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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel.* **3M COMPANY** f/k/a Minnesota Mining and Manufacturing Co., **MINE SAFETY APPLIANCE COMPANY**, and **AMERICAN OPTICAL CORPORATION**,

DO NOT REMOVE
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Petitioners,

v. No. 20-0014

THE HON. JAY HOKE, JUDGE OF THE CIRCUIT COURT OF LINCOLN COUNTY, STATE OF WEST VIRGINIA *ex rel.* **PATRICK MORRISEY, ATTORNEY GENERAL,**

Respondents.

THE RESPONSE OF PATRICK MORRISEY, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, TO PETITION FOR WRIT OF PROHIBITION

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STATEMENT OF THE CASE

The Petition for Writ of Prohibition of the Dusk Mask Defendants (Petitioners, hereinafter are identified collectively as "DMDs") is a thinly-disguised attempt to appeal a nonappealable order, and this Court should refuse it summarily. The Circuit Court Order the DMDs seek to appeal here (PA01-21) – is a routine, non-final "Procedural Order" granting the State's Motion to Amend its Complaint and its Rule 42 Motion to Sever its Consumer Act claim for trial – the granting of which was a common judicial act well within a trial court's broad case management discretion; here, the trial court carefully considered and rejected the DMDs opposition arguments, arguments they regurgitate here to pursue an improper interlocutory appeal. In so doing, the DMDs violate *W.Va.R.App.P.* 16(d)(7)'s mandate that they "**must explain** why the original jurisdictional relief sought **is not available in any other court or cannot be had through any other process**." (Emphasis added). Not only is the mandatory requirement of Rule 16(d)(7) unmet here, it is ignored.

The DMD's Rule 16(d)(7) omission is perhaps unsurprising given that the interlocutory "original jurisdictional relief " they seek from the trial court's Procedural Order can of course be accomplished through multiple other procedures, most obviously, the traditional appellate process available in every case after the issuance of a final order. Because the DMDs fail to satisfy Rule 16(d)(7), for that reason alone they should be barred from invoking this Court's extraordinary, original jurisdiction as an improper substitute for a premature appeal.

The State, by its Attorney General, has standing, and brought this action, *inter alia*, under well-recognized common law and statutory authority of the Attorney General to administer and enforce the West Virginia Consumer Credit and Protection Act (hereinafter "CCPA" or "Consumer Act"), to hold the DMD's accountable for willful, deceptive and misleading advertising and sale of

hundreds of thousands of dust masks into West Virginia, intended for use by coal miners to protect them from black lung disease, that they knew would not protect coal miners from contracting black lung disease.[1] Now, after the trial court granted the State's Motion to Amend and Sever (motions made expressly for the purpose of moving this case forward after years of delays), the DMDs seek refuge and further delay by seeking an unnecessary extraordinary writ. The Court should see through this most recent delay tactic and refuse to issue a rule to show cause or a writ, and allow the parties to complete discovery and try this case.

STATEMENT OF FACTS

The factual basis for the State's CCPA claim concerns the DMDs' omissions, misrepresentations and statutory liability for manufacturing, marketing, promoting and selling into

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[1]Black lung disease is a latent disease that often takes decades to develop. A recent news story reported:

> "The rate of black lung disease in coal miners is growing, particularly in miners who work in central Appalachia, according to a study published in the American Journal of Public Health this week.
>
> One in five coal miners who've worked in West Virginia, Kentucky or Virginia for more than 25 years has coal workers' pneumoconiosis (CWP), according to the study, which was published Thursday. Nationally, more than 10 percent of miners with the same amount of experience have the debilitating and irreversible disease, which is caused by exposure to coal dust.
>
> Of those miners with at least 25 years of experience, one in 20 has black lung disease that's progressed to progressive massive fibrosis.
>
> The rate of black lung started declining in 1969, when Congress shifted its focus on limiting dust exposure. But scientists have found an increase in the disease since 1997, especially in younger miners whose careers started after 1969."

https://www.wvgazettemail.com/news/health/study-black-lung-growing-especially-in-central-appalachia/article_be47c666-2b54-5b78-bc90-7f545373316d.html .

West Virginia dust masks intended for use as a safety device by coal miners in West Virginia for protection from black lung disease. The fact that individual coal miners contracted black lung is not at issue, but rather whether the DMDs misrepresented the effectiveness of their dust masks. The State alleges the DMDs knew their dust masks would not protect coal miners from black lung disease, and nevertheless represented the dust masks would protect coal miners from black lung disease and concealed their knowledge that the dust masks users would not be protected from black lung disease.

On October 28, 2019 the trial court entered a Procedural Order granting the State's Motion to Amend and Sever its CCPA claim for trial. The trial court concluded, "under the present posture of the facts and circumstances of this case, a severance of the Consumer Act claim is necessary and just for the purposes of judicial economy, for the avoidance of further delay, and for an expeditious resolution of this litigation." PA18, ¶ 31. In its Second Amended Complaint, the State alleges, *inter alia*:

> "4. This action is also brought under W. Va. Code, Section 46A-7-111, which authorizes the Attorney General of the State of West Virginia to seek appropriate equitable relief and civil penalties for each violation under the West Virginia Consumer Credit and Protection Act, W. Va. Code Section 46A-6-102, including deceptive acts or practices, and/or the use of fraud, misrepresentation or the suppression or omission of any material fact in connection with the sale or advertisement of goods. Plaintiff alleges that said violations were committed by these defendants in the advertising and sale of their respiratory protection equipment in the State of West Virginia."
>
> * * *
>
> "13. Tens of thousands of West Virginia workers have developed a progressive, irreversible lung disease known as occupational pneumoconiosis (including but not limited to silicosis and coal worker's pneumoconiosis or Black Lung) caused by breathing coal, rock, sand or other dust after being provided and/or using the respirators/dust masks manufactured, marketed, promoted, distributed and sold by the Respiratory Protection Defendants, and have received or are now receiving WC benefits from the State on account of OP."

* * *

"17. In violation of W.Va. Code § 46A-6-101, *et seq.*, the Respiratory Protection Defendants made untrue, deceptive or misleading representations of material facts to and omitted and/or concealed material facts from, the State and citizens and employers of West Virginia in marketing and promotional campaigns and materials, among other ways, regarding the appropriate use and safety of their respiratory protection devices."

* * *

"20. The Respiratory Protection Defendants knew or should have known that the use of their respiratory protection devices could cause or contribute to causing occupational pneumoconiosis, a serious and potentially life threatening pulmonary disease. They knew or should have known also that the poor, negligent and defective design of the respirator/dust masks encouraged non-use and that such non-use caused or contributed to causing OP.

21. The Respiratory Protection Defendants knew of the acceptance of the misinformation and misrepresentations regarding the uses, safety and efficacy of their respiratory protection devices by West Virginia citizens, employers and workers, including but not limited to coal mine employers and workers, and their employees, but remained silent because their appetite for significant future profits far outweighed their concern for the health and safety of the citizens of West Virginia."

* * *

"23. The actions of Defendants in manufacturing, marketing, promoting, distributing and selling defective respiratory protection devices in West Virginia constitute violations of the West Virginia Consumer Protection Act in that they are unfair methods of competition and/or unfair deceptive acts or practices pursuant to W. Va. Code § 46A-6-102(f)."[2]

---

[2] In their Statement of the Case, the DMDs posit their masks "cannot cause disease by themselves and are not mandatory or consistently used in the mines." Petition at 5-6. They appear to be using this contested assertion to argue that their masks "protect coal miners' lungs." *Id.* at 6. See PA 14-16, 10-28-19 Order at ¶¶ 24-27 (discussing some of the many contested facts in this case). But this contested issue would be decided at trial of the State's CCPA claim. Just as importantly, it is the conduct of the DMDs, not coal miners, which is at issue in the CCPA claim, so the DMDs argument in this regard is misplaced. *Id.* See PA06, at ¶ 9 ("[T]he Court concludes it is *defendants'* intent and not any act or reliance on third parties or damage sustained by them, that provides the element of the claim. Therefore, individual worker or employer specific discovery discussed by the Defendants' response is unnecessary to try the State's

PA1141-61.

As explained by the trial court's order, the DMDs opposed severance of the Consumer Act claim, "so they may pursue discovery into, *inter alia,* files of past workers compensation Black Lung/OP claims." PA4, ¶ 6. In that regard, the DMDs proffered opposition arguments to the State's Motion below that were wholly dependent on acceptance of their version of disputed facts. As determined by the trial court, however, the DMDs argument was premature because they did not put forward any evidence and because discovery on those issues was extremely limited and had yet to be completed:

> [G]iven the extremely limited discovery thusfar conducted on this [statute of limitations] issue, it appears to the Court at this time that this argument relies on factual assertions which are outside the pleadings[.]"

PA11, ¶19. The first two issues raised in the DMDs Petition relies on those disputed facts, specifically an assumption that no sale of a dust mask in issue occurred after 1998. Because that position thusfar has been the subject of only "extremely limited discovery" and is contested, and is not based on any admissible evidence, the trial court found the premise the DMDs continue to rely upon for their petition here to be unestablished and premature.[3] *Id.*

Consumer Act claim[.]").

[3] The DMDs inaccurately assert in their Writ of Prohibition that counsel for the State confirmed all respirators at issue did not continue to be marketed after July, 1998. Petition at 3-4, citing PA 1073-74; 1118. First, this is inaccurate – indeed, in its reply below to the DMDs response brief (where the statute of limitation issue was first raised), the State disagreed, stating the DMDs argument, "relies completely on factual assertions outside the pleadings," and cited *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997) ("In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury."). PA 1202-03. The DMDs inaccurate assumption of a contested "fact," on a topic for which discovery has not been completed, is the foundation upon which the issues in the Petition are based. Because the DMDs premise is premature and disputed, their arguments for extraordinary relief collapse for that reason alone.

PROCEDURAL HISTORY

The State for years has tried to move this case forward, but little progress was made. In an effort to push forward more expeditiously, the State moved to amend its Complaint and sever the Consumer Act claim for trial. An impediment to moving forward expeditiously was the DMDs' insistence on doing "individualized discovery" of the over twenty thousand individual West Virginia coal miners with black lung disease who filed for and received workers compensation benefits for their injuries. In granting the State's Motion, the Circuit Court determined that,

> "[A]t this time, the defendants' liability under the Consumer Act is not necessarily dependent on any "miner-specific" or "employer-specific" information because reliance on the proffered misrepresentation is not relevant to the State's Consumer Act claims. This is so because pursuant to W. Va. Code § 46A–6–104, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful," and W. Va. Code § 46A–6–102(7) (2005), which identifies a nonexclusive list of acts that constitute "unfair methods of competition and unfair or deceptive practices," includes but is not limited to "(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression

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Second, the DMDs assumptions here also fail to account for the fact that discovery and admissions made in other jurisdictions have shown respirator products at issue continued to be sold and/or used beyond 1998 with the same product design defects. As an example, Petitioner Mine Safety Appliances Company acknowledged in sworn discovery responses in Kentucky that it continued to sell the Dustfoe 88 until 2004. (*E.g.*, Defendant Mine Safety Appliances Company's Answers to Plaintiffs' First Set of Interrogatories to Defendants 3M Company, Mine Safety Appliances Company, American Optical Corporation, Mine Service Company, Inc. and Kentucky Mine Supply Company *Miller, et. al. v. 3M et. al.,* Civil Action No. 06-CI-00571 (Perry Circuit Court, Kentucky) (answer to Interrogatory No. 2, dated September 18, 2007). Given that discovery on this topic in the case at bar has been "extremely limited thus far" in the case at bar, the State has every reason to expect similar evidence to be adduced in discovery here. Because factual issues establishing the continued sale of DMD defective respiratory products beyond 1998, and even after the State's lawsuit was filed in 2003, remain to be fully developed through discovery, as the trial court expressly acknowledged has thusfar been extremely limited (see PA11, ¶19), it correctly rejected the DMDs statute of limitations "futility" argument in their opposition to the State's Motion to Amend "at this time."

> or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, *whether or not any person has in fact been misled, deceived or damaged thereby*[.]" Thus, the Court concludes because the Consumer Act claim requires no showing of reliance or even actual damages, the discovery relied upon by defendants is irrelevant to the Court's consideration of the State's Motion at this time[.]"
>
> * * *
>
> [M]oreover, because the State's Consumer Act claim requires only requires only that the State show that in selling their dust masks for use in West Virginia, the Defendants made misrepresentations or omitted any material fact with the intent that others rely thereon, regardless of whether any person actually relied thereon, the Court concludes it is *defendants*' intent, not any act or reliance by third parties or damage sustained by them that provides the element of the claim. Therefore, the individual worker or employer specific discovery discussed by Defendants response is unnecessary to try the State's Consumer Act claim.
>
> That the Court further reasons that by granting the Motion to Sever, discovery can be limited only to that which is necessary to prosecute and defend the Consumer Act claim, without prejudicing defendants, and thus will avoid additional delay because discovery on that one claim can be completed, and the case tried, on a far more expeditious schedule."

PA4,6 at ¶¶ 7, 9-10.

The trial court in granting the Motion to Amend and Sever, did not have before it a discovery motion, and therefore did not issue a discovery rulings; nor did it have before it a motion in regard to the amount of any yet to be determined penalty, and so no ruling on that topic was issued. Rather, the Court only ruled on a Motion to Amend the Complaint and to Sever a Claim.

In response to the Circuit Court granting the Motion to Amend and Sever, the DMDs filed the instant Petition.[4] Because the Circuit Court's Order at issue was well within its broad discretion, the State hereby responds in opposition.

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[4] It should be noted that the DMDs previously made a motion to dismiss which was denied. See PA8, ¶14 ("[T]he Court has determined that these Defendants challenged the sufficiency of the State's claims in their Rule 12 Motions to Dismiss, and the sufficiency of the claims was upheld.").

SUMMARY OF ARGUMENT

In petitioning this Court for an extraordinary writ, the DMDs are trying to appeal a procedural order involving amending pleadings and severing a claim, which is the type of procedural ruling appellate courts generally with deference to the classic, discretionary case management authority of a trial court. The DMDs did not raise the issues they present by way of extraordinary writ through an affirmative motion to dismiss, or for summary judgment, or even a motion in limine, but rather in the context of their attempt to convince the trial court not to allow the State to amend its complaint, and sever the Consumer Act claim for trial.

While there are numerous reasons why this Court should deny the DMDs Petition, the most apparent is the Petition is an improper interlocutory appeal that does not meet the DMDs burden to show entitlement to extraordinary relief. Prohibition is not a remedy available when material facts are in dispute. *Syl.* Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979) (prohibition is to be used "to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate *which may be resolved independently of any disputed facts*[.]" (emphasis added)). As this Court recently has held:

> "[W]e have clearly stated that extraordinary remedies are reserved for "really extraordinary causes." As we have explained, "a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code* 53-1-1."4 And, they are not available in routine circumstances."

State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 829 S.E.2d 35, 40 (2019) (citation omitted). The Circuit Court's granting of the State's Motion to Amend and Sever is far removed from the, "really extraordinary causes" which may warrant use of an extraordinary remedy.

The Circuit Court has broad discretion to determine a Motion to Amend and Sever a claim.

The trial court's order granting the State's Motion is one that can be addressed adequately on an appeal. This Court many times has held a writ of prohibition cannot be used as a substitute for an appeal, as it is being used by the DMDs here. A writ of prohibition lies only when a court abuses its powers so flagrantly that it violates a Petitioner's rights in such a way that makes an appeal inadequate. An appeal here would not be inadequate, and the DMDs offer no explanation to the contrary.

Here, the lower court determined that factual disputes and incomplete discovery are some of the many reasons for rejecting the DMDs rationale for opposing the State's Motion. Such factual disputes and incomplete discovery concomitantly make the issues raised by the DMDs inappropriate for extraordinary relief. *Syl.* Pt. 1, *Hinkle,* 164 W. Va. 112, 262 S.E.2d 744. Nevertheless, even if the DMDs issues qualify for consideration, the trial court did not err in granting the State's Motion to Amend and Sever, and a writ should not issue.

The DMDs first "issue" is their argument that the State's CCPA claim should not be amended because to do so was "futile." Their futility argument relies upon assertions outside the pleadings that have not been subject to full discovery to suggest the statute of limitations for penalties in a Consumer Act claim would apply if the claim was amended. But as found by the Circuit Court in its Order:

> "Defendants second proposition in support of their "futility" argument is that the State's Consumer Act claim is "time-barred." Defendants' statute of limitations argument cites the Consumer Act's four year statute of limitations, but the Court finds this argument relies completely on factual assertions outside the pleadings, and ignores the discovery rule completely. "In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury." *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997)."

PA11, ¶ 19. The DMDs do not mention the foregoing finding of the trial court in their Petition, even

though it is one of the reasons the Court granted the Motion to Amend. PA2 at ¶ 2 ("the Court finds and concludes the State's Motion to Amend easily satisfies Rule 15(a) of the *West Virginia Rules of Civil Procedure*, which requires that leave to amend should be granted freely."). Because the DMDs limitations argument relies on facts in dispute and untested by discovery, it is premature and inappropriate to address this issue at this time, let alone on an extraordinary writ.[5]

Likewise, the second issue of a putative "retroactive application" of the CCPA penalty provision raised by the DMDs is especially inappropriate for a writ of prohibition because it deals narrowly with the potential amount of penalty available under the CCPA. Like the statute of limitations issue, the DMDs rely entirely on the same contested factual assertion concerning the last date they violated the CCPA. The DMDs raised this issue only *by way of a footnote* in their response to the State's Motion to Sever the CCPA claim. PA 1175. The trial court did not address this putative "retroactive application" issue because it was not relevant to determining the Motion to Sever. It granted the Motion to Sever primarily because it would move the case forward in a more expeditious manner:

> "[T]he Court finds and concludes that severance of the Consumer Act claim for a separate trial under Rule 42 is far more likely to result in a just and expeditious final disposition of the litigation than discovery review [of] tens of thousands of workers compensation claim files and attendant medical records therein or to depose the thousands of such coal miners or other workers who received workers compensation black lung benefits. The Court finds and concludes that under the circumstances of this case, severance clearly is necessary for the purposes of judicial economy, for

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[5] *Arguendo*, even if discovery was complete and the relevant facts not in dispute, the State's CCPA claim would not be time barred as a matter of law due to the discovery rule or intentional concealment or other applicable tolling doctrines. PA11-16. Moreover, the DMDs argument also ignores that the State's CCPA claim includes potential *equitable* relief, to which no statute of limitations applies, only laches. *Dunn v. Rockwell*, 225 W. Va. 43, 54, 689 S.E.2d 255, 266 (2009) ("Our law is clear that there is no statute of limitation for claims seeking equitable relief.").

> avoidance of further delay, and for an expeditious resolution of this litigation, and thus the Motion to Sever should be **GRANTED**."

PA18, ¶¶ 30-31. Because the Circuit Court properly granted State's Motion to Sever, and an appeal would be an adequate remedy, extraordinary jurisdiction is not appropriate on the penalty issue raised by the DMDs.[6]

The third and last issue raised by the DMDs is their position that the trial court's Order on the Motion to Amend and Sever violated their due process rights. The trial court correctly relied on the language of the CCPA in holding that reliance and damages are not required elements of the Consumer Act claim because the statute expressly states a violation can be shown by wrongful conduct, "**whether or not any person has in fact been misled, deceived or damaged thereby**[.]" *W. Va. Code* § 46a-6-102(7) (emphasis added). PA19, ¶ 34. The trial court thus concluded,

> "The Court has determined that the State's Consumer Act claim is concentrated narrowly on the Defendants alleged misrepresentations and omissions concerning the efficacy of dust masks they sold for use in West Virginia, and thus the Court concludes that what individual coal operators and individual coal miners did is not determinative to the State's Consumer Act claim. As noted above, because actual reliance by the claimants is not an element of the State's Consumer Act claim, the Court has further determined that evidence that specific, individual miners used the Defendants' masks in unnecessary at this point in time (although the State argues, and the Defendants do not deny thusfar, they sold hundreds of thousands, if not millions, of dust masks for use in the State, which thereby sufficiently shows their use)[.]"

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[6] The DMDs took the position below that the State could recover no more than a single $5000 penalty no matter what the evidence shows at trial as to how many violations of the Act they committed. To make this argument, the DMDs rely on a faulty interpretation of a holding of this Court, *State By & Through McGraw v. Imperial Mktg.*, 203 W. Va. 203, 506 S.E.2d 799 (1998). The *Imperial Marketing* court held that a trial court could not assess a single *$500,000* penalty under the CCPA *without first explaining the rationale for assessing the penalty.* The holding was based on the lack of rationale for the amount of the penalty in the Court's Order, not, as the DMDs argue here, that the statute did not allow more than a single $5000 penalty regardless of the number of violations.

PA18-19, ¶ 33. The trial court properly evaluated the benefits of severing the CCPA claim for trial, including the fact that CCPA clearly states the State need not show reliance or damage to prevail on its CCPA claim.[7]

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the Petition is without merit, and further proceedings only would delay further the State's prosecution of its case.

ARGUMENT

A THE PETITION IS NOTHING MORE THAN A DISGUISED APPEAL OF A NON-APPEALABLE ORDER, AND SHOULD BE REFUSED SUMMARILY

In regard to the DMDs first issue, that the State's Motion to Amend should have been denied because the State's CCPA claim is time barred, the DMDs ignore the trial court's correct conclusion that the factual assumptions upon which the DMDs base their limitations argument have yet to be established or tested by full discovery, and are contested by the State: "given the extremely limited discovery thusfar conducted on this issue, it appears to the Court at this time that this argument relies upon factual assertions which are outside the pleadings[.]" PA11, ¶ 19. As this Court has held repeatedly, prohibition can not be used in cases such as this that can not be "resolved independently of any disputed facts,";

> "'[T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate **which may be resolved independently of**

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[7] In their Statement of the Case, the DMDs offer a section entitled "Manufacturers' efforts to obtain discovery." Petition at 6-9. The assertions therein are nothing more than the DMDs various discovery grievances asserted over the course of this litigation, or discussions of counsel at hearings usually taken out of context. All the assertions in that section have one thing in common – they are wholly irrelevant and have no connection to the three "issues" the DMDs raise in their Petition.

> **any disputed facts** and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.'"

Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Group, Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014). (emphasis added). The trial court found the factual assumption made by the DMDs in support of their statute of limitations argument was not established, and was premature "at this time" because discovery on that issue had to this point been "extremely limited. PA11, ¶ 19. The trial court's uncontested conclusion in this regard shows the DMDs lack entitlement to any relief, let alone extraordinary relief. The DMDs ignore discussion of this part of the trial court's order granting the State's Motion to Sever the CCPA claim.

The trial court's procedural order granting a motion to amend and sever a claim also is one for which trial courts traditionally are afforded such great deference that the exercise of such discretion rarely constitutes reversible error. This Court consistently has held trial courts have very broad discretion in ruling on procedural motions like the State's Motion to Amend and Sever, and "rarely" will the granting of such a motion constitute reversible error:

> "[W]e emphasize that because the trial court has such broad discretion in this arena, rarely will we find that its ruling on a bifurcation motion constitutes reversible error."

Barlow v. Hester Indus., Inc., 198 W. Va. 118, 127, 479 S.E.2d 628, 637 (1996). Likewise, a Motion to Amend a Complaint rarely should be denied:

> "Rule 15(a) states that leave to amend a complaint should be "freely given when justice so requires," and we have held that amendments to pleadings should rarely be denied."

Brooks v. Isinghood, 213 W. Va. 675, 684, 584 S.E.2d 531, 540 (2003) (citation omitted). The DMDs nowhere recognize the foregoing standards, nor do they offer any rationale that would justify

the micro-management of a trial court's procedural orders requested here.

When faced with a petition for prohibitory relief, this Court holds "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." *Syl.* Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). This Court explains use of an extraordinary writ of prohibition is reserved only for cases where a trial court engages in an abuse of powers, "so flagrant and violative of the petitioner's rights" as to make an appeal inadequate:

> "[W]e have explained, "traditionally, the writ of prohibition speaks purely to jurisdictional matters. It was not designed to correct errors which are correctable upon appeal. . . . [O]nly if the appellate court determines that the abuse of powers is **so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate**, will a writ of prohibition issue."

SER Evans v. Robinson, 197 W. Va. 482, 489, n.11, 475 S.E.2d 858, 865 n.11 (1996) (citations omitted) (emphasis added). Nowhere do the DMDs explain how a remedy by appeal for the alleged errors would be inadequate.

As discussed above, this Court has cautioned that, "'prohibition against judges [is a] **drastic** and **extraordinary** remedy,'" and as such, "[is] **reserved for <u>really extraordinary causes</u>**." *River Riders, Inc. v. Steptoe,* 223 W. Va. 240, 247, 672 S.E.2d 376, 383 (2008) (quoting *SER United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 436, 460 S.E.2d 677, 682 (1995)) (emphasis added). Accordingly, the Court "has been restrictive in the use of prohibition as a remedy." *Horkulic v. Galloway,* 222 W. Va. 450, 458, 665 S.E.2d 284, 292 (2008) (quoting *SER W. Va. Fire & Casualty Co. v. Karl,* 199 W. Va. 678, 683, 487 S.E.2d 336, 341 (1997)).

The lone case the DMDs cite in support their assertion that a writ of prohibition may lie to prohibit the granting of a motion to amend and sever a claim clearly is inapposite. Petition at 16,

citing *Syl.* Pt 4, *SER Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) (trial court exceeded powers by approving issuance of subpoena). *Syllabus* Pt. 4 of *Hoover* states:

> "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.

The DMDs ignore *Hoover*'s five-part test and address *only* part three – the DMDs can not satisfy parts 1, 2, 4 and 5, because clearly (1) they have other adequate means to obtain their sought after relief, such as a direct appeal; (2) granting the State's Motion to Amend and Sever will not damage or prejudice them in a way that is not correctable on appeal; as for parts (4) and (5), the DMDs assert neither that the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law, nor that the lower court's order raises new or important problems or issues of law of first impression. As for part 3 of the test in *Syl.* Pt, 4 of *Hoover, supra*, the lower court's order granting of the motion to amend and sever is subject to broad discretion and is not "clearly erroneous as a matter of law."

Further, the DMDs omit any discussion of the prohibition standard they must meet articulated in *Syllabus* Point 3 of *Hoover, supra*, that holds:

> "Prohibition lies only to restrain inferior courts from proceedings 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 [a petition for appeal]

or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 75 S.E.2d 370 (1953).

Likewise, the DMDs ignore *Hinkle, supra.* As noted above, the issues raised by the DMDs can not be "resolved independently of any disputed facts." *Syl.* Pt. 1, in part, *Hinkle, supra.*

Accordingly, because the interlocutory issues raised by the DMDs rely on contested assumed facts not in evidence, that have not been subject to full discovery, and that adequately can be appealed per the normal appeal process, and because they do not meet the high standard necessary for issuance of a writ of prohibition, the State respectfully requests this Court refuse to issue a rule to show cause, and allow this case to proceed in the normal course before the Circuit Court of Lincoln County.

B IF THE COURT CONSIDERS THE MERITS, IT SHOULD REFUSE THE PETITION

The DMDs show no basis to justify the issuance of a rule to show cause, let alone a writ of prohibition. The Circuit Court's procedural order granting the State's Motion to Amend and Sever does not rise to the extraordinary level of an abuse of judicial power. To the contrary, the trial court's decision was correct. Out of an abundance of caution, the State will address below the three substantive issues asserted in the Petition, demonstrating the Circuit Court committed no error in granting the State's Motion to Amend and Sever.

1 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE DUST MASK MANUFACTURERS ARGUMENT THAT THE MOTION TO AMEND AND SEVER SHOULD BE DENIED ON THE BASIS OF THEIR BELATED ARGUMENT THAT THE STATE'S CCPA CLAIM SHOULD BE TIME BARRED

The trial court's uncontested holding regarding incomplete discovery as to the premature assumptions underlying the DMDs position is dispositive of the Petition as to the statute of limitations issue. Even if the DMDs premature factual assumptions could be accepted as true at this stage, the trial court's alternative discussion of tolling doctrines applicable to the State's CCPA claim will be addressed out of an abundance of caution.

The DMDs statute of limitations argument does not apply to equitable relief available to the State pursuant to its CCPA claim. The DMDs wrongly assert the State "eliminated its requests for equitable remedies." Petition at 9. While the State did remove its claim for certain equitable remedies that overlap with the remedies available to its common law claims for which the DMDs seek "individualized discovery," it did not eliminate the equitable remedies in their entirety. In the Second Amended Complaint, the State's CCPA claim continues to request, "such other and further relief, as the Court deems proper[.]" PA1149, Second Amended Complaint ¶ 24.c. See *Imperial Mktg., supra,* 203 W. Va. at 215–16, 506 S.E.2d at 811–12 ("[T]he use of the phrase 'other appropriate relief' in *W.Va.Code*, 46A–7–108 [1974], 'indicates that the legislature meant the full array of equitable relief to be available in suits brought by the Attorney General.'"). Equitable remedies are not subject to a statute of limitation, only laches, which the DMDs do not assert applies. *See Charter v. Maxwell*, 52 S.E.2d 753, 758 (W. Va. 1949) ("Statutes of limitation are never applicable to causes of action falling within the exclusive jurisdiction of courts of equity."). For example, the equitable remedy of unjust enrichment would be available to the State, and only laches

could apply as a potential time bar. Therefore, even if the Court issued the premature writ on the basis sought by DMDs, the State's CCPA claim still would proceed, and concomitantly for that reason, the trial court was correct to allow the amendment to the Complaint and reject the DMDs argument that the State's amendment would be "futile."

The only limitation period potentially relevant to the State's CCPA claim is *W. Va. Code* § 46A-7-111(2), that states civil penalties cannot be imposed for violations occurring more than four years before an action is filed. The statute is clear this provision is applicable only to the State's claim for civil penalties. *W. Va. Code* § 46A-7-111(2) ("No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought."). However, the State is not constrained by this limitation period for several reasons.

First, the discovery rule tolls the statute of limitation until after a plaintiff discovers the factual basis for a complaint, unless "a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action." *Dunn*, 689 S.E.2d at 258. Moreover, application of the discovery rule is a question of fact. *Id.*

In *Dunn*, the West Virginia Supreme Court of Appeals described the analysis that courts should undertake in statutes of limitation determinations:

> "A five-step analysis should be applied to determine whether a cause of action is time barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of Gaither v. City Hosp., Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the

> plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. **Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.**"

Id. at Syl. Pt. 5, 689 S.E.2d at 258 (emphasis added).

The DMDs contend the absence of tolling language in *W.Va. Code* § 46A-7-111(2) conclusively establishes that tolling under any circumstances is prohibited, and any tolling of this statute of limitations must constitute "clear legal error." While the DMDs cite several inapposite cases discussing statutes of "repose," they offer no West Virginia case that either categorizes § 46A-7-111(2) or even another limitations period within the CCPA as a statute of repose. They therefore assert that the Circuit Court's refusal to adopt their interpretation of § 46A-7-111(2) was clear legal error, without offering any precedent to validate their interpretation. The DMDs suggest that any tolling of a statutory claim's limitations period, even in circumstances involving fraudulent concealment, "violate[s] the Legislature's clear intent." Petition at 21. This conclusion is inconsistent with the purpose and liberal construction of the CCPA, and it ignores the breadth of circumstances in which the discovery rule has been applied in West Virginia courts.

The DMDs assert the Circuit Court committed clear legal error by applying the discovery rule to a limitations period in a statutory claim. But the DMDs cite a case where the discovery rule was applied to a statute of limitations pursuant to a claim brought under the state's Workers Compensation statute. See *State ex rel. Gallagher Bassett Services, Inc. v. Webster*, 242 W.Va. 88, 829 S.E.2d 290 (W.Va. 2019). Although not clearly delineated in their Petition, the DMDs apparently seek to persuade the Court that the discovery rule should be applied only in the context of common law torts or statutory claims grounded in tort law.

In *Ash v. Allstate Ins. Co.*, 2010 WL 3788045 (N.D. W.Va. 2010), the federal district court applied the discovery rule to a statutory claim for unfair or deceptive business acts under the West Virginia Unfair Trade Practices Act (UTPA). While the UTPA contained a one-year limitations period pursuant to *W.Va. Code* § 55-2-12, the district court acknowledged the discovery rule should apply to toll the statute "until [the] claimant knows or by reasonable diligence should know of the claim." *Id.* at *3; *See Syl* .Pt. 1, *Wilt v. State Auto. Mut. Ins. Co.*, 203 W.Va. 165, 506 S.E.2d 608 (W.Va. 1998). As did the Circuit Court in the present case, the district court acknowledged the five-step analysis outlined in *Dunn, supra,* and remanded the case to the Circuit Court in order for the trier of fact to determine whether the UTPA limitations period had been tolled under the discovery rule. *Id* at *4. The *Ash* court emphasized that if the discovery rule did not apply, the trier of fact "then must determine whether the doctrine of fraudulent concealment applies to toll the statute of limitation. This is a factual issue that a jury must determine." *Id.*

Following an appeal in *Ash*, this Court applied the *Dunn* analysis to the petitioner's UTPA claim, holding that he had failed to satisfy the third *Dunn* element, *i.e.*, when he "knew or should have known that he was supposedly entitled to stacked UIM coverage[.]" *Ash v. Allstate Ins. Co.*, 2013 WL 5676774 (W.Va. 2013).[8] By the DMDs logic, this Court's engaging in the *Dunn* analysis in the context of a UTPA claim, as a non-tort creature of statute, would constitute clear legal error.

The DMDs reliance on then-Chief Justice Loughry's opinion in *Metz v. E. Assoc. Coal, LLC*, 799 S.E.2d 707 (W.Va. 2017) is misplaced. The *Syllabus* in *Metz* is applicable only to "employment discrimination cases brought to enforce rights under the West Virginia Human Rights Act, W.Va.

[8] *Syl* pt. 5, *Dunn*, 225 W.Va. 43, 689 S.E.2d 255 ("Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action....").

Code §§ 5-11-1 to -20 (2013)." *Metz, supra* at *Syl.* Pt. 3, in part. If the court were to articulate such a wide-sweeping rule as the DMDs suggest, it would make it part of the holding in the Syllabus, and not state it in *dicta*, as in *Metz*. See *Syl.* Pt. 5, *JWCF, LP v. Farruggia*, 232 W. Va. 417, 752 S.E.2d 571, 574 (2013) ("'"[N]ew points of law ... will be articulated through syllabus points as required by our state constitution." *Syllabus* Point 2, in part, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001).' *Syl.* Pt. 13, *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003)."). Indeed, if *Metz* stood for the broad, sweeping rule of decision suggested by the DMDs, as opposed to the more narrow application stated in the *Syllabus*, the vast majority of the opinion would be completely irrelevant.[9] In fact, far from articulating a general rule against application of the discovery rule to any statutory claim, the Metz court ultimately concluded its decision was "compelled by the purpose of the discovery rule":

> "**This result is compelled by the purpose of the discovery rule** — to toll the running of the applicable statute of limitations until the plaintiff discovers his or her injury and the identity of the injury-causing entity. The injury in this case was EAC's non-hiring of Mr. Metz. Apprised of EAC's decision not to hire him, and given his membership in a protected class, Mr. Metz was armed with sufficient facts to further

[9] The *Metz* court discussed at length its various rationales concerning employment discrimination claims as its reasons why the discovery rule should not apply, all of which would be unnecessary if the holding had articulated a general rule as advocated by the DMDs. For example, the *Metz* court discussed its rationale that, "there is no statutory requirement that a complainant be aware of the employer's discriminatory animus before initiating a suit under the HRA[.]" *Metz, supra*, 799 S.E.2d at 713–14. The court further discussed at least eight cases from other jurisdictions it described as the evidencing "the overwhelming current of judicial decisions," not concerning application of the discovery rule to all statutory claims, but to "employment discrimination cases" generally. *Id.*, 799 S.E.2d at 714. The court in *Metz* also based its decision on its finding that, "an employee or prospective employee knows of his injury immediately upon finding out that he or she was not hired or was terminated or otherwise discriminated against." *Id.*, 799 S.E.2d at 715. See *Id.*, 799 S.E.2d at 715–16 ("Absent the finality that statutes of limitation provide in cases such as this, employers would be forever subject to lawsuits as former employees or prospective employees could always assert that they only recently discovered the alleged discriminatory basis for bringing a HRA claim.").

investigate whether his age was the basis for the adverse employment decision."

Metz, supra, 799 S.E.2d at 716 (emphasis added).

Contrary to the DMDs argument, the *Dunn* court's acknowledgment that the discovery rule is "generally applicable to all torts" does not foreclose the discovery rule's applicability in other contexts, as indeed, the federal court in *Ash* applied the *Dunn* analysis to a CCPA statute of limitation where the language of the provision was substantially akin to the one at issue, § 46A-7-111(2).

In *Hanshaw v. Wells Fargo Bank, N.A.*, 2015 WL 5345439 at *6 (S.D. W.Va. 2015), the District Court determined whether a claim under the CCPA was barred by the applicable statute of limitations. The limitations provision provided as follows:

> With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this chapter, **no action pursuant to this subsection may be brought more than four years** after **the violations <u>occurred</u>**. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

W.Va. Code § 46A–5–101(1) (1996) (emphasis added). The language of the *Hanshaw* statute of limitations largely mirrors the one at issue both in structure and usage of the word "occur."

> "No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought."

W.Va. Code § 46A-7-111(2).

The DMDs argue the presence of the word "occur" indicates the statutory language prohibits tolling of any kind, and by extension, prohibits any application of the *Dunn* analysis. Again, as discussed above, the district courts disagree. The *Hanshaw* court, as did the trial court here, proceeded to apply the five-step analysis in *Dunn v. Rockwell*, determining that the defendants failed

to meet their burden to establish that the plaintiffs' CCPA claims were time-barred. Because (as here) there were insufficient facts in the record at the motion to dismiss stage as to when the statute of limitations began to run, the court stopped at the second *Dunn* step, *i.e.*, "identify[ing] when the requisite elements of the cause of action occurred." *Dunn*, 225 W.Va. at 53, 689 S.E.2d at 265. Note that only the first *Dunn* step – "identifying the applicable statute of limitation for each cause of action" – is "purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact." *Id.*

The only question of law within the *Dunn* analysis is identifying the applicable statute of limitation, which is not at issue here. The remaining *Dunn* elements – identifying when the elements of the cause of action occurred, whether the discovery rule should apply, or whether fraudulent concealment tolled the applicable statute – all involve questions of fact that are not appropriate for the issuance of a writ of prohibition. *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997) ("In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury.").

The DMDs further argue that a limitations period provision within a statute that "creates claims based on fraud and/or misrepresentation [...] cannot be read to allow fraud to defeat the statute of [limitations]." Petition at Sec. I(E). Once again, the DMDs tender bald legal conclusions and generalized principles of statutory construction to escape the lack of precedent supporting their position. No West Virginia court has determined the CCPA prohibits application of either the discovery rule or the doctrine of fraudulent concealment to toll a statute of limitations therein. To the contrary, under West Virginia law, "estoppel applies when a party is induced to act or refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentations

or concealment of material facts." *Bradley v. Williams*, 465 S.E.2d 180, 184 (W. Va. 1995). The standard for the extraordinary remedy of issuing writs of prohibition requires showing a "substantial clear-cut legal error plainly in contravention of a clear statutory, constitutional, or common law mandate." *Syl.* Pt. 2, *State ex rel. West Virginia Regional Jail Authority v. Webster*, 836 S.E.2d 510 (W.Va. 2019). Having provided no authority, let alone a "clear mandate," that fraudulent concealment cannot be applied to toll a CCPA limitations period, the DMDs again fail to demonstrate a "clear-cut legal error." *Id.*[10]

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[10] In addition, the Fourth Circuit has expressly determined that fraudulent concealment may toll limitations periods within statutes devoted to fraud-prevention.

In *Lembach v. Bierman*, 528 Fed.Appx. 297 (4th Cir. 2013), the Fourth Circuit held that the discovery rule tolled the limitations period in the Fair Debt Collections Practices Act (FDCPA). The FDCPA statute of limitations provided that "[a]n action to enforce any liability created by this subchapter may be brought [...] within one year from the date on which the violation occurs." 15 U.S.C.A. § 1692k(d). Similar to the limitations period at issue, the FCDPA statute of limitations [1] made no explicit provision permitting tolling and [2] the FDCPA's purpose was, in part, to remedy damages for a debt collector's "false, deceptive, or misleading representation." 15 U.S.C.A. § 1692e:

> "The only circuit to address whether to apply the discovery rule to an FDCPA action has concluded that it should apply. See *Id.* The Ninth Circuit noted [...] "the general federal rule is that 'a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" *Id.* at 940 (quoting *Norman–Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1266 (9th Cir.1998)) (internal quotation marks omitted). Although not embracing a general discovery rule, the Supreme Court in *TRW Inc. v. Andrews*, 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), "**observed that lower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue**,' " *Id.* at 27, 122 S.Ct. 441 (quoting *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000)).
>
> We see no reason not to apply the discovery rule to this case. The [Plaintiffs] had no way of discovering the alleged violation until they actually saw the fraudulent signatures on the docketing material. **Further, [Defendant] should not be allowed to profit from the statute of limitations when its wrongful acts have been concealed.** As the Supreme Court held in *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 22 L.Ed. 636 (1875), **"where the party injured by the fraud remains**

The trial court did not commit clear legal error by concluding that the issue of whether fraudulent concealment could toll § 46A-7-111(2) was better suited to a more mature stage than a motion to amend. Moreover, the Circuit Court's order was entirely consistent with this Court's determination that fraudulent concealment involves a factual inquiry. PA12, ¶ 21 ("[T]here would need to be significant facts established to determine the remainder of the five-step analysis from *Dunn*, such that the issue would be more properly addressed at the time for a mature WVRCP rule 56(c) Motion").

Further, the lower court's interpretation of § 46A-7-111(2) is entirely consistent with the "policy that the statute was designed to serve," namely the policy of protecting consumers. *Va. Human Rights Comm'n v. Garretson*, 196 W.Va. 118, 119, 468 S.E.2d 733, 738 (W.Va. 1996). The CCPA is a remedial statute. "Where an act is clearly remedial in nature, **we must construe the statute liberally so as to furnish and accomplish all the purposes intended.**" *State ex rel. McGraw v. Scott Runyan*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (W.Va. 1995) (citing *Kisamore v. Coakley*, 198 W.Va. 147, 437 S.E.2d 585 (1993) (emphasis added)). The DMDs advocation for the narrowest construction of § 46A-7-111(2) would not accomplish all the purposes intended by the CCPA in circumstances involving undetected fraud. Such an interpretation contravenes the plain instruction by this Court that the CCPA be construed liberally, and therefore should be rejected for that reason as well.

For all of the reasons stated above, the DMDs basis for seeking a writ on the issue of the

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> **in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered,**" *Id.* at 348."

Lembach v. Bierman, 528 Fed.Appx. 297, 303 (4th Cir. 2013) (emphasis added).

CCPA's statute of limitations should be rejected both because it relies improperly on unproved assumed and contested assertions of fact, and also because the trial court correctly stated the law in its order granting the State's Motion to Amend and Sever.

2 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE DUST MASK MANUFACTURERS ARGUMENT THAT THE MOTION TO AMEND AND SEVER SHOULD BE DENIED ON THE BASIS OF THEIR ARGUMENT THAT ANY STATUTORY PENALTIES THEY MAY BE SUBJECT TO FOR THEIR VIOLATIONS OF THE CCPA SHOULD BE LIMITED TO $5000

Like their argument as to the statute of limitations, the DMDs second argument assumes as proved fact that no violations occurred after 1998. They admit any violations after June 10, 1999 would not be subject to their argument. Petition at 29-30. As discussed above, *supra* at 5-6, the DMDs assumption that no violations occurred after 1998 is contested, and as the trial court expressly found, is outside the pleadings and discovery has yet to be completed thereon. Any such argument based on unproved assumptions that must still be subject of discovery would be premature and inappropriate for consideration upon a petition for extraordinary relief, and should be rejected for the same reasons as the issue raised in regard to the statute of limitations. See *supra*, at 12. Out of an abundance of caution, the State nevertheless will address why the trial court did not error in granting the Motion to Amend and Sever over the DMDs opposition.

As for this second "issue" the DMDs characterize as the "retroactive application" of a statute, their proposition raises a novel issue from whole cloth. The DMDs position involves an attempt to re-interpret the holding of a 1998 decision of this Court to argue that, if they are found to have violated the Consumer Act statute, that regardless of the number of repeated violations they may have committed, the trial court may assess no more than a single penalty of $5000.

The genesis of this putative issue raised by the DMDs is curious. The entirety of their discussion of CCPA penalties, for which they now seek a writ, was relegated to *a footnote* in their response to the State's Motion to Amend and Sever. PA1175. This footnote was an adjunct to their primary argument that such discovery was necessary to defend the State's CCPA claim on the issue of liability, an argument they appear to have dropped in their Petition. The purpose of this footnote was to suggest "individualized discovery" of tens of thousands of coal miners with black lung disease and their medical records was necessary to support their argument that coal miners didn't actually wear the hundreds of thousands of dust masks they distributed into West Virginia, so the DMDs require such massive "individualized discovery" to try to mitigate the amount of the penalty.

Given the off point nature of the DMDs footnote discussion before the trial court, it is understandable that when it entered its Order granting the State's Motion to Amend and Sever, the trial court focused not on the potential penalties available, but rather on the primary arguments of the parties:

> "32. That the Defendants in their Response argue that "individualized evidence" requiring discovery of the thousands of coal miners who received workers compensation benefits as a result of contracting black lung disease is a necessary element to prove the State's Consumer Act claim. Given the current posture of the case, the Court has determined the law does not require the individualized evidence suggested by defendants in their response to be able to rule on the pending issue; and,
>
> 33. That as a result, the Court has determined that the State's Consumer Act claim is concentrated narrowly on defendants' alleged misrepresentations and omissions concerning the efficacy of dust masks they sold for use in West Virginia, and thus the Court concludes that what individual coal operators and coal miners is not determinative to the State's Consumer Act claim. As noted above, because actual reliance by the claimants is not an element of the State's Consumer Act claim, the Court has further determined that evidence that specific, individual miners used the Defendants' masks is unnecessary at this point in time (although the State argues and defendants do not deny they sold hundreds of thousands, if not millions of dust masks for

use in the State, thereby shows their use); and,

34. That within this specific context, the Court has determined that the elements of the State's Consumer Act claim are founded upon statute, and are as follows: the State must show defendants used, "any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, *whether or not any person has in fact been misled, deceived or damaged thereby*[.]"

PA18-19, citing *W. Va. Code* § 46A-6-102(7). The trial court continued:

"36. That in light of these controlling provision, the Court concludes the applicable statute does not provide for any inquiry into any issue other than whether or not Defendants engaged in conduct that was determined to be in violation of that statute. From the evidence and arguments made thus far, the statutory language empowers the Court to impose a penalty of up to $5,000 per occurrence if a statutory violation is established by the evidence and the law. *W. Va. Code* § 46A-7-111(2). From this perspective, the Court concludes it is not authorized by the statute to examine anything beyond these issues[.]"

PA20. Thus, the entirety of the Court's discussion in its Order on this topic is within the sentence, "From the evidence and arguments made thus far, the statutory language empowers the Court to impose a penalty of up to $5,000 per occurrence if a statutory violation is established by the evidence and the law. *W. Va. Code* § 46A-7-111(2)." The trial court simply mentioned the availability of penalties, and it was not remotely suggested, as argued by the DMDs, that it was "retroactively applying" any statutory provision, especially given that the court had earlier concluded that discovery on when the violations had occurred was incomplete. PA11, ¶ 19.

Nevertheless, and contrary to the DMDs suggestion, the sentence from the trial court's Order relied upon for the instant writ is a correct statement of the law whether one applies *W. Va. Code* § 46A-7-111(2) in its present form or its previous version. The DMDs position is a mistaken reinterpretation of the holding in *Imperial Mktg., supra*. The penalty assessed in *Imperial Marketing*

was not set aside because it was more than $5000, as argued by the DMDs, but because the lower court did not articulate appropriate reasoning for how the penalty it assessed was calculated:

> "Consequently, **the silence of the final order (and indeed of the record before us) with respect to how the amount of $500,000 was determined**, particularly in light of the statutory limitation of $5,000, precludes any meaningful review of the penalty by this Court. **In other words, the absence of any reasoning with respect to how the Court arrived at the $500,000 amount necessarily renders that amount arbitrary**. Syl. pt. 4, *Poole v. Berkeley County Planning Commission*, 200 W.Va. 74, 488 S.E.2d 349 (1997); syl. pt. 2, *Farm Family Mutual Insurance Company v. Bobo*, 199 W.Va. 598, 486 S.E.2d 582 (1997); syl. pt. 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997). **Therefore, the $500,000 civil penalty against Suarez must be set aside**.

Imperial Mktg., supra, 203 W. Va. at 214, 506 S.E.2d at 810 (emphasis added). When the *Imperial Marketing* court set aside the lower court's assessment of a $500,000 penalty, *it did so because the lower court did not provide any reasoning as to how it arrived at the amount*. If the Court meant to hold that penalties under the CCPA could never exceed $5000, it would have made no difference how the $500,000 amount was calculated. But that was not the holding. The Court clearly held it was the lower court's "absence of any reasoning with respect to how the Court arrived at the $500,000 amount necessarily renders that amount arbitrary." *Id.*, 203 W. Va. at 214, 506 S.E.2d at 810. Had the lower court offered reasoning to support a $500,000 penalty, it is clear the Court would have upheld it. To be blunt, if the *Imperial Marketing* Court had intended to limit all CCPA penalty actions to $5000 total (as opposed to $5000 per violation occurrence) it would have said so directly, and put such holding in the *Syllabus*. See *Syl.* Pt. 5, *JWCF, LP v. Farruggia, supra*. Instead, the only *Syllabus* Point applicable to the reversal of the $500,000 penalty was *Syllabus* Point 5, which reiterated that lower courts must set out findings of fact in support of an order granting summary judgment:

> "'Although our standard of review for summary judgment remains de novo, a circuit

> court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.' *Syllabus* point 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997)."

Imperial Mktg., supra at *Syllabus* Point 5.

Moreover, the *Imperial Marketing* court specifically agreed with the Attorney General that, "a maximum penalty of $5,000 in an action such as this one serves as very little deterrent to repeated violations of the West Virginia Consumer Credit and Protection Act[.]" *Id.*, 203 W. Va. at 214–15, 506 S.E.2d at 810–11. The *Imperial Marketing* court then reiterated that the basis for setting aside the single $500,000 penalty was that "under the circumstances," a single penalty of $500,000, without findings of fact and reasoning in a summary judgment order, precluded meaningful review by the court, and thus had to be set aside. Pursuant to the Imperial Marketing court's holding, had the trial court articulated sufficient findings, penalties of $500,000 would have been sustained. On the other hand, if the DMDs reinterpretation of Imperial Marketing was correct, no "findings" ever would have been sufficient to justify the $500,000 in penalties, and a reversal based on lack of findings would be rendered meaningless and nonsensical.

That the foregoing is accurate is confirmed by the concurring opinion in *Imperial Marketing*, which clearly explained why the majority rejected the appellant's argument that only a single penalty of no more than $5000 ever could be awarded in a CCPA case, and why the Court would welcome legislative clarification:

> "The language of *W. Va. Code*, 46A–7–111(2) clearly assumes that a civil penalty may be imposed for each, individual violation of the Consumer Credit and Protection Act. Other jurisdictions considering this question have consistently held that a civil penalty may be imposed for each individual violation of a consumer protection statute. See, e.g., *State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717 (Mo.App.1994) (consumer protection statute authorized civil penalty up

to $1,000.00 per violation; court upheld $273,600.00 penalty for unlawful pyramid scheme involving 1,368 victims, holding penalties amounted to $200.00 per person); *State ex rel. Stenberg v. American Midlands*, Inc., 244 Neb. 887, 509 N.W.2d 633 (1994) (statute authorized $2,000.00 civil penalty per violation; court upheld penalty of $788,000.00 where 788 persons paid money to an advance fee loan scam); *People v. Dollar Rent–A–Car Systems, Inc.*, 211 Cal.App.3d 119, 259 Cal.Rptr. 191 (1989) (each of the more than 500,000 misleading or deceptive car rental contracts could justify a separate penalty; therefore, the $100,000.00 penalty was "abundantly justified"); *State ex rel. Corbin v. United Energy Corp. of America*, 151 Ariz. 45, 725 P.2d 752 (Ariz.App.1986) (the state Consumer Fraud Act allowed court to impose a civil penalty of $55,000.00, or the statutory maximum of $5,000.00 for each of 11 consumers who were victims of fraud); *People v. Toomey*, 157 Cal.App.3d 1, 203 Cal.Rptr. 642 (1984) (civil penalties for fraudulent telephone solicitations should be imposed "per victim;" because the defendant committed at least 150,000 violations of two statutes, court was justified in imposing $150,000.00 in civil penalties); *United States v. Reader's Digest Association, Inc.*, 662 F.2d 955 (3d Cir.1981) (each individual mailing of a simulated check violated the Federal Trade Commission Act; while a civil penalty could be assessed of "not more than $10,000.00 for each violation," court upheld the imposition of $1,750,000.00 penalty for one bulk mailing of simulated checks to millions of consumers); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 553 P.2d 423, 436 (1976) (court held that under Washington Consumer Protection Act, a civil penalty could be assessed for every violation of the Act, and that there could be multiple violations for each victim. The court stated that "[e]ach cause of action required respondent to prove divergent facts to establish a violation. Therefore, we hold that each cause of action is a separate violation of the consumer protection act."); *People v. Bestline Products, Inc.* 61 Cal.App.3d 879, 132 Cal.Rptr. 767 (1976) (court upheld a $1,000,000.00 civil penalty, or approximately $330.00 per violation in a pyramid promotional scheme where 3,000 consumers lost $9,000,000.00, stating that the number of violations of the statute was to be determined by the number of persons to whom misrepresentations were made).

Imperial Mktg., supra, 203 W. Va. at 219, 506 S.E.2d at 815 (Starcher, J., concurring).[11]

Thus, not only did the *Imperial Marketing* court expressly state that its sole basis for reversing the lower court's single $500,000 penalty *was the lower court's failure to explain its reasoning*, it also did not discuss, let alone attempt to distinguish, caselaw from other jurisdictions interpreting the similar language in other state's Consumer Act statutes as allowing a penalty for

[11]See *Frye v. Future Inns of Am.-Huntington, Inc.*, 211 W. Va. 350, 357, 566 S.E.2d 237, 244 (2002) (Starcher, J., dissenting).

each violation, as opposed to a maximum single penalty in a particular case. The DMDs' proffered new interpretation more than 20 years after the holding in *Imperial Marketing* would lead to the result that the Attorney General could have had to file thousands of separate lawsuits to recover a penalty for each separate CCPA violation by a defendant. The fact that the Legislature thereafter amended the CCPA clearly shows it followed the concurrence encouragement to, "act to *clarify W.Va.Code*, 46A–7–111(2) with the addition of the italicized text, so that this insulting argument does not rear its ugly head in the future." *Imperial Mktg.*, 203 W. Va. at 219, 506 S.E.2d at 815 (1998) (Starcher, J. concurring) (emphasis added). That clarification was not a change in the law, but was meant to clarify and ensure no other party made the same "insulting argument" as the defendant in *Imperial Marketing*, a message the DMDs apparently have yet to receive.

Because the DMDs reinterpretation of the holding in Imperial Marketing is meritless, both because it relies on an improper assumption of fact and erroneous conclusion of law, their writ based on that issue raised by way of a footnote in their response to the State's Motion to Amend and Sever should be rejected.

3 THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE DUST MASK MANUFACTURERS ARGUMENT THAT THE MOTION TO AMEND AND SEVER SHOULD BE DENIED IN ORDER TO ALLOW THEM TO DELAY THIS CASE EVEN LONGER THROUGH "INDIVIDUAL DISCOVERY" OF THE BLACK LUNG CLAIMS OF TENS OF THOUSANDS OF WEST VIRGINIA COAL MINERS

Well over twenty thousand individual West Virginia coal miners with black lung disease filed for and received workers compensation benefits for their injuries. Each such claim includes personal medical records of each claimant. The DMDs took the position before the trial court that the Motion to Sever should be denied because, they argued, even in the Consumer Act claim

> "each defendant should be allowed to discover and develop defenses against each specific workers compensation claim based on: (1) **the worker's** failure to wear the Defendant's respirator's regularly; (2) **the worker's** misuse or abuse of the respirator; (3) **the employer's** failure to select the proper respirator for workplace conditions; (4) **the employer's** failure to adequately train and supervise its workers on the proper use of respirators; (5) **the employer's** violation of federal and state health and safety regulations regarding air quality; and (6) **the State's** contributory fault in failing to monitor or regulate mine operators."

PA1176-77 (emphasis added).

The trial court correctly rejected the DMDs contention that this separate "individual discovery" into the tens of thousands of workers' compensation claimants was necessary to resolve the State's Consumer Act claim against them, that is, whether they knew the dust masks they sold into West Virginia were ineffective at preventing black lung disease. Instead, as part of its analysis of the Motion to Sever, the trial court found that such *Hinkle, supra* factors as, "the over-all economy of effort and money among litigants, lawyers and courts," strongly favored granting the motion to sever:

> "On this the Court finds and concludes that severance of the Consumer Act claim for a separate trial under Rule 42 is far more likely to result in a just and expeditious final disposition of the litigation than discovery review of tens of thousands of workers compensation claims files and attendant medical records therein or to depose

> the thousands of such miners or other workers who received workers compensation black lung benefits[.]")

PA17-18, at ¶ 29-30.

In granting the Motion to Sever, the trial court concluded correctly that the Consumer Act in *W.Va. Code* § 46A-6-102(7), "does not provide for any inquiry into any issue other than whether or not the defendants engaged in conduct that was determined to be in violation of that statute." PA19-20, at ¶¶ 34-35. The trial court was referencing not the penalty provision, but the portion of the Consumer Act that discusses the elements of liability. *Id.* The trial court's statement of the law was made in the context of the reasons why the Motion to Sever was appropriate, not as part of a discovery or evidentiary ruling (such as a ruling on a motion to compel or motion in limine). Nevertheless, the Consumer Act language cited by the trial court clearly does not provide for inquiry beyond whether the Defendant's conduct violated the statute, and so even if the trial court issued a "discovery moratorium," there was no error in the trial court's order granting the State's Motion to Sever.[12]

The DMDs "discovery moratorium" argument is a curious one – they argue that despite manufacturing and selling hundreds of thousands of dust masks into West Virginia for use in coal mines to protect miners from black lung disease, that they must do extensive "individual discovery" of the tens of thousands of coal miners with black lung who received workers compensation benefits,

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[12] Even if the trial court's order granting the Motion to Amend and Sever can be construed as a "discovery order," it is clear the trial court has broad discretion in that regard (just as it does to determine motions to amend and motions to sever a claim):

> "'A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion.' Syl. Pt. 1, in part, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996)."

Syl. Pt. 8, *State ex rel. Myers v. Sanders*, 206 W. Va. 544, 526 S.E.2d 320 (1999).

and also of their coal operator employers. The stated purpose of such massive discovery is to show, "**few of their respirators were used or that few miners saw or relied on their statements.**" Petition at 34 (emphasis added).[13] In other words, the putative purpose of this massive amount of discovery ostensibly is to support the contrived argument that almost no one used the hundreds of thousands of dust masks they sold into West Virginia, and no one really believed the dust masks would stop black lung disease.

The legal problem with the DMDs position is that it ignores the plain language of the Consumer Act stating that liability attaches whether or not anyone was damaged or misled by the defendant's conduct:

> "any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services" then penalties under the Act may be imposed regardless of, "**whether or not any person has in fact been misled, deceived or damaged thereby**[.]"

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[13] The Order granting the State's Motion to Amend and Sever was not a "discovery order," but even if it were the DMDs could not meet their burden of showing entitlement to extraordinary relief per *Syl.* pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). First, it is clear that any review of a lower court's discovery rulings is deferential:

> "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence [. . .] are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syl. pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995). The first *Hoover* factor requires an evaluation of whether there exists another adequate remedy, such as direct appeal, to redress the petitioner's grievance. This Court repeatedly has observed, "discovery orders, are interlocutory. They do not finally end the litigation and are generally reviewable only after the final judgment." *State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 437, 460 S.E.2d 677, 683 (1995) (citations omitted). The DMDs may appeal from any such rulings once "the litigation is finally ended." *Id.* As such, the DMDs clearly fail to satisfy the first *Hoover* factor for issuance of a writ of prohibition.

W. Va. Code § 46a-6-102(7) (emphasis added). See *W. Virginia ex rel. McGraw v. Bristol Myers Squibb Co.*, 2014 WL 793569, at *6 (D.N.J. 2014) ("[W]hen the State [of West Virginia] brings consumer fraud claims involving prescription drugs pursuant to *W. Va.Code* §§ 46A–7–111(2), the State does not need to establish reliance or causation[.]"). To the extent the DMDs attempt to argue that they have a due process interest flowing from their "right to present a defense to a cause of action," and a "right to litigate an issue central to a statutory violation," Petition at 35, they ignore completely the language of *W. Va. Code* § 46a-6-102(7), which states clearly that it is not a "defense to the cause of action" or "central to the statutory violation," "whether or not any person has in fact been misled, deceived or damaged thereby," which is precisely the extensive discovery the wish to pursue. Because the massive individualized discovery they wish to pursue it is not central to or a defense to the State's Consumer Act claim, it can not possibly be a due process violation. Simply put, the putative discovery upon which the DMDs base their writ argument, *i.e.,* whether or not tens of thousands of individual coal miners who contracted black lung were "in fact been misled, deceived or damaged thereby," is not an issue in the State's severed Consumer Act claim.

The DMDs seek to avoid the clear language of the statute by arguing it somehow is "implicit" in the Consumer Act that such massive discovery of third parties must be done simply because the trial court has discretion to determine the amount of a penalty. No caselaw from any jurisdiction is cited to support this novel discovery proposition, that the conduct of tens of thousands of third parties is significant to the determination of a penalty against a Consumer Act violater who knowingly sells a safety product that does not perform the safety function for which it is sold. However, caselaw exists to the contrary. In *United States v. Bornstein*, 423 U.S. 303 (1976), the United States Supreme Court has held that, under the federal False Claims Act, which contains a

similar per-violation penalty to West Virginia's Consumer Act, it was held that, "**the focus in each case [must] be upon <u>the specific conduct of the person from whom the Government seeks to collect the [penalties]</u>**." 423 U.S. at 313. In other words, the United States Supreme Court holds that similar federal false claims law requires that a penalty inquiry should focus on the conduct of the defendant. Thus, the focus in evaluating penalties is on conduct of the DMDs, not the conduct of tens of thousands of third parties from whom they want to take discovery, such as the coal miners or coal operators or others.[14]

Therefore, once violation(s) of the Consumer Act is satisfied, what is primarily important to a penalty inquiry is the number of repeated violations of the Act and the scienter of the DMDs (that the defendant's violations were "repeated and wilful"). This is obvious from the plain language of the Act itself: "**if the court finds *that the defendant has engaged in a course of repeated and willful violations of this chapter***, it may assess a civil penalty of no more than five thousand dollars for each violation of this chapter." *W. Va. Code* § 46A-7-111(2) (emphasis added).

To escape the fact that the statute's penalty provision expressly states, "repeated and wilful violations" as the standard to be examined for the assessment of penalties, the DMDs suggest the statute includes an unwritten "obvious idea" that gives them the right to conduct massive "miner-specific and operator-specific discovery." Petition at 34. In other words, the DMDs ask that this Court read into the Consumer Act words that are not there. In uniformly rejecting arguments advocating adding words to a statute, this Court has held as follows:

"This Court is not at liberty to read into a statute that which simply is not there.

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[14] In their Response to the State's Motion to Amend and Sever, the DMDs admit the focus of the discovery they refer as the basis for their opposition to the Motion to Sever is not based on their own conduct, but rather is, "**based on the conduct of individual workers and employers, as well as the State's own conduct**." PA1176 (emphasis added).

> "It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten," *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 299 n. 10, 624 S.E.2d 729, 736 n. 10 (2005) (internal quotations and citations omitted). If the Legislature has promulgated statutes to govern a specific situation yet is silent as to other related but unanticipated corresponding situations, it is for the Legislature to ultimately determine how its enactments should apply to the latter scenarios. *Soulsby v. Soulsby*, 222 W.Va. 236, 247, 664 S.E.2d 121, 132 (2008). See also *Banker v. Banker*, 196 W.Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996) ("It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." (citing *Bullman v. D & R Lumber Company*, 195 W.Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W.Va. 383, 452 S.E.2d 699 (1994)))[.]"

Kasserman & Bowman, PLLC v. Cline, 223 W. Va. 414, 421–22, 675 S.E.2d 890, 897–98 (2009). Thus, even assuming the order granting the Motion to Amend and Sever amounts to a "discovery moratorium," because the statute does not include the so-called "obvious idea" they argue should be read into it, the extraordinary relief sought by the DMDs would be unavailable to allow massive "individual discovery" of tens of thousands of third parties whose conduct, pursuant to the plain language of the Consumer Act statute, is not in issue.

Because the third issue raised by the DMDs in their Petition also fails to meet the standard necessary for extraordinary relief and was decided correctly by the trial court in granting the State's Motion to Amend and Sever, the Petition should be denied.

C CONCLUSION

For all of the foregoing reasons, no rule to show cause should issue, and the Writ of Prohibition should be denied.

Respectfully submitted,

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