



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0931

(Lower Tribunal: Circuit Court of Kanawha County, West Virginia)

(Civil Action No.: 11-C-606)

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. 15-1178

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

Respondents.

**Response in Opposition to Petition for
Writ of Prohibition**

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TABLE OF CONTENTS

RESPONSE TO THE QUESTION PRESENTED..... 1

STATEMENT OF CASE 1

SUMMARY OF THE ARGUMENT 2

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 3

ARGUMENT 3

 A. Petitioner has not met its burden for issuance of a Writ of Prohibition 3

 B. The Renewed Motion to Dismiss was appropriately denied by the lower court5

 i. CMD has properly pled a claim for "common law bad faith" 6

 ii. CMD has properly pled a claim for "violations of the WV Unfair Trade Practices Act" 7

 iii. CMD has properly pled a claim for “breach of contract” 8

 C. CMD has properly asserted and is able prove its claims for first-party bad faith, violations of the WV Unfair Trade Practices Act, and breach of contract 9

 i. CMD has properly asserted and can prevail on its claim of Breach of the Duty of Good Faith and Fair Dealing.....9

 ii. CMD is not a Third-Party Claimant in regards to its bad faith claim11

 iii. CMD’s claims are not barred by the Statute of Limitations12

 iv. CMD properly asserted and can prove its breach of contract claim against State Auto13

CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>Akerson v. City of Bridgeport</i> , 36 Conn.App. 158, 649 A.2d 796 (Ct.1994)	5
<i>Cantley v. Lincoln County Comm'n</i> , 221 W.Va. 468, 655 S.E.2d 490 (2007)	6
<i>Chapman v. Kane Transfer Co., Inc.</i> , 160 W.Va. 530, 236 S.E.2d 207 (1977)	6
<i>Daugherty v. Allstate Ins. Co.</i> , 55 P.3d 224 (Colo.App.2002)	10
<i>Findley v. State Farm Mut. Auto. Insu. Co.</i> , 576 S.E.2d 807 (W.Va. 2002)	12
<i>Forshey v. Jackson</i> , 222 W.Va. 743, 671 S.E.2d 748 (2008)	6
<i>Graham v. Beverage</i> , 211 W.Va. 466, 566 S.E.2d 603 (2002)	13
<i>Gutierrez v. Gutierrez</i> , 116 N.M. 86, 860 P.2d 216 (Ct.App.1993)	5
<i>Hayseeds v. State Farm Fire and Cas. Co.</i> , 177 W.Va. 323, 352 S.E.2d 73 (1986)	7, 11
<i>John W. Lodge Dist. Co., Inc. v. Texaco, Inc.</i> , 161 W.Va. 603, 245 S.E.2d 157(1978)	6
<i>Loudin v. National Liability & Fire Ins. Co.</i> , 228 W.Va. 34, 716 S.E.2d 696 (2011)	11
<i>Miller v. Fluharty</i> , 201 W.Va. 685, 500 S.E.2d 310 (1997)	12
<i>Morton v. Amos–Lee Secs., Inc.</i> , 195 W.Va. 691, 466 S.E.2d 542 (1995)	11
<i>Noland v. Virginia Ins. Reciprocal</i> , 224 W.Va. 372, 686 S.E.2d 23 (2009)	10, 13
<i>School Bd. of Marion Co. v. Angel</i> , 404 So.2d 359 (Fla.Dist.Ct.App.1981)	5
<i>State ex. Rel. Allstate Ins. v. Gaughan</i> , 203 W.Va. 358, 508 S.E.2d 76 (1998)	10
<i>State ex rel Arrow Concrete Co. v. Hill</i> , 194 W.Va. 239, 460 S.E.2d 53 (1995)	4
<i>State ex rel. Brison v. Kaufman</i> , 213 W.Va. 624, 584 S.E.2d 480 (2003)	10
<i>State ex rel Hoover v. Berger</i> , 199 W.Va. 12, 482 S.E.2d 12 (1996)	1
<i>State ex rel. North River Ins. Co. Chafin</i> , 233 W.Va. 289, 758 S.E.2d 109 (2014)	4
<i>State ex rel. Piper v. Sanders</i> , 228 W.Va. 792, 724 S.E. 2d 763 (2012)	3
<i>State ex rel. Williams v. Narick</i> , 164 W.Va. 632, 264 S.E.2d 851 (1980)	3
<i>Texaco, Inc. v. Cottage Hill Operating Co.</i> , 709 F.2d 452 (7th Cir.1983)	4
<i>Thornton v. Hickox</i> , 886 P.2d 779 (Idaho 1994)	5

Wenzel v. Enright, 68 Ohio St.3d 63, 623 N.E.2d 69 (1993)5
Wilfong v. Wilfong, 156 W.Va. 754, 197 S.E.2d 96 (1973)4

Rules

West Virginia Rules of Civil Procedure 123

Statutes

West Virginia Code §33-11-1, et seq7, 8
West Virginia Code § 53-1-13

Other Authorities

15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.1 (2d ed. 1992)4
17A Am.Jur.2d Contracts § 37014

I. RESPONSE TO THE QUESTION PRESENTED

Respondent, CMD Plus, Inc. respectfully submits that the question presented by the Petition is actually a prohibited substitute for an appeal of a lower court ruling by Judge James C. Stucky in denying the Petitioner's Motion to Dismiss. Respondent submits that Petitioner fails to meet its burden of showing entitlement to the extraordinary relief for which it seeks, and that Judge Stucky's ruling was not clearly erroneous as a matter of law nor did Judge Stucky abuse his discretion.

II. STATEMENT OF THE CASE

This case stems from an underlying lawsuit filed by Barry and Ann Evans ("Plaintiffs") against CMD Plus, Inc. (hereinafter referred to as "CMD") in April 2011. App. at 00009. The Plaintiffs alleged nuisance, trespass, and negligence against CMD in regard to a hillside slip that occurred as a result of construction activity performed by CMD on the adjacent property. *Id.* Subsequently CMD sought leave and was granted authority to file a Third-party complaint against State Auto related to the Plaintiffs' claims. In its Third-Party Complaint, CMD alleged common law bad faith, violations of the West Virginia Unfair Trade Practices Act, and breach of contract against State Auto. App. at 00026-00035. In response to the Third-Party Complaint, State Auto filed a Motion to Dismiss in April 2012. App. at 00036-00081. The Court rejected State Auto's arguments and the Motion was denied in September 2012. App. at 00097-00098. Importantly, State Auto filed no Petition for Writ of Prohibition or for any other extraordinary relief at that time. The Circuit Court, while allowing discovery, stayed the Third-Party action pending resolution of the Plaintiffs' civil-action.

After nearly four (4) years of litigation, including a Declaratory Judgment action in which State Auto unsuccessfully attempted to avoid insurance coverage, State Auto finally resolved the Plaintiffs claims against CMD. App. at 00119-00125. Subsequently, the Court entered a new Scheduling Order so that CMD could litigate its claims against State Auto. App. at 00188. However, State Auto once again moved for a dismissal of the Third-Party Complaint and filed a "Renewed Motion to Dismiss" in August 2014. App. at 00124-00161. State Auto made virtually

the same arguments that had been the basis of its prior unsuccessful motion. State Auto also attempted to inject additional facts, including its settlement of the Plaintiffs' claims, to support its renewed motion. Said renewed Motion was set for hearing in October 2015, and was again denied by Order dated November 10, 2015. App. at 0001-0008.

State Auto now has filed the instant extraordinary Writ of Prohibition, seeking that this Honorable Court issue a show cause why the Court should not grant the Petition for Writ of Prohibition, and reverse the Circuit Court's Order Denying State Auto's Renewed Motion to Dismiss. CMD asserts that Petitioner fails to meet its burden of showing entitlement to the extraordinary relief, and the Writ of Prohibition should be denied.

III. SUMMARY OF THE ARGUMENT

Petitioner State Auto completely fails to meet its burden of showing entitlement to the extraordinary relief of a Writ of Prohibition, and the Court should refuse the Petition. This Court has frequently explained that it examines the following factors in a Writ of Prohibition:

(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 whether the lower tribunal's order raises new and important problems or issues of law of first impression.

(Quoting, in part, Syl Pt.4, State ex rel Hoover v. Berger, 199 W.Va. 12, 482 S.E.2d 12 (1996). The Court went on to state 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 need not be satisfied, it is clear that the third factor, the existence of a clear error as a matter of law, should be given substantial weight.” *Id.*

Examination of these factors clearly results in refusal of the Writ. In fact, Petitioner only argues factor number three (3) in its Petition. However, despite the arguments by Petitioner, Judge Stucky's Order is not clearly erroneous as a matter of law. As shown herein, the Petition is nothing

more than an attempt to appeal a non-appealable Order, and thus should be summarily refused. As for the arguments on the merits, the lower Court properly ruled pursuant to *Rule 12(b)(6) of the West Virginia Rules of Civil Procedure* that CMD has sufficiently pled all of its claims in the Third-Party Complaint to show it is entitled to relief.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that The Writ of Prohibition should be summarily refused, and that oral argument is unnecessary. If the Court deems that oral argument is necessary, this case is appropriate for a West Virginia Rule of Appellate Procedure 19 argument and disposition by memorandum decision

V. ARGUMENT

A. Petitioner has not met its burden for issuance of a Writ of Prohibition.

A Writ of Prohibition is inapplicable to the case at bar. Pursuant to *West Virginia Code § 53-1-1*, prohibition is a form of extraordinary relief appropriate only where a lower court exceeds its legitimate powers. The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers. *Id.* This Court has been very clear that Prohibition “will not issue to prevent a simple abuse of discretion by the trial court.” *State ex rel. Piper v. Sanders*, 228 W.Va. 792, 797, 724 S.E. 2d 763 (2012).

This Court has further stated that “[t]raditionally, the writ of prohibition speaks purely to jurisdictional matters. It was not designed to correct errors which are correctable upon appeal.” *State ex rel. Williams v. Narick*, 164 W.Va. at 635, 264 S.E.2d at 854. The Court further explained that the writ does not lie to correct “mere errors” and that *it cannot serve as a substitute for appeal*, writ of error or certiorari. *Id.* (emphasis added). Because of the nature of the writ, there has been a general reluctance to allow its use in interlocutory matters unless there was exhibited some obvious jurisdictional defect or purely legal error on the part of the trial court. In the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. *Id.* at 636.

Factor number one (1) stated by the *Berger* Court is “whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief.” Petitioner is attempting to appeal a denial of the “Renewed Motion to Dismiss” through a Writ of Prohibition. For obvious reasons, Petitioner has resisted categorizing this prohibition as an appeal of the denial of the “Renewed Motion to Dismiss.” Essentially, that is what State Auto is attempting to do, and it is improper. The denial of a motion for failure to state a claim upon which relief may be granted made pursuant to *West Virginia Rules of Civil Procedure* 12(b)(6) is interlocutory and is, therefore, not immediately appealable. *Syl. Pt. 2, State ex rel Arrow Concrete Co. v. Hill, 194 W.Va. 239, 460 S.E.2d 53 (1995).*

In *Hill*, the Court refused to grant a Writ of Prohibition for a denial of a Motion to Dismiss. The Court found that “[i]ndirectly, the defendants are asking this Court to address the trial court’s denial of their motion to dismiss for failure to state a claim.” *Id.* at 60. In denying the Writ, the *Hill* Court relied upon *Wilfong v. Wilfong, 156 W.Va. 754, 197 S.E.2d 96 (1973)*, which concluded that “[t]he entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial is merely interlocutory and not then appealable to this Court.”

The *Hill* Court reasoned that “although *Wilfong* did not directly address the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to *W.Va.R.Civ.P.* 12(b)(6), the above rationale in *Wilfong* is nevertheless applicable to a 12(b)(6) motion.” *460 S.E.2d 53* at 60. Since the *Hill* decision, this Court has consistently refused to grant a Writ of Prohibition based upon an Order denying a Motion to Dismiss. (emphasis added).

In fact, as recently as 2014, this Court again reiterated that “*a writ of prohibition is not available to correct discretionary rulings*” when it denied a Petition for Writ of Prohibition based upon an Order denying a Motion to Dismiss. *State ex rel. North River Ins. Co. Chafin, 233 W.Va. 289, 294, 758 S.E.2d 109, 114 (2014)*. (*See, also, 15A Charles Alan Wright et al., Federal Practice and Procedure* § 3914.1 at 493 (2d ed. 1992) (“Ordinarily the denial [of a motion to dismiss for failure to state a claim] is not appealable.” (footnote omitted)); *Texaco, Inc. v. Cottage Hill Operating Co., 709 F.2d 452, 453 (7th Cir.1983)* (“As a general rule, denials of motions to dismiss

are not appealable.” (citations omitted)); *Akerson v. City of Bridgeport*, 36 Conn.App. 158, 649 A.2d 796 (Ct.1994); *School Bd. of Marion Co. v. Angel*, 404 So.2d 359 (Fla.Dist.Ct.App.1981) (Prohibition is not available to review the correctness of a judge's ruling on a motion to dismiss); *Thornton v. Hickox*, 886 P.2d 779 (Idaho 1994); *Gutierrez v. Gutierrez*, 116 N.M. 86, 860 P.2d 216 (Ct.App.1993); and *Wenzel v. Enright*, 68 Ohio St.3d 63, 623 N.E.2d 69 (1993). Thus, it is clear that Petitioner is wrongfully attempting to use a Writ of Prohibition to obtain this Court’s review of a non-appealable order.

Factor number two (2), “whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal,” weighs heavily against Petitioner. Judge Stucky’s Order is not a final order on the merits. Said decision does not rule on the merits of CMD’s claims or of Petitioner’s defenses. Petitioner is not prejudiced as it may renew its Motion as summary judgment which, if denied, would be appealable. It is actually CMD which is prejudiced by delay in prosecution of its claims by this fruitless attempt at prohibition.

Factor number three (3), “whether the lower tribunal’s order is clearly erroneous as a matter of law,” weighs heavily against the Petitioner. As more fully explained below, CMD’s claims against State Auto are all legitimate causes of action, based upon West Virginia law. Judge Stucky viewed the Third-Party Complaint under the appropriate 12(b)(6) standard and found that CMD had asserted claims upon which it can prevail.

Factors four (4) and five (5) which were not even discussed by Petitioner in its Petition, also weigh against prohibition. The lower Court’s ruling is not an “oft repeated error” and does not manifest “persistent disregard for either procedural or substantive law.” Judge Stucky made a discretionary ruling based upon the appropriate 12(b)(6) standard. The ruling also does not raise any “new and important problems or issues of law.” CMD’s allegations against Petitioner are well-established, causes of action based upon West Virginia statutory and common law.

B. The Renewed Motion to Dismiss was appropriately denied by the lower court.

The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint. A trial court considering a motion to dismiss under Rule

12(b)(6) must liberally construe the complaint so as to do substantial justice. *Cantley v. Lincoln County Comm'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007). In addition, Motions to Dismiss are viewed with disfavor, and the Supreme Court of Appeals counsels lower Courts to rarely grant such motions. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

“The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Syl. Pt. 3, Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

In discussing the above syllabus point, this Court has further explained that

[a]ll that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings.

John W. Lodge Dist. Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 605–6, 245 S.E.2d 157, 159 (1978) (citation omitted).

With that being said, the lower court “in viewing the four corners of the Third-Party Complaint and viewing all the facts in the light most favorable to CMD” found that CMD has asserted claims upon which it can prevail. Nevertheless, State Auto in its “Renewed Motion to Dismiss” and in the instant Petition continuously alleges and argues specific facts and evidence which are not included in the “four-corners” of the Complaint and not to be considered under the 12(b)(6) standard of review. As shown herein and already established by the lower court, CMD’s claims for common law bad faith, violations of the WV Unfair Trade Practices Act, and breach of contract were properly pled based upon West Virginia law.

i. CMD has properly pled a claim for “common law bad faith.”

In the Third-Party Complaint, CMD alleges 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 00017-00018. Specifically, CMD alleged that State Auto committed “bad faith” through:

- a. its delay in investigating and taking action on claims made by and on behalf of CMD and the Plaintiffs;
- b. by its refusal to effectuate the necessary repairs to the Shah Property and the Evans Property; and
- c. by its delay in handling, facilitating and approving repair and/or relocation of the sanitary sewer line,

Id.

The allegations in the Third-Party Complaint were also cited verbatim in Judge Stucky’s Order denying Petitioner’s “Renewed Motion to Dismiss.” App. at 0003. As further alleged in the Third-Party Complaint and cited in the Order, CMD alleges that State Auto breached its common law duty of good faith and fair dealing to CMD such to its conduct amounts to “bad faith” as recognized in the seminal case of *Hayseeds v. State Farm Fire and Cas. Co.*, 177 W.Va. 323, 352 S.E.2d 73 (1986). *Id.* CMD has also clearly alleged that the delays and inaction by State Auto caused it to suffer damages including lost business opportunities and attorney fees. Therefore, and determined by the Circuit Court, the allegations pled against State Auto in the Third-Party Complaint regarding the breach of the duty of good faith and fair dealing were sufficiently pled as a matter of law. State Auto was unable to overcome the applicable 12(b)(6) standard, and the Motion to Dismiss was appropriately denied.

- ii. CMD has properly pled claims for “violations of the WV Unfair Trade Practices Act.”

In the Third-Party Complaint, CMD alleges that State Auto was subject to the laws of the State of West Virginia pertaining to the appropriate and lawful conducting of the business of insurance including but not limited to the statutory sections and their intended regulations known as the West Virginia Unfair Trade Practices Act (“UTPA”), *West Virginia Code §33-11-1, et seq.* Specifically, CMD alleged that State Auto:

- a. failed to act reasonably promptly with respect to the subject claim of CMD for coverage in direct violation of *West Virginia Code* § 33-11-4(9)(b);
- b. failed to attempt in good faith to effectuate a prompt, fair and equitable settlement of either the Plaintiffs' claims or CMD's claims in direct violation of *West Virginia Code* § 33-11-4(9)(f);
- c. forced the Plaintiffs, and, now, CMD to institute litigation in order to obtain the coverage due CMD per the Insurance Policy, thus constituting a direct violation of *West Virginia Code* § 33-11-4(9)(g),
App. at 00018-00019.

In addition, the Court also once again cited these allegations verbatim in its Order. App. at 00003-00004. CMD has further alleged that the conduct of State Auto as described hereinabove is part of a general business practice and constitutes unfair claims settlement practices under West Virginia law, and specifically under the provisions of *West Virginia Code* § 33-11-4(9). *Id.* CMD has also clearly alleged that State Auto violations of the UTPA has caused it to suffer economic damages including lost business opportunities and attorney fees. *Id.* Therefore, the allegations pled against State Auto in the Third-Party Complaint regarding violations of the West Virginia Unfair Trade Practices Act are sufficiently pled as a matter of law. State Auto was unable to overcome the applicable 12(b)(6) standard, and the Motion to Dismiss was appropriately denied.

iii. CMD has properly pled a claim for "breach of contract."

Lastly, CMD properly pled a claim for "breach of contract" against State Auto. CMD has clearly alleged in the Third-Party Complaint that State Auto breached its contractual obligations to satisfy all legitimate claims made against CMD which were covered under the Insurance Policy. App. at 00019-00021. Specifically, CMD has alleged that:

- a. State Auto has breached its contractual obligations to satisfy the Plaintiffs' claims and/or failing to effectuate the necessary repairs to the Evans Property in accord with the Insurance Policy; and by failing to effectuate the necessary repairs and

improvements to the Shah Property in accord with the Insurance Policy, among other obligations.

- b. State Auto failed to make available to CMD coverage under the Insurance Policy;
- c. State Auto was in breach of contract with CMD in regards to the Insurance Policy;
- d. As a result of the breach of contract by State Auto, CMD suffered damages, including but not limited to: insured's damages for net economic loss caused by delay in settlement, attorneys' fees, as well as general damages for annoyance and inconvenience, mental anguish, emotional distress and damage to its reputation

Id.

Judge Stucky also took notice of CMD's allegations of "breach of contract" and the same was included in the Order. App. at 0005. Therefore, the allegations pled against State Auto in the Third-Party Complaint regarding breach of contract are sufficiently pled as a matter of law. State Auto was unable to overcome the applicable 12(b)(6) standard, and the Motion to Dismiss was properly denied.

Clearly, the lower court's order is not "*clearly erroneous as a matter of law.*" Judge Stucky clearly articulated the 12(b)(6) standard in the Order, and viewed the Third-Party Complaint and the facts in the light most favorable to CMD. As such, the Petitioner's Writ should be denied.

C. CMD has properly asserted and is able to prove its claims for first-party bad faith, violations of the WV Unfair Trade Practices Act, and breach of contract.

As noted above, State Auto's "Renewed Motion to Dismiss" and the instant Petition contain specific facts and evidence which are not included in the "four-corners" of the Third-Party Complaint. Despite the fact that such arguments are not appropriate for a Motion to Dismiss, Petitioner briefly responds to said arguments herein:

- i. CMD as properly asserted and can prevail on its claim of Breach of the Duty of Good Faith and Fair Dealing.

State Auto argues that 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." This

is simply untrue. State Auto relies heavily on a concurring opinion authored by Justice Davis in *State ex rel. Brison v. Kaufman*, 213 W.Va. 624, 584 S.E.2d 480, 490 (2003). State Auto's reliance is misplaced.

In her concurring opinion, Justice Davis cites to *State ex. Rel. Allstate Ins. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 76,86 (1998) and elaborates on the different types of first party bad faith actions. However, the concurring opinion, which is not law but merely dicta, does not change or alter the Court's the Court's definition of first party bad faith. The Court succinctly defined first party bad faith in *Gaughan* as follows: "[f]or definitional purposes, a first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured." 203 W.Va. 358 at 369. (emphasis added).

State Auto argues that since the underlying lawsuit filed by the Plaintiffs did not result in an excess judgment, there can be no bad faith claim. However, this is not the law in West Virginia. CMD has specifically alleged that State Auto committed bad faith in regard to State Auto's acts and omissions in failing to use good faith in handling and settling claims brought against CMD.

State Auto also asserts that, since the CGL policy does not cover "first party losses," that CMD cannot assert a first-party bad faith claim. To support its argument, State Auto relies on the fact that CMD conceded in the underlying Declaratory Judgment action that it was not making an independent claim against State Auto for damage for repairs or alterations on the Shah or CMD property. However, the fact that CMD is not asking for repairs to be made on the Shah or CMD property does not acquit State Auto from duties owed to CMD to promptly and in good faith handle claims against CMD under the policy. The issue in this case is State Auto's duty to act in good faith and deal fairly with its insured, CMD. See, e.g., *Noland v. Virginia Ins. Reciprocal*, 224 W.Va. 372, 386, 686 S.E.2d 23, 37 (2009) ("*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.*") (quoting *Daugherty v. Allstate Ins. Co.*, 55 P.3d 224, 228 (Colo.App.2002)).

ii. CMD is not a Third-Party Claimant in regards to its bad faith claim.

State Auto also argues that CMD is a third-party claimant and is not entitled to bring a bad faith cause of action. Once again, this argument is without merit. West Virginia case law is very clear that a “first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim filed by the insured.” *Syl. Pt. 2, Loudin v. National Liability & Fire Ins. Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011). CMD clearly asserted viable claims and fits the Court’s definition of a first-party.

A third party claimant has no contract with the insurer, has not paid any premiums, has no legal relationship to the insurer or special relationship of trust with the insurer, and in short, has no basis upon which to expect or demand the benefit of the extra-contractual obligations imposed on insurers with regard to their insureds. In this case, CMD has a valid policy in place with State Auto. CMD has paid all premiums due and complied with the terms and conditions of the Insurance Policy. Therefore, CMD, as the insured, has the right to expect certain legal duties and obligations from State Auto, including the duty to act in good faith and deal fairly.

As the Court explained in *Loudin*, it would be fundamentally unfair to hold that when an insured files an initial claim with its insurer, it is not owed a duty of good faith and fair dealing in resolving that claim as a first-party claimant. Such an outcome essentially treats CMD as a non-premium paying claimant seeking coverage under a third-party's policy, when in fact; CMD has paid the premiums for the policy in question.

West Virginia has long recognized the right of an insured first-party to bring a bad faith cause of action against his/her insurer under the common law and the West Virginia Unfair Trade Practices Act. *Syl. pt. 1, Morton v. Amos–Lee Secs., Inc.*, 195 W.Va. 691, 466 S.E.2d 542 (1995) (“There is a private cause of action for a violation of W. Va. Code 33–11–4(1)(a) (1985), of the West Virginia Unfair Trade Practices Act.”); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986) (holding that a common law duty of good faith and fair dealing runs from insurer to its insured).

As discussed above, CMD's allegations against State Auto relate to State Auto's duty to act in good faith and deal fairly on claims made by and on behalf of CMD and the Plaintiffs. CMD has specifically alleged that State Auto has, among other things: delayed in investigating and taking action on claims made by and on behalf of CMD and the Plaintiffs, and delayed in handling, facilitating and approving repair and/or relocation of the sanitary sewer line. As a result of these delays, CMD has suffered damages.

State Auto fails to realize that CMD is not attempting to collect the costs to repair the sewer line from the Charleston Sanitary Board or the Plaintiffs' property. Instead, as a direct result of State Auto's delays, CMD has also suffered its own damages. CMD is entitled to the protections afforded to a first-party insured. As the West Virginia Supreme Court of Appeals has stated "[a] policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation. The goal is for all policyholders to get the benefit of their contractual bargain . . ." *Miller v. Fluharty*, 201 W.Va. 685, 694, 500 S.E.2d 310, 319 (1997) (footnote omitted)

Furthermore, State Auto's contention that CMD lacks standing is without merit. 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. Insu. Co.*, 576 S.E.2d 807, 821 (W.Va. 2002). CMD is claiming its own rights against State Auto for common law bad faith, violation of the West Virginia Unfair Trade Practices Act, and breach of contract. CMD, as the insured, has been harmed by State Auto's conduct. CMD is not merely acting as an agent for the Plaintiff Evans. As noted above, CMD itself has suffered damages, and is entitled to bring its own claims against State Auto.

iii. CMD's claims are not barred by the Statute of Limitations.

State Auto argues that the statute of limitations bars CMD's claims for common law bad faith and violations of the West Virginia Unfair Trade Practices Act. The third-party claims are not barred because State Auto's bad faith, breach and improper handling of the claims were continuing at the time the Third-Party Complaint was filed.

Similar to the previously filed Motion to Dismiss, State Auto relies on *Noland*, which recognizes that “*a first-party bad faith claim that is based upon an insurer’s refusal to defend, and is brought . . . 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.*” However, CMD is claiming that State Auto improperly, and continually through the filing of the Third-Party Complaint, acted and continued to act in bad faith in handling claims both against and now by its own insured.

At the time of the filing of the Third-Party Complaint, it had been over two and a half (2 ½) years since CMD first notified State Auto about the alleged damage that occurred to Plaintiffs’ property. CMD alleged that, as of the filing of the Third-party complaint, State Auto still had not taken appropriate action to handle the claim. Where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease. *Graham v. Beverage*, 211 W.Va. 466, 566 S.E.2d 603 (2002). CMD alleged, and the lower Court found, that CMD had properly asserted its claim to defeat the statute of limitations argument. At best for the Petitioner, questions of material fact exist in this matter which requires the jury to decide when the elements of the claim were known and on what date the statute of limitations could reasonably begin to commence. Thus, CMD’s claim could not have been dismissed as a matter of law, and the lower court did not err in refusing to grant the “Renewed Motion to Dismiss.”

iv. CMD properly asserted and can prove its breach of contract claim against State Auto.

Lastly, State Auto argues that CMD cannot assert a breach of contract claim against State Auto. However, the Third-Party Complaint clearly alleges that State Auto breached its contract with CMD by failing to satisfy all legitimate claims against CMD which were covered under the Insurance Policy. CMD is clearly contractually entitled to rely upon State Auto’s obligation to properly handle and settle all legitimate claims under the policy. CMD also clearly asserted that, State Auto failed to do so and has therefore breached the Insurance Policy. CMD’s Third-Party

Complaint properly pled its breach of contract claim and therefore its claims were not dismissed by the lower court.

Moreover, insurance policies are contracts and the legal obligations owed to and the duties of the parties to an insurance policy are a contract law issue. A basic tenet of contract law is that the parties approach the contracting process act with good faith and the intent to deal fairly. There is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *17A Am.Jur.2d Contracts § 370*. CMD was owed a duty of good faith and fair dealing by State Auto to pay their legitimate claims arising from the Insurance Policy. CMD has asserted that State Auto disregarded the duties it owed to CMD. Therefore, State Auto's "Renewed Motion to Dismiss" was appropriately denied by the lower court as it would unjustly deny CMD of its rightful recourse under the law.

VI. CONCLUSION

Respondent CMD Plus, Inc. respectfully requests that Petitioner's Petition for Writ of Prohibition be denied. Petitioner has failed to show entitlement to the extraordinary relief requested, and the lower court was correct in denying the "Renewed Motion to Dismiss."

Respectfully Submitted,

CMD PLUS, INC.,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0931

(Lower Tribunal: Circuit Court of Kanawha County, West Virginia)

(Civil Action No.: 11-C-606)

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. 15-1178

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

Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, CMD Plus, Inc., does hereby certify this 29th day of December, 2015, that a true copy of the foregoing “**RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION**” was served upon all counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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