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IN THE CIRCUIT COURT OF KANWHA COUNTY, WEST VIRGINIA

IN RE: UNIVERSITY COMMONS LITIGATION Civil Action No. 13-C-7000

THIS DOCUMENT APPLIES TO:

UNIVERSITY COMMONS RIVERSIDE
HOME OWNERS ASSOCIATION, INC.

v. Civil Action No. 10-C-637 MON

R.E. CRAWFORD CONSTRUCTION, INC., et al.

ORDER REGARDING PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND MOTION FOR SANCTIONS AGAINST DEFENDANT NATIONWIDE MUTUAL INSURANCE COMPANY AND PLAINTIFFS' MOTION TO COMPEL DISCOVERY AGAINST DEFENDANT NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

The Court has reviewed "Plaintiff's Motion to Compel Discovery and Motion for Sanctions" against Defendant Nationwide Mutual Insurance Company (NMIC) e-filed on July 23, 2013 (TID 53309831), NMIC's Memorandum in opposition to Plaintiff's motion e-filed on August 6, 2013 (TID 53434499), and Plaintiff's Reply in support of its motion e-filed on August 13, 2013 (TID 53711483), including numerous and lengthy exhibits attached thereto. The Court has also reviewed "Plaintiffs' Motion to Compel Discovery Against Defendant Nationwide Mutual Fire Insurance Company" (NMFIC) e-filed on September 4, 2013 (TID 54013202), NMFIC's Memorandum in opposition to Plaintiffs' motion e-filed on September 18, 2013 (TID 54220077) and Plaintiff's Reply in support of its motion e-filed on September 26, 2013 (TID 54287747), including numerous and lengthy exhibits attached thereto.[1] Because Plaintiffs' motions and the responses of

[1] Supporting memoranda filed by NMIC and NMFIC in response to Plaintiffs' motions were in excess of 30 pages each, and no motion was filed by NMIC or NMFIC seeking leave of court to exceed the twenty (20) page limit for supporting memoranda set by Trial Court Rule 22.01. No party may file a supporting memorandum in excess of twenty (20) pages without prior Court authorization.

Defendants' NMIC and NMFIC are substantially identical, this Order applies to both motions.

The Presiding Judges have conferred with one another to insure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), and based upon their review and consideration of all the above, the Court hereby **ORDERS** Plaintiff's motions **GRANTED IN PART** as to Plaintiffs' Interrogatories Numbers 2, 6, 7 and 8, and **HELD IN ABEYANCE** as to Plaintiffs' Request for Production of Documents Numbers 1, 4 and 8, subject to preparation of privilege logs by NMIC and NMFIC, and the Court's *in camera* inspection of the documents requested by Plaintiffs.

Plaintiffs' motion for sanctions against Defendant NMIC is **DENIED**.

PRELIMINARY MATTERS

NMIC claims University Commons Riverside (UCR) never amended its May 2, 2011, Second Amended Complaint to formally add NMIC as a party to the above-captioned Declaratory Judgment Action. Instead, NMIC asserts it requested leave and was permitted by Order entered on June 6, 2011, to intervene in order to file its own Complaint for Declaratory Judgment against its insureds. NMIC Mem. at p. 1. NMIC further asserts UCR did not file an answer in response to NMIC's Complaint for Declaratory Judgment or ask that NMIC amend its Complaint to formally add UCR as a party. Id., p. 2. Significantly, NMIC states that, "[b]oth declaratory judgment actions relate to the issue of the availability of liability coverage for the underlying claim by UCR against NMIC's insureds." Id.

Under W.Va. Code § 55-13-2, the Uniform Declaratory Judgments Act,

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are

> affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

W.Va. Code § 55-13-2. Further, all persons are made parties if they have a claim or interest which may be affected by the declaration of the Court. W.Va. Code § 55-13-11sets forth the status of parties:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding.

Accordingly, the Court **ORDERS** UCR to amend its Second Amended Complaint to include NMIC as a named defendant in the above-captioned Declaratory Judgment Action. Likewise, NMIC is **ORDERED** to amend its Complaint for Declaratory Judgment to add UCR as a party.

Defendants' reliance upon *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996) is misplaced. In *Powderidge,* the circuit court granted the defendants' motion for summary judgment and the plaintiff condominium owners' association appealed. The Supreme Court of Appeals of West Virginia affirmed the lower court, holding the court did not abuse its discretion in not allowing a continuance for the plaintiff to develop evidence in opposition to summary judgment.

In this case, the Monongalia County Circuit Court held in abeyance ruling upon Nationwide's motions for summary judgment pending resolution of their discovery dispute with Plaintiff. Furthermore, the Mass Litigation Panel has lifted the stay of discovery in the underlying tort action and the declaratory judgment action. *Order*

Memorializing Rulings During July 9, 2013 Status Conference (TID 53257811); and *Second Case Management Order* (fact discovery completed February 28, 2014) (TID 53847676).

Plaintiffs' Interrogatories 2, 6, 7 and 8

Plaintiffs' Interrogatories 2, 6, 7 and 8 seek the name, address, and title of each employee and/or representative of Nationwide: who has been involved in review of the claims asserted by Plaintiff in the underlying litigation; with whom defense counsel has communicated in connection with this case; who was involved in determining whether coverage existed for its insureds for the claims asserted by UCR in the underlying litigation; and who is involved in any fashion in the adjustment of the underlying litigation. Under West Virginia law, there is no prohibition against obtaining the identity of potential witnesses. Syllabus Points 3-5 of *State ex rel. Chaparro v. Wilkes*, 190 W.Va. 395, 438 S.E.2d 575 (1993), are instructive on this point. "The 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. There is no prohibition against using other discovery methods to identify witnesses and depose them." Syl. pt. 3, *Chaparro*, citing Syl. pt. 8, *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984).

> Under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, when a party propounds an interrogatory to an opposing party seeking to discover the identity and location of persons having knowledge of any discoverable matter, such information is not work product. A party to whom an interrogatory asking for names and addresses is propounded cannot avoid an answer on the ground that the names were learned by counsel in the course of an investigation.

Chapparo, Syl. pt. 4. Although witness statements taken during an investigation in anticipation of litigation are protected and are not to be provided absent the required

showing under Rule 26(b)(3), names and addresses of the persons giving the witness statements are not protected. Id., Syl. pt. 5.

Because Plaintiffs' Interrogatory Nos. 2, 6, 7 and 8 seek only the identity and contact information for Nationwide employees or representatives the Court **GRANTS** Plaintiffs' Motion to Compel as to these interrogatories. Defendants NMIC and NMFIC are **ORDERED** to respond to Plaintiffs' Interrogatory Nos. 2, 6, 7 and 8 by no later than November 15, 2013.

Plaintiffs' Request for Production of Documents Numbers 1, 4 and 8

Plaintiffs' Request for Production of Documents Numbers 1, 4 and 8 seek: the underwriting file for each insurance policy issued to the insured, University Commons Morgantown, LLC, and/or Collegiate Homes, Inc. from 2005 to present; the claim file related to whether or not coverage exists for the underlying claim and/or underlying litigation; and all claim logs, log notes or memos related to potential coverage for the underlying claim and/or litigation. Defendants NMIC and NMFIC have asserted attorney-client privilege and the work product doctrine in response to each of these requests, but have not provided the Court or Plaintiffs with a privilege log.

"The 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. 3, *State ex rel. United Hosp. Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997), citing Syl. pt. 4, *State ex rel. USF & G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995). Additionally, for NMIC and NMFIC to successfully assert attorney client privilege they must establish: both parties contemplate the attorney-client relationship does or will exist; advice is sought by the client from that attorney in his capacity as a legal advisor; and the

communication between the attorney and client is intended to be confidential. Syl. pt. 6. *Bedell,* citing Syl. pt. 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979), and Syl. pt. 7, *State ex rel. USF & G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

> A party cannot prevent discovery by simply stating that material sought is privileged. That is, a general or blanket claim of privilege is insufficient for a party to cloak materials under a claim of privilege. To hold otherwise would mean that no party could ever obtain information during discovery, because parties would invoke an unreviewable claim of privilege. Obviously this is not, and never has been, the law.

Litigation Handbook On West Virginia Rules Of Civil Procedure, Fourth Edition, § 26(b)(1), p. 692 (2012), citing *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W.Va. 37, 658 S.E.2d 728 (2008). When a party asserts a communication is privileged, the trial court should conduct an in camera inspection of the materials. Id.

> The purpose of preparing the privilege log is to assist the court and the parties in performing the careful analysis that a privilege or immunities evaluation demands. An invocation of a claim of privilege without producing an accompanying privilege log can be an unfair discovery tactic that increases delay in the resolution of lawsuits, fosters excessive motion practice, increases the costs of litigation and greatly increases the work of the court. In addition, the very act of preparing a privilege log has a salutary effect on the discovery process by requiring the attorney claiming privilege to actually think about the merits of assertion before it is made, and to decide whether such a claim is truly appropriate. Moreover, the requirement of a privilege log is intended to underscore the gravity, if not the solemnity, of an assertion that otherwise presumptively discoverable documents are exempt from discovery. The requirement that detail be provided operates to discourage pro forma, half-baked, dilatory, and even jocular assertions of privilege.

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W.Va. at 42-43, 658 S.E.2d at 733-734, citing *Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.,* 240 F.R.D. 44, 47 (D.Conn. 2007).[2]

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[2] As Justice Menis E. Ketchum II recently wrote, "The legal response to obstructive discovery is to file a motion to compel discovery. A circuit judge then must pore over each question, each objection, each answer, and judiciously entice the parties to follow the *Rules of Civil Procedure*. But let's be honest: our

The general procedure for discovery of allegedly privileged documents is set forth in Syllabus Point 2 of *Kaufman*:

> (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.

This procedure, which was narrowly confined to the context of a bad faith action against an insurer in *State ex rel. Westfield Insurance Co. v. Madden*, 216 W.Va. 16, 602 S.E.2d 459 (2004), was later extended by the West Virginia Supreme Court of Appeals to "have a general application to discovery of privileged communication in any context." *Kaufman*, 222 W.Va. at 43, 658 S.E.2d at 734.

Pursuant to Syllabus Point 2 of *Kaufman,* the Court **FINDS** that Plaintiff's Request for Production of Documents Numbers 1, 4, and 8 are stated with reasonable particularity under Rule 34(b) of the West Virginia Rules of Civil Procedure, when read in conjunction with Plaintiffs' communications to Defendants clarifying the requests. Because Defendants NMIC and NMFIC have argued that the requested documents are protected from discovery by the attorney-client privilege or the work product doctrine, Plaintiff's motions to compel responses to Request for Production of Documents Numbers 1, 4 and 8

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circuit judges are just too busy to police voluminous, repeated motions to compel discovery. Perhaps the best way for judges to curb the abuse is to start imposing severe monetary penalties." *Impeding Discovery, Eliminating Worthless Interrogatory Instructions and Objections,* The West Virginia Lawyer, p. 18 (April-June 2012).

are **HELD IN ABEYANCE**, subject to preparation of privilege logs by NMIC and NMFIC, and the Court's *in camera* inspection of the documents requested by Plaintiffs.

Defendants NMIC and NMFIC are **ORDERED** to provide privilege logs to the Court and to Plaintiffs by no later than 12:00 noon on November 15, 2013. The privilege logs shall identify the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege. Defendants NMIC and NMFIC are further **ORDERED** to provide Lead Presiding Judge Derek C. Swope with the documents requested in Plaintiffs' Request for Production of Documents Numbers 1, 4 and 8, by no later than 12:00 noon on November 15, 2013, for *in camera* inspection by the Court.

ENTER: October 7, 2013

/s/ Derek C. Swope
Lead Presiding Judge
University Commons Litigation