

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213
W. Va. 457

583 S.E.2d 80 (2003) · No. No. 30840 · Decided July 11, 2003

SUMMARY

The Supreme Court of Appeals of West Virginia granted a writ of prohibition preventing enforcement of a discovery order requiring Medical Assurance of West Virginia, Inc. to produce its complete investigative and claims files in a third-party bad-faith insurance action. The court held that the lower court applied the wrong legal standard and directed it to apply traditional attorney-client privilege and work-product principles. The court declined to adopt a balancing test allowing discovery of otherwise privileged communications based on compelling need.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Maynard, Justice; Davis, Justice; Albright, Justice; McGraw, Justice; Starcher, Chief Justice
JURISDICTION	West Virginia
DECIDED	July 11, 2003
DOCKET	No. 30840
DISPOSITION	writ_granted
PROCEDURAL POSTURE	Original proceeding seeking a writ of prohibition to prevent enforcement of a circuit court discovery order compelling an insurer to produce its complete investigative and claims files in a third-party statutory bad-faith action.
STANDARD OF REVIEW	A discovery ruling is ordinarily reviewed for abuse of discretion, but review is plenary when the ruling rests on a misinterpretation of the West Virginia Rules of Civil Procedure. A writ of prohibition may issue to correct a clear legal error resulting from a substantial abuse of discretion in a discovery order, particularly when the order probably invades confidential materials protected by Rule 26(b)(1) or (3).
PRECEDENTIAL VALUE	published precedential opinion

PARTIES

State of West Virginia ex rel. Medical Assurance of West Virginia, Inc.
v. The Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio
County, The Estate of Marjorie I. Verba, by Sally Jo Nolan, Executrix

TOPICS

discovery dispute

attorney client privilege

work product doctrine

insurance bad faith

civil procedure

PRACTICE AREAS

civil procedure

insurance bad faith

evidence

appellate procedure

medical malpractice

QUESTIONS PRESENTED

1. Whether the Supreme Court should issue a writ of prohibition to review and prevent enforcement of a circuit court order compelling production of allegedly privileged and protected insurance claim-file materials.
2. Whether communications between the insured's defense counsel and the insured remain protected by the attorney-client privilege when those communications are received or reviewed by the insured's liability insurer.
3. What standards govern discovery of factual and opinion work product contained in an insurer's investigative and claims files.
4. Whether the court should create a balancing-test exception permitting discovery of attorney-client privileged communications in a third-party insurance bad-faith action.
5. Whether a footnote in *Honaker v. Mahon* authorized the circuit court's broad rejection of privilege claims in this third-party bad-faith discovery dispute.

HOLDINGS

1. A writ of prohibition is appropriate where a discovery order probably invades confidential materials protected by Rule 26(b)(1) or (3) and rests on a clear legal error, including application of the wrong legal standard.
2. Communications between the insured and the insured's defense counsel remain protected by the attorney-client privilege even when shared with or reviewed by the insured's liability insurer, unless the privilege has otherwise been waived or an established exception applies.
3. Factual work product prepared in anticipation of litigation may be discovered upon a showing of substantial need and inability, without undue hardship, to obtain the substantial equivalent by other means; investigative materials showing an insurer's internal claim-evaluation processes may be discoverable upon that showing.
4. Opinion work product consisting of mental impressions, conclusions, opinions, or legal theories is afforded nearly absolute protection and may be discovered only in rare and extraordinary circumstances.

5. The court declined to create a balancing test that would permit discovery of attorney-client privileged communications based on a litigant's compelling need in a third-party insurance bad-faith action.
6. Footnote 8 of *Honaker v. Mahon* does not govern the discoverability of materials allegedly protected by attorney-client privilege in this third-party bad-faith action.

KEY QUOTATIONS

“A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.” (213 W. Va. at 465)

“When the attorney-client privilege is applicable... it is absolute.” (213 W. Va. at 471)

“If this Court were to create a new exception to attorney-client privilege, it would do so in a syllabus point and not in a footnote.” (213 W. Va. at 474)

“language in a footnote generally should be considered obiter dicta which, by definition, is language “unnecessary to the decision in the case and therefore not precedential.”” (213 W. Va. at 474)

FACTUAL BACKGROUND

Dr. David Ghaphery performed anti-reflux surgery on Marjorie Verba, who died shortly after being released from the hospital; an autopsy attributed the death to a surgical laceration and resulting peritonitis. Verba's estate obtained a substantial medical-malpractice verdict against Ghaphery, after which it asserted that Medical Assurance, Ghaphery's insurer, violated West Virginia's unfair-claim-settlement-practices statute by inadequately investigating the claim and rejecting a settlement offer. In discovery in that statutory bad-faith action, the Estate sought Medical Assurance's complete investigative and claims files, including materials that the insurer identified as protected by attorney-client privilege and the work-product doctrine.

PROCEDURAL HISTORY

The Estate of Marjorie I. Verba sued Dr. David Ghaphery for medical malpractice and later amended its complaint to assert an unfair-claim-settlement-practices claim against his insurer, Medical Assurance. During discovery in the bad-faith action, the circuit court granted the Estate's motion to compel and ordered Medical Assurance to produce the requested files without asserting privilege except for a narrow category of communications. Medical Assurance sought a writ of prohibition, and the Supreme Court of Appeals granted the writ, preventing enforcement of the order and directing reconsideration under traditional privilege and work-product principles.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The Circuit Court of Ohio County must not enforce its September 19, 2002 discovery order. Any further proceedings on the Estate's motion to compel must apply traditional attorney-client privilege and work-product

principles under Rule 26(b) and West Virginia precedent, including document-specific analysis, the substantial-need and undue-hardship standard for factual work product, and heightened protection for opinion work product.

CASES CITED

- State ex rel. Allstate Insurance Co. v. Gaughan, 203 W. Va. 358, 508 S.E.2d 75 (1998)
- State ex rel. USF & G v. Canady, 194 W. Va. 431, 460 S.E.2d 677 (1995)
- State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996)
- Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953)
- State Farm v. Stephens, 188 W. Va. 622, 425 S.E.2d 577 (1992)
- State ex rel. John Doe v. Troisi, 194 W. Va. 28, 459 S.E.2d 139 (1995)
- State v. Burton, 163 W. Va. 40, 254 S.E.2d 129 (1979)
- In re Markle, 174 W. Va. 550, 328 S.E.2d 157 (1984)
- State ex rel. United Hospital Center v. Bedell, 199 W. Va. 316, 484 S.E.2d 199 (1997)
- State ex rel. Chaparro v. Wilkes, 190 W. Va. 395, 438 S.E.2d 575 (1993)
- Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)
- State ex rel. USF & G v. Montana Second Judicial District, 240 Mont. 5, 783 P.2d 911 (1989)
- Honaker v. Mahon, 210 W. Va. 53, 552 S.E.2d 788 (2001)
- Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001)
- Verba v. Ghaphery, 210 W. Va. 30, 552 S.E.2d 406 (2001)
- Dunn v. National Security Fire & Casualty Co., 631 So. 2d 1103 (Fla. Dist. Ct. App. 1993)
- In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994)
- In re Doe, 662 F.2d 1073 (4th Cir. 1981)
- United States v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)
- Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d 720 (1998)
- State v. Douglass, 20 W. Va. 770 (1882)
- State v. Beard, 194 W. Va. 740, 461 S.E.2d 486 (1995)
- Elmore v. State Farm, 202 W. Va. 430, 504 S.E.2d 893 (1998)