IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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No. 33209

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
ERIE INSURANCE PROPERTY & CASUALTY COMPANY,
Defendant Below, Petitioner

v.

THE HONORABLE JAMES P. MAZZONE, JUDGE
OF THE CIRCUIT COURT OF OHIO COUNTY,
AND ELIZABETH MURFITT,
Plaintiff Below, Respondents

PETITION FOR A WRIT OF PROHIBITION

WRIT DENIED

Submitted: January 23, 2007
Filed: June 7, 2007

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE STARCHER and JUSTICE BENJAMIN concur and reserve the right to file concurring 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." Syl. Pt. 3, *State ex rel. U. S. Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995).

2. "A circuit court's ruling on discovery requests is reviewed for an abuse of discretion standard; but, where a circuit court's ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court's procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard." Syl. Pt. 5, *State ex rel. Med. Assurance of West Virginia v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003).

3. "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." Syl. Pt. 7, *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997).

4. When individual case reserves information is set by an attorney or by a non-lawyer representative with the primary intent of preparing for litigation, then the individual case reserves information is subject to protection from discovery as opinion work product pursuant to Rule 26(b)(3) of the West Virginia Rules of Civil Procedure.

5. For the purposes of Rule 26(b)(3) of the West Virginia Rules of Civil Procedure, aggregate reserves documents compiled for specific litigation either by a lawyer or by a non-lawyer representative are opinion work product and merit greater protection from discovery. However, aggregate reserves documents not developed primarily in anticipation of specific litigation but produced for general business purposes are not protected by the work product rule.

6. Reserves documents determined to be opinion work product are generally protected from disclosure under the provisions of Rule 26(b)(3) of the West Virginia Rules of Civil Procedure unless the party seeking discovery demonstrates compelling need for the materials, which shall include proof that the opinion materials qualify for a recognized exclusion from application of the work product doctrine.

7. "When a trial court presiding over a third-party bad faith action makes its determination of whether a document was prepared in anticipation of litigation, the trial court should consider the nature of the requested documents, the reason the documents were

prepared, the relationship between the preparer of the document and the party seeking its protection form discovery, the relationship between the litigating parties, and any other facts relevant to the issue." Syl. Pt. 12, in part, *State ex rel. Allstate Ins. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998).

Albright, Justice:

For a second time in the underlying third-party bad faith action, Erie Insurance Property & Casualty Company (hereinafter referred to as "Erie") invokes the original jurisdiction of this Court[1] in order to obtain a writ of prohibition to bar the enforcement of a discovery order of the Ohio County Circuit Court requiring disclosure of relevant reserves information to the plaintiff below, Elizabeth Murfitt. This Court had granted Erie's earlier request to prohibit the enforcement of a March 30, 2005, order regarding the reserves information. *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218 W.Va. 593, 625 S.E.2d 355 (2005) (hereinafter referred to as "*Erie I*"). While Erie had asserted in *Erie I* that the reserves information was protected from disclosure as opinion work product, we did not reach the work product argument and instead granted the writ based on the more fundamental problem that the threshold inquiry regarding relevancy had not been completed by the lower court. *See id*. at Syl. Pt. 4. Erie renews its opinion work product argument in the request now before this Court to prohibit the enforcement of the lower court's June 29, 2006, order, which again requires disclosure of the reserves information. For the reasons explained below, the relief in prohibition is denied.

I. Factual and Procedural Background

[1]*See* W.Va. Const. article VIII, § 3; W.Va. Code §§ 51-1-3, 53-1-1 to -11 (Repl. Vol. 2000).

The original negligence claim in this case was brought by Ms. Murfitt against a driver whose automobile insurer was Erie. During the course of the jury trial on the negligence action, the parties settled the claim. Ms. Murfitt then filed an amended complaint alleging that the manner in which Erie had handled her claim evidenced bad faith.[2]

When Erie objected to discovery requests of Ms. Murfitt, including documents containing Erie's reserves information regarding the claim, Ms. Murfitt filed a motion to compel discovery. The ruling on the motion took the form of a lower court order dated March 30, 2005. In that order the court below directed that "any documents pertaining to 'reserves' are to be disclosed to the extent of reserve amounts and dates on which any such amounts were placed." The March 30, 2005, order was the object of our attention in *Erie I*.

Following our decision in *Erie I*, the lower court held a hearing on May 12, 2006, to address Ms. Murfitt's Renewed Motion to Compel Production of Reserve Information. After hearing oral argument, the trial court, adhering to the direction provided in *Erie I*, determined that the reserves information is relevant to Ms. Murfitt's claim that Erie intentionally undervalued her claim in its settlement offers.[3] Thereafter, the lower court reaffirmed its previous determination that the reserves information was not excluded from

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[2]The original defendant was subsequently dismissed from the lawsuit.

[3]No objection has been raised in this proceeding regarding the relevancy determination.

discovery under the principles of the work product doctrine. As indicated in the Memorandum Opinion and Order dated June 29, 2006, the lower court found the doctrine inapplicable because only the raw data regarding the reserves amounts and the dates those amounts were calculated were being ordered disclosed rather than the reasoning and thought process behind the reserves numbers. Additionally, the lower court in its June 29, 2006, order found that "anticipation of litigation is not the primary motivating purpose for establishing insurance reserves. . . ." The court below alternatively found that disclosure was appropriate even if the reserves information was work product because Ms. Murfitt had established the requisite level of need.

On August 14, 2006, Erie petitioned this Court for a writ of prohibition to bar enforcement of the June 29, 2006, order. The petition asserts that by again issuing the discovery order the lower court exceeded its legitimate powers and abused its discretion because the material ordered to be produced is opinion work product, which Erie contends should be treated as privileged material that Erie maintains should rarely, if ever, be subject to disclosure. After finding a prima facie case had been established, on October 26, 2006, this Court issued a rule against the circuit judge and Ms. Murfitt as respondents to show cause why the writ prayed for should not be awarded. W.Va. Code § 53-1-5 (1933) (Repl. Vol. 2000).

II. Standard of Review

The requested extraordinary relief is sought to stop the enforcement of an order directing release of information at the discovery phase of a civil proceeding. As we held in syllabus point three of *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995), "[w]hen 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."

> As a general rule,
>
> > [a] circuit court's ruling on discovery requests is reviewed for an abuse of discretion standard; but, where a circuit court's ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court's procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard.

Syl. Pt. 5, *State ex rel. Medical Assurance of West Virginia v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). Furthermore, when presented with a challenge to the compelled disclosure of materials alleged to be privileged, we conduct "a hard and more stringent examination" of whether the circuit court abused its discretion. Syl. Pt. 5, *Canady*,194 W.Va. 433, 460 S.E.2d at 679..

III. Discussion

Erie urges us to find that the lower court erred as a matter of law when it ordered disclosure of the subject reserves information because it maintains that the information is protected from discovery pursuant to Rule 26(b)(3) of the West Virginia Rules of Civil Procedure as opinion work product that was prepared in the context of anticipated or existing litigation. With like force Ms. Murfitt urges us to uphold the ruling because it neither demonstrates improper application of the law nor an abuse of discretion by the court below. Ms. Murfitt specifically maintains that Erie failed to substantiate its claim that the reserves information was protected from disclosure under the work product doctrine because the primary motivating purpose for creating the reserves information was not "in anticipation of litigation or for trial." W. Va. R. Civ. P. 26(b)(3).

In reaching its conclusion that the reserves information is subject to discovery, the lower court made the following relevant findings, as manifested in the June 29 order:

> The Court FINDS and CONCLUDES that the raw data indicating the reserve amounts and the dates said reserve amounts were placed on the claim are not privileged. However, the reasoning and the thought process behind the reserve numbers are privileged as work product . . . .
>
> The facts of this case indicate that anticipation of litigation is not the primary motivating purpose for establishing insurance reserves, as insurance companies are required by law to establish reserves. Every claim presumably has some reserve amount attached to it, regardless of whether the claim ends in litigation or is resolved through other means. During her deposition on February 16, 2006, claims supervisor Sandra Barker testified that a reserve is "an amount of money or a dollar amount that's set aside for payment of an injury claim or

> any type of claim of [sic] any payment upon any claim." Mrs. Barker's description of reserves supports the Court's conclusion that the potential for litigation is not the primary motivating purpose for setting reserves, as they are set aside for "any type of claim" and for "any payment upon any claim," not limited to those claims for which litigation is likely or anticipated.
>
> Also significant is Erie's disclosure that Erie employees, and not attorneys are involved in setting the reserve amounts. In its answer to Plaintiff's First Set of Interrogatories, Erie identified four individuals as being those that "participated in the decisions regarding the setting of reserves in connection with the claim brought by Elizabeth Murfitt." . . . In Erie's responses to Plaintiff's First Set of Interrogatories, each of . . . [the named] individuals is identified as either an agent, representative and/or employee of Erie that had involvement in Mrs. Murfitt's claim.
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> The Court's decision is limited to the facts of the case before it and it is not deciding that insurance reserve information is discoverable in every case as a general matter. The Court is persuaded that the reserve amounts ordered produced are relevant to the Plaintiff's claims, particularly in light of the Defendant's admission that the reserve amounts in this case were driven by the specific facts of the underlying claim. Pursuant to Rule 26(b)(3) of the West Virginia Rules of Civil Procedure, the Court additionally FINDS that the party seeking discovery has a substantial need of the materials and that the party is unable to obtain the equivalent of the materials by other means. (Citation and footnote omitted.)

A fair summary of the lower court's ruling then is that the subject reserves information is discoverable for two reasons: (1) the reserves amounts and the dates on which the amounts were set are not work-product because they were not set in anticipation of litigation, and (2) if the reserves information is subject to Rule 26(b)(3) as work-product, substantial need and inability to obtain the material elsewhere were demonstrated by Appellant.

In order to determine the propriety of the lower court's rulings, we initially examine the work-product doctrine as set forth in Rule 26(b)(3) of the West Virginia Rules of Civil procedure (hereinafter referred to as "Rule 26(b)(3)")[4], with particular consideration to the distinction between fact and opinion work product under the rule and whether and under what circumstances other courts have treated reserves information as opinion work product for discovery purposes.

We recognized in *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W.Va. 316, 327, 484 S.E.2d 199, 210 (1997), that the work product doctrine has its roots in the United States Supreme Court decision of *Hickman v. Taylor,* 329 U.S. 495 (1947),

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[4]The relevant portion of Rule 26(b)(3) of the Rules of Civil Procedure states:

> (3) Trial preparation: materials. – Subject to the provisions of subdivision (b)(4) 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 discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or other legal theories of an attorney or other representative of a party concerning the litigation.

predating the adoption of Rule 26(b)(3). The underlying purpose for the protection afforded by the doctrine as explained in *Hickman*, serves as guidance in our examination of the issue now pending:

> Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.
>
> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed . . . as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.

Id. at 510-11. However, the Court in *Hickman* made clear that the work-product doctrine provides qualified and not absolute immunity from disclosure. "[A]ll written materials obtained or prepared by an adversary's counsel with an eye toward litigation are [not] necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation

of one's case, discovery may properly be had." *Id*. at 511. Following this direction, we held in syllabus point seven of *State ex rel. United Hospital Center, Inc. v. Bedell*, that in order "[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." 199 W.Va. at 320, 484 S.E.2d at 203. Because the preparers of the reserves information in the instant case were non-lawyers, we further note that Rule 26(b)(3) extends work product protection to materials prepared by non-lawyers when the paramount purpose for generating the materials is litigation. As explained by the United States Supreme Court in *United States v. Nobles*, 422 U.S. 225 (1975):

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

Id. at 238-39 (footnote omitted). This Court has likewise concluded that "[t]he purpose of Rule 26(b)(3) is to narrow the ability to obtain trial preparation material by expanding the coverage of the work product rule to include persons other than an attorney." Syl. Pt. 6, in part, *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984). While authority to invoke the protection of the work product doctrine generally rests exclusively with attorneys, we

decided in *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998), that insurers defending third party bad-faith claims may invoke work product protection of certain information in claims files. Insurers may raise the work product rule "where an insured has signed a release of his/her claim file to a third-party litigant . . . [and] documents in the insured's claim file that were generated prior to the filing date of a third-party's complaint" are sought to be discovered. *Id*. at Syl. Pt. 11.

The work product doctrine provides a qualified immunity to two categories of work products: fact and opinion. *See In re Markle*, 174 W.Va. at 556-57, 328 S.E.2d at 163. Pursuant to the applicable provisions of Rule 26, fact work product includes any documents or tangible things prepared by a party, or a party's representative, in anticipation of litigation. Opinion work product encompasses those documents or tangible materials which contain "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative. . . concerning the litigation." W.Va. R. Civ. P. 26(b)(3).

We observed in syllabus point seven of *In re Markle* that provisions of Rule 26(b)(3) distinguish the level of necessity that must be demonstrated in order to obtain discovery of factual work product versus opinion work product. We then elaborated on the distinction by stating:

> Where factual work product is involved, the party demanding production must show "a substantial need" for the material and that he cannot obtain the same or its equivalent through other

> means "without undue hardship." Where opinion work product is involved, the showing required to obtain discovery is even stronger since the rule states that "the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories." Rule 26(b)(3).

174 W.Va. at 556-57, 328 S.E.2d at 163 (footnotes omitted). We further observed in *State ex rel. Brison v. Kaufman*, 213 W.Va. 624, 633, 584 S.E.2d 480, 489 (2003), that "[a]s between the two, opinion work product is more scrupulously protected." *See also State ex rel. Med. Assurance of West Virginia, Inc. v. Recht*, 213 W.Va. at 467, 583 S.E.2d at 90 (identifying cases in which the heightened protection of opinion work product is acknowledged); John F. Wagner, Jr., *Protection from Discovery of Attorney's Opinion Work Product under Rule 26(b)(3), Federal Rules of Civil Procedure*, 84 A.L.R. Fed. 779 (1987).[5]

[5]Although this Court has not *comprehensively* addressed what conditions would overcome the greater protection afforded opinion work product, there are two general exceptions which have developed in other jurisdictions recognizing the heightened justification for disclosure. The first of these has been dubbed the crime-fraud exception which permits discovery of opinion work product created in furtherance of a crime or fraud. The second exception allows discovery of opinion work product when mental impressions are directly at issue as the subject matter of the suit. *See* Edna Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 589-93; 8 Wright, Miller & Marcus, *Federal Practice and Procedure* § 2026 (2d ed., 1994); Jeff A. Anderson, Gena E. Cadieux, George E. Hays, Michael B. Hingerty, Richard J. Kaplan, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 831-837 (1983); Andrea L. Borgford, *The Protected Status of Opinion Work Product: A Misconduct Exception*, 68 Wash. L. Rev. 881 (1993); Kathleen Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 Or. L. Rev. 385 (1994). This Court has adopted the crime-fraud exception in syllabus point eight of *State ex rel. Allstate Insurance Company v. Madden*, 215 W.Va. 705, 601 S.E.2d 25 (2004), but has never addressed the applicability of the "directly at issue" exception. Given the conclusion we reach in this opinion, that discussion is left for another day when a more suitable situation allows us to examine the matter fully.

Erie asserts that the lower court erred by applying the more relaxed *fact* work product standard to the reserves information, which Erie maintains should in all relevant instances be subject to review as *opinion* work product. If indeed the material at issue is opinion work product, we agree that the lower court erred in applying the fact work product standards. Our task now turns to the yet unanswered question in this jurisdiction of when reserves information is considered opinion work product.

We find no authority to support Erie's implication that reserves information is generally treated as opinion work product. Rather, courts addressing this issue have undertaken a more close analysis of the circumstances under which the information is gathered and the nature, if any, of attorney as well as non-lawyer representative involvement in the collection process. Two federal cases[6] with focused discussions on when reserves information falls within the boundaries of opinion work product are particularly instructive: *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987), and *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Company*, 139 F.R.D. 609 (E.D. Pa. 1991).[7] We acknowledge that neither case involved a third-party bad faith action or an insurer's right to invoke the work product

[6]To aid in defining the meaning and scope of this state's individual civil rules of procedure, this Court often gives substantial weight to federal cases interpreting virtually identical federal rules. *Painter v. Peavy*, 192 W.Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994).

[7]These cases were discussed by Chief Justice Davis in her concurring opinion to *Erie I*.

rule, but nonetheless find the reasoning of these courts helpful in dealing with the issue of insurance reserves as opinion work product.

In *Simon*, the Eighth Circuit Court of Appeals had under consideration certified questions arising from a pending products liability action. One of these questions involved whether corporate risk management documents prepared by non-lawyer corporate officials, but revealing aggregate information compiled from individual case reserves numbers determined by lawyers, are subject to protection from discovery as opinion work product. As related in the *Simon* opinion, an attorney set individual case reserves when Searle received notice of a claim or suit with consideration of such factors as an estimate of anticipated legal expenses, settlement value, length of time to resolve the case, and geographic estimates. These reserves figures in turn were used by non-lawyer personnel in Searle's risk management department for a variety of reserves analysis functions.

As a backdrop to its discussion, the court in *Simon* noted that work product protection under the provisions of Rule 26 extends only to documents prepared in anticipation of litigation. The court concluded that even though the risk management documents in the case before it were not prepared in anticipation of litigation, they may still be protected from discovery as opinion work product if the aggregate information disclosed the individual case reserves calculated by Searle's attorneys. The court reasoned that when "individual case reserve figures reveal the mental impressions, thoughts, and conclusions of

the attorney in evaluating a legal claim[] [,b]y their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product. *Hickman [v. Taylor]*, 329 U.S. at 512, 67 S.Ct. at 394; *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)." *Id*. at 401. However, based on the facts before it, the court in *Simon* found that the aggregate reserves document assembled by non-lawyers was not opinion work product because the individual case reserves figures were not readily identifiable in the document. This result was reached because the aggregation was not a direct compilation of the individual claim reserves figures but rather the result of the application of a formula containing a number of other factors. In holding that the work product doctrine did not bar discovery of the aggregate case reserves information contained in the risk management documents before it, the court in *Simon* said: "The purpose of the work product doctrine – that of preventing discovery of a lawyer's mental impressions – is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at best, such an indirect and diluted manner." *Id*. at 402.[8]

The federal district court in *Rhone-Poulenc* had occasion to examine reserves information as work-product when presented with a motion to compel by corporate policyholders who were seeking information about an insurer's reinsurance for claims and

[8]While lawyer and non-lawyer generated material was discussed in *Simon*, the conclusion reached by the *Simon* court did not turn on who compiled the materials but whether "the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim" were revealed. 816 F.2d at 401.

the reserves set for those claims in underlying "AIDS-related litigation." 139 F.R.D. at 610. Apparently the reserves material sought was all "established based on legal input"and included individual case reserves as well as aggregated reserves information. *Id.* at 614. With respect to individual case reserves information, the court in *Rhone-Poulenc* relied upon the same authorities cited in *Simon* to reach a virtually mirror-image conclusion as the court in *Simon*:

> Although these risk management documents being sought by plaintiffs may not have in themselves been prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by defendants' attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation, and consequently, they are protected from discovery as opinion work-product. *Hickman v. Taylor*, 329 U.S. 495, 512, 67 S.Ct. 385, 394, 91 L.Ed. 451 (1947); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977).

Id. (citations omitted). When such individual case reserves information is used in preparing aggregate reserves information such as risk management documents, the court in *Rhone-Poulenc* deviated from some of the conclusions reached in *Simon* by casting a broader net as to the reserves documents falling within the work product rule's protection by holding:

> [T]he aggregate reserve figures may give some insight into the mental processes of the lawyers in setting specific case reserves. This is inevitable, considering that these aggregates and averages are based upon the attorney's evaluations of the value of specific claims. Notably, this is not a situation where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily

> embody the protected material. They could not be formulated without the attorney's initial evaluations of specific legal claims. Thus it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures.

Additionally, the *Rhone-Poulenc* court went a step farther than the *Simon* court by undertaking to dispel any misconception that the aggregate reserves information in the risk management documents should be treated differently because non-lawyers developed the documents. In this regard, the court in *Rhone-Poulenc* stated:

> It can be argued, of course, that while this Court is protecting the mental impression/opinion work product concerning the attorney's evaluation of the reserve necessary for each lawsuit that I should not grant similar protection to any risk management department's opinion work-product concerning an aggregate reserve necessary for the underlying litigation. I find no basis in Rule 26(b)(3) for this distinction. Rule 26(b)(3) requires a court to "protect against disclosure of the mental impressions, conclusions, opinions or [other] legal theories of an attorney *or other representative* of a party concerning the litigation." Thus protective work product is not confined to information or materials gathered or assembled by a lawyer. Instead, it includes materials gathered by any consultant, surety, indemnitor, insurer, agent, or even the party itself. The only question is whether the mental impressions were documented, by either a lawyer or non-lawyer in anticipation of litigation.

139 F.R.D. at 615 (internal citations omitted).

In the case now pending, the information sought to be discovered is referred to broadly by the parties as "reserves." It is apparent from the *Simon* and *Rhone-Poulenc*

opinions that categorizing reserves materials as individual claim reserves and aggregate reserves is essential to a full examination of the issue raised. To lend clarity to our discussion, the term "individual claim reserves" is defined as reserves set when an insurance claim is made in an individual case, including any updates made to reserves in the individual file as additional information about the claim becomes available. The term "aggregate reserves" or "aggregate reserves document" means a document collecting a variety of individual claim reserves. In either instance, it is apparent from the discussions in *Simon* and *Rhone-Poulenc* that the pivotal issue regarding when reserves information is subject to broader protection from discovery as opinion work product is whether the information is prepared in anticipation of particular litigation.

With specific regard to individual claim reserves, the mutual finding of the *Simon* and *Rhone-Poulenc* courts regarding the circumstances under which individual case reserves are considered opinion work product is in line with this Court's general proclamations regarding the work product doctrine as earlier discussed. As a result, we conclude that when individual case reserves information is set by an attorney or by a non-lawyer representative with the primary intent of preparing for litigation, then the individual case reserves information is subject to protection from discovery as opinion work product pursuant to Rule 26(b)(3).

It is equally apparent that aggregate reserves documents compiled for specific litigation by a lawyer or by a non-lawyer representative are prepared in anticipation of litigation and are subject to protection as opinion work product. Accordingly, we hold that for the purposes of Rule 26(b)(3) aggregate reserves documents compiled for specific litigation either by a lawyer or by a non-lawyer representative are opinion work product and merit greater protection from discovery. However, aggregate reserves documents not developed primarily in anticipation of specific litigation but produced for general business purposes are not protected by the work product rule. *See State ex rel. United Hosp. Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997). We do not close the door to the possibility that there may be exceptional situations when aggregate reserves documents which include individual reserves information developed for general litigation purposes or for a particular class of cases may be entitled to protection from discovery as opinion work products. Under such unique circumstances, it remains within the sound discretion of the reviewing court to determine if the work product rule is implicated because the thought processes of an attorney or other representative about the case then pending are in jeopardy of disclosure.

Once reserves documents are determined to be opinion work product, the reviewing court treats the material as any other opinion work product. Such materials remain generally protected from disclosure under the provisions of Rule 26(b)(3) unless the party seeking discovery demonstrates to the reviewing court compelling need for the materials,

which shall include proof that the opinion materials qualify for a recognized exclusion from application of the work product doctrine.

Although we have adopted these standards regarding reserves information in light of the work product doctrine, we do not find that they have application in the present case. No question is raised in this case regarding Erie's right as an insurer defending a third party bad faith action to resist the discovery of documents it believes to be opinion work product. Syl. Pt. 11, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998). In order to succeed in its effort, Erie bears the burden to adequately demonstrate that the reserves information at issue is indeed opinion work product worthy of protection from discovery. Syl. Pt. 4, *State ex rel. U. S. Fid. & Guar. Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995). As this Court has often stressed, "the work product rule traditionally operates to protect documents prepared *in anticipation of litigation*." *Gaughan*, 203 W.Va. at 374, 508 S.E.2d at 91. As noted early in our discussion, a document is considered prepared in anticipation of litigation in the context of a work product analysis when the primary motivation for creating the document is "to assist in pending or probable future litigation." Syl. Pt. 7, *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W.Va. at 320, 484 S.E.2d at 203. This "[d]etermination of whether a document was prepared in anticipation of litigation or in the ordinary course of business is a factual one," which is examined on a case-by-case basis. *Id*. at 328, 484 S.E.2d at 211. In the particular context of an insurer seeking work product protection of documents in an insurance claim file in a third-party bad faith

action, we held in *Gaughan* that the factors a reviewing court in such circumstances should consider to determine whether a document was prepared in anticipation of litigation include "the nature of the requested documents, the reason the documents were prepared, the relationship between the preparer of the document and the party seeking its protection from discovery, the relationship between the litigating parties, and any other facts relevant to the issue." Syl. Pt. 12, in part, 203 W.Va. at 362, 508 S.E.2d at 79.

The language of the June 29, 2006, order at issue reveals that the lower court adhered to these principles of law in reaching its conclusion "that the raw data indicating the reserve amounts and the dates said reserve amounts were placed on the claim are not privileged." It is clear from the language of the June 29, 2006 order, that the lower court considered the factors set forth in *Gaughan* to conclude that the reserve information in the instant case was not prepared in anticipation of litigation:

> The facts of this case indicate that anticipation of litigation is not the primary motivating purpose for establishing insurance reserves, as insurance companies are required by law to establish reserves. Every claim presumably has some reserve amount attached to it, regardless of whether the claim ends in litigation or is resolved through other means. During her deposition on February 16, 2006, claims supervisor Sandra Barker testified that a reserve is "an amount of money or a dollar amount that's set aside for payment of an injury claim or any type of claim of [sic] any payment upon any claim." Mrs. Barker's description of reserves supports the Court's conclusion that the potential for litigation is not the primary motivating purpose for setting reserves, as they are set aside for "any type of claim" and for "any payment upon any claim," not limited to

> those claims for which litigation is likely or anticipated.[9] (Citation omitted.)

We find no reason in the limited record before us or the arguments presented to conclude that Erie set the reserves in this case for reasons other than the ordinary course of business. The position adopted by this Court in *State ex rel. United Hospital v. Bedell*, is that "'documents prepared in the regular course of the compiler's business, rather than specifically for litigation, even if it is apparent that a party may soon resort to litigation,' are not protected from discovery as work product." 199 W.Va. at 328, 484 S.E.2d at 211 (citation omitted). Erie maintains in its brief that the reserves information in this case was indeed prepared in anticipation of specific litigation since the reserves are set by the company's claims representatives and embody the mental impressions of those representatives concerning issues of coverage, liability and damages with respect to the specific claim. This assertion hardly addresses the discerning issue of whether the *primary or driving motivation* behind setting the reserves in this case was anticipation of litigation rather than for routine business purposes. Even if, as Erie avers, the claim was referred to its litigation department during the time the reserves were being set, Erie did not prove that the principal reason for setting the reserves was anticipation of litigation. It takes much more than some indicia of concern about possible litigation to establish *primary* motivation. We simply have no basis to find either that the lower court erred as a matter of law or abused its discretion by concluding that

[9]According to Ms. Murfitt, Ms. Barker explained during her deposition testimony that it was a matter of company policy that reserves were initially set when a claim was received and every ninety days thereafter.

the reserve amounts and the dates the amounts were set are subject to discovery in this case. Erie, as the party seeking protection of the reserves documents, has failed to meet its burden of proving that the materials qualify as either fact *or* opinion work product.[10] Consequently, we do not find that the lower court's ultimate disposition of this matter demonstrates an abuse of discretion and thus this Court's intervention through extraordinary relief is not warranted.

IV. Conclusion

Based upon the foregoing, the extraordinary relief in prohibition requested is denied.

Writ of prohibition denied.

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[10]As previously noted, Erie also claims that the lower court erred because it required a more relaxed level of proof in its alternative base for granting disclosure. In its second reason for granting discovery, the lower court apparently decided *if* the reserves information was discoverable it was because the material was *fact* work product and applied the more relaxed standard of proof. While this misconstrues the issue of when work product is based on fact or opinion, the conclusion does not warrant further discussion because we have found that the work product doctrine is not applicable under the facts of this case.