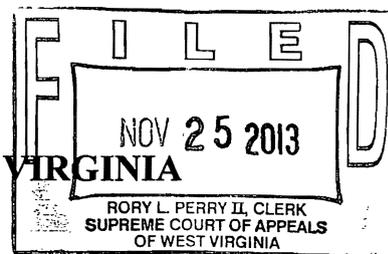


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13- 1172



STATE OF WEST VIRGINIA ex rel. MONTPELIER US INSURANCE COMPANY AND CHARLESTON, REVICH & WOLLITZ LLP, a California Limited Liability Partnership,

Petitioners,

vs.

HONORABLE LOUIS H. BLOOM, Judge of the Circuit Court of Kanawha County, West Virginia; and JAMES M. BUCKLAND, an individual; B & B TRANSIT, INC., a West Virginia corporation; B & D SALVAGE, INC., a West Virginia corporation; and TIM'S SALVAGE, INC., a West Virginia corporation,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

Lee Murray Hall, Esquire (WV Bar # 6447)
Sarah A. Walling, Esquire (WV Bar #11407)
Jason D. Bowles, Esquire (WV Bar # 12091)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
(304) 523-2100
*Counsel for Petitioner Montpelier US
Insurance Company*

Ancil G. Ramey (WV Bar No. 3013)
Charles F. Johns (WV Bar No. 5629)
Mark Jeffries (WV Bar No. 11618)
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000
(304) 933-8183 fax
*Counsel for Petitioner Charlston, Revich &
Wollitz LLP*

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I. QUESTIONS PRESENTED

1. Whether the Respondent Judge exceeded his judicial authority in compelling the production of documents created by counsel for the explicit and exclusive purpose of providing an insurer with confidential legal advice regarding its duty to defend an insured.
2. Whether the Respondent Judge exceeded his judicial authority in compelling the production of an attorney's preparatory work involving mental impressions and opinions related to the scope of insurance coverage.
3. Whether the Respondent Judge exceeded his judicial authority in concluding that coverage opinions involving unrelated insurance policies and third party non-litigants are within the permissible realm of discovery.

II. STATEMENT OF THE CASE

Under W. Va. Code § 53-1-1, *et seq.*, and Rule 16 of the Rules of Appellate Procedure, Montpelier US Insurance Company ("Montpelier") and Charleston, Revich & Wollitz, LLP ("CRW") petition this Court for a writ of prohibition to prevent Respondent, the Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, West Virginia, from enforcing his order compelling responses to objectionable discovery requests more fully described herein. The Respondent Judge ratified the recommended decision of a Discovery Commissioner which compelled production of 357 pages of privileged documents, including billing statements, fee agreements, client training materials, and nearly 250 pages of coverage opinions written by CRW for Montpelier in unrelated cases. The decision of the circuit court is erroneous and will cause substantial immediate and irreparable harm. Thus, Petitioners challenge the Respondent Judge's decision through this Petition for Writ of Prohibition.

A. Statement of Facts and Procedural History

This case arises out of Montpelier's denial of a defense to its insureds, the Plaintiffs below, in a third party property damage claim brought by Gina Bryant Corrick and her husband, Jason Corrick ("the Corricks") in the Circuit Court of Logan County ("the Corrick action").

On January 4, 2012, the Corricks filed the underlying Complaint commencing suit against the Plaintiffs below based on allegedly negligent work performed by B&B Transit, Inc. ("B&B") pursuant to a contract entered into with the State of West Virginia. In relevant part, the Corricks' Complaint alleged that "on or about January 14, 2010, [B&B] negligently and unlawfully caused a landslide to invade the [Corricks'] property, and caused damage to their property and their house." (Appx. at 000021)

After the inception of the Corrick action, B&B notified Montpelier and demanded coverage and a defense. (Appx. at 000012). Montpelier retained CRW as counsel for evaluation of the duty to defend under the Complaint and thereafter determined that the Corrick claim fell outside the scope of coverage granted to B&B because the policy explicitly excluded damage caused by landslides. On February 7, 2012, Howard Wollitz of CRW prepared a letter to B&B communicating a denial of coverage decision based on the subsidence of land exclusion contained in the B&B Policy. (Appx. at 000247)

On January 30, 2013, the Corricks filed an Amended Complaint which modified the central allegation and removed the paragraph that alleged that Plaintiffs negligently caused a landslide. (Appx. at 000023-000027) Once Montpelier reviewed the Amended Complaint, it retained defense counsel to defend Plaintiffs against the allegations in the Amended Complaint. Montpelier settled the Corrick claim during mediation on October 29, 2013. Plaintiffs

nevertheless maintain the present bad faith action challenging the conduct of Petitioners in the investigation and disclaimer of the Corrick claim.

B. Statement of Discovery Issues

Respondent Plaintiffs served Interrogatories and Requests for Production of Documents on CRW and Montpelier.¹ CRW served written responses and objected to certain requests on the basis of attorney/client privilege, relevancy, and the work product doctrine. (Appx at 000071-000082). Respondent Plaintiffs subsequently moved to compel production of the exempt materials, which both CRW and Montpelier opposed. (Appx. at 000052-000226, 000229-000342, 000348-000373). The Respondent Judge referred the matter to a special commissioner, G. Nicholas Casey, who conducted a hearing on October 22, 2013. (Appx. at 000227-000228). The primary issue presented was whether the attorney/client privilege and work product doctrine protected certain materials from production.

Special Commissioner Casey reviewed the documents *in camera* and on November 2, 2013, issued his “Recommended Decision,” ordering that billing statements, fee agreements, portions of the claims file and nearly 250 pages of insurance coverage opinions authored by CRW and tendered to Montpelier (its client) in unrelated cases in other jurisdictions be produced. (Appx. at 000004-000009). CRW and Montpelier filed written objections to the Special Commissioner’s Recommended Decision on November 6, 2013, and November 7, 2013, respectively. (Appx. at 000441-000516, 000517-000571). The Discovery Commissioner’s proposed rulings were ratified and adopted by the Respondent Judge pursuant to an Order dated November 12, 2013. (Appx. at 000001-000002). Petitioners seek to prevent enforcement of the November 12, 2013, Order adopting the Special Commissioner’s recommendations because the

¹ Montpelier served its responses on October 21, 2013, pursuant to an extension of time. Its responses are not a subject of this petition.

documents fall squarely within the attorney/client privilege and are protected by the work product doctrine.

Specifically, Petitioners challenge the following four discovery requests:

REQUEST FOR PRODUCTION NO. 10: True and accurate copies of any representation agreement or contract (including but not limited to billing schedule) between with MUSIC [sic].”

REQUEST FOR PRODUCTION NO. 11: True and accurate copies of any commercial liability coverage opinion tendered to MUSIC by the law firm of CRW (names and other identifying information may be redacted) prior to that given with respect to the Corrick claim.

REQUEST FOR PRODUCTION NO. 20: True and accurate copies of any coverage opinion issued by CRW to MUSIC finding coverage for the claim alleged (names and other identifying information may be redacted).

REQUEST FOR PRODUCTION NO. 22: True and accurate copies of any seminar or training materials prepared by CRW, for any carrier or industry trade group, related either to coverage interpretation or extra-contractual liability.

CRW objected to the requests on the basis of attorney/client privilege and/or the work product doctrine. CRW further objected on the basis of relevancy as commercial liability coverage opinions provided to Montpelier in other claims, all of which involve policies issued in other states and governed by foreign law, have no relevance on whether the Corrick claim was covered by the Montpelier policy at issue. (Appx. at 000074-000079)

Despite CRW’s appropriate objections, the Discovery Commissioner held that neither the attorney/client privilege nor the work product doctrine applied to the requested materials. In his Recommended Decision, the Special Commissioner determined that one of the criteria necessary for the application of the attorney client privilege was not satisfied simply because some of the contents of CRW’s communications with its client, Montpelier, were shared with non-clients in

separate communications either by CRW or Montpelier. (Appx. at 000005-000006). In other words, according to the Discovery Commissioner, if an attorney and a client have confidential communications about a topic, those communications between the attorney and the client lose the attorney/client privilege and work product protection if either the attorney or the client discuss that topic, but not the communication itself, with any non-client. Of course, most attorney/client communications, by necessity, involve subsequent communications with non-clients about the subject matter of the attorney/client communications, but no court to Petitioners' knowledge has ever held that an attorney/client communication is waived if either the attorney or the client subsequently discuss the subject matter of the consultation with a non-client.

Moreover, the Discovery Commissioner inexplicably determined that the attorney client privilege was not available because CRW is a party to the instant litigation, and therefore, was subject to deposition and trial testimony. (Appx. at 000006). In other words, the Discovery Commissioner ruled that in order to negate the attorney/client privilege and work product doctrine, simply naming the attorney as a party automatically renders the privilege and the doctrine unavailable to the client or the attorney. Again, no court to Petitioners' knowledge has ever held that the attorney/client privilege and work product doctrine are negated when an attorney is named as a party defendant arising from the attorney's representation of the client.

Finally, with respect to the work product doctrine, the Discovery Commissioner stated that Respondent Plaintiffs have substantial need for the requested materials given their theory of the case and to force Respondent Plaintiffs to gather the material by other means would result in undue hardship. Id. Not only was this an erroneous application of the test for determining

whether a fact work product objection should be overruled, the Discovery Commissioner simply ignored the different test applicable to the disclosure of opinion work product.

In ratifying the Recommended Decision of the Special Commissioner, the circuit court has disregarded the attorney/client privilege and work-product doctrine; ignored the well-established public policy of this State; and have applied tests which to Petitioners' knowledge no court has ever employed under similar circumstances. Accordingly, Petitioners assert their entitlement to a writ of prohibition.

III. SUMMARY OF THE ARGUMENT

While Petitioners recognize that issuance of a writ of prohibition remains an extraordinary remedy, this Court has recognized an exception for discovery orders, such as the Order entered by the circuit court on November 12, 2013. Prohibition of enforcement of the subject order is appropriate in this case because CRW and Montpelier have no other adequate means to obtain the relief requested and will suffer immediate and irreparable harm if Respondent Plaintiffs are permitted to obtain the privileged and confidential materials they seek.

The circuit court clearly erred in granting Respondent Plaintiffs' Motion to Compel because the documents sought by Respondent Plaintiffs, including the coverage opinions and billing statements prepared by CRW for its client, Montpelier, in its capacity as legal counsel, fall squarely within the protection afforded by the attorney/client privilege. As Respondent Plaintiffs themselves have stated, these materials also constitute opinion work product and are thus afforded a nearly absolute immunity from discovery. Furthermore, Respondent Plaintiffs have not even argued that these materials are fact work product, let alone established the existence of a substantial need **and** an undue hardship as required to overcome the lesser protection afforded to fact work product.

Finally, the coverage opinions prepared by CRW for Montpelier address different policies, different facts, and different claims in different jurisdictions governed by different law. These coverage opinions are not relevant to the duty to defend or interpretation of a subsidence exclusion under West Virginia law.

As the documents and materials sought by Respondent Plaintiffs are privileged, confidential, and fall outside the scope of discovery, Petitioners are entitled to issuance of a writ prohibiting enforcement of the circuit court's November 12, 2013 Order compelling production.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted under Rule 19(a) of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law protecting the disclosure of confidential information pursuant to the attorney client privilege, the work product doctrine and the discovery provisions established by the West Virginia Rules of Civil Procedure.

V. ARGUMENT

A. Issuance of a Writ of Prohibition is Appropriate under the Standard Established by this Court.

Pursuant to W. Va. Code §53-1-1, "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." While a writ of prohibition remains an extraordinary remedy, this Court has "carve[d] out . . . a specific exception to the general rule: 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.” *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 437, 460 S.E.2d 677, 683 (1995).

This Court has also provided an “apparent” reason for this exception: “If the privilege and/or immunity to keep confidential materials from being delivered to the opponent pursuant to court order is not vindicated before the violation occurs, then this sacred privilege and/or immunity is no privilege and/or immunity at all but a cruel illusion.” *Id.* Furthermore, “the attorney/client privilege and the work product exception would be lost forever if the offended party is forced to ‘run the gauntlet’ before having an opportunity to seek redress before this Court.” *Id.* The *Canady* opinion also noted:

If the relators wrongfully are compelled to produce records protected by either the attorney-client privilege and/or the work product doctrine, the damage will occur upon disclosure, and a later appeal would be uneventful. In the area of communication privileges, ‘once the cat is out of the bag, it cannot be put back in.’ The only other alternative the relators have is to disobey the circuit court’s order and to suffer a contempt citation or other sanctions. We do not believe it is necessary to leave the relators in this position. Thus, we find the relators have no other adequate means to obtain relief from the circuit court’s order that compelled the disclosure of privileged information and work product. We also find the disputed questions involve important issues completely separate from the merits of the action which effectively are unreviewable on an appeal from a final judgment.

Id. at 446 n.8, 460 S.E.2d at 692 n.8.

Pursuant to this Court’s holding in *State ex rel. Chafin v. Halbritter*, 191 W. Va. 741, 743-4, 448 S.E.2d 428, 430-1 (1994): “Prohibition may be substituted for a writ of error or appeal when the latter alternatives would provide an inadequate remedy.” This Court has also recognized that its “modern practice is to allow the use of prohibition, based on the particular facts of the case, where a remedy by appeal is unavailable or inadequate, or where irremediable prejudice may result from lack of an adequate interlocutory review.” *State ex rel. Amy M. v.*

Kaufman, 196 W. Va. 251, 257, 470 S.E.2d 205, 211 (1996) (quoting *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 532, 295 S.E.2d 16, 22 (1982)).

This Court applies the following five-part test to determine whether issuance of a writ of prohibition is appropriate in a particular case:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Applying these factors and the above-cited authorities to the case *sub judice*, Petitioners have no other adequate means to obtain the relief available through a writ of prohibition and, just as in *Canady*, will be damaged or prejudiced in a way that is not correctable upon appeal.

The requested documents were prepared for Montpelier by its counsel for the explicit and exclusive purpose of providing an insurer with confidential legal advice regarding the scope of coverage under a given set of facts and contain mental impressions and opinions of counsel related to the scope of insurance coverage, the facts presented and the law of a particular jurisdiction. As such, the circuit court's November 12, 2013 Order ignores long-standing privileges, protections, and procedures consistently recognized and enforced by this Court and is

therefore clearly erroneous as a matter of law. Petitioners respectfully request that this Court recognize the privileged and confidential nature of the material sought by Respondent Plaintiffs and exercise its prohibition jurisdiction to avoid significant, irreparable, and imminent harm to Petitioners.

B. The Respondent Judge Exceeded His Judicial Authority In Compelling The Production Of Documents In That They Were Created By Counsel For The Explicit And Exclusive Purpose Of Providing its Client With Confidential Legal Advice

In his HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, the Honorable Franklin D. Cleckley teaches that “[t]he first testimonial privilege ever established was the attorney-client privilege.” F. Cleckley, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 5-4(E)(1) (4th ed. 2000). Furthermore, “[t]here is no rule of law better settled than that an attorney will not be permitted to divulge any matter communicated to him in professional confidence.” 2A MICHIE’S JURISPRUDENCE *Privileged Communications* § 33 (2004) (footnote omitted). This Court has recognized the purpose of the attorney-client privilege as having “as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.” *State ex rel. United Hosp. Center, Inc. v. Bedell*, 199 W. Va. 316, 326, 484 S.E.2d 199, 209 (1997) (citing Syl. pt. 11, in part, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988)) (additional citations omitted).

To establish the existence of attorney-client privilege, the party claiming privilege must show that: “(1) both parties contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be [intended] to be confidential.” *United. Hosp. Center, Inc., supra* at 209 (citing *Canady, supra* at Syl. pt. 7) (additional citations omitted).

The coverage opinions responsive to Plaintiff's requests numbered 11 and 20 satisfy each criteria of the attorney-client privilege. As Montpelier stated in its Response to Plaintiffs' Motion to Compel, CRW and Montpelier entered into an attorney/client relationship whereby Montpelier sought the advice of CRW in its capacity as legal counsel. (Appx. at 000350). Respondent Plaintiffs admitted in their Amended Complaint that Montpelier sought legal advice from CRW. (Appx. at 000011). Further, both CRW and Montpelier intended their communications regarding coverage to remain confidential, and both CRW and Montpelier have consistently asserted the attorney/client privilege as to documents exchanged between them.

The responsive documents are coverage opinions authored by CRW for Montpelier in both the Corrick claim and in forty unrelated claims over the past five years. All of the documents are coverage opinions written by counsel giving confidential legal advice to a client. It is difficult to imagine a series of documents that fall more squarely within the attorney privilege than legal opinion letters on the existence of coverage. In fact, there is no issue with respect to the first two requirements, as Respondent Plaintiffs never disputed that an attorney/client relationship existed between CRW and Montpelier nor did Respondent Plaintiffs dispute that Montpelier sought legal advice from CRW as its legal advisor. Rather, Respondent Plaintiffs contend that CRW and Montpelier waived attorney/client privilege as to all information simply because the outcome of the letter was eventually related to a third party in the form of a letter from the law firm. (Appx. at 000055-000056) Even on its face, this assertion lacks merit. This is tantamount to suggesting that because a settlement offer is eventually relayed to plaintiff's counsel by defense counsel, defense counsel's analysis and evaluation letters to its clients which ultimately led to that offer are discoverable. While the amount of the settlement (or in this case whether coverage was denied or granted) is discoverable, the

evaluation or opinions letters are not. Here, Plaintiffs have not tendered a simple interrogatory asking the percentage of cases in which coverage was granted or denied. It wants the legal opinions and analysis performed by counsel.

The production of documents can act as a waiver only where the produced documents are privileged. *See State ex rel. McCormick v. Zakaib*, 189 W. Va. 258, 430 S.E.2d 316 (1993). For example, the February 7, 2012, Wollitz letter is not privileged, as it was not a communication between an attorney and a client, and neither Montpelier nor CRW have asserted privilege as to the Wollitz letter. A party does not waive privilege simply by producing a letter to an opposing party from an attorney. Nor can production of such a non-privileged document create a waiver as to all communications related to the present claim.

Although the Special Commissioner indicated in his recommended decision that “in a number of the numbered documents in the series 157 to 383, CRW communicated its opinion based on facts and its’ [*sic*] coverage interpretations of the covered party’s insurance policy to a non-client by letter,” the Special Commissioner either misunderstood or misspoke. (Appx. at 000005). None of the documents in CRW 157 to 383 (Appx. 000730-000956) are communications to a non-client. CRW did not provide any coverage opinions to a non-client, and it did not provide a billing statement, representation agreement or contract to a non-client. Furthermore, Montpelier reiterated during the Special Commissioner’s hearing on October 22, 2013 that it never waived any privilege with respect to any communications between it and CRW. (Appx. at 0000430).

In response to Request 22, the Special Commissioner also ordered CRW to produce training materials it prepared for its insurance carrier clients that are not party to this action. As

these materials are confidential communications between an attorney and client, they are also privileged and not subject to discovery.

Plainly, “The mere fact that an insurance company hires outside counsel to write a coverage opinion does not result in the waiver of the attorney-client privilege.” *BancInsure, Inc. v. Peoples Bank of the South*, 2012 WL 139208 at *2 (S.D. Miss.).² Moreover, appellate courts have intervened where, as here, the production of attorneys’ coverage opinions in unrelated litigation involving a liability insurer have been involved. *USAA v. Roth*, 859 So. 2d 1270 (Fla. Ct. App. 2003)(granting the Florida equivalent of a writ of prohibition against a trial court order compelling, as in this case, the production of unrelated coverage opinions for which the attorney/client privilege was asserted); *Liberty Mutual Ins. Co. v. Hanson*, 824 So.2d 1013 (Fla. Ct. App. 2002)(granting the Florida equivalent of a writ of prohibition against a trial court order compelling the production of all coverage opinions obtained by insurer defining resident, residence, or residency).

² See also *Yamagata Enterprises, Inc. v. Gulf Insurance Company*, 2008 WL 942567 at *1 (D. Nev.) (“First, confidential communications between Defendant and its outside counsel regarding coverage for the subject claims are protected by the attorney-client privilege. Defendant has not waived the privilege by raising an advice of counsel defense. Secondly, Defendant’s counsel’s drafts of his coverage opinion letters are protected by the attorney-work product doctrine. Plaintiff has obtained the final coverage opinion/denial letters of Defendant’s counsel and is able to challenge the legal validity of Defendant’s and its coverage counsel’s evaluation of coverage. Plaintiff has, therefore, not demonstrated substantial need for the attorney’s draft letters. Additionally, Plaintiff can obtain discovery, through depositions of Defendant’s claims personnel, including inside claims counsel, regarding the facts and circumstances relating to any change of position in Defendant’s coverage position or the facts and circumstances relating to the alleged delay in denying coverage. Plaintiff, therefore, has not demonstrated substantial need to discover outside counsel’s draft letters relating to its coverage opinions.”); *Arch Coal, Inc. v. Federal Insurance Company*, 2006 WL 1391317 at *1 (E.D. Mo.) (“The coverage opinion contains a thorough legal analysis of the case. The coverage opinion constitutes a communication between an attorney and his client and is protected by the attorney-client privilege.”); *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 630 (D. Colo. 1998) (finding no waiver of the attorney-client privilege where the defendants did not affirmatively assert good faith or reliance on the advice of counsel in defending against the plaintiff’s claims; ‘the fact that Defendant . . . has stated in deposition testimony that the Plan Committee relied on advice of counsel in denying Mr. Aull’s claim does not establish an at issue waiver as to this advice. This statement alone does not indicate that the Defendants have taken affirmative action to place the advice of the Plan Committee’s counsel at issue.’”).

In short, there is simply no legal basis for Respondent Plaintiffs' broad theory of waiver. Accordingly, Montpelier and CRW asserted proper objections to the discovery requests at issue based on privilege, and the circuit court erred in ordering that CRW and Montpelier produce privileged documents to Respondent Plaintiffs.

C. The Respondent Judge Exceeded His Judicial Authority Because the Requested Documents Involve Mental Impressions and Opinions Of Counsel

1. Respondent Plaintiffs Failed To Demonstrate Rare And Extraordinary Circumstances Justifying Production of Opinion Work Product.

The work-product doctrine is distinguishable from the attorney/client privilege in that “[u]nlike the attorney-client privilege, which is designed to encourage the client to communicate freely with her attorney, the work product doctrine is designed for the attorney’s sake.”

Cleckley, *supra* at § 5-4(E)(3). As this Court has noted:

The roots of the work product doctrine can be traced to the United States Supreme Court decision of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) in which the Court was required to ascertain ‘the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party’s counsel in the course of preparation for possible litigation after a claim has arisen.’ *Id.*, 329 U.S. at 497, 67 S.Ct. at 387, 91 L.Ed. at 455.

United Hosp. Center, Inc., *supra* at 210. Cleckley teaches that the work-product doctrine protects:

[A]ll documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories prepared or assembled by an attorney in anticipation of litigation and for trial. . . . Also protected are witnesses’ statements taken by the attorney or her agent. Pure work product of an attorney insofar as it involves mental impressions, conclusions, opinions, or legal theories concerning litigation is immune from discovery to the same extent as attorney-client communication, regardless of whether the material is actually prepared by an attorney or by another representative.

Cleckley, *supra* at § 5-4(E)(3). Furthermore:

Courts have analyzed the work product privilege in two contexts: fact work product and opinion work product. Both are generally protected and can be discovered only in limited circumstances. Fact work product can be disclosed upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. Opinion work product is even more scrupulously protected, as it represents the actual thoughts and impressions of the attorney and the protection can be claimed by the client or the attorney. . . . Indeed, in *In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997), the court stated:

. . . revealing an attorney's thoughts and opinions to an opposing party runs contrary to the principles underlying the adversary process. . . . If courts failed to protect opinion work product, lawyers would lose the incentive to do thorough research, relying instead on the opposing party's effort; clients and our adversary system would suffer as a result.

Id. (additional citations omitted).

Admittedly, “work product protections are not absolute. ‘While the work product doctrine creates a form of qualified immunity from discovery, it does not label protected material as ‘privileged’ and thus outside the scope of discovery under Rule 26(b)(1), *W.V.R.C.P.*’ . . . Rather, ‘Rule 26(b)(3) of the West Virginia Rules of Civil Procedure makes a distinction between factual and opinion work product with regard to the level of necessity that has to be shown to obtain their discovery.’” *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 466-67, 583 S.E.2d 80, 89-90 (2003) (citations omitted).

The coverage opinions the circuit court ordered CRW to produce are protected opinion work product because the materials are CRW's mental impressions and opinions. Under Rule 26(b)(3) of the West Virginia Rules of Civil Procedure, opinion work product consists of mental

impressions, conclusions, opinions or legal theories contemplated in an attorney's labor. This Court has stressed that "opinion work product enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances." *United Hosp. Center, Inc., supra* at 211 (internal quotations omitted).

Coverage opinions developed and prepared by CRW are opinion work product. See, e.g., *BancInsure, supra* at *1 (attorney's insurance coverage advice protected by work product doctrine); *Ex Parte Great American Surplus Lines Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 540 So. 2d 1357, 1358 (Ala. 1989) ("We hold, based on our understanding of the above cited cases, that the 'opinion letter' sought by respondent in the proceeding is immune from discovery because it falls within the 'zone of privacy' protected by the work product doctrine.").

In fact, the very terms of Respondent Plaintiffs' discovery requests indicate that Respondent Plaintiffs seek to discover opinion work product inasmuch as they request "any commercial liability coverage **opinion** tendered to MUSIC by the law firm of CRW . . . prior to that given with respect to the Corrick claim." Mr. Wollitz's preparatory work involves the evaluation of various claims submitted to him by Montpelier and consists of his opinion as to whether Montpelier has a duty to defend and/or indemnify the insured in forty unrelated cases. (Appx. at 000446-000447). Additionally, Mr. Wollitz provides the basis for his opinion and often identifies factors that would influence or sway that opinion. He also provides recommendations for future action in each case. *Id.*

Although these documents fall within the opinion work product umbrella, the Special Commissioner mistakenly evaluated the requests under the less stringent standard applied to fact work product – whether the requesting party has a substantial need for the material and cannot obtain it by other means without undue hardship – and failed to recognize that the opinion work

product Respondent Plaintiffs seek enjoys near absolute protection. Because the coverage opinions requested invoke the opinion work product of Mr. Wollitz, his work product should remain immune from discovery absent a compelling showing of rare and extraordinary circumstances.

In response to Request No. 10 for the claims file, the Commissioner, after an *in camera* review, concluded that certain documents were privileged. Of those documents, CRW 1-4 (Appx. at 000574-000577) are CRW's billing statements to Montpelier for its work on the coverage opinion. The documents clearly reveal exactly what was done, how long it took and precisely the issues researched, and how long such research and writing took. They therefore reveal the mental impressions of counsel.

Respondent Plaintiffs failed to articulate any extraordinary circumstances that would compel disclosure of these documents. Furthermore, the Special Commissioner's Recommended Decision omits any application of the opinion work product doctrine, and therefore cannot serve to nullify the near absolute immunity to which opinion work product is entitled. Accordingly, the documents sought by Respondent Plaintiffs are exempt from disclosure and protected under the work product exception, and Petitioners are entitled to issuance of a writ of prohibition of enforcement of the Circuit Court's November 12, 2013 Order.

2. **Should This Court Determine That The Requested Documents Constitute Fact Work Product, Respondent Plaintiffs Failed To Demonstrate A Substantial Need Or An Undue Hardship.**

a. **Plaintiffs failed to demonstrate a substantial need for CRW's coverage opinions and billing information.**

Fact work product is discoverable only 'upon a showing of *both* a substantial need *and* an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.' ” *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999), *quoting In re Grand Jury*

Proceedings, 33 F.3d 342, 348 (4th Cir. 1994) (emphasis added). The substantial need test may be satisfied where it is shown that the requested information relates to essential elements of the cause of action and the information is not reasonably obtainable by other means. *See Poulin v. Greer*, 18 F.3d 979 (1st Cir. 1994); *In re Int'l Sys. & Controls Corp. Sex. Litig.*, 693 F.2d 1235 (5th Cir. 1982). As Respondent Plaintiffs have failed to demonstrate each of the necessary criteria for overcoming the immunity provided to fact work product, Petitioners cannot be compelled to produce the requested documents.

Neither Respondent Plaintiffs nor the Special Commissioner have articulated a substantial need for CRW's coverage opinions or its billing statements. Respondent Plaintiffs simply claimed that the opinions sought by Request for Production No. 11 are necessary to test CRW's knowledge of insurance law and to determine how often it found coverage as compared to the number of claims for which it denied coverage. (Appx at 000406-000407) An attempt to find evidence to corroborate a claim, as Respondent Plaintiffs desire, is not a substantial need sufficient to require production of fact work product. 6 James Wm. Moore et al., *MOORE'S FEDERAL PRACTICE*, § 26.70[5][c] (Matthew Bender 3d Ed.)

As MOORE'S instructs, "[s]ubstantial need for material otherwise protected by the work product doctrine is demonstrated by establishing that the facts contained in the requested documents are essential elements of the requesting party's prima facie case." *Id.* Substantial need exists, for example, when test results cannot be duplicated, photographs were taken immediately after an accident and the scene has changed, or when a significant time lapse occurred since the taking of contemporaneous statements showing immediate impressions of facts. *Id.* By comparison, Respondent Plaintiffs can easily obtain the information they seek

through deposition testimony, interrogatories, and proper requests for production that do not implicate the attorney/client privilege or the work product doctrine.

Again, Respondent Plaintiffs have failed to establish that the requested materials should not be entitled to the immunity given to work product. Moreover, the Special Commissioner's Recommended Decision is devoid of law or facts that would tend to support a finding that Plaintiffs have demonstrated a substantial need for the information CRW has claimed to be exempt from discovery pursuant to the work product doctrine. The Special Commissioner merely stated that Respondent Plaintiffs' theory of the case demonstrates the substantial need for the materials. (Appx. at 0000006). As such, the findings made by the Special Commissioner are insufficient to support the recommendations made. Accordingly, this Court should issue a writ prohibiting enforcement of the circuit court's November 12, 2013 Order.

b. **Plaintiffs failed to establish that nondisclosure of the requested materials would cause them undue hardship.**

Whether a hardship "is 'undue' depends on both the alternative means available and the need for continuing protection from discovery." *State ex rel. Chaparro v. Wilkes*, 190 W. Va. 395, 398, 438 S.E.2d 575, 578 n.2 (1993). The Special Commissioner stated that an undue hardship exists as demonstrated by "the parties['] own concerns, as set forth in the hearing transcript, that gathering the coverage opinions would be burdensome[.]" (Appx. at 000006) However, a review of the transcript indicates that CRW's counsel, not Respondent Plaintiffs', raised concerns regarding the burden placed on CRW in having to review all opinions prepared for Montpelier. (Appx. at 000417-000421) Respondent Plaintiffs never identified or argued that it would be unduly burdensome to obtain the substantial equivalent of the material in the coverage opinions.

No undue hardship to Respondent Plaintiffs exists in this case. First, Respondent Plaintiffs have not identified any facts, as opposed to opinions prepared by counsel, they believe the requested documents may contain. Second, Respondent Plaintiffs have not demonstrated that they cannot obtain facts pertaining to CRW's knowledge of insurance law and the number of claims for which it has found coverage through alternative means of discovery, including depositions, interrogatories, and appropriately framed requests for production. Therefore, even if this Court considers Respondent Plaintiffs' request to seek fact work product, Respondent Plaintiffs failed to meet the requisite standard to overcome the protection afforded by the work product doctrine.

D. The requested documents are not relevant in that they are not likely to lead to the discovery of admissible evidence.

Rule 26(b)(1) of the Rules of Civil Procedure limits discovery to “any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Furthermore, information sought through discovery must be “reasonably calculated to lead to the discovery of admissible evidence.” As this Court is well aware, Rule 402 of the West Virginia Rules of Evidence also provides that “evidence which is not relevant is not admissible.” Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

In addition to the previously-discussed objections based on the attorney/client privilege and work product doctrine, Petitioners objected to Respondent Plaintiffs' Requests for

Production Nos. 10, 11, 20, and 22 on the grounds that the requests sought documents that were neither relevant nor likely to lead to the discovery of admissible evidence. (Appx. at 000074-000079). Without providing a basis for his decision, the Special Commissioner dismissed these objections in one sentence, concluding that “the Special Commissioner has determined the documents identified on the privilege log are relevant[.]” (Appx. at 000005) During the hearing on Respondent Plaintiffs’ Motion to Compel, the Special Commissioner stated that these requests are relevant to establishing existence of a general business practice by CRW. (Appx. at 000417-000418). However, he did not explain the relevancy of these coverage opinions to Respondent Plaintiffs’ claims against CRW, who is not in the business of insurance and is not covered by the West Virginia Unfair Trade Practices Act. *See* Syl. pt. 5, *Rose v. St. Paul Fire & Marine Ins. Co.*, 215 W. Va. 250, 599 S.E.2d 673 (2004).

Moreover, neither Respondent Plaintiffs nor the Special Commissioner articulated how coverage opinions pertaining to different policies issued to different insureds in different jurisdictions to provide liability for different businesses as a result of different claims could conceivably lead to the discovery of admissible evidence in this case. For example, it is difficult to imagine how a coverage opinion issued to a carrier other than Montpelier, based upon a claim of premises liability, under a policy lacking the subsidence of land exclusion at issue in this case, in a state with different insurance law than West Virginia, could somehow lead to relevant, admissible evidence in this case. The factual and legal differences between the policies, the claims, and the laws of the respective jurisdictions would prevent such evidence from making the existence of a general business practice by CRW more or less probable, thus rendering it inadmissible under Rules 401 and 402 of the West Virginia Rules of Evidence and outside the scope of discovery pursuant to Rule 26 of the West Virginia Rules of Civil Procedure.

E. **The crime-fraud exception does not warrant the production of the privileged documents because neither Respondent Plaintiffs nor the Special Commissioner considered this issue below; Respondent Plaintiffs have not demonstrated an adequate factual basis to establish an alleged crime or fraud; and the exception cannot apply to other coverage opinions CRW provided to Montpelier.**

1. **Respondent Plaintiffs did not raise the crime-fraud exception below, and it was not cited by the Special Commissioner as a basis for his Recommended Decision.**

As previously noted, Petitioners can find no authority supporting the Special Commissioner's rulings that coverage opinions lose any attorney/client privilege or work product protection if the subject matter of those opinions, but not the communications themselves, are subsequently discussed by either the attorney or the client with non-clients and that the attorney/client privilege and work product doctrine are extinguished once the attorney is made a party in litigation arising from his or her representation of a client with whom the attorney share confidential attorney/client communications and generated fact and opinion work product. Apparently, Respondent Plaintiffs, likewise, can find no authority in support of these propositions and, accordingly, now raise an entirely new issue never considered by either the Special Commissioner or Respondent Judge, i.e., the crime-fraud exception.

Although they never raised the argument in their Motion to Compel or at the hearing before the Special Commissioner, Respondent Plaintiffs now belatedly claim that production of the privileged documents sought in discovery is warranted by the crime-fraud exception to the attorney/client privilege. (Resp'ts' Resp. to Pet'rs' Mot. to Stay Pending Pet. for Writ of Prohibition at 1, 4). Raising such an argument *post facto* before this Court is improper. See *Canady, supra*, 194 W. Va. at 440, 460 S.E.2d at 686. The crime-fraud exception was not the basis for the Respondent Plaintiffs' Motion to Compel, nor the Special Commissioner's Recommended Decision, nor the circuit court's Order. Accordingly, the Court need not consider

the application of the crime-fraud exception to the discovery requests at issue in this case. If, however, in the interests of judicial efficiency, the Court wishes to entertain Respondent Plaintiffs' untimely argument, it should have no difficulty in determining that the exception has no application here.

2. **Respondent Plaintiffs have not made a prima facie showing of evidence of a crime or fraud so as to warrant the application of the crime-fraud exception.**

The Court should reject Respondent Plaintiffs' crime-fraud argument because they have not shown any evidence that Montpelier sought CRW's legal opinion in furtherance of a crime or fraud. Respondent Plaintiffs' purported "smoking gun" evidence of fraud is a red herring which has been used to confuse the issues, the witnesses and the Court.

This Court has recognized that the crime-fraud exception to the attorney/client privilege may compel the disclosure of otherwise privileged materials. Syl. pt. 7, *State ex rel. Allstate Ins. Co. v. Madden*, 215 W. Va. 705, 601 S.E.2d 25 (2004). The crime-fraud exception removes the privilege attached to confidential communications between an attorney and client if the communications were made in furtherance of a fraudulent or criminal scheme. *Id.* at 716, 601 S.E.2d at 36. In order for the exception to apply, "it must clearly appear that such communications were made by the client with that intent and purpose." *Id.* at 717, 601 S.E.2d at 37 (quoting Syl. pt. 2, *Thomas v. Jones*, 105 W. Va. 46, 141 S.E. 434 (1928)).

Although the crime-fraud exception was not raised below, where, as here, there has been an *in camera* review of the privileged documents, the party opposing the assertion of privilege may prevail only where the evidence establishes that the client intended to perpetrate a crime or fraud and there is a valid relationship between the confidential communication and the crime or fraud. *Id.* at 718, 601 S.E.2d at 38.

The Fourth Circuit Court of Appeals characterizes the inquiry as a two-prong test: the party invoking the exception must show that “(1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear *a close relationship* to the client’s . . . scheme to commit a crime or fraud.” *In re Grand Jury Proceedings #5 v. Under Seal*, 401 F.3d 247, 251 (4th Cir. 2005) (emphasis added). The Special Commissioner conducted an *in camera* review of the disputed documents and did not indicate that he found any evidence that Montpelier was engaged in a fraudulent scheme. If this Court reviews the documents, it will also find no valid basis to apply the crime-fraud exception.

By way of background, Respondent Plaintiffs argue that the crime-fraud exception applies because Montpelier denied a defense under the policy on the basis of a subsidence exclusion even though a letter from a claims adjuster to Montpelier shows that Montpelier knew that a landslide that occurred on the plaintiff’s property was not caused by Respondent Plaintiffs, thus rendering the allegations in the complaint false. (Resp’ts’ Resp. to Pet’rs’ Mot. to Stay Pending Pet. for Writ of Prohibition at 6). Respondent Plaintiffs, however, misstate the facts and misapply the law.

As Respondent Plaintiffs have admitted, there were a series of landslides involved in this matter. (Pls’ Resp. to Defs’ Jt. Mot. to Stay at 5, attached as “Exhibit C” to Mot. to Stay Pending Pet. for Writ of Prohibition) (“In the course of draining the mine, a drainage pipe connection failed causing mine water and eventually mine sludge to flow on the Corrick property *on three occasions.*”) (emphasis added). This fact is reinforced by Mr. Mullins’s “Second Report” of June 6, 2010, where he detailed three leaks caused by Respondent Plaintiffs, the third of which caused a “thick clay/mud type of water” to flow on the Corrick’s property. *Id.* at “Exhibit 3.” He

also noted that the Corricks had mentioned “a mudslide on their property.” *Id.* While an initial landslide predated and was the cause of Buckland’s retention, the remaining three events were allegedly caused by the Bucklands. Thus, even had Mr. Wollitz considered the claims adjuster’s reports, there was nothing in them that contradicted the allegations in the Corrick complaint.

This Court has expressly held that an insurance company’s duty to defend the insured is based on the allegations in the complaint, whether they are true or not. In a case where the complaint against the insured alleged deliberate acts of sexual abuse, and the insured appealed a circuit court decision that the insurance company had no duty to defend, the Court rejected the insured’s argument that in order to decide coverage, one must determine whether the facts alleged in the complaint are true. *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 47, 602 S.E.2d 483, 490 (2004). (“The dispositive question is answered *by looking at the allegations in [the] complaint* to determine whether the allegations are reasonably susceptible of an interpretation that the claim may be covered. . . .For the same reason, *whether there was in fact sexual abuse is not material to answering the question . . .*”) (emphasis added). In this case, the allegations in the Corrick complaint specifically claimed damage caused by a landslide. The Montpelier policy specifically excluded coverage for damage caused by a subsidence of land arising out of, *inter alia*, a landslide. Whether there was in fact a landslide was not material to determining the duty to defend. Nor can a single sentence—taken out of context—that suggests one of several landslides was not caused by the insured be evidence of fraud.

Because the documents Respondent Plaintiffs seek are also opinion work product, even if the crime-fraud exception to the attorney/client privilege applies, the Court must determine whether it acts as an exception to the opinion work product protection.

The Court has noted that the crime-fraud exception applies to opinion work product. *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 220 W. Va. 525, 533, 648 S.E.2d 31, 39 n.5 (2007). It has not, however, explored the contours of the application of the exception to the work product doctrine. The Fourth Circuit Court of Appeals has noted that, unlike the attorney/client privilege, work product protection belongs to *both* the attorney and the client. It further observed that opinion work product enjoys greater protection than fact work product. The Fourth Circuit therefore found that in order for the crime-fraud exception to apply to opinion work product, there must be evidence that the attorney was aware of or a knowing participant in the criminal or fraudulent conduct. *In re Grand Jury Proceedings #5, supra*, 401 F.3d at 252. Respondent Plaintiffs have made no such showing here. There is no evidence that CRW or Mr. Wollitz reviewed the adjusters reports and exhibits or played any role in the alleged “fraud.”

Even considering Respondent Plaintiffs’ delayed argument, they offer absolutely no evidence of an intent to commit fraud by Montpelier and Mr. Wollitz that would warrant an exception to the attorney/client privilege and work product doctrine. Should the Court take this opportunity to review the disputed documents *in camera*, it will not find evidence that Montpelier was engaged in fraud, nor will it find that Montpelier’s privileged communications with CRW are closely related to any purported fraudulent scheme. Respondent Plaintiffs therefore have no basis for claiming that the crime-fraud exception applies here.

The facts reveal nothing more and nothing less than Montpelier received a complaint and, not knowing the details of West Virginia law, consulted with coverage counsel and determined

that no duty to defend existed for the allegations in the complaint. When it learned that the Complaint was amended to remove the allegations of a landslide, it determined that a duty to defend did exist and provided defense counsel who subsequently resolved the suit.

A rational extension of Respondent Plaintiffs' argument that a coverage opinion by an attorney employed by an insurance company with which a policyholder disagrees can constitute a "fraud" is that a coverage opinion by an attorney employed by a policyholder with which an insurance company disagrees can also constitute "fraud." Likewise, a legal opinion on any subject matter, according to the argument, can constitute "fraud" warranting invalidation of the attorney/client privilege and work product doctrine. The assertion that a new theory or any particular theory of liability arising under certain facts can constitute "fraud." The assertion of a new type of damages or any assertion of damages under certain facts can constitute "fraud." The profound implications of this type of argument are obvious.

3. Even if the crime-fraud exception applied in this case, it would not apply to the coverage opinions not involved in the underlying case.

Although Respondent Plaintiffs have no evidence of fraud by Montpelier and CRW in the underlying Corrick action, even if they did, that would only serve to create an exception to the attorney/client privilege as to documents closely related to that purported fraud. Respondent Plaintiffs have not even attempted to show evidence of fraud in the other forty claims for which CRW provided opinions for Montpelier.

As the Court has observed, merely showing evidence of a fraudulent scheme is not enough to create an exception to the attorney/client privilege; there must be a "valid relationship" between the privileged communications and the alleged fraud. *State ex rel. Allstate Ins. Co., supra*, at 718, 601 S.E.2d at 38. Thus, even if the Final Report could be considered evidence of

fraud by Montpelier, there is simply no way that communications and opinions between CRW and Montpelier in other claims, from other jurisdictions, involving insureds who are not parties to this case, have a valid relationship to the purported scheme to defraud the Respondent Plaintiffs. Consequently, even if the crime-fraud exception could somehow be found to apply to the communications between CRW and Montpelier involving the Corrick claim, it does not have any application to the nearly 250 pages of coverage opinions CRW provided to Montpelier in forty other claims.

VI. CONCLUSION

Prohibition of the circuit court's November 12, 2013, Order is appropriate in this case because CRW and Montpelier have no other adequate means to obtain the relief requested and will suffer immediate and irreparable harm if Respondent Plaintiffs are permitted to obtain the privileged and confidential materials they seek.

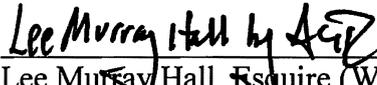
Compelling production of the documents sought by Respondent Plaintiffs, including the coverage opinions prepared by CRW for its client, Montpelier, in its capacity as legal counsel, are certainly protected by the attorney/client privilege, which Montpelier never waived. As stated in Respondent Plaintiffs' discovery requests, they seek coverage **opinions** prepared by counsel, which, by definition, are opinion work product and are thus protected by a nearly absolute immunity from discovery.

Finally, Respondent Plaintiffs seek production of coverage opinions prepared by CRW for Montpelier that pertain to different policies, different facts, and different claims that were filed in different jurisdictions with different law which are not relevant in that they are not likely to lead to the discovery of admissible evidence and are therefore not subject to discovery.

As the documents and materials sought by Respondent Plaintiffs are privileged, confidential, and fall outside the scope of discovery, Petitioners respectfully request that this Court issue a writ of prohibition in this matter prohibiting the Honorable Judge Bloom from enforcing his November 12, 2013 Order compelling discovery responses and award Petitioners such other relief as set forth herein and/or that the Court deems appropriate.

**MONTPELIER US INSURANCE
COMPANY**

By Counsel



Lee Murray Hall, Esquire (WV Bar # 6447)
Sarah Walling, Esquire (WV Bar # 11407)
Jason D. Bowles, Esquire (WV Bar # 12091)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Telephone: (304) 523-2100
Fax: (304) 523-2347

**CHARLSTON, REVICH & WOLLITZ,
LLP**

By Counsel



Charles F. Johns (WV Bar No. 5629)
Ancil G. Ramey (WV Bar No. 3013)
Mark Jeffries (WV Bar No. 11618)
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000
(304) 933-8183 fax

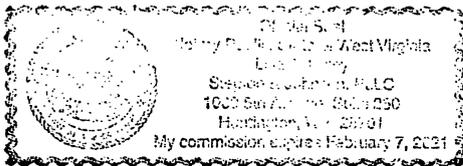
VERIFICATION

I, Ancil G. Ramey, Esq., being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, WRIT OF MANDAMUS; that the factual representations contained therein 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.


Ancil G. Ramey, Esq.

Taken, subscribed, and sworn to before me this 25th day of November, 2013.

My Commission expires: February 7, 2021.




Lisa A. Ramey

CERTIFICATE OF SERVICE

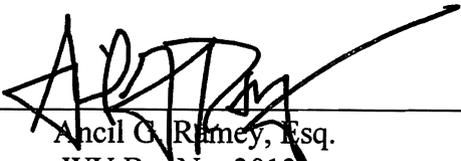
I, Ancil G. Ramey, Esq., do hereby certify that I served this “VERIFIED PETITION FOR WRIT OF PROHIBITION” and this “APPENDIX TO PETITION FOR WRIT OF PROHIBITION” on November 25, 2013, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Honorable Louis H. “Duke” Bloom, Judge
Kanawha County Judicial Building
111 Court Street
Charleston, WV 25301

Guy R. Bucci, Esquire
BUCCI, BAILEY & JAVINS, L.C.
P.O. Box 3712
Charleston, WV 25337
Counsel for Respondents

F. Alfred Sines, Jr., Esquire
Victoria L. Casey, Esq.
1516 Viewmont Drive
Charleston, WV 25302
Counsel for Respondents

Kevin A. Nelson, Esquire
WV Bar No. 2715
Patrick T. White, Esquire
WV Bar No. 9992
HUDDLESTON BOLEN LLP
707 Virginia Street East, Suite 1300
Charleston, WV 25301
Telephone (304) 720-7545
Counsel for Jim Lively Insurance



Ancil G. Ramey, Esq.
WV Bar No. 3013