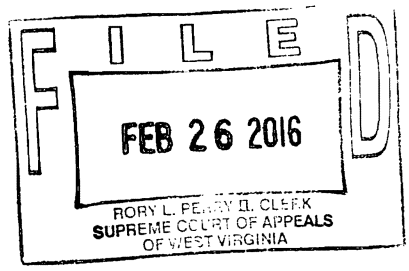
16-0183

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
POTOMAC TRUCKING AND EXCAVATING, INC.

Petitioner,

v. DOCKET NO. _____

THE HONORABLE JAMES W. COURRIER, JR.,
Judge of the Circuit Court of Grant County, West Virginia
and SHIRLEY BERGDOLL,
on behalf of Joshua Bergdoll,
a protected person,

Respondents.

PETITION FOR WRIT OF PROHIBITION

(Circuit Court of Grant County, West Virginia
Civil Action No. 14-C-62)

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QUESTIONS PRESENTED

A. Whether, pursuant to West Virginia Rule of Civil Procedure 34, the Circuit Court erred when it granted Respondent's Motion to Compel, ordering Potomac Trucking and Excavating, Inc. to perform an accident recreation for Respondent by ordering that it produce a truck and trailer, along with a company driver, at the scene of an accident where Respondent's Counsel and/or Respondent's expert will then direct the driver in recreating some and/or all of said accident?

STATEMENT OF THE CASE

This Petition arises out of a civil action now pending in the Circuit Court of Grant County, West Virginia, before respondent, The Honorable Judge James W. Courrier, Jr., currently styled *Shirley Bergdoll, on behalf of Joshua Bergdoll, a protected person, Plaintiff v. Potomac Trucking and Excavating, Inc. and Anna R, Turpin, individually*, Civil Action No. 14-C-62. This Petition for Writ of Prohibition is filed pursuant to Article VIII, §3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, and West Virginia Code § 53-1-1. This Petition for Writ of Prohibition seeks relief from an Order Granting Plaintiff's Motion to Compel entered February 1, 2016.

C. The Allegations of Respondent

On or about December 22, 2014, Joshua David Bergdoll filed his Complaint with the Circuit Court of Grant County, West Virginia. App. at 00007-00015. Mr. Bergdoll's Complaint alleges that, on or about March 7, 2014, Mr. Bergdoll was on his way to work in his 2002 Chevrolet Cavalier westbound on Route 28/55 at approximately 5:45 a.m. when Douglas Wratchford was backing a 2003 Peterbuilt model EX truck and trailer, owned by Potomac Trucking, out of his residential driveway onto Route 28/55. App. at 00008. Mr. Bergdoll's Complaint claims that oncoming traffic had no warning that Mr. Wratchford would be backing the Potomac Trucking Peterbuilt truck and trailer into the active lanes of traffic of Route 28/55.

App. at 00008. Mr. Bergdoll's Complaint alleges that he was lawfully operating his vehicle in the westbound land of Route 28/55 and had the right-of-way when Mr. Wratchford improperly and negligently back Potomac Trucking's Peterbuilt truck and trailer into his immediate path, causing a collision. App. at 00008. Following the collision, Mr. Wratchford reportedly exited the truck and trailer, attempting to warn and flag vehicles approaching the scene of the accident. App. at 00009. Mr. Bergdoll alleged in his Complaint that, on or about the time of the collision, Anna Turpin was traveling westbound on Rt. 28/55 and approached the scene of the accident. As Ms. Turpin approached the accident, she failed to adhere to the warnings being conveyed by Mr. Wratchford and other unknown persons and she struck the rear of Mr. Bergdoll's vehicle. App. at 00009.

Mr. Bergdoll's Complaint set forth five Counts: Count I – Respondeat Superior/Vicarious Liability as to Potomac, Count II – Negligent and Wreckless [sic] Conduct as to Potomac, Count III – Negligent Entrustment as to Potomac, Count IV – Negligence as to Anna Turpin and Count V – Proximate Cause to All Defendants. App. at 0007-00015.

D. <u>Procedural History of Pertinent Underlying Issues</u>

Subsequent to Mr. Bergdoll filing his Complaint, Potomac Trucking served its Answer on January 27, 2015. App. at 00016-00027. Thereafter, Plaintiff made a Motion for Leave to Substitute Shirley Bergdoll as Plaintiff on Behalf of Joshua Bergdoll and to Amend the Style of and/or Case Caption. By Agreed Order entered April 10, 2015, the Circuit Court of Grant County, West Virginia granted leave to substitute Shirley Bergdoll as Plaintiff on behalf of Joshua Bergdoll. App. at 00028-00030. Accordingly, the Respondent for purposes of this appeal, and Plaintiff below, is Shirley Bergdoll, on behalf of Joshua Bergdoll, a protected person.

Regrettably, Mr. Bergdoll passed away on September 10, 2015, due to circumstances not associated with the accident at issue.

During the discovery phase of this case, on October 22, 2015, Respondent served her "Request for Production of Documents and Other Tangible Things and Entry Upon Land for Inspection." App. at 00046-00048. In pertinent part, Respondent requested that Potomac Trucking produce and permit the plaintiff to inspect and/or test the following tangible things:

> 1. That Defendant Potomac Trucking and Excavating, Inc. produce and permit the plaintiff to inspect and/or test the following tangible things:
>
> a. The 2003 Peterbilt Truck Tractor which was involved in the March 7, 2014 collision, and bearing VIN No. 1XPFDB9X23D89333;
> b. The trailer which was involved in the March 7, 2014, collision, and bearing VIN No. WV114284
>
> Such inspection is to take place at 3112 North Fork Highway, Petersburg, WV 26847 at a time and date that is mutually convenient to all parties involved, but not later than 30 days after the Service of this Request.
>
> 2. That the plaintiff be permitted to enter the property located at 3112 North Fork Highway, Petersburg, WV 26847 where the above-described tractor and trailer were parked on March 7, 2014 and to inspect, measure, survey, and photograph such land at the same time and date upon which the inspection described in Request 1 is conducted. This inspection of property is specifically limited to the portions of the property on which the tractor-trailer were parked, the driveway, and any portions of the property on which the tractor-trailer may have been able to drive and or turn around. This inspection does not include or request access or entry to any dwelling or other building on the property.

App. at 00045 to 00048.

On October 29, 2015, Potomac Trucking objected to Respondent's Requests for Production. *See* App. at 00049 to 00052. Further, by letter dated October 29, 2015, Counsel for

Potomac Trucking explained that, regarding inspecting the truck and trailer, Counsel would contact Potomac Trucking to see if it still had possession of the same. App. at 00053 to 00054. It was noted, at that time, that Respondent's expert had already been permitted to inspect the truck and trailer on April 3, 2014. *Id.* During that inspection, Respondent's expert had free access to inspect and test both the truck and trailer. *Id.* After that, by way of email communications dated April 7, 2014, Potomac Trucking's Counsel informed Respondent's Counsel that the trailer would be repaired and both the trailer and truck would be put back in service. *Id.* Respondent's Counsel agreed that the repairs could be made. *Id.* Nevertheless, despite the fact Respondent had already been allowed to conduct one inspection and despite questions regarding the usefulness of any information from an inspection of a vehicle that had been back in use for almost 18 months, at the time of the request, Potomac Trucking's Counsel agreed to make arrangements for Respondent's expert to inspect the same, if Potomac Trucking still had possession of the truck. *Id.*

While Potomac Trucking agreed to produce the truck and trailer, Potomac Trucking objected to producing it at Mr. Wratchford's residence. *Id.* It was noted that Mr. Wratchford was not a party to the suit and his property was beyond the control of Potomac Trucking, and Potomac Trucking possessed no ability to make Mr. Wratchford permit inspections on or of his property. *Id.* Counsel for Potomac Trucking pointed out that the West Virginia Rules of Civil Procedure do not require Potomac Trucking to drive its truck and trailer to its employee's property for an inspection and/or testing to take place. *Id.* As a result, Potomac Trucking advised that it would only make the truck and trailer available to be inspected at Potomac Trucking's facility. *Id.* However, Potomac Trucking's Counsel indicated that he would be willing to speak with Mr. Wratchford to see if he would permit his property to be inspected,

which, if he was willing, then this would avoid the subpoena process set forth in Rule 45 of the West Virginia Rules of Civil Procedure. *Id.*

On November 5, 2015, Respondent made the purpose of her request clearer. In a letter from her Counsel to Potomac Trucking's Counsel, it was noted that Respondent sought to recreate the accident in order to "evaluate what could or could not be seen by either Mr. Wratchford or Mr. Bergdoll as the truck and trailer were being backed out of Mr. Wratchford's property." Once again, Potomac Trucking objected to Respondent's request. App. at 00057 to 00058. By letter dated November 9, 2015, Potomac Trucking noted that the West Virginia Rules of Civil Procedure do not require that Potomac Trucking take its truck and trailer to Mr. Wratchford's residence so that Respondent may recreate the accident. *Id.* Counsel for Potomac Trucking advised Respondent that Potomac Trucking would not make the truck and trailer available at Mr. Wratchford's residence as it was not hard to envision complications arising with the production of Potomac Trucking's truck and trailer in such a manner. *Id.* Further, Potomac Trucking's counsel noted that Potomac Trucking would not participate in a recreation of the accident as it is not required to do so under the West Virginia Rules of Civil Procedure. *Id.* Potomac Trucking noted, however, that it would make the truck and trailer available for inspection at its shop as it still possessed the truck and trailer. *Id.* Also, Potomac Trucking indicated that it likely could coordinate with Mr. Wratchford access to his property for inspection of the property, and would do its best to facilitate a voluntary inspection of the property. *Id.*

Counsel for both sides undertook further efforts to resolve this matter. App. at 00059 to 00062. However, an impasse was reached and, as a result, Respondent served a Motion to Compel on December 3, 2015. App. at 00031 to 00074. At that time, the Motion was set for hearing on January 11, 2016. Potomac Trucking served its Response to Respondent's Motion to

Compel on January 7, 2016. App. at 00075 to 00087. Following the hearing on January 11, 2016, by Order entered February 1, 2016, and received by Potomac Trucking's Counsel on February 5, 2016, the Circuit Court of Grant County, West Virginia granted Respondent's Motion to Compel. App. at 00001 to 00006. The Order directed that Potomac Trucking produce the subject truck and trailer at the location of the accident and have its employee operate the truck for an accident recreation, as specified by the Plaintiff in her request for inspection, within thirty (30) days from the entry of the Order. *Id.* On February 11, 2016, Potomac Trucking served its Motion to Stay Proceedings in the Circuit Court of Grant County, West Virginia Pending Resolution of Writ of Prohibition. *Id.* This Motion is set for hearing on February 25, 2016.

Since the Circuit Court entered its Order granting Respondent's Motion to Compel, Respondent has settled her claims against Ms. Turpin and has agreed to dismiss Ms Turpin as a defendant. Further, Respondent filed a Motion for Leave to File Her First Amended Complaint to add Douglas Allen Wratchford, individually, as a defendant. However, based upon information received from the Grant County Circuit Clerk's Office on February 23, 2016, no Order granting this Motion has been entered on the Circuit Court's Docket. Further, according to the Clerk's Office, there is no indication upon the Circuit Court's docket that the First Amended Complaint has been filed or that it has been served upon Mr. Wratchford.

SUMMARY OF THE ARGUMENT

The Circuit Court of Grant County, West Virginia, contrary to any established West Virginia law, has ordered Potomac Trucking to perform a recreation of the accident with its truck and trailer operated by its employee for the sole benefit and at the sole direction of Respondent. As a result of the Circuit Court's Order, Potomac Trucking is being forced to assume liability for

transportation of the truck to Mr. Wratchford's property, the use of the truck and trailer during recreation of the accident at Mr. Wratchford's property, and transportation of the truck back to Potomac Trucking's office. Imposing this substantial burden of recreating the accident for Plaintiff upon Potomac Trucking while also forcing it to assume all liability associated with the same is not contemplated by Rule 34 of the West Virginia Rules of Civil Procedure and certainly is not a reasonable manner in which to proceed under Rule 34.

There are no cases or instances under West Virginia law where a defendant is required to actively participate in a recreation with its employee and vehicle, at the location of the subject accident, at the direction of the plaintiff. In fact, other courts have found that this type of accident recreation is not permitted. *Sullivan v. New York City Transit Authority*, 487 N.Y.S.3d 72, 74, 109 A.D.2d 879 (N.Y.A.D. 2 Dept. 1985) (upheld a lower Court decision to grant a protective order against plaintiffs' request that defendants supply them with a certain bus to be positioned on a city street so as to recreate the alleged accident scene, finding that Civil Practice Law and Rule 3120 contemplated discovery and inspection and did not sanction the reenactment of an alleged accident scenario); *see also Madison v. Spancrete Machine Corp.*, CA 01-01071 (N.Y.A.D. 4 Dept. 2001) (Revising lower court grant of motion compelling inspection, finding that the proposed protocol effectively required third-party defendant to reenact the accident and that CPLR 3120 (a) (1) (ii) permits "entry upon designated land or other property in the possession, custody or control of [a] party * * * for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon." It does not authorize discovery and inspection in the form of an accident reenactment.); *Hyde v. Chrysler Corp.*, 540 N.Y.S.2d 868, 150 A.D.2d 343 (N.Y.A.D. 2 Dept. 1989) (Affirmed lower court's decision when

declined to authorize further discovery and inspection in the form of an accident reenactment at the plaintiff's premises.).

Nothing in the West Virginia Rules of Civil Procedure permits a party to force and/or require, by Court Order, another party to actually "create" evidence for the other party to use against it at the trial. Likewise, the Rules of Civil Procedure do not mandate an accident vehicle be produced at the location of the accident and operated by the defendant for a plaintiff's expert so the accident scene can be inspected and/or the accident recreated. This recreation is not a reasonable manner to conduct an inspection because of the burden placed upon Potomac Trucking, and therefore, this Court should reverse the Circuit Court's Order Granting Respondent's Motion to Compel.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

ARGUMENT

Standard of Review

This Court has previously stated that "[t]he writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of jurisdiction." Syl., *State ex rel. Vineyard v. O'Brien*, 100 W. Va. 163, 130 S.E. 111 (1925); *see also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) ("Prohibition lies only to restrain inferior courts

from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari."); Syl. Pt.2, *State ex rel. Preacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977) ("A writ of prohibition will not issue to prevent a simply abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1.")

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

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

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

B. Pursuant to Rule 34 of the West Virginia Rules of Civil Procedure, the Circuit Court of Grant County erred when it Ordered that Potomac Trucking supply its truck and trailer and a driver to recreate for Plaintiff the accident that is the subject of the underlying litigation.

Rule 34 of the West Virginia Rules of Civil Procedure require that Plaintiff designate "a **reasonable** time, place, and manner" for its requested inspection. *See* W. Va. R. Civ. 34(b). (Emphasis supplied.) However, under the circumstances of this case, inspection is not reasonable because it involves Potomac Trucking actually having its employee perform and take part in a recreation of the subject accident with Potomac Trucking's truck and trailer at the direction of and for the benefit of Respondent.

Respondent explained in her Motion to Compel, "[t]he purpose of this inspection is to evaluate what could or could not be seen by either Mr. Wratchford or Mr. Bergdoll as the truck and trailer were being back out of Mr. Wratchford's property." App. 00036. In other words, the purpose of Plaintiff's requested inspection at the designated location, Mr. Wratchford's property, is to have Potomac Trucking perform an accident recreation for and on behalf of her and her expert. The Grant County Circuit Court granted Respondent's Motion to Compel, ordering Potomac Trucking to not only produce the subject truck and trailer at the location specified by Plaintiff in her request for inspection, but also to (1) operate the truck and trailer at the direction of the Plaintiff for purposes of recreating the accident, and (2) allow Plaintiff's expert to be inside the subject truck at various spots on the driveway to determine sight lines and to determine what could and could not be seen by Defendant's employee while backing the truck out of the driveway. App. 00005. By the Circuit Court's Order, Plaintiff has no limit on the number of times the subject truck can be backed out of the driveway, except that they should not be "unreasonably demanded."

In Respondent's Motion to Compel, she repeatedly proclaimed the reasonableness of her request that Potomac Trucking's truck and trailer be produced at the property owned by its employee Mr. Wratchford. Respondent contends that it would be very hard for the Defendant to argue that an inspection that takes place at the exact location of the accident is unreasonable. App. at 00011. In so doing, Respondent wrongly articulates Defendant's position by suggesting that Potomac Trucking and Excavating "is obstructing this valid inspection" because it is concerned "that the inspection will lead to damaging evidence which could be used against it." *Id.* While Potomac Trucking has acknowledged that this "inspection," which the Court has ordered it partake in at the direction of Respondent, will inevitably be argued against it for liability in this accident, this is not the true reason for Potomac Trucking's objection. As Potomac Trucking succinctly noted in its Response to Respondent's Motion to Compel, there are a number of "problems arising" with the compelled production of Potomac Trucking's truck and trailer – problems the West Virginia Rules of Civil Procedure do not require Potomac Trucking assume merely because a plaintiff wishes to conduct a recreation of the underlying accident. *See* App. 00075 to 00081.

The Circuit Court, failing to cite to any legal authority upon which it basis its findings, simply states that "the location specified by the plaintiff for the inspection of the truck and trailer is reasonable . . ." pursuant to Rule 34 of the West Virginia Rules of Civil Procedure. *See* App. 00001 to 00006 Notably, however, the Circuit Court fails to point to the provision within Rule 34 of the West Virginia Rules of Civil Procedure, or for that matter any other Rule within the West Virginia Rules of Civil Procedure, that imposes an obligation upon a party to litigation to perform for or be a party to an accident recreation that the other party to litigation wishes to perform. *See* App. at 00001 to 00006. Indeed, there is nothing in the West Virginia Rules of

Civil Procedure that mandates an accident vehicle be produced at the location of the accident so the accident scene can be "inspected," or as in this case, the accident recreated.

While the Circuit Court ordered that Respondent pay for the reasonable fuel expenses related to bringing the subject truck and trailer from the Petitioner's offices/shop to the location of the inspection and to pay for the reasonable expenses to have one of Petitioner's employees operate the subject truck and trailer, Respondent's request and the Circuit Court's Order completely ignores the burden and the liability imposed upon Potomac Trucking by compelling it to recreate the accident (i.e., if there would be an accident and/or incident going to, while at, or traveling from the inspection, Potomac Trucking potentially could be sued by Potomac Trucking's driver, Mr. Wratchford, Respondent's expert witness and/or a other third a third parties that may come into contact with the events of this recreation). *Id.* As a result of the Circuit Court's Order, Potomac Trucking, under the direction of Respondent, her counsel and/or her expert, is being forced to assume liability for transportation of the truck to Mr. Wratchford's property, the use of the truck and trailer during recreation of the accident at Mr. Wratchford's property, and transportation of the truck back to Potomac Trucking's office. *See* App. 00077. In other words, while operating the truck and trailer for the sole benefit of Respondent, Potomac Trucking is being forcibly exposed to potential liability for any incident(s) that may occur while the truck is being transported to and from Mr. Wratchford's property, including any potential liability to third-parties who may be involved in a possible incident and/or liability to the driver of the truck and trailer. *Id.* Similarly, Potomac Trucking is also being forcibly exposed to liability for any incident(s) that may occur while the truck is being utilized, at the direction of Respondent, at Mr. Wratchford's property, including any potential liability to third-parties, the driver and Respondent's expert, an individual the Circuit Court ordered may be inside the truck

as well as any potential real property damage that may result. *Id.* All the while, Potomac Trucking is being forced to actually create evidence that Respondent will seek to introduce against it at the trial of this matter.

Imposing this substantial burden of recreating the accident for Plaintiff upon Potomac Trucking while also forcing it to assume all liability associated with the same is not contemplated by Rule 34 of the West Virginia Rules of Civil Procedure and certainly is not a reasonable manner in which to proceed under Rule 34. *Id.* Clearly, contrary to the Circuit Court's finding, under the present circumstances, there is nothing reasonable about Respondent's requests. *Id.* In fact, there are no cases or instances under West Virginia law where a defendant is required to actively participate in a recreation with its employee, with its vehicle, at the location of the subject accident. Other courts have found that this type of accident recreation is not permitted. *See id.* 00078 to 00079; 00098-00101. For example, the Supreme Court, Appellate Division, Second Department of New York upheld a lower Court decision to grant a protective order against the plaintiffs' request that defendants supply them with a certain bus to be positioned on a city street so as to recreate the alleged accident scene. *Sullivan v. New York City Transit Authority*, 487 N.Y.S.3d 72, 74, 109 A.D.2d 879 (N.Y.A.D. 2 Dept. 1985). There, the Court found that Civil Practice Law and Rule 3120 contemplated discovery and inspection and did not sanction the reenactment of an alleged accident scenario. *Id.*; *see also Madison v. Spancrete Machine Corp.*, CA 01-01071 (N.Y.A.D. 4 Dept. 2001) (Revising lower court grant of motion compelling inspection, finding that the proposed protocol effectively required third-party defendant to reenact the accident and that CPLR 3120 (a) (1) (ii) permits "entry upon designated land or other property in the possession, custody or control of [a] party * * * for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion

pictures or otherwise the property or any specifically designated object or operation thereon." It does not authorize discovery and inspection in the form of an accident reenactment.); *Hyde v. Chrysler Corp.*, 540 N.Y.S.2d 868, 150 A.D.2d 343 (N.Y.A.D. 2 Dept. 1989) (Affirmed lower court's decision when declined to authorize further discovery and inspection in the form of an accident reenactment at the plaintiff's premises.).

Rule 34 of the West Virginia Rules of Civil Procedure is very similar to New York's Civil Practice Law and Rule 3120. *See* App. 00078 to 00079. Much like West Virginia's Rule of Civil Procedure 34, New York's Civil Practice Law and Rules 3120 provides for "discovery and production of documents and things for inspection, testing, copying or photographing." More specifically it provides as follows:

> 1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum: (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, **to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served**; or (ii) **to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.**
>
> 2. The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity.
>
> 3. The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto

> are available for inspection and copying, specifying the time and place thereof.
>
> 4. Nothing contained in this section shall be construed to change the requirement of section 2307 that a subpoena duces tecum to be served upon a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof, requires a motion made on notice to the library, department, bureau or officer, and the adverse party, to a justice of the supreme court or a judge of the court in which the action is triable.

See N.Y. C.P.L.R. 3120. (Emphasis supplied.) Just as there is nothing within CPLR 3120 that sanctions the reenactment of an alleged accident scenario, there is also nothing in Rule 34 that would sanction such a reenactment. *See* App. 00078 to 00079. Indeed, West Virginia Rule of Civil Procedure, like CPLR 3120, provides as follows:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or **to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served**; or (2) **to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon**, within the scope of Rule 26(b).

W. Va. R. Civ. P. 34. (Emphasis supplied.) Clearly, this recreation is not a reasonable manner to conduct an inspection because of the burden placed upon Potomac Trucking, and the Circuit Court exceeded its legitimate powers in ordering the same.

Discovery is governed by the Rules of Civil Procedure and a circuit court has no inherent power to compel discovery. As a result, a motion to compel discovery must fail unless there is a specific rule authorizing a circuit court to enter an order compel the discovery sought. In the

present case, there is no Rule of Civil Procedure that authorizes Respondent to forcibly recreate the accident for her benefit. In fact, there is nothing in the West Virginia Rules of Civil Procedure that would even suggest that a circuit court may compel a defendant to operate a motor vehicle or recreate an accident at the direction of a plaintiff. The Circuit Court's Order Compelling Potomac Trucking to perform a "recreation" of the accident overlooks the fact that the ability of any party to portray completely and exactly how an accident occurred is impossible. Indeed, the recreation of an accident fails to capture the uncertainties of a witness's recollection. In other words, whereas a verbal description of an accident will convey a party's hesitancies and/or vagueness as to certain facts, the recreation of an accident, like the one compelled in this case, will not express these ambiguities. Recreating the exact trajectory at which the vehicles were traveling in the moments leading up to and during this accident is virtually impossible. In fact, in the present case, Plaintiff has admitted that the purpose of this inspection is to evaluate what could or could not be seen by either Mr. Wratchford or Mr. Bergdoll as the truck and trailer were being back out of Mr. Wratchford's property. Certainly, the lighting conditions on the day in question as well as the visibility of reach vehicle, which could depend not only on the time of day, the stage of the moon and the weather conditions, but also on the conditions of the vehicle at the time of the accident. Further, Mr. Bergdoll has never given a deposition in this matter, and, as noted previously, unfortunately, Mr. Bergdoll has since passed away. As a result, the ability to recreate Mr. Bergdoll's location and/or actions leading up to and during the accident will be next to impossible. It is factors like these, in addition to the burden of liability placed upon the party being forced to recreate the accident, which clearly demonstrate that Rule 34 of the West Virginia Rules of Civil Procedure do not authorize recreation of an accident.

As the discussion above demonstrates, Potomac Trucking will suffer extreme prejudice if it is forced to comply with the Circuit Court's Order Granting Respondent's Motion to Compel. Indeed, Potomac Trucking will unreasonably be forced to perform, at the direction and on behalf of Respondent, a recreation of the accident that is the subject of this litigation, and assume all liability associated with said recreation. Potomac Trucking has no other adequate means to obtain its desired relief other than this writ of prohibition.

CONCLUSION

For the foregoing reasons, Potomac Trucking and Excavating, Inc., respectfully requests that this Honorable Court issue a show cause why the Court should not grant this Petition for Writ of Prohibition, and reverse the Circuit Court's Order Granting Respondent's Motion to Compel, directing the Circuit Court to enter an order denying the same.

Signed: Tiffany A. Cropp

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Morgantown, WV 26501

VERIFICATON

STATE OF WEST VIRGINIA

COUNTY OF MONONGALIA, to wit:

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

Tiffany A. Cropp

Tiffany A. Cropp, Esq.
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TAYLOR LAW OFFICE
34 Commerce Drive, Suite 201
Morgantown, WV 26501

STATE OF WEST VIRGINIA

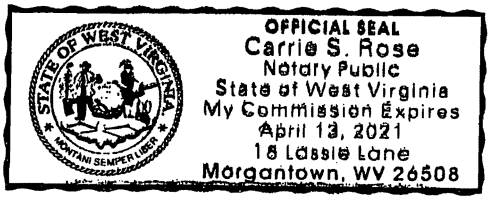
COUNTY OF MONONGALIA, to wit:

Subscribed and sworn to before me by Tiffany A. Cropp on this the 23rd day of February, 2016.

Carrie S. Rose

Notary Public

My commission expires: 13th day of April, 2021.



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
POTOMAC TRUCKING AND EXCAVATING, INC.

Petitioner,

v. DOCKET NO. _____

THE HONORABLE PHIL JORDAN, Judge of the
Circuit Court of Grant County, West Virginia and
SHIRLEY BERGDOLL,
on behalf of Joshua Bergdoll,
a protected person.

Respondents.

APPENDIX TO PETITION FOR WRIT OF PROHIBITION

(Circuit Court of Grant County, West Virginia
Civil Action No. 14-C-62)

Counsel for Potomac Trucking and Excavating, Inc.

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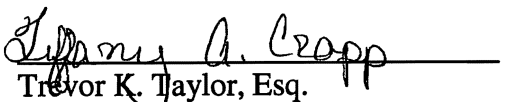
PETITIONER'S CERTIFICATION OF APPENDIX

Petitioner, Potomac Trucking and Excavating, Inc., through its undersigned counsel, hereby certifies that the contents in the appendix are true and accurate copies of items contained in the record of the lower tribunal. Further, Petitioner certifies that the appendix as a whole is sufficient to permit the Court to fairly consider the questions presented in the petition.

Counsel for Potomac Trucking and Excavating, Inc.



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APPENDIX OF EXHIBITS
TABLE OF CONTENTS

Petitioner, Potomac Trucking and Excavating, Inc., pursuant to Rule 7(c)(3) of the West Virginia Rules of Appellate Procedure, with respect to that certain Writ of Prohibition filed contemporaneously herewith, does hereby state that the following portions of the record have been determined by the Petitioner to be necessary as to a determination of the issues raised in the Notice of Appeal:

1. Order Granting Plaintiff's Motion to Compel.....00001

2. Complaint.....00007

3. Defendant Potomac Trucking and Excavating, Inc.'s Answer to Plaintiff's Complaint.....00016

4. Agreed Order Granting Plaintiff's Motion for Leave to Substitute Shirley Bergdoll as Plaintiff on Behalf of Joshua Bergdoll and to Amend the Style and/or Case Option.....00028

5. Plaintiff's Motion to Compel.....00031

6. Exhibit 1 to Plaintiff's Motion to Compel Containing Letter dated October 22, 2015 and Plaintiff's Request for Production of Documents and Other Tangible Things and Entry Upon Land for Inspection.....00045

7. Exhibit 2 to Plaintiff's Motion to Compel Containing Defendant Potomac Trucking and Excavating, Inc.'s Objections To Plaintiff's October 22, 2015, Request for Production of Documents and Other Tangible Things and Entry Upon Land for Inspection.....00049

8. Exhibit 3 to Plaintiff's Motion to Compel Containing Letter Dated October 29, 2015.....00053

9. Exhibit 4 to Plaintiff's Motion to Compel Containing Letter Dated November 9, 2015.....00055

10. Exhibit 5 to Plaintiff's Motion to Compel Containing Letter Dated November 9, 2015.....00057

11. Exhibit 6 to Plaintiff's Motion to Compel Containing Letter Dated November 13, 2015.....00059

12. Exhibit 7 to Plaintiff's Motion to Compel Containing Series of Emails.....00061

13. Exhibit 8 to Plaintiff's Motion to Compel Containing Portions of The Videotaped Deposition of Douglas Allen Wratchford.....00063

14. Potomac Trucking and Excavating, Inc.'s Response to Plaintiff's Motion to Compel.....00075

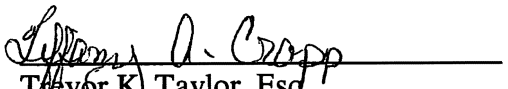
15. Potomac Trucking and Excavating, Inc.'s Motion to Stay Proceedings in the Circuit Court Of Grant County, West Virginia Pending Resolution Of Writ Of Prohibition.....00088

16. Certified Copy of Docket Sheet.....00095

17. Other Jurisdiction Case Law Cited in Petition.....00098

Respectfully submitted this 23rd day of February, 2015.

Counsel for Potomac Trucking and Excavating, Inc.



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2016, true and accurate copies of the foregoing **"Petition for Writ of Prohibition"** and **"Appendix"** were served via United States Mail in a postage-paid envelope addressed to the following:

The Honorable Judge James W. Courrier, Jr.
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