No. 22-0400

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA *ex rel.*,
ANTERO RESOURCES CORPORATION,

Petitioner,

v.

THE HONORABLE CHRISTOPHER McCARTHY, Judge of the Circuit Court of Harrison County, West Virginia; SCOTT A. WINDOM, TRUSTEE OF THE CAROLYN E. FARR TRUST, and its Beneficiaries, and EMPIRE OIL & GAS, INC., a West Virginia Corporation,

Respondents

From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 20-C-163-1

PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

This Petition seeks to prevent the Circuit Court of Harrison County, West Virginia, Judge Christopher McCarthy presiding ("Circuit Court"), from enforcing an Order Granting Plaintiffs' Motion to Compel entered on April 7, 2022 (the "Order"), which requires Kevin Ellis, an in-house attorney for Petitioner Antero Resources Corporation ("Antero"), to respond to questions at deposition that are subject to the attorney-client privilege and/or the work product doctrine. Specifically, the Order represents an abuse of the Circuit Court's discretion because it makes factual findings not supported by and in contravention of the evidentiary record and incorrect legal conclusions, which result in the erroneous application of the crime-fraud exception in this matter that abrogates Antero's right to invoke the attorney-client privilege and work product doctrine. If not reversed, the Circuit Court will require Mr. Ellis to answer questions that the Circuit Court acknowledges are protected from disclosure by the attorney-client privilege and the work product doctrine.

The first question presented, therefore, is whether the Circuit Court abused its discretion in determining that "[i]t is not necessary to analyze each question or topic posed to Deponent Kevin Ellis" because "Defendant Antero consulted with Deponent Kevin Ellis in order to perpetuate a fraud" such that the crime-fraud exception abrogates all of Antero's claims of attorney-client privilege and work product doctrine. The second question presented is whether the Circuit Court abused its discretion by finding that an inference of fraud existed when Clarence Sigley, Sr., executed record title documents in his own name when the trust instrument establishing the trust expressly granted Mr. Sigley the power and authority to do that very thing—sign leases and other documents in his own name. The final question presented is whether the Circuit Court clearly erred in concluding that the crime-fraud exception eliminated Antero's right to the protections

afforded under the attorney-client privilege and work product doctrine under the evidentiary record in this case. In short, the entire premise upon which the Circuit Court found the crime-fraud exception to exist represents a clear error, and this Court should issue the writ to avoid manifest injustice.

II. STATEMENT OF THE CASE

This Petition arises from a discovery dispute that arose during the course of a deposition of Kevin Ellis on October 15, 2021, during which counsel for Antero asserted claims of attorney-client privilege in response to certain questions asked by counsel for Respondents, Scott A. Windom, Trustee of the Carolyn E. Farr Trust, the beneficiaries of the Carolyn E. Farr Trust, and Empire Oil & Gas, Inc. (together, "the Farr Trust"). As a result of the assertion of the attorney-client privilege, the Farr Trust filed a Motion to Compel that generally requested the Circuit Court to order that "Mr. Ellis . . . be directed to appear and to complete his deposition and to answer all questions . . . as nothing in the transcript indicates that there was any attorney/client relationship involving Mr. Ellis which impacted his conduct in acquiring Farr Trust mineral properties for Antero . . . ." App. at 106. The Court assigned this discovery dispute to a Discovery Commissioner, Teresa J. Lyons, for a recommendation. App. at 15–17.

The Discovery Commissioner's recommendations, adopted by the Circuit Court in its Order without change, concluded that counsel for the Farr Trust "should be able to depose [Mr. Ellis] and ask the questions about topics included in the notice of deposition, *including questions that would have been barred by the attorney-client privilege*." App. at 9–10 (emphasis added).[1] In addition, the Circuit Court determined that "[i]t is not necessary to analyze each question or topic posed to Deponent Kevin Ellis" because of the Circuit Court's "finding" that "Defendant

[1] Mr. Ellis is a fact witness; hence, there were no "topics included" in his notice of deposition.

Antero consulted with Deponent Kevin Ellis in order to perpetuate a fraud[.]" App. at 9–10. Remarkably, this "finding" is made without citation to any specific evidence and is based solely upon an inference: "Defendant Antero's participation in the fraudulent scheme can be *inferred* by its inspection of property records and its continued payment to Clarence E. Sigley, Sr.,[2] as an individual without taking any action to verify the propriety of the actions of Clarence E. Sigley, Sr." App. at 9 (emphasis added). Not only did the Discovery Commissioner and Circuit Court magically convert an inference into a "finding" that "Defendant Antero consulted with Deponent Kevin Ellis in order to perpetuate a fraud," but it used this inference to misapply West Virginia law to completely eliminate Antero's right to keep communications by and involving Mr. Ellis, its counsel privileged. App. at 9. In addition, the Circuit Court completely ignored the uncontested fact that the public records used to create the "inference" in the first place—record title instruments signed by Mr. Sigley—were entirely proper under the trust document that established the Farr Trust.

The Circuit Court's Order represents a broad and dangerous expansion of the crime-fraud exception, which in turn eviscerates the "solemnly respected" attorney-client privilege, which this Court acknowledges must be "scrupulously guarded." Kessel v. Leavitt, 204 W. Va. 95, 182, 511 S.E.2d 720, 807 (1998). This Court, therefore, should reverse the Order and require the Circuit Court to (1) conduct a question-by-question analysis of the application of the attorney-client privilege to questions posed to Mr. Ellis; (2) hold an *in camera* hearing to determine whether any of the privileged testimony supports a correct application of the crime-fraud exception; and (3) identify specific evidence that it relies upon to support application of the crime-fraud exception.

[2] As detailed below, Clarence E. Sigley, Sr., was, until his death on September 22, 2019, the Trustee of the Farr Trust.

A. Procedural Background.

The Farr Trust filed its Complaint on June 22, 2020. App. at 57–69. Thereafter, the Farr Trust filed its First Amended Complaint on July 26, 2021 ("Amended Complaint") which represents the operative complaint in this matter. App. At 91–102.

The Complaint and Amended Complaint make the following claims against the defendants, The Estate of Clarence E. Sigley, Sr., by Barbara Wright Sigley, Executrix ("Estate"), Barbara Wright Sigley, individually, Amy R. Zannino, and Antero:

- Breach of Fiduciary Duty, Breach of Trust and Confidential Relationship, Conversion, Misappropriation, and Unjust Enrichment (Count I);
- Fraud, Concealment of Trust Assets, and Intentional and Reckless Conduct (Count II);
- Fraudulent Transfer of Real and Personal Trust Property (Count III);
- Entitlement to Accounting, Constructive Trust, Injunction and *Lis Pendens* (Count IV);
- Declaratory Judgment and Other Relief (Count V)
- Aiding/Abetting and Civil Conspiracy (Count VI);
- Joint Venture (Count VII);
- Tortious Interference (Count VIII);
- Breach of the Duty of Good Faith and Fair Dealing (Count IX);
- Breach of Contract by Defendant Antero (Count X); and
- The Voiding and Cancellation of All Transactions by All Defendants Regarding Farr Trust Assets (Count XI).

See App. at 62–68 (Complaint) and 91–100 (Amended Complaint).

The parties engaged in voluminous and complicated motions practice and embarked upon discovery, including the scheduling and taking of numerous depositions. The deposition of Kevin Ellis took place on October 15, 2021. App. at 725–1060 ("Ellis Depo.").

During the deposition of Mr. Ellis, who at the time of most of the transactions at issue was a licensed attorney employed by Antero as its Manager, Administrative and Legal (App. at 752), counsel for Antero lodged a number of objections to questions from counsel for the Farr Trust. As a result, Farr Trust filed its Motion to Compel on December 15, 2021, which generally requested the Circuit Court to order that Mr. Ellis answer all questions as "nothing in the transcript indicates that there was any attorney/client relationship involving Mr. Ellis which impacted his conduct in acquiring Farr Trust mineral properties for Antero . . . ." App at 106. Antero filed a Response in Opposition to Plaintiffs' Motion to Compel on January 5, 2022. App. at 111–81. The Farr Trust then filed a Reply to Antero's Response in Opposition to Plaintiffs' Motion to Compel on January 20, 2022, which—for the first time—argued that Antero's assertion of the attorney-client privilege should be stricken under the crime-fraud exception to the attorney-client privilege. App. at 182–347.

The Circuit Court referred the Motion to Compel to a Discovery Commissioner, which held a hearing on January 25, 2022. App. at 1. The Discovery Commissioner issued written recommendations on February 24, 2022. App. at 12. Antero filed a written Objection to the Discovery Commissioner's Recommended Order Granting Plaintiffs' Motion to Compel on March 10, 2022 ("Objection"). App. at 348–401. In that Objection, Antero requested that, if the Circuit Court granted the Motion to Compel, it also include sufficient findings of fact and conclusions of law to allow for meaningful interlocutory review by this Court. App. at 363.

Thereafter, the Farr Trust filed a "Request for Expedited Hearing Regarding Antero's Objection and Desire to File a Writ to the Supreme Court if this Court Adopts Discovery Commissioner's Recommended Order Finding Antero was Participating in a Fraud Which Negates the Invoking of the Attorney Client Privilege" on March 17, 2022. App. at 691–96. The Circuit Court held a hearing on that "Request for Expedited Hearing" on March 21, 2022, and on March 30, 2022, it entered its Order Following March 21, 2022 Expedited Hearing. App. at 27–28. That Expedited Hearing Order, issued at a time when over thirty motions remained pending before the Circuit Court, continued the trial date until September 12, 2022, and set a schedule for the filing of briefs related to Antero's Objection, with the final "sur-reply" due from the Farr Trust by April 1, 2022. App. at 28.

The Farr Trust then filed its Response to Antero's Objection to Discovery Commissioner's Recommended Order Regarding Crime/Fraud Exception to Assertion of Attorney-Client Privilege on March 28, 2022. App. at 697–709. Antero filed its Reply in Support of Objections to the Discovery Commissioner's Recommended Order Granting Plaintiffs' Motion to Compel on April 1, 2022. App. at 710–20.

As noted above, on April 7, 2022, the Circuit Court entered the Order that adopted verbatim the Discovery Commissioner's recommendations concerning the Farr Trust's Motion to Compel. On that same date, the Circuit Court also entered an Order Granting Plaintiffs' Motion to Disqualify Steptoe & Johnson, PLLC (App. at 31–56), which the Farr Trust filed on September 27, 2021. This disqualification order not only removed Antero's previous counsel from the case, but "restrict[ed] the firm from sharing any information, except documents, with new counsel." App. at 54. The order disqualifying Antero's previous counsel gave Antero 30 days to find new

counsel. The undersigned, who are that new counsel, served a Notice of Appearance on May 6, 2022. App. at 721–24.

B. Factual Background.

1. Creation of the Farr Trust, the conduct of Clarence E. Sigley, the Leases assigned to Antero, and the Farr Trust's claims.

On May 24, 1991, Carolyn E. Farr created the Farr Trust and designated Clarence E. Sigley, Sr., as Trustee. App. at 59, ¶ 9; see also App. at 451–58 ("Farr Trust Agreement"). The purpose of the Farr Trust was to establish funds for the general care, maintenance, and support of Ms. Farr during the remainder of her lifetime and, upon her death, to provide for the general care, maintenance, and support of her children, William A. Farr, Paul "P.D." Farr II, John C. Farr, and Lee Ann Farr. Upon the death of the last of Carolyn E. Farr's children, the principal and any undistributed income of the Farr Trust will be distributed to the Carolyn Elizabeth Farr Foundation—not the beneficiaries or their progeny. App. at 451–58. Mr. Sigley served as the Trustee of the Farr Trust until his death on September 22, 2019. App. at 59, ¶ 9.

Before and during Mr. Sigley's tenure as Trustee, Mr. Sigley had regular interactions with the beneficiaries of the Farr Trust, particularly William Farr and P.D. Farr. Both William Farr and P.D. Farr worked for Empire Oil & Gas, Inc. ("Empire"), a West Virginia company that is an asset of the Farr Trust, and Mr. Sigley managed or otherwise worked for Empire. App. at 469–72 ("William Farr Depo") and at 503–04; 508–09 ("P.D. Farr Depo"). Empire's business consisted of ownership and operation of wells in the oil and gas industry. App. at 465–68 (discussing well-tending and work with drilling rigs at Empire). Both William Farr and P.D. Farr, therefore had extensive work histories in the oil and gas industry. App. at 464–68 (discussing work history with Empire) and 490–502 (discussing work history in various aspects of the oil and gas industry). Notably, William Farr worked for Empire during the entirety of Mr. Sigley's tenure and reported

to him regularly. App. at 471–72. William Farr and P.D. Farr also testified to having a friendship with Mr. Sigley and spending time together outside of work. App. at 471–72; 505–07. Mr. Sigley also often served as a contact or agent for the beneficiaries in their personal property and business dealings. For example, when Antero contacted the beneficiaries regarding the execution of division orders, Antero was told to contact Mr. Sigley regarding transactions involving the beneficiaries. App. at 530–34; 536–38 ("Schopp Depo"). Mr. Sigley thus had a long-standing business and personal relationship with the Farr family throughout his tenure as Trustee of the Farr Trust, including several joint ventures involving Mr. Sigley, William Farr, and P.D. Farr dating back to the 1980s. App. at 540–76. And, notably, P.D. Farr, who signed ratifications that reflect the transfer of leasehold interests from "Clarence E. Sigley Sr. Trustee for the Caroline E. Farr Trust, to Clarence E. Sigley Sr." on at least 2 occasions, admitted that "according to the terms of the trust, Mr. Sigley could have property in his name and anybody's name that he wanted to, as long as it was for the benefit of the trust." App. at 1276–1278 (Exhibit 1 to P.D. Farr Depo.) and 1279–1280 (Exhibit 2 to P.D. Farr Depo.); App. at 1211; see also App. at 1209–1210 ("Q. Did you ask any questions about why these ratifications were in your name, PD Farr, II, as opposed to the trust? A. No. Q. Why not? A. Because he had the right to do anything that he wanted to with that, trust property, in his name or anybody else's name.").

In early 2012, Antero negotiated an option agreement with Mr. Sigley and with P.D. Farr for the purchase of certain leasehold rights in Doddridge and Ritchie Counties, for properties held by the Farr Trust, for properties that Mr. Sigley held individually, and for properties that P.D. Farr held individually. App. at 577–81 ("Option Agreement"); App at 1162–1163 and 1165 (admits that he was "aware" of negotiations because "I was there."; counsel for Farr Trust admits that P.D. Farr "was there [during negotiations] at the same time with Sigley."). Antero, Mr. Sigley, and

P.D. Farr signed the Option Agreement on February 28, 2012, after several meetings between representatives of Antero, (including Mr. Ellis), Mr. Sigley, and P.D. Farr. App. at 1163–1165 and 1236–1237. Per the terms of the Option Agreement, Antero agreed to pay $2,200 per net acre and an "overriding royalty interest on any Lease where there is a positive difference between (i) 18.75% and (ii) all existing lease burdens including lessor royalties, existing overriding royalty payments and production payments existing as of the date of Closing[.]" App. at 577–78, ¶¶ 2 & 4.

Between 2012 and 2016, Mr. Sigley, both individually and as Trustee, assigned numerous leasehold interests to Antero, some of which were pursuant to the terms of the Option Agreement and others that were stand-alone transactions. App. at 79, ¶ 5. In exchange, Antero paid to the record assignor the payments described in the Option Agreement, i.e., 18.75%. App. at 582–88. For some mineral interests, Mr. Sigley, as Trustee, assigned the leasehold interests to Antero. For some mineral interests, however, Mr. Sigley, as Trustee, transferred Farr Trust interests to himself and then assigned the leases to Antero. App. at 409, n.5. In those situations, the Farr Trust received a royalty of 12.5% and Mr. Sigley received an overriding royalty interest of 6.25%, which was consistent with Antero's payment obligations of 18.75% under the Option Agreement. App. at 589–90. Critically, the Farr Trust Agreement authorized Mr. Sigley to sign leases in both the name of the Farr Trust and in his own name, and the Farr Trust received and accepted, and continues to receive and accept, royalty payments pursuant to the Sigley–Farr Leases.

After Mr. Sigley's death in September 2019, Scott A. Windom was appointed Successor Trustee of the Farr Trust. App. at 57, ¶ 1 & 59, ¶ 9. As detailed above, the Farr Trust then filed suit in the Circuit Court of Harrison County on June 22, 2020.

In the Complaint, the Farr Trust alleged that Mr. Sigley converted, misappropriated, and fraudulently diverted Farr Trust assets, thus breaching his duties and obligations as Trustee. App. at 60, ¶¶ 14–15. Specifically, the Farr Trust alleges that (1) Mr. Sigley, as Trustee, leased certain Farr Trust mineral interests to himself; (2) Mr. Sigley then, in his individual capacity, assigned those leases to Antero in exchange for an assignment payment and an overriding royalty interest on any future production; and (3) Mr. Sigley then kept those payments for himself, to the detriment of the Farr Trust and in violation of Mr. Sigley's fiduciary duties to the Farr Trust. App. at 60, ¶¶ 14–15. The Farr Trust claims to be the proper owner of the overriding royalty interests associated with the Sigley–Farr Leases and contends that the Sigley–Farr Leases are void or voidable. App. at 60, ¶¶ 14–15. As to Antero, the Farr Trust alleges that Antero consented to and assisted Mr. Sigley with a scheme whereby Mr. Sigley leased the Farr Trust mineral interests to himself and assigned those leases to Antero, and that Antero knew or should have known that Mr. Sigley's actions violated his fiduciary duties. App. at 64, ¶ 22.

2. The role and deposition testimony of Kevin Ellis.

As noted above, Mr. Ellis, a licensed attorney (W.Va. Bar # 9964), was employed by Antero as its Manager, Administrative and Legal from 2011 to 2014, which included the time period when Antero entered into the Option Agreement in February 2012 and when Mr. Sigley, both individually and as Trustee of the Farr Trust, assigned many of the various leasehold interests to Antero.[3] App. at 758.

Mr. Ellis' deposition, which lasted from 9:25a until 4:45p and encompassed over 306 pages of testimony, included questions to which Antero's counsel asserted the attorney client privilege. App. at 4–6 (which briefly describes the 14 questions to which Mr. Ellis was directed to not

[3] Mr. Ellis has held various positions of responsibility at Antero since 2014, and he currently serves as Antero's Regional Vice President – Appalachia. App. at 763.

answer). While Antero acknowledges that at least some of the questions asked may have, upon further analysis, not implicated the attorney-client privilege, the Circuit Court also acknowledged that some of the questions to Mr. Ellis during his deposition included "questions that would have been barred by the attorney-client privilege." App at 10. In addition, at Mr. Ellis' deposition, counsel for Antero offered that Mr. Ellis could testify as to certain areas of inquiry if counsel for the Farr Trust would stipulate that such testimony would not constitute a waiver of attorney-client confidentiality—a reasonable solution given the numerous threats by counsel for the Farr Trust that he would argue waiver of the privilege if such testimony was given. App. at 826–27. Ultimately, however, the Circuit Court adopted verbatim the Discovery Commissioner's conclusion that it was not necessary to analyze each question or topic posed to Mr. Ellis during his deposition, and the Court instead decided that even if the attorney-client privilege or work product doctrine applied to certain questions, they were each abrogated by the crime-fraud exception. App. at 10.

III. SUMMARY OF THE ARGUMENT

The Circuit Court adopted the Discovery Commissioner's failure to conduct any analysis into the scope of the attorney-client privilege and the work-product doctrine as they apply to the questions asked of Mr. Ellis. The Circuit Court compounded this failure when it incorrectly concluded that the crime-fraud exception abrogates application of the attorney-client privilege and the work product doctrine in this matter as they apply to Mr. Ellis.

In analyzing the crime-fraud exception, the Circuit Court misapplied facts, improperly elevated an "inference" into an established "fact," and misstated applicable West Virginia law concerning fraud. In doing so, the Circuit Court abused its discretion and committed clear error.

Antero recognizes that "if a client seeks the aid of his attorney in the perpetration of a crime or to commit a fraud, his communications are not privileged, and the attorney may testify." See

Thomas v. Jones, 105 W. Va. 46, 141 S.E. 434, 437 (1928). The purpose of the exception is "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." State v. Beard, 194 W. Va. 740, 753, 461 S.E.2d 486, 499 (1995) (quoting United States v. Zolin, 491 U.S. 554, 563 (1989), and Clark v. United States, 289 U.S. 1, 15, (1933)) (internal quotations omitted). Importantly, however, the crime-fraud exception is a narrow exception to the attorney-client privilege and work-product doctrine. Kessel v. Leavitt, 204 W. Va. 95, 183, 511 S.E.2d 720, 808 (1998); State ex rel. Med. Assurance of W. Va. v. Recht, 213 W. Va. 457, 472, 583 S.E.2d 80, 95 (2003) (Davis, J., concurring) (noting that crime-fraud exception applies to nullify protections afforded by the work-product doctrine). The exception "operates to remove the privilege attaching to communications between a client and his or her counsel that were made in furtherance of a fraudulent or criminal scheme." State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 716, 601 S.E.2d 25, 36 (2004).

Critically, "when a party attempts to overcome the applicability of the privilege by employing the crime or fraud exception, the discovering party, and not the party asserting the privilege, bears the burden of establishing, by prima facie evidence, that a crime or fraud has tarnished the allegedly privileged communications thereby authorizing their disclosure." Kessel v. Leavitt, 204 W. Va. 95, 183, 511 S.E.2d 720, 808 (1998) (citing to 2A Michie's Jur. *Attorney and Client* § 34, at 618 (1993) ("To succeed, the [party seeking to overcome the privilege] must make a prima facie showing that the lawyer was consulted and employed for the purpose of facilitating or concealing an ongoing, or future, criminal or fraudulent scheme.")). As a result, before the Circuit Court deemed the attorney-client privilege to have been waived, the Farr Trust

had the burden to establish—with evidence and not mere allegations—that Mr. Ellis communicated with Antero for the purposes of advancing a fraudulent or criminal scheme.

Here, the Farr Trust failed to present actual evidence that Antero "participated in a fraudulent or criminal scheme." Rather, the Circuit Court determined that the Option Agreement signed by Mr. Sigley, both individually and as Trustee of the Farr Trust, by P.D. Farr, individually, and by Mr. Ellis on behalf of Antero, and the documents which reflect that Mr. Sigley began leasing certain Farr Trust leasehold interests to himself, which he then leased to Antero for an assignment payment and an override royalty payment, represent "the fraudulent scheme undertaken by" Mr. Sigley—not by Antero. App. at 6–7, ¶¶ 13-14. The Circuit Court then determined that "Antero's participation in the fraudulent conduct occurred when it began paying Clarence E. Sigley, Sr. personally, as opposed to paying him in his capacity as a trustee, without any verification that the lease from Clarence E. Sigley, Sr. as trustee to Clarence E. Sigley, Sr. as an individual was proper." App. at 8, ¶ 16. This determination ignored, however, that the Farr Trust Agreement provided Mr. Sigley with express authority to sign documents and take title to property in his own name. App. at 451–58. It also ignored, therefore, that Antero's payments under the Sigley-Farr Leases conformed exactly with the terms of those leases and were permissible under the Farr Trust Agreement, and if Mr. Sigley fraudulently transferred Farr Trust leasehold properties or assets to himself, that represented a fraudulent act of Mr. Sigley. In fact, per W. Va. Code § 44-5A-3(b) "the party dealing with the fiduciary is not under a duty to follow the proceeds or other consideration received by the fiduciary from the sale or exchange" of property of the trust. Notwithstanding this clearly erroneous determination, the Circuit Court nonetheless identified the payments made by Antero as "the fraudulent act . . . of Antero[.]" App. at 8, ¶ 17.

Even more remarkably, the Circuit Court admitted that the supposed "fact" that Antero committed a "fraudulent act" was actually an *inference*: "Defendant Antero's participation in the fraudulent scheme *can be inferred* by its inspection of property records[4] and its continued payment to Clarence E. Sigley, Sr., as an individual without taking any action to verify the propriety of the actions of Clarence E. Sigley, Sr." App. at 9, ¶ 21. The Circuit Court then magically converted this inference into a "finding" that "Defendant Antero consulted with Deponent Kevin Ellis in order to perpetuate a fraud[.]" App. at 9, ¶ 22. This magical conversion of an inference that lacks any evidentiary basis into a "finding" in support of invocation of the crime-fraud exception falls far short of the standard even the Circuit Court acknowledged it must be to apply: "In order to admit into evidence confidential communications between attorney and client under the exception to the general rule that if such communications were made in order to perpetuate a fraud on justice they are not privileged, *it must clearly appear that such communications were made by the client with that intent and purpose*." Thomas v. Jones, 105 W. Va. 46, 141 S.E. 434, Syl. Pt. 2 (1928) (emphasis added); see App. at 6, ¶ 11. Here, the Farr Trust presented absolutely no evidence that Antero communicated with Mr. Ellis with the "intent and purpose" to commit a fraud—and no such evidence appears in the Order.

In short, the Circuit Court's Order falls far short of reflecting the *prima facie* showing that the Farr Trust—not Antero—must prove for invocation of the crime-fraud exception. The Order fails to identify sufficient evidence that Antero participated in a fraud, made any misrepresentation to the Farr Trust or its beneficiaries, or consulted with Mr. Ellis "for the purpose of facilitating or concealing an ongoing, or future, fraudulent scheme." Kessel v. Leavitt, 204 W. Va. at 183, 511 S.E.2d 720 at 808, (1998) (citing 2A Michie's Jur. Attorney and Client § 34, at 618 (1993)). The

[4] The Order cites to no evidence that reflects Antero's "inspection of property records."

Circuit Court also abused its discretion when it failed to consider the Farr Trust Agreement, which explicitly gave Mr. Sigley the authority sign contracts and to "cause . . . property which may comprise the Trust Estate to be registered . . . in [Trustee's] name . . . ." App. at 453 (Fifth (a), (b), and (e)). As a result, this Court should reverse the Order and remand with instructions for the Circuit Court to conduct a proper and detailed analysis as to whether Antero properly objected on the basis of the attorney-client privilege to any of the questions of Mr. Ellis for which the privilege was invoked, following which the Circuit Court may conduct an *in camera* examination into whether any of the privileged testimony justifies application of the crime-fraud exception.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary under Rule 18(a) West Virginia Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of fundamental public importance concerning the proper scope and application of the crime-fraud exception to the protections offered under the attorney-client privilege and the work product doctrine under West Virginia law.

V. ARGUMENT

A. Standard for issuance of a Writ of Prohibition.

Under West Virginia Code § 53-1-1, 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.B. v. Carolyn M., 456 S.E.2d 16, 20 (W.Va. 1995).

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. . . . 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.

State ex rel. West Virginia Mutual Insurance Company v. Salango, 246 w. Va. 9, 866 S.E.2d 74, 78 (2021); State ex rel. West Virginia University Hospitals, Inc. v. Scott, 246 W. Va. 184, 866 S.E.2d 350, 356 (2021).

B. Antero is Entitled to a Writ of Prohibition Under the Applicable West Virginia Law.

An examination of the factors for issuance of a writ of prohibition shows that Antero is entitled to issuance of the writ.

1. Antero has no other adequate means to obtain its desired relief, and it will be irreparably harmed if the trial goes forward.

Antero filed this Petition because no other avenue exists to protect information subject to the attorney-client and work product privilege from being disclosed in this matter. While the Order adopted the Discovery Commissioner's conclusion that "[a]ll questions related to the admissibility of any evidence will be addressed by this Court, either before or during trial in this case[,]" this gesture is meaningless. App. at 11, ¶ 27.

Specifically, the damage caused by abrogation of the attorney-client privilege and work product doctrine will have already occurred if Mr. Ellis is further deposed as he would be required to divulge information otherwise protected from disclosure. Likewise, the damage is done if Antero is required to produce documents protected by either the attorney client privilege or the work product doctrine. As this Court noted in State ex rel. U.S. Fid. & Guar. Co. v. Canady, 194 W. Va. 431, 437, 460 S.E.2d 677, 683, n.8 (1995), if a party is compelled to disclose information

that is "protected by either the attorney-client privilege and/or the work product doctrine, the damage will occur upon disclosure, and a later appeal would be uneventful. In the area of communication privileges, 'once the cat is out of the bag, it cannot be put back in.'"[5]

The irreparable harm is two-fold. First, once privileged information is disclosed, it cannot be undisclosed. Canady, 194 W. Va. at 437, 460 S.E.2d at 683, n.8. Second, any waiver of the attorney-client privilege may represent the waiver of *all* privileged communications "related to the same subject matter." State ex rel. McCormick v. Zakaib, 189 W. Va. 258, 261, 430 S.E.2d 316, 319 (1993) ("Ordinarily, when the attorney-client privilege is waived with respect to a particular document, it is also waived for all other communications relating to the same subject matter."). Here, Mr. Ellis's deposition took place against the backdrop of repeated warnings from the Farr Trust's counsel that, in his view, any testimony that touched upon an attorney-client communication would constitute a complete waiver of the privilege with respect to the subject matter of the Farr Trust's claims in this civil action.

In short, Antero has no other way to protect its right to withhold the disclosure of information subject to the attorney-client privilege and work product doctrine as a result of the Order than through a petition for writ of prohibition. Likewise, damage to Antero as a result of the Order—especially given that the Circuit Court conducted no analysis of whether any of the questions posed to Mr. Ellis were protected by the privilege—is both significant and irreparable, especially if the waiver extends to all privileged communications between Mr. Ellis and Antero

[5] For this reason, Antero filed a Motion for Stay Pending Final Disposition of Petition for Writ of Prohibition on May 6, 2022, that requests the Circuit Court to stay all proceedings, including the continued deposition of Mr. Ellis, until final resolution of Antero's Petition by this Court.

and between Antero and any of its counsel retained in this matter.[6] The first two elements to support the issuance of a writ of prohibition, therefore, have been met.

2. The Circuit Court's order is clearly erroneous as a matter of law.

The Order fundamentally misapplies the test under West Virginia law as to whether the crime-fraud exception abrogates the attorney-client privilege and work product doctrine under the circumstances in this case. In doing so, the Order misconstrues the application and scope of the crime-fraud exception by making clearly erroneous findings and conclusions of law.

a. At least some of the questions asked of Mr. Ellis sought information subject to the attorney client and/or work product privilege.

As noted above, neither the Discovery Commissioner nor the Circuit Court conducted any analysis into whether any of the questions asked of Mr. Ellis sought information subject to the attorney-client privilege or the work product privilege. Instead, the Circuit Court "assumed" that at least some of the questions "could, at least arguably, be protected from disclosure by the attorney client privilege." App. at 4, ¶ 8.

The failure to conduct this analysis ignores that Mr. Ellis has an attorney-client relationship with Antero, that he was asked to offer testimony on the advice he provided to Antero in his capacity as a legal advisor, and that the communications between Mr. Ellis and Antero regarding legal advice sought or given was intended to be confidential and privileged. Likewise, it ignores that the Farr Trust seeks both Mr. Ellis's factual work product (i.e., documents he may have sent or received regarding the payments that are in dispute) and opinion work product, (i.e., his mental

[6] Extension of the waiver to all communications between Antero and its counsel in this matter is not a specious fear. This Court has refused to adopt a "*per se* rule that attorneys for clients under investigation cannot be subpoenaed unless the prosecutor makes a showing of compelling need and circumstances." State ex rel. Doe v. Troisi, 194 W. Va. 28, 36, 459 S.E.2d 139, 147 (1995). The Order's conclusion that Antero "participat[ed] in the fraudulent conduct" (App. at 8, ¶16) such that all right to claim the attorney-client privilege or the work product doctrine is waived per the crime-fraud exception absolutely puts all communications with and documents from Antero's counsel in jeopardy of being subject to a request for production.

impressions, conclusions, opinions, or legal analyses, which is supposed to enjoy "nearly absolute immunity."). See State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 218 W. Va. 593, 599, 625 S.E.2d 355, 361 (2005) (Davis, J., concurring) ("Opinion work product consists of mental impressions, conclusions, opinions or legal theories that are contained in factual work product . . . . Opinion work product enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances.").

Antero obviously cannot ask this Court to review whether the Circuit Court properly determined whether any particular question raises attorney-client or work product concerns because the Circuit Court did not conduct this analysis. This failure, however, exacerbates the Order's shortcomings because application of the crime-fraud exception necessarily involves a review of the communications subject to the privilege.

b. The parameters of the crime-fraud exception.

Antero acknowledges that, under the crime-fraud exception, "if a client seeks the aid of his attorney in the perpetration of a crime or to commit a fraud, his communications are not privileged, and the attorney may testify." See Thomas v. Jones, 105 W. Va. 46, 141 S.E. 434, 437 (1928) (analyzing exception in personal injury negligence case). The exception exists "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." State v. Beard, 194 W. Va. 740, 753, 461 S.E.2d 486, 499 (1995) (quoting United States v. Zolin, 491 U.S. 554, 563 (1989), and Clark v. United States, 289 U.S. 1, 15, (1933)) (internal quotations omitted).

For the crime-fraud exception to apply to otherwise privileged communications, it must clearly appear that the communications with the attorney were made in a deliberate effort to commit the crime, fraud, or tort. Thomas, 105 W. Va. 46, 141 S.E. at 437–38 (finding insufficient

showing of intent to commit fraud and holding that communications between plaintiff and his attorneys about negligence of defendants was privileged).

The crime-fraud exception represents a narrow exception to the attorney-client privilege and work-product doctrine. Kessel v. Leavitt, 204 W. Va. 95, 183, 511 S.E.2d 720, 808 (1998). "Once the attorney-client privilege . . . has been found to apply to insulate communications from discovery, the protections afforded thereby nevertheless may be overcome through application of the crime-fraud exception." Madden, 215 W. Va. at 716, 601 S.E.2d at 36. "In short, the crime-fraud exception operates to remove the privilege attaching to communications between a client and his or her counsel *that were made in furtherance of a fraudulent or criminal scheme*." Madden, 215 W. Va. at 716, 601 S.E.2d at 36 (emphasis added). See also State ex rel. Med. Assurance of W. Va. v. Recht, 213 W. Va. 457, 472, 583 S.E.2d 80, 95 (2003) (Davis, J., concurring) (recognizing that courts have applied the crime-fraud exception to obviate the protections against discovery under the work-product doctrine). Only communications in furtherance of the commission of a future crime, fraud, or tort, therefore, are subject to the exception.

c. The Order fails to provide a factual basis that Antero participated in fraudulent conduct, that Antero participated in fraud, or that Antero committed a material and false act on which the Farr Trust justifiably relied; hence, the Circuit Court abused its discretion in applying the crime-fraud exception against Antero.

Under West Virginia law, "[t]he 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 on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Horton v. Tyree, 104 W. Va. 238, 242, 139 S.E. 737 (1927); Lengyel v. Lint, 167 W. Va. 272, 280 S.E.2d 66, Syl. Pt. 1 (1981); Kidd v. Mull,

215 W. Va. 151, 595 S.E.2d 308, Syl. Pt. 5 (2004); Sneberger v. Morrison, 235 W. Va. 654, 776 S.E.2d 156, Syl. Pt. 8 (2015). While the Circuit Court recognized the application of this black-letter West Virginia law (App. at 8, ¶ 15), it failed to cite to any evidence that Antero or Mr. Ellis engaged in a fraud or that Antero communicated with Mr. Ellis for purposes of advancing a fraudulent scheme; therefore, it incorrectly concluded that Antero participated in a fraudulent scheme and communicated with Mr. Ellis with the intent to perpetuate the fraud.

i. The Order fails to provide a factual basis to support a finding that Antero participated in fraudulent conduct.

The first element of fraud requires "that the act claimed to be fraudulent was the act of the defendant or induced by him." Horton, 104 W. Va. at 242, 139 S.E. at 738; Lengyel, 167 W. Va. 272, 280 S.E.2d 66, Syl. Pt. 1; Kidd, 215 W. Va. 151, 595 S.E.2d 308, Syl. Pt. 1; Sneberger, 235 W. Va. 654, 776 S.E.2d 156, Syl. Pt. 8. The Circuit Court incorrectly concluded that the Farr Trust established this element of fraud because Antero allegedly participated in fraudulent conduct when it "began paying Clarence E. Sigley, Sr. personally, as opposed to paying him in his capacity as a trustee, without any verification that the lease from Clarence E. Sigley, Sr. as trustee to Clarence E. Sigley, Sr. as an individual was proper." App. at 8, ¶ 16.

The Order, however, completely fails to cite to any evidence to support the conclusion that Antero had a duty to verify the propriety of the trustee's actions and failed to satisfy any such duty, and in fact, West Virginia law does not even support the conclusion that such a duty exists. See W. Va. Code § 44-5A-3(b) ("the party dealing with the fiduciary is not under a duty to follow the proceeds or other consideration received by the fiduciary from the sale or exchange" of property of the trust). During Mr. Ellis's deposition, counsel for the Farr Trust asked whether Antero had verified the propriety of the leases and whether Mr. Ellis thought the leases might not be proper. See App. at 5, ¶¶ 9(c), (i). This question strikes at the heart of the attorney-client privilege and

work-product doctrine because the propriety of the leases represents a legal opinion. As counsel to Antero, Mr. Ellis' opinions on the legal question of the propriety of leases are protected by the work-product doctrine, and whether he communicated any of his opinions to his client, Antero, and the substance of any such communications, are protected by the attorney-client privilege.

Antero's counsel properly objected to these questions, and Mr. Ellis did not testify on that subject. The Discovery Commissioner or the Circuit Court could have conducted an *in camera* proceeding to ascertain Mr. Ellis' testimony about what efforts he made to verify the propriety of the leases, but neither chose to conduct such a review. See Madden, 215 W. Va. 705, 601 S.E.2d 25, Syl. Pt. 11 (holding that, "[i]f the party seeking testimony for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery"). Instead, these questions remain unanswered on the record, and they remained unanswered to the Circuit Court because it failed to conduct an *in camera* proceeding. As a result, without this evidence, the Circuit Court abused its discretion in concluding that Antero participated in fraudulent conduct because the Order cited to no other evidence that Antero had a duty to verify the property of Mr. Sigley's actions and failed to meet that duty. The lack of evidence of an event cannot possibly represent the evidence that the event happened, yet that is exactly what the Circuit Court did in its Order.

Notably, the Farr Trust does not allege that Antero made any false representations with the intent to induce the reliance of the Farr Trust or any of its beneficiaries, and it does not allege that either the Farr Trust or the beneficiaries relied upon such false representations to their detriment. Instead, the Farr Trust's theory is that Antero improperly paid royalties to Mr. Sigley that should

have been paid to the Farr Trust. Whatever cause of action this may support, it does not constitute "fraud."

There can be no actual fraud here, which is defined under West Virginia law as anything falsely and intentionally done or said to induce another to part with property or to surrender some legal right. Stanley v. Sewell Coal Co., 169 W. Va. 72, 76, 285 S.E.2d 679, 683 (1981); see also Steele v. Steele, 295 F. Supp. 1266, 1269 (S.D. W. Va. 1969) ("Actual fraud, as defined by the West Virginia courts consists of 'deception, intentionally practiced, to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.'") (quoting Miller v. Huntington & Ohio Bridge Co., 123 W. Va. 320, 15 S.E.2d 687 (1941)). The Farr Trust Agreement explicitly gave Mr. Sigley the right to execute documents and to hold Farr Trust property in his own name. App. at 453 (Fifth (a), (b), and e). This uncontested fact eliminates the basis of support for any finding of an inference of fraud by Antero in this case. Antero, by paying royalties, did not falsely and intentionally do or say anything to induce the Farr Trust, its beneficiaries, or any other party to part with property or surrender some legal right. Antero, therefore, cannot be deemed to have engaged in actual fraud.

Likewise, there can be no constructive fraud here, which is defined as "a breach of legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence." Steele, 295 F. Supp. at 1269 (internal quotations omitted). Here, Antero owes no fiduciary duty to the Farr Trust, which is Antero's contractual adversary. See Cather v. Seneca-Upshur Petroleum, Inc., No. 1:09-CV-139, 2010 WL 3271965, at *5 (N.D. W. Va. Aug. 18, 2010); Leggett v. EQT Prod. Co., No. 1:13-CV-4, 2015 WL 1212342, at *3 (N.D. W. Va. Mar. 17, 2015); see also 38 Am. Jur. 2d Gas and Oil § 55 (2020) ("Mineral leases generally do not create a fiduciary relationship between the

lessor and lessee; rather, the relationship is purely contractual in nature." (footnotes omitted)). Likewise, Antero does not owe a fiduciary duty to the beneficiaries of the Farr Trust. Brozik v. Parmer, No. 16-0238, 2017 WL 65475 (W. Va. Jan. 6, 2017) (bank had no duty to borrower that could support a breach of fiduciary duty claim arising out of transaction in which borrower obtained loan to purchase debt owed by borrower's nephew's business; bank acted as nothing more than a lender); Peters v. Peters, 191 W. Va. 56, 443 S.E.2d 213 (1994) (bank owes no fiduciary duty to holders of depository accounts). The reason is simple—both the Farr Trust and the beneficiaries represent contract adversaries of Antero. Antero, therefore, cannot be deemed to have engaged in constructive fraud.

In short, Antero owed the Farr Trust no obligation to independently investigate the propriety of Mr. Sigley's actions as Trustee. By the plain language of the Farr Trust Agreement, Mr. Sigley was authorized to exercise his "unfettered business judgment" in purchasing or selling property for the benefit of the Farr Trust. App. at 453 (Fifth (a)). The Farr Trust Agreement also specifically permitted Mr. Sigley to hold Trust property in his own name without disclosing the Farr Trust. App. at 453, (Fifth (e)). All of the leasehold agreements obtained by Antero from P.D. Farr, individually, and Mr. Sigley, both as Trustee and individually, represented public documents recorded in the appropriate county real property records, and they were all signed by P.D. Farr, a beneficiary of the Farr Trust. These uncontested facts simply do not reflect, or even infer, an actual or constructive fraud.

Antero was thus entitled "to presume that [Mr. Sigley would] apply the funds to their proper purposes" without further inquiry or investigation. See Lerner v. Fleet Bank, N.A., 459 F.3d 273, 287 (2d Cir. 2006). Here, the Circuit Court abused its discretion when it concluded that Antero

participated in fraudulent conduct because that conclusion is not supported either by the evidentiary record by West Virginia law, and this Court should reverse that conclusion.

ii. The Order fails to provide a sufficient factual basis that Antero committed a material and false act upon which the Farr Trust was justified in relying.

The second element of fraud requires (a) that the act claimed to be fraudulent was material and false, (b) that plaintiff relied upon it, and (c) that the reliance was justified. Horton, 104 W. Va. at 242, 139 S.E. at 738; Lengyel, 167 W. Va. 272, 280 S.E.2d 66, Syl. pt. 1; Kidd, 215 W. Va. 151, 595 S.E.2d 308, Syl. pt. 1; Sneberger, 235 W. Va. 654, 776 12 S.E.2d 156, Syl. pt. 8. The Circuit Court concluded that the second element of fraud was satisfied because the amount of payments made by Antero to Mr. Sigley was material, the payments were "false" because they were "predicated upon a lease which would reasonably raise a question as to its validity," and the Farr Trust "reasonably relied upon Defendant Antero paying the correct persons." App. at 8, ¶ 17. In reaching this conclusion, however, the Circuit Court committed a number of clear errors.

First, the Circuit Court misapplied the materiality requirement, which pertains to the nature of the misrepresentation—not to the alleged damages of the action. See Restatement (3d) Torts: Liability for Economic Harm § 9 Fraud, cmt. d (2020) ("Liability for fraud attaches only to misrepresentations that are material. A misrepresentation is material if a reasonable person would give significant weight to it in deciding whether to enter into the relevant transaction, or if the defendant knew that the plaintiff would give it such weight (whether reasonably or not). The question, in effect, is whether the defendant knew or should have known that the misrepresentation would matter to the plaintiff."). The accurate payment of royalties by Antero under the terms of a lease cannot be a misrepresentation for the purposes of fraud. Moreover, even if it is, materiality

is not dictated by the sum of money paid, and the Circuit Court misapplied the materiality provision when it concluded that the amount of the payments to Mr. Sigley established materiality.

Likewise, the Circuit Court's conclusion that the Farr Trust "reasonably relied upon Defendant Antero paying the correct persons" is simply not supported by any facts in the record. App. at 8, ¶ 17. Moreover, even if such reliance existed, there is no indication that the Farr Trust or its beneficiaries acted or changed their position in any way based upon such reliance. Instead, the Farr Trust beneficiaries relied upon Mr. Sigley—not Antero—to look after the interests of the Farr Trust. App. at 376 (testifying that she "trusted Mr. Sigley"); App. at 383 (testifying that he felt no need to consult with an attorney before executing ratifications because "Mr. Sigley was doing business for the trust and he was trusted"); App. at 390–92 (testifying that, even if he had known at the time that Mr. Sigley was leasing Trust property to himself individually, he would not have objected because he trusted Mr. Sigley); App. at 1201–1202 (testifying that he did not question "anything" Mr. Sigley did because he trusted Mr. Sigley)). In fact, the record reflects that P.D. Farr and William Farr worked at Empire and were familiar with the oil and gas industry, including information about wells, leases, and royalty payments, yet never raised any concern over payments made directly to Mr. Sigley on the Sigley-Farr Leases in the 8 years between the first assignment of a Sigley-Farr Lease to Antero and Mr. Sigley's death in 2020. As discussed above, given the language in the Farr Trust Agreement, and given that Antero did not owe a fiduciary duty to the Farr Trust (see W. Va. Code § 44-5A-3(b)), the beneficiaries' reliance on Antero to independently verify that Mr. Sigley acted within the scope of his powers under the Farr Trust Agreement is not justified—if any such reliance even existed.

The Circuit Court's analysis, as reflected in the Order, transforms every breach of contract case into a fraud case—with the attorney-client privilege and work-product doctrine automatically

waived—despite the absence of any evidence of fraud. Under the Circuit Court's rationale, each party to a contract is entitled to assume that any payments made will be done in accordance with the contract's terms, and if one party fails to make those payments, a fraud has been committed, and that party's attorney would be subject to interrogation regarding whether he or she was aware of the terms of the contract, did he or she believe those terms to be legally valid, did he or she offer advice to the contracting party as to their payment obligations, and what reasons does he or she have to give regarding why payments were made in one way or the other. This represents an unsound analysis that overreaches in its conclusion.

Therefore, the Circuit Court abused its discretion in concluding that a fraud occurred, that Antero made a knowing misrepresentation or concealment of a material fact, and that the Farr Trust or its beneficiaries justifiably relied upon to their detriment on any alleged act or representation of Antero.

iii. The Order fails to provide a sufficient factual basis that Antero consulted with Mr. Ellis in furtherance of a fraudulent scheme.

The Circuit Court somehow concluded that Antero consulted with Mr. Ellis in furtherance of a "fraudulent scheme." App. at 9, ¶ 21. In support of this conclusion, the Circuit Court stated that "Antero's participation in a fraudulent scheme can be inferred" by its sophistication as to oil and gas property rights, an "unmistakable paper trail" (the contents of which the Circuit Court did not identify), and payments to Mr. Sigley. App. at 9, ¶ 21. The Circuit Court failed to explain, however, how the inference that Antero participated in a fraudulent scheme led to another attenuated inference that Antero consulted with Mr. Ellis in furtherance of such a fraudulent scheme.

Critically, the Order ignores that, before a court can deem the attorney-client privilege to have been waived, it must be presented with evidence, not mere allegations, that the attorney communicated with his or her client for the purposes of advancing a fraudulent or criminal scheme. Troisi, 215 W. Va. At 716, 601 S.E.2d at 36. Here, the Order cites to no evidence presented by the Farr Trust that established a *prima facie* showing that Antero communicated with Mr. Ellis for purposes of advancing a fraudulent scheme.

The Circuit Court fails to consistently identify the purported fraud that supposedly overcomes the attorney-client privilege. For example, Paragraphs 16 through 18 of the Order concluded that Antero paid royalties "without any verification that the lease . . . was proper." App. at 8, ¶¶ 16–18. In Paragraph 21 of the Order, however, the Circuit Court found that there was a "fraudulent scheme" to obtain "valuable gas leases." App. at 9, ¶ 21. The propositions that (1) Antero did not verify the leases' propriety and that (2) an "unmistakable paper trail" exists are mutually exclusive; both cannot be true. In other words, it cannot be the case that a "sophisticated" party's inspection of an "unmistakable paper trail" gives rise to a "fraudulent scheme" that is based upon a failure to verify the propriety of such an "unmistakable paper trail."

Even if this Court accepts the far-fetched inference that Antero participated in a fraudulent scheme, the Circuit Court provided no explanation for the inferential leap that Antero consulted with Mr. Ellis, its in-house counsel, in furtherance of such a scheme. As detailed above, Mr. Ellis did not answer whether he evaluated or formed an opinion as to the propriety of the leases based upon a proper interjection of the attorney-client privilege, and the Circuit Court failed to conduct an *in camera* proceeding to determine what Mr. Ellis's testimony would have been.

Finally, and perhaps most importantly for purposes of this Petition, the Farr Trust does not contend, and the Order contains no factually supported conclusion, that Mr. Ellis participated in

the communication of any fraudulent representations to the Farr Trust or any of its beneficiaries, or otherwise acted in furtherance of Antero's "fraud." As a result, no factual basis exists for the Circuit Court's conclusion, based on an inference, that Antero consulted with Mr. Ellis in furtherance of any "fraudulent scheme." The practical effect of the Order is that the *mere allegation of fraud* results in the complete abrogation of the attorney-client privilege of the party accused of fraud, which is absurd.

In short, the Circuit Court abused its discretion by transforming an "inference" into a conclusion that Antero participated in a fraudulent scheme, and then further abused its discretion by concluding that Antero consulted with Mr. Ellis in furtherance of such a fraudulent scheme.

3. The Circuit Court's Order raises important issues of law as to the proper scope and application of the crime-fraud exception to invocation of the attorney-client and work product privilege in civil lawsuits.

Finally, the Order raises important considerations as to the scope and application of the crime-fraud exception upon the invocation of the attorney-client and work product privilege in civil lawsuits. As noted above, the Circuit Court's failure to properly ensure that an evidentiary record exists to support application of the crime-fraud exception means that the mere allegation of fraud would obliterate the attorney-client privilege and work product doctrine. This is not, and cannot be, the law in West Virginia.

Likewise, the Order relies upon inferences unsupported by evidence to reach legal and factual conclusions that go well beyond the matters relevant to application of the crime-fraud exception. For example, the Circuit Court concluded that Mr. Sigley "impermissibly collected funds that properly belonged to the beneficiaries of the Farr Trust." App. at 2, ¶ 2. Whether Mr. Sigley's conduct was permissible or proper is beyond the scope of the Farr Trust's Motion to Compel and essentially grants judgment to the Farr Trust for its claims against Mr. Sigley's Estate.

These conclusions reflect overreach by the Circuit Court that help illustrate the extent to which the Circuit Court abused its discretion in the Order.

VI. CONCLUSION

The Circuit Court's Order represents a broad and dangerous expansion of the crime-fraud exception that is the result of clearly erroneous findings of fact that are not supported by the evidentiary record and conclusions of law that misapply applicable law. There is simply no evidence to suggest that Antero participated in fraudulent conduct, committed a material or false act on which the Farr Trust justifiably relied, or consulted with Kevin Ellis in furtherance of a fraudulent scheme. Rather, West Virginia law, applied to the uncontested facts in the record, clearly reflect that Antero entered into arms-length negotiations that resulted in lease assignments for which Antero has paid all monies due. Under West Virginia law, Antero did not owe any duty to either the Farr Trust or its beneficiaries, against whom Antero was a contract adversary. Even so, under both West Virginia law and the terms of the Farr Trust Agreement, Mr. Sigley was permitted to hold Farr Trust assets in his name, individually. If the Farr Trust contends that Mr. Sigley did something with Farr Trust assets contrary to his duties as Trustee, that is between the Farr Trust and the Estate of Mr. Sigley. As to Antero, however, the facts and the law demonstrate that it did not engage in a fraud, and therefore could not possibly have consulted with Mr. Ellis, its attorney, in furtherance of a fraud. Without this unpinning, therefore, the Circuit Court abused its discretion in determining that the crime-fraud exception abrogated the attorney-client privilege and work product doctrine as it applies to Antero in this matter.

Antero, therefore, asks that this Court (1) reverse the Order and (2) require the Circuit Court to (a) conduct a question-by-question analysis of the application of the attorney-client privilege to questions posed to Mr. Ellis; (b) hold an *in camera* hearing to determine whether any

of the privileged testimony supports a correct application of the crime-fraud exception; and (c) identify specific evidence that it relies upon to support application of the crime-fraud exception.

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VERIFICATION

Per West Virginia Code § 53-1-3

I, the undersigned counsel for the Petitioners, hereby certify that the facts and allegations contained in the **Petition for Writ of Prohibition** and **Appendix** are true and correct to the best of my belief and knowledge.

Dated: May 20, 2022

Mychal S. Schulz (WVSB #6092)

CERTIFICATE OF SERVICE

I, Mychal Sommer Schulz, counsel for the Petitioners, hereby certify that I served a true copy of the foregoing **Petition for Writ of Prohibition** and **Appendix** upon the following individuals, on this 20th day of May, 2022.

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