

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: 13-0897

STATE OF WEST VIRGINIA EX REL. THE NORTH RIVER INSURANCE COMPANY,

Petitioner/Defendant,

v.

THE HONORABLE ROBERT G. CHAFIN, SPECIAL JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA; ALL PLAINTIFFS AND CROSS-CLAIMANT PLAINTIFFS IN *JILL A. LAMBERT, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CARLOS G. LAMBERT, DECEASED V MINE SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 10-C-69, AND *TERESA DIANE PERSINGER, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF EDDIE D. PERSINGER, DECEASED V MINES SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 11-C-45

Respondents/Plaintiffs.

**RESPONDENT/CROSS-CLAIMANT PLAINTIFF MINE SAFETY APPLIANCES
COMPANY'S OPPOSITION TO PETITION FOR WRIT OF PROHIBITION**

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QUESTIONS PRESENTED

1. Whether the Circuit Court for Wyoming County abused its discretion when, after providing specific findings of fact regarding each of the eight factors listed in W. Va. Code § 56-1-1a(a) and weighing those findings as directed by that statute, it denied the motion of Petitioner/Defendant The North River Insurance Company.
2. Whether the Circuit Court abused its discretion when it determined under W. Va. Code § 56-6-10 that a stay would be improper because the resolution of the out-of-state actions will not completely resolve the present cases and therefore denied North River's motion to stay.
3. Whether the Circuit Court abused its discretion when it (a) followed well-established West Virginia law recognizing that tort plaintiffs may seek declaratory relief from an alleged tortfeasor's insurer and (b) held that West Virginia tort plaintiffs do not subject themselves to a foreign state's jurisdiction by accepting an assignment of insurance rights from the alleged tortfeasor.

STATEMENT OF THE CASE

I. THE PRESENT ACTIONS

The underlying actions, *Lambert v. Mine Safety Appliances Co.*, No. 11-C-69 (Wyoming Cnty. Cir. Ct.), and *Persinger v. Mine Safety Appliances Co.*, No. 11-C-45 (Wyoming Cnty. Cir. Ct.), concern insurance coverage for injuries sustained by West Virginia citizens. In the Circuit Court of Wyoming County (the "Circuit Court"), Respondent/Plaintiff Jill Lambert and Respondent/Plaintiff Teresa Diane Persinger sued Respondent/Cross-Claimant Plaintiff Mine Safety Appliances Company ("MSA"), alleging that their husbands developed coal workers' pneumoconiosis ("CWP") because MSA's respirators failed to protect them from coal-mine dust. Resp't's App. at 16 (¶¶ 18-19), 24-25 (¶¶ 18-19). Mrs. Lambert's and Mrs. Persinger's claims

against MSA are based in West Virginia tort law and allege that injury and death occurred in West Virginia. Resp't's App. at 13-21, 22-29.

Without admitting any liability, MSA settled with Mrs. Lambert and Mrs. Persinger following good-faith, arms-length negotiation. Under the settlement, which was executed in West Virginia, MSA paid Mrs. Lambert and Mrs. Persinger a sum certain and assigned them the right to recover the remainder of the settlement amount under an insurance policy that Petitioner/Defendant The North River Insurance Company ("North River") sold to MSA. Pet'r's App. at 1327-38, 1351-59.

After settling with MSA, Mrs. Lambert and Mrs. Persinger amended their complaints to add claims against North River. Pet'r's App. at 1319-26, 1343-50. Mrs. Lambert and Mrs. Persinger seek (1) a declaratory judgment concerning North River's obligation to provide insurance coverage for their husbands' injuries and (2) an order requiring North River to pay the remainder of the settlement amount. Pet'r's App. at 1324, 1348. To protect its rights, after Mrs. Lambert and Mrs. Persinger amended their complaints, MSA filed cross-claims against North River. Pet'r's App. at 1395-1402, 1449-56. In its cross-claims, MSA seeks (1) declarations regarding North River's obligation to pay for Plaintiffs' claims and (2) damages for North River's breach of those obligations. Pet'r's App. at 1399-1401, 1453-55.¹ These actions have been consolidated for discovery, and are scheduled for back-to-back trials in April 2014. Resp't's App. at 5-6, 9-10.

¹ Up to this point, the procedural history of *Lambert* and *Persinger* is identical to another claim involving MSA and North River. Prior to assigning rights to Mrs. Lambert and Mrs. Persinger, MSA assigned rights to Norman and Lisa Moore, tort plaintiffs who alleged that Mr. Moore had developed CWP because MSA's respirators failed to protect him from coal-mine dust. *See* Pet'r's App. at 399. Following the assignment, Mr. and Mrs. Moore asserted claims against North River, just as Mrs. Lambert and Mrs. Persinger did here. Pet'r's App. at 397-404. North River eventually settled with Mr. and Mrs. Moore, and their claim against North River was dismissed. Resp't's App. at 1701-03.

North River moved under West Virginia Code § 56-1-1a(a) to dismiss *Lambert* and *Persinger*, arguing that West Virginia is an inconvenient forum. Pet'r's App. at 9-35, 454-81. In the alternative, North River moved under West Virginia Code § 56-6-10 to stay *Lambert* and *Persinger* until coverage actions involving MSA and North River that are pending in Pennsylvania and Delaware are resolved. *Id.*

After considering the facts of the cases and all of the statutory factors, the Circuit Court denied North River's motion. Pet'r's App. at 1-8.

As to North River's motion to dismiss Mrs. Lambert's and Mrs. Persinger's claims under § 56-1-1a(a), the court found that it is "in the interests of justice and the convenience of the parties to have the cases heard in this County and not out of state." *Id.* at 3. The court came to this conclusion because, among other things:

- Mrs. Lambert's and Mrs. Persinger's choice of forum is entitled to "great deference." *Id.* at 3-4 (§ 56-1-1a).
- "[T]here is no alternative forum to address plaintiffs' claims against North River and to provide plaintiffs with an adequate remedy." *Id.* at 4 (§ 56-1-1a(a) factor no. 1).
- The foreign courts do not have personal jurisdiction over the plaintiffs. *Id.* at 4, 7 (§ 56-1-1a(a) factors no. 1, 7).
- The foreign courts "cannot determine whether North River must pay plaintiffs" or "fully resolve the issues presented in the cases before this Court." *Id.* at 4, 6 (§ 56-1-1a(a) factors no. 1, 7).
- The causes of action accrued in West Virginia (including because the subject injuries and deaths occurred in West Virginia and the settlement that underlies

plaintiffs' contractual-assignment claims took place in West Virginia). *Id.* at 5-6 (§ 56-1-1a(a) factors no 5, 6).

- Any risk of inconsistent judgments from simultaneous litigations does not justify an indefinite stay because the court can minimize any risk of inconsistent judgments. *Id.* at 4 (§ 56-1-1a(a) factor no. 2).

As to North River's motion to stay Mrs. Lambert's and Mrs. Persinger's claims under § 56-6-10, the Circuit Court found that it "is not in the interest of justice" to stay *Lambert* and *Persinger* until the actions pending in Pennsylvania and/or Delaware are fully resolved, and thus denied North River's motion. *Id.* at 7. In support of this finding, the court noted that the Pennsylvania and Delaware actions are not yet scheduled for trial, despite having been pending for many years, but the West Virginia actions are scheduled for trial next April. *Id.* at 2, 7.

The Circuit Court also denied North River's motion to dismiss or stay as it pertained to MSA because plaintiffs' claims regarding "the validity of the insurance assignment in the settlement agreement with plaintiffs and the meaning of [MSA's] insurance policy with North River are going to be adjudicated," and judicial economy and fundamental fairness counsel that MSA be allowed to participate. *Id.* at 8.

North River now has filed this Petition for Writ of Prohibition concerning the Circuit Court's findings.

II. THE ACTIONS PENDING OUTSIDE WEST VIRGINIA CANNOT RESOLVE THIS ACTION OR PROVIDE PLAINTIFFS RELIEF

The out-of-state actions to which North River insists the West Virginia courts should defer will not resolve all of the coverage issues in *Lambert* and *Persinger*. Specifically, those actions (which are pending in Pennsylvania federal court, Pennsylvania state court, and Delaware

Superior Court)² will not address the validity of MSA's assignments to Mrs. Lambert and Mrs. Persinger, or the reasonableness of Mrs. Lambert and Mrs. Persinger settlements with MSA. Pet'r's App. at 1-8.³ These issues are key to plaintiffs' ability to recover from North River. Additionally, the actions pending in Pennsylvania do not include the policy under which Mrs. Lambert and Mrs. Persinger seek relief, *compare* Pet'r's App. at 97-98, *and* Resp't's App. at 1278, *with* Pet'r's App. at 1319-20, 1343-44, and the action pending in Delaware Superior Court does not include damages for Mrs. Lambert's and Mrs. Persinger's claims. Thus, the out-of-state actions would not resolve the claims at issue.

Moreover, Mrs. Lambert and Mrs. Persinger are not subject to the out-of-state courts' jurisdiction. Pet'r's App. at 1-8; *see also* Resp't's App. at 1093. Mrs. Lambert and Mrs. Persinger are not now and never have been parties to these actions. And, as North River has acknowledged, Delaware does not have jurisdiction over Mrs. Lambert and Mrs. Persinger. Resp't's App. at 1093. Furthermore, the Delaware court itself stated that it has no jurisdiction over the West Virginia plaintiffs, even by virtue of an assignment of insurance proceeds. Pet'r's App. at 1080 (26:1-2). Thus, even if the actions between North River and MSA in other states would not resolve all of the coverage issues in *Lambert* and *Persinger* – which they will not – those rulings would not provide plaintiffs relief.

² The three out-of-state actions to which North River wants the Circuit Court to defer are: *Mine Safety Appliances Co. v. The North River Insurance Co.*, No. 2:09-CV-00348 (W.D. Pa.), *The North River Insurance Co. v. Mine Safety Appliances Co.*, Civil Action No. G.D 10-007432 (Pa. Cm. Pls.), and *Mine Safety Appliances Co. v. AIU Insurance Co.*, C.A. N10C-07-241 (Del. Super. Ct.). *See* Pet'r's App. at 1127-71 (Delaware Superior Court); Pet'r's App. at 97-112 (Western District of Pennsylvania); Resp't's App. at 1269-86 (Allegheny Circuit Court).

³ North River and MSA also are party to an action in Delaware Chancery Court, which is Delaware's court of equity. *See* Pet'r's App. at 1230-45. In the Chancery Court action, North River seeks to enjoin MSA from proceeding further in *Lambert* and *Persinger* and any other claims MSA might bring against North River in West Virginia. *Id.* North River also seeks to enjoin MSA from assigning to any tort claimant the right to assert claims against North River and from "providing any material assistance" to tort claimants who have sued North River. *See* 1244. North River has made arguments in Chancery Court that parallel its arguments here, *see, e.g.*, 1244 ¶ 48 (arguing that MSA must be enjoined in order to prevent the risk of inconsistent rulings), but it is undisputed that the Chancery Court will not substantively resolve the parties' disputes because Chancery Court only has equitable jurisdiction. Del. Code Ann. tit. 10, § 341; *Bird v. Lida, Inc.*, 681 A.2d 399, 402 (Del. Ch. 1996).

III. ANY RISK OF INCONSISTENT JUDGMENTS DOES NOT JUSTIFY AN INDEFINITE STAY

The Circuit Court also denied North River's motion on the basis that any risk of inconsistent judgments from the out-of-state actions does not justify an indefinite stay. The court is not alone in coming to this conclusion. In fact, the Delaware Superior Court – a court that North River furiously suggests should be deciding Mrs. Lambert's and Mrs. Persinger's coverage issues – has indicated the same.

In September 2010, North River moved to dismiss or stay the Delaware Superior Court Action in favor of the actions pending in Pennsylvania federal court and Pennsylvania state court. Resp't's App. at 30-71. North River argued, among other things, that a dismissal or stay was necessary to prevent the Delaware Superior Court and the Pennsylvania courts from issuing inconsistent judgments. Resp't's App. at 59-63.

In January 2011, the Delaware Superior Court denied North River's motion to dismiss but granted North River's motion to stay. *Mine Safety Appliances Co. v. AIU Ins. Co.*, C.A. No. N10C-07-241 MMJ, 2011 WL 300252, at *1 (Del. Super. Ct. Jan. 24, 2011), *app. refused*, 15 A.3d 217 (Del. 2011). Among the factors the Superior Court cited in imposing the stay were the similarity of the parties and issues in Delaware and Pennsylvania and the consequent risk of inconsistent rulings. *Id.* at *5-7.

Notwithstanding the potential risk of inconsistent judgments, the Delaware Superior Court has since relaxed the stay. On March 16, 2012, the Superior Court lifted the stay to permit MSA and all defendants other than North River and Allstate Insurance Company ("Allstate") (the other insurer with which MSA is litigating in Pennsylvania) to take discovery. Resp't's App. at 1708-10 (57:11-60:18); Pet'r's App. at 346-48. On November 8, 2012, the Superior Court also authorized MSA and defendants other than North River and Allstate to file summary

judgment motions, despite the risk of inconsistent rulings. Resp't's App. at 1716-1718 (28:5-30:3).

Thus, the Delaware Superior Court has found that the risk of inconsistent judgments does not prohibit simultaneous litigation. Indeed, the Delaware Superior Court has stated that it never contemplated that the Delaware Superior Court action would remain stayed until all other litigation had concluded, and that had it known how different the issues in the Pennsylvania actions and the Delaware Superior Court action were, it never would have imposed the stay in the first place. Pet'r's App. at 1000 (21:8-12); Resp't's App. at 1723 (70:1-23).

Currently, the Delaware Superior Court action remains stayed in part as to North River, but it automatically will be lifted in its entirety as soon as the Pennsylvania state court rules on certain motions. Pet'r's App. at 346-48.⁴ And, although North River argues in its Petition that MSA violated the stay by assigning rights to Mrs. Lambert and Mrs. Persinger and bringing cross-claims to protect its rights in the plaintiffs' actions, as addressed below, North River has acknowledged elsewhere that MSA has not violated the stay. *See infra* Argument III.B (citing Pet'r's App. at 1109 (55:13-22) ("I agree with that. I mean, we're not alleging – Judge Johnston did not, as part of her orders, state that MSA is precluded from filing elsewhere. So technically there is no violation of her stay.")).

SUMMARY OF ARGUMENT

First, the Circuit Court did not abuse its discretion in denying North River's motion to dismiss under West Virginia Code § 56-1-1a. Rather, as required by statute and *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 645-46, 713 S.E.2d 356, 360-61 (2011), the Circuit Court considered each of the eight factors listed in West Virginia Code § 56-1-1a(a), provided specific

⁴ Although North River has argued that this could occur at any moment, it is important to note that these motions have been pending since March 2013, and the Pennsylvania court has given no indication regarding when it will rule.

findings of fact regarding each factor, and weighed each of those findings before denying North River's motion.

Second, the Circuit Court did not abuse its discretion in denying Petitioner/Defendant The North River Insurance Company's motion to stay under West Virginia Code § 56-6-10. Rather, the court exercised its "wide discretion" and determined that a stay would be improper because the resolution of the out-of-state actions will not completely resolve the West Virginia actions. *See State ex rel., Piper v. Sanders*, 228 W. Va. 792, 796, 724 S.E.2d 763, 767 (2012).

Third, the Circuit Court did not abuse its discretion because (a) it followed well-established law recognizing that West Virginia tort plaintiffs have an independent cause of action against an alleged tortfeasor's insurer under West Virginia law and (b) West Virginia tort plaintiffs do not subject themselves to a foreign state's jurisdiction by virtue of accepting an assignment of insurance rights from an alleged tortfeasor in partial settlement of their tort claims. Moreover, the Circuit Court did not abuse its discretion or permit MSA to "perpetrate a sham upon the Court" because, as North River previously has acknowledged, MSA has not violated the Delaware Superior Court's stay.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary under the criteria laid out in the Revised Rule of Appellate Procedure 18(a) because the dispositive issues have been authoritatively decided. *See W. Va. Revised R. App. P. 18(a)(3)*. Moreover, "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." *See id.* (a)(4).

ARGUMENT

I. STANDARDS OF REVIEW

A. A Writ of Prohibition is an Extraordinary, Disfavored Measure, and Would be Improper in this Case.

A writ of prohibition is a disfavored, extraordinary remedy that has no applicability to the Circuit Court’s order denying North River’s motion to stay or dismiss *Lambert* and *Persinger*. “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” Syl. pt. 1, *State ex rel. York v. W. Va. Office of Disciplinary Counsel*, 231 W. Va. 183, 744 S.E.2d 293, 295 (2013) (quoting Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)); *see also Sanders*, 228 W. Va. at 795, 724 S.E.2d at 766 (“[A] writ of prohibition is not available to correct discretionary rulings”); *State ex rel. W. Va. Nat’l Auto. Ins. Co. v. Bedell*, 223 W. Va. 222, 228, 672 S.E.2d 358, 364 (2008) (calling a writ of prohibition a “drastic, tightly circumscribed, remedy which should be invoked only in extraordinary circumstances”); Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (“Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.”).

Where a petitioner claims (as North River has here) not that the lower court lacks jurisdiction, but rather that the lower tribunal exceeded its legitimate powers, this Court examines five factors to determine whether to issue a writ of prohibition:

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

new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.

Syl. pt. 1, *State ex rel. W. Va. Dep't of Health & Human Res. v. Yoder*, 226 W. Va. 520, 522, 703 S.E.2d 292, 294 (2010) (quoting Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)). However, “although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law [and the one on which North River relies], should be given substantial weight.” *Id.*

Here, North River cannot satisfy the third factor because the Circuit Court did not abuse its discretion, and therefore is not “clearly erroneous as a matter of law.” To the contrary, the Circuit Court followed the law explicitly by describing in detail its analysis of why a stay or dismissal should be denied under the statutory eight-factor test.⁵ *Zakaib*, 227 W. Va. at 645-46, 713 S.E.2d at 360-61. Therefore, a Writ of Prohibition is not appropriate.

B. West Virginia Code § 56-1-1a Gives Great Deference to Plaintiff’s Choice of Forum and this Court Reviews Decisions Under that Statute Under an Abuse of Discretion Standard.

West Virginia Code § 56-1-1a(a) provides, in relevant part that, “the plaintiff’s choice of a forum is entitled to great deference.” *Id.* The court considers the following eight factors in determining whether to grant a motion to stay or dismiss an action, or dismiss any plaintiff under the doctrine of *forum non conveniens*:

- (1) Whether an alternate forum exists in which the claim or action may be tried;
- (2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

⁵ Although there are four other factors to consider, the third is given substantial weight, and North River did not mention or address the other four factors. Thus, those four other factors should be weighed in MSA’s favor.

- (3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
- (4) The state in which the plaintiff(s) reside;
- (5) The state in which the cause of action accrued;
- (6) Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;
- (7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and
- (8) Whether the alternate forum provides a remedy.

W. Va. Code Ann. § 56-1-1a.

This Court reviews the lower court's decision on *forum non conveniens* under an abuse of discretion standard. *Zakaib*, 227 W. Va. at 645-46, 713 S.E.2d at 360-61; *see also* Syl. pt. 3, *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am.*, 194 W. Va. 186, 187, 460 S.E.2d 1, 2 (1994) ("A circuit court's decision to invoke the doctrine of *forum non conveniens* will not be reversed unless it is found that the circuit court abused its discretion."); *Nezan v. Aries Techs., Inc.*, 226 W. Va. 631, 637, 704 S.E.2d 631, 637 (2010) ("On the issue of *forum non conveniens*, we have held that the standard of review of this Court is an abuse of discretion.").

As described in Section II *infra*, the Circuit Court did not abuse its discretion in weighing the eight statutory factors in a detailed order denying North River's motion to dismiss. North River's arguments to the contrary merely attempt to convert a clearly factual issue into a legal one.

C. It Requires a Strong Showing of Prejudice to a Party to Reverse the Action of a Court for Refusal to Grant a Stay under West Virginia Code § 56-6-10.

West Virginia Code § 56-6-10 states, “[w]henever it shall be made to appear to any court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein, upon such terms as may be prescribed in the order.” *Id.* This Court reviews orders denying a stay under an abuse of discretion standard. *Sanders*, 228 W. Va. 792, 796-97, 724 S.E.2d 763, 767-68 (2012). The language of West Virginia Code § 56-6-10 “vests a wide discretion in the court, and though it is not an arbitrary discretion, yet it requires a strong showing of prejudice to a party to reverse the action of a court for a refusal to make such stay.” *Id.* (quoting Syl. pt. 4, *Dunfee v. Childs*, 59 W. Va. 225, 233, 53 S.E. 209, 212 (1906)).

In *Sanders*, 228 W. Va. at 797, 724 S.E.2d at 768, this Court denied a writ of prohibition challenging the circuit court's refusal to stay a tort claim pending final resolution of a declaratory judgment action seeking insurance coverage for the tort claim. The Court reasoned that “the decision whether to grant a stay of proceedings pending resolution of another case is within the sound discretion of the trial court” and further stated that “a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” *Id.* Similarly, in this case, the order denying North River's motion to stay the case was within the sound discretion of the trial court, and a writ of prohibition should be denied.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING NORTH RIVER'S MOTION TO STAY OR DISMISS *LAMBERT* AND *PERSINGER*

The Circuit Court did not abuse its discretion in refusing to stay or dismiss *Lambert* and *Persinger* under West Virginia Code § 56-1-1a or § 56-6-10.

A. The Circuit Court Did Not Abuse its Discretion in Denying North River's Motion to Dismiss or Stay on the Grounds of *Forum Non Conveniens* Under West Virginia Code § 56-1-1a.

First and foremost, “the plaintiff’s choice of a forum is entitled to great deference.”

W. Va. Code Ann. § 56-1-1a. As West Virginia residents whose cause of action accrued in West Virginia, Mrs. Lambert and Mrs. Persinger brought their actions against North River in the same court and same cases in which they originally sued MSA. Thus, the Circuit Court gave great deference to their choice of forum.

Second, the Circuit Court considered the facts of the cases in light of the factors specified in West Virginia Code § 56-1-1a and found that it is “in the interests of justice and the convenience of the parties to have the cases heard in this county and not out of state.” Pet’r’s App. at 3. The court weighed the facts under the eight statutory factors and made the following findings:

Under Statutory Factor 1 (*Whether an alternate forum exists in which the claim or action may be tried*), the Circuit Court found “there is no alternative forum to address plaintiffs’ claims against North River and to provide plaintiffs with an adequate remedy” because the Delaware and Pennsylvania courts lack personal jurisdiction over the plaintiffs, cannot “determine whether the settlement agreements in these cases are enforceable,” and “have not been presented with the unique affirmative defenses asserted by North River here.” *Id.* at 4.

Under Statutory Factor 2 (*Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party*), the Circuit Court found that

North River is registered to do business in West Virginia and has agreed to a case management order and trial dates that will not cause it to “suffer a substantial injustice.” *Id.* The Circuit Court also rejected North River’s arguments of inconsistent judgments by stating:

North River is already at risk for inconsistent judgments between the Pennsylvania and Delaware court systems. Moreover, North River is not entitled, as it argues, to have its insurance policies solely examined by out-of-state courts. West Virginia has long authorized injured plaintiffs to sue insurance companies of tortfeasors. Minimizing the risk of inconsistent judgments is that the Courts may take into consideration any rulings made by another.

Id. at 4-5.

Under Statutory Factor 3 (*Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff’s claim*), the Circuit Court found that Pennsylvania and Delaware have jurisdiction over MSA and North River. *Id.* at 5.

Under Statutory Factor 4 (*The state in which the plaintiff(s) reside*), the Circuit Court found that plaintiffs are residents of West Virginia and would suffer substantial injustice if they were forced to litigate elsewhere. *Id.* at 5.

Under Statutory Factor 5 (*The state in which the cause of action accrued*), the Circuit Court found the cause of action accrued in West Virginia because the subject injuries occurred in West Virginia and MSA settled with plaintiffs in West Virginia, thus “their contractual-assignment claims against North River arose in West Virginia.” *Id.* at 5.

Under Statutory Factor 6 (*Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state*), the Circuit Court found that the injuries and death occurred in West Virginia, various witness are located in West Virginia, and

the State of West Virginia has a strong interest in seeing the cases handled by West Virginia for West Virginia citizens. *Id.* at 5-6.

Under Statutory Factor 7 (*Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation*), the Circuit Court found that plaintiffs are not parties to the Delaware or West Virginia cases, those forums have no jurisdiction over the plaintiffs, and insurance assignment rights are not at issue there. *Id.* at 6.

Under Statutory Factor 8 (*Whether the alternate forum provides a remedy*), the Circuit Court found that “Pennsylvania and Delaware courts are not in a position to order North River to pay the insurance assignment amounts to plaintiffs.” *Id.* at 6.

The Circuit Court thus carefully applied the facts of the case to each statutory factor, and weighed those factors in denying North River’s motion to stay or dismiss the case. Therefore, the Circuit Court did not abuse its discretion, and North River’s Petition for a Writ of Prohibition on this point should be denied.

B. The Circuit Court Used Its Sound Discretion, and North River Can Point to No Prejudice, in the Circuit Court’s Denial of North River’s Motion to Stay Under West Virginia Code § 56-6-10.

Under West Virginia Code § 56-6-10, the Circuit Court had “wide discretion” to determine whether *Lambert* and *Persinger* should be stayed pending final resolution of the out-of-state actions. *See* W. Va. Code Ann. § 56-6-10; *Sanders*, 228 W. Va. at 796-97, 724 S.E.2d at 767-68. But, a stay is improper if the resolution of an out-of-state action will not completely resolve the West Virginia action. *See Sanders*, 228 W. Va. at 796-97, 724 S.E.2d at 767-68. As discussed above, none of the out-of-state actions will fully resolve the claims in *Lambert* and *Persinger*. *See supra* Argument II.A. Moreover, the court found that it would be prejudicial to postpone this action, given that the Pennsylvania and Delaware actions are not yet scheduled for trial, despite having been pending for multiple years, whereas the West Virginia actions are

scheduled for trial next April. Pet'r's App. at 2, 7. Accordingly, the Circuit Court properly applied its discretion in denying North River's motion.

To overcome the Circuit Court's appropriate application of its discretion, North River must provide "a strong showing of prejudice." *Sanders*, 228 W. Va. at 796, 724 S.E.2d at 767 (quoting *Dunfee*, 59 W. Va. at 233, 53 S.E. at 212). But North River does not even attempt to establish that it was prejudiced by the Circuit Court's denial of its motion under West Virginia Code § 56-6-10. Rather, North River merely quotes the statute and conclusorily states that "it is clear that the Circuit Court should have dismissed or stayed these actions in favor of the action before the Delaware Superior Court." Pet. for Writ. of Prohibition at 22-23. Such conclusory statements do not constitute a "a strong showing of prejudice," and North River's Petition for Writ on this point should be denied.

III. NORTH RIVER IMPROPERLY ATTEMPTS TO TURN AN ISSUE OF FACT INTO AN ISSUE OF LAW

North River seeks to distract the Court by claiming that the issue here is not one of fact – how the Circuit Court, in its sound discretion, weighed the eight statutory factors – but one of law. In particular, North River contends that the Circuit Court erred as a matter of law when it rejected North River's argument that Delaware has personal jurisdiction over the West Virginia tort plaintiffs by virtue of the assignment and that "[p]laintiffs abdicated their right to have their claims heard exclusively by a West Virginia court when they accepted the partial Assignments from MSA." Pet. for Writ. of Prohibition at 10. North River also contends that MSA violated a Delaware Superior Court stay by assigning part of its insurance rights.

North River is wrong for two reasons. First, North River has conceded – and Delaware itself has stated – that it has no personal jurisdiction over the West Virginia tort plaintiffs. Second, North River previously acknowledged that MSA did not violate the stay. Therefore,

North River has failed to show that the Circuit Court's order was "clearly erroneous as a matter of law," and a Writ of Prohibition therefore is not appropriate.

A. Foreign Courts Do Not Have Jurisdiction Over The West Virginia Tort Plaintiffs.

1. Plaintiffs have an independent cause of action under *Christian v. Sizemore*.

North River fails to mention in its petition that, even without an assignment, the West Virginia tort plaintiffs have a direct cause of action against North River under *Christian v. Sizemore*, 181 W. Va. 628, 383 S.E.2d 810 (1989). Under *Christian*, a tort plaintiff may bring a declaratory judgment action against the alleged tortfeasor's insurer to determine whether the insurer's policy covers the tort plaintiff's claim. *Id.* at 181 W. Va. 632-33, 383 S.E.2d at 814-15.

North River has argued in Delaware that *Christian* doctrine applies only before a settlement or judgment against the insured. However, "[i]t is well-settled law that an injured plaintiff may join as a co-defendant the defendant's insurance company subsequent to obtaining judgment against the insured." *Price v. Messer*, 872 F. Supp. 317, 321 (S.D.W. Va. 1995); accord *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W. Va. 293, 298, 452 S.E.2d 384, 389 (1994) (finding "the trial court [Chafin, J.] committed no error by allowing complaint to be amended after judgment to assert" claims for declaratory judgment against the tortfeasor's insurer). "*Christian* does not require, as the petitioner suggests, that the circuit court must exercise its discretion in a particular manner or that a bifurcated coverage issue must, in every instance, be finally resolved *before* the merits of an underlying liability claim may be addressed." *Sanders*, 724 S.E.2d at 767, 724 S.E.2d at 796. Rather, "these decisions remain within the trial court's sound discretion." *Id.* Therefore, it was in the Circuit Court's "sound discretion" whether to allow Mrs. Lambert and Mrs. Persinger to bring a declaratory judgment action against North River after settling with MSA. Thus, even if MSA had not assigned its rights to

Mrs. Lambert and Mrs. Persinger, the tort plaintiffs would have a direct cause of action against MSA's insurers. *See Christian*, 181 W. Va. at 632, 383 S.E.2d at 814; *see also Price*, 872 F. Supp. at 321.

2. Plaintiffs do not have minimum contacts with Delaware by virtue of an assignment.

North River argues that the West Virginia tort plaintiffs are "subject to the jurisdiction of the Delaware Superior Court and its ruling" because they accepted an assignment of insurance rights from MSA. Pet. for Writ. of Prohibition at 13. North River makes this argument even though it previously conceded, and the Delaware court has acknowledged, that Delaware has no personal jurisdiction over the West Virginia tort plaintiffs. Pet'r's App. at 1080 (26:1-2); Resp't's App. at 1093. The Delaware Chancery Court even specifically addressed the assignment issue, stating, "I can't stop these plaintiffs from going forward under the assignment." Pet'r's App. at 1080 (26:1-2).

Moreover, North River's argument ignores that West Virginia tort plaintiffs do not have minimum contacts with Delaware. *See Del. Code Ann. tit. 10 § 3104.* ("Personal jurisdiction by acts of nonresidents.") The U.S. Supreme Court and Delaware have been clear that, "[i]f the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528 (1985); *see also Matter of Rehab. of Nat'l. Heritage Life Ins. Co.*, 656 A.2d 252, 256-58 (Del. Ch. 1994) (holding that an out-of-state party that contracts with a Delaware insurance company does not have minimum contacts with Delaware).

B. As North River Has Acknowledged Elsewhere, MSA is Not Perpetrating a Sham on the Court.

North River states, no less than eleven times, that MSA has “perpetrate[d] a sham upon the Court” by assigning a portion of its insurance rights to the West Virginia tort plaintiffs “in attempt to circumvent the stay issued by Delaware Superior Court.” Pet. for Writ. of Prohibition at 23. However colorful North River’s words may be, they can carry no weight in arguing that a writ must issue when (1) North River itself has conceded elsewhere that MSA has not violated the stay issued by the Delaware Superior Court and (2) has settled with one of MSA’s assignees.

First, North River has acknowledged that MSA did not violate the Delaware Superior Court’s stay:

THE COURT: But Mr. Packman is correct, is he not, that you [North River] really no longer are asserting what you asserted in the complaint, that they’re in violation of the stay? It’s really the vindication of Delaware jurisdiction?

MR. MILLER: I agree with that. I mean, we’re not alleging – Judge Johnston did not, as part of her orders, state that MSA is precluded from filing elsewhere. So technically there is no violation of her stay.

Pet’r’s App. at 1109 (55:13-22).

Second, Mrs. Lambert and Mrs. Persinger are not the only tort claimants to whom MSA assigned rights in settlement. MSA also assigned rights to Norman and Lisa Moore. *See* Pet’r’s App. at 397. Following the assignment, Mr. and Mrs. Moore asserted claims against North River, just as Mrs. Lambert and Mrs. Persinger did here. *Id.* at 397-404. North River settled with Mr. and Mrs. Moore, and their claim against North River was dismissed. Resp’t’s App. at 1701-03. Thus, North River’s previous actions demonstrate that MSA has not perpetrated a sham, and any assertions to the contrary (all eleven of them, in this case) are meritless.

CONCLUSION

The Circuit Court did not abuse its discretion, and North River's attempts to convert an issue of fact into an issue of law are unavailing. This Court should therefore not issue a rule to show cause and deny the Petition.

MINE SAFETY APPLIANCES COMPANY

By:  _____

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IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: 13-0897

THE STATE OF WEST VIRGINIA EX REL. THE NORTH RIVER INSURANCE COMPANY,

Petitioner/Defendant,

v.

THE HONORABLE ROBERT G. CHAFIN, SPECIAL JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA; ALL PLAINTIFFS AND CROSS-CLAIMANT PLAINTIFFS IN *JILL A. LAMBERT, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CARLOS G. LAMBERT, DECEASED V MINE SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 10-C-69, AND *TERESA DIANE PERSINGER, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF EDDIE D. PERSINGER, DECEASED V MINES SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 11-C-45

Respondents/Plaintiffs.

VERIFICATION

I, Craig R. Banford, counsel for Mine Safety Appliances Company, being duly sworn, depose and say that I have reviewed the foregoing Opposition to North River's Petition for Writ of Prohibition and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.

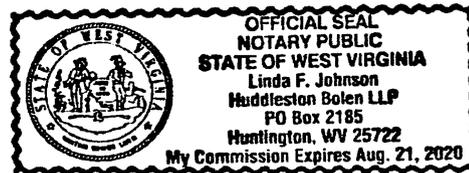


Craig R. Banford

Subscribed and sworn to before me this 15 day of October, 2013.



Notary Public



My commission expires: August 21, 2020

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the *“Respondent/Cross-Claimant Plaintiff Mine Safety Appliances Company’s Opposition to Petition for Writ of Prohibition”* on counsel of record via electronic mail and by depositing true copies thereof in the regular manner in the United States mail, postage prepaid, at Huntington, West Virginia on the 15th day of October, 2013, addressed as follows:

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