

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

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Maynard, Chief Justice, concurring:

I concur in the result of this case because I think it clearly and concisely provides a basic primer of the established bad faith law of this State that hopefully will serve as a helpful resource to those folks who insist on pursuing bad faith litigation. I write separately for the sole purpose of clarifying one point in the majority's opinion: the standard of proof applicable to the crime-fraud exception.

As my dissenting colleague has observed, this Court has not definitively enunciated the precise standard of proof that a party must satisfy in order to assert the crime-fraud exception as a means of defeating the protections afforded by the attorney-client privilege and the work product doctrine. As noted in the majority's opinion, a party wishing to assert the crime-fraud exception must first make a prima facie showing that a crime or fraud has been committed that would invade otherwise privileged attorney-client communications. Once such a prima facie showing has been made and a court ascertains that enough evidence has been presented to overcome this initial obstacle, however, the fundamental question remains as to the standard of proof a party must satisfy to demonstrate that the attorney-client relationship has been tainted by an allegedly criminal or fraudulent

purpose. Simply stated, then, the inquiry is what is the quantum of proof needed to establish a criminal or fraudulent scheme.

We long have held that, to establish a cause of action for fraud, the evidence in support of such a claim must be clear and convincing. *See* Syllabus Point 2, in part, *Lutz v. Orinick*, 184 W.Va. 531, 401 S.E.2d 464 (1990) (“A party seeking to prove fraud . . . must do so by clear and convincing evidence[.]”). *Accord* *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 472, 425 S.E.2d 144, 148 (1992) (recognizing that the “elements [of a cause of action for fraud] must be proved by clear and convincing evidence” (citations omitted)). Insofar as the misdeed upon which a party bases his or her assertion of the crime-fraud exception also consists of fraudulent conduct, then the proper quantum of proof likewise would be clear and convincing evidence.

Less certain, however, is the level of proof needed to establish criminal activity for the purposes of asserting the crime-fraud exception. Consistency and the sanctity of the underlying privileges suggest the propriety of adopting a clear and convincing standard in this context as well.¹ As the majority’s detailed discussion of the crime-fraud exception demonstrates, reliance on this exception in order to access otherwise privileged information

¹The United States Court of Appeals for the Second Circuit has also considered the clear and convincing standard as the standard of proof for establishing the elements of the crime-fraud exception. *See In re John Doe, Inc.*, 13 F.3d 633, 637-38 (2nd Cir. 1994).

requires a multi-tiered analysis, beginning with a prima facie showing of the exception's applicability in a particular case. Given the numerous criteria already required for its assertion, the adoption of a completely different standard of proof for allegedly criminal, as compared to purportedly fraudulent, conduct would only serve to obfuscate the process and result in protracted litigation.

Moreover, insofar as the attorney-client privilege and the work product doctrine are highly regarded, near sacred, protections afforded to confidential attorney-client communications, they warrant substantial protection from improper invasion. *See, e.g.*, Syllabus Point 11, *Marano v. Holland*, 179 W.Va. 156, 366 S.E.2d 117 (1988) (recognizing purpose and importance of attorney-client privilege); *State ex rel. United States Fid. & Guar. Co. v. Canady*, 194 W.Va. 431, 444, 460 S.E.2d 677, 690 (1995) (commenting upon sanctity and necessity of work product privilege). Thus, by requiring clear and convincing evidence of allegedly criminal conduct to establish the elements of the crime-fraud exception, the confidentiality that these privileges were designed to protect can be insulated from unwarranted intrusion and disclosure.

For the foregoing reasons, I respectfully concur.