

DO NOT REMOVE
FROM FILE
FILE COPY

No. 19-0689

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA, *ex rel.*,
M. ANDREW BRISON,

Petitioner,

v.

THE HONORABLE CARRIE WEBSTER, Judge of the Circuit Court of Kanawha
County, West and DAVID F. NELSON, SENIOR

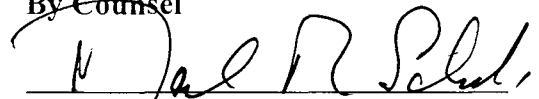
Respondents

*From the Circuit Court of Kanawha County, West Virginia
Civil Action NO. 16-C-1590*

PETITION FOR WRIT OF PROHIBITION

M. ANDREW BRISON

By Counsel



Daniel R. Schuda (WVSB #3300)
ANSPACH MEEKS ELLENBERGER LLP
900 Lee Street East, Suite 1700
Charleston, West Virginia 25301
Direct Dial: (304) 932-0251
Telephone: (304) 205-8063
Fax: (304) 205-8062
dschuda@anspachlaw.com

Dated: August 6, 2019

TABLE OF CONTENTS

Table of Authorities iii, iv

I. Questions Presented 1

II. Statement of the Case 1

III. Summary of Argument 4

IV. Statement Regarding Oral Argument 5

V. Argument 5

A. Standard for issuance of Writ of Prohibition 5

B. The trial court committed clear legal error which requires this Court to enter a *Writ of Prohibition* ordering the Circuit Court of Kanawha County to grant the relief sought by Brison in his Motion to Compel. 6

1. Attorney-Client Privilege 8

2. Work Product Doctrine 10

C. Stay of Proceedings

.14

VI. Conclusion14

TABLE OF AUTHORITIES

Cases:

ACLU Found. of Md. v. City of Salisbury, 2018 Md. Cir. Ct. LEXIS 5, *19-20 10

Atchinson Casting Corp. v. Marsh, Inc., 216 F.R.D. 225, 227 (D.Mass 2003) 13

Bennett v. La Pere, 112 F.R.D. 136, 140 (D.R.I. 1986) 11, 12

Corn Exch. Bank v. Tri-State Livestock Auction Co., 368 N.W.2d 596, 599 (S.D. 1985) 12

Dutton v. Guste, 395 So. 2d 683, 685 (La. 1981) 10

Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 148 F.R.D. 532, 534 (E.D. Pa. 1993) 12

Ford Motor Co. v. Leggat, 904 S.W.2d 643, 649 (Tex. 1995) 12

Herchenroeder v. John Hopkins Univ. Applied Physics Lab., 171 F.R.D. 179, 181
(D. Md. 1997) 12

In re Asbestos Litig., 2013 W.Va. Cir. LEXIS 497 12

In re: CFS-Related Secs. Fraud Litig., No. 99-CV-825(K)J Consolidated, 2003 U.S. Dist. LEXIS
15230, *17-18 (N.D. Okla. July 31, 2003) 13

In re Enron Corp. Securities, Derivative & ERISA Litig., 623 F. Supp. 2d 787, 838 (2009) 9

In re Union Pac. Res. Co., 22 S.W.3d 338 (Tex. 1999) 9

In re W.Va. Rezulin Litig. v. Hutchison, 585 S.2d 52, 62 (W.Va. 2003) 6

James M.D. v. Carolyn M., 456 S.E.2d 16, 20 (1995) 5

Morse/Diesel, Inc. v. Fidelity & Dep. Co., 122 F.R.D. 447, 450-51 (S.D.N.Y. 1988) 12

Newby v. Enron Corp., 623 F. Supp. 2d 798, 838 (S.D. Tex. 2009) 13

Page v. Guidry, 506 So. 2d 854, 857-58 (La. Ct. App. 1987) 12

Perez v. State Indus., Inc., 578 So. 2d 1018, 1020 (La. Ct. App. 1991) 12

Polston v. Eli Lilly & Co., No. 3:08-3639, 2010 U.S. Dist. LEXIS 74720, at *4, 2010 WL 2926159 (D. S.C. July 23, 2010) 12

iii

Porter Hayden Co., 2012 U.S. Dist. LEXIS 23716, 2012 WL 628493, at *1. 11

Riddell Sports, Inc. v. Brooks, No. 92 Civ. 7851, 1995 U.S. Dist. LEXIS 434(S.D.N.Y. Jan. 19, 1995) 10

Selective Way Ins. Co., 2014 U.S. Dist. LEXIS 16801, 2014 WL 462807, at *2 11

Slusher v. Ospital, 777 P.2d 437, 444 (Utah 1989) 12

Spilker v. Medtronic, Inc., No. 4:13-CV-76-H, 2014 U.S. Dist. LEXIS 134335, 2014 WL 4760292 (E.D.N.C. Sept. 24, 2014) 11

State ex rel. Ash v. Swope, 232 W. Va. 231, 237, 751 S.E.2d 751, 757 (2013) 9

State ex rel. Johnson Controls, Inc. v. Tucker, 729 S.E.2d 808, 814 (W.Va. 2012). 6

State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 220 W.Va. 525, 534, 648 S.E.2d 31, 40 (2007). 10

State ex rel. Med. Assur. of W. Va., Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003). . . . 8, 10

SER Monongahela Power Co. v. Fox, 227 W.Va. 531, 711 S.E.2d (2011). 6

State ex rel. United Hosp. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997). 10

Tanner v. Johnston, No. 2:11-cv-00028-TS-DBP, 2013 U.S. Dist. LEXIS 3512, *4-5 (D. Ut. Jan. 8, 2013) 13

United States v. Martin, 773 F.2d 579, 584 (4th Cir.1985) 9

United States v. Robinson, No. SA-06-MC-781-XR, 2007 U.S. Dist. LEXIS 14853, *16 (W.D. Tex. March 1, 2007) 13

Yakima Newspapers v. Yakima, 77 Wash. App. 319, 326-27, 890 P.2d 544, 548 (1995) 10

Young v. State Farm Mut. Auto. Ins. Co., CIVIL ACTION NO. 5:96-0046, 1996 U.S. Dist. LEXIS 19929, at *1 (S.D. W. Va. Oct. 23, 1996) 11

Statutes:

West Virginia code § 53-1-1 5

Rules:

Rule 26(b)(1). 5

Other Legal Authority:

Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Handbook on Evidence for West Virginia Lawyers § 501.02 (5th ed. 2012) 9

Cleckley, Davis, & Palmer, Litigation Handbook § 26(b)(3) at 721.10

PETITION FOR WRIT OF PROHIBITION

Question Presented

Should Circuit Court of Kanawha County be prohibited from enforcing a clearly error our ruling denying Petitioner the ability to discovery relevant, non-privileged communications about and completing the settlement of similar claims asserted against this Petitioner between the Plaintiff and a party then omitted from the case?

Should a “Rule to Show Cause” be issued, pursuant to Rule 16(j) of the West Virginia Rules of Appellate Procedure staying all proceedings in the Circuit Court of Kanawha County?

Statement of the Case

The parties in the underlying action were previously members of the law firm of Francis, Nelson and Brison, PLLC (“FNB”) (*Appx. at 18*) in which Petitioner M. Andrew Brison (“Brison”), was a 13% owner; Plaintiff in the underlying action David F. Nelson, Sr., (“Nelson”) was a 37% owner; and Ford Francis, the third member but not a party to these proceedings, was a 50% owner of FNB. (*Id.*) The three (3) named members were all guarantors of loans made to FNB. (*Appx. at 3 and 7*) In 2010, FNB was merged with or acquired by Allen, Kopet & Associates (“AK&A”), which, as part of the acquisition, agreed to pay all of FNB’s debt obligations. (*Appx. at 3, 19 and 20*) All of the FNB members agreed to this acquisition. (*Appx. at 5*)

In July 2013, having much earlier resigned as the Managing Attorney, Brison left AK&A. AK&A asserted it was owed an early departure penalty. (*Appx. at 21, 26, and 28*) but, when Brison asserted that the conditions for payment of the penalty were not met, AK&A never pursued the issue. (*Appx. at 14-15 and 69*)

Nelson left AK&A four (4) months later, in November 2013, and also refused to pay any penalty to AK&A. (*Appx. at 12, 21, and 28*) AK&A never pursued enforcement of that penalty, either.

On October 18, 2016, Nelson filed this civil action against AK&A for breach of contract and related claims, (*Appx. at 6 and 14-15*) also making an alternative claim against Brison asserting that *if* AK&A had an enforceable right to collect the early departure penalty from Brison, *and if* AK&A was entitled to a setoff for that amount to the claims of Nelson or FNB, then Brison should be held liable for the amount of the penalty. (*Id.*)

Nelson settled the claims against AK&A, the terms of which were said to be contained in a settlement agreement but which have never been made known to Brison. (*Appx. at 16, 18, 23-24, and 62*) On July 7, 2017, Nelson filed a *Second Amended Complaint* solely against Brison (*Appx. at 18*) asserting that, presumably as a part of the settlement, AK&A assigned its penalty claim against Brison. (*Appx. at 18 and 62*)

On November 29, 2017, Brison served “*Defendant M. Andrew Brison’s First Set of Interrogatories and Requests for Production of Documents*” on Nelson. (*Appx. at 33, 34, and 51-60*) Nelson did not respond until after Brison filed his first *Motion to Compel* on March 20, 2018. (*Appx. at 30*) Despite Nelson’s waiver of objections pursuant to W.V.R.Civ.P. 33(b)(4) as the result of his untimely response, Nelson asserted that the discovery requests called for confidential information and materials protected by the attorney-client privilege and the work-product doctrine. (*Appx. at 31 and 51-57*) He refused to provide any information as to the terms and conditions of his settlement with AK&A. (*Appx. at 51-57; 58-60*) This necessitated Brison’s filing of an *Amended Motion to Compel* on April 20, 2018. Without any scheduled

hearing on the Motion or other response from the Court, Brison filed a *Renewed Amended Motion to Compel* on June 12, 2018. (*Appx. at 35 and 40*)

Because Brison could not get a hearing nor ruling from the trial court, a *Writ of Mandamus* was finally filed in this Court eight (8) months later, on February 8, 2019. The relief sought in the *Writ* was ruled moot by this Court by *Order* entered March 26, 2019 because of the *Order Granting Defendants Amended Motion to Compel, in part, and Deferring Ruling in part Pending Receipt of Additional Information Requested by the Court and Setting Hearing Regarding Attorney Client Privilege / Work Product Doctrine on April 8, 2019* entered by Judge Carrie Webster on March 25, 2019. (*Appx. at 74-77 and 78*)

The hearing was held on April 8, 2019. (*Appx. at 80-135*) and an *Order* subsequently entered on May 9, 2019, holding that the settlement documents and other information relating to the settlement between Nelson and his former law firm were protected by either “attorney work product privilege or, regarding communications between Plaintiff and his counsel, pursuant to attorney client privilege.” (*Appx. at 136-141*)

In his written submissions, and during argument, counsel advised the Circuit Court that the legal standard applicable to Petitioner’s discovery requests was simply whether the settlement materials were relevant “to the subject matter involved in the pending action” — nothing more — because any communications between Nelson and/or Nelson’s counsel as one party to the communication and AK&A as the other party were not privileged (*Appx. at 58-60, 84, 106, and 112-128*) As stated during the hearing by Brison’s counsel:

[T]he privilege that is being asserted here, Mr. Stroebel is asserting that in his conversations with Allen Kopet, it is an attorney-client privilege. There is no attorney-client relationship there.

(*Appx. at 114*)

* * *

Both parties to the communication must contemplate that the attorney-client relationship does or will exist. There was no attorney-client relationship between Mr. Stroebel and Allen Kopet or Mr. Nelson and Allen Kopet.

(*Appx. at 115*)

* * *

Judge Webster: I disagree. I disagree. Beyond the fact that Mr. Stroebel has represented that those negotiations that resulted in a settlement agreement and the communications that precipitated that, I think, fall squarely within that – that privilege and communication.

(*Appx. at 116*)

The trial court's ruling was set forth in an *Order* prepared by Nelson's counsel and entered, with change, on May 9, 2019. (*Appx. at*)

Summary of Argument

The trial court's May 9, 2019, "*Order Denying Defendant's Motion to Compel*," is based on a clear misunderstanding of the law of privilege applicable to attorney-client communications and attorney work-product. No evidence or legal authority has been introduced which protects from disclosure the settlement agreement (and related documents) between Nelson and AK&A (a former party). The terms of the settlement and the communications between Nelson and AK&A and Nelson's attorney and AK&A are relevant and material to the claims in this matter because the matters for which either party to that settlement were released and the claims for which payments was made are relevant in testing the validity of the claim against Brison and any damages claimed. All documents related to the settlement, not otherwise privileged, are subject to full disclosure. The trial court has misapplied West Virginia law in holding that any communications between an attorney and a non-client third-party during litigation, whether relating to a settlement or any other subject, are protected from disclosure due to the attorney-

client privilege and/or the work product doctrine. Neither privilege applies to communications between one party to a lawsuit, Nelson and his counsel, and AK&A, an opposing party, during litigation. The trial court's ruling improperly prevents the seeking and use of evidence that is, "relevant to the subject matter involved in the pending action." See Rule 26(b)(1). It should also be noted that the Court prohibited Petitioner from obtaining the requested information not only from Plaintiff below but, also, from AK&A by deposition. (*Appx. at*)

A *Writ of Prohibition* should be issued to prevent the Circuit Court of Kanawha County from enforcing its ruling as to this matter.

Statement Regarding Need for Oral Argument

Petitioner suggests that oral argument is not necessary for fair and complete adjudication of this matter. Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, oral arguments are "unnecessary when . . . the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." In this matter, the Trial Court made a clear error of law which may be corrected by a Memorandum Decision by this Court.

V. ARGUMENT

A. Standard for issuance of a Writ of Prohibition.

West Virginia Code § 53-1-1 provides that a right to a *writ of prohibition* shall lie, in part, where a Circuit Court "exceeds its legitimate powers." W.Va. Code § 53-1-1; *James M.D. v. Carolyn M.*, 456 S.E.2d 16, 20 (1995). Applying that to this *Petition*, a *writ of prohibition* is available to correct the clear legal error resulting from a trial court's substantial abuse of its powers in improperly denying Brison's motion to compel production of relevant evidence

material to his defense on multiple issues, including liability and damages. See *SER Monongahela Power Co. v. Fox*, 227 W.Va. 531, 711 S.E.2d (2011).

In determining whether a *writ* is a proper remedy, this Court has established five (5) relevant factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. See *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808, 814 (W.Va. 2012); *In re W.Va. Rezulin Litig. v. Hutchison*, 585 S.2d 52, 62 (W.Va. 2003). These factors are general guidelines that serve as a useful starting point for determining whether a discretionary *writ of prohibition* should issue. **Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.** *Id.* Brison proffers that it was clear legal error for the Circuit Court to misapply settled law to find that communications between adverse parties to a settlement are protected by the attorney-client privilege and/or work product doctrine. This error is manifest (i.e., factor three) and issuance of a *writ of prohibition* is also supported by review under factors one and two listed above.

B. The trial court committed clear legal error which requires this Court to enter a *Writ of Prohibition* ordering the Circuit Court of Kanawha County to grant the relief sought by Brison in his Motion to Compel.

In this case, Nelson initially sued his former employer AK&A for breach of contract, and included a count in the alternative against Brison. Nelson settled the claims against AK&A and

began a concerted effort to deny relevant, material evidence in the form of documents discussing the terms, provisions, duties, responsibilities, and claims assigned and/or settled between those parties. This evidence is relevant and discoverable under Rule 26 of the West Virginia Rules of Civil Procedure for Brison, to among other things: (1) understand the factual basis of the claim assigned to Nelson by AK&A; (2) whether he has affirmative defenses based on the terms of the settlement or scope of the release; (3) discover what the \$60,000 settlement paid for; (4) learn if there were any claims released by Nelson or AK&A not identified in the *Complaint* or Amended *Complaint*; (5) determine what admissions were made by Nelson and AK&A relevant to the claims and/or defenses in this matter; and (6) discover information relevant to witness bias, credibility, and interest of parties and witnesses.

It is mystifying why the Circuit Court has permitted Nelson to shield non-privileged, material information, and Brison is forced to guess to what extent his claimed liability has already been satisfied by Nelson or AK&A. This is particularly troubling because Nelson testified that the only claim he is pursuing in the action against Brison is the assigned claim from AK&A. But only the most general terms of that specific assignment have been disclosed. (*Appx. at 79*) Nelson asserts that all documents, not just the assignment, are protected from disclosure by the attorney-client privilege and/or the work product doctrine. *There is not and has never been, in any document or disclosure by Nelson or his attorney, any assertion that either Nelson or his attorney is also legal counsel for AK&A.*

Absent such a relationship, the Circuit Court was provided with specific legal authority that no attorney client privilege could exist. It was ignored.

In rendering this wrong ruling, the trial court sought, and was apparently provided, certain of the settlement documents. The May 9, 2019, *Order* denying Brison the right to see

those documents makes clear that the settlement agreement, which the Court reviewed, in fact involves Nelson's claims against Brison in its finding that the agreement "represents the product of attorneys for both parties [Nelson and AK&A] regarding the claims between them and deal with legal theories and principles relating to those claims or other claims, **including claims involving the Defendant Brison.**" (*Appx. at 140*)

1. Attorney-Client Privilege

Nelson's argument supporting his refusal to produce the requested documents is that the terms are confidential and privileged because they relate to a settlement negotiated by counsel for the parties. As the Court is aware:

In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) **the communication between the attorney and client must be intended to be confidential.**"

Syllabus Point 7, *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

The requested documents were NOT communications between an attorney and his client but, at best, were 1) communications between two adverse attorneys, one for Nelson and another for AK&A, or 2) between two parties, Nelson and AK&A, or 3) between an attorney and a non-client, counsel for Nelson and AK&A. Because all of the parties who were originally or are now involved in this case is an attorney and were or are represented by attorneys does not change the fact that none of the requested discovery involved an attorney-client communication. In fact, none of the three required elements are met because the attorneys for Nelson and AK&A did not: (1) believe that opposing counsel was representing their client in any way; (2) Nelson's attorney was not seeking the legal advice of AK&A's attorney, or *vice versa*; and (3) none of the

communication between Nelson and AK&A was intended to be confidential as between an attorney and his client.

If, in fact, the documents contained any confidentiality clause, that restriction would apply only to the parties to the agreement. Here, no court has ever sealed the documents sought in discovery. The fact that a settlement agreement contains a confidentiality provision does not render the agreement or its contents undiscoverable as a matter of law. *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 623 F. Supp. 2d 787, 838 (2009); *In re Union Pac. Res. Co.*, 22 S.W.3d 338 (Tex. 1999) (orig. proceeding) (per curiam). The privately-agreed and included confidentiality provisions do not insulate the document from discovery if the discovery is otherwise relevant to the case.

When Nelson authorized his attorney to communicate and negotiate a settlement with AK&A, it is recognized by West Virginia law that any information provided him by Nelson which he revealed to AK&A, as well as "the details underlying the data which was to be published [by Nelson's attorney to the non-client third party]" would not enjoy the attorney-client privilege. *State ex rel. Ash v. Swope*, 232 W. Va. 231, 237, 751 S.E.2d 751, 757 (2013)(quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Handbook on Evidence for West Virginia Lawyers, § 501.02[7][F] (5th ed. 2012) (it has been recognized that "[s]tatements made by a client to an attorney are not within the attorney-client privilege if the information is given with the intent that it be used and disseminated to third parties." See *United States v. Martin*, 773 F.2d 579, 584 (4th Cir.1985) ("To be privileged it must be intended that information given [to] an attorney remain confidential; information given with the intent that it be used . . . is inconsistent with the confidentiality asserted.")).

Therefore, the settlement documents requested by Brison (i.e., communications between Nelson and/or Nelson's attorney with AK&A related to the settlement) are not subject to the attorney-client privilege. To rule otherwise is clear error.

2. Work Product Doctrine

Similarly, the work product doctrine does not apply to the discovery sought because that only concerns documents and tangible things "prepared in anticipation of litigation." The "work product protection under the provisions of Rule 26 extends only to documents prepared in anticipation of litigation." *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 220 W. Va. 525, 534, 648 S.E.2d 31, 40 (2007).

This Court held that, "[t]o determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, **the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation.**" Syllabus Point 8, *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). See also Syllabus Point 7, *State ex rel. United Hosp. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997).

It has been noted that "the burden of establishing the work product exception always rests upon the person asserting it." Cleckley, Davis, & Palmer, Litigation Handbook § 26(b)(3), at 721. The majority of courts addressing this issue have ruled that the work product doctrine does not apply to settlement documents. See *Yakima Newspapers v. Yakima*, 77 Wash. App. 319, 326-27, 890 P.2d 544, 548 (1995); *Dutton v. Guste*, 395 So. 2d 683, 685 (La. 1981) (settlement agreements are not prepared in anticipation of litigation; rather, they are documents prepared "in an attempt to conclude the litigation between these parties by settlement"); *Riddell Sports, Inc. v. Brooks*, No. 92 Civ. 7851, 1995 U.S. Dist. LEXIS 434(S.D.N.Y. Jan. 19, 1995) (settlement documents are not protected by the work product rule because they are not prepared in preparation for possible litigation, instead they terminate the litigation between the parties); *ACLU Found. of Md. v. City of Salisbury*, 2018 Md. Cir. Ct. LEXIS 5, *19-20 (settlement

agreements are not work product, and the privilege does not apply, because the sole reason for existence of such documents is to end litigation and ensure an action never reaches the trial stage). It was also stated that the work product privilege cannot stand as a bulwark to the disclosure of a settlement agreement, because by its very nature, it is not prepared "in anticipation of litigation or in readiness for trial." *Id.* To the contrary, settlement documents are prepared for the express purpose of preventing litigation. *Id.*

Instructive on the scope of discovery relevant to settlement documents, the Court in *Young v. State Farm Mut. Auto. Ins. Co.*, CIVIL ACTION NO. 5:96-0046, 1996 U.S. Dist. LEXIS 19929, at *1 (S.D. W. Va. Oct. 23, 1996), ruled that the plaintiff (an attorney) had a right to discovery concerning a settlement reached between his co-counsel and State Farm despite the fact that the settlement agreement included a confidentiality provision. The court required disclosure of documents related to the settlement agreement including documents from co-counsel's file and documents from State Farm detailing the agreement and payment details. The Court relied on *Bennett v. La Pere*, 112 F.R.D. 136, 140 (D.R.I. 1986), for the holding that the settlement agreement should be disclosed if it is relevant to the claims at issue.¹

¹ In *Porter Hayden Co.*, the defendant sought reimbursement from its insurers for expenditures paid from asbestos settlement trusts to victims of asbestos-related diseases. *Porter Hayden Co.*, 2012 U.S. Dist. LEXIS 23716, 2012 WL 628493, at *1. The Court held that the defendant's prior settlement-related communications with third parties were discoverable because the defendant sought indemnification from its insurers for the payments it made to claimants, thus, producing the documents would permit the insurers "to confirm the factual basis of the claims for which [the defendant] contends the [i]nsurers must pay." *Id.* Likewise, in *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2014 U.S. Dist. LEXIS 134335, 2014 WL 4760292 (E.D.N.C. Sept. 24, 2014), the Court held that a prior settlement agreement was discoverable, in part, because it was relevant "to assess Defendants' exposure to possible damages." In *Spilker*, the plaintiff in a wrongful death action reached a confidential settlement agreement with a hospital prior to then suing the defendant medical device manufacturers. 2014 U.S. Dist. LEXIS 134335, [WL] at *1. The Court stated that, "'faced with a substantial damages suit,' the defendants' 'ability realistically to evaluate the plaintiffs' case against it depend[ed] upon an awareness of the terms and conditions of the settlement.'" 2014 U.S. Dist. LEXIS 134335, [WL] at *4 (quoting *Selective Way Ins. Co.*, 2014 U.S. Dist. LEXIS 16801, 2014 WL 462807, at *2).

The holding from *Bennett* has become the majority rule in West Virginia and federal courts. *Herchenroeder v. John Hopkins Univ. Applied Physics Lab.*, 171 F.R.D. 179, 181 (D. Md. 1997) (when determining whether a settlement agreement is producible in discovery, courts in this circuit have found that 'relevance, not admissibility, is the appropriate inquiry'); See also *Polston v. Eli Lilly & Co.*, No. 3:08-3639, 2010 U.S. Dist. LEXIS 74720, at *4, 2010 WL 2926159 (D. S.C. July 23, 2010) ("The Fourth Circuit has never recognized a settlement privilege or required a particularized showing for production of a confidential settlement documents.")² It is also regularly cited in opinions issued by West Virginia's Mass Litigation Panel compelling production of settlement documents. See *In re Asbestos Litig.*, 2013 W.Va. Cir. LEXIS 497; *In re Asbestos Pers. Injury Litig.*, 2011 W.Va. Cir. LEXIS 1034.

In *Bennett v. La Pere*, the Court found that a hospital had a right to obtain a copy of the settlement agreement between the plaintiff and a co-defendant doctor so that it could realistically evaluate plaintiff's case against it in light of the terms and conditions of the settlement. The Court noted that it would be unfair to leave the remaining defendant "**groping blindly in the dark, * * * as fairness cannot be achieved when one side is needlessly blindfolded.**" The

² *Fidelity Fed. Sav. & Loan Ass'n v. Felicetti*, 148 F.R.D. 532, 534 (E.D. Pa. 1993) (holding party was entitled to discovery of settlement agreement); *Morse/Diesel, Inc. v. Fidelity & Dep. Co.*, 122 F.R.D. 447, 450-51 (S.D.N.Y. 1988) (holding settlement agreements were discoverable because they were relevant to issues of construction costs); *Perez v. State Indus., Inc.*, 578 So. 2d 1018, 1020 (La. Ct. App. 1991) (holding settlement agreement was discoverable and could be used to show bias despite rule prohibiting the introduction of settlement agreements to prove liability); *Page v. Guidry*, 506 So. 2d 854, 857-58 (La. Ct. App. 1987) (holding settlement agreements were discoverable where the agreements were not admitted to establish liability but were admitted to apportion damages and assess the plaintiff's credibility and veracity); *Corn Exch. Bank v. Tri-State Livestock Auction Co.*, 368 N.W.2d 596, 599 (S.D. 1985) (stating "any agreement between some, but not all, of the litigants should be disclosed upon the request of any party in accordance with our rules of procedure"); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 649 (Tex. 1995) (stating "settlement agreements are discoverable to the extent they are relevant"); *Slusher v. Ospital*, 777 P.2d 437, 444 (Utah 1989) (holding "where an injured plaintiff and one or more, but not all, defendant tortfeasors enter into a settlement agreement, the parties must promptly inform the court and the other parties to the action of the existence of the agreement and of its terms").

court held that any concern regarding the sensitivity of the documents may be adequately mitigated by the entry of a protective order. *Id.* A protective order has been entered by the Circuit Court in this case.

The principle at issue is that confidentiality clauses in private settlement agreements cannot preclude court-ordered discovery pursuant to a valid discovery request." *Newby v. Enron Corp.*, 623 F. Supp. 2d 798, 838 (S.D. Tex. 2009) (collecting cases). "A general concern for protecting confidentiality does not equate to privilege [L]itigants may not shield otherwise discoverable information from disclosure . . . merely by agreeing to maintain its confidentiality." *Tanner v. Johnston*, No. 2:11-cv-00028-TS-DBP, 2013 U.S. Dist. LEXIS 3512, *4-5 (D. Ut. Jan. 8, 2013); *United States v. Robinson*, No. SA-06-MC-781-XR, 2007 U.S. Dist. LEXIS 14853, *16 (W.D. Tex. March 1, 2007) (private confidentiality agreement will not eclipse a court order of production unless established legal privilege applies.); *In re: CFS-Related Secs. Fraud Litig.*, No. 99-CV-825(K)J Consolidated, 2003 U.S. Dist. LEXIS 15230, *17-18 (N.D. Okla. July 31, 2003) (Confidential settlement agreement discoverable when relevant to claims and defenses in lawsuit.); *Atchinson Casting Corp. v. Marsh, Inc.*, 216 F.R.D. 225, 227 (D.Mass 2003) (holding that the "broad scope of the discovery rules" require the disclosure of the settlement agreement).

Accordingly, it was a clear error of law for the Circuit Court to rule that the work product doctrine has any application to the discovery sought. The requested documents are NOT work product because they were not prepared in anticipation of litigation, but rather documents prepared at the conclusion of the case between Nelson and AK&A. The trial court's order permitting Nelson to hide the details of his settlement with AK&A behind inapplicable privilege claims has left Brison with information certainly relevant and potentially vital to his defense.


D. Stay of Proceedings.

The information sought by Brison in his requested discovery is obviously of importance, in potentially several different ways, to his defense. Pending this Court's action on this *Petition*, it is respectfully suggested that further proceedings in discovery or trial of this matter be stayed inasmuch as the mere later appeal of the case to this Court unfairly exposes both parties to unnecessary expense and this Court to the unnecessary waste of judicial resources.

IV. CONCLUSION

The Petitioner requests that a *Writ of Prohibition* be issued finding that the trial court committed clear legal errors in denying Brison's *Motions to Compel*, that this Court order that the requested discovery be required to be produced, and that further proceedings in the trial court be stayed pending resolution of this issue.

M. ANDREW BRISON
By Counsel


Daniel R. Schuda (WVSB #3300)
ANSPACH MEEKS ELLENBERGER LLP
900 Lee Street East, Suite 1700
Charleston, West Virginia 25301
Direct Dial: (304) 932-0251
Telephone: (304) 205-8063
Fax: (304) 205-8062
dschuda@anspachlaw.com