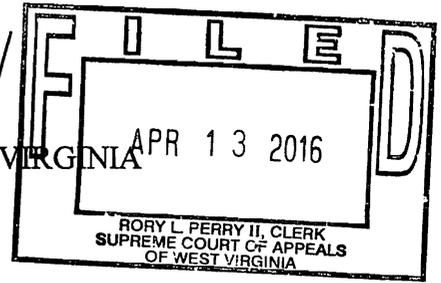


16-0361



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. _____

STATE OF WEST VIRGINIA ex rel.
WESTFIELD INSURANCE COMPANY,
Appearing and Defending in the Name of
Underinsured Motorist CHAD STEAR and
CAROL WRISTON,

Petitioners,

v.

THE HONORABLE JOSEPH K. REEDER,
JUDGE OF THE CIRCUIT COURT OF
PUTNAM COUNTY and MARK HUNTER
AND JENNIFER HUNTER,

Respondents.

PETITION FOR WRIT OF PROHIBITION
(Civil Action No. 15-C-116, Circuit Court of Putnam County, West Virginia)

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INTRODUCTION

Petitioners Westfield Insurance Company (Westfield), appearing and defending in the name of underinsured motorist Chad Stear, and Carol Wriston, a Westfield employee, ask the Court to prohibit enforcement of the Circuit Court of Putnam County's *Order* entered March 23, 2016 in *Mark Hunter and Jennifer Hunter, Plaintiffs v. Westfield Insurance Company, Carol Wriston and Chad Stear, Defendants*, Civil Action No. 15-C-116. The March 23, 2016 *Order* denied the Petitioners' request to bifurcate and stay the Hunters' bad faith and breach of contract claims pending the full and complete resolution of the Hunters' underlying claims for underinsured motorists coverage benefits. In that regard, the Petitioners argued that bifurcation and a stay for trial and discovery purposes was necessary because Westfield has elected to defend in the name of the alleged underinsured motorist pursuant to *W. Va. Code §33-6-31(d)*. Petitioners asserted that absent bifurcation and a stay of discovery regarding the bad faith and breach of contract claims, Westfield's ability to defend in the name of Chad Stear would be unfairly prejudiced.

The Circuit Court's March 23, 2016 *Order* permits discovery in the case to proceed as to all of the Hunters' claims and denies Westfield's request for bifurcation of trial as premature while indicating that Westfield may renew its request for bifurcation at the conclusion of discovery. Specifically, the Circuit Court below concluded that bifurcation and a stay is not warranted under *Light v. Allstate Insurance Company*, 203 W.Va. 27, 506 S.E.2d 64 (1998), inasmuch as both the Hunters' underlying claims and their "bad faith" claims are being asserted against Westfield. This holding contravenes West Virginia law and will unduly prejudice Westfield by effectively eliminating Westfield's right to defend in the name of the underinsured motorist. Therefore, pursuant to *Rule 16* of the *West Virginia Rules of Appellate Procedure*, the Petitioners ask the Court

to issue a writ of prohibition directing that discovery with respect to the Hunters' claims for bad faith and breach of contract be stayed pending the resolution of their underlying claims for underinsured motorists coverage and that the trial of said claims be bifurcated so that Westfield may defend in the name of the underinsured motorist as expressly permitted under *W.Va. Code §33-6-31(d)*.

QUESTIONS PRESENTED

- A. Whether a claimant's underlying tort claims against an underinsured motorist should be bifurcated from bad faith and breach of contract claims against the underinsured motorist carrier and its employee when the underinsured motorist carrier has elected to defend in the name of the underinsured motorist tortfeasor?
- B. Whether discovery with respect to a claimant's bad faith and breach of contract claims against an underinsured motorist carrier and its employee should be stayed when the underinsured motorist carrier has elected to defend in the name of the underinsured motorist tortfeasor?

STATEMENT OF THE CASE

I. Statement Of Facts

This civil action arises from a September 24, 2013 motor vehicle accident, in which Mark Hunter alleges he was injured by the negligence of Chad Stear. Mr. Hunter and his wife allege that Mr. Stear negligently rear-ended the vehicle driven by Mr. Hunter on Interstate 64 in Putnam County, West Virginia and caused him severe and permanent injuries. (App. at 4) At the time of the accident, Chad Stear was insured under a liability insurance policy issued by State Farm and the Hunters were insured under a policy issued by Westfield. The Hunters assert that the coverage available under the State Farm policy was insufficient to pay for all of their damages and allege that

Mr. Stear is an underinsured motorist pursuant to West Virginia law. (App. at 5) In particular, they assert that even though State Farm has paid them the liability limits available to Mr. Stear, they have suffered additional damages which exceed the available liability coverage. (App. at 5) They further assert that after settling with State Farm, they submitted a claim for underinsured motorists coverage under their own policy which Westfield refused to pay. The Hunters' first notice of their claims to Westfield was by their attorney's letter of representation on December 29, 2014. Westfield acknowledged the claim the same day. Westfield advised Plaintiffs' counsel of its medical payments coverage and Plaintiffs' counsel of the offer letter from State Farm, the liability carrier, and the identity of any liens. On March 31, 2015, Westfield requested examinations under oath of Mr. and Mrs. Hunter. Plaintiffs did not comply. They then filed suit against Westfield, its adjuster Carol Wriston, and Mr. Stear, seeking underinsured motorists benefits pursuant to *W.Va. Code §33-6-31*. (App. at 4)

The Hunters filed their *Complaint* on May 11, 2015. In Count I of the *Complaint*, they allege Stear's negligence and assert that they are entitled to recover underinsured motorists coverage from Westfield. (App. at 4-5) Count II of their *Complaint* alleges Defendants Carol Wriston's and Westfield's violations of the West Virginia Unfair Trade Practices Act, *W.Va. Code §33-11-4(9)*, in the handling of the Hunters' underinsured motorists claim. Count III alleges breach of the insurance contract by Westfield. The Hunters allege that Westfield and Carol Wriston failed to conduct a reasonable investigation, failed to respond to their communications, failed to attempt to settle in good faith, and violated various regulations during the handling of their claims. (App. at 6-7) In addition to their claim for underinsured motorist benefits, the Hunters also seek

compensatory and punitive damages for the alleged misconduct of Westfield and its employee, as well as damages for breach of contract. (App. at 8-10)

II. Procedural History

After being served with the Hunters' *Complaint* on May 28, 2015, Carol Wriston served a timely *Answer* on June 15, 2015. (App. at 11-19) Once service was completed upon Westfield, it served its *Notice of Appearance, Election to Defend, and Answer* on July 9, 2015. In that pleading, Westfield noted that it was electing to defend Count I of Plaintiffs' *Complaint* in the name of Chad Stear, as permitted by *W. Va. Code §33-6-31*. (App. at 20-29) In order to preserve its right to do so, the Petitioners served their *Motion To Bifurcate And Stay*. (App. at 31-40) The Petitioners asserted that Westfield's right to appear and defend in the name of the underinsured motorist would be unfairly prejudiced if the Hunters were permitted to conduct discovery regarding their bad faith and breach of contract claims while their underlying claims were still pending and then present all of those claims in a single trial where Westfield and its adjuster would be identified as parties. (App. at 31-40) On February 12, 2016, the Hunters served their *Response* and asserted that bifurcation and a stay of discovery was not warranted under *Rule 42* of the *West Virginia Rules of Civil Procedure* and this Court's decision in *Light v. Allstate Insurance Company*, 203 W.Va. 27, 506 S.E.2d 64 (1998). (App. at 41-48) The Petitioners served their *Reply* on February 16, 2016 (App. at 49-54), and the Circuit Court below then held a hearing on the issue on February 18, 2016.

In its March 23, 2016 *Order Denying Motion To Bifurcate And Stay*, the Circuit Court below accepted the Hunters' argument that bifurcation and a stay of discovery was not warranted under *Light v. Allstate Insurance Company*, because both the Hunters' underlying claims for underinsured motorists coverage and their "bad faith" claims were being asserted against Westfield. (App. at 1-3)

The Court further found that Westfield did not have the right to defend in the name of the underinsured motorist where Westfield consented to the Hunters' settlement with the tortfeasor prior to the filing of suit. The Court concluded that the Petitioners' request for bifurcation was premature. (App. at 2) Based upon these findings, the Circuit Court below denied the petitioners' *Motion* and permitted discovery with regard to all of the Hunters claims to proceed. (App. at 2-3) Accordingly, the Hunters are now free to conduct discovery with respect to Westfield's evaluation and defense of their underlying claims even as Westfield is attempting to defend those very claims in the name of the underinsured motorist.

SUMMARY OF ARGUMENT

The Circuit Court below's March 23, 2106 *Order* constitutes clear legal error and creates important problems for any underinsured motorist carrier attempting to exercise the right to defend in the name of an underinsured motorist pursuant to *W.Va. Code §33-6-31*. Moreover, its enforcement will damage the Petitioners in a way not correctable on appeal.

Bifurcation of the Hunters' bad faith and breach of contract claims is necessary in order to preserve Westfield's ability to appear and defend in the name of the underinsured tortfeasor pursuant to *W.Va. Code §33-6-31*. In particular, if those claims are not bifurcated, the Petitioners will be prejudiced by having evidence of insurance and settlement negotiations presented to the jury while the jury is considering the Hunters' bodily injury claims against the underinsured tortfeasor. All of the authority relied upon by the Circuit Court below to deny the petitioners' request for bifurcation involved claims where the underinsured tortfeasor had not been named in the suit. Here, Chad Stear was named as a defendant and Westfield exercised its right to appear and defend in his name

pursuant to *W.Va. Code §33-6-31*. Under applicable law, Westfield's right to defend will be unfairly prejudiced if it is forced to participate in the trial in its own name.

A stay of discovery with respect to the Hunters' bad faith and breach of contract claims is also necessary to protect the Petitioners from unfair prejudice. In that regard, permitting the Hunters to obtain discovery regarding Westfield's and Wriston's evaluation of the underlying claims and Westfield's strategy for defending the claim prior to the trial of those underlying claims will defeat the purpose of *W.Va. Code §33-6-31* and render the right of insurers to defend in the name of underinsured tortfeasors meaningless.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument on the Petition is needed where no party has waived oral argument; the Petition is not frivolous, but addresses discovery issues crucial to litigation in this State's courts; the Court has not decided the issues; and oral argument would significantly aid the Court's decisional process. The Petition involves issues of first impression and fundamental public importance to the application of *W.Va. Code §33-6-31* and an underinsured motorist carrier's ability to defend in the name of an underinsured motorist as expressly permitted under West Virginia Law. The Petitioners ask the Court to hear oral argument under *Rule 20* of the *West Virginia Rules of Appellate Procedure*.

ARGUMENT

I. Standard of Review

The Petitioners seek a writ of prohibition because the Circuit Court below exceeded its legitimate powers and committed clear legal error when it denied the Petitioners' request for bifurcation and permitted the Hunters to conduct discovery with respect to their bad faith and breach

of contract claims after Westfield exercised its right to defend in the name of the underinsured motorist. 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. The 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.* Prohibition is ““available to correct a clear legal error resulting from a trial court’s substantial abuse of its discretion in regard to discovery orders.”” *State ex rel. State of West Virginia Dept. of Transp., Div. Of Highways v. Cookman*, 219 W.Va. 601, 604, 639 S.E.2d 693, 696 (2006) (quoting Syl. Pt. 1, *State Farm Mut. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992)).

The Court ordinarily reviews discovery orders for abuse of discretion, but when a ruling ““turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court’s procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard.”” *Id.* (quoting Syl. Pt. 5, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003)). The same principles apply to pretrial evidentiary admissibility rulings that will result in ““irremediable prejudice.”” *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 518, 575 S.E.2d 124, 128 (2002) (quoting Syl. Pt. 2, *State ex rel. Williams v. Narick*, 164 W.Va. 632, 264 S.E.2d 851 (1980); citing *Policarpio v. Kaufman*, 183 W.Va. 258, 261, 395 S.E.2d 502, 505 (1990)).

In this case, the March 23, 2016 *Order* applies the wrong legal standards under *Light v. Allstate Insurance Company*, 203 W.Va. 27, 506 S.E.2d 64 (1998). Moreover, allowing discovery regarding Westfield's evaluation and defense of the Hunters' claim for underinsured motorist benefits while that claim is still being defended in the name of the underinsured motorist will unfairly prejudice the Petitioners and prevent Westfield from effectively exercising its rights. Therefore, the Petitioners ask the Court to review the Orders *de novo*. *Id.*; *Cookman*, 219 W.Va. at 604, 639 S.E.2d at 696; Syl. Pt. 1, *State Farm Mut.*, 188 W.Va. 622, 425 S.E.2d 577; Syl. Pt. 5, *Medical Assurance*, 213 W.Va. 457, 583 S.E.2d 80.

II. Allowing the Hunters' bad faith and breach of contract claims to proceed in a unitary trial with their claims for underinsured motorists coverage benefits would irremediably injure the Petitioners in ways not correctable on appeal.

The "overriding concern" on a bifurcation motion is the provision of a fair and impartial trial to all litigants. Syl. Pt. 2, *State ex rel. Cavender v. McCarty*, 198 W.Va. 226, 479 S.E.2d 887 (1996).

To provide a fair trial, the Court considers

(1) whether the issues sought to be tried separately are significantly different, (2) whether the issues are triable by jury or the court, (3) whether discovery has been directed to a single trial of all issues, (4) whether the evidence required for each issue is substantially different, (5) whether one party would gain some unfair advantage from separate trials, (6) whether a single trial of all issues would create the potential for jury bias or confusion, and (7) whether bifurcation would enhance or reduce the possibility of a pretrial settlement.

Id., 479 S.E.2d at 895 (Cleckley, J., concurring) (citation omitted). When those factors are considered in this case, it is clear that bifurcating the trial of the Hunters' bad faith and breach of contract claims from the trial of the tort claims upon which their claims for underinsured motorists coverage are based is necessary to ensure the Petitioners receive a fair trial.

In this case, the Hunters' tort claims will turn upon factual questions concerning the negligence of the underinsured motorist and the causation of damages for physical injuries which will necessarily have to be decided by a jury. In contrast, the breach of contract and bad faith claims will turn upon the conduct of Westfield and Carol Wriston during the handling of the Hunters' claims and will involve the application of the West Virginia Unfair Trade Practices Act. In fact, the extent of the Hunters' claim for "bad faith" cannot be fully developed until the value of their underlying claim has been determined. For example, the Hunters assert that Westfield violated the Unfair Trade Practices Act by failing to make a timely and fair and reasonable settlement offer. (See App. at 6-7) A jury's assessment of the merits of that claim necessarily includes determining what a "reasonable" offer would have been, but that is not possible until a jury first determines the value of the Hunters' underlying underinsured motorist claim. Likewise, injecting evidence of settlement negotiations prior to an adjudication of the underlying tort claims is inherently prejudicial. For example, in *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986), at Syllabus Point 7, this Court noted "[a]t a trial, pretrial settlement negotiations have no bearing on the progress or outcome of a case and, in fact, are usually privileged[.]" Similarly, *Rule 408* of the *West Virginia Rules Of Evidence* provides:

(a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim, the liability of a party in a disputed claim, or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

If the Hunters' bad faith claims are tried alongside their underlying claims, the Petitioners would be forced to present evidence regarding settlement issues, evaluations, and discussions even as the same jury is also considering the underlying tort issues. Alternatively, Petitioners would have to forego a critical part of their defense in order to avoid the prejudice associated with advising the jury of the evaluations and settlement negotiations. In effect, the Circuit Court below's decision not to bifurcate deprives Westfield of the right to defend in the name of the tortfeasor since combining the "bad faith" claims against Westfield and Wriston with the underlying claim for bodily injuries will necessarily inject settlement evaluations and negotiations into the heart of trial.

The danger of undue prejudice arises in this case because Westfield has elected to defend Count I of the Hunters' *Complaint*, which seeks to recover underinsured motorist benefits, in the name of Chad Stears. In that regard, *W.Va. Code 33-6-31(d)* provides that an insurer has the right to file pleadings and take such other action in the name of the owner or operator or both of the underinsured motor vehicle. It states:

(d) Any insured intending to rely on the coverage required by subsection (b) of this section shall, if any action be instituted against the owner or operator of an uninsured or underinsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the

owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.

Here, the Hunters filed suit against Chad Stears and Westfield. Westfield, by its *Notice of Appearance, Answer and Affirmative Defenses*, elected to defend Count I of Plaintiffs' Complaint in the name of Chad Stears pursuant to *W.Va. Code 33-6-31(d)*. If the Hunters' remaining claims are not bifurcated, Westfield's election would be meaningless.

In Syl. Pt. 1 of *Postlewait v. Boston Old Colony Ins. Co.*, 189 W.Va. 532, 432 S.E. 2d 802 (1993), this Court held:

W.Va. Code, 33-6-31(d) outlines certain rights given to an uninsured/underinsured insurance carrier where a tortfeasor who is uninsured or underinsured is sued by a plaintiff. It requires that a copy of the complaint be served upon the insurance carrier. It also allows the carrier "the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured vehicle or in its own name."

The obvious purpose of allowing the underinsured motorist carrier to defend in the name of the tortfeasor is to prevent the jury from taking into account the issue of insurance when the jury is deciding the liability of the underinsured tortfeasor and assessing the claimant's damages. In that regard, *Rule 411* of the *West Virginia Rules of Evidence* provides:

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or, if controverted, proving agency, ownership, or control. This evidence may be admissible against a party that places in controversy the issues of the party's poverty, inability to pay, or financial status.

In *Reed v. Wimmer*, 195 W.Va. 199, 365 S.E. 2d 199 (1995), this Court explained the purpose of *Rule 411*, prohibition against the mention of insurance, stating:

The prohibition in Rule 411 is based on the assumption that jurors who are informed about the insurance status of a party may find that party liable only because the liability will be cost-free to the party, or that jurors will increase the amount of damages in that only an insurance company will be affected adversely. By the adoption of this exclusionary language, Rule 411 forbids two inferences. First, the Rule does not permit the trier of fact to infer that an insured person is more likely than an uninsured person to be careless. Second, Rule 411 rejects the inference that the foresight to take out insurance is indicative of a responsible attitude, making negligence less likely. Although both the inferences and their probative force are highly questionable, under the West Virginia Rules of Evidence, **the doctrine is clear, and compliance with Rule 411 and the other rules discussed in this opinion is not a matter of judicial discretion.**

Reed at 205, 205. (Emphasis supplied.) While *Reed* recognized that mentioning insurance for some other purpose is permissible and that violations of *Rule 411* are not per se reversible error, it required the trial court to “do the requisite balancing and determine whether the probative value of the insurance evidence is outweighed by its prejudicial effect.” *Id.* at 206, 206. Moreover, it directed that the trial court consider whether less prejudicial evidence is available and give limiting instructions regarding the purposes for which such evidence can be offered. *Id.* If Westfield and Carol Wriston are forced to sit beside Chad Stear during the trial at which his liability to the Hunters and the Hunters’ damages will be decided, all of the protections of *Rule 411* as outlined in *Reed* would be ignored. Worse, Westfield’s right to defend in the name of the tortfeasor found in *W.Va. Code 33-6-31(d)* would be rendered meaningless.

Citing *Postlewait*, *supra*. the Circuit Court below indicated that it was not convinced that Westfield has the right to defend in the name of the underinsured motorist when the negligent driver settled and paid his liability limits prior to the claimant bringing a lawsuit. (App. at 2) Specifically, the Circuit Court below noted:

Consenting to the settlement and waiving subrogation may constitute a waiver of the right to defend in the name of the negligent driver.

(App. at 2) However, *Postlewait* focused upon the question of whether the claimants could file a direct action against their own carrier without suing the tortfeasor when the underinsured motorist carrier had consented to a settlement with the tortfeasor and had waived its right of subrogation.

This Court indicated:

It is well to emphasize again that W.Va. Code, 33-6-31(d), deals only with the situation where the plaintiff has sued the uninsured/underinsured tortfeasor.

Postlewait at 535, 805. This Court then distinguished the situation in *Postlewait* where the tortfeasor had not been sued from its earlier decision in *Davis v. Robertson*, 175 W.Va. 364, 332 S.E.2d 819 (1985), where the tortfeasor had been named, stating:

It must be remembered that in this case the plaintiffs are seeking only the right to maintain a suit against their own underinsured carrier after obtaining the policy limits from the tortfeasor's liability carrier. As previously pointed out, W.Va.Code, 33-6-31(d), relates to uninsured/underinsured motorist suits against a known tortfeasor. It does not foreclose suit by an insured who received the full amount of the tortfeasor's liability policy and also obtained a waiver of the uninsured/underinsured carrier's right of subrogation against the tortfeasor. *Davis v. Robertson, supra*, applies only where a suit is filed against the tortfeasor. In that situation, W.Va.Code, 33-6-31(d), applies and a judgment must be obtained against the tortfeasor before the suit can be filed against the uninsured/underinsured carrier.

Postlewait at 536, 806. Here, like *Davis* but unlike *Postlewait*, the Hunters named Chad Stear as a defendant in this action and thereby triggered the applicability of *W.Va. Code 33-6-31(d)*.

In further support of its findings, the Circuit Court below also cited two unreported federal decisions, *Sanders v. State Farm* 2007 WL 2740657 (S.D. W.Va. 2007) and *Tustin v. Motorist Mutual Insurance Company*, 2008 WL 5377835 (N.D. W.Va. 2008) (App. at 2) While both dealt

with requests for bifurcation, they, like *Postlewait*, involved cases where the claimants had not filed suit against the underinsured tortfeasor. For example, in *Sanders*, the Court noted:

Here, because plaintiffs Joann and John Sanders have not instituted an action against Mr. Neil, the tortfeasor, West Virginia Code § 33-6-31(d) does not apply, and State Farm's rights under that Code section are unavailable.

Sanders at 2. Similarly, in *Tustin*, the Court noted:

Here, Tustin settled her claims against Williamson, the tortfeasor. Motorists consented to that settlement and agreed to waive its subrogation rights. Tustin has filed the present suit directly against Motorists. She has initiated no action against Williamson. Accordingly, § 33-6-31(d) has no application to this case, and Motorists' right to elect to defend the suit in Williamson's name is unavailable.

Tustin at 4. Thus, neither case is applicable here where the Hunters did name Chad Stear as a defendant and Westfield has elected to defend in his name pursuant to *W.Va. Code 33-6-31(d)*.

Interestingly, the Courts in both *Sanders* and *Tustin* rejected the reasoning of another federal decision, *Smith v. Westfield Ins. Co.*, 932 F. Supp. 770 (S.D. W.Va. 1996), based upon the fact that *Smith* relied upon the unpublished decision of this Court in *Dowler v. Reed*, No. 21960 Slip. Op. (W.Va. Dec. 10, 1993) (per curiam).¹ In *Smith*, United States District Judge Haden of the Southern District of West Virginia considered a request for bifurcation under similar circumstances and noted that the right to bring a direct action against an underinsured motorist carrier where the carrier has consented to a settlement pursuant to *Postlewait* was not absolute. Instead, the Court in *Smith* found

¹ Both *Sanders* and *Tustin* were decided before this Court addressed the precedential value of per curiam opinions in *State v. McKinley*, 234 W.Va. 143, 764 S.E. 2d 303 (2014). In each, the Federal Courts took the position that such unpublished decisions had no precedential value. See *Sanders* at 3 and *Tustin* at 4.

that the right to bring such an action depends upon the particular circumstances of the case and quoted the following text from this Court's unpublished decision in *Dowler*:

Postlethwait presented us with a unique set of circumstances. In *Postlethwait*, service of process could not be obtained on the tortfeasor because he was a resident of Massachusetts. The Postlethwait's had, however, negotiated a settlement with the tortfeasor's insurer. Boston Old Colony, underinsured carrier for the Postlethwait's, filed a motion to dismiss claiming that it could not be sued because no judgment had been obtained against the tortfeasor. Under those precise circumstances where the tortfeasor could not be sued, we confronted the issue of whether settlement with the tortfeasor's insurer, in the absence of an actual civil action against the tortfeasor, was sufficient to permit a direct action by the plaintiff against his own underinsurance carrier.

* * * * *

While we stated in *Postlethwait* that West Virginia Code § 33-6-31(d) does not preclude plaintiff from suing his own underinsurance carrier *we have not expanded that principle to one which would grant the plaintiff an absolute right to sue his own underinsurance carrier in every situation wherein a settlement with the tortfeasor's insurer and a waiver of subrogation rights have been obtained.* We do not perceive the current situation as one in which the plaintiff must be permitted to join his underinsurance carrier as a defendant.

Smith at 771-772 (emphasis in original.) Based upon that reasoning, the Court in *Smith* noted:

In the present case, there has been no determination of liability or the extent of damages which the Plaintiff is entitled to recover as a result of the accident. Unlike the situation in *Postlethwait*, the tortfeasor here, a West Virginia resident, is not beyond the jurisdiction of this Court. At this stage of the litigation, the appropriate manner to pursue recovery of the underinsured motorist coverage is to join the tortfeasor as a defendant. Such joinder would avoid undue prejudice to Westfield by allowing Westfield to appear and defend in the name of the tortfeasor pursuant to W.Va.Code § 33-6-31(d).

Id. The Court in *Smith* then explained:

The case presents both personal injury claims arising from the motor vehicle accident and bad faith claims arising from the manner in which Westfield allegedly handled the Plaintiff's claim for insurance coverage. Accordingly, the claims against the insurer must be bifurcated from those against the insured, and any discovery or proceedings against the insurer must be stayed pending resolution of the underlying claim between the plaintiff and the insured.

Id. Here, the same factors apply and bifurcation is the only means of permitting Westfield to effectively exercise its right to defend the underlying claims in the name of the underinsured motorist.

III. A stay of discovery with respect to the bad faith and breach of contract claims is also necessary to protect Westfield's ability to defend in the name of the tortfeasor.

On a motion to stay certain claims, as well as to bifurcate them for trial, the Court considers convenience, judicial economy, and avoidance of prejudice, Syl. Pt. 1, *State ex rel. Allstate Ins. Co. v. Bedell*, 203 W.Va. 37, 506 S.E.2d 74 (1998) (quoting Syl. Pt. 2, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998), and the following factors:

“(1) the number of parties in the case, (2) the complexity of the underlying case against the insurer, (3) whether undue prejudice would result to the insured if discovery is stayed, (4) whether a single jury will ultimately hear both bifurcated cases, (5) whether partial discovery is feasible on the bad faith claim and (6) the burden placed on the trial court by imposing a stay on discovery.”

Syl. Pt. 2, *Bedell*, 506 S.E.2d 74 (quoting Syl. Pt. 3, *Light*, 506 S.E.2d 64). Once again, the most important factor here is the undue prejudice that the Petitioners would suffer if the Hunters are permitted to pursue discovery regarding their bad faith and UTPA claims while Westfield is defending the underlying tort claims in the name of the underinsured motorist.

In this case, the Circuit Court below improperly relied upon *Light v. Allstate* to deny the Petitioners' request for a stay even though the facts of that case were quite different. In *Light*,

Allstate denied the availability of underinsured motorists coverage based upon the insured's execution of a release of the tortfeasor without notice to Allstate, thereby prejudicing Allstate's subrogation rights. *Light* at 29, 66. Having denied coverage, Allstate was not pursuing the path of defending in the name of the underinsured tortfeasor and that driver was not even named as a party

to the action. (See *Light* at 29, 66, wherein the Court noted "the Kellers were not named as parties.")

Instead, in *Light*, the focus was whether Allstate properly denied coverage and whether Allstate acted in bad faith or violated the Unfair Trade Practices Act. Here, Westfield has not denied the availability of underinsured motorists coverage to the Hunters. Instead, Westfield was merely seeking information necessary to evaluate the Hunters' claim because of substantial pre-existing conditions when the Hunters filed suit and named Westfield, Carol Wriston, and Mr. Stear as defendants. Since Westfield is seeking to defend in the name of the underinsured tortfeasor, it would be unfairly prejudiced by allowing discovery to proceed with respect to all of the Hunters' claims. The factors discussed in *Light* that favored combined discovery there simply do not apply in this case.

The Hunters' cause of action for alleged violations of *W.Va. Code §33-11-4-(9)* was recognized in *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W. Va. 597, 280 S.E.2d. 252 (1991). Importantly, *Jenkins* permitted either a first-party insured such as the Hunters, or a third-party claimant, to pursue such an action but held that third-party actions were premature until the underlying tort claim had been resolved. Later, in *State ex. rel. State Farm Fire and Casualty Insurance Company v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994), this Court overruled *Jenkins* in part, by permitting a direct claim by a third-party against an insurer for violation of the Unfair Trade Practices Act to be joined with an underlying third-party personal injury action, but only when

the claims against the insurer were bifurcated and stayed until the underlying tort claim was ultimately resolved. *Madden* at 726.

In *Madden*, this Court was concerned about the danger that the jury might “decide the underlying claim based on the fact of insurance coverage and not on the merits of the case.” *Id.* The Court was also concerned about the danger to the insured’s defense associated with allowing discovery on both claims to proceed simultaneously and, therefore, held that all such discovery must be stayed in third-party actions until the underlying tort claim is resolved. *Id.* While those considerations did not apply in *Light*, they do apply here because Westfield has elected to defend in the name of the underinsured motorist.

In *Light v. Allstate*, this Court found that allowing a unitary trial in first-party actions does not create the danger of undue prejudice as in third-party actions, and stated:

In a first-party bad faith action the insurer is actually the named defendant in both the underlying claim and the bad faith claim. Thus the primary concern of disclosing the existence of insurance which was articulated in *Madden* does not exist in a first-party bad faith action.

Light at 21-22, 71.² If, however, an underinsured motorist carrier is exercising its right to defend in the name of the underinsured tortfeasor, the concerns articulated in *Madden* do exist with respect to the defense of the underlying tort claim. Allowing discovery of the insurer’s claim file under such circumstances will allow a claimant to obtain information regarding the insurer’s evaluation of the claim, and anticipated defenses and strategies which would never be subject to discovery if a liability

²It is important to note that in *Light*, the insureds’ UIM claim was not at issue. As recognized by the Court in *Light* at footnote 2, the insureds filed a separate action in state court against the tortfeasor to address the issues related to the tortfeasor’s liability for the accident, and the insureds’ damages. As such, the *Light* case addressed only the insureds’ breach of contract, bad faith, and UTPA claims.

insurer were defending the claim. In effect, the Circuit Court below's ruling eliminates the ability of an underinsured motorist carrier to exercise its right to defend in the name of the underinsured tortfeasor and renders that portion of *W.Va. Code 33-6-31(d)* meaningless. This Court has held:

It is always presumed that the legislature will not enact a meaningless or useless statute. . . . Moreover, this Court has long held that, "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made."

Richards v. Harman, 217 W. Va. 206, 211, 617 S.E.2d 556, 561 (2005) If an underinsured motorist carrier that elects to appear and defend in the name of the tortfeasor can be compelled to participate in a unitary trial with that tortfeasor and submit to discovery regarding its defense while the underlying claims are still being litigated, the benefit of appearing and defending in the name of the tortfeasor would be lost. Such an absurd result should be avoided and the Circuit court below should be prohibited from enforcing its Order permitting discovery as to all of the Hunters' claims and denying the Petitioners' request for bifurcation.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that the Court prohibit enforcement of the Circuit Court of Putnam County's *Order* entered March 23, 2016, and issue its writ of prohibition directing that discovery with respect to the Hunters' claims for bad faith and breach of contract be stayed pending the resolution of their underlying claims for underinsured motorists coverage and that the trial of said claims be bifurcated so that Westfield may defend the Hunters' action in the name of the underinsured motorist as expressly permitted under *W.Va. Code §33-6-31(d)*.

Petitioners, WESTFIELD INSURANCE
COMPANY, Appearing and Defending in
the Name of Underinsured Motorist CHAD
STEAR and CAROL WRISTON,

By Counsel



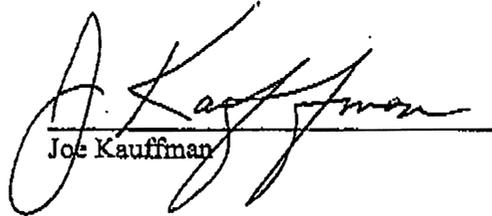
Brent K. Kesner (WV Bar #2022)
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Charleston, WV 25329
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bkesner@kesnerlaw.com
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VERIFICATION

STATE OF MICHIGAN

COUNTY OF LENAWEE to-wit:

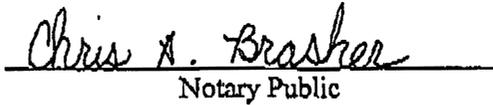
Westfield Insurance Company _____ Joe Kauffman being duly sworn on oath,
deposes and says that he has read the foregoing Petition for Writ of Prohibition and that the facts
contained therein are, to his knowledge, true and correct except such facts which are upon
information and belief and that with respect to such facts, she is informed and believes the same to
be true and correct.



Joe Kauffman

Taken, subscribed and sworn to before me, the undersigned Notary Public in and for the
County and State aforesaid, by Joe Kauffman, this 13th day of April, 2016.

My commission expires: 12-20-2016



Notary Public

CHRIS A. BRASHER

CHRIS A. BRASHER
Notary Public, Lenawee Co., MI
My Comm. Expires Dec. 20, 2016

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. _____

STATE OF WEST VIRGINIA ex rel.
WESTFIELD INSURANCE COMPANY,
Appearing and Defending in the Name of
Underinsured Motorist CHAD STEAR and
CAROL WRISTON,

Petitioners,

v.

THE HONORABLE JOSEPH K. REEDER,
JUDGE OF THE CIRCUIT COURT OF
PUTNAM COUNTY and MARK HUNTER
AND JENNIFER HUNTER,

Respondents.

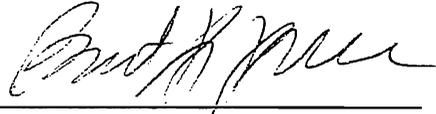
**NAMES AND ADDRESSES UPON WHOM RULE TO SHOW CAUSE
IS TO BE SERVED, IF GRANTED**

Petitioners, Westfield Insurance Company, Appearing and Defending in the Name of Chad Stear and Carol Wriston, state that a rule to show cause, if granted, is to be served upon the following:

Honorable Joseph K. Reeder
Putnam County Circuit Court
Putnam County Courthouse
3389 Winfield Road
Winfield, WV 25213
Respondent

James R. Fox, Esq.
Fox Law Offices
3359 Teays Valley Road
Hurricane, WV 25526
Counsel for Plaintiffs/Respondents

John D. Hoblitzell, III, Esq.
Luci R. Wellborn, Esq.
Kay Casto PLLC
P.O. Box 2031
Charleston, WV 25327
Counsel for Chad Stear



Brent K. Kesner (WV Bar #2022)

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. _____

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WESTFIELD INSURANCE COMPANY,
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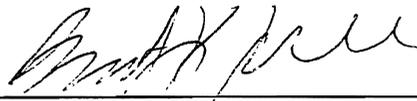
CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Petitioners, Westfield Insurance Company, Appearing and Defending in the Name of Chad Stear and Carol Wriston, certify that the **PETITION FOR WRIT OF PROHIBITION**, with **APPENDIX** and **NAMES AND ADDRESSES UPON WHOM RULE TO SHOW CAUSE IS TO BE SERVED, IF GRANTED** were served on the following this **13th day of April, 2016**, by deposit in the regular course of the United States mail, postage prepaid, addressed to:

Honorable Joseph K. Reeder
Putnam County Circuit Court
Putnam County Courthouse
3389 Winfield Road
Winfield, WV 25213
Respondent

James R. Fox, Esq.
Fox Law Offices
3359 Teays Valley Road
Hurricane, WV 25526
Counsel for Plaintiffs/Respondent

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Luci R. Wellborn, Esq.
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P.O. Box 2031
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Counsel for Chad Stear



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