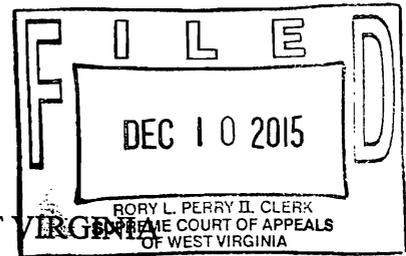


NO. 15-1101



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Petitioner,

v.

HONORABLE JEFFREY D. CRAMER,  
JUDGE OF THE SECOND JUDICIAL CIRCUIT  
OF WEST VIRGINIA and  
WILLIAM BASSETT AND SARAH BASSETT,

Respondents.

FROM THE CIRCUIT COURT OF  
WETZEL COUNTY, WEST VIRGINIA  
Civil Action No. 13-C-24K

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RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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## **QUESTIONS PRESENTED**

1. Did the Circuit Court commit clear legal error and exceed its legitimate powers by merely ordering State Farm to identify fact witnesses with relevant knowledge subject to a protective order?

2. Did the Circuit Court properly find that the Bassetts were entitled to learn the identity of fact witnesses with knowledge of how State Farm handled similar claims in the past when the Bassetts have asserted claims for violations of West Virginia's Unfair Trade Practices Act and claims for punitive damages?

3. Did the Circuit Court properly reject State Farm's arguments regarding the privacy interests of its insureds when the only information sought was the names, addresses and telephone numbers of witnesses with relevant information?

4. Did the Circuit Court properly reject State Farm's request that the Bassetts be prevented from contacting the subject fact witnesses when they clearly have knowledge of relevant information?

## **STATEMENT OF THE CASE**

In this action, the Respondents, William and Sarah Bassett have asserted claims against State Farm arising from a December 3, 2011 motor vehicle accident. In particular, the Bassetts allege that on December 3, 2011, Respondent William Bassett was traveling to work on West Virginia Route 20 in Wetzel County when a stolen vehicle operated by Brian Leroy Wade crossed the center line of the highway and struck the Respondent's vehicle head-on. (JA 14-15) As a result of the accident, Respondent William Bassett sustained serious and permanent injuries, incurred in excess of

\$93,000.00 in medical expenses, sustained lost wages, and suffered a permanent loss of earning capacity. (JA 15-16)

At the time of the accident, Mr. Wade was operating a 1997 Chevrolet pick-up that he had stolen the night before from David and/or Debra Bennett (JA 14-15). It is undisputed that no liability insurance applied to address the Bassetts' claims against Wade. William Bassett was operating a vehicle owned by his father, Edward Bassett, which was insured under Defendant State Farm's Policy No. 260 3017-D07-48F for various motor vehicle coverages, including \$20,000.00/\$40,000.00 of uninsured motorists ("UM") coverage. (JA 17-18) The Bassetts were also insured under two additional State Farm Policies identified as State Farm Policy Nos. 023 8838-F12-48C and 059 7276-F25-48C. (JA 17) Both of the Bassetts' State Farm Policies provided stated limits of \$20,000.00/\$40,000.00 of UM coverage. It is undisputed that the State Farm policies at issue stack to provide total UM coverage of \$60,000.00/\$120,000.00. (JA 17) Unfortunately, due to the severity of his injuries and the fact that his capacity to earn a living has been greatly curtailed, Mr. Bassett's total damages greatly exceed the stated UM coverage limits.

The woefully inadequate amount of UM coverage available to cover Mr. Bassett's damages prompted the Bassetts' counsel to investigate whether State Farm properly offered UM coverage to Edward Bassett and the Respondents. It was determined that State Farm had, in fact, failed to make the mandatory commercially reasonable offers of UM coverage to the Bassetts as required under West Virginia law. *W. Va. Code §33-6-31(b)*, requires insurers to offer their customers UM coverage of at least \$100,000.00/\$300,000.00. Furthermore, under *W. Va. Code § 33-6-31d*, insurers are required to make such offers on the form "prepared and made available" by the West Virginia Insurance Commissioner.

The mandatory offer requirement is found in *W. Va. Code § 33-6-31*, the “omnibus statute.”

The omnibus statute sets forth the requirements which apply to all auto insurers issuing policies in West Virginia, and provides, in relevant part, as follows:

(b) Nor may any such policy or contract be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he or she is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time: ***Provided, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle up to an amount of \$100,000 because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, in the amount of \$300,000 because of bodily injury to or death of two or more persons in any one accident and in the amount of \$50,000 because of injury to or destruction of property of others in any one accident.*** Provided, however, That such endorsement or provisions may exclude the first three hundred dollars of property damage resulting from the negligence of an uninsured motorist: Provided further, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without setoff against the insured’s policy or any other policy ...

*W. Va. Code § 33-6-31* (emphasis added).

In *Bias v. Nationwide Mut. Ins. Co.*, 179 *W.Va.* 125, 365 *S.E.2d* 789 (1987), this Court examined the mandatory offer requirement and concluded that the insurer bears the burden of establishing a commercially reasonable offer and that the insured made a knowing and intelligent rejection of the coverage where the insurer is unable to meet its burden of proof, its policy must be reformed to provide coverage in an amount equal to the level of coverage which the insurer was required to offer. *Bias*, 179 *W. Va.* at 127. This Court explained:

Code §33-6-31(b) addresses both uninsured and underinsured motorist coverage. It provides, first, that every automobile insurance policy issued or delivered in West Virginia contain uninsured motorist coverage with minimal limits of coverage as set forth in West Virginia Code §17D-4-2 (1986 Replacement Vol.). Additionally, it provides that each policy shall offer an option for somewhat higher dollar limits of uninsured motorist coverage, which coverage is automatic unless waived in writing by the insured. The section's third proviso is that each policy *shall offer an option* for both uninsured and underinsured motorist coverage up to the dollar limits of the liability insurance purchased by the insured.

*Bias*, 179 W. Va. at 126 (emphasis in original). Recognizing that the omnibus statute was intended to protect consumers who might not understand such insurance coverages, the Court also noted:

Where an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made, . . . and that any rejection of said offer by the insured was knowing and informed. *The insurer's offer must be made in a commercially reasonable manner, so as to provide the insured with adequate information to make an intelligent decision.*

*Id.* at 127 (citations omitted, emphasis added).

Importantly, this Court held that if an insurer cannot establish that its insured made a knowing and intelligent rejection of the optional coverage, the amount of un- or underinsured motorists coverage will be extended to the level of coverage which the insurer was required to offer, stating:

When an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured.

*Id.* Therefore, *Bias* placed West Virginia insurers in the position of having to prove the knowing and intelligent rejection of increased levels of UM and UIM coverage by their customers.

In 1993, difficulties associated with proving a “knowing and intelligent waiver” prompted the West Virginia Legislature to enact *W. Va. Code § 33-6-31d*, which required the Insurance

Commissioner to “prepare and make available” a form to be used by all auto insurers in West Virginia. Under *W. Va. Code § 33-6-31d*,

(a) Optional limits of uninsured motor vehicle coverage and underinsured motor vehicle coverage required by section thirty one of this article ***shall be made available to the named insured*** at the time of initial application for liability coverage and upon any request of the named insured ***on a form prepared and made available by the insurance commissioner***. The contents of the form shall be as prescribed by the commissioner and ***shall specifically inform the named insured of the coverage offered and the rate calculation therefor, including, but not limited to, all levels and amounts of such coverage available and the number of vehicles which will be subject to the coverage***.

(b) ... Any insurer who issues a motor vehicle insurance policy in this state ***shall provide the form*** to each person who applies for the issuance of such policy by delivering the form to the applicant or by mailing the form to the applicant together with the applicant’s initial premium notice. . .

(c) ... The contents of a form described in this section which has been signed by any named insured shall create a presumption that all named insureds under the policy received an effective offer of the optional coverages described in this section and that all such named insureds exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form. Such election or rejection is binding on all persons insured under the policy.

*W. Va. Code § 33-6-31d* (emphasis added). Pursuant to that Statute, the Commissioner has promulgated a mandatory selection/rejection form which is now used by insurers across the State.

Unlike most insurers, State Farm has decided to utilize selection/rejection forms of its own creation in making the mandatory offer and those forms have previously been found to be inconsistent with the forms promulgated by the Insurance Commissioner pursuant to *W. Va. Code § 33-6-31d*. In the case of *Martin v. State Farm Mutual Automobile Insurance Co.*, 809 F. Supp. 2d 496 (S.D. W.Va. 2011), the claimants asserted that State Farm’s failure to use the Commissioner’s form resulted in the underinsured motorists coverage being automatically “rolled-up” to an amount equal to the liability limits. In contrast, State Farm asserted that failing to use the mandatory form

merely resulted in the loss of a statutory presumption and the reversion to the standards for proving a commercially reasonable offer set forth by this Court in *Bias*. This Court subsequently resolved the issue in response to a certified question in the case of *Thomas, et al. v. McDermitt, et al.*, 232 W.Va. 159, 751 S.E. 2d 264 (W.Va. 2013), and indicated that State Farm's failure to use the form promulgated by the Insurance Commissioner resulted in the loss of the statutory presumption of a commercially reasonable offer, and required that the insurer prove a "commercially reasonable offer" and a "knowing and informed rejection" under the standards set forth in *Bias*. (See *Thomas*, at Syl. Pts. 3 and 12.) The Bassetts' claims against State Farm in this case are based on the fact that the UM selection/rejection forms used by State Farm to offer the coverage at issue here are materially different from the Commissioner's mandatory, prescribed form and State Farm is unable to prove that it made the required commercially reasonable offers in some other fashion pursuant to *Thomas*. (JA 18-19)

In an effort to obtain the additional UM coverage which State Farm was required to offer but refused to pay<sup>1</sup>, the Bassetts filed their original *Complaint* in March of 2013, and sought a declaratory judgment with respect to the amount of UM coverage available to them under the State Farm Policies at issue. (JA 7-13) In particular, the Bassetts asserted that \$100,000.00/\$300,000.00 in UM coverage was available under each of the applicable policies because the UM coverage was not properly offered by State Farm to Edward Bassett for Policy No. 260 3017-D07-48F or to the Respondents for Policies Nos. 023 8838-F12-48C and 0597276-F25-48C. (JA 17). In 2015, the

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<sup>1</sup> State Farm paid the Bassetts the undisputed \$60,000.00 in UM coverage, but refused to "roll-up" the UM coverage under the subject policies to reflect the amounts of UM coverage which State Farm was required to offer. (JA11)

Bassetts sought and were granted leave to amend their *Complaint* to assert claims against State Farm for breach of contract, “bad faith,” and violations of West Virginia’s Unfair Trade Practices Act (*W.Va. Code §33-11-4(9)*). (JA 14-25) After they did so, State Farm agreed to “roll-up” the UM coverage on each policy to \$100,000.00/\$300,000.00 and paid the Bassetts’ an additional \$240,000.00, conceding the coverage issue. (See State Farm’s *Petition* at pg. 3.)<sup>2</sup> Thus, the declaratory issue with respect to the amount of UM coverage available is no longer at issue since the Bassetts have already prevailed on the roll-up issue.

In order to obtain evidence to support their bad faith and Unfair Trade Practices Act claims, the Bassetts served their Third Set of Interrogatories and Requests for Production on March 11, 2015. The discovery requests sought information regarding other claimants who presented similar claims against State Farm and were subject to similar treatment. (See Interrogatories Nos. 3, 4 and 5, as quoted at JA 60-61.) The subject Interrogatories sought the identification of individuals who, like the Bassetts, had presented claims for UM coverage to State Farm and had their claims denied in the same fashion even though State Farm knew its selection/rejection forms were defective. The Bassetts anticipated that these individuals would have factual knowledge regarding how State Farm handled their claims and whether State Farm performed any investigation into the other *Bias* factors pursuant to *Thomas* or simply relied upon its defective forms to deny coverage as it had done during the handling of the Bassetts’ claim.

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<sup>2</sup> On pg. 3 of its *Petition*, State Farm asserts that the Bassetts amended their *Complaint* to assert bad faith claims against it “despite receiving the relief they requested in the original complaint,” implying that it agreed to roll-up the Bassetts’ UM coverage before the *Amended Complaint* was filed. In fact, the Agreed Order permitting the Bassetts to amend their *Complaint* was entered on March 4, 2015, well before State Farm agreed to “roll-up” the UM coverage. Further while State Farm asserts that it paid all of the relief sought by the Bassetts, that is inaccurate.

On April 10, 2015, State Farm served its responses to the Bassetts' discovery requests, setting forth a number of objections regarding whether such information was relevant and whether disclosing it would violate the privacy rights of the individuals involved. (JA 60-61) In order to resolve the disputed matters, the Bassetts' counsel wrote to State Farm's counsel on June 5, 2015, and set forth the Bassetts' position on each issue. (See JA 48-50, counsel's letter of June 5, 2015.) On June 9, 2015, State Farm's counsel responded, agreeing to produce some additional information, but indicating that State Farm otherwise stood by its objections. (See JA 53-55, counsel's letter of June 9, 2015.) The Bassetts filed their *Motion To Compel* (JA 26-56) and asked the Circuit Court to compel State Farm to produce the requested information regarding other claimants because it was directly relevant to their "bad faith" and Unfair Trade Practices Act claims. State Farm responded by again asserting that the information was irrelevant and that the request violated the privacy interests of its insureds. (See JA 57-127)

On September 28, 2015, the Circuit Court below granted the Bassetts' request and found that the requested information "is reasonably calculated to lead to the discovery of relevant admissible evidence." (JA 3-5) It further found that the privacy interests of the subject State Farm insureds could be protected through an Agreed Protective Order which had previously been entered. (JA 4) State Farm then filed its *Motion To Reconsider*, asserting essentially the same arguments (JA 137-165) which the Circuit Court denied on October 27, 2015, although the Court did provide the identification of the fact witnesses which was to be subject to the existing Protective Order in this case. (JA 1-2) State Farm now seeks a writ of prohibition with respect to the Circuit Court's ruling.

## SUMMARY OF THE ARGUMENT

The Circuit Court correctly found that the Bassetts' Interrogatories Nos. 3, 4 and 5 were reasonably calculated to lead to the discovery of relevant and admissible evidence. Evidence regarding State Farm's handling of similar claims is directly relevant to the "general business practice" requirement of *W.Va. Code §33-11-4(9)* pursuant to *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 *W. Va.* 597, 280 *S.E.2d* 252 (1981). In *Jenkins*, this Court found that "[p]roof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants and attorneys who have dealt with such company and its claim agents." *Jenkins* at 260. Here, the Bassetts are seeking to establish how often State Farm has engaged in similar conduct in the past and whether or not it accepted its liability quickly and "rolled up" UM coverage to the correct amount when it discovered that its selection/rejection form was invalid and that it could not meet its burden of proof under Bias. The identification of other West Virginia claims in which the uninsured motorists coverage was "rolled-up" in the past ten years will allow the Bassetts to determine how often such adjustments of coverage have occurred in West Virginia, the identity of witnesses with knowledge regarding such claims, how long State Farm's conduct has been occurring, and whether the adjustments were made promptly or required litigation even though the invalidity of State Farm's selection/rejection form and State Farm's burden of proof under Bias was clear. Thus, the Bassetts' discovery requests are specifically targeted to the precise situation at issue in this case and are limited in scope both geographically and to the time period at issue.

The Bassetts' discovery requests also seek information which is directly relevant to their claim for punitive damages. In that regard, this Court set forth the factors to be examined by a jury

in connection with an award of punitive damages in *Garnes v. Fleming Landfill*, 186 W.Va. 656, 413 S.E.2d 897 (W.Va. 1991), stating that the jury may consider “how long the Defendant continued in [its] actions, . . . whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once [its] liability became clear to [it].” *Garnes* at 668, 909. The Bassetts’ interrogatories expressly seek such information with respect to how State Farm handled other “roll-up” cases.

State Farm’s assertion that the names of other claimants in similar circumstances are not relevant to the Plaintiffs’ Unfair Trade Practices Act claims because making a defective offer of uninsured motorists coverage is not a violation of the Act is without merit because it ignores why the Bassetts want to know who those other claimants are. While making a defective offer is not, in and of itself, a violation of the Act, the refusal to properly investigate and handle claims where a defective offer was made may very well constitute a violation of multiple provisions of the Act. The only way the Bassetts can learn how State Farm handled other similar claims and conducted its investigations of the *Bias* factors pursuant to *Thomas* is by asking the individuals who made those claims how they were treated. This information provides exactly the sort of “general business practice” evidence the Bassetts need to prove their case under *Jenkins*.

Finally, State Farm’s suggestion that identifying fact witnesses with relevant knowledge will somehow violate the witnesses’ privacy rights ignores the very nature of discovery. In that regard, *Rule 26* of the *West Virginia Rules of Civil Procedure* expressly states that parties may obtain discovery regarding “the identity and location of persons having knowledge of any discoverable matter.” Here, the Bassetts are seeking to discover the identify of witnesses who have relevant

knowledge of State Farm's business practices and its conduct in handling claims similar to the Bassetts' claim. Merely obtaining the names and addresses of such fact witnesses will not invade their privacy. Moreover, if such individuals wish to protect their privacy they can simply decline to discuss their claims. Rule 26 already addresses what information must be provided as to witnesses, including the identity and location of persons having knowledge of discoverable matters.

State Farm's reliance upon *State ex. rel. West Virginia Fire & Cas. Co. v. Karl*, 202 W.Va. 471, 505 S.E.2d 210 (W.Va. 1998), and *State ex rel. Westbrook Health Services, Inc. v. Hill* 209 W.Va. 668, 550 S.E.2d 646 (W.Va. 2001), with respect to privacy issues is misplaced. The *Karl* decision involved a request for the entire claim files, including medical records and other personal information, of a substantial number of infants who had been involved in accidents. *Karl* at 474, 213. Likewise, the *Hill* decision did not involve an effort to learn the identity of fact witnesses for purposes of contacting them. Instead, the discovery request at issue in *Hill* was a request for the private employment information and records, including wage and tax information, of the claimant's fellow employees. As such, neither *Karl* nor *Hill* involved the limited request for the identification of fact witnesses with information relevant to State Farm's business practices.

The Circuit Court below's decision to make the information regarding other claimants subject to a protective order provided more than adequate protection for the privacy of the fact witnesses at issue. Providing the names and addresses for such fact witnesses while precluding the Bassetts from contacting them would be nonsensical. Because State Farm has failed to demonstrate why the Circuit Court below's decision was incorrect and has failed to provide any reasonable basis for limiting the Bassetts' ability to discover the identity of fact witnesses with relevant knowledge, State Farm's *Petition* should be denied.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

State Farm suggests that oral argument is needed under Rule 19 of the Rules of Appellate Procedure because “the decisional process will be aided by oral argument.” However State Farm goes on to recognize that existing law addresses all of the issues raised by its Petition. The Bassetts oppose State Farm’s request for oral argument because the Petition presents no issues requiring extraordinary relief and because, as a matter of law, the Circuit Court’s interlocutory order with respect to a discovery issue did not exceed its legitimate powers.

### ARGUMENT

**I. The Circuit Court did not exceed its authority or commit clear legal error and the extraordinary remedy of a writ of prohibition is not warranted.**

Prohibition lies when a trial court “exceeds its legitimate power[]” on a non-jurisdictional matter, *W. Va. Code § 53-1-1 (1923)*, but it is not a substitute for appeal. This Court considers whether the petitioner “will be damaged or prejudiced in a way ... not correctable on appeal[,]” whether the trial court’s order is clear legal error or a repeated error, and whether it “raises new and important problems or issues of law of first impression.” Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). The petitioner need not meet all factors, but “the existence of clear error as a matter of law[] should be given substantial weight.” *Id.* This Court has noted:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that

the trial will be completely reversed if the error is not corrected in advance.

Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) Likewise, this Court has found that “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.” Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

In this case, State Farm does not dispute that the subject Orders were within the Circuit Court’s jurisdiction. Instead, State Farm suggests that it was “clear error” for the Circuit Court to order it to identify fact witnesses who have what it describes as “marginally relevant” information. State Farm then proceeds to argue that the Bassetts are seeking “personal information” regarding these witnesses and will violate their “right to be left alone” if the Circuit Court’s decision is not reversed. In fact, the Bassetts are only seeking the identification of fact witnesses and have not requested any of their personal information. As such, the Circuit Court’s decision is no more an abuse of its discretion than an order directing a party to identify persons who witnessed an accident. Thus, the Circuit Court’s decision to permit such limited discovery about the identity of fact witnesses was not the sort of “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate ...” which would warrant extraordinary relief. Syl. pt. 1, *Hinkle*, 164 W.Va. 112, 262 S.E.2d 744.

The real motion behind State Farm’s *Petition* is best illustrated by examining State Farm’s response to the Bassetts’ Interrogatory No. 6, which was not in dispute as part of the subject *Motion*

*To Compel.* In that Interrogatory, the Bassetts asked State Farm to identify other claims and suits in West Virginia where the claimants alleged State Farm's "bad faith" or violations of the Unfair Trade Practices Act. (JA 74-75) In response, State Farm provided the names of first-party claimants who had filed suit against State Farm, indicating the style of each suit (which, of course, included the names of those State Farm insureds who were parties), the civil action numbers, and the jurisdictions where those actions had been filed. (See the list of suits, which includes the names of approximately two hundred claimants found at JA 77-85) State Farm did not hesitate to provide "personal information" regarding those insureds, including their names, the fact that they had been involved in a lawsuit against State Farm, and even the details of their claims contained in the subject Court files. This raises the obvious question of why State Farm is so concerned about the privacy interests of some of its' insureds, but not others. Of course, the answer is obvious. Those insureds who had asserted a bad faith claim against State Farm were already aware of the issues that lead them to file suit. On the other hand, if the Bassetts contact other State Farm customers who had similar uninsured motorists claims to ask how their claims were handled, those insureds could learn of State Farm's defective selection/rejection forms. Rather than protecting its insureds from an invasion of their privacy, State Farm's clear motivation is its desire to continue its deception about its use of defective selection/rejection forms and the fact that State Farm has routinely denied its insureds' claims based solely upon those defective forms. Such concerns are not grounds for limiting legitimate discovery requests.

The standard for discovery is a liberal one. This Court has noted that pursuant to *Rule 26* of the *West Virginia Rules Of Civil Procedure*:

...discovery is not limited only to admissible evidence, but applies to information reasonably calculated to lead to the discovery of admissible evidence.

Syl. pt. 4, in part, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). Here, the identification of other State Farm insureds who had UM claims, and whose UM limits were less than \$100,000/\$300,000 will disclose witnesses with material information about State Farm's business practices related to its handling, investigation, and settlement of such claims. Far from being overly broad, the subject discovery requests are specifically targeted to the precise situation at issue in this case and are limited in scope both geographically and to the time period at issue. Since these witnesses have presented uninsured motorists claims to State Farm under circumstances similar to the Bassetts and have knowledge of State Farm's business practices in handling their claims such that even State Farm admits at pg. 4 of its *Petition* that their information is "marginally relevant," the Circuit Court's decision to permit discovery of the identification of these witnesses, subject to a protective order, was not "clearly erroneous." Accordingly, State Farm's request for relief should be denied.

**II. The information sought by the Bassetts' Interrogatories Nos. 3, 4 and 5 is highly relevant to their claims and clearly subject to discovery.**

In its *Petition*, State Farm asserts that the information sought by the Bassetts is at best "marginally relevant" and that the privacy interests of its insureds outweighs the Bassetts' right to obtain information about its general business practices. This assertion is simply incorrect.

In order to understand why the information sought by Interrogatory Nos. 3, 4 and 5 is relevant, it is first necessary to examine the nature of the Bassetts' claims. In that regard, despite State Farm's assertion to the contrary at pg. 3 of its *Petition*, the Bassetts do not assert that State

Farm's use of a form that differs from the Insurance Commissioner's promulgated form is "per se" a violation of the Unfair Trade Practices Act. Rather, the Bassetts assert that the manner in which State Farm investigated, handled, and settled their UM claim violated the Unfair Trade Practices Act in light of State Farm's decision to use a defective UM selection/rejection form.

A private cause of action for an insurance company's violations of *West Virginia Code* §33-11-4(9) was recognized by this Court in the case of *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W.Va. 597, 280 S.E.2d 252 (1981), where the Court stated:

[I]t does seem clear that **more than a single isolated violation of W.Va. Code 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of "a general business practice,"** which requirement must be shown in order to maintain the statutory implied cause of action.

*Jenkins*, at 260. (Emphasis supplied.) This Court then described two different means by which a claimant could meet the statute's "general business practice" requirement. The first method of meeting the "general business practice" requirement discussed in *Jenkins* was by showing that more than one violation occurred in the handling of a single claim. *Jenkins* at 260. The second is through testimony regarding the insurer's handling of the unrelated claims by others. In that regard, the Court noted:

Proof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants and attorneys who have dealt with such company and its claim agents, or from any person who is familiar with the company's general business practice in regard to claim settlement.

*Jenkins* at 260. Under *Jenkins*, the testimony of other claimants or about unrelated claims is admissible at trial. Obviously, the only way a claimant can learn the identity of such "other

claimants” is by obtaining their names and addresses from the insurer and the only way to learn what information those “other claimants” have is by contacting them. State Farm seeks to prohibit such discovery, even though this discovery is expressly contemplated under *Jenkins* and is highly relevant to the “general business practice” issue since it involves State Farm’s conduct in the handling of similar claims.

With respect to the specific violations at issue, *W. Va. Code §33-11-4(9)(f)* requires insurers to offer a prompt, fair and equitable settlements when liability is reasonably clear. In this case, State Farm made the deliberate choice not to follow *W. Va. Code §33-6-31d* and to instead use selection/rejection forms of its own design. State Farm was well aware of the fact that, on August 22, 2011, the United State District Court for the Southern District of West Virginia entered its *Memorandum Opinion And Order* in the *Martin* case finding that the selection/rejection forms designed and used by State Farm were defective, since they did not inform State Farm’s insureds of the actual cost for available limits of coverage. State Farm was also aware that the Bassetts had asserted that the selection/rejection forms at issue here were not compliant in their original *Complaint*. (JA 11) Nevertheless, State Farm continued to deny the Bassetts’ claim for additional UM coverage until it finally conceded the coverage issue in 2015.

*W. Va. Code §33-11-4(9)(g)* prohibits insurers from compelling their insureds to institute litigation in order to recover amounts due under their policies. In this case, State Farm refused to acknowledge the defects in its UM selection/rejection forms and its inability to prove a commercially reasonable offer and compelled the Bassetts to file this action before finally agreeing to “roll-up” the coverage after extensive litigation. The Bassetts believe that State Farm has acted in a similar

fashion with respect to other claimants under the same or similar circumstances and Interrogatories Nos. 3, 4, and 5 are expressly designed to identify the witnesses with knowledge of State Farm's business practices. While making a defective offer of UM coverage is not, in and of itself, a violation of the Act, the refusal to properly investigate, handle, and settle claims where a defective offer was made would constitute a violation of multiple provisions of the Act. However, the only way the Bassetts can establish how State Farm handled other similar claims is by asking the individuals who made those claims. As such, the information sought by the Bassetts is highly relevant and clearly subject to discovery.

State Farm also ignores the fact that the Bassetts are seeking punitive damages in this case. (JA 21) In that regard, this Court addressed the factors to be examined by the jury in connection with an award of punitive damages in *Garnes v. Fleming Landfill*, 186 W.Va. 656, 413 S.E.2d 897 (W.Va. 1991), noting:

**The jury may consider** (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury may take into account **how long the Defendant continued in his actions**, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, **whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.**

*Garnes* at 668, 909. (Emphasis supplied.) By contacting fact witnesses who have been in the same circumstances, the Bassetts can establish how State Farm has treated other customers and how long it engaged in similar conduct in the past, all of which is directly relevant under *Garnes*. Far from

being “marginally relevant,” the information sought in Interrogatories Nos. 3, 4 and 5 goes to the heart of the Bassetts’ claims.

**III. Disclosing the names and addresses of fact witnesses with relevant information subject to a protective order will not violate the privacy rights of State Farm’s insureds.**

At pg. 6 of its *Petition*, State Farm broadly asserts that the privacy interests of non-parties are to be protected and their names, addresses, telephone numbers and other identifying information “are not to be produced.” If such a broad rule actually applied, no party would ever be able to inquire about the identity of fact witnesses with knowledge of a case since the responding party could not disclose such information about persons who are not parties to the case. Such an absurd result would be patently unfair and would completely defeat the purpose of discovery. The drafters of *Rule 26* already weighted the privacy rights of witnesses and determined that the identity and location of witnesses having knowledge of discoverable matters must be provided in every civil action.

In support of its privacy arguments, State Farm relies heavily upon *State ex. rel. West Virginia Fire & Cas. Co. v. Karl*, 202 W.Va. 471, 505 S.E.2d 210 (W.Va. 1998). However, State Farm fails to recognize that the *Karl* decision involved a request for the entire claim files of a substantial number of infants who had been involved in accidents, not merely the identification of general business practice witnesses. *Karl* at 474, 213. Specifically, the Court in *Karl* noted:

. . . Fire & Casualty filed a Motion to Reconsider the lower court’s order requiring the production of unrelated non-litigant infant settlement claim files resolved without court approval in the last ten years. Fire & Casualty contended that production of such files in their entirety would violate the privacy rights of the non-litigants and could subject Fire & Casualty to liability for production of confidential information of the non-litigant individuals.

*Id.* Obviously, the entire claim files related to infant claims would include confidential medical information, medical records, and other private and confidential information. This Court explained:

Where a claim is made that a discovery request is unduly burdensome under Rule 26(b)(1)(iii) of the West Virginia Rules of Civil Procedure, the trial court should consider several factors. First, a court should weigh the requesting party's need to obtain the information against the burden that producing the information places on the opposing party. This requires an analysis of the issues in the case, the amount in controversy, and the resources of the parties. Secondly, the opposing party has the obligation to show why the discovery is burdensome unless, in light of the issues, the discovery request is oppressive on its face. Finally, the court must consider the relevancy and materiality of the information sought.

*Karl* at 476, 215. This Court then applied that test to the significant privacy interest the infant non-litigants would have related to their medical records and other private information and determined that identifying information should be redacted before the claim files were produced. *Id.* However, this Court also stated:

Subsequent to production, if any party seeks additional information or testimony which would necessitate release of any non-litigant's name or personal information, that party can petition the lower court for the production of such information.

*Id.* As such, *Karl* does not stand for the proposition that the identification of non-litigant claimants is not subject to discovery. Rather, *Karl* dealt with the balancing test to be applied to a request for entire claim files which contain medical records, bills and other personal and confidential information. Here, the Bassetts are only seeking the identification of fact witnesses who have had similar UM claims with State Farm and are likely to have been subject to the same treatment by State Farm. None of the witnesses' private medical records or other confidential information is being requested and the Bassetts have not requested their claim files. When the factors discussed in *Karl* are applied to the Bassetts' requests here, it is clear that the Bassetts' need for the names of fact

witnesses who have had similar claims with State Farm outweighs any burden State Farm would face in protecting the privacy of such individuals.<sup>3</sup>

State Farm's reliance upon *State ex rel. Westbrook Health Services, Inc. v. Hill* 209 W.Va. 668, 550 S.E.2d 646 (W.Va. 2001), is also misplaced. Like *Karl*, the *Hill* decision did not involve an effort to learn the identity of fact witnesses. Instead, the discovery request at issue in *Hill* was a request for private and confidential employment information and records, including wage and tax information, related to the claimant's fellow employees. The Court recognized that even such "private" information could be subject to discovery so long as a protective order was in place, noting:

In its supplemental brief submitted to this Court, Westbrook states, "Petitioner was never trying to keep relevant information from Respondent Wilson, Petitioner simply wanted to have protection from potential lawsuits by employees and/or former employees, who may have a claim that their individual right of privacy was violated." Westbrook later goes on to state that "the point cannot be made too strongly that Petitioner was never attempting to keep this information completely from Respondent Wilson, but only wanted an order protecting them from future liability for the disclosure." Westbrook also conceded during oral argument before this Court that the documents were likely producible.

*Hill* at 674, 652. Here, the Bassetts only want the identification of fact witnesses so that they can contact them and obtain evidence of State Farm's business practices. If such individuals wish, they can simply refuse to discuss their claims. Such a refusal would protect any "right to be left alone" while still allowing the Bassetts to obtain relevant factual information from those fact witnesses who

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<sup>3</sup> The mere fact that an individual was involved in a motor vehicle accident with an uninsured motorist is hardly private, inasmuch as investigating officers, fire and medical personnel, other involved drivers, witnesses and even the media routinely learn about such accidents and who was involved. Crash Reports containing such information are available to the public.

are willing to provide it. Rather than allow the Bassetts to engage in the ordinary process of contacting fact witnesses with relevant information, State Farm wants to completely prevent such individuals from discussing State Farm's business practices with the Respondents. This information will assist the Bassetts in proving State Farm's general business practice of violating *W. Va. Code* §33-11-4(9) and State Farm should not be permitted to conceal this material and relevant evidence under the guise of protecting the privacy of individuals who it may have also mistreated.

**IV. The Circuit Court adequately protected the privacy of the subject State Farm insureds while properly permitting the Bassetts to contact fact witnesses with relevant information.**

State Farm also asserts that the Circuit Court erred by refusing to prohibit the Bassetts from contacting those fact witnesses who are the subject of the Bassetts' Interrogatories Nos. 3, 4 and 5. Its arguments in that regard are simply absurd and raise the obvious question of what value the identification of the fact witnesses would have if the Bassetts could not contact the witnesses to determine how they were treated by State Farm. As discussed above, the Bassetts are entitled to the identification of these fact witnesses because they have relevant knowledge of State Farm's general business practices with respect to the handling of claims similar to that of the Bassetts. Contact information for potential witnesses is only useful if a litigant can contact the witness and obtain information. Otherwise, the Bassetts are prevented from identifying "other claimants" with knowledge of State Farm's business practices, as contemplated by *Jenkins, supra*. The "numerical information" which State Farm proposes to provide is worthless for showing State Farm's general

business practices because the Bassetts would have no means of determining how the unidentified individuals were actually treated by State Farm.<sup>4</sup>

*Rule 26 of the West Virginia Rules of Civil Procedure* provides for liberal discovery and states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Here, the Bassetts have demonstrated that they are seeking to discover the identify of witnesses who have relevant knowledge of State Farm's business practices and State Farm's conduct in handling claims similar to the Bassetts' claim. The Circuit Court below agreed and directed State Farm to produce the requested information, subject to a protective order. State Farm has failed to demonstrate why the Circuit Court's decision was incorrect and has failed to provide any reasonable basis for limiting the Bassetts' ability to contact fact witnesses with relevant knowledge. Therefore, State Farm's request for a writ of prohibition should be denied.

**V. There is no putative class action at issue in this case and State Farm's arguments with respect to discovery requests in other cases where a class action was being asserted are misplaced.**

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<sup>4</sup> The Bassetts did not oppose having the contact information of the individuals in question being subject to the Circuit Court below's previously entered protective order so long as the information could be used to contact the individuals to determine how they were treated by State Farm and the Circuit Court properly included such protections in its Order. (JA 4)

At pg. 9 of its *Petition*, State Farm asserts that the Circuit Court overlooked the fact that Interrogatories Nos. 3, 4 and 5 were somehow intended for a putative class action. State Farm then asserts that since similar interrogatories were used by the claimants in the *Martin* case in an effort to obtain class information, the discovery could not also be used to obtain “general business practice” evidence in this case. This argument is nothing more than an attempt to inject the negative connotations of a “class action” into litigation where no class claims have been asserted.

Neither the Bassetts’ original *Complaint* nor their *Amended Complaint* contain any class allegations or even make reference to the assertion of a class action. (JA 7-25) Nor can State Farm point to any mention of class claims in any of the Bassetts’ pleadings or discovery in this case. Instead, the only matters currently in dispute here are the Bassetts’ claims against State Farm for “bad faith” and violations of the Unfair Trade Practices Act. In fact, if the Bassetts were to attempt to assert class claims in this action, State Farm would undoubtedly point out that because the declaratory portion of their claim was resolved by its concession on the coverage issue, the Bassetts could not serve as class representatives. There are simply no “class claims” at issue here and the fact that the information sought by Interrogatories Nos. 3, 4 and 5 could also be important in a class action is irrelevant.

### CONCLUSION

For the reasons set forth above, the Circuit Court properly granted the Bassetts’ *Motion To Compel* and properly rejected State Farm’s *Motion To Reconsider*. Therefore, State Farm’s request for a writ of prohibition should properly be denied.

Respectfully submitted,

**WILLIAM BASSETT AND SARAH BASSETT,**

By counsel



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**VERIFICATION**

BRENT K. KESNER, being by me first duly sworn, upon his oath, deposes and says that he is counsel for the Respondents, William and Sarah Bassett, in the foregoing verified RESPONSE TO PETITION FOR WRIT OF PROHIBITION; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, he believes them to be true.

  
BRENT K. KESNER (WVSB 2022)

NO. 15-1101

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Petitioner,

v.

HONORABLE JEFFREY D. CRAMER,  
JUDGE OF THE SECOND JUDICIAL CIRCUIT  
OF WEST VIRGINIA and  
WILLIAM BASSETT AND SARAH BASSETT,

Respondents.

FROM THE CIRCUIT COURT OF  
WETZEL COUNTY, WEST VIRGINIA  
Civil Action No. 13-C-24K

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CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for William and Sarah Bassett., certify that the foregoing RESPONSE TO PETITION FOR WRIT OF PROHIBITION was served on counsel of record this 10<sup>th</sup> day of **December, 2015**, by depositing a true copy thereof in the regular U.S. Mail, first-class postage prepaid, addressed as follows:

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