

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

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No. 31114

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**FILED**  
June 13, 2003  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.  
M. ANDREW BRISON AND REBECCA STEPTO,  
Petitioners

v.

THE HONORABLE TOD J. KAUFMAN, JUDGE OF THE  
CIRCUIT COURT OF KANAWHA COUNTY, AND DEBORAH K. FALLS,  
ADMINISTRATRIX OF THE ESTATE OF CLEDITH LEE FALLS, JR., DECEASED,  
Respondents

and

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No. 31115

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STATE OF WEST VIRGINIA EX REL.  
NATIONWIDE MUTUAL INSURANCE COMPANY AND ASH COWDER, JR.,  
Petitioners

v.

THE HONORABLE TOD J. KAUFMAN, JUDGE OF THE  
CIRCUIT COURT OF KANAWHA COUNTY, AND DEBORAH K. FALLS,  
ADMINISTRATRIX OF THE ESTATE OF CLEDITH LEE FALLS, JR., DECEASED,  
Respondents

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WRITS OF PROHIBITION

WRITS GRANTED AS MOULDED

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Filed: June 13, 2003

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JUSTICE McGRAW delivered the Opinion of the Court.  
JUSTICE DAVIS concurs and reserves the right to file a  
concurring opinion.

## SYLLABUS BY THE COURT

1. “The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction.” Syl., *State ex rel. Vineyard v. O’Brien*, 100 W.Va. 163, 130 S.E. 111 (1925).

2. “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.” Syl. pt. 3, *State ex rel. United States Fidelity and Guarantee Company v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

3. “A circuit court’s ruling on discovery requests is reviewed [under] 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.” Syl. pt. 5, *State ex rel. Medical Assurance of West Virginia v. Recht*, No. 30840 (W.Va. - opinion filed April 30, 2003).

4. Attorneys practicing in “captive law firms” are subject to the same ethical responsibilities toward their clients and to the legal profession as are other attorneys practicing in this State.

5. “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 advise must be sought by the client from the attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be intended to be confidential.” Syl. pt. 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

6. “A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney’s advice in issue.” Syl. pt. 8, *State ex rel. United States Fidelity and Guaranty Company v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

7. Where the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company’s attorney-client privilege concerning the underinsurance claim.

8. “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.” Syl. pt. 7, *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984).

McGraw, Justice:

In these original proceedings, an insurance company, its former claims representative and two of its former attorneys seek to prohibit the enforcement of a January 7, 2003, pre-trial discovery order entered in a “bad faith” and unfair trade practices action filed in the Circuit Court of Kanawha County, West Virginia. Specifically, Nationwide Mutual Insurance Company, claims representative Ash Cowder, Jr., and attorneys M. Andrew Brison and Rebecca Stepto, hereinafter “petitioners,” ask this Court to prohibit the compelled production and disclosure of the petitioners’ litigation file and redacted portions of the petitioners’ claim file, both of which were created and maintained during an earlier wrongful death action involving a claim for underinsured motorist coverage.

The petitioners contend, as they alleged in a motion for a protective order denied below, that the litigation file and the redacted portions of the claim file are subject to the attorney-client privilege and the work product doctrine. Thus, the petitioners argue that the Circuit Court exceeded its jurisdiction in ordering production and disclosure. Respondent, Deborah K. Falls, however, the plaintiff in the underlying bad faith action and also the plaintiff in the earlier wrongful death action, contends that the ruling of the Circuit Court was within its discretion.

This Court has before it the petitions for writs of prohibition, the responses thereto, all exhibits and the arguments of counsel. In addition, this Court has received *amicus curiae* briefs from the West Virginia Trial Lawyers Association, the Defense Research Institute, the West Virginia Insurance Federation, the Defense Trial Counsel of West Virginia and Ok Cha and Robert Collins.

For the reasons expressed below, this Court holds that the Circuit Court exceeded its jurisdiction in ordering production and disclosure of the litigation file and the redacted portions of the claim file by failing to apply the correct legal standards to the petitioners' assertions of attorney-client privilege and work product doctrine. Accordingly, production and disclosure of the documents in question are hereby prohibited pending a renewal below of the respondent's motion for production and a renewal of the petitioners' motion for a protective order, following which the Circuit Court shall apply the principles expressed herein.

I.  
FACTUAL BACKGROUND AND THE WRONGFUL DEATH ACTION

On August 7, 1999, Cledith Lee Falls, Jr., the son of respondent Deborah K. Falls, was killed in an accident on State Route 39 in Nicholas County while riding as a passenger in an automobile driven by April D. Knight. At least two other vehicles were involved in the accident. Soon after, in September 1999, respondent Falls, as Administratrix

of the Estate of Cledith Lee Falls, Jr., filed a wrongful death action in the Circuit Court of Kanawha County against April D. Knight and others.

Because the accident involved several motor vehicles, the insurance proceeds of various policies were potentially available to respondent Falls with regard to her son's death. Respondent Falls, however, asserted a claim for underinsured motorist coverage against a policy issued by petitioner Nationwide Mutual Insurance Company to Cledith Lee Falls' stepmother, Tonya Falls. According to the respondent, the claim against the stepmother's policy was valid because Cledith Lee Falls, Jr., had been residing in his stepmother's household at the time of the accident. Although initially disputing the decedent's residence, Nationwide, by letter dated May 31, 2000, from claims representative Cowder, stated that coverage could be provided for the respondent's underinsurance claim. In the meantime, having been formally served with notice of the wrongful death action, Nationwide assigned the matter to attorney M. Andrew Brison, who filed a response in the Circuit Court of Kanawha County reserving Nationwide's right to file various defenses. *W.Va. Code*, 33-6-31(d) (1998). Mr. Brison was an attorney in the law firm Dwane L. Tinsley & Associates, Nationwide Trial Division, Charleston, West Virginia.

By letter dated October 26, 2000, petitioner Brison stated to counsel for respondent Falls that all available insurance proceeds from other applicable policies would have to be paid before any payment of underinsured motorist proceeds would be made by

Nationwide. Similarly, in a subsequent letter to respondent Falls' counsel, dated January 16, 2001, petitioner Cowder stated: "Once you have provided us with the information confirming that all applicable limits of coverage have been exhausted, we will then be able to give consideration to payment under our underinsured motorist claim." Thereafter, petitioner Stepto, an attorney replacing Mr. Brison at Dwane L. Tinsley & Associates, filed a Notice of Court Scheduling Conflict and argued that the trial of the wrongful death action, set for April 30, 2001, be continued. The Circuit Court refused to continue the trial. Thereafter, on April 26, 2001, Nationwide paid the respondent, Deborah K. Falls, \$50,000, the policy limits concerning the underinsurance claim. In return, respondent Falls signed a release of all claims against Nationwide with regard to the accident of August 7, 1999, and with regard to all negotiations in relation thereto.

## II. THE UNDERLYING BAD FAITH ACTION

In December 2001, respondent Falls filed a "bad faith" and unfair trade practices action in the Circuit Court of Kanawha County against Nationwide, claims representative Ash Cowder, Jr., and others. The respondent alleged that Nationwide's delay in paying her claim for underinsurance benefits was unreasonable, thereby constituting bad faith and a violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 (1974), *et seq.* Nationwide and Cowder, on the other hand, filed an answer and motion to dismiss in which they denied the allegations of the complaint and asserted that the release

signed by respondent Falls barred the bad faith and unfair trade practices action. The answer and motion to dismiss were filed upon behalf of Nationwide and Cowder by a Charleston law firm completely separate from Dwane L. Tinsley & Associates and attorneys Brison and Stepto.

In January 2002, respondent Falls filed a discovery request in the bad faith and unfair trade practices action for production of Nationwide's claim file, which concerned the respondent's claim for underinsured motorist benefits. In addition, respondent Falls requested production of the litigation file created and maintained by petitioners Brison and Stepto with regard to the wrongful death action. Specifically, the litigation file was generated by Brison and Stepto, as attorneys employed by Dwane L. Tinsley & Associates, Nationwide Trial Division, following service upon Nationwide of notice of the wrongful death action. In response to the discovery request, the petitioners filed a motion for a protective order raising the attorney-client privilege and the work product doctrine. According to the petitioners, both files evidenced privileged attorney-client communications between Nationwide and its counsel during the wrongful death action as to the respondent's claim for underinsured motorist benefits. Consequently, an abridged claim file was disclosed to the respondent (with an attached "privilege log"), and the issues of attorney-client privilege and the work product doctrine, as to both the litigation file and the redacted portions of the claim file, remained for the Circuit Court to decide.

Following a hearing and an *in camera* review of the documents in question, the Circuit Court entered the order of January 7, 2003, denying the petitioners' motion for a protective order and directing the petitioners to produce and disclose, in their entirety, the litigation file and the redacted portions of the claim file. In so ruling, the Circuit Court stated that the files were not subject to the protections of either the attorney-client privilege or the work product doctrine. The Circuit Court focused primarily, however, upon the attorney-client privilege and concluded as follows:

In this case, after a thorough review of each document in . . . Nationwide's attorney file and claims file, the Court finds that no document in the files is protected by the attorney-client privilege. The documents simply contain facts that were not meant to be confidential. Furthermore, the Court finds that the issue of bad faith has brought into question the advice of Nationwide's attorneys, and, therefore, the attorney-client privilege is waived.

The order of January 7, 2003, contained no findings of fact concerning the nature of the attorney-client relationship between Nationwide and attorneys Brison and Stepto. Nor did the order explain why, inasmuch as the documents "contain facts" which were not meant to be confidential, the entirety of both the litigation file and the redacted portions of the claim file were discoverable, other matters contained therein notwithstanding. Finally, the order included no findings of fact with regard to the two files concerning the work product doctrine.

On February 6, 2003, petitioners Nationwide, Cowder, Brison and Stepto filed petitions in this Court seeking relief in prohibition with regard to the order of January 7, 2003. On February 13, 2003, this Court issued rules to show cause why relief should not be granted.

### III. STANDARDS OF REVIEW

This Court has original jurisdiction in prohibition proceedings pursuant to Art. VIII, Sec. 3, of The Constitution of West Virginia. That jurisdiction is recognized in Rule 14 of this Court's Rules of Appellate Procedure and in various statutory provisions. *W.Va. Code*, 51-1-3 (1923); *W.Va. Code*, 53-1-2 (1933). In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925), as follows: "The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." *State ex rel. Murray v. Sanders*, 208 W.Va. 258, 260, 539 S.E.2d 765, 767 (2000); *State ex rel. Barden and Robeson Corporation v. Hill*, 208 W.Va. 163, 166, 539 S.E.2d 106, 109 (2000); *Health Management, Inc., v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999). See also, *W.Va. Code*, 53-1-1 (1923); syl. pt. 1, *State ex rel. Steven Michael M. v. Merrifield*, 203 W.Va. 723, 510 S.E.2d 797 (1998); syl. pt. 2, *Long Flame Coal Company v. State Compensation Commissioner*, 111 W.Va. 409, 163 S.E. 16 (1932).

The above notwithstanding, the orders of a circuit court granting discovery requests are interlocutory in nature and are, therefore, usually reviewable by appeal only, rather than subject to extraordinary remedies. Discovery orders, such as the order before us, which compel the production and disclosure of ostensibly confidential material, however, are atypical. That is because, if the production and disclosure of such material occurs upon the basis of an erroneous order, the harm resulting therefrom is not correctable upon appeal. Thus, this Court held in syllabus point 3 of *State ex rel. United States Fidelity and Guarantee Company v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995): “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.” Syl. pt. 3, *State ex rel. Medical Assurance of West Virginia v. Recht*, no. 30840 (W.Va. - opinion filed April 30, 2003); *State ex rel. Charles Town General Hospital v. Sanders*, 210 W.Va. 118, 123-24, 556 S.E.2d 85, 90-91 (2001); *State ex rel. West Virginia State Police v. Taylor*, 201 W.Va. 554, 562, 499 S.E.2d 283, 291 (1997); syl. pt. 2, *State ex rel. United Hospital Center v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997). *See also*, syl. pt. 1, *State Farm Mutual Automobile Insurance Company v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992), stating that 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.”

Generally speaking, Rule 26(b)(1) of the West Virginia Rules of Civil Procedure concerns the attorney-client privilege and Rule 26(b)(3) of those Rules concerns the work product doctrine. In that regard, *Medical Assurance, supra*, an original proceeding in prohibition involving the attorney-client privilege and the work product doctrine, holds:

A circuit court's ruling on discovery requests is reviewed [under] 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.

Syl. pt. 5, *Medical Assurance*.

The findings required of a circuit court, suggested above in *Medical Assurance*, are critical when an otherwise interlocutory order to compel production and disclosure is brought before this Court upon a request for relief in prohibition. However, the right of a litigant to file a petition for extraordinary relief in such a case carries with it the responsibility to ask the circuit court to set forth findings and conclusions in order to make the discovery ruling clear. As syllabus point 6 of this Court's opinion in *State ex rel. Allstate Insurance Company v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998), states in part: "A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision." Here, such a request was made. On December 23, 2002, Nationwide, indicating that it was considering

filing a petition for extraordinary relief in this Court, asked the Circuit Court to enter an order “with specific findings of fact and conclusions of law.”

#### IV. DISCUSSION

In reviewing the January 7, 2003, order of the Circuit Court, it is important to define the type of underlying bad faith and unfair trade practices action brought by respondent Falls against petitioners Nationwide and claims representative Cowder. Fortunately, in this complex area of the law, this Court may look to *State ex rel. Allstate Insurance Company v. Gaughan, supra*, for assistance. In *Gaughan*, this Court observed that courts generally recognize two broad categories of bad faith actions against insurers: first-party bad faith actions and third-party bad faith actions. 203 W.Va. at 369, 508 S.E.2d at 86.

In a third-party bad faith action, a lawsuit is usually brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor. For example, in the recent case of *State ex rel. Medical Assurance of West Virginia v. Recht, supra*, a plaintiff, who had prevailed against an insured tortfeasor, brought an action for unfair claim settlement practices against the tortfeasor’s insurance company. In prohibiting the enforcement of a discovery order compelling the production of the insurance company’s investigative and claims files concerning the tort action, this Court, in *Medical Assurance*,

held that the Circuit Court of Ohio County failed to correctly analyze the insurer's assertion of the attorney-client privilege and the work product doctrine.

On the other hand, in a first-party bad faith action, a lawsuit is usually brought by an insured against his or her own insurance company for failing to use good faith in settling a claim for insurance coverage. For example, in *State ex rel. United States Fidelity and Guaranty Company v. Canady, supra*, this Court prohibited the enforcement of a discovery order in an action wherein an insured brought a bad faith and unfair trade practices lawsuit against his own insurance company. The insured alleged that the insurance company failed to promptly pay him fire insurance proceeds following the destruction of his residence. The *United States Fidelity and Guaranty Company* case exemplifies the type of first-party bad faith action, described in *Gaughan*, wherein the interests of the insured and the insurer are "presumptively in conflict." 203 W.Va. at 370, fn. 17, 508 S.E.2d at 87, fn. 17.

Manifestly, the action brought by respondent Falls against petitioners Nationwide and Cowder was a first-party bad faith and unfair trade practices action wherein the interests of the respondent and the petitioners were in conflict. Following the somewhat contested question of the decedent's residency, it was determined that the decedent was an insured under the policy issued by Nationwide to the decedent's stepmother, Tonya Falls. That policy formed the basis of the respondent's claim for underinsured motorist coverage. From that time, nearly a year went by prior to the payment of the underinsurance claim in

April 2001. During the wrongful death action, Nationwide, rather than respondent Falls, was the client of attorneys Brison and Stepto. Accordingly, respondent Falls' pursuit of the litigation file and the redacted portions of the claim file necessarily implicates the legal representation of Nationwide by Brison and Stepto. Therefore, the petitioners' assertion of attorney-client privilege and the work product doctrine must be viewed in that context.

Nor, for purposes of this opinion, is it dispositive that Brison and Stepto were members of a "captive law firm" or that the litigation file of those attorneys was included in the discovery request of respondent Falls in addition to her request for the claim file.

As the term is understood, attorneys Brison and Stepto were members of a "captive law firm" because, although their law office, Dwane L. Tinsley & Associates, Nationwide Trial Division, was in a separate location from the Nationwide claims office, Brison and Stepto received their paychecks from Nationwide and worked exclusively upon Nationwide insurance matters. As indicated above, the phrase "Nationwide Trial Division" appeared upon the law firm's letterhead. Such a manner of practicing law in West Virginia has been approved by the West Virginia State Bar through its Lawyer Disciplinary Board. *See*, Legal Ethics Inquiry 99-01. In that regard, it is self-evident that attorneys practicing in "captive law firms" are subject to the same ethical responsibilities toward their clients and to the legal profession as are other attorneys practicing in this State.

The exhibits in these proceedings demonstrate that Brison and Stepto, in fact, represented Nationwide as attorneys, rather than merely as insurance adjusters or employee investigators. *See, United States Fidelity and Guaranty Company, supra*, 194 W.Va. at 444, 460 S.E.2d at 690. Both filed pleadings in the respondent's wrongful death action, and Ms. Stepto presented argument at a pre-trial hearing in that action concerning the scheduled trial date. Thus, both Brison and Stepto performed traditional legal duties in the wrongful death action, and they had standing to raise the attorney-client privilege and the work product doctrine.

Moreover, for purposes of this opinion, this Court treats as equivalent the attorneys' litigation file and the redacted portions of the claim file, both of which are sought by respondent Falls and both of which concern her claim for underinsured motorist benefits. The two files were not differentiated by the Circuit Court in the order of January 7, 2003, and this Court's analysis of the attorney-client privilege and the work product doctrine applies equally to both.

V.  
THE ATTORNEY-CLIENT PRIVILEGE  
AND THE WORK PRODUCT DOCTRINE

In view of the above, the petitioners' assertions inexorably fall within a more traditional analysis of the attorney client privilege and the work product doctrine. In particular, inasmuch as there was never any express release of the two files in question to a

third party, the less protective “quasi attorney-client privilege” identified in *Gaughan, supra*, does not apply.

Pursuant to Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, discovery may be obtained “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action [.]” The import of Rule 26(b)(1), associated with the traditional attorney-client privilege, was noted in *United States Fidelity and Guaranty Company, supra*, as follows: “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.” 194 W.Va. at 441, 460 S.E.2d at 687. In fact, as stated in *Gaughan*: “Traditional attorney-client privileged material is virtually undiscoverable under Rule 26(b) of the West Virginia Rules of Civil Procedure.” 203 W.Va. at 373, 508 S.E.2d at 90. Nevertheless, as recognized in syllabus point 4 of *United States Fidelity and Guaranty Company*, the burden of establishing the attorney-client privilege, and the work product exception for that matter, “always rests upon the person asserting it.”

In syllabus point 2 of *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979), this Court held:

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 advise

must be sought by the client from the attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be intended to be confidential.

Syl. pt. 3, *State ex rel. Westbrook Health Services v. Hill*, 209 W.Va. 668, 550 S.E.2d 646 (2001); syl. pt. 6, *Bedell, supra*; syl. pt. 2, *State v. Jarvis*, 199 W.Va. 38, 483 S.E.2d 38 (1996).

In syllabus point 11 of *Marano v. Holland*, 179 W.Va. 156, 366 S.E.2d 117 (1988), the importance of the privilege was emphasized: “The attorney-client privilege originated at common law, and has as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.” *State v. Rodoussakis*, 204 W.Va. 58, 68, 511 S.E.2d 469, 479 (1998). Nevertheless, in syllabus point 8 of *United States Fidelity and Guaranty Company, supra*, this Court held that “[a] party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney’s advice in issue.” *See also*, syl. pt. 12 of *Marano, supra*.

As indicated above, the Circuit Court concluded that, inasmuch as the documents reviewed *in camera* contained “facts that were not meant to be confidential,” the entire contents of the litigation file and the redacted portions of the claim file were subject to production and disclosure. The Circuit Court treated that conclusion separately from the issue of whether the attorney-client privilege had been waived but did not explain why the documents were not meant to be confidential. The validity of compelling disclosure of the

entire contents of the two files is doubtful, especially in view of the following assertion of the petitioners: “Mr. Brison was selected by Nationwide to represent Nationwide’s interests in the claim made against it for underinsured benefits . . . [.] \* \* \* His job was to defend Nationwide and render legal advice.” The order of January 7, 2003, contained no findings of fact concerning the nature of the attorney-client relationship between Nationwide and attorneys Brison and Stepto.

Of more concern, however, is the conclusion of the Circuit Court that “the issue of bad faith has brought into question the advice of Nationwide’s attorneys, and, therefore, the attorney-client privilege is waived.” That conclusion was set forth in the absence of findings as to whether anyone associated with Nationwide actually waived the privilege. Nationwide and Cowder deny that they put in issue, in the respondent’s bad faith action, any legal advice they received concerning the underinsurance claim. *See*, syl. pt. 8, *United States Fidelity and Guaranty Company, supra*. In any event, the Circuit Court did not address, for example, whether any of the correspondence received by respondent Falls from attorneys Brison and Stepto or from Cowder may have constituted a waiver of the attorney-client privilege. Instead, the Circuit Court suggests, by its ruling, that the attorney-client privilege applicable in an underlying matter will be considered waived in the event a bad faith action is filed. Such a suggestion constitutes “too tenuous a premise upon which to anchor any steady standard of law.” *State ex rel. J.L.K. v. R.A.I.*, 170 W.Va. 339, 346, 294 S.E.2d 142, 149 (1982). Rather, this Court holds that, where the interests of an insured and his or her

insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company's attorney-client privilege concerning the underinsurance claim.

Here, the Circuit Court failed to apply the correct legal standards with regard to the petitioners' assertions of attorney-client privilege. Therefore, the order compelling production and disclosure was erroneous, and discovery concerning the litigation file and the redacted portions of the claim file should be prohibited until further consideration by the Circuit Court.

If the Circuit Court subsequently determines that the documents in question are not barred by the attorney-client privilege, a consideration of the work product doctrine would then be warranted. *United States Fidelity and Guaranty Company, supra*, 194 W.Va. at 444, 460 S.E.2d at 690. Generally, the work product doctrine operates to protect documents prepared in anticipation of litigation. *Gaughan, supra*, 203 W.Va. at 374, 508 S.E.2d at 91. The doctrine is reflected in the provisions of Rule 26(b)(3) of the West Virginia Rules of Civil Procedure which states in part:

[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 mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

As this Court held in syllabus point 7 of *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984): "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." Syl. pt. 10, *Medical Assurance, supra*; syl. pt. 2, *State ex rel. Chaparro v. Wilkes*, 190 W.Va. 395, 438 S.E.2d 575 (1993). As between the two, opinion work product is more scrupulously protected. *See, United States Fidelity and Guaranty Company, supra*, 194 W.Va. at 445, 460 S.E.2d at 691.

The order of January 7, 2003, contained no findings of fact concerning the litigation file or the redacted portions of the claim file with regard to the work product doctrine. As with the attorney-client issue, discovery concerning those documents should be prohibited until further consideration by the Circuit Court.

## VI. CONCLUSION

Upon all of the above, this Court holds that the Circuit Court of Kanawha County exceeded its jurisdiction in ordering production and disclosure of the litigation file and the redacted portions of the claim file by failing to apply the correct legal standards to the petitioners' assertions of attorney-client privilege and work product doctrine. Accordingly, production and disclosure of the documents in question are hereby prohibited pending a renewal below of respondent Falls' motion for production and a renewal of the petitioners' motion for a protective order, following which the Circuit Court shall apply the principles expressed herein.

Writs granted as moulded.