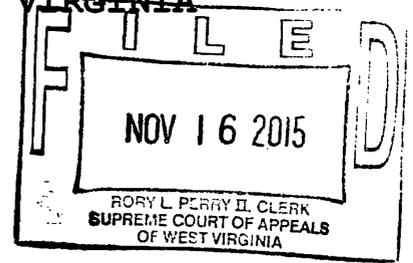

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-1101



STATE OF WEST VIRGINIA *ex rel.*
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner,

v.

(Circuit Court of Wetzel County
Civil Action No.: 13-C-24K)

HONORABLE JEFFREY D. CRAMER,
WILLIAM BASSETT and SARAH BASSETT,

Respondents.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S
PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

The State of West Virginia has long recognized that individuals have legally protected privacy interests. However, the Circuit Court of Wetzel County did not adequately protect those interests when it ordered State Farm Mutual Automobile Insurance Company ("State Farm") to produce personal information regarding policyholders who have no involvement in nor interest in the litigation pending before the Circuit Court.

Pursuant to Rule of Appellate Procedure 16, State Farm requests this Court issue a Writ of Prohibition, prohibiting the respondent, the Honorable Jeffrey D. Cramer, from enforcing an Order denying State Farm's Motion to Reconsider Ruling Granting Plaintiffs' Motion to Compel or, in the Alternative, Motion for Protective Order. In its Order entered October 27, 2015, the lower court failed to protect the privacy interests of individuals who are not parties to the litigation and who have not given State Farm permission to release their personal information to strangers.

QUESTIONS PRESENTED

1. Whether the lower court committed clear legal error and exceeded its legitimate powers in ordering State Farm to disclose the names, addresses and telephone numbers of non-parties when State Farm does not have permission from those individuals to release their personal information.

2. Whether the lower court committed clear legal error by failing to provide a framework to ensure that non-parties are protected from unreasonable intrusion into their private affairs.

STATEMENT OF THE CASE

I. Statement of Facts

William Bassett was involved in an automobile accident on December 3, 2011, when the vehicle he was operating was struck by a vehicle operated by Brian Wade. (App. 8.) Mr. Wade had stolen the vehicle from its owners, David and/or Debra Bennett. Because of Mr. Wade's theft of the vehicle, the Bennetts' insurer, Erie, denied liability coverage for the accident.

Thereafter, Mr. Bassett made a claim for uninsured motorist ("UM") coverage with State Farm under three State Farm policies -- the policy upon the accident vehicle issued to Mr. Bassett's parents; a State Farm policy issued to Mr. Bassett; and, a State Farm policy issued to Mr. Bassett and his wife, Sarah Bassett. (App. 10.) In each instance, the policyholder chose to purchase only the mandatory UM coverage with limits of \$20,000 per person and \$40,000 per accident. *Id.* Within three months of the accident, State Farm paid Mr. Bassett \$60,000, the total UM policy limits available from the three policies. (App. 11.)

Mr. and Ms. Bassett subsequently filed suit against Mr. Wade and State Farm. (App. 7-13.) Against State Farm, they sought a declaratory judgment for reformation of the three policies to provide additional UM coverage equal to the liability coverage limits of \$100,000 per person and \$300,000 per accident. (App. 10-12.) After the parties engaged in discovery relative to the coverage issue, State Farm reformed the three policies to provide UM coverage equal to the liability coverage limits of each policy and paid the Bassetts additional UM coverage benefits of \$240,000, as well as an additional \$102,578 for attorney's fees and aggravation and inconvenience under *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986), for total payment of \$402,578.

II. Procedural History

Despite receiving the relief they requested in the original complaint, the Bassetts amended their complaint to assert claims for State Farm for breach of contract and alleged violation of the Unfair Trade Practices Act, W. Va. Code §33-11-4(9). (App. 14-25.) Essentially, the Bassetts contend that State Farm's use of a UM offer form that differs from the Insurance Commissioner's form is *per se* a violation of the Unfair Trade Practices Act.

A. The interrogatories at issue seek personal information regarding individuals not involved in the litigation and are, at best, marginally relevant to the issues in the amended complaint.

In furtherance of the misguided theory that use of an offer form different from the Insurance Commissioner's form constitutes a violation of the Unfair Trade Practices Act, the Bassetts served expansive discovery upon State Farm, to which State Farm responded and, where appropriate, objected. (App. 70-88.) On July 16, 2015, the Bassetts filed a Motion to Compel further answers to interrogatories 3, 4 and 5 of Plaintiffs' Third Set of Interrogatories to Defendant State Farm Mutual Automobile Insurance Company.¹ The interrogatories at issue are interrelated and sought information regarding UM coverage offers made to other State Farm insureds:

3. Identify by name, address and telephone number every State Farm insured in the State of West Virginia, from 2005 to the present, who was injured by or suffered property damage as a result of the acts of an uninsured motorist and whose policy did not have uninsured motorists coverage limits at least equal to the liability limits stated in the insured's policy declarations of [sic] \$100,000, whichever is greater. You may exclude from this response all insureds who obtained a judgment against the uninsured tortfeasor for less than the stated uninsured motorists coverage limits afforded by the State Farm policy or who settled his/her claim for uninsured motorists benefits for less than the stated uninsured motorists coverage limits afforded by the State Farm policy.

ANSWER: Objection. This interrogatory is vague and ambiguous as your defendant cannot reasonably ascertain

¹The Bassetts also moved to compel a further answer to interrogatory 1, but that interrogatory is not at issue.

what plaintiffs mean by "uninsured motorists coverage limits at least equal to the liability limits stated in the insured's policy declaration of \$100,000, whichever is greater." This interrogatory also is overly broad and unduly burdensome on its face, is not relevant to the subject matter of plaintiffs' amended complaint and not reasonably calculated to lead to the discovery of admissible evidence. In addition, this interrogatory seeks information the discovery of which would violate the privacy and confidentiality interests of State Farm Mutual Automobile Insurance Company insureds.

State Farm Mutual Automobile Insurance Company further objects to this interrogatory on the grounds that it seeks information for certification of a class and, not only has no class been certified in this action, plaintiffs' amended complaint contains no allegations relating to a putative class. Moreover, pursuant to *Martin v. State Farm Mutual Automobile Insurance Company*, 809 F. Supp.2d 496 (S.D.W. Va. 2011) and *Thomas v. McDermitt*, 751 S.E.2d 264 (W. Va. 2013), whether a commercially reasonable offer of optional uninsured motorist coverage was made and a knowing and informed rejection of that coverage obtained is dependent upon the facts and circumstances of the offer made to each individual policyholder. Accordingly, no commonality exists or can exist for a class action. *Martin* at 510. Without waiving these objections, in the event that plaintiffs seek class certification and a class is certified in this matter, State Farm Mutual Automobile Insurance Company will identify those policyholders who fall within the applicable class definition, in an appropriate manner and at an appropriate time and place.

4. Identify the State Farm insured named in response to Interrogatory No. 3 who received payment under a State Farm policy for uninsured motorists benefits where the "Uninsured Motorist Coverage Offer" form listed more than a single premium for each optional level of uninsured motorists coverage.

ANSWER: Objection. See answer to interrogatory 3.

5. Identify every claim in the State of West Virginia from 2005 to the present where State Farm has "rolled-up" or reformed an insured's stated limits of uninsured motorists coverage to an amount equal to the insured's

liability coverage limits or \$100,000, whichever is greater, indicating the claim number, the name, address and telephone number of the insured, and the reason or reasons the policy was reformed.

ANSWER: Objection. See answer to interrogatory 3.

(App. 72-74.)

B. The Circuit Court failed to appreciate and protect the privacy rights of non-parties.

Despite this Court's warnings that privacy rights of non-parties are to be protected, by Order Granting Plaintiffs' Motion to Compel Discovery, entered September 28, 2015, the lower court ordered State Farm to answer interrogatories 3, 4 and 5, and to produce the names, addresses and telephone numbers of State Farm policyholders who have no interest in this litigation and who had not authorized State Farm to release their personal information. (App. 3-5.) The lower court failed to follow this Court's holding in *State ex rel. West Virginia Fire & Casualty Company v. Karl*, 202 W. Va. 471, 505 S.E.2d 210 (1998), that privacy interests of non-parties are to be protected and their names, addresses, telephone numbers and other identifying information are not to be produced, even if a protective order is in place.

C. The lower court summarily rejected State Farm's argument that the discovery sought was irrelevant to the allegations of the amended complaint.

The purchase of UM coverage by insureds in an amount less than the liability coverage limits, reformation of the

policy to provide UM coverage equal to the liability coverage limits, or use of an offer form not identical to the one promulgated by the Insurance Commissioner do not constitute violations of the Unfair Trade Practices Act. W. Va. Code §33-6-31d contains "no provision indicating that failure to use the requisite form renders an offer of UIM coverage ineffective as a matter of law ..." *Thomas v. McDermitt*, 232 W. Va. 159, 165, 751 S.E.2d 264, 270 (2013).² No penalty attaches in the event the precise form promulgated by the Insurance Commission is not utilized for making an offer. *Id.*, 232 W. Va. at 167, 751 S.E.2d at 272. Therefore, the identity of other insureds who purchased UM coverage less than their liability limits is not relevant to either the Unfair Trade Practices Act claims or the punitive damages claim based upon alleged claim handling.

The lower court also failed to recognize the interrogatories contained a misstatement of West Virginia law.

²Since the lower court's Order of October 27, 2015, and in furtherance of the theory that use of an offer form different from the Insurance Commissioner's form is a *per se* violation of the Unfair Trade Practices Act, the Bassetts served additional discovery, seeking "exemplar copies" of all UM offer forms used by State Farm since 1993; all internal communications regarding any proposed changes to State Farm's UM offer forms; and, how communications by State Farm or its agents with policyholders were to be "documented," since 1993 to the present. State Farm's "exemplar forms" or discussions regarding any proposed changes to the offer forms have no bearing upon a claim for alleged violation of the Unfair Trade Practices Act inasmuch utilizing a form that differs from the Insurance Commissioner form is not evidence of a violation of the Unfair Trade Practices Act.

The interrogatories requested information regarding instances where the insured did not purchase UM equal to the liability coverage limits or equal to \$100,000 per person and \$300,000 per accident, "whichever is greater," under the theory that a policy must be reformed to provide UM coverage equal to the liability coverage limits of the policy or \$100,000, whichever is higher.

(App. 72.) That position previously was rejected by this Court:

[W]hen an insurer fails to prove an effective offer and a knowing and intelligent waiver under W.Va.Code § 33-6-31(b) (1998), the minimum uninsured or underinsured coverage required to be included in the insured's policy by operation of law is a sum recoverable as damages "up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured." **This language clearly means that the minimum uninsured or underinsured coverage included in the insured's policy under these circumstances is an amount equal to the bodily injury liability insurance and the property damage liability insurance actually purchased by the insured.** (emphasis supplied.)

Jewell v. Ford, 214 W. Va. 511, 515, 590 S.E.2d 704, 708 (2003).

If reformation is required, a policy is reformed to equal the liability coverage limits, thus the request for information regarding instances where the insured did not purchase \$100,000 of UM coverage was irrelevant.

The lower court also accepted the Bassetts' representation that information regarding offers made to other insureds was relevant to their claim for punitive damages. The standard for imposition of punitive damages is stringent, requiring a showing of actual malice which means "that the company

actually knew the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 330-31, 352 S.E.2d 73, 80-81 (1986).

Even a "preconceived disposition to deny the claim" does not rise to the level of actual malice. *Id.*, 177 W. Va. at 331, 352 S.E.2d at 81. Where there is a "bona fide dispute" over coverage, "the insurer's persistence in asserting its position as to applicable limits cannot be deemed malicious." *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 592, 396 S.E.2d 766, 773 (1990). The lower court failed to consider this principle.

D. The lower court further overlooked the prior representation that interrogatories 3, 4 and 5 were intended for a putative class action and are not relevant here.

Interrogatories 3, 4 and 5 are virtually identical to interrogatories served by the Bassetts' counsel when he was counsel for plaintiffs in *Martin v. State Farm Mutual Automobile Insurance Company*, Civil Action No.: 3:10-0144, filed in the United States District Court for the Southern District of West Virginia.³ In *Martin*, plaintiffs filed a putative class action seeking reformation of automobile insurance policies to provide

³Counsel for the Bassetts recently served almost identical interrogatories in a case involving underinsured motorist coverage where he also is counsel for the plaintiff. In addition, the request for additional documents recently served by the Bassetts mirrors documents requested during discovery on the class certification issues in *Martin*. (App. 116, 120.)

underinsured motorist ("UIM") coverage as a matter of law. *Martin v. State Farm Mut. Auto. Ins. Co.*, 809 F. Supp.2d 496 (S.D.W. Va. 2011).⁴

During discovery in *Martin*, plaintiffs' counsel argued that the information sought in interrogatories 15 and 16, which were virtually identical to the interrogatories at issue here, was "critical to the identification of the proposed class and goes to the heart of the Plaintiffs' claims. ... Otherwise, the Plaintiffs and the Court will not have the information necessary to address the numerosity, commonality and typicality requirements under Rule 23 of the Federal Rules of Civil Procedure." (App. 12-13.) The lower court did not consider that the representation made in *Martin* flatly contradicted the position put forward in this litigation that interrogatories 3, 4 and 5 allegedly are relevant to the Unfair Trade Practices Act claim.

E. The lower court failed to remedy its error when it denied State Farm's Motion to Reconsider Ruling Granting Plaintiffs' Motion to Compel or, in the Alternative, Motion for Protective Order.

By Order entered September 28, 2015, the Circuit Court ordered State Farm to provide personal information of over four hundred individuals who have no involvement whatsoever with this

⁴This Court adopted the *Martin* Court's reasoning that failure to use an offer form identical to that promulgated by the Insurance Commissioner did not require reformation of the policy to provide UIM coverage as a matter of law. *Thomas v. McDermitt*, 232 W. Va. at 170-73, 751 S.E.2d at 275-78.

litigation and who have not consented to the release of their personal information. (App. 3-5.) To give the lower court an opportunity to correct its erroneous ruling, State Farm filed a Motion to Reconsider Ruling Granting Plaintiffs' Motion to Compel or, in the Alternative, Motion for Protective Order. (App. 137-65.)

The Circuit Court did not rectify its prior misapplication of the law. Instead, by Order entered October 27, 2015, the lower court denied State Farm's motion to reconsider the prior ruling granting the motion to compel. (App. 1-2.) The Circuit Court made minor, but inadequate concessions to the privacy interests of non-parties.

The Court ordered State Farm to provide the names, address and telephone numbers of its policyholders, but ordered the information not be disclosed outside the context of the litigation. (App. 2.) The Circuit Court's Order permits the Bassetts' counsel to contact non-parties, while directing that such contact "be performed in a manner designed to cause the least possible intrusion to the lives of said individuals." *Id.* The lower court indicated if it received complaints regarding the "nature" of the contact, then the same might be suspended by the Court. *Id.* The Court, however, provided no direction nor framework as to the type of contact which would be least intrusive. Nor did the Circuit Court explain how individuals not involved in

this litigation would know that they could complain to the Circuit Court of Wetzel County about receiving contact from the Bassetts. Despite the lower court's efforts, the Order entered October 27, 2015, does not adequately protect the well-recognized privacy rights of non-litigants.

SUMMARY OF ARGUMENT

The lower court committed clear legal error by failing to appreciate and protect the privacy rights of State Farm policyholders who are not parties to this litigation and who have not consented to the release of their personal information. The lower court disregarded this Court's respect for the privacy rights of non-parties, as demonstrated in both *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 202 W. Va. 471, 505 S.E.2d 210 (1998), and *State ex rel. Westbrook Health Services, Inc. v. Hill*, 209 W. Va. 668, 550 S.E.2d 646 (2001).

The lower court's ruling constitutes clear legal error. State Farm requests that the Court stay further proceedings in the Circuit Court of Wetzel County, issue a rule to show cause as to why a Writ of Prohibition should not be granted, schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, prohibit the lower court from enforcing the Order of October 27, 2015, and direct the lower court to deny the Bassetts' Motion to Compel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

State Farm believes that oral argument pursuant to the criteria set forth in Rule of Appellate Procedure 19 is necessary as the decisional process will be aided by oral argument. Oral argument under Rule 19 is appropriate, as this case involves application of settled law and the lower court's clear legal error in applying that settled law. State Farm believes that either a memorandum decision or an opinion would be appropriate in this case.

ARGUMENT

I. Standard of Review.

State Farm seeks a writ of prohibition because the lower court exceeded its legitimate powers and committed clear legal error when ordering State Farm to provide names, addresses and telephone numbers of over four hundred State Farm policyholders who have no involvement in this litigation and have not consented to the release of their information beyond what was necessary for the handling of their respective claims. In such instances, the Court established the following standard of review for issuing a writ of prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in

a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, syl. pt. 4, 199 W. Va. 12, 483 S.E.2d 12 (1996). Accord *State ex rel. HCR ManorCare, LLC v. Stucky*, ___ W. Va. ___, 776 S.E.2d 271 (2015); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 228 W. Va. 749, 724 S.E.2d 353 (2012).

The first two factors unquestionably are present here. "A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders." Syl. Pt.1, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, syl. pt. 3, 226 W. Va. 138, 697 S.E.2d 730 (2010). Moreover, "prohibition may be available where the orders concern the disclosure of potentially privileged information. See *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W.Va. 118, 123, 556 S.E.2d 85, 90 (2001)." *State ex rel. HCR ManorCare, LLC v.*

Stucky, ___ W. Va. at ___, 776 S.E.2d at 278. The lower court's error cannot be corrected on appeal because State Farm is being forced to disclose personal information regarding policyholders during the discovery process.

If not corrected, the trial court's erroneous ruling will require dissemination of personal and private information of over four hundred individuals who have no interest in this litigation and have not authorized State Farm to release their information to outsiders, such as the Bassetts. A writ of prohibition is the only means to correct the lower court's legal error.

The third and most important factor -- that the lower tribunal's order is clearly erroneous as a matter of law -- exists here. West Virginia has long recognized an individual's right to privacy. *Tabata Charleston Area Med. Ctr.*, 233 W. Va. 512, 759 S.E.2d 459 (2014); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958). Insureds who submit claims to State Farm have an expectation that State Farm will not provide their personal information, including their names, addresses and telephone numbers, to strangers who are not involved in the handling of their claims. The lower court overlooked the privacy interests of these individuals.

II. A motion to reconsider was the proper method by which to give the lower court an opportunity to correct its erroneous interlocutory ruling.

"As long as a circuit court has jurisdiction over the case, then it possesses the inherent power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Hubbard v. State Farm Indem. Co.*, syl. pt. 4, 213 W. Va. 542, 584 S.E.2d 176 (2003). "'Interlocutory orders and judgments are not within the provisions of 60(b), but are left to the plenary power of the court that rendered them to afford such relief from them as justice requires.'" *Id.*, 213 W. Va. at 551, 584 S.E.2d at 185, quoting *Caldwell v. Caldwell*, 177 W. Va. 61, 350 S.E.2d 688 (1986). See also *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 438 n.4, 752 S.E.2d 586, 592 n.4 (2013) (standard for motion to reconsider is whether justice requires amending an earlier order); *Riffle v. C.J. Hughes Constr. Co.*, 226 W. Va. 581, 586 n.5, 703 S.E.2d 552, 557 n.5 (2010) (motion was properly titled motion for reconsideration when it sought review of an interlocutory ruling.)⁵

⁵The Court's recent admonishment in *Malone v. Potomac Highlands Airport Auth.*, syl. pt. 3, No. 14-0849 (W. Va. Oct. 7, 2015), that motions to reconsider are not recognized under the Rules of Civil Procedure addressed motions seeking relief from final orders, which should be brought under Rules of Civil Procedure 59 or 60. State Farm's motion to reconsider was addressed to the lower court's interlocutory rulings contained in the Order entered September 28, 2015.

A motion to reconsider is not only "an allowable method of reviewing a prior order", but also "is the most appropriate and advantageous method of seeking relief from an interlocutory order for a party to pursue." *Hubbard*, 213 W. Va. at 551 n.19, 584 S.E.2d at 185 n.19, quoting *Fisher v. Nat'l R.R. Passenger Corp.*, 152 F.R.D. 145 (S.D. Ind. 1993). State Farm's use of that procedural mechanism was proper.

III. The lower court committed clear legal error and exceeded its legitimate powers when it failed to protect the privacy interests of non-parties.

West Virginia recognizes a "legally protected interest in privacy." *Twigg v. Hercules Corp.*, 185 W. Va. 155, 157, 406 S.E.2d 52, 54 (1990). "The right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages." *Roach v. Harper*, syl. pt. 1, 143 W. Va. 869, 105 S.E.2d 564 (1958). See also *Tabata v. Charleston Area Med. Ctr., Inc.*, syl. pt. 4, 233 W. Va. 512, 759 S.E.2d 459 (2014) (petitioners had standing to assert claims for invasion of privacy when their personal information, including names, contact details, Social Security numbers and dates of birth were placed on the Internet.)

Privacy rights must be protected when a party to litigation seeks disclosure of personal information of non-

litigants. "Weighing the requesting party's need to obtain the information against the burden that producing the information places upon Fire and Casualty, we must be cognizant of the privacy rights of non-litigant third parties." *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 202 W. Va. 471, 476, 505 S.E.2d 210, 215 (1998). Plaintiffs in *Karl* requested claim files of non-litigants relating to infant settlement proceedings and the insurer objected to providing such information on that basis that doing so would violate the privacy interests of the non-party claimants.

Even though the lower court entered a protective order, prohibiting dissemination of information outside the confines of the litigation, this Court's protection of non-parties' privacy interests went beyond the mere issuance of a protective order. "[C]ognizant of the privacy rights of non-litigant third parties," the Court held the insurer "should be required to produce redacted copies of the infant claim portions of the requested claim files. **Fire and Casualty may adequately protect the privacy interests of the non-litigants by redacting the names, addresses, personal medical information, and other identifying material from the records.**" (emphasis supplied.) *Id.*, 202 W. Va. 476, 505 S.E.2d at 215.

There is no distinction between the privacy interests at issue in *Karl* versus the privacy interests the Bassetts seek

to invade in this case. After redaction of personal information -- including names, addresses and medical records -- the information left in an infant claims portion of a claim file essentially reveals whether a summary proceeding was conducted and would provide a numerical count of the claims with a summary proceeding and those without. The *Karl* Court did **not** permit discovery of the names and addresses of the claimants and, did not permit plaintiffs to contact the non-litigants. In fact, the Court was very specific as to the procedure to be followed in the event additional information might be requested:

Subsequent to production, if any party seeks additional information or testimony which would necessitate release of any non-litigant's name or personal information, that party can petition the lower court for the production of such information. One possible approach which might be taken at such juncture would be that approved in *Colonial Life* [647 P.2d 86 (Cal. 1982), wherein the court directed that letters of consent be required prior to release of any personal or identifying information from any non-litigant. The content of such letters would be subject to prior court approval. In the present posture of the case, however, redaction protects the privacy interests of the non-litigants while also affording the plaintiffs' adequate discovery privileges.

Id., 202 W. Va. at 476, 505 S.E.2d at 215.

Similarly, redaction of the personal information in this case would provide the Bassetts with numerical information regarding the number of UM claims in the past 10 years where the insureds purchased UM coverage less than their liability coverage limits or less than \$100,000; the number of insureds who received

payment in instances where the UM offer form contained more than a single premium for each level of optional UM coverage; and, the number of instances where a policy was been reformed to provide UM coverage equal to the liability coverage limits. This information is more than sufficient, particularly when one considers the Bassetts rely upon a legally invalid basis for requesting the information -- their erroneous belief that using an offer form that differs from the Insurance Commissioner form is a *per se* violation of the Unfair Trade Practices Act.⁶

Although *Karl* also involved claims of alleged violation of the Unfair Trade Practices Act, the Court did not permit plaintiffs to violate non-litigants' rights to be left alone.

⁶The Bassetts' assertion that pursuant to *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W. Va. 597, 280 S.E.2d 252 (1981), they are entitled to information relating to coverage choices made by other insureds in order to demonstrate State Farm allegedly engaged in a general business practice of violating the Unfair Trade Practices Act is incorrect. Not only did *Jenkins* refer to "violations," of the Unfair Trade Practices Act and did not address discoverability of a non-litigant's personal decision as to the amount of UM coverage to purchase, but the purchase of UM coverage by insureds in an amount less than the liability coverage limits, use of a form different from the Insurance Commissioner's form or reformation of a policy to provide UM coverage equal to the liability coverage limits do not constitute violations of the Unfair Trade Practices Act. See *Thomas v. McDermitt*, 232 W. Va. at 165, 167, 751 S.E.2d at 270, 272 (using a form which differs from the Insurance Commissioner's form does not "render[] an offer of UIM coverage ineffective as a matter of law ..." and no penalty attaches in the event the precise form promulgated by the Insurance Commission is not utilized for making an offer.) Accordingly, the names of other insureds who purchased UM coverage less than their liability coverage limits does not and cannot demonstrate a general business practice of violating the Unfair Trade Practices Act.

Indeed, "[a]s the Court of Appeals of Texas recognized in *Alpha Life Insurance Co. v. Gayle*, 796 S.W.2d 834 (Tex.Ct.App.1990), the insurer's 'interests in protecting the privacy rights of its claimants clearly outweighs any right the real parties in interest have to discover the identities of the other claimants.'" *Karl*, 202 W. Va. at 476, 505 S.E.2d at 215.

This coincides with the Court's observation that there are instances when a privilege applies so that "many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence." *State ex rel. Med. Assurance of West Virginia, Inc. v. Recht*, syl. pt. 12, 213 W. Va. 457, 583 S.E.2d 80 (2003). In that same vein, privacy rights can, and in this case do, outweigh any right the Bassetts have to disclosure of personal information relating to other policyholders.

Similarly, in *State ex rel. Westbrook Health Services, Inc. v. Hill*, 209 W. Va. 668, 550 S.E.2d 646 (2001), the Court discussed the need to protect the privacy rights of employees and former employees of the defendant. Plaintiff sought information from her former employer relating to such matters as severance pay and employment offers made to other employees. Based upon "concerns of invasion of privacy, Westbrook refused to answer numerous interrogatories which sought personnel information about employees or former employees of Westbrook." *Id.*, 209 W. Va. at

673, 550 S.E.2d at 651. The lower court ordered the employer to produce information regarding other employees. *Id.*, 209 W. Va. at 671, 550 S.E.2d at 649. The employer then sought a writ of prohibition to prohibit the lower court from enforcing its order compelling, *inter alia*, production of personal information regarding employees.

Relying upon its decision in *Karl*, this Court again acknowledged "that the privacy rights of nonlitigant third parties are important" and discussed the procedure it approved in *Karl* for redaction of personal information, including names and addresses. *Id.*, 209 W. Va. at 674, 550 S.E.2d at 652. The Court suggested that "[p]erhaps this or a similar procedure can be followed to protect Westbrook from violating the privacy rights of nonlitigant employees or former employees regarding employment records and tax information." *Id.* The Court directed Westbrook to seek a protective order from the lower court to protect "itself from possible claims of invasion of privacy." *Id.*

The privacy rights at stake here for State Farm's insureds are substantial. An insured presenting a UM claim after an accident has no reason to expect that State Farm will disclose information to strangers who have no business interest in the insured's claim. These insureds have not consented to the release of their identities, their addresses nor their telephone numbers to the Bassetts. They have not even consented to having

the fact they presented an insurance claim revealed to others.⁷ Further, given the nature of the interrogatories, revealing the identity of these policyholders necessarily reveals that they, for whatever reason, purchased UM coverage less than their liability coverage limits.

These insureds have an expectation of privacy in their insurance decisions and their purchase of insurance. There are numerous reasons an insured may have purchased UM coverage with limits less than the liability coverage limits, including financial considerations which are personal to that insured. Those insureds have no interest in this litigation, but the Bassetts seek to delve into the private financial affairs of the insureds solely because of personal decisions these insureds made when purchasing UM coverage less than their liability coverage limits. The insureds are entitled to have their private insurance transactions protected, but the lower court neglected to do so.

IV. The lower court failed to set any parameters governing the Bassetts' contact with non-parties.

After denying State Farm's motion to reconsider, and thereby requiring State Farm breach the privacy interests of its

⁷The fact the names of these individuals might appear on a West Virginia Uniform Traffic Crash Report does not mean they surrendered their privacy interests when they made a claim with State Farm. Providing State Farm with information which may duplicate some information on an accident report does not equate to permission for State Farm to freely disclose that information to others.

policyholders, the lower court granted in part and denied in part State Farm's alternative motion for protective order. (App. 1-2.) The Circuit Court ordered the personal information of non-parties not be disclosed outside the context of the "present litigation." (App. 2.) However, the Order permits the Bassetts to contact non-parties, so long as they do so "in a manner designed to cause the least possible intrusion to the lives of said individuals." *Id.* The Order gives no guidance as to how this non-intrusive contact is to be conducted. Moreover, although the Circuit Court indicated it would halt contact if it received complaints regarding the nature of the contact, the Order fails to articulate how a policyholder in Mingo County or Summers County or Cabell County would know to complain to the Circuit Court of Wetzel County regarding contact by the Bassetts. Nor does the Order specify how many complaints relating to the nature of the contact would be needed before the lower court suspended contact.

The lower court erred in allowing the Bassetts to contact the non-litigants. These individuals have a right "to be let alone" and that includes being "let alone" from unsolicited telephone calls, text messages, in-person visits and/or other communications from the Bassetts. *Roach v. Harper*, syl. pt. 1, 143 W. Va. 869, 105 S.E.2d 564.

Presumably through no fault of their own, insureds who were involved in accidents with uninsured motorists made claims

for benefits under the UM coverage they chose to purchase. They did not, however, acquiesce to receiving unsolicited communications, unrelated to the resolution of their claims, from persons outside State Farm. Nor did they, by purchasing UM coverage in an amount less than their liability coverage limits, invite strangers to contact them to discuss their personal financial decisions relating to insurance coverage. Buying insurance or making a claim under an insurance policy does not equate to consent to have strangers pry into one's personal affairs.

In *Karl*, this Court suggested adopting the approach utilized in *Colonial Life & Accident Insurance Company v. Superior Court*, 31 Cal. 3d 785, 647 P.2d 86 (1982), where a "letter of consent to release information" was sent to all non-parties whose information was sought. *Karl*, 202 W. Va. at 747, 505 S.E.2d at 213. The Circuit Court's Order does not provide the same protection to non-parties as does the method suggested by the *Karl* Court.

First, the lower court did not embrace the type of procedure suggested in *Karl*. The Court did not require informing all non-parties their names, addresses and telephone numbers had been requested by the Bassetts, and advising those non-parties of their ability to consent or withhold consent to having their information disclosed.

Second, the lower court failed to set any parameters upon the Bassetts' contact with non-litigants. Although the Order cautioned the Bassetts to initiate contact in a "manner designed to cause the least possible intrusion to the lives of said individuals," the lower court provided no guidelines as to what type of contact that would entail.⁸ (App. 2.) Does that include telephone calls, answering machine messages, text messages, uninvited visits to the insureds' residence?

The Circuit Court also neglected to establish a means by which aggrieved non-parties could complain to the Court. The Order contains a provision stating contact with non-parties will be suspended if the Court received complaints "regarding the nature of said contact." (App. 2.) The Order, however, gives no guidance as to informing non-parties of their right to complain to the Circuit Court of Wetzel County. There is no reason to believe that a policyholder in Logan County, West Virginia, receiving a telephone call, a text message or a personal visit from a representative for the Bassetts would have any idea that

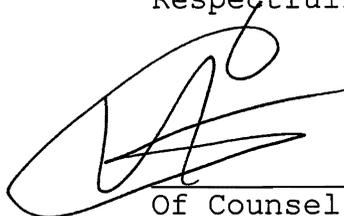
⁸Rule of Professional Conduct 7.3(a) prohibits the solicitation of professional employment through "in-person, live telephone or real-time electronic contact," and Rule 7.3(c) requires a disclaimer that a "written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter" indicate the communication is "Advertising Material." The lower court did not, however, establish any procedures to ensure that contact with non-parties did not devolve into solicitation of those individuals as potential clients.

he or she should contact the Circuit Court of Wetzel County to complain about the contact. The Order entered October 27, 2015, does not adequately protect the privacy rights of State Farm policyholders who have no interest in this litigation and have not consented to the release of their personal information to strangers.

CONCLUSION

Petitioner State Farm Mutual Automobile Insurance Company requests that the Court stay further proceedings in the Circuit Court of Wetzel County, West Virginia, issue a rule to show cause as to why a Writ of Prohibition should not be granted, schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, prohibit the lower court from enforcing the Order of October 27, 2015, and, direct the lower court to deny the Motion to Compel or, alternatively, to establish a procedure whereby the non-parties are notified that the Bassetts have requested their names, addresses and telephone numbers and be given the opportunity to consent to or object to the release of that information, including a procedure whereby the non-parties are informed they may complain to the Circuit Court of Wetzel County in the event they believe they are being harassed or that the contact is intrusive.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. Carter Elkins', written over a horizontal line.

Of Counsel for Petitioner State
Farm Mutual Automobile Insurance
Company

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VERIFICATION

State Farm Mutual Automobile Insurance Company Team
Manager Mary Adkins being duly sworn on oath, deposes and says
that she has read the foregoing Petition for Writ of Prohibition
and that the facts contained therein are, to her knowledge, true
and correct except such facts which are upon information and
belief and that with respect to such facts, she is informed and
believes the same to be true and correct.

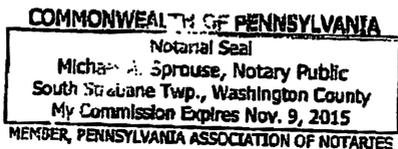
Mary Adkins
Mary Adkins

STATE OF Pennsylvania,

COUNTY OF Washington, TO WIT:

Taker, subscribed and sworn to before me, a notary
public in and for the county and state aforesaid, this 8 day
of Nov, 2015.

My commission expires Nov 9 2015.



Michael A. Sprouse
Notary Public

CERTIFICATE OF SERVICE

The undersigned, of counsel for petitioner, State Farm Mutual Automobile Insurance Company, does hereby certify the Petition for Writ of Prohibition and the Joint Appendix were this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

Honorable Jeffrey D. Cramer, Judge
Circuit Court of Wetzel County
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Moundsville, West Virginia 26155
(304) 845-1727

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The rule to show cause should be served upon Judge Jeffrey Cramer and upon Gregory A. Gellner and Brent K. Kesner as counsel for the respondents.

Done this 16th day of November, 2015.



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