
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33875

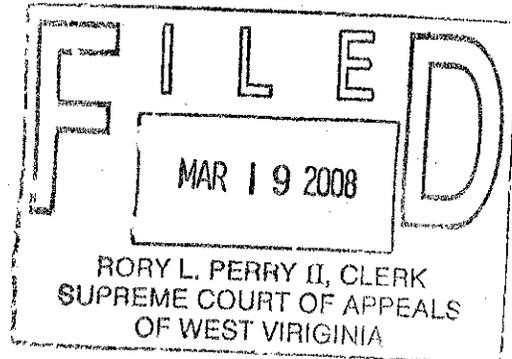
STATE OF WEST VIRGINIA
ex rel. JANE L. CLINE, Insurance
Commissioner of the State of
West Virginia,

Petitioner,

v.

THE HONORABLE ANDREW N. FRYE, JR.,
Judge of the Circuit Court of Grant County,
GERRY A. DAVIS, SR., et al., MONUMENTAL
LIFE INSURANCE COMPANY, and
WILLIAM BLANKENBECKLER,

Respondent.



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I. INTRODUCTION

The question in this prohibition is whether an investigatory file created by the Insurance Commissioner is statutorily protected from disclosure in a private civil action when a court of competent jurisdiction has ordered production of the file where the subject of the investigation, the insurance company who turned over initial information triggering the investigation, and the plaintiffs who were interviewed as part of the investigation have all waived any objection to disclosure and jointly seek production. Because the answer to this question is no, the Court should deny the prohibition.

II. STATEMENT OF FACTS

The Plaintiffs in the underlying case sued Monumental Life Insurance Company and one of its former agent employees, William Blankenbeckler, for alleged misconduct by Mr. Blankenbeckler. During the course of litigating the case, Monumental and the Plaintiffs requested an investigatory file from the Insurance Commissioner ("Commissioner"). The material contained in the file concerns the very actions of Mr. Blankenbeckler that are the subject of this suit and the contents of the file includes potential corroborative or impeachment evidence.

The Commissioner's file was generated as a result of a report Monumental made to the Commissioner after Monumental fired Mr. Blankenbeckler. Monumental had audited Mr. Blankenbeckler's clients and found certain shortages. After receipt of Monumental's report, the Commissioner undertook an investigation, which included interviewing the Plaintiffs in this case.

Thereafter, the Commissioner sent an agreed order to Mr. Blankenbeckler revoking his West Virginia license and containing certain alleged admissions. Mr. Blankenbeckler

signed the order, although he testified at his deposition that he did so without actually reading it. At his deposition he also testified that he disagreed with the order's findings. Mr. Blankenbeckler testified that he signed the order based on a telephone call from an investigator from the Commissioner's office stating that Monumental wanted him to sign the order. Monumental's corporate witnesses have testified that they were never contacted by the Commissioner concerning any agreed order and never told Mr. Blankenbeckler—nor anyone else—that Monumental wanted Mr. Blankenbeckler to sign the agreed order. The Respondent Judge ordered the Commissioner to disclose the file finding that West Virginia Code § 33-2-19, the statutory provision upon which the Commissioner relied in refusing to turn over the file, did not prohibit disclosure under the circumstances of this case. Pet'n Prohibition, Addendum C. Moreover, the participants in the investigation, Mr. Blankenbeckler and the Plaintiffs, and the insurance company employing Mr. Blankenbeckler, Monumental Life, all consent to and seek production of the file. The Commissioner has not asserted that information or documents about persons other than the Plaintiffs and Mr. Blankenbeckler are contained in the investigative file.

III. STANDARD FOR GRANTING THE WRIT

West Virginia Code § 53-1-1 provides that "The 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." Thus, the writ will only lie in one of two circumstances: (1) when the inferior court lacks subject-matter jurisdiction; or, (2) when, having subject-matter jurisdiction, the inferior court exceeds its legitimate powers. The Commissioner does not dispute that the Respondent Judge had subject-matter jurisdiction. Thus, the standard

governing the issuance of a Writ of Prohibition is that set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). See, e.g., *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 807, 591 S.E.2d 728, 733 (2003) ("Frazier & Oxley and City National do not dispute that the circuit court had jurisdiction. They argue that the circuit court exceeded its legitimate powers in allowing St. James to amend its complaint. The governing standard in such a case is set forth in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)"); *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 573, 584 S.E.2d 203, 207 (2003) (per curiam) ("Dr. Leung does not dispute that the circuit court enjoyed jurisdiction over this case; rather, he contends that it exceeded its legitimate powers in declining to allow him to file his third-party complaint. The standard in such a case is found in Syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)"). Equally, the *Hoover* standard is applied to determine whether to issue the writ when a claim of privilege is advanced. *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, No. 33652, slip op. at 5-6 (W. Va. Jan. 25, 2008). In Syllabus Point 4 of *Hoover*, this Court held:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

IV. ARGUMENT

The Petition deals with evidentiary privileges. “The term privilege as used in evidence law means freedom from compulsion to give evidence or discover material, or a right to prevent or bar information from other sources, during or in connection with litigation, but on grounds extrinsic to the goals of litigation.” 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 5-1(A) (4th ed. 2000). Privilege prohibits the admission of otherwise relevant evidence when the interests that the privilege seeks to advance are regarded as more important than the interests served by resolution of litigation based on full disclosure of all relevant facts. *Id.* “If a privilege exists, information may be withheld, even if relevant to the lawsuit and essential to the establishment of plaintiff’s claim.” *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982). Privileges, therefore, act to suppress relevant and sometimes vital evidence, Cleckley, *Handbook on Evidence* § 5-1(A), and undercut the principle that “the public . . . has a right to every man’s evidence.”” *State ex rel. Ward v. Hill*, 200 W. Va. 270, 277, 489 S.E.2d 24, 31 (1997) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting John H. Wigmore, *Evidence* § 2192 (3rd ed.)). In short, “privileges obstruct the search for truth.” *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972).

Because of this, “[e]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.” *Id.*, 489 S.E.2d at 32 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)) (footnote omitted). Privileges created under common law are to be strictly construed, *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990); *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 437, 460 S.E.2d 677, 683 (1995) (common law attorney

client privilege must be strictly construed). The same is true for statutory privileges. While “[i]t is well recognized that a privilege may be created by statute[, such a] statute granting a privilege is to be strictly construed so as ‘to avoid a construction that would suppress otherwise competent evidence.’” *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 41, 454 S.E.2d 77, 86 (1994) (Cleckley, J., concurring) (quoting *Baldrige v. Shapiro*, 455 U.S. 345, 362 (1982) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961))).

In this case, the Commissioner relies on West Virginia Code § 33-2-19 to assert that her investigatory file is privileged and therefore excuse the suppression of relevant evidence. There are two reasons that this is incorrect and that, accordingly, the prohibition should be denied: (A) the statute upon which the Commissioner relies to assert a claim of absolute privilege does not create an absolute privilege and in fact, create no privilege at all in civil cases regarding discovery of investigatory files so there is privilege that is triggered;¹ and, (B) since the same plaintiffs who made reports and were interviewed by the Commissioner have intentionally and voluntarily waived any interest in any purported privilege, the purpose animating the purported privilege would not be frustrated in turning over the file and, as such, the purported privilege ceased to exist under these circumstances.

¹While not relied on by Judge Frye, because this argument is one of pure law, Monumental may rely on it because its argument is apparent from the record. *Cf. Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) (“An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support.”)

A. By its very terms and its statutory context, the statute upon which the Commissioner relies to assert a claim of privilege is not triggered in this case.

The Commissioner asserts that West Virginia Code § 33-2-19 excuses her from complying with the Judge Frye's Order. West Virginia Code § 33-2-19 provides in pertinent part:

(a) Documents, materials or other information in the possession or control of the commissioner that are obtained in an investigation of any suspected violation of any provision of this chapter or chapter twenty-three of this code are confidential by law and privileged, are not subject to the provisions of chapter twenty-nine-b of this code and are not open to public inspection. The commissioner may use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties. The commissioner may use the documents, materials or other information if they are required for evidence in criminal proceedings or for other action by the state or federal government and in such context may be discoverable only as ordered by a court of competent jurisdiction exercising its discretion.

(b) Neither the commissioner nor any person who receives documents, materials or other information while acting under the authority of the commissioner may be permitted or required to testify in any private civil action concerning any confidential documents, materials or information subject to subsection (a) of this section except as ordered by a court of competent jurisdiction.

"[W]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (citations omitted). Application of the plain language of the statute establishes that the report is not privileged in this private civil action.

The Commissioner begins her argument by citing the West Virginia Freedom of Information Act. Pet'n Prohib. II. B. This argument is easily disposed of since the case here deals not with the FOIA but with discovery in a civil case. "Most courts have concluded that . . . [a] FOIA exemption does not automatically constitute a 'privilege' within the

meaning of the . . . Rules of Civil Procedure.” *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.15 (1982). West Virginia follows this principle. In a situation analogous to this one, this Court has held that, “The provisions of this state’s Freedom of Information Act, West Virginia Code §§ 29B-1-1 to -7 (1998), which address confidentiality as to the public generally, were not intended to shield law enforcement investigatory materials from a legitimate discovery request when such information is otherwise subject to discovery in the course of civil proceedings.” Syl. Pt. 2, *Maclay v. Jones*, 208 W. Va. 569, 542 S.E.2d 83 (2000). See also *Manns v. City of Charleston Police Dep’t*, 209 W. Va. 620, 624, 550 S.E.2d 598, 602 (W. Va. 2001) (noting that in *Maclay* this Court “found that the FOIA provisions were not controlling with regard to matters of confidentiality raised in the course of civil discovery.”).

The Commissioner then asserts that the second sentence of Code § 33-2-19 permits disclosure only to criminal cases, actions by the federal government or actions by the state government. Pet’n Prohib. Part II.B. In essence, the Commissioner asserts that Code § 33-2-19 creates an absolute privilege except in criminal cases or actions brought by the state or federal government, when the privilege becomes conditional. The problem with the Commissioner’s position is that Code § 33-2-19 does not create any privilege at all *except* for a conditional privilege *applicable only* in criminal cases, and actions brought by the state or federal government and not private civil actions. This is supported by reference to subsection (b) of West Virginia Code § 33-2-19, which creates a conditional privilege relating to testimony from the Commissioner or any person who receives documents, materials or other information while acting under the authority of the Commissioner “*in any private civil action.*” The Legislature was well aware of how to create a privilege

applicable to a private civil action—and did not do so in Code § 33-2-19. This conclusion is buttressed by reference to other provisions of the Insurance Code which should be read in *pari materia*.

“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.” Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907, 908 (1975). There are a number of statutes in the Insurance Code dealing with the confidentiality of information that use similar, although, critically, not identical language, West Virginia Code §§ 33-2-19 and 33-41-7. These two statutes should be read in *pari materia*. See, e.g., *Alias Smith & Jones, Inc. v. Barnes*, 695 P.2d 302, 305 (Colo. Ct. App. 1984) (“All the statutes in Title 10 are intended to be part of a uniform system of regulating the insurance industry in this state and should be construed in *pari materia*.”).

West Virginia Code § 33-2-19 provides that “[d]ocuments, materials or other information in the possession or control of the commissioner that are obtained in an investigation of any suspected violation of any provision of this chapter or chapter twenty-three of this code are confidential by law and privileged, are not subject to the provisions of chapter twenty-nine-b of this code and are not open to public inspection.” The confidentiality provisions of the Insurance Fraud Prevention Act contains similar language, but with one crucial addition not contained in Code § 33-2-19:

Documents, materials or other information in the possession or control of the office of the insurance commissioner that are provided pursuant to section six of this article or obtained by the commissioner in an investigation of alleged fraudulent acts related to the business of insurance shall be confidential by law and privileged, shall not be subject to the provisions of chapter twenty-nine-b of this code, shall not be open to public inspection, *shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.*

W. Va. Code § 33-41-7 (a). The language, “shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action[,]” creates an absolute privilege--a privilege not contained in West Virginia Code § 33-2-19(a). Similarly, other provisions of the Insurance Code include absolute privilege language—language not found in Code § 33-2-19(a). See W. Va. Code §§ 33-2-15b(c) (report to Legislature on third-party bad faith); 33-12-25(f)(1) (termination of authority to represent insurer); 33-12-37(h) (criminal background checks); § 33-46-5 (third-party administrator act).

If the Legislature meant for Code § 33-2-19(a) to protect documents from discovery or admissibility in private civil actions, it certainly could have done so as it did in West Virginia Code § 33-41-7(a). See *Lester v. Summerfield*, 180 W. Va. 572, 575, 378 S.E.2d 293, 296 (1989) (“other related statutes clearly indicate that the legislature knew how to preserve prior service credit, as evidenced by the provisions applicable to chief deputy sheriffs set out in W. Va. Code, 7-14-13 . . .”). See also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (“Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so.”); *Cote H. v. Eighth Jud. Dist. Court ex rel. County of Clark*, 175 P.3d 906, 908-09 (Nev. 2008) (footnote omitted) (“if the Legislature intended NRS 201.230(1) to only apply to perpetrators over the age of 14, the Legislature would have expressed that limitation as it has done in other statutes.”); *Tamashiro v. Department of*

Hum. Serv., 146 P.3d 103, 120 (Haw. 2006) (“However, had the legislature intended that the adjudicatory provisions of Chapter 91 be followed, it would have expressly indicated such intent as it has done in other statutes on various subjects.”); *Kish v. Akron*, 846 N.E.2d 811, 819 (Ohio 2006) (“Had the legislature intended ‘record’ to be limited otherwise, it would have modified the term itself, as it has done in analogous statutes.”); *Chance v. American Honda Mtr. Co., Inc.*, 635 So.2d 177, 179 (La. 1994) (“the legislature is fully capable of expressing its intent clearly as evidenced by the explicit language used in other statutes to specify retroactive application.”); *Queets Band v. State*, 682 P.2d 909, 911 (Wash. 1984) (“If the Legislature had intended to include this unique group within the terms of the reciprocity statute, it would have done so expressly. The Legislature has regularly evidenced such an intent in other statutes by expressly referring to Indian Tribes.”); *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979) (“In other statutes, the legislature has demonstrated its ability to express its intent to eliminate sentencing options.”); *Ernsting v. Ave Maria College*, 736 N.W.2d 574, 580 (Mich. Ct. App. 2007) (“Had the Legislature intended to limit the term ‘law enforcement agency’ to mean only state and local law enforcement agencies, it could have expressly so stated, as it did in subsections d(i) through (iv), and as it has done in other statutes.”); *Mitchell v. State*, 813 N.E.2d 422, 429 (Ind. Ct. App. 2004) (“Moreover, we do not ordinarily read requirements into statutes. This is so especially where the legislature has demonstrated in other statutes that it is capable of including the omitted language.”); *De Anza Santa Cruz Mobile Estates Homeowners Ass’n v. De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr.2d 708, 724 (Ct. App. 2001) (“the Legislature has specifically provided in other statutes in other California codes that punitive damages *are* available, and presumably it was capable of including

similar express language in section 798.86 if it so intended.”); *Onsite Computer Consulting Serv., Inc. v. Dartek Computer Supply Corp.*, 2006 WL 2771640, *2 (Mo. Cir. Ct.) (“If Congress wanted to permit a ‘good faith’ defense, it would have done so as it has in other statutes.”); *Yoder v. American Travellers Life Ins. Co.*, 57 Pa. D. & C.4th 540, 544-45 (Com. Pl. 2002) (emphasis deleted) (“However, as we previously addressed in our memorandum opinion, the legislature, if they had wanted, could have specifically set forth, as they did in other statutes, that the law should apply to insurance policies issued or renewed after a certain date.”).

Just as a court should not read a statute in such a way as to render superfluous another provision in the same act, *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995), neither should a court read one statute in such a way as to render superfluous or surplusage another statutory enactment. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003) (“A statutory interpretation that renders another statute superfluous is of course to be avoided.”); *Jung v. Southland Corp.*, 717 A.2d 387, 393 (Md.1998) (“Nor should the statute be read so as to render another statute in that statutory scheme, or any portion of it, meaningless, surplusage, superfluous or nugatory.”). Also, it is not within the realm of a court to read into statutes language which the Legislature has chosen not to include. “Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996) (citing *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994)). If the Commissioner is correct that Code § 33-2-19 creates an absolute privilege, then the

language in other statutes, e.g., “shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action,” would be rendered superfluous or mere surplusage. On the other hand, if the language, “shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action,” is necessary to create a privilege, then such language must be read into Code § 33-2-19 by this Court if Code § 33-2-19 is to have the effect the Commissioner seeks. West Virginia law disfavors such judicial rewriting of statutory language. This apparent conundrum is easily solved by reading West Virginia Code § 33-2-19 by its plain terms, which do not create any privilege in a civil action much less an absolute privilege. In short, West Virginia Code § 33-2-19 must be read the exact opposite way the Commissioner does.

While the Commissioner focuses on the statute’s creation of a conditional privilege (1) where the Commissioner uses the documents in a (2) criminal proceeding, (3) other state action, or (4) other federal action, she ignores what the statute does not do, that is, it does not create any privilege involving a private civil action.² Under the plain language of the West Virginia Code § 33-2-19, its terms of privilege are not applicable here and the prohibition should be denied.

B. Since the same individuals who made reports and were interviewed by the Commissioner have voluntarily waived any interest in the privilege, the purpose animating the purported privilege would not be frustrated in turning over the file.

In the instant case, Judge Frye concluded that the investigative file was not exempt from discovery because “the subjects of the investigation are requesting the records.” Pet’n

²Indeed, it is not without precedent that the Legislature would create a privilege triggered only in certain cases. *See* W. Va. Code § Code § 57-3-3 (generally spouse may not be compelled to testify adversely against the other spouse, but only in a criminal case).

Prohibition Addendum B.³ While the Commissioner asserts that West Virginia Code § 33-2-19 “does not contain such an exception to the privilege,” Pet’n Prohibition, II.B., as a matter of privilege law generally, “most jurisdictions . . . hold that a privilege will not operate in certain situations, primarily those in which eliciting privileged information is necessary to accurately resolve litigation between the parties to the privilege.” Thomas A. Mauet and Warren D. Wolfson, *Trial Evidence* § 8.9 at 269 (3d ed.). In this case, Mr. Blankenbeckler and the Respondents/Plaintiffs below, those who are involved in the investigation and who are now involved in litigation, all agreed (or at least did not object) to the release of the investigative file. In light of this, any purported privilege is not triggered.

“Common sense dictates there must be some point at which privilege ceases to serve its intended purpose.” *In re Tollison*, 92 S.W.3d 632, 635 (Tex. App.2002). That point has been reached here as “a privilege is lost when the reason for it ceases to apply.” *Goldsborough v. Eagle Crest Partners, Ltd.*, 838 P.2d 1069, 1071 (Or. 1992) (citation omitted).

The Commissioner identifies the purpose of West Virginia Code § 33-2-19 (at least implicitly) by asserting that “production of the investigative file could make it difficult in the future for the Petitioner to perform her statutory duties because insurance companies will not be able to rely on the confidentiality provision of W. Va. Code § 33-2-19[.]” and that “Insurance Companies may be hesitant to provide materials to the Petitioner if Petitioner is forced to provide the materials to other parties in civil actions.” However, no such

³And, at no point did the Commissioner ever assert that the file contained information related to anyone other than Monumental, Mr. Blankenbeckler, or the Plaintiffs—all parties who have consented to disclosure.

confidentiality concern or hesitancy exists here because Monumental Life seeks production of the file and the circumstances of this case are unique enough to not create such concerns or hesitancy in other insurance carriers. Consequently, the Commissioner has failed to show grounds to enter a prohibition and it should be denied.

V. CONCLUSION

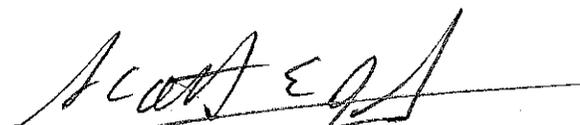
For all of the above-reasons, the Petition for a Writ of Prohibition should be denied.

Respectfully submitted,

Monumental Life Insurance Company

By Counsel

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William Blankenbeckler Deposition Transcript

page:line

201:12 Q So I'm wondering if -- but you deny that
201:13 you misrepresented the policies even though you've signed a
201:14 document saying that you did?

201:15 A Yeah, because that fellow told me, he said
201:16 "You've got to get this back here," and it was from the --
201:17 if I would have not signed it, I would have had to have
201:18 gone to litigation with the State Insurance Commissioner,
201:19 and they said "We'll just take your license if you send
201:20 that back," and I really didn't pay much attention to -- I
201:21 didn't -- well, you don't have any choice other than to
201:22 sign that document.

202:1 Q We're having a hearing next Monday morning
202:2 that will be held in Parsons on certain motions in this
202:3 case, you may have seen it in some of the documentation
202:4 you've got. I think it might be something at that point
202:5 that we might jointly ask the court for a court order to
202:6 permit us to get a copy of this file, particularly in light
202:7 of the fact that you are denying the content of what's in a
202:8 document that you signed, so I think that creates what's
202:9 known as a prior inconsistent statement, one place you
202:10 admit it, another place you deny it.

202:11 But I would like to have you aware that we
202:12 are going to have that hearing and we may bring that issue
202:13 up with the court, so if you'd like to be there, either
202:14 alone or with counsel, to protect your interests if you
202:15 don't want us to have a copy of that document, I think
202:16 that's the only fair thing I can tell you there, too,
202:17 because I would very much like to see that file to see what
202:18 is in the file, so it's --

202:19 What time is that hearing (referring to Ms.
202:20 Preston)?

202:21 MS. PRESTON: 11:00.

202:22 BY MR. COOPER:

203:1 Q -- 11:00 next Monday morning in Parsons, if
203:2 you'd like to attend.

203:3 MR. GEARY: John, I have one time at
203:4 9:30. One is at 9:30 and one is 11:00. I think we had
203:5 opposite times on the motions.

203:6 MR. COOPER: Just so everybody is aware,
203:7 and so you're aware, Mr. Blankenbeckler, the Clerk in
203:8 Tucker County sets everything for 9:30, but because

203:9 Monumental's counsel are in Martinsburg, we agreed that
203:10 they could have their hearing at 11:00, and I understand
203:11 that the judge has -- or the judge's secretary had approved
203:12 that, and so the hearing actually will be at 11:00 as
203:13 opposed to 9:30.

203:14 He needs to change the tape.

203:15 VIDEOGRAPHER: Off the record.

203:16 (WHEREUPON, a recess

203:17 was taken, after which

203:18 the deposition resumed

203:19 and the following

203:20 proceedings were had.)

203:21 VIDEOGRAPHER: Back on the record.

203:22 MR. COOPER: In off-the-record

204:1 discussions, it has been agreed that this deposition will

204:2 recess until Thursday of next week in the same location at

204:3 9:30 a.m., --

204:4 Is that what we've agreed?

204:5 MR. HULETT: Yes.

204:6 MR. COOPER: -- and that the Defendants,

204:7 or at least Monumental, has indicated it will send by

204:8 express delivery to Mr. Blankenbeckler a copy of the

204:9 various discovery documents that have been produced in this

204:10 case so that he'll have an opportunity to review them.

204:11 It's also been indicated to -- and I don't

204:12 know if was on the record or not, but that I have advised

204:13 Mr. Blankenbeckler that there is a hearing at 11:00 a.m.

204:14 next Monday morning in front of Judge Frye in Parsons,

204:15 dealing with at least a couple of issues, one brought by

204:16 the Monumental folks on the consolidation motion, and the

204:17 other being our response to that.

204:18 There's also -- we may want to address with

204:19 the court, seeking a court order to release -- direct the

204:20 release of a copy of the Insurance Commissioner's file

204:21 involving Mr. Blankenbeckler, although he would like to

204:22 have an opportunity to speak with counsel and he may choose

205:1 to appear either with or without counsel at that hearing.

205:2 Have I left anything out, folks, that we've

205:3 talked about?

205:4 MR. LEWIN: I think when you said to

205:5 provide discovery, we're going to provide him the

205:6 Monumental's discovery --

205:7 MR. COOPER: Right.

205:8 MR. LEWIN: -- we understand you guys

205:9 have produced.

205:10 MR. COOPER: Right.
205:11 MR. LEWIN: Okay.
205:12 MR. COOPER: And, Mr. Blankenbeckler, you
205:13 know, you might wish to check, but just be certain that you
205:14 have the Davis documentation that Ms. Preston sent to you a
205:15 year ago. I feel confident that -- I know we've talked
205:16 about it, I know two sets were made, one for the court and
205:17 one for you, in addition to the one that went to
205:18 Monumental, but you just check and be certain, if you will.
205:19 THE WITNESS: I will, but I don't remember
205:20 ever -- I got everything else, but I don't remember going
205:21 over that. I may have been in a rush and put that away or
205:22 something and didn't open it.
206:1 MR. COOPER: Because that's been about --
206:2 like I said -- Janet said, it's been about probably a year
206:3 and a half or two years ago, I think. It was long before
206:4 the more recent documentation.
206:5 MS. PRESTON: Well, there's been some
206:6 continuing, though. Every time we've supplemented, it's
206:7 been sent.
206:8 MR. COOPER: Okay.
206:9 Thank you. That concludes the portion of
206:10 your deposition today, sir, thank you for coming in.
206:11 MR. LEWIN: Yeah, thank you for your
206:12 time.
206:13 MR. HULETT: Appreciate it.
206:14 THE WITNESS: You're welcome.
206:15 VIDEOGRAPHER: The time is 3:50 p.m. We're
206:16 now off the record.
206:17 (Witness stands aside.)
206:18 (WHEREUPON, the deposition
206:19 was adjourned at 3:50 p.m.,
206:20 and by agreement of counsel,
206:21 was continued to July 27,
206:22 2007, at 9:30 a.m.)

CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for Monumental Life Insurance Company, hereby certify that on the 19th day of March 2008, I served the foregoing *Response of Monumental Life Insurance Company* upon all counsel of record and unrepresented parties by depositing true and correct copies thereof in the United States Mail, First Class Postage prepaid, addressed as follows:

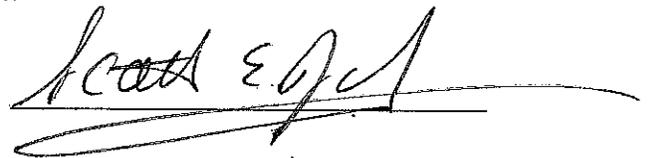
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The Honorable Andrew N. Frye, Jr.
Chief Judge, Circuit Court of Grant County
P.O. Box 446
Petersburg, WV 26847

A handwritten signature in black ink, appearing to read "Scott E. Johnson", is written over a horizontal line.