IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33095

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL
STATE OF WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a public corporation, and FRED VAN KIRK,
P.E., SECRETARY/COMMISSIONER OF HIGHWAYS,
Petitioners,**

V.

**THE HONORABLE DONALD H. COOKMAN, JUDGE OF THE
CIRCUIT COURT OF HARDY COUNTY and
FORT PLEASANT FARMS, INC.,
Respondents.**

PETITION FOR WRIT OF PROHIBITION

WRIT GRANTED AS MOULDED

**Submitted: September 13, 2006
Filed: December 1, 2006, 2006**

Clarence E. Martin, III
Martin & Seibert, L.C.
Martinsburg, West Virginia

and

John D. Athey
Keyser, West Virginia
Attorneys for Petitioner

James D. Gray
Steptoe & Johnson, PLLC
Clarksburg, West Virginia

and

Ancil G. Ramey
Steptoe & Johnson, PLLC
Charleston, West Virginia

and

Oscar M. Bean
Bean & Bean
Moorefield, West Virginia

Attorneys for Respondent Fort Pleasant Farms, Inc.

JUSTICE BENJAMIN delivered the opinion of the Court.

CHIEF JUSTICE DAVIS dissents and reserve the right to file a dissenting opinion.

JUSTICE STARCHER concurs in part, dissents in part and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "Prohibition 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 writ of error, appeal or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

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 Mutual Insurance Company v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).

3. "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." Syllabus Point 5, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

4. A circuit court is required, pursuant to Rule 26 (b)(4)(B) of the *West Virginia Rules of Civil Procedure,* to make specific findings regarding the existence of

exceptional circumstances justifying the discovery of facts known or opinions held by an expert or consultant who has been retained or specially employed by a party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial before the circuit court may compel such discovery over a party's objection.

Benjamin, Justice:

Petitioners, West Virginia Department of Transportation, Division of Highways, and Fred VanKirk, Secretary/Commissioner of Highways [hereinafter collectively "DOT"], instituted this original jurisdiction proceeding by filing a Petition for Writ of Prohibition on April 24, 2006, seeking an order from this Court prohibiting the enforcement of an April 13, 2006, order issued by the Circuit Court of Hardy County. In its April 13, 2006, Order, the Circuit Court of Hardy County compelled DOT to produce certain appraisal reports and other evaluations prepared by experts and/or consultants retained by DOT in connection with the underlying condemnation proceeding. On May 24, 2006, this Court issued a Rule to Show Cause why the requested writ of prohibition should not be awarded. Upon due consideration of the arguments of counsel and the pertinent legal authorities, we now grant the requested writ, as moulded.

I.

FACTUAL AND PROCEDURAL HISTORY

In June 2004, DOT condemned 48.24 acres of property owned by Respondent Fort Pleasant Farms, Inc. ["Fort Pleasant"] in Hardy County, West Virginia, for use in the construction of Corridor H, a federally assisted highway project. Civil action number 04-C-51 was instituted in the Circuit Court of Hardy County to determine the appropriate compensation for this governmental taking. It appears from the limited record before this

Court that the 48.24 acre tract of property at issue is a portion of a 160 acre tract owned by Fort Pleasant and contains a significant fine, fissel shale deposit.[1]

Not surprisingly, the parties' evaluations of the value of the property taken and damage to the residue differs significantly.[2] After a commissioners' hearing was held on December 14 and 15, 2005, a report was issued valuing the taking and residue damage at $1,100,600.00. Both parties filed exceptions to the commissioners' report with the circuit court. In addition, Fort Pleasant filed a motion to compel answers to its October 27, 2005, discovery requests with the circuit court. The October 27, 2005, discovery requests consisted of the following two interrogatories:

> **INTERROGATORY NO. 1:** Identify each and every expert witness or potential expert witness Petitioner or its counsel have consulted or communicated with in any fashion and/or retained in connection with this case, whether or not Petitioner intends to use or call such persons as a witness, who have not been previously disclosed.
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> **INTERROGATORY NO. 2:** Have any of the persons identified as expert appraisal witnesses or potential expert

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[1] In its Response to the Petition for Writ of Prohibition, Fort Pleasant states that the 48.24 acres taken severs its property diagonally, land-locking 13.58 acres of property. Additionally, Fort Pleasant represents that the taking included approximately 2.5 million yards of fine, fissel shale in a DOT designated quarry area.

[2] It appears from the limited record before this Court that DOT valued the property taken at several hundred thousand dollars while Fort Pleasant claimed a value of several million dollars.

> appraisal witnesses appraised other properties for the Petitioner of a similar nature (properties having a highest and best use as residential, commercial and/or industrial development properties), which are located within one-half mile of the subject? If so, identify each such person and provide a copy of all appraisal reports as to each of said properties.

DOT responded to the October 27, 2005 discovery requests with objections. In response to the first interrogatory, DOT objected on the basis that the request was beyond the scope of permissible discovery.[3] DOT objected to the second request on the basis that it sought the

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[3] Specifically, DOT stated the request was:

> beyond the scope of discovery pursuant to Rule 26(b)(4)(B) of the West Virginia Rules of Civil Procedure. A request for information concerning potential expert witnesses is beyond the scope of discovery, violates the attorney-work product, and may also violate the attorney-client privilege. A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by the Petitioners in anticipation of litigation or preparation for trial who is not expected to be called as a witness at trial, except as provided in Rule 26 (b)(4) (A) and (B) of the West Virginia Rules of Civil Procedure.

The same request had been posed in Interrogatory No. 2 of Fort Pleasant's November 2004 discovery requests. At that time, DOT responded, without objection, and disclosed nine individuals. When questioned regarding the prior response during oral argument, counsel for DOT indicated that the prior requests had been withdrawn. Though Fort Pleasant acknowledged withdrawing Interrogatory No. 4 from its November 2004 requests in its brief before this Court, Fort Pleasant was silent both in its brief and at oral argument regarding the withdrawal of Interrogatory No. 2 of the November 2004 requests and did not argue that the objection had been waived by the initial response. Similarly, Interrogatory No. 4 of the November 2004 requests is identical to Interrogatory No. 2 of the October 27, 2005, requests with the exception that in 2004 information was sought regarding properties within a one-mile radius of the subject property, rather than the one-half mile radius specified in the October 27, 2005, requests.

provision of appraisals and other personal information of non-parties in violation of their right to privacy, that exceeded the scope of permissible discovery, that it was irrelevant, immaterial, burdensome and not reasonably calculated to lead to the discovery of admissible evidence, and that it sought materials subject to the attorney-client privilege and/or prepared in anticipation of litigation.

In addressing Fort Pleasant's motion to compel the discovery and DOT's objections thereto, the circuit court entered its April 13, 2006, order finding the information sought was relevant, was not unduly burdensome and that it constituted proper discovery. Although finding the information discoverable, the circuit court noted that the extent to which such information may be utilized at trial was a different issue. In granting Fort Pleasant's motion over DOT's objections, the circuit court ordered DOT to immediately produce to Fort Pleasant:

> (1) copies of all appraisal reports and other evaluations, of or relating to the subject property, prepared for Petitioners [DOT] by all experts and consultants, *whether or not said persons or firms will or may be witnesses in this proceeding*; and
>
> (2) copies of all appraisal reports and evaluations pertaining to other properties acquired for the subject Corridor H project, which are located within one-half mile of the subject property, conducted twelve-months before or after the date of take of the subject property and prepared by those persons who are designated or may be designated by the Petitioners [DOT] as witnesses in this action.

(Emphasis added).

Shortly after entry of the circuit court's order, DOT petitioned this Court for a writ of prohibition. In its petition, DOT argued that the circuit court exceeded its legitimate powers and abused its discretion by ordering the production of appraisal reports and other evaluations performed by persons not designated as witnesses in the underlying condemnation case. DOT also contended that the circuit court improperly ordered the production of appraisal reports and evaluations pertaining to other properties.

II.

STANDARD OF REVIEW

Pursuant to West Virginia Code § 53-1-1 (1923), a "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." Addressing the available scope of a writ of prohibition, 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 writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

In the instant matter, DOT argues that the circuit court exceeded its legitimate powers and abused its discretion by ordering the production of certain appraisals and other evaluations in the underlying condemnation action. This Court has previously held that "[a] writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders." Syl. Pt. 1, *State Farm Mut. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). Further,

> [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.

Syl. Pt. 5, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). *See also*, Syl. Pt. 4, *State ex rel. Wausau Business Ins. Co. v. Madden*, 216 W. Va. 776, 613 S.E.2d 924 (2005); Syl. Pt. 2, *State ex rel. Erie Prop. & Cas. Ins. Co. v. Mazzone*, 218 W. Va. 593, 625 S.E.2d 355 (2005). With these standards guiding our determination, we now consider the request for issuance of the writ of prohibition herein.

III.

DISCUSSION

Finding solely that Fort Pleasant's requests constituted "proper discovery," the circuit court ordered DOT to produce two distinct categories of documents. First, DOT was ordered to produce copies of all appraisal reports and other evaluations relating to the Fort Pleasant property prepared by all experts and/or consultants whether or not those persons "will or may be witnesses" in the condemnation action. Thus, the circuit court ordered production of appraisal reports and other evaluations made on behalf of DOT regardless of the preparer's role in the litigation. Secondly, the circuit court ordered production of any appraisal reports or other evaluations prepared by a person who is or may be designated by DOT as a witness in the Fort Pleasant condemnation action and which: (1) pertain to properties located within one-half mile of the Fort Pleasant property; (2) were taken in relation to the Corridor H project; and (3) were conducted within the twelve months before and after the taking of the Fort Pleasant property. With respect to the production of appraisal reports and other evaluations relating to those other properties, the circuit court apparently did not consider whether the other properties were involved in on-going condemnation proceedings or the preparer's role in any such proceedings.

Both before the circuit court and before this Court, DOT argues that Fort Pleasant has not satisfied its burden of showing the "exceptional circumstances" required by Rule 26 (b)(4)(B) of the *West Virginia Rules of Civil Procedure*, to permit the production of materials prepared by consultants and non-testifying experts. Therefore, DOT maintains the materials ordered to be produced are not properly discoverable. Rule 26 (b)(4)(B) provides:

> (b) *Discovery Scope and its limits.* – Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> > (4) Trial preparation: experts.—Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
> >
> > . . .
> >
> > (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

In seeking to obtain discovery from or regarding experts or consultants not designated as witnesses in the condemnation action, Fort Pleasant bears the burden of demonstrating the existence of exceptional circumstances justifying such discovery. *Michael v. Henry*, 177 W. Va. 494, 498, 354 S.E.2d 590, 594 (1987). Fort Pleasant maintains that exceptional circumstances exist due to the "unique" nature of condemnation proceedings, the application

of the Uniform Relocation Assistance and Real Property Acquisition Properties Act,[4] the complexities of the condemnation action and the relevance of the requested materials to the proceedings. Conversely, DOT argues that federal law requires the appraisals and/or evaluations ordered to be produced to remain confidential.[5] DOT argues that Fort Pleasant's

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[4] West Virginia incorporated the Uniform Relocation Assistance and Real Property Acquisition Properties Act, 42 U.S.C. § 4601, *et seq*., into our law through the Legislature's adoption of Chapter 3, Article 54 of the *West Virginia Code*. This Act applies to all state eminent domain proceedings undertaken in relation to projects which have received federal assistance. The Act requires state agencies to follow federal law in relation to the takings. *See* W. Va. Code § 54-3-3 (1988). Similarly, W. Va. Code § 17-2A-20 (1988), requires compliance with federal law where property is taken by condemnation proceedings for the construction of a highway project receiving federal funding.

Under federal law, an agency seeking to take land through condemnation proceedings must, prior to the initiation of condemnation proceedings, seek to purchase the property through negotiations and conduct a pre-negotiation appraisal. 42 U.S.C. § 4651 (1)-(2) (1987). Pursuant to 42 U.S.C. § 4651 (3), an agency seeking to take land through condemnation proceedings must, before the initiation of negotiations "establish an amount which [it] believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. . . .[the agency must also] provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount [it] established as just compensation."

[5] According to DOT, federal law requires only that a summary of the pre-condemnation appraisal findings be disclosed to the landowner and that 49 C.F.R. 24.9 (b) (2005) requires the pre-condemnation appraisal itself to remain confidential. 49 C.F.R. 24.9 (b), provides "records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise." Conversely, Fort Pleasant argues the document retention provisions set forth in 49 C.F.R. 24.9 (a) are for the purpose of keeping the records available for discovery in litigation and that litigation discovery qualifies as an "applicable law" exception under 49 C.F.R. 24.9 (b). Based upon the limited record before this court, which consists solely of the circuit court's order and DOT's responses to the two sets of discovery requests, it does not appear that the application of federal law was raised before the circuit court.

experts may conduct their own evaluations of the Fort Pleasant and near-by properties.

It is not necessary, however, for this Court to resolve the parties' disagreement over the application of federal law regarding the disclosure of appraisals and other evaluations or whether condemnation proceedings themselves constitute exceptional circumstances for the purposes of Rule 26(b)(4)(B), in order to determine whether we should prohibit the enforcement of the circuit court's April 13, 2006, discovery order. Finding only that the information sought constituted "proper discovery" and that production of the same was not "unduly burdensome," the circuit court made no findings regarding the presence or absence of "exceptional circumstances" warranting the production of discovery relating to non-testifying experts and/or consultants or the interplay of federal law with the parties' discovery obligations. Although a circuit court is ordinarily afforded discretion in issuing discovery orders, deference to the exercise of such discretion "does not apply where the [circuit] court makes no findings or applies the wrong legal standard." Syl. Pt. 5, in part, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). Without specific findings of fact or law regarding the existence of "exceptional circumstances" or even a mention of the consideration of the requirements of Rule 26(b)(4)(B) in the circuit court's order, we are left to speculate as to the circuit court's reasons for ordering the disclosure of information from experts and/or consultants who have not been designated as expert witnesses in the instant condemnation action.

While federal law and the nature of condemnation actions arguably may be proper considerations in determining the existence of exceptional circumstances warranting the production of information from non-testifying experts or consultants, those issues are not properly before this Court because the circuit court did not address the same. As this Court stated in *State ex rel. United States Fidelity and Guaranty Company v. Canady*, 194 W. Va. 431, 440, 460 S.E.2d 677, 686 (1995),

> [i]t is a traditional and salutary practice of this Court to decline to answer important policy questions in original jurisdiction proceedings until the lower court has the opportunity to provide us with the full and established circumstances of the case. . . . Only when a circuit court makes adequate findings can the impact of certain privileges upon individual litigants be reviewed with confidence that relevant considerations were not overlooked.

This Court has likewise recognized that "[i]n exercising original jurisdiction in a petition for writ of prohibition, it is not our task merely to decide who is right or wrong or what the law is. Rather, our primary obligation is to determine whether the lower judicial tribunal acted in excess of its authority." *Canady*, 194 W. Va. at 440, n. 11, 460 S.E.2d at 686, n. 11.

In the instant matter, the circuit court ordered the production of information from non-testifying experts and/or consultants over the objection of DOT and without the requisite finding required by Rule 26(b)(4)(B) that exceptional circumstances exist warranting the production of such material. Having failed to address the application of Rule

26 (b)(4)(B)'s exceptional circumstance requirement, the circuit court likewise precluded proper review of its April 13, 2006 order by this Court. In order to facilitate future review of orders requiring the production of discovery from or regarding non-testifying experts or consultants, we now specifically hold that a circuit court is required, pursuant to Rule 26 (b)(4)(B) of the *West Virginia Rules of Civil Procedure,* to make specific findings regarding the existence of exceptional circumstances justifying the discovery of facts known or opinions held by an expert or consultant who has been retained or specially employed by a party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial before the circuit court may compel such discovery over a party's objection. Accordingly, we now grant the requested writ and prohibit the enforcement of the circuit court's April 13, 2006, order to the extent it compels the production of appraisal reports and other evaluations prepared by persons who have not been designated as DOT witnesses in the underlying condemnation matter.

The circuit court also ordered production of appraisal reports or evaluations prepared during a specific time period by persons who have been or may be designated as witnesses in the instant action relative to properties located within a one-half mile radius of the Fort Pleasant property and which were taken relative to the Corridor H project. DOT objects to production of this material on a myriad of grounds, including that the material is subject to the attorney-client privilege and/or prepared in anticipation of litigation.

Conversely, Fort Pleasant argues that the circuit court's order requiring production of this material was proper because such information is relevant for cross examination purposes, including to disclose potential variances in the witness's methodology and opinions relative to different properties.

We agree that discovery of appraisal reports and evaluations prepared by designated witnesses relative to other properties may be discoverable information in appropriate circumstances.[6] However, we find that given its breadth, the circuit court's order lacked the appropriate findings to unconditionally order the disclosure of this information. The circuit court's order contains no findings regarding the role of persons designated as witnesses in the instant action when preparing an appraisal report or other evaluation of other properties. A designated witness in the instant action may have produced an appraisal report or other evaluation in the role of consultant or non-testifying expert relative to the other

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[6] The *West Virginia Rules of Civil Procedure* do not currently provide for the automatic disclosure of expert reports and information regarding other litigation in which testifying experts have been involved. However, discovery of materials relied upon by an expert witness in formulating an opinion are often discoverable. In this respect, we observe that under Rule 26 (a)(2) of the *Federal Rules of Civil Procedure*, a party is required to, among other things, identify all testifying experts, produce detailed reports from each testifying expert, disclose each testifying expert's compensation and disclose all cases in which the witness has testified as an expert at trial or by deposition in the preceding four years. Thus, the *Federal Rules* would mandate disclosure of information similar to that sought by Fort Pleasant herein. While we recognize the potential benefits of the Federal Rules in this regard, we do not believe that a petition seeking extraordinary relief is the proper mechanism for consideration of changes to our rules of civil procedure. For now, we leave it to the judges of our state to determine whether to require more of litigants under Rule 26 in cases pending before them.

property. In such a case, discovery of the appraisal report or other evaluation of the other property would be subject to a finding of exceptional circumstances under Rule 26(b)(4)(B). For instance, the exceptional circumstance requirement may be satisfied by a showing that such appraisal report or evaluation of the other property is relevant because of its use or potential use by a witness in the instant action as a comparative to the Fort Pleasant property such as when it is relied upon by the witness in formulating the witness's opinion relative to the Fort Pleasant property. Absent a finding that the required disclosures were prepared by testifying experts or consultants or that a finding of exceptional circumstances has been met, their discovery may not be compelled.

Accordingly, we grant the requested writ of prohibition relative to the disclosure of appraisal reports and other evaluations of properties located within one-half mile of the Fort Pleasant property which were prepared by witnesses designated in the instant action to the extent those witnesses were acting as non-testifying experts or consultants when preparing the appraisal report or other evaluation. In such circumstances and with proper findings, a determination of exceptional circumstances is required before the appraisal reports and other evaluations may be discovered. To the extent the circuit court's April 13, 2006, order requires the disclosure of appraisal reports and evaluations of other properties prepared by witnesses designated in the instant action and those designated witness were acting in the role of testifying expert or consultant when preparing the same, the April 13, 2006, order is enforceable by the circuit court.

Upon the return of this matter to the Circuit Court of Hardy County, Fort Pleasant may renew its motion to compel the production of appraisal reports and other evaluations prepared by persons who have not been designated as DOT witnesses in the underlying condemnation matter and to compel the disclosure of appraisal reports and other evaluations of properties which were prepared by witnesses designated in the instant action who were acting as non-testifying experts or consultants when preparing the appraisal report or other evaluation. Should Fort Pleasant renew its motion, the circuit court must hold a hearing and make the appropriate findings regarding the existence of exceptional circumstances, as outlined herein, before it may compel the production of such materials.

IV.

CONCLUSION

The Circuit Court of Hardy County is hereby prohibited from enforcing its April 13, 2006, order requiring the disclosure of appraisal reports and other evaluations of the Fort Pleasant property prepared by persons or firms retained by DOT and not designated as witnesses in the underlying condemnation action because the circuit court failed to make the requisite finding of exceptional circumstances as required by Rule 26(b)(4)(B) of the *West Virginia Rules of Civil Procedure*. Likewise, the Circuit Court of Hardy County is prohibited from enforcing its April 13, 2006, order to the extent it requires disclosure of appraisal reports and evaluations of non-Fort Pleasant property prepared by witnesses

designated in the instant action who served as a non-testifying expert or consultant when preparing the appraisal report or evaluation absent the requisite finding of exceptional circumstances as required by Rule 26(b)(4)(B) of the *West Virginia Rules of Civil Procedure*. Upon a renewed motion by Forth Pleasant to compel such materials, the circuit court must make specific findings regarding the existence of exceptional circumstances justifying their discovery before ordering the same to be produced.

WRIT GRANTED, AS MOULDED