

**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**DOUGLAS E. GRIFFITH, JR.,  
an individual, and  
LEASE & RENTALS, LLC,  
a West Virginia Limited  
Liability Company,**

**Plaintiffs,**

**v.**

**MVB BANK, INC., a West Virginia  
Corporation, and  
JARROD FURGASON,  
an individual,**

**Defendants,**

**and**

**CHRISTOPHER P. SANDER,**

**Intervenor**

**Civil Action No.: 20-C-231  
Presiding Judge Nines**

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**ORDER GRANTING IN PART AND DENYING IN PART MVB BANK, INC.'S  
MOTION TO COMPEL**

Pending before the Court is *MVB Bank, Inc.'s Motion to Compel*, filed pursuant to Rule 26 of the West Virginia Rules of Civil Procedure. The Court has received and considered *MVB Bank, Inc.'s Motion to Compel* filed on May 1, 2024, *Plaintiffs' Response in Opposition to MVB Bank, Inc.'s Motion to Compel* filed on May 23, 2024, and MVB Bank Inc.'s rebuttal. In light of the foregoing, the Court hereby makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Plaintiffs filed their Complaint on September 14, 2020 and their Amended Complaint on March 27, 2024, against Defendants MVB Bank, Inc. ("MVB") and its former Market President Jarrod Furgason stating claims for Negligence, Breach of Contract, Fraud/Fraudulent Misrepresentation, Unfair Trade Practices, Violation of Insurance Sales

Consumer Protection Act and Negligent Supervision and Retention and are seeking damages caused by a failed life insurance premium financing/investment plan.

2. On November 17, 2020, MVB served Plaintiffs with *MVB Bank, Inc.'s First Set of Requests for Production and Interrogatories* and Plaintiffs responded on January 20, 2021 and simultaneously presented a proper Privilege Log detailing the communications between Plaintiffs and the law firm Greenberg Traurig ("Greenberg") and Attorney Martin Kalb, who represented Plaintiffs during the final stages of the failed investment plan.

3. In their Motion to Compel, MVB is seeking communications between Plaintiffs and Greenberg and/or Attorney Kalb, which are identified on Plaintiffs' Privilege Log.

4. MVB argues that it is entitled to these communications first because no attorney client relationship existed between Plaintiffs and Greenberg or Attorney Kalb. *See Motion to Compel, Introduction, p. 4 and p. 7.*

5. The Court notes that in this motion, MVB claims because Plaintiffs "allege Greenberg Traurig was in on the nefarious Plan to defraud them", Greenberg did not provide any independent legal advice to Plaintiffs and therefore, there was no attorney client relationship. *See Motion to Compel, Introduction, p. 4 and p. 7.*

6. However, Plaintiffs allege, and the Amended Complaint supports, that at no point have Plaintiffs alleged that Greenberg or any other lawyer or law firm participated in the wrongful acts of Defendants or specifically that Greenberg or its attorney Martin Kalb are responsible for any damages suffered by Plaintiffs. *See Amended Complaint. ¶¶ 35 and 36.*

7. The averments of the Amended Complaint (which refers to Greenberg twice) state that Defendants "secured the services" of Greenberg to provide services on Mr. Griffith's behalf. *See id.*

8. Although he was introduced to Greenberg by Defendant Furgason, Plaintiffs and Attorney Kalb established a confidential and privileged attorney-client relationship, in writing.

9. MVB also acknowledged the existence of an attorney client relationship between Greenberg and Plaintiffs in several pleadings.

10. Second, MVB argues that, if this Court finds that there is an attorney-client relationship between Plaintiffs and Greenberg, Plaintiffs have waived the privileged by putting their communications with Greenberg and Attorney Kalb at issue. *See Motion to Compel, p. 14.*

11. As set forth in the Amended Complaint and in Plaintiffs' Answer to Counterclaims, Plaintiffs have not placed the advice of counsel at issue in any of their claims or defenses.

12. MVB finally argues that Plaintiffs waived the attorney client privilege by sharing communications with third parties. *See Motion to Compel, p. 19*

13. Plaintiffs allege the alleged communication shared with third parties was an email dated October 21, 2019, from Mr. Kalb to Mr. Griffith recapping a conference call among Attorney Kalb, and third parties Defendant Furgason, Mark Goodman, Derek Urbealis and Richard Urbealis. The email was forwarded to the call participants so that everyone who participated in the conference call was copied on Attorney Kalb's summary. The call was not an attorney-client privileged communication.

### **CONCLUSIONS OF LAW**

14. "In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be intended to be confidential." Syl. pt. 2, State v. Burton, 163 W. Va. 40, 254 S.E.2d 129 (1979). "The burden of establishing the existence

of the attorney-client privilege in all its elements rests upon the person asserting it.” United States Fidelity & Guar. Co., 194 W. Va. 431, 438, 460 S.E.2d 677, 684 (1995). The communications between the attorney and the client are intended to be confidential when “the client obtained the advice from the attorney in the absence of third parties.” Burton, 163 W. Va. at 48, 254 S.E.2d at 135.

15. Here, the Court examines whether Plaintiffs can meet their initial burden of establishing the attorney-client privilege.

*Both Parties Contemplate Attorney-Client Relationship*

16. First, the Court examines the element that dictates that both parties must contemplate that the attorney-client relationship does or will exist. *State v. Burton*, 254 S.E.2d 129, 135 (W. Va. 1979). It does not appear that the parties dispute that there was an attorney client relationship. *See* Def’s Mot., p. 13 (analyzing elements #2 and #3). The parties do not dispute that on September 19, 2019, Griffith signed a representation agreement with Greenberg Traurig. *Id.* at 4; *see also* Pl’s Resp., p. 9. Plaintiff also points to evidence in the record supporting no previous objection by Defendant to the existence of an attorney-client relationship here. *See* Pl’s Resp., p. 10. For example, in its Notice Regarding Potential Nonparty Fault, MVB Bank noted that Greenberg Traurig “employs Martin Kalb, who personally advised and represented Mr. Griffith during the later stages of the insurance-premium financing plan. *Id.* Likewise, in its Answer to Plaintiff’s Amended Complaint, MVB Bank stated that “Plaintiff Griffith was represented in his personal capacity by [Greenberg] for the transaction at issue in this Complaint...and that [Greenberg] appears to have provided Plaintiff Griffith with independent advice regarding the transaction at issue in this Complaint”. *Id.* at 10-11.

17. For all of these reasons, the Court finds that element #1 is met.

*Advice From Attorney in Capacity as a Legal Advisor*

18. Next, the Court examines the element that dictates that the advice must be sought by the client from the attorney in his capacity as a legal advisor. *State v. Burton*, 254 S.E.2d 129, 135 (W. Va. 1979). MVB Bank avers that Griffith spoke to Mr. Kalb only because Defendants told him to. *See* Def's Mot., p. 13. The Court finds that because Mr. Kalb and the law firm of Greenberg Traurig was retained by Plaintiff, including the use of a formal representation agreement and the payment of \$50,000.00, evidence supports the fact that Griffith sought the advice of Mr. Kalb and the law firm of Greenberg Traurig in the capacity of legal advisor with regard to the financial transaction at the heart of this litigation. Indeed, Mr. Kalb declined to answer questions at his deposition regarding topics that were related to legal advice he gave Griffith. While the Court notes privilege is the client's to assert, the Court considers and notes this further in its analysis of the specific element of whether or not the advice was from the attorney in his capacity as a legal advisor. *State v. Burton*, 254 S.E.2d 129, 135 (W. Va. 1979). Although he was introduced to Greenberg by Defendant Furgason, Plaintiffs and Attorney Kalb established a confidential and privileged attorney-client relationship, in writing. For all of these reasons, the Court finds the second element is met.

*Intended to be Confidential*

19. Finally, the Court examines the requirement that the communication between the attorney and client must be intended to be confidential. *State v. Burton*, 254 S.E.2d 129, 135 (W. Va. 1979). MVB Bank points to the fact that Griffith and Mr. Kalb forwarded a one-on-one email with third parties "almost immediately", and argues it supports the conclusion that the communications were not intended to be confidential. *See* Def's Mot., p. 13. Plaintiffs contend throughout this case Griffith has steadfastly asserted the attorney-client privilege and that is why

several communications have been withheld and marked on the Privilege Log. *See* Pl's Resp., p. 16. Plaintiffs aver that after careful scrutiny any non-confidential communications that included third parties or were forwarded were produced, as Plaintiffs agree they are not subject to the attorney-client privilege. *Id.*

20. Any communications that were forwarded will be addressed later in this Order. However, not every communication that is the subject of this motion is alleged to have been shared. As to those communications, the Court finds element number three is met as to confidentiality.

21. In sum, the Court finds Greenberg prepared, signed and delivered an engagement letter to Plaintiffs on September 19, 2019, which was signed and accepted by Plaintiffs on September 23, 2019. Greenberg was paid \$50,000.00 for this representation. Plaintiffs and Defendants both contemplated the existence of an attorney client relationship, Plaintiffs sought legal advice from Greenberg, and both Plaintiffs and Defendants intended their legal communications to be confidential.

22. Having found the elements regarding attorney client relationship have been established, this Court turns to whether or not any waiver applies, as the parties argued in their briefs.

23. "A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue. The classical example is where an attorney is sued by a client for legal malpractice." State ex rel. United States Fid. & Guar. Co. v. Canady, 194 W. Va. 431, 442, 460 S.E.2d 677, 688 (1995). "A defendant also may waive the privilege by asserting reliance on the legal advice of an attorney." *Id.* (citation omitted).

24. "[A]dvice is not in issue merely because it is relevant, and it does not come in

issue merely because it may have some effect on a client's state of mind. Rather, it becomes an issue where a client takes affirmative action to assert a defense and attempts to prove that defense by disclosing or describing an attorney's communication.” *Id.* at 442 n.16, citing *N. River Ins. Co. v. Phila. Reinsurance Corp.*, 797 F. Supp. 363, 370 (D.N.J. 1992); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 71 (D.N.J. 1992).

25. There are generally two standards used by courts to determine whether an implied waiver of the attorney-client privilege has occurred—the standard articulated in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), relied on by MVB, which essentially makes all relevant information discoverable, even when privileged, and the standard adopted in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994), which requires reliance by the party asserting the privilege for the privileged documents to be discoverable.

26. West Virginia Courts have explicitly held that “privileged matters, although relevant, are not discoverable. . . . , [and] many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence.” Syl. pt 12, *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). Therefore, this Court does not apply the standard adopted in *Hearn*.

27. This Court declines to adopt MVB’s reliance on the implied waiver standard set forth in *Hearn*. The Court considers courts in the Fourth Circuit have adopted Rhone as being the most helpful and consistent with Fourth Circuit precedent. See *Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81, 87 (W.D.N.C. 2000); *In re Zetia Ezetimibe Antitrust Litig.*, No. MDL No. 2:18-md-2836, 2022 U.S. Dist. LEXIS 171193, at \*24 (E.D. Va. Aug. 15, 2022). In addition, a federal court sitting in the Northern District of West Virginia has reviewed and rejected *Hearn* in light of West Virginia law.

[T]o the extent that *Hearn* suggests privileged information is at issue merely because it is relevant to a claim, this aspect of the test is difficult to square with West Virginia law...[A]lthough privilege can be waived in West Virginia when a party's claim or defense puts its attorney's advice at issue, advice does not become "in issue" unless a client takes affirmative action to rely on his or her attorney's advice in subsequent litigation. Indeed, the Supreme Court of Appeals has noted that advice does not become "in issue" merely because it is relevant or affected the client's state of mind.

*First Am. Title Ins. Co. v. Rice*, No. 1:16-CV-00219, 2017 U.S. Dist. LEXIS 203163, at \*17-18 (N.D.W. Va. Dec. 11, 2017)(internal citations omitted).

28. The Court finds that considering the foregoing, *Hearn* is inconsistent with West Virginia law, and this Court does not adopt it.

29. Because Plaintiffs have never placed Attorney Kalb's advice – or the advice of any attorney – at issue in this case, asserted an "advice of counsel defense," or claimed that Attorney Kalb or Greenberg or any lawyer was responsible for or complicit in the Defendants' scheme, the information sought by MVB, although potentially relevant, is clearly not discoverable under existing West Virginia law. The Court notes that based on Plaintiffs' own representation that they are not asserting that Kalb or Greenberg or any lawyer was responsible for or complicit in the Defendants' scheme, Plaintiffs can be barred from inferring such a conspiracy or action with regard to said attorneys at the trial in this civil action.

30. During discovery, when a "responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege" and provide the privilege log to the requesting party and the court. Syl. pt. 2, *in part*, *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008). "Failure to respond, even if the discovery sought is wholly objectionable, exposes the respondent



to sanctions under Rule 37(d) [.]” Louis J. Palmer, Jr., Esq. and Robin Jean Davis, Justice, *Litigation Handbook of West Virginia Rules of Civil Procedure* §34 (5th ed. 2017).

31. When the attorney-client privilege is properly asserted, it “may be waived if disclosure of privileged communications is made to third parties.” Syl. pt. 12, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988). However, in order to be waived, the communication must first be privileged and “an attorney-client communication is not privileged where it is made under circumstances which indicate the client did not intend the communication to be confidential.” *State v. Burton*, 163 W. Va. 40, 48-49, 254 S.E.2d 129, 136 (1979) (citations omitted).

32. Plaintiffs have provided a proper privilege log, have asserted this log since 2021, and asserted the attorney-client privilege throughout this case.

33. Plaintiffs aver the forwarding of the email from Attorney Kalb to Mr. Griffith, dated October 21, 2019 by Mr. Griffith to Mr. Furgason and also by Attorney Kalb to Messrs. Urbealis and Mr. Goodman, was not a confidential communication protected by the attorney-client privilege. Plaintiffs aver the forwarding of this email does not result in a waiver of Plaintiffs’ privileged communications with its counsel because the communication involved third parties, was not confidential, and therefore not privileged.

34. The Court finds that under the well-settled rule set forth in *Marano v. Holland*, any forwarded communications and emails to third parties would be waived. MVB Bank argues waiver applies because Griffith shared a one-on-one communication from Mr. Kalb by forwarding it. The Court agrees that waiver would apply as to those communications that were forwarded to third parties only. It is unclear from Griffith’s argument that this particular email was forwarded and not confidential or privileged, whether this email is at issue between the parties. The Court concludes to the extent that this email, or other emails, were shared with third-parties, the attorney

client privilege does not apply to those particular emails. The motion is granted in part as to any emails that exist, if any, that were shared with third parties and are being held back from production under attorney-client privilege.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court does hereby **ORDER, ADJUDGE, and DECREE** that *MVB Bank, Inc.*'s Motion to Compel is **GRANTED IN PART AND DENIED IN PART.**

It is further **ORDERED** that the Clerk shall provide an attested copy of this Order to all counsel of record. **IT IS SO ORDERED.**

ENTERED this 5<sup>th</sup> day of Aug, 2024.

  
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**THE HONORABLE JUDGE SHAWN D. NINES**

Prepared by (with changes by the Court):

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