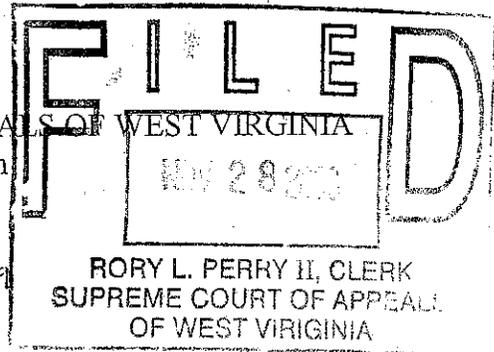


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

No. 32777
33209



STATE OF WEST VIRGINIA, EX REL.,
ERIE INSURANCE PROPERTY & CASUALTY COMPANY

Petitioner,

vs.

THE HONORABLE JAMES P. MAZZONE,
JUDGE FOR THE CIRCUIT COURT OF
OHIO COUNTY AND ELIZABETH MURFITT

Respondents.

**PLAINTIFF BELOW, ELIZABETH MURFITT'S, BRIEF IN SUPPORT OF THE
DECISION OF THE CIRCUIT COURT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER
TRIBUNAL 1

FACTUAL AND PROCEDURAL BACKGROUND..... 3

TIMELINE OF ERIE’S LOWBALL TACTICS AND NEGOTIATION HISTORY..... 7

ARGUMENT

I. The standard of review for a circuit court’s discovery order
that includes findings of fact and conclusions of law is abuse
of discretion..... 10

II. A writ should not issue because Judge Mazzone faithfully
applied the test suggested by this Court in State ex rel. Erie
Ins. Co. v. Mazzone..... 11

a. Erie conceded that the reserves in this case are based on
the specific facts of the case and not actuarial analyses
of all claims and deposition evidence supports the
concession 12

b. The nature of this case – a failure to timely settle case –
further supports discoverability of reserve information..... 13

c. An additional issue in this case, not cited by the circuit
court, also supports the discoverability of reserves in
this case 15

d. No attorneys were involved in the setting of the
reserves in this case, nor was “anticipation of litigation”
the primary motivating purpose for the setting of the
reserve amounts; therefore, there is no threat to any
attorney work-product..... 16

III. A writ should not issue because insurance reserve
information is not work product..... 18

a. Reserve information fails to meet the basic
qualifications for treatment as work product 18

b.	Neither the <u>Rhone-Poulenc</u> view nor the <u>Simon</u> view is applicable in bad faith cases, since <u>Simon</u> is a coverage case and <u>Rhone-Poulenc</u> appears to be one.....	19
c.	Courts have ruled overwhelmingly that reserve information is discoverable in bad faith cases	21
d.	Erie has no evidentiary foundation for its work product claims	29
IV.	Erie’s arguments regarding “chilling effect” do not apply to a decision regarding <u>discoverability</u>	30
	CONCLUSION.....	31

TABLE OF AUTHORITIES

West Virginia Constitution

See Article VIII, § 3 of the West Virginia Constitution 10

West Virginia Supreme Court of Appeals Cases

Erie v. Mazzone 2, 4, 20, 29

Fraternal Order of Police v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996)..... 17

Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979)..... 7

Kiser v. Caudill, 215 W.Va. 403, Syl. Pt. 4 (W.Va. 2004) 29

McDougal v. McCammon, 193 W.Va. 229 (1995) 10, 11

State v. Farley, 192 W.Va. 247 (1994) 10

State ex rel. United Hospital Center, Inc. v. Bedell, 199 W. Va. 316,
484 S.E.2d 199 (1997) 3, 16, 17

State ex rel. Medical Assurance v. Recht, 583 S.E.2d 80 (W.Va. 2003)..... 2, 17, 27

Walker v. West Virginia Ethics Commission, 201 W.Va. 108, 492 S.E.2d 167
(1997)..... 16

West Virginia Code

W.Va. Code § 33-11-4(9) 4, 9

West Virginia Code § 53-1-1 (1923) (Repl. Vol. 2000) 10

W.Va. R.Civ. P. 26(b)(3) 16

W.Va. R.Civ. P. 26(b)(1) 18

Other Cases

Allied Processors, Inc. v. Western Nat. Mut. Ins. Co., 246 Wis.2d 579, 629 N.W.2d
329 (Wis.App.,2001)..... 27

Allstate Indem. Co. v. Ruiz, 899 So.2d 1121 (Fla.,2005)..... 24

<u>APL Corp. v. Aetna Cas. & Sur. Co.</u> , 91 F.R.D. 10 (D.C.Md., 1980).....	25
<u>Athridge v. Aetna Casualty and Surety Co.</u> , 1998 WL 429661 *10 (D.D.C.).....	23
<u>Ballard v. Eighth Judicial Dist. Court of State In and For County of Clark</u> , 106 Nev. 83, 787 P.2d 406 (1990)	24
<u>Bartlett v. John Hancock Mut. Life Ins. Co.</u> , 538 A.2d 997, (R.I. 1988).....	26
<u>In re Bergeson</u> , 112 F.R.D. 692, (D.Mont., 1986)	26
<u>Brown v. Superior Court In and For Maricopa County</u> , 137 Ariz. 327, 670 P.2d 725, (1983).....	25, 26
<u>Caldwell v. District Court in and for the City and County of Denver</u> , 644 P.2d 26 Colo., (1982)	26
<u>Culbertson v. Shelter Mutual Insurance Company</u> , 1998 WL 743592 (E.D.La.).....	23
<u>Ex parte Fuller</u> , 600 So.2d 214 (Ala. 1992)	27
<u>First National Bank of Louisville v. Loretta Lustig, et al</u> , 1991 WL 236839 (E.D.La.).....	23
<u>First National Bank of Louisville</u> , 1993 WL 411377 (E.D.La.)	23
<u>Fretz v. Mutual Benefit Ins. Co.</u> , 37 Pa. D. & C.4th 173 (Allegheny Cty. 1998).....	23
<u>Gibson v. Western Fire Ins. Co.</u> , 210 Mont. 267, 682 P.2d 725 (1984)	26
<u>Grange Mut. Ins. Co. v. Trude</u> , 151 S.W.3d 803 (Ky., 2004).....	25
<u>Groben v. Travelers Indem. Co.</u> , 49 Misc.2d 14, 266 N.Y.S.2d 616 (N.Y.Sup.Ct.1965)	14, 21, 23, 24
<u>Hall v. Goodwin</u> , 775 P.2d 291, 1989 OK 88 (Okla. 1989).....	26
<u>Langdon v. Champion</u> , 752 P.2d 999 (Alaska 1988).....	24
<u>Leski Inc v Fed Ins Co.</u> , 129 FRD 99 (D.N.J. 1989)	22
<u>Limstrom v. Ladenburg</u> , 136 Wash.2d 595, 963 P.2d 869 (1998).....	27
<u>Lipton v. Superior Court</u> , 48 Cal.App.4th 1599, 56 Cal.Rptr.2d 341 (Cal.App. 2 nd Dist.,1996)	12, 15, 22, 30

<u>Lopez v. Woolever</u> , 62 Va. Cir. 198, 2003 WL 21728845, 18 VLW 137, (Va. Cir. Ct., 2003)	28
<u>Loyal Order of Moose v. International Fidelity Insurance Co.</u> , 797 P.2d 622 (Alaska 1990).....	17
<u>Loyal Order of Moose, Lodge 1392 v. International Fidelity Insurance Co.</u> , 797 P.2d 622, fn. 14 1990	22, 23
<u>Moskovitz v Mt. Sinai Medical Center</u> , 69 Ohio St 3d 638 (1994).....	26
<u>National Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chemical Co.</u> , 558 A.2d 1091, (Del.Super.,1989).....	24
<u>North River Ins. Co. v. Greater NY Mut. Ins. Co.</u> , 872 F. Supp. 1411, (E.D. Pa. 1995).....	14, 21
<u>Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.</u> , 139 F.R.D. 609, (E.D.Pa.1991).....	19, 20, 21, 22
<u>Safeguard Lighting Systems, Inc. v. North American Specialty Ins. Co.</u>	14
<u>Samson v. Transamerica Ins. Co.</u> , 636 P.2d 32, (Cal.1981)	23
<u>Silva v. Basin Western, Inc.</u> , 47 P.3d 1184, (Colo. 2002)	25
<u>Sims v. Knollwood Park Hospital</u> , 511 So.2d 154 (Ala.1987)	27
<u>Society Corp v American Cas. Co.</u> , 1991 WL 346302 (ND Ohio 1991).....	26
<u>Tackett v. State Farm Fire and Cas.</u> , 558 A.2d 1098, (Del.Super. 1988)	23
<u>Thomas Organ Co. v. Jadranska Slobodna Plovidba</u> , 54 F.R.D. 367, 372 (N.D.Ill.1972)	25
<u>Town of Nassau v. Phoenix Assurance Co. of New York</u> , 394 N.Y.S.2d 319, (N.Y.App.Div.1977)	23, 24
<u>United Services Automobile Association v. Werley</u> , Alaska Supr., 526 P.2d 28, n. 15 (1974).....	22, 26
<u>Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.</u> , 690 N.W.2d 38, (Iowa, 2004).....	27
<u>Young v. Allstate Ins. Co.</u> , 351 Ill.App.3d 151, 285 Ill.Dec. 921 (Ill. App. 1 Dist., 2004).....	26

**KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER
TRIBUNAL**

In this third-party bad faith case, the Plaintiff, Elizabeth Murfitt, contends that Erie Insurance Company low-balled her valid injury claim by offering her only a small fraction of what she was owed, and by forcing her to go to trial to obtain the coverage to which she was lawfully entitled. After the underlying insurance claim was settled during the trial, Ms. Murfitt sued Erie for breach of the implied covenant of good faith and fair dealing and for the now-repealed independent cause of action under West Virginia's Unfair Trade Practices Act.

In the instant bad faith case, Ms. Murfitt sought to discover evidence regarding what Erie knew about her claim and when Erie knew it. Most particularly, she sought evidence of what value Erie placed on her claim at the time Erie made its lowball offers, including information about the reserves set by Erie for her claim. Erie objected to the discoverability of the reserves, claiming they were covered by Rule 26's work-product exception. The circuit judge conducted an in camera evaluation of the materials consistent with this Court's decision in State ex rel. Westfield v. Madden.¹ After applying Madden, the trial court overruled the work-product objections as to the reserve amounts² and Erie sought an extraordinary writ.

Although relevance of the reserves was not raised by Erie in the trial court, it was raised sua sponte by this Court and this Court remanded the case to Judge Mazzone for a

¹ Syl. Pt. 2.

² Erie's Petition claims that all information pertinent to the reserves was ordered disclosed. See Petition at ¶ I, p. 3 and at p. 9. This is a significant overstatement. Judge Mazzone held that documents pertaining to reserves were to be disclosed "as to the extent of reserve amounts or the dates on which such any such amounts were placed." Order granting Plaintiff's Motion to Compel in Part, dated March 30th, 2005 at p. 3.

relevancy inquiry.³ Testimony was taken regarding the test for the relevance of reserves set forth in this Court's Opinion and an evidentiary hearing was held in the circuit court.

Following the hearing, the circuit court again granted Plaintiff's Motion to compel the discoverability of reserve amounts and dates, issuing in an Order containing detailed findings of fact and conclusions of law. The trial court applied syllabus point five of State ex rel. Erie v. Mazzone, issued in this case, and concluded that the reserve amounts are relevant. Judge Mazzone found that reserves are relevant in a failure to timely and fairly settle case, and because the undisputed testimony of Erie personnel was that Erie sets reserves to reflect Erie's valuation of the claim. See Memorandum Opinion and Order dated June 29th, 2006 (attached as Exhibit A).

Erie again seeks extraordinary relief, but has abandoned any pretense that the reserves are not relevant. Erie contends that the reserves are undiscoverable work product. This Court has issued a Rule to Show Cause as to why Judge Mazzone's decision should not be reversed, citing the careful scrutiny this Court is committed to providing where claims of privilege are at issue. Ms. Murfitt asked Erie to provide this Court with the reserve information Judge Mazzone reviewed in camera, but Erie has refused to do so.⁴

Ms. Murfitt asks that this Court uphold Judge Mazzone's decision and discharge the Rule for the following reasons:

- 1) Judge Mazzone did not abuse his discretion in determining that Erie had failed to substantiate a claim of work product. Ms. Murfitt relies on State ex rel. Westfield v. Madden and State ex rel. Medical Assurance v. Recht.

³ See State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone, 218 W.Va. 593, Syl. Pt. 5 (W.Va. 2005).

⁴ See Erie's Response to Mrs. Murfitt's Motion to Compel Supplementation of the Appendix to the Petition.

- 2) Reserve information is not work-product because the primary motivating purpose for its creation is not the anticipation of litigation. Ms. Murfitt relies on State ex rel. United Hospital Center, Inc. v. Bedell.⁵
- 3) Even if reserve information is work product, where it is relevant it is discoverable, because there is no other source to obtain the information. Ms. Murfitt relies on the plain language of Rule 26, as well as Bedell, supra.
- 4) The overwhelming weight of authority in other states supports the proposition that reserves are discoverable in a "lowball," or failure-to-timely-and-fairly-settle bad faith case.

FACTUAL AND PROCEDURAL BACKGROUND

A Wheeling hotel maid, Elizabeth Murfitt, sustained a shattered wrist in a car wreck caused by Petitioner Erie's insured, Edward Lai. Her injuries deprived her completely of her \$12,500.00 per-year job and she incurred over \$50,000.00 in medical bills, owing primarily to multiple wrist surgeries. After notifying Erie of her claim, she was repeatedly low-balled with unreasonable offers for over two years. Erie forced her to a jury trial after two years through its pattern of offering far less than fair value on Ms. Murfitt's claim until shortly before trial.

When it became clear that Ms. Murfitt would not settle her claim for pennies on the dollar, after two years of delay and a month before trial, Erie began making offers over ten times higher than any made during the previous two years. These offers still fell short of a fair evaluation of her claim and Ms. Murfitt had to have her attorney impanel a jury, make opening statements and go through a day and a half of testimony. After Erie finally settled Ms. Murfitt's claims on the second day of trial, Ms. Murfitt sued Erie for violating the West Virginia Unfair Trade Practices Act by failing to fairly, timely, and reasonably settle her claim, in which liability and damages were clear.

⁵ 199 W. Va. 316 (1997).

During discovery of the bad faith case, Plaintiff sought disclosure of the amounts at which Erie had the case reserved, to bolster the common-sense inference that the fair value of Ms. Murfitt's claim did not increase in value by a factor of ten to sixteen during the last three weeks before trial. Ms. Murfitt seeks to prove that Erie knew all along the magnitude of her claim, but sought to pressure an unsophisticated woman, with no income to settle for a tiny fraction of what her case was worth by low-balling, pushing for continuances and delaying the case.⁶

The trial court (Mazzone, J., presiding) granted Plaintiff's Motion to Compel the amounts of the reserves set by Erie in Ms. Murfitt's case after an in camera review in a carefully nuanced ruling, holding that that Erie did not have to disclose its thought processes in setting the reserves, but that the simple fact of the reserve amounts was discoverable.⁷ Judge Mazzone circumscribed his ruling to reserve amounts and dates, stating: "the reasoning and the thought process behind the reserve numbers are privileged as work product, as previously ordered."⁸ Erie Petitioned for an extraordinary writ and this Court issued syllabus point 5 of State ex. rel Erie v. Mazzone, governing the discoverability of reserves. This Court then remanded for consideration of the matter in light of this new syllabus point:

In making a determination in the context of discovery about the relevancy of insurance reserves information, the trial court should take into account the nature of the case, the methods used by the insurer to set the reserves and the purpose for which the information is sought, and only grant requests for disclosure when its findings of fact and conclusions of law support a

⁶ Such conduct is prohibited by West Virginia's Unfair Trade Practices Act. See W.Va. Code § 33-11-4(9).

⁷ See Order Granting in Part Plaintiff's Motion to Compel filed on or about March 30th, 2005 (exhibit B).

⁸ Order Granting Plaintiff's Renewed Motion to Compel filed on or about June 29th, 2006 at 7.

determination that the specific facts of the claim in the case before it directly and primarily influenced the setting of the reserves in question.⁹

The parties subsequently undertook discovery to determine the proper application of this Court's prescribed test. During depositions, Erie personnel testified repeatedly and unambiguously that the specific facts of a claim determine the setting of Erie's reserves.¹⁰

Moreover, at the hearing on Plaintiff's motion to compel, Erie conceded that the reserves are set by adjusters with reference to the specific facts of the case. Judge Mazzone, having heard this evidence, and upon submission of the complete depositions of Mr. Phillips and Ms. Barker, and upon consideration of all the evidence of record in the case, ruled as follows:

... at the May 12, 2006, hearing on the Renewed Motion to Compel, Erie conceded that the requested reserve information for this case is based upon the specific facts of the underlying claim. Counsel for Erie agreed that Erie takes into consideration the specific facts of the claim, as opposed to actuarial-based approach to setting reserves. This practice is confirmed by the deposition testimony of at least two of Erie's claims agents. Based upon the nature of the claim, the stated purpose for the request, and the fact that the reserves are based upon the facts of the underlying claim, the Court FINDS and CONCLUDES that the reserve information is relevant to the issue of whether

⁹ Id. at Syl Pt. 5.

¹⁰ For example, claim supervisor Michael Phillips stated:

Q. Is it fair to say that when setting reserves, the company takes into account the specific information it's received regarding that individual's claim?

A. Yes.

Q. Is it fair to say that the specific information that the company has received regarding an individual's claim is what is taken into account when setting the reserves?

A. Yeah. It's what is made available to us through our investigation.

Phillips deposition at 94 (attached as Exhibit C). Another supervisor, Sandy Barker, confirmed Mr. Phillips analysis, stating:

Q. When a reserve is changed by the adjuster, is it based upon the information that the adjuster has learned about the claimant and their injuries?

A. Yes.

Sandy Barker Deposition at 100-01 (attached as Exhibit D).

Erie offered settlement amounts that were lower than the estimated value of the claim in bad faith.¹¹

In addition, Judge Mazzone carefully tailored his ruling to account for the issues noted in the opinions of this Court (as well as the concurring opinion of Justice Davis), regarding work product. Judge Mazzone stated:

The Court FINDS and CONCLUDES that the raw data indicating the reserve amounts and the dates said reserve amounts were placed on the claim are not privileged. However, the reasoning and the thought process behind the reserve numbers are privileged as work product, as previously ordered.¹²

Erie makes no mention of this subtlety in its Petition, attempting to convince this Court that Judge Mazzone's ruling is far broader than it actually is. Ultimately, the circuit court's ruling allows discovery only into what Erie did, when it set the reserves, and not into what it might have thought in doing so.

The trial court in this case made detailed findings of fact in addition to its finding that the specific facts of the case were reflected in the reserves. For example, Judge Mazzone found that potential for litigation is not the primary motivating purpose for the creation of the reserves:

Ms. Barker's description of reserves supports the Court's conclusion that the potential for litigation is not the primary motivating purpose for setting reserves, as they are set aside for "any type of claim" and for "any payment upon any claim," not limited to those claims for which litigation is likely or anticipated.¹³

Of course, sitting as the trial court and conducting the in camera review uniquely positions Judge Mazzone to make this finding, especially where Erie has elected to deny this Court the benefit of what it was Judge Mazzone reviewed.

¹¹ Order GRANTING Plaintiff's Motion to Compel at 6 (emphasis supplied).

¹² Id. (emphasis supplied).

¹³ Id. at 8.

The trial court also found it important that no attorneys were ever involved in any way with Erie's setting of its reserves in this case, stating "Also significant is Erie's disclosure that Erie employees, and not attorneys, are involved in setting the reserve amounts."¹⁴ Id. There is therefore no danger whatsoever that the opinion work-product of any attorney will be disclosed with the reserve amounts in this case.

Finally, even if the reserve amounts and dates somehow constitute work-product, Judge Mazzone found that under Rule 26, Mrs. Murfitt had made a successful showing of substantial need, stating: "the Court additionally FINDS that the party seeking discovery has a substantial need of the materials and that the party is unable to obtain the equivalent of the materials by other means."¹⁵ Of course, Erie is in sole possession of the knowledge as to when and at what amounts its reserves were set. Since they are unambiguously relevant and not obtainable elsewhere, they are discoverable even if they meet the work product test.

Following the issuance of Judge Mazzone's Order again allowing the discoverability of reserves, Erie again Petitioned for an extraordinary writ and this Court has issued a Rule to Show Cause. For the reasons articulated herein, Plaintiff below, Elizabeth Murfitt, urges that the Rule be DISCHARGED and that this Court UPHOLD Judge Mazzone's decision on the grounds articulated herein or such other grounds as support the decision of the trial court.

TIMELINE OF ERIE'S LOWBALL TACTICS AND NEGOTIATION HISTORY

This case presents an extreme factual scenario wherein an insurance company attempted to low-ball a modest-income, seriously-injured Plaintiff for over two years in an

¹⁴ This is especially significant in considering the concurring opinion of Justice Davis in connection with this case, since Simon was explicitly concerned with reserves set with attorney input.

¹⁵ June 29th, 2006 Order at 9 (emphasis supplied).

effort to get her to settle a devastating injury claim for a small fraction of what it was worth. Elizabeth Murfitt was a hotel maid with no other marketable skills when Erie's insured wrecked into the van in which she was an innocent passenger. Her wrist was shattered as a result of the wreck and she lost her livelihood permanently. There was no liability issue in the case. She incurred over \$50,000.00 in medical bills and was never able to return to work.

Nevertheless, Erie offered Ms. Murfitt only about \$47,000.00, seven months after the wreck, despite her permanent loss of her ability to work and the fact that she had already had multiple wrist surgeries. This was tantamount to offering her nothing in light of her medical bills and attorney's fees that would need to be paid out of the settlement. Erie offered no more than \$55,500.00, total, until three weeks before the trial, a period of over two years. During this time, Erie knew Ms. Murfitt could not work and had no other sources of income. Detailed information on her injuries and damages were provided, but Erie made no move to settle fairly, obviously hoping she would just give up and take the low offer.

Ms. Murfitt persevered despite Erie's low-ball tactics, and then, suddenly, just three weeks before trial, Erie offered a settlement of \$275,000.00, an over four-fold increase in its long-standing negotiating position. Three days before trial, Erie offered \$500,000.00, nearly ten times more than it had been trying to get Ms. Murfitt to take. At the outset of the trial, Erie offered \$600,000.00. Finally, in the middle of the second day of trial, the case settled for \$800,000.00 – nearly sixteen times the amount of the offer Erie insisted was fair for two years.¹⁶

¹⁶ This negotiation history is not disputed by Erie. Erie's Responses to Plaintiff's First Set of Discovery Requests stated as follows (keep in mind, the injuries occurred on October 19th, 2000):

Ms. Murfitt claims, with strong factual support, that Erie low-balled her for two years, hoping she would settle for six cents on the dollar and that Erie forced her through jury selection and two days of trial in the hopes she would cave. She contends such conduct was prohibited by the UTPA which states that insurers must “attempt in good faith to effectuate a prompt, fair, and equitable settlement of . . . claims when liability was reasonably clear.” W.Va. Code § 33-11-4(9). The UTPA also prohibits “[c]ompelling the insured to institute litigation to recover amounts due under defendant’s insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by plaintiff” Id. Erie’s reserve amounts certainly have the potential to bear on the key issue of whether Erie’s violations of the UTPA

-
- [Offer 1:] May 30, 2001 - Harold Michael, Jr. offered Plaintiff **\$48,575**. Harold Michael, Jr. and Sandra Barker were involved in deciding the time and amount of the offer.
- [Offer 2:] June 18, 2001 - Harold Michael, Jr. offered Plaintiff **\$50,000**. Harold Michael, Jr. and Sandra Barker were involved in deciding the time and amount of the offer.
- [Offer 3:] July 12, 2001 - Harold Michael, Jr. offered Plaintiff **\$55,500**. Harold Michael, Jr. and Sandra Barker were involved in deciding the time and amount of the offer.
- [gap of one year, three months]**
- [Offer 4:] October 17, 2002 – **[three weeks pre-trial]** James Wright, Esquire offered Plaintiff **\$275,000**. Michael Philipps and Edward Vallery were involved in deciding the time and amount of the offer.
- [Offer 5:] November 13, 2002 – **[three days before trial]** James Wright, Esquire offered Plaintiff **\$500,000**. Michael Philipps and Edward Vallery were among the people involved in deciding the time and amount of the offer.
- [Offer 6:] November 15, 2002 **[the first day of trial]** - James Wright, Esquire offered Plaintiff **\$600,000**. Michael Philipps and Edward Vallery were among the people involved in deciding the time and amount of the offer.
- [Offer 7:] November 16, 2002 – **[the second day of trial]** James Wright, Esquire offered Plaintiff **\$800,000**. Michael Philipps and Edward Vallery were among the people involved in deciding the time and amount of the offer.

Id.

were done consciously and deliberately of the true value of Ms. Murfitt's claims and are therefore relevant under syllabus point 5 of Mazzone.

Erie takes the opposite position, and has affirmatively asserted that its offers reflected its evaluation of the case when they were made. Erie stated in its answer, regarding its offer of \$55,500.00 to settle that "based upon the information available to Defendant during this time, it felt that the offer it had made on July 12, 2001 and which Plaintiff had rejected was reasonable, fair, appropriate and made in good faith."¹⁷ It is the veracity of this assertion, among others made by Erie that Ms. Murfitt seeks to test through discovery of the reserves.

ARGUMENT

I. The standard of review for a circuit court's discovery order that includes findings of fact and conclusions of law is abuse of discretion.

The West Virginia Constitution provides the power for this Court to hear matters in the nature of a Petition for an Extraordinary Writ. See Article VIII, § 3 of the West Virginia Constitution. West Virginia Code § 53-1-1 (1923) (Repl. Vol. 2000) provides that "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Id.

The standard of review for discovery orders in this Court varies depending on the particular circumstances of the trial court's order. For example, a discovery order will be reviewed de novo where it involves a misinterpretation of the West Virginia Rules of Civil Procedure, or where it does not state the facts on which it relies or the correct legal standard. See McDougal v. McCammon, 193 W.Va. 229, 238 (1995), quoting State v. Farley, 192

¹⁷ Erie's Answer and Affirmative Defenses at ¶ 43 (Exhibit E).

W.Va. 247, 253 (1994). (“The discretion that is normally given to a trial court’s [procedural] decisions does not apply where ‘the trial court makes no findings or applies the wrong legal standard[.]’”

By the same token, however, where the trial court’s order contains specific findings of fact and conclusions of law, and applies the correct legal standard, this Court should review only for an abuse of discretion.

[T]he West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making . . . procedural rulings. As the drafters of the rules appear to recognize . . . procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to the specific facts of each case . . . Thus, absent a few exceptions, this Court will review all aspects of the circuit court’s determinations under an abuse of discretion standard.¹⁸

In this case, there is no dispute that Judge Mazzone applied the correct legal standard, as this Court provided that standard in Syllabus Point 5 of its opinion in this very case last year. Moreover, since Judge Mazzone carefully applied this Court’s new syllabus point in his order, including specific findings of fact, this Court should review his decision under the abuse of discretion standard.¹⁹

II. A writ should not issue because Judge Mazzone faithfully applied the test suggested by this Court in State ex rel. Erie Ins. Co. v. Mazzone.

In this case, Judge Mazzone had the benefit of this Court’s carefully-drafted syllabus point regarding the discoverability of reserve information. As this Court would expect, its syllabus point was the touchstone for Judge Mazzone’s ruling on remand. This Court stated:

In making a determination in the context of discovery about the relevancy of insurance reserves information, the trial court should take into account the

¹⁸ McDougal v. McCammon, 193 W.Va. 229, 235 (1995).

¹⁹ McDougal at 235.

nature of the case, the methods used by the insurer to set the reserves and the purpose for which the information is sought, and only grant requests for disclosure when its findings of fact and conclusions of law support a determination that the specific facts of the claim in the case before it directly and primarily influenced the setting of the reserves in question.²⁰

Judge Mazzone carefully applied each aspect of this syllabus point, determining that the specific facts of Ms. Murfitt's case were the impetus for setting the reserves and that this type of case was an appropriate one for discovery of reserves. His Order also clearly identified the purposes for which the reserve amounts were sought.

Of course, Judge Mazzone did not decide the more complex issues of admissibility, as the standard is quite different than that for discoverability.²¹ In addition, Judge Mazzone narrowly circumscribed his ruling, allowing inquiry only into the actual reserve amounts that were set, and not the reasoning Erie used in setting them.

- a. **Erie conceded that the reserves in this case are based on the specific facts of the case and not actuarial analyses of all claims and deposition evidence supports the concession.**

Following this Court's issuance of its opinion in Mazzone, a deposition of a supervisor for Erie was taken in Columbus, Ohio. During the deposition, it became unmistakably clear that the reserves in Ms. Murfitt's case were set with regard to the specific facts of her case and are nothing like the large-scale, corporate, actuarial reserves Erie implied were involved in its argument to this Court last year. As Judge Mazzone made clear in his Order:

... at the May 12, 2006, hearing on the Renewed Motion to Compel, Erie conceded that the requested reserve information for this case is based upon the specific facts of the underlying claim. Counsel for Erie agreed that Erie takes into consideration the specific facts of the claim, as opposed to actuarial-based approach to setting reserves.

²⁰ Id. at Syl Pt. 5.

²¹ See Lipton v. Superior Court, 48 Cal.App.4th 1599, 56 Cal.Rptr.2d 341 (Cal.App. 2nd Dist.,1996) (distinguishing between admissibility and discoverability of reserves).

Id. Nothing in Erie's Petition even attempts to contradict this clear finding of Judge Mazzone. Deposition testimony of Erie employees confirmed Judge Mazzone's conclusion.²² Therefore, the key requirement of Mazzone, that the reserve reference the specific facts of the case, is satisfied.

b. The nature of this case – a failure to timely settle case – further supports discoverability of reserve information.

This Court's syllabus point also asked the trial court to consider the "type of case" in which discoverability of reserves was sought and the purposes for which such information will be used. Judge Mazzone also analyzed this aspect of the standard set by this Court, stating:

For example, the Plaintiff alleges that in handling her personal injury claim, Erie repeatedly offered "lowball" settlement amounts in order to discourage her from continuing to seek what she felt was the appropriate damage amount for her injuries. The stated purpose for seeking the reserve information is to show that Erie intentionally undervalued her claim when offering to settle the claim. The Plaintiff asserts that the reserve amounts will support her position that Erie in fact valued the claim at an amount higher than the amounts offered to the Plaintiff in settlement of her claim.²³

As explained above, this is a failure-to-timely and-fairly-settle case, based on Erie's attempt to get Ms. Murfitt to take six cents on the dollar by low-balling her until trial.

Erie claims that its offers, such as the \$55,500.00, despite being obvious low-balls, were in fact at all times reasonable and fair. Erie affirmatively asserted in its Answer that "[Erie], through its agents, servants and employees, acted reasonably, appropriately and in good faith at all relevant times" and that "All of [Erie's] acts were done in a careful, reasonable, prudent and good faith manner pursuant to the obligations and duties imposed on Defendant by law and/or contract." See Answer of Erie (attached as Exhibit E).

²² See e.g. Phillips Deposition, at 88-94 (attached as Exhibit F).

²³ Order Granting Plaintiff's Motion to Compel.

Judge Mazzone is clearly correct that the reserves are relevant and material to the proper resolution of this dispute. If Erie had Ms. Murfitt's claim reserved at several times the amount of its offers, that would tend to suggest that it low-balled Ms. Murfitt intentionally. Likewise, if Erie's offers were somehow at all times consistent with its reserves that would be at least some evidence that its offers were sincere and in good faith. Either way, the reserve amounts themselves are pertinent, relevant evidence. As an influential New York opinion has explained:

Bad faith is a state of mind which must be established by circumstantial evidence. The actions of the defendant in respect to the reserve are relevant. Negligent investigation and uninformed evaluation of the worth of the [underlying] claims go to the heart of the case since serious and recurring negligence can be indicative of bad faith.

Groben v. Travelers Indem. Co., 49 Misc.2d 14, 266 N.Y.S.2d 616, 619 (N.Y.Sup.Ct.1965), cited in Mazzone, *supra*.

The law of the federal courts in Pennsylvania, cited extensively in Justice Davis' concurring opinion, is not to the contrary. In North River Ins. Co. v. Greater New York Mut. Ins. Co.,²⁴ the Eastern District of Pennsylvania held that reserves were both relevant and discoverable in a dispute over the good faith valuation of a claim. That court applied the same standard in Safeguard Lighting Systems, Inc. v. North American Specialty Ins. Co.,²⁵ where it was determined that the reserves were not work product, but could not be discovered in any event because they had little to do with the issues in dispute. It is the nature of the case in which the reserves are sought that determines their discoverability.²⁶

²⁴ 872 F.Supp. 1411 (E.D.Pa.,1995) (reserve information relevant and discoverable where the good faith of the insurer's evaluation is at issue).

²⁵ 2004 WL 3037947 at *2 (E.D.Pa., 2004).

²⁶ Mrs. Murfitt submits that the fact that reserves are discoverable in some cases and under some circumstances strongly suggests that the cornerstone of their discoverability is relevance and not the work-product doctrine.

Of course, evidence need not be admissible, nor dispositive to be discoverable. The mere fact that other explanations for the amounts of the reserve could exist has no affect on their discoverability.²⁷ The Rule 26 test for discoverability requires only that information be relevant or “reasonably calculated to lead to the discovery of relevant evidence.” As the Lipton court explained:

The evaluation of a case made by an insurer, whether compelled by law or business prudence, is information which might well lead to discovery of evidence admissible on any number of issues which commonly are presented in bad faith actions.

Id. at 349-50.

- c. **An additional issue in this case, not cited by the circuit court, also supports the discoverability of reserves in this case.**

Generally, courts have held it is not permissible to admit reserves to show a denial of coverage was made in bad faith. However, reserves could be relevant, and even dispositive, in a concealment of coverage case. In this case, during the early days of Ms. Murfitt’s claim, Erie told Ms. Murfitt’s attorneys that the coverage available in the case was \$250,000.00 per person. Ms. Murfitt found out much later that Erie’s policyholder actually had \$1,000,000.00 in umbrella coverage with Erie. Erie contends that the failure to disclose the umbrella coverage was inadvertent.

Plaintiff has not seen the reserve amounts of course. However, Erie never sets a reserve above the policy limit. See deposition of Phillips at 95. If Erie reserved the case in excess of the underlying policy limit long before disclosing the umbrella to Ms. Murfitt, that would be evidence that Erie knowingly concealed the full extent of the applicable coverage

²⁷ See Lipton v. Superior Court, 48 Cal.App.4th 1599, 56 Cal.Rptr.2d 341 (Cal.App. 2nd Dist.,1996) (distinguishing between admissibility and discoverability of reserves).

from her. The failure to disclose applicable coverages violates West Virginia Insurance Regulations. Therefore, the reserves are potentially relevant in that area as well.

- d. No attorneys were involved in the setting of the reserves in this case, nor was “anticipation of litigation” the primary motivating purpose for the setting of the reserve amounts; therefore, there is no threat to any attorney work-product.**

Judge Mazzone found as a fact that no attorneys were involved in setting the reserves in this case. He also found as a fact that “anticipation of litigation” was not the “primary motivating purpose” the reserves were set. Not only are these findings clearly correct and well supported, they are entitled to substantial deference from this Court: “In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syllabus point 2, Walker v. West Virginia Ethics Commission, 201 W.Va. 108, 492 S.E.2d 167 (1997).

In order to qualify as work-product, materials must be prepared “in anticipation of litigation.” See W.Va.R.Civ.Pro. 26(b)(3). According to this Court, the anticipation of litigation must be the “primary motivating purpose” for the creation of the materials.²⁸ Judge Mazzone found as follows:

The facts of this case indicate that anticipation of litigation is not the primary motivating purpose for establishing insurance reserves, as insurance companies are required by law to establish reserves. Every claim presumably has some reserve amount attached to it, regardless of whether the claim ends in litigation or is resolved through other means. During her deposition on February 16, 2006, claims supervisor Sandra Barker testified that a reserve is “an amount of money or a dollar amount that's set aside for payment of an injury claim or any

²⁸ See State ex rel. United Hospital Center v. Bedell.

type of claim of [sic] any payment upon any claim” Deposition transcript, p 98. Ms. Barker's description of reserves supports the Court's conclusion that the potential for litigation is not the primary motivating purpose for setting reserves, as they are set aside for “any type of claim” and for “any payment upon any claim,” not limited to those claims for which litigation is likely or anticipated.²⁹

Barker also testified that reserves are set every ninety days, with or without litigation, as a matter of company policy. Barker Deposition. at 100.

Erie therefore clearly failed to satisfy the “primary motivating purpose” prong of the test for work product ensconced in Rule 26 and confirmed by Bedell. “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.”³⁰ Judge Mazzone’s findings with regard to Erie’s intent is the type of factual conclusion by a trial court that is entitled to deference from this Court. “In these types of cases, the issues are ordinarily fact-dominated rather than law-dominated and, to that extent, the trial court's resolution of them is entitled to deference.”³¹

Judge Mazzone’s ruling is not out of the ordinary, as other courts have swept aside the claim that reserves are prepared in anticipation of litigation

Discovery of the existence and character of such reserves appears reasonably calculated to lead to the discovery of admissible evidence. In reaching this conclusion we reject IFI's assertion of . . . the work product immunity doctrine. The existence and amount of any loss reserve is not . . . prepared in anticipation of litigation, rather, the reserve is established in the “ordinary course of business.”³²

²⁹ Exhibit A at 7.

³⁰ State ex rel. United Hospital Center, Inc. v. Bedell, 199 W. Va. 316, 484 S.E.2d 199 (1997); see also State ex rel. Medical Assurance v. Recht, 583 S.E.2d 80 (W.Va. 2003).

³¹ Fraternal Order of Police v. City of Fairmont, 196 W.Va. 97, 100, 468 S.E.2d 712, 715 (1996) (footnote omitted).

³² Loyal Order of Moose v. International Fidelity Insurance Co., 797 P.2d 622, 628-29 (Alaska 1990).

It is additionally significant that no attorneys participated in the setting of reserves. The reserves are therefore not the “opinion work product” of any attorney. Erie simply had its adjusters set reserves in this case according to normal company practice. Therefore, there is no danger that in releasing the reserves, Erie’s communication with its attorneys or their “opinion work product” could ever be compromised by Judge Mazzone’s ruling.

III. A writ should not issue because insurance reserve information is not work product.

Erie also contends that reserve information should be treated generally as work product, whatever the circumstances of its specific reserve setting in this case, relying on Justice Davis’ concurring opinion in Mazzone. As an initial matter, such treatment conflicts with the opinion of the Court in Mazzone that

In other words, it is widely recognized that relevancy of reserve information turns on the unique factors presented in each case.

.....
These cases make it clear that a case-by-case examination of the factors we have previously identified is necessary for a court to be able to conclude that information involving reserves is admissible or “reasonably calculated to lead to the discovery of admissible evidence” and, as a result, is subject to disclosure. W.Va. R.Civ.P. 26(b)(1).

Id. Erie’s arguments therefore fly in the face of the opinion issued by this Court, in this case, which makes clear that the discoverability of reserves are to be analyzed on a case-by-case basis, according to syllabus point 5 of Mazzone.

a. Reserve information fails to meet the basic qualifications for treatment as work product.

As noted above, when reserves are not prepared with the “anticipation of litigation” as the “primary motivating purpose,” they are not work-product. Similarly, the doctrine of “opinion work product” refers to the almost inviolable privilege that attaches to an attorney’s

ideas, strategies and impressions, and has no application where attorneys are not involved. Therefore the burden, as always, should be on the party resisting discovery, Erie, to show how its particular reserves in a particular case, partake of the qualities of work product. Erie has not even attempted to make such a showing in this case, nor is it possible, even in principle, to make a showing that all reserves have such qualities. Accordingly, Erie's argument that all reserves are work product fails. Conversely, Judge Mazzone's findings of substantial need and unavailability are entitled to deference from this Court and since Erie did not even attempt to dispute those findings, Judge Mazzone can hardly be said to have abused his discretion.

b. Neither the Rhone-Poulenc view nor the Simon view is applicable in bad faith cases, since Simon is a coverage case and Rhone-Poulenc appears to be one.

Erie relies heavily on the concurring opinion of Justice Davis in its Petition, and urges this Court to look to the Simon and Rhone-Poulenc cases for guidance in this case. However, since Simon is clearly not a bad faith case and Rhone-Poulenc is a coverage case,³³ they are not properly applicable to a bad faith context. Consideration of Simon and Rhone-Poulenc would be more proper when and if this Court sees a comparable case, in which, like Simon, a product liability claimant is attempting to discover an insurer's reserves for similar product claims, while the product claim remains ongoing. Likewise, in a declaratory judgment action

³³ See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 1991 WL 237636 (E.D.Pa. 1991) clearly holding that the question of work product previously addressed was totally academic, since reserves are not relevant in a coverage case. ("information concerning reserves was of tenuous relevance, if any relevance at all, in policy interpretation").

seeking to establish coverage such as Rhone-Poulenc, it is clear that the setting of the reserve at any amount does not determine the scope of the policy's coverage provisions.³⁴

If Ms. Murfitt had come to Judge Mazzone seeking discovery of Erie's reserves before settling her injury case, that would present an altogether different question to which Simon or Rhone-Poulenc might be applicable. But Ms. Murfitt did not do so – nor is she asking in this case what Erie has reserved to settle her bad faith case. Simon is therefore clearly inapposite.

Justice Davis' concurring opinion cited a series of cases where reserve information was called work product. Ms. Murfitt respectfully notes that few of these cases were bad faith cases and by and large involved attempts to discover reserves in the underlying litigation itself, i.e. they were tantamount to Ms. Murfitt seeking the reserves not for the underlying injury case, but for this case.³⁵

³⁴ Furthermore, Rhone-Polenc is inconsistent with Syllabus Point five in this case, inasmuch as it tends to suggest that the more relevant the reserves to the particular case, the less discoverable they should be.

³⁵ Cf. State ex rel. Erie v. Mazzone at 600-01 (concurring opinion of Davis, C.J.) with Frank Betz Assocs., Inc. v. Jim Walter Homes, Inc., 226 F.R.D. 533 (D.S.C.2005) (“The plaintiff seeks discovery on the amount of a ‘reserve’ that was set aside for purposes of this litigation.”); Boston Gas Co. v. Century Indem. Co., No. Civ. A. 02-12062-RWZ, 2005 WL 2150530 (D.Mass. Aug. 31, 2005) (the cryptic order does not say what the case is about, but based on the verdict forms available on Westlaw, it was a coverage case, not a bad faith case at all, nor one about lowball valuation); J.C. Assocs. v. Fidelity & Guar. Ins. Co., No. Civ. A. 01-2437 RILJM, 2003 WL 1889015 (D.D.C. Apr. 15, 2003) (Specifically noting at *1: where the value of the claim is at issue, reserves may discoverable, but that they are not discoverable in disputes about the existence of coverage or where Plaintiff makes no showing of relevance); Mordesovitch v. Westfield Ins. Co., 244 F.Supp.2d 636 (S.D.W.Va.2003) (the alleged bad faith dealt with refusal to waive subrogation, not valuation, although the issues at stake are unclear from the opinion); Chambers v. Allstate Ins. Co., 206 F.R.D. 579 (S.D.W.Va.2002) (the underlying loss claim was still pending as of the time the reserves were sought); Certain Underwriters at Lloyds, London v. Fidelity & Cas. Ins. Co. of New York, No. 89 C 876, 1998 WL 142409 (N.D.Ill. Mar. 24, 1998) (reserves set with attorney input not discoverable: “We conclude that reserve recommendations, in this case, do reveal attorney mental impressions, thoughts, and conclusions since the reserve figures were calculated only after an attorney acting in his legal capacity carefully determined the merits and value of the underlying case.”); Montgomery v. Aetna Plywood, Inc., No. 95 C 3193, 1996 WL 189347

c. Courts have ruled overwhelmingly that reserve information is discoverable in bad faith cases.

In contrast to the distinguishable circumstances of Simon and Rhone-Poulenc, there is a large body of case law dealing with the discovery of reserves in bad faith litigation and Ms. Murfitt respectfully submits that it is this body of law, and not Simon or Rhone-Poulenc to which this Court should look in this case. Although the citations that follow here are lengthy, since Erie is trying to convince this Court to adopt a position that has been so widely rejected, it seemed essential to set forth the countervailing authority at length.

The following states make reserve information discoverable categorically, or as part of allowing complete discoverability of an insurance claim file in a bad faith case. Of course, since third-party bad faith is a rare animal, many jurisdictions have reached this issue only in first-party cases.

New York: Groben v. Travelers Indem. Co., 49 Misc.2d 14, 17, 266 N.Y.S.2d 616 (N.Y. Sup. 1965)

There is included in the proposed notice a request for production of material concerning the reserve established by the insurer and correspondence with the Insurance Department of the State in respect to it. Presumably, these items could be material and necessary to the action as an admission against interest as to defendant's knowledge and evaluation of the case. It can be argued that this was an internal matter of the insurer not related to the preparation of the legal defense of the actions. However, examination with respect to the reserve may develop evidence on the issue of defendant's bad faith. Bad faith is a state of mind which must be established by circumstantial evidence. The actions of defendant in respect to the reserve are relevant. Negligent investigation and uninformed evaluation of the worth of the Rosen

(N.D.Ill. Apr. 16, 1996) (citing to Rhone-Poulenc in finding valuation reports prepared by consultants protected by opinion work product doctrine); Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 117 F.R.D. 283 (D.D.C.1986) (reserves not relevant because they do not reflect whether coverage exists – in a coverage case, also noting that attorney-input is what makes reserves sometimes work product); Stevens v. Hartford Ins. Co. of the Midwest, 646 So.2d 981 (La.Ct.App.1995) (letter from adjuster to attorney about case reserve should not have been admitted in the underlying case); PECO Energy Co. v. Insurance Co. of N. Am., 852 A.2d 1230 (Pa.Super.Ct.2004) (reserves not discoverable in a coverage dispute).

claims go to the heart of the case since serious and recurring negligence can be indicative of bad faith. Defendant's actions on the reserve may have a direct bearing on the issue.

Pennsylvania: North River Ins. Co. v. Greater NY Mut. Ins. Co., 872 F. Supp. 1411, 1412 (E.D. Pa. 1995). (Documentation of reserves set aside by primary liability insurer with respect to tort action was relevant, and, therefore, subject to discovery in excess insurer's action as insureds' assignee and equitable subrogee seeking to recover for bad faith failure to settle tort action within policy limits; amount set aside was germane to any analysis that primary insurer made of settlement value, and that information was relevant to whether primary insurer acted in bad faith during pretrial settlement negotiations." But see Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co., 139 F.R.D. 609, 613 (E.D.Pa.1991) (taking the opposite view in a coverage case).³⁶

Alaska: Loyal Order of Moose, Lodge 1392 v. International Fidelity Insurance Co., 797 P.2d 622, fn. 14 1990 ("We also note our disagreement with the superior court's discovery ruling denying the Lodge discovery of the existence and amount of any loss reserves IFI may have established regarding the Moose Lodge claims. Discovery of the existence and character of such reserves appears reasonably calculated to lead to the discovery of admissible evidence.") See also United Services Automobile Association v. Werley, Alaska Supr., 526 P.2d 28, 32 n. 15 (1974).

California: Lipton v. Superior Court, 48 Cal.App.4th 1599, 1614-15, 56 Cal.Rptr.2d 341, 349-350 (Cal. App. 2 Dist.,1996).

The evaluation of a case made by an insurer, whether compelled by law or business prudence, is information which might well lead to discovery of evidence admissible on any number of issues which commonly are presented in bad faith actions.

We are not unmindful of the reasonable concerns an insurer may have that its compliance with the statutory requirements for setting and adjusting loss reserves may well force it into the making of an "admission" which might be introduced against it in a subsequent dispute with its insured.

.....
This argument fails here for several reasons. First, the method of establishing and amount of claims reserves is guided by statute. (Ins.Code section 923.5). The amount of reserves carried at any specific time cannot be arbitrary. The insurer must reasonably estimate the

³⁶ Accord., Leski Inc v Fed Ins Co., 129 FRD 99 (D.N.J. 1989) (reserve not relevant in coverage suit)

amount necessary to provide for the payment of all losses and claims for which the insurer may be liable. It must reasonably provide for the expense of adjustment or settlement of losses and claims. (Ibid.). Second, each insurer transacting business in the State of California is required to disclose the amount of its reserves each year in its annual statement which is filed with the Department of Insurance. (Ins.Code section 923.) Third, the Insurance Commissioner, by regulations promulgated by the Department of Insurance, requires each company to: (a) establish an effective method for testing the adequacy of loss and loss expense reserves (10 Cal. Regs. section 2319.1) and (b) comply with the prescribed methodology of computing reserves (10 Cal. Regs. section 2319.2.). The Commissioner is empowered to audit claims reserves of any insurer doing business in this state. (10 Cal. Regs. section 2319.4.) The power of the Commissioner of Insurance to regulate reserves is a strong disincentive to the establishment of unrealistically low or high reserves. Finally, LMIC's argument is really directed to the limitation or exclusion of loss information at trial. It does not respond to Lipton's pretrial discovery demand.

Louisiana: First National Bank of Louisville v. Loretta Lustig, et al, 1991 WL 236839 (E.D.La.) ("Reserve information, including any post-litigation reserve information, is relevant to show the insurer's state of mind in relation to its claims settlement practices." citing Loyal Order of Moose, supra; Tackett supra; Bergeson supra; Samson v. Transamerica Ins. Co., 636 P.2d 32, 44 (Cal.1981); Town of Nassau v. Phoenix Assurance Co. of New York, 394 N.Y.S.2d 319, 320 (N.Y.App.Div.1977); Groben supra.)

See also Culbertson v. Shelter Mutual Insurance Company, 1998 WL 743592 (E.D.La.), ("this court chooses to follow that line of cases which hold that reserve information is discoverable where a claim of bad faith is asserted. See First National Bank of Louisville, 1991 WL 236839 and 1993 WL 411377 (E.D.La.); see Athridge v. Aetna Casualty and Surety Co., 1998 WL 429661 *10 (D.D.C.). The information sought may demonstrate or lead to admissible evidence with respect to the thoroughness with which defendant investigated and considered plaintiff's loss of income claim. It is therefore discoverable and may be relevant to the good or bad faith of defendant in denying the claim."

See also Fretz v. Mutual Benefit Ins. Co., 37 Pa. D. & C.4th 173, 179-80 (Allegheny Cty. 1998) ("compelled an insurer in a bad faith action to produce documentation describing the procedures by which the insurer established its loss reserves and has concluded that such reserve information may be pertinent to the issue of whether the insurer neglected to make a reasonable settlement offer")

Delaware: Tackett v. State Farm Fire and Cas., 558 A.2d 1098, 1104-05 (Del.Super. 1988).

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 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. Groben v. Travelers Indemnity Company, N.Y.Super., 49 Misc.2d 14, 266 N.Y.S.2d 616, 619 (1965) and Town of Nassau v. Phoenix Assur. Co. of New York, Sup.Ct.App.Div., 57 A.D.2d 992, 394 N.Y.S.2d 319, 320 (1977).

But see National Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chemical Co., 558 A.2d 1091, 1097-98 (Del.Super.,1989) (holding that reserves are not discoverable because they are not relevant in a coverage dispute, and expressly distinguishing cases of bad faith refusal to settle).

Nevada: Ballard v. Eighth Judicial Dist. Court of State In and For County of Clark, 106 Nev. 83, 84-85, 787 P.2d 406 (1990).

Petitioner first contends that the statement was taken in anticipation of litigation and is therefore subject to a qualified privilege under the "work product doctrine." . . . The issue presented is one of first impression in Nevada. We have considered the conflicting authorities from other jurisdictions as cited by the parties and amicus curiae. We conclude that the better rule is that the materials resulting from an insurance company's investigation are not made "in anticipation of litigation" unless the insurer's investigation has been performed at the request of an attorney. See Langdon v. Champion, 752 P.2d 999 (Alaska 1988). Therefore, because the statement in this case was not taken at the request of an attorney, it is not privileged under NRCP 26(b)(3).

Florida: Allstate Indem. Co. v. Ruiz, 899 So.2d 1121, 1129-30 (Fla.,2005) (emphasis supplied).

Consistent with the analysis outlined, we hold that in connection with evaluating the obligation to process claims in good faith under section 624.155, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action.³⁷

Kentucky: Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803 (Ky., 2004). (Allowing wide-ranging discovery of insurance company documents in bad faith case: “Evidence of Grange’s reserve setting procedures would help show whether Grange is following the statutory and regulatory requirements and whether the specific system for setting reserves is aimed at achieving unfairly low values. We find that this evidence is relevant to the bad faith claim.”).

Colorado: Silva v. Basin Western, Inc., 47 P.3d 1184, (Colo. 2002). (CO allows discovery of reserves in first party cases, the only kind of bad faith it has. Colorado does not allow discovery of reserves in the underlying tort case. “In a first-party claim, the establishment of reserves and settlement authority could be relevant and reasonably calculated to lead to admissible evidence regarding whether the insurance company adjusted a claim in good faith or made a prompt investigation, assessment, or settlement of a claim.”)

Arizona: Brown v. Superior Court In and For Maricopa County, 137 Ariz. 327, 670, P.2d 725, (1983) (“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.”).

Maryland: APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 17-18 (D.C.Md., 1980), citing Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D.Ill.1972).

An insurance company by the nature of its business is not called into action until one of its insured has suffered some form of injury and has a potential claim against some other party and/ the insurer itself. At this point, the insurer must conduct a review of the factual data underlying the claim, presumably through the talents of agents or employees who summarize the data for middle- or upper-management, the latter deciding whether to resist the claim, to reimburse the insured and seek

³⁷ Research did not uncover a Florida third-party case bearing on the issue.

subrogation of the insured's claim against the third party, or to reimburse the insured and forget about the claim thereafter. The logical absurdity of the plaintiff's position is that, under its theory, the amendments to the discovery rules which were believed to be a liberalization of the scope of discovery would be a foreclosure of discovery of almost all internal documents of insurance companies relating to the claims of insureds. We do not believe that Rule 26(b)(3) was designed to so insulate insurance companies merely because they always deal with potential claims. If this were true, they would be relieved of a substantial portion of the obligations of discovery imposed on parties generally that are designed to insure that the fact finding process does not become reduced to gamesmanship that rewards parties for hiding or obscuring potentially significant facts.

Montana: In re Bergeson, 112 F.R.D. 692, (D.Mont., 1986).

The only issue then is whether particular documents within the claims file were prepared in anticipation of litigation or fall within the attorney client privilege and, if so, whether they may be withheld from discovery. The Court finds ample authority to support a ruling that the claims file should be disclosed in a bad faith action against an insurance carrier. See Gibson v. Western Fire Ins. Co., 210 Mont. 267, 682 P.2d 725 (1984) (references in opinion indicate complete access to claims file, including attorney-client correspondence); Caldwell v. District Court in and for the City and County of Denver, 644 P.2d 26 Colo., (1982); Brown v. Superior Court in and for Maricopa County, 137 Ariz. 327, 670 P.2d 725 (1983); United Services Automobile Assn v. Werley, 526 P.2d 28 (Alaska 1974). . . This Court agrees that the insurance company's claims file is permissible discovery in a bad faith action brought by its insured for failure to pay a claim.

Rhode Island: Bartlett v. John Hancock Mut. Life Ins. Co., 538 A.2d 997, (R.I. 1988) (entire claim file is subject to discovery once breach contract claim is concluded, citing Brown, Bergeson, supra) (rev'd on other grounds).

Ohio: Moskovitz v Mt. Sinai Medical Center, 69 Ohio St 3d 638 (1994) (All parts of claim file discoverable in bad faith litigation. Society Corp v American Cas. Co., 1991 WL 346302 (ND Ohio 1991) (reserve information should be disclosed in response to an interrogatory).

Oklahoma: Hall v. Goodwin, 775 P.2d 291, 1989 OK 88 (Okla. 1989) (In a bad faith case, the Plaintiff has a substantial need for claim file documents, including those prepared in anticipation of litigation).

Illinois: Young v. Allstate Ins. Co., 351 Ill.App.3d 151, 285 Ill.Dec. 921 (Ill. App. 1 Dist., 2004). (claim file, even after litigation initiated, apparently discoverable) (“Plaintiffs further contend that the trial court disregarded the contradictory positions that Allstate presented during litigation regarding the issuance of a stated value policy, which is apparent from the claim file, Allstate's correspondence and discovery conducted during litigation.”)

Wisconsin: Allied Processors, Inc. v. Western Nat. Mut. Ins. Co., 246 Wis.2d 579, 629 N.W.2d 329 (Wis.App.,2001) (Reserve information not only discoverable, but admitted, and part of the case supporting an award to Plaintiff in a bad faith case).

The following states all appear to follow ordinary procedures for determining the discoverability of work product, virtually all including the in camera review procedures mandated by State ex. rel Medical Assurance v. Recht: Alabama, Arkansas, Georgia, Iowa, Kansas, Maine, Minnesota, Mississippi, Iowa,³⁸ North Carolina, Pennsylvania, Utah, Virginia, and Washington.³⁹ In these states, the discoverability of reserve information therefore turns, as it did in this case, on the outcome of the in camera review. In these states, the burden is on the insurer to show its privilege applies. These states therefore honor the position taken by this Court, in this case, that discoverability of reserves should be determined case-by-case.

For example, in Alabama, in Ex parte Fuller, 600 So.2d 214, 215-16 (Ala. 1992), the Supreme Court of Alabama held:

The distinction between Bozeman and this case is that we are unable here to conclude that the materials Fuller seeks were, in fact, prepared in anticipation of litigation. Under Rule 26(b)(3), the party objecting to discovery bears the burden of establishing the elements of the work-

³⁸ Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., 690 N.W.2d 38, 49 (Iowa, 2004). Having conducted our own in camera review of the Wisconsin report, we cannot say that the district court's conclusion was clearly unreasonable or untenable. Accordingly, we affirm the district court's order compelling production of the report.

³⁹ “At any rate, the only way a court can accurately determine what portions of a file may be exempt from disclosure as work product is by an in camera review of the file.” Limstrom v. Ladenburg, 136 Wash.2d 595, 615, 963 P.2d 869 (1998).

product exception. Sims v. Knollwood Park Hospital, 511 So.2d 154 (Ala.1987). Based on the scant materials before us, we conclude that State Farm has not carried that burden. Unlike Ex parte Bozeman and Ex parte State Farm Mutual Automobile Ins. Co., supra, in this case there are no affidavits, memorandums, or reports to support the insurer's position. To hold that the materials Fuller seeks fall under the work-product exception, we would have to speculate, simply because State Farm was eventually added as a defendant, that it had generated those materials in anticipation of litigation

Id. See also, Lopez v. Woolever, 62 Va. Cir. 198, 2003 WL 21728845, 18 VLW 137, (Va. Cir. Ct., 2003) (“Thus, the Court concludes that determination of whether the investigation was performed in the first party liability or third party liability context is not dispositive. A case-by-case analysis is required to determine whether the doctrine applies” (emphasis added)).

No one can claim to have reviewed all published opinions in this day and age, but no state, as far as Respondent can determine, has held that reserve information, without even being looked at, categorically qualifies for work-product protection. It bears repeating – not one single state has adopted the position urged by Erie with regard to bad faith cases, either first or third party.

Of the thirty or so states that have considered the issue of discoverability of reserves or entire claim files in bad faith case, approximately eighteen have ruled that reserves are categorically discoverable in themselves, or as part of the entire claim file. Over a dozen more place the burden on the insurer to show why they are work product and allow discovery of reserves depending on the in camera review.⁴⁰ Erie has failed to carry its burden to show that the reserves in this case are work product, and has essentially ignored the decision of this Court in this case that the showing that reserves are immune from discovery must be made on a case-by-case basis.

⁴⁰ Accord., Recht Syl. Pt. 6.

In this case, out of over three hundred documents reviewed, Judge Mazzone found Erie failed to meet its burden as to approximately 24. His ruling is consistent not only with Recht, but with the great weight of authority across the country. The type of case in which the discovery of reserves are sought and the purposes for which they are sought is the touchstone for discoverability of reserves across the country and also in West Virginia. See State ex rel. Erie v. Mazzone, Syl. Pt. 5.

d. Erie has no evidentiary foundation for its work product claims.

Finally, it is worth noting that Erie has no evidentiary foundation for its claims of work product. Erie failed to make any legitimate record whatsoever that the factual foundation required to establish work-product existed. The only time it even purported to do so was in submitting a classic sham affidavit from Erie supervisor Barker just a few days before the hearing on the motion to compel. See Kiser v. Caudill, 215 W.Va. 403, Syl. Pt. 4 (W.Va. 2004). Even though Barker was deposed and did not testify to the boilerplate assertions of the elements of work product during her testimony, Erie submitted an affidavit from her, after her deposition and just a few days before the hearing on the motion to compel, in an attempt to contradict her statements at deposition. Cf. deposition of Barker from 98-108 and 132-33 (discussing reserves being set as part of the ordinary course of business and immediately upon receipt of the claim) with affidavit of Barker attached to Erie's Response to Plaintiff's Renewed Motion to Compel (making boilerplate assertions that the reserves in this case were set in anticipation of litigation, even though it was patently clear from her deposition that reserves are set in every case, litigation or not). If Erie believed its affidavit, it should have made that record at deposition such that those claims could be cross-examined,

and not brought them before the Court in a sham affidavit. See also Tr. of hearing on Plaintiff's renewed motion to compel at 46-48.

IV. Erie's arguments regarding "chilling effect" do not apply to a decision regarding discoverability.

Erie contends, bizarrely, that if reserve information is not held to be non-discoverable, reserves will not be accurately set by insurers for fear of liability. Since reserves are required to be set by law, this position is astounding. Erie is essentially coming to the Court saying that if it does not receive special exemptions in discovery, it will set false reserves and break the law. Why would this Court come to the aid of a litigant or class of litigants willing to so blatantly threaten procedures at the core of the rule of law?

Moreover, nothing prevents Erie from producing and marshalling evidence that the reserve amounts reflect not only case value, but also defense costs, or that they are otherwise not to be taken as the equivalent of the insurer's evaluation of the claim. As one court explained:

even if the trial court admits reserve information in evidence the insurer would not be foreclosed from fully explaining through competent testimony, the reason the reserve was established, the reasonableness of the amount of the reserve, the allocation between indemnity and loss adjustment expense and any other evidence relevant to the issue from the insurer's standpoint.

Lipton, supra, at n. 17. Reserve amounts are like any other piece of relevant evidence. They bear on the ultimate question, but do not resolve it. It is for trial judges to determine the proper extent of their use in a particular case and for juries to assign the proper weight they are given.

CONCLUSION

First, Judge Mazzone faithfully applied this Court's syllabus point from Mazzone and his determinations were well within his discretion and should stand;

Second, the nature of the case and the purpose for which reserves are sought are and should remain the touchstones for their discoverability.

Third, the position advanced by Erie is out-of-step with virtually all the courts that have examined the question -- i.e. the discoverability of reserves in bad faith cases.

Fourth, if nothing else, Erie's refusal to allow this Court to conduct an in camera review of the reserve information justifies the Discharge of the Rule to Show Cause.

WHEREFORE, Plaintiff below, Elizabeth Murfitt, respectfully requests that the Rule to Show Cause in this matter be DISCHARGED.

Respectfully submitted,

ELIZABETH MURFITT, Respondent

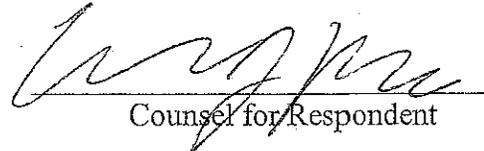
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CERTIFICATE OF SERVICE

Service of the foregoing PLAINTIFF BELOW, ELIZABETH MURFITT'S, RESPONSE TO ERIE'S PETITION FOR A WRIT OF PROHIBITION was had upon the defendant herein by regular United States mail, postage prepaid, on this 22nd day of November, 2006, addressed as follows:

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