No. 30840 - State of West Virginia ex rel. Medical Assurance of West Virginia, Inc. 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

**FILED**
**May 30, 2003**
**RORY L. PERRY II, CLERK**
**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

Davis, J., concurring:

I wish to make it clear that, not only do I concur in the majority's disposition of this case, "I agree entirely with Justice [Maynard's] analysis of the legal issues presented here and with his application of them to the facts of this case." *Woodall v. International Bhd. of Elec. Workers*, 192 W. Va. 673, 678, 453 S.E.2d 656, 661 (1994) (Cleckley, J., concurring). I have chosen to write separately on the crime-fraud exception to the attorney-client privilege as it is an issue that I believe trial courts will be confronting now that the Court has made clear that the attorney-client privilege and work product rule [1] can be asserted in third-party insurance bad faith cases. Justice Maynard's opinion identified the issue in footnote 11, when he stated that "fraud is not alleged in the instant case."

[1]"The crime-fraud exception also applies to materials otherwise protected by the work product doctrine." *In re Grand Jury Investigation*, 772 N.E.2d 9, 21 n.28 (Mass. 2002). *See also In re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979) ("The work product privilege is perverted if it is used to further illegal activities as is the attorney-client privilege, and there are no overpowering considerations in either situation that would justify the shielding of evidence that aids continuing or future criminal activity."); *Ocean Spray Cranberries, Inc. v. Holt Cargo Sys., Inc.*, 785 A.2d 955, 959 (N.J. Super. Ct. Law Div. 2000) ("The work-product privilege is also subject to the 'crime-fraud' exception.").

Nevertheless, it is my belief that the crime-fraud exception will, in fact, be a recurring matter in insurance bad faith claims. Consequently, I write separately to explore its contours.

## 1. THE CRIME-FRAUD EXCEPTION IN GENERAL

In the early decision of *State v. Douglas*, 20 W. Va. 770 (1882), this Court "indicated that the attorney-client privilege was justified on the 'grounds of public policy, because greater mischiefs would probably result from requiring or permitting . . . [disclosures], than from wholly rejecting them.'" Franklin D. Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. Va. L. Rev. 1, 33 (1990) (quoting *Douglas*, 20 W. Va. at 780). Although public policy demands clothing communications between an attorney and his/her client with a privilege, "it is [well] settled under modern authority that the [attorney-client] privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud." 1 Kenneth S. Broun et al., *McCormick on Evidence* § 95, at 380 (John W. Strong ed., 5th ed. 1999) (footnote omitted). Thus, "[o]ne of the more important exceptions to the attorney-client privilege is the 'crime-fraud' exception." *Grassmueck v. Ogden Murphy Wallace*, 213 F.R.D. 567, 572 (W.D. Wash. 2003). Under this exception "if such communications were made in order to perpetrate a [crime or] fraud on justice, they are not privileged[.]" Syl. pt. 2, in part, *Thomas v. Jones*, 105 W. Va. 46, 141 S.E. 434 (1928). As noted by Justice Cardozo, "[a] client who consults an attorney for advice that will serve him in the commission of a [crime or] fraud will have no help from the

law." *Clark v. United States*, 289 U.S. 1, 15, 53 S. Ct. 465, 469, 77 L. Ed. 993 (1932). *See also In re Grand Jury Investigation*, 772 N.E.2d 9, 21 (Mass. 2002) ("No public interest is served by permitting a client to use the attorney-client privilege to help him or her break the law.").

Courts have recognized that "[t]he crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons supporting the privilege fail." *People v. Paasche*, 525 N.W.2d 914, 917 (Mich. Ct. App. 1994). "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 2626, 105 L. Ed. 2d 469 (1989) (citations omitted). *See also In re Grand Jury Proceedings*, 183 F.3d 71, 76-77 (1st Cir. 1999) ("[W]e exclude from the privilege communications made in furtherance of crime or fraud because the costs to truth-seeking outweigh the justice-enhancing effects of complete and candid attorney-client conversations."); *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997) ("The crime-fraud exception removes the privilege from those attorney-client communications that are 'relate[d] to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.'"); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) ("While there is a societal interest in enabling clients to obtain complete and accurate legal advice . . . there

is no such interest when the client consults the attorney to further the commission of a crime or fraud.").

The crime-fraud "exception applies even if the attorney is unaware of the client's criminal or fraudulent intent, and applies of course where the attorney knows of the forbidden goal." *Ocean Spray Cranberries, Inc. v. Holt Cargo Sys., Inc*., 785 A. 2d 955, 959 (N.J. Super. Ct. Law Div. 2000). *See also United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977) ("The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought in furtherance of such an improper purpose."); *Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F. Supp. 2d 1170, 1171 (C.D. Cal. 1999) ("[T]he lawyer does not have to be aware of the fraud for the crime-fraud exception to apply."); *In re National Mortg. Equity Corp. Mortg. Pool Certificates Litig.*, 116 F.R.D. 297, 300 (C.D.Cal. 1987) ("[T]he party seeking disclosure need not show that the attorney knowingly participated in the crime or fraud."). Thus, "[t]he determining factor is not the attorney's intention or actions; for purposes of analyzing the crime-fraud exception, the attorney's conduct and motive is irrelevant." *In re Grand Jury Investigation*, 772 N.E.2d 9, 25 (Mass. 2002). Further, "[t]he client need not succeed in committing the intended crime or fraud in order to forfeit the attorney-client privilege. The dispositive question is whether the attorney-client communications are part of the client's effort to commit a crime or perpetrate a fraud." *First Union Nat'l Bank v. Turney*, 824 So. 2d 172, 187 (Fla. Dist. Ct. App. 2001)

Generally,

> under the crime/fraud exception to the lawyer-client privilege, "fraud" would include the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud. The crime/fraud exception comes into play when 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.

*Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. Ct. App. 1993). With regard to the "fraud on the court" component of the crime-fraud exception, we stated in dicta in *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998), that "only a crime or a fraud *upon the court* will suffice to overcome the attorney-client privilege." *Kessel*, 204 W. Va. at 183, 511 S.E.2d at 808. This discussion was limited to the specific factual context under consideration in that case, which involved fraud upon the court, and was based upon the observation that "'[m]ost of the decisions fashioning a fraud exception have dealt with a client's use of an unwitting attorney to carry out a scheme to fraudulently or criminally subvert the normal progress of litigation[.]'" 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 5-4(E)(6)(a) (1994) (quoting *In re Doe*, 662 F.2d 1073 (4th Cir. 1981)). In light of the narrow circumstances under which the crime-fraud exception was placed in issue in *Kessel*, our decision therein should not be interpreted as limiting the crime-fraud exception to only that of fraud upon the court.

## 2. DIVERSITY IN THE SCOPE OF THE FRAUD EXCEPTION

An issue that has resulted in little uniformity among courts involves the scope of the "fraud" component of the crime-fraud exception. As one court has observed, "[t]he word 'fraud' could be given its ordinary meaning, that is, common-law civil fraud. On the other hand, 'fraud' might mean any tort which involves some element of planning." *Milroy v. Hanson*, 902 F. Supp. 1029, 1032-33 (D. Neb. 1995). The diversity in the scope of the fraud exception is most easily demonstrated by reviewing how courts have treated the term. For example, one court has held that "'[a]cts constituting fraud are as broad and as varied as the human mind can invent. Deception and deceit in any form universally connote fraud. Public policy demands that the 'fraud' exception to the attorney-client privilege . . . be given the broadest interpretation.'" *Fellerman v. Bradley*, 493 A.2d 1239, 1245 (N.J. 1985) (quoting *In Re Callan*, 300 A.2d 868 (N.J. Super. Ct. Ch. Div. 1973), *rev'd on other grounds*, 331 A.2d 612 (N.J. 1975)). While the *Fellerman* court interpreted the term "fraud" as almost boundless, other courts have been more cautious. In *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981), the South Carolina Supreme Court explained that "the privilege does not extend to communications in furtherance of criminal, tortious or fraudulent conduct."

In *United Services Automobile Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974), the Alaska Supreme Court adopted a broad view of the fraud exception. *Werley* stated that the attorney-client privilege does not apply when there is evidence that "an insurer through its attorney engage[d] in a bad faith attempt to defeat, or at least reduce, the rightful claim of its

insured[.]" *Werley*, 526 P.2d at 33. Thus, under *Werley* mere evidence of bad-faith can defeat the attorney-client privilege. *But see Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F.Supp.2d 1170, 1173 (C.D.Cal. 1999) ("[T]here is no persuasive reason to include bad faith in the fraud exception to the lawyer-client privilege."). Indeed, in the context of the exception, there are nearly as many definitions for the term "fraud" as there are courts tackling the issue. *See, e.g.*, *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) ("Communications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or other misconduct."); *Cooksey v. Hilton Int'l Co.*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994) ("[T]orts moored in fraud can trigger the crime-fraud exception."); *Central Constr. Co. v. Home Indem. Co*., 794 P.2d 595, 598 (Alaska 1990) (same); *Volcanic Gardens Mgmt. Co.,* 847 S.W.2d 343, 347 ("'Fraud' is sometimes defined as '[a] generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated." (quoting *Johnson v. McDonald*, 39 P.2d 150 (Okla. 1934))); *International Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 180 (M.D. Fla. 1973) ("The privilege may be overcome, not only where fraud or crime is involved, but also where there are other substantial abuses of the attorney-client relationship.").

While West Virginia has never expressly defined the scope of our fraud exception,

in *State v. Douglas*, 20 W. Va. 770 (1882), this Court made clear that civil fraud may defeat the attorney-client privilege. In the more recent case of *Kessel v. Leavitt*, the Court suggested that a narrow meaning should be afforded the fraud exception by commenting that "when the fraud alleged bespeaks of tortious fraudulent conduct, . . . the . . . fraud exception does not operate to compel disclosure of the privileged communications." *Kessel*, 204 W. Va. at 183, 511 S.E.2d at 808. This language, which is mere dicta, does not overrule the precedent set by this court in *Douglas*, and should not be interpreted to mean that civil fraud[2] is unavailable as a basis for piercing the attorney-client privilege. *Kessel* did not hold and should not be contrued as holding, that evidence of other types of tortious conduct, like bad faith, could not be used to pierce the attorney-client privilege. Under the facts presented in *Kessel*, it was not necessary for the Court to define the scope of the fraud component of the crime-fraud exception. Consequently, the Court did not create a new syllabus point in *Kessel* that sought to define what type of evidence would be appropriate to establish the fraud exception. *See* Syl. pt. 2, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001) ("[N]ew points of law are . . . articulated through

---

[2]The elements of common law civil fraud were set out in Syllabus point 1 of *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981), as follows:

> The essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737 (1927).

syllabus points as required by our state constitution."). *Accord* Syl. pt. 13, *State ex rel. Medical Assurance of West Virginia v. Recht*, ___ W. Va. ___, ___ S.E.2d ___ (No. 30840 April 30, 2003). As explained in *In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959), "[o]biter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent." *Kanawha Valley*, 144 W. Va. at 382-83, 109 S.E.2d at 669.

In the final analysis, *Kessel* does not limit the fraud exception to civil fraud, nor does the decision preclude using evidence of tortious misconduct, such as bad faith, to help establish the civil fraud exception. This is an issue that the Court will have to resolve when properly presented for a resolution.

### 3. ESTABLISHING THE CRIME-FRAUD EXCEPTION

It is often difficult to prove the crime-fraud exception only with evidence independent of the privileged communication itself. "The best, and often only, evidence of whether the exception exists is the allegedly privileged communication." *In re Marriage of Decker*, 606 N.E.2d 1094, 1106 (Ill. 1993). The United States Supreme Court addressed this issue in *United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989).[3]

[3]"[T]he attorney- client privilege is not itself constitutionally guaranteed." *State v. Bright*, 676 So. 2d 189, 193 (La. Ct. App. 1996). Consequently, the decision in *Zolin* is not binding on states.

In *Zolin,* the Supreme Court was asked to decide (1) whether a district court, at the request of the party opposing the attorney-client privilege, may review the allegedly privileged communications *in camera* to determine whether the crime-fraud exception applies; (2) whether some threshold evidentiary showing is needed before the district court may undertake the requested review; and (3) the type of evidence the opposing party may use to meet the threshold showing.[4]

As to the first issue, *Zolin* held that "the party opposing the privilege on crime-fraud grounds [may] rely[] on the results of an *in camera* review of the communications." *Zolin*, 491 U.S. at 568, 109 S. Ct. at 2629. As to the second issue, *Zolin* held that a party must establish through nonprivileged evidence, "'a factual basis adequate to support a good faith belief by a reasonable person,' that *in camera* review of the [privileged] materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin*, 491 U.S. at 572, 109 S.Ct. at 2631 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)). In addressing the third issue, *Zolin* concluded "that the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review[.]" *Zolin*, 491 U.S. at 574, 109 S. Ct. at 2632.

---

[4]For a discussion of *Zolin* in the context of tobacco litigation, *see* Ronald L. Motley and Tucker S. Player, *Issues in "Crime-Fraud" Practice and Procedure: The Tobacco Litigation Experience*, 49 S.C.L. Rev. 187 (1998).

There are three points I want to highlight regarding *Zolin*. First, under the decision in *Zolin*, a party may actually use a privileged communication to establish the crime-fraud exception. This point is critical because often-times a party will not be able to establish the crime-fraud exception without reliance upon the privileged communication. Second, *Zolin* permits the use of any nonprivileged evidence to establish a prima facie case of crime-fraud.[5] Under this standard, any type evidence showing misconduct (*e.g.*, bad faith), so long as it is not privileged, may be used to help support a prima facie case. Third, *Zolin's* threshold prima facie case, the proof necessary to trigger an *in camera* hearing, is not a high burden. The decision itself emphasized that "[t]he threshold we set . . . need not be a stringent one." *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631.[6] Thus, *Zolin's* threshold prima facie case "requires only

---

[5]Although *Zolin* does not permit the use of privileged information to make out a prima facie case to trigger an *in camera* review of the privileged communication, *Zolin* does allow use of the communication if a court has not made an initial determination on the issue of privilege. In fact, this was the situation in *Zolin*. That is, in *Zolin,* the district court did not make an initial determination that the communication in question was privileged. Consequently, the Supreme Court held in *Zolin* that the communication could be used in making out a prima facie case of crime-fraud.

[6]The majority of state courts addressing the issue have applied the prima facie evidence standard for triggering an *in camera* review of privileged communications. *See Pearce v. Stone*, 720 P.2d 542 (Ariz. Ct. App.1986); *State Farm Fire & Cas. Co. v. Superior Court*, 62 Cal. Rptr. 2d 834 (1997); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982); *American Tobacco Co. v. State*, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997); *Wallace, Saunders, Austin, Brown & Enochs, Chartered v. Louisburg Grain Co.*, 824 P.2d 933 (Kan. 1992); *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512 (Minn. Ct. App. 1991); *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604 (Mo. 1993); *National Util. Serv., Inc. v. Sunshine Biscuits, Inc*., 694 A.2d 319 (N.J. Super. Ct. App. Div. 1997); *Kahn v. Pony Express Courier Corp*., 20 P.3d 837 (Ore. Ct. App. 2001); *Arkla, Inc. v. Harris*, 846 S.W.2d 623 (Tex. Ct. App. 1993); *Lane v. Sharp Packaging Sys., Inc*., 640 N.W.2d 788 (Wis. 2002).

a factual showing sufficient to support a reasonable good-faith belief that review of the privileged documents '*may reveal evidence* to establish that the crime fraud exception applies.'" *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (quoting *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631 (emphasis in original)).[7] The *Zolin* prima facie showing to trigger an *in camera* review of the crime-fraud exception was adopted by this Court in *State v. Beard*, 194 W. Va. 740, 461 S.E.2d 486 (1995). In *Beard* we interpreted *Zolin* as requiring a party to "establish[] a *sufficient showing* to invoke the crime-fraud exception." *Beard*, 194 W. Va. at 754, 461 S.E.2d at 500 (emphasis added).

Once a prima facie case of the crime-fraud exception has been sufficiently established, the trial court may then conduct an *in camera* proceeding.[8] During the *in camera*

---

[7]An *in camera* review is not necessary if a party's initial evidence is sufficient to establish the crime-fraud exception.

[8]"[O]n a showing of a factual basis adequate to support a reasonable belief that an *in camera* review of the evidence may establish that the exception applies, the judge has discretion to conduct such an *in camera* review." *Purcell v. District Attorney*, 676 N.E.2d 436, 439 (Mass. 1997). *See also Lane v. Sharp Packaging Sys., Inc*., 640 N.W.2d 788, 809 (Wis. 2002) ("[T]he decision to conduct an *in camera* review is a discretionary decision."). It has been said that "[o]nce the threshold showing is made to allow *in camera* review, courts should make the decision to review in light of the amount of material they have been asked to review, the relevance of the alleged privilege material to the case, and the likelihood that *in camera* review will reveal evidence to establish the applicability of the crime-fraud exception." *In re Grand Jury Investigation*, 974 F.2d 1068, 1072-73 (9th Cir. 1992). Moreover, a "court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is not allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings." *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631.

review, the party opposing the privilege may prevail only where the evidence establishes "that the client intended to perpetrate a [crime or] fraud," *Olson v. Accessory Controls & Equip. Corp*., 757 A.2d 14, 31 (Conn. 2000).[9] In addition, "the court must find a valid relationship between the confidential communication that was made and the crime or fraud." 1 Franklin D. Cleckley, *Handbook on Evidence* § 5-4(E)(6)(a) (1994).[10]

Although the United States Supreme Court found in *Zolin* that "the party opposing the privilege on crime-fraud grounds [may] rely[] on the results of an *in camera* review of the communications," *Zolin*, 491 U.S. at 568, 109 S. Ct. at 2629, the Supreme Court did "not decide the quantum of proof necessary ultimately to establish the applicability of the crime fraud exception." *Zolin*, 491 U.S. at 563, 109 S. Ct. at 2626.[11] The West Virginia Supreme Court has never directly addressed the issue of the standard of proof for establishing the crime-fraud exception.[12] Courts that have addressed the issue are split. A

---

[9]"To overcome a claim of privilege using the fraud exception, the seeker of the documents does not have to prove that a fraud has actually taken place." *Dixon v. Bennett*, 531 A.2d 1318, 1329 (Md. Ct. Spec. App. 1987).

[10]"The party asserting the privilege may also have an opportunity to demonstrate why, in light of the discovering party's prima facie case, the privilege should remain intact." *Kessel*, 204 W. Va. at 183, 511 S.E.2d at 808.

[11]*Zolin* did make clear that "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege." *Zolin*, 491 U.S. at 572, 109 S. Ct. at 2631.

[12]As a general matter, this Court has held that "[a] party seeking to prove fraud . . . must do so by clear and convincing evidence[.]" Syl. pt. 2, in part, *Lutz v. Orinick*, 184 W. Va. 531, 401 S.E.2d 464 (1990). I doubt that the "clear and convincing evidence"

majority of state courts have held that the crime-fraud exception may be proven by "prima facie" evidence.[13] *See Matter of Mendel*, 897 P.2d 68, 74 (Alaska 1995) (prima facie evidence standard); *State v. Fodor*, 880 P.2d 662, 670 (Ariz. Ct. App. 1994) (same); *State Comp. Ins. Fund v. Superior Court*, 111 Cal. Rptr. 2d 284, 291 (2001) (same); *People v. Board*, 656 P.2d 712, 714 (Colo. Ct. App. 1982) (same); *In re Marriage of Decker*, 606 N.E.2d 1094, 1105 (Ill. 1993) (same); *Lahr v. State*, 731 N.E.2d 479, 483 (Ind. Ct. App. 2000) (same); *Wallace, Saunders, Austin, Brown & Enochs, Chartered v. Louisburg Grain Co., Inc*., 824 P.2d 933, 939 (Kan. 1992) (same); *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 691 (Minn. Ct. App. 2000) (same); *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608 (Mo. 1993) (same); *Ocean Spray Cranberries, Inc. v. Holt Cargo Sys., Inc*., 785 A.2d 955, 959 (N.J. Super. Ct. Law Div. 2000) (same); *Matter of Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 980 (1989) (same); *In re Investigating Grand Jury of Philadelphia County*, 593 A.2d 402, 407 (Pa. 1991) (same); *Kugle v. DaimlerChrysler Corp*., 88 S.W.3d 355, 362 (Tex.

---

standard would be required for establishing the crime-fraud exception to the attorney-client privilege.

[13]There is no single test for what may constitute prima facie evidence. Some courts suggest that "[p]rima facie evidence denotes evidence which, if left unexplained or uncontradicted, would be sufficient to carry the case to the jury and sustain a verdict in favor of the plaintiff on the issue it supports." Syl. pt. 3, *Baker v. City of Garden City*, 731 P.2d 278 (Kan. 1987). In the context of a prima facie case of negligence, this Court has held that "'[a] prima facie case of actionable negligence is that state of facts which will support a jury finding that the defendant was guilty of negligence which was the proximate cause of plaintiff's injuries[.]'" Syl. pt. 12, in part, *Antco, Inc. v. Dodge Fuel Corp*., 209 W. Va. 644, 550 S.E.2d 622 (2001) (quoting Syl. pt. 6, *Morris v. City of Wheeling*, 140 W. Va. 78, 82 S.E.2d 536 (1954)).

Ct. App. 2002) (same); *Lane v. Sharp Packaging Sys., Inc*., 640 N.W.2d 788, 807 (Wis. 2002) (same). One state court uses a probable cause standard. *See Olson v. Accessory Controls & Equip. Corp*., 757 A.2d 14, 31 (Conn. 2000). At least three state courts use a preponderance of the evidence standard. *See American Tobacco Co. v. State*, 697 So. 2d 1249, 1256 (Fla. Dist. Ct. App. 1997) (preponderance of the evidence standard); *Stidham v. Clark*, 74 S.W.3d 719, 727 (Ky. 2002); (same) *Purcell v. District Attorney*, 676 N.E.2d 436, 439 (Mass. 1997) (same).

Federal courts employ the prima facie evidence standard, but utilize a variety of different terminology to describe that standard of proof. *See*, *e.g.*, *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir.1997) (evidence that, if believed by the trier of fact, would establish the elements of an ongoing or imminent crime or fraud); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir.1996) (reasonable cause to believe attorney was used in furtherance of ongoing scheme); *United States v. Davis*, 1 F.3d 606, 609 (7th Cir.1993) (evidence presented by the party seeking application of the exception sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); *Haines v. Liggett Group Inc*., 975 F.2d 81, 95-96 (3d Cir. 1992) (evidence that, if believed by the fact finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987) (evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed); *In re International Sys. & Controls Corp. Sec. Litig*., 693 F.2d

1235, 1242 (5th Cir.1982) (evidence such as will suffice until contradicted and overcome by other evidence). Two federal appellate courts utilize a probable cause standard. *See In re Richard Roe, Inc*., 68 F.3d 38, 40 (2d Cir. 1995) (probable cause standard); *In re Antitrust Grand Jury*, 805 F.2d 155, 166 (6th Cir. 1986) (same).

## 4. ASSERTING THE CRIME-FRAUD EXCEPTION IN INSURANCE BAD FAITH CASES

The question of whether a plaintiff may invoke the crime-fraud exception, to obtain privileged communications in an insurance bad faith case, has never been squarely addressed by this Court. The majority of courts that have been confronted with the question have held that the crime-fraud exception may be invoked in insurance bad faith litigation. *See Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F. Supp. 2d 1170 (C.D. Ca. 1999) (first-party bad faith); *Ekeh v. Hartford Fire Ins. Co.*, 39 F. Supp. 2d 1216 (N.D. Ca. 1999) (third-party bad faith); *Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7 (D. Mass. 1997) (first-party bad faith); *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653 (M.D. N.C. 1995) (first-party bad faith); *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974) (first-party bad faith); *State Farm Fire & Cas. Co. v. Superior Court*, 62 Cal. Rptr. 2d 834 (1997) (first-party bad faith); *Escalante v. Sentry Ins*., 743 P.2d 832 (Wash. Ct. App. 1987) (third-party bad faith), *disapproved on other grounds by Ellwein v. Hartford Acc. and Indem. Co.*, 15 P.3d 640 (Wash. 2001). At least one court has expressly declined to allow the crime-fraud exception to be used to obtain attorney-client communication in an insurance bad faith case.

*See State v. Second Judicial Dist. Court*, 783 P.2d 911, 916 (Mont. 1989) ("We reject the reasoning of those cases, which would extend the civil fraud exception to bad faith allegations.").

Application of the crime-fraud exception in bad faith litigation has been justified on the grounds "that attorney-client communications should not be protected when they pertain to ongoing or future fraudulent conduct by the insurer." *Escalante*, 743 P.2d at 842. In other words, *Escalante* has determined that the traditional justification for invoking the crime-fraud exception extends to bad faith litigation. I agree with *Escalante* insofar as I conceive of no legitimate reason for refusing to extend the crime-fraud exception to bad faith litigation.

The decision in *United Services Automobile Association v. Werley*, 526 P.2d 28 (Alaska 1974), provides a good illustration of the type of proof found to be acceptable for establishing the fraud component of the crime-fraud exception to the attorney-client privilege in an insurance bad faith action. *Werley* involved a first-party bad faith action brought against an insurer. The plaintiff, who was injured in an auto accident, filed a bad faith claim when his insurer refused to provide uninsured motorist coverage.[14] During discovery, the plaintiff requested documents that the insurer claimed were protected from disclosure by the attorney-

[14]The case is far more complex than I have stated, but for the sake of clarity, I have omitted discussion regarding other plaintiffs and other causes of action filed in the case.

client privilege. The trial court ordered the documents be turned over to the plaintiff. The insurer filed a petition with the Alaska Supreme Court seeking review of the trial court's order requiring disclosure of privileged information.

The Alaska Supreme Court found that, while the documents were protected by the attorney-client privilege, the plaintiff had produced sufficient evidence to satisfy the fraud exception. In affirming the trial court's decision, *Werley* held that the plaintiff's "prima facie evidence of fraudulent conduct consists of a demonstration that the [two] defenses urged by [the insurer] in opposition to his claim for $30,000 were, on their face, devoid of any merit." *Werley*, 526 P.2d at 33. In other words, under *Werley* an "insurer's allegedly tortious conduct in asserting bad faith defenses against a claim for coverage constitute[s] 'civil fraud,' and . . . the attorney-client privilege [will] not protect communications between an attorney and her client relating to that fraud." *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188, 195 (Alaska 1989).

In view of the foregoing, I concur.