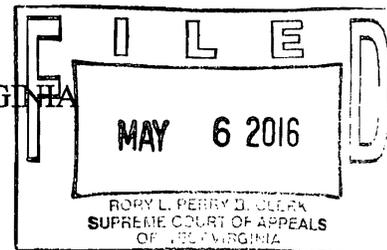


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 16-0361



STATE OF WEST VIRGINIA EX REL.
WESTFIELD INSURANCE COMPANY,
APPEARING AND DEFENDING THE NAME OF
UNDERINSURED MOTORIST CHAD STEAR AND
CAROL WRISTON,

Petitioners

vs.

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

Respondents

MARK AND JENNIFER HUNTER'S RESPONSE TO
THE PETITION FOR WRIT OF PROHIBITION
(Civil Action No. 15-C-116, Circuit Court of Putnam County, West Virginia)

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QUESTION PRESENTED

1. Did the Circuit Court commit a substantial clear-cut legal error (incapable of being remedied on appeal) and substantially abuse its discretion in denying bifurcation as premature and permitting discovery in this first-party UIM bad faith insurance case?

STATEMENT OF THE CASE

Mark Hunter was seriously injured in a multiple car pile-up on Interstate 64 near the Nitro/St. Albans bridge. The negligent driver Chad Stear was insured by State Farm which promptly paid its policy limits without the necessity of filing a lawsuit. Since the coverage was insufficient, Mr. Hunter requested payment of underinsured motorist (UIM) benefits through Westfield Insurance which has insured him for decades.

Westfield consented to the settlement with the negligent driver which included a full release plus waiver of subrogation. However, Westfield refused to pay any UIM benefits which forced Mark and Jennifer Hunter to file a lawsuit against their own insurance carrier. Contrary to the persistent mis-statements by the Petitioner, this litigation does not include a cause of action against a third party tortfeasor.

This litigation involves exclusively first party claims for payment of UIM benefits plus causes of action for bad faith and breach of contract based on the refusal to pay these benefits. The real parties in interest are Mark and Jennifer Hunter and their insurer Westfield. The third party tortfeasor was released from all liability prior to this litigation and is not a real party in interest. He was included simply to trigger UIM benefits as clarified in the complaint. (App. at 5)

This case is in its early stages. Minimal discovery has been conducted and Westfield has defied the pretrial order requiring it to engage in bad faith discovery. Now, Westfield seeks a

writ of prohibition to avoid complying with the order. Westfield has also misconstrued and exaggerated the scope of the order denying bifurcation and permitting discovery. The argument that the trial court entered a final ruling denying bifurcation and precluding a defense of the UIM claim in the negligent driver's name is completely inaccurate. These issues were taken under advisement and denied as premature with the specific right to renew the motion upon completion of discovery (App at 2).

No final decision has been made concerning bifurcation or the ability to defend the UIM claim in the name of the negligent driver. The court cautioned Westfield that it may have waived the ability to do so since it consented to the settlement and waived subrogation. However, a final ruling has not been made. (App at 2)

The pretrial ruling permits discovery concerning all aspects of the case, but it does not preclude Westfield from raising objections or seeking protective orders. It simply denied Westfield's request for a complete stay of discovery. (App at 2) Westfield is seeking a writ of prohibition preventing the enforcement of this discretionary pretrial ruling.

SUMMARY OF ARGUMENT

The extraordinary relief sought by Westfield is clearly not warranted in this first party UIM/bad faith insurance case. Trial courts are granted broad discretion in discovery matters and those decisions will not be overruled in the absence of substantial legal error and compelling evidence of irremediable harm. Those circumstances certainly do not exist in this case because the trial court simply ruled that discovery was permissible on all aspects of the case.

The discretionary ruling was consistent with well settled legal precedent and clearly within the court's discretion. Writs of prohibition are not available to review interlocutory decisions or to correct simple legal errors. That relief must wait until conclusion of the litigation.

Writs of prohibition are only available to correct substantial, clear-cut legal errors that cannot be adequately addressed on appeal.

The pretrial order does not foreclose bifurcation or Westfield's ability to defend in the negligent driver's name. These matters were taken under advisement. Consequently, no final order has been entered and the matter is premature. It is not ripe for this Court's consideration because Westfield has not exhausted its remedies at the trial court level. Adequate remedies also exist to appeal after the case is completed and a full record exists for a meaningful analysis.

Writs of prohibition are not a substitute for an appeal and are not intended for piecemeal challenges to pretrial discovery orders. The trial court's decision is extremely narrow in its scope. It is also consistent with applicable law and is not clearly erroneous. There is absolutely no justification for granting a writ of prohibition in this straight forward first party insurance case.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 19 Rules of Appellate Procedure, plaintiffs certify that oral argument is not necessary in this case. The rulings of the trial court are interlocutory and based on unequivocal legal authority clearly permitting the ruling.

The issues do not involve unsettled law or an abuse of discretion. Since a writ of prohibition is obviously not warranted, summary dismissal of the petition is the only appropriate result. Thus, oral argument is not necessary.

ARGUMENT

A. Standard of Review

Writs of prohibition "provide a drastic remedy to be invoked only in extraordinary situations." Owners Insurance Company v. McGraw 233 W.Va. 776, 760 SE 2d 590 (2014),

citing State ex rel Allen v. Bedell 193 W.Va. 32, 454 SE2d 77 (1994). There must be a clear and indisputable legal error resulting from a substantial abuse of discretion, plus compelling evidence of irreparable prejudice that cannot be corrected on appeal. River Riders, Inc. v. Steptoe 223 W.Va. 240, 672 SE2d 376 (2008). This procedure cannot be used as a substitute for appeal or to disrupt the orderly administration of justice through piecemeal challenges to pretrial discovery rulings. State ex rel Nationwide Insurance Company v. Marks 223 W.Va. 452, 676 SE2d 156 (2009). Writs of prohibition may only be used to correct “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.” Hoover v. Berger 199 W.Va. 12, 483 SE2d 12 (1996). The restrictions and limited applicability of writs of prohibition were succinctly stated in State ex rel Shelton v. Burnside 212 W.Va. 514, 575 SE2d 124 (2002)

There is a significant practical reason for not allowing challenges, by use of the writ of prohibition, to every pre-trial discretionary evidentiary ruling made by trial courts. Such use of the writ would effectively delay trial interminably while parties rushed to this court for relief every time they disagree with a pre-trial ruling. The fact remains that “(t)he piecemeal challenge of discretionary rulings through writs of prohibition does not facilitate the orderly administration of justice. Said another way “writs of prohibition should not be issued nor used for the purpose of appealing cases upon the installment plan.”

Such extraordinary “relief should be parsimoniously granted rather than serving as an interlocutory review of a trial court’s pretrial rulings.” McGraw at 786, 600. This principle is particularly applicable in this case where the trial court simply allowed discovery to proceed in both the UIM and bad faith claims. The concerns of prejudice involving discovery of insurance files and other information does not exist in first party UIM/ bad faith actions because the claims

are against the insurance company. Light v. Allstate Insurance Company 203 W.Va. 27, 506 SE2d 64 (1998).

The following factors must be considered in deciding whether to issue a writ of prohibition.

- 1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- 2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- 3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- 4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- 5) whether the lower tribunal's order raises new and important problems or issues of law or first impression.

These factors strongly support denying the writ of prohibition. Most importantly, the ruling is not clearly erroneous. It is based on well settled legal precedent. Additionally, the trial court did not foreclose Westfield's ability to have the claims bifurcated for trial. In fact, the court found the request to bifurcate was premature, took the matter under advisement, and specifically permitted Westfield to renew its motion at the conclusion of discovery. The ability to defend the UIM claim in the name of the tortfeasor must also be determined in conjunction with the bifurcation motion. Westfield has not exhausted its remedies at the trial court level; and, it also has an adequate remedy to correct any potential legal errors on appeal at the conclusion of the case.

I. The trial court relied on well settled legal precedent in denying bifurcation as premature and permitting discovery in this first party insurance claim. It is inconceivable to suggest that this limited pretrial ruling is clearly erroneous or a substantial abuse of discretion.

The petition misconstrues the applicable law and scope of the pretrial ruling, and relies on third party bad faith cases which do not have any precedential value in this first party action where the insureds have asserted a cause of action against their own insurance company.

The decision in Light v. Allstate established the standards for bifurcating and staying first party insurance claims. The fact pattern and causes of action are identical to this litigation. An insured sued his automobile insurer to recover UIM benefits and damages for bad faith, exactly the same as the Hunters. This Court held that bifurcation is not mandatory. It is discretionary in first party claims.

We conclude that in a first-party bad faith action against an insurer that also involves an underlying contract or tort claim against the insurer, it is not mandatory that the trial court bifurcate and stay the bad faith claim. Nor, is it mandatory that discovery be stayed on the first-party bad faith claim when bifurcation is ordered.

Bifurcation is controlled by Rule 42(c) West Virginia Rules of Civil Procedure which only applies when necessary in furtherance of convenience, economy, or to avoid prejudice. In addition to finding that bifurcation was premature, the trial court rejected the nonsensical notion that Westfield would be prejudiced by mentioning insurance in a lawsuit against an insurance company. The pretrial order states:

“The perception of prejudice and concern over mentioning insurance is generally not present in first party UIM and bad faith claims where the causes of action are against the insurance company and the existence of insurance is present throughout the litigation. Light v. Allstate Insurance Company 203 W.Va. 27, 506 SE2d 64 (1998).” (App at 1)

The conclusion that bifurcation is premature and should be decided at the conclusion of discovery is supported by sound legal precedent including this Court’s decision in State ex rel Nationwide v. Kaufman 222 W.Va. 37, 658 SE2d 728 (2008). In that case the trial court held the bifurcation issue in abeyance pending completion of discovery which is exactly what Judge Reeder ruled. This court found: “it would be premature on our part to prohibit the circuit court from doing that which it has yet to rule upon.” This conclusion is also supported by the holdings in Chaffin v. Watford 2009 WL 772916 (S.D. W.Va. 2009), Tustin v. Motorists Mutual Ins. Co.

2008 WL 5377835 (N.D. W.Va. 2008) and Holley v. Allstate Ins. Co. No. 3:0801413 (S.D. W.Va. 2009) which found that bifurcation must be determined at the conclusion of discovery. The facts of Chaffin are also strikingly similar. In describing the lawsuit as a “straight forward first-party insurance action” involving a UIM claim coupled with bad faith and breach of contract, the district court found it “premature to raise issues of potential bias at trial early in the discovery process.” Consequently, the motion to bifurcate was denied without prejudice and with the right of defendant to “re-file the motion after discovery is complete.”

It is also ludicrous to suggest that the trial court committed a clear legal error and substantially abused its discretion in allowing discovery. First, discovery cannot be stayed unless the claims are bifurcated. This is a prerequisite as explained in Light v. Allstate.

Trial courts have discretion in determining whether to stay discovery in a first-party bad faith claim against an insurer that has been bifurcated and stayed. Factors trial courts should consider in determining whether to stay discovery when bifurcation has been ordered in a bad faith action include (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. The party seeking to stay discovery on the bad faith claim has the burden of proof on the issue.

After carefully considering these factors, the trial court (Judge Reeder) found:

The standard for staying discovery is set forth in Light v. Allstate Insurance Company 203 W.Va. 27, 506 SE2d 64 (1998). The Court has carefully considered these factors and finds that they support proceeding with discovery in all aspects of the case. There are only two parties in interest – plaintiffs and Westfield. The case is not complex. The UIM claim involves injuries from a car wreck, and the bad faith claim is related to the adjustment of the UIM claim. Plaintiffs would be unfairly prejudiced by staying discovery which could cause unnecessary delay, and unnecessarily increase the costs and time involved in litigating the claims. It would also increase the burden on the Court. Westfield will not be prejudiced from participating in discovery, as the real party in both the UIM claim and the bad faith claim is the same. There is

no danger that materials and information learned through discovery could unfairly prejudice their party tortfeasor, as there is not one in this case. Finally, judicial economy weighs against staying discovery. (App at 2)

This same rationale was adopted in the Nationwide decision. Discovery was appropriate because “the case involved a limited number of parties, the issues were not complex, the claims brought against Nationwide could lead to resolution of the entire case, and staying discovery would result in a burden and unnecessary delay.”

The district court in Tustin v. Horace Mann also refused to stay discovery because there were only two parties and the issues were not complex. Plaintiffs would be prejudiced by the delay and it would impose greater burdens on the court. Finally, the decision in Chafin also applied this exact reasoning in rejecting the insurance company’s attempt to block discovery.

The legal precedent is clear. Discovery is necessary and permissible on all aspects of the first-party insurance claims, and bifurcation cannot be meaningfully evaluated until the completion of discovery. The trial court’s decision adopting this precedent is completely correct and precludes issuance of a writ of prohibition.

II. Westfield will not be prejudiced by participating in discovery.

Westfield’s claim of potential prejudice is illusory. The concern over mentioning insurance is non-existent in first party bad faith claims where the cause of action is directly against the insurance company. The prevailing view recognizes that mentioning insurance is “rarely prejudicial” even in third party claims, Light v. Allstate Insurance Company 203 W.Va. 27, 506 SE2d 64 (1998); and this perception of prejudice disappears in first party actions like this case because plaintiffs are “suing their own insurer on both claims.” Light at 31, 68.

The discovery of evaluations and reasons for refusing to make offers is certainly not prejudicial in UIM/bad faith claims. To the contrary, that is exactly the type of information necessary to prove the claims. It is impossible to prove that the insurer failed to make a fair and reasonable offer as required by West Virginia Code § 33-11-4(9) without this information.

Westfield has misconstrued the applicable law and exaggerated the pretrial ruling. The decision in State ex rel. State Farm Fire & Cas. Co. v. Madden 192 W.Va. 155, 451 SE2d 721 (1994) required staying discovery in third-party bad faith actions to prevent prejudice to the **insured** (i.e., the tortfeasor), not the insurance company.¹ In those cases, both the insured and insurer are defendants. The unmistakable purpose of Madden was to protect the insured from the risk that liability in the underlying tort claim would be influenced by the existence of insurance. It has nothing to do with protecting the insurance company.

There is a clear distinction between first party and third party bad faith actions. It is understandable that prejudice may occur if the case involves claims against the negligent driver plus his insurance company. This however does not exist in first party bad faith cases where an insured sues his own insurance company as repeatedly recognized in numerous decisions beginning with Light v. Allstate. Additionally, Beane v. Horace Mann Insurance Company 2007 WL 1009916 (S.D. W.Va. 2007) also found that “defendants will not be prejudiced by the disclosure of insurance to the jury because the concern surrounding that disclosure does not exist in a first party bad faith action in which the insurer is the named defendant.” To be clear, the negligent driver Chad Stear is not a real party in interest. He settled for policy limits prior to filing suit. He has been fully released, and cannot be held liable. The only true defendant in this case is Westfield.

¹ Westfield has also misconstrued the applicability of Rule 411 of the West Virginia Rules of Evidence. This Rule is completely inapplicable in lawsuits against insurance companies where the entire claim revolves around insurance.

The facts in Light v. Allstate and Horace Mann are strikingly similar to this litigation. In Horace Mann the negligent driver paid policy limits of \$50,000 and plaintiff made a UIM claim for \$100,000 which was ignored and resulted in a lawsuit for UIM benefits and bad faith. That is precisely what has occurred in this case. The Court in Chaffin v. Watford also rejected the “prejudice” theory in first party UIM/bad faith claims. Judge Chambers explained that “this case is a straightforward first party insured action; the cases are relatively simple, plaintiffs would be prejudiced by the delay and costs associated with a stay in discovery, and a stay of discovery would likely impose a higher burden on the court.” The perception of prejudice is non-existent because the issue of insurance is present throughout the litigation.

The fear of prejudice in bad faith actions focuses exclusively upon the insured and only applies to the **insured**. There is absolutely no legal authority to support the novel concept asserted by Westfield. As clarified by the third factor set forth in Light, the primary concern is “whether undue prejudice would result to the **insured** if discovery is stayed.” Prejudice to the insurance company is not a consideration in first or third party bad faith cases.

Based upon the dearth of precedent recognizing the admissibility of this evidence, a pretrial ruling permitting discovery cannot possibly cause irremediable harm. The ruling does not foreclose the ability to defend in the tortfeasor’s name or raise objections to discovery. Furthermore, the fact that plaintiffs included the tortfeasor as a nominal defendant to trigger UIM benefits does not create a basis for Westfield defending in his name. This is a distinction without any difference and is completely meaningless. It does not change the fact that Westfield is the only real party in interest. Moreover, this argument was specifically rejected in Jones v. Sanger 204 W.Va. 333, 512 SE2d 590 (1998). In that case, the plaintiff sued State Farm for UIM coverage and bad faith after settling with the tortfeasor. State Farm sought dismissal as a

defendant, arguing that it should be permitted to defend in the tortfeasor's name since he was included in the lawsuit.

In rejecting this argument and allowing the case to proceed directly against State Farm (despite the tortfeasor being included as a nominal defendant) this Court explained:

In this case, Jones settled with Sanger for Sanger's policy limits, and released Sanger. The settlement was made with the consent of State Farm, and State Farm waived its right of subrogation against Sanger. The plaintiff now seeks to recover underinsured motorist benefits from State Farm, his father's underinsured motorist insurance carrier, because the insurance company provided coverage for the vehicle in which he was a passenger. The requirements of Postlethwait and Plumley being satisfied, the plaintiff may bring an action directly against the underinsured motorist insurance carrier, State Farm. The circuit court was therefore in error to dismiss State Farm as a party defendant.

Westfield's argument is further negated by the holdings in Postlethwait and Chaffin in which the tortfeasor was included in both lawsuits despite having already settled prior to the litigation. This fact was inconsequential and did not justify completely abandoning long-standing precedent. The insurance companies remained the only party in interest, and were not permitted to pretend that the case was against someone else. The decision in Tustin also prohibited defending in the tortfeasor's name because that claim had already been settled. This defense is only proper when the tort claim has not been resolved and is still pending against the negligent driver.

The court in Halstead v. Kalwei 393 F. Supp.2d 393 (S.D. W.va. 2005) also rejected this theory and permitted a direct claim against the insurer even though the lawsuit included the settling tortfeasor as a defendant. These cases (all of which include the settling tortfeasor as a nominal defendant) clarify that the proper focus is on whether or not the accident victim is actually pursuing payment from the tortfeasor. If that claim has already been settled and the

tortfeasor released from liability, the insurance company cannot realistically claim prejudice in being forced to answer discovery.

Westfield's reliance on Davis v. Robertson 175 W.Va. 364, 332 SE2d 819 (1985) is unpersuasive and without merit. The circumstances are completely different and illustrate the fallacy in Westfield's argument. In Davis, the accident victim asserted actual, cognizable causes of action against the negligent driver. The liability claim against the tortfeasor was still pending. It had not been resolved. This Court simply held that the underlying claim against the negligent driver (who did not have insurance) had to be completed prior to pursuing uninsured benefits. This decision does not support the exception sought by Westfield and it cannot change the fact that the underlying tort claim was settled prior to plaintiffs filing suit. Justification for defending in the tortfeasor's name only exists where that claim has not been completed.

There is not any factual or legal basis to support a finding that Westfield will be prejudiced by participating in discovery.

III. Westfield does not have an absolute right to defend the UIM claim in the name of the tortfeasor; and most importantly, the trial court has not made a final ruling on this particular issue.

The trial court was completely accurate in observing the plethora of legal authority finding that underinsured motorist carriers do not have an absolute right to defend in the tortfeasor's name. This right does not exist when the tortfeasor settles prior to litigation and the UIM carrier consents and waives subrogation. Numerous decisions clarify that the purpose of West Virginia Code §33-6-31(d) is to protect an uninsured/underinsured insurance carrier from having a judgment entered against the uninsured/underinsured tortfeasor without the carrier having an opportunity to defend the suit." Postlethwait, 432 SE2d at 805. This protection is necessary because the insurance company could be held liable for the judgment. It is not

applicable where the tortfeasor settles prior to suit and the insurance company is the only party in interest.

That potential prejudice does not exist in a case in which, as here, the carrier is not bound by collateral estoppels principles because no judgment was rendered against the tortfeasor, (and) the plaintiffs still have to prove liability and their applicable damages.” Beane v. Horace Mann

This section is “applicable only when the plaintiff sues the uninsured/underinsured tortfeasor (and is actually pursuing a claim for damages under the liability policy) and not when the plaintiff settles with the tortfeasor, and the underinsured motorist carrier waives its subrogation rights” Postlethwait at Id at 806. The facts and holding in Postlethwait are directly on point. Plaintiff was injured in a car wreck, settled with the negligent driver for policy limits, and made a UIM claim. The UIM carrier -like Westfield- consented to the settlement and waived subrogation. At that point, it is impossible to get a judgment against the tortfeasor, and no legitimate reason exists to defend the UIM claim in his name. The UIM carrier must be separately served with the lawsuit and given an opportunity to defend. Default judgment is not an issue or concern. The holdings in Postlethwait and Beane v. Horace Mann confirm that the plain language § 33-6-31(d) refutes defendant’s claim that is has an absolute right to defend in the name of the underinsured motorist. The Court in Horace Mann observed:

The Postlethwait court found significant the fact that the uninsured/underinsured carrier had waived its right of subrogation against the tortfeasor, a Horace Mann has done in this case. Had Horace Mann declined to waive its subrogation right, it could have forced suit to be brought in the name of the underinsured motorist. Horace Mann waived that right, however, and it is therefore not entitled to the relief sought.

Several district court decisions have also interpreted this statute in the same manner.

Tustin v. Motorist Mutual Insurance Company 2008 WL 537783 (N.D. W.Va. 2008) and

Sanders v. State Farm Insurance Company 2007 WL 2740657 (S.D. W.Va. 2007) involve car wrecks where the tortfeasor settled for policy limits prior to suit and the plaintiffs subsequently sued their own carrier for UIM benefits – exactly like the plaintiffs in this case. Both cases refused to allow the UIM carrier to defend in the tortfeasor’s name.

It is not logical to suggest that despite the tortfeasor’s settlement, Westfield can still defend in his name. Such a result would totally eviscerate the statutory purpose of preventing the entry of judgment without an opportunity to defend. The decisions in Postlethwait and Jones v. Sanger clarify that where the tortfeasor settles (even if the lawsuit names him as a nominal defendant) the right to defend a UIM claim in his name ceases to exist.

The attempt to create an exception because plaintiffs’ complaint included the tortfeasor as a nominal party for the sole purpose of triggering UIM benefits is completely contrary to these decisions. This argument ignores the purpose of §33-6-31(d) and the plain language of the complaint which clarifies that the tortfeasor has been fully released of liability. It also defies reality and seeks to promote a falsehood. The jury has a right to know the real defendant’s identity, and Westfield should not be allowed to pretend this case is against someone else. This fiction is unnecessary when the case involves a first party claim directly against the insurer.

IV. Westfield has not exhausted its legal remedies at the trial court level. Adequate remedies are also available to correct any potential legal error through an appeal upon completion of the litigation.

The law is clear. Parties may only appeal discretionary pretrial rulings once the case is complete. The pretrial rulings are interlocutory and do not constitute a final, appealable order. Moreover, writs of prohibition are rarely granted and are reserved for the most egregious circumstances. The “correctness of a discretionary ruling should ordinarily be challenged at a time when the entire record is available to an appellate court.”State ex rel Shelton v. Burnside

212 W.Va. 514, 575 SE2d 124 (2002) citing Woodall v. Laurita 156 W.Va. 707, 195 SE2d 717 (1973).²

In the absence of compelling evidence of irremediable prejudice, pretrial rulings on discretionary discovery matters will not be considered in a piecemeal fashion.

Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue."

The issues raised by Westfield are premature and not ripe for appeal because the trial court has not made a final decision. The request to bifurcate was taken under advisement. Resolution of this question will necessarily include answering whether the insurance company can defend in the tortfeasor's name. This precise scenario was addressed by this Court in State ex rel. Nationwide Ins. Co. v. Kaufman 222 W.Va. 37, 658 SE2d 728 (2008). Nationwide sought a writ of prohibition attempting to force bifurcation and stay of discovery. The trial court held bifurcation in abeyance pending completion of discovery. Since Nationwide had not exhausted its remedies at the trial court level, a writ of prohibition was premature and unwarranted. "It would be premature on our part to prohibit the circuit court from doing that which it has yet to rule upon."

Westfield has not presented any compelling evidence of prejudice because none exists. In addition to having permission to renew the motion upon completion of discovery, any mistakes or potential prejudice can be remedied on appeal. Our jurisprudence provides an absolute right

² Westfield did not include the hearing transcript in the Appendix although it would be extremely helpful in this Court's analysis. It also failed to inform the trial court of the intent to seek a writ of prohibition and most importantly, did not request the inclusion of findings of fact and conclusions of law in the Order. See e.g. River Riders at 242, 378. As a result, a full understanding and meaningful analysis of the court's decision is greatly impaired.

of appeal. Allowing discovery in this straightforward first-party insurance claim does not represent the type of egregious mistake necessary to justify such extraordinary relief. A remedy by appeal is both available and adequate.

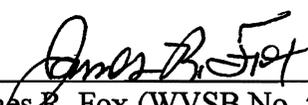
CONCLUSION

There is absolutely no basis to grant a writ of prohibition in this case. The trial court's ruling permitting discovery and taking bifurcation under advisement was completely consistent with the applicable law. No legal error exists.

Moreover, Westfield has not exhausted its remedies at the trial court level. An adequate remedy also exists through an appeal at the conclusion of this case. Therefore, the writ of prohibition should be denied.

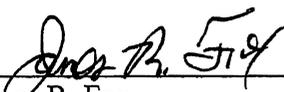
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VERIFICATION

As counsel for Respondents, the undersigned counsel verifies that the foregoing Response to Petition for Writ of Prohibition and 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, they are informed and believe the same to be true and correct.



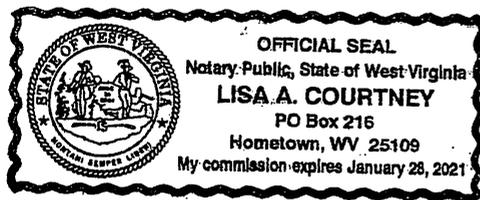
James R. Fox

Taken, subscribed and sworn to before the undersigned authority this 5 day of May, 2016.

My commission expires: January 28, 2021.



Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 16-0361

STATE OF WEST VIRGINIA EX REL.
WESTFIELD INSURANCE COMPANY,
APPEARING AND DEFENDING THE NAME OF
UNDERINSURED MOTORIST CHAD STEAR AND
CAROL WRISTON,

Petitioners

vs.

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

Respondents

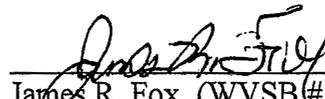
CERTIFICATE OF SERVICE

The undersigned, Counsel for Respondents Mark Hunter and Jennifer Hunter, hereby certifies that on the 5th day of May 2016, the foregoing **Response to Petition for Writ of Prohibition** was served upon the following via U.S. Mail.

Honorable Joseph K. Reeder
Putnam County Circuit Court
12093 Winfield Road Ste. 12
Winfield, WV 25213

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