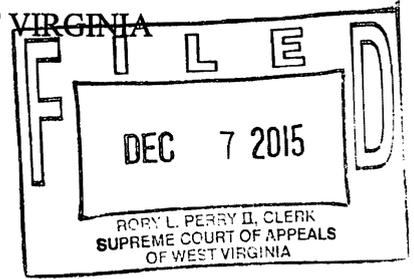


15-1178

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
STATE AUTO PROPERTY INSURANCE COMPANIES
d/b/a STATE AUTO PROPERTY AND CASUALTY
INSURANCE COMPANY, an Ohio company.

Petitioner,

v.

Docket No. _____

THE HONORABLE JAMES C. STUCKY, Judge of the
Circuit Court of Kanawha County, West Virginia and
CMD PLUS, INC., a West Virginia Corporation,

Respondents.

PETITION FOR WRIT OF PROHIBITION

(Circuit Court of Kanawha County, West Virginia
Civil Action No. 11-C-606)

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d/b/a State Auto Property and Casualty Insurance Company,
an Ohio company, Petitioner**

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QUESTIONS PRESENTED

- A. Whether, pursuant to West Virginia law, the Circuit Court erred in finding that CMD Plus, Inc. can state causes of action for first-party bad faith and violations of the Unfair Trade Practice Act?
- B. Whether the Circuit Court erred in finding that CMD Plus, Inc. can state a cause of action for breach of contract and/or breach of the duty of good faith and fair dealings under West Virginia law?

STATEMENT OF THE CASE

This Petition arises out of a civil action now pending in the Circuit Court of Kanawha County, West Virginia, before respondent, The Honorable James C. Stucky, styled *Barry G. Evans and Ann M. Evans, Plaintiffs v. CMD Plus, Inc., a West Virginia Corporation, C. K. Shah, Chandrakant N. Shah, and Kimberly S. Shah, Defendants and CMD Plus, Inc., a West Virginia Corporation, Third-Party Plaintiff, v. State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, an Ohio company, Third Party Defendant*, Civil Action No. 11-C-606. This Petition for Writ of Prohibition is filed pursuant to Article VIII, §3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, and West Virginia Code § 53-1-1. This Petition for Writ of Prohibition seeks relief from an Order denying State Auto's Renewed Motion to Dismiss.

A. The Allegations of CMD Plus, Inc.

On or about September 26, 2011, Respondent, CMD Plus, Inc. (hereinafter sometimes referred to as "CMD") sought leave, pursuant to West Virginia Rule of Civil Procedure 14(a), to file a Third-Party Complaint against Petitioner, State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company. App. at 00009-00023. The Circuit Court granted CMD's motion on March 9, 2012. App. at 00024-00025. CMD's Third-Party Complaint sets forth three Counts: Count I – Common Law Bad Faith, Count II – Violation of West

Virginia Unfair Trade Practices Act and Count III – Breach of Contract. App. at 00027-00035. The allegations relating to each of these claims stem from a Commercial General Liability Insurance Policy issued by State Auto to CMD. App. at 00082-00096.

CMD alleged that Plaintiffs, Barry G. and Ann M. Evans filed suit against it, alleging nuisance, trespass and negligence in regards to a hillside slip that occurred in March 2009 as a result of construction being performed by CMD on CMD's property adjacent to the Evanses' property. App. at 00009. According to CMD, prior to March 9, 2009, CMD entered into a contractual arrangement with CMD and Co-Defendants, C.K. and Kimberly S. Shah. App. at 00027. CMD claims it was to construct a custom home on real property owned by the Shahs located on Meadow Road in Charleston, West Virginia. *Id.* As a result of the construction on the home, on or about March 9, 2009, a portion of the hillside on the Shahs' property reportedly fell, causing damage to both the Shahs' property as well as the property owned by the Evanses. *Id.* CMD alleges it was notified by the Evanses of a claim for property damage relating to CMD's construction activities and the hillside slip. App. at 00027-00028. CMD alleges that it notified State Auto of the hillside slip and the Evanses reported damage almost immediately after it received notice from the Evanses. App. at 00028.

In Count I of CMD's Third-Party Complaint, CMD alleges that State Auto had "a duty and legal obligation to CMD to make a full investigation of CMD's claims and to effectuate a prompt, fair and equitable settlement of those claims." App. at 00030. CMD claims that State Auto's alleged delay in investigating and taking action on claims made by and on behalf of CMD and the Evanses was a breach of its common law duty of good faith and fair dealings to CMD. App. at 00031. Further, CMD also alleges that State Auto's purported "refusal to effectuate the necessary repairs to the Shah Property and the Evans Property" and "delay in handling,

facilitating and approving repair and/or relocation of the City of Charleston sanitary line” breached its common law duty of good faith and fair dealing to CMD. *Id.*

In Count II, CMD alleges that State Auto violated the West Virginia Unfair Trade Practices Act, specifically, West Virginia Code Sections 33-11-4(9)(b), 33-11-4(9)(f), 33-11-4(9)(g). App. at 00032. Finally, in Count III, CMD asserts that State Auto breached its contractual obligations to satisfy Respondent’s claims and/or by failing to effectuate the necessary repairs to the Evanses’ property and by failing to effectuate the necessary repairs and improvements to the Shahs’ property, all in accordance with the insurance policy. App. at 00033.

State Auto filed a Motion to Dismiss, Motion to Bifurcate and Stay, and Answer to Third-Party Complaint. App. at 00036-00081. By Order dated September 25, 2012, the Circuit Court denied State Auto’s Motion to Dismiss, except that the Court dismissed all such claims that, in actuality, are claims of the Plaintiffs, Barry G. Evans and Ann M. Evans. App. at 00097-00098.

B. Procedural History of Pertinent Underlying Issues

Subsequent to CMD filing its Third-Party Complaint, State Auto filed a Motion to Intervene on or about May 1, 2012, for the purpose of filing a Declaratory Judgment action. *See* App. at 00099-00101. State Auto’s Motion to Intervene was granted by Agreed Order on June 7, 2012, and on June 14, 2012, State Auto filed its Declaratory Judgment action, seeking a determination regarding whether or not the Commercial General Liability (“CGL”) Policy issued to CMD provided coverage for the claims being asserted by the Shahs, CMD Plus, Inc. and the Evanses based upon the facts alleged in the Complaint and the Third-Party Complaint. The Declaratory Judgment was ultimately decided on Motions for Summary Judgment wherein the

Circuit Court denied State Auto's Motion for Summary Judgment. App. at 00102-00109. The Order denying State Auto's Motion for Summary Judgment was appealed to this Court. Before the appeal was heard by this Court, the parties reached an agreement as to all coverage issues and the appeal was dismissed. App. at See 00110-00113. In dismissing the appeal, the parties agreed and stipulated to the following, pertinent terms:

1. Barry and Ann Evans, agree that no claim is being presented for property damage or bodily injury arising from mold, fungi, bacteria or mildew. To the extent such claims have been made, the Evanses hereby withdraw such claims.
2. Barry and Ann Evans, are not making a claim for or seeking insurance coverage or indemnification for any repairs, alterations, enhancement, maintenance, restorations or replacements on the Shah or CMD Plus, Inc. property, even to the extent needed for prevention of injury to a person or damage to another's property. To the extent such a claim was made by the Evanses, the Evanses hereby withdraw such claim.
3. CMD is not making an independent claim against State Auto seeking damages for any repairs alterations, enhancements, maintenance, restorations or replacements on the Shah or CMD's property.

Id.

Thereafter, on January 13, 2015, State Auto Property and Casualty Insurance Company was ordered to pay CMD's counsel's attorney's fees in the amount of \$52,757.54. App. at 00114-00118. In so ordering, the Circuit Court held that pursuant to *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), that State Auto had a duty to defend CMD, and therefore CMD was entitled to recover reasonable attorney's fees arising from the declaratory judgment action. *Id.* It is important to note, that since the inception of the underlying civil matter filed by the Evanses, State Auto provided a defense to CMD. Further, in or around June 2015, State Auto, on behalf of CMD, resolved the Evanses' claims, settling the underlying matter and securing a complete Release of All Claims, releasing CMD of and from any and all liability

relating to the allegations contained in the Evanses' Complaint for past, present, and **future** damages. App. at 00119 to 00125.

On August 13, 2015, State Auto filed a Renewed Motion to Dismiss and Memorandum in Support. App. at 00124 to 00161. On or around August 26, 2015, State Auto was provided a hearing date of October 7, 2015, by the Circuit Court of Kanawha County, West Virginia, for its Renewed Motion to Dismiss, prepared a Notice of Hearing regarding the same and served it upon Counsel of Record. *See* App. at 00162-00164. Subsequently, on October 1, 2015, CMD Plus, Inc. filed its Response in Objection to State Auto Property & Casualty Company's Renewed Motion to Dismiss. App. at 00165 to 00175. Thereafter, State Auto filed a Reply to CMD Plus, Inc.'s Response in Objection to State Auto Property & Casualty Company's Renewed Motion to Dismiss. App. at 00176-00187. As noticed, the Circuit Court of Kanawha County held a hearing on the Renewed Motion to Dismiss on October 7, 2015. At the hearing, Counsel for State Auto specifically advised the Court that, if denied, it would seek a Writ of Prohibition and requested that the Court enter an Order setting forth specific findings of facts and conclusions of law.¹ By Order filed with the Circuit Clerk on November 10, 2015, and mailed to the parties on November 17, 2015, the Circuit Court denied the Renewed Motion to Dismiss. App. at 00001-00008.

Discovery in this matter is to be completed by January 29, 2016, dispositive motions are to be filed by February 5, 2016, the pre-trial conference is scheduled for March 29, 2016, and trial is scheduled for April 4, 2016. App. at 00188.

¹ At the hearing, Respondent was instructed to prepare an Order, denying the Renewed Motion to Dismiss. Whenever Respondent had failed to submit an order by October 16, 2015, Petitioner prepared and submitted a Proposed Order to the Circuit Court for its consideration. Thereafter, on October 21, 2015, Respondent submitted a Proposed Order to the Circuit Court for its consideration.

SUMMARY OF THE ARGUMENT

This Court has explained that a first-party bad faith action against an insurer may arise in two contexts. First, a first-party bad faith action may arise when an insurer fails to use good faith in resolving a “loss claim” filed by the insured. The second type of first-party bad faith action may arise as a result of the insurer’s failure to use good faith in settling a lawsuit by a third-party the insured harmed, resulting in an “excess judgment” against the insured. Here, neither of these set of circumstances exist. As a result, the cause of action CMD seeks to assert is not authorized by West Virginia law.

Further, the causes of action CMD seeks to assert, common law bad faith claims and statutory violations of the West Virginia Unfair Trade Practices Act, are not claims it possesses. Under West Virginia law, State Auto fulfilled its duty to act in good faith and deal fairly with CMD when it defended CMD from beginning to end in the underlying litigation and also by fully indemnifying CMD of any liability it had to the Evanses for any past, and more importantly any future, claims. Nevertheless, CMD seeks to assert a claim for breach of the duty of good faith and fair dealings by claiming that State Auto refused to effectuate the necessary repairs to the Shah Property and the Evans Property and delayed in handling, facilitating and approving repair and/or relocation of the City of Charleston sanitary line. To further bolster their claim of common law bad faith and to assert a statutory bad faith claim, or violation of the West Virginia Unfair Trade Practice Act, CMD alleges that State Auto violated West Virginia Code Section 33-11-4(9)(b), (f) and (g). Notably, however, when these claims are examined, pursuant to West Virginia law, it is readily apparent that these are not CMD’s claims, and therefore, CMD lacks standing to assert them. Further, even if CMD is found to have standing, these claims remain those of third-parties. CMD cannot allege bad faith for how third-parties’ claims were handled

by State Auto because third-party bad faith claims are strictly prohibited by West Virginia law. Furthermore, CMD asserted any common law bad faith claims and/or statutory bad faith claims more than one year after it knew or reasonably should have known about them, which places them outside the applicable statute of limitations.

Additionally, CMD's breach of contract claim is duplicative of its allegations of common law bad faith. Under West Virginia law, the duty at issue in a bad faith breach of insurance contract claim is the insurance company's duty to act in good faith and deal fairly with its insured. There is no policy provision that CMD can point to that State Auto, in violation of its duty to act in good faith and deal fairly with CMD, breached. Because State Auto defended CMD throughout the underlying litigation under the CGL Policy and eventually fully indemnified CMD and because the CGL Policy provided no coverage to CMD for damages to its own property, no breach of contract claim exists.

Under the above circumstances, dismissal of CMD's Third-Party Complaint was appropriate. Indeed, with regard to motions to dismiss, this Court has stated:

[D]espite the allowance in Rule 8(a) that the plaintiff's statement of the claim be "short and plain," a plaintiff may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint [,]" see *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir.1993), or where the claim is not authorized by the laws of West Virginia. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.

Williamson v. Harden, 214 W. Va. 77, 585 S.E.2d 369, 372 (W.Va., 2003)(quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995); accord, *Harrison v. Davis*, 197 W.Va. 651, 657-58 n. 17, 478 S.E.2d 104, 110-11 n. 17 (1996)). Further, this Court has recognized that "[w]hile courts should make limited use of their power to

dismiss cases under Rule 12(b)(6), the rule remains a valuable tool to control a court's docket.” *Id.* In the present case, as explained above and more fully below, the Circuit Court exceeded its power to permit claims not recognized by West Virginia law to proceed against State Auto. In other words, the Circuit Court has permitted CMD to state claims that are not authorized by the laws of West Virginia. Accordingly, this Court should grant this Petition for Writ of Prohibition, and reverse the Circuit Court’s Order Denying State Auto Property & Casualty Insurance Company’s Renewed Motion to Dismiss.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument in this case is unnecessary because the principle issues in this case have been authoritatively decided previously, and the facts and legal arguments are adequately presented in this brief and the record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a West Virginia Rule of Appellate Procedure 19 argument and disposition by memorandum decision.

ARGUMENT

Standard of Review

This Court has previously stated that “[t]he writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of jurisdiction.” Syl., *State ex rel. Vineyard v. O’Brien*, 100 W. Va. 163, 130 S.E. 111 (1925); *see also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (“Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.”); Syl. Pt.2, *State ex rel. Preacher v. Sencindiver*, 160 W. Va. 314, 233

S.E.2d 425 (1977) (“A writ of prohibition will not issue to prevent a simply 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.”)

This Court has defined the standard for issuance of a writ of prohibition where it is claimed that the lower tribunal exceeds its legitimate powers. *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, ____ W. Va. ____, ____ S.E.2d ____ No. 15-0424, *7-8 (2015) (quoting Syl. Pt., 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1997)). This Court examines the following 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 new and important problems or issues of law of first impression.

Id. (quoting Syl. Pt., 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1997)). This Court has held that “[t]hese factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.* (quoting Syl. Pt., 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1997))

A. The Circuit Court erred in finding that CMD Plus, Inc. can state a cause of action for first-party bad faith under West Virginia law.

1. CMD's allegations of first-party bad faith do not meet the criteria of either of the two types of first-party bad faith claims recognized under West Virginia law.

The Circuit Court erred when it concluded that, pursuant to *State ex rel. Allstate Ins. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 76 (1998), CMD's Third-Party Complaint asserts a proper first-party bad faith claim upon which relief may be granted. In West Virginia, when defining first-party bad faith, it is quite evident that such a claim exists in only one of two circumstances: (1) where an insurer has failed to use good faith in settling a claim brought against the insured or (2) where an insurer has failed to use good faith in settling a claim filed by the insured. *State ex rel. Allstate Ins. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 76, 86 (1998). In 2003, Justice Davis elaborated upon the first-party bad faith cause of action, further explaining these two types of actions in her concurring opinion in *State el rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480, 490 (2003). There, Justice Davis, citing *Gaughan*, explained a first-party bad faith action against an insurer may arise in two contexts. "First, the first-party bad faith action may arise when an insurer fails to use good faith in resolving a "loss claim" filed by the insured. The second type of first-party bad faith action may arise as a result of the insurer's failure to use good faith in settling a lawsuit by a third-party the insured harmed, *resulting in an "excess judgment" against the insured.*" *Id.* 213 W. Va. 624, 584 S.E.2d at 490. (emphasis supplied). The Circuit court failed to recognize that neither of these set of circumstances exist in the present case, and as a result, on its face, CMD's Third-Party Complaint cannot state a cause of action for first-party bad faith. The Circuit Court, without explanation and/or citation to any West Virginia law, nevertheless, denied State Auto's Renewed Motion to Dismiss as to Count I

and Count II of CMD's Third-Party Complaint, entering an Order that was clearly erroneous as a matter of law and that exceeded its legitimate powers.

i. The Policy of Insurance Issued by State Auto to Respondent Does Not Provide Coverage for First-Party Losses.

First, as State Auto concisely pointed out to the Circuit Court, CMD cannot state a claim for a first-party bad faith action on the grounds that State Auto failed to use good faith in resolving a "loss claim" filed by CMD because the policy of insurance issued to CMD is a CGL Policy, which does not provide coverage for first-party losses. *See* App. at 00082-00096. By the specific provisions in the CGL Policy, it applies only to damages that the insured is legally obligated to pay for "bodily injury" or "property damage" to which the insurance applies. *See* App. at 00082. The CGL Policy does not provide coverage for or require State Auto to pay for damages incurred by CMD to CMD's property. In other words, this is a **liability policy**, and it is meant to protect the insured – in this case CMD – from claims of liability for injuries and damages allegedly caused by CMD to others. This Court has long recognized that commercial general liability policies are specifically designed to insure against the risk of tort liability for physical injury to persons or property sustained by third parties as a result of the product or work performed by the insured. *See Webster County Solid Waste Auth. v. Brackenrich and Assocs., Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005); *See also McGann v. Hobbs Lumber Co.*, 150 W.Va. 364, 145 S.E.2d 476 (1965) ("A liability insurance policy, unlike a builder's risk policy, is designed to indemnify the insured against damage to other persons or property caused by his work or property and is not intended to cover damage to the insured's property.").

Accordingly, to the extent that CMD seeks to recover damages to its own property caused by its own liability/actions, the CGL Policy **is not** meant to cover such damages. In fact, under

exclusion (j), the Commercial General Liability Policy specifically excludes coverage for damage to property owned, rented or occupied by the insured. App. at 00085-00086. There, the CGL Policy provides, in relevant, part:

2. Exclusions

j. Damage to Property

“Property damage” to:

- (1) Property you own, rent or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property;

Id. Under these circumstances, exclusion (j) would exclude coverage for any property owned, rented or occupied by CMD. In fact, in resolving the underlying Declaratory Judgment Action, CMD conceded that it was not making an independent claim against State Auto seeking damages for any repairs alterations, enhancements, maintenance, restorations or replacements on the Shah or CMD’s property. App. at 00110-00113. For that matter, Barry and Ann Evans also conceded that they were not making a claim for or seeking insurance coverage or indemnification for any repairs, alterations, enhancement, maintenance, restorations or replacements on the Shah or CMD Plus, Inc. property, even to the extent needed for prevention of injury to a person or damage to another’s property. App. at *Id.*

Accordingly, because there is no coverage for first-party damages, there is no basis for a first-party bad faith claim against State Auto as CMD cannot assert a “loss claim” under the CGL Policy from which a bad faith claim may flow. As a result, CMD’s allegations that State Auto failed to make a full investigation of CMD’s claims and to effectuate a prompt, fair and equitable

settlement of those claims, that State Auto refused to effectuate the necessary repairs to CMD and/or Shah Property and that State Auto forced Respondents to institute litigation in order to obtain the coverage due CMD are baseless, and, as a matter of law, could not support a claim for first-party bad faith. The Circuit Court erred by failing to examine CMD's Third-Party Complaint in light of this well established law, which clearly demonstrates Plaintiff cannot state a cause of action for first-party bad faith under the first type of such a claim.

ii. The underlying matter settled, and therefore, there is no “excess judgment” against the insured.

The other circumstance under which this Court has recognized a first-party bad faith claim is when an insurer fails to use good faith in settling a lawsuit by a third-party the insured harmed, **resulting in an “excess judgment” against the insured.** *Kaufman*, 213 W. Va. 624, 584 S.E.2d at 490. The “excess judgment” component for what is required for this circumstance is the only instance where the insured may file suit against its own insurer. There is no case law otherwise in West Virginia. In the present case, no such excess judgment was ever obtained by the Evanses. Rather, State Auto settled the lawsuit brought by the Evanses, thereby preventing any judgment, excess or otherwise, from being entered against CMD. *See* App. 00119-00125. As such, CMD also cannot state a claim for first-party bad faith under the second circumstance giving rise to such a claim. Nevertheless, as with the first type of first-party bad faith, the Circuit Court once again erred by failing to consider the application of the law relating to the second type of first-party bad faith, allowing CMD's claim to proceed despite the absence of any West Virginia law supporting the same. The Circuit Court's decision provides no explanation as to the legal authority upon which CMD's claim is permitted to proceed.

Under these clearly established principles of West Virginia law, the Circuit Court's ruling that CMD can state a claim for first-party bad faith, common law and statutory, is plainly wrong.

2. The bad faith claims, common law and statutory, that CMD seeks to assert are those of third-parties, the Evanses and/or the City of Charleston², and therefore, are barred pursuant to West Virginia Code Section 33-11-4a and common law.

CMD claims that State Auto delayed in investigating and taking action on claims made by and on behalf of CMD and the Evanses, breaching its common law duty of good faith and fair dealings to CMD. Further, CMD also alleges that State Auto's purported "refusal to effectuate the necessary repairs to the Shah Property and the Evans Property" and "delay in handling, facilitating and approving repair and/or relocation of the City of Charleston sanitary line" were also breaches of its common law duty of good faith and fair dealing to CMD. App. at 00031. To further bolster their claim of common law bad faith and to assert a statutory bad faith claim, or violation of the West Virginia Unfair Trade Practice Act, CMD alleges that State Auto violated West Virginia Code Section 33-11-4(9)(b), (f) and (g). App. at 00032. In pertinent part, subsection (9) provides that "no person shall commit or perform with such frequency as to indicate a general business practice any of the following: . . . (b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; . . . (f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; . . . (g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in action brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered." Notably, however, when these claims are considered, under West Virginia law, it is apparent that the claims CMD

² The City of Charleston did not initiate any litigation with regard to the replacement of its sanitary line.

seeks to assert are not supported by West Virginia law as they are not CMD's claims. The Circuit Court, however, failed to consider this fact when issuing its Order, denying State Auto's Motion to Dismiss.

First, as a matter of law, CMD cannot prove a breach of the duty of good faith and fair dealings. While this Court has recognized that "the duty at issue in a bad faith breach of insurance contract claim is the insurance company's duty to act in good faith and deal fairly with its insured"; "the insurance company is not called upon to perform this duty until some contractual duty imposed by the insurance policy has arisen." See *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23, 37 (2009) (quoting *Daugherty v. Allstate Ins. Co.*, 55 P.3d 224, 228 (Colo.App.2002)); see also *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 716 S.E.2d 696, fn. 9 (2011) (quoting *Noland*, 224 W. Va. 372, 686 S.E.2d 23, 37). The Commercial General Liability Coverage Form, at App. at 00082-00096, clearly establishes only two contractual obligations owed to CMD by State Auto. First, under Section I - Coverage A Bodily Injury and Property Damage Liability, the insuring agreement obligates State Auto to, "pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." In other words, Section I defined the duty to indemnify. Second, also under Section I Coverage A Bodily Injury and Property Damage Liability, the policy states, "we will have the right and duty to defend the insured against any suit seeking those damages." This provision sets forth the duty to defend. In the underlying case, State Auto met both of these obligations set forth in the CGL Policy.

At all times during the pendency of the underlying litigation by the Evanses, State Auto defended CMD. In fact, there is no evidence to even remotely suggest that the duty to defend has been breached. CMD, itself, admitted in its Reply to State Auto's Renewed Motion to

Dismiss that State Auto defended CMD in the underlying litigation. App. at 00170. Likewise, the duty to indemnify has not been breached because litigation in the underlying matter was resolved by settlement. App. at 00119-00125. Pursuant to the terms of that settlement, State Auto paid to resolve all claims asserted by the Evanses against CMD while securing a complete release of CMD of and from any and all liability relating to the allegations contained in the Evanses' Complaint. *Id.* In fact, State Auto has secured a release to make sure that CMD cannot be sued again in the future. *Id.* Accordingly, as a matter of law, CMD cannot set forth any facts upon which it may base a claim for bad faith breach of the insurance contract against State Auto. The allegations upon which CMD seeks to base its breach of the duty of good faith and fair dealings – State Auto's purported refusal to effectuate the necessary repairs to the Shah Property and the Evans Property and State Auto's delay in handling, facilitating and approving repair and/or relocation of the City of Charleston sanitary line – in no way relate to State Auto's duty to indemnify and defend CMD, which State Auto undeniably fulfilled.

Second, with regard to the sections of the West Virginia Unfair Trade Practices Act CMD alleges State Auto violated, it is important to note that any duty owed by State Auto under subsections (9)(b) and (f) were owed to the Evanses and/or the City of Charleston, not CMD. Further, subsection (9)(g) has absolutely no application to this litigation at all because, as noted previously, the CGL Policy is a liability policy, which does not afford coverage for damage to the insured's property.

In other words, while CMD has tried desperately to set forth a set of facts upon which relief may be granted, it is abundantly clear that West Virginia law does not support the causes of action CMD seeks to assert. The causes of action, common law bad faith claims and statutory violations of the West Virginia Unfair Trade Practices Act, alleged by CMD, are not claims for

which CMD has any standing to assert. Further, even if CMD is found to have standing, the claims are third-party bad faith claims, which West Virginia law strictly prohibits.

In that regard, in West Virginia, “standing is defined as a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807, 821 (2002). “Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.” Syl. Pt. 5, *Findley*, 213 W. Va. 80, 576 S.E.2d 807. “[S]tanding is gauged by the specific common law, statutory or constitutional claims that a party presents.” Cleckley, Davis and Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(1) at 329. The *Findley* Court found that, “our standing inquiry focuses on the appropriateness of a party bringing the questioned controversy to the court.” *Findley*, 213 W. Va. 80, 576 S.E.2d at 822. One specific aspect of standing is that one generally lacks standing to assert the rights of another. *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 584 S.E.2d 203 (2003). For example, in *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720, 743 (1998), this Court recognized the “specific prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves, and held that one defendant lacked standing to raise a co-defendant’s objection to the circuit court’s exercise of personal jurisdiction over the co-defendant.” In fact, in *Kessel*, this Court recognized that “[t]raditionally, courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds

that third parties are generally the most effective advocates of their own rights and that *such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.*” See *Kessel*, 204 W. Va. 95, 511 S.E.2d 720, 743. (emphasis in original).

When asserting Count I, its common law bad faith claim, CMD describes the actions of State Auto it alleges supports this cause of action, as delay in investigating and taking action on claims made by the Evanses, refusal to effectuate the necessary repairs to the Evanses Property and delay in handling, facilitating and approving repair and/or relocation of the City of Charleston’s sanitary line. App. at 00030-00031. Further, in asserting Count II, its Violation of the West Virginia Unfair Trade Practices Act claim, CMD asserts that State Auto failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the Evanses’ claim. App. at 00032. Clearly, the alleged duties CMD claims State Auto breached were duties State Auto purportedly owed to the Evanses and the City of Charleston, not CMD, and therefore, CMD’s allegations do not set forth an invasion of a legally protected interest of CMD. Rather, CMD is seeking to assert the rights or legal interests of others, here the Evanses and/or the City of Charleston, in order to obtain relief from what it claims is a purported injury to itself. This Court has found that, under such circumstances, the individual and/or entity seeking to assert such a claim lacks standing, and therefore, is prohibited from attempting to vindicate the rights of a third party. Notably, the Circuit Court ignored the allegations being made by CMD and its complete lack of standing to assert said claim.

Essentially, by allowing CMD to assert claims relating to how State Auto handled the *third-party claims* of the Evanses and/or the City of Charleston, the Circuit Court is permitting CMD to assert third-party bad faith claims – claims third-parties, themselves, are prohibited from

asserting under West Virginia law – couching them as first-party bad faith claims. In 2005 the West Virginia legislature enacted West Virginia Code § 33-11-4a, which explicitly prohibited such claims. There is absolutely no law that would permit CMD to assert these claims on behalf of Mr. and Mrs. Evans and/or the City of Charleston.

Under West Virginia Code § 33-11-4a, all that is permitted to a third-party is an administrative remedy. Specifically, West Virginia Code § 33-11-4a, states:

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

W. Va. Code § 33-11-4a(a).

Moreover, prior to the enactment of West Virginia Code Section 33-11-4a (2005), this Court held that no common law bad faith cause of action existed by a third-party claimant against an insurer. *See* Syl., *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998) (“A Third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealings or for common law breach of fiduciary duty.”)

By the specific mandates of West Virginia law, the Evanses and/or the City of Charleston cannot name State Auto in any capacity in a civil action for any allegations as to how their third-party claim(s) has been handled. Accordingly, under West Virginia law, CMD cannot assert a claim on behalf of the Evanses and/or the City of Charleston of third-party bad faith by feebly attempting to dress it up in first-party bad faith clothes. In its November 10 Order, the Circuit

Court never considered (1) that State Auto, as a matter of law, fulfilled its obligation to indemnify and defend CMD or (2) that CMD's allegations to support its claims for bad faith, common law and statutory, relate to State Auto's handling of third-party claims asserted by the Evanses, rendering said claims **third-party** bad faith claims, which not only left CMD lacking standing to assert said claim, but failed to acknowledge that such a claim is prohibited by West Virginia law. Again, the ruling by the Circuit Court that CMD can state a claim for first-party bad faith, common law and statutory, is erroneous as a matter of law.

3. CMD's common law bad faith allegations and violations of the West Virginia Unfair Trade Practices Act are barred by the statute of limitations.

Allegations for common law bad faith are governed by a one year statute of limitations. In *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009), this Court held that the one year statute of limitations contained in W. Va. Code § 55-2-12(c) (1959) (Repl. Vol. 2008) applies to a common law bad faith claim. In Syl. Pt. 5 of *Noland*, this Court held that "in a first-party bad faith claim that is based upon an insurer's refusal to defend, and is brought under W. Va. Code § 33-11-4(9) (2002) (Repl. Vol. 2006) and/or as a common law bad faith claim, the statute of limitations begins to run on the claim when the insured knows or reasonably should have known that the insurer refused to defend him or her in an action." 224 W. Va. 372, 686 S.E.2d 23.

This Court has addressed in depth the issues underling the statute of limitations and how strictly this rule is to be applied. For instance, the Supreme Court has found that statutes of limitations impose very strict temporal requirements within which a cause of action must be initiated. See, e.g., Syl. pt. 2, *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997) ("The ultimate purpose of statutes of limitations is to require the institution of a cause of action within a

reasonable time.”); Syl. pt. 1, in part, *Stevens v. Saunders*, 159 W. Va. 179, 220 S.E.2d 887 (1975) (“Statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time[.]”), superseded by statute on other grounds as stated in *Frantz v. Palmer*, 211 W.Va. 188, 564 S.E.2d 398 (2001). Failure to file a lawsuit within such time periods usually results in the dismissal of the action as having been untimely filed. *Wright v. Myers*, 215 W. Va. 162, 597 S.E.2d 295 (2004).

Statutes of limitations provide certainty for litigants and promote judicial economy. *See, e.g.*, Syl. pt. 2, *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997) (“The ultimate purpose of statutes of limitations is to require the institution of a cause of action within a reasonable time.”); Syl. pt. 4, *Humble Oil & Ref. Co. v. Lane*, 152 W. Va. 578, 165 S.E.2d 379 (1969) (“Statutes of limitation are statutes of repose, the object of which is to compel the exercise of a right of action within a reasonable time.”) In other words, [s]tatutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power. Syl. pt. 1, *Stevens v. Saunders*, 159 W. Va. 179 (1975), superseded by statute on other grounds as stated in *Frantz v. Palmer*, 211 W. Va. 188, 564 S.E.2d 398 (2001). *Accord Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence.”) It is for these reasons that this Court has strictly enforced the temporal requirements for filing causes of action in the courts of this State. “By strictly enforcing statutes of limitations, we are both recognizing and adhering to

the legislative intent underlying such provisions.” *Johnson v. Nedeff*, 192 W.Va. 260, 265, 452 S.E.2d 63 (1994).

CMD’s Third-Party Complaint was filed well after the one year period permitted for a bad faith claim. CMD did not even seek leave to file its Third-Party Complaint until September 26, 2011. Even then, CMD’s motion was not heard until January 2012, and the Third-Party Complaint was not filed until March 20, 2012. Notably, however, according to the Third-Party Complaint, the alleged problems with how State Auto handled CMD’s claims, assuming *arguendo* that CMD even possessed a “claim,” date back to late 2009. The Third-Party Complaint alleges that the landslide at issue in the underlying matter occurred on March 9, 2009. App. at 00027. It alleges that State Auto was notified “immediately” and that at the time of initial notification the hillside slip was App. at 00028. It is alleged that State Auto was provided an estimate to make the repairs to the property, but instead of paying it, State Auto did nothing for six months until it issued a reservation of rights letter in September 2009. *Id.* CMD alleged that State Auto finally began its investigation into the hillside slip in October 2009. *Id.* CMD alleges that, in March 2010, one of State Auto’s hired engineers was preparing plans to repair the Shah and Evans properties. App. at 00029. According to the Third-Party Complaint, by that time, despite having one year to properly investigate, handle and resolve claims relating to the hillside slip, State Auto had yet to make any positive move toward resolving the issues. *Id.* Because of this, counsel for CMD drafted a correspondence to State Auto on May 30, 2010, advising of “its continuing and now substantial damages resulting from State Auto’s failure to promptly and properly handle the claim.” *Id.* CMD alleges it previously sent a similar letter on October 28, 2009. App. at 00028.

Based upon the facts contained in CMD's Third-Party Complaint, the improper handling of its "claim" began in late 2009 and was clearly documented and known by CMD at least by May 2010, if not sooner. While the Respondent's allegations are not based upon a failure to defend, the same rationale for application of the statute of limitations should apply with equal force in this case for failing to file the bad faith claims within one year of the first notice of the same. By giving Respondent's every benefit of the doubt and using the later date of May 2010 as the date when CMD knew of the alleged "bad faith," their Complaint regarding the same must have been filed by May 2011; otherwise, it is barred by the statute of limitations. The motion to file the Third-Party Complaint was not filed until September 2011. The hearing for the motion did not occur until January 2012. CMD finally filed its Third-Party Complaint on March 20, 2012. Clearly, these dates all surpass the one year statute of limitations for common law bad faith.

For the same reasons, CMD's common law bad faith "claims" are also barred. Indeed, this Court has held that a one year statute of limitations also applies to a statutory bad faith claim. See Syl. pt. 1, *Wilt v. State Auto. Mut. Ins. Co.*, 203 W.Va. 165, 506 S.E.2d 608 (1998) ("Claims involving unfair settlement practices that arise under the Unfair Trade Practices Act, West Virginia Code § 33-11-1 to -10 (1996 & Supp.1997), are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c) (1994).") CMD's allegations of the West Virginia Unfair Trade Practices Act are supported by the same factual contentions upon which it based its common law bad faith claims – all of which occurred more than one year prior to CMD even filing its motion for leave to file a third-party complaint. While this argument was presented to the Circuit Court, based upon the Circuit Court's Order, it appears it failed to examine the allegations of CMD's Third-Party Complaint and the allegations set forth therein to

determine whether they satisfied the statute of limitation, which, as the discussion above clearly demonstrates, they do not.

B. The Circuit Court erred in finding that CMD could state a claim for breach of contract.

In essence, CMD has asserted a cause of action for breach of contract, claiming that State Auto failed to cover claims asserted by Mr. and Mrs. Evans and CMD, breaching its contractual obligation to satisfy such claims. As a result of this claimed breach, State Auto allegedly caused damage to CMD. To establish a breach of contract, a party must establish four elements: (1) that a valid, enforceable contract exists; (2) that the plaintiff has performed under the contract; (3) that the defendant has breached or violated its duties or obligations under the contract; and (4) that the plaintiff has been injured as a result of a breach. *See Executive Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 714 (S.D.W. Va. 2009) (stating the four elements to establish a breach of contract); see also *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d 731, 749 (N.D.W. Va. 2012) (“In West Virginia, the elements of breach of contract are (1) a contract exists between the parties; (2) a defendant failed to comply with a term in the contract; and (3) damage arose from the breach.”). The breach or violation of the contract must be material; or in other words, the alleged breaching party must fail to do something which he is bound to do according to the contract that is so important and central to the contract that it defeats the very purpose of the contract. *J.W. Ellison, Son & Co. v. Flat Top Grocery Co.*, 69 W. Va. 380, 71 S.E. 391 (1911); *Kesner v. Lancaster*, 180 W. Va. 607, 378 S.E.2d 649 (1989); *see also See Benson v. AJR, Inc.*, 226 W.Va. 165, 698 S.E.2d 638, 650, 31 IER Cases 684 (2010). CMD cannot establish a material breach of the contract under the facts of this case.

determine whether they satisfied the statute of limitation, which, as the decision above clearly demonstrates, they do not.

B. The Circuit Court erred in finding that CMD could state a claim for breach of contract.

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Fundamentally, this claim by CMD is duplicative of its allegations of common law bad faith. As explained previously, “the duty at issue in a bad faith breach of insurance contract claim is the insurance company’s duty to act in good faith and deal fairly with its insured.” *See Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23, 37 (2009) (quoting *Daugherty v. Allstate Ins. Co.*, 55 P.3d 224, 228 (Colo.App.2002)); *see also Loudin v. Nat’l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 716 S.E.2d 696, fn. 9 (2011) (quoting *Noland*, 224 W. Va. 372, 686 S.E.2d 23, 37). Further, in breach of contract cases, this Court has recognized that an alleged breach of the covenant of good faith and fair dealing is not a separate cause of action from a breach of contract claim. *See State ex. Rel. Nationwide Mut. Ins. Co. v. Wilson*, ___ W. Va. ___, ___ S.E.2d ___ No. 15-0424, Fn. 1 (2015) (citing *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 587, 746 S.E.2d 568, 578 (2013) (Breach of the common law duty of good faith sounds in breach of contract and is not an independent claim). As discussed in detail above, CMD can point to no provision in the CGL Policy that has been materially breached by State Auto that has resulted in damage to it. Respondent relies upon much of the same allegations set forth for in its common law first-party bad faith claim, wherein it alleges breach of the duty of good faith and fair dealings, and its violations of the Unfair Trade Practices Act to support its claim for breach of contract. *See generally*, App. at 00031-00034. However, the mere fact that Mr. and Mrs. Evans’ case took time to resolve is not actionable grounds for breach of an insurance contract; rather, it is a natural byproduct of the litigation process. There is no policy provision that CMD can point to or has pointed to that State Auto, in violation of its duty to act in good faith and deal fairly with CMD, breached. *See* App. at 00033-00034. As explained in significant detail above, because State Auto both defended and indemnified CMD throughout the underlying litigation under the CGL

Policy and because the CGL Policy provided no coverage to CMD for damages to its own property, just as no breach of the duty of good faith and fair dealing exists, no breach of contract claim exists. Under these circumstances, the Circuit Court's failure to evaluate the allegations set forth in CMD's Third-Party Complaint in light of West Virginia law, permitting Count III to survive dismissal, was clearly erroneous and beyond its legitimate power.

CONCLUSION

For the foregoing reasons, Petitioner State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, respectfully requests that this Honorable Court issue a show cause why the Court should not grant this Petition for Writ of Prohibition, and reverse the Circuit Court's Order Denying State Auto Property & Casualty Insurance Company's Renewed Motion to Dismiss.

Signed: _____

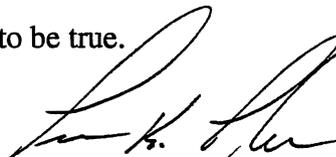

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VERIFICATON

STATE OF WEST VIRGINIA

COUNTY OF MONONGALIA, to wit:

The undersigned deposes and says that the contents of the foregoing PETITION FOR WRIT OF PROHIBITION are true to the best of his information and belief and to the extent they are based upon information and belief, he believes them to be true.

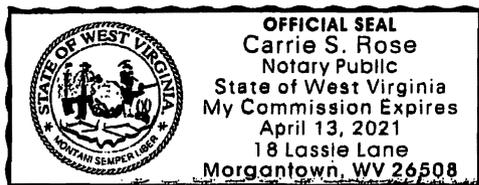


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STATE OF WEST VIRGINIA

COUNTY OF MONONGALIA, to wit:

Subscribed and sworn to before me by Trevor K. Taylor on this the 2nd day of December, 2015.



Notary Public

April 2021.

My commission expires: ~~15th day of December, 2015.~~

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel.*
STATE AUTO PROPERTY INSURANCE COMPANIES
d/b/a STATE AUTO PROPERTY AND CASUALTY
INSURANCE COMPANY, an Ohio company.

Petitioner,

v.

Docket No. _____

THE HONORABLE JAMES C. STUCKY, Judge of the
Circuit Court of Kanawha County, West Virginia and
CMD PLUS, INC., a West Virginia Corporation,

Respondents.

APPENDIX TO PETITION FOR WRIT OF PROHIBITION

(Circuit Court of Kanawha County, West Virginia
Civil Action No. 11-C-606)

**Counsel for Petitioner, State Auto Property Insurance Companies
d/b/a State Auto Property and Casualty Insurance Company,
an Ohio company, Petitioner**

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PETITIONER'S CERTIFICATION OF APPENDIX

Petitioner, State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, through its undersigned counsel, hereby certifies that the contents in the appendix are true and accurate copies of items contained in the record of the lower tribunal. Further, Petitioner certifies that the appendix as a whole is sufficient to permit the Court to fairly consider the questions presented in the petition.

Counsel for Petitioner, State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, an Ohio company, Petitioner



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APPENDIX OF EXHIBITS
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Petitioner, State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, pursuant to Rule 7(c)(3) of the West Virginia Rules of Appellate Procedure, with respect to that certain Writ of Prohibition filed contemporaneously herewith, does hereby state that the following portions of the record have been determined by the Petitioner to be necessary as to a determination of the issues raised in the Notice of Appeal:

1. Order Denying State Auto Property & Casualty Insurance Company’s Renewed Motion to Dismiss.....	00001
2. Motion for Leave to File Third-Party Complaint.....	00009
3. Order Granting Leave to File Third-Party Complaint.....	00024
4. Third Party Complaint.....	00026
5. State Auto Property & Casualty Company’s Motion to Dismiss, Motion to Bifurcate and Stay, and Answer to Third-Party Complaint.....	00036
6. Commercial General Liability Coverage Form.....	00082
7. Order Denying Motion to Dismiss.....	00097
8. Agreed Order Granting State auto Property and Casualty Insurance Company’s Motion to Intervene.....	00099
9. Final Order	00102
10. Stipulation and Agreed Order to Lift Stay.....	00110
11. Order Granting CMD Plus Inc.’s Motion for Attorney’s Fees and Costs.....	00114
12. Release and Settlement Agreement.....	00119
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Respectfully submitted this ____ day of December, 2015.

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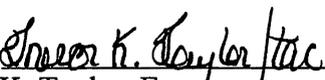
CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2015, true and accurate copies of the foregoing “**Petition for Writ of Prohibition**” and “**Appendix**” were served via United States Mail in a postage-paid envelope addressed to the following:

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