

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

Docket Number: 13-0897

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. MINE SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 11-C-45

Respondents/Plaintiffs

**PLAINTIFFS-RESPONDENTS' VERIFIED RESPONSE
TO THE PETITION FOR WRIT OF PROHIBITION**

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RESPONSE TO THE QUESTION PRESENTED

Plaintiffs-respondents, Jill Lambert and Teresa Persinger, respectfully submit that the question presented by the Petition is whether Judge Chafin abused his discretion in denying North River's motion to dismiss on *forum non conveniens* grounds and for a stay under W. Va. Code §56-6-10, when the Circuit Court followed the Legislature's instructions, correctly applied the well-established law to the facts, and issued a comprehensive ruling explaining his factual findings. Defendant-petitioner, The North River Insurance Company ("North River"), agrees that the ruling below is to be reviewed under an abuse-of-discretion standard. *See* Petition at Question Presented. Plaintiffs maintain that Judge Chafin, an experienced jurist, did not abuse his discretion and did not commit clear legal error in allowing Mrs. Lambert and Mrs. Persinger (who are West Virginia citizens) to have access to their home state's judicial system.

STATEMENT OF THE CASE

I.

Carlos Lambert and Eddie Persinger were coal miners who lived and worked in West Virginia. They are deceased, and their widows, Jill Lambert and Teresa Persinger, are the plaintiffs in these cases.

Plaintiffs separately filed suit against Mine Safety Appliances Company ("MSA"), claiming that the dust respirators manufactured and sold by MSA were defective and a cause of their husbands' coal worker's pneumoconiosis ("CWP"). Both men died from this lung disease. MSA denied any and all liability in both cases.

After years of litigation, each plaintiff entered into separate settlement discussions with MSA and, at different times, ended up reaching an agreement with MSA.¹ Under the terms of each settlement, MSA agreed to pay the plaintiff a substantial amount of cash and assigned to the plaintiff the right to recover the remainder of the settlement consideration from North River under an insurance policy issued by North River to MSA.

In an attempt to portray itself as the victim here, North River repeatedly claims that the plaintiffs' settlements with MSA were "shams" and merely designed to assist MSA in circumventing the coverage litigation pending between MSA and North River in Pennsylvania and Delaware. This is simply not true. As explained to Judge Chafin at oral argument, for years North River has arbitrarily denied insurance coverage to MSA on all claims brought by West Virginia coal miners suffering from CWP.² Due to North River's denial of coverage and wanting to maximize their recovery in the tort actions, plaintiffs agreed to accept a combination of cash and insurance assignments from MSA. In the *Lambert* case, moreover, Judge McGraw approved the settlement between MSA and plaintiffs as fair and reasonable under the wrongful death statute. Thus, it was not a "sham" for plaintiffs to accept insurance assignments against North River as part of their settlements with MSA.

¹Mrs. Lambert settled with MSA on or about February 20, 2013. Petitioner's Appendix at 1327-35. Mrs. Persinger resolved her claims with MSA on or about June 25, 2012. *Id.* at 1351-59.

²This is ironic given that North River certainly knew, when it first insured MSA, that MSA was in the business of selling safety products for use by underground coal miners and may therefore face claims from coal miners. Note, MSA stands for "**Mine **Safety **Appliances Company."******

Ultimately, North River set the stage for the use of assignments to settle cases by denying insurance coverage on claims asserted against MSA by injured West Virginia coal miners. Post-loss insurance assignments are expressly authorized by West Virginia law. *See Smith v. Bruege*, 182 W. Va. 204, 211, 387 S.E. 2d 109, 116 (1989). North River is in no position to complain about having to litigate in West Virginia.

II.

Plaintiffs amended their lawsuits to assert claims against North River, seeking to recover on the insurance assignments. North River agreed to the consolidation of the two cases for pre-trial discovery and to the entry of a case management order. Fact discovery ends on January 10, 2014, and trial is scheduled for April 2014.

Despite agreeing to the case management order, North River subsequently moved the Circuit Court to dismiss or stay the actions under the *forum non conveniens* statute, W.Va. Code §56-1-1a. Alternatively, North River requested that these actions be stayed under W. Va. Code §56-6-10 until the Pennsylvania and Delaware cases were concluded. In North River's view, Mrs. Lambert and Mrs. Persinger should be forced to litigate out of state or have their cases stayed for years.

Plaintiffs vigorously opposed North River's motion. Petitioner's Appendix at 1192-1208. Application of the factors set forth in the *forum non conveniens* statute to the facts made clear that a dismissal or stay was not appropriate. Moreover, as West Virginia plaintiffs, Mrs. Lambert and Mrs. Persinger's choice of forum was entitled to "great deference" under the statute. *Id.* Plaintiffs objected to North River's request for an indefinite stay under W. Va. Code §56-6-10 as well.

III.

Armed with the parties' extensive briefing, the Circuit Court conducted oral argument and, after the hearing, indicated it was going to deny the motion and issue findings of fact and conclusions of law. Petitioner's Appendix at 51-52. In doing so, Judge Chafin made several important observations. First, he was not willing to stay the cases until after the out-of-state litigation was resolved because such litigation had been ongoing for years and no end was in sight. (No trial dates had been set in the out-of-state cases.) *Id.* at 1548. Second, the Circuit Court recognized that the primary issue in the cases was whether plaintiffs were entitled to recover from North River under the insurance policy as a result of the assignments. The Pennsylvania and Delaware cases between North River and MSA were not going to address this issue. *Id.* at 1549.

The Circuit Court subsequently issued its ruling and addressed each of the factors found in the *forum non conveniens* statute. Judge Chafin concluded that a dismissal or stay was not appropriate, and an in-depth review of his ruling is discussed below.

SUMMARY OF ARGUMENT

I.

Judge Chafin rendered a discretionary, factual ruling in denying North River's motion to dismiss or for a stay. He applied the *forum non conveniens* statute to the facts and, after considering all of the enumerated factors, refused to dismiss or stay the cases. Similarly, after examining the facts and weighing the equities, the lower court exercised its discretion and decided not to stay the cases under W. Va. Code §56-6-10. North River acknowledges that the lower court's ruling should be reviewed for an abuse of discretion. *See* Petition at Question Presented.

As a procedural matter, the Court should not issue a writ of prohibition to review Judge Chafin's ruling for a simple abuse of discretion. This Honorable Court has made clear that the extraordinary writ of prohibition "will not issue to prevent a simple abuse of discretion by a trial court." *State ex rel. Piper v. Sanders*, 228 W. Va. 792, 797, 724 S.E. 2d 763, 768 (2012). Writs of prohibition are reserved to correct "substantial, clear-cut, legal errors . . . which may be resolved independently of any disputed facts." *State ex rel. Allstate Ins. Co v. Gaughan*, 203 W. Va. 358, 365, 508 S.E. 2d 75, 82 (1998) (quotations omitted).

II.

The writ of prohibition should not issue for another reason: Judge Chafin certainly did not abuse his discretion nor did he commit clear legal error in his ruling. Applying the factors in the *forum non conveniens* statute, the lower court correctly concluded that the West Virginia plaintiffs were entitled to have their West Virginia claims heard in West Virginia state court, and this result honored the Legislature's instruction that the plaintiffs' choice of forum be given "great deference." Similarly, under W. Va. Code §56-6-10, the Circuit Court properly denied North River's request for a stay, which could last years, as fundamentally unfair and because the earlier-filed actions would not fully and finally resolve these cases.

To justify its writ application under the test set forth in *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E. 2d 12 (1996), North River weakly claims that the Circuit Court "ignored" the applicable law on assignments and committed legal error as a result. Petition at 11. This is simply incorrect. Judge Chafin specifically addressed and rejected North River's argument that plaintiffs somehow morphed into MSA via the assignments and were therefore subject to the Pennsylvania

and Delaware stay orders entered against MSA. Petitioner's Appendix at 4. There is no doubt the trial court was correct in this ruling.

Ultimately, North River has failed to establish the factors necessary for the issuance of a writ of prohibition. The trial judge did not commit clear legal error, his ruling does not contain an oft-repeated error, and the lower court's decision does not present a legal issue of first impression. The writ application is nothing more than an attempt by North River to re-litigate in this Court the application of W. Va. Code §56-1-1a and §56-6-10 because it is unhappy with Judge Chafin's ruling.

III.

Plaintiffs respectfully request that the writ of prohibition be summarily denied and that no rule to show cause be issued. North River is hoping the cases will be stayed due to the issuance of a rule to show cause. *See* W. Va. Rule of Appellate Procedure 16(j). In this way North River would obtain the very relief that Judge Chafin refused to provide. Moreover, North River is well aware that a stay under Rule 16(j) would interrupt the pre-trial discovery that is currently underway and potentially disrupt the April 2014 trial dates. Plaintiffs respectfully ask that their underlying cases not be stayed as a result of this writ application.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary under West Virginia Rule of Appellate Procedure 18(a)(4). The issues presented in this writ of prohibition are adequately presented in the briefs.

ARGUMENT

THE WRIT OF PROHIBITION SHOULD NOT ISSUE BECAUSE PETITIONER IS ASKING THE COURT TO REVIEW THE CIRCUIT COURT'S RULING FOR A SIMPLE ABUSE OF DISCRETION

I.

The writ of prohibition is a “drastic and extraordinary” measure which is “reserved for really extraordinary causes.” *State ex rel. United States Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 436, 460 S. E. 2d 677, 682 (1995) (citations omitted). Such relief is authorized when a circuit court, which enjoys jurisdiction, “exceeds its legitimate powers.” W. Va. Code §53-1-1.

In *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E. 2d 12 (1996), the Court set forth a five-part test for determining when a writ of prohibition should issue:

(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. 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, should be given substantial weight.

Id. at 21. The *Hoover* test, therefore, focuses on whether the lower court clearly erred on an important legal issue. This approach insures the extraordinary writ of prohibition is used sparingly and only when there is a real concern that a circuit court has exceeded its legitimate authority.

Relatedly, this Honorable Court has made clear that a writ of prohibition will not issue on discretionary, factual decisions handed down by the trial courts. In *State ex rel. Piper v. Sanders*,

228 W. Va. 792, 724 S.E. 2d 763 (W. Va. 2012), the trial court denied a request for a stay under W. Va. Code §56-6-10, the same statute applied by Judge Chafin here. The Court explained that a writ of prohibition would not issue to review this discretionary ruling:

[B]ecause the decision whether to grant a stay of proceedings pending resolution of another case is within the sound discretion of the trial court and because a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court, we conclude for this reason also that the writ of prohibition sought by the petitioner will not issue.

Id. at 768. Stated another way, “if the circuit court’s ruling in the instant case is wrong, it amounts to a simple abuse of discretion which is not correctable by a writ of prohibition.” *State ex rel. Shelton v. Burnside*, 212 W. Va. 514, 519, 575 S.E. 2d 124, 129 (2002). This approach honors the extraordinary nature of the writ of prohibition and avoids entangling the Court in factual decisions made in the discretion of the lower courts.³

II.

In denying North River’s motion, Judge Chafin rendered a purely discretionary, factual ruling as authorized by the two operative statutes. The *forum non conveniens* statute, W. Va. Code §56-1-1a, empowered the Circuit Court to decline to exercise its lawful jurisdiction if the court found that doing so was in “the interest of justice and for the convenience of the parties.” *Id.* Thus, the lower court’s decision on *forum non conveniens* is reviewed under an abuse-of-discretion standard. *See State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 645, 713 S.E.2d 356, 360 (2011). Similarly, W. Va. Code §56-6-10 authorized Judge Chafin to exercise his discretion and stay the cases if appropriate in light of earlier-filed litigation. It comes as no surprise that North River concedes that

³In *Sanders*, the Court also found no abuse of discretion on the merits; therefore, plaintiffs address whether Judge Chafin abused his discretion in the next section of their Response.

the question presented by the writ is whether the Circuit Court “abused its discretion.” Petition at Question Presented.

As a result, the extraordinary writ of prohibition should not issue. In denying North River’s motion, Judge Chafin made factual decisions entrusted to his sound discretion. The writ of prohibition is not appropriately invoked to review a ruling for an abuse of discretion.

THE WRIT SHOULD NOT ISSUE BECAUSE JUDGE CHAFIN APPROPRIATELY EXERCISED HIS DISCRETION, AND HIS RULING WAS NOT CLEARLY ERRONEOUS AS A MATTER OF LAW.

North River tries to invoke the third factor of the *Hoover* test by claiming that Judge Chafin “ignored” the law on assignments and, as a result, his ruling is “clearly erroneous as a matter of law.” Petition at 11. Such is clearly not the case. However, out of an abundance of caution, plaintiffs address below why the Circuit Court did not abuse its discretion nor did it issue a clearly erroneous legal ruling.

I. THE TRIAL COURT FOLLOWED THE LEGISLATURE’S MANDATE AND PROPERLY APPLIED THE *FORUM NON CONVENIENS* STATUTE.

A review of Judge Chafin’s thoughtful ruling evidences that he understood the Legislature’s purpose in enacting the *forum non conveniens* statute and properly applied the statute to the facts. At the outset, the Circuit Court noted that another court had denied a similar request for a stay by North River in a companion matter and found this ruling “supportive” of its decision to deny North River’s motion. Petitioner’s Appendix at 3. After citing *Zakaib*, the Circuit Court turned to the *forum non conveniens* issues. *Id.*

Judge Chafin began his analysis by correctly noting that the “ultimate decision” to be reached under the statutory scheme is to decide “whether in the interests of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this state.” *Id.*

(quotations omitted). The Circuit Court expressly held that it was “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.* Judge Chafin acknowledged that the State of West Virginia had a “strong interest in the cases,” and properly found that the “plaintiffs’ choice of forum (West Virginia)” was “entitled to great deference under the statute.” *Id.* at 4 (quotations omitted).

The Circuit Court then turned to the statutory factors and applied them to the facts of the case. In doing so, the trial court performed the analysis requested by the Legislature in enacting the *forum non conveniens* statute.

II. JUDGE CHAFIN CORRECTLY APPLIED THE EIGHT STATUTORY FACTORS TO THE FACTS AND, IN THE PROCESS, REJECTED THE SAME ARGUMENTS THAT NORTH RIVER IS NOW MAKING TO THIS COURT.

In its Petition, North River attempts to re-litigate whether the cases should be dismissed or stayed under the *forum non conveniens* statute, W. Va Code §56-1-1a. The issue, however, is whether Judge Chafin abused his discretion in denying such relief. As set forth below, it is clear that the lower court did not abuse its discretion.

A. THE CIRCUIT COURT CORRECTLY ANALYZED FACTOR NO. 1 OF THE *FORUM NON CONVENIENS* STATUTE.

Under statutory factor No. 1, Judge Chafin considered whether an alternative forum exists in which the claim or action may be tried and found that an alternative forum for plaintiffs’ claims did not exist. He properly began with the issue of jurisdiction, noting that the Pennsylvania and Delaware courts lacked jurisdiction over these West Virginia plaintiffs. *Id.* at 4. North River does not dispute this finding. Moreover, according to North River, the Delaware court expressly acknowledged it lacks jurisdiction over plaintiffs. Petition at 8.

Not only did the out-of-state courts lack jurisdiction over plaintiffs, Judge Chafin correctly found that the Pennsylvania and Delaware courts “were not in a position to determine whether the settlement agreements in these cases are enforceable.” Petitioner’s Appendix at 4. Those foreign courts could not order North River to pay the plaintiffs on the assignments because the assignments (and their validity) were not part of those proceedings. Simply put, West Virginia is the only state whose courts have jurisdiction over both plaintiffs and North River and may also rule on whether the assignments made by MSA to plaintiffs are valid under West Virginia law.

B. IN CONNECTION WITH ITS ANALYSIS OF FACTOR NO. 1, THE CIRCUIT COURT REJECTED NORTH RIVER’S ARGUMENT THAT PLAINTIFFS WERE “EXTENSIONS OF MSA” VIA THE ASSIGNMENTS AND THEREFORE SUBJECT TO THE STAY ORDERS ENTERED AGAINST MSA IN PENNSYLVANIA AND DELAWARE.

1.

North River asserts that Judge Chafin committed legal error because he “ignored” its argument that plaintiffs were “extensions of MSA” due to the assignments. Petition at 11. As a result, according to North River there is an alternative forum available to handle plaintiffs’ claims because plaintiffs submitted themselves to the jurisdiction of the Pennsylvania and Delaware courts and have “abdicated” their right to sue in West Virginia. *Id.* at 10, 12-13 & 16.

Judge Chafin did **not** ignore North River’s argument regarding the law on assignment; in fact, he specifically addressed and rejected it. The lower court appropriately concluded that the “fact that plaintiffs accepted assignments of insurance proceeds from MSA does not subject the plaintiffs to the rulings made by these out-of-state courts; rather, plaintiffs are free to seek to enforce their contractual assignment rights in West Virginia, the state in which they reside.” Petitioner’s Appendix at 4.

2.

Judge Chafin was entirely correct when he rejected North River's argument that plaintiffs, via the limited contractual assignment of rights, somehow morphed into the "same entity" as MSA and thereby subjected themselves to the jurisdiction of the Pennsylvania or Delaware courts and the stay orders entered against MSA in those cases. It is horn-book law that an assignment of rights merely invests in the assignee the right to pursue the assignor's rights in the assignee's name. The Restatement (Second) of Contracts §317(1) explains:

An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

See also Smith, 182 W. Va at 210, 387 S.E. 2d at 115 (quoting Restatement language).

Of course, the assignee cannot enjoy more substantive rights than those enjoyed by the assignor. This is the meaning of the language cited by North River from *Lightner v. Lightner*, 146 W. Va. 1024, 1034, 124 S.E. 2d 355, 362 (1962), where an assignee "stands in the shoes" of the assignor. Petition at 11.

Thus, MSA's assignment of rights to plaintiffs gave them the right to assert, in their own names, a cause of action against North River under the insurance policy issued to MSA. As this Honorable Court has explained: "Assignment, after loss, of the proceeds of insurance does **not** constitute an assignment of the personal contract represented by the policy, **but only of a claim or right of action on the policy.**" *Smith*, 182 W. Va. at 211, 387 S.E. 2d at 116 (emphasis added).

In these cases, plaintiffs have followed *Smith* and asserted their personal causes of action against North River pursuant to the assignment of rights received from MSA under the insurance policy. North River is simply wrong when it claims that plaintiffs, by entering into the assignments,

“are no longer involved in these actions in their individual capacities.” Petition at 12. The law on assignments is clear that Mrs. Lambert and Mrs. Persinger are entitled to assert claims against North River, under the MSA insurance policy, in their own name. Plaintiffs have not submitted themselves to the jurisdiction of the Pennsylvania and Delaware courts nor abdicated their right to file suit in West Virginia, as North River argues.

C. FORUM NON CONVENIENS FACTOR NO. 2: JUDGE CHAFIN PROPERLY CONCLUDED THAT MAINTAINING THESE CASES IN WEST VIRGINIA WOULD NOT WORK A SUBSTANTIAL INJUSTICE ON NORTH RIVER.

Factor No. 2 required Judge Chafin to consider whether North River would suffer a substantial injustice if the cases remained in West Virginia. He correctly concluded that North River would not suffer serious prejudice if the motion were denied. First, North River had agreed to the case management order, and the cases had been consolidated for pre-trial purposes in the interests of judicial economy. Second, Judge Chafin rejected the risk of inconsistent verdicts because North River was already at risk of such a result between Pennsylvania and Delaware. Third, the Circuit Court noted that North River could not reasonably expect to have its insurance policies solely examined by out-of-state courts. West Virginia law expressly allows injured plaintiffs to sue the insurance companies of the tortfeasor. Petitioner’s Appendix at 4-5.

Judge Chafin did not abuse his discretion under factor no. 2, and North River will not suffer a “substantial injustice” in having to litigate with Mrs. Lambert and Mrs. Persinger in West Virginia. North River claims it is entitled to litigate insurance coverage for CWP claims with MSA exclusively in Pennsylvania and/or Delaware. This is incorrect. In *Christian v. Sizemore*, 181 W. Va. 628, 632-33, 383 S.E. 2d 810, 814-15 (1989), the Court held that an injured West Virginia plaintiff may bring a declaratory judgment action, in the tort lawsuit, to determine if there is coverage for plaintiff’s

claim under the policy issued by the defendant's insurance company. In *Price v. Messer*, 872 F. Supp. 317, 321 (S.D. W. Va. 1995), the federal court found that the injured plaintiff was entitled to sue the defendant's insurance company, in the tort suit, to collect a judgment obtained against the defendant-insured.

Thus, North River could not reasonably expect that coverage issues relating to CWP claims brought against MSA by West Virginia coal miners and their families (like Mrs. Lambert and Mrs. Persinger) would be exclusively decided in Pennsylvania or Delaware. Under West Virginia law, an injured plaintiff is entitled to request a determination whether his claim against the defendant-insured is covered by the insurance policy, and may also seek to recover under that policy for a covered claim. Judge Chafin correctly concluded North River would not be substantially prejudiced in having to litigate with Mrs. Lambert and Mrs. Persinger in the West Virginia courts.

D. JUDGE CHAFIN CORRECTLY APPLIED FACTORS NOS. 3, 4 AND 5 IN DENYING NORTH RIVER'S MOTION.

The Circuit Court properly handled these three factors under the *forum non conveniens* test. As to factor no. 3, the alternative forums did have jurisdiction over a defendant to plaintiffs' claims. *Id.* at 5. As to factor no. 4, Judge Chafin noted the undisputed fact that plaintiffs were residents of West Virginia. Importantly, the Circuit Court also found that "substantial injustice" would result if plaintiffs were forced to litigate with North River out of state. *Id.*

Regarding factor no. 5, Judge Chafin correctly held that the plaintiffs' causes of action had accrued in West Virginia. Consider that plaintiffs originally brought their tort claims against MSA in West Virginia due to harm that occurred in the State, and these cases were settled in West Virginia for a combination of cash and insurance assignments. Plaintiffs' claims against North River, therefore, arose in West Virginia as well.

All three factors taken together supported denial of North River's *forum non conveniens* motion, and the Circuit Court did not abuse its discretion. The State of West Virginia has a strong interest in these cases: West Virginia plaintiffs, whose causes of action accrued in West Virginia, have the right to have their cases heard in West Virginia. North River's effort, in its Petition, to undermine Judge Chafin's application of these factors is based on its discredited assignment argument. Petition at 17.

E. THE CIRCUIT COURT PROPERLY HANDLED FACTOR NO. 6 OF THE FORUM NON CONVENIENS TEST.

Factor no. 6 required Judge Chafin to exercise his discretion and balance the public and private interests to determine if the cases should be brought in an alternative forum. The Circuit Court engaged in this analysis and found that the weighing of the private and public interests did **not** predominate in favor of the actions being brought out of state. *Id.* Judge Chafin, for example, noted the strong connection between the cases and the State of West Virginia given that the plaintiffs' husbands' injuries and deaths had occurred in the State. *Id.* Further, the Circuit Court found no reason why the Wyoming County court should have any administrative difficulties in dealing with the two cases. *Id.* at 5-6. Judge Chafin did not abuse his discretion in weighing the private and public interests.

In the Petition, North River claims the private and public interests weigh in favor of dismissal of the cases. Petition at 18-20. Judge Chafin, however, was presented with these arguments and rejected them in his discretion. *See* Petitioner's Appendix at 24-30 (*Lambert*), 470-75 (*Persinger*), 1015-17 & 1313. North River, moreover, overlooks the fact that it is convenient for the plaintiffs to litigate in West Virginia (their home state) and allowing them to do so is clearly in the interests of justice.

F. FACTOR NO. 7: JUDGE CHAFIN CORRECTLY RULED THAT DENIAL OF NORTH RIVER'S MOTION WOULD NOT RESULT IN UNREASONABLE DUPLICATION OF LITIGATION.

The Circuit Court found that denial of North River's motion would not result in unreasonable duplication or proliferation of litigation. This finding was clearly correct, and Judge Chafin did not abuse his discretion. The out-of-state courts were not in a position to rule on plaintiffs' claims against North River; consequently, maintaining these actions in West Virginia did not result in an unreasonable duplication or proliferation of litigation. *Id.* at 6. Further, West Virginia law specifically authorizes injured victims to sue the insurer of a tortfeasor in a coverage action, and that is exactly what plaintiffs have done here. Importantly, the Court should keep in mind that North River set the stage for the plaintiffs' coverage claims by denying insurance coverage to MSA.

G. THE CIRCUIT COURT'S ANALYSIS OF FACTOR NO. 8 WAS CORRECT.

This factor inquires whether the alternative forum provides a remedy. Judge Chafin properly concluded that the Pennsylvania and Delaware courts do not offer plaintiffs a remedy against North River. *Id.* The only court having jurisdiction over plaintiffs and North River and that can order North River to pay the insurance assignments is the West Virginia trial court and, ultimately, this Honorable Court. In the Petition, North River merely raises its discredited assignment argument on this issue. Petition at 20-21.

**JUDGE CHAFIN DID NOT ABUSE HIS DISCRETION
IN DENYING A STAY UNDER W. VA. CODE §56-6-10.**

After completing his analysis under the *forum non conveniens* statute, the Circuit Court next determined whether North River was entitled to a stay of the proceedings under W. Va. Code §56-6-10. Judge Chafin denied North River's stay request. First, a stay of the actions was not proper because the earlier-filed actions in Pennsylvania and Delaware would not fully and finally resolve

these matters. Petitioner's Appendix at 7. Second, the Circuit Court found that a stay that may last years, as requested by North River, was improper and not in the interests of justice. *Id.* Judge Chafin did not abuse his discretion in denying the stay request.

North River again argues that a stay should have been granted because the settlements with plaintiffs were a "sham." Petition at 23-24. North River made the same claim to Judge Chafin, and he was not swayed by this argument. For the reasons discussed above, moreover, there is no "sham" being perpetuated in these cases. Plaintiffs' settlements with MSA included insurance assignments, as authorized by West Virginia law, because North River had denied coverage to MSA on CWP claims brought by West Virginia coal miners and plaintiffs wanted to maximize their recovery.

JUDGE CHAFIN JUDICIOUSLY HANDLED THE ISSUES BEFORE HIM

Based on the foregoing, the Court should conclude that the Circuit Court did not abuse its discretion in denying relief under the *forum non conveniens* statute and the stay-of-proceedings statute. Judge Chafin, moreover, expressly acknowledged that rulings from Pennsylvania and/or Delaware may impact the rights of the West Virginia plaintiffs. *Id.* at 8.

The lower court, therefore, will give whatever deference is due to any out-of-state rulings while handling this litigation. This effort at comity is precisely the approach that should be taken under the circumstances.

THE WRIT OF PROHIBITION SHOULD NOT BE ISSUED BECAUSE THE FOURTH AND FIFTH FACTORS OF THE *HOOVER* TEST ARE NOT SATISFIED HERE.

Not only has North River failed to establish the third factor of the *Hoover* test, North River has also not demonstrated that factors four and five are satisfied here. Judge Chafin's ruling does not exemplify an oft-repeated error by the lower courts. To the contrary, the lower court's ruling embodies exactly how trial courts should apply the *forum non conveniens* statute and W. Va. §56-6-

10. Similarly, Judge Chafin's order does not present a new or important legal issue for the Court's consideration.

CONCLUSION

Judge Chafin applied clear legal standards to a set of facts and did not abuse his discretion when he refused to dismiss or stay the cases under W. Va. Code §56-1-1a and §56-6-10. The Circuit Court, moreover, issued comprehensive reasons for judgment. The extraordinary writ of prohibition should not issue in a case like this one; otherwise, the Court will be inviting parties to abuse this extraordinary writ in the future.

Moreover, plaintiffs respectfully request that the Court not stay the underlying cases, under West Virginia Rule of Appellate Procedure 16(j), by issuing a rule to show cause. Staying the cases would provide North River with the exact relief that Judge Chafin declined to provide. A stay by this Court may also jeopardize the pending trial dates, another result sought by North River. Plaintiffs, therefore, respectfully request that the writ of prohibition be summarily denied and no rule to show cause be issued by this Court.

RESPECTFULLY SUBMITTED,

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TERESA DIANE PERSINGER, BY COUNSEL



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COUNSEL FOR RESPONDENTS/PLAINTIFFS

THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: 13-0897

THE NORTH RIVER INSURANCE COMPANY,

Petitioner/Defendant,

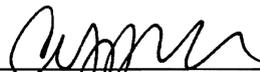
v.

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. MINE SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 11-C-45

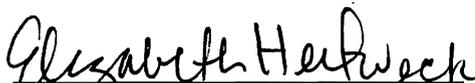
Respondents/Plaintiffs.

VERIFICATION

I, Eric J. Jacobi, counsel for Respondent/Plaintiffs, being duly sworn, depose and say that I have reviewed the foregoing Verified Response to the 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.


Eric J. Jacobi, Esq.
WV Bar No. 11806

Subscribed and sworn to before me this 14th day of October 2013.


Notary Public

My commission expires: 7-30-2015

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Respondents/Plaintiffs.

CERTIFICATE OF SERVICE

I, Eric J. Jacobi, undersigned counsel for Respondents/Plaintiffs, do hereby certify that service of the foregoing **Verified Response to the Petition for Writ of Prohibition** was served on the following counsel of record by US Mail this 14th day of October, 2013:

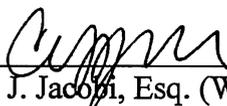
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