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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 20-0257



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

v.

THE HONORABLE JENNIFER BAILEY,
Respondent.

Relief sought from an Order of the Circuit Court
of Kanawha County (16-C-497) consolidating
Civil Action No. 18-C-985 with 16-C-497

Petition for Writ of Prohibition

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I. QUESTION PRESENTED

1. Did the trial court err when it consolidated an insurance coverage action filed by West Virginia Mutual Insurance Company with the underlying sexual abuse tort cases against its insured under West Virginia Rule of Civil Procedure 42(a) when the coverage action involves distinct questions of fact and law from those in the tort cases pending against the insured?

II. STATEMENT OF THE CASE

a. Procedural History

West Virginia Mutual Insurance Company's ("WVMIC") Petition for Writ of Prohibition arises from the Circuit Court's Order consolidating a declaratory judgment action—an action premised on insurance and contract law principles—with several consolidated tort lawsuits against WVMIC's insured which allege a bevy of torts ranging from sexual harassment to fraud. Despite the varying questions of law and fact that must be resolved in these disparate actions, the trial court entered an Order consolidating WVMIC's declaratory judgment action with the tort lawsuits on March 3, 2020. Petitioner's Appendix ("App.") 1. WVMIC now seeks a Writ of Prohibition prohibiting the Honorable Jennifer Bailey from conducting any further proceedings in Civil Action No. 16-C-497 until the Order joining WVMIC's unrelated declaratory judgment action with the underlying tort cases has been vacated.

The first of these dissimilar, underlying tort cases, *T.W. v. Steven R. Matulis, et al.*, Civil Action No. 16-C-497 in the Circuit Court of Kanawha County, West Virginia, was filed on April 5, 2016, before Judge Jennifer Bailey. In that case, the plaintiff alleged that Dr. Matulis subjected her to inappropriate touching and sexual misconduct while she was unconscious for a medical procedure. App. 257. Based on these allegations, the plaintiff brought claims against Dr. Matulis and his medical practice, Charleston Gastroenterology Associates, PLLC ("the Practice").

In the wake of the *T.W.* case, a number of other plaintiffs also brought suits against Dr. Matulis and the Practice, asserting similar claims of alleged sexual misconduct.¹ In total, fifteen

¹ Some of the other suits brought, such as *A.H., et al. v. Steven Matulis, et al.*, Civil Action No. 18-C-176, included other entities such as Charleston Area Medical Center, Inc. App. 446.

separate lawsuits based on this conduct were filed against Dr. Matulis and the Practice.² Because each of these lawsuits “alleg[ed] substantially similar facts,” the trial court entered an Order on September 26, 2018, consolidating those tort cases.³ App. 545.

WVMIC filed a declaratory judgment action against Dr. Matulis and the Practice on May 30, 2017, because these sexual tort actions are not covered by an insurance policy number PL0002028 (“the Policy”) issued by WVMIC effective July 1, 2015 to July 1, 2016.⁴ App. 20. This declaratory judgment action, Civil Action No. 17-C-748, was assigned to Judge Charles King in the Circuit Court of Kanawha County. *Id.* WVMIC’s initial declaratory judgment sought a declaration of no coverage of three sexual abuse tort claims made against Dr. Matulis and the Practice. The Complaint has since been amended several times as additional claims were asserted against Dr. Matulis and the Practice, to seek a declaration of no coverage on all claims asserted based on Dr. Matulis alleged sexual misconduct. App. 105, 144.

In response to WVMIC’s declaratory judgment action, Dr. Matulis and the Practice filed an answer and counter-claims, including claims for alleged breach of the duty of good faith and fair dealing, alleged violation of the Unfair Claims Settlement Practices Act under W. Va. Code § 33-11-4(9), and common law bad faith. App. 513. Thus, Civil Action No. 17-C-748 consists of an insurance coverage declaratory judgment action and insurance bad faith claims, while Civil

² The cases against Dr. Matulis and the Practice include Civil Action Nos. in the Circuit Court of Kanawha County: 16-C-497; 16-C-1709; 16-C-1723; 16-C-1738; 17-C-286; 17-C-456; 17-C-1057; 17-C-1472; 17-C-1579; 18-C-15; 18-C-176; 18-C-205; 18-C-575; 18-C-576; and 18-C-578. App. 144-492.

³ The West Virginia Rules of Civil Procedure set forth two provisions governing the consolidation of cases: Rule 42(a) and 42(b). Rule 42(a) contemplates actions “before the court” whereas Rule 42(b) governs actions “pending before different courts.” The Circuit Court cited both Rules in its September 26, 2018 Order, but it is unclear which provision it ultimately followed to effect consolidation in that Order. App. 544.

⁴ This date range represents the effective dates of the Policy. App. 198.

Action No. 16-C-497 consists of a plethora of individual sexual abuse tort claims against Dr. Matulis and others.

On July 8, 2019, WVMIC moved for judgment on the pleadings in its declaratory judgment action based upon three distinct coverage defenses: an intentional acts exclusion in the Policy, a sexual acts exclusion in the Policy, and the fact that Dr. Matulis’s sexual misconduct does not constitute a “medical incident” or “professional services” sufficient to trigger coverage under the Policy. App. 552. Through this Motion, WVMIC sought to swiftly resolve its coverage obligations. Indeed, in October 2019, it filed a Motion to Advance its Declaratory Judgment Action pursuant to Rule of Civil Procedure 57 in an effort to have coverage issues resolved prior to the plaintiffs’ consolidated tort claims in Civil Action No. 16-C-497. App. 768. WVMIC’s effort to obtain a resolution of the coverage issue, however, has been now delayed by the efforts of the claimants to join these two lawsuits together.

b. Claimants’ Efforts to Consolidate WVMIC’s Action

Nearly *one year* after the tort cases premised on Dr. Matulis’s alleged sexual misconduct were consolidated—and nearly *two years* after WVMIC filed its declaratory judgment action—plaintiffs in those sexual abuse tort actions sought to bypass the assignment of the declaratory judgment action to Judge King by seeking to consolidate WVMIC’s declaratory judgment action, with the pendent counterclaims for bad faith, with the pending tort actions in Civil Action No. 16-C-497 before Judge Bailey. Specifically, on May 10, 2019, plaintiffs in *A.H., et al. v. Steven Matulis, et al.* filed a Motion to Consolidate based on Rule 42 of the West Virginia Rules of Civil Procedure⁵ merely containing a conclusory assertion that the “declaratory judgment action aris[es] out of the same facts” as the tort actions filed against Dr. Matulis. App. 658. On May 31, 2019,

⁵ These plaintiffs did not specify whether they were basing their motion on Rule 42(a) or 42(b).

the plaintiffs in *Y.T. v. Steven Matulis, et al.* filed a Motion to Transfer based on Rule 42(b). App. 692.

On August 20, 2019, WVMIC filed a Memorandum of Law in Opposition to A.H. and Adriana Fleming's Motion to Consolidate, arguing that the Motion was an effort to delay a determination on insurance coverage, that there was no common factual or legal issue as required to consolidate under Rule 42(a), and that consolidation would prejudice WVMIC. App. 666. On September 24, 2019, A.H. filed a reply that seemingly conceded that Rule 42(b) did not apply because the cases were "technically not in 'different courts' " but argued that Rule 42(a) applied because the declaratory judgment action turned on the same set of facts as the tort actions in Civil Action No. 16-C-497. App. 683.

The same day that WVMIC filed its Memorandum of Law in Opposition to A.H. and Adriana Fleming's Motion to Consolidate, it also filed a Memorandum of Law in Opposition to Y.T.'s Motion to Transfer. App. 707. In that Opposition, WVMIC noted that Rule 42(b) does not apply because both actions are pending in the Circuit Court of Kanawha County; that even if Rule 42(b) did apply, consolidation of the declaratory judgment action was improper because it did not arise out of the same transaction or occurrence as the tort claims in Civil Action No. 16-C-497; and that Judge King should decide the Motion to Transfer because WVMIC's action was filed prior to Y.T.'s tort action.

Judge King failed to take up these motions.⁶ See App. 826. On November 22, 2019, the parties appeared before Judge Bailey in Civil Action No. 16-C-497 for hearing on the Motions. At this hearing Judge Bailey ultimately indicated she was going to consolidate WVMIC's case

⁶ When counsel for WVMIC contacted Judge King's chambers in an effort to obtain a potential hearing date for these issues counsel was advised by Judge King's law clerk that Judge King was deferring ruling on these matters to Judge Bailey.

with the tort actions in Civil Action No. 16-C-497. But the Court did not state whether its decision was predicated on West Virginia Rule of Civil Procedure 42(a) or 42(b). App. 783, 812. Instead of citing the relevant West Virginia Rule of Civil Procedure on which its decision turned, the Court indicated at the hearing that it was consolidating the cases based on “efficiency”—not because they involved common questions of law or fact or the same transaction. App. 810 (determining that consolidation made sense “strictly looking at the efficiency”); *id.* at 811 (determining that consolidation was appropriate “so that we can keep everybody in one area moving forward, scheduling and so forth”). To understand the basis for Judge Bailey’s decision, WVMIC requested that the Court enter an Order which contained findings of fact and conclusions of law so that WVMIC could determine whether it had basis for a petition for writ of prohibition. App. 834, 844.

c. The Trial Court’s Erroneous Order

Several months later, on March 3, 2020, the trial court entered its *Order Granting Motion to Consolidate Civil Action Number 17-C-748 With Civil Action Number 16-C-497*. App. 1. Citing Rule 42(a) of the West Virginia Rules of Civil Procedure, the trial court concluded that WVMIC’s declaratory judgment action and the underlying tort actions “stem from and turn on the application of the same set of facts,” App. 4, and consolidated WVMIC’s case with Civil Action No. 16-C-497. The trial court did not specifically mention Rule 42(b) of the West Virginia Rules of Civil Procedure, nor separately address Y.T.’s Motion to Transfer premised on that provision. Most troubling was the trial court’s conclusion that the coverage issues—including whether WVMIC even has a duty to defend in the first instance—will somehow turn on whether facts developed through discovery in the underlying tort claims establish that sexual abuse actually occurred. App. 4. This ignores that the duty to defend turns on the allegations in the complaint,

not on whether those allegations are true. Thus, the trial court erroneously entangled the coverage analysis with the search for the truth of the underlying tort allegations.

Because WVMIC's case is not appropriate for consolidation with Civil Action No. 16-C-497 under either Rule 42(a) of the West Virginia Rules of Civil Procedure WVMIC now petitions this Court for a Writ of Prohibition prohibiting the Honorable Jennifer Bailey from conducting any further proceedings in Civil Action No. 16-C-497 until the Order consolidating WVMIC's unrelated declaratory judgment action with the consolidated tort cases has been vacated.

III. SUMMARY OF ARGUMENT

Consolidation exists to group like cases together so they may be resolved efficiently and effectively. Despite this, the trial court used West Virginia Rule of Civil Procedure 42(a) to group dissimilar cases that may not be efficiently resolved together, and in fact, cannot be resolved together at all. Put simply, the trial court erroneously used the Rule to group apples and oranges—WVMIC's insurance coverage action is fundamentally different than the sexual abuse tort cases. Indeed, this Court previously recognized in *State ex rel. Energy Corp. of Am. v. Marks*, 235 W. Va. 465, 470, 774 S.E.2d 546, 551 (2015) that lawsuits regarding insurance coverage do not present common legal or factual issues as underlying tort actions. This makes sense—the question of what an insurance contract means and what it covers is an entirely distinct issue from whether a party in a tort lawsuit is legally liable for a tortious act. Therefore, WVMIC's declaratory action regarding insurance coverage does not present a "common question of law or fact" with tort actions alleging sexual torts.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under West Virginia Rule of Appellate Procedure 18(a), WVMIC respectfully requests a Rule 19 oral argument. This Petition is appropriate for oral argument pursuant to Rule of Appellate

Procedure 19(a)(2) because it addresses issues of unsustainable exercise of discretion where West Virginia law governing that discretion is settled. Specifically, it will resolve issues regarding the requirement of what findings of fact and conclusions of law are appropriate under the requirements of West Virginia Rule of Civil Procedure 42(a). The Circuit Court’s ruling only operates to sidestep the governing law and generally misapply it, as discussed more fully below. Accordingly, because this Petition satisfies Rule 19 of the West Virginia Rules of Appellate Procedure, oral argument is both necessary and appropriate.

V. ARGUMENT

a. A Writ of Prohibition is appropriate because WVMIC will be irreparably harmed if it is forced to litigate an improperly consolidated case.

The West Virginia Constitution confers original jurisdiction upon the Supreme Court of Appeals regarding extraordinary remedies, such as Writs of Prohibition. *See* W. VA. CONST. art VIII, § 3. A Writ of Prohibition “shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court . . . exceeds its legitimate powers.” W. VA. CODE § 53-1-2. This extends to interlocutory orders and a Circuit Court’s granting of injunctive relief. *See* W. VA. CODE § 53-5-8.

Issuance of a Writ of Prohibition “under the original jurisdiction of the Supreme Court . . . is not a matter of right, but of discretion sparingly exercised.” W. VA. R. App. P. 20. Generally, this Court discourages parties from invoking its original jurisdiction in cases “involving merely factual disputes.” *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548 (1996). However, “[w]here the issues are largely one of law and clearly erroneous actions of the court below are asserted, prohibition may be a more appropriate method to seek review of an interlocutory determination regarding injunctive relief.” *State ex rel. McGraw v. Telecheck Serv.*,

213 W. Va. 438, 582 S.E.2d 885, n. 11 (2003); *see also E.I. DuPont de Nemours and Co. v. Hill*, 214 W. Va. 760, 591 S.E.2d 318 (2003).

In determining whether to issue a Writ of Prohibition, courts should consider

(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.

Syl. pt. 1, *E.I. DuPont de Nemours*, 214 W. Va. at 760 (2003). Although none of the factors are dispositive, this Court noted that the third prong “should be given substantial weight.” *Id.* In this case, however, four of the five factors—including the crucial third factor—weigh overwhelmingly in favor of granting the Petition for Writ of Prohibition.

First, WVMIC has no other avenue of challenging the trial court's consolidation of its declaratory judgment action in Civil Action No. 16-C-497. If this matter is consolidated, WVMIC will be forced to engage in prolonged litigation resulting from the consolidation of its case with dissimilar cases. Accordingly, the first factor weighs in favor of issuing a Writ of Prohibition.

Second, WVMIC will be irreparably harmed if it cannot challenge the trial court's Order now. This Court has explained that Writs of Prohibition are “preventative remed[ies]. One seeking relief by prohibition in a proper case is not required . . . to . . . wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed.” Syl. pt. 5, *State ex rel. City of Huntington v. Lombardo*, 149 W.Va. 671, 413 S.E.2d 535, 536 (1965). Here, WVMIC will be irreparably harmed if it is forced to litigate its case, and engage in discovery, while grouped with dissimilar cases that turn on entirely different evidence and principles of law.

Specifically, the trial court's erroneous conclusion that "[d]iscovery of the facts of the underlying cases is paramount to the determination of coverage under the Policy" means that until discovery in the tort actions is fully concluded the trial court may not decide the coverage issue at all. App. 4. Such a conclusion would inevitably place the coverage decision at the back of the line and interminably delay resolution of this key issue. Accordingly, the second factor weighs in favor of issuing a Writ of Prohibition.

Third, the third and fourth factors weigh in favor of granting a Writ. As WVMIC's following arguments show, the Circuit Court's Order is clearly erroneous as a matter of law and manifests disregard for substantive law as it improperly applies West Virginia Rule of Civil Procedure 42(a). Accordingly, as WVMIC's following arguments show, the third and fourth factors weigh in favor of issuing a Writ of Prohibition.

As demonstrated, all factors of the *Dupont* test weigh overwhelmingly in favor of granting a Writ of Prohibition. Accordingly, WVMIC requests a Writ of Prohibition prohibiting the Honorable Jennifer Bailey from conducting any further proceedings in Civil Action No. 16-C-497 until the Order consolidating WVMIC's unrelated declaratory judgment action with the sexual abuse tort claims has been vacated.

b. The trial court erred when it applied West Virginia Rule of Civil Procedure 42(a) to consolidate WVMIC's declaratory judgment action with a series of dissimilar cases that do not involve "common questions of law or fact" as required by Rule 42(a).

West Virginia Rule of Civil Procedure 42(a) permits consolidation only where "[w]hen actions *involving a common question of law or fact* are pending before the court." W. VA. R. CIV. P. 42(a) (emphasis added). Although the trial court stated that WVMIC's "declaratory judgment action involves common questions of law and fact to the underlying civil actions" App. 4, this Court and courts around the country have repeatedly determined that insurance coverage

declaratory judgment actions do not involve common questions of law or fact as lawsuits premised on the incidents that arguably give rise to coverage.

Indeed, in *State ex rel. Energy Corp. of Am. v. Marks*, 235 W. Va. 465, 470, 774 S.E.2d 546, 551 (2015), this Court, interpreting Rule 20(a)'s nearly identical requirement that a lawsuit sought to be joined through permissive joinder involve "any question of law or fact common to all defendants" as the underlying lawsuit, determined that an insurance coverage action did not involve a common factual or legal question as an underlying negligence claim. Specifically, this Court noted that the defendant's "negligence in causing the wreck has *no bearing* on whether the plaintiffs' insurer is obligated to pay the claim for medical payments coverage." *Marks*, 235 W. Va. at 470, 774 S.E.2d at 551 (emphasis added).

This Court is not alone in this determination. Courts throughout the country have determined that declaratory judgment actions involving insurance coverage do not involve common questions of law or fact as lawsuits based on the incident that arguably triggers coverage. *See, e.g., Cramer v. Walley*, 2015 WL 3968155, at *4 (D.S.C. June 30, 2015) ("The weight of authority holds that the claims for negligent operation of an automobile do not arise from the same transaction or occurrence as a subsequent claim against an insurer or a declaratory judgment action involving coverage questions, and therefore cannot be joined under Fed. R. Civ. P. 20"); *St. Paul Fire & Marine Ins. Co. v. Mannie*, 91 F.R.D. 219, 221 (D.C.N.D. 1981) ("The terms of the policy and their application to a given set of facts is a question entirely separate from the question of [insured's] alleged negligence"); *Stokes v. Loyal Order of Moose Lodge*, 466 A.2d 1341, 1345 (Pa. 1983) (finding that the underlying action and the insurance claim involved separate transactions and occurrences as "[t]he evidence that would establish [the insurer's] obligation to insure is distinct from the evidence that would establish [the owner's] liability"); *Colonial Penn Ins. Co. v.*

Hart, 162 Ga. App. 333, 291 S.E.2d 410, 414 (1982) (injured party’s claim against tortfeasor’s insurer could not be maintained as a compulsory counterclaim in insurer’s declaratory judgment action because “the insurer’s contractual liability under a given set of facts and the insured’s tort liability are fundamentally distinct issues” and the tort claim “did not arise out of the transaction or question presented by the action for declaratory judgment”). The reason for this is simple: Insurance coverage actions turn on fundamentally different facts and law than tort actions.

Indeed, regardless of what actions Dr. Matulis did or did not commit, those issues are separate and distinct from whether WVMIC has an obligation to defend and indemnify Dr. Matulis and the Practice under its insurance policy. West Virginia law is clear that the allegations in a plaintiff’s complaint—not the truth of the facts alleged in the complaint—are determinative of insurance coverage. *See, e.g., State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc.*, 208 W. Va. 713, 716, 542 S.E.2d 876, 879 (2000) (“[A]n insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers.”); *Butts v. Royal Vendors, Inc.*, 202 W. Va. 448, 453, 504 S.E.2d 911, 916 (1998) (undertaking an “examination of the allegations of the complaint” to determine the parameters of the duty to defend and indemnify under an insurance contract); *Syl. pt. 3, Bruceton Bank v. U.S. Fidelity Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997) (noting that the duty to defend turns on whether “the allegations in the complaint . . . are reasonably susceptible [to] an interpretation that the claim may be covered by the terms of the insurance policies”).

In its Order, the trial court concluded that “what actions Dr. Matulis’ [sic] committed and what those actions legally constitute are questions of fact and law that are germane to all causes of action.” App. 4. Notwithstanding the court’s erroneous conclusion to the contrary, WVMIC’s

insurance coverage action is not concerned with whether or not Dr. Matulis actually committed the acts alleged in the complaints filed against him—WVMIC’s coverage action instead turns on whether the *allegations* in those complaints are sufficient to trigger coverage under the policies it issued to the Practice. The dissimilar tort cases consolidated in Civil Action No. 16-C-497, on the other hand, are premised on proving or disproving the truth of the allegations contained in those complaints. These distinct issues are not common issues of law or fact, and the trial court misapplied West Virginia law when it consolidated WVMIC’s case with the dissimilar tort cases using Rule 42(a).

Beyond improperly concluding that WVMIC’s declaratory judgment action involved common questions of law or fact to the dissimilar cases in Civil Action No. 16-C-497, which is sufficient in its own right to warrant relief from the Order, the trial court also failed to meaningfully consider the factors this Court requires trial courts to consider prior to consolidation under Rule 42(a). This Court has instructed trial courts to consider the following factors when exercising discretion in deciding consolidation: (1) whether risks of prejudice and possible confusion outweigh considerations of judicial dispatch and economy; (2) what burden on parties, witnesses, and available judicial resources would be imposed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial and multiple-trial alternatives. Syl. pt. 2, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 438 S.E.2d 609 (1993).

The trial court tangentially addressed these factors in Paragraph 10 of its Order, in which it summarily concluded that the *Ranson* factors weighed in favor of consolidating WVMIC’s coverage action with the underlying tort actions because “consolidation would streamline

discovery.” App. 4. In so doing, the trial court inexplicably found that “[d]iscovery of the facts of the underlying cases is paramount to the determination of coverage under the Policy.” App. 4. Of course, this finding is plainly erroneous as the duty to defend will in no way be determined by what is discovered in the underlying tort actions. As discussed above, under established West Virginia law, the allegations in a plaintiff’s complaint—not the truth of the facts alleged—are determinative of coverage as to the obligation to provide a defense. *See, e.g., State Auto.*, 208 W. Va. at 716, 542 S.E.2d at 879; *Butts*, 202 W. Va. at 453, 504 S.E.2d at 916; Syl. pt. 3, *Bruceton Bank*, 199 W.Va. at 548, 486 S.E.2d at 19. Because that coverage determination ultimately turns on the interpretation of the insurance policy and whether that policy’s coverage clauses are triggered by allegations in the complaints, *regardless of the facts*, any “[d]iscovery of the facts of the underlying cases” is wholly irrelevant to the declaratory judgment action brought by WVMIC. This is a classic reason why insurance coverage disputes and the underlying tort claims which gave rise to those coverage disputes should not be heard by the same court, and definitely should not be heard in a consolidated fashion. This potential entanglement of coverage and tort liability is exemplified by the trial court’s conclusion in this matter that discovery in the tort matter would impact the coverage analysis. Accordingly, a purported “streamlining of discovery” is an improper basis for consolidation of the actions.

Further, in contrast to the cursory review undertaken by the trial court, WVMIC illustrated that each of the *Ranson* factors weighed against consolidation. App. 666. First, it showed that the risk of prejudice was high because joining WVMIC’s insurance coverage action with the dissimilar tort claims improperly broadens the discovery WVMIC will be required to endure. For example, claim files and underwriting files which may be argued to be potentially relevant in an insurance coverage action should not be discoverable in a tort action. *See State ex rel. State Farm Fire &*

Cas. Co. v. Madden, 192 W. Va. 155, 160, 451 S.E.2d 721, 726 (1994) (noting that allowing additional claims against an insurer to proceed would entail discovery of the insurer’s claim files that would prejudice the insured’s ability to defend itself against the original negligence claim).

In addition to prejudicing WVMIC, consolidation does nothing to alleviate the burden on the parties, witnesses, and the trial court. As discussed above, WVMIC’s action must be resolved based on the *allegations* in the complaints filed against the Practice and Dr. Matulis and on the relevant insurance policies. The lawsuits against Dr. Matulis, on the other hand, turn on evidence showing he did or did not do the acts alleged. While the outcome of the underlying lawsuits may have a bearing on whether there is a duty to indemnify—but only if WVMIC does not first prevail on the duty-to-defend issue—there is no reason to inject insurance coverage issues into those lawsuits in the meantime, particularly where, as here, the coverage issues turn on application of the policy terms and exclusions as a matter of law. Therefore, the evidence involved in the coverage action is fundamentally different than that involved in the tort actions, and consolidation does not promote judicial economy or lessen the burden on the parties. Moreover, this Court has explicitly rejected the trial court’s purported basis of “judicial economy” and determined that the consolidation of a coverage action with an underlying tort does *not* promote judicial efficiency because the two “claims do not present a single factual or legal question in common, [and] the claim against [the insured] can be resolved with just as much efficiency without being joined to the [claim] against their insure[d].” *Marks*, 235 W. Va. at 470, 774 S.E.2d at 551.

Finally, consolidation delays WVMIC’s resolution of the insurance coverage issue. The principal purpose of WVMIC’s declaratory judgment action is to resolve uncertainty among the parties regarding defense and indemnity issues. However, as the trial court’s Order makes clear, this coverage matter will now become entangled in the extensive discovery that will be ongoing in

the tort cases before Judge Bailey, because the trial court thinks that discovery might be relevant, and the resolution of the coverage claim will be further delayed while that discovery plays out, to the detriment of WVMIC and its insureds. That is especially true if the trial court believes, as it stated, that discovery will impact the court's coverage analysis. In the meantime, WVMIC will continue to defend claims it has no obligation to defend, and uncertainty will remain for all parties regarding whether indemnity coverage is available, thus complicating or completely preventing any settlement efforts.

Likewise, consolidation does not otherwise avoid unnecessary cost or delay because, in any event, under West Virginia law, and as the trial court itself acknowledged, App. 4, coverage issues would need to be bifurcated from the tort claims against the insureds. Indeed, bifurcation is mandatory where, as here, parties have asserted bad faith counts against the insurer. *See Madden*, 192 W. Va. at 159, 451 S.E.2d at 725. Put simply, there is no benefit generated by joining WVMIC's coverage action with the larger and more complex litigation involving the underlying tort claims. Instead, consolidation will serve only to further delay the coverage determination, which should be separately and expeditiously resolved for the benefit of all parties.

Accordingly, because WVMIC's declaratory judgment action does not involve common questions of fact or law with the actions consolidated in Civil Action No. 16-C-497 and because the *Ranson* factors weigh heavily against consolidation, the trial court misapplied settled West Virginia law when it consolidated WVMIC's action. Therefore, WVMIC requests a Writ of Prohibition prohibiting the Honorable Jennifer Bailey from conducting any further proceedings in Civil Action No. 16-C-497 until the Order consolidating WVMIC's unrelated declaratory judgment action with that case has been vacated.

VI. CONCLUSION

This Court should enter a Writ of Prohibition prohibiting the Honorable Jennifer Bailey from conducting any further proceedings in Civil Action No. 16-C-497 until the Order of consolidation has been vacated and allow the declaratory judgment matter to remain pending where it was originally assigned. WVMIC's declaratory judgment action does not present a "common question of law or fact" with the tort actions consolidated in Civil Action No. 16-C-497 as required by West Virginia Rule of Civil Procedure 42(a), and the trial court's consolidation based on that provision was erroneous. Therefore, WVMIC asks that this Court enter a Writ of Prohibition requiring the trial court to vacate its erroneous Order and allow the matter to proceed before Judge King.



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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, to-wit:

I, Marc E. Williams, after being first duly sworn, depose and say that the facts contained in the foregoing Petition for Writ of Prohibition are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated to be upon information and belief, I believe them to be true.

Marc E. Williams

Taken, subscribed and sworn before me, the undersigned Notary Public, this 26th day of March, 2020.

My commission expires Oct. 30, 2022.

Shelly R Estep

