IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED

April 30, 2003
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30840

STATE OF WEST VIRGINIA EX REL.
MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner

v.

THE HONORABLE ARTHUR M. RECHT,
JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY;
THE ESTATE OF MARJORIE I. VERBA, BY SALLY JO NOLAN, EXECUTRIX,
Respondents

Petition for Writ of Prohibition

WRIT GRANTED

Submitted: January 14, 2003
Filed: April 30, 2003

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JUSTICE MAYNARD delivered the Opinion of the Court.
CHIEF JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.
JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.
JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.
JUSTICE MCGRAW dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "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." Syllabus Point 4, *State ex rel. Hoover v. Berger,* 199 W.Va. 12, 483 S.E.2d 12 (1996).

2. "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." Syllabus Point 1, *State Farm v. Stephens,* 188 W.Va. 622, 425 S.E.2d 577 (1992).

3. "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." Syllabus Point 3, *State ex rel. USF&G v. Canady,* 194 W.Va. 431, 460 S.E.2d 677 (1995).

4. "Unless obviously correct or unreviewably discretionary, rulings requiring attorneys to turn over documents that are presumably prepared for their clients' information and future action are presumptively erroneous." Syllabus Point 6, *State ex rel. USF&G v. Canady,* 194 W.Va. 431, 460 S.E.2d 677 (1995).

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

6. "The burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it." Syllabus Point 4, *State ex rel. USF&G v. Canady,* 194 W.Va. 431, 460 S.E.2d 677 (1995).

7. "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 the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential." Syllabus Point 2, *State v. Burton,* 163 W.Va. 40, 254 S.E.2d 129 (1979).

8. "The limitation in Rule 26(b)(3) of the West Virginia Rules of Civil Procedure is against obtaining documents and other tangible things used in trial preparation."

Syllabus Point 8, in part, *In re Markle,* 174 W.Va. 550, 328 S.E.2d 157 (1984).

9. "To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." Syllabus Point 7, *State ex rel. United Hosp. v. Bedell,* 199 W.Va. 316, 484 S.E.2d 199 (1997).

10. "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,* 174 W.Va. 550, 328 S.E.2d 157 (1984).

11. "The purpose of Rule 26(b)(3) [of the West Virginia Rules of Civil Procedure] is to narrow the ability to obtain trial preparation material by expanding the coverage of the work product rule to include persons other than an attorney." Syllabus Point 6, in part, *In re Markle,* 174 W.Va. 550, 328 S.E.2d 157 (1984).

12. In clear language, Rule 26 of the West Virginia Rules of Civil Procedure provides that privileged matters, although relevant, are not discoverable. As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence. In determining what privileges or protections are applicable, we are obligated to look both at the rules themselves and to our statutory and common law.

13. "[N]ew points of law . . . will be articulated through syllabus points as

required by our state constitution." Syllabus Point 2, in part, *Walker v. Doe,* 210 W.Va. 490, 558 S.E.2d 290 (2001).

Maynard, Justice:

In this original proceeding for a writ of prohibition, this Court is asked to prevent the enforcement of the September 19, 2002, order of the Circuit Court of Ohio County which directed the relator and defendant below, Medical Assurance of West Virginia, Inc., to produce its complete investigative and claim files in connection with the underlying medical malpractice claim of respondent and plaintiff below, the Estate of Marjorie I. Verba. The relator alleges that these files contain information protected by the attorney-client privilege, work product doctrine, and quasi attorney-client privilege. For the reasons set forth below, we grant the writ of prohibition.[1]

I.

FACTS

Dr. David A. Ghaphery performed anti-reflux surgery on Marjorie Verba on February 21, 1996. Within several hours of Ms. Verba's release from the hospital four days later, she died. An autopsy indicated that a surgical nick resulted in a laceration to her stomach which caused Ms. Verba to contract peritonitis and to die as a result.

[1]At this point, we acknowledge the valuable contribution of *amici* West Virginia Insurance Federation, Nationwide Mutual Insurance Company, Progressive Paloverde Insurance Company, and American Insurance Association who submitted briefs to this Court.

Ms. Verba's estate, respondent herein and plaintiff below ("Respondent"), brought a medical malpractice action against Dr. Ghaphery. A jury awarded $300,000 for physical pain, mental pain, and loss of enjoyment of life; $21,000 for medical and funeral bills; and $2,500,000 to the beneficiaries of Ms. Verba's estate under the wrongful death statute.[2] The trial court reduced the award to conform to the medical malpractice cap on noncompensatory damages found in W.Va. Code § 55-7B-8 (1986).[3] Respondent appealed the reduction and challenged the constitutionality of the one million-dollar cap. In *Verba v. Ghaphery,* 210 W.Va. 30, 552 S.E.2d 406 (2001), this Court upheld the cap's constitutionality.

Following the favorable jury verdict and prior to the appeal, Respondent was granted leave to amend its complaint to allege that the relator herein and defendant below, Medical Assurance of West Virginia, Inc., Dr. Ghaphery's medical liability insurer,

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[2]*See* W.Va. Code §§ 55-7-5 - 55-7-7.

[3]According to previous W.Va. Code § 55-7B-8, which is applicable to the instant case, "[i]n any medical professional liability action brought against a health care provider, the maximum amount recoverable as damages for noneconomic loss shall not exceed one million dollars and the jury may be so instructed." This code section was amended effective March 5, 2003, to reduce the maximum amount recoverable as compensatory damages for noneconomic loss to $250,000 per occurrence or $500,000 where the damages for noneconomic losses suffered by the plaintiff were for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities. Again, the amendment has no bearing on the instant case.

committed unfair claim settlement practices in violation of W.Va. Code § 33-11-4(9).[4] Specifically, Respondent alleged that the relator did not perform an adequate investigation; liability was reasonably clear throughout the underlying malpractice claim; and the relator rejected Respondent's offer of settlement of one million dollars plus medical expenses, and made no offer in return. The unfair claim settlement practices or "bad faith" action[5] was stayed and bifurcated pending resolution of the appeal after which the stay was lifted and discovery commenced.[6]

Pursuant to discovery in the bad faith action, Respondent requested, among other things:

> (2) The **complete** investigative files and claims files (including their original folders and binders and all documents therein) of Medical Assurance in connection with the underlying claim of plaintiff arising from the malpractice claims, including, but not limited to, claims files

[4]The statute which prohibits unfair claim settlement practices, W.Va. Code § 33-11-4(9), is part of the Unfair Trade Practices Act, W.Va. Code §§ 33-11-1, *et seq.*

[5]For easy reference, we will refer to Respondent's statutory action for unfair claim settlement practices as a "bad faith" action. We realize, however, that "there is actually a technical distinction between a 'bad faith' claim and an 'unfair settlement practices' claim. The phrase 'bad faith' was developed to describe the common law action against an insurer. The phrase 'unfair settlement practices' was developed to describe the statutory action against an insurer. Because the statutory claim actually includes the elements of a cause of action for the common law claim, our cases use the two phrases interchangeably." *Light v. Allstate Ins. Co.,* 203 W.Va. 27, 30 n. 5, 506 S.E.2d 64, 67 n. 5 (1998) (citations omitted).

[6]This case was filed prior to the Legislature's elimination of third-party bad faith claims against insurers of health care providers. *See* W.Va. Code § 55-7B-5(b) (2001).

> maintained by adjusters, claims files maintained by claims examiners, claims files maintained by district or regional offices and claims files maintained by the home office of Medical Assurance. These files are to be produced in their entirety, in their original state, complete with original file jacket and any notes or attachments thereto.
>
> (4) All memoranda, diary entries, notes or other writings, recordings and/or other data entries which in any way document and/or record discussions between any representative of Medical Assurance and any other person relating to the claims made on behalf of plaintiff arising out of the underlying claim.
>
> (11) Any and all statements of witnesses, potential witnesses or interested parties relating in any way to the subject matter of plaintiff's Amended Complaint.
>
> (17) All e-mail documents and computer documents, whether reduced to hard copies or not, which in any way relate to the handling of the underlying claim.

The relator responded that a general request for materials and files as that contained in Request number 2 is improper under this Court's opinion in *State ex rel. Allstate Ins. Co. v. Gaughan,* 203 W.Va. 358, 508 S.E.2d 75 (1998). The relator also asserted various privileges including the attorney-client privilege of the insured, opinion and fact work product, and the quasi attorney-client privilege of the relator. Documents in the files, created up through the resolution of post-verdict motions in the medical malpractice action, which

the relator considered non-privileged were produced. Documents considered privileged were not produced but were identified by the relator in a 52-page "Privilege Log."

Respondent subsequently moved to compel production of all the documents requested. Following a hearing, the Circuit Court of Ohio County, by order dated September 19, 2002, granted Respondent's motion and directed the relator to fully respond to the requests for production of documents and deliver the documents to Respondent's counsel on or before September 30, 2002. The circuit court further ruled that,

> Defendant Medical Assurance shall not be permitted to withhold the production of any documents requested by said requests for production of documents based upon any claim of privilege with the exception that defendant may object to producing any document which was exclusively between Steptoe & Johnson and Defendant David Ghaphery, M.D., and was not received by and/or reviewed by Defendant Medical Assurance, and all documents falling within this objection shall be produced to this Court *in camera* for inspection and all such documents shall be identified by its identifying information, together with the specific reason for objecting to production.

Shortly thereafter, the relator presented to this Court its petition praying for a writ of prohibition to be directed against the Circuit Court of Ohio County and the Estate of Marjorie I. Verba. This Court issued a rule to show cause, and we now grant the writ.

II.

STANDARD OF REVIEW

The general standard for issuance of the writ of prohibition is set forth in W.Va. Code § 53-1-1 (1923) which states that "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." This Court has held that "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor,* 138 W.Va. 207, 75 S.E.2d 370 (1953). The relator herein does not claim that the circuit court has no jurisdiction but rather that it has exceeded its legitimate powers.

> 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.

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

"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." Syllabus Point 1, *State Farm v. Stephens,* 188 W.Va. 622, 425 S.E.2d 577 (1992). Also, "[w]hen a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate." Syllabus Point 3, *State ex rel. USF&G v. Canady,* 194 W.Va. 431, 460 S.E.2d 677 (1995). Further, "[u]nless obviously correct or unreviewably discretionary, rulings requiring attorneys to turn over documents that are presumably prepared for their clients' information and future action are presumptively erroneous. Syllabus Point 6, *Canady, id.* Finally,

> Quite clearly, a circuit court's ruling on discovery

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

Canady, 194 W.Va. 431, 439, 460 S.E.2d 677, 685, *quoting McDougal v. McCammon,* 193 W.Va. 229, 238, 455 S.E.2d 788, 797 (1995), *quoting State v. Farley,* 192 W.Va. 247, 253, 452 S.E.2d 50, 56 (1994).

Applying these standards to the case before us, we first conclude that the discovery order at issue involves a probable invasion of confidential materials and work product. Although we do not have the documents at issue, we have a copy of the privilege log in which the various documents are described by the relator. Our review of the privilege log leads us to conclude that at least some of the documents sought by Respondent are probably protected by attorney-client privilege or the work product doctrine. Therefore, because of the probable invasion of confidential materials, this Court's original jurisdiction is appropriate. Second, for the reasons discussed in Subsection 3 of this opinion, we find that the circuit court's ruling turns on its application of the wrong legal standard. Further, the circuit court's use of the wrong legal standard was its sole reason for ordering the production of the documents at issue. Accordingly, we have no choice but to grant the writ of prohibition prayed for by the relator.

III.

DISCUSSION

1. Traditional Attorney-Client Privilege and Work Product Principles

First, we find that upon any reconsideration of Respondent's motion to compel, the circuit court shall apply traditional attorney-client privilege and work product principles in determining whether the documents sought by Respondent should be produced. At this point, we will discuss these principles.

A. Attorney-Client Privilege

The attorney-client privilege applies to communications between Steptoe & Johnson and Dr. Ghaphery. This privilege protects litigants during discovery as set forth in Rule 26(b) of the West Virginia Rules of Civil Procedure which provides in pertinent part:

> *Discovery scope and limits.* --- Unless otherwise limited by order of the court in accordance with these rules, the scope of

> discovery is as follows:
>
> (1) In general. --- Parties may obtain discovery regarding 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. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added).

Thus, according to Rule 26(b), generally parties may not obtain discovery of privileged matters.

This Court has described the attorney-client privilege as "a common law privilege that protects communications between a client and an attorney during consultations." *State ex rel. John Doe v. Troisi,* 194 W.Va. 28, 35-36, 459 S.E.2d 139, 146-47 (1995) (citations omitted). "Communications made in confidence either by an attorney or a client to one another are protected by the privilege." *Canady,* 194 W.Va. at 441, 460 S.E.2d at 687 (footnote omitted). In other words, the "privilege protects the substance of communications[.]" *Troisi,* 194 W.Va. at 36, 459 S.E.2d at 147 (footnote omitted). Communications are protected whether they are made verbally or in writing, including electronic mail messages and facsimile transmissions. 1 Franklin D. Cleckley, *Handbook on*

Evidence for West Virginia Lawyers, § 5-4(E)(2)(b), p. 5-107 (4th ed. 2000); *see also Canady,* 194 W.Va. at 443, 460 S.E.2d at 689 ("Both the electronic mail message and the facsimile transmission similarly seem to be protected by the attorney-client privilege.").

The attorney-client privilege also "extends to others who are advised of confidential information at the direction of the attorney." *Troisi,* 194 W.Va. at 36, 459 S.E.2d at 147 (citations omitted). "[T]herefore, the privilege extends to protect communication between the attorney and the agents, superiors, or attorneys in joint representation." *Id.* (Citations omitted). Significantly, "among those considered a representative of the lawyer is an insurance company's investigator who takes a statement from an insured to assist the insurance company's lawyer in defending a possible claim against the insured." 1 Cleckley, *Handbook on Evidence,* § 5-4(E)(5), p. 5-129. Therefore, the circuit court erred in its September 30, 2002, order when it ruled that only communications between Steptoe & Johnson and Dr. Ghaphery, which were not received and/or reviewed by Medical Assurance, are protected by attorney-client privilege. Privileged communications between Steptoe & Johnson and Dr. Ghaphery remain privileged even if shared with Dr. Ghaphery's liability insurer.

"The burden of establishing the attorney-client privilege or the work product exception, in all their elements, always rests upon the person asserting it." Syllabus Point

4, *Canady, supra.*

> 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 the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential.

Syllabus Point 2, *State v. Burton,* 163 W.Va. 40, 254 S.E.2d 129 (1979). Finally, "there must be no evidence that the client intentionally waived the privilege." *Troisi,* 194 W.Va. at 36 n. 11, 459 S.E.2d at 147 n. 11 (citation omitted). "A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue." Syllabus Point 8, *Canady.*

In the event the circuit court reconsiders Respondent's motion to compel, the circuit court is directed to apply the above attorney-client privilege principles in assessing the discoverability of the specific documents sought by Respondent.

B. Work Product

Where the attorney-client privilege does not apply, material sought by Respondent may still be protected by the work product doctrine. This doctrine "historically protects against disclosure of the fruits of an attorney's labor [and] is necessary to prevent

one attorney from invading the files of another attorney." *Canady,* 194 W.Va. at 444, 460 S.E.2d at 690. Under the work product rule, "an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation[.]" *In re Doe,* 662 F.2d 1073, 1077 (4th Cir. 1981), *modification on other grounds recognized by In re Grand Jury Proceedings,* 33 F.3d 342 (4th Cir. 1994). The rule governing work product is found in W.Va.R.Civ.P. 26(b)(3), which states, in pertinent part:

> Trial preparation: materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

By its express terms, Rule 26(b)(3) defines work product as "documents and tangible things . . . prepared in anticipation of litigation or for trial[.]" According to Syllabus

Point 8, in part, of *In re Markle,* 174 W.Va. 550, 328 S.E.2d 157 (1984), "[t]he limitation in Rule 26(b)(3) of the West Virginia Rules of Civil Procedure is against obtaining documents and other tangible things used in trial preparation." We have also held that "t]o determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." Syllabus Point 7, *State ex rel. United Hosp. v. Bedell,* 199 W.Va. 316, 484 S.E.2d 199 (1997).

The work product doctrine differs from attorney-client privilege in that 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.*" *State ex rel. Chaparro v. Wilkes,* 190 W.Va. 395, 397, 438 S.E.2d 575, 577 (1993). 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." Syllabus Point 7, *In re Markle, supra.*

"Fact work product[7] is discoverable only 'upon a showing of both a substantial

[7]"Factual work product may be defined as the information or materials gathered or assembled by a lawyer in anticipation of litigation not falling under the category of opinion

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.
>
> Although the cost of obtaining depositions may be relevant, it is seldom, if ever, sufficient in itself to constitute "undue hardship."

In re Markle, 174 W.Va. at 557, 328 S.E.2d at 163-64 (citations omitted). Also, "[w]hat hardship is 'undue' depends on both the alternate means available and the need for continuing protection from discovery." *State ex rel. Chaparro v. Wilkes,* 190 W.Va. at 398 n. 2, 438 S.E.2d at 578 n. 2 (citations omitted).

In the instant case, pursuant to Rule 26(b)(3), the respondent is entitled to apply to the circuit court to examine the attorneys' *fact* work product, not the attorneys' *opinion* work product, generated for but not by the attorneys, upon the proper showing of need. In

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work product." *State ex rel. Chaparro v. Wilkes,* 190 W.Va. 395, 397 n 1, 438 S.E.2d 575, 577 n 1 (1993), *citing* 4 *Moore's Federal Practice* P. 26.64 at 26-361, 362 (1980 ed.).

addition, upon the proper showing of need, the respondent is entitled to discover from Medical Assurance's investigative files all fact work product which shows or tends to show Medical Assurance's internal processes in evaluating the underlying claim against Dr. Ghaphery. Of course, documents may be redacted to omit any excluded material.

Opinion work product consists of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." W.Va.R.Civ.P. 26(b)(3). It "is even more scrupulously protected as it represents the actual thoughts and impressions of the attorney[.]" *In re Grand Jury Proceedings,* 33 F.3d 342, 348 (4th Cir. 1994). In fact, "opinion work product enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances." *State ex rel. United Hosp. v. Bedell,* 199 W.Va. at 328, 484 S.E.2d at 211, *quoting Republican Party of North Carolina v. Martin,* 136 F.R.D. 421, 429 (E.D.N.C. 1991), *aff'd in part, rev'd in part* and *remanded on other grounds,* 980 F.2d 943 (4th Cir. 1992) (*quoting In re Doe,* 662 F.2d 1073, 1080 (4th Cir. 1981). This Court has instructed that " efforts to obtain disclosure of opinion work product should be evaluated with particular care." *Canady,* 194 W.Va. at 445, 460 S.E.2d at 691 (citation omitted). Accordingly, should the issue be raised again below, the circuit court should use special care in evaluating efforts to obtain the opinion work product of Dr. Ghaphery's attorneys.

Finally, as with the attorney-client privilege, the work product protection of Steptoe & Johnson is not negated simply because the documents were received and/or reviewed by the defendant's insurer. Rule 26(b)(3) specifically provides that documents prepared in anticipation of litigation or by or for the party's representative, "including the party's . . . insurer[,]" are discoverable only upon the proper showing. We have explained that "[t]he purpose of Rule 26(b)(3) is to narrow the ability to obtain trial preparation material by expanding the coverage of the work product rule to include persons other than an attorney." Syllabus Point 6, in part, *In re Markle,* 174 W.Va. 550, 328 S.E.2d 157 (1984). "Thus it [is] now . . . clear that a report from the insured to the insurer is within the immunity as also [are] statements obtained by investigators for the insurer." *In re Markle,* 174 W.Va. at 556, 328 S.E.2d at 162, *quoting* 8 C. Wright and A. Miller, Federal Practice and Procedure § 2024 at 202-07 (1970).

Therefore, if the circuit court is called upon to reconsider Respondent's motion to compel, it is directed to apply the work product rules set forth above in order to determine whether the documents sought by Respondent should be produced.[8]

2. Viability of a Balancing Test To Determine the Discoverability of Privileged Materials

[8]As noted above, the relator also claims the protection of the quasi attorney-client privilege articulated in *Gaughan.* However, *Gaughan* expressly applies where the insured has signed a release of his or her claim file to a third-party litigant. These are not the facts in the instant case. Also, see footnote 9, *infra.*

During oral argument, counsel for Respondent asserted that, if this Court finds that the circuit court erred, we should adopt a balancing test similar to the one formulated in *Gaughan, supra,* whereby Respondent may obtain privileged documents upon a showing of compelling need. Respondent contends that a balancing test is necessary because a claim file is a unique, contemporaneously prepared history of its handling of a claim that cannot be discovered by other means but that is absolutely necessary to prove the elements of a bad faith cause of action. According to Respondent, the compelled production of otherwise privileged material will not have a chilling effect on attorney-client communications because every attorney involved in these types of cases knows that his or her opinions are likely to be disclosed. For the following reasons, we decline to create the exception to the attorney-client privilege urged on us by Respondent.[9]

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[9]Respondent's efforts to apply *Gaughan* as a fallback position are actually misguided. In *Gaughan,* the insured executed a release which allowed the plaintiff to have access to the insured's claim file. Because the claim file was created for the insured, the insured could waive all privileges attached to the claim file -- which was done by the release that was executed. Under this unique set of facts, it became necessary to provide the insurer with some protection against disclosure of privileged information in the claim file, because the insured had waived the attorney-client privilege by authorizing a third party to have access to the claim file. In providing the insurer some protection, we created a quasi privilege which could be penetrated upon a showing of compelling need. In the instant case, the insured has not authorized release of his claim file to Respondent. Consequently, there has been no waiver of the attorney-client privilege by the insured. Since there has been no waiver in the case, the attorney-client privilege is fully in effect. As we indicate in the body of this opinion, this Court will not break with centuries of precedent, to create an exception to the common law attorney-client privilege, by applying *Gaughan's* fact specific balancing test.

First, a balancing test governing the discovery of privileged communications is inconsistent with Rule 26 of the West Virginia Rules of Civil Procedure which concerns the scope of discovery. According to Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action[.]" (Emphasis added.) Under the rule's plain terms, privileged material is not discoverable.

> In clear language, Rule 26 provides that privileged matters, although relevant, are not discoverable. As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence. In determining what privileges or protections are applicable, we are obligated to look both at the rules themselves and to our common law.

Canady, 194 W.Va. at 441, 460 S.E.2d at 687 (citation and footnote omitted). Therefore, there is no provision under our Rules of Civil Procedure for the discovery of privileged material.

Second, using a balancing test to govern the discoverability of privileged communications is unknown to the common law. "When the [attorney-client] privilege is applicable . . . it is absolute." *Gaughan,* 203 W.Va. at 372 n. 21, 508 S.E.2d at 89 n. 21, *quoting* 1 Cleckley, *Handbook On Evidence,* § 5-4(E)(3) (3d ed. 1994). This is consistent with the United States Supreme Court's "reject[ion] . . . of a balancing test in defining the contours of the [attorney-client] privilege." *Swidler & Berlin v. United States,* 524 U.S. 399,

409, 118 S.Ct. 2081, 2087, 141 L.Ed.2d 379, 388 (1998) (citations omitted). It is also consistent with "[t]he overwhelming majority of courts support[ing] the view that if the essential conditions for the applicability of the privilege are met, the privileged communications will be permanently protected unless the privilege is waived by the client." 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.01 at p. 1-7 (2d ed. 1995) (footnote omitted). We simply do not believe that a significant deviation from the common law which would be applicable only in third-party bad faith insurance cases is desirable or necessary.

Third, our research suggests that there is no precedent for using a balancing test to determine the discoverability of privileged material in third-party bad faith claims. Of the small minority of states that recognize the right of a third-party plaintiff to bring a bad faith action against the insured-defendant's insurance company,[10] it appears that only Florida and

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[10]Unlike West Virginia, the majority of states do not recognize a right to bring a private cause of action under their unfair claim settlement practices statutes. According to Stephen S. Ashley, in *Bad Faith Actions: Liability and Damages* § 9:03, pp. 9-9 - 10 (1997), "[t]hough a few states have agreed with the conclusion that the unfair claims settlement practices statutes support private claims, most have rejected private causes of action." (Footnote omitted). Ashley lists as those states which recognize private causes of action, Arizona, Connecticut, Florida, Kentucky, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Texas, and West Virginia.

Among these states, only a handful recognize *third-party* bad faith claims based on their unfair claims settlement practices statutes. According to *Gaughan,* 203 W.Va. at 369, n, 15, 508 S.E.2d at 86 n. 15, "[m]ost courts which have considered a third-party bad faith action have not allowed such a third-party claim against a tortfeasor's insurer." (Citation omitted). This is in accord with Paul R. Rice, *A Quasi-Attorney-Client Privilege?*

Montana courts have addressed the issue of the discoverability of attorney-client privileged material in an insurer's claim file in the context of third-party bad faith claims. Neither of these states created a balancing test to determine the discoverability of privileged material, and only the Florida court permitted discovery of the claim file. Significantly, the approach taken by the Florida court in *Dunn v. National Security Fire and Cas. Co.,* 631 So.2d 1103 (Fla.Dist.Ct.App. 1993), was rejected by this Court in *Gaughan.*

Respondent avers, however, that discovery of privileged material in the insurer's files is necessary to prove the elements of a bad faith cause of action.[11] We

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West Virginia's Mislabeled Fiduciary Duty Exception, 101 W.Va. L.Rev. 311, 314 (1998) which says, "[b]ecause the third-party action involves a plaintiff to whom the insurance company did not owe a contractual duty under the insurance policy, most state jurisdictions that have addressed the issue have refused to find an implied statutory duty under legislative schemes similar to those in West Virginia." (Footnote omitted).

[11]Several of the cases cited by Respondent to support its assertion that bad faith actions can only be proved by access to the claim file are first-party bad faith cases in which the courts did not consider the attorney-client privilege of the insured. *See Brown v. Superior Court,* 137 Ariz. 327, 670 P.2d 725 (Ariz. 1983); *Clausen v. National Grange Mut. Ins. Co.,* 730 A.2d 133 (Del.Super.Ct. 1997); *Tackett v. State Farm Fire and Cas. Ins. Co.,* 653 A.2d 254 (Del.Super.Ct. 1995); *Robarge v. Patriot Gen. Ins. Co.,* 42 Conn.Supp. 164, 608 A.2d 722 (1992) (third-party plaintiff subrogated to the rights of the insured by statute); and *Bartlett v. John Hancock Mut. Life Ins. Co.,* 538 A.2d 997 (R.I. 1988), *abrogated on other grounds by Skaling v. Aetna Ins. Co.,* 799 A.2d 997 (R.I. 2002). Two of the cases do not address attorney-client privilege but rather the discoverability of opinion work product under the Rules of Civil Procedure. *See Holmgren v. State Farm Mut. Auto. Ins. Co.,* 976 F.2d 573 (9th Cir. 1992) and *Morrow v. Brown, Todd & Heyburn,* 957 S.W.2d 722 (Ky. 1997). Finally, in *Escalante v. Sentry Ins.,* 49 Wash.App. 375, 743 P.2d 832 (1987), *disapproved of on other grounds by Ellwein v. Hartford Acc. and Indem. Co.,* 142 Wash.2d 766, 15 P.3d

disagree. In *State ex rel. USF&G v. Montana Second Judicial Dist.,* 240 Mont. 5, 783 P.2d 911 (1989), the Montana court rejected a third-party's efforts to discover the insurer's files in a bad faith action and explained:

> Plaintiffs contend that the privilege must give way in the context of bad faith litigation because the plaintiff must be able to determine whether the insurance company had a good faith basis for its decision. They urge that the requisite information includes knowledge of reliance on advice of counsel, and that if discovery is not permitted in the present case it will render the Unfair Trade Practices Act ineffectual. Plaintiff contends that the nature of the cause of action should control discoverability. We disagree and conclude that it is the nature of the relationship which is determinative.
>
> Plaintiffs contend that their inability to discover these communications will impede the policy behind the Unfair Trade Practices Act. We conclude that the opposite is true. The attorney-client privilege allows for an honest, careful and prompt analysis by qualified persons. This enables the insurer to evaluate and settle a claim expeditiously and in this way furthers the policy behind the Act. The free flow of information between the attorney and client equally benefits the claimant because it is this kind of communication which results in the settlement of most insurance claims.

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640 (2001), the court held that the parents of a deceased automobile passenger covered under the uninsured motorist policy of the automobile's owner must show a foundation in fact for the charge of civil fraud in order to overcome the insurer's privilege. Civil fraud is not alleged in the instant case. In sum, we do not find any of these cases helpful to our analysis.

> Normally, all communications between attorney and client, including conversations and phone calls, are memorialized in writing. If these writings are all potentially discoverable, the impact on an attorney's ability to fully advise a client would be devastating. An insurance company must have an honest and candid evaluation of a case, possibly including a "worst case scenario." A concern by the attorney that communications would be discoverable in a bad faith suit would certainly chill open and honest communication. An attorney's inability to communicate freely with the client would impede all communications and could diminish the attorney's effectiveness. It could also impede settlements. We conclude that the need for the privilege outweighs any alleged need of the plaintiffs.

Montana Second Judicial Dist., 240 Mont. at 12-13, 783 P.2d at 915-16. This Court concurs with the reasoning of the Montana court.[12]

Further, even though Respondent does not have access to privileged materials, it still may engage in the evidence-gathering process. For example, non-party witness interviews do not implicate attorney-client privilege. Respondent may even depose the insured.

The attorney-client privilege only protects

[12]This Court's rejection of *Montana Second Judicial Dist.* in *Gaughan* was limited to the extent "it provides an insurer with all the protections of the attorney-client privilege with respect to an insured's claim file in third-party bad faith actions." *Gaughan,* 203 W.Va. at 372, 508 W.Va. at 89. In the instant case, in contrast, we are concerned with the attorney-client privilege of the insured.

> disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question "What did you say or write to the attorney?" and may not refuse to disclose any relevant fact within knowledge merely because s/he incorporated a statement of such fact into her communication to her attorney. Courts have repeatedly noted that a party cannot conceal a fact merely by revealing it to her lawyer.

1 Cleckley, *Handbook On Evidence,* § 5-4(E)(1), 5-105 (footnotes omitted). Finally, while the insurer's investigative materials are protected by work product, these materials are discoverable upon the proper showing pursuant to Rule of Civil Procedure 26(b)(3). Accordingly, we do not find it necessary to create a novel rule which would permit, in certain third-party bad faith cases, the discovery of privileged communications.

3. Inapplicability of *Honaker v. Mahon* to the Instant Case

Having set forth above the proper legal standard for determining the discoverability of the documents at issue, we deem it necessary to briefly explain our finding that the circuit court utilized an improper standard in ruling on Respondent's motion to compel. The transcript of the hearing on the motion to compel indicates that the circuit court based its decision to compel the production of the documents at issue on footnote 8 of *Honaker v. Mahon,* 210 W.Va. 53, 62, 552 S.E.2d 788, 797 (2001), which says, in part, that

"[a]n insurance company owes its own policyholders a duty . . . to refrain from statutory unfair claim settlement practices . . . . [T]hese duties are not delegable, and insurance companies are therefore responsible for the actions of the attorneys they employ." (Citations omitted). The circuit court interpreted the footnote language to mean that little or no privilege attaches to communications between the insured, his or her lawyer, *and* the insurer in third-party bad faith insurance cases.[13] Accordingly, the circuit court ruled that the relator would not be permitted to withhold from production, based on claims of privilege, any documents requested by the plaintiff, with the exception of communications exclusively between Dr. Ghaphery and his lawyers.

This Court has held, however, that ". . . [n]ew points of law . . . will be articulated through syllabus points as required by our state constitution." Syllabus Point 2,

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[13]In *Gaughan,* 203 W.Va. at 369-70, 508 S.E.2d at 86-87, this Court explained:

> For definitional purposes, a first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. A third-party bad faith action is one that is brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor. In the bad faith action against the insurance company the third-party alleges the insurer insurance company engaged in bad faith settlement in the first action against the insured tortfeasor.

(Footnotes and citation omitted).

in part, *Walker v. Doe,* 210 W.Va. 490, 558 S.E.2d 290 (2001). If this Court were to create a new exception to attorney-client privilege, it would do so in a syllabus point and not in a footnote. Second, language in a footnote generally should be considered obiter dicta which, by definition, is language "unnecessary to the decision in the case and therefore not precedential." *Black's Law Dictionary* 1100 (7th ed. 1999). Third, the statement in footnote 8 of *Honaker* is in a discussion about an insurance company's duty to *its own policyholders,* not third parties.[14] Finally, we believe the circuit court's reading of the *Honaker* footnote is inconsistent with the lawyer's ethical obligation to represent the insured under Rule of Professional Conduct 5.4(c).[15] Therefore, we conclude that the language in footnote 8 of *Honaker v.* Mahon does not govern the discoverability of materials allegedly protected by

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[14]When read in context, the *Honaker* footnote says that an insurer's duties of good faith and fair dealing and to refrain from statutory unfair claim settlement practices are not delegable and are applicable to the attorneys employed by the insurers. The instant case, however, concerns a third-party bad faith claim, and this Court has indicated that there is a substantial difference in the duties owed by an insurer to policyholders as opposed to third parties. For example, insurers owe no common law duty of good faith and fair dealing and no fiduciary duty to third parties. Thus, this Court has held that "[a] third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty." Syllabus, *Elmore v. State Farm,* 202 W.Va. 430, 504 S.E.2d 893 (1998).

[15]According to Rule of Professional Conduct 5.4(c), "[a] lawyer shall not permit a person who . . . employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The insurer hires the attorney to represent the insured and it is the obligation of the lawyer to diligently represent the insured with commitment, dedication and zeal. *See* W.Va.R.Prof.Cond. 1.3, comment. Therefore, a rule that says that an attorney hired to represent the insured is also an agent of the insurer so that the insurer is responsible for the actions of the attorney is inequitable to both the insured and the insurer. It also puts the lawyer in the difficult and potentially impossible position of acting on the behalf of both the insurer and the insured.

the attorney-client privilege.

IV.

CONCLUSION

In conclusion, we have found that the circuit court used the wrong legal standard in ordering the discovery of the allegedly privileged information sought by Respondent. We have also declined Respondent's request that we create an exception to attorney-client privilege, such as a balancing test, whereby privileged information may be discovered. Accordingly, we issue the writ of prohibition prayed for by the relator, and we prevent the enforcement of the circuit court's September 19, 2002, order. Finally, any further proceedings on Respondent's motion to compel discovery shall be conducted by the circuit court in accord with traditional attorney-client privilege and work product principles set forth in Rule 26(b) of the Rules of Civil Procedure and the decisions of this Court.

Writ Granted.