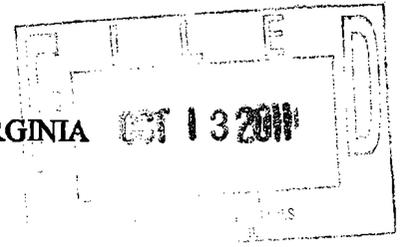


No. 11-1404



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. COAL AGE,  
INC. d/b/a CAI INDUSTRIES, THE BAUGHAN  
GROUP, INC., and GAULEY ROBERTSON, INC.

Petitioners/Defendants Below,

v.

THE HONORABLE WARREN R. MCGRAW,  
Judge of the 27<sup>th</sup> Judicial Circuit, and  
Jason D. O'Neal, et al.,

Respondents/Plaintiffs Below.

---

**PETITION FOR WRIT OF PROHIBITION**  
FROM THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA  
Civil Action No. 10-C-20

---

Submitted by:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. COAL AGE,  
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**PETITION FOR WRIT OF PROHIBITION**  
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NOW COMES the Petitioners, Coal Age Incorporated, D/B/A CAI Industries, The Baughan Group Inc. and Gauley Robertson, Inc. (collectively referred to as "CAI"), by and through counsel, Cy A. Hill, Jr., Andrew D. Byrd and the law firm of Mannion & Gray Co., L.P.A., and Johnnie E. Brown and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, pursuant to the provisions of West Virginia Code § 56-1-1, *et seq.* and Rule 16 of the Revised Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, and respectfully request that this Honorable Court issue an order directing Respondents to show cause why a writ of prohibition should not issue barring the Honorable Warren R. McGraw, Judge of the Circuit Court of Wyoming County and the Plaintiffs below from leave to amend their complaint to add individual defendant, Roger Baughan. CAI hereby petitions this Honorable Court to issue a writ of prohibition (1) staying the proceedings in the Circuit Court until presentation and resolution of this petition for writ of prohibition; (2) vacating the Circuit

Court's Order entered September 13, 2011; (3) directing the Circuit Court of Wyoming County to deny Plaintiffs' Motion for Leave to File Second Amended Complaint In Order to Add an Additional Defendant; and (4) directing the Circuit Court of Wyoming County to dismiss Roger Baughan from the underlying civil action. In support hereof, the Petitioners state and aver as follows:

1. This action arises from an unfortunate incident in an underground coal mine that occurred on June 20, 2009. Plaintiffs filed their original Complaint in this matter on February 11, 2010. This matter was then removed to the United States District Court for the Southern District of West Virginia on or about April 5, 2010.

2. On May 27, 2010, United States District Judge Irene C. Berger entered a Scheduling Order in the matter. As part of the Scheduling Order, Judge Berger mandated that the "joinder of any party shall be completed no later than July 12, 2010." Plaintiffs did not add any additional individual defendants at that time.

3. On October 4, 2010, the District Court entered a Memorandum Opinion and remanded the matter back to the Circuit Court of Wyoming County, West Virginia. On that same day, Plaintiffs' filed their First Amended Complaint in Federal Court, which was filed subsequent to the Remand Order issued by Judge Berger. Plaintiffs added Defendant Robertson, Inc. (d/b/a Gauley-Robertson) in their First Amended Complaint. However, Plaintiffs did not add any additional individual defendants at that time.

4. Due to the fact that this case was remanded back to the Circuit Court of Wyoming County, West Virginia, the Honorable Judge McGraw entered a new Scheduling Order on January 21, 2011. As set forth in the Scheduling Order, the Honorable Judge McGraw set trial in

the matter for Monday, September 26, 2011 and Pre-Trial for Friday, August 5, 2011. The Pre-Trial was later continued until Wednesday, September 7, 2011.

5. On September 1, 2011, Plaintiffs' served counsel for the Petitioners with their Motion for Leave to File Second Amended Complaint in Order to Add an Additional Defendant. In their motion, Plaintiffs aver that the purpose of said motion was to add additional individual defendant, Roger Baughan, to this civil action, based upon information learned by the Plaintiffs during the course of discovery. Plaintiffs stated that during discovery, it was disclosed in sworn testimony that Roger Baughan personally supervised all day-to-day activities of the Defendants CAI Industries and The Baughan Group companies. Plaintiffs relied upon the Affidavit of Roger Baughan notarized on May 12, 2010 to support their Motion for Leave which was filed nearly sixteen (16) months after the Baughan affidavit was produced.

6. Plaintiffs' referenced Mr. Baughan's May 12, 2010 affidavit in support of their contention that Mr. Baughan was individually liable for negligently supervising said companies in the design and manufacture of the allegedly defective shuttle car in the matter. Plaintiffs cited to Rule 15 of the West Virginia Rules of Civil Procedure stating that "leave to file an amended complaint 'shall be freely given' by the Court 'when just so requires.'" However, as these Petitioners argued in their Motion in Opposition to Plaintiffs' Motion for Leave, the Plaintiffs failed to recognize the dilatoriness of their amendment, which Rule 15 and this Honorable Court do not permit.

7. Importantly, evidence of Plaintiffs' dilatoriness was set forth in Plaintiffs counsel's July 12, 2011 correspondence to counsel for Petitioners. In said correspondence, Plaintiffs' counsel admitted that they have known about the affidavit of Mr. Baughan since May 14, 2010.

8. On September 7, 2011, the parties appeared before the Circuit Court of Wyoming County in front of the Honorable Judge Warren R. McGraw and presented oral arguments regarding Plaintiffs' Motion for Leave to File a Second Amended Complaint in Order to Add an Additional Defendant and Petitioners' Motion in Opposition.

9. Subsequently, on September 13, 2011, the Circuit Court entered an Order granting Plaintiffs' Motion for Leave and the same was filed with the circuit clerk on September 26, 2011.

10. The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay. Syl. Pt. 3, State ex rel. Vedder v. Zakaib, 618 S.E.2d 537, 539 (W.Va. 2005).

11. Petitioners contend that Plaintiffs have known about the affidavit of Roger Baughan since May 14, 2010. Plaintiffs did not join Mr. Baughan as an additional party before the July 12, 2010 deadline mandated by District Judge Irene Berger. Moreover, Plaintiffs did not seek leave to add Mr. Baughan as an additional party as part of their First Amended Complaint, which was filed on October, 4, 2010. Yet Plaintiffs, by their own counsel's admissions, knew about Mr. Baughan's affidavit since May 14, 2010. Plaintiffs sought leave to file a Second Amended Complaint to add Roger Baughan as an additional party approximately 25 days before the original trial date and nearly a year and four (4) months after having knowledge that he was a potential defendant. The dilatory nature of such filing is inexcusable and constitutes a lack of diligence on the part of the Plaintiffs.

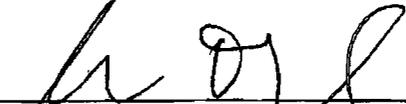
12. West Virginia Code § 53-1-1 provides that a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such venue, exceeds its legitimate powers.”

13. Petitioners submit that the Circuit Court of Wyoming County abused its discretion in granting Plaintiffs’ Motion for Leave to a file a second amended complaint in order to add Roger Baughan as an individual defendant in the underlying matter.

14. Accordingly, Petitioners submit that a writ of prohibition should issue against the Circuit Court of Wyoming County vacating the Circuit Court’s September 13, 2011 order, and directing the Circuit Court to dismiss Roger Baughan from the civil action forthwith as Roger Baughan was personally served on October 8, 2011.

**WHEREFORE**, based upon the foregoing arguments, legal support, and matters set forth in the *Memorandum of Law in Support of Petition for Writ of Prohibition*, the Petitioners respectfully request that this Honorable Court issue a rule directing the Respondents named herein to stay any further proceedings below, to appear and show cause why a writ of prohibition should not issue to prevent the Circuit Court from permitting the Plaintiffs leave to amend its complaint to add Roger Baughan as an individual defendant, and directing the Circuit Court to dismiss Roger Baughan as an individual defendant.

Respectfully submitted,

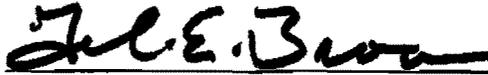


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No. \_\_\_\_\_

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. COAL AGE,  
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Judge of the 27<sup>th</sup> Judicial Circuit, and  
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Respondents/Plaintiffs Below.

**CERTIFICATE OF SERVICE**

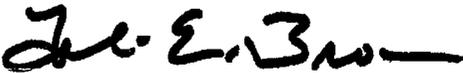
The undersigned counsel for the Petitioners, Coal Age Incorporated, D/B/A CAI Industries, The Baughan Group Inc. and Gauley Robertson, Inc., does hereby certify that the foregoing "*Petition for Writ of Prohibition*" was served upon the following counsel of record by mailing a true copy thereof via United States mail:

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The Honorable Warren R. McGraw  
Wyoming County Courthouse  
Main & Bank Streets  
P.O. Box 581  
Pineville, WV 24874  
*Circuit Court Judge*

This 13<sup>th</sup> day of October, 2011.

  
\_\_\_\_\_  
Cy A. Hill, Jr. (WV Bar #8816)  
Andrew D. Byrd (WV Bar #11068)

  
\_\_\_\_\_  
Johnnie E. Brown (WV Bar #4620)

No. \_\_\_\_\_

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**MEMORANDUM OF LAW IN SUPPORT OF COAL AGE INC. d/b/a CAI INDUSTRIES,  
THE BAUGHAN GROUP, INC. AND GAULEY ROBERTSON, INC.'s  
PETITION FOR WRIT OF PROHIBITION  
FROM THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA  
Civil Action No. 10-C-20**

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Submitted by:

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NOW COMES the Petitioners, Coal Age Incorporated, D/B/A CAI Industries, The Baughan Group Inc. and Gauley Robertson, Inc. (collectively referred to as "CAI"), by and through counsel, Cy A. Hill, Jr., Andrew D. Byrd and the law firm of Mannion & Gray Co., L.P.A., and Johnnie E. Brown and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and respectfully submit this *Memorandum of Law in Support of CAI's Petition for Writ of Prohibition*. In support of its petition for writ of prohibition, CAI states as follows:

**I. QUESTION PRESENTED**

Whether the Circuit Court of Wyoming County abused its discretion in granting Plaintiffs' Motion for Leave to File a Second Amended Complaint in Order to Add an Additional Defendant a year and four months after the Plaintiffs had knowledge of the potential claim against the additional defendant?

## II. STATEMENT OF THE CASE

This action arises from an unfortunate incident in an underground coal mine that occurred on June 20, 2009. Plaintiffs filed their original Complaint in this matter on February 11, 2010. (See Appendix "Exhibit 1"). This matter was then removed to the United States District Court for the Southern District of West Virginia on or about April 5, 2010. (See Appendix "Exhibit 2"). On May 27, 2010, United States District Judge Irene C. Berger entered a Scheduling Order in the matter. As part of the Scheduling Order, Judge Berger mandated that the "joinder of any party shall be completed no later than July 12, 2010." (See Appendix "Exhibit 3"). Plaintiffs did not add any additional individual defendants at this time.

On October 4, 2010, the District Court entered a Memorandum Opinion and remanded the matter back to the Circuit Court of Wyoming County, West Virginia. (See Appendix "Exhibit 4"). On that same day, Plaintiffs' filed their First Amended Complaint in Federal Court, which was filed subsequent to the Remand Order issued by Judge Berger. Plaintiffs added Defendant Robertson, Inc. (d/b/a Gauley-Robertson) in their First Amended Complaint. However, Plaintiffs did not add any additional individual defendants at that time. (See Appendix "Exhibit 5").

Due to the fact that this case was remanded back to the Circuit Court of Wyoming County, West Virginia, Respondent, the Honorable Judge McGraw entered a new Scheduling Order on January 21, 2011. (See Appendix "Exhibit 6"). As set forth in the Scheduling Order, the Honorable Judge McGraw set trial in the matter for Monday, September 26, 2011 and Pre-Trial for Friday, August 5, 2011. The Pre-Trial was later continued until Wednesday, September 7, 2011.

On September 1, 2011, Plaintiffs' served counsel for the Petitioners with their Motion for Leave to File Second Amended Complaint in Order to Add an Additional Defendant. (See Appendix "Exhibit 7"). In their motion, Plaintiffs aver that the purpose of said motion was to add additional individual defendant, Roger Baughan, to this civil action, based upon information learned by the Plaintiffs during the course of discovery. Id. at ¶ 1. Plaintiffs stated that during discovery, it was disclosed in sworn testimony that Roger Baughan personally supervised all day-to-day activities of the Defendants CAI Industries and The Baughan Group companies. Plaintiffs referenced the Affidavit of Roger Baughan notarized on May 12, 2010. Id. at ¶ 2.

Plaintiffs' referenced Mr. Baughan's May 12, 2010 affidavit in support of their contention that Mr. Baughan was individually liable for negligently supervising said companies in the design and manufacture of the allegedly defective shuttle car in the matter. Id. at ¶ 2. Plaintiffs cited to Rule 15 of the West Virginia Rules of Civil Procedure stating that "leave to file an amended complaint 'shall be freely given' by the Court 'when just so requires.'" Id. at ¶ 3. However, as these Petitioners argued in their Motion in Opposition to Plaintiffs' Motion for Leave (See Appendix "Exhibit 8"), the Plaintiffs failed to recognize the dilatoriness of their amendment, which Rule 15 and this Honorable Court do not permit.

Importantly, evidence of Plaintiffs' dilatoriness was set forth in Plaintiffs counsel's July 12, 2011 correspondence to counsel for Petitioners. In said correspondence, Plaintiffs' counsel admitted that they have known about the affidavit of Mr. Baughan since May 14, 2010:

[...]Furthermore, as you may be aware, after this case was filed, we discovered (pursuant to an affidavit filed by your clients on May 14, 2010) that Roger Baughan himself "*personally* direct[s], control[s], and coordinate[s]" and the "daily business activities" of CAI.[...]"

(See Appendix "Exhibit 9").

On September 7, 2011, the parties appeared before the Circuit Court of Wyoming County in front of the Honorable Judge Warren R. McGraw and presented oral arguments regarding Plaintiffs' Motion for Leave to File a Second Amended Complaint in Order to Add an Additional Defendant and Petitioners' Motion in Opposition. At said hearing, Plaintiffs' Motion for Leave was granted<sup>1</sup> and the trial in the matter was continued, but no new scheduling order was entered. Subsequently, on September 13, 2011, the Circuit Court entered an Order granting Plaintiffs' Motion for Leave and the same was filed with the circuit clerk on September 26, 2011. (See Appendix "Exhibit 10"). Roger Baughan was personally served on October 8, 2011.

Petitioners contend that Plaintiffs have known about the affidavit of Roger Baughan since May 14, 2010. Plaintiffs did not join Mr. Baughan as an additional party before the July 12, 2010 deadline mandated by District Judge Irene Berger. Moreover, Plaintiffs did not seek leave to add Mr. Baughan as an additional party as part of their First Amended Complaint, which was filed on October, 4, 2010. Yet Plaintiffs, by their own counsel's admissions, knew about Mr. Baughan's affidavit since May 14, 2010. Plaintiffs sought leave to file a Second Amended Complaint to add Roger Baughan as an additional party approximately 25 days before the original trial date and nearly a year and four (4) months after having knowledge that he was a potential defendant. The dilatory nature of such filing is inexcusable and constitutes a lack of diligence on the part of the Plaintiffs.<sup>2</sup> Accordingly, Petitioners submit that the Circuit Court of Wyoming County abused its discretion in granting Plaintiffs' Motion for Leave to file a second amended complaint in order to add Roger Baughan as an individual defendant in the underlying matter.

---

<sup>1</sup> These Petitioners would like to point out that the Circuit Court of Wyoming County recognized the validity of the Motion in Opposition to Plaintiffs' Motion for Leave filed by the Petitioners, but neglected to rule consistently with the arguments set forth therein. The Circuit Court further recognized the potential for error in its ruling. (See Appendix "Exhibit 11" pgs. 151-152).

<sup>2</sup> Petitioners maintain that Roger Baughan's joinder is improper under this Honorable Court's criteria for piercing the corporate veil set forth in Lava v. Erin Homes, Inc., 352 S.E.2d 92 (W.Va. 1986). Mr. Baughan is an officer, director and shareholder of the corporation who's involvement is to direct the company's strategic plans and operations. Mr. Baughan is a non-engineer and had no role in the design and production of the shuttle car at issue.

### **III. SUMMARY OF ARGUMENT**

Petitioners contend that the Circuit Court of Wyoming County abused its discretion in granting Plaintiffs' Motion for Leave to a file a second amended complaint to add Roger Baughan as an individual defendant in the underlying matter. In their Motion for Leave, Plaintiffs' referenced Mr. Baughan's May 12, 2010 affidavit in support of their contention that Mr. Baughan was individually liable for negligently supervising said companies in the design and manufacture of the allegedly defective shuttle car in the matter. However, Plaintiffs have known about the affidavit of Roger Baughan since May 14, 2010.

Plaintiffs did not join Mr. Baughan as an additional party before the July 12, 2010 deadline mandated by District Judge Irene Berger, when the case was in Federal Court. Moreover, Plaintiffs did not seek leave to add Mr. Baughan as an additional party as part of their First Amended Complaint, which was filed on October, 4, 2010. Yet Plaintiffs, by their own counsel's admissions, knew about Mr. Baughan's affidavit since May 14, 2010. Plaintiffs sought leave to file a Second Amended Complaint to add Roger Baughan as an additional party approximately 25 days before the original trial date and nearly a year and four (4) months after having knowledge that he was a potential defendant. The dilatory nature of such filing is inexcusable and constitutes a lack of diligence on the part of the Plaintiffs.

### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, these Petitioners submit that oral argument is unnecessary as the record below is clear, the question presented has been authoritatively decided by this Honorable Court, and the facts and legal arguments on behalf of the Petitioners have been adequately presented in this Petition for Writ of Prohibition and the record below. Petitioners are of the belief that the decisional process by this Honorable

Court would not be significantly aided by oral argument, but leaves this within the discretion of this Honorable Court pursuant to Rules 19 and 20 of the Revised Rules of Appellate Procedure.

## V. ARGUMENT

### Standard of Review

According to W.Va. Code § 53-1-1, a writ of prohibition “shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” “When a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies.” State ex rel. Farber v. Mazzone, 584 S.E.2d 517, 521 (W.Va. 2003)(citing Syl. Pt. 10, Jennings v. McDougle, 98 S.E. 162 (W.Va. 1919)).

This Honorable Court has observed that a trial court is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W.Va.R.Civ.P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syl. Pt. 2, State ex rel. Vedder v. Zakaib, 618 S.E.2d 537, 539 (W.Va. 2005).

This Honorable Court has also observed that the liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time.

Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay. Syl. Pt. 3, State ex rel. Vedder v. Zakaib, 618 S.E.2d 537, 539 (W.Va. 2005). Thus, it is apparent in this case that the Circuit Court abused its powers in granting the Plaintiffs' Motion for Leave to File a Second Amended Complaint in Order to Add an Additional Defendant.

**The Circuit Court of Wyoming County Erred in Granting the Plaintiffs' Motion for Leave to File a Second Amended Complaint in Order to Add an Additional Defendant as the Plaintiffs Were Dilatory in Filing Their Motion for Leave.**

In light of the Affidavit of Roger Baughan signed on May 14, 2010, the Plaintiffs claim that Roger Baughan could be a potential defendant in this matter. Nevertheless, Plaintiffs did not file their motion for leave to add Mr. Baughan as an additional defendant until September 1, 2011 with no explanation for the dilatory delay. However, the Circuit Court of Wyoming County found that the Plaintiff's Motion for Leave was proper, and thus granted the same. To this end, this Honorable Court has addressed this very issue under Rule 15 of the West Virginia Rules of Civil Procedure.

In Zakaib supra, Ms. Vedder was driving her husband's vehicle when she was involved in a single-car roll-over automobile crash in March of 2001. 618 S.E.2d 537, 539 (W.Va. 2005). Ms. Vedder and her husband notified their automobile insurer, Nationwide Mutual Insurance Company, of the accident and filed an uninsured motorist claim. In April of 2001, Ms. Vedder retained legal counsel who requested that Nationwide store the vehicle until such time that an expert can examine the vehicle. Nationwide responded to Ms. Vedder's counsel and indicated that no claim had yet been opened with regards to his client's accident. However, a claim had already been set up and payments had been made on behalf of Ms. Vedder. Further, an

employee of Nationwide had determined that Ms. Vedder's car was totaled and sold the vehicle to a salvage yard in May 2001. Id.

In January of 2002, Ms. Vedder's counsel contacted Nationwide and requested information regarding the vehicle's location. Id. Nationwide informed Ms. Vedder's counsel that the vehicle had been sold to a salvage yard." In March of 2003, Ms. Vedder filed a complaint against, among others, Toyota Motor Sales, U.S.A., Inc. Toyota Motors Distributors, Inc., and Nationwide. In January of 2004, Toyota inspected the vehicle at the salvage yard with Ms. Vedder's counsel and found that it had been substantially altered since Ms. Vedder's accident. Id.

Consequently, Ms. Vedder filed a motion in April of 2004 to amend her complaint to add a cause of action against Nationwide for spoliation of evidence. Id. at 540. The Circuit Court denied the same. Id. The circuit court concluded that Ms. Vedder was dilatory in asserting and/or investigating a potential spoliation claim because even though she knew as early as January 2002 that the vehicle had been sold for salvage, she took no action to inspect or store the vehicle. Ms. Vedder then presented her writ of mandamus to compel the circuit court to permit her to amend her complaint. Id.

This Honorable Court agreed with the circuit court's ruling criticizing Ms. Vedder's dilatoriness in asserting her potential spoliation claim. Id. This Honorable Court stated that the liberality allowed in the amendment of pleadings [pursuant to 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his [or her] case for a long period of time. Id. at 541. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his [or her] neglect and delay.

This Court stated it should have been apparent to Ms. Vedder at the time she learned the vehicle had been sold to a salvage yard that it was likely the vehicle would be dismantled and its salvageable parts sold. Id. at 542. Due diligence demanded Ms. Vedder to inquire into the vehicle's condition to determine whether the vehicle had been altered or still could be preserved. Instead, Ms. Vedder made absolutely no effort to inspect the vehicle and only discovered the vehicle's altered condition more than two years later when Toyota inspected it. Id.

Accordingly, this Honorable Court held that in the absence of a valid reason, the delay of two years and three months from the time Ms. Vedder became aware of a potential claim for spoliation of evidence until the time she moved to amend her complaint to assert such a claim is unreasonable and constitutes a lack of diligence and justifies the denial of leave to amend the complaint. Id. at 544.

While the present case does not involve the same facts as in Zakaib, where the Petitioner filed a motion to amend her complaint more than two years after the opportunity to do the same arose under Rule 15 of the West Virginia Rules of Civil Procedure, it still stands for the proposition that parties cannot be dilatory in asserting claims where the delay is unreasonable and where the moving party cannot demonstrate some valid reason for his [or her] neglect and delay.

In the case *sub judice*, it is apparent that Plaintiffs knew about the affidavit of Roger Baughan since May 14, 2010. (See Appendix "Exhibit 9"). Plaintiffs had the opportunity, but did not join, Mr. Baughan as an additional party before the July 12, 2010 deadline mandated by District Judge Irene Berger. Plaintiffs had the opportunity, but did not seek leave, to add Mr. Baughan as an additional party as part of their First Amended Complaint which was filed on October, 4, 2010. (See Appendix "Exhibit 5"). Plaintiffs sought leave to file a Second Amended

Complaint to add Roger Baughan individually as an additional party approximately 25 days before the original trial date, which was granted by the Circuit Court of Wyoming County.

Plaintiffs' Motion for Leave was filed nearly a year and four (4) months from the date counsel for the Plaintiffs became aware of the potential claim against Roger Baughan until the time the Plaintiffs actually moved to amend their complaint to assert such a claim. The dilatory nature of such a filing by the Plaintiffs is inexcusable, unreasonable, constitutes a lack of diligence and is absent of any justified reason. However, the Circuit Court of Wyoming County still granted the Plaintiffs' Motion for Leave.

In Zakaib, this Honorable Court held that due to the absence of a valid reason, the delay of two years and three months from the time the Plaintiff became aware of a potential claim until the time she moved to amend her complaint to assert such a claim was unreasonable and constitutes a lack of diligence and justified a denial of leave to amend the complaint. Id. at 544. Just as this Honorable Court held Zakaib, this Court should find that a delay of a year and four (4) months was unreasonable and constitutes a lack of diligence on the part of the Plaintiffs.

The Plaintiffs in the underlying matter had ample time to discover, depose, and disclose that Mr. Baughan could be a potential defendant in this matter. Accordingly, this Honorable Court should find that the Circuit Court of Wyoming County abused its discretion in granting the Plaintiffs' Motion for Leave to File Second Amended Complaint In Order to Add an Additional Defendant. Plaintiffs' Motion for Leave should have been denied by the Circuit Court of Wyoming County as the same was dilatory in nature pursuant to this Honorable Court's pronouncement in Zakaib.

**Any Argument by the Plaintiffs that the Circuit Court of Wyoming County Did Not Err in Granting the Plaintiffs' Motion for Leave to File a Second Amended Complaint in Order to Add an Additional Defendant Because No Prejudice Will Result as the Underlying Matter was Continued Must Fail Under This Honorable Court's Decision in State ex rel. Packard v. Perry.**

While it is undisputed that the Plaintiffs were dilatory in the filing of their Motion for Leave, Petitioners anticipate that the Plaintiffs' will argue that their dilatoriness will result in no prejudice to the Petitioners due to the fact that the Circuit Court of Wyoming County continued the underlying matter. (See Appendix "Exhibit 11" pgs. 152-153). However, Plaintiffs lack of diligence cannot be remedied by the fact that the Circuit Court of Wyoming County continued the trial in this matter. As set forth below, this potential argument by the Plaintiffs was been attempted and not accepted as a viable argument by this Honorable Court in State ex rel. Packard v. Perry, 655 S.E.2d 548 (W.Va. 2007).

In Perry, petitioner filed a medical malpractice action against a doctor in June of 2003, alleging that the doctor negligently treated her minor son's fractured elbow in 1994, leaving a deformity in his forearm. Id. at 552. The doctor filed a motion to dismiss based upon the two-year statute of limitations as to petitioner's individual claim for medical expenses. The circuit court denied the doctor's motion to dismiss the petitioner's individual claims based on the statute of limitations after finding that it is jury question. However, the circuit court agreed with the doctor that only the petitioner, and not the minor son, had the right to recover medical expenses incurred during his infancy as a result of the alleged malpractice. Id.

Further, in May 2006, the petitioner orally moved the circuit court for leave to amend her complaint to add a cause of action for battery arising from the doctor's failure to obtain informed consent prior to her minor son's surgery. By order entered in June of 2006, the circuit court denied the petitioner's motion for leave to amend her complaint based on the petitioner's

inexcusable delay in making the motion. Id. at 553. Petitioner sought a writ of prohibition from this Honorable Court to prevent the enforcement of the circuit court's ruling on her motion for leave to amend her complaint. Id.

In her Writ of Prohibition, petitioner argued that leave to amend pursuant to Rule 15 of the Rules of Civil Procedure should be liberally granted to facilitate a decision on the merits. Id. at 561. **The petitioner argued that there would be no prejudice to the doctor from such an amendment because the trial of the case was continued at the time her motion for leave to amend was made.** Id. at 562. (emphasis added). The respondent doctor responded that the circuit court did not abuse its discretion in denying the petitioner's leave to amend her complaint because the delay between the time the petitioner filed her complaint and the time she moved for leave to amend was unreasonable. Further, the respondent doctor argued that the petitioner did not present a valid reason for the delay. Id.

This Honorable Court, in addressing the arguments set forth by both the petitioner and the respondent, noted that "when leave of court is required, it rests in the sound discretion of the trial court whether to permit the amendment, and it has been held not to be an abuse thereof to deny the right to amend if...(4) there has been a delay in seeking an amendment even though the facts on which the amendment would be based have been long known by the party. Id. (citing Marlyn E. Lugar and Lee Silverstein, *West Virginia Rules of Civil Procedure*, Rule 15(a), pp. 136-37 (1960)).

This Honorable Court agreed with the respondent doctor that the circuit court did not abuse its discretion in denying the petitioner leave to amend her complaint. This Court cited to Zakaib, supra, where it found no abuse of discretion in denying leave to amend a complaint to a plaintiff who for no valid reason waited at least ten months after becoming aware of the

existence of an additional cause of action before making her motion. Id. This Court then set forth its Syllabus Point 3 of Zakaib that “the liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims or to neglect his or her case for a long period of time. Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay.” Id.

Based upon this Court’s pronouncement in Zakaib, this Honorable Court found that petitioner knew that she did not sign the surgical consent form for her minor son’s surgery before her complaint was filed. Nevertheless, the petitioner did not include a cause of action for battery based on these facts in her complaint. Instead, this Court found that the petitioner waited for approximately two years and nine months before bringing the issue of consent to the circuit court’s attention. Id.

Moreover, this Honorable Court held that the petitioner failed to provide a valid reason for her dilatory behavior. In light of the petitioner’s inexcusable delay, this Honorable Court declared that the circuit court did not abuse its discretion in denying the petitioner leave to amend her complaint. This Court denied her writ of prohibition prayed for by the petitioner in her challenge to the circuit court’s denial of leave to amend her complaint. Id.

In the present case, it is apparent that Plaintiffs had knowledge of the potential claim against Roger Baughan since May 14, 2010. (*See* Appendix “Exhibit 9”). As set forth above, Plaintiffs had the opportunity, but did not join, Mr. Baughan as an additional party on multiple occasions. Plaintiffs sought leave to file a Second Amended Complaint to add Roger Baughan individually as an additional party approximately 25 days before the original trial date and nearly

a year and four (4) months from the time they had knowledge of the potential claim. Thus, any argument that Petitioners will not be prejudice by the filing of their motion for leave to amend due to the continuance of the underlying matter must fail based upon Perry, supra.

In Perry, this Honorable Court held that due to the absence of a valid reason, the delay of two years and nine months from the time the petitioner became aware of a potential claim until the time she moved to amend her complaint to assert such a claim was unreasonable and constitutes a lack of diligence and justified a denial of leave to amend the complaint under Zakaib. Id. at 562. The petitioner argued that there would be no prejudice to the doctor from such an amendment because the trial of the case was continued at the time her motion for leave to amend was made. Id. at 562. This Honorable Court did not accept this argument in Perry.

Just as this Honorable Court established in Perry, this Court should hold that Plaintiffs lack of diligence cannot be remedied by the fact that the Circuit Court of Wyoming County continued the trial in this matter as the Petitioner argued in Perry and as this Honorable Court found to be unpersuasive. Therefore, this Honorable Court should find that the Circuit Court of Wyoming County abused its discretion in granting the Plaintiffs' Motion for Leave to File Second Amended Complaint in Order to Add an Additional Defendant.

## VI. CONCLUSION

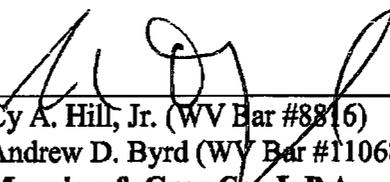
It is apparent that Plaintiffs delay of a year and four (4) months from the time that the Plaintiffs had knowledge that Roger Baughan could be a potential defendant in this matter was unreasonable and constitutes a lack of diligence under this Court's holding in Zakaib. Moreover, it is clear that the dilatory nature of Plaintiffs filing of their Motion for Leave is inexcusable, unreasonable, constitutes a lack of diligence and is absent of any justified reason. Thus, this Petitioner respectfully submits that the Circuit Court of Wyoming County erred when it issued its

September 13, 2011 order granting the Plaintiffs' Motion for Leave to File Second Amended Complaint In Order to Add an Additional Defendant. The Wyoming County Circuit Court's erroneous ruling would not be correctable on appeal following a trial as the parties would have already incurred costs, expenses, and time litigating the claims of the additional party.

**WHEREFORE**, for the foregoing reasons, the Petitioners respectfully request that this Honorable Court:

1. **STAY** any and all proceedings in the underlying action pending this Court's ruling on this Petition for Writ of Prohibition;
2. **ORDER** the Respondents named herein to appear and show cause why a Writ of Prohibition should not issue to prohibit the Circuit Court from granting the Plaintiffs leave to amend its complaint to add Roger Baughan as an individual defendant, and
3. **GRANT** the Petition and **ISSUE** an Order vacating the September 13, 2011 Order of the Circuit Court of Wyoming County and directing the Circuit Court of Wyoming County to deny Plaintiffs' Motion for Leave to File Second Amended Complaint In Order to Add an Additional Defendant and to dismiss Roger Baughan from the matter.

Respectfully submitted,



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Robertson, Inc.*

No. \_\_\_\_\_

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. COAL AGE,  
INC. d/b/a CAI INDUSTRIES, THE BAUGHAN  
GROUP, INC., and GAULEY ROBERTSON, INC.

Petitioners/Defendants Below,

v.

THE HONORABLE WARREN R. MCGRAW,  
Judge of the 27<sup>th</sup> Judicial Circuit, and  
Jason D. O'Neal, et al.,

Respondents/Plaintiffs Below.

**CERTIFICATE OF SERVICE**

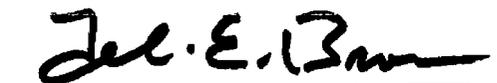
The undersigned counsel for the Petitioners, Coal Age Incorporated, D/B/A CAI Industries, The Baughan Group Inc. and Gauley Robertson, Inc., does hereby certify that the foregoing "*Memorandum of Law in Support of Coal Age Incorporated, D/B/A CAI Industries, The Baughan Group Inc. and Gauley Robertson, Inc.'s Petition for Writ of Prohibition*" was served upon the following counsel of record by mailing a true copy thereof via United States mail:

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P.O. Box 581  
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*Circuit Court Judge*

This 13<sup>th</sup> day of October, 2011.

  
\_\_\_\_\_  
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\_\_\_\_\_  
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