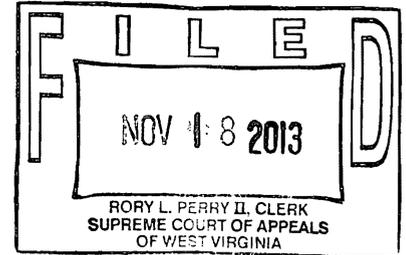


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 13- 1153



STATE OF WEST VIRGINIA EX REL.
OWNERS INSURANCE COMPANY,

Petitioner,

v.

WARREN R. McGRAW, JUDGE OF THE CIRCUIT COURT
OF WYOMING COUNTY, WEST VIRGINIA, AND
MORLAN ENTERPRISES, INC.,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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WARREN R. McGRAW, JUDGE OF THE CIRCUIT COURT
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MORLAN ENTERPRISES, INC.,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

Comes now Owners Insurance Company (hereinafter "Petitioner"), by and through its undersigned counsel, Barbara J. Keefer, Karen E. Klein and Schuda & Associates, *pllc*, and submits the instant Petition for Writ of Prohibition pursuant to Rule 16 of the Revised Rules of Appellate Procedure for the reasons that follow. This Petitioner seeks to prohibit the Circuit of Wyoming County from exercising personal jurisdiction over it; to prohibit the Circuit Court of Wyoming County from applying West Virginia substantive law to an issue of insurance coverage relating to a policy issued in Ohio to an Ohio insured by an Ohio insurer via an Ohio agent; to prohibit the Circuit Court of Wyoming County from permitting Morlan Enterprises, Inc., to proceed to a jury trial now scheduled for December 9, 2013,¹ on first-party claims for bad faith and violation of W. Va. Code § 33-11-4(9), the West Virginia Unfair Trade Practices Act, based upon the application of *Marlin v. Wetzel County Bd. of Educ.*, 212 W. Va. 215, 569 S.E.2d 462

¹ As part of its Petition, Owners seeks expedited entry of a Rule to Show Cause, which, pursuant to Rule 16(f) of the Revised Rules of Appellate Procedure, shall automatically stay any further proceedings in the circuit court and, in particular, the December 9, 2013 trial.

(2002); and to prohibit the Circuit Court of Wyoming County from excluding all evidence of payment by Morlan's own insurer of Morlan's attorney fees throughout this declaratory action.

I. QUESTIONS PRESENTED

Did the Circuit Court of Wyoming County exceed its legitimate authority by ruling that it had jurisdiction over an Ohio insurer that issued a policy to an Ohio insured via an Ohio agent an exposure located in Ohio and which did not do business in West Virginia? Did the Circuit of Wyoming County exceed its legitimate authority by applying West Virginia substantive law to an issue of insurance coverage relating to a policy issued in Ohio to an Ohio insured by an Ohio insurer via an Ohio insurance agent? Further, did the Circuit Court of Wyoming County exceed legitimate authority by declaring that an entity that is named on a Certificate of Insurance is a first-party claimant to the insurance policy for which the Certificate was issued, when the entity was neither a named insured nor an additional insured by endorsement, for purposes of claims of bad faith and violation of the West Virginia Unfair Trade Practices Act and seeking damages pursuant to *Hayseeds v. State Farm Fire & Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1996)? Finally, did the Circuit Court of Wyoming County exceed its legitimate authority by applying the collateral source rule to attorney fees paid by an entity's own insurer in a coverage dispute regarding priority of coverages between that insurer and another insurer?

II. STATEMENT OF THE CASE

Paul Kerns, an electrician in Cambridge, Ohio, who held a master electrician's license in Ohio and Kentucky, approached the Gladstone Agency ("Gladstone"), an insurance agent in Cambridge, Ohio, in 2000 and applied for commercial general liability ("CGL") insurance. He advised Gladstone that his business was located in Guernsey County, Ohio. The location of his

business on the application for insurance was designated as the entire ZIP code or county surrounding his business at 311 Woodlawn Ave., Cambridge, Guernsey County, Ohio 43725.

Gladstone placed the insurance with Owners Insurance Company, a company licensed to do business in Ohio, but not in West Virginia. Owners underwrote and issued the CGL policy based upon the information provided to it from Gladstone, which had been provided to by Kerns. Kerns renewed his CGL policy with Owners for multiple successive terms.²

On March 2, 2005, Gladstone faxed Morlan Enterprises, Inc. (“Morlan”), a West Virginia business located in Parkersburg, West Virginia, a Certificate of Liability Insurance dated March 2005 (“March Certificate”), APP. 107, which identified, among other policies,³ a general liability policy effective October 9, 2004 to October 9, 2005. The March Certificate listed Owners Insurance Company as the insurer affording coverage. In a section entitled “Description of Operations/Locations/Vehicles/Exclusions Added by Endorsement/Special Provisions” the Certificate stated that “Morland Enterprise Inc. its’s subsidiaries and assigns are included under the General Liability and Automobile policies as additionally insured.” (Errors in original.)

The March Certificate also stated in bold letters as follows: “THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.”

Gladstone never advised Petitioner Owners that it had issued the certificate or that the insured asked Gladstone to add Morlan to the CGL policy as an additional insured. Therefore, Owners was unaware that an Ohio agent had represented to a West Virginia entity that some

² By the time of the policy at issue in this litigation, Kerns’ business location moved to 530 W. 10th Street, also in Cambridge, Guernsey County, Ohio.

³ The other policies are not at issue in this matter.

of coverage may be available to it under the Ohio policy issued to Owners' Ohio insured until years later.

Kerns worked as an electrical subcontractor for Morlan at sites in Ohio, Kentucky and West Virginia, including a site in Mingo County, West Virginia, where Kerns and a Morlan employee worked in April and May 2005. Kerns completed the job and he and Morlan's left the site. On September 15, 2005, while working for a different company on a different project, Bobby Messer was injured while working on high-power electrical lines in Mingo County, West Virginia. He filed suit on October 10, 2006, in Wyoming County,⁴ West Virginia, against several electrical company and contractor defendants alleging, *inter alia*, that his injury was proximately caused by the work performed by the electrical contractors at the site. (APP. 793-803)⁵

On September 12, 2007, Morlan's insurer, Westfield Insurance Company ("Westfield"), sent a letter to Kerns and to Gladstone to place Kerns on notice of the potential claim. Enclosed with the letter was a Certificate of Insurance issued by Gladstone regarding the Kerns policy and

⁴ The history of all of the claims associated with Mr. Messer's injury is lengthy and complicated. Plaintiff Bobby Messer was represented by Samuel A. Hrko, son of Judge John Hrko, and filed suit in Wyoming County, where Judge Hrko presided. Judge Hrko then recused himself and, by Administrative Order on December 14, 2006, Supreme Court Chief Justice Robin Jean Davis transferred the *Messer* case to Judge Rudolph J. Murensky of the Eighth Judicial Circuit. After Mr. Messer's claims were resolved, Mr. Hrko was no longer involved in the case and Judge Hrko had retired from the bench and because Owners had filed a separate declaratory judgment action against Morlan's insurer, Westfield, in Wyoming County that was pending before Judge Warren R. McGraw, Judge Murensky asked the West Virginia Supreme Court of Appeals to reassign the case back to the Twenty-Seventh Circuit. By Administrative Order entered February 7, 2012, Chief Justice Menis E. Ketchum reassigned this matter to the docket of Judge Warren R. McGraw, where it now resides. Owners sought to consolidate the *Owners v. Westfield* matter and the *Morlan v. Owners* matters as they arise out of the same issues, but Judge McGraw denied that motion on November 4, 2013.

⁵ Although most defendants settled, Messer went to trial against one defendant, Hampden Coal Company, LLC. The jury returned a verdict for Hampden on September 15, 2009. Mr. Messer appealed the denial of his post-trial motions to the Supreme Court, which issued an opinion on May 16, 2012, affirming the lower court's decision. *Messer v. Hampden Coal Co., LLC*, 229 W. Va. 97, 727 S.E.2d 443 (2012). None of the issues raised in this Petition are affected by the *Messer v. Hampden* verdict or opinion.

dated October 5, 2005, more than three weeks after the subject accident (“the October Certificate”). APP. 362. The October Certificate stated that “Morland Enterprise Inc.” was a Certificate Holder. As the October Certificate was dated more than three weeks after the subject accident, it was not applicable to the claim against Morlan. Westfield hired counsel to defend Morlan. No further communication occurred between Westfield and Owners or Kerns regarding coverage for Morlan under the Owners policy until March 3, 2009.

On November 30, 2007, Morlan, by its Westfield-retained defense counsel, filed a Third-Party Complaint against Paul Kerns, claiming that any liability it had to Mr. Messer was the result of work performed by Kerns in April and May 2005. Owners hired counsel to defend its insured, Kerns, for the third-party claim. Mr. Messer eventually asserted a direct claim against Kerns as well and Kerns’ Owners-retained counsel continued to defend this claim.

On March 3, 2009, two days before mediation was to take place regarding Mr. Messer’s claims against the various defendants, Morlan claimed for the first time that it was an additional insured under the commercial liability policy that Owners issued to Kerns in Ohio. Morlan produced the March Certificate from Gladstone to support its claim, relying on the West Virginia Supreme Court of Appeals case of *Marlin, supra*, and tendered its defense and indemnification to Owners. APP. 105-107.

On March 17, 2009, Owners believing that the insurance policy issued in Ohio to an Ohio insured by an Ohio agent on behalf of an Ohio insurer was subject to the law of the state of Ohio, filed a Complaint for Declaratory Judgment against Morlan and Westfield in Guernsey County, Ohio, where Kerns was located. APP. 108-117.

On March 23, 2009, Morlan filed a motion in the Wyoming County action for leave to a third-party complaint against Owners in which it sought a declaratory judgment that Owners

owed it a defense and indemnification, and asserted claims for breach of contract, common-law bad faith and violation of W. Va. Code § 33-11-4(9), the West Virginia Unfair Trade Practices Act (“UTPA”). Morlan asserted its right to recover for common-law “bad faith,” was based upon *Hayseeds, supra*⁶, and *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), and specifically sought recovery of “economic and non-economic damages, including attorneys fees and costs recoverable under *Hayseeds*.” The UTPA claim cited to *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981) and *Dodrill v. Nationwide Mut. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996) , as providing authority for recovery of, among other claimed damages, “legal fees and costs.” APP. 056-065.

While Morlan’s motion for leave was pending, Owners negotiated settlement of the claim against Morlan to eliminate further liability to Morlan and to secure a full and complete release and dismissal of that claim.⁷ Owners advised Westfield that it negotiated the settlement while reserving the coverage question to be resolved between Owners and Westfield. APP. 765-765-766.

On April 22, 2009, Circuit Judge Murensky entered an Order permitting Morlan to file its Third-Party Complaint against Owners. On May 4, 2009, Owners filed a “Motion to Dismiss the Third-Party Complaint,” and supporting memorandum, asserting that the circuit court did not

⁶ Owners notes, however, that *Hayseeds* was a property claim. The doctrine permitting attorney fees to be imposed on a insurer that wrongfully denies a first-party claim by its insured has been subsequently expanded into the area of underinsured motorist claims. However, a claim for indemnification and defense under a liability policy such as the one at issue here is not subject to *Hayseeds*, but rather to *Aetna Cas. & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Under *Pitrolo*, the claimant insured [which Owners denies Morlan is] can recover only its “expenses of litigation, including costs and reasonable attorney’s fees.” Syl. Pt. 1, *id.*

⁷ Morlan was dismissed as a defendant by order entered August 24, 2009.

personal jurisdiction over it.⁸ APP. 066-154. Nearly two years later, on March 28, 2011, the court finally entered an order denying Owners' motion to dismiss.⁹ APP. 001-010.

On May 24, 2011, Owners filed a motion to apply Ohio's substantive law to the claims brought by Morlan. APP. 288-311. The motion was fully briefed, but no ruling issued from the circuit court. On January 21, 2013, Owners filed an amended motion to add a request for judgment. APP. 382-421. Morlan filed its response in opposition and asserted a "Cross-Motion Summary Judgment" (APP. 447-583), to which Owners responded in opposition. APP. 605-627. The summary judgment issue was fully briefed by February 4, 2013. Yet the parties still received no ruling on Owners' original motion seeking application of Ohio law. That Motion remained pending for more than two years.¹⁰ On June 11, 2013, the circuit court finally ruled that West Virginia substantive law would apply, but held in abeyance the issue of summary judgment as to coverage. APP. 011-020. By Order entered November 4, 2013, the circuit court granted Morlan's cross-motion for summary judgment, restating its findings of fact and conclusions of law that

⁸ On May 6, 2009, Owners also filed a "Motion for Protective Order and Expedited Hearing" to attempt to get prompt resolution of its jurisdictional arguments in the Circuit Court of Wyoming County. The circuit court never ruled on that motion.

⁹ While not immediately relevant to the issues before this Court, Petitioner advises this Court that while the West Virginia action by Morlan against Owners was pending and no ruling was forthcoming from the circuit court on jurisdiction, Owners continued to pursue its attempts to secure a declaratory judgment in courts in Ohio, where it believed both personal jurisdiction over the parties and subject matter jurisdiction over the Ohio policy issued by an Ohio insurer via an Ohio agent to an Ohio insured were proper. The Ohio courts eventually declined to hear Owners' declaratory judgment claims, citing the doctrine of *forum non conveniens*. No Ohio court ever ruled whether Ohio or West Virginia substantive law would apply to the coverage issues and no Ohio court ever ruled on the merits of Owners' coverage position. After having exhausted its appeals available in Ohio, on November 10, 2010, Owners filed its own declaratory judgment action against Westfield in the Circuit Court of Wyoming County, at Civil Action No. 10-C-199. APP.703-779 and APP. 780-792.

¹⁰ The Motion to Apply Ohio Law was on the docket of Judge Murensky for eight months until he requested the matter be transferred back to the docket of the Twenty-Seventh Judicial Circuit, as noted in footnote 2. The Motion then was pending on the docket of Judge McGraw for an additional sixteen (16) months before Owners obtained a ruling on the choice of laws issue.

Virginia law would apply to the claims Morlan presented against Owners arising out of the Ohio policy. APP. 021-036.

On January 21, 2013, Owners also filed a motion to strike the damages claims of Morlan and asserted that Westfield, not Morlan, was the real party in interest because Westfield had paid all attorney fees and expenses associated with the declaratory judgment action. APP. 422-446. Morlan responded in opposition on February 1, 2013. APP. 585-604. No ruling was forthcoming. In accordance with the circuit court's pretrial order, on September 30, 2013, Morlan then filed a motion *in limine* asking the court to preclude any evidence or mention of the defense provided by Westfield to Morlan and asserted that Westfield's payment of the attorney fees is a "collateral source." APP. 628-690. By separate Orders entered November 4, 2013, the circuit court granted Morlan's motion *in limine*, APP. 048-055, and denied Owners' motion to strike Morlan's damages claims. APP. 037-047.

Owners now petitions the Supreme Court of Appeals to prohibit the Circuit Court of Wyoming County from enforcing the following rulings, issued by the circuit court, which exceed the legitimate authority of the circuit court and which are clearly erroneous as a matter of law:

- 1) The Circuit Court of Wyoming County has jurisdiction over an Ohio insurer that issued a policy to an Ohio insured via an Ohio agent for an exposure located in Ohio and which did not do business in West Virginia;
- 2) West Virginia substantive law is applicable to an issue of insurance coverage relating to a policy issued in Ohio to an Ohio insured by an Ohio insurer via an Ohio insurance agent;

- 3) An entity that is named on a Certificate of Insurance is a first-party claimant to the insurance policy for which the Certificate was issued, when the entity was neither a named insured nor an additional insured by endorsement; and
- 4) The collateral source rule applies to attorney fees paid by an entity's own insurer in a coverage dispute regarding priority of coverages between that insurer and another insurer.

III. SUMMARY OF ARGUMENT

The circuit court's orders are based upon multiple manifest and clear legal errors. These errors mandate that this Court issue a writ of prohibition to prevent the circuit court from proceeding with the trial of first-party bad faith and UTPA claims of Morlan against Owners under West Virginia law as set forth in the court's multiple pretrial orders.

First, the circuit court found that it could exercise personal jurisdiction over the Petitioner, even though the Petitioner did not have such "minimum contacts with the state of the forum that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice," and Owners did not contract to insure a risk that was located within West Virginia at the time of contracting.

Second, the circuit court applied West Virginia substantive law to an insurance policy issued in Ohio by an Ohio insurer to an Ohio insured, via an Ohio insurance agent. This ruling violates the laws of comity and is contrary to the clear choice of laws provisions of West Virginia, in particular those decisions of this Court involving an insured of another state who by mere chance is in West Virginia, rather than the state of contracting, when injury occurs to a third party. This Court has repeatedly held that the state of contracting is the state whose substantive laws should apply to any disputes regarding the insurance contract.

Third, after wrongly determining that West Virginia law would govern the Ohio contract and a dispute arising out of that contract, the circuit court wrongly expanded the existing law of this state as set forth by this Court in *Marlin, supra*, and its progeny to declare that a Certificate of Insurance not only operates as estoppel to an insurer to deny coverage to the holder as an additional insured, but also elevates that certificate holder to a first party under the contract, capable of pursuing all possible claims that a first party could pursue. Such claims include breach of a contract to which it was not a party, common-law bad faith and violation of the UTPA. This holding is in clear contravention to the language of the Certificate and the language of *Marlin*, is an unreasonable expansion of the law of this state.

Finally, the circuit court wrongly applied the collateral estoppel rule to a dispute about priority of coverages for defense and indemnification of Morlan for the claims asserted by underlying Plaintiff Messer. The plain language of the law holds that in West Virginia, an insured may recover attorney fees *it incurred or paid* to secure coverage from its insurer when it “substantially prevails” against its insurer, because the insured has purchased insurance to protect itself from such litigation.

In this case, Westfield paid and is paying the legal fees and expenses for its insured to obtain a declaration about whether its policy or Owners’ policy owes coverage. Westfield has no right under its contract with Morlan to reimbursement of those fees from Morlan. Westfield’s payment of the fees is not a collateral source and Morlan has no right to recover “damages” that it has not incurred or paid and will not incur.

Further, Morlan is not an “insured” under the Owners policy and did not pay premiums to obtain the policy. Therefore, it simply does not possess the same right to recover attorney fees in

coverage dispute with a company that is *not* its own insurer that an insured would possess. To otherwise is an unreasonable and unwarranted expansion of the law of this state.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument is necessary under Rule 18(a) of the Revised Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of first impression and issues of fundamental public importance.

V. ARGUMENT

A. Prohibition is the only remedy to correct this clear legal error.

A right to a writ of prohibition shall lie, in part, where a circuit court “exceeds its powers.” W. Va. Code § 53-1-1. This Court has held that a writ of “prohibition lies only to 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 for writ of error, appeal or certiorari.” Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). Further, this Court “invites opportunities to correct substantial, clear-cut, legal errors where there is the high probability that the trial will be completely reversed if the error is not corrected in advance.” *Hinkle v. Black*, 164 W. Va. 112, 121, 262 S.E.2d 744 (1979). This Court has set forth the following criteria to evaluate in determining whether to issue a writ of

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (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 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

satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, it is evident that the circuit court has committed numerous fundamental errors in the application of the law in its pretrial orders. In particular, the circuit court has wrongly applied the law of West Virginia to an issue arising under an Ohio contract and, in doing so, has further wrongly determined that Morlan is a first-party insured under the policy issued by Owners. If uncorrected, these clear legal errors will result in Owners being forced to defend itself at a trial presided by a court that does not have personal jurisdiction over it, at which West Virginia law will be applied, and for a claim that does not exist under either Ohio law (which should apply) or West Virginia law.

It is clear that a court that exercises personal jurisdiction where none exists has unfairly prejudiced the defendant. In this matter, the circuit court's clear error regarding the choice of law creates additional unfair prejudice to Owners inasmuch as Ohio recognizes no doctrine regarding certificates of insurance that would bind an insurer to provide coverage and no doctrine that imbues a claimant who is not an insured with any rights to pursue claims against an insurer. Therefore, this Court's ruling that Ohio law applies to the dispute will resolve all pending between Morlan and Owners in Owners' favor.¹¹

Further, the timeline as set forth by Petitioner recites repeated instances of motions held up to two years regarding two of the four issues raised in this Petition as having been decided in

¹¹ For brevity's sake, the Ohio law supporting this argument will not be included in this Petition as it is not dispositive to the choice of law, but is persuasive as to the merits of Owners' petition for writ from this Court. The argument, however, was fully briefed by Owners in its amended motion to apply Ohio law and for summary judgment. APP. 382-421. Owners also notes that the non-West Virginia caselaw upon which it relied in that motion was provided to the circuit court pursuant to Trial Court Rule 6.04, but as it is not part of the circuit clerk's "official record," it has not been included in the Appendix to this Petition.

contravention of existing law: personal jurisdiction and choice of law. In particular, Petitioner sought expedited relief on the jurisdictional motion, but it was not decided until 22 months later. This procedural history strongly supports the fourth *Hoover* factor for consideration of a writ of prohibition as the “lower tribunal’s order[s] manifest[] persistent disregard for either procedural substantive law.”

Finally, Owners has no right of appeal from the circuit court’s orders as the circuit judge did not present any of his orders as final judgments.¹²

B. The Circuit Court of Wyoming County exceeded its legitimate authority by ruling that it had jurisdiction over an Ohio insurer that issued a policy to an Ohio insured via an Ohio agent for an exposure located in Ohio and which did not do business in West Virginia.

West Virginia has two long-arm statutes that dictate when personal jurisdiction can be obtained over a foreign corporation. The first provides, in relevant part:

- (a) The engaging by a nonresident, or by his or her duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the Secretary of State, or his or her successor in office, to his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in this state, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or acts, and the engaging in such act or acts shall be a

¹² The jurisdiction, choice of laws and collateral source issues are interlocutory and thus not appealable. However, each of those issues constitutes matters that exceed the legitimate jurisdiction of the circuit court and, if decided in accordance with existing law, would eliminate one or all of the pending claims to be tried on December 9, 2013. Thus, those matters are appropriate for a writ at this time. Further, regarding the order granting Morlan’s cross-motion for summary judgment on coverage and the circuit court’s determination that Morlan is a first-party claimant against Owners, Owners filed a motion with the circuit court on November 12, 2013 for entry of a supplemental order to obtain a declaration that the order is final and appealable. APP. 695-699. Owners also filed a motion to stay the underlying action until this Petition could be heard. APP. 700-702. Owners was not able to obtain a hearing date on those motions until November 20, 2013, sixteen days after entry of the order. Because of the pending trial date and the need for expedited relief on the errors raised by Owners in this Petition, Owners proceeds with this Petition to avoid any argument pursuant to Rule 29 of the Revised Appellate Rules that it failed to seek this relief within fourteen days of the entry of the summary judgment order.

of such nonresident's agreement that any such process against him or her, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state:

- (1) Transacting any business in this state;
 - (2) Contracting to supply services or things in this state;
 - (3) Causing tortious injury by an act or omission in this state;
 - (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
 - (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
 - (6) Having an interest in, using or possessing real property in this state; or
 - (7) Contracting to insure any person, property or risk located within this state at the time of contracting.
- (b) When jurisdiction over a nonresident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivisions (1) through (7), subsection (a) of this section may be asserted against him or her.

W. Va. Code § 56-3-33.

The second statute is expressly applicable to foreign corporations, and states in relevant part:

- (d) A foreign corporation is deemed to be transacting business in this state if:

- (1) The corporation makes a contract to be performed, in whole or in part, by any party thereto in this state;
- (2) The corporation commits a tort, in whole or in part, in this state; or
- (3) The corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property within this state notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this state at the time of the injury.

W. Va. Code § 31D-15-1501.

In considering the application of the above-referenced long-arm statutes as the first component of a two-part test for determining when West Virginia courts may exercise personal jurisdiction over a foreign corporation, this Court has held:

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va. Code, [31 D-15-1501] and W. Va. Code, 56-3-33. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.

Syl. pt. 5, *Abbott v. Owens-Corning Fiberglas Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1994).¹³

The second step set forth by the *Abbott* Court, determining whether a defendant's contacts with this state satisfy federal due process, is rooted in "fair play" and "substantial justice." At the core of the minimum contacts requirement is the notion, rooted in concerns of fundamental fairness, that before a non-resident individual or corporation can be haled into the courts of another state, there must first be a showing of sufficient ties or connections to that state which demonstrate a purposeful interjection into the forum state.

Grove v. Maheswaran, 201 W. Va. 502, 505, 498 S.E.2d 485, 488 (1997) (internal quotation and citations omitted).

¹³ *Abbott* actually applied a prior version of the long-arm statute applicable to foreign corporations, W. Va. Code § 31-1-15, which was later repealed and replaced by W. Va. Code § 31-1-1501(d) and (e). This does not alter the analysis set forth here, however.

Owners is domiciled in Michigan and licensed to do business in the state of Ohio. It is not licensed to do business in the state of West Virginia, and, in fact, it does not do business in this state. Owners has no officers or employees, nor does it maintain any offices, in West Virginia. Owners does not issue and has never issued insurance policies in West Virginia, nor does it otherwise engage in the business of insurance in this state. Indeed, Owners does not transact any business or conduct any business activities in this state. APP. 302-303. Accordingly, Owners not have sufficient minimum contacts with the state of West Virginia to permit the Court to exercise personal jurisdiction over it in this matter.¹⁴

Owners issued an insurance policy to an Ohio contractor, Paul Kerns, to provide commercial general liability coverage for his electrical contracting business, which he operated in Ohio. Unquestionably, Mr. Kerns traveled to other states in connection with his business. However, there is no evidence that the policy at issue was expressly intended to insure any risk located in the state of West Virginia.

Nothing can be drawn from the relationship between Owners and its insured or the insurance transaction between them that would support a finding that Owners has engaged in any conduct identified under either of the West Virginia long-arm statutes, nor that Owners has purposely interjected itself into West Virginia in any manner sufficient to provide the basis for exercising personal jurisdiction over the insurer in this case.

This Court has recognized that:

Fundamentally, “jurisdiction cannot be asserted over a defendant with which a has no contacts, no ties and no relations.” *State ex ref. CSR Ltd. v. MacQueen*, W. Va. 695, 698, 441 S.E.2d 658, 661 (1994). Indeed, “[a] court which has jurisdiction of the subject matter in litigation exceeds its legitimate powers when

¹⁴ By contrast, Ohio has jurisdiction over both Westfield, which is an Ohio corporation, and Morlan, which does business in Ohio, as testified by its principal, Larry Morlan.

undertakes to hear and determine a proceeding without jurisdiction of the parties.” Syl. pt. 4, *State ex ref. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d 610. Thus, “[i]n order to render a valid judgment or decree, a court must have jurisdiction both of the parties and of the subject matter and any judgment or rendered without such jurisdiction will be utterly void.” Syl. pt. 1, *Schweppes U.S.A. Ltd. v. Kiger*, 158 W.Va. 794, 214 S.E.2d 867 (1975).

Easterling v. American Optical Corp., 207 W. Va. 123, 128, 529 S.E.2d 588, 593 (2000).

The party that urges the court to assert personal jurisdiction bears the burden of demonstrating the basis for the court’s exercise of such jurisdiction. *Town of Fayetteville v. Law*, 201 W. Va. 205, 209, 495 S.E.2d 843, 847 (1997). Morlan argued, and the circuit court adopted reasoning, that Gladstone and Owners were inseparable for purposes of “purposeful availment.” Inasmuch as Gladstone sent the March Certificate by fax to Morlan in Parkersburg, West the circuit court held that “Owners issued a Certificate of Insurance to Morlan, thereby and agreeing to insure a ‘person, property or risk located within’ West Virginia.” APP. 007. However, this finding erroneously presumed that Gladstone was an agent of Owners for all purposes, without properly examining agency doctrine. Therefore, the circuit court’s determination that a single act by Gladstone subjects Owners to personal jurisdiction in the West Virginia courts exceeds the legitimate authority of the court and is not supported by law.

C. The Circuit Court of Wyoming County exceeded its legitimate authority by applying West Virginia substantive law to an issue of insurance coverage relating to a policy issued in Ohio to an Ohio insured by an Ohio insurer via an Ohio insurance agent.

An insurance policy is a contract. “This Court has repeatedly recognized that questions of policy *coverage* as opposed to *liability* are governed by conflicts of law principles applicable to contracts.” *Howe v. Howe*, 218 W. Va. 638, 643, 625 S.E.2d 716, 721 (2005) (emphasis in original), citing *Lee v. Saliga*, 179 W. Va. 762, 766, 373 S.E.2d 345, 349 (1988); *Liberty Mut. Co. v. Triangle Indus., Inc.*, 182 W Va. 580, 583, 390 S.E.2d 562, 565 (1990); *Nadler v. Liberty*

Mut. Fire Ins. Co., 188 W. Va. 329, 334, 424 S.E.2d 256, 261 (1992). This Court came to the following conclusion regarding conflict of laws issues with insurance policies:

In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state.

Syl. pt., *Triangle Indus.*, *supra*.

The basis for this decision stems from a more generalized rule of contract interpretation forth by this Court: “The law of the state in which a contract is made and to be performed the construction of a contract when it is involved in litigation in the courts of this state.” Syl. pt. *Gen. Elec. Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981) (citations omitted).

Further, this Court has recognized that “[t]he mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of laws principles is contrary to the public policy of the forum state.” Syl. pt. 3, *Nadler*, *supra*.

Owners issued a policy of insurance to Kerns through the Gladstone Insurance Agency, an independent insurance agent in Cambridge, Ohio. Owners is an insurance company licensed to write business in Ohio, with offices located in Ohio. Kerns’ place of business is located in Cambridge, Ohio. The Owners policy issued to Kerns provided property, inland marine, and commercial general liability coverages to Kerns at his Cambridge, Ohio, address. As stated previously, clearly, the policy was intended to cover Kerns’ business operations in Ohio.

Thus, the insurance contract between Owners and Paul Kerns was made to be performed in Ohio. As such, Ohio law must be applied in interpreting the terms and conditions of the Owners insurance policy issued to Kerns.

The circuit court has held that the March Certificate, on which Morlan relies to claim coverage under the Ohio policy, supports the application of West Virginia law to interpretation the terms and conditions of that policy because Gladstone, an agent for Owners, faxed the Certificate to Morlan in West Virginia. Morlan asserted, and the circuit court adopted a of law, that the transaction at issue is not the Kerns insurance policy, but the March Certificate, which, by its own definition, is not an insurance policy and does not modify the terms of the insurance policy. Further, the circuit court adopted Morlan's comparison of this matter with a matter decided in the Southern District of West Virginia by Judge Copenhaver, *North American Precast, Inc. v. General Cas. Co. of Wis.*, 2008 WL 906327 (S.D.W. Va. March 31, 2008). In *North American Precast*, the U.S. District Court concluded that West Virginia law applied to the interpretation of a policy of insurance issued to an Ohio insured when a certificate of insurance was issued to a West Virginia corporation. *Id.* There are, however, significant distinctions the cases that the circuit court did not recognize that make the reasoning of the court in *North American Precast* inapplicable to the present matter.

First, the certificate of insurance issued in the *North American Precast* case *specifically identified* the construction project located in West Virginia, and was clearly provided solely for the work to be performed in West Virginia. No such specific identification is shown on the Certificate of Insurance in this case. The March Certificate in the case before this Court was issued to Morlan Enterprises, a West Virginia corporation, but makes no mention of work being performed solely in West Virginia. In fact, Kerns performed work for Morlan in several states, including West Virginia, Kentucky and Ohio. APP. 304-306.

There is no evidence that the Certificate of Insurance issued to Morlan was solely for the project site where the Plaintiff was injured, let alone for work solely to be performed in West

Virginia. As such, although the Certificate Holder (Morlan) is a West Virginia corporation, and underlying litigation stems from an injury which occurred in West Virginia, the ties to West Virginia end there. The policy of insurance was issued by Owners, an Ohio corporation, to an Ohio resident, to cover Kerns' business, an Ohio risk, through the Gladstone Insurance an Ohio corporation. Reliance by the circuit court on *North American Precast* is therefore misplaced and a ruling based upon such reliance is in clear violation of the law of this state.

A more on-point case (and one decided by this Court, rather than by a federal court predicting how the West Virginia court would rule) is *Liberty Mutual v. Triangle Industries*, The policy at issue in that case was issued in New Jersey, the insured risk (a processing plant) located in West Virginia, and the damage (environmental contamination from sludge produced at the plant) occurred in Ohio.

Especially persuasive on this matter was this Court's well-reasoned explanation why it chose to rely on *lex loci contractus* for the conflicts principle when determining substantive law in coverage disputes:

We believe that "certainty, predictability and uniformity of result," as well as "ease in the determination and application of the law to be applied" is essential to the interpretation of an insurance policy when the law is not otherwise chosen by the parties. Given the increasingly complex nature of the insurance industry, we believe that the needs of the "interstate" system of insurance require that law be applied in the most uniform and predictable manner possible.

Although we recognize that, in this case, both West Virginia and Ohio have significant relationships to the transaction, the policy was bargained for, created, and agreed to in New Jersey by both parties. We do not believe the insurance company demonstrated any reasonable expectation at the time the contracts were entered into that any litigation over the policy would be based upon West Virginia law.

Quite simply, we believe that, absent specific provisions to the contrary, it is infinitely more practicable to permit one policy to cover the numerous contracts

rather than to require both Triangle and the insurance companies to negotiate individual policies based upon each state where an insured risk is located.

Id. at 585, 390 S.E.2d at 567.

Kerns worked in a multitude of states. Therefore, as this Court stated in *Triangle Indus.*, “it is infinitely more practicable to permit one policy to cover the numerous [projects in different states] rather than to require [Kerns] and the insurance compan[y] to negotiate individual policies based upon each state where [Kerns’ work is performed].”

Therefore, application of the doctrine of *lex loci contractus* requires the application of the substantive law of the state of Ohio, not the substantive law of West Virginia, as the circuit court erroneously ruled.

In analogous cases, this Court has consistently held that the law of the jurisdiction in the policy was issued governs the interpretation of the insurance policy, even if application of West Virginia law would otherwise result in the extension of greater coverage. In that regard, Court has particularly rejected the application of West Virginia law to the construction of insurance policies when this state’s only connection to the parties is the “mere fortuity” that the underlying claim arose here. *Howe v. Howe, supra* (applying law of Ohio to motorcycle, homeowners, and umbrella policies and finding Ohio had more significant relationship because risk was principally located in Ohio, where motorcycle driver and passenger resided as spouses Ohio, and West Virginia was only location of accident); *Nelson v. Allstate Indem. Co.*, 202 W. 289, 503 S.E.2d 857 (1998) (applying Maryland law where policyholder, whose child was killed, was resident of that state, and West Virginia’s only relationship was place of accident); *Nadler, supra* (finding Ohio had more significant relationship to transaction and parties and finding Ohio law governed insurance coverage issues where insureds and their decedents were residents of

Ohio, policy was issued in Ohio, covered vehicles were registered and garaged in Ohio, parties reasonably expected Ohio law to control interpretation policy; West Virginia's only connection coverage dispute was fortuity that underlying accident occurred there and operator of other was West Virginia resident); *Adkins v. Sperry*, 190 W. Va. 120, 437 S.E.2d 284 (1993) (finding Ohio law applicable to coverage issues and that Ohio had more significant relationship with transaction and parties, where insureds lived in Ohio, application for coverage was an Ohio application, policy was an Ohio policy, and risk insured was registered and licensed in Ohio, though insured drove into West Virginia on daily basis).

This Court has addressed these issues primarily in the context of motor vehicle coverage, which are analogous in that such policies insure a risk, *i.e.*, a motor vehicle, that is principally located in one state, but has the potential to give rise to liability in jurisdictions other than the jurisdiction in which the policy was issued. As this Court noted in *Nadler*, where a motor vehicle accident resulting in injury occurs in another state, the parties to an auto policy nevertheless reasonably expect that the law of the state in which the policy was issued will govern construction of the terms of the policy.

There would be no reason for a different rule to apply in a case such as this one, in which a liability policy is issued to cover a business that is principally located in Ohio, but where business operations are also conducted in other states. The "mere fortuity" that an event might occur in West Virginia does not create a more substantial relationship between the parties and the transaction and this state.

The Circuit Court of Wyoming County, therefore, exceeded its legitimate authority by applying West Virginia law to interpretation of the contract between Owners and Kerns, its

insured, and Petitioner Owners is entitled to a writ of prohibition declaring that the circuit court's ruling cannot be sustained.

D. The Circuit Court of Wyoming County exceeded its legitimate authority by declaring that an entity that is named on a Certificate of Insurance is a first-party claimant to the insurance policy for which the Certificate was issued, when the entity was neither a named insured nor an additional insured by endorsement, for purposes of prosecuting claims of bad faith and of the West Virginia Unfair Trade Practices Act and seeking damages pursuant to *Hayseeds v. State Farm Fire & Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1996).

This Court has previously held that in a situation where an entity has an insured contract and has received a Certificate of Insurance representing that it is an additional insured on an insurance policy of another entity, the insurer may later be estopped from denying the existence of the coverage represented by the certificate, if the certificate holder has “reasonably relied to their detriment” upon the certificate. Syl. Pt. 9, *Marlin*, *supra*.

However, this Court's decision in *Marlin* relied on the existence of an indemnification agreement in an insured contract between the insured and the recipient of the Certificate, which it has held is “by nature ‘essentially non-insurance contractual risk transfers.’” *Blessing v. W. Va. DOT*, 222 W. Va. 267, 272, 664 S.E.2d 152 (2008), quoting *Marlin*. Even before *Marlin*, the insured contract has been held to create rights to a first-party claimant, as noted by this Court in *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 393, 508 S.E.2d 102 (1998), when it found that “when a party has an ‘insured contract,’ that party stands in the same shoes as the insured for coverage purposes.” *Id.* at Syl. Pt. 7, in part.

While the *Marlin* Court acknowledged that “[g]enerally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract,” *Id.* at Syl. Pt. 7 (internal citation omitted), the *Marlin* Court carved out an exception to that

principle in its new syllabus point, based in part, as noted above, on the existence of an insured contract with an indemnification agreement.

Neither in *Marlin* nor in subsequent decisions in the nearly twelve years since that case was decided has this Court allowed a party to prosecute a first-party bad faith and UTPA claim against the insurer of another entity, based solely upon the application of a *Marlin* Certificate without the existence of an indemnification agreement. To do so constitutes an unwarranted expansion of this Court's holding in *Marlin* beyond the scope of the decision.

Further, the circuit court's ruling¹⁵ that Morlan is a first-party claimant under the Owners policy issued to Kerns also is an improper expansion of the unique nature of insurance coverage disputes. *Hayseeds* and its progeny do not deal with "insurance policies which provide [the claimant] first party benefits," as the circuit court concluded. Instead, they address insurance policies for which the *claimant insured* paid a premium and purchased "peace of mind and security." *Miller v. Fluharty*, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997). The damages authorized by *Hayseeds*, *Pitrolo*, *Miller* and related cases have been recognized by this Court as arising and flowing from the contractual relationship between an insurer and an insured "who originally purchased the insurance policy" (*Hayseeds*, *supra*, at 329, 352 S.E.2d at 79 (internal citation omitted)) and, therefore, are damages associated directly with the breach of an insurance contract between the actual parties to that contract. As this Court also noted in *Miller*: "The goal for all policyholders to get the benefit of their contractual bargain: they should get their policy

¹⁵ The circuit court intertwined the question of Morlan's right to pursue its claims against Owners in two orders: In the "Order Granting Morlan Enterprises Inc.'s Cross-Motion for Summary Judgment," the circuit court found as a matter of law that Owners' policy provided primary coverage for Morlan pursuant to *Marlin*, APP. 035 at ¶ 25, and in the "Order Denying Owners Insurance Company's Motion to Strike Damages Claims of Morlan Enterprises, Inc.," the circuit court found as a matter of law that "Morlan is a first-party claimant with regard to the Owners coverage." APP. 045 at ¶ 14.

proceeds promptly without having to pay litigation fees to vindicate their rights.” *Id.* at 694, 500 S.E.2d at 319, quoted in *Loudin v. Nat. Liab. & Fire Ins. Co.*, 228 W. Va. 34, 40, 716 S.E.2d 702 (2011).

In the recent decision of *Loudin*, this Court relied heavily on the issue of *who paid for* the insurance to determine whether a claimant is a first party or a third party. As the Court noted: observations expressed in *Miller* and *Hayseeds* echo a firm public policy of this State to hold insurers accountable in a court of law when they wrongfully deny coverage *to premium-paying insureds.*” *Id.* (emphasis added). See also *Marshall v. Saseen*, 192 W. Va. 94, 100, 450 S.E.2d 797 (1994) (“First party insurance means that the insurance carrier has *directly contracted* with insured to provide coverage and to reimburse the insured for his or her damages up to the policy limits.”) (emphasis added).¹⁶

The Legislature’s action in 2005 to enact W. Va. Code § 33-11-4a and abolish third-party bad faith reflects the public policy of this state to restrict the universe of parties that can bring actions against insurers as first parties.

Therefore, the circuit court’s orders finding as a matter of law that Morlan is a first-party claimant and is entitled to pursue first-party bad faith and UTPA claims and resulting damages from Petitioner Owners are in contravention of existing law and Petitioner is entitled to a writ of prohibition against the circuit court.

¹⁶ As an example of another class of claimants whose right to pursue an action against an insurer is not unlimited, this Court has ruled that a loss payee has a “separate *contractual right* with the insurer” that entitles him to insurance proceeds but only “to the extent of the amount of his debt which is independent of the claim of other lien or judgment creditors.” Syl. pt. 4, in part, *Fuller v. Stonewall Cas. Co. of W. Va.*, 172 W. Va. 193, 304 S.E.2d 347 (1983).

E. The Circuit Court of Wyoming County exceeded its legitimate authority by applying the collateral source rule to attorney fees paid by an entity's own insurer in a coverage dispute regarding priority of coverages between that insurer and another insurer.

Morlan's insurer, Westfield, provided it a defense from the date that Morlan was placed on notice by Alltel of a potential claim onward, for all activities related to the suit brought by the Messers and for Morlan's own subsequent prosecution of the third-party complaint against Owners arising out of the Certificate of Insurance discussed above.

Morlan now asserts, and the circuit court has agreed, that such defense costs paid to counsel retained by Westfield to represent Morlan through the litigation are collateral source in Morlan's bad faith suit against Owners.¹⁷ The circuit court granted Morlan's motion *in limine* on this issue and has ruled that the jury is not permitted to hear any evidence regarding the fact that Westfield has paid all attorney fees and expenses and funded Morlan's coverage dispute with Owners.

Morlan's motion *in limine* seeking application of the collateral source rule was a attempt lodge a second attack at Owners' motion to strike Morlan's damages claim¹⁸ which asserted that

¹⁷ Owners asserted that Westfield's policy obligated it to provide the defense and indemnification to Morlan and, in the separate declaratory judgment action against Westfield, sought reimbursement by Westfield for the Messer settlement it paid in 2009. APP. 703-709. Westfield asserts that Owners' policy is primary as to Morlan's defense and indemnification and Westfield seeks reimbursement of all attorney fees and expenses it expended in defending its insured, Morlan.

¹⁸ Owners also asserted in its Motion that Morlan could not prove its annoyance and inconvenience resulting from the coverage and bad faith portion of this litigation. The circuit relied on this Court's holding in *Dodrill, supra*, in ruling that Larry Morlan could testify regarding annoyance and inconvenience to support a "viable" claim for annoyance and inconvenience to Morlan Enterprises, Inc. However, this Court's very recent decision in *AIG Domestic Claims, Inc. v. Hess Oil Co.*, No. 12-0705 and No. 12-0719, 2013 W. Va. LEXIS 1154, 2013 WL 5814095 (W. Va. Oct. 25, 2013), has made it clear that a corporation's annoyance and inconvenience associated with a bad faith claim cannot be established by the "personal aggravation, annoyance, and inconvenience" of its shareholders. Because the *Hess Oil Co.* matter was decided after pretrial motions were due in the *Morlan* case, Owners did not raise the specific issue of an corporation's principal testifying regarding his personal annoyance and inconvenience. Owners, however, reserves its right to raise the issue in the trial court and on appeal, as appropriate, if this matter proceeds to trial.

Morlan cannot prove that it suffered any economic loss or special damages because any such damages are not those of Morlan, but those of Westfield. Owners' motion argued that the dispute is in actuality a dispute between Owners and Westfield about priority of coverages and which policy is primary for the defense and indemnification of Morlan for Mr. Messer's claim.

Because Westfield's payment of the attorney fees incurred by Morlan in the declaratory judgment action against Owners are actually fees paid in Westfield's own interest to secure a court ruling regarding the priority of coverage between Owners and Westfield, they are not a "collateral source" in the sense implied by the collateral source rule.

The collateral source rule was established to prevent defendants from taking advantage of payments received by the plaintiff as a result of plaintiff's own contractual arrangement entirely independent of the defendants. Part of the rationale for this rule is that the party at fault should be able to minimize his or her damages by offsetting payments received by the injured parties through their own independent arrangement. *Ratlief v. Yokum*, 167 W.Va. 779, 787, 280 S.E.2d 584, 590 (1981). "The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party." Syl. pt. 7, *Id.*

The rule states that payments made to or on behalf of an injured party (such as health insurance, property damage or other casualty insurance) cannot be used to offset the *liability* of a tortfeasor. In the instant case, the insurance at issue is liability insurance and a determination of which *liability insurer* is obligated to pay for the defense and indemnification of Morlan for the claims of an injured party, Mr. Messer. Priority of coverages is *not* an situation in which the collateral source rule is applicable.

Further, the claims asserted by Morlan are not tort claims, but are claims for breach of contract, bad faith and UTPA, which arise out of a contractual relationship. The damages sought by Morlan under *Hayseeds, supra*; *Jenkins, supra*; and *Doddrill, supra*, are not the type of awarded for negligence or tort actions. These damages as recognized by this Court arise and flow from the contractual relationship between an insurer and an insured “who originally purchased insurance policy” (*Pitrolo, supra*, at 194, 342 S.E.2d at 160) and, therefore, are damages associated with the breach of an insurance contract. This also is *not* a situation in which the collateral source rule is applicable.

Rule 17(a) of the West Virginia Rules of Civil Procedure provides that:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, or any other fiduciary, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in that person’s own name without joining the party for whose benefit the action is brought. When a law of the state so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof. . . .

W. Va. R. Civ. P. 17(a).

This Court has held that the purpose of Rule 17(a) “is to ensure that the party who asserts cause of action possesses, under substantive law, the right sought to be enforced.” Syl. Pt. 5, in part, *Keesecker v. Bird*, 200 W. Va. 667, 671, 490 S.E.2d 754, 758 (1997).

The *Pitrolo* Court noted the following public policy:

Where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer’s breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney’s fees and expenses arising from litigation.

Pitrolo, 176 W. Va. at 194, 342 S.E.2d at 160.

From the law that has developed in this area, this Court intended two requirements be met for recovery of attorney fees:

- a) Such recovery may be had only by the policyholder who “buys an contract for peace of mind and security, not financial gain, and certainly to be embroiled in litigation” (*Miller, id.* at 694, 500 S.E.2d at 319), and
- b) Such recovery may be had only as to fees actually paid or owed by the policyholder. Where the policyholder has incurred no expenses, the policyholder has no valid claim to recover any such expenses.

As Mr. Morlan has testified that all fees and expenses associated with both Morlan’s defense of the Messers’ underlying claim and Morlan’s prosecution of its claim against Owners have been borne by Westfield, such payment is not collateral source as to Morlan.

The Westfield insurance policy does not require its insured to reimburse it for the fees and expenses incurred in its defense of Morlan. There is no scenario under which Morlan does or would have a claim for fees and expenses incurred in this action.

Morlan asserted, and the circuit court adopted, a “Conclusion of Law” summarizing this Court’s ruling in *Hayseeds* that “the common-law rule requiring each party to pay their own attorneys’ fees worked an unique hardship upon persons who were forced to engage in litigation to recover benefits under insurance policies which provide them first party benefits.” APP. 040. This “conclusion” is an incorrect statement of the Court’s holding that unreasonably expands the scope of who can claim and recover such damages from an insurer.

Therefore, the circuit court’s orders that Westfield’s payment of such fees and expenses a collateral source, that Owners may not present evidence of the payment by Westfield for Morlan’s attorney fees, that Morlan may recover such fees if it is successful in its claims against Owners are in direct contravention of the law. The circuit court exceeded its legitimate authority

ruling that Morlan can seek to recover its attorney fees and that Owners cannot raise the issue of Westfield's payment of the fees in defense.

VI. CONCLUSION

For the reasons listed, the Petitioner prays that this Court grant Petitioner's Verified Petition for Writ of Prohibition and overrule the following Orders entered by the circuit court:

- 1) March 28, 2011, Order denying Owners' Motion to Dismiss the Third-Party Complaint for lack of personal jurisdiction;
- 2) June 11, 2013, Order denying Owners' Amended Motion to Apply Ohio Law;
- 3) November 4, 2013, Order Granting Morlan's Cross-Motion for Summary Judgment;
- 4) November 4, 2013, Order Granting Morlan's Motion *in Limine* to Prohibit Argument that its Damages are Reduced or Eliminated Because It Had Other Liability Coverage Available from A Collateral Source.

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
OWNERS INSURANCE COMPANY,
Petitioner

By Counsel


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VERIFICATION

BARBARA J. KEEFER, being by me first duly sworn, upon her oath, deposes and says that she is counsel for the petitioner, State of West Virginia, ex. rel. Owners Insurance Company, in the foregoing verified *VERIFIED PETITION FOR WRIT OF PROHIBITION*; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, she believes them to be true.

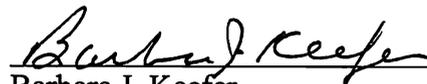

BARBARA J. KEEFER

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner does HEREBY CERTIFY that I have served a true copy of the *Verified Petition for Writ of Prohibition* upon counsel for respondent by depositing said copy in the United States mail, first-class postage prepaid, on the 18th day of November, 2013, addressed as follows:

The Honorable Warren R. McGraw
Judge of the Circuit Court of Wyoming County
Wyoming County Courthouse
P.O. Box 190
Pineville, WV 24874

Brent K. Kesner
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