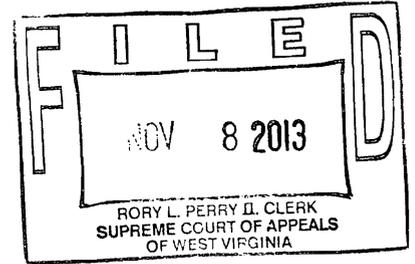


IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



AIG DOMESTIC CLAIMS, INC.,

Supreme Court  
Case No.: 13-1048

Petitioner and  
Defendant Below,

vs.

Ohio County Circuit Court  
Civil Action No.: 05-C-550

THE HONORABLE LARRY V STARCHER,  
JUDGE OF THE CIRCUIT COURT OF  
OHIO COUNTY, WEST VIRGINIA, and  
CANDY GEORGE, Individually and as  
Guardian, Mother and Next of Friend of  
KYLE GEORGE, a minor, and MARK  
GEORGE

Respondents and Plaintiffs Below.

**RESPONDENTS RESPONSE IN OPPOSITION TO AGI DOMESTIC CLAIMS, INC.'S  
VERIFIED PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS WITH  
ATTACHED APPENDICES OF EXHIBITS**

Counsel for Respondents  
Ronald W. Zavolta (W.Va. State Bar ID #8739)  
**ZAVOLTA LAW OFFICE**  
741 Fairmont Pike  
Wheeling, WV 26003  
Telephone: (304) 905-8073

## TABLE OF CONTENTS

<b>Table of Authorities .....</b>	<b>iii - vii</b>
<b>I. Respondents Opposition to Petitioners Writ .....</b>	<b>1</b>
<b>II. Questions Presented .....</b>	<b>5</b>
<b>III. Statement of Case .....</b>	<b>5</b>
<b>(A) Factual Background .....</b>	<b>5</b>
<b>( B) Claims Handling .....</b>	<b>6</b>
<b>( C) Procedural History .....</b>	<b>7</b>
<b>( D) Judge Starcher’s Order Denying Protective Order.....</b>	<b>8</b>
<b>IV . Argument .....</b>	<b>8</b>

## TABLE OF CASE AUTHORITIES

### STATUTES:

W.Va Code § 33-11-4a.....	Pages 3, 4, 9, 10, 11, 12 13, 14, 15, 16, 20
West Virginia Code § 33-11-4(9)(b)( c) (d) and (f).....	Page 7
West Virginia Code § 33-11-9( c) .....	Page 7
W.Va Code § 55-1-1 .....	Page 1

### RULES :

West Virginia Insurance Regulations .....	Pages 7, 8
West Virginia Rule of Civil Procedure 3 (a) .....	Page 14
West Virginia Rule of Civil Procedure 26 (b)(1).....	Pages 18, 19, 20
West Virginia Rule of Civil Procedure 26 (b)(1) (iii).....	Page 19
West Virginia Rule of Civil Procedure 26 - 37 .....	Page 17
Federal Rules of Civil Procedure 3.....	Page 14
Federal Rules of Civil Procedure 26 (b) (1).....	Page 19
Federal Rules of Evidence 402 .....	Page 19

### CASES:

<u>Babyage.com, Inc. v. Toys "R" Us, Inc.</u> , 458 F.Supp.2d 263, 265 (E.D.Pa. 2006).....	Pages 19, 20
<u>Banker v. Banker</u> , 196 W.Va. 535, 546-47 S.E. 465, 476-77 (1996).....	Page 3
<u>Bullman v. D&amp;R Lumbar Company</u> , 195 W.Va. 129, 464 S.E. 2d 771 (1995).....	Page 3

<u>Consumer Advocate Division v. Public Service Commission</u> , 182 W.Va. 152, 386 S.E. 2d 650 (1989).....	Page 4
<u>Crawford v. Taylor</u> Syl. Pt. 1, 138 W.Va. 207, 75 S.E. 2d 370 (1953) .....	Page 1
<u>Crockett v. Andrews</u> , 153 W.Va. 714, 718-19, 172 S.E. 2d 384, 387 (1970) Syl. Pt 2.....	Page 11
<u>Charlton v. M.P. Industries, Inc.</u> , 173 W.Va. 253, 256, 314 S.E. 2d 416, 419-20 (1984).....	Page 13
<u>Davis v. Mound View Health Care Inc.</u> , 220 W.Va. 28, 640 S.E.2d 91 (2006) .....	Pages 11, 13
<u>Devanne v. Kennedy</u> , 205 W.Va. 519, 529, 519 S.E. 2d 622, 632 (1999) .....	Page 4
<u>Donley v. Bracken</u> , 192 W.Va. 383, 452 S.E. 2d 699 (1994) .....	Page 3
<u>Dunlap v. Freidman's Inc.</u> , 213 W.Va. 394, 401, 582 S.E. 2d 841, 848 (2003) .....	Page 12
<u>Evans v. Mutual Mining</u> , 199 W.Va. 526, 530, 485 S.E. 2d 695, 699 (1997) .....	Pages 17, 20
<u>Fleming James, Jr., Geoffrey C. Hazard, Jr., &amp; John Leubsdorf</u> , Civil Procedure § 5.8 at 249 (4th ed. 1992) .....	Page 18
<u>Findley v. State farm Mut. Auto Insu. Co.</u> , 213 W.Va. 80, 576 S.E. 2d 807 (2002) Syl. Pt 3 .....	Page 13
<u>Herbalife Intern., Inc. v. St. Paul Fire and Marine Ins. Co.</u> , Not Reported in F.Supp.2d, 2006 WL 2715164 (N.D.W.Va. 2006) .....	Page 19
<u>Hoover v. Berger</u> , 199 W.Va. 12, 483 S.E. 2d 12 (1996).....	Page 1
<u>Jenkins v. JC Penney Cas. Ins. Co.</u> , 167 W.Va. 597, 280 S.E. 2d 252 (1981) Syl. Pt. 2 .....	Page 10

<u>Johnson v. Nedeff</u> , 192 W.Va. 26 D, 452 S.E. 2d 63 (1994) Syl. Pt. 1 .....	Page 13
<u>Kirwan v. Kirwan</u> , 2012 W.Va. 520, 575 S.E 2d 130 (2002) .....	Page 4
<u>Klettner v. State Farm Mut. Automobile Insurance Co.</u> , 205 W.Va. 587, 519 S.E. 2d 870 (1999) Syl. Pt 5 .....	Page 10
<u>Leksi v. Federal Ins. Co.</u> , 129 F.R.D. 99, 104 (D.N.J.1989) (citing Wright & Miller, Federal Practice and Procedure § 2007-2008.).....	Page 19
<u>Miller v. Fluharty</u> , 201 W.Va. 685, 500 S.E.2d 310 (1997) .....	Page 17
<u>McDougal v. McCammon</u> , 193 W.Va. 229, 238 n.9, 455 S.E. 2d 788, 797 n.9 (1995) .....	Pages 18, 20
<u>McKinney v. Fairchild Intern., Inc.</u> , 199 W.Va. 718, 487 S.E. 2d 913 (1997) .....	Page 12
<u>Motto v. CSX Transp., Inc.</u> 210 W.Va. 412, 647 S.E. 2d 848, 855 (2007) .....	Pages 12, 13
<u>Nestle Foods Corp. v. Aetna Cas. and Sur. Co.</u> , 135 F.R.D. 101, 104 (D.N.J.1990) .....	Page 19
<u>People ex rel Klaeren v. Will. of Lisle</u> , 352 Ill. App. 3d 831, 838, 817 NE 2d 147, 153 .....	Page 3
<u>Phillips v. Larry's Drive In Pharmacy, Inc.</u> , 220 W.Va. 484, 647 S.E. 2d 920 (2007) .....	Page 12
<u>Policarpio v. Kaufman</u> , 183 W.Va. 258, 261, 395 S.E. 2d 502, 505 (1990) .....	Page 17
<u>Roderick v. Hough</u> , 146 W.Va. 741, 748-79, 124 S.E. 2d 703-707-08 (1961).....	Page 13
<u>State ex rel. Allstate Ins. Co v. Gaughan</u> , 640 S.E. 2d 176 (2006) .....	Page 19

<u>Sowa v Hoffman</u> , 191 W.Va. 105, 14, 443 S.E. 2d 262, 268 (1994).....	Page 4
<u>State v. Elder</u> , Syl. Pt. 2, 152 W.Va. 571, 165 S.E. 2d 108 (1968).....	Page 4
<u>State ex. Rel. Baker Installation, Inc. v. Webster</u> , 2012 WL 2874102 (W.Va.) .....	Page 2
<u>State v. Williams</u> , 196 W.Va. 639, 474 S.E. 2d 569 (1996) Syl Pt. 12 .....	Page 12
<u>State Farm Mut. Auto Ins. Co. v. Stephens</u> , 188 W.Va. 622, 425 S.E. 2d 577 (1992) .....	Pages 18, 20
<u>Stern v. Chemtall, Inc.</u> 617 S.E. 2d 876, 881 (W.Va. 205) .....	Page 1
<u>Subcarrier Communications, Inc. v. Nield</u> , 218 W.Va. 292, 299 n. 10, 624 S.E. 2d 729, 736 n.10 (2005) .....	Pages 11, 12
<u>Taggart v. Damon Motor Coach</u> , Not Reported in F. Supp.2d, 2006 WL 2473395 (N.D.W.Va. 2006) .....	Page 19
<u>United States Supreme Court in United States v. Procter &amp; Gamble Co.</u> , 356 U.S. 677, at 682-683, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) .....	Pages 19, 20
<u>Verba v. Ghaphery</u> , 2010 W.Va. 30, 36, 552 S.E. 2d 406, 412 (2001) .....	Page 5
<u>Vest v. Cobb</u> , 138 W.Va. 660, 662, 76 S.E. 2d 885, 888 (1953) .....	Page 12
<u>Vincenzo v. AIG Ins. Services, Inc.</u> Not Reported in F. Supp 2d 2007 WL 2773834 (N.D. W.Va. 2007) .....	Pages 9, 10
<u>Wallace v. Shaffer</u> , 155 W.Va. 132, 138, 181 S.E. 2d 677, 680 (1971) .....	Page 14
<u>Williamson v. Greene</u> , 200 W.Va. 421, 426-27, 490 S.E. 2d 23, 28-29 (1997) .....	Page 4

**References:**

Blacks Law Dictionary, Sixth Edition, page 192 .....Page 14

Blacks Law Dictionary, Sixth Edition, page 183 .....Page 14

**I. RESPONDENTS OPPOSITION TO PETITIONERS WRIT**

**Standard of Review for Writs of Prohibition and Mandamus**

There is no legal basis and Petitioner should be denied its request for a Writ of Prohibition and/or Mandamus. Simply stated, the facts and evidence relied upon by Petitioner falls woefully short of demonstrating the Circuit Court of Ohio County had no jurisdiction of the subject matter in issue, or having requisite jurisdiction exceeded its legitimate powers or that there was usurpation and substantial abuse of power. W.Va. Code § 53-1-1 Crawford v. Taylor Syl. Pt. 1, 138 W.Va. 207, 75 S.E. 2d 370 (1953).

Further, Judge Starcher in no way exceeded his judicial powers by entering the April 11, 2013, Order at issue permitting Respondent to conduct discovery on post July 8, 2005, conduct.

Petitioner relies on Hoover v. Berger, 199 W.Va. 12, 483 S.E. 2d 12 (1996) in its argument for this Court to grant a writ of prohibition. Respondent acknowledges Hoover's applicability however, Petitioner cannot demonstrate Respondent has a legal duty to do what Petitioner seeks to compel. Additionally, there is no absence of another adequate remedy. As this Court is well aware, Petitioner is required to demonstrate all three elements referenced in Stern v. Chemtall, Inc. 617 S.E. 2d 876, 881 (W.Va. 205) (citations omitted) co-exist.

Petitioner argues, that the Writ of Prohibition / Mandamus is appropriate pursuant to West Virginia Code § 53-1-1, et seq. Respondent acknowledges the same however, Petitioner fails to demonstrate and cannot demonstrate Judge Starcher's Order of April 11, 2013, somehow exceeded its legitimate powers / acted outside of its authority.

Petitioner further argues, albeit unsuccessfully, that this Court can issue a Mandamus to Compel a Circuit Court to rule on issue pending before it. Petitioner cites State ex. Rel. Baker Installation, Inc. v. Webster, 2012 WL 2874102 (W.Va.) as a legal basis for their position.

Baker involved a new trial motion before Judge Webster, which was not ruled upon for in excess of one year. The matter before this Court contains no such delay or unreasonable neglect or refusal to act by Judge Starcher. Petitioner's procedural history accurately documents the hearing was held on February 15, 2013 and Judge Starcher promptly ruled at the hearing. The Order was dated April 11, 2013 and permitted post July 8, 2005 conduct discovery (see Petitioner's Exhibit A, Order pages 000001-000004).

Petitioner in an effort to prevent Respondent from conducting full and comprehensive discovery now seeks to compel the lower Court to rule on admissibility of post July 8, 2005, conduct prior to the discovery taking place and without Judge Starcher having an opportunity to review the same and render a decision in advance of Trial.

Petitioner further argues for a writ of prohibition, indicating Judge Starcher's Order presents clear error. The Petitioner's argument is flawed on numerous fronts. The post July 8, 2005 claims handling was made actionable by the timely filing of the Complaint prior to the change in our law eliminating third party bad faith cases. The timely filing of the Complaint in essence triggered the relevancy and admissibility of post July 8, 2005 claims handling. But for the timely filing of the Complaint, Petitioner would be correct, the claims conduct post July 8, 2005, would unfortunately be

irrelevant, not actionable and inadmissible. Again, the plain language of W.Va. Code §33-11-4a has been followed by Respondent in bringing forth this cause of action. Petitioner was promptly served with the Complaint and timely answered. Petitioner/ AIG is a large highly sophisticated insurance company with a wealth of insurance and litigation experience.

It is worth noting, Petitioner cites an Illinois Appellate case, People ex rel Klaeren v. Will. of Lisle, 352 Ill. App. 3d 831, 838, 817 NE 2d 147, 153 (Ill. Appl. Ct. 2004) as its only basis for changes in the law apply prospectively. Their reliance on this case for this purpose is misplaced and misguided.

This Illinois case first of all, does not involve a statutory change in the law rather it involved Meijer Inc.'s decision to build and open a large department store in the Village of Lisle. At a public hearing on the Meijer development the mayor prevented a party from cross examining Meijer witnesses. This not surprisingly, was held to violate Due Process.

The Petitioner's argument and legal analysis seeks to place this Court in a position of a super legislature. Petitioner's aforementioned argument and legal analysis requires this Court to re-write W.Va. Code § 33-11-4a albeit under the guise of statutory interpretation.

This Court previously held:

"It is not for Courts arbitrarily to read into [ a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that we purposely included, we are obligated not to add to statutes something the legislature purposely omitted." Banker v. Banker, 196 W.Va. 535, 546-47 S.E. 465, 476-77 (1996) citing Bullman v. D&R Lumbar Company, 195 W.Va. 129, 464 S.E. 2d 771 (1995), Donley v. Bracken, 192 W.Va. 383, 452 S.E. 2d 699

(1994). Moreover, “[a] statute, or an administrative rule, may not, under the guise of “interpretation” be modified, revised, amended, or rewritten.” Syl. Pt 1 Consumer Advocate Division v. Public Service Commission, 182 W.Va. 152, 386 S.E. 2d 650 (1989), Sowa v Hoffman, 191 W.Va. 105, 14, 443 S.E. 2d 262, 268 (1994).” Williamson v. Greene, 200 W.Va. 421, 426-27, 490 S.E. 2d 23, 28-29 (1997).

Nevertheless, Petitioner seeks redress from this Court that unequivocally requires a re-writing, modification, revision, amendment and/or remodeling in the face of a statute, W.Va. Code §33-11-4a that clearly and unambiguously provides

*“(a) A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice. A third-party claimant's sole remedy against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the Commissioner in accordance with subsection (b) of this section. A third-party claimant may not include allegations of unfair claims settlement practices in any underlying litigation against an insured.”*

Petitioner argues the statute is clear and unambiguous but proceeds to argue for what amounts to a re-writing, modification, revision and/or amendment. Respondent argues, consistent with West Virginia law, when the language of a statute is clear and unambiguous the plain meaning is to control and be accepted without resorting to the rules of interpretation. State v. Elder, Syl. Pt. 2, 152 W.Va. 571, 165 S.E. 2d 108 (1968). Therefore, consistent with this Court’s holding at Syl. Pt. 2, Kirwan v. Kirwan, 2012 W.Va. 520, 575 S.E 2d 130 (2002) and Devanne v. Kennedy, 205 W.Va. 519, 529, 519 S.E. 2d 622, 632 (1999) when “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” This statute, W.Va. Code §33-11-4a is both clear and unambiguous therefore, its plain terms should be applied as written.

Petitioner argues in essence that the legislation at issue is not meeting its desired goals. However, while Respondent disagrees with this conclusion, the remedy to amend lies with our legislatures not with this Court. Verba v. Ghaphery, 2010 W.Va. 30, 36, 552 S.E. 2d 406, 412 (2001) (percuriam).

In light of Petitioner's failing to meet the legal requirements for an issue of a Writ of Prohibition and/or Mandamus Respondent respectfully request Petitioner Writs be DENIED.

**To the extent this court is inclined to grant petitioner's writ, respondent provides the following with a request for oral argument**

## **II. QUESTION PRESENTED**

The Petitioners petition accurately presents the two legal questions to this Court. However, there has been no ruling as of this date as to whether or not post July 5, 2008 conduct / claims handling is admissible at Trial.

## **III. STATEMENT OF CASE**

The Petitioner accurately presents the Statement of this Case with one exception. This cause of action and the third party claims handling commenced on or about March 18, 2004 and ended at the time of settlement in 2009 or early 2010. Therefore, the basis for Petitioner's cause of action is not restricted to post July 8, 2005, claims handling activities. It is Respondents position the July 8, 2005, claims handling of AIG should not be immunized, struck and excluded from this third party case timely filed in compliance with applicable West Virginia Law.

### **(A) Factual Background**

Petitioners petition accurately provides the factual basis for this matter.

**(B) Claims Handling**

This incident involved nine (9) year old Kyle George sustaining a head injury while engaging in a school sanctioned and monitored playground activity.

The claims were wrongfully denied by Petitioner AIG claims adjuster Sandy Horton. Her initial investigation revealed multiple violations of the West Virginia Unfair Trades Practices Act. Specifically, the Ohio County Board of Education Bethlehem Elementary School had in place at the time of this incident Policies and Procedures prohibiting playing football and/or playing with a ball during recess on the playground. This policy was in writing and Petitioner AIG adjuster Horton selectively chose to ignore the same in her liability investigation and conclusion denying liability for this claim.

The second fall and resulting injuries to minor Kyle George occurred on or about March 22, 2004. Kyle's mother Candy personally presented a note to a person in a position of authority, an employee of Ohio County School System at Bethlehem Elementary.

This note informed and advised Bethlehem Elementary School that Kyle was not permitted to participate in playground and/or gym related activities as a result of his sustaining the head injury on or about March 18, 2004.

Adjuster Hart was the assigned Adjuster by Petitioner, AIG to adjust this claim. Liability was crystal clear, as Bethlehem Elementary School acknowledged they misplaced and/or mishandled the medical based note and directed and/or acquiesced in minor George's participation in recess related playground activities resulting in a second injury.

Petitioner was provided medical records and bills by Respondent counsel on or before April 16, 2005. The aforementioned medical bills and records demonstrated a clear causal relationship to the aforementioned incidents in issue.

Petitioner failed to make any settlement offer and Respondent counsel filed the Complaint on June 30, 2005, in excess of three months after minor George's medical bills and records were provided to AIG. There are multiple violations rising to a level of a general business practice involved in the claims handling of this case.

**(C) Procedural History**

The underlying cause of action resolved in 2009 or early 2010. Therefore, Petitioner AIG had in excess of five years to resolve this matter prior to its settlement.

Respondent provided certified Answers and Responses to Petitioner's discovery (see Petitioner's Exhibit C, Appendix pages 000129-000215). The answers and responses were concise and specific, stating no settlement offer was ever made until April 21, 2008. This time period encompasses over four years. Any reasonable investigation would have determined from all available facts and evidence that liability was reasonably clear. The discovery responses specifically reference violations of West Virginia Code § 33-11-4(9)(b)(c)(d) and (f) along with West Virginia Insurance Regulations.

Further, Respondents response to Petitioner's discovery request specifically reference April 4, 2005, as a reference point for the Unfair Trades Practices Act violations. Additionally, Petitioner's answers and responses specifically referenced March 24, 2004, as a violation of West Virginia Code §33-11-9 (c) and West Virginia

Insurance Regulations.

It is of import, Petitioner AIG denied Respondent's initial claim approximately 72 hours after the date of incident, March 18, 2004. The March 24, 2004, incident much like the March 18, 2004, claim, was clearly denied without conducting a reasonable investigation.

The Respondent, Candy Galentine's deposition was scheduled and cancelled multiple times. Defendant AIG filing for the Protective Order and Partial Summary Judgment had absolutely nothing to do with Respondent's discovery responses and everything to do with bringing this matter involving a State insurer to the West Virginia Supreme Court.

Respondent would be remiss in not addressing Petitioner's reference to requesting supplementation of discovery regarding the post 2005 conduct. Specifically, correspondence dated September 26, 2012, October 29, 2012 and November 9, 2012. As Petitioner's counsel is well aware, Respondent's counsel unfortunately was involved in a horrific head-on automobile collision on November 3, 2012, and even as of this date has not been able to return to full time work.

**(D) Judge Starcher's Order Denying Protective Order**

The order by Judge Starcher denying AIG's Protective Order is clear. Discovery was to be permitted on post July 8, 2005, claims handling because Respondent's cause of action was timely filed on or about June 30, 2005, prior to the change in the law.

**IV. ARGUMENT**

The Respondent seeks an Order from this Court denying Petitioner's Motion for

Writ of Prohibition / Mandams and permitting the full and complete cause of action to proceed against Petitioner AIG. Specifically, all claims handling and adjustment of Petitioner's claim and cause of action is discoverable and admissible. That Petitioner AIG's violations of the Unfair Trades Practices Act and West Virginia Insurance Regulations should not be afforded a cloak of protection it clearly is not legally entitled to.

The law in West Virginia is clear and is not capable of multiple interpretations. West Virginia Code § 33-11-4a effective date is July 8, 2005. This third party cause of action was filed on June 30, 2005, prior to enactment of West Virginia Code § 33-11-4a, which in summary eliminated a third party claimant from bringing a private cause of action or any other action against any person for an unfair claims settlement practice. Respondent's timely filed third party bad faith cause of action is in no way, shape or form circumventing West Virginia Code § 33-11-4a. Simply and concisely stated, West Virginia Code § 33-11-4a is inapplicable to this cause of action.

Judge Keeley in Vincenzo v. AIG Ins. Services, Inc. Not Reported in F. Supp 2d, 2007 WL 2773834 (N.D.W.va. 2007) held "[i]t is undisputed that the Vincenzos timely filed their complaint prior to the abolition of the private cause of action for a third party insurance bad faith claim by the West Virginia legislature. Therefore, they are not attempting to circumvent the effective date of W.Va.Code 33-11-4a and bring, for the first time, a cause of action that is no longer recognized in West Virginia." Vincenzo v. AIG Ins. Services, Inc., Not Reported in F.Supp.2d, 2007 WL 2773834 (N.D.W.Va. 2007). Judge Keeley also held that ". . . the savings statute allows the Vincenzos to continue to pursue their insurance bad faith claim despite the enactment of West

Virginia Code § 33-11-4a.”<sup>1</sup> Id. Thus, W.Va. Code § 33-11-4a is irrelevant as the case is controlled by Jenkins v. J. C. Penney Cas. Ins. Co., 167 W.Va. 597, 280 S.E.2d 252 (1981) and its progeny not W. Va.Code § 33-11-4a. Vincenzo v. AIG Ins. Services, Inc., Slip Copy, 2010 WL 415247 (N.D.W. Va.2010).

A cursory review of the clear and unambiguous language of West Virginia Code § 33-11-4a demonstrates its non application to third party bad faith claims filed prior to July 8, 2005. Our West Virginia legislature only prohibited filing or bringing forth a new lawsuit on or after the previously referenced effective date of the statute. As this Court and our West Virginia legislatures are well aware, prior to West Virginia Code § 33-11-4a, a third party claimant like the Respondent / Plaintiff was legally authorized to file a Complaint against a third party insurer alleging violations of the West Virginia Unfair Trades Practices Act while the underlying claim was still pending provided the bad faith claim was stayed. Syl. Pt. 2, Jenkins v. J. C. Penney Cas. Ins. Co., 167 W.Va. 597, 280 S.E.2d 252 (1981); Syl. Pt. 5, Klettner v. State Farm Mut. Automobile Ins. C.O., 205 W. Va. 587, 519 S.E.2d 870 (1999).

Respondent strenuously takes the position pursuant to well established and well recognized statutory construction principles Petitioner’s Writ of Prohibition / Mandamus should be DENIED. The clear and unmistakable statutory language fails in any way to expressly address timely filed pending third party claims the and the statutory language is devoid and without any legislative intent to somehow immunize and/or offer a cloak of

---

<sup>1</sup> The Vincenzo’s underlying claim was not resolved until March 2006 after the effective date for the abolishment of third-party bad faith. See Id. at n.1.

protection to insurance companies for their continuing misconduct in violation of West Virginia Unfair Trades Practices Act. See Syl. Pt. 2, Davis v. Mound View Health Care, Inc., 220 W.Va. 28, 640 S.E.2d 91 (2006); Syl. Pt. 2, Crockett v. Andrews, 153 W.Va. 714, 718-19, 172 S.E.2d 384, 387 (1970); Subcarrier Communications, Inc. v. Nield, 218 W.Va. 292, 299 n.10, 624 S.E.2d 729, 736 n.10 (2005) .

Therefore, to provide Respondents/Plaintiffs what their entitled to in our civil system of justice and to afford them Due Process, Respondent respectfully and strenuously maintains all facts and evidence of AIG misconduct after the effective date is both discoverable and admissible.

The West Virginia legislatures had full knowledge, notice and a wealth of information from many valuable sources when this legislation was drafted and ultimately became law on July 8, 2005. Furthermore, the West Virginia legislature knew undeniable and unquestionably, that there were third party bad faith cases pending before Circuit Courts and more to be filed throughout the State of West Virginia prior to the July 8, 2005 effective date. Armed with all of this knowledge and resources our legislatures failed to specifically prohibit, limit, restrict or exclude evidence of claims handling misconduct occurring after July 8, 2005 (see West Virginia Code § 33-11-4a). The West Virginia legislature had every opportunity to address this critically important issue but elected to intentionally forego the same. The West Virginia legislature elected to limit the reach, scope and application of West Virginia Code § 33-11-4a to a specific factual scenario that is not at all applicable to this case as Respondents Complaint was filed prior to July 8, 2005. See Syl. Pt. 2, Davis v. Mound View Health Care, Inc., 220 W.Va. 28, 640 S.E.2d 91 (2006); Syl. Pt. 2, Crockett v. Andrews, 153 W.Va. 714, 718-

19, 172 S.E.2d 384, 387 (1970); Subcarrier Communications, Inc. v. Nield, 218 W.Va. 292, 299 n.10, 624 S.E.2d 729, 736 n.10 (2005) . See Syl. Pt. 3, McKinney v. Fairchild Intern., Inc., 199 W.Va. 718, 487 S.E.2d 913 (1997); Syl. Pt. 2, State v. Williams, 196 W.Va. 639, 474 S.E.2d 569 (1996) quoting Syl. Pt. 12, Vest v. Cobb, 138 W.Va. 660, 662, 76 S.E.2d 885, 888 (1953).

The clear and concise statutory language of West Virginia Code § 33-11-4a expresses absolutely no intent to limit, affect, prohibit, restrict or exclude evidence of claims misconduct occurring after July 8, 2005.

In short, Petitioner AIG seeks this Court's assistance to re-write the statute by adding language which leads to an inconsistent, unjust and unreasonable result by requiring essential and critical parts of Respondent / Plaintiffs claims to be essentially decided by two different tribunals leading to the real potential of inconsistent results and waste of time and resources. Dunlap v. Friedman's, Inc., 213 W.Va. 394, 401, 582 S.E.2d 841, 848 (2003).

To follow Petitioner's legal reasoning, the jury will not be informed of the underlying claim settlement and litigation, it having occurred post July 8, 2005. This is illogical and frankly makes no sense. In essence, Petitioner's Writ of Prohibition is an improper request to judicially modify or amend the clear and unambiguous language of West Virginia Code § 33-11-4a. See Motto v. CSX Transp., Inc., 210 W.Va. 412, 647 S.E.2d 848, 855 (2007).

Defendant AIG's argument that conduct occurring on or after July 8, 2005, is not discoverable or may not be used to support the plaintiff's case is without merit as the language is not found anywhere in the statute. Syl. Pt. 6, Phillips v. Larry's Drive-In

Pharmacy, Inc., 220 W.Va. 484, 647 S.E.2d 920 (2007); Motto v. CSX Transp., Inc., 210 W.Va. 412, 420, 647 S.E.2d 848, 856 (2007). Had the Legislature intended this result, then such language would have been specifically included in W.Va. Code § 33-11-4a. *Id.* In fact, the clear and unambiguous language of the statute places absolutely no restraints on private causes of action for third-party bad faith that were filed prior to the effective date of the statute, including evidence of misconduct occurring on or after July 8, 2005. W.Va. Code § 33-11-4a. The final result of the clear language chosen by the West Virginia Legislature in enacting W.Va. Code § 33-11-4a is that the statute only prohibits the filing of a new complaint for third-party bad faith after the effective date of the statute. See Motto v. CSX Transp., Inc., 210 W.Va. 412, 419-20, 647 S.E.2d 848, 855-56 (2007); See Syl. Pt. 3, Davis v. Mound View Health Care, Inc., 220 W.Va. 28, 640 S.E.2d 91, 94-95 (2006).

As this Court is well aware, and as previously referenced, Plaintiff's cause of action was preserved by the timely of filing the complaint. Charlton v. M.P. Industries, Inc., 173 W.Va. 253, 256, 314 S.E.2d 416, 419-20 (1984); Syl. Pt. 1, Johnson v. Nedeff, 192 W.Va. 260, 452 S.E.2d 63 (1994). Moreover, the Legislature did not by clear, strong and imperative words or by necessary implication give W.Va. Code § 33-11-4a retroactive force and effect to proceedings instituted prior to the effective date nor did the Legislature by clear language apply the statute to conduct occurring after abolishment to cases filed before the effective date. Syl. Pt. 3, Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 576 S.E.2d 807 (2002); Roderick v. Hough, 146 W.Va. 741, 748-49, 124 S.E.2d 703, 707-08 (1961)(“. . . Perhaps said it best, “therefore, rights accrued, claims arising, proceedings instituted, orders made under the

former law, or judgments rendered before the passage of an amended statute, will not be affected by it, but will be governed by the original statute, unless a contrary intention is expressed in the later statute. . . .”). Defendant AIG’s argument that the plaintiff’s third-party bad faith cause of action is limited to events occurring prior to the effective date of the statute must fail as the Legislature did not by clear, strong and imperative words or by necessary implication intend W.Va. Code § 33-11-4a to retroactively apply to proceedings instituted prior to the effective date of the statute as evidenced by the clear statutory language which only prohibits the bringing of a new private cause of action for an unfair claims settlement practice after the effective date.

Plaintiff’s private cause of action for third-party bad faith is unaffected by the abolishment of third-party bad faith as her complaint was filed prior to the effective date of the statute such that her cause of action was preserved and Defendant AIG’s misconduct occurring after the effective date relates back to the original complaint. See Wallace v. Shaffer, 155 W.Va. 132, 138, 181 S.E.2d 677, 680 (1971).

Black’s Law Dictionary defines bring suit as “[t]o ‘bring’ an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. A suit is ‘brought’ at the time it is commenced. ‘Brought’ and ‘commenced’ in statutes of limitations are commonly deemed to be synonymous. Under the Federal Rules of Civil Procedure, and also most state courts, a civil action is commenced by filing a complaint with the court.” Black’s Law Dictionary, Abridged Sixth Edition, pg 192 (1991). Black’s Law Dictionary defines commence as “[t]o initiate by performing the first act or step. To begin, institute or start. Civil Action in most jurisdictions is commenced by filing a complaint with the Court. Fed.R.Civil P.3.” Black’s Law Dictionary, Abridged

Sixth Edition, pg 183 (1991); "A civil action is commenced by filing a complaint with the court. . . ." W.Va. R. Civ. P. 3(a).

On December 8, 2010, Judge Ronald E. Wilson entered an order denying Nationwide's Motion for Protective Order seeking to bar the production of documents generated on or after July 8, 2005 (See Petitioner's Exhibit K, 00412-00413). Also, Judge Ronald E. Wilson held that "[t]he issue before the Court is one of discovery which is liberally construed. The Plaintiff should be permitted broad discretion in their ability to seek discovery. Ultimately the issue of what of the discoverable information is admissible will be addressed by the Court prior to trial" (See Petitioner's Exhibit K, 00412-00413).

On July 6, 2011, Judge James P. Mazzone entered an order denying Nationwide's Motion for Protective Order seeking to bar discovery of information and documents regarding Nationwide and its agents' conduct occurring after July 8, 2005. (See Petitioner's Exhibit M, 000415-000416).

Plaintiffs request to deny Defendant AIG's Motion is supported by an order entered by Judge Martin J. Gaughan denying Nationwide Mutual Fire Insurance Company's Motion to Exclude Evidence of Post - July 8, 2005 Claims Activity in a third-party bad faith case (See Petitioner's Exhibit N, 000417 - 000420). Judge Martin J. Gaughan entered an order holding (See Petitioner's Exhibit N, 000417 - 000420):

1. The Court finds that discovery is allowed on conduct occurring post-effective date of W.Va. Code § 33-11-4a.
2. The Court finds that a jury can consider actions on behalf of Defendant Nationwide Mutual Fire Insurance Company, the insurer, occurring post-effective date of W.Va. Code § 33-11-4a.

3. The Court finds that the legislature is very clear and the language is very concise that you should not be able to file a cause of action for third-party bad faith after the effective date of W.Va. Code § 33-11-4a.
4. The Court finds that the legislature did not go back and amend the Consumer Protection Act or alter the legislative rules of the insurance commissioner, so that the actions of the insurer occurring post-effective date of W.Va. Code § 33-11-4a are still violations of the statute, W.Va. Code § 33-11-4.
5. The Court finds that actions in violation of W.Va. Code § 33-11-4 are still inherently wrong, if in fact they are proven to have occurred, and there is nothing in the statute, W.Va. Code § 33-11-4a, that would prevent consideration by a jury in a case that has already been filed prior to the effective date of W.Va. Code § 33-11-4a, that the insurance company continued to ignore the laws of the State of West Virginia and the legislative rules of the State of West Virginia and that continued post-effective date of W.Va. Code § 33-11-4a.
6. The Court finds that ignoring the laws create additional damages and certainly should be considered by the jury in reaching a verdict, especially whether these were of a continuing nature or repeated violations, if in fact they are proven to have occurred, so therefore there is no basis and no reason why the plaintiffs cannot present evidence and request damages based on conduct occurring post-effective date of W.Va. Code § 33-11-4a.
7. The Court finds that W.Va. Code § 33-11-4a is very clear on its face as it only prevents the filing of new lawsuits.
8. The Court finds that W.Va. Code § 33-11-4a does not in any way approve the actions of an insurer or modify the standards that have to be met.

Plaintiff's request to deny Defendant AIG's motion is further supported by an order entered by Judge Ronald E. Wilson on April 27, 2012. (See Petitioner's Exhibit L, 000414). Judge Ronald E. Wilson held the following regarding W.Va. Code § 33-11-4a:

This legislation was not retroactive and nowhere in the statute does it state that all pending claimants are hereby stripped of their grievances by the new law. It is the opinion of the court that the 2005 statute did not extinguish actions currently pending at the time the legislation became effective. Therefore, the Court finds that the statute in effect on date the civil action was filed will control. With that finding it follows that it would be absurd to hold that only the

Pennsylvania half of the plaintiffs case could be presented to a jury, as argued by Nationwide.

When an insured sued his insurance carrier to recover attorney's fees, costs, and prejudgment interest because the insurance carrier would not pay the policy limits of the underinsured's motorist policy, the Court in Miller v. Fluharty, 201 W.Va. 685, 500 S.E.2d 310 (1997), stated that the "totality of the policyholder's negotiations with the insurance carrier, not merely the status of negotiations before and after a lawsuit is filed," is used to determine whether a policyholder has substantially prevailed. The same logic should apply in a third-party bad faith law suit. It is the totality of the Ms. Johnsons' negotiations with Nationwide that is to be examined in this lawsuit. What a foolish law it would be that would immunize improper conduct by Nationwide if the company knew that it would not be accountable for its treatment of Ms. Johnson after the law changed.

(See Petitioner's Exhibit L)

Further, Defendant AIG's Motion for Protective Order seeking to limit discovery should be denied as the West Virginia Rules of Civil Procedure are to be liberally construed in favor of permitting discovery. See Syl. Pt. 1, Evans v. Mutual Mining, 199 W. Va. 526, 530, 485 S.E.2d 695, 699 (1997) ("Civil discovery is governed by the West Virginia Rules of Civil Procedure, Rules 26 through 37. 'The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue. (footnote omitted).' Policarpio v. Kaufman, 183 W.Va. 258, 261, 395 S.E.2d 502, 505 (1990). Discovery disputes that must be resolved by the circuit court are addressed to the circuit court's sound discretion, and the circuit court's order will not be disturbed upon appeal unless there has been an abuse of that discretion."). "As a general proposition, any material is subject to discovery unless: (1) its discovery is categorically prohibited or made conditional by the discovery rules, or (2) the matter is so obviously irrelevant or the mode of discovery so ill-fitted to the issues of the case that it can be said to result in 'annoyance, embarrassment, oppression, or

undue burden or expense.' Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, Civil Procedure § 5.8 at 249 (4th ed. 1992)." McDougal v. McCammon, 193 W.Va. 229, 238 n.9, 455 S.E.2d 788, 797 n.9 (1995). Generally, unless a relevant matter is privileged, it is discoverable. W.Va. R. Civ. P. 26(b)(1). West Virginia Rule of Civil Procedure 26(b)(1) describes the scope of discovery, as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"The question of the relevancy of the information sought through discovery essentially involves a determination of how substantively the information requested bears on the issues to be tried. However, under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, **discovery is not limited only to admissible evidence, but applies to information reasonably calculated to lead to the discovery of admissible evidence.**" Syl. Pt. 4, State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992) (Emphasis added.). "[O]ne of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure." McDougal v. McCammon, 193 W.Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995). To be successful, a party seeking a protective order must do more than make unsubstantiated

or conclusory statements that a discovery request is overly broad and burdensome. See State ex rel. Allstate Ins. Co. v. Gaughan, 640 S.E.2d 176 (2006); W.Va. Rule Civ. Proc. 26(b)(1)(iii). "The test for relevancy under the discovery rules is necessarily broader than the test for relevancy under Rule 402 of the Federal Rules of Evidence. Fed.R.Civ.P. 26(b)(1) ("relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.")" Taggart v. Damon Motor Coach, Not Reported in F.Supp.2d, 2006 WL 2473395 (N.D.W.Va. 2006). "Courts also have construed Federal Rule of Civil Procedure 26(b)(1) liberally, creating 'a broad vista for discovery which would encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.'" Herbalife Intern., Inc. v. St. Paul Fire and Marine Ins. Co., Not Reported in F.Supp.2d, 2006 WL 2715164 (N.D.W.Va. 2006) (quoting Nestle Foods Corp. v. Aetna Cas. and Sur. Co., 135 F.R.D. 101, 104 (D.N.J.1990)). "Moreover, the question of relevancy is to be more loosely construed at the discovery stage than at the trial." Herbalife Intern., Inc. v. St. Paul Fire and Marine Ins. Co., Not Reported in F.Supp.2d, 2006 WL 2715164 (N.D.W.Va. 2006) citing Leksi v. Federal Ins. Co., 129 F.R.D. 99, 104 (D.N.J.1989)(citing Wright & Miller, Federal Practice and Procedure § 2007-2008.). "As was articulated by the United States Supreme Court in United States v. Procter & Gamble Co., 356 U.S. 677, at 682-683, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958):

Modern instruments of discovery serve a useful purpose.... They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Babyage.com, Inc. v. Toys "R" Us, Inc., 458 F.Supp.2d 263, 265 (E.D.Pa. 2006).

“As the Supreme Court has stated, litigation is no more ‘a game of blind man's buff.’”

Babyage.com, Inc. v. Toys "R" Us, Inc., 458 F.Supp.2d at 265 quoting Procter & Gamble Co., 356 U.S. at 682, 78 S.Ct. 983.

Defendant AIG's motion should be denied as the depositions are proper and the plaintiff is absolutely permitted to inquire into the witnesses' background, handling and knowledge of the plaintiff's insurance claim. The depositions sought are reasonably calculated to lead to the discovery of admissible evidence. The plaintiff has not sought the discovery for any improper purpose such as to harass the defendant or to cause any undue expense. The discovery is requested plainly for valid reasons under the West Virginia Rules of Civil Procedure as discovery is liberal and broad. See Syl. Pt. 1, Evans v. Mutual Mining, 199 W. Va. 526, 530, 485 S.E.2d 695, 699 (1997); McDougal v. McCammon, 193 W.Va. 229, 238 n.9, 455 S.E.2d 788, 797 n.9 (1995); Syl. Pts. 3 - 4, State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992); W.Va. R. Civ. P. 26(b)(1). The requested discovery is necessary, legitimate investigation of the claim under the West Virginia Rules of Civil Procedure.

**WHEREFORE**, Plaintiffs respectfully requests that an order be entered Denying Petitioner's Writ of Prohibition / Mandamus. Petitioner's argument that conduct occurring after third-party bad faith cases were abolished by the West Virginia Legislature, July 8, 2005, is somehow not discoverable or admissible is without merit as the clear and unambiguous language of W. Va. Code § 33-11-4a only prohibits the filing or bringing of a new complaint for third-party bad faith after the effective date, which did not occur in this case.

Respectfully Submitted,  
CANDY GEORGE, et al.

  
Of counsel

Ronald W. Zavolta (W.Va. State Bar ID #8739)  
**ZAVOLTA LAW OFFICE**  
741 Fairmont Pike  
Wheeling, WV 26003  
Telephone: (304) 905-8073

**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

AIG DOMESTIC CLAIMS, INC.,

Petitioner and  
Defendant Below,

Supreme Court  
Case No.: 13-1048

vs.

THE HONORABLE LARRY V STARCHER,  
JUDGE OF THE CIRCUIT COURT OF  
OHIO COUNTY, WEST VIRGINIA, and  
CANDY GEORGE, Individually and as  
Guardian, Mother and Next of Friend of  
KYLE GEORGE, a minor, and MARK  
GEORGE

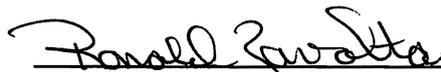
Ohio County Circuit Court  
Civil Action No.: 05-C-550

Respondents and Plaintiffs Below.

**CERTIFICATE OF SERVICE**

Service of **RESPONDENTS RESPONSE IN OPPOSITION TO AGI DOMESTIC CLAIMS, INC.'S VERIFIED PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS WITH ATTACHED APPENDICES OF EXHIBITS** was had upon the parties herein by facsimile and mailing true and correct copies, by United States Mail, postage prepaid, this 7<sup>th</sup> day of November, 2013 to:

Don C. A. Paker, Esquire  
Laura E. Hayes, Esquire  
Spilman, Thomas & Battle, PLLC  
300 Kanawha Boulevard, East  
Charleston, WV 25301  
Facsimile : 304-340-3801



Ronald W. Zavolta (W.Va. State Bar ID #8739)  
**ZAVOLTA LAW OFFICE**  
741 Fairmont Pike  
Wheeling, WV 26003  
Telephone: (304) 905-8073

# Exhibits on File in Supreme Court Clerk's Office