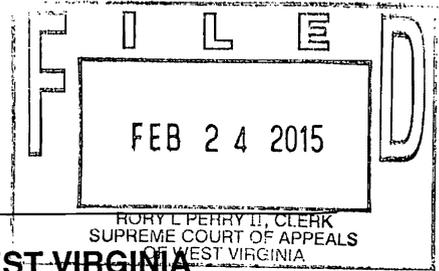


No. 14-1168



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

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**ENERGY CORPORATION OF AMERICA,  
and JOHN D. SOLLON,**

Petitioners,

v.

**THE HONORABLE JOHN LEWIS MARKS,  
JUDGE OF THE CIRCUIT COURT OF HARRISON  
COUNTY, and ERIN ELIZABETH GILMORE,  
ERIKA LOIS GILMORE AND RON R. GILMORE,**

Respondents.

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From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 14-C-215-1

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**RESPONDENTS' RESPONSE TO ENERGY CORPORATION OF AMERICA AND  
JOHN D. SOLLON, JR.'S REQUEST FOR WRIT OF PROHIBITION**

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DAVID J. ROMANO  
West Virginia State Bar ID No. 3166  
ROMANO LAW OFFICE  
363 Washington Avenue  
Clarksburg, West Virginia 26301  
(304) 624-5600  
[romanolaw@wvdsi.net](mailto:romanolaw@wvdsi.net)  
*Counsel for Erin Elizabeth Gilmore,  
Erika Lois Gilmore and Ron R. Gilmore*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... - i - & - ii -

I. Questions Presented ..... 1

II. Facts and Background ..... 2

III. Standard of Review ..... 4

    A. The Trial Court’s Denial of a Motion to Sever is Interlocutory and Not  
    Subject to Piecemeal Review ..... 4

    B. Should This Court Review this Original Jurisdiction Appeal Seeking  
    Prohibition, Such Relief Is Not a Proper Remedy in this Case ..... 6

        i) ECA and Sollon Have Not Satisfied the Five Factor Test  
        Entitling them to a Writ of Prohibition ..... 6

IV. The Trial Court’s Order Satisfied the Requirements of Rule 20 Which  
Requires Joinder of All Parties in One Action When Those Claims Arose Out  
of the Same “Transaction, Occurrence, or Series of Occurrences” ..... 9

V. ECA Failed to Carry Its Burden to Demonstrate Prejudice if Severance and  
Dismissal Under Rule 21 Was Not Granted ..... 10

VI. Conclusion ..... 11

**TABLE OF AUTHORITIES**

**West Virginia Court Cases**

Bennett v. Warner,  
179 W.Va. 742, 372 S.E.2d 920 (1988) . . . . . 5, 8

C&O Motors, Inc., v. West Virginia Paving, Inc.,  
223 W.Va. 469, 677 S.E.2d 905 (2009) . . . . . 6

Christian v. Sizemore,  
181 W.Va. 628, 383 S.E. 2d 810 (1989) . . . . . 8, 9, 11

Hinkle v. Black,  
164 W.Va. 112, 262 S.E.2d 744 (1979) . . . . . 4

Jonas v. Conrath,  
149 F.R.D. 520 (S.D.W.Va. 1993) . . . . . 8-11

Kenamond v. Warmuth,  
179 W.Va. 230, 366 S.E.2d 738 (1998) . . . . . 8

Light v. Allstate Ins. Co.,  
203 W.Va. 27, 506 S.E. 2d 64 (1998) . . . . . 8-10

Morris v. Crown Equipment Corp.,  
219 W.Va. 347, S.E.2d 292, cert. denied, 549 U.S. 1096 (2006) . . . . . 8, 9

Ranson v. Riffle,  
195 W.Va. 121, 464 S.E.2d 763 (1995) . . . . . 12

State ex rel. Allstate v. Bedell,  
203 W.Va. 37, 506 S.E.2d 74 (1998) . . . . . 10

State ex rel Cavender v. McCarty,  
198 W.Va 226, 479 S.E.2d 887 (1996) . . . . . 5, 8

State ex rel Hoover v. Berger,  
199 W.Va. 12, 483 S.E.2d 12 (1996) . . . . . 6

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman,  
222 W.Va. 37, 658 S.E.2d 728 (2008) . . . . . 6

State ex. rel., Piper v. Saunders,  
228 W.Va. 792, 724 S.E.2d 763 (2012) . . . . . 8, 9

State ex rel. Shepard v. Holland,  
219 W.Va. 310, 633 S.E.2d 255 (2006) . . . . . 4

State ex rel. State Farm Fire & Casualty Co. v. Madden,  
192 W.Va. 155, 451 S.E.2d 721 (1994) . . . . . 11

State ex rel West Virginia National Auto Ins. Co. v Bedell,  
223 W.Va. 222, 672 S.E. 2d 358 (2008) ..... 6

Woulard v. Rogers,  
2012 WL 1956057 (N.D.W.Va. 2012) ..... 8, 9

**Cases from Other Jurisdictions**

Acevedo v. Allsup’s Convenience Stores, Inc.,  
600 F.3d 516 (5<sup>th</sup> Cir. 2010) ..... 9

**Rules & Statutes**

W.Va. R. Civ. P. 20 ..... *passim*  
W.Va. R. Civ. P. 21 ..... *passim*  
W.Va. R. Civ. P. 42 ..... 4  
W.Va. R. Civ. P. 42(b) ..... 7  
W.Va. R. Civ. P. 42(c) ..... 11  
W.Va. Code § 56-1-1 ..... 2  
W.Va. Code § 56-1-1(b) ..... 12

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**ENERGY CORPORATION OF AMERICA,  
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**THE HONORABLE JOHN LEWIS MARKS,  
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From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 14-C-215-1

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**RESPONDENTS' RESPONSE TO ENERGY CORPORATION OF AMERICA AND  
JOHN D. SOLLON, JR.'S REQUEST FOR WRIT OF PROHIBITION**

---

**I. Questions Presented:**

1. Did the Circuit Court abuse its discretion in refusing to sever or bifurcate the automobile tort action against Defendants ECA and Sollon from the first party bad faith claim against Defendant State Auto?  
Answer: **No.**
2. Is the Circuit Court's interlocutory Order denying the tort Defendants' Motion to sever and dismiss reviewable by extraordinary writ?  
Answer: **No.**

## II. Facts and Background:

This case is both an automobile tort action arising from a rear-end motor vehicle crash caused by Defendant Sollon, a resident of Monongalia County, West Virginia occurring on May 17, 2012 on Interstate 79 in Pennsylvania just past the West Virginia State boundary, due to Defendant Sollon's tailgating<sup>1</sup> Plaintiffs' Nissan Versa was struck forcefully in the rear by Defendant Sollon's F-150 Ford truck.<sup>2</sup> (see **Exhibit A** Crash Report at pg. 1). This case is a matter of clear liability. However, neither the Defendants nor their insurer, National Union, attempted to negotiate any settlement whatsoever even after multiple attempts by Plaintiffs for seven (7) months before retaining counsel, as well as, attempts by counsel subsequent to Plaintiffs obtaining an attorney. (See **Exhibit B**, Plaintiffs' "Response to ECA and Sollon's Motion for Improper Venue, etc." and exhibits attached thereto) and [App. Exhibit 6 Paragraphs 5, 6 & 7]<sup>3</sup>

Because no negotiation was undertaken by the Defendants or National Union, Plaintiffs needed to file a civil action as none of their damages, including their vehicle had been paid for by the Defendants. A lawsuit was filed in the Circuit Court of Harrison County<sup>4</sup> as Plaintiffs believed that "ECA was a foreign corporation, as its President and principal Office were both located in the State of Colorado, and ECA conducted substantial business in Harrison County. However, ECA had been incorporated in West Virginia so ECA filed a Motion to Dismiss for lack of Venue which was granted by the Circuit Court on July 31, 2013 without prejudice to re-file consistent with W.Va. Code § 56-1-1.

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<sup>1</sup> Defendant Sollon was charged by the Pennsylvania State Police; see **Exhibit A** pg. 2.

<sup>2</sup> Defendant Sollon was acting in the course and scope of his employment, which vehicle was owned by his employer, Defendant Energy Corporation of America (hereinafter "ECA") and insured by AIG's National Union Fire Insurance (hereinafter "National Union")

<sup>3</sup> Reference to the Appendix will be "App. \_\_\_", and is the Appendix filed by Petitioners; any other relevant documents referenced by Respondents will be attached to this Response.

<sup>4</sup> Civil Action No. 13-C-136-2.

After the dismissal, Plaintiffs' counsel again attempted to negotiate with ECA and National Union through their attorney, but National Union did not respond at all to Plaintiffs' settlement requests. Plaintiffs also sought payment from their own insurance carrier State Auto for both medical payments coverage and underinsured motorist coverage. However, State Auto failed to provide the no fault medical payments coverage as required by Plaintiffs' insurance policy and also failed to adequately respond to Plaintiffs' inquiries regarding UIM benefits.<sup>5</sup> After various requests to State Auto for the medical payments benefits and not receiving them, Plaintiffs filed this current civil action on May 1, 2014, 8½ months after the previous case had been dismissed. This second civil action was also filed in Harrison County against the automobile tort Defendants, ECA and Sollon, and State Auto which was the venue giving Defendant as State Auto is a foreign corporation which does business in Harrison County by having, among other transactions, delivered the Plaintiffs' insurance policy to them in Harrison County and by failing to adjust Plaintiffs' claims in Harrison County consistent with West Virginia insurance law. State Auto is not a participant to this prohibition action and did not object to venue in Harrison County, but only sought bifurcation which was denied by the Trial Court in its Order. [App. Exhibit 6]

Defendant ECA did not challenge the validity of Plaintiffs' cause of action against State Auto nor did State Auto. [App. Exhibit 6, Paragraphs 5, 6 & 7]; Both ECA and State Auto admitted that Plaintiffs' representations and exhibits referenced in Plaintiffs' response to the Motions to sever, dismiss and bifurcate would not be challenged. *Id.* No assertion has been made by ECA that Plaintiffs filed a cause of action against State Auto for the purpose of gaining venue. *Id.* There is no issue before this Court regarding the validity of Plaintiffs' cause of action against State Auto and the prior dismissal of Plaintiffs' first civil action has no relevance to this appellate action by ECA. Thus, the issue before this Court

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<sup>5</sup> To date, Erika Gilmore's medical expenses total \$11,986.85 and neither National Union, nor State Auto have provided any coverage for these damages.

is whether the Trial Court's discretionary determination not to sever the tort claims against ECA, and then dismiss them from this civil action, is ripe for a rule to show cause, and if so, whether the Trial Court's discretion was abused in such a manner as to deprive the Trial Court of jurisdiction.

### III. Standard of Review:

This Court has addressed the standard of review applicable to a writ of prohibition, explaining that:

“[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va.Code 53-1-1.” Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977). “The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters no if the aggrieved party has some other remedy adequate or inadequate.” State ex rel. Valley Distributors, Inc. v. Oakley, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969).

State ex rel. Shepard v. Holland, 219 W. Va. 310, 313-314, 633 S.E.2d 255, 258 - 259 (2006).<sup>6</sup>

#### A. The Trial Court's Denial of a Motion to Sever is Interlocutory and Not Subject to Piecemeal Review

A motion to sever pursuant to Rule 42 is discretionary with the Trial Court. A single trial is the presumption, and severance or bifurcation an exception, as a single proceeding promotes judicial economy, saves the litigants time and money and is consistent with the

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<sup>6</sup> See also Syllabus point one of Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979), which held regarding the evaluation of a request for a writ of prohibition:

“In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way **to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate** which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” (emphasis added)

directives of Rule 1 that the Rules of Civil Procedure “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” Bennett v. Warner, 179 W.Va. 742, 372 S.E.2d 920 (1988); accord, State ex rel Cavender v. McCarty, 198 W.Va 226, 479 S.E2d 887 (1996). The Trial Court in its ruling faithfully applied these principles.

The burden of proof was upon Petitioner, ECA, to demonstrate prejudice sufficient to require separate trials for a matter that arose out of the same precipitating transaction, i.e. the automobile/truck crash and the resulting failure of the Parties to pay even the accepted damages caused from the crash. Neither Petitioner nor State Auto presented to the Trial Court any cogent reasons why this case should not proceed as one trial for purposes of discovery and trial, even though the Trial Court always has the discretion, should it become necessary, to bifurcate the automobile tort action against ECA and Sollon from the first party bad faith action against State Auto. Petitioner just ignores this necessary proof to entitle it to a severance.<sup>7</sup> The Trial Court no doubt considered such factors including the likelihood that some or part of the case may settle leaving only the ECA Defendants’ automobile tort action or State Auto’s bad faith action before the Trial Court, thereby eliminating any issue regarding alleged prejudice which Petitioner did not prove anyway.

This Court should not entertain this extraordinary appeal seeking prohibition as it encourages litigants, especially those with tremendous resources, to file such piecemeal appellate actions causing all parties and the Courts a waste of time and money. This Court should deny Petitioners’ request for a rule to show cause seeking prohibition as being premature as the Trial Court’s Order denying severance to Petitioners is not a final order and is subject to modification if appropriate facts are developed that would warrant

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<sup>7</sup> Assuming that ECA may be entitled to bifurcation it does not automatically follow that it would be entitled to dismissal which would result in the same case being in two different forums; the Trial Court recognized this but ECA did not; [App. Exhibit 6, Paragraph 9.]

modification. C&O Motors, Inc., v. West Virginia Paving, Inc., 223 W.Va. 469, 677 S.E.2d 905 (2009).

**B. Should This Court Review this Original Jurisdiction Appeal Seeking Prohibition, Such Relief Is Not a Proper Remedy in this Case**

***i) ECA and Sollon Have Not Satisfied the Five Factor Test Entitling them to a Writ of Prohibition***

Finally, ECA has not met, nor did it even address, any of the five criteria established by this Court to entitle Petitioners to a rule to show cause. This Court has clearly set forth the five factors that will be examined to determine whether a writ of prohibition should be considered and, concomitantly the proceedings below stayed, as a result of the granting of a rule to show cause. Those five factors include:

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

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W.Va. 37, 658 S.E.2d 728, 729 (2008) syl. pt 1; accord, State ex rel West Virginia National Auto Ins. Co. v Bedell, 223 W.Va. 222, 672 S.E. 2d 358 (2008).

This Court has held that the third factor, whether the Trial Court's Order is clearly erroneous as a matter of law, should be given "substantial weight", Syl. Pt. 1, Kaufman, citing State ex rel Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). As discussed above, the Circuit Court's Order complies with the West Virginia Rules of Civil Procedure<sup>20</sup>

and 21, West Virginia Code §56-1-1, and the case law interpreting such Rules and Statute.<sup>8</sup> The Trial Court's broad discretion when ruling on severance to efficiently manage trial issues is accorded great deference, especially on such discretionary matters. Such an interlocutory order can be amended or modified at any time during the proceedings, if warranted, so micro management by writ is disruptive. Ultimately, ECA and Sollon have not provided any legal authority holding that the Trial Court's Order is clearly erroneous and unlawful to be considered in excess of the Trial Court's legitimate powers as a matter of law and subject to interlocutory review at this stage of the proceedings.

Regarding the first factor, ECA and Sollon have other adequate means to obtain the desired relief, such as seeking reconsideration of bifurcation of the first-party bad faith claims from the underlying tort, if the facts warrant such Trial Court action. However, ECA has never sought bifurcation, they desire severance merely to change venue which clearly is not warranted in this case. Also, further proceedings may narrow the issues, or moot them, based on ECA's actions in the case. As such, the first factor weighs against ECA's entitlement to a show cause order for prohibition.

The second factor also weighs against ECA's entitlement to a show cause order for prohibition. ECA will suffer no harm that is not remediable on direct appeal. By filing this Writ, Nation Union, through ECA, merely seeks to multiply these proceedings in an effort to coerce the Plaintiffs to accept a "low ball" settlement. ECA has the right to appeal any final order rendered in this case if it can demonstrate prejudice from the Trial Court's refusal to sever and dismiss ECA. Conversely, the Plaintiffs will be significantly harmed by severance and dismissal as they will be forced to litigate in two separate forums with the attendant costs and time required thereby. Accordingly, this factor weighs against ECA and in favor of the Trial Court's discretion.

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<sup>8</sup> No Party has raised the mandatory provisions of Rule 42(b) which would require the Trial Court to consolidate a separate civil action brought against ECA in another Court as bifurcation would address any alleged prejudice from a single trial if such prejudice is proven.

The fourth factor is whether the Trial Court's order is an often repeated error or manifests persistent disregard for either procedural or substantive law. As is discussed above, the Trial Court did not err by finding: 1) that State Auto was a proper venue giving defendant; and, 2) that the ECA Defendants were properly joined under Rule 20, as each of the Plaintiffs' claims arose out of the same transaction, i.e. the motor vehicle crash; 3) that bifurcation would satisfy any of ECA's concerns, if entitled to it, but ECA failed to seek bifurcation. The Trial Court's Order determining that the causes of action were related is firmly based on accepted precedent from this Court and other Courts. Accordingly, this factor weighs against ECA and in favor of the Trial Court's discretion. Bennett and Cavender, supra; Jonas v. Conrath, 149 F.R.D. 520 (S.D.W.Va. 1993)

The fifth factor is whether the lower tribunal's order raises new and important issues of law of first impression. The law favoring a single trial and joinder of all related claims and the venue giving defendant principle, are all firmly established in this State. See Christian v. Sizemore, 181 W.Va. 628, 383 S.E. 2d 810 (1989); State ex. rel., Piper v. Saunders, 228 W.Va. 792, 724 S.E.2d 763 (2012); Woulard v. Rogers, 2012 WL 1956057 (N.D.W.Va. 2012); Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E. 2d 64 (1998) addressing the proper joinder of related claims and Kenamond v. Warmuth, 179 W.Va. 230, 366 S.E.2d 738 (1998); Morris v. Crown Equipment Corp., 219 W. Va. 347, 356, 633 S.E.2d 292, 301, cert. denied, 549 U.S. 1096 (2006), regarding the venue-giving defendant rule. Together these cases clearly demonstrate that the Trial Court was on firm ground when denying ECA's motion to sever and dismiss. Accordingly, this factor weighs heavily against ECA and in favor of the Trial Court's Order which followed settled law and its exercise of discretion in weighing the facts regarding any potential prejudice to ECA from a single proceeding.

**IV. The Trial Court's Order Satisfied the Requirements of Rule 20 Which Requires Joinder of All Parties in One Action When Those Claims Arose Out of the Same "Transaction, Occurrence, or Series of Occurrences"**

As permitted, under W.Va. R. Civ. P., Rule 20, the Plaintiffs joined all persons whose liability arose "out of the same transaction, occurrence, or series of transactions or occurrences." Morris v. Crown Equipment Corp., *supra*. "The goal of... permissive joinder is the promotion of judicial economy by preventing both the duplication of effort and the uncertainty embodied in piecemeal litigation." *Id.* Such piecemeal litigation "cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *Id.* at 357.

Plaintiffs' first-party bad faith claim against Defendant State Auto arises from the same underlying action that involves ECA and Sollon and joinder in one action, including all first party insurance claims, has long been the law in this State. Christian v. Sizemore, *supra*; State ex. rel., Piper v. Saunders, *supra*; Woulard v. Rogers, *supra*; and Light v. Allstate Ins. Co., *supra*.

ECA primarily relied upon a Fifth Circuit Court of Appeal's opinion in Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516 (5<sup>th</sup> Cir. 2010). However, former Chief Judge Charles H. Haden's Memorandum Opinion and Order entered in Jonas v. Conrath, *supra*, is more persuasive as it is based upon similar facts and is based upon West Virginia law. Jonas presents a similar factual scenario wherein Prudential Insurance Company of America provided healthcare coverage to Plaintiff Jonas who sought treatment from an optometrist. Plaintiff Jonas' claims against Prudential were grounded in contract, while those against the optometrist and his office, were those of tort. Prudential moved to sever the contract claims against it from those tort claims against the optometrist. Rule 21 of West Virginia Rules of Civil Procedure, like the Federal Rule, is silent as to what specifically constitutes misjoinder and this is understandable as the factual scenarios that can present to a trial court are innumerable. Rule 21 states:

"misjoinder is present, and severance appropriate, when 'the claims asserted by or against the joined parties do not arise out of the same transaction or

occurrence or do not present some common question of law or fact.’ Rule 20(a) ‘**permits the broadest possible scope of action consistent with fairness to the parties [and] joinder of claims, parties and remedies is strongly encouraged.**’” (emphasis added)

*Id.* at 523. (internal citations omitted) “The court note[d] ‘the transaction and common question requirements prescribed by Rule 20(a) are to be liberally construed in the interest of convenience and judicial economy.’” *Id.* (internal citations omitted)

In Jonas, the claims against the optometrist defendant and the insurance defendant were found to arise out of the same transactions or occurrences when a common question of fact or law existed when evidence necessary for the tort action would also be useful to prove some part of the contract action. The district court in denying Prudential’s motion stated “[d]enying the motion to sever will serve judicial economy and promote the just, speedy and inexpensive determination of this action.” *Id.* In the case at Bar, evidence of damages in the automobile tort action against ECA will be the same or similar to prove damages in the bad faith action and the Trial Court found that severance and dismissal would be duplicative if two trials are required. Such was the type of discretionary decision making that trial judges must exercise in almost every trial and litigants should not be permitted to second guess it by piecemeal litigation.

#### **V. ECA Failed to Carry Its Burden to Demonstrate Prejudice if Severance and Dismissal Under Rule 21 Was Not Granted**

Severance would result in two trials, causing unnecessary delay, increased expense and inconvenience to the parties and witnesses, unnecessary waste of the Court’s scarce judicial resources and would not affect the Trial Court’s jurisdiction to decide this case. The ECA Defendants did not provide any justification for severance, when unitary trials are generally preferred. Light, supra; See also, State ex rel. Allstate v. Bedell, 203 W.Va. 37, 506 S.E.2d 74 (1998)(per curium) [Syl. Pt. 2].

In ECA’s questions presented to this Court, ECA has admitted proper joinder, yet

argues for severance and dismissal. Pet. pg. 2 Questions Presented [...“despite proper joinder, to cure the prejudicial effect of having the claims discovered and tried together.”] With proper joinder admitted, Rule 21, which permits a remedy for misjoinder of parties, i.e. severance, would not be appropriate in this case. The appropriate remedy would be bifurcation which ECA did not request. “[C]ourts have uniformly held that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties as set forth in Rule 20(a).” Jonas at 523 (internal citations omitted). Seemingly, ECA rests its argument upon the word “transaction,” yet Rule 20(a) provides that a party may be permissively joined under *either* precondition and does not require the presence of both the same transaction *and* the same occurrence. However, as discussed above, the claims against State Auto, ECA and Sollon arose out of the same occurrence and the same transaction.

In Christian v. Sizemore, the Court held that the plaintiff was permitted to bring a declaratory action claim against the defendant tortfeasor’s insurance carrier in the same personal injury suit against the tortfeasor, instead of by separate action. The Court in Christian discussed that severance of issues for separate trials under W.Va. R.Civ.P. 42(c) “rests within the discretion of the trial judge.” Christian v. Sizemore, at 815. The Court’s right to order separate trials, should only be granted to prevent prejudice to a party, and in this case ECA has failed to demonstrate any prejudice which would occur in a unitary trial. see generally, State ex rel. State Farm Fire & Casualty Co. v. Madden, 192 W.Va. 155, 451 S.E.2d 721 (1994).

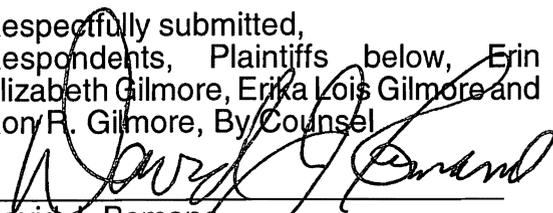
## **VI. Conclusion:**

There are absolutely no grounds upon which Defendants ECA and Sollon can legitimately claim that they are entitled to extraordinary relief by way of a writ of prohibition requiring the Trial Court to sever their claims from those against State Auto and then

dismiss them for lack of venue. ECA seeks to boot strap an unauthorized motion for intra-state change of venue by way of a motion for severance.<sup>9</sup> The Trial Court did not abuse its discretion or exceed its legitimate powers, and to allow the ploy of ECA to succeed will cause havoc for a trial court to be able to efficiently manage its docket and reduce costs and prevent the waste of scarce judicial and attorney resources.

Accordingly, this Court should deny ECA and Sollon's request for a rule to show cause and dismiss their Petition with prejudice.

Respectfully submitted,  
Respondents, Plaintiffs below, Erin  
Elizabeth Gilmore, Erika Lois Gilmore and  
Ron R. Gilmore, By Counsel



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David J. Romano  
W.Va. State Bar ID No. 3166  
ROMANO LAW OFFICE  
363 Washington Avenue  
Clarksburg, West Virginia 26301  
(304) 624-5600  
[romanolaw@wvdsi.net](mailto:romanolaw@wvdsi.net)

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<sup>9</sup> Ranson v. Riffle, 195 W.Va. 121, 464 S.E.2d 763 (1995); W.Va. Code §56-1-1(b).

**CERTIFICATE OF SERVICE**

I, David J. Romano, do hereby certify that on the 23<sup>rd</sup> day of February, 2015, I served the foregoing "**RESPONDENTS' RESPONSE TO ENERGY CORPORATION OF AMERICA AND JOHN D. SOLLON, JR.'S REQUEST FOR WRIT OF PROHIBITION**" upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses:

Michael P. Markins, Esquire  
W.Va. State Bar ID No. 8825  
Mannion & Gray Co., L.P.A.  
707 Virginia Street East, Suite 260  
Charleston, WV 25301  
[Fax No. 304-513-4243]  
Counsel for Energy Corporation of America and  
John D. Sollon, Jr.

David P. Cook, Jr., Esquire  
W.Va. State Bar ID No. 9905  
MacCorkle Lavender PLLC  
300 Summers Street, Suite 800  
P.O. Box 3283  
Charleston, WV 25332-3283  
[Fax No. 304-344-8141]  
Counsel for State Auto Property & Casualty Insurance  
Company d/b/a State Auto Insurance Companies

  
\_\_\_\_\_  
David J. Romano

# Exhibits on File in Supreme Court Clerk's Office