occasions and only upon clear proof of the alleged fraud or crime. To do otherwise will surely amount to a demise in the willingness of both corporations and individuals to seek advice from attorneys. No one would seriously dispute that the courts of this state should never be used as a tool for denying protections viewed as intrinsic to our system of jurisprudence. Yet, the majority has set the stage for just such a downward spiraling of these age-old protections.

**Conclusion**

In summary, I would have refused the requested writ of prohibition after noting that the attorney-client privileges at issue do apply in first-party bad-faith cases, absent otherwise recognized exceptions. I would have postponed this Court's foray into the crime-fraud exception for another day, preferring to ground any decision to adopt that exception and the explanations regarding the exception's application, to the factual and procedural

predicate presented by a complete record in which the issue regarding the exception was squarely presented, briefed, and argued.

Based on the foregoing, I respectfully dissent.