

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, ex rel.,
Erie Insurance Property & Casualty
Company,

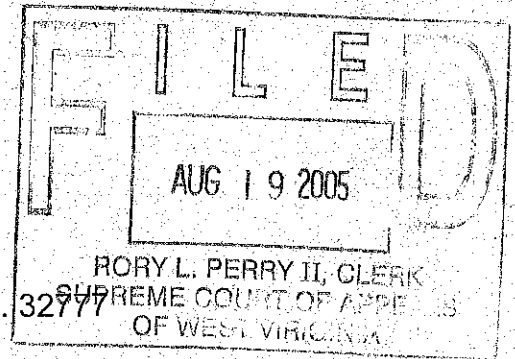
Petitioner/Defendant Below,

vs.

The Honorable James P. Mazzone,
Judge for the Circuit Court of
Ohio County and Elizabeth Murfitt

Respondents.

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**RESPONDENT MURFITT'S RESPONSE TO ERIE INSURANCE PROPERTY
& CASUALTY COMPANY'S VERIFIED PETITION FOR WRIT OF PROHIBITION
AND RULE TO SHOW CAUSE**

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INTRODUCTION

The respondent and plaintiff below, Elizabeth Murfitt, files the following response to the petition filed by the petitioner and defendant below, Erie Insurance Property & Casualty Company ("Erie").

STATEMENT OF FACTS

The plaintiff, Elizabeth Murfitt, suffered serious and life-altering injuries on October 19, 2000 when the tortfeasor, Edward Lai, failed to yield the right of way and slammed into the van in which she was riding. Mrs. Murfitt suffered a Colles fracture of the right arm requiring multiple surgeries. More significantly, Mrs. Murfitt suffered damage to the ulnar nerve causing persistent, severe pain and limiting the mobility of her dominant arm. The nerve damage required additional surgeries and nerve blocks in an effort to alleviate Mrs. Murfitt's pain. Even after six separate surgeries and after more than a hundred sessions of intensive hand therapy, Mrs. Murfitt still was unable to return to work or perform routine tasks because of a loss of strength, grip and mobility in her right hand.

The tortfeasor was insured by the defendant, Erie. According to its claim log, Erie accepted liability on December 14, 2000. Nevertheless, Erie did not engage in reasonable, good faith settlement efforts and, instead, attempted through its negotiating to browbeat Mrs. Murfitt into accepting a settlement for less than fair value. For instance, Erie was fully aware of the fact that Mrs. Murfitt was not working

due to her injuries and had little or no income. When asked for a \$5,000 advance to pay for Mrs. Murfitt's monthly living expenses, however, Erie delayed payment for a full five months.

Eventually, in May 2001, Erie made its first settlement offer, i.e., \$48,575. This was clearly a lowball offer in view of Mrs. Murfitt's lost wages, medical expenses and substantial personal injuries. Over the next month and a half, Erie made a series of "creeping" lowball offers culminating in an offer of \$55,000 in July 2001. Mrs. Murfitt rejected each of these offers, demanding that Erie make a fair offer. Instead, Erie refused to make any further offers for over a year.

It was not until October 15, 2002 that Erie made any additional settlement offer--a \$275,000 offer which came almost two years postcollision and only one month before the start of trial. Even this offer was woefully short of an amount providing full compensation. Erie finally settled the claim for \$800,000 on the second day of trial, but only after compelling Mrs. Murfitt to endure a long and harrowing litigation process.

Following the settlement of her personal injury claim, Mrs. Murfitt amended her complaint to assert allegations of bad faith against the defendant, Erie. Mrs. Murfitt served discovery requesting, *inter alia*, the production of Erie's claim file. There was also a set of interrogatories wherein Mrs. Murfitt requested when and in what amount a reserve was established for her personal injury claim and, as well, asking when and in what amount the reserve was increased. Erie objected that reserve information was work-product and, thus, protected from discovery.

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Judge Mazzone conducted a full in-camera review of Erie's file pursuant to *State ex rel. Westfield Ins. Co. v. Madden*, 216 W.Va. 16, 602 S.E.2d 459 (2004). On March 30, 2005, he entered an order addressing all of Erie's privilege objections. The order required the production of some, but not all, of Erie's claim file materials. With regard to reserve information, the order provided: "In addition to the aforementioned documents to be produced either in their entirety or in redacted version, the court would hereby order that any documents pertaining to "reserves" are to be disclosed to the extent of reserve amounts and dates on which any such amounts were placed." 3/30/05 ORDER, at 3. Erie delayed taking any action with respect to the March 30th order until June 22, 2005 when it filed the present petition requesting a writ of prohibition.

ARGUMENT

A.

Information Concerning the Amount of An Insurer's Loss Reserve Is Not Protected From Discovery As Work Product In A Case Alleging Unfair Claim Settlement Practices

The issue raised by Erie in its petition is whether its reserve information is protected from discovery as work-product. This response is filed on behalf of the plaintiff, Mrs. Murfitt. Information concerning the amount of reserves established for the payment of Mrs. Murfitt's claim is obviously relevant, and Erie does not suggest otherwise.¹ The only issue, then, is whether the work product privilege prevents its disclosure.

¹ Not only is reserve information relevant in establishing Erie's evaluation of the claim, it is also relevant in establishing when Erie became aware of the tortfeasor's umbrella coverage. Erie

It is appropriate to begin with a few fundamental principles. Privileges are disfavored in the law because they are in derogation of the truth. Accordingly, privileges are strictly construed and the party claiming the existence of a privilege bears the burden of proving all of its elements. See, e.g., *Maclay v. Jones*, 208 W.Va. 569, 575, 542 S.E.2d 83 (2000)(privileges "interfere with truthseeking" and, thus, are "strongly disfavored"); *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995)(noting that a privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle" and, further, that the burden of establishing a privilege "always rests upon the party asserting it")

The work-product privilege is often traced to *Hickman v. Taylor*, 329 U.S. 495 (1947). Essentially, the privilege is intended to protect a party's litigation strategies and preparation. It comes as no surprise, then, that Rule 26 does not provide work-product protection unless a document was actually prepared "in anticipation of litigation." To meet this test, Erie, as the party claiming the privilege, must prove that "the primary motivating purpose behind the creation of [the document or information in question] was to assist in pending or probable litigation." If, however, the document or information is prepared in the regular course of Erie's business, no work product protection is available: "Documents prepared in the regular course of the compiler's business, rather than specifically for litigation, even if it is apparent that a party may soon resort to litigation, are not protected from discovery as work-product." *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199

disclosed the tortfeasor's liability limits of \$250,000 in December, 2000, but did not disclose the existence of an additional \$1,000,000 in umbrella coverage until a year later. If Erie was reserving the claim in an amount exceeding its liability coverage, then clearly it was aware of the umbrella coverage.

(1997); see also *State ex. rel. Medical Assurance v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (W.Va. 2003).

Erie provided Judge Mazzone with no evidentiary materials of any kind to sustain its burden of proof. Instead, it argued that reserve information is always protected from discovery under the work-product privilege. The only case cited for this proposition is *Mordesovitch v. Westfield Ins. Co.*, 244 F.Supp.2d 636 (S.D. W. Va. 2003). Not only is *Mordesovitch* a federal case which has no binding precedential effect, the magistrate judge did not engage in any legal analysis but, instead, made a fact-specific finding that the reserve information he reviewed in camera contained protected mental impressions. *Mordesovitch* does not provide any meaningful insight into this issue.

More insightful is the court's discussion in *North River Ins. Co. v. Greater New York Mut. Ins. Co.*, 872 F.Supp. 1411 (E.D. Pa. 1995), a case involving a bad faith refusal to settle a personal injury claim. One of the issues presented was whether the liability insurer, GNY, acted in bad faith by refusing to settle within its policy limits. Discovery was served requesting reserve information for the personal injury claim. The court granted a motion to compel production of the reserve information, noting that the establishment of a reserve is not done in anticipation of litigation but, rather, as a regular part of an insurer's business:

State insurance law generally requires casualty insurance companies to set aside reserves upon notice of potential losses under their policies. See, e.g., N.Y. Ins. Law § 1303 McKinney 1985; 40 Pa.Cons.Stat. Ann. § 115. The reserves are established to pay those losses upon settlement or when liability is established. The existence of these reserves also allows state insurance departments to monitor the financial condition of the insurance companies they regulate for the protection of insureds and the

public. The reserves, of course, must have some relationship to the insurer's estimation of the insured's potential liability. Otherwise, the setting aside of reserves would serve little, if any, purpose. Accordingly, the amount at which GNY set its reserves for the *McIlhenny* case is certainly germane to any analysis GNY made of its settlement value. This information, in turn, is relevant to the question of whether or not GNY acted in bad faith during the pretrial settlement negotiations. 872 F.Supp. at 1412; see also *Simon v. G.D. Searle and Co.*, 816 F.2d 397 (CA 8 1987); *Athridge v. Aetna Casualty & Surety Co.*, 184 F.R.D. 181 (D.D.C. 1998).

These cases recognize a fundamental fact of life: that reserve setting is required by law in order for regulators to determine if, in fact, insurers have the financial wherewithal to pay their claims. Indeed, as a Pennsylvania insurer doing business in West Virginia, Erie is subject to regulation and administrative oversight in *both* jurisdictions.

Under Pennsylvania law, all insurers are required to establish reserves and to file periodic reports with the office of the insurance commissioner. If the commissioner determines that "the loss reserves of any insurer under his supervision, calculated in accordance with the foregoing provisions, are inadequate, he may, in his discretion, require such insurer to maintain additional reserves based upon estimated individual claims or otherwise." 40 Pa. St. 115; see also 40 Pa St. 92 (providing that reserves must be "set down, by careful estimate in each case"); *Commonwealth v. Safeguard Mut. Ins. Co.*, 478 Pa. 592, 387 A.2d 647 (1978)(confirming that state law requires liability insurers to "maintain reserves for outstanding losses to insure the availability of funds to cover the losses").

West Virginia law also regulates reserve setting. Reserves are treated as a liability chargeable against an insurer's assets. Accordingly, an insurer's records and statements must reflect "[t]he amount, estimated consistent with the provisions of this

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chapter, necessary to pay all of its unpaid losses and claims incurred on or before the date of the statement, whether reported or unreported, together with the expenses of adjustment or settlement thereof." W.Va. Code 33-7-5. Insurers are subject to examination by the commissioner who has free access to all of their records. Examinations are conducted using guidelines developed by the National Association of Insurance Commissioners which includes, *inter alia*, a review of reserve information. W.Va. Code 33-2-9. In certain instances, West Virginia law dictates the amount of reserves which must be maintained and in what form (cash, cash equivalents, etc.). W.Va. Code 33-8-22.

Discovery in this case has not progressed to the point that Erie representatives have been questioned with regard to reserve setting. However, in bad faith cases involving other large, well known insurers doing business in West Virginia, representatives have conceded that the setting of reserves is done for purposes of statutory compliance. E.g., CIRRINCIONE DEPOSITION, AT 57, 58 (Allstate--reserve setting "is required by statutory principles and also accounting principles"); REGER DEPOSITION, AT 132 (Nationwide--reserves are a "requirement of the insurance commissioner [so] that the insurance company has enough funds in order to pay future losses"); HOHL DEPOSITION, AT 44 (Nationwide--reserves are a "statutory accounting" mandated by "insurance departments...to protect policyholders"); RIEHLE DEPOSITION, AT 258-59 (Twin City--West Virginia regulations dictate that a reserve must reflect the "upper" value of the claim);

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MOORE DEPOSITION, AT 123 (Hartford--reserves are set pursuant to "legal guideline[s] for insurance companies").²

It should also be pointed out that reserves are set for *all* claims regardless of whether litigation is anticipated by the insurer. For example, reserves are established for property damage claims which are seldom, if ever, litigated and for claims arising under collision and other "no fault" coverages. PRALA DEPOSITION, AT 209 (Allstate--reserves are automatically established in property damage claims); PARDEE DEPOSITION, AT 157 (Hartford--reserves are set in "no fault" claims); ZAVATSKY DEPOSITION, AT 93 (State Farm--a reserve is automatically established when a collision claim is presented). Furthermore, the mere filing of a lawsuit does not affect the value of a claim, nor does it serve to increase or decrease the reserve. SENGHAS DEPOSITION, AT 117-18 (Twin City); VOLLERT DEPOSITION, AT 146-47 (same).

Contrary, then, to the argument advanced by Erie, insurers do not establish reserves for reasons related to litigation. Insurers, as regulated entities, are compelled by law to establish and report reserves and make their reserve information open to examination. Failure to establish reserves as required by law can result in remedial steps being taken by the commissioner, including, in extreme cases, delinquency proceedings.

It is also significant that insurers receive preferential tax treatment for their reserves. Under the federal tax code, amounts set aside for reserves are treated as "unpaid losses" which may be claimed as a deduction for corporate income tax purposes. See, e.g., *Atlantic Mut. Ins. Co. v. Commissioner of Internal Revenue*, 523

² Relevant excerpts from the depositions cited herein are attached to this response.

U.S. 382(1998)(explaining the tax treatment given to liability insurers for loss reserves). In other words, all amounts set aside as reserves for the payment of future claims are deductible from an insurer's gross income and, thus, reduce the insurer's overall tax liability.

Reserves clearly are not set for litigation purposes. First, insurers establish reserves because it is *compulsory* to do so. Reserve setting is required by law regardless of whether litigation is anticipated. This is because the purpose of a reserve is to guarantee that the insurer has ample funds to pay all of its claims—those that are litigated and those that are not. Second, insurers establish reserves because it is *advantageous* to do so: it offsets their income and reduces the taxes due and owing. These, then, are the primary motivations behind the setting of reserves. Erie has not and cannot satisfy its burden of proving that reserves are prepared in anticipation of litigation.

B.

Even If The Work Product Privilege Applies To Reserve Information,
The Privilege Is Overcome In View Of The Fact That The Reserves
Are The Only Reliable, Contemporaneous Record Of The Insurer's Claim
Evaluation

Even if the court would determine that reserve information is protected by the work product privilege, the privilege is clearly overcome under the facts of the present case.

It is important to remember that work product protection is not absolute. "While the work product doctrine creates a form of qualified immunity from discovery, it does not label the protected material as 'privileged' and thus outside the scope of discovery under Rule 26(b)(1)." *State ex rel. Chaparro vs. Wilkes*, 190 W.Va. 395,

397, 438 S.E.2d 575 (1993); see also *State ex rel. Medical Assurance vs. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003). Rule 26(b)(3) more fully sets forth this standard: documents protected by work product are discoverable "upon a showing that the party requesting 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."

This standard is clearly met here. After all, the *bona fides* of Erie's evaluation is the central issue that must be decided. The plaintiff has alleged that Erie acted in bad faith by failing to attempt to resolve her claim for a full, fair and reasonable amount. Erie's own determination of the value of the plaintiff's claim is obviously critical evidence. The reserves it established, and how those reserves were adjusted throughout the pendency of the claim, are the only contemporaneous record of Erie's evaluation process. To resolve the issue of Erie's bad faith, it is necessary to prove Erie's opinion concerning the value of the plaintiffs' claim. The one and only source of evidence is Erie's reserve information.

The premier case addressing work product in a bad faith context is *Brown vs. Superior Court*, 137 Ariz. 327 670 P.2d 725 (1983). *Brown* was cited with approval by Justice Starcher in his concurring opinion in *Recht*. The plaintiff in *Brown* sued his insurer, CNA, alleging bad faith and through discovery requested production of the entire claim file. CNA objected citing work product. *Brown* concluded that even though parts of the file might be subject to work product protection, the plaintiffs' substantial need for the file overcame the privilege:

Further, bad-faith actions against an insurer, like actions by client against attorney, patient against doctor, can only

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be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming. APL Corporation v. AETNA Casualty & Surety Co., 91 F.R.D., 10, 13-14 (D.Md.1980). The "substantial equivalent" of this material cannot be obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issues of whether Continental acted reasonably. 137 Ariz. at 336., 676 P.2d at 734.

Brown, in turn, was cited with approval in *Tackett vs. State Farm Fire and Casualty*, 558 A.2d 1098 (1988). The plaintiff sued her insurer, State Farm, alleging that its refusal to pay underinsured motorists benefits constituted bad faith. The plaintiff requested the entire claim file including, specifically, reserve information. The court concluded that even though reserves might reflect the mental impressions of the adjuster responsible for setting them, any privilege was overcome under the substantial need standard:

[I]t is certain that a plaintiff will have to establish how the defendant processed the claim, why the defendant took the action it did, and why it took the time it did to process the claim. In this context, it is clear then that, "The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming." **Brown 670 P.2d at 734.** The 'substantial equivalent' of this material cannot be obtained through other means of discovery. The claims file 'diary' is not only likely to lead to evidence, but to be very important evidence on the issue of whether Continental acted reasonably." **Brown, supra at 734.** Given the very essence of a claim of bad faith, I am satisfied that plaintiffs have met the substantial need test of Rule 26(b)(3).

The court in **Brown, supra**, adopting the at issue exception, succinctly concluded as follows: Recognizing that mental impressions and the like are afforded greater protection under Rule 26(B)(3), **Brown [670 P.2d] at 735**, we do not believe such protection can be absolute in a case presenting issues*1105 similar to one at bench . . . the reasons the insurer denied the claim or the manner in which it dealt with it are central to [plaintiff's] claim of bad faith. Thus, the strategy theories, mental impressions and opinions of [the insurer's] agents concerning the . . . claim are directly at issue. When mental impressions and the like are directly at issue in a case, courts have permitted an exception to the strict protection of Rule 26(b)(3) and allowed discovery. Id. Having stated the above, it follows a *fortiori* that reserve figures which are the product of mental impressions, opinions and conclusions of the insurer's agents are likewise discoverable in the context of the case at bar. 558 Atlantic 2d at 1103-04.; see also Groben vs. Travelers Indemnity Co., 49 Misc. 2d 14, 266 N.Y.S. 2d 616 (1965).

The same legal reasoning applies here. Regardless of whether work product protection is available, the plaintiff nevertheless is entitled to the reserve information she has requested because she has a substantial need for it. Indeed, *Brown*, followed by *Tackett*, have concluded that the plaintiff's need is "overwhelming" in light of the fact that the information is essential in proving the insurer's state of mind. Accordingly, the reserve information is discoverable alternatively under the substantial need test.

CONCLUSION

Prohibition is an extraordinary remedy that is available only where a trial court commits a clear-cut legal error. See e.g. *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). In this case, Judge Mazzone conducted an in camera review of all of the claim file materials produced by Erie. From his review, and applying the legal

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principles from *Hickman, Bedell* and other authorities, Judge Mazzone concluded that Erie's reserve information was not entitled to work-product protection. Erie cannot demonstrate a clear-cut legal error. For this reason and others appearing from the record, Erie's petition should be denied.

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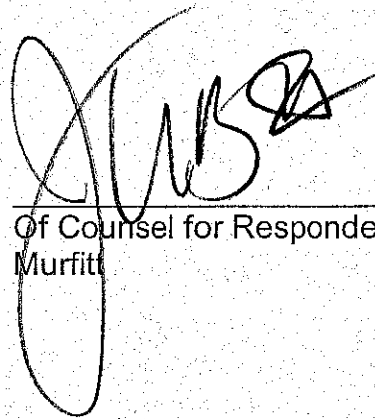
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CERTIFICATE OF SERVICE

Service of the foregoing RESPONDENT MURFITT'S RESPONSE TO ERIE INSURANCE PROPERTY & CASUALTY COMPANY'S VERIFIED PETITION FOR WRIT OF PROHIBITION was had upon the petitioner and defendant herein by regular United States mail, postage prepaid, on this 18th day of August, 2005, addressed as follows:

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