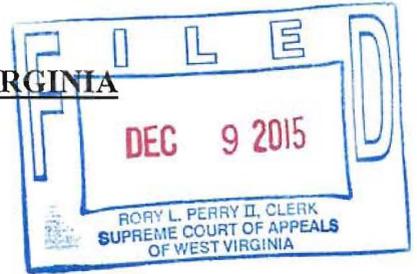


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia, ex rel., )  
Scott Kaminski, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
Honorable Thomas C. Evans, III, )  
Judge of the Fifth Judicial Circuit of )  
Jackson County, West Virginia, A.I.O. )  
Holdings, LLC; and Thomas T. Martin, )  
 )  
Respondents. )

No. 15-1100

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THOMAS T. MARTIN'S RESPONSE TO ORIGINAL PETITION FOR WRIT OF  
PROHIBITION ON BEHALF OF SCOTT H. KAMINSKI

---

Nicholas S. Preservati, Esquire (W.Va. Bar # 8050)  
**Spilman Thomas & Battle, PLLC**  
300 Kanawha Boulevard, East (ZIP 25301)  
Post Office Box 273  
Charleston, WV 25321-0273  
304.720.3437 – office  
304.340.3801- fax  
[npreservati@spilmanlaw.com](mailto:npreservati@spilmanlaw.com)

*Counsel for Thomas T. Martin*

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## QUESTION PRESENTED

Whether the trial court exceeded its authority by ordering Mr. Kaminski to disclose communications regarding the underlying lawsuit with entities that were not his client in the underlying litigation?

## STATEMENT OF CASE

On January 27, 2004, Mr. Martin leased the right to drill for and produce natural gas on approximately sixty-one (61) acres (the "Martin Lease") to Martin Twist Energy Corporation ("MTEC"). (App. 1). Pursuant to that lease, MTEC drilled three (3) wells upon the Mr. Martin's property. The three (3) wells were the Martin #1, Martin #2, and Martin #4 well. (App. 1).

Thereafter, AIO loaned MTEC two-million dollars (\$2,000,000), with the loan collateralized by various oil and gas leases and wells, including the Martin Lease and the wells drilled thereunder. (App. 1). MTEC defaulted on its loan with AIO and as a result, AIO instituted a foreclosure proceeding against MTEC in the Circuit Court of Jefferson County, Kentucky. (App. 1). As part of the Agreed Judgment entered by the Court, MTEC transferred its entire right and interest in the Martin Lease and the wells drilled thereunder to AIO on October 8, 2008. (App. 1). On March 12, 2009, Mr. Martin filed suit against AIO on multiple grounds, including its failure to pay Mr. Martin appropriate royalties under the Martin Lease. (App. 2). On April 15, 2009, Counsel for AIO made his first appearance in the case by removing the case to federal court. The case was later remanded back to state court. (App. 2).

Shortly thereafter, Counsel for AIO filed a counterclaim against Mr. Martin. (App. 2). The Counterclaim alleged that Mr. Martin interfered with AIO'S production from the three (3) wells when he chased AIO employees off of the property with a gun and prohibited them from

working on the wells. (App. 2). Under the original Scheduling Order the trial court found that this case was an appropriate case to refer to mediation and ordered the parties to complete such mediation not less than two (2) weeks prior to the pre-trial conference. (App. 2). The trial court ordered each party to present a representative that had full decision making discretion to examine and resolve issues involved in this case. (App. 2).

On July 16, 2010, Mr. Martin, and Todd Pilcher, on behalf of AIO, appeared before the Hon. Judge Andrew A. MacQueen, to attempt to resolve this case. (App. 2). Mr. Martin presented a settlement offer in the form of a certain Settlement Agreement and Mutual Release, but Mr. Pilcher rejected the settlement offer on behalf of AIO. (App. 2). On November 2, 2010, AIO served "*Defendant A.I.O. Holdings, LLC'S Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents*" upon Mr. Martin's. (App. 2). The responses were signed by Counsel and verified by Mr. Pilcher. (App. 2).

Interrogatory 4 asked AIO to identify the legal and factual basis for each defense set forth in its answer. (App. 2). AIO responded in part, "Defendant does contend that it complied with all of its obligations under the subject lease agreement including its right to operate the subject wells and its duty to pay royalties/shut-in fees." (App. 3). Interrogatory 11 asked AIO to identify each person or entity know to it that had rights in the Martin Lease. (App. 3). AIO responded, "None other than the present parties." (App. 3). Interrogatory 15 requested AIO to identify all communications it has had with Plaintiff regarding the lease of their property. (App. 3). AIO responded in part, "Too numerous to detail, but plaintiff has threatened defendant's employees or contractors on numerous occasions." (App. 3).

On May 12, 2011, AIO served "*Defendant's Responses to Plaintiffs' First Requests to Admit to A.I.O. Holdings, LLC.*" (App. 3). The responses were signed by Counsel, but were not

signed or verified by any other individual. (App. 3). Request 1 asked AIO to admit that it came into possession of the Martin Wells through proper foreclosure proceedings in Kentucky. (App. 3). This request was admitted by AIO. (App. 3). Request 3 asked AIO to admit that it maintained documentation of its gas production from the Martin Wells. (App. 3). Request 4 asked AIO to admit that it maintained documentation of its revenues from the Martin Wells. Request 5 asked AIO to admit that it maintained documentation of its costs incurred from the Martin Wells. (App. ). AIO admitted all three of these requests. (App. 3).

Request 6 asked AIO to admit that it had paid all taxes due on the Martin Wells to the State of West Virginia. (App. 3). AIO admitted this request. Request 14 asked AIO to admit that it maintains the Martin Wells to ensure optimum gas production. (App. 3). AIO admitted this request. (App. 3). Request 17 asked AIO to admit that it is currently producing gas from the Martin Wells. (App. 3). AIO responded that it could not admit or deny this request because the Martin Wells were “shut-in.” (App. 3).

Mr. Martin advised Counsel for AIO that its responses to Mr. Martin’s Interrogatories and Requests for Production were incomplete. (App. 4). When AIO refused to supplement its responses, Mr. Martin filed a Motion to Compel. (App. 4). In his response to the Motion to Compel, Counsel for AIO stated that he refused to provide the contact information for Mr. Pilcher and Mr. Rager because both men were employed by AIO, and therefore, all contact with them must occur through counsel. (App. 4). Counsel then justified his failure to schedule the Rule 30(b)(7) deposition of the AIO corporate representative because Mr. Pilcher, the designated representative, was unavailable and “is the only individual with such knowledge.” (App. 4).

AIO served its supplemental responses to Mr. Martin’s interrogatories on August 8, 2011. (App. 4). In supplemental response to Interrogatory 8, AIO stated that no additional production

reports were available because the wells had been shut-in since the time of the last reports. (App. 4). The latest production report provided to Mr. Martin by AIO showed production during May, 2009. (App. 4). There were only two checks received by Mr. Martin after May, 2009. (App. 4). They were dated June 11, 2010, but they did not reference the corresponding month of production. (App. 4).

Mr. Martin's Motion to Compel has heard by the lower court on August 12, 2011. (App. 4). During that hearing, Counsel for AIO stated that from the inception of this case through July of 2011, "Pilcher was the only person that I had any contact with relative to this case." (App. 4). When the Court inquired as to whether Mr. Pilcher was an employee of AIO, the following exchange occurred:

Kaminski: He is *not* a direct employee of AIO and *never* was.

Court: What is he?

Kaminski: He is an independent contractor...

Court: *How can AIO designate as a corporate representative* an independent contractor? I've never heard of that.

Kaminski: I have. It is rare, your Honor, but I have seen it done. Under 30(b)(7), *the corporation*, as I understand it, *is to designate the person* with the most knowledge about the given subjects that are listed...

Court: *So AIO can't control him*, and he's refusing to cooperate.

Kaminski: That is correct, your Honor. I don't know where he is.

Court: Is he really ill?

Kaminski: I don't know.

Court: *Nobody knows at AIO?*

Kaminski: It has been – *yeah*, I – the only -- *it's been represented to me* that he was admitted and put into a 90-day treatment facility in Illinois, and then I haven't heard from him since, so.

(App. 5).

On September 14, 2011, Mr. Gregory P. Anastas, the Rule 30(b)(7) representative of AIO, was deposed. (App. 5). Mr. Anastas testified that the sole member of AIO is Advantage Investments. (App. 5). He is the only member of Advantage Investments (App. 5). Also, AIO has no employees and no day-to-day operations. (App. 5). Mr. Anastas did not learn about the lawsuit until well into 2011. (App. 5). When asked who was managing the lawsuit on behalf of AIO before he became aware of it, he stated, "I don't know." (App. 5). Mr. Anastas was not aware of previous court dates in this case and does not know who retained Mr. Kaminski. (App. 5).

Mr. Anastas testified further:

Q: ... Do you know who answered the initial interrogatories for the company?

A: *No.*

Q: If there's no employees or anyone involved with A.I.O. Holdings other than yourself, how could anyone else have answered the interrogatories?

A: *I have no idea.*

Q: Were you aware that there was a mediation in this case over a year ago?

A: *I was not.*

Q: Did you authorize anybody to go to that mediation?

A: *I did not.* I don't recall that.

Q: So, you didn't authorize Todd Pletcher (Pilcher) to go to the mediation with authority to set [sic] on?

A: *No. I don't know who that is.*

(App. 6).

Also, MTEC has no involvement whatsoever with AIO; it has no managerial discretion; and does not consult with AIO. (App. 6). Mr. Anastas further testified that, until he was advised by Mr. Martin's Counsel during his deposition, he did not even know that AIO had an interest in the Martin Lease or the wells drilled thereunder. (App. 6). Mr. Anastas then re-confirmed that he had never heard of Todd Pilcher or Jonathan Rager. (App. 6).

AIO has never authorized anyone to maintain the Martin wells or to monitor production from the wells. (App. 6). Despite this fact, Mr. Rager was retained by Blue Light of Kentucky, LLC ("Blue Light") to tend the Martin wells. (App. 6). Blue Light's managing member was Martin Twist, and it had an office address of 530 W. Main Street, Louisville, Kentucky. (App. 6). As late as August 2, 2011, Mr. Rager was instructed to forward the Martin well meter readings to Martin Twist. (App. 6).

On the same day that Mr. Anastas was deposed, but several hours after the deposition, Martin Twist telephoned Mr. Rager and requested copies of all production logs for the Martin wells. (App. 7). Mr. Twist informed Mr. Rager that he was requesting this information because of allegations that were made during Mr. Anastas' deposition. (App. 7). Anastas did not know about AIO's counterclaim until he was told about it by Mr. Kaminski. (App. 7). In addition, AIO has no evidence whatsoever to support its counterclaim against Mr. Martin. (App. 7). Mr. Anastas testified that:

- a. AIO has no records in its possession related to the Martin Wells;
- b. AIO has never made a royalty payment to Mr. Martin;
- c. AIO has never received one cent from the production from the Martin wells;
- d. AIO cannot speak to the amount of gas produced from the Martin wells; and
- e. AIO cannot counter Mr. Martin's claims that he has not been properly compensated by AIO under the Martin Lease.

(App. 7).

Mr. Martin filed their Motion for Sanctions as a result of Mr. Anastas' deposition. (App. 7). Coincidentally, on the same day Mr. Kaminski received the Motion for Sanctions, he received an operating agreement showing that A.I.O. had in fact allowed Mr. Twist to operate the wells. (App. 7). Mr. Kaminski immediately moved to withdraw from the case. (App. 7).

A.I.O. agreed to waive their attorney client privilege in regards to any communications between Mr. Kaminski and A.I.O., people acting on behalf of A.I.O., and people purporting to act on behalf of A.I.O. (App. 7). A.I.O. then provided Mr. Martin with communications from Mr. Kaminski. (App. 7). Mr. Martin then served Mr. Kaminski with a subpoena requesting categories of documents. (App. 7). Mr. Kaminski opposed the subpoena on the basis of the attorney client privilege.

The categories of documents being sought by the subpoena can be separated into four different groups. Mr. Kaminski is no longer refusing to provide three groups of these documents. However, it is critically important that this Court understand why Mr. Kaminski is no longer challenging these three groups of documents because it highlights the Mr. Martin's need for the fourth group of documents. The four groups of documents are as follows:

**First Group - A.I.O. Documents**

Request No. 1 sought all correspondence between Mr. Kaminski and A.I.O. related to this case. (App. 215-16). Request No. 2 sought all communications between Mr. Kaminski and A.I.O.'s sole owner, Mr. Anastas. (App. 215-16). Request No. 6 sought all legal invoices submitted to A.I.O. by Mr. Kaminski. (App. 215-16). Request No. 7 sought copies of all checks, wire transfers, and other documents evidencing payment of the legal invoices by A.I.O. (App. 215-16).

A.I.O. provided Mr. Martin with all of the communications it had with Mr. Kaminski during the 2 ½ years that this case had been litigated by Mr. Kaminski. (App. 235-45). According to A.I.O., there was only one document. It was a short e-mail chain between Mr. Anastas and Mr. Kaminski discussing the scheduling of Mr. Anastas' deposition.

Initially, Mr. Kaminski refused to comply with Subpoena Requests No. 1, 2, 6, and 7. Now, Mr. Kaminski's counsel has represented that there are no additional documents responsive to these four requests. Said differently, despite representing A.I.O. in this case for 2 ½ years, the only written communications Mr. Kaminski had with the actual client was a single e-mail chain. There are no letters, facsimiles, memorandums or legal bills between Mr. Kaminski and the actual defendant he was representing in this case.

**Second Group - Todd Pilcher Documents**

Request No. 3 sought all communications between Mr. Kaminski and Todd Pilcher. (App. 215-16). A.I.O. previously provided Mr. Martin with all of the communications in its possession between Mr. Kaminski and Mr. Pilcher. (App. 215-16). Those communications consisted of a single facsimile cover-sheet. Mr. Kaminski initially resisted this request on the basis of the attorney-client privilege. However, Mr. Kaminski has abandoned that argument and now claims that the one page cover-sheet is the only written communication that exists between himself and Todd Pilcher.

To put this in perspective, Mr. Kaminski represented that Mr. Pilcher was the only individual that he communicated with regarding this case for nearly 2 ½ years. He is the individual that provided Mr. Kaminski with the answers to interrogatories, responded to the document production requests, prepared for and attended the mediation in this case, and provided Mr. Kaminski with the information underlying A.I.O.'s counterclaim and motion for summary

judgment. Despite all of this, the only written communication between Mr. Kaminski and Mr. Pilcher is a one-page facsimile cover-sheet.

**Third Group - Jonathan Rager Documents**

Request No. 4 sought all communications between Mr. Kaminski and Jonathan Rager. (App. 215-16). Mr. Rager is a well tender that worked on the Martin wells. Mr. Kaminski identified Mr. Rager as one of two individuals in this case that had knowledge of the claims set forth in Mr. Martin's complaint. He also identified Mr. Rager as an individual that had communicated with the Plaintiff regarding the subject wells and as also having witnessed the Plaintiff threaten other A.I.O. employees. Mr. Kaminski initially challenged this request on the basis of the attorney-client privilege. Now, Mr. Kaminski has withdrawn that objection and claims that he has no documents responsive to this request.

**Fourth Group - Martin Twist and related Twist Entities Documents**

Request No. 5 sought all communications between Mr. Kaminski and Mr. Twist, or one of his companies, *related to this case*. (App. 215-16). Request No. 8 sought copies of all legal invoices submitted to Mr. Twist or one of his companies by Mr. Kaminski *for this case*. (App. 215-16). Finally, request No. 9 sought copies of all checks, wire transfers, or other documents evidencing payment of Mr. Kaminski's legal invoices by Mr. Twist or one of his companies. (App. 215-16). Mr. Kaminski has advised the Mr. Martin that he has no documents responsive to Request No. 9, but that he does have documents responsive to Request No. 5 and Request No. 8. However, Mr. Kaminski refuses to provide these documents due to the attorney-client privilege.

It should be noted that Mr. Kaminski supposedly did not communicate with Martin Twist about this case from its inception in March of 2009 through at least June of 2011 (Mr. Kaminski

moved to withdraw as counsel in October of 2011). When Mr. Martin attempted to depose Mr. Twist in this case, Mr. Kaminski refused to produce him because he “knows nothing” about this case. Mr. Kaminski submitted discovery responses acknowledging that neither Martin Twist, nor any of his companies, had any interest in A.I.O. or the Martin gas wells. Yet, despite Mr. Twist’s complete lack of involvement or knowledge, the only documents that Mr. Kaminski has that are responsive to the subpoena are with Mr. Twist and his related companies. He then filed the Motion to Quash that is the subject of this order. (App. 7).

During the pendency of this matter it was discovered that MTEC and others had engaged in a scheme to shield its assets from investors. The important facts that were discovered are as follows. Mr. Lonny Armstrong worked for Mr. Twist for several years. (App. 20). Mr. Twist was sued in the matter Bengfort v. Martin Twist, et al., Civil Action No. 07-C-2358. (App. 20). In that case, Mr. Armstrong was deposed by various attorneys, *including Mr. Kaminski*. (App. 20). During that deposition, Mr. Armstrong testified that Martin Twist had him create new companies in the name of nominal individuals. (App. 20). Mr. Twist would then have the new company place a lien on the assets of one of his existing companies so that it could foreclose upon those assets. (App. 20). Once the assets were foreclosed upon, Martin Twist would retain control of the assets. (App. 20). This was done in order to protect the assets of Mr. Twist’s companies from creditors. (App. 20).

Mr. Armstrong identified three specific companies involved in such transactions. (App. 20). They were Blue Flame Energy Company, LLC, Cherokee Drilling Co., and A.I.O. Holdings, the current defendant. (App. 20). More specifically, Mr. Armstrong testified that Cherokee Drilling had significant debt and that Mr. Twist wanted to protect the company’s assets from creditors. (App. 20). Therefore, Mr. Twist had Mr. Armstrong create Blue Flame Energy

in Mr. Armstrong's name. (App. 21). Cherokee Drilling's assets were then transferred to Blue Flame to protect them from Cherokee Drilling's creditors. (App. 21).

Likewise, Mr. Armstrong testified that Martin Twist asked him to create A.I.O., which he did. (App. 21). He claims that Mr. Twist asked him to do so in order for him to protect Martin Twist Energy Company's assets from creditors. (App. 21). Mr. Armstrong further testified that the plan was to have Martin Twist Energy Company default on a loan from A.I.O. so that A.I.O. could place a first lien upon the assets in order to protect them from creditors. (App. 21). Throughout the course of this proceeding, Counsel for Mr. Kaminski has challenged the truthfulness of Mr. Armstrong's deposition testimony. (App. 21). Counsel argues that the testimony is unreliable because it was given as a *quid pro quo* for Mr. Armstrong being dismissed from that lawsuit with prejudice. (App. 21).

During the pendency of this lawsuit, Mr. Twist was indicted by the U.S. Attorney's Office for the Western District of Kentucky for the very conduct Mr. Armstrong discussed in his deposition. (App. 21). More specifically, he was indicted for creating Blue Flame Energy in the name of a nominee owner in order to conceal the assets of Cherokee Drilling and Martin Twist Energy Company, as well as transferring real estate and business holdings to nominee owners in order to remove his name and prevent collection activity. (App. 21).

Then, on July 9, 2013, Mr. Twist entered into a plea agreement acknowledging that he had committed the acts set forth in the indictment. (App. 21). More specifically, Mr. Twist admitted to creating new companies in the name of nominee owners in order to protect his assets. (App. 21). He verified Mr. Armstrong's testimony that he transferred assets out of Cherokee Drilling and Martin Twist Energy Company and into Blue Flame to avoid creditors. (App. 22).

Then, that same day, Mr. Twist appeared before the Honorable Charles R. Simpson, III and admitted his guilt by pleading guilty in federal court. (App. 22).

Mr. Twist confirmed every aspect of Mr. Armstrong's testimony regarding Cherokee Drilling and Blue Flame. (App. 22). The reliability of Mr. Armstrong's testimony regarding Cherokee Drilling and Blue Flame gives additional credence to his testimony regarding A.I.O.

### **SUMMARY OF ARGUMENT**

The Petition for Prohibition should be denied because the lower court did not commit a substantial, clear-cut legal error. For over two-and one-half (2 1/2) years, Mr. Kaminski claimed that he represented AIO in the underlying litigation. This is despite the fact that he was not retained by AIO, paid by AIO, or even in communication with anyone from AIO. During this period, AIO did not even know the lawsuit existed. Someone other than AIO retained Mr. Kaminski and paid him to represent AIO, all without AIO's knowledge or consent.

In AIO's initial written discovery responses, drafted and submitted by Mr. Kaminski, it was represented that neither Martin Twist, nor any of his related entities, had any control over AIO or any involvement in AIO's operation of the Martin Wells. When the Plaintiff attempted to depose Martin Twist to confirm this fact, Mr. Kaminski refused to present him on the basis that Mr. Twist knew nothing about the underlying litigation. This is despite the fact that Mr. Kaminski had represented Mr. Twist and MTEC in other cases and was personally aware of the allegations that Mr. Twist had fraudulently created AIO. More specifically, Mr. Kaminski was expressly aware of the allegations that MTEC was operating AIO from the shadows. Not only did Mr. Kaminski deny that Mr. Twist had any involvement in the litigation, Mr. Kaminski advised the lower court that the only individual that he spoke with about the case for over two years was Mr. Pilcher.

Therefore, up until the time that Mr. Anastas was deposed, Mr. Kaminski claimed that he had not spoken to Martin Twist about the litigation and that Mr. Twist and MTEC had nothing to do with the case. However, shortly after Mr. Anastas' deposition, Mr. Kaminski admitted that he had communicated with Mr. Twist. Also, after he withdrew from the case<sup>1</sup>, he decided to take the position that Mr. Twist and MTEC were his clients in the underlying litigation all along.

In regards to the underlying litigation, there was never any attorney-client relationship between Mr. Kaminski, Mr. Twist, or MTEC. Mr. Kaminski is now attempting to create the attorney-client relationship after he has already withdrawn from the case. Judge Evans was correct in every aspect of his order. There was no attorney-client privilege because Mr. Kaminski did not represent Mr. Twist or MTEC in the underlying litigation. Even if there were such a relationship, Mr. Kaminski and his counsel waived their ability to preserve the privilege by refusing to submit a privilege log.

The only entity that Mr. Kaminski represented in the underlying litigation was AIO. AIO expressly waived the attorney-client privilege in regards to its communications with Mr. Kaminski. It also waived the privilege on behalf of anyone acting on behalf of AIO, or purporting to act on behalf of AIO. Therefore, to the extent the privilege did exist, it belonged to AIO and was waived by AIO.

Finally, the lower court properly found that the crime-fraud exception applied in this case. Mr. Kaminski's counsel continues to erroneously argue that this exception only applies when an actual crime has been committed. Judge Evans correctly found that the exception also

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<sup>1</sup> Mr. Kaminski claims that he withdrew from the case once he learned of the Operating Agreement between AIO and 530 West Main because the Agreement created a conflict of interest. Judge Evans inquired of Mr. Kaminski's counsel as to how the Agreement created a conflict, as it appeared to Judge Evans that the Agreement would alleviate the conflict, not create it. Judge Evans' question was not answered.

applies when a good faith argument has been made that fraud has been committed upon the Court. Mr. Kaminski has the burden of proving that the lower court committed a substantial, clear-cut legal error. It did not. Therefore, the Petition should be denied.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Mr. Martin concurs with Petitioner that, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is necessary and that the decisional process would be significantly aided by oral argument.

### **ARGUMENT**

When the petitioner seeking a writ of prohibition avers not that the lower tribunal lacks jurisdiction but that the presiding judge has exceeded the bounds of his/her authority, the writ is used to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. State ex rel. Brooks v. Zakaib, 214 W. Va. 253, 588 S.E.2d 418 (2003). Also, in prohibition proceedings, the party seeking the writ has the burden of proving the allegations of his petition. State ex rel. Godfrey v. Rowe, 221 W. Va. 218, 654 S.E.2d 104 (2007).

#### **I. THE TRIAL COURT PROPERLY DENIED MR. KAMINSKI'S MOTION TO QUASH SUBPOENA.**

##### **A. *The Rules of Professional Conduct do not Prohibit Disclosure of the Communications.***

Mr. Kaminski claims that he cannot provide the requested information due to the confidentiality requirements set forth in the Rules of Professional Conduct. The Rules of Professional Conduct do not apply to this case. There are two related bodies of law which

embrace the principle of confidentiality. They are the ethical duty of confidentiality and the evidentiary attorney-client privilege. Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995). However, the evidentiary privilege exists apart from, and is not coextensive with, the ethical confidentiality precepts. Id.

Thus, “the [evidentiary] attorney client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.” Id. at 859. “In contrast, the lawyer’s broader ethical duty of confidentiality, embodied in Rule 1.6, applies in situations *other than those where evidence is sought from the lawyer through compulsion of law.*” Id. at 860. (emphasis added). Since this matter involves the disclosure of information from Mr. Kaminski through the compulsion of law, the attorney-client privilege applies and the Rules of Professional Conduct do not.

Mr. Kaminski’s argument fails even if the Rules of Professional Conduct do apply. This is because the Comments to Rule 1.6 state that the lawyer must also comply with court orders requiring him to provide information about his client. Since Mr. Kaminski has been ordered to provide the information by Judge Evans, he will not be in violation of the Rules of Professional Conduct if he does so.

**B. *There were no Privileged Communications between 530 West Main Street Properties, LLC and Mr. Kaminski in this Case.***

Mr. Kaminski argues that because 530 West Main Street Properties, LLC (“530 West Main”) had an indemnity agreement with AIO, that any communication that he had with Mr. Twist or others working for 530 West Main were automatically subject to the attorney-client privilege. This is wrong.

In order to meet the substantive requirement for invoking the attorney-client privilege, the following three elements must be shown: (1) both parties contemplated the existence of the

attorney-client relationship; (2) the advice must have been sought by the client from the attorney in his capacity as a legal adviser; and (3) the communication between the attorney and client must be identified to be confidential.” *Syllabus Point 2, State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979). In this case, Mr. Kaminski has failed to prove each of these three elements.

The first requirement to be proven is that *both* parties contemplated the existence of the attorney-client privilege. If *either* Mr. Kaminski *or* the “client” did not contemplate the existence of the relationship, the privilege does not apply. Mr. Kaminski has failed to allege that 530 West Main contemplated the existence of an attorney-client relationship *in this case*. Perhaps even more importantly and problematic, Mr. Kaminski failed to allege that *he* contemplated the existence of an attorney-client relationship with 540 West Main in this case.

Instead of meeting his burden of proving that the privilege applies, Mr. Kaminski claims that Mr. Martin must prove that the privilege does not apply. He then claims that he can invoke the privilege because Mr. Martin failed to present sufficient evidence to circumvent the privilege. Mr. Kaminski’s position is simply not supported by the law. The burden is upon Mr. Kaminski to prove that both parties contemplated the existence of the attorney-client relationship and he has failed to offer any such proof.

The second requirement is that the advice must have been sought by the client from the attorney in his capacity as a legal adviser. Again, Mr. Kaminski’s Petition contains no evidence that 530 West Main sought his legal advice in this case. In fact, Mr. Kaminski has personally acknowledged that the only entity that he believed was involved in this case was AIO. He further advised that he did not discuss this matter with Martin Twist for at least the first thirty (30) months of the litigation. Therefore, according to Mr. Kaminski’s previous representations, there should be *no* communications with 530 West Main or Mr. Twist, much less any privileged

communications. For this reason alone, Mr. Kaminski's attempt to invoke the attorney-client privilege must fail.

The third requirement is that the communication between the attorney and client must be identified to be confidential. Mr. Kaminski has failed to prove this element as he has failed to identify the communications in dispute, and he has failed to offer any evidence that the alleged communications were considered confidential by himself and the client. One simple fact remains; Mr. Kaminski offered no evidence in his Petition or to the lower court to prove any of the three necessary elements. As such, the lower court could not have erred in weighing the evidence because no such evidence was provided.

In addition, the attorney-client relationship is case-specific. Mr. Kaminski acknowledged that he did not represent Mr. Twist or any Twist entity in this case. However, Mr. Kaminski argued that his communications with Mr. Twist regarding this case were still subject to the attorney-client privilege because he represented Mr. Twist in other unrelated cases. This argument fails because the attorney-client privilege is case-specific.

For example, in In re Grand Jury Investigation, 640 F.Supp. 1047 (S.D. W.Va. 1986), the government sought to have an attorney testify against his unnamed client before the grand jury. The lawyer also represented a client known as A.D., whom the government believed was part of a criminal conspiracy with the lawyer's unnamed client. The government believed that the unnamed client had hired the attorney to represent A.D. and that he did so as part of the conspiracy. The attorney refused to testify against his unnamed client on the grounds of the attorney-client privilege. The lawyer did so on the basis that he had a current attorney-client relationship with the unnamed client in a separate state court proceeding. However, the lawyer did not represent the unnamed client in the case in which the lawyer was asked to testify.

As additional support for his ruling that the attorney-client privilege did not apply, Judge Haden cited the following portion of In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5<sup>th</sup> Cir. 1982):

Even if the anonymous fee-payer *was in other respects a client* of the attorney, he was *not the client* with respect to the matter for which the *fee was paid and for which the attorney was to be interrogated*. The three individuals who were the *beneficiaries of the attorney's services were the clients*. Because those three had *waived* the attorney-client privilege and because the unnamed client had failed to establish an attorney-client relationship, the concurring judges believed it unnecessary to discuss whether the legal services were provided pursuant to a conspiracy.

The relevant facts of the instant case are nearly identical to the facts in Judge Haden's case. In both cases, an anonymous fee-payer retained the lawyer to represent the named defendant. In both cases, the lawyer was asked to provide information related to the anonymous fee-payer. In each case, the lawyer refused citing his attorney-client relationship with the anonymous fee-payer. Also, in both cases, the lawyer did not represent the anonymous fee-payer in the case in which the lawyer was being asked to provide information. The lawyers in both cases based their objections on the fact that they had an attorney-client relationship with the anonymous fee-payer in some other case. Finally, in both cases, the actual client being represented by the lawyer agreed to waive the attorney-client privilege.

Judge Haden's reasoning and the holding in Pavlick are consistent with the holdings of numerous other jurisdictions that have addressed this same issue. *See, Panko v. Alessi*, 362 Pa.Super 384 (Pa. Sup. Ct. 1987) (attorney-client privilege did not bar lawyer from testifying against vendor that he represented in unrelated matter); Lopez v. State, 651 S.W.2d 830 (Texas Ct. App. 1983) (Lawyer that represented client in unrelated case could testify against client in criminal case); State v. Murvin, 304 N.C. 523 (N.Car. S.Ct. 1981) (Attorney-client privilege did

not protect disclosure of communication to attorney because the communication did not relate to the matter for which she was consulting the attorney); Tepsich v. Howe Construction, 377 Mich. 18 (Mich. S.Ct. 1965) (attorney-client relationship in unrelated case did preclude attorney from testifying against his client in matter where no attorney-client relationship existed); O'Connor v. Padget, 82 Neb. 95, 116 N.W.1131 (Neb. S.Ct. 1908) (a communication to an attorney, where there is no attorney-client relationship, is not privileged even though attorney employed in some other capacity); Rand v. Ladd, 238 Iowa 380 (Iowa S.Ct. 1947) (Lawyer who represented client in former prosecution could testify against client in injunction hearing without violating attorney-client privilege); People v. Hall, 55 Cal.App.2d 343 (Cal. Ct. App. 1942) (that attorney represented client with respect to one matter did not preclude him from testifying against client in entirely different matter where attorney-client relationship did not exist); Denunzio's Receiver v. Scholtz, 25 Ky.L.Rptr 1294 (Ky. Ct. App. 1903) (privilege does not apply to communications that do not concern the matter in which the lawyer represented the client); Milan v. State, 24 Ark. 346 (Ark. S.Ct. 1866) (Lawyer may testify against client as to matters in which no attorney-client relationship exists); and Churchill v. Corker, 25 Ga. 479 (Ga. S.Ct. 1858) (privilege does not preclude lawyer from testifying against client regarding facts that occurred in unrelated case).

The communications *regarding this case* between Mr. Kaminski and Mr. Twist are not protected by the attorney-client privilege because Mr. Kaminski and Mr. Twist did not have an attorney-client relationship *in this case*. Since the subpoena only sought communications between Mr. Kaminski and Mr. Twist related to this case, the requested documents are not protected by the attorney-client privilege and must be produced.

**C. Mr. Kaminski has failed to properly assert the attorney-client privilege.**

In order to assert the attorney-client privilege, a party must file a privilege log identifying the document that is allegedly privileged by name, date, custodian, source and the basis for the claim of privilege. State ex rel. Nationwide v. Kaufman, 222 W.Va. 37, 43, 658 S.E.2d 728, 734 (2008). The privilege log is to be provided to the Court and to the requesting party prior to any hearing seeking to compel the discovery. Id.

Mr. Martin's subpoena was issued on January 22, 2013. Shortly thereafter, Mr. Kaminski filed a motion to quash based upon the attorney-client privilege. However, he did not provide a privilege log. On July 18, 2013 Plaintiffs' counsel requested that Mr. Kaminski follow the proper procedure and provide a privilege log. Plaintiffs' counsel explained that it would be very difficult to determine whether the documents were privileged if no one even knew which documents were at issue. Mr. Kaminski's counsel responded that it would not provide a privilege log at that time because he was not going to "waste our time" responding to the Plaintiffs' "fishing expedition."

It is improper for Mr. Kaminski to refuse to comply with the subpoena under the cover of the attorney-client privilege, and then refuse to identify the privileged documents. Whether the privilege applies is to be determined on a document-by-document review by the lower court. This cannot be done if Mr. Kaminski refuses to identify the documents to be reviewed. The Supreme Court's mandate is clear. If a party refuses to provide documents under the claim of privilege, they must provide the other party and the court with a privilege log. Mr. Kaminski does not get to ignore this requirement simply because he thinks it is a waste of time.

**D. If there were Privileged Communications, the Privilege belonged to AIO. It did not belong to 530 West Main.**

Mr. Kaminski confuses several concepts. He cites the Recht case for the proposition that communications between the client's lawyer and third-parties acting on behalf of the client are also subject to the attorney-client privilege. Plaintiffs do not dispute this fact. However, Mr. Kaminski makes the faulty leap in logic that, because the lawyer's communications with the third-party are privileged, that the third-party has the right to assert the privilege. That is simply not the case. While the third-party communications may be privileged, the privilege still belongs to the client, not the third-party. Hawkins v. Stables, 148 F.3d 379, 384 n. 4 (4<sup>th</sup> Cir. 1998); U.S. v. Sharp, 2009 WL 1867619 at \*1 (N. D. W. Va. June 29, 2009). Therefore, because AIO expressly waived the privilege related to third parties acting on AIO's behalf; and third parties posing as AIO, Mr. Kaminski has no basis for claiming the third-parties must waive their privilege before he can produce the documents.<sup>2</sup>

Finally, the attorney-client privilege cannot be manufactured after-the-fact. Throughout the course of this litigation, Mr. Kaminski denied that Mr. Twist had any involvement in this case or had any right to operate the gas wells. Mr. Kaminski claims that it was only after he obtained a copy of the operating agreement that he learned that Mr. Twist was operating the wells. This fact is fatal to Mr. Kaminski's argument. Since Mr. Kaminski withdrew as counsel for A.I.O. immediately upon his receipt of the operating agreement, all of his communications with Mr. Twist regarding this case would have had to have occurred prior to his receipt of the

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<sup>2</sup> Mr. Kaminski argues that AIO did not waive the privilege based upon its response to Mr. Martin's written discovery requests. Mr. Kaminski misrepresents AIO's response. AIO objected to the discovery requests on the basis that the requests exceeded its waiver of the privilege by requesting more documents than those that evidence communications between Mr. Kaminski and (1) AIO Holdings, LLC (2) third parties acting on AIO's behalf, and (3) third parties posing as AIO. AIO acknowledged that it was producing communications between its lawyer, Mr. Kaminski and (1) AIO Holdings, LLC (2) third parties acting on AIO's behalf, and (3) third parties posing as AIO. (App. 236)

operating agreement. Thus, Mr. Kaminski was not communicating with Mr. Twist as the operator of the wells because Mr. Kaminski did not know that Mr. Twist was the operator of the wells when the conversations occurred. Therefore, even if Mr. Twist's status as operator were akin to a third-party insured, he did not communicate with Mr. Kaminski in his capacity as the operator. For this reason, Mr. Twist has no right to assert the attorney-client privilege based upon his status as well operator. The only privilege in this case belongs to A.I.O. Since A.I.O. has clearly waived the privilege in relation to the requested documents, Mr. Kaminski must produce any responsive documents in his possession.

***E. The Crime/Fraud Exception Applies***

Even if Mr. Kaminski's communications with Mr. Twist were privileged and had not been waived, they would still be discoverable due to the application of the crime-fraud exception to the attorney-client privilege. The crime-fraud exception operates to remove the privilege attaching to communications between a client and his or her counsel that were made in furtherance of a fraudulent or criminal scheme. State of W. Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 716, 601 S.E.2d 25, 36 (2004). This exception "applies even if the attorney is unaware of the client's criminal or fraudulent intent." Id. at 473. However, there must be *prima facie* evidence sufficient to establish the existence of a crime or fraud so as to render the exception operable. Id. at 718-19.

Finally, Counsel for Mr. Kaminski erroneously states the exception does not apply to civil fraud, but only to criminal fraud. For purposes of the crime-fraud exception to the lawyer-client privilege, "fraud" would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud." Madden at 717.

Mr. Martin have provided prima facie evidence to support a finding that the crime-fraud exception applies. The important facts are as follows. Mr. Lonny Armstrong worked for Mr. Twist for several years. Mr. Twist was sued in the matter Bengfort v. Martin Twist, et al., Civil Action No. 07-C-2358. In that case, Mr. Armstrong was deposed by various attorneys, *including Mr. Kaminski*. During that deposition, Mr. Armstrong testified that Martin Twist asked him to create A.I.O in order for him to protect MTEC's assets from creditors. Mr. Armstrong further testified that the plan was to have MTEC default on a loan from A.I.O. so that A.I.O. could place a first lien upon the assets in order to protect MTEC from creditors.

During the pendency of this lawsuit, Mr. Twist was indicted by the U.S. Attorney's Office for the Western District of Kentucky for similar conduct that Mr. Armstrong discussed in his deposition.<sup>3</sup> More specifically, he was indicted for creating Blue Flame Energy in the name of a nominee owner in order to conceal the assets of Cherokee Drilling and MTEC, as well as transferring real estate and business holdings to nominee owners in order to remove his name and prevent collection activity.

Then, on July 9, 2013, Mr. Twist entered into a plea agreement wherein he admitted to creating new companies in the name of nominee owners in order to protect his assets. He verified Mr. Armstrong's testimony that he transferred assets out of Cherokee Drilling and MTEC and into Blue Flame to avoid creditors. Then, that same day, Mr. Twist appeared before the Honorable Charles R. Simpson, III and admitted his guilt by pleading guilty in federal court.

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<sup>3</sup> Mr. Kaminski claims that neither the Indictment nor the Plea Agreement were made part of the public record in the underlying litigation. This is incorrect. Both documents, in addition to the transcript of Mr. Twist's Plea hearing were provided to the Trial Court and Mr. Kaminski's counsel as exhibits to "Plaintiff's Supplemental Response In Opposition To Motion To Quash Subpoena." At the time they were provided the documents were not under seal.

Just as Mr. Armstrong claimed, Mr. Twist, MTEC, Cherokee Energy, Cherokee Drilling and Joerhea Realty, LLC had judgment entered against them in favor of A.I.O. as a result of the default on A.I.O.'s alleged \$2,000,000 loan. However, before doing this, MTEC had already sold and assigned the boreholes of the Martin wells, and all of the gas produced from the wells, to Appalachian Energy Partners 2003-S, LLP. Appalachian Energy Partners 2003-S, LLP's sole member and registered agent is Cherokee Energy Company, LLC. Cherokee Energy Company, LLC's registered agent and member is Martin Twist. Therefore, despite the appearance that A.I.O. was the new owner of the Martin wells, Martin Twist still retained sole interest in the gas produced from the wells.

Based upon AIO's judgment, Mr. Martin filed this case against A.I.O instead of MTEC. A.I.O. answered the complaint and filed a counterclaim against Mr. Martin. A.I.O. then responded to numerous discovery requests served by Mr. Martin. In response to several of those requests, A.I.O. represented that it was the only entity that had any right in Mr. Martin's lease. It represented that the only two people who knew anything about the case were two employees of A.I.O., Todd Pilcher and Jonathan Rager. It further stated that neither Mr. Twist, nor any of his related entities, had any rights in the lease or authority to operate the wells. Shortly thereafter, A.I.O. attended the court ordered mediation and attempted to negotiate a settlement in this case. Mr. Pilcher is the individual that verified A.I.O.'s answers to interrogatories and attended the mediation on A.I.O.'s behalf.

Shortly thereafter, the Rule 30(b)(7) deposition of Mr. Greg Anastas was conducted. During the deposition, Mr. Anastas stated that he was the sole owner of A.I.O. He further testified that A.I.O. had no employees and that he had never heard of Mr. Pilcher or Mr. Rager. Mr. Anastas further testified that he did not know about the lawsuit until shortly before his

deposition, that he did not retain Mr. Kaminski to represent A.I.O., and that he never authorized anyone to answer discovery or to attend the mediation.

More importantly, Mr. Anastas testified that he did not even know that he owned the gas wells on Mr. Martin's property. He stated that A.I.O. had no knowledge of who was operating the wells or any knowledge regarding the counterclaim filed on A.I.O.'s behalf. Finally, Mr. Anastas testified that A.I.O. never operated the wells and that he had never authorized anyone to operate the wells on behalf of A.I.O.

It was eventually learned that Mr. Pilcher, the individual purporting to act on behalf of A.I.O., actually worked for Mr. Twist, not A.I.O. In fact, during the pendency of this case, Mr. Kaminski represented Mr. Twist and Mr. Pilcher, in his capacity as a Twist employee, in a separate unrelated lawsuit. It was also revealed to the trial court by counsel for Mr. Kaminski that it was in fact Mr. Twist that had retained Mr. Kaminski to represent A.I.O. in this case all along.<sup>4</sup>

Based upon the significant evidence provided by both parties, the trial court was led to the unmistakable conclusion that Mr. Pilcher committed a fraud on the Court in order to hide Mr. Twist's involvement. This is evidenced by the fact that Mr. Kaminski has disavowed all of the written discovery responses provided by Mr. Pilcher on behalf of A.I.O. While Mr. Kaminski correctly refused to identify which discovery responses were false, he did acknowledge that there were false responses. Mr. Pilcher would not have been able to falsely represent that he worked for A.I.O. and shield Mr. Twist if the lawyer in this case reported to A.I.O. or Mr. Anastas instead of Mr. Twist. Therefore, Mr. Kaminski's communications with Mr. Twist related to this

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<sup>4</sup> According to Rule 1.8(f) of the Rules of Professional Conduct, a lawyer shall not accept compensation for representing a client from one other than the client unless; 1) the client gives informed consent; 2) there is no interference with the client-lawyer relationship; and 3) information regarding the representation of the client is protected from the third party as required by Rule 1.6.

lawsuit were in furtherance of Mr. Pilcher and Mr. Twist's scheme to secretly direct this litigation on behalf of A.I.O.<sup>5</sup> Accordingly, the trial court found as a matter of law that the crime-fraud exception applies to the requested documents. Therefore, Mr. Kaminski's assertion of the attorney-client privilege must fail and his Petition must be denied.

***F. Mr. Kaminski's Legal Bills are not Privileged***

Even if there were an attorney-client relationship between Mr. Twist and Mr. Kaminski in this case, the attorney-client privilege was not already waived, and the crime-fraud exception did not apply, Mr. Kaminski's legal invoices submitted to Mr. Twist are still not privileged. That is because legal invoices that describe the work performed in general terms are not protected by the attorney-client privilege under West Virginia law. Chesapeake & Ohio Ry. Co. v. Kirwan, 120 F.R.D. 660, 665 (S.D.W. Va. 1988).

***G. Mr. Kaminski's Rule 11 Argument is without Merit***

Mr. Kaminski claims that Mr. Martin's subpoena does not seek information related to any potential claims or defenses in this case. Therefore, he argues that since the federal version of Rule 11 prohibits "satellite litigation" of claims unrelated to the case, the state version must also prohibit such litigation. As such, he claims that Mr. Martin cannot pursue his subpoena without leave of court and without a showing of exceptional circumstances.

First, Mr. Martin cannot locate a single instance of West Virginia courts ever applying the federal position on this issue. Second, while Mr. Kaminski limits his analysis of the subpoena to Rule 11, Mr. Martin did not so limit his motion for sanctions. The motion was brought pursuant to Rule 11, Rule 16 and Rule 37. The motion was not limited to Rule 11.

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<sup>5</sup> The crime-fraud exception applies even if the attorney is unaware of the client's criminal or fraudulent intent. State of W. Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 716, 601 S.E.2d 25, 36 (2004). Therefore, this Court need not find that Mr. Kaminski knew of or participated in Mr. Twist and Mr. Pilcher's fraudulent scheme.

Therefore, even if Mr. Kaminski's argument were correct, it only addresses one of the three rules under which Mr. Martin brought his motion. As such, Mr. Martin would still be able to proceed on his subpoena under the other two rules.

However, the most compelling reason why this argument must fail is because the subpoena is seeking documents that are critical to Mr. Martin's current claims and defenses, as well as additional claims against additional parties. This is a very important fact because, while Mr. Kaminski has disavowed all discovery responses in this case, the pleadings still stand. Those pleadings include denials of Mr. Martin's claims, a counterclaim, as well as a motion for summary judgment. Therefore, Mr. Martin still has viable claims against A.I.O., and A.I.O. still has a counterclaim against Mr. Martin. The evidence sought by the subpoena is seeking information that will help Mr. Martin prevail on those claims against A.I.O., as well as defend against the counterclaim in the event a settlement is not reached.

The subpoena is not only seeking documents to defend against these claims, it is seeking documents to support claims against additional individuals and entities. Mr. Martin believes that Mr. Pilcher and others engaged in a pattern of fraud that has caused significant damage to Mr. Martin. That pattern of fraud includes leasing the gas wells and continuing to produce gas under the claim that the wells are shut-in. It includes transferring the interest in Mr. Martin's lease in order to protect assets from collection. It also includes hiring counsel for the nominee party and steering the litigation in a manner to hide the above mentioned fraud. Not only did the Mr. Martin suffer damages from the manner in which the wells were operated, he has nearly depleted his retirement accounts in order to fund this litigation. He has spent his savings litigating a case that has turned out to be a sham.

Mr. Martin has issued the subpoena in part to determine just how extensive Mr. Twist and his related entities were involved in this fraud. It is also important to see to what extent Mr. Twist was in fact communicating with Mr. Kaminski regarding this case since it was represented that there were no communications for the first two years. While this information may also implicate Mr. Kaminski, it's more important use is to show that Mr. Twist, Mr. Pilcher and MTEC were directly involved in the fraud and directed the litigation.

Therefore, the information sought by the subpoena is not intended for the sole use of supporting the motion for sanctions against Mr. Kaminski. The primary purpose of the subpoena is to seek documents to support a claim against the individuals that have been perpetrating a fraud against the Mr. Martin for over four years now. These documents go to the very heart of this matter. As such, Mr. Kaminski's claim that Mr. Martin is simply engaging in satellite litigation is unfounded and does not warrant quashing the subpoena.

***H. Mr. Kaminski is not entitled to invoke the Work-Product Privilege.***

Mr. Kaminski makes a passing comment in his Petition that the work-product privilege may also apply to the challenged communications. To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." Syllabus Point 7, State ex rel. United Hosp. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997).

To the extent Mr. Kaminski is actually raising the work-product privilege; his claim must fail for two reasons. First, his Petition fails to identify any specific communications or any analysis as to why the communications may be privileged. Instead, he simply claims that if such communications exist, they must fall under the work-product privilege. Mr. Kaminski bears the

burden of proving that he is entitled to invoke the work-product privilege. Since he has failed to offer any evidence substantiating his claim of privilege, he has failed to meet his burden.

Second, Mr. Kaminski filed a Petition for Writ of Prohibition based on the allegation that Judge Evans exceeded his authority by denying his motion to quash. Mr. Kaminski cannot simply raise the issue of the work-product doctrine in his Petition if he did not raise it below before Judge Evans. There is no allegation in the Petition that the issue of work-product privilege was presented to Judge Evans. While Mr. Kaminski may have made some passing reference to the privilege below, he never presented any evidence or argument as to why he was entitled to invoke the privilege. Since no argument or evidence was presented to Judge Evans on this issue, it is impossible for Mr. Kaminski to claim that Judge Evans erred by not finding that the privilege applied.

### CONCLUSION

The Petitioner bears the burden of proving that Judge Evans acted beyond his authority, and as a result, committed substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. Petitioner has offered no actual evidence that Judge Evans committed error, much less a substantial clear-cut error. As such, his Petition should be denied.

  
\_\_\_\_\_  
Nicholas S. Preservati, Esquire (W.Va. Bar # 8050)  
**Spilman Thomas & Battle, PLLC**  
300 Kanawha Boulevard, East (ZIP 25301)  
Post Office Box 273  
Charleston, WV 25321-0273

**VERIFICATION**

State of West Virginia:

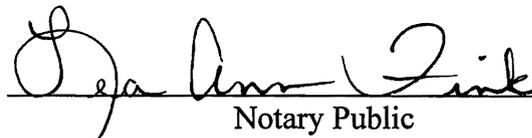
County of Kanawha, to-wit:

I, Nicholas S. Preservati, after first being duly sworn upon oath, state that I have read the foregoing **“THOMAS T. MARTIN’S RESPONSE TO ORIGINAL PETITION FOR WRIT OF PROHIBITION ON BEHALF OF SCOTT H. KAMINSKI”** and that the facts and allegations therein contained are true, except so far as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

  
\_\_\_\_\_  
Nicholas S. Preservati (W.Va. Bar # 8050)

Taken, sworn to and subscribed before me, a Notary Public in and for Kanawha County, West Virginia, this 9<sup>th</sup> day of December, 2015.

My commission expires: November 10, 2021.

  
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Notary Public



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

<b>State of West Virginia, ex rel.,</b>	)	
<b>Scott Kaminski,</b>	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	<b>No. 15-1100</b>
<b>Honorable Thomas C. Evans, III,</b>	)	
Judge of the Fifth Judicial Circuit of	)	
Jackson County, West Virginia, A.I.O.	)	
<b>Holdings, LLC; and Thomas T. Martin,</b>	)	
	)	
Respondents.	)	

**CERTIFICATE OF SERVICE**

I, Nicholas S. Preservati, do hereby certify that on the 9<sup>th</sup> day of December, 2015, I served a true and exact copy of the foregoing **“THOMAS T. MARTIN’S RESPONSE TO ORIGINAL PETITION FOR WRIT OF PROHIBITION ON BEHALF OF SCOTT H. KAMINSKI”** upon the parties and counsel of record listed below, by placing the same in the United States mail, postage prepaid, addressed as follows:

David Hendrickson, Esquire  
Raj A. Shah, Esquire  
HENDRICKSON & LONG  
214 Capitol Street  
Charleston, WV 25301

Robert L. Greer, Esquire  
GREER LAW OFFICES, PLLC  
P.O. Box 4338  
Clarksburg, WV 26302

The Honorable Thomas C. Evans, III  
Fifth Judicial District  
P.O. Box 800  
Ripley, WV 25271



\_\_\_\_\_  
Nicholas S. Preservati (W.Va. Bar # 8050)