

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 070080

**JEFFREY A. HORKULIC, REBECCA A. HORKULIC, his wife and
JEFFREY HORKULIC as natural parent and legal guardian of STEPHANIE
HORKULIC and BENJAMIN HORKULIC, minors,**

Plaintiffs below/Appellees herein,

v.

**WILLIAM O. GALLOWAY, GALLOWAY LAW OFFICES, CAMBRIDGE
PROFESSIONAL LIABILITY SERVICES and ACORDIA OF WEST VIRGINIA, INC.,
and JOHN DOES UNKNOWN,**

Defendants below,

and

TIG INSURANCE COMPANY,

Defendant below/Appellant herein.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

On Appeal from the Circuit Court of Hancock County
(Honorable Arthur Recht)
Civil Action No. 02-C-244 R

**BRIEF OF APPELLANT
TIG INSURANCE COMPANY**

Respectfully Submitted,

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I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

The appellant, TIG Insurance Company [“TIG”], appeals from an Order entered by the Circuit Court of Hancock County, West Virginia, which deprives TIG of property without due process of law. On August 25, 2006, the Circuit Court entered the Order which granted the Motion to Compel Enforcement of Compromise Settlement Agreement [the “Motion to Compel”] filed by the plaintiffs below and appellees herein, Jeffrey A. Horkulic, Rebecca A. Horkulic, and Jeffrey A. Horkulic, as natural parent and legal guardian of Stephanie Horkulic and Benjamin Horkulic [“Appellees”]. Notwithstanding TIG’s property interest as the insurance company paying the settlement, the Circuit Court did not allow TIG to participate at the May 30, 2006 plenary hearing on the Motion to Compel. TIG’s participation in the plenary hearing was essential considering the Appellees alleged that TIG consented to the settlement.

The essential nature of TIG’s participation is supported by the fact that the Circuit Court ultimately issued an Order which entered findings of fact and conclusions of law against TIG. The Circuit Court also heard the Motion for Injunctive Relief filed by Mr. Galloway without providing TIG notice. Moreover, the Circuit Court erred to the extent that it permitted others to waive TIG’s attorney-client privilege and quasi attorney-client privilege, as well as permitted hearsay testimony over TIG’s objections. This Court granted TIG’s Petition for Appeal on these and, as such, TIG herein appeals the Order.

II. STATEMENT OF FACTS

The underlying action is a legal malpractice action filed by Appellees against their former attorney, William O. Galloway and Galloway Law Offices arising out of a missed statute of limitations on a automobile accident claim. First Amended Complaint at ¶ 8, Index No. 2. The tortfeasor had a liability policy with limits of \$100,000.00. Mr. Horkulic sustained medical bills

of approximately \$30,000.00 and lost wages in the amount of \$4,022.49. Mrs. Horkulic sustained medical bills in the amount of \$256.00. At all relevant times, Mr. Galloway was insured under a lawyers professional liability policy issued by TIG with liability limits of \$500,000.00. TIG undertook the defense of Mr. Galloway in the underlying action and hired William D. Wilmoth, Esq., to defend Mr. Galloway. However, Mr. Galloway continued to retain his own private attorney, Jason Cuomo, Esq. On October 27, 2003, Appellees amended their complaint to assert a cause of action for third-party bad faith against TIG as well as Cambridge Professional Liability Services and Acordia of West Virginia. First Amended Complaint at ¶¶ 33-36, Index No. 2.

On or about May 4, 2005, Mark S. Rapponotti, Senior Claims Analyst for TIG, was contacted by telephone by Mr. Wilmoth and Appellees' counsel, Robert P. Fitzsimmons, Esq., and Robert "Rocky" J. Fitzsimmons, Esq., regarding settlement of the legal malpractice portion of the underlying lawsuit. During the telephone call, Mr. Wilmoth explained two settlement proposals to Mr. Rapponotti. At the conclusion of the telephone call, Mr. Rapponotti requested the two proposals in writing. Affidavit of Mark S. Rapponotti, attached as Exhibit 1 to "Response to Plaintiffs' Motion and Supplement to Motion to Compel Enforcement of Compromise Settlement Agreement," December 5, 2005, Index No. 9. At the time of the phone call, the only settlement authority extended to Mr. Wilmoth by TIG was two hundred and fifty thousand dollars. Id. During the course of the telephone call, Mr. Rapponotti did not extend further settlement authority to Mr. Wilmoth. Id. This telephone call was the last communication Mr. Rapponotti had with Appellees or their attorneys regarding settlement of the legal malpractice portion of the lawsuit. Id.

Mr. Rapponotti subsequently received a facsimile that same date, May 4, 2005, from Mr. Wilmoth outlining the two settlement proposals discussed during the May 4, 2005 telephone call. Correspondence from William D. Wilmoth to Mark S. Rapponotti, attached as Exhibit 1.A. to Id., Index No. 9. The first proposal consisted of a four hundred and fifty thousand dollar cash payment from TIG and a stipulated judgment for \$1.5 million relative to Mr. Galloway's legal malpractice. Id. The second proposal consisted of a \$1 million cash payment from TIG. Id. TIG, through Mr. Rapponotti, responded by letter dated May 6, 2005, extending Mr. Wilmoth authority to settle the legal malpractice portion of the underlying lawsuit for five hundred thousand dollars. Correspondence from Mark S. Rapponotti to William D. Wilmoth, attached as Exhibit 1.B. to Id., Index No. 9. However, TIG expressly declined to consent to the stipulated judgment: "However, be advised that TIG will not consent to the insured entering into a stipulated judgment for \$1,500,000 such as demanded by the plaintiffs and outlined in your letter of May 4, 2005." Id.

TIG received no further communication regarding a settlement until May 24, 2005. Affidavit of Mark S. Rapponotti, attached as Exhibit 1 to Id., Index No. 9. On that date, Mr. Wilmoth sent an e-mail to Mr. Rapponotti stating as follows:

We have provisionally settled [Appellees'] case against Bill Galloway for \$450,000. All depositions and the trial have been postponed. The sticking point, as you know, is Bob Fitzsimmons' insistence on the consent judgment of \$1.5 million, with agreement not to execute on Mr. Galloway's personal assets. Plaintiffs wanted TIG to agree to the entry of the consent judgment, which TIG was not inclined to do. Therefore, [Appellees] will file a 'Motion for Entry of Consent Judgment,' to which Mr. Galloway will agree (to protect his assets).

E-mail from William D. Wilmoth to Mark S. Rapponotti, attached as Exhibit 1.D. to Id., Index No. 9. Mr. Rapponotti e-mailed Mr. Wilmoth back the same day stating as follows: "Thank you

for finally responding to my inquiries. I will refer this to Bollinger Rubery & Garvey for a response." Id.

By letter dated June 13, 2005 to Mr. Wilmoth, TIG, though counsel Beth Ann Berger Zerman, Esq., of Bollinger Rubery & Garvey, objected to the provisional settlement:

This will respond to [Mr. Wilmoth's] email of May 24, 2005. On May 6, 2005, TIG gave you authority to settle the legal malpractice portion of the above-referenced case within the full \$500,000.00 Limit of Liability ("Limit") of TIG Policy No. AP37988671 (the "TIG Policy"). We understand from your e-mail that Mr. Galloway has "provisionally" settled this portion of the case for less than [sic] the Limit of the TIG Policy and including a consent judgment, which is far in excess of the TIG Policy Limit. The "consent judgment" will stipulate, among other things that, "the value of the malpractice claims of the plaintiffs against Mr. Galloway are \$1.4 million for Mr. Horkulic and \$100,000.00 for Mrs. Horkulic." And that "Those damages were caused as a result of Mr. Galloway's negligence [for missing the Statute of Limitations]." TIG on May 6, 2005 expressly declined to consent to this proposed stipulation. ... TIG therefore reiterates that it does not consent to the stipulated judgment portion of the "provisional" settlement.

(emphasis original) Correspondence from Beth Ann Berger Zerman to William D. Wilmoth, attached as Exhibit 1.E. to Id., Index No. 9.

By letter dated July 27, 2005, Mr. Fitzsimmons represented not only that a settlement agreement had been reached, but that "[e]ach of the terms was also approved by the insurance agent representing the insurance company." Correspondence from Robert P. Fitzsimmons to Beth Ann Berger Zerman, attached as Exhibit 2.A. to Id., Index No. 9. Mr. Fitzsimmons also accused TIG of interfering with the contractual settlement agreement allegedly entered into by Appellees and Mr. Galloway. Id. However, TIG not only never consented to the purported settlement, but has a well documented history of objection to the purported settlement. Ms.

Berger Zerman responded by letter dated August 3, 2005 stating that TIG was not aware of any settlement besides the "provisional settlement" to which TIG was not a party:

... Your letter contains many misapprehensions. First and foremost, TIG is not aware of any "settlement agreement" between Galloway and the Horkulics. The only information with which TIG has been provided to date regarding settlement is that a "provisional" settlement was reached between Galloway and the Horkulics, to which TIG was not a party. Your letter clearly misapprehends TIG's position on that provisional settlement. TIG expressly declined, upon its first suggestion, to consent to a \$1.5 million stipulated judgment in this case. TIG intends to vehemently object to any such stipulated judgment, which intent was communicated to Wilmoth, Galloway and his personal counsel Cuomo in June [2005].

Your letter also accuses TIG of causing the Horkulics to "not [receive] their agreed upon settlement proceeds." In particular, your letter accuses TIG and this counsel of "tortuously interfering" with a contractual agreement to pay proceeds. This accusation is unfounded. TIG has not been made aware of any contract regarding this matter. Furthermore, neither Galloway, nor his attorneys have made a request to TIG to fund a settlement. Although I understand that a member of your team has instructed a structured settlement company, Ringler Associates, to contact Mark Rapponotti of TIG in connection with the possible funding of a \$150,000.00 structure, upon inquiry July 22, 2005, defense counsel Wilmoth declined knowledge of any agreement to fund a structure. No further communication has been received by TIG in that regard.

Correspondence from Beth Ann Berger Zerman to Robert P. Fitzsimmons, attached as Exhibit 2.B. to Id., Index No. 9.

During an August 18, 2005 telephone call initiated by TIG, TIG and its counsel were informed by Mr. Wilmoth that Mr. Galloway had authorized him to settle the legal malpractice claim for policy limits and a stipulation for a \$1.5 million judgment against him. TIG reiterated its objection to the stipulated judgment portion of the settlement and that it did not authorize the

same. TIG agreed to pay policy limits on the basis of Mr. Wilmoth's representation that Mr. Galloway had authorized the same.

On August 25, 2005, TIG outlined its position in writing by letter from attorney Berger Zerman to Mr. Wilmoth:

... On or about May 6, 2005, TIG gave you authority to settle the legal malpractice portion of this case within the full \$500,000.00 Limit of Liability ("Limit") of TIG Policy No. AP37988671 (the "TIG Policy"). TIG, however, expressly declined consent for a proposed stipulated agreement assigning a value of \$1.5 million to the claim. Notwithstanding the foregoing, TIG has continued to make available the \$500,000.00 limits of the TIG Policy for settlement of the legal malpractice portion of the above-referenced case. TIG stands ready and willing to issue the settlement check at your direction.

With regard to the consent portion of the settlement, any such stipulation was agreed to by the insured, not only without TIG's consent, but in express contradiction to TIG's authority, and this in express violation of the hereinafter identified provision of the TIG Policy. We advised you and the insured, Mr. Galloway, on May 6, 2005 and June 13, 2005 that TIG declined to consent to the proposed \$1.5 million consent portion of the proposed settlement. It is TIG's position that a consent agreement for \$1.5 million is without good faith.

Correspondence from Beth Ann Berger Zerman to William D. Wilmoth, attached as Exhibit F to Id., Index No. 9.

By letter dated August 30, 2005, Mr. Galloway's personal counsel, Jason Cuomo, Esq., similarly expressed confusion with regard to the settlement that Mr. Fitzsimmons insisted occurred with all parties' consent. Mr. Cuomo also informed the parties that Mr. Galloway *did not consent* to a settlement:

... During the [May 4, 2005] "settlement conference" that was held in attorney Fitzsimmon's [sic] office a couple of months ago, you [Mr. Wilmoth] contacted attorney Galloway and myself regarding a proposition that was on the table between the parties as follows:

A \$450,000.00 offer within the policy limits plus a proposed consent to judgment by Bill Galloway in the amount of \$1.5 million dollars. Bill Galloway and myself advised you that if you could get the insurance company to consent to the \$1.5 million judgment to go ahead and try. Otherwise, we wanted to see a copy of the proposed consent to judgement [sic] before we could agree to anything along those lines.

To this date, we have not seen any documents nor heard of anything about the "settlement conference."

To my knowledge, Bill Galloway has not entered into any agreement regarding a consent to judgement [sic] in any amount without TIG's consent ...

Correspondence from Jason A. Cuomo to William D. Wilmoth, attached as Exhibit 2.C. to Id., Index No. 9. In other words, the only persons who believe a settlement occurred are Mr. Fitzsimmons and Mr. Wilmoth. Importantly, the defendant himself, Mr. Galloway, and the company paying the settlement proceeds, TIG, were not only unaware of the alleged settlement, but also objected to portions of the proposed settlement. The TIG Policy at Section II.B. requires written consent of the insured for settlement of a claim covered by the Policy. The same section of the Policy also requires the prior written consent of TIG to any settlement.

On or about September 1, 2005, Appellees began to pad their file by again attempting to confirm settlement for a five hundred thousand dollar cash payment from TIG and a stipulated judgment for \$1.5 million by Mr. Galloway. Correspondence from Robert P. Fitzsimmons to Thomas V. Flaherty and William D. Wilmoth, attached as Exhibit 2.D. to Id., Index No. 9. By letter dated September 13, 2005, Mr. Cuomo, on behalf of Mr. Galloway, rejected the settlement confirmation. Correspondence from Jason Cuomo to William D. Wilmoth, attached as Exhibit 2.E. to Id., Index No. 9. Counsel for TIG, Thomas V. Flaherty ["Mr. Flaherty"], rejected the

settlement confirmation for TIG as well. Correspondence from Thomas V. Flaherty to Robert P. Fitzsimmons, attached as Exhibit 2.F. to Id., Index No. 9. Nevertheless, Mr. Fitzsimmons continued to write letters requesting the settlement proceeds and the stipulated judgment from both TIG and Mr. Galloway.

On September 21, 2005, despite the lingering questions regarding the status of any settlement, TIG, in good faith, offered to tender \$500,000.00 to Appellees. Correspondence from Thomas V. Flaherty to Robert P. Fitzsimmons, attached as Exhibit 2.H. to Id., Index No. 9.

By letter dated September 29, 2005, Mr. Wilmoth wrote to Mr. Fitzsimmons to confirm the settlement as requested by Appellees' letter dated September 1, 2005. Correspondence from William D. Wilmoth to Robert P. Fitzsimmons, attached as Exhibit 2.I. to Id., Index No. 9. Mr. Wilmoth's letter relied on the August 18, 2005 telephone call between himself, Appellees' counsel, and TIG's counsel. Mr. Wilmoth, however, completely ignored the interim correspondence from Mr. Cuomo that denied the existence of the settlement by Mr. Galloway.

On October 21, 2005, Appellees filed the Motion to Compel Enforcement of Compromise Settlement Agreement. In the Motion, Appellees argued that on May 9, 2005 they had entered into a settlement with Mr. Galloway, through Mr. Wilmoth, for the following terms:

(a) Defendant Galloway would pay [Appellees] Four Hundred Fifty Thousand Dollars (\$450,000.00) cash;

(b) Attorney Galloway would confess judgment admitting liability and admitting damages to Jeffrey A. Horkulic in the amount of One Million Four Hundred Thousand Dollars (\$1,400,000.00) and damages to Rebecca A. Horkulic in the amount of One Hundred Thousand Dollars (\$100,000.00);

(c) Attorney Galloway would waive all attorney-client privileges he has to any and all documents and records maintained by [TIG];

(d) As part of the release, language would be inserted acknowledging that [Appellees] were not made whole by the settlement for their damages and that Attorney Galloway's policy was fully exhausted as a result of the cash payment, together with expenses;

(e) There was no agreement of confidentiality although [Appellees] would exercise their best efforts not to publicize the settlement;

(f) If Attorney Galloway filed any type of claim against his insurer, TIG, [Appellees] would receive thirty-three and one-third percent (33-1/3%) of the gross amount of any monies collected;

(g) TIG would not consent to the confessed judgments of liability and damages;

(h) [Appellees] would agree not to execute on the judgment against Attorney Galloway above the Four Hundred Fifty Thousand Dollar [sic] (\$450,000.00) agreed upon cash payment and would also agree not to record the judgment in the County Clerk's Office;

(i) A request would be made to the Court to determine that this was a good-faith settlement; and

(j) Although not part of the settlement agreement, Attorney Wilmoth once against [sic] indicated he did not think that structuring part of the settlement proceeds would be a problem and, if so, he would advise [Appellees'] counsel.

"Motion to Compel Enforcement of Compromise Settlement Agreement," August 12, 2005, Index No. 5. TIG responded to the Motion and argued that as there was no meeting of the minds, there was no settlement. TIG Response to Motion to Compel, Dec. 5, 2005, Index No. 9. Mr. Galloway similarly responded to the Motion and stated that he did not consent to the proposed settlement either. Galloway Response to Motion to Compel, Nov. 14, 2005, Index No. 8.

On March 29, 2006, the Circuit Court conducted a status conference. In the status conference, Appellees requested that TIG not be allowed to participate in the plenary hearing on

the Motion to Compel Enforcement of Compromise Settlement Agreement. Hearing Transcript, March 29, 2006, at p. 12, Index No. 14. Appellees argued that the issue of whether there was a settlement was between Appellees and Mr. Galloway alone and had nothing to do with TIG. Id. TIG objected to its exclusion from the plenary hearing on the Motion to Compel. Id. at p. 13 – 14. TIG argued that Appellees made allegations against TIG that TIG was entitled to address. Id. at p. 19. However, the Circuit Court wrongfully determined that only Appellees and Mr. Galloway could participate in the hearing. Id. at p. 23.

The Circuit Court conducted the plenary hearing on the Motion on May 20, 2006. In the hearing, the Circuit Court also heard a Motion for Injunctive Relief filed by Mr. Galloway seeking an order that Mr. Galloway's personal assets were not at risk and completely protected from Appellees and TIG. TIG was not given prior notice of the hearing on the Motion for Injunctive Relief nor allowed to participate in the hearing.

On August 25, 2006, the Circuit Court entered the Order granting the Motion to Compel. The Order contained findings of fact directly implicating TIG:

(6) At all times material to the motions being considered, William D. Wilmoth, a member of Steptoe & Johnson, PLLC, Wheeling, West Virginia, and a member of the State Bar of West Virginia for 31 years, was the attorney for Defendant Galloway, having been selected and retained by TIG pursuant to TIG's obligation to defend Galloway as a TIG insured.

(11) Galloway's attorney discussed the alternative settlement proposals with a Senior Corporate Claims Analyst from TIG, namely, Mark S. Rapponotti (who is an attorney), and obtained authority to settle the claim on behalf of Defendant Galloway in accordance with alternative A with the exception that TIG would not consent to the confession of judgments.

(12) On or about May 9, 2005, Attorney Wilmoth contacted Attorney Fitzsimmons and advised him that he had

authority to enter into a settlement agreement generally consistent with Alternative A, and Galloway's attorney and [Appellees'] attorney entered into a settlement agreement upon the following terms:

(a) TIG as insurer for Defendant Galloway would pay [Appellees] Four Hundred Fifty Thousand Dollars (\$450,000.00) cash;

(g) TIG would not consent to the confessed judgment of liability and damages;

(i) A request would be made to the Court to determine that this was a good faith settlement agreement, and although not part of the settlement agreement, Galloway's attorney indicated he did not think it would be a problem to structure some of the proceeds into a structured settlement annuity. ...

(15) The only disagreement as to the terms of the settlement among [Appellees], Galloway *and* TIG appears to be the provision wherein Galloway and TIG were asked to consent to a confessed judgment of liability and damages.

(18) On or about August 18, 2005, a telephonic conference was held among William F. Wilmoth; Thomas V. Flaherty, attorney for TIG; Beth Ann Berger Zerman, Attorney for TIG; and Mr. Ruberry, as representative for TIG. After discussing the parameters of the settlement, the parties included [Appellees'] attorney, Robert P. Fitzsimmons, in the conference call, and a settlement agreement was reached and confirmed, which included the following items:

(a) [Appellees] would be paid Five Hundred Thousand Dollars (\$500,000.00) cash from Galloway's insurance company, TIG; [footnote excluded]

(b) Galloway would confess judgment on liability and also damages for Mr. Horkulic in the amount of One Million Four Hundred Thousand Dollars (\$1,400,000.00) and Mrs. Horkulic in the amount of One Hundred Thousand Dollars (\$100,000.00);

(c) TIG could file an objection to the confessions of judgment;

(21) It was at all times material herein Attorney Wilmoth's intent and belief that the settlement reached between the Horkulics and Galloway would not create personal liability exposure to his client, Galloway, from either [Appellees] or his insurer, TIG.

(22) Attorney Wilmoth believed at all times material herein based upon his discussion with representatives of TIG that the settlement agreement reached by him on behalf of his client, Galloway, and with [Appellees'] counsel would not in any way create personal liability of exposure to Wilmoth's client, Galloway.

(24) Attorney Wilmoth indicated that the claims adjuster, Mark Rapponetti [sic], had only indicated that the insurance company would not consent to the confessions of liability and judgment and never indicated that Attorney Wilmoth did not have the authority to bind the insured to the confessions of judgment on liability and damages.

(25) Attorney Wilmoth did not know that the insurance company would object to its insured's consent and confession to a judgment on liability and damages until Attorney Wilmoth received a letter from Beth Zerman dated August 25, 2005 ...

(30) The terms of the settlement between [Appellees] and Galloway by and through Galloway's attorney and TIG, are as follows:

(a) TIG would pay [Appellees] Five Hundred Thousand Dollars (\$500,000.00) cash;

(b) Defendant Galloway would confess judgment admitting liability and admitting damages to Jeffrey A. Horkulic in the amount of One Million Four Hundred Thousand Dollars (\$1,400,000.00) and damages to Rebecca A. Horkulic in the amount of One Hundred Thousand Dollars (\$100,000.00);

(c) Defendant Galloway would waive all attorney-client privileges he has to any and all documents and records maintained by his insurer [TIG] and attorneys;

(d) Language would be included in the release acknowledging that [Appellees] were not made whole by the settlement for their damages and that Defendant Galloway's policy of insurance was fully exhausted as a result of the cash payment;

(e) [Appellees] would exercise their best efforts not to publicize the settlement;

(f) If Defendant Galloway files any type of claim against TIG Insurance Company or Cambridge Professional Liability Services, [Appellees] would receive thirty-three and one-third percent (33-1/3%) of the gross amount of any monies or things collected;

(g) TIG would file an objection to the confessed judgments;

(h) [Appellees] would agree not to execute on the judgment against Defendant Galloway above the Five Hundred Thousand Dollar (\$500,000.00) agreed-upon cash payment and would also agree not to record the judgment in the County Clerk's office;

(i) [Appellees] and/or Galloway may request that this Court find that this was a good faith settlement;

(j) [Appellees] may designate any portion of the Five Hundred Thousand Dollars (\$500,000.00) settlement for purchasing a structured annuity (which agreement will be hereinafter referred to as the "August 18, 2005, Settlement"); and

(k) A dismissal with prejudice would be filed and entered in favor of Defendant Galloway for all claims against Defendant Galloway.

(31) Attorney Wilmoth and Attorney Fitzsimmons had the actual authority to enter into a settlement upon the terms set forth in the "August 18, 2005, Settlement."

(32) Attorney Wilmoth had the authority from TIG to enter into the settlement upon the terms described in the "August 18, 2005, Settlement."

Order at p. 6 – 19, Index No. 27. The Order also implicates TIG in the issues relating to the Motion:

(28) There are two issues relating to the motions, namely,

(b) Whether TIG precluded Wilmoth from including the consent judgment as part of the settlement.

Id. at p. 15 – 16, Index No. 27. Moreover, the Order introduces the terms of the settlement with the following statement, "The terms of the settlement between [Appellees] and Galloway by and through Galloway's attorney *and TIG*, are as follows[.]" (*Emphasis added*) Id. at p. 16, Index No. 27. The Order further states that "Attorney Wilmoth had the authority from TIG to enter into the settlement upon the terms described in the 'August 18, 2005, Settlement.'" Id. at p. 19, Index No. 27. The Order also includes the following conclusions of law directly implicating TIG:

(9) A settlement agreement was reached between the Horkulics and Galloway's legal representative and TIG at the latest by August 18, 2005, the terms of which are as follows:

(a) Galloway's insurance carrier, TIG, would pay [Appellees] Five Hundred Thousand Dollars (\$500,000.00) cash;

(11) At all times material herein, Attorney Wilmoth had the actual authority to bind TIG in the settlement, specifically including the "August 18, 2005, Settlement."

(12) Defendants Galloway and TIG have not fulfilled the terms of the "August 18, 2005, Settlement," and therefore plaintiffs' motion to compel enforcement or compromise of settlement agreement should be granted.

(13) It was Attorney Wilmoth's intent, which he expressed to TIG, that this settlement would eliminate any personal exposure or liability of the assets of his client, Defendant Galloway, and TIG knew or should have known that the elimination of any personal exposure or liability to Defendant Galloway was a part of the settlement of August 18, 2005.

(14) As a result of the settlement, Galloway's personal assets are not at risk and are completely protected from [Appellees] and TIG.

(15) TIG has no right to seek any claim against Defendant Galloway as a result of Defendant Galloway's agreement to consent to a confessed judgment on liability and damages.

Id. at p. 21 – 25, Index No. 27. The Circuit Court finally ordered as follows:

ORDERED that a judgment in the amount of Five Hundred Thousand Dollars (\$500,000.00) be awarded in favor of [Appellees] against William E. Galloway, Galloway Law Office and TIG Insurance Company as of August 18, 2005, with interest at the rate of ten percent (10%) per annum from August 18, 2005, until paid in full and TIG shall pay said judgment with applicable interest.

ORDERED that Defendant Galloway waives all attorney-client privilege he has to any and all documents, records and things maintained by TIG and/or Cambridge and his or their attorneys.

ORDERED that TIG Insurance Company is prohibited from seeking a judgment against Defendant Galloway's personal assets as a result of any of his actions in this proceeding and in his representation of [Appellees].

Id. at p. 27, 30, Index No. 27. The Order was entered over TIG's strenuous objections. By Order dated September 29, 2006, the Circuit Court held that the Order was a final judgment as contemplated by Rule 54(b) of the West Virginia Rules of Civil Procedure. Order, Sept. 29, 2006, Index No. 26.

III. ASSIGNMENTS OF ERROR

- A. The Circuit Court of Hancock County erred by finding that TIG consented to the settlement without allowing TIG to participate in the plenary hearing.**
- B. The Circuit Court of Hancock County erred in entering findings of fact and conclusions of law against TIG that are central to the issues in the Appellees' third-party bad faith portion of the underlying case.**
- C. The Circuit Court erred in hearing the Motion for Injunctive Relief without providing TIG notice of the hearing.**
- D. The Circuit Court erred in ordering the waiver of attorney-client privilege to the extent that the Order waives TIG's attorney-client privilege.**
- E. The Circuit Court erred in overruling TIG's objection to the admission of hearsay testimony by Mr. Wilmoth in the plenary hearing.**

IV. ARGUMENT

- A. The Circuit Court of Hancock County erred by finding that TIG consented to the settlement without allowing TIG to participate in the plenary hearing..**

The Fourteenth Amendment of the United States Constitution states that, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]" Const. Art. XIV, § 1. Article 3, Section 10, of the West Virginia Constitution similarly provides that "[n]o person shall be deprived of life, liberty, or property, without due

process of law, and the judgment of his peers.” W.Va. Const. Art. III, § 10. The Circuit Court of Hancock County erred in finding that TIG consented to the settlement of the legal malpractice portion of the underlying case, ordering TIG to contribute to the settlement, and prohibiting TIG to seek redress against its insured, Mr. Galloway, after depriving TIG of the right to participate in the plenary hearing. By failing to allow TIG to participate in the plenary hearing, TIG was effectively deprived of its procedural due process rights in violation of the Fourteenth Amendment of the United States Constitution and Article 3, Section 10, of the West Virginia Constitution.

“A due process analysis is founded upon the concept of fundamental fairness.” Marcus v. Holley, 217 W.Va. 508, 618 S.E.2d 517, 536 (2005); State ex rel. Peck v. Goshorn, 162 W.Va. 420, 422, 249 S.E.2d 765, 766 (1978). Under due process, a court cannot order one to pay money, which is property, to another without some legal basis or jurisdiction requiring the party to do so. Steel v. Hartwick, 209 W.Va. 706, 709, 551 S.E.2d 42, 45 (2001). Accordingly, a court cannot preclude an individual from litigating an issue central to his or her case. G.M. v. R.G., 211 W.Va. 528, 531, 566 S.E.2d 887, 890 (2002). Therefore, an individual is entitled to procedural due process rights which entitle him or her to representation by counsel, notice, an opportunity to be heard, and the right to present evidence. Marcus, 217 W.Va. at 527, 618 S.E.2d at 536; Barazi v. W.Va. State College, 201 W.Va. 527, 498 S.E.2d 720 (1997); Clay v. City of Huntington, 184 W.Va. 708, 403 S.E.2d 725 (1991). At minimum, the due process clause requires an adjudication preceded by notice and an opportunity for a hearing appropriate to the nature of the case. Layne v. W.Va. Child Support Enforcement Div., 205 W.Va. 353, 355, 518 S.E.2d 357, 355 (1998). While the applicable standard for procedural due process depends

upon the circumstances of each particular case, this Court recognizes three fundamental principles:

First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of right may not require as large a measure of procedural due process protection as a permanent deprivation.

Syl. Pt. 2, Higgenbotham v. Clark, 189 W.Va. 504, 432 S.E.2d 774 (1993).

The purpose of the plenary hearing was to determine whether the purported settlement that Appellees moved to compel was actually entered into by Mr. Galloway and TIG. But despite the fact that Appellees sought to compel the settlement against TIG as well as Mr. Galloway, counsel for Appellees, Mr. Fitzsimmons, argued against TIG's participation in the plenary hearing in the March 29, 2006 status conference:

MR. FITZSIMMONS: ... This is [about] Mr. Galloway and Mr. Horkulic, plaintiff and defendant, as to whether a settlement occurs, and I don't believe that there should be other participants and other parties to this particular motion to enforce. This is between plaintiff and defendant.

This does not have anything to do with the insurance companies, carriers. If you recall, you have an order of bifurcation as to all the bad-faith issues. This is a more narrow issue that we allege there has been a settlement between the plaintiff and defendant Galloway.

And defendant Galloway was represented at that time by Attorney Wilmoth. That's just so there's no mistake. I know there's other participants here. I don't know that they even have a right to participate at this point at all, since you bifurcated the remaining portion of the case.

The bad-faith case, if you recall, pursuant to the defendant's motion, was bifurcated. And we'd like to make sure ... I just want to make sure that we walk in there, that there aren't

five attorneys, or if there are, I want to be – at least know that ahead of time.

[TIG, Cambridge, and Acordia] are interlopers so far as [the settlement] issue is concerned.

Now, do they have issues that may flow from that between Galloway and the insurance company? I suspect it may, but that's between them. They have no standing in this settlement agreement. They are not a party in this underlying case at all at this point. They opted to bifurcate it and stay totally out of it.

I think it creates an absolutely unfair advantage to bring any counsel in that isn't a party's counsel to participate in this hearing.

Hearing Transcript, March 29, 2006, p. 12 – 13, 16, Index No. 14. Counsel for TIG, Mr. Flaherty, responded that “[t]he issue, however, of the settlement does involve one of those third parties, TIG, and their claims representative Mr. Rapiotte [sic] and his conversation with Mr. Wilmoth, who was then representing Mr. Galloway.” Id. at p. 13 – 14, Index No. 14. Another counsel for TIG, Ms. Berger Zerman, responded to Mr. Fitzsimmons' argument as well:

MS. ZERMAN: ... [I]f Mr. Fitzsimmons is willing to leave TIG out of his arguments in connection with the settlement, that would be fine. But we believe that he's going to use it as an opportunity to put things on the record, as he did in his brief, for his benefit that we will not have an opportunity to object to. So as far as that goes, we're not willing to sit idly by and allow that to happen.

We are what we are in connection with the settlement. If we're not brought into the mix as we were with respect to Mr. Fitzsimmons's briefs, then we're willing to sit on the sidelines, but in the event allegations are made directly against TIG, we need the opportunity to object to those on the record.

Id. at p. 16 – 17, Index No. 14. But despite TIG's objection, by Order dated April 19, 2006, the Circuit Court expressly excluded TIG from participating in the plenary hearing, except for the

limited purpose of representing their clients called as witnesses. And, as feared, the resulting Order is littered with findings of fact and conclusions of law against TIG, which it was without power to dispute. See Id., Index No. 14; Order, generally, Index No. 27; “Motion to Compel Enforcement of Compromise Settlement Agreement” and memorandum of law in support, August 12, 2005, Index Nos. 5 – 6.

Contrary to Mr. Fitzsimmons’ assertion in the March 29, 2006 status conference, Appellees’ Motion to Compel Enforcement of Compromise Settlement Agreement did not involve the settlement agreement between Appellees and Mr. Galloway alone. Moreover, as counsel for TIG suspected, Appellees were not going to leave the issue of insurance coverage for the purported settlement between Mr. Galloway and TIG alone. As such, whether TIG provided consent to Mr. Galloway to enter into the purported settlement became the focus of the Motion, the plenary hearing, and the Order.

Due to the fact that TIG’s consent to the settlement became the focus, TIG was entitled to procedural due process pursuant to the three fundamental principles inherent in procedural due process. Syl. Pt. 2, Higgenbotham, 189 W.Va. 504, 432 S.E.2d 774. First, TIG was entitled to procedural due process due to the large amount of property at issue; notably, the \$1.5 million consent judgment. As such, the Circuit Court should have provided safeguards to protect TIG’s interest. Second, TIG should have been provided due process before the Order was entered. And, third, TIG was owed a greater amount of procedural due process as it is being permanently deprived of its property. Not only was TIG ordered to pay five hundred thousand dollars to Appellees, but the Circuit Court further ordered that TIG had no right of redress against Mr. Galloway. The Circuit Court ordered TIG to abide by the settlement based on TIG’s alleged consent to the purported settlement of which TIG was denied the opportunity to dispute. These

findings of fact and conclusions of law were with regard to facts disputed by TIG. Absent a hearing, this Order is in complete contravention of TIG's due process rights. Layne, 205 W.Va. at 355, 518 S.E.2d at 355.

Moreover, the Court entered findings of fact and conclusions of law regarding Mr. Wilmoth's conversations with an agent of TIG as well as Mr. Wilmoth's authority to bind TIG, which TIG, again, was not permitted to dispute. The Circuit Court expressly stated that there were two issues relating to motions at issue. Order at p. 15, Index No. 27. One of the issues was "[w]hether TIG precluded Wilmoth from including the consent judgment as part of the settlement." Id. at p. 16. This issue was of major importance considering that TIG's consent to the consent judgment was allegedly the sticking point to TIG's approval of the settlement in general. The Circuit Court also referred to the purported settlement as between Appellees, Mr. Galloway, and TIG. Id. at 16, 21. There is no doubt that TIG was deprived of its procedural due process rights when the Circuit Court entered the Order providing that TIG agreed to the settlement.

Appellees want this Court to uphold the Order requiring TIG to abide by the settlement based upon a finding that TIG consented to the settlement while denying TIG the opportunity to dispute whether it had, in fact, consented to the settlement. Appellees also want Mr. Galloway to enter into a consent judgment for \$1.5 million despite statements from Mr. Galloway's personal counsel, Mr. Cuomo, that Mr. Galloway not only did not agree to enter into a consent judgment, but also would not agree if TIG did not approve. Correspondence from Cuomo to Wilmoth, attached as Ex. 2.C. to Index No. 9. The facts as asserted by Appellees in the plenary hearing were in complete contravention of the plethora of written communications from TIG regarding its position as to the provisional settlement. If Appellees are sure that TIG agreed to the

settlement, then why were they so adamant that TIG be blocked from the plenary hearing? Why did Appellees call only Mr. Wilmoth as a witness and not Mr. Galloway, Mr. Cuomo, or a representative of TIG?

Appellees will argue that TIG should not have been allowed to participate in the plenary hearing because it was not a party to the settlement. However, Appellees did not want TIG to participate in the plenary hearing for two very different reasons. First, Appellees wanted only to present their side of the story to the Circuit Court. Any evidence from TIG and Mr. Galloway that the settlement did not occur would block Appellees enforcement of the alleged settlement. Second, Appellees did not want to give TIG a chance to put on the record that it did not approve of the settlement, at least the provision requiring Mr. Galloway to enter a consent judgment for \$1.5 million. If TIG disputed this on the record, then policy provisions come into play that void coverage if the insured admits liability without the consent of the insurer as well as the provisions of the policy requiring the insured to cooperate with the insurer. Appellees knew that if Mr. Galloway's coverage from TIG was gone, so were their chances of recovery. Therefore, Appellees not only wanted, but *needed* the Order stating that TIG had agreed to the settlement to prevent any declination of coverage. This allows Appellees to side step the requirements of TIG's policy requiring the insured to obtain its consent and opens the door for Appellees not only to recover under the policy, but also to bolster their third-party bad faith case against TIG -- all without TIG being able to defend itself.

Appellees will also argue that Mr. Wilmoth was TIG's attorney for purposes of agreeing to a settlement and, therefore, could bind TIG. If this is true, then why not allow Mr. Wilmoth's alleged client, TIG, to testify at the plenary hearing to state whether it gave authority to Mr. Wilmoth to settle the case on its behalf? If this is true, then why was it necessary for the Court to

base its Order enforcing the settlement on a "finding of fact" that TIG authorized Mr. Wilmoth "to enter into the settlement upon the terms described in the 'August 18, 2005 settlement.'" Order, Index 27. Again, Appellees did not want TIG to put its continued resistance to the alleged settlement on the record. Appellees only wanted their side of the story to reach the Circuit Court.

TIG expects that in response to this appeal that Appellees will ignore the merits of this appeal in lieu of a mantra regarding the direness of insurance companies. Appellees will attempt to take every action of TIG and turn it into a conspiracy. In other words, Appellees will attempt to make an emotional plea lamenting the pitfalls of the insurance industry rather than the actual facts giving rise to this appeal and TIG's well-documented resistance to the alleged settlement. However, the Constitutions of the United States of America and the State of West Virginia do not exempt TIG from its due process rights because Appellees opine that the insurance industry is bad and corrupt. This is especially true in this case as Appellees will argue mere speculation as to why it believes TIG is disputing the alleged settlement. Again, TIG's objection to the alleged settlement is clearly documented and not out of thin air as Appellees will attempt to lead this Court to believe. The fact is that the Circuit Court has ordered TIG to submit to an alleged settlement without its consent, which TIG was entitled to give and Mr. Galloway was required to obtain under the policy.

The Circuit Court easily could have entered an order regarding only Mr. Galloway and Appellees' agreement to enter into the purported settlement. There could be no dispute by TIG if the Order only stated that Mr. Galloway and Appellees entered into a settlement. And, as Appellees argued in the status conference, the remaining issue of coverage under the policy would remain between Mr. Galloway and TIG. The problem arises in that the Circuit Court held

that TIG consented to the settlement, which has severe ramifications on TIG's property rights. As such, TIG had the right to participate in the hearing before the Circuit Court could hold that TIG consented. The failure to allow TIG to participate in the plenary hearing deprived TIG of property without an opportunity to be heard. Accordingly, the Circuit Court erred.

B. The Circuit Court erred in issuing findings of fact and conclusions of law that are central to the Appellees' third-party bad faith portion of the underlying action without allowing TIG to participate in the plenary hearing.

By entering findings of fact and conclusions of law regarding disputed material facts that are central to the bad faith portion of the underlying case, TIG was denied its due process rights. The Circuit Court made findings that (1) TIG consented to the purported settlement on May 6, 2005; (2) Mr. Wilmoth had authority to enter into the purported settlement on TIG's behalf; (3) TIG failed to communicate to Mr. Wilmoth that it would not agree to the stipulated judgment; and, (4) the only disagreement TIG had to the proposed settlement was the consent judgment. Order, p. 4 – 16, Index No. 27. However, TIG was denied the ability to defend itself against these allegations made by Appellees in the plenary hearing. See Hearing Transcript, March 29, 2006, p. 12 – 13, 16, Index No. 14. As such, these findings of fact, along with the consent judgment for \$1.5 million, will be used against TIG to deprive TIG of property, being money, in the third-party bad faith portion of the underlying action. Under due process, a court cannot preclude an individual from litigating an issue central to his or her case. G.M., 211 W.Va. at 531, 566 S.E.2d at 890. Issues regarding TIG's consent to the purported settlement are central to TIG's defense in the bad faith portion of the underlying case. Accordingly, by entering findings of fact and conclusions of law against TIG, TIG was denied its due process rights in the underlying action.

C. The Circuit Court erred in hearing the Motion for Injunctive Relief without providing TIG notice of the hearing.

The Circuit Court erred in deciding upon Mr. Galloway's alternative Motion for Injunctive Relief in the plenary hearing and making conclusions of law upon the Motion for Injunctive Relief in the Order. Specifically, the Circuit Court ordered that "[a]s a result of the settlement, Galloway's personal assets are not at risk and are completely protected from plaintiffs and TIG." Order at p. 25, Index No. 27. However, the Motion for Injunctive Relief was not noticed for hearing at the plenary hearing on May 30, 2006. Therefore, not only was TIG not permitted a hearing on the Motion for Injunctive Relief, but TIG was not given notice of the hearing. As the result of the Circuit Court's Order is to preclude TIG from seeking reimbursement from Mr. Galloway for the settlement, TIG was effectively denied its due process rights.

Due process demands notice. Notice is an issue of crucial importance throughout the adjudication of a contested case. McJunkin Corp. v. W.Va. Human Rights Commission, 179 W.Va. 417, 420, 369 S.E.2d 720, 723 (1988). The purpose of the notice requirement is to make certain that the prospective party in a contested case is aware of the impending proceeding and its substance with sufficient certainty to be in a position to answer and participate. Id. Notice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits. Id. at 421. TIG was neither provided with notice of adjudication on the Motion for Injunctive Relief, nor provided with the opportunity to be heard upon the merits of that Motion. Accordingly, the Circuit Court erred in granting Mr. Galloway injunctive relief without providing TIG notice of the hearing or the opportunity to be heard.

D. The Circuit Court erred in ordering the waiver of attorney-client privilege to the extent that the Order waives TIG's attorney-client privilege.

1. The Circuit Court erred to the extent it ordered that Mr. Galloway waived attorney-client privileges belonging to TIG.

In the Order, the Circuit Court ordered "that Defendant Galloway waives all attorney-client privileges he has to any and all documents, records and things maintained by TIG and/or Cambridge and his or *their* attorneys." (*emphasis added*) Order at p. 28, Index No. 27. However, the Court erred in ordering the waiver to the extent that Mr. Galloway seeks to waive TIG's attorney-client privilege and/or quasi attorney-client privilege.

Attorney-client privilege belongs to the client. State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 372, 508 S.E.2d 75, 89 (1998). When the attorney-client privilege is applicable, it is absolute. Franklin D. Cleckley, 1 Handbook on Evidence for West Virginia Lawyers, § 5-4(E)(3) (3d ed. 1994) cited in Gaughan, Id. An attorney cannot be compelled to release privileged information without the express consent of the client. Gaughan, Id. As such, persons not a party to the attorney-client relationship cannot waive attorney-client privilege on the client's behalf. Therefore, the Circuit Court erred to the extent that it orders that Mr. Galloway waived information between TIG and its counsel which is protected by attorney-client privilege.

Moreover, as Mr. Galloway's insurer, TIG's claim file in the underlying lawsuit is protected by the quasi attorney-client privilege. "All communications in an insured's claim file generated on and after the filing date of a third-party's complaint against an insured, are presumptively quasi attorney-client privilege communications." Gaughan, 203 W.Va. at 373, 508 S.E.2d at 90 (1998). In a third-party bad faith action by an injured party against a liability insurer, where an insured has signed a release of his/her claim file, the insurer may raise a quasi attorney-client privilege to communications in the insured's file. Id. at 372, 89. "The quasi

attorney-client privilege belongs to the insurer, not the insured, and may be waived only by the insurer.” Id. at 372, 89. The purpose of quasi attorney-client privilege is to protect an insurer in a “third-party bad faith action where an insured has signed a release of his/her claim file to a third-party litigant[.]” Id. at 373, 90. According to the Order, Mr. Galloway waived “all attorney-client privileges he has to any and all documents, records and things maintained by TIG and/or Cambridge and his or their attorneys.” Order at p. 28, Index No. 27. Mr. Galloway is prohibited from exercising a waiver implicating TIG’s claim file regarding the defense of either the legal malpractice or the third-party bad faith portion of the underlying lawsuit. Only TIG may waive the quasi attorney-client privilege. Therefore, the Circuit Court erred to the extent that it orders that Mr. Galloway waived information subject to TIG’s quasi attorney-client privilege.

2. The Circuit Court erred in allowing Mr. Wilmoth to waive TIG’s attorney-client privilege at the plenary hearing.

In the plenary hearing, Appellees called Mr. Wilmoth to testify as to Mr. Galloway and TIG’s alleged consent to settle the legal malpractice portion of the underlying action. In the course of the examination, not only did Mr. Wilmoth testify as to his communications with TIG regarding the proposed settlement, but he also turned over various correspondences between himself and TIG. Mr. Fitzsimmons introduced the correspondence in the plenary hearing and moved for their admittance as exhibits. However, these communications were protected by the quasi attorney-client privilege, which was not Mr. Wilmoth’s to waive. Therefore, the Circuit Court erred in admitting privileged information as exhibits and allowing Mr. Wilmoth to testify as to privileged information over TIG’s objection.

Although TIG was not allowed to participate in the plenary hearing, TIG's counsel, Mr. Flaherty and Ms. Berger Zerman, objected to the introduction of the privileged information to which the following dialogue ensued:

Q [Mr. Fitzsimmons]: And there were some questions, obviously, concerning attorney-client privilege and things like that that you've been reviewing; is that correct?

A [Mr. Wilmoth]: And I provided a copy of this to both Mr. Galloway's present counsel and counsel for TIG in advance so they could object if they -

Q [Mr. Fitzsimmons]: Prior to today?

A. [Mr. Wilmoth]: Yes.

Q [Mr. Fitzsimmons]: They've had that opportunity to review in case there were any privilege objections that need to be made before using it at today's hearing; is that correct?

A [Mr. Wilmoth]: Yes, in fact, I gave them everything that I had left of my file that I did not transfer to counsel later on.

MR. FITZSIMMONS: Your Honor, I'm going to ask -

THE COURT: Wait.

MR. FLAHERTY: I don't want to interrupt, but as I understand, you gave my client, TIG, opportunity to object to anything that was confidential or privileged.

THE COURT: To protect your client's interests.

[Mr. Wilmoth]: Yes, sir.

MR. FLAHERTY: Mr. Wilmoth gave me the documents that he is referring to as I came in here at 10:00 this morning. I've not had an opportunity to review them because the Court came on to the bench moments later, and I do not have my client's authority to waive any attorney-client privilege.

[Mr. Wilmoth]: I did send - I sent the copies to Ms. Berger Zerman, I believe, Friday, Your Honor, Thursday or Friday of last week.

MS. ZERMAN: Your Honor, they came in after hours on Friday. We asked for them a month ago, so we did not have an opportunity to look at them to interpose our objections, and we do not waive our attorney-client privilege.

THE COURT: All right. There are two ways we can do it. Obviously, we'll preserve your objection. Question now is whether or not we want to give them some time to do it, to look over – have you looked, Mr. Flaherty; have you reviewed it all.

MR. FLAHERTY: Your Honor, I just turned to the note that Mr. Fitzsimmons and Mr. Wilmoth are speaking about, the August 18, '05, handwritten note I'm reading for the first time as they're discussing it.

THE COURT: All right.

MR. FITZSIMMONS: I haven't looked at it. I just picked up the copy right now. I haven't even peeked yet – peeked once, but I didn't read it.

THE COURT: Well, it's obviously a sensitive subject. Mr. Wilmoth, may I presume that you have reviewed it and conducted whatever harvesting that's – from your advantage point you believe that there's nothing in here that would violate attorney-client privilege?

[Mr. Wilmoth]: That's correct, Your Honor. And we have counsel to the firm, a group inside our firm, that reviews these things as well, and that was done.

THE COURT: You see, this brings up the very thorny question at all times in terms of defense counsel representing or being retained by insurance companies and the duties that are owed and the tripartite relationship that exists and where does the privilege – how does it run?

There are rather – they're not easy questions even for the most liberal judge in the – I had to get that in – but I would like to give you that opportunity to look at them.

The problem is, I don't know if you'll have enough time. What I want you to do is to take about – let's take about ten minutes and take a look at 'em and see where you are from that standpoint. I'll give you – you can go back to the jury room. Then we'll see where we're going.

I'm going to preserve your objection, but if there's anything that would stand out that you believe that should be addressed now, I can try to do that.

I'm not going to hold it up too long, but I think you should be given that opportunity. So, and everybody can do it to the extent that you haven't really had an opportunity, includes plaintiff and Mr. Selep.

So let's go ahead, and I'll give you that opportunity. Let's take about 15 minutes now, and then we'll come back and see where we're going from there. All right.

(Brief Recess.)

THE COURT: Be seated, please. Okay. Mr. Flaherty, do you want to say anything?

MR. FLAHERTY: Yes, Your Honor, just for the record, the Court has given us 15 minutes to go through this stack of documents. I've gone through them during this period as fast as I can, but not as thoroughly as I would like.

It appears that there are a number of things in here that are not responsive to the subpoena, but I will leave that to the Court on that issue. There are also documents going back and forth between Mr. Wilmoth and my client as part of that tripartite arrangement.

Clearly Mr. Wilmoth's client on the attorney-client privilege issue is Mr. Galloway, but I think that certain communications between Mr. Wilmoth and Rapponotti are deemed privileged under the various holding of the courts that I've been in front of.

I don't have the authority to waive that privilege. I simply want to note that for the record, and also to register an objection to anything that Mr. Wilmoth relates that my client, Mr. Rapponotti, said. I think that's hearsay.

THE COURT: All right. Both these objections are noted, which is about all I can really do at this time.

Transcript of Hearing, May 30, 2006, p. 44 – 49, Index No. 15. At that point, Appellees continued to introduce privileged information into evidence and Mr. Wilmoth continued to testify as to privileged information.

As previously discussed, “[a]ll communications in an insured’s claim file generated on and after the filing date of a third-party’s complaint against an insured, are presumptively quasi attorney-client privilege communications.” Gaughan, 203 W.Va. at 373, 508 S.E.2d at 90 (1998). “The quasi attorney-client privilege belongs to the insurer, not the insured, and may be waived only by the insurer.” Id. at 372, 89. The purpose of quasi attorney-client privilege is to protect an insurer in a “third-party bad faith action where an insured has signed a release of his/her claim file to a third-party litigant[.]” Id. at 373, 90.

The quasi attorney-client privilege was created for this exact situation. Accordingly, TIG maintains a quasi attorney-client privilege to communications between itself and Mr. Wilmoth as counsel for their insured, Mr. Galloway. Mr. Wilmoth cannot waive this privilege for TIG. Needless to say, TIG did not waive the quasi attorney-client privilege, especially as that privilege relates to communications between Mr. Wilmoth and TIG’s attorneys as well as communications between Mr. Wilmoth and Mr. Rapponotti. Therefore, the Circuit Court erred in not only allowing Mr. Wilmoth to unlawfully waive TIG’s quasi attorney-client privilege, but relying on information derived from this privileged information in the Order.

E. The Circuit Court erred in overruling TIG’s objection to the admission of hearsay testimony by Mr. Wilmoth in the plenary hearing.

In the plenary hearing, Mr. Wilmoth submitted hearsay testimony regarding a telephone conversation with Mr. Rapponotti at the May 4, 2005 settlement conference:

Q [Mr. Fitzsimmons:] So was it your understanding that, when you left that -- the office that day, that there was a general understanding of a settlement at that point?

A [Mr. Wilmoth:] Yes --

Q [Mr. Fitzsimmons:] Okay.

A [Mr. Wilmoth:] -- because I recall the discussion between -- perhaps I was the one who listed for Mr. Rapponotti the portions of the settlement that you and I had been discussing.

He [Mr. Rapponotti] said: Okay. He used the word "okay," two words. Whatever that is, he used the words "okay" to the settlement. He said: The only thing I have a question on is the consent judgment.

And I believe you [Mr. Fitzsimmons] said: Well, then you can come in and object, to which Mr. Rapponotti again responded: Okay. So, I believe that at that point there was a settlement which protected Bill Galloway's personal assets and settled the malpractice portion of the case.

Hearing Transcript, May 30, 2006, at p. 30 – 31, Index No. 15. Counsel for TIG, Mr. Flaherty, objected to this testimony as hearsay. Id. at p. 49, Index No. 15.

Rule 802 of the West Virginia Rules of Evidence states that "[h]earsay is not admissible except as provided by these rules." W.Va.R.Evid. 802 (2006). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." W.Va.R.Evid. 801(c) (2006). Hearsay is generally considered to be untrustworthy because the out-of-court declarant is not available to be immediately cross-examined concerning the accuracy of the statement. State v. Browning, 199 W.Va. 417, 485 S.E.2d 1 (1997).

Mr. Wilmoth's testimony squarely falls within the definition of inadmissible hearsay under Rules 801(c) and 802. First, Mr. Wilmoth's testimony as to what Mr. Rapponotti said in a May 4, 2005 telephone conversation is obviously a statement made by someone other than Mr. Wilmoth. See W.Va.R.Evid. 801(c). Second, Mr. Wilmoth's testimony was offered into

evidence to prove the truth of the matter asserted, which was that TIG agreed to settle the legal malpractice portion of the underlying action on May 4, 2005. Id. And, finally, the hearsay testimony offered by Mr. Wilmoth does not fall within any of the hearsay exceptions. However, the Circuit Court not only allowed this hearsay testimony by overruling TIG's objections, but issued findings of fact arising from it. Order at p. 6 – 7, Index No. 27; Hearing Transcript, May 30, 2006, at p. 51, Index No. 15. The Circuit Court also admitted the hearsay testimony despite a pleading filed by TIG responding to the Motion to Compel in which TIG expressly stated, and included an affidavit from Mr. Rapponotti to the point, that Mr. Rapponotti did not consent to the settlement on May 4, 2005. TIG's Response to Motion to Compel, Dec. 5, 2005, at p. 6 – 7, Index No. 9. Accordingly, the Circuit Court erred in overruling all of TIG's objections in the plenary hearing, which included TIG's hearsay objections.

V. RELIEF REQUESTED

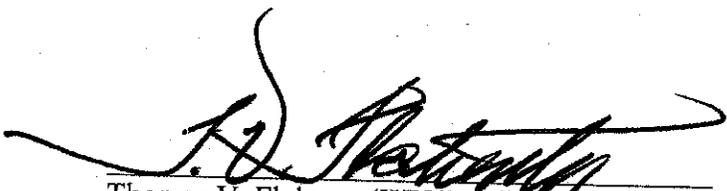
Wherefore, the appellant, TIG Insurance Company, respectfully requests this Honorable Court grant its appeal and order the Circuit Court of Hancock County to:

1. Remove any and all reference in the Order alluding that the settlement was between Appellees, Mr. Galloway, and TIG.
2. Remove any and all reference in the Order to TIG's purported consent to the settlement in the findings of fact and conclusions of law. This includes any and all reference to consent made by TIG's personal counsel, counsel hired by TIG to defend Mr. Galloway, and TIG's agents on TIG's behalf.
3. Remove the portion of the Order ordering TIG to pay Appellees the amount of the purported settlement, with interest.
4. Remove the portion of the Order directing TIG to purchase a structured annuity from the settlement proceeds.
5. Remove the portion of the Order prohibiting TIG from seeking judgment against Mr. Galloway's personal assets.

6. Reverse the Circuit Court's overruling of TIG's objections to the admittance of exhibits on the grounds of quasi attorney-client privilege.
7. Remove the portions of the Order making findings of fact and corresponding conclusions of law to the extent that they were begotten from information protected by the quasi attorney-client privilege.
8. Remove the portion of the Order ordering that Mr. Galloway waives all attorney-client privileges he has to any and all documents, records and things maintained by TIG and/or Cambridge and his or their attorneys.
9. Prohibit Appellees from using any privileged material that was produced over the objections of TIG in any subsequent proceeding against TIG unless TIG expressly waives the privilege in that proceeding.
10. Remove portions of the Order based on hearsay testimony regarding the telephone conversation between Mr. Wilmoth and Mr. Rapponotti on May 4, 2005.

TIG INSURANCE COMPANY,

By Counsel,



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