FILED
NOV 18 2015
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 15-0968

STATE OF WEST VIRGINIA EX REL. ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Petitioner,

v.

THE HONORABLE J.D. BEANE, Judge of the Fourth Judicial Circuit, Wood County, West Virginia; and DAVID CHEDESTER AND JOYCE CHEDESTER,

Respondents.

RESPONSE OF RESPONDENTS, DAVID CHEDESTER AND JOYCE CHEDESTER, TO VERIFIED PETITION FOR WRIT OF PROHIBITION

James I. Stealey, WV State Bar 3583
The Stealey Law Firm, PLLC
417 Grand Park Drive, Suite 102
Parkersburg, WV 26101
304-485-3127 (T)
304-917-4534 (F)
jis@stealeylawfirm.com

and,

Todd Wiseman, WV State Bar 6811
Wiseman Law Firm, PLLC
1510 Grand Central Avenue
Vienna, WV 26105
304-428-3006 (T)
304-428-0134 (F)
toddswiseman@yahoo.com

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Questions Presented 1

Statement of the Case 2

Summary of the Argument 3

Standard of Review 4

Statement Regarding Oral Argument 4

Argument 5

A. Issuance of a Writ of Prohibition is Not a Proper Remedy in this Case 5

B. The Circuit Court's Order Denying the Dismissal of Plaintiffs' Claims was Correct as a Matter of Law under Sizemore 7

1. The Circuit Court was Correct in Concluding that a 10 Year Statute of Limitations Applies to Counts I and II of the Complaint 7

2. The Trial Court was Correct in Denying Erie's Request for Dismissal of Counts III and IV of the Respondents' Complaint 13

Conclusion 15

Certificate of Service . . . . . end

TABLE OF AUTHORITIES

STATUTES

W.Va. Code § 33-11-4(9) 1, 2, 4, 5, 6, 12, 14, 15, 16

W.Va. Code § 33-17-2 . . . . . 2, 3, 9, 10, 11

W.Va. Code § 33-6-14 . . . . . 3, 7, 8, 9, 10, 13, 15

W.Va. Code § 55-2-6 . . . . . 3, 7, 13, 15

W.Va. Code § 53-1-1 4

CASES

Hayseeds, Inc. v. State Farm Fire & Casualty,
177 W.Va. 323, 352 S.E. 2d 73 (1989) 1, 2, 3, 4, 7, 13, 14, 15, 16

Sizemore v. State Farm Gen. Ins. Co.,
202 W.Va. 591, 505 S.E.2d 654 (1998) 2, 7, 9, 10, 11, 12, 13

Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977) 4

State ex rel. Valley Distributors, Inc. v. Oakley,
153 W.Va. 94, 99, 168 S.E.2d 532 (1969) 4

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

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W.Va. 37, 658 S.E.2d 728 (2008) .. 5, 6

State ex rel. West Virginia National Auto Ins. Co. v. Bedell,
223 W.Va. 222, 672 S.E. 2d 358 (2008) 5

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

Prete v. Royal Globe Insurance Co., 533 F. Supp. 332 (N.D. W.Va. 1982) 11

L.H. Jones Equip. Co. v. Swenson Spreader LLC, 224 W.Va. 570, 687 S.E.2d 353 (2009) . . . 11

Beasley v. Allstate Insurance Co., 184 F. Supp. 2d 523 (S.D. W.Va. 2002) 12, 13

Kirk v. Firemen's Insurance Co., 107 W.Va. 666, 150 S.E. 2 (1929) 12

Thompson v. Prudential Ins. Co. of Am.,
2014 U.S. Dist. LEXIS 167873 (S.D. W.Va. Dec. 4, 2014) 13, 15

McKenzie v. Cherry River Coal & Coke Co., 195 W. Va. 742, 466 S.E.2d 810 (1995) 13

Mills v. Indem. Ins. Co. of N. Am., 108 W. Va. 317, 150 S.E. 718 (1929) 13

I. QUESTIONS PRESENTED

A. Did Respondent, Judge J.D. Beane, of the Circuit Court of Wood County, commit a clear error of law and exceed his judicial authority by denying Petitioner Erie Insurance Property and Casualty Company's motion to dismiss the underlying Complaint?

B. Did Respondent, Judge J. D. Beane, commit error by holding that the statute of limitations for breach of insurance contract and reasonable expectations in this case is ten (10) years, despite Petitioner's argument that the policy in question purports to saddle Respondents, David Chedester and Joyce Chedester, with a statute of limitations period of only one (1) year?

C. Did Respondent, Judge J. D. Beane, commit error by holding that the Respondents' claim for violations of West Virginia Unfair Trade Practices Act, W.Va. Code § 33-11-4(9) ("UTPA"), and the claim arising under Hayseeds, Inc. v. State Farm Fire & Casualty, 177 W.Va. 323, 352 S.E. 2d 73 (1989), do not accrue and the one (1) year statute of limitations does not begin to run until the underlying coverage issues are resolved?

D. Are there other legal authorities which are contrary to Petitioner's claim that a Writ of Prohibition should be granted to them in this case on the basis that the applicable statutes of limitation on each and every one of Respondents' claims against Petitioner has expired as a matter of law?

II. STATEMENT OF THE CASE

Respondents adopt the Statement of The Case outlined in Section II of Erie's Verified Writ of Prohibition filed on October 1, 2015, as their Statement of The Case, subject to the following exceptions:

1. The policy at issue is not a standard fire policy;

2. The policy at issue is a multi-peril, Erie Extracover Home Protector Policy, homeowners' policy which contains coverage for loss due to fire and many other hazards and occurrences;

3. It is the Respondents' position that any claims for damages arising under Hayseeds do not accrue and the statute of limitations does not begin to run until it is determined that Respondents have prevailed on their coverage claim;

4. It is the Respondents' position that Erie's acts of "bad faith" and violations of the UTPA are continuing in nature. Additional discovery is necessary only to identify the date and character of Erie's conduct and to reinforce the fact that bad faith has been committed by Erie. Dismissal of Petitioner's UTPA claim at this stage is precipitous, given that discovery has not even commenced;

5. With respect to Petitioner's assertion of facts concerning what it terms the "Claims Handling History", it is the position of the Respondents that such history cannot possibly be established with any degree of certainty (aside from Petitioner's self-serving assertions, though verified) because Petitioner is in sole possession of its claims file, and Respondents have not had an opportunity to examine it to determine if the self-serving assertions of Petitioner are true and accurate;

6. The Respondents' home remains unrepaired. They have used their best efforts to mitigate damages and performed repairs which must be made to maintain safety.

III. SUMMARY OF THE ARGUMENT

There is no reasonable argument, supported either by statute or case law, that the inclusion of coverage for a fire loss in a multi-peril insurance policy converts the policy into a "standard fire policy" and thus nullifies the statute which prohibits insurance companies from limiting the time for filing lawsuits against them for any period less than two (2) years, except as to fire losses arising under standard fire policies.[1] Sizemore v. State Farm Gen. Ins. Co., 202 W.Va. 591, 595, 505 S.E.2d 654 (1998), made it clear that rights arising under the standard fire policy can appropriately be limited to one (1) year. Otherwise, under § 33-17-2, the shortest statute of limitations applicable is a two (2) year time period. The Erie policy at issue in this case

[1] According to Erie, the policy at issue in this case is an Erie, Extracover Home Protector Policy, a multi-peril, homeowners policy.

did not contain the minimum two (2) year statute of limitations for claims resulting from perils insured against, other than fire. Under § 33-17-2, any provision in the Erie policy limiting the time period for filing suit related to perils other than fire is void. Since the statute of limitations provision in the Erie policy as to all perils (other than fire) is void, then the ten (10) year statute of limitations on written contracts set forth in W.Va. Code § 55-2-6 is applicable.

Erie would have this Court reform its policy by inserting a provision that all other claims (aside from fire) must be brought within two (2) years after the date of occurrence. Erie's policy contains no such language. Erie cannot enforce a two (2) year statute of limitations on a claim involving damage due to ice and snow when its policy does not contain that limitation, and when the only provision in the policy pertaining to the statute of limitations has been voided and rendered unenforceable by the provisions of § 33-6-14. Likewise, Erie cannot ask this Court to rewrite its policy. Courts do not have the power to rewrite this or any other insurance policy in this fashion. Erie's argument for a two (2) year statute of limitations to be substituted for the illegal and unenforceable one (1) year statute of limitations in the policy is patently absurd. The Trial Court had no choice but to deny Erie's motion to dismiss for these reasons.

To do anything other than deny the motion to dismiss would have resulted in a complete evisceration of the intent of the legislature to prevent insurers from saddling claimants with unreasonably short periods of limitation for filing suits against their insurance companies when claims are denied.

There is no reasonable argument supported by case law that a derivative Hayseeds claim for damages must be filed before there has been a determination that the plaintiff has substantially prevailed in the underlying litigation. Although a plaintiff may choose to allege entitlement to recover Hayseeds damages as part of the initial Complaint, in the event that the

plaintiff should *substantially prevail*, there is absolutely no obligation that it be filed at the time of commencement of the underlying claim litigation. Because it is a derivative claim, recovery of such damages is contingent upon a resolution of the coverage claim.

There is no reasonable argument supported by case law that any claim arising under W.Va. Code § 33-11-4(9), *et seq.*, or a common law bad faith claim should be dismissed as a matter of law simply because the Respondents have not yet been afforded with an opportunity to conduct discovery to reinforce the fact that there have been multiple violations of the UTPA and acts of bad faith. Certainly, discovery will enable the Respondents to determine when the last act of bad faith occurred (prior to the date of the filing of the lawsuit).

IV. STANDARD OF REVIEW

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

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

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

V. STATEMENT REGARDING ORAL ARGUMENT

The facts and legal arguments are adequately presented by the briefs and record filed with the Writ, and the decisional process would not be significantly aided by oral argument. Accordingly, the Respondents urge this Court to act expeditiously and enter a memorandum decision affirming Judge Beane's Order so that the Respondents may resume their case without

further delay. In the event that Erie is granted oral argument, the Respondents respectfully request a similar opportunity for oral argument to respond to any facts or arguments raised by Erie before the Court.

VI. ARGUMENT

A. Issuance of a Writ of Prohibition is Not a Proper Remedy in this Case.

Erie has not met the requisite criteria set forth by this Court to entitle it to a rule to show cause. This Court has clearly set forth the five factors that will be examined to determine whether a writ of prohibition should be heard and, concomitantly, the proceedings below stayed, as a result of the granting of a rule to show cause. Those five factors are as follows:

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

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

Regarding the first factor, Erie has other adequate means to obtain the desired relief. The Trial Court denied Erie's motion to dismiss without prejudice. There was no clear error committed. Erie's position regarding the statute of limitations with regard to claims arising under the policy, also the basis for its motion to dismiss, was clearly wrong. The Trial Court stayed claims related to bad faith and UTPA from the litigation of the coverage claims. Rather than proceed with the case, knowing that a motion for summary judgment could have been filed

subsequent to discovery, as to the statute of limitations regarding bad faith and UTPA claims, Erie instead sought the extraordinary relief of a Writ. Erie's Writ presents various arguments that require discovery before the Trial Court (or this Court) can address those issues. As such, the first factor weighs against this Court issuing a Rule to Show Cause.

The second factor also weighs against this Court issuing a Rule to Show Cause. Neither Erie nor any other defendant will suffer any harm as a result of the Circuit Court's Order not remedied on direct appeal. By filing this Writ, Erie is attempting to deny the Plaintiffs their day in Court and/or unreasonably delaying the process. Erie will not be prejudiced, in any way, by allowing the case to proceed to trial. Conversely, the Respondents will be harmed if this Court issues a Rule to Show Cause as they will, once again, have to wait many months before being able to litigate their case before a jury of their peers. In addition to delaying litigation, the Respondents have not been able to make the necessary repairs to their home. Because of Erie's conduct, they have been forced to suffer through with minor repairs to their home, all while knowing that the value of the home is impaired because of its condition. More importantly, the home is a constant source of anxiety and the Respondents fear that it is not as safe as it should be. Accordingly, the second factor also weighs against this Court issuing a Rule to Show Cause. There is no reason to cause further delay.

This Court has held that the third factor, whether the Trial Court's Order is clearly erroneous as a matter of law, should be given "substantial weight", Syl. Pt. 1, Kaufman, citing State ex rel. Hoover v. Berger, W.Va. 483 S.E.2d 12 (1996). The Trial Court's Order that there is a ten (10) year statute of limitation regarding contract claims is clearly the correct rule of law established by this Court and by statute, as is the Trial Court's ruling concerning the statute of

limitations on Respondents' Unfair Trade Practices Act, common law bad faith and Hayseeds claims. The Trial Court's ruling was anything but clearly erroneous.

The fourth factor is whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law. As is set forth in this memorandum, the Circuit Court did not err by the entry of its Order. This factor also weighs against this Court issuing a Rule to Show Cause. The matters now before this Court are not oft repeated errors.

The fifth factor is whether the lower tribunal's order raises new and important problems or issues of law of first impression. The matters now before this Court, vis-à-vis Erie's Writ, are well settled matters of law, both by statute and case law. It makes no sense for this Court to accept this case on an extraordinary Writ. It is likewise premature. The Plaintiffs have not been afforded with sufficient time to discover matters pertinent directly to this litigation and pertinent to issues raised by the Writ. These issues have not been fully briefed before the Circuit Court, and discovery is not complete, so this Court does not have a complete record to review in this case. As such, it would be prudent for this Court to allow this case to proceed before the Circuit Court. Accordingly, the fifth factor also weighs against this Court issuing a Rule to Show Cause.

B. The Circuit Court's Order Denying the Dismissal of Plaintiffs' Claims was Correct as a Matter of Law under Sizemore.

1. The Circuit Court was Correct in Concluding that a 10 Year Statute of Limitations Applies to Counts I and II of the Complaint.

Sizemore is the controlling law of this case. Under West Virginia law, there is a ten (10) year statute of limitations on claims arising from the breach of a written contract. W.Va. Code § 55-2-6. Obviously, an insurance policy is a written contract. Despite W.Va. Code § 55-2-6, our legislature under the provisions of W.Va. Code § 33-6-14 does permit an insurer the right to limit the ten (10) year time within which an action may be brought on an insurance policy to two (2)

years from the time the cause of action accrues. § 33-6-14 provides an exception to this two (2) year rule which applies only to standard fire insurance policies. By statute, standard fire policies are not subject to the two (2) year rule and the issuer of a standard fire policy is free to limit the time within which to bring an action to a period of one (1) year from the date of the occurrence. West Virginia law recognizes a distinct difference between a "standard fire insurance policy" and a "multi-peril insurance policy" in terms of applicable statutes of limitations to which an insurance company may arbitrarily limit claims under West Virginia law. The difference is self-evident. A standard fire insurance policy insures against the peril of fire. A multi-peril insurance policy insures against additional perils. Notwithstanding the obvious difference between these two types of policies, Erie, on a petition for extraordinary relief, has boldly asked this Court to rule, as a matter of law, that a standard fire insurance policy is one and the same as a multi-peril insurance policy for purposes of W.Va. Code § 33-6-14. Erie asks this Court to saddle all policyholders with the same contractual time limitations, as dictated solely by the insurance company, as claimants who are forced to litigate their claims under the same limitations in force under the terms of standard fire insurance policies. What Erie fails or refuses to recognize is that a multi-peril insurance policy is not the same as a standard fire insurance policy, and W.Va. Code § 33-6-14 doesn't treat them the same. In fact, the policy at issue in Erie's Writ is not a standard fire policy.

W.Va. Code § 33-6-14 states:

> No policy delivered or issued for delivery in West Virginia and covering a subject of insurance resident, located, or to be performed in West Virginia, shall contain any condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country, except as necessary to meet the requirements of the motor vehicle financial responsibility laws or compulsory disability benefit laws of such other state or country, or preventing the bringing of an action against any such insurer for more than six months after the cause of action accrues, or limiting the time within which an action may be brought to a period of less than two years from the time the cause of

> action accrues in connection with all insurances other than marine insurances; in marine policies such time shall not be limited to less than one year from the date of occurrence of the event resulting in the loss. Any such condition, stipulation or agreement shall be void, but such voidance shall not affect the validity of the other provisions of the policy. This section shall not apply to the standard fire insurance policy. W.Va. Code § 33-6-14 (Emphasis added).

As opined by the Trial Court in its Order, "Exclusion of the "standard fire insurance policy" from § 33-6-14 simply acknowledges that in the statutory framework shaping West Virginia insurance law, fire insurance is treated separately in article 17 which establishes a standard for such policies. Hence, "standard fire policy" is a term of art rooted in the historical New York standard fire policy as entailed in § 33-17-2."

Again, the Trial Court (citing Sizemore) was correct when it said, "It is significant and helpful to understanding the statutory framework as a whole to note that § 33-17-2 declares that its provisions do not apply to multiple line coverages with casualty insurance combined with fire insurance if "the fire portion thereof contains" language at least as favorable to the insured as the applicable portions of the standard fire policy". Thus, it is sensible in order to maintain the distinctive elements respecting fire coverage in the statutory insurance framework and to avoid confusion which may arise from different statutes addressing the same subject matter, that § 33-6-14 simply excludes "the standard fire insurance policy" from its provisions."

The Sizemore decision also attempted to resolve any confusion arising from the two statutes being examined by finding and concluding:

> Accordingly, we find that because the Legislature saw fit to allow insurance providers to write multiple line policies containing fire insurance coverage conforming to the standard fire policy, the Legislature also saw fit to allow fire insurance portions of multiple line policies to contain the same limitation of action provision as the standard fire policy to which they must conform. We conclude, therefore, that the term, "standard fire insurance policy" in W.Va. Code 33-6-14 (1957) includes the fire portion of approved multiple line insurance policies which combine casualty and fire insurance coverage, as provided for in W.Va. Code 33-17-2 (1957), so that the fire portion of approved multiple line

> policies is exempt from the two year requirement for limitation of action provisions in insurance contracts set out in W.Va. Code 33-6-14 so long as the policy language is at least as favorable to the insured as the applicable portions of the standard fire policy .... There is a one year statute of limitations under the standard fire insurance policy which would apply to the fire portion of a multiple line policy but would not apply to other lines of such policy. *Id.* at 597.

Stated succinctly, if the multiple line policy containing both fire and casualty insurance is included within the meaning of the term "standard fire insurance policy" in W.Va. Code § 33-6-14, it is exempt from the prohibition on limitation of action provisions of less than two (2) years contained in that statute, and the policy's one (1) year limitation provision is valid. **Conversely, if the multiple line policy is not included within the meaning of the term "standard fire insurance policy," its one (1) year limitation of action provision is void.** (Emphasis added). *Id.* at 595. Sizemore clearly and unequivocally stands for the principle that the purchase of a multi-peril coverage policy is not a standard fire policy. Sizemore does not support Erie's positon, despite Erie's insistence.

Sizemore clarified what is and what is not a standard 165 line fire policy.[2] Essentially, it was the Court's reasonable conclusion that the form of the standard fire policy can be moved around. It can be incorporated into the form of a multi-peril policy and other coverages traditionally incorporated with a standard fire policy are included within the meaning of the 165 line policy. But, in its sound reasoning the Court said:

> ". . . we believe that the intent of the Legislature, as set forth in W.Va. Code § 33-17-2, is to treat the 165 line standard fire insurance policy the same as the approved fire portions of multiple line coverages which combine casualty and fire insurance. We find, therefore, that W.Va. Code § 33-17-2 (1957) defines the scope and meaning of the term "standard fire policy" to include not only the 165 numbered line basic policy, but also approved multiple line policies containing fire coverage." *Id.* at 597.

[2] The facts of the Sizemore case involved a fire claim arising under the terms of a State Farm policy issued by its general company which covered a manufactured home of some sort.

In so reasoning, the Court stated that § 33-17-2 permitted an insurance company to establish a one (1) year statute of limitations for the standard fire policy, but that the mere incorporation of the terms of the standard fire policy, with casualty coverage, into a multi-peril policy did not alter the statutory prohibition as to all other claims for all other perils insured against by the policy. Otherwise, the remaining portions of the policy were intended to possess a statute of limitations of not less than two (2) years. In furtherance of that understanding, Sizemore says:

> ". . . we find that because the Legislature saw fit to allow insurance providers to write multiple line policies containing fire insurance coverage conforming to the standard fire policy, the Legislature also saw fit to allow fire insurance portions of multiple line policies to contain the same limitation of action provision as the standard fire policy to which they must conform." (Emphasis added). *Id.* at 597.

Erie's interpretation of Sizemore and applicable legislation is a distortion of the intent and mechanics of standard fire policy and statutory construction. Erie cites Prete v. Royal Globe Insurance Co., 533 F. Supp. 332 (N.D. W.Va. 1982), to support its tortured interpretation of Sizemore.[3] Erie argues that the one (1) year limitation contained in a standard fire policy extends well beyond that to include other coverages offered in multi-peril policies. The Prete policy at issue was a standard fire policy. Prete is not remotely relevant and it is not dispositive of a single issue now before this Court. Likewise, Erie also cites L.H. Jones Equip. Co. v. Swenson Spreader LLC, 224 W.Va. 570, 687 S.E.2d 353 (2009) as a case which supports its position. It cannot be readily discerned from Jones what kind of policy was at issue, or more importantly, what light it sheds on the Erie homeowners policy purchased by the Respondents. What is crystal clear are the lengths to which Erie will attempt to go to call any policy a standard

[3] Prete pre-dates Sizemore by 16 years and it does not involve claims arising under a multi-peril homeowner's policy. The claim in Prete indisputably arose squarely under the terms of the 165 line standard fire policy, unlike the facts in the case now before this Court. The claim was for damage to a wall allegedly caused by separated piping which resulted in loss rent and income in a commercial setting.

fire policy, *even when it is not,* and to obtain the benefit of a one (1) year statute of limitations, even where it is not entitled to that benefit.[4]

Petitioner cites Beasley v. Allstate Insurance Co., 184 F. Supp. 2d 523 (S.D. W.Va. 2002), wherein Judge Haden ruled that a ten (10) year statute of limitations applied to claims under what was presumably a homeowners policy issued by Allstate. Petitioner attempts to distinguish Beasley from the present case by stating that no argument was presented for the application of a one (1) year statute of limitation. Like the case now before this Court, the claim for damage to the Beasley home was caused by snow and ice, and it was denied by Allstate in the same manner as Erie has denied the claims of the Respondents. The Beasleys were forced to retain their own engineer to convince Allstate that the cause of the damage to the home was snow and ice. Using a policy exclusion which purportedly required the Beasleys to institute a lawsuit within a year from the date of loss; Allstate continued the denial of the claim and then sought dismissal. In Beasley, claims for bad faith and UTPA claims were also presented.

The Court ruled that the one (1) year limitation, asserted under a standard fire policy was void and invoked a ten (10) year statute of limitations.[5] There is absolutely no reason to believe that Judge Haden would not have followed the precedent which was established some four (4) years before Beasley by this Court's holding in Sizemore had the one (1) year statute of limitations argument been made. Thus, it is clear that the Trial Court was absolutely correct when it denied the motion to dismiss and Ordered:

> There is a one year statute of limitations under the standard fire insurance policy which would apply to the fire portion of a multiple line policy but would not apply to other lines of such policy. Accordingly, the court finds and concludes

[4] Erie also cites a 1929 case, Kirk v. Firemen's Insurance Co., 107 W.Va. 666, 150 S.E. 2 (1929). Kirk is yet another case where it is explicitly evident that a New York Standard Fire Insurance Policy was purchased.

[5] Judge Haden also ordered bifurcation and stay of the UTPA and bad faith claims in the same manner as the Trial Court ordered in this case.

> that the statute of limitations for plaintiffs' breach of contract and reasonable expectations claims is ten years as each of the claims sounds in contract.
>
> *Id.* at 527

The entire basis of Erie's prayer for extraordinary relief falls flat. The Trial Court was clearly correct with regard to its application of Sizemore and the applicable legislation. With regard to any claim by Erie that the claims for coverage must have been brought within one (1) year of the date of the occurrence, Erie is wrong.

2. The Trial Court was Correct in Denying Erie's Request for Dismissal of Counts III and IV of the Respondents' Complaint.

Citing Beasley, the Trial Court ordered that the Respondents' coverage claims in Counts III and IV do not accrue until the underlying claims for coverage are resolved.[6] In Thompson v. Prudential Ins. Co. of Am., 2014 U.S. Dist. LEXIS 167873 (S.D. W.Va. Dec. 4, 2014), Judge Goodwin **held that in West Virginia, the statute of limitations for breach of contract actions is ten years from the date of accrual**. (Emphasis added). The Trial Court's ruling makes perfect sense. As in Beasley and in Thompson, there is a ten (10) year statute of limitation for contract claims which are not subject to the limitations placed under coverage within the standard fire policy. As is well settled by Hayseeds, until a policyholder substantially prevails, a claim for damages which are available under Hayseeds is premature. The Trial Court bifurcated

---

[6] See W.Va. Code § 55-2-6. A breach of contract action accrues when "breach of the contract occurs or when the act breaching the contract becomes known." McKenzie v. Cherry River Coal & Coke Co., 195 W.Va. 742, 466 S.E.2d 810, 817 (W.Va. 1995). The West Virginia Supreme Court of Appeals has recognized, however, that parties may contract to shorten the statute of limitations period. See Mills v. Indem. Ins. Co. of N. Am., 108 W.Va. 317, 150 S.E. 718, 719 (W.Va. 1929) Freedom of contract is limited by West Virginia Code § 33-6-14, which provides that insurance policies cannot contain a limitations period of less than two years from the date the action accrued. See W.Va. Code § 33-6-14; Beasley v. Allstate Ins. Co., 184 F. Supp. 2d 523, 525 (S.D. W.Va. 2002) ("[Section 33-6-14] simply prohibits the parties from inserting a limitations provision below the two-year floor.").

the bad faith and UTPA claims from the balance of claims which relate to coverage. In doing so, the Trial Court denied Erie's motion to dismiss without prejudice.

Yet, Erie has proceeded in its Writ to ask this Court to find that any claims for relief pursuant to Hayseeds are controlled by the same case law which coincidentally governs the statutes of limitation in a UTPA or common law bad faith. Relief under Hayseeds is mutually exclusive from relief afforded to victims of bad faith and UTPA claims. In this case, Erie wrongfully denied claims which are and were compensable under the terms of the applicable Extracover homeowners policy that it sold to the Respondents. Erie denied the Respondents' claims in a way that led them to believe that if they could produce additional information for Erie's consideration, Erie would take all new information into account and determine whether the claim was compensable. On at least a few separate occasions, the Respondents provided Erie with additional information. Erie denied the claim subsequent to receiving such information. There are other acts and/or omissions committed by Erie (which are certainly of a continuing nature) which will be known subject to further discovery and which will have some bearing upon any statutes of limitation. For example, even though the insurance regulations require Erie to disclose applicable statutes of limitation, there are no facts in evidence to confirm that Erie fulfilled that obligation.

It is clear that Erie has acted in bad faith. Additional discovery is necessary to uncover claims documents to demonstrate that Erie never intended to pay the claim, honor the contract or simply treat the Respondents fairly. Erie left the Respondents in an impossible situation with significant property damage to their home which is unquestionably covered under the policy. Throughout the process, it purposefully and intentionally strung the Respondents along to the point that they clung onto the hope that a little more information and/or different information

provided to Erie would cause Erie to reverse its claims position. What the Respondents did not know is that Erie would use the policy provisions as a device to bar recovery, to leave them with thousands of dollars of damage to their home without a possibility of compensation.

On at least a few separate occasions, even after it was presented with information demonstrating that Erie's original basis for the denial of the claim was flawed and without foundation, Erie again and again denied the Respondents' claims. As was the case in Thompson, *supra*, the Court stated that there were material issues of fact which were not part of the record and which were necessary in order to permit the Court to determine exactly when the statute of limitations should begin to run. This is precisely what Respondents argued to the Trial Court in addition to the argument that a cause of action under Hayseeds does not accrue until the claimant substantially prevails.

VII. CONCLUSION

Judge Beane was absolutely correct in his ruling which denied Petitioner's motion to dismiss based upon statute of limitations grounds. Because W.Va. Code § 33-6-14 renders Erie's contractual statute of limitations provision in its policy null, void and unenforceable, the ten (10) year statute of limitations under W.Va. Code § 55-2-6 applies to the Respondents' underlying claims. The Trial Court committed no clear error in denying Erie's Motion to Dismiss. There is absolutely no authority and no justification for this Court to adopt Petitioner's position that its own null and void and unenforceable policy provision should be reformed so as to establish a two (2) year statute of limitations on Respondents' claims. Moreover, even if there was authority to reform the policy, the Respondents are entitled to conduct necessary discovery to properly document the acts of bad faith and violations of the UTPA (already been committed), which will in turn shed some light on the statute of limitations with regard to multiple denials of

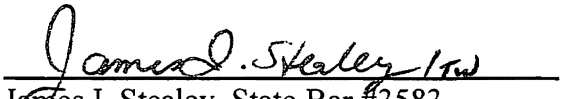
coverage (even after Erie was provided with additional information to show that its original denial of coverage was flawed and wrong) and claims arising under the UTPA and common law bad faith precedent.

Judge Beane was also correct in his ruling that the Respondents' Hayseeds claim should not be dismissed because it does not accrue until it is determined that the Respondents substantially prevailed on the underlying insurance claim. The same is true of Respondents' UTPA and common law bad faith claims, as it is impossible to determine, in the absence of discovery, when the last act of bad faith occurred. There is no factual record, other than Petitioner's self-serving verification, upon which this Court can make a rational decision as to whether or not Erie committed bad faith, and, if so, when acts of bad faith occurred. If and when the facts of this case are uncovered during discovery, and those facts show that no act of bad faith under the UTPA or under common law occurred within one (1) year of the date that suit was filed, Petitioner will still have the remedy of filing a motion for summary judgment at that time, and the Trial Court indicated its willingness to entertain such a motion.

It is for these reasons that Respondents, David Chedester and Joyce Chedester, respectfully request that this Court should not issue a Rule to show cause in response to Petitioner's Writ of Prohibition.

RESPECTFULLY SUBMITTED,

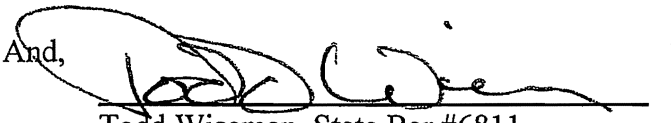
David Chedester and Joyce Chedester,



James I. Stealey, State Bar #3583
The Stealey Law Firm, PLLC
417 Grand Park Drive, Suite 102
Parkersburg, WV 26101
(304) 485-3127

Facsimile (304)917-3534
jis@stealeylawfirm.com

And,



Todd Wiseman, State Bar #6811
Wiseman Law Firm, PLLC
1510 Grand Central Avenue
Vienna, WV 26105
(304) 428-3006
Facsimile (304)428-1304
toddswiseman@yahoo.com

CERTIFICATE OF SERVICE

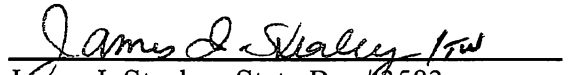
I hereby certify that a true and correct copy of the foregoing Response of Respondents, David Chedester and Joyce Chedester, to Verified Petition for Writ of Prohibition was served upon the following by regular United States mail, postage prepaid, this 18th day of November, 2015:

Laurie C. Barbe, Esquire
Chelsea V. Prince, Esquire
Steptoe & Johnson, PLLC
1085 Van Voorhis Road, Suite 400
P. O. Box 1616
Morgantown, WV 26507-1616

Honorable J.D. Beane
Wood County Judicial Bldg, Room 421
2 Government Square
Parkersburg, WV 26101-5353

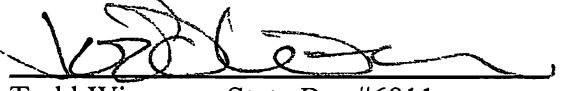
Amy M. Smith, Esquire
Steptoe & Johnson, PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330

David Chedester and Joyce Chedester,



James I. Stealey, State Bar #3583
The Stealey Law Firm, PLLC
417 Grand Park Drive, Suite 102
Parkersburg, WV 26101
(304) 485-3127
Facsimile (304)917-3534
jis@stealeylawfirm.com

And,



Todd Wiseman, State Bar #6811
Wiseman Law Firm, PLLC
1510 Grand Central Avenue
Vienna, WV 26105
(304) 428-3006
Facsimile (304)428-1304
toddswiseman@yahoo.com