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 Virginia, and DAVID F. NELSON, SR.

Respondents,

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

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

DAVID F. NELSON, SR.
By Counsel

Paul M. Stroebel (W.Va. Bar N. 5758)
Stroebel & Johnson, PLLC
P.O. Box 2582
Charleston, WV 25329
(304) 346-0197
paulstroeb@aol.com

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Cases:

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Question Presented

Should a Writ of Prohibition and "Rule to Show Cause" issue when the Circuit Court of Kanawha County entered orders granting in part and denying the Defendant Petitioner's Motion to Compel the production documents, including a confidential settlement agreement involving the Plaintiff and a former defendant that was the work product of the settling parties' counsel, settlement communications between the settling parties' counsel, and communications between Plaintiff and his counsel, when the Court conducted an *in camera* review of the settlement document and found that all terms relevant had been provided to Petitioner, found that the non-relevant and specifically confidential terms clearly were the result of attorney work product and settlement negotiations between counsel, found that Petitioner had other discovery mechanisms available, and found that the sought after communications between Plaintiff and his counsel were protected by attorney client privilege.

Statement of the Case[1]

Although Petitioner's Statement of the Case outlines some of the factual circumstances of the present dispute, some assertions demand correction and other aspects are a clear effort to

[1] Respondent would be remiss if he did not point out to this Court that there is substantial circumstantial evidence that this Writ of Prohibition was not brought because of any legitimate belief that the Circuit Court committed a clear error that would amount to an injustice, but rather as procedural device to obtain a third continuance of the trial date in order to delay payment on a clearly owed debt. Plainly, the timing of this Writ is suspect. The Circuit Court announced her ruling on the relevant portions of Petitioner's Motion to Compel in open court on April 8, 2019, and then entered the submitted order on May 9, 2019. At the same hearing the Court entered an Amended Scheduling Order providing a deadline for any remaining discovery, the filing of dispositive motions and other pretrial motions by July 22, 2019, the filing of pretrial motions by August 12, 2019, a Pretrial Conference on August 22, 2019, and a trial date of October 7, 2019. Petitioner did not seek relief from this Court until August 7, 2019, essentially on the eve of the Pretrial Conference. For this reason, the Circuit Court denied Petitioner's Motion to Stay at the Circuit Court level. *See* Exhibit A – proposed Order submitted by Petitioner's counsel on August 16, 2019.

muddy Plaintiff's straight forward claims against him. Plaintiff and Respondent were two of the three former equity members of a law firm (Francis, Nelson & Brison, PLLC, hereinafter referred to as "FNB") acquired by Allen, Kopet & Associates, PLLC, (subsequently renamed Allen & Newman, PLLC, hereinafter referred to as "A/K") in 2010. (T.R. 18-20). Under the terms of the acquisition agreement, *inter alia,* A/K acquired all of FNB's assets, including accounts receivable, work in progress, office equipment, goodwill, and many of its liabilities, including property and equipment leases, and the obligation to retire a commercial line of credit and a commercial loan, which combined debt was approximately $435,000.00. A/K also agreed to pay the three FNB equity members increased salaries, provided guaranteed benefits, bonus eligibility, and other enhanced benefits. (T.R. 1-5).

Because of tax consequences associated with the debt retirement, the agreement also allowed the FNB equity members to receive $150,000.00 of the future collected work in progress to offset their tax exposure. In consideration of this, the equity members, who were identified as "Managing Attorneys" in the new A/K Charleston office, agreed to the payment of a penalty to A/K in the event that they did not remain with the firm for a full five (5) years after the acquisition. The penalty would be due and owing within six (6) months of departure. (T.R. 1-5). Both Plaintiff and Respondent resigned from A/K in 2013 after completing three years with the new firm, with Brison departing in July and Nelson in November. At that time, the departure penalty for each attorney equaled $50,000.00. (T.R. 21). At the time of their departure, all three FNB equity members remained as guarantors on the balance of the remaining commercial note, on which A/K had been making payments. Additionally, Nelson believed that he had a valid wage and hour claim against A/K for more than $23,000.00 based on its withholding of family

health insurance premiums from his salary from 2011 through 2013 in violation of the agreement. (T.R. 14).

A/K notified Brison that his penalty was due in January of 2014, but Brison did not respond. (T.R. 11, 26). Nelson, concerned that A/K would use Brison's inaction as justification to cease payments on the commercial note, demanded that A/K retire the entire commercial note so that he would not be responsible for Brison's breach. (T.R. 11, 28-29). At that time A/K advised it would continue to make payments on the commercial note until the principal balance equaled $100,000.00, which was the gross penalty amount for the two departing FNB equity members under the agreement. (T.R. 11). In early 2016, as the commercial loan balance was approximately $105,000.00, A/K followed through on its promise and notified the FNB members that it was making a partial payment and would make no further payments on the note. (T.R. 12-13). As guarantors on the note, the former FNB equity members remained jointly and severally liable for the balance and would be subject to costs and penalties associated with a default. With Petitioner Brison unwilling and the other member unable to refinance the note, Nelson was compelled to make one loan payment and then subsequently retired the remaining approximately $103,000.00 of the note himself to avoid the costly prospect of default.[2] (T.R. 13).

Plaintiff then filed this lawsuit in the Circuit Court of Kanawha County, initially against A/K for breach of contract regarding its cessation of payments under the note, against A/K for

[2] Petitioner explained his situation in his deposition: "..So you asked about when the issue became an issue? It became an issue as far as I was concerned in January of 2016 when the note was defaulting. I was a guarantor on the note along with Andy and Ford, and Andy had a 50,000-dollar stake in that obligation. I had a $50,000-dollar stake in that obligation, and the only option I had was either to pay the note or be sued by Fifth Third Bank and face attorneys' fees, litigation costs, et cetera. I was the only one with any assets. Andy had made it very clear that his home and his assets were in his wife's name only. And who would they come after? They were going to come after me. I paid it off because they would have come after me. So to answer your question, I had a fiduciary duty to Ford and Andy that they not be responsible for my debt, which I met. Andy had a fiduciary responsibility to me and to Ford, which he did not. Ford suffered no damage. I did." (T.R. at 68).

wage and hour violations, and against Petitioner Brison for his failure to pay his penalty obligation to Nelson's detriment. (T.R. 6-15). Before A/K filed a responsive pleading, Plaintiff's counsel was able to negotiate a settlement with A/K of his wage and hour and contract claims, which agreement provided, *inter alia*, that A/K would pay Plaintiff $60,000.00[3] and assigned A/K's contractual rights against Petitioner Brison to Plaintiff. Plaintiff then filed an Amended Complaint that updated his claims against Respondent to include the A/K-assigned claim in addition to counts of breach of fiduciary duty and unjust enrichment. (T.R. 18-25). Plaintiff's payment of the commercial note and Petitioner's refusal to reimburse are not disputed. Now, although Petitioner has been provided with a copy of the A/K claim assignment and the precise amount of the settlement, Petitioner claims that he is unable to defend Plaintiff's claims unless he is also provided with the actual settlement agreement.

Petitioner had initially filed a Motion to Compel concerning multiple discovery objections raised by Plaintiff. Ultimately, some materials were provided by agreement and others were provided after the Circuit Court initially granted Petitioner's Motion to Compel, in part, and set the matter for a hearing on April 8, 2019 (T.R. at 74-77). At the April 8, 2019, hearing the Circuit Court made specific inquiries and considered the further oral arguments of counsel regarding the remaining subjects of the dispute: privileged communications between Petitioner and his counsel, settlement communications between Petitioner's counsel and counsel for A/K, and the actual settlement agreement, which had been provided to the Court. (T.R.80-130). Following a lengthy and contentious hearing, the Court announced her holdings and asked counsel to prepare a proposed order.

[3] Plaintiff's wage and hour claim included the potential for treble damages and the award of attorneys' fees, with an exposure of well over $100,000.00.

Following the hearing, the Circuit Court entered its order on the matter, which order specifically held:

***

4. Regarding the claims of attorney-client privilege, the Court finds that Plaintiff has plainly satisfied the requirements under West Virginia law regarding any and all documents relating to communications or deliberations between them Plaintiff and his counsel, which Defendant's broadly worded discovery request would appear to encompass. See State ex rel. United Hosp. Ctr., Inc. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997).

5. The primary controversy appears to center on documents that Plaintiff claims are protected solely by attorney-work product privilege, which include the Release and Settlement Agreement signed between the parties, which was negotiated as a confidential document, and communications between Plaintiff's counsel and A/N's counsel. West Virginia jurisprudence provides clear guidance on this topic. This doctrine "historically protects against disclosure of the fruits of an attorney's labor [and] is necessary to prevent one attorney from invading the files of another attorney." State ex rel. USF & G v. Canady, 194 W.Va. 431, at 444, 460 S.E.2d 677, at 690 (1995). Under the work product rule, "an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation[.]" In re Doe, 662 F.2d 1073, 1077 (4th Cir.1981), modification on other grounds recognized by In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir.1994).

6. The rule governing work product is found in W.Va.R.Civ.P. 26(b)(3), which states, in pertinent part:

> *Trial preparation: materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*

7. Rule 26(b)(3) defines work product as "documents and tangible things . prepared in anticipation of litigation or for trial[.]" According to Syllabus Point 8, in

part, of In re Markle, 174 W.Va. 550, 328 S.E.2d 157 (1984), "[t]he limitation in Rule 26(b)(3) of the West Virginia Rules of Civil Procedure is against obtaining documents and other tangible things used in trial preparation." The West Virginia Supreme Court also has also 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 7, State ex rel. United Hosp. v. Bedell, 199 W.Va. 316, 484 S.E.2d 199 (1997).

8. "Fact work product is discoverable only 'upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.'" Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir.1999), quoting In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir.1994).

9. In this matter the Court has been provided with a copy of the settlement agreement between Plaintiff and A/N. Upon review of the same it is clear that the contents therein represent the product of attorneys for both parties 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. ***The document itself does not contain any discussion or representation regarding any specific facts integral or relevant to the claims between Nelson & Brison. The only exception to the foregoing is that the agreement obviously references the exchange of consideration that may be relevant, including monetary consideration and a contractual claims assignment, both of which have been disclosed to Defendant.***

10. While the Court has not reviewed any documents reflecting settlement discussions or communications between Plaintiff and A/N, it would seem obvious and apparent that those discussions likewise contain issues involving or resulting from attorney work product. Importantly, Defendant has failed to articulate any substantial need for such information in preparing and formulating his defense regarding the matters in this case. The principal argument raised is that Defendant may have a right to an offset Nelson's recovery from A/K from any judgment obtained against Brison. This contention ignores the fact that Nelson had brought both breach of contract and Wage Payment and Collection Act claims against A/K, which were separate and distinct from his claims against Brison regarding the departure penalty and commercial loan.

11. This Court also bears in mind that Defendant was afforded an opportunity to depose Plaintiff, during which time he could have freely questioned him about the settlement and its terms had he desired. Accordingly, there were other avenues available for Defendant to obtain any facts if he believed them to be important or material. In this case, the Court finds that Defendant has failed to satisfy his burden of establishing either substantial need for the requested information or an inability to obtain the substantial equivalent of the materials by alternate means. See State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 583 S.E.2d 80 (W.Va. 2003).

* * *

(T.R. 138-141) [emphasis supplied].

Petitioner now seeks the extraordinary relief in the form of a Writ of Prohibition in response to the Circuit Court's discretionary ruling denying part of Petitioner's Motion to Compel.

Summary of Argument

The Circuit Court performed an *in camera* review of the settlement agreement that is at the heart of this dispute. The Circuit Court found that the terms and conditions contained therein, other than the assignment of claims from A/K to Plaintiff and the amount of the settlement, both of which have been disclosed or provided to Petitioner, were not relevant to dispute between Plaintiff and Petitioner and further contain matters considered to be protected by attorney-work product privilege. Such a finding is consistent with the law and plainly falls within the Circuit Court's discretionary authority to consider discovery motions. Its findings are clearly memorialized by its order, contain no clear error to justify this Court's exercise of the extraordinary relief through a Writ of Prohibition, and the Petition should be refused without further delay.

Statement Regarding Need for Oral Argument

Plaintiff/Respondent agrees that oral argument is unnecessary for this matter to be resolved by the West Virginia Supreme Court of Appeals.

Argument

A. Writ of Prohibition Standard

The West Virginia Supreme Court of Appeals has held repeatedly that the standard of review applicable to a writ of prohibition is that "[a] writ of prohibition will not issue to prevent

a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va.Code 53–1–1." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977). In Syllabus pt. 4 of State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court said:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five 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. 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."

State ex rel. Owners Ins. Co. v. McGraw, 233 W. Va. 776, 779, 760 S.E.2d 590, 593 (2014).

This Court has held that "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953). In addition, "[t]his Court is 'restrictive in its use of prohibition as a remedy.' State ex rel. West Virginia Fire Cas. Co. v. Karl, 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997)." State ex rel. Allstate Ins. Co. v. Gaughan, 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006).

In syllabus point 4 of *State ex rel. Hoover v. Berger,* this Court said:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five 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. 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.

State ex rel. Owners Ins. Co. v. McGraw, 233 W. Va. 776, 780, 760 S.E.2d 590, 594 (2014)

Applying this standard of review, Petitioner Brison is not entitled to the requested writ of prohibition. Under the first prong of syllabus point 4 of *Hoover,* the Court must examine whether the party seeking the writ has any other adequate means, including a direct appeal, to obtain the desired relief. Inasmuch as the order of the circuit court is not a final order, Brison would have an opportunity to appeal the decision of the lower court upon entry of a final order.

Applying the second *Hoover* factor regarding whether Brison will be prejudiced in a way that is not correctable upon appeal, there is no evidence that any error in the lower court's interlocutory and discretionary rulings would not be reparable if this matter were directly appealed to this Court. Accordingly, under prong two of *Hoover,* Owners is not prejudiced by waiting to appeal a final order. The third and most significant factor is whether the circuit court's order is clearly erroneous as a matter of law. This Court has defined "clearly erroneous" as follows:

> A finding is "clearly erroneous" when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely.

Syl. pt. 1, in part, In the interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

In this case the trial record, and specifically the order from which this Writ of Prohibition is directed, reflects no clear error. Finally, as conceded by Petitioner, prongs 4 and 5 of *Hoover* are inapplicable to this matter.

1. Attorney Client Privilege

Petitioner Brison dedicates a substantial portion of his Petition to a claim that the Circuit Court's order has shielded the disclosure of the settlement agreement based on attorney-client privilege. This is an intentional misdirection. Paragraph 4 of the Circuit Court's order plainly identify that it was the communications between Plaintiff and his counsel, not the settlement agreement, that fell squarely under the attorney-client privilege shield. (T.R. at 138). Beginning in paragraph 5 of the Order, the Circuit Court began its analysis of the settlement agreement utilizing the attorney-work product privilege doctrine and associated case law. Accordingly, this portion of the Petition is misplaced and unfounded, as there is no question that Plaintiff's communications with his own attorney fall within the attorney client privilege.

2. Work Product Doctrine

As admitted by Petitioner, this Court has 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). [*emphasis supplied*]. In this case, there is no question that the settlement agreement negotiated between Plaintiff and his former employer concerned *pending litigation* and further, as it pertained to the assignment provision, also directly anticipated *future litigation between* Nelson and the Petitioner. Accordingly, while it may be true that many or even most settlement documents are prepared to

terminate litigation, it is undisputed that the subject agreement was specifically reached with full knowledge that Nelson would be proceeding with claims against Brison. Accordingly, the suggestion that the settlement agreement does not fall within the attorney-work product doctrine is incorrect.

Critically, the Circuit Court specifically reviewed the subject agreement, *in camera*, and specifically held that:

> *"[u]pon review of the same it is clear that the contents therein represent the product of attorneys for both parties 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.* ***The document itself does not contain any discussion or representation regarding any specific facts integral or relevant to the claims between Nelson & Brison. The only exception to the foregoing is that the agreement obviously references the exchange of consideration that may be relevant, including monetary consideration and a contractual claims assignment, both of which have been disclosed to Defendant."***

(T.R. at 140, paragraph 9) [***emphasis supplied***]. Therefore, the Circuit Court clearly did not limit its analysis to the issue of whether the settlement agreement was subject to attorney work product privilege but went further to consider whether any of the factual contents were integral or relevant to claims between Nelson and Brison. On this point, the only matters that appeared to be relevant were the amount of money paid in the settlement, which had been long disclosed,[4] and the specific provisions of the claim assignment, which was also disclosed.[5]

In support of his contentions, Petitioner has offered numerous cases mirroring an analysis supported by the United States District Court for the Southern District of West Virginia's decision in Young v. State Farm Mut. Auto. Ins. Co., 169 F.R.D. 72 (1996).[6] For the sake of

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[4] T.R. 120

[5] T.R. 79

[6] In this instance, and in numerous other instances, the Petition contains "Lexis" citations instead of proper full parallel citations in compliance with Rule 38(d) of the West Virginia Rules of Appellate Procedure. Respondent has provided the proper reporter citation.

brevity and clarity, Respondent suggests that the Young decision is representative of the cross section of cases advanced by Petitioner. The Young case involved a dispute between a set of local attorneys, their former client, and another set of counsel over attorneys' fees collected in an insurance bad faith lawsuit maintained by the client against an insurance carrier. The district judge found that the disclosure of the settlement agreement was relevant and material to the attorney lien dispute. Indeed, in that case, the parties to the settlement agreement sought to prevent the disclosure of even the settlement amount. *Id*, at 74.

Importantly, the Young court engaged in a careful review of cases involving requests seeking to produce confidential settlement agreements and noted that, contrary to Petitioner's contentions, the majority of courts considering the issue "have required the requesting party to meet a heightened standard in deference to Federal Rule of Evidence 408 and the public policy to encourage settlements and to uphold confidentiality provisions. *Id.* at 76, citing Bottaro v. Hatton Associates, 96 F.R.D. 158, 159 (E.D.N.Y. 1982). However, the Court went on to note that the Bottaro case may have improperly focused on matters of admissibility rather than the Rule 26(b) standard of considering whether the evidence may be reasonably calculated to lead to the discovery of relevant evidence. *Id.* at 77. Unlike in the case at bar, the district court in Young found that matters within the settlement agreement *were relevant and material* to the controversy between the local counsel who had been cut out of the settlement. That finding was within the district court's discretion. On the other hand, the Circuit Court in the subject litigation reached the opposite conclusion and found that the portions of the settlement document to be protected *were not relevant or material* to the continuing dispute between Nelson and Brison.

Obviously, the relevancy findings of the Circuit Court in this case, following her *in camera* review, fall within her discretion and do not constitute clear error. The mere fact that

Petitioner blindly and unilaterally rejects the Circuit Court's express findings about the contents of the settlement agreement does not constitute clear error nor does it justify this Court's issuance of a either a stay of the proceedings or the issuance of a Writ of Prohibition. The Circuit Court's finding that settlement agreements may contain attorney-work product privileged materials that may be protected from disclosure if they are not relevant or material falls squarely within the law.

Additional Matters

Finally, it must be noted that while the Petition contains numerous errors that are likely obvious to the Court in reviewing and comparing the record, three of them stand out and must be addressed lest they be deemed to be conceded. The first clear misstatement is the Petitioner's claim that Respondent has "refused to provide any information as to the terms and conditions of his settlement with AK&A." Petition at p. 2. This contention is plainly refuted by the record, as noted in this Response, as Petitioner has been provided with both the amount of the settlement and the assignment obtained by the settlement. The second is that the Court prohibited Petitioner from obtaining the requested information from A/K by deposition, a claim made without any support identified in the record. Petition at p. 5. This claim is also false, as no such order issued, as the truth is that Petitioner simply failed to take the deposition of any A/K representative during discovery and then failed to seek relief in the aftermath of the hearing to do so. (T.R. at 126-128). The third is the false claim that Plaintiff testified that the only claim he is pursuing is the assigned claim. Petition, at p. 7. Indeed, Plaintiff plainly testified in his deposition, which is already part of the Trial Record, that he was maintaining separate claims for unjust enrichment and breach of fiduciary duty. (T.R. 62-65).

Plaintiff can only speculate why Petitioner made these clearly incorrect factual representations to this Court, but to the extent that it believes that any of those representations to be relevant or material to its deliberations, the Court deserves to know the truth.

Stay of Proceedings

Petitioner's Writ of Prohibition is plainly unfounded. Plaintiff is entitled to move forward with his long-delayed trial in order to obtain repayment of a clearly owed substantial debt. A stay of the proceedings under the circumstances will only deprive him of such relief.

CONCLUSION

Respondent requests that this Court refuse the Petition for *Writ of Prohibition* as unfounded and unwarranted, and that such order be issued without delay.

DAVID F. NELSON, SR.
By Counsel

Paul M. Stroebel (W.Va. Bar N. 5758)
Stroebel & Johnson, PLLC
P.O. Box 2582
Charleston, WV 25329
(304) 346-0197
paulstroeb@aol.com

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2019 AUG 20 AM 10:49

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

DAVID F. NELSON, SR., individually and as a member of Francis, Nelson & Brison, P.L.L.C.,
Plaintiff,

v.

M. ANDREW BRISON,
Defendant.

CIVIL ACTION NO.: 16-C-1590
JUDGE CARRIE WEBSTER

ORDER

Having been directed by eMail from April D. Conner, Law Clerk to Judge Carrie L. Webster, to submit an Order to the Court detailing the ruling set forth in that eMail by noon Friday, August 16, 2019, Defendant M. Andrew Brison, by his counsel, Anspach, Meeks & Ellenberger LLP and Daniel R. Schuda, submitted the following Order for entry by the Court:

The Court **DENIES** the "Motion for Stay" that was filed August 12, 2019, after the Court's email correspondence of August 9, 2019, which advised that the Court would not be inclined to grant a stay.

As indicated previously, the Court does not believe a writ of prohibition is available to correct a discretionary ruling of a trial court.

Furthermore, the Court notes that the hearing on the "Motion to Compel" was held on April 8, 2019, at which time the Court announced its ruling. The *Order Denying Defendant's Motion to Compel* was entered May 9, 2019. Defendant filed its "Petition for Writ of Prohibition" on August 6, 2019, which the Court deems to be on the eve of the final Pretrial Conference scheduled for August 22, 2019.

As a result, as stated in the August 9, 2019 email correspondence, the Court advises the Defendant to seek its stay before the West Virginia Supreme Court of Appeals. In the absence of a stay, the modified deadlines issued in the email correspondence dated August 8, 2019 shall control, and the August 22, 2019 Pretrial Conference shall proceed as scheduled.

Entered: 8/19/19

Judge Carrie Webster

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22 DAY OF August 2019
Cathy S. Gatson CLERK CO
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Submitted by:

Daniel R. Schuda (WVSB #3300)
ANSPACH MEEKS ELLENBERGER LLP
900 Lee Street, Suite 1700
Charleston, West Virginia 25301
304-205-8063 – telephone
304-205-8062 – facsimile
dschuda@anspachlaw.com

EXHIBIT
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A