

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPH CASACCIO and
NATIONAL INDEMNITY COMPANY,

Petitioners Non-Parties Below,

v.

Docket No. _____

HAROLD A CURTISS, Executor of
the Estate of Norma Lee Curtiss,
Deceased, HAROLD A. CURTISS,
Administrator of the Estate of
MARY LYNN CURTISS, Deceased;
and HAROLD A. CURTISS, Executor
of the Estate of Charles E. Curtiss,
Deceased,

Respondents/ Plaintiffs Below,

v.

CIVIL ACTION NO. 05-C-1118
Circuit Court of Kanawha County

HARTLEY TRUCKING CO., INC.;;
JOHN R. TANNER, and MARTHA
A. HOY,

Defendants Below.

PETITION FOR APPEAL OF NATIONAL INDEMNITY AND JOSEPH CASACCIO

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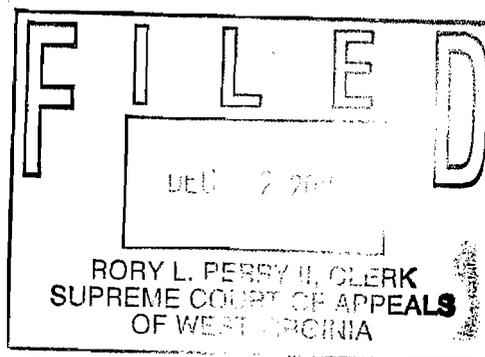


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I. STATEMENT OF THE CASE

This Petition for Appeal ultimately arises from the mediation of the case of *Harold A. Curtiss, as Executor of the Estates of Norma Lee Curtiss, Mary Lynn Curtiss and Charles E. Curtiss v. Hartley Trucking, et. al.*, Civil Action No. 05-C-1118, hereinafter the “Curtiss Civil Action,” pending in the Circuit Court of Kanawha County, West Virginia, before the Honorable Paul Zakaib, Jr. The Petitioners, National Indemnity Company and Joseph G. Casaccio, *were not parties* to the Curtiss Civil Action, nor did either of them issue a policy of insurance to any party in said action. The circuit court of Kanawha County has nevertheless issued sanctions of **Two Hundred Seventy-Three Thousand, Eight Hundred Twenty-One Dollars and Seventy Nine Cents (\$273,821.79)**, in the absence of any sanctionable conduct by Joseph Casaccio and National Indemnity and without having jurisdiction over them.

On November 10, 2006, the parties to the Curtiss Civil Action participated in a Court Ordered mediation wherein Ms. Knapp, an employee of a third-party administrator and the designated representative for Converium, the insurance carrier for the Defendant Hartley Trucking Co., Inc., made a Seven Hundred Fifty Thousand Dollar (\$750,000.00) settlement offer, followed by an agreement to conclude the mediation and return to Converium where she would recommend and seek the approval of Converium to settle the matter for Nine Hundred Thousand Dollars (\$900,000.00). *See e.g., Transcript of February 7, 2007, hearing.*

Sometime prior to the November 10, 2006, mediation, National Indemnity had entered into a contract with Converium to purchase all or certain portions of Converium. *Sanctions Order* at Findings of Fact, ¶4. The sales contract between National Indemnity and Converium required Converium to seek the approval of National Indemnity to settle any claim

for an amount greater than Five Hundred Thousand Dollars (\$500,000.00). *Id.*

Sometime *after* the November 10, 2006, mediation, Converium sought the approval of National Indemnity with regard to the settlement offer made by Ms. Knapp at the November 10, 2006, mediation of this matter; National Indemnity would not consent.

Apparently it was communicated to the circuit court that Converium would not honor its settlement offer made during mediation as a result of National Indemnity's unwillingness to consent under the sales agreement. The circuit court then set a subsequent mediation to be held on November 27, 2006, and Ordered that, among others, a representative of National Indemnity Company be physically present to approve any settlement. *See November 19, 2006, correspondence from Don O'Dell.* No Order to this effect was ever entered by the circuit court, the correspondence from the mediator Mr. O'Dell is the only written documentation of this mandate.

On November 27, 2006, a representative of National Indemnity was not physically present at the mediation; Joseph Casaccio, the designated representative of National Indemnity,¹ was unavoidably delayed in the course of his travel to the mediation. *Sanctions Order at Findings of Fact, ¶10.* Mr. Casaccio was instructed by the circuit court to appear for mediation on the following day, November 28, 2006, which he did. *Id.* The mediation was successful and the case settled for less than the \$900,000 tentative "offer" of Ms. Knapp. *Sanctions Order at Findings of Fact, ¶10 (sic).*

¹ The Circuit court's September 25, 2007, *Order* erroneously asserts that Joseph Casaccio is "the General Counsel of National Indemnity;" if such representation has in fact been made to the Circuit court it was not made by the undersigned or anyone having authority to speak for National Indemnity. *Exhibit 2 at Findings of Fact ¶5.*

However, on December 28, 2006, after the mediation and settlement of the Curtiss Civil Action, the circuit court entered an *Order Scheduling Sanctions Hearing on February 7, 2007*, which set a hearing date and briefing schedule “on the issue of whether the conduct of Joseph G. Casaccio and/or National Indemnity Co. and/or Berkshire Hathaway Group warrants that sanctions be imposed in connection with the Court-ordered mediation of this [the Curtiss] case.” See *Order Scheduling Sanctions Hearing on February 7, 2007*.

The Order directed the Circuit Clerk to “serve Mr. Casaccio, National Indemnity Co. and Berkshire Hathaway Group with a copy of this ORDER by certified mail, return receipt requested.” *Id.* The Plaintiff, Harold A. Curtiss, in his capacity as Executor, hereinafter “Plaintiff Curtiss,” was ordered to “file a motion and memorandum of law setting forth their position on the sanctions issue on or before January 24, 2007,” and ordered that any response was to be filed by February 2, 2007. *Id.*

Upon receipt of said Order, Joseph Casaccio and National Indemnity Company, filed a *Motion to Dismiss for Lack of Jurisdiction; Motion for Due Process Identification of Alleged Wrongful Conduct; and Motion for Identification of Rule Pursuant to Which Sanctions Are Sought*. Thereafter, Plaintiff Curtiss filed a *Petition for Issuance of a Commission to Subpoena Joseph Casaccio* to which Mr. Casaccio and National Indemnity responded by filing a Motion for Protective Order. The original hearing date of February 7, 2007, was converted to a hearing on Joseph Casaccio and National Indemnity Company’s *Motion to Dismiss for Lack of Jurisdiction; Motion for Due Process Identification of Alleged Wrongful Conduct; and Motion for Identification of Rule Pursuant to Which Sanctions Are Sought*; Plaintiff Curtiss’ *Petition for Issuance of a Commission to Subpoena Joseph Casaccio*; and Mr. Casaccio and National

Indemnity's Response to Petition for Issuance of a Commission to Subpoena Joseph Casaccio and Motion for Protective Order.

The circuit court heard the arguments of counsel on February 7, 2007, and on September 25, 2007, over **Seven (7)** months later, entered the *Order* denying Mr. Casaccio and National Indemnity's Motions; granting Plaintiff Curtiss' Petition for issuance of a subpoena for Mr. Casaccio; and setting a schedule for discovery in this sanctions matter against Mr. Casaccio and National Indemnity. *See Order*, entered September 25, 2007.

Mr. Casaccio and National Indemnity, respectively petitioned this Court for a writ of prohibition against the circuit court to prohibit it from enforcing its September 25, 2007, *Order* for want of *in personam* jurisdiction over them, but said Petition was denied.

Discovery proceeded against National Indemnity Company and Mr. Casaccio and on May 15, 2008, the circuit court took evidence and heard oral argument as to the issue of sanctions against them. On August 22, 2008, over **Three (3)** months later the circuit court entered *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* (hereinafter "*Sanctions Order*.") The *Sanctions Order* awards Plaintiffs:

1. Fifty Thousand Dollars (\$50,000) as the difference between their \$900,000 demand at the November 10, 2006, mediation and the Eight Hundred Fifty Thousand Dollars (\$850,000) the Plaintiffs ultimately accepted in settlement;
2. Twenty-Five Thousand Dollars (\$25,000) "as compensation [to the Plaintiffs] for the [unspecified and unidentified] injuries caused by Joseph Casaccio and National Indemnity's conduct";
3. One Hundred Fifty Thousand Dollars (\$150,000) "to punish Joseph Casaccio and

National Indemnity for its improper conduct”; and

4. “Attorney fees expended by Plaintiff from the date of the first court-ordered mediation, November 10, 2006, through the date of the entry of this Order, including time expended preparing for trial after November 10, 2006.

Sanctions Order at page 12-13. Plaintiffs were directed in the *Sanctions Order* to submit an affidavit setting forth their attorney fee claim.

On August 29, 2008, Plaintiffs filed and served *Plaintiffs’ Submission of Attorney Fees and Litigation Expenses as Directed by the Court’s Order of August 22, 2008*, which claimed total fees and expenses of One Hundred Fifteen Thousand Two Hundred Seventy Nine Dollars and Seventy Eight Cents (\$115,279.78). Joseph Casaccio and National Indemnity filed notice of their objection to the claim on September 15, 2008, and in October filed their *Response in Opposition to “Plaintiffs’ Submission of Attorney Fees and Litigation Expenses as Directed by the Court’s Order of August 22, 2008”* and argued that the Court not award the requested attorney fees because they were excessive, were not properly documented and did not comply with the American Bar Association or other accepted billing guidelines for lawyers, alternatively argued that if fees were awarded that the award should represent a reduced amount and not that being claimed by the Plaintiffs.

In November of 2008, the *Motion of National Indemnity Company and Joseph Casaccio to Reconsider Plaintiffs’ Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions” Dated August 22, 2008*, was also filed with the circuit court.

Over **Fifteen (15)** months later on February 22, 2010, the circuit court entered an *Order Regarding Attorney Fees & Expenses*, which summarily in one (1) paragraph stated that the

circuit court “concludes and finds that Plaintiffs are entitled to an award of attorney fees and expenses as additional sanctions in this matter in the sum of \$48,821.79.”

As clearly indicated both on the docket sheet of the Circuit Clerk of Kanawha County and on the notation by the Clerk on the original *Order Regarding Attorney Fees & Expenses* counsel for Joseph Casaccio and National Indemnity did not receive a copy of this Order. In fact, Joseph Casaccio and National Indemnity only became aware of the Order when counsel for Plaintiffs telephoned late Friday afternoon on July 2, 2010, to advise that he intended to execute on purported judgments. Court was closed on Monday July 5th in celebration of the 4th of July, on Tuesday July 6, 2010, counsel for Joseph Casaccio and National Indemnity advised the Court of their failure to receive notice and presented the *Order Staying Execution of Judgment* which was entered by the circuit court on July 6, 2010, which not only stayed execution regarding the August 22, 2008, and February 22, 2010, orders, but also vacated and reentered the February 22, 2010, Order “as of the date shown on this instant Order” of July 6, 2010.

Thereafter Joseph Casaccio and National Indemnity filed their *Motion for Clarification of Rulings and Entry of Final Order* which was later amended to correct certain typographical errors. Plaintiffs filed their *Motion to Lift Stay of Execution of Judgment*. Both of these Motions were heard by the circuit court on October 22, 2010. No ruling was made by the circuit court at this hearing, the circuit court stating it would take the matter under advisement.

On October 29, 2010, the circuit court entered its *Order Clarifying this Court's Prior Orders and Denying Mr. Casaccio and National Indemnity's Objections* which was prepared by counsel for Plaintiffs and not presented to counsel for Joseph Casaccio and National Indemnity under Trial Court Rule 24.01. The Order which was signed by the circuit court on October 29,

2010, purports to make Joseph Casaccio and National Indemnity's appeal time run from July 2, 2010, the date they received notice of the entry of the February 22, 2010, order from counsel for Plaintiffs, instead of July 6, 2010, the date the February 22, 2010, Order was re-entered as set forth in the *Order Staying Execution of Judgment*. Thereafter, the Circuit Clerk of Kanawha County did not mail counsel for Joseph Casaccio and National Indemnity their copy of the *Order Clarifying this Court's Prior Orders and Denying Mr. Casaccio and National Indemnity's Objections* until November 3, 2010, and it was not received until November 4, 2010, one and two days respectively after the new purported appeal period had run.

Joseph Casaccio and National Indemnity were not parties to the Curtiss Civil Action, nor did they insure any parties to the action; they are not residents of the State of West Virginia, and their treatment in this case, the violation of their basic constitutional rights, the convenient manner in which they do not receive notice of orders until *after* any purported appeal time has run, is difficult to explain and impossible to justify. Joseph Casaccio, National Indemnity *and* their counsel pray that this Court correct the injustice shown to Mr. Casaccio and National Indemnity and dispel their misconception that non-citizens of West Virginia are regularly denied constitutional and procedural rights in the courts of this State.

II. SUMMARY OF THE ARGUMENT AND POINTS OF ERROR

- A. The Circuit Court's exercise of *in personam* jurisdiction over Joseph Casaccio as an individual is unconstitutional and against the teachings of *International Shoe* and *Burger King*.
 1. Mr. Casaccio's contact with, and acts within the State of West Virginia were only as a result of an Order of the Circuit Court which exceeded its jurisdictional powers.
 2. Mr. Casaccio's contact with, and acts within the State of West Virginia

were exclusively as an agent and representative of National Indemnity Company.

3. Mr. Casaccio's contact with, and acts within the State of West Virginia did not constitute a tort under the laws of this State or otherwise satisfy any of the conduct under the long arm statute, West Virginia Code §56-3-33.

B. The Circuit Court Has Misinterpreted And Misapplied Rule 25.10 Of The West Virginia Trial Court Rules.

1. Rule 25.10 of the West Virginia Trial Court Rules is not an independent jurisdiction granting rule/statute.
2. National Indemnity and Joseph Casaccio are not in the class of individuals Identified in Rule 25.10 of the West Virginia Trial Court Rules.
3. National Indemnity and Joseph Casaccio did not have any notice of the November 10, 2007, mediation and did not have sufficient notice of the November 27, 2007.

C. The Circuit Court Has Exceeded Its Legitimate "Inherent Authority."

1. There was no direct contemptuous behavior in the presence of the circuit court.
2. There was no indirect contempt by virtue of the absence of a valid court Order.
3. The sanctions Order constitutes criminal, not civil contempt.

D. The Trial Court's Order Is Completely Devoid Of Factual Basis.

1. The hearing transcript does not support the factual findings in the Order awarding sanctions.
2. There is no evidentiary basis for finding actual or apparent authority of Jo Knapp as an agent of National Indemnity.
3. When the alleged wrongful acts took place National Indemnity did not own Converium nor does National Indemnity now own Converium.
4. The Court's entry of *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* dated August 22, 2008, sanctions

Joseph Casaccio and National Indemnity for the acts of other persons and entities.

- F. The circuit court's sanction of Joseph Casaccio and National Indemnity in this instance is not reasonably calculated to address the alleged misconduct.
- G. The circuit court's August 22, 2008, Order titled *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* was not a final appealable order, alternatively Joseph Casaccio and National Indemnity were not required to appeal the Order within four months of its entry.
- H. The circuit court's February 22, 2010, Order titled *Order Regarding Attorney Fees and Expenses* was not a final appealable order; nevertheless, Joseph Casaccio and National Indemnity did not receive notice of the *Order Regarding Attorney Fees and Expenses* until at least July 2, 2010.
- I. It was improper for the Circuit Clerk of Kanawha County to issue the abstracts of judgments as requested by counsel for the Plaintiffs with regard to either the August 22, 2008, or February 22, 2010, orders identified above and this Court should rule that they are void and held for naught.

III. ARGUMENT

National Indemnity does business in West Virginia and would therefore be subject generally to the jurisdiction of the courts of the State of West Virginia. Mr. Casaccio, however, does not have sufficient minimum contacts with West Virginia to enable the circuit court to exercise *in personam* jurisdiction over him as an individual; any such exercise simply does not satisfy constitutional due process standards. Furthermore, the circuit court's use of West Virginia Trial Court Rule 25.10 as a jurisdictional granting statute is an erroneous application of the Rule, which the circuit court has additionally misapplied. The circuit court has exceeded any legitimate contempt powers and does not have a legal foundation for these sanction proceedings.

Furthermore, this appeal has been filed at this time out of an abundance of caution as the circuit court, at least up until its October 29, 2010, *Order Clarifying this Court's Prior Orders*

and Denying Mr. Casaccio and National Indemnity's Objection, had not entered a final appealable order in this case.

A. The circuit court's exercise of *in personam* jurisdiction over Joseph Casaccio as an individual is unconstitutional and against the teachings of *International Shoe* and *Burger King*.

The circuit court's exercise of *in personam* jurisdiction over Joseph Casaccio as an individual is fundamentally unfair, unconstitutional and against the teachings of *International Shoe* and *Burger King* when Mr. Casaccio's contact with, and acts within the State of West Virginia: 1) were only as a result of an Order of the circuit court which exceeded its jurisdictional powers; 2) were exclusively as an agent and representative of National Indemnity; and 3) did not constitute a tort under the laws of this State or otherwise satisfy any of the conduct under the long arm statute, West Virginia Code §56-3-33. See, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); See also, *Robinson v. Cabell Huntington Hosp., Inc.*, 201 W.Va. 455, 498 S.E.2d 27 (1997).

“ ‘To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.’ Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W.Va. 753, 117 S.E.2d 610 (1960).” Syl. Pt. 4, *Beane v. Dailey*, 2010 WL 1260157 (W.Va. 2010), quoting, Syl. Pt. 1, *Leslie Equipment Co. v. Wood Resources Co., L.L.C.*, 224 W.Va. 530, 687 S.E.2d 109 (2009).

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal

jurisdiction statutes set forth in *W.Va.Code*, §31-1-15 [1984]² and *W.Va.Code*, §56-3-33 [1984]³. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.

Syl. Pt. 5, *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W.Va. 198, 444 S.E.2d 285 (1994).

As later courts have observed, this two-step analysis essentially folds into one, “[b]ecause the West Virginia long-arm statute is coextensive with the full reach of due process[.]” *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir. 1997).

An essential inquiry in the minimum contacts analysis is whether the defendant has *purposefully* acted to obtain benefits or privileges in the forum state. *Syllabus Point 3, Prise v. Watt*, 186 W.Va. 49, 410 S.E.2d 289 (1991).” Syl. Pt. 2, in part, *Easterling*, 207 W.Va. 123, 529 S.E.2d 588 (emphasis added.); *See also, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985).

The *purposeful availment* requirement of due process ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon random or fortuitous contacts or

² *W.Va. Code* §31-1-15 was repealed by Acts 2002, c. 25, 2nd Ex.Sess., eff. Oct. 1, 2002.

³ The West Virginia Long Arm Statute, *W.Va. Code* §56-3-33 lists the following, potentially relevant activities, as those which confer jurisdiction over a foreign corporation:

(1) Transacting any business in this state;

...

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

...

(7) Contracting to insure any person, property or risk located within this state at the time of contracting.

the unilateral activity of another party or a third person. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985).

Joseph Casaccio is a New York resident. Mr. Casaccio does not conduct any personal business in West Virginia, nor does he own any real property located in West Virginia. Mr. Casaccio was physically present in West Virginia not as an individual, but as a representative of National Indemnity, and only as a result of an oral Order of the circuit court, communicated in a letter from mediator Don O'Dell, that someone from National Indemnity personally attend the November 27, 2006, mediation.

Purposeful availment does not exist where Mr. Casaccio entered the jurisdiction as the representative of National Indemnity under the order of a circuit court who did not have, under the circumstances, the authority to subpoena or otherwise command the physical presence of Mr. Casaccio or National Indemnity in the State of West Virginia. Nor can Mr. Casaccio be said to have personally purposefully availed himself when his physical presence in West Virginia was only as an agent of National Indemnity. *See e.g., Morris v. UNUM Life Ins. Co. Of America*, 66 Mass.App.Ct. 716, 850 N.E.2d 597 (2006) (Generally stated, the fiduciary shield doctrine operates to limit or preclude the assertion of *in personam* jurisdiction over a nonresident corporate director and employees where the individual defendants' acts were undertaken in their corporate rather than personal capacity.); *See also e.g., Rivello v. New Jersey Auto Full. Ins. Underwriting Ass'n*, 432 Pa. Super. 336, 638 A.2d 253 (1994) (Purposeful availment does not exist where the only contact a foreign insurer has with the state concerns the insured's loss and occurs after the loss.); *Tennessee Farmers Mut. Ins. Co. v. Harris*, 833 S.W.2d 850 (Ky.Ct.App 1992)(minimum contacts do not exist where the only contact a foreign insurer has with the forum

state concerning the insured's loss occurs after a loss when an adjuster goes to the forum state to obtain a police report, look at the insured's vehicle and arrange for salvage); *See also, Couch on Insurance* 3d., §228:32, pg. 228-33 (Regardless of whether the foreign insurance company hires a local adjuster or personally sends communications into the state, it will not constitute sufficient contact and purposeful availment.); *Also see e.g., Taylor v Firemans Fund Ins. Co. of Canada*, 161 Ariz. 432, 778 P.2d 1328 (Ct.App.Div.2 1998).

This Court must consider whether Mr. Casaccio's related contacts with West Virginia were compelled by the unilateral actions of the parties and the defendant's insurer, Converium, or otherwise by circumstances over which Mr. Casaccio had no control such as Court Ordered mediation where the claimant has chosen to live. *See e.g., Bookman v. KAH Incorporated, Inc.*, 614 So.2d. 1180 (Fla.Dist.Ct.App. 1st Dist. 1993.) These activities are not evidence of Mr. Casaccio purposefully availing himself of the benefits and privileges of the State of West Virginia such that he is properly subject to the personal jurisdiction of this Court.

Finally, there is no evidence and it cannot be said that Mr. Casaccio committed a tort in West Virginia, or otherwise engaged in conduct sufficient to satisfy the West Virginia Long Arm Statute. Mr. Casaccio did not transact any personal business in this State; Mr. Casaccio did not contract to supply services or things in this State; Mr. Casaccio did not cause a tortious injury by an act or omission in this State; Mr. Casaccio did not cause a tortious injury by an act or omission outside of this State while he was in the course of regularly doing or soliciting businesses, engaging in a persistent course of conduct or deriving substantial revenue from a good or service sold in this state; Mr. Casaccio did not breach any warranty regarding the sale of goods in this State; Mr. Casaccio does not have an interest in, does not use or possess real

property in this State; Mr. Casaccio did not contract to insure any person or property within this State. *W.Va. Code* §56-3-3.

None of the factual circumstances necessary for the circuit court to exercise *in personam* jurisdiction over Joseph Casaccio exist and any sanctions proceedings against him should be dismissed.

B. The circuit court has misinterpreted and misapplied Rule 25.10 of the West Virginia Trial Court Rules.

The circuit court's *Sanctions Order* erroneously finds that it has jurisdiction over Mr. Casaccio by virtue of West Virginia Trial Court Rule 25.10, its inherent authority and waiver by Mr. Casaccio. *Sanctions Order* at ¶2.

This Court concludes that it has jurisdiction over Mr. Casaccio and National Indemnity Co. to impose sanctions under Rule 25.10 and the inherent authority of the Court. This conclusion is based on the fact that Mr. Casaccio, a lawyer, appeared before this Court on behalf of National Indemnity Co. at the mediation on November 28, 2006. At no time did he or National Indemnity Co. challenge this Court's jurisdiction. A party that appears before a Court, and chooses to not challenge its jurisdiction consents thereto. Vanscoy v. Anger, 510 S.E.2d 283 (W.Va. 1998); Blankenship v. Estep, 496 S.E.2d 211 (W.Va. 1997); Lemley v. Barr, 343 S.E.2d 101 (W.Va. 1986); Stone v. Rudolph, 32 S.E.2d 742 (W.Va. 1944).

Id. This ruling is a very clear misinterpretation of the law.

Mr. Casaccio was not a "party" to any civil action and he did not come to West Virginia "voluntarily" for a "Court appearance," but rather he came on behalf of National Indemnity which was erroneously Court ordered to attend a mediation. *See Sanctions Order*.

West Virginia Trial Court Rule 25.10 is not a jurisdiction granting statute and there is no authority under the plain language of Rule 25.10 for the circuit court to sanction either Joseph Casaccio or National Indemnity. Rule 25.10 states:

The following persons, *if furnished reasonable notice*, are required to appear at the mediation session: (1) each party (2) each party's counsel of record; and (3) *a representative of the insurance carrier for any insured party*, which representative has full decision making discretion to examine and resolve issues and make decisions. . . . *If a party or its representative, counsel or insurance carrier fails to appear at the mediation session without good cause or appears without decision-making discretion, the court sua sponte or upon motion may impose sanctions*, including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

W.Va.T.Ct.R., Rule 25.10 (emphasis added.)

It does not matter how many times Plaintiff Curtiss says that National Indemnity was the insurance carrier for the defendant in the Curtiss Civil Action, it does not make it so. National Indemnity did not have a contract of insurance with the defendant Hartley Trucking. There is no way under the clear language of Rule 25.10, that National Indemnity was one of the persons required to attend the subject mediation.

Understanding their role and the fact that they did not insure any party to the Curtiss Civil Action, Mr. Casaccio and National Indemnity, upon notice that the circuit court was considering sanctions, filed a Motion seeking both the identification of the alleged wrongful conduct and the identification of the rule or doctrine under which the circuit court was considering sanctions.

With regard to their right to identification of the alleged wrongful or sanctionable conduct, Mr. Casaccio and National Indemnity relied upon well established law in West Virginia regarding sanctions and their right to due process under the law. The law is very clear that when a court is considering sanctions, “[i]nitially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction.” *Syl. Pt. 2, in part, Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

It was additionally stressed to the circuit court that due process required that Mr. Casaccio and National Indemnity have an opportunity to be heard prior to any determination regarding sanctions. It was and still is necessary to Mr. Casaccio and National Indemnity's due process rights that they be informed as to allegations against them and have ample time to prepare a defense. *See e.g., Kessel v. Leavitt*, 204 W.Va. 95, 155, 511 S.E.2d 720, 780 (1998)(An opportunity to be heard has little worth unless one is informed that the matter is pending and can choose for him or herself whether to contest.) Notice, in the due process sense, contemplates meaningful notice which affords the opportunity to prepare a defense. *See e.g. Hawks v. Lazaro*, 157 W.Va. 417, 440, 202 S.E.2d 109, 124 (1974)(Notice of commencement of involuntary commitment must contain a detailed statement of the grounds on which the commitment is sought, as well as the underlying facts supporting the commitment.)

A meaningful opportunity to prepare a defense necessarily requires that the individual be informed of the charges levied against him. *Baker v. Board of Education, county of Hancock*, 207 W.Va. 513, 534 S.E.2d 378 (2000)(Citing *Hawks v. Lazaro*, the Court held that the purpose of the notification requirement was so that the employees would receive timely notice and thereby have an opportunity to respond.); *See also, McJunkin Corp. v. West Virginia Human Rights Com'n*, 179 W.Va. 417, 369 S.E.2d 720 (1988)(Discussing the constitutionality of certain statutory notice provisions, the Court held that a complaint must set out sufficient facts to provide the adversarial party with notice and an adequate opportunity to prepare.)

The *Order Scheduling Sanctions Hearing On February 7, 2007*, was wholly deficient notice in that it did not identify "the conduct of Joseph G. Casaccio and/or National Indemnity Co., and/or Berkshire Hathaway Group [which] warrants that sanctions be imposed in connection

with the Court-ordered mediation of this case.”⁴ During the February 7, 2008, hearing the circuit court was reluctant to identify with particularity the alleged sanctionable conduct of Mr. Casaccio and National Indemnity. *See February 7, 2008 Hearing Transcript. The Sanctions Order* resulting from said February 7, 2007, hearing either 1) does little to rectify this situation; or 2) identifies only two alleged sanctionable acts. *Sanctions Order* at ¶6.

The failure of National Indemnity to appear at the November 10, 2006 mediation and the failure of Mr. Casaccio to appear at the November 27, 2006, mediation is a violation of Trial Court Rule 25.10 and may potentially result in the imposition of sanctions.

Id.

This conclusion of law by the circuit court could not be more wrong. Nevertheless, either the circuit court has still not identified the alleged sanctionable conduct of Mr. Casaccio or National Indemnity in violation of their due process rights, or the only basis for sanctions is a failure to appear at mediation of which they did not have notice, or failing to appear at the first day of the second mediation because Mr. Casaccio missed his connecting flight, but attended by telephone. *Id.*

First and foremost there is no question that Joseph Casaccio had no duty as an individual under Trial Court Rule 25.10 to appear at the mediation. Second, there is no evidence that Joseph Casaccio failed to appear at mediation without full decision making authority. Consequently, there is simply no basis under Rule 25.10 for the circuit court to sanction Mr. Casaccio in his individual capacity.⁵

⁴ On December 22, 2006, a timely “Objection to Entry of Sanctions Order” and “Request for Hearing” were filed by the undersigned pursuant to West Virginia Trial Court Rule 12.03.

⁵ The Circuit court’s *Order* is transparent in its intent; the conduct for which Plaintiff Curtiss and the Circuit court wish to sanction Joseph Casaccio for concluding “that the settlement value of the case was less than

Likewise National Indemnity was not an insurance carrier for any party in the Curtiss Civil Action and therefore did not have a duty to appear at either the November 10, 2006, or the November 27, 2006, mediation. Furthermore, even if National Indemnity were the defendant's insurance carrier, which it was not, it was not informed of the November 10, 2006, mediation until *after* it had already occurred; certainly not "reasonable notice" under Rule 25.10.

The circuit court's scheduling of a subsequent mediation to be held on November 27, 2006, and Order that a representative of National Indemnity Company be physically present to approve any settlement, was communicated to the parties by correspondence from the mediator, Don O'Dell, dated November 19, 2006. *Sanctions Order*. November 19, 2006, was a Sunday; Thanksgiving Day fell on that Thursday, and the mediation would then have been set for the following Monday. Even if one assumes that National Indemnity received notice of the November 27, 2006, mediation at the earliest possible time which would have been Monday, November 20, 2006, reasonable notice was not given. Reasonable notice under the West Virginia Rules of Civil Procedure is generally ten (10) days; however, Rule 6 specifically states that if the time period is less than eleven (11) days, then weekends and holidays are not included in the computation. *W.Va.R.Civ.P.*, Rule 6. Under the best possible conditions and assuming that a letter which was not addressed to National Indemnity was forwarded to them Monday, November 20, 2006, National Indemnity was given four (4) days notice to provide a representative to be physically present in West Virginia with full decision making authority

\$900,000." *Sanctions Order* at Findings of Fact ¶8. Disagreeing with the plaintiff over the value of a case absolutely cannot be sanctionable conduct at a mediation; it is ludicrous to suggest that such a proposition would be supported by Rule 25.10. In fact the plain language of Rule 25.10 sets forth only two acts of sanctionable conduct 1) failing to appear; and 2) not appearing with full decision making authority, failing to give the plaintiff all the money they want does not appear on the list.

(which in the context of this case would be decision making authority exceeding a half of a million, approaching one million dollars in authority). Under no circumstances did National Indemnity receive “reasonable notice” under Rule 25.10.

Rule 25.10 speaks only to parties, counsel and insurance carriers. It provides the court authority to sanction these individuals for failing to appear or failing to appear with full authority to settle, but it also requires that these individuals receive “reasonable notice.” There is absolutely no basis for the circuit court to sanction Joseph Casaccio or National Indemnity under Rule 25.10.

C. The circuit court has exceeded its legitimate “inherent authority.”

Although the various West Virginia rules of court do not formally require any particular procedure before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. *Syl. Pt. 4, in part, Dodrill v. Egnor*, 198 W.Va. 409, 481 S.E.2d 504 (1996).

Mr. Casaccio and National Indemnity vehemently argued to the circuit court prior to and at the February 7, 2007, hearing that clarification of the foundation for sanctions against them was paramount to the due process requirement of a meaningful opportunity to prepare a defense as the standard of law by which Mr. Casaccio and/or National Indemnity’s conduct will be judged is dependent upon the particular court rule under which sanctions are sought.

The circuit court may not issue sanctions against Mr. Casaccio and National Indemnity under Rule 25.10; Mr. Casaccio and National Indemnity were not parties to the action; and neither Mr. Casaccio, nor National Indemnity were properly served with a subpoena. Consequently, the only authority under which the circuit court can proceed with regard to

sanctions against them would be its inherent authority or contempt power.

The circuit court erroneously finds in its *Order* that “[b]ecause the Court is not considering imprisonment and because this Court is proceeding pursuant to Trial Court Rule 25.10, the nature of these proceedings is that of civil, not criminal contempt.” *Sanctions Order* at Conclusions of Law, ¶5.

There are four possible classifications of contempt: direct-criminal; indirect-criminal; direct-civil; and indirect-civil. *See e.g., Trescot v. Trescot*, 202 W.Va. 129, 502 S.E.2d 445 (1998). Direct contempt occurs in the presence of the court; indirect contempt occurs outside of the presence of the court. Any conduct that may constitute contempt which occurs entirely or partially outside of the actual physical presence of the court may only be treated as an indirect contempt. *Id.*

Joseph Casaccio and therefore National Indemnity’s physical presence before the circuit court was limited to a November 28, 2006, proceeding before the mediation and a second November 28, 2006, proceeding following the mediation where the participants to the mediation put the settlement agreement on the record. *See Transcript of November 28, 2006, proceedings.* There is no evidence in either transcript of contemptuous behavior occurring in the presence of the circuit court, nor is there, for that matter, any indication by the circuit court that it was offended or in any way angered by anything that transpired before it. *Id.* It appears as if the circuit court is proceeding on a theory of indirect contempt.

“Whether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action.” *United Mine Workers of America v. Faerber*, 179 W.Va. 73, 75, 365 S.E.2d

353, 354 (1986)(internal citations omitted.) Neither is the trial court's classification of contempt as either criminal or civil is not determinative. *See e.g., State ex rel Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997). Whether contempt is civil or criminal depends upon the purpose the trial court attempts to served by imposing the contempt sanction. *See e.g., In re Brandon H.S.*, 218 W.Va. 724, 629 S.E.2d 783 (2006). The purpose of the contempt order also determines the type of sanction which is appropriate. *See e.g., United Mine Workers of America, supra.*

If the purpose of imposing the sanction is to compel the contemner to comply with a court order to benefit the party bringing the contempt action, it is civil contempt. However, if the purpose of imposing the sanction "is to punish the contemner for an affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court, the contempt is criminal." Syl. Pts., 1, 2 and 4, [*State ex rel*] *Robinson [v. Michael]*, 166 W.Va. 660, 276 S.E.2d 812 (1981).]

Lambert at 806, 490 S.E.2d 895.

The time for compliance with the circuit court's Order has come and gone. Issuance of sanctions against National Indemnity cannot possibly compel its compliance with the circuit court's order to attend mediation of a case that has already been mediated and settled. *Sanctions Order, Order* at Findings of Fact, ¶11. The only purpose to be served in this instance by sanctioning Joseph Casaccio and/or National Indemnity would be to punish them for an affront to the Circuit court's authority. *Lambert, supra; Accord, Czaja v. Czaja*, 208 W.Va. 62, 537 S.E.2d 908 (2000). As criminal contempt proceedings, the circuit court is held to a higher standard with regard to due process which it has failed to fulfill.

Nevertheless, regardless of whether the contempt proceedings are criminal or civil, the circuit court has not issued a valid Order upon which it can issue sanctions against Mr. Casaccio

and/or National Indemnity. The circuit court's order to mediate resulting in the scheduled November 10, 2006, mediation (presumably its Scheduling Order) cannot form the basis of sanctions against Joseph Casaccio and/or National Indemnity as they did not have notice of the order. *See e.g., State ex rel Walker v. Giardina*, 170 W.Va. 483, 294 S.E.2d 900 (1982).

Moreover, the circuit court's order as communicated in the correspondence of the mediator, Don O'Dell, that someone from National Indemnity be physically present at the mediation, cannot form the basis of any contempt proceedings as the circuit court was without authority or jurisdiction to order the physical presence of National Indemnity and/or Joseph Casaccio in West Virginia at the November 27, 2006, mediation of the Curtiss Civil Action. Where a "judge lacks jurisdiction, or is without power or authority to render the order, refusal to comply with such order may not be punished as contempt." *State ex rel Hamstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984).

D. The circuit court's Order issuing sanctions is completely void of factual basis.

The evidence presented at the sanctions hearing, as seen in the hearing transcript, does not support the factual findings of the circuit court made in the *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* dated August 22, 2008. Specifically, there was no evidentiary basis for a finding of actual or apparent authority of Jo Knapp as to National Indemnity. Furthermore, the circuit court cannot sanction a pending purchaser (to-be parent corporation) for acts of the pending purchasee (to-be subsidiary corporation.) When alleged wrongful acts took place National Indemnity did not own Converium nor does National Indemnity now own Converium. It is painfully apparent from the *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* entered by the circuit court on

August 22, 2008, that Joseph Casaccio and National Indemnity are being sanctioned for the acts of other persons and entities.

Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions (hereinafter "*Sanctions Order*"), which was entered by this Court on August 22, 2008, sets forth in Paragraph 11 of page 10, the "[a]ctions taken by Joseph Casaccio and National Indemnity" which the Court viewed as "sanctionable." Of fourteen (14) discrete 'sanctionable' acts set forth in Paragraphs A through F on pages 11 and 12 of the *Sanctions Order*, which was drafted by counsel for the Plaintiffs, Joseph Casaccio and/or National Indemnity are not even the *alleged* actor in the majority of the cited instances, and they are not the *true* actor in but one or two. Additionally, some of the more important, foundational statements in the *Sanctions Order* are simply untrue and are not supported by the evidence and record of the May 15, 2008, hearing on sanctions.

For instance, Paragraph (a) contains two statements:

[1] Pursuant to the Stock Purchase Agreement between National Indemnity and Converium, Converium was not permitted to pay more than \$500,00 to settle a case without National Indemnity's consent. [2] Despite that fact, National Indemnity chose to neither send a representative to the mediation nor to make one available by telephone.

Sanctions Order pg. 10, ¶11A.

The first statement [1] sets forth the existence of a lawful contract between National Indemnity and Converium which could not possibly form the basis of a Court-ordered sanction. Nevertheless, it still overstates the content of the Stock Purchase Agreement. A contract which "does not permit" is not the same as a contract which requires consent which may not unreasonably be withheld.

The second statement [2] is simply false. The evidence provided during the May 15, 2008, hearing did not include anything even hinting that National Indemnity and/or Joseph Casaccio had notice of the November 10, 2006, mediation. There was no “choice” by National Indemnity not to attend the mediation because at the time of the November 10, 2006, mediation, the insurer, Converium Insurance, had never provided any information about the claim to National Indemnity and National Indemnity was unaware that the case of *Curtiss v. Hartley* even existed. See Transcript of May 15, 2008, Sanctions Hearing, pg. 36 at lines 7-10; pg. 96 at lines 23-24; and pg. 97 at lines 1-6.

The Findings of Fact section of the *Sanctions Order* at Paragraph 5, page 3, attempts to cure this gaping hole by shifting the burden of proof in alleging that “National Indemnity presented no evidence that following the execution of the Stock Purchase Agreement that it made any effort to identify the cases in Converium’s portfolio that involved settlement values in excess of \$500,000.” Later, in Paragraph 9 of the Conclusions of Law section of the *Sanctions Order* it saddles National Indemnity with “imputed notice of the November 10, 2006, mediation.”

There is no legal basis whatsoever to impose upon National Indemnity this duty of attempting to locate cases in Converium’s portfolio meeting any criteria. It was not a condition of the contract between National Indemnity and Converium, it is not among any law or regulation applicable to the purchase of insurance company stock; and this Court simply does not have the power under these circumstances to *sua sponte* and *ex post facto* to create such a contractual or other duty.

Furthermore, the *Sanctions Order*’s finding of “imputed notice” to National Indemnity likewise has no legal or factual foundation. “Imputed notice” is a term found only four (4) times

in the history of our jurisprudence and is not appropriately applied to the factual circumstances of this case.

The government will not be lightly heard to argue that due process may be made to depend upon the intermediate actions of third parties Imputed notice in such cases may be but a legal fiction; in practice, imputed notice may result in no notice at all. By contrast, the constitution requires notice that is more than a 'mere gesture.' *Mullane*, 339 U.S. [306], 315, 70 S. Ct. [652] 657 [1950].

Tazco, Inc. v. Director, Office of Workers Compensation Program, 895 F.2d 949, 951 (4th Cir. 1990).

In this case there was no evidence that anyone even attempted to give National Indemnity notice of the November 10, 2006, mediation; there is not even a mere gesture upon which a finding of "imputed notice" could rely.

Sanctioning National Indemnity for failing to attend a mediation for which it was not given notice violates all sorts of State and Federal constitutional and statutory protections. Moreover, to sanction Joseph Casaccio, who was not even a party to the contract between National Indemnity and Converium, for failing to appear at the November 10, 2006, mediation is beyond any justification.

Paragraph (b) contains three (3) separate sentences:

[1] The Plaintiffs and the mediator were misled because Converium concealed the fact that it had no authority to resolve this case in an amount greater than \$500,000. [2] Indeed, this fact was not revealed to Plaintiffs, Plaintiffs' counsel or the mediator until after Converium had already made a firm offer of \$700,000 and at the end of the day convinced Plaintiffs to agree to accept \$900,00 in final settlement (the \$700,000 offer was obviously made in bad faith since, according to National Indemnity, the Converium representative had no authority to extend the offer). [3] It was also not revealed until after the Plaintiffs had been lured into telling Defendants their bottom line, i.e., the amount for which they were willing to settle the case.

Sanctions Order pgs. 10-11, ¶11B.

There is not one single act, sanctionable or otherwise, identified in Paragraph 11B, attributed to National Indemnity and Joseph Casaccio. To the extent that Paragraph 11B, which contains false statements in parts [1] and [2], is the basis of the sanctions award, it simply serves as further illustration of the miscarriage of justice and abuse of the legal system to which National Indemnity and Joseph Casaccio have been subjected in these proceedings.

Paragraph (c) contains one (1) sentence which alleges four (4) discrete acts:

After [1] Ms. Knapp represented to Plaintiffs that their willingness to accept the \$900,000 figure would not be used in any way to bargain against them, [2] National Indemnity refused to pay the \$900,000 and, as admitted by Mr. Casaccio, [3] immediately used that amount as the figure from which to negotiate, thus attempting to get Plaintiffs to agree to a lesser amount in violation of [4] Converium's promise at the mediation.

Sanctions Order pg. 11, ¶11C.

Again, National Indemnity and Joseph Casaccio are being sanctioned for the acts of others, in particular, [1] Ms. Knapp's representation and [4] Converium's promise at mediation. Ms. Knapp was the Third-Party Administrator hired by Converium to attend the mediation on its behalf. There is absolutely no legal basis for attributing anything Ms. Knapp did, or did not do, to National Indemnity, let alone to Joseph Casaccio. At the time of the November 10, 2006, mediation, National Indemnity had only contracted to purchase Converium's stock if approved by governmental regulations. The *Sanctions Order* seeks to sanction not even an actual stockholder but only a potential stockholder, National Indemnity, and the potential stockholder's representative, Joseph Casaccio, for the acts of a corporation, Converium, committed by that corporation's agent, Ms. Knapp. In fact, "[t]he law presumes that two separately incorporated

businesses are separate entities and that corporations are separate from their shareholders.” Syl. pt. 3, *Southern Electrical Supply Co. v. Raleigh County National Bank*, 173 W.Va. 780, 320 S.E.2d 515 (1984); Accord, Syl. Pt. 1, *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986).” *T & R Trucking, Inc. v. Maynard*, 221 W.Va. 447, 452, 655 S.E.2d 193, 198 (2007). There is simply no justification for imputing liability to National Indemnity and/or Joseph Casaccio for the acts of Converium or its agent, Ms. Knapp.

Part [2] of Paragraph C actually brings us to the true heart of these proceedings and the real reason National Indemnity and Joseph Casaccio are being sanctioned: “National Indemnity refused to pay the \$900,000,” which even that is not a true statement.

National Indemnity was not the Defendants’ insurer, Converium was. National Indemnity did not write, or issue, or own any insurance policy which would have provided coverage for the acts alleged in the Curtiss Complaint. Regardless of whether or not the Stock Purchase Agreement had been approved by the appropriate regulatory authorities, at no time was National Indemnity expected to pay anything with regard to this case. Converium, a separate legal entity, was the insurer of the Defendants in this action and Converium had the duty to perform its duties to its insured. It also had the responsibility under the Stock Purchase Agreement, to seek the “consent” of National Indemnity to settle any matter in excess of \$500,000. But this latter responsibility could not alter or remove the duties to which Converium was subject under the relevant insurance statutes and regulations or which it undertook in the insurance policy it (and not National Indemnity or Joseph Casaccio) issued to its insured, Hartley Trucking; or which Converium (and not National Indemnity and Joseph Casaccio) owed to the claimants.

It is true that National Indemnity refused to give its consent to Converium under the Stock Purchase Agreement to settle the Curtiss case for \$900,000. However, this was a proper and lawful right for which National Indemnity contracted as part of the Stock Purchase Agreement. In return, the Stock Purchase Agreement required that National Indemnity not unreasonably withhold such consent. Even so, neither the conduct of National Indemnity in withholding consent, nor the Stock Purchase Agreement itself, altered the duties of Converium (an insurance provider operating in the State of West Virginia) or shifted those duties to National Indemnity.

As for fact [4], the allegation that, “as admitted by Mr. Casaccio, [National Indemnity] immediately used that amount [the \$900,000] as the figure from which to negotiate, thus attempting to get Plaintiffs to agree to a lesser amount. . . ,” Joseph Casaccio and John Ardent testified during the May 15, 2008, sanctions hearing that they were not told that the \$900,000 was anything other than one in a series of settlement demands made by Plaintiffs. *Transcript of Sanctions Hearing*, pg. 97 at lines 7-16; pg. 138 at lines 2-11. There is no reason or evidence to find otherwise.

The *Sanctions Order* further states that “National Indemnity instructed Converium to inform the Plaintiffs that it could not settle the case for \$900,000, despite the fact that Converium valued the case at \$900,000.” *Sanctions Order* at pg. 4, ¶12. Not only is this finding not supported by the evidence presented at the May 15 Sanctions Hearing, it is simply not true. Nevertheless, nothing in this alleged conduct violated any duty owed by National Indemnity and/or Joseph Casaccio to the Plaintiffs because National Indemnity and Joseph Casaccio had no duty to the Plaintiffs. The only duty of National Indemnity in this whole circumstance was not to

unreasonably withhold its consent under the Stock Purchase Agreement – a duty owed to Converium and no one else. If Converium believed that National Indemnity was unreasonably withholding its consent, if Converium believed that the Plaintiffs’ case was worth \$900,000, then as the insurer of the Defendants in the Curtiss matter, Converium had a duty to settle the case for that amount and seek its redress against National Indemnity under the Stock Purchase Agreement. On no legal basis can the Plaintiffs prosecute a claim against National Indemnity for the rights of Converium under the Stock Purchase Agreement, let alone against Joseph Casaccio.

Paragraph (d) of the enumerated sanctionable conduct contains two (2) sentences:

[1] Following the close of the November 10, 2006, mediation, Ms. Knapp, on behalf of Defendants, agreed that the Defendants would contact the mediator that day. [2] In fact, Defendants did not contact the mediator until approximately a week after they promised.

Sanctions Order pg. 11, ¶11D.

Again, Paragraph D is completely void of any act of National Indemnity and/or Joseph Casaccio. Ms. Knapp was not and cannot legally be interpreted to have been the agent of National Indemnity. To belabor this point any further should be unnecessary.

Paragraph (e) contains three (3) sentences:

[1] When Defendants contacted the mediator, they offered Plaintiffs \$350,000 to settle this case acting at the direction of National Indemnity. [2] This offer was made in bad faith. [3] Defendants had previously extended an offer of \$700,000 to settle the case and Ms. Knapp had agreed that a fair value to resolved the case would be \$900,000.

Sanctions Order pg. 11, ¶11E.

The only sanctionable ‘act’ even arguably attributable to National Indemnity as set forth in Paragraph E is the allegation that the \$350,000 offer was made at the direction of National

Indemnity. Neither National Indemnity nor Joseph Casaccio contacted the mediator, made the offer, and/or previously extended an offer to the Plaintiffs. Both Joseph Casaccio and John Ardent testified that they were not aware that the Plaintiffs had previously been offered \$700,000. *Transcript of Sanctions Hearing*, pg. 97 at lines 7-16.; pg. 138 at lines 2-11. John Ardent testified that had he known the Plaintiffs had been offered \$700,000, they would never have suggested that a \$350,000, settlement offer be made and that the suggestion was just that, a suggestion to Converium as to the value of the case. *Transcript of Sanctions Hearing*, pg. 87 at lines 8-13; pg. 99 at lines 2-15.

Paragraph (f) asserts that “[a]fter this Court ordered this case to be mediated a second time, National Indemnity again failed to appear for the mediation.” *Sanctions Order* pg. 11, ¶11F. This National Indemnity did do, or not do, as the case may be. However, as the *Sanctions Order* notes: “[o]n November 27, 2006, Mr. Casaccio did not appear. Instead, he notified the Court that he had planned to attend the mediation but due to a missed flight connection could not do so. Again, no representative of National Indemnity appeared at the mediation.” *Id.* at pg. 6, ¶18.

Setting aside for a moment that National Indemnity and/or Joseph Casaccio cannot be sanctioned for failing to comply with a non-existent and invalid court order or that it was National Indemnity which Plaintiffs assert had the duty to appear and not Mr. Casaccio or that this Court has asserted that its jurisdiction over National Indemnity and Mr. Casaccio arises from their appearance before the Court during the mediation (Mr. Casaccio in person and National Indemnity by its representative, Mr. Casaccio) *appearances which had not yet occurred*, the *Order* fails to recognize that Mr. Casaccio participated in the November 27, 2006, mediation by

telephone with the Court's approval *and* promptly appeared before the Court on November 28, 2006. Transcript of Sanctions Hearing, pg. 141 at lines 19-24; pg. 142 at lines 21-24; pg. 143 at line 1, 10-12. Assuming for the sake of argument that Rule 25.10 of the West Virginia Trial Court Rules even applies to Joseph Casaccio and/or National Indemnity, Plaintiffs failed to show that Mr. Casaccio's missed flight connection was intentional.

The Court should consider whether or not National Indemnity's absence from the November 27, 2006, mediation was intentional and not elevate form over substance in application of Rule 25.10. *See e.g., Smith v. Archer*, 812 N.E.2d 218 (2004) (Before sanctioning a party for technically violating an ADR rule, trial courts should examine not only whether a rule violation has occurred, but also whether the violation was intentional or in bad faith and whether it resulted in prejudice to the party moving for sanctions.)

Surely, an email not authored by but rather sent to National Indemnity and a missed flight connection cannot possibly provide the basis for Two Hundred and Twenty-Five Thousand Dollars (\$225,000) in sanctions and another One Hundred Fifteen Thousand, Two Hundred Eighty-Two Dollars and Ninety-Eight Cents (\$115,282.98) in attorney fees.

It is clear that National Indemnity is, in fact, being sanctioned for "failing to pay the \$900,000 settlement" and these proceedings are just an end-run-around the legislative prohibition against third-party bad faith claims.

E. The circuit court's sanction is too harsh; the punishment is not reasonably calculated to address the alleged misconduct.

There is no reported case from the West Virginia Supreme Court of Appeals which cites or discusses Rule 25.10 of the West Virginia Trial Court Rules. However, guidance is available

on the issue of sanctions in cases in our jurisdiction discussing Rule 11 and Rule 37 of the West Virginia Rules of Civil Procedure and, also, from cases outside of our jurisdiction which discuss sanctions in the context of mediation and/or alternative dispute resolution.

“Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure that it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party’s misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party’s misconduct.” Syl. Pt. 1, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

Syl. Pt. 2, *Mills v. Davis*, 211 W.Va. 569, 567 S.E.2d 285 (2002). Additionally, our West Virginia Supreme Court of Appeals has held that

“[i]n formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” Syl. pt. 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

Syl. Pt. 3, *Davis ex rel Davis v. Wallace*, 211 W.Va. 264, 565 S.E.2d 386 (2002).

The circuit court has awarded the Plaintiffs sanctions to be paid by Joseph Casaccio and National Indemnity:

- (1) Fifty Thousand Dollars (\$50,000) as the difference between their \$900,000 demand at the November 10, 2006, mediation and the Eight Hundred Fifty Thousand Dollars (\$850,000) the Plaintiffs ultimately accepted in settlement;

- (2) Twenty-Five Thousand Dollars (\$25,000) “as compensation for the [unspecified and unidentified] injuries caused by Joseph Casaccio and National Indemnity’s conduct”;
One Hundred Fifty thousand Dollars (\$150,000) in punitive damages with no meaningful discussion; and
- (3) Attorney fees of Forty Eight Thousand Eight Hundred Twenty One Dollars and Seventy Nine Cents (\$48,821.79).

The resulting award --Two Hundred Seventy-Three Thousand, Eight Hundred Twenty-One Dollars and Seventy-Nine Cents (\$273,821.79) – is unrelated to any breach of duty or damages suffered or exhibit of contempt for the circuit court.

The sanctions in this case are grossly disproportionate to any evaluation of the Plaintiffs’ tort case and represent an extreme punishment by the circuit court without any factual or legal justification.

F. The circuit court’s August 22, 2008, Order titled *Plaintiffs’ Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* was not a final appealable order, alternatively Joseph Casaccio and National Indemnity were not required to appeal the Order within four months of its entry.

In West Virginia, by definition, a “judgment” must necessarily be an appealable order. “‘Judgment’ as used in . . . [the West Virginia Rules of Civil Procedure] includes a decree and any order *from which an appeal lies.*” *W.Va.R.Civ.P.*, Rule 54(a). (emphasis added). The finality required for appeal “is a statutory mandate, not a rule of discretion.” *Province v. Province*, 196 W.Va. 473, 478, 473 S.E.2d 894, 899 (1996).

“ ‘Under W.Va. Code §58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been

determined.’ ” Syllabus, *Vaughn v. Greater Huntington Park and Recreation Dist*, 223 W.Va. 583, 678 S.E.2d 316 (2009), *quoting*, Syl. Pt. 3, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995).

A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

W.Va. Code §58-5-1 (1998).

“There are exceptions to the rule of finality, but they are rare and ‘fall within a specific class of interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure, or must fall within a jurisprudential exception.” *Vaughn* at 588, 678 S.E.2d 321, *quoting James M.B.* at 292-293, 456 S.E.2d 19-20.

When more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . ***only upon an express determination*** that there is no just reason for delay ***and upon an express direction for the entry of judgment***. *In the absence of such determination and direction, any order or other form of decision, however, designated, which adjudicates fewer than all of the claims . . . shall not terminate the action as to any of the claims.* . . . and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

W.Va.R.Civ.P., Rule 54(b)(emphasis added).

The circuit court’s *Plaintiffs’ Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions* entered August 22, 2008, was not a final appealable order and consequently was not a judgment order. This Order did not enter judgment against Joseph Casaccio and National Indemnity Company, did not resolve all of the issues in this matter, and did not settle the amount of the award to the Plaintiffs.

“The mere fact that an issue has been decided by the lower court, however, does not automatically render the issue appealable.” *State ex rel. Clark v. Blue Cross Blue Shield of W. Virginia, Inc.*, 203 W. Va. 690, 699, 510 S.E.2d 764, 773 (1998). The August 22, 2008 Order left unsettled the issue of attorneys’ fees.

Counsel for the Plaintiffs are directed to submit to the Defendants’ counsel an affidavit setting forth the total amount of their fees and hours expended as set forth in the previous paragraph. The Affidavit should be submitted within five days of the date of entry of this Order. Defendants’ counsel shall have 10 days to object to any aspect of these fees, should Defendants conclude such an objection is appropriate.

Sanctions Order entered August 22, 2008, ¶5, pgs. 12-13.

“ ‘[A]n order ... adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own.’ ” *C & O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W.Va. 469, 474, 677 S.E.2d 905, 910 (2009), quoting, *Franklin v. District of Columbia*, 163 F.3d 625, 629 (D.C.Cir.1998). An order adjudging liability, but not setting damages would be appealable only where “the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains.” *C & O Motors, Inc.* at 475, 677 S.E.2d 911. By rule and by statute, such an order should contain language stating that “there is no just reason for delay” and an “express direction for the entry of judgment.” *W.Va. Code* §58-5-1 (1998); *W.Va.R.Civ.P.*, Rule 54(b).

However, even in the absence of the Rule 54(b) language that “there is no just reason for delay” and an “express direction for the entry of judgment,” an appeal may still be taken if the trial court’s ruling is a final order in its nature and effect. *Durm v. Heck’s Inc.*, 184 W.Va. 562,

401 S.E.2d 908 (1991)(Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that “no just reason for delay” exists and “directi[ng] ... entry of judgment” will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect.); *Turner ex rel. Turner v. Turner*, 223 W. Va. 106, 112, 672 S.E.2d 242, 248 (2008). “The key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect.” *State ex rel. Consolidation Coal Co. v. Clawges*, 206 W.Va. 222, 523 S.E.2d 282 (1999).

In this instance, not only was the August 22, 2008, Order not final because of the absence of the Rule 54(b), language regarding no just reason for delay, and the absence of an express direction for the entry of judgment, the Order was not final in its nature and effect because of the outstanding issue of attorney fees and expenses.

Likewise, the February 22, 2010, *Order Regarding Attorney Fees and Expenses* was not a final appealable order. Following a recitation of the materials reviewed and considered by the Court, the February 22, 2010, Order states only that “this Court concludes and finds that the Plaintiffs are entitled to an award of attorney fees and expenses as additional sanctions in this matter in the sum of \$48,821.79.” *Order Regarding Attorney Fees and Expenses*. The February 22, 2010 Order did not, in fact, award Plaintiffs any attorney fees. The Order simply “found and concluded” Plaintiffs were entitled to receive attorneys fees.

“A finding of fact and the conclusions of the court thereon do not render a decree appealable, even though the intention of the court to render a certain judgment is clearly apparent therefrom. The judgment of the court must be actually entered.” Syllabus, *Coltrane v. Gill*, 99 W. Va. 447, 129 S.E. 469 (1925); *See also, De Armit v. Town of Whitmer*, 63 W. Va. 300, 60 S.E. 136, 137 (1908), *quoting*, 1 Black on Judgments, § 31, and authorities there cited. (“A judgment which merely awards costs to the defendant, without more, is not a final judgment. In order to have that character, it must profess to terminate and completely dispose of the action.”)

In West Virginia, there is a distinction between the rendition of a judgment and its entry. *See e.g., McClain v. Davis*, 37 W.Va. 330, 16 S.E. 629 (1892). No judgment has been entered against Joseph Casaccio and National Indemnity Company with regard to these matters.

The West Virginia Supreme Court of Appeals has held on multiple occasions that an appeal may be had from an order which is not technically final because of the absence of Rule 54(b), language if the “Court can determine from the order that the trial court’s ruling approximates a final order in its nature and effect.” *Durm* at 567, 401 S.E.2d 913; *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 185 W.Va. 33, 404 S.E.2d 425 (1991). “However, simply because an order *may* be appealed pursuant to *Durm* does not require that it *must* be appealed prior to the final order in the case.” *Dodd v. Potomac Riverside Farm, Inc.*, 222 W.Va. 299, 306, 664 S.E.2d 184, 191 (2008), *citing, Hubbard v. state Farm Indem. Co.*, 213 W.Va. 542, 550, 584 S.E.2d 176, 184 (2003) (emphasis in original). The “entry of a *Durm*-type order, while allowing an aggrieved party to take an immediate appeal, does not require that such an appeal be taken at that time, and an aggrieved party may take an appeal at any time until the

final appeal time in the case expires.” *Eblin v. Coldwell Banker Residential Affiliates, Inc.*, 193 W.Va. 215, 221, 455 S.E.2d 774, 780 (1995).

The August 22, 2008, and February 22, 2010, Orders of this Court were not final appealable orders; however, even if Joseph Casaccio and National Indemnity Company could appeal those orders under a *Durm* analysis, they were not required to appeal either because the case was not yet over.

G. The abstracts of judgment were erroneously issued by the Circuit Clerk of Kanawha County and should be removed from the court records and the records of the County Clerk.

Not having been final orders, the August 22, 2008, and February 22, 2010, documents cannot be judgments. The issuing of an abstract of judgment as to either by the Clerk was improper.

A judgment is the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding. A written order or decree indorsed by the judgment is only evidence of what the court has decided. The entry or recordation of such an instrument in an order book is the ministerial act of the clerk and does not constitute an integral part of the judgment.

11A Michie’s Jurisprudence, *Judgment and Decrees*, §35, at 108 (Repl. Vol. 2007). In West Virginia, docketing of the judgment is not necessary to the validity of a judgment lien, but is only necessary for the lien to take priority and be valid against a purchaser of real estate for valuable consideration who does not have notice. *See W.Va. Code* §38-3-7.

Furthermore, “[a] mere abstract, not being a copy, of a judgment, does not provide the existence of the judgment, if controverted.” Syl. Pt. 2, *Thompson & Lively v. Mann*, 53 W.Va. 432, 44 S.E. 246 (1903); *accord*, *Stewart v. Senter*, 88 W.Va. 124, 106 S.E. 443 (1921).

Obviously, the docketing of a supposed judgment and the issuing of abstracts by the Clerk cannot

turn a court order into a judgment. The recordation of judgments in this matter was a ministerial or clerical error.

All courts have the inherent power to correct a formal defect in the entry of a judgment. *See e.g., Haller v. Digman*, 113 W.Va. 240, 167 S.E.593, 594 (1933)(“The rule that a court has the inherent power, under proper circumstances, to correct a formal defect in the entry of a judgment, applies to a justice’s court.”) “In whatever respect the clerk may have erred in entering judgment, the court may, on proper evidence, nullify the error by making the judgment entry fully and correctly express the judgment rendered.” 11A Michie’s Jurisprudence, *Judgment and Decrees*, §36, at 109-110 (Repl. Vol. 2007), *citing, Davis v. Trump*, 43 W.Va. 191, 27 S.E. 397 (1897). “The clerical mistakes which may be corrected under the court’s inherent power encompass errors made by other officers of the court, including attorneys.” *Id.*

By its inherent power this Court has the authority to correct the errors which occurred by the issuing of abstracts of judgment on the two aforementioned order and entry in the judgment book. In the interests of justice this Court should exercise such inherent power in this case.

H. Because Joseph Casaccio and National Indemnity Company did not have notice of the February 22, 2010, until July 2, 2010, the Order would not have been effective against them without notice.

Even assuming solely for the sake of argument that the February 22, 2010, Order was a judgment, Joseph Casaccio and National Indemnity Company did not have notice of the Order until July 2, 2010; the Order would therefore not be valid against them at the earliest until such time as they had notice of the same. *See e.g., McClain v. Davis*, 37 W.Va. 330, 16 S.E. 629, 630 (1892) (“[T]his entry of a judgment [was]. . . done without any notice whatever to the defendant in the court below. It is a well-established rule that, if they regarded the omission of the entry as

a mere clerical error, they could only correct such error upon reasonable notice to the other party.”)

However, in this instance on July 6, 2010, the circuit court vacated and re-entered the February 22, 2010, Order awarding attorney fees. The appeal time would have therefore ran four (4) months after the re-entry of the Order, or November 6, 2010.⁶ This latest Order of the circuit court, drafted by Plaintiffs’ counsel which attempts to shorten the appeal period by four (4) days to November 2, 2010, is not and cannot be effective as to Joseph Casaccio and National Indemnity. Although signed and entered by the circuit court judge on October 29, 2010, the Order was mysteriously not even mailed to counsel for Joseph Casaccio and National Indemnity until November 3, 2010, one day after the purported appeal time set forth in the Order would have ran.

‘In *Myers v. Myers*, 128 W.Va. 160, 35 S.E.2d 847 (1945), this Court held that “[t]he entry of an order ... in the absence of ‘reasonable notice ...’ is reversible error.”’ *Beane v. Daily*, -- W.Va. --, -- S.E.2d --, 2010 WL 1260157 (W.Va. 2010). Although the *Beane* Court was addressing a default judgment, the underlying fundamental legal principals and the important of notice to the protection of those rights are the same. *Myers* dealt with an order awarding costs during the pendency of an action of which the defendant did not receive proper notice. The *Myers* court held that “[t]he entry of an order making an allowance of suit money and counsel fees in the absence of ‘reasonable notice to a man’ is reversible error.” Syl. Pt. 2, *Myers, supra*.

Joseph Casaccio and National Indemnity did not have notice of the February 22, 2008,

⁶ November 6, 2010, is a Saturday. In accordance with Rule 6 of the West Virginia Rules of Civil Procedure the Petition for Appeal would be due the following business day, Monday, November 8, 2010.

Order until July 2, 2010. That Order was ultimately vacated and re-entered as of July 6, 2010, starting any four month appeal period from that time. Thereafter, Joseph Casaccio and National Indemnity did not receive notice that the circuit court was attempting to move the commencement and therefore the conclusion of the appeal period until after it had expired.

An entry “nunc pro tunc” is an entry made now of something which was previously done, to have effect as of the former date, and the function of such entry is to make the record speak the truth, and to supply something which actually occurred but has been omitted from the record through inadvertence or mistake, and it is not the function of such entry by a fiction to antedate the actual performance of an act which never occurred, or to supply an entire omission to act within the time limit of such action, or to make the record show that which never existed.

Bloyd v. Scroggins, 123 W. Va. 241, 15 S.E.2d 600, 600 (1941). “An order nunc pro tunc can only be entered where the intent to enter an order in the first instance is shown by some entry or memorandum on the records or quasi records of the court.” *Monongahela Ry. Co. v. Wilson*, 122 W. Va. 467, 10 S.E.2d 795, 795 (1940). “An order may not be entered nunc pro tunc if the rights of any party will thereby be adversely affected.” Syllabus, *Baker v. Gaskins*, 125 W. Va. 326, 24 S.E.2d 277, 277 (1943) (“A judgment, which, by order entering it, is shown to have been rendered on date stated therein, cannot, by subsequent provision of the order, be made to take effect as of an earlier date on the recited ground that such order was inadvertently omitted from entry on the earlier date.”)

It is outrageous for Joseph Casaccio and National Indemnity to even have to argue the invalidity of an act where the circuit court entered an Order which at the time entered gave them two business days to file an appeal, but then of which they were not given notice until two days after the time for appeal had expired. Statutes and case citations should be unnecessary when

arguing for equitable relief from such a situation and ineffective when arguing against it.

Joseph Casaccio and National Indemnity should not be bound by an Order of which they did not receive timely notice.

I. The circuit court erred in ruling that it had previously entered a final appealable Order.

A circuit court cannot make an otherwise interlocutory order appealable with the addition of Rule 54(b) language, if the Order does not dispose of the issues between the parties and is not otherwise a final order in its nature and purpose. *See e.g., C & O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W.Va. 469, 677 S.E.2d 905 (2009). It therefore stands to reason that while the *Order Clarifying this Court's Prior Orders and Denying Mr. Casaccio and National Indemnity's Objections* may be a final appealable order in and of itself, the August 22, 2008, and February 22, 2010, Orders addressed therein were not. Neither of the two order contained Rule 54(b) language, or otherwise expressed an intent to dispose of all issues between the parties. The later ruling of the circuit court cannot, now, amend that fact.

IV. CONCLUSION

The circuit court of Kanawha County lacks *in personam* jurisdiction over Joseph Casaccio, and is not authorized by any rule or statute to issue sanctions against Joseph Casaccio under the facts of these proceedings. Neither Joseph Casaccio, nor National Indemnity are subject to sanctions under Rule 25.10 of the West Virginia Trial Court Rules as they are not insurance carriers for a party to the Curtiss Civil Action who received "reasonable notice" of a court ordered mediation. Furthermore, the circuit court of Kanawha County does not have a legal basis under its inherent authority or contempt power to sanction Joseph Casaccio or National Indemnity.

The failure of the Kanawha County Circuit Clerk to both deliver notice or deliver timely notice to Joseph Casaccio and National Indemnity in this case makes said Orders ineffective against them. The circuit court cannot retroactively enter an Order which shortens the appeal period and adversely affects Joseph Casaccio and National Indemnities right of appeal, especially when through circumstances not of Joseph Casaccio and/or National Indemnities control, they do not receive notice of the Order until after the modified appeal period has run.

This case screams for the intervention of the West Virginia Supreme Court of Appeals. Joseph Casaccio and National Indemnity have been denied reasonable notice and the benefit of the federal and state constitutions at every turn in this case. They have incurred substantial legal expenses defending themselves from a sanctions proceeding which should never have been brought and sanctioned Two Hundred Seventy-Three Thousand Eight Hundred Twenty-One Dollars and Seventy-Nine Cents (\$273,821.79) For the reasons more fully set forth in the above arguments, the circuit court's substantial monetary sanction of Joseph Casaccio and/or National Indemnity should be prohibited by this Court.

WHEREFORE, Joseph Casaccio and National Indemnity Company, by counsel respectfully petition this Court for an Order:

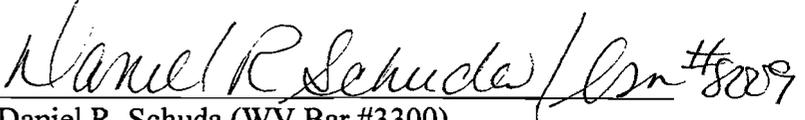
- 1) Overturning the circuit court's August 22, 2008, *Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Order Awarding Sanctions*;
- 2) Overturning the circuit court's February 22, 2010, *Order Regarding Attorney Fees and Expenses*, which was vacated and re-entered as of July 6, 2010;
- 3) Finding that the circuit court does not have *in personam* jurisdiction over Joseph Casaccio;
- 4) Finding that the circuit court may not sanction National Indemnity and/or Joseph Casaccio in the absence of a valid court order of which they were in contempt

and/or in the absence of any contemptuous conduct in the direct presence of the circuit court;

- 5) Finding that the circuit court has exceeded its inherent authority in sanctioning Joseph Casaccio and National Indemnity;
- 6) Finding void and holding for naught the abstracts of judgment issued by the Circuit Clerk of Kanawha County on the August 22, 2008, and February 22, 2010, Orders in this case and directing her to remove them from her records;
- 7) Directing the County Clerk of Kanawha County to remove from her records the abstracts of judgment or other execution papers as void;
- 8) Dismissing the matter of *Curtiss v. Hartley*, Civil Action No. 05-C-1118 from the docket of the Circuit Court of Kanawha County and directing the Circuit Court to cease and desist in any continued efforts to sanction Joseph Casaccio and National Indemnity; and
- 9) Granting such other and further relief as this Court deems appropriate under the circumstances.

Date: 11-3-10

JOSEPH CASACCIO and
NATIONAL INDEMNITY COMPANY,
By counsel.


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPH CASACCIO and
NATIONAL INDEMNITY COMPANY,

Petitioners Non-Parties Below,

v.

Docket No. _____

HAROLD A CURTISS, Executor of
the Estate of Norma Lee Curtiss,
Deceased, HAROLD A. CURTISS,
Administrator of the Estate of
MARY LYNN CURTISS, Deceased;
and HAROLD A. CURTISS, Executor
of the Estate of Charles E. Curtiss,
Deceased,

Respondents/ Plaintiffs Below,

v.

CIVIL ACTION NO. 05-C-1118
Circuit Court of Kanawha County

HARTLEY TRUCKING CO., INC.;
JOHN R. TANNER, and MARTHA
A. HOY,

Defendants Below.

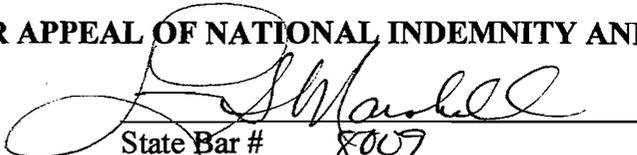
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November, 2010, I sent by U. S. Mail,
postage prepaid, to:

Robert B. Allen (WVSB #110)
Philip J. Combs (WVSB #6056)
Pamela C. Deem (WVSB #976)
ALLEN GUTHRIE & THOMAS, PLLC
P.O. Box 3394
Charleston, WV 25333-3394
Counsel for Respondents

George N. Stewart (WVSB #5628)
ZIMMER KUNZ, PLLC
132 South Main Street, Suite 400
Greensburg, PA 15601
*Counsel for Hartley Trucking Co., Inc., John Tanner,
and Martha A. Hoy*

a copy of the foregoing, "PETITION FOR APPEAL OF NATIONAL INDEMNITY AND
JOSEPH CASACCIO."


State Bar # 8007
Schuda & Associates, *pllc*
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