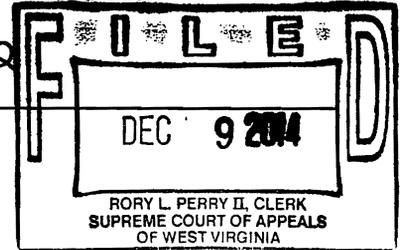


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: ~~13-061~~ 13-1172



**STATE OF WEST VIRGINIA EX REL. MONTPELIER US
INSURANCE COMPANY and CHARLSTON, REVICH & WOLLITZ LLP,**

Petitioners,

vs.

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

Respondents.

**RESPONSE BRIEF ON BEHALF
OF THE RESPONDENTS JAMES M. BUCKLAND,
B&B TRANSIT, INC. B&D SALVAGE, INC. AND TIM'S SALVAGE, INC.**

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I. QUESTION PRESENTED

Respondent Plaintiffs James M. Buckland, B&B Transit, Inc., B&D Salvage, Inc. and Tim's Salvage, Inc. object to Petitioner's characterization of the Questions Presented and restate the Question Presented as follows:

Whether a Writ of Prohibition is proper where the Circuit Court ordered that certain communications between an attorney acting as an agent for an insurance company and said insurance company be disclosed where an insured has substantial need for the discovery, the documents relate to a matter directly at issue, where the denial of coverage at issue was part of a fraudulent scheme perpetuated by Petitioners and where the communication was of a type published to a non-party.

II. STATEMENT OF THE CASE

Respondent Plaintiffs, as alleged in their Amended Complaint, purchased a Commercial General Liability Insurance Policy (hereinafter "Policy"), issued by Montpelier US Insurance Company (hereinafter "MUSIC"). See Petitioner's Appx. at 000010-000019 (Amended Complaint). The purpose of this insurance purchase was to cover Plaintiffs' business operations which include contracting, heavy equipment and scrap metal. On December 27, 2011, Gina and Jason Corrick filed a complaint in the Circuit Court of Logan County against a plaintiff in this action, B & B Transit, Inc., as well as the West Virginia Department of Environmental Protection, alleging they "negligently and unlawfully caused a landslide to invade the plaintiffs' property and caused damage to their property and their house" in January of 2011. See Petitioner's Appx. at 000023-000028. The complaint makes no allegation or other references that there was any "subsidence of land" caused by defendants' negligence.¹ As discussed herein, MUSIC ultimately denied coverage in a

¹ The Corrick plaintiffs, on January 30, 2013, filed an Amended Complaint deleting the "landslide" allegation and alleging defendants "negligently and unlawfully breached a significantly large deposit of water causing the water to flow into and under plaintiffs' home and land which

letter prepared and signed by Howard Wollitz, a California lawyer, based upon a “subsidence of land” exclusion which was made a part of the policy by an endorsement.

Beginning in May of 2010, MUSIC conducted an investigation and employed an investigator, Kevin Mullins, to inspect the property, take photographs and interview the Corricks and others, including employees of Respondents. Mr. Mullins determined repair costs to be approximately \$4,601.46.² At the end of the investigation, on August 3, 2010, MUSIC was informed by its own investigator that the landslide was pre-existing. See Respondent’s Appx. p 1-2. [This landslide was the central basis for the coverage denial letter of February 7, 2012.³ See Respondent’s Appx. p 3 - 6].

In December 2011, the Corricks filed their Complaint against the Respondent Plaintiff, and served the Complaint in January 2012. Respondent Plaintiffs notified their insurance agent, who forwarded the Complaint to MUSIC. MUSIC refused to provide a defense for Respondent Plaintiffs, and Respondent Plaintiffs hired F. Alfred Sines, Jr., and Victoria Casey to file an Answer to the Complaint and provide a defense.

MUSIC employed the Los Angeles, California, law firm of Charlston, Revich & Wollitz LLP (hereinafter “CRW”), which MUSIC defines as its “national coverage counsel,” to participate in its

proximately caused damage to their home and property, including but not limited to, damage to the foundation of plaintiffs’ home.” See Petitioner’s Appx. at 000023-000028.

² In fact, Mr. Mullins reported to MUSIC that the Corricks would accept the \$4,601.46 damage estimate it offered. Years later, after extensive litigation, the case settled for \$84,500.00.

³ A week later, MUSIC denied the claim but specifically reserved the right to make a coverage decision later. Neither denial was supported by the facts and or the evidence. Finally, this letter places MUSIC’s knowledge that the slide was pre-existing at some 18 months before the Wollitz coverage denial letter blaming the landslide as the reason to deny coverage and about 30 months before the Corrick Amended Complaint, which deleted reference to the landslide.

claims investigation. MUSIC, on February 7, 2012, through CRW's name partner Howard Wollitz, sent a letter to Plaintiffs and denied coverage for the Corrick claim and based on the landslide referenced in the Mullins investigation and which Mr. Mullins ultimately advised MUSIC was pre-existing. In his letter, Mr. Wollitz stated:

We understand that the landslide allegedly arose from drainage from a pipe B&B installed at or around the Corricks' property pursuant to its contract with the co-defendant, the West Virginia Department of Environmental Protection. [Emphasis added.]

Respondent's Appx. p. 3 - 6. In his letter, Mr. Wollitz identified himself as part of an inquiry into the facts of the case and by his letter assumed the duty, as would any lawyer anywhere, to know and to investigate those facts. We know, however, Mr. Wollitz's "investigation" included no contact with either Plaintiffs or their counsel Mr. Sines and Ms. Casey. Mr. Wollitz concluded his letter by requesting any additional information from Respondent Plaintiffs be sent directly to him. Of course, the Corrick case continued to be prosecuted against Respondent Plaintiffs, who were denied coverage and had to defend themselves.⁴

In December 2011, the Corrick's filed their Complaint against the Respondent Plaintiffs, and served the Complaint in January 2012. Respondent Plaintiffs notified their insurance agent, who forwarded the Complaint to MUSIC. MUSIC refused to provide a defense, coverage or indemnity for Respondent Plaintiffs, and Respondent Plaintiffs hired F. Alfred Sines, Jr., and Victoria Casey

⁴ In approximately June of 2013, MUSIC employed Huntington attorney Stephen P. Burchett to represent Respondents in the Corrick civil action. MUSIC provided a defense and indemnity and eventually the case settled.

In November 2012, Respondent Plaintiffs' filed this bad faith action. MUSIC's finally realized their bad faith conduct and provided a defense and settled the case. Had suit not been filed, B & B would still be fending for itself.

to file an Answer to the Complaint and to provide a defense. From January 2012 until July 2012, there was a series of correspondence, telephone calls and email exchanges between MUSIC's adjuster and Respondent Plaintiffs' counsel concerning coverage issues, a pre-existing landslide, and the limited damage to the Corrick property. Despite MUSIC's assurance that documents from the claim file would be made available to Respondent Plaintiffs' counsel for the defense, MUSIC only provided limited documents, and in fact, withheld important documents. When the obviously missing documents were requested with specificity in July 2012, MUSIC ceased correspondence and communication with Respondent Plaintiffs' counsel.

In November 2012, Respondent Plaintiffs filed a first-party bad faith/fraud action against Petitioners in the Circuit Court of Kanawha County. Respondent Plaintiffs directed written discovery to said Defendants. Such discovery was answered with numerous objections by Defendant CRW and by a complete refusal by MUSIC to answer any of the second discovery requests. Both asserted attorney-client and work-product privileges objections. The Respondents followed with a motion to compel which, after consideration by Discovery Commissioner G. Nicholas Casey, Jr. and upon his recommendation, was granted to the extent the issue is now before this Court. Recently the Circuit Court affirmed Commissioner Casey's Supplemental Recommended Decision.

The requested discovery relates to a matter directly in issue and is sought from a party who, though an agent who happened to be an attorney, was undertaking insurance claims handling by directly communicating with a non-party. As correctly found by the Discovery Commissioner and the Circuit Court, Respondent Plaintiffs' discovery requests are reasonably likely to lead to the discovery of admissible evidence, substantial need exists for the documents given the fraudulent scheme by Petitioners, and the relationship between Petitioners is a matter directly in issue given the

manner in which the subject claim was handled.

III. SUMMARY OF THE ARGUMENT

A writ of prohibition is an extraordinary remedy that should only be invoked where there is substantial legal error. The issue before the this Honorable Court is one of discoverability, not admissibility. Petitioners seek to avoid disclosure of certain documents based upon the attorney-client privilege and/or the work product doctrine. Though the Respondent Plaintiffs have not actually seen the subject documents, the plain facts of this case and rulings below demonstrate the subject documents are not privileged.⁵ The Circuit Court committed no substantial, legal error when ordering that Respondent Plaintiffs discovery requests be compelled.

Petitioner MUSIC hired the CRW law firm to undertake insurance claim handling and to directly correspond and communicate with Respondent Plaintiffs. The mere fact that a party hires an attorney to perform a task does not dictate that all documents related to an attorney are not discoverable. In the course of corresponding with the non-party Respondent Plaintiffs, Petitioner CRW provided Respondent Plaintiffs with facts for its rationale for denying coverage and also requested information from the Respondent Plaintiffs. So this invitation for open discussion cannot be withdrawn.

This is a first-party bad faith action. The discovery sought by Respondent Plaintiffs can come from no other source. There exists both substantial need and undue hardship. The requested documents seek information related to pattern and practice, plan, absence of mistake and lack of

⁵ In any case in which there is a privilege claim to certain documents or other possible evidence, only the reviewing court and party-in-possession making the privilege objections have read the subject material. To a significant degree, a full adversarial process is lacking so the court must be careful to protect the rights of any party who must challenge a privilege objection.

accident when denying coverage where the Petitioners' own investigation established coverage existed.

The discovery seeks information related to a matter directly at issue and to the perpetuation of a fraud borne from the basic facts of this action. A party may not utilize the attorney-client privilege or the work product doctrine to shield discovery related to a fraud whose genesis is found in these communications.

Given the basic facts of this action, no clear legal error exists in the Circuit Court's November 12, 2013, Order (or the second Order which is not before the Court) compelling production of the requested documents and the petition for writ of prohibition must be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT

Respondent Plaintiffs state oral argument is neither desirable nor necessary. The issues are well-settled in our jurisdiction and are neither novel nor rise to a constitutional level. The decisional process would not be significantly aided by oral argument.

V. ARGUMENT

A. Issuance of a Writ of Prohibition is Not Warranted under the Standard Established by this Court.

“A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.’ Syl. Pt. 1, State Farm v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992).” Syl. Pt., State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W.Va. 457, 583 S.E.2d 80 (2003). It is a “discretionary way 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.” Syl. Pt. 1, State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (W.Va. 1995) *quoting* Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (W.Va. 1979). As recognized by the Petitioners, “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.” State ex rel. Hoover v. Berger, 199 W.Va. 12, 15, 483 S.E.2d 12, 15 (W.Va.1996).

Application of the Hoover factors to the case *sub judice* requires that the petition be denied. First, the Circuit Court followed the procedure set forth in Syllabus Pt. 2, State ex. rel Nationwide Mutual Insurance Co. v. Kaufman, 222 W.Va. 37, 658 S.E.2d 728 (W.Va. 2008). However, even beyond the requirements of Kaufman, the Circuit Court in this action appointed a Discovery

Commissioner, so a second set of eyes actually viewed the subject documents and reached the same conclusions. There is no indication in the petition that any alleged error is oft-repeated or that this matter presents a new or novel issue. Given the facts presented and the nature of the Plaintiffs' claims, there is no indication that the Circuit Court committed error so as to grant the petition.

B. Judge Bloom Did Not Exceed His Judicial Authority In Compelling the Production of Documents.

The purpose of the discovery process is to narrow the focus of litigation by eliminating uncontroverted issues from consideration and to exchange information necessary for parties anticipating litigation to prepare properly for trial. See 23 Am. Jur. 2d Depositions and Discovery § 1 (2010). Under Rule 26(b) of the West Virginia Rules of Civil Procedure, the scope of discoverable evidence is any matter not privileged which is relevant to a claim or defense of the party seeking discovery, regardless of its ultimate admissibility at trial. The objective of the discovery process is not to obtain relief, but to obtain evidence; thus, the rules of discovery are governed by the policy that the search for truth must be aided. See Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958).

Recognizing the goal of discovery, this Court has held that “[t]he burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it.” Syl. pt. 4, State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (1995).” Syl. Pt. 3, State ex rel. United Hosp. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997). Petitioners failed to meet their burden as it relates to the subject documents in question.

In this case, CRW acted as an investigating party for the purpose of determining coverage under the insurance policy at issue. Petitioners then directly communicated with the Respondent

Plaintiffs, who are not their clients and who are classic third parties. As indicated by his letter to the Respondent Plaintiffs, Mr. Wollitz stated:

We understand that the landslide allegedly arose from drainage from a pipe B&B installed at or around the Corricks' property pursuant to its contract with the co-defendant, the West Virginia Department of Environmental Protection.

Respondent's Appx. p. 4 (emphasis added). In his letter, Mr. Wollitz identified himself as part of an inquiry into the facts of the case and explained his understanding of the facts, an understanding which extended far beyond than his current "eight corners" defense. Also, he requested that additional information be sent directly to him. Id.

Where an attorney acts to investigate a claim and has direct contact with third-parties as a result of the investigation, the attorney-client privilege does not apply. See State ex. rel. United Hosp. Center, Inc., v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (W.Va. 1997). In Bedell, the counsel for the defendant hospital undertook investigation of a fall. The circuit court in Bedell found that "the investigation report by Mr. Bray was factual in nature, and analogous to an insurance investigator's report in similar circumstances. The Court noted that the fact that the incident investigation was performed by counsel did not automatically confer work product status upon it. Based on an analogy to authority under the Federal Rules of Civil Procedure, the Court found that the material did not consist of attorney work product and was not protected by attorney client privilege." State ex. rel. United Hosp. Center, Inc., v. Bedell, 199 W.Va. at 206-207, 484 S.E.2d at 323-324. The Bedell Court recognized that the attorney-client privilege did not extend where an attorney was acting in an investigative capacity as an agent of the defendant and found that the hospital failed to meet its burden.

Similar to Bedell, in this action, Petitioner CRW undertook insurance claims handling duties and had direct contact with Respondent Plaintiffs. As such, the attorney-client privilege does not apply. Nor would such a privilege apply in similar claims, and documents reflecting a general business practice. Similarly, claims training materials would apply directly to the process and mode by which such claims are handled and considered by the Petitioners.

Insofar as an attorney-client relationship exists, privilege has been waived. In State v. Canady, 194 W.Va. 431, 442, 460 S.E.2d 677, 688 (W.Va. 1995), the Court made clear that a party may waive the attorney-client privilege by asserting claims or defenses. Moreover, the attorney-client privilege extends only to confidential communication, not to acts incorporated in the communication. As Justice Cleckley explained:

The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the questions, “What did you say or write to the attorney?” but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

(emphasis added) (citations omitted). Respondent Plaintiffs want to know: (1) what Mr. Wollitz knew; (2) when he know it; and (3) and what did he know when he authored and directed his coverage denial letter to the Respondents. Acting as he did for an insurer gives Mr. Wollitz no immunity from discovery when the letter itself is communicated to a third-party insured.

In State ex. rel. Brison v. Kaufman, 213 W.Va. 624, 584 S.E.2d 480 (W.Va. 2007), our Court again recognized that a party may waive the privilege by placing an attorney’s advice in issue. Even though CRW is a law firm, its privilege is of no higher level of protection than had MUSIC written the letter itself to Plaintiffs. The issue here is deceptively simple because of the waiver of the

privilege by the written communication to Mr. Buckland. Examples of the waiver were discussed by Justice Cleckley, in Kaufman, 194 W.Va. 442, 460 S.E.2d at 688:

A defendant may waive the privilege by asserting reliance on the legal advice of an attorney . . . a party's claim that its tax position was reasonable because it was based on advice of counsel puts advice in issue and waives privilege.

(Internal citation omitted). In view of the claims raised by the Respondent Plaintiffs and CRW's role in handling insurance claims, it cannot be said that evidence of general business practice is not discoverable. The Circuit Court committed no error and a writ of prohibition is inappropriate.

C. Judge Bloom Did Not Exceed His Judicial Authority Because the Requested Documents Are Not Protected By the Attorney-Client Privilege and Do Not Contain Mere Mental Impressions.

1. The Work-Product Doctrine Does Not Apply and, Even Assuming its Application, the Facts of This Action Require Disclosure.

As the Petitioners correctly point out, the subject "protected" documents were considered by both a Discovery Commissioner as well as the Circuit Court of Kanawha County. *See* Petitioners' Appx. at A. *Id.* "[A]lthough the work product doctrine creates a form of qualified immunity from disclosure, it does not label materials as 'privileged' and thus outside the scope of discovery under Rule 26(b)(1)." McDougal v. McCammon, 193 W.Va. 229, 237 n. 9, 455 S.E.2d 788, 796 n. 9 (1995). Both the attorney-client privilege and the work product doctrine must be strictly construed and the burden of establishing the exception rests upon the party asserting it. *See State ex. Rel. United Hosp. Center, Inc., v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (W.Va. 1997). The rules of civil procedure do not permit a party to participate in insurance claim handling and then assert privilege to avoid disclosure of the documents it created and relied upon in the course of handling

of an insurance claim.

Petitioners crossed the privilege communication barrier when the insurance company's "counsel" undertook insurance adjustor duties and became involved in the handling of the claim and directly communicating with a third party. As this Court made clear in State ex. rel. United Hospital v. Bedell, 199 W.Va. 316, 326, 484 S.E.2d 199, 209 (W.Va. 1997), the attorney-client privilege may only be successfully asserted if certain criteria are met. The Bedell Court explained:

In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must 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. (Citations omitted).

Id. Neither Mr. Wollitz nor MUSIC satisfy this criteria, especially to the third element: confidentiality. Mr. Wollitz was employed to publish a communication to a third-party and to handle further investigation of the subject claim. There is nothing confidential about the subject communication. What he and MUSIC did to prepare the non-privileged communication is open to full and complete discovery, as are the documents they relied upon. The question of whether Mr. Wollitz was engaged in the unauthorized practice of law in West Virginia was not directly raised by the Petitioners in their Petitioner; however, in recognition of Petitioners' arguments, Mr. Wollitz certainly was engaged in the practice of law as that term is defined in this State. See "Definition of the Practice of Law."⁶

Mr. Wollitz, in practicing law in West Virginia, deserves no greater protection than West

⁶ Our Court has relied on the Code of Professional Responsibility for guidance in such situations. See State ex. rel. Bluestone Coal. Mazzone, 226 W.Va. 148, 697 S.E.2d 740 (W.Va. 2010).

Virginia members of the bar. There is no safe harbor protecting any communication when the purpose of the letter and the facts that formed it were published by a lawyer to a third-party.

Recognizing that “work product protections are not absolute,” Petitioners maintain that Petitioner CRW’s handling of insurance claims constitutes mental impressions and is therefore not discoverable. Petitioner’s Brief at p. 15. Given CRW’s involvement in claims handling, it cannot be said that the documents Petitioners were compelled to produce are protected by any privilege. A contrary rule would forbid a plaintiff from ever obtaining information about a general business practice or procedure related to claims handling and consideration. Nevertheless, even assuming *arguendo* the documents are mental impressions, where the mental impressions are directly at issue, an exception to the work product doctrine exists that requires disclosure. See State ex. rel Erie Ins. Property & Cas. Co. v. Mazzone, 220 W.Va. 525, 533, fn 5, 648 S.E.2d 21, 39, fn5 (W.Va. 2007).

There exists compelling circumstances requiring disclosure of the requested documents, assuming the work-product doctrine even applies. As such, the petition must be denied.

2. Should This Court Determine That The Requested Documents Constitute Fact Work Product, Respondent Plaintiffs Demonstrated Substantial Need and an Undue Hardship.

As recognized in State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W.Va. 457, 467, 583 S.E.2d 80, 90 (W.Va. 2003):

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.” Syllabus Point 7, In re Markle, *supra*. “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)

(footnote added). Where factual work product is involved, the question of what constitutes “substantial need” and “undue hardship” has been frequently litigated in the federal courts. It is now well established that this standard is met where a witness is no longer available for questioning or is hostile and refuses to give a statement or has a faulty memory and can no longer remember the details of the event in question. Discovery has also been allowed where crucial information was in the exclusive control of the opposing party.

(Internal citations and references omitted).

Respondent Plaintiffs have a substantial need for the subject communications as it is the only way Respondents can determine the means and methods by which Petitioners made the decision to deny the Respondents’ insurance coverage. These communications are a matter directly at issue in this bad faith action. State ex rel. United Hospital Center, Inc., v. Bedell, 199 W.Va. 316, 333, fn 22, 484 S.E.2d 199, 219, fn 22 (W.Va. 1997).⁷ The information compelled by the Circuit Court relates to essential elements of the cause of action and is not reasonably obtainable by other means. By definition, given that “the crucial information was in the exclusive control of the opposing party,” an undue hardship would be imposed were discovery as to similar claims to be denied. State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W.Va. 457, 467, 583 S.E.2d 80, 90. As discussed in Section E supra, Petitioners offer conflicting accounts of the claims process and information relied upon in formulating the claims decision in this matter. Given the nature of the information sought and CRW’s role in handling the claim in question, a writ of prohibition is not warranted and the Circuit Court committed no error.

⁷ If we accept Mr. Wollitz’s testimony as true that he was hired to only relay the insurance company’s coverage denial opinion, it is clear that MUSIC then waived any privilege it may assert to said communications. State ex rel. United Hospital Center, Inc., v. Bedell, 199 W.Va. 316, 332, fn 22, 484 S.E.2d 199, 215, fn 22 (W.Va. 1997). Syl. Pt. 1, State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (W.Va. 1995)

D. The Requested Documents are Relevant⁸ and Likely to Lead to the Discovery of Admissible Evidence.

The Respondent Plaintiffs, because of the objections, were not provided the opportunity to review the subject documents. Nevertheless, it is clear that documents related to Petitioners' business practices in claims handling is reasonably calculated to lead to the discovery of admissible evidence under W.Va. R.Civ.P. 26. Petitioner CRW was engaged in the practice of insurance claim handling during the course of its normal business operation. It contacted insureds and obtained information related to insurance coverage. Certainly, its pattern and practice and course of dealings are discoverable and such correspondence fall outside any claim of privilege.

Rule 401 of the West Virginia Rules of Evidence 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." Rule 402 of the West Virginia Rules of Evidence provides that "evidence which is not relevant is not admissible." When considering whether testimony or evidence is relevant, the Court must consider the testimony in relation to the elements and facts that must be proven in a particular case. See Federal Advisory Committee Notes, F.R.E. 401, 56 F.R.D. 183, 215.

Rule 404(b) of the West Virginia Rules of Evidence provides that "[e]vidence of **other** crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

⁸ Contrary to the Petitioners' argument, "relevancy," standing alone, has no bearing at this juncture in the proceeding given that relevance is an evidentiary standard. This issue before the Court is one of discoverability not admissibility.

or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.” (Emphasis added). This is the precise type of information Respondent Plaintiffs seek. See e.g. Tudor v. Charleston Area Medical Center, Inc., 203 W.Va. 111, 506 S.E.2d 554 (W.Va. 1997).

When this Court considers W.Va.R.Civ.P. 26 within the prism of W.Va.R.E. 401 and 404(b), the discovery sought by Respondent Plaintiffs is discoverable and the Circuit Court committed no error finding as such.

E. The Crime-Fraud Exception Warrants the Production of the Document.

The basic conduct of the Petitioners invoke the crime-fraud exception to their privilege objection. “The crime/fraud exception applies when a client, or even a prospective client, seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.” State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W.Va. 457, 473-474, 583 S.E.2d 80, 96 - 97 (W.Va. 2003) *citing* Volcanic Gardens Mgmt. Co. v. Paxson, 847 S.W.2d 343, 348 (Tex.Ct.App.1993).

The Amended Complaint in this action specifically cites to Petitioners’ “misrepresentation of pertinent facts and insurance policy provisions” related to the case at issue. See Appx. at 1 at p. 5, ¶ 18 and p. 4, ¶ 16-17. Claims of civil conspiracy have been specifically alleged. Id. at p. 4, ¶ 16. The Respondent Plaintiffs’ motion to compel in the Circuit Court is littered with detailed analysis and explanation of the Petitioners’ fraudulent scheme and this Response further amplifies Petitioners’ fraudulent conduct. Finally, MUSIC’s own investigative record established that the landslide was pre-existing which it has fraudulently concealed establishes the scope and purpose of

the fraud.

Insofar as the Petitioners maintain that the Respondent Plaintiffs cannot prove “intent and purpose,” the facts alone meet the quantum of evidence required to show a fraud and the depth and magnitude of the fraud can best be shown by permitting this discovery and by further deposition testimony of those engaged in the fraud. “The crime-fraud exception to the attorney-client and work-product privileges are predicated on the recognition that where the attorney-client relationship advances a criminal enterprise or a fraud, the reasons supporting the privilege fail.” State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W.Va. 457, 473, 583 S.E.2d 80, 96 (W.Va. 2003)(citation omitted). Though discovery in this matter is far from completed, discovery nevertheless establishes that the Petitioners’ claims of privilege must be rejected based solely upon the crime-fraud exception. In his verified discovery answers served on July 3, 2013, Mr. Wollitz reveals the elements of fraud:

(1)(b) Charlston, Revich did not deny coverage to plaintiffs, but merely relayed Montpelier’s decision to deny coverage to the plaintiffs.

(2)(b) Charlston, Revich did not deny coverage to Plaintiffs, but merely relayed Montpelier’s decision to deny coverage to the Plaintiff. Leo Leonard of Montpelier produced documents, fact and information that Charlston, Revich relied upon in drafting the Wollitz letter.

(3) Charlston, Revich did not deny coverage to Plaintiff, but merely relayed Montpelier’s decision to the plaintiff. Charlston, Revich relied on the following information in drafting the Wollitz letter; the Corrick Complaint; Montpelier US Insurance Company Policy No. MP0047001000047 (the “Montpelier Policy”); Montpelier’s Claim file; West Virginia statutory case law; and communication with representatives of Montpelier.

See Respondent’s Appx. p. 7 - 53 (discovery responses).

Assuming he told the truth in these answers, Mr. Wollitz reached far beyond the eight corners

of the Complaint and the insurance policy in writing his denial letter.⁹ Nevertheless, at his recent deposition, on November 6, 2013 (a copy of pertinent pages is provided to this Honorable Court and attached as Respondent's Appx. p. 54), Mr. Wollitz changed his testimony, insisting the Corrick (underlying action) Complaint and the MUSIC insurance policy were the *only* materials he received and relied upon. Respondent's Appx. p. 55 - 58 at pp. 14, 36 and 37. He also insists that West Virginia insurance law authorizes the denial of coverage based on the pleadings and the policy under what he describes as the "eight corners" rule, even though the insurer actually knows from the investigation that facts, in fact, much more than the facts necessary to establish an alternative explanation, exist to affirm coverage because the landslide in question was pre-existing. Respondent Plaintiffs could not have caused it to occur because subsidence of land was never alleged (or existed). Respondent Plaintiffs want to know how this claim started from a full investigation, then to a limited investigation and then to relying on only the Complaint and Policy when the investigative documents were highly prejudicial to MUSIC's denial and found suddenly irrelevant, even disposable. There is more than the scent of a fraud here.

Like his verified discovery answers, Respondent's Appx. p. 7 - 53, Mr. Wollitz's coverage denial letter tells a different story than his "eight" corner defense and shows Mr. Wollitz included information in his letter from outside his self-fashioned "eight corner" rule. He said, "[w]e understand that the landslide allegedly arose from drainage from a pipe B&B installed at or around

⁹ Again, Petitioners claim that had Respondents just provided them with a copy of the Corrick Amended Complaint served in about January of 2013, which deletes the "landslide" allegation, they would have never denied coverage. The Amended Complaint was made available to the Petitioners in about May of 2013. Petitioners, however, knew nearly three years before, in August of 2010, that the subject landslide was pre-existing when informed by Mr. Mullins' investigative reports, yet coverage was denied because Mr. Wollitz claimed Respondents caused a landslide.

the Corrick's property pursuant to its contract with the co-defendant. . . ." See Respondent's Appx. p. 4. This information was not contained within the complaint or the policy.

However, seemingly changing his testimony a third time, when explaining why his coverage denial letter of February 7, 2012, contains a paragraph of investigative information that was not referenced in either the Complaint or the policy, he admits that he got that information from outside the Complaint. See Respondent's Appx. p. 3 - 6.

Mr. Wollitz also let the cat out of the bag writing in the coverage denial letter of February 7, 2012, that: (a) it was Montpelier that decided to deny coverage; and (b) that the Montpelier coverage denial was based on information currently available to Montpelier and that additional investigation may be conducted if additional information is received that was not previously produced. From the Montpelier investigative file, we know Montpelier relied on much more than the policy and the pleading and acted in bad faith and with actual malice to deny coverage.

To verify that point, the Court need look no further than the Respondent's Appx. p. 1 - 2. This exhibit, a letter dated August 3, 2010, from its adjuster to Montpelier, explains that the landslide, which was used as the justification to deny coverage, actually pre-existed the date Plaintiffs started to work on the Corrick property.¹⁰ Obviously, the stated reason for denying coverage was false, but that did not deter Montpelier.

A few final points concerning Mr. Wollitz:

- He met with Leo Leonard, Montpelier's claim adjuster, and Leo Leonard provided him with information¹¹.

¹⁰ This was also referenced by Mr. Wollitz in his February 7, 2012, letter.

¹¹ According to Mr. Wollitz, the extent of the information Mr. Leonard provided ranges from the Corrick Complaint and policy to "information," "documents" and the "claim file."

- He says he was not practicing law in West Virginia and he had no contact with any West Virginia lawyer.
- He did research and was aware of the Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 609 S.E.2d 895 (W.Va. 2004) and Bruceton Bank v. U.S. Fidelity and Guar. Ins. Co., 199 W.Va. 548, 486 S.E.2d 19 (W.Va. 1997) decisions but was not familiar with their holdings.
- Reportedly, he claims West Virginia is a four corner or eight corner jurisdiction.
- That the exclusion in question is defined as subsidence of land that causes a landslide. The Complaint does not allege any “subsidence of land.” Nevertheless, Mr. Wollitz says these words are meant, are intended or somehow appear in the Complaint.
- Mr. Wollitz repeated over and over West Virginia is a four corner or eight corner state even when the insurer’s investigation shows facts in conflict with the allegations in the Complaint and those investigation facts compel coverage.

The civil fraud scheme would not be effective if CRW were employed to simply send its “client,” MUSIC, a confidential coverage opinion. If this were the case, Mr. Wollitz would not be able to rely on the ruse of the “eight corners” rule as an explanation of coverage denial. Rather, he would be confronted with a number of uncomfortable truths, including the uncontested fact the “landslide” was pre-existing and coverage could not be denied based on the “subsidence of land” exclusion. Closely connected, the Corrick complaint never alleged a “subsidence of land,” another convenient omission by Petitioners. Were “subsidence of land” or even an unconnected “landslide” alleged, Petitioner, relying on an exclusion, would have the burden of proof to establish the applicability of the exclusion and with it the statutory and common law duty to consider the claim based upon all information available.

In Bruceton Bank v. USF & G Ins. Co., 199 W.Va. 548, 486 S.E.2d 19 (W.Va. 1997), this Court adopted a rule that reads nothing like the “eight corner” rule Mr. Wollitz fashioned to deny

coverage to the insureds.¹² An insurer is bound by the principles articulated in Bruceton Bank and the West Virginia Unfair Claims Settlement Practice Act, W.Va. Code St. R. § 33-11-4(9)(d), which require a reasonable investigation and that claim determinations be made upon all available information. An investigation is not reasonable and is not based on all available information when it ignores pivotal facts that trigger coverage.

MUSIC hand-picked “national coverage counsel” to ignore facts and to pull a rabbit from the hat by invoking an inapplicable “eight corners” rule. It did so, even when its own investigator, Mr. Mullins, rejected the factual reasons it relied upon to deny coverage. Even Mr. Wollitz cannot escape the facts of the investigation. At his deposition, Mr. Wollitz admitted that he did not consider all available information as required by the WV Unfair Claims Settlement Practice Act. See W.Va. Code St. R. § 33-11-4(9)(d).

Bruceton Bank only allows an insurer not to conduct an investigation when a claim is foreign to the risk insured. The burden to prove an exclusion rests with the insurer, which necessarily means that some investigation is required and it is a rare circumstance that the complaint alone allows denial of coverage. In this case, the risk of flooding could not be considered on its face as foreign to a CGL policy. In fact, Bruceton Bank requires an analysis of the complaint and all facts in the insurer’s possession to determine if coverage and/or a duty to defend can be reasonably gleaned for the allegations and known facts. Syllabus Point 3 of Bruceton Bank, 199 W.Va. 548, 486 S.E.2d 19, instructs insurers:

¹² Syl., Farmers & Mechanics Mut. Fire Ins. Co. of West Virginia v. Hutzler, 191 W.Va. 559, 447 S.E.2d 22 (W.Va. 1994) (“When a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide.”).

included in the consideration of whether the insurer has a duty to defend is whether the allegations in the complaint against the bank are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies.

Bruceton Bank must be squared with the duty imposed by the Unfair Claim Settlement Practice Act when the claim is made with a liability insurance carrier and may not be used to defeat coverage when it actually knew its investigation is in conflict with the bare allegations in the Complaint. Investigative reports from MUSIC's own investigator clearly stated that the landslide it relied upon in the Wollitz letter to deny coverage was preexisting and not caused by Respondent Plaintiffs. There is no signal from Bruceton Bank that an insurer is permitted to rely on a "subsidence of land" exclusion where there is no such allegation in the Complaint, because such an approach only leads to an alternative coverage finding. The ordinary rule of insurance law requires strict construction of policy exclusions against the insurer, so MUSIC's reliance on this exclusion is beyond the pale.

At Mr. Wollitz's November 6, 2013, deposition, he¹³ denied, even repudiated, his verified written discovery answers when he admitted to relying on information, documents and the claim file from MUSIC. Mr. Wollitz changed his story and testified that he only relied on the Corrick complaint and the MUSIC policy. The Mullins investigative reports to MUSIC explain there were three flooding events in January of 2010, no subsidence of land and no landslide that was not pre-existing. He described dirty mine drainage water that flooded the Corrick property. That is not a landslide or other any other excluded event.

¹³ Mr. Wollitz confirmed he is not admitted to practice in West Virginia, did not consult with West Virginia counsel, never attended a seminar on West Virginia law and never visited West Virginia which undermines the credibility of his West Virginia coverage opinion.

These documents include the multiple Mullins reports and the Ruth Burseth claim denial letter of August 10, 2010. Ms. Ruth Burseth and Mr. Leo Leonard are scheduled to be deposed on December 12, 2013. If they testify these January flooding events were more than mine water and/or flooding and, in fact, were actually landslides or subsidence of land, this will be the first time MUSIC offers as facts and as a new basis to deny coverage.¹⁴ But at best, such a defense suggests only a question of fact, not a coverage denial. Indeed, even Mr. Mullins says there was only flooding of mine water, brown in color, far short of the excluded landslide, mud flow or subsidence of land. Moreover, the flood occurred at a location that experiences on-going flooding from nearby mines and other surface water, so any damage to the property has been progressive.¹⁵ MUSIC offers neither consistent nor reliable coverage analysis and just continues to grasp at any excuse, true or not, to deny coverage, and break every rule requiring prompt and fair claims handling based upon the facts in its possession.

Insofar as Petitioners' claim that the crime-fraud exception does not apply to the procedural scheme followed in similar claims, it is incorrect. A party need establish "a valid relationship between the confidential communication that was made and the crime or fraud." State of West Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W.Va. 705, 718, 601 S.E.2d 25, 38 (W.Va. 2004)(internal citations omitted). Hence, once a prima facie claim of fraud is established, "other act" evidence need only be reasonably calculated to lead to discoverable evidence of the process or scheme of the parties. Assuming this Court finds it necessary to consider the crime-fraud exception,

¹⁴ It is noted that the nature of the work Respondent Plaintiffs were contracted to conduct was the drainage of mine water from an abandoned flooded underground old punch mine.

¹⁵ The Corrick residence is supported by mine timbers and concrete blocks and flooding of this foundation exists.

the Respondent Plaintiffs clearly met their burden.

VI. CONCLUSION

The West Virginia Rules of Civil Procedure “generally provide for broad discovery to ferret out evidence which is some degree relevant to contested issue[s].” Syl. Pt. 1, Evans v. Mutual Min., 485 S.E.2d 695 (W.Va. 1997). CRW undertook insurance claims handling and now attempts to avoid disclosure of its general business practice. Respondent Plaintiffs have substantial need for the subject documents and there is no indication that the Circuit Court committed substantial legal error in compelling production of the subject documents after *in camera* review. Under such facts, issuance of a rule to show cause is inappropriate.

WHEREFORE, for the foregoing reasons and authorities, the Petitioner’s Verified Petition for Writ of Prohibition should be denied and the Respondents should be awarded other such relief as deemed equitable and just.

Respectfully submitted

**JAMES M. BUCKLAND, an individual;
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West Virginia corporation; and TIM’S
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 13-061

“CONFIDENTIAL CASE”

**STATE OF WEST VIRGINIA EX REL. MONTPELIER US
INSURANCE COMPANY and CHARLSTON, REVICH & WOLLITZ LLP,**

Petitioners,

vs.

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

Respondents.

CERTIFICATE OF SERVICE

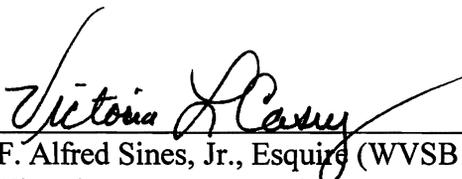
The undersigned does hereby certify that the following original document **RESPONSE BRIEF ON BEHALF OF THE RESPONDENTS JAMES M. BUCKLAND, B&B TRANSIT, INC. B&D SALVAGE, INC. AND TIM’S SALVAGE, INC.**, has been served upon counsel of record by depositing a true and exact copy thereof, via regular U.S. Mail and properly addressed on this **9th** day of **DECEMBER, 2013**, as follows:

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